



March 20, 2018

To the Members of the Joint Committee on Public Health:

Thank you for allowing me the opportunity to provide testimony today in favor of this proposed statute, regulating the deceptive advertising practices of pregnancy centers in Connecticut. Connecticut House Bill 5416 would prevent organizations that hold themselves out as offering pregnancy-related services from advertising online, in newspapers, on websites, or on billboards, bus shelters or other places in Connecticut with false, misleading or deceptive language about the services they provide. The State of Connecticut has the right to protect its citizens from deception and fraud by enacting laws like House Bill 5416, which balances the state's strong interest in preventing consumer deception with the First Amendment rights of pregnancy centers who would be regulated under it. While these centers have important First Amendment rights to advocate against abortion (which is their primary goal), to share their views widely, and even to try to directly persuade women who are pregnant not to have abortions, they do not have the right to deceive or trick women by claiming to offer services they do not provide in order to convince women to come to their centers to hear those views.

My name is Jordan Goldberg and I am Senior Policy Advisor at the National Institute for Reproductive Health. The National Institute for Reproductive Health is a non-profit national organization based in New York that works across the country to increase access to reproductive health care by changing public policy, galvanizing public support, and normalizing women's decisions to have abortions and use contraception. Our organization supports and partners with state and local advocacy organizations and health care providers across the country, including in Connecticut, to promote access to the full range of reproductive health care for all. This work has included working on policies intended to reduce the harmful impact of fake clinics, or pregnancy centers that hold themselves out as medical centers in order to deceive women who are seeking reproductive healthcare. Last year, we supported and testified in favor of the ordinance adopted by Hartford intended to address the deception wrought by the pregnancy centers in Hartford. We also work directly in New York State and New York City to support and promote policies intended to expand access to reproductive health care and advocated for the adoption of a pregnancy center regulation in New York City seven years ago.

Prior to joining the National Institute, I served as State Advocacy Counsel for the Center for Reproductive Rights and clerked for the Honorable Barry T. Albin of the Supreme Court of New Jersey, after graduating from Fordham University School of Law.

Given my background as a policy advocate and attorney in the field of reproductive rights, my testimony will: (1) briefly describe the harm that these centers cause women when they use fraudulent advertising tactics to mislead or deceive them, understanding that many others will and have testified today about the harms these types of centers can cause when they mislead women about the services they provide, and (2) how this legislation balances this State’s compelling interest in ensuring that women seeking reproductive healthcare are not mislead, deceived or delayed in accessing that care with the First Amendment rights of pregnancy service centers. Because this legislation is carefully tailored to address that harm while ensuring that those who are associated with pregnancy centers can continue to express their personal beliefs and opinions as protected by the First Amendment, this proposed bill represents an effective and constitutional approach to addressing a serious public health situation.

I. Fake Clinics, or “Pregnancy Resource Centers” Harm Women

Women who are pregnant, or think they might be, need access to qualified medical professionals who can provide them with accurate information as well as access to the medical services they need. A woman experiencing an unintended pregnancy might choose to continue the pregnancy or not, but in either case, she needs access to timely access to information and care.

When a woman in Connecticut seeks out information about and access to pregnancy related services, she may encounter ads for health centers, women’s centers or even “clinics” that claim to offer a full range of options counseling and seem to provide medical services – but upon arrival at one of the centers, find only limited services, anti-abortion information and counseling, with no medical care or referrals to comprehensive reproductive healthcare available.

Over the past few decades, these types of pregnancy services centers have proliferated in cities and states all over the country.¹ These centers, frequently located very close to abortion providers, with names that mimic or are similar to those clinics’ names, often describe their primary work as discouraging women who are facing unintended pregnancies from seeking or obtaining abortions and urging them to continue their pregnancies. These centers conduct their operations in different ways: Some centers are open about their anti-abortion beliefs and provide services to women who are facing unintended pregnancies that include things like pregnancy testing, counseling, support for an ongoing pregnancy, diapers, baby clothing and referrals to

¹ There are thousands of such pregnancy centers through the United States, although exact numbers are difficult to determine because only some are affiliated with major networks while others are smaller entities. *See, e.g.* NPR, States Fund Pregnancy Centers That Discourage Abortion, March 9, 2015, *available at* <https://www.npr.org/sections/health-shots/2015/03/09/391877614/states-fund-pregnancy-centers-that-discourage-abortion>; Elizabeth Dias, *The Abortion Battleground. Crisis Pregnancy Centers*, Time Magazine, Aug 5, 2010, *available at* <http://content.time.com/time/nation/article/0,8599,2008846,00.html> (estimating that there are approximately five times as many such centers as there are abortion providers in the United States).

other resources. However, many such centers are less forthcoming about their intentions, seeking to lure “abortion minded” women² in to be able to share non-medical information about pregnancy and abortion with those women with the goal of dissuading them from obtaining that care.³ Moreover, many of these centers are networked together under umbrella organizations such as CareNet, Heartbeat International,⁴ and Birthright International, which provide training and guidance, including specifically about how to “lure” women who have already decided to have an abortion into coming to their facilities.⁵ Indeed, the Care Net home page itself begins with the statement “She is calling to learn more about abortion. Help her choose life!”⁶ In Baltimore, one pregnancy center’s executive director admitted in court papers that its “ads are purposely vague, of course” and that after beginning to run those “purposely vague” ads, they had a large increase in calls from women who “wanted to schedule an abortion” and who were “under the impression from the bus advertisements that [the pregnancy center] assisted in paying for abortions.”⁷ In Oakland, during a city council hearing regarding an ordinance very much like House Bill 5416, testimony was offered that one of these nationwide pregnancy center chains has a hotline that trains its staff to be intentionally “vague” when women call seeking abortion services.⁸

Although some of these centers advertise online, on billboards and on their own websites in ways that make clear the services they provide, others are truly “fake clinics,” advertising in ways that suggest that provide medical care that they will not provide or refer for, in order to bring clients in who are seeking that care. Moreover, the intentional confusion about the services available at these fake clinics is not necessarily dispelled upon the woman’s arrival at the fake clinic –

² See Sharouna Coats, *Anti-Choice Groups Use Smartphone Surveillance to Target ‘Abortion-Minded Women’ During Clinic Visits*, Rewire, May 25, 2016, <https://rewire.news/article/2016/05/25/anti-choice-groups-deploy-smartphone-surveillance-target-abortion-minded-women-clinic-visits/> (last visited March 18, 2018) for a discussion of some of the techniques used to bring in “abortion minded” women.

³ See, e.g., Jennifer Carnig, *Abortion’s foes resort to deception: What I found when I went to a crisis pregnancy center*, New York Daily News, Nov. 5, 2010, available at <http://www.nydailynews.com/opinion/abortion-foes-resort-deception-found-crisis-pregnancy-center-article-1.453393> (documenting the experience of an advocate who, at twenty-three weeks of pregnancy, visited a fake clinic/pregnancy center in New York City, in the weeks before the City adopted its own deceptive practices legislation, to understand how the center described itself and treated pregnant women).

⁴ The Care Net website lists 12 centers in Connecticut that are affiliated with CareNet or Heartbeat International. <https://www.care-net.org/find-a-pregnancy-center> (last visited March 16, 2018).

⁵ Amicus Brief for the City and County of San Francisco et al., 6-10, *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 843 (9th Cir. 2016), cert. granted in part sub nom. *Nat’l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2017 WL 5240894 (U.S. Nov. 13, 2017).

⁶ Care Net, Home Page, <https://www.care-net.org/> (last visited March 16, 2018)

⁷ Amicus Brief for the City and County of San Francisco et al., 7, *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 843 (9th Cir. 2016), cert. granted in part sub nom. *Nat’l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2017 WL 5240894 (U.S. Nov. 13, 2017) (citing Joint Appendix to Appellants’ Brief in *Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.* No. 16-2325 (4th Cir. Jan. 30, 2017) ECF No. 26)).

⁸ *Id.* at 8 (citing Joint Appendix to Appellants’ Brief at 308, *Evergreen Ass’n Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) (No. 11-2735-cv), ECF Nos. 78-81).

indeed, many women at such facilities are intentionally deceived further, given ultrasounds and told they are not yet eligible for an abortion, or need to return for another ultrasound before they can seek an abortion, or other similar tactics.⁹

As has now been documented in multiple states and municipalities that have sought to regulate these deceptive practices, including Hartford, these practices harm women – pregnant women have been deceived to the point where they no longer had the opportunity to choose whether or not to continue the pregnancy, and in some cases, pregnant women have been deceived into thinking they were getting care and later discovered serious health problems with their pregnancies that would have been far less dangerous if discovered earlier.¹⁰

II. House Bill 5416 Regulates Commercial Speech and There is No First Amendment Right to Engage in Deceptive Commercial Speech

Not all speech is the same, and thus not all speech is subject to the same level of protection or regulation. When pregnancy centers advertise their services, despite the fact that they do not charge for those services, they are engaging in commercial speech. As a result, those advertisements are subject to the same types of consumer fraud regulation as any other advertisements for services in the state.

Most relevantly, the federal Court of Appeals for the Ninth Circuit recently upheld a San Francisco ordinance that closely resembles House Bill 5416 in a case called *First Resort v. Herrera*.¹¹ The court held that the law regulated commercial speech, specifically the pregnancy centers' advertising that was placed in the marketplace along with advertisements from other providers of pregnancy related services, and that the law properly balanced the First Amendment rights of the centers to engage in that speech with the City's significant interest in preventing consumer fraud and deception. The court also agreed that the ordinance did not constitute viewpoint discrimination. The court's decision in this case provides clear guidance to the Connecticut legislature that House Bill 5416 would meet the same constitutional tests.

Like the San Francisco ordinance, House Bill 5416 would prohibit limited services pregnancy centers only from using false, misleading or deceptive language about the services they provide, or using language offering services that the center has no intention of providing. The bill would not regulate, limit or have any impact on the advocacy that these pregnancy centers engage in – it

⁹ See generally *id.*

¹⁰ *Id.* at 16, 18.

¹¹ *First Resort v. Herrera*, 860 F.3d. 1263, 1276-77 (2017). The language of the San Francisco ordinance is quoted in large part in *First Resort*, 860 F.3d at 1270, or can be found here: <https://www.nirhealth.org/wp-content/uploads/2015/08/San-Francisco-CPC-Ordinance.pdf>.

simply does not reach beyond false, deceptive or misleading advertising. As a result, the language reached by the bill would be purely commercial speech, rather than ideological speech. Whether or not something is commercial speech is dictated by the facts of the particular situation. In *First Resort*, the Ninth Circuit held that the language reached by the San Francisco ordinance was clearly commercial, offered in the context of other advertisements with the purpose of inducing customers/clients to come to their centers instead of going to reproductive health care facilities.¹² Here in Connecticut, as in San Francisco, centers advertise their own services in fora used by other types of entities including full spectrum reproductive health clinics and other medical providers.¹³

The court rejected the argument that this speech should not be considered commercial because the limited pregnancy services centers do not charge for their services. The goal of the advertisements are to “solicit a patient base,” in the same way that other advertisers seek patients. As a result, it cannot be the case that their failure to charge fees means that they are exempt from the otherwise significant government interest in preventing consumers who are engaged in the marketplace from being defrauded or deceived. As the court noted

the Ordinance is directed at advertisements related to the provision of certain medical services, not the exchange of ideas: the City did not attempt to ban advertisements related to constitutionally protected pro-life advocacy. Instead the Ordinance only regulates the dissemination of false or misleading statements regarding the pregnancy related services a limited service pregnancy center offers in the marketplace for those services.¹⁴

Moreover, as a number of nonprofit health organizations, led by Black Women for Wellness, recently noted in an amicus brief to the Supreme Court in a pending case relating to pregnancy centers, “to hold that the state has less authority—or indeed less duty—to protect recipients of pro bono services from deceptive marketing or advice, or simply from misinformation, than to protect recipients of paid services, would be to fail the most vulnerable members of society.”¹⁵

Indeed, other courts have similarly recognized that whether or not speech is considered commercial is a fact driven inquiry, and those facts include not only the motivation for the

¹² *First Resort v. Herrera*, 860 F.3d. 1263, 1276-77 (2017).

¹³ *Id.* at 1272. See also Yelp!, searching for “Free abortion” in Connecticut will show ads for “ABC Women’s Centers”, which is a pregnancy resource center, along with ads for Planned Parenthood and an OB/GYN office.

¹⁴ *Id.* at 1273-74 (citing *Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176 (N.D.), *Cert denied* 476 US. 1108 (1986)).

¹⁵ Black Women for Wellness et al., Amicus, *National Institute of Family and Life Advocates v. Becerra*, at 19-25 (March 2018), available at https://www.supremecourt.gov/DocketPDF/16/16-1140/36830/20180227140103852_AmicusBrief-BWW-16-1140..pdf (citing analogous cases about attorney speech and noting that there has been no suggestion that professional standards or prohibitions would not apply to attorneys simply because they offer their services pro bono).

speech in question but how the speech will be perceived by the listener or target audience.¹⁶ Under current Supreme Court jurisprudence, Courts of Appeals throughout the country have settled on a test for whether speech is commercial.¹⁷ Under this test, there are “three factors to consider in deciding whether speech is commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech.”¹⁸

In *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, a case assessing the validity of a different type of pregnancy center regulation, the Fourth Circuit noted that “[w]hile ‘the combination of *all* these characteristics ... provides strong support for the ... conclusion that [speech is] properly characterized as commercial speech,’ it is not necessary that each of the characteristics ‘be present in order for speech to be commercial.’”¹⁹ Indeed the Fourth Circuit held that “the potential commercial nature of speech does not hinge solely on whether the Center has an economic motive.”²⁰ Instead, “context matters. From a First Amendment free speech perspective, that context includes the viewpoint of the listener, for ‘[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.’”²¹

A case from the 1980s, *Fargo Women's Health Organization, Inc. v. Larson*, was one of the first to review the deceptive practices of pregnancy service centers and has been instructive to both courts and legislators:²²

There, the plaintiffs alleged that the defendant Help Clinic, “through false and deceptive advertising and related activity, misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda.” The trial court entered a preliminary injunction barring “all deceptive advertising and related solicitation practices,” and the Help Clinic appealed. Notwithstanding the Help Clinic's assertion “that its communication is not commercial speech because

¹⁶ See *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013) (“That analysis is fact-driven, due to the inherent “difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.”).

¹⁷ See, e.g., *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir.1990) (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983)).

¹⁸ *Id.*

¹⁹ *Greater Baltimore Ctr. for Pregnancy Concerns, Inc.*, 721 F.3d at 285 (4th Cir. 2013) (quoting *Bolger, id.* at 67 n. 14) (internal citations omitted).

²⁰ *Id.* at 285–86 (citing *Cent. Hudson*, 447 U.S. at 561–62, 100 S.Ct. 2343).

²¹ *Id.*; see also *Va. State Bd. of Pharmacy*, 425 U.S. at 756, 96 S.Ct. 1817 (“Freedom of speech presupposes a willing speaker. But where a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both.” (footnote omitted)).

²² 381 N.W.2d 176 (N.D.), *cert. denied*, 476 U.S. 1108 (1986),

no financial charges are assessed against persons receiving services from the clinic,” the state supreme court deemed the clinic's advertisements to be commercial speech. The court explained that “the degree, if any, that monies are received by the Help Clinic from its clients [is not] dispositive [of the commercial speech issue].” It was “[m]ore important[]” to the court that “the Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas.” “In effect,” the court concluded, “the Help Clinic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech.”²³

In summary, House Bill 5416 would do no more than regulate commercial speech and Connecticut has a strong interest in prohibiting such speech from being false or misleading. As the Ninth Circuit noted, the statute “only would regulate the misleading aspects” of their advertisements about the services these types of centers offer, rather than any of the other statements they wish to make.²⁴ Under House Bill 5416, these centers would continue to be free to advertise, truthfully, the services they actually do provide, and to advertise any other information about their ideas or anything else. The Supreme Court has clearly held that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”²⁵

Finally, it should be noted that even if a court were to determine that these advertisements constituted something other than commercial speech, the Second Circuit Court of Appeals has upheld a related regulation under an even higher constitutional standard: In reviewing a pregnancy services center regulation aimed at deceptive speech that required the centers to make certain disclosures to all clients, that court, held that regardless of whether the speech of pregnancy services centers is commercial or not, governments have a compelling interest in regulating their deceptive speech to ensure that pregnant women seeking critical, time-sensitive medical services are not deceived.²⁶

²³ *Greater Baltimore Ctr. for Pregnancy Concerns, Inc.*, 721 F.3d at 286 (all quotations from *Fargo Women's Health Org.*, 381 N.W. 2d at 177-181).

²⁴ *Id.*

²⁵ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980).

²⁶ *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014) (“We find, however, that we need not decide [whether the City law regulates commercial speech], because our conclusions are the same under either intermediate scrutiny (which looks to whether a law is no more extensive than necessary to serve a substantial governmental interest) or strict scrutiny (which looks to whether a law is narrowly drawn to serve a compelling governmental interest). . . [U]nder either level of review, . . . the Status Disclosure survives.”).

III. Preventing Centers from Misleading the Public About the Services They Provide Is Not Viewpoint Discrimination

House Bill 5416 would prohibit only limited pregnancy services centers, meaning those who do not offer or refer for abortion or contraception, from engaging in false or misleading advertising. The San Francisco ordinance similarly applied its restrictions only to “limited services pregnancy centers” that do not offer abortion or contraception, rather than to all clinics or medical centers that offer pregnancy related services. The Ninth Circuit rejected the claim that the San Francisco ordinance constituted viewpoint discrimination, despite its limited scope. The Court held that

[T]he Ordinance does not discriminate based on the particular opinion, viewpoint or ideology of [these pregnancy centers]. . . [W]hether the Ordinance applies depends on the services offered, not on the particular views espoused or held by a clinic. . . . Moreover, . . . the Ordinance regulates [the centers] because they engage in false or misleading speech, irrespective of their viewpoints. . . . [T]he ordinance merely seeks to prevent [the centers] from harming women through false or misleading speech about their services and in no way restricts those entities from expressing their views about abortion to the public or their clients.²⁷

The court also noted “put differently, it may be true that LSPCs engage in false or misleading advertising concerning their services because they hold anti-abortion views. However, the Ordinance does not regulate LSPCs based on any such anti-abortion views. Instead, the Ordinance regulates those entities because of the threat to women’s health posed by their false or misleading advertising.”²⁸

Moreover, the Supreme Court has recently emphasized that “[s]tates adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.”²⁹ Here, there is evidence that limited services pregnancy centers are engaging in deceptive advertising, but none to indicate that actual health facilities or medical offices in Connecticut are engaged in any such thing.

In conclusion, is no First Amendment right to lie to consumers about your services or product, and where evidence of such deception exists, the State of Connecticut has every right to act to prevent it.

²⁷ *First Resort*, 860 F.3d. at 1277-78.

²⁸ *Id.* at 1278.

²⁹ *McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014) (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion)).

IV. House Bill 5416 Does Not Raise the Same Constitutional Questions As Those Before the Supreme Court in *National Institute for Family and Life v. Becerra*.

On March 20th, the Supreme Court will hear argument in *National Institute for Family and Life v. Becerra*, a challenge to a California state law enacted in 2015 that was similarly aimed at preventing women who are or might be pregnant from being deceived when seeking care.³⁰ However, the California law, called the FACT Act, operates in a completely different way, requiring certain types of facilities that offer pregnancy related services to make disclosures to people entering their facilities about either the types of services that low-income women in California can access through Medi-Cal or whether or not the facility itself has licensed medical professionals.³¹ These disclosures must be distributed or posted on signs in the facilities. The statute was challenged by a group of the regulated facilities, but upheld both by a federal district court and the Court of Appeals for the Ninth Circuit.³² The facilities have now brought that challenge to the Supreme Court, claiming that they have a First Amendment right not to post or otherwise make these disclosures. The State of California will be defending the statute, and amicus briefs have been filed in support of the law by groups including thirteen different states, including Connecticut, cities including New York, Baltimore and San Francisco, the National League of Cities, advocacy organizations, social scientists, the ACOG and ten other major medical associations, and others.

Although related to the same types of centers, House Bill 5416 is not similar to the law at issue in the Supreme Court case. Instead, House Bill 5416 would prohibit false or misleading advertising that indicates to consumers that they can find certain services at a particular facility, not require the centers to post signs or otherwise make disclosures to clients. Unlike in the *NIFLA* case, where the question is whether the State of California can compel pregnancy services centers to engage in some speech, House Bill 5416 would not compel any speech whatsoever. Instead, it would prohibit these centers from engaging in false, misleading or deceptive commercial speech.³³

V. Conclusion

In 2018, it is clear that fake clinics/pregnancy centers are widespread and have a clear and unabashed goal of deterring women who are seeking abortion care from obtaining it, even through fraudulent or deceptive means. In their zeal to promote their own perspective, these centers can cause great harm to women, preventing them from obtaining care, deceiving them

³⁰ *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 843 (9th Cir. 2016), cert. granted in part sub nom. *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2017 WL 5240894 (U.S. Nov. 13, 2017).

³¹ See *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d at 829-31.

³² *Id.* at 830-31.

³³ It should be noted that the plaintiffs in *First Resort* have filed a petition for certiorari with the Supreme Court, but the parties have not yet completed the filing of responses and papers are not due until April 19, 2018.



into believing they have obtained care, and/or delaying them unnecessarily as they seek time-sensitive services. While those centers have a First Amendment right to share their views with women, to advertise their views online, in newspapers, and in any other fora, and to argue to all the world their opposition to abortion and wish that all women would carry all pregnancies to term, they do not have the right to deceive women into believe they are entering a medical facility for the purpose of obtaining medical care. House Bill 5416 ordinance strikes a careful balance between the compelling interest of the State in ensuring that women are not deceived and misled while seeking reproductive healthcare, and those First Amendment rights. I strongly urge the Committee to pass this legislation and would be happy to provide further information at any time.

Sincerely,

A handwritten signature in blue ink that reads "Jordan Goldberg". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jordan Goldberg
Senior Policy Advisor
National Institute for Reproductive Health
14 Wall St., New York, NY 10005
jgoldberg@nirhealth.org
(646) 520-3521