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IN SUPPORT OF HR 5416: AN ACT CONCERNING DECEPTIVE ADVERTISING PRACTICES OF  
LIMITED SERVICES PREGNANCY CENTERS

Thank you for this opportunity to provide this testimony concerning the proposed statute regulating the deceptive practices of pregnancy services centers in Connecticut.

My name is Priscilla Smith and I am a Clinical Lecturer in Law and Associate Research Scholar at Yale Law School where I direct the Program for the Study of Reproductive Justice and teach the Reproductive Rights and Justice Project clinical course. I received my law degree from Yale Law School in 1991; my B.A. from Yale College in 1984; and currently conduct research and writing on First, Fourth, and Fourteenth Amendment issues, with a focus on reproductive rights, rights to liberty and equality, and privacy law. Prior to joining the legal academy, I litigated numerous cases in federal and state courts and presented arguments in the U.S. Supreme Court twice, in *Ferguson v. City of Charleston*, 531 U.S. 67 (2000), and in *Gonzales v. Carhart*, 550 U.S. 124 (2007). I am testifying in my personal capacity and do not purport to represent any institutional views of Yale Law School.

My testimony will focus on First Amendment jurisprudence and explain how it applies the proposed statute that is designed to prevent deception in the provision of medical services and false and misleading advertising.

## **The Proposed Statute**

The Proposed Statute applies to “limited services pregnancy centers,” (limited PSCs), defined as facilities “the primary purpose of which is to provide services to women who are or may be pregnant, that either 1) offer[] obstetric ultrasounds, obstetric sonograms, pregnancy testing or diagnosis, or prenatal care to pregnant women; or 2) ha[ve] the appearance of a medical facility,” as defined further in the ordinance, but that do not “directly provide or provide referrals to clients for abortions or emergency contraception.” The Proposed Statute prohibits false, misleading or deceptive advertising by limited PSCs. The Statute is constitutional according to well-established First Amendment doctrine.

## **The Proposed Statute Is Carefully Drawn to Protect First Amendment Rights.**

As almost all Americans are aware, the First Amendment to the U.S. Constitution protects the freedom of speech as a fundamental right that all Americans possess. The right to free speech, however, is not an absolute right, and does not protect *all* speech in all circumstances. As the former Dean of Yale Law School explains, “vast stretches of ordinary verbal expression, as for example between dentists and their patients, between corporations and their shareholders, between product manufacturers and their customers, are not considered necessary for the formation of public opinion and are consequently excluded from First Amendment coverage.” Robert C. Post, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 15 (2012) (“FIRST AMENDMENT JURISPRUDENCE”).

For example, the State may regulate the various professions, unimpeded by the First Amendment, to protect the public from spoken misconduct by unscrupulous lawyers or charlatan doctors. *FIRST AMENDMENT JURISPRUDENCE*, supra, at 45 (“First Amendment coverage does not typically extend to malpractice litigation.”). States may also protect the public by prohibiting the practice of law or medicine without a license or by disciplining a lawyer, for example, for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.<sup>1</sup> As one court has put it, “the First Amendment . . . does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions.”<sup>2</sup>

### **I. Proposed Ordinance’s Prohibition on False Advertising is a Constitutional Regulation of Commercial Speech**

Some types of speech, like the commercial speech regulated here, is provided with less protection under the First Amendment than core political speech. It is textbook First Amendment doctrine that commercial speech has never been given the stringent level of scrutiny or been subject to the same doctrinal rules as public discourse.<sup>3</sup> Before 1976, in fact, commercial speech fell outside First Amendment protections altogether. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (noting that the Constitution imposes no restraint on government regulation of commercial advertising).

In 1976, in *Virginia State Bd.*, the Supreme Court overruled prior precedent, holding that commercial speech was not “wholly outside” the protections of the First Amendment. *Virginia State Bd.*, 425 U.S. at 761 (striking down a law preventing licensed

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<sup>1</sup> *See, e.g., Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978). Compare *Bates v. State Bar of Arizona*, 433 U.S. 350, 448-49 (1977) (*truthful* advertising of “routine” legal services is protected by the First and Fourteenth Amendments against blanket prohibition by a State).

<sup>2</sup> *Shea v. Bd. of Med. Exam’rs*, 81 Cal. App. 3d 564, 577 (1978); see also *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 824 (2011) (“a lawyer’s right to freedom of expression is modified by the lawyer’s duties to clients”).

<sup>3</sup> *See, e.g., Stone, et al., THE FIRST AMENDMENT* 186-215 (4<sup>th</sup> ed. 2012); Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 871-72 (2015).

pharmacists from advertising the prices of prescription drugs). Still, the Court protected commercial speech less vigorously than core political speech in keeping with the different constitutional values served by the different types of speech. See, e.g., Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer and Abood*, 40 Val. U. L. Rev. 555, 559 (2005) (internal quotations omitted). Because citizens engage in commercial speech in order to facilitate transactions in the marketplace, the First Amendment's concern for commercial speech is based on the value of accurate and free-flowing information to the consumer. *Virginia State Bd.*, 425 U.S. at 761 (discussing "keen" consumer interest and society's "strong interest" in the "free flow of commercial information.").<sup>4</sup> Simply put, where public discourse doctrine is speaker centered,<sup>5</sup> commercial speech doctrine is audience centered.<sup>6</sup>

Because of the different constitutional values being served by commercial speech doctrine, that doctrine has developed to allow "modes of regulation that might be impermissible in the realm of noncommercial expression." *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)). For example, the Court has held that neither overbreadth nor prior restraint doctrines apply to commercial speech;<sup>7</sup> chilling-effect doctrine does not apply;<sup>8</sup> and certain types of commercial speech can be targeted for specific restrictions, all in order to serve the value of preserving the informational value of the speech.<sup>9</sup>

#### **A. The First Amendment Does Not Protect False or Misleading Advertising.**

In establishing these limited protections for commercial speech in 1976, the Court has always been clear that false and misleading commercial speech falls outside First Amendment protection. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of*

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<sup>4</sup> See also Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer and Abood*, 40 Val. U. L. Rev. 555, 559 (2005) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)); Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. at 872-73 (internal footnotes omitted); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d. Cir. 2001) (protecting "robust and free flow of accurate information" is principal justification for protecting commercial speech).

<sup>5</sup> The most common rationales given for protecting public discourse at the highest level include the "marketplace of ideas" rationale, the self-governance rationale and the autonomy rationale, all of which are concerned with the interests of the speaker. Stone, et al., *THE FIRST AMENDMENT*, 9-14.; *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (The First Amendment is "the guardian of our democracy.").

<sup>6</sup> Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 14 (2000) ("*Constitutional Status*") (in commercial speech doctrine "[t]he Court has ... focused its analysis on the need to receive information, rather than on the rights of speakers.").

<sup>7</sup> Post, *Constitutional Status*, 48 UCLA L. Rev. at 28-33; Amanda Shanor & Robert Post, *Adam Smith's First Amendment*, 128 Harvard L. Rev. F. 165, 167-73; see also *Central Hudson*, 447 U.S. at 565 n.8; *id.* at 571 n.13; *Va. State Bd.*, 425 U.S. at 771-72 n.24.

<sup>8</sup> *Va. State Bd.*, 425 U.S. at 771 n.24.

<sup>9</sup> *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (quoting *Va. State Bd.*, 425 U.S. at 771-72).

*Ohio*, 471 U.S. 626, 638 (1985) (“[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading”).<sup>10</sup> Protecting false commercial speech would undermine the constitutional value that First Amendment protections are intended to serve because “the public and private benefits from commercial speech derive from confidence in its accuracy and reliability.” *Bates*, 433 U.S. at 383. As the Court explained in *Central Hudson*, 447 U.S. at 563, because “[t]he First Amendment's concern for commercial speech is based on the informational function of advertising . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”

It is also permissible to target certain industries for prohibitions against fraud and other forms of deception. For example, in *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993), the Court noted that a ban on in-person solicitation by certified public accountants would be constitutional if it targeted only fraud and deceptive commercial expression as 25 States and the District of Columbia did at the time. 507 U.S. at 768-69. As the Court wrote in *Edenfield*., “our cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification.” *Id.* (citing among others *Central Hudson Gas & Electric Corp.*, 447 U.S., at 563-564).

In accord with this Supreme Court precedent, the Ninth Circuit recently upheld an Ordinance containing a provision identical to the Proposed Ordinance’s ban on fraudulent advertising, noting that the Constitution affords no protection to false or misleading commercial speech. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1268-71 (9<sup>th</sup> Cir. 2017). See also *Zauderer*, 471 U.S. at 638 (government may “prevent the dissemination of commercial speech that is false, deceptive, or misleading”); *Schiff*, 379 F.3d at 630 (“[f]raudulent commercial speech may be enjoined . . . . An advertisement is fraudulent when it misleads customers about the benefit of the offered product.”).<sup>11</sup>

## **B. The Ordinance Regulates Commercial Speech.**

As even the United States Department of Justice under the Trump Administration agrees, advertisements promoting services delivered at PSCs are commercial speech whether or not the PSCs charge for their services. See BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY, *NIFLA v. Becerra*, No. 16-1140 (filed Jan. 16, 2018), available at <https://www.supremecourt.gov/DocketPDF/16/16->

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<sup>10</sup> See also *Central Hudson*, 447 U.S. at 563 (holding the state may “ban forms of communication more likely to deceive the public than to inform it.”); *United States v. Schiff*, 379 F.3d 621, 630 (9th Cir.2004) (“Fraudulent commercial speech may be enjoined” without violating the First Amendment); *Hoffman v. Capital Cities/ABC, Inc.* 255 F.3d 1180, 1184 (9th Cir. 2001) (“False or misleading commercial speech is not protected.”).

<sup>11</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012), is not to the contrary. There, the Court distinguished false speech in the political sphere which was protected because proscribing false political speech will usually chill truthful, valuable speech as well. *Alvarez*, 132 S. Ct. at 2545 (Kennedy, J.) (citing *Gertz v. Robert Welch*, 418 U.S. 323, 339-41 (1974) (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”) This is not the case with regard to fraudulent advertising.

Financial motivation of the speaker is not and never has been the determining factor in establishing the commercial nature of speech. Originally, the Court characterized commercial speech as “speech which does no more than propose a commercial transaction.” *Va. State Bd. of Pharm.*, 425 U.S. at 762 (internal quotation marks and citations omitted). This limited definition sufficed for the statute challenged in that 1976 case, which prevented pharmacists from advertising the price of prescription drugs. However, in *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983), the Court looked beyond this one factor and recognized that economic motivation of the speaker was not necessarily required. *Id.*

Instead, the appropriate question is how the target of the speech, in this case a pregnant woman considering abortion who sees an advertisement listing pregnancy services such as pregnancy tests and ultrasounds, will understand the advertisement. As the Supreme Court recognized in *Central Hudson*, courts must consider whether the speech would impact the economic interest of the audience. *Central Hudson*, 447 U.S. at 561 (asking whether the speech is related to the “economic interests of the speaker *and its audience.*”) (emphasis added); *see also Riley v. Nat’l. Fed’n. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) (holding that “lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.”).<sup>12</sup>

As the U.S. Department of Justice wrote recently, the “[c]ourts have not doubted, for instance, that the government may regulate malpractice or misconduct by attorneys, tax preparers, and medical professionals without regard to whether a professional charges for a particular service or provides it pro bono. . . . A manufacturer that offers free samples as a promotion, or a professional that offers free consultations to attract customers, is still entering the marketplace in competition with other providers, and the government’s interest in requiring disclosures about the goods or services does not automatically disappear merely because they are offered without charge.” *Id.* at 20-21. Offering services for free, especially services one does not even provide, in order to draw women to the PSCs under false pretenses, skews the information available in the marketplace and pollutes the stream of information. Thus, this is exactly the type of false advertising that falls outside the limited First Amendment protections for commercial speech. *Bates*, 433 U.S. at 364 (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)) (protection of *truthful nonmisleading* commercial speech “serves individual and societal interests in assuring informed and reliable decisionmaking.”).

## Conclusion

The Proposed Statute is a carefully limited measure that is designed to insure that women seeking pregnancy related health care services receive information that is truthful and not misleading about the nature of the services the facilities provide. It is also

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<sup>12</sup> *See* Jennifer Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 J. Const. L. 539, 589-95 (discussing contours of commercial speech doctrine).

carefully designed to comply with the First Amendment and insures that providers of services may express their own views about any pregnancy related care. As such, it does not violate any First Amendment guarantees.

Sincerely,

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