Written Testimony of Rachel N. Morrison, Esq.
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On H.B. 7070
Submitted to the Joint Committee on Public Health
February 11, 2019

Dear Chair Abrams, Chair Steinberg, and Members of the Committee:

My name is Rachel N. Morrison, and I serve as Litigation Counsel at Americans United for Life (AUL), the oldest and most active pro-life non-profit advocacy organization. Established in 1971, AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death, as well as for the free speech rights of pro-life pregnancy centers. As an attorney, I specialize in constitutional and First Amendment law, and have represented pro-life pregnancy centers and medical professionals, including in briefs before the U.S. Supreme Court in *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*")[1] and *First Resort v. Herrera*.[2]

Thank you for the opportunity to testify against H.B. 7070, an Act concerning the alleged "deceptive" advertising practices of pregnancy centers. It is my legal opinion that the Act violates the First Amendment by singling out and targeting pro-life pregnancy centers and chilling protected pro-life speech.

H.B. 7070 singles out pro-life pregnancy centers.

H.B. 7070 singles out pro-life—and only pro-life—pregnancy centers. The Act's provisions apply only to "limited services pregnancy centers," which are defined as facilities that do not "provide referrals to clients for abortions or emergency contraception." Sec. 1(7).

Despite defining "pregnancy services center" broadly as a facility that has "the primary purpose . . . to provide services to clients who are or may be pregnant," the sole qualification to be considered a "full services" pregnancy center is referring for abortion or emergency contraception. In its definition of "pregnancy services center," the Act lists the services that are sufficient to

[1] Brief *Amicus Curiae* of the American Association of Pro-Life Obstetricians & Gynecologists et al. in Support of Petitioners, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), https://aul.org/wp-content/uploads/2018/10/AUL-Amicus-Brief-NIFLA-Becerra.pdf.
[2] Brief *Amicus Curiae* of Heartbeat International, Inc. in Support of Petitioner, *First Resort, Inc. v. Herrera*, No. 17-1087 (U.S. March 5, 2018), https://aul.org/wp-content/uploads/2018/10/20180305165317599_USSC-17-1087-Amicus-Brief-of-Heartbeat-International.pdf.

qualify a facility as such as center: "obstetric ultrasounds, obstetric sonograms, pregnancy testing or diagnosis, or prenatal care to pregnant clients." Sec. 1(9). Patently absent from this broad list of qualifying services is the provision of or referrals for abortion and emergency contraception. Thus, if a facility offers *only* referrals for abortion or emergency contraception, and does not provide any other services—such as ultrasounds, sonograms, pregnancy tests, referrals for adoption, or material assistance for new mothers—it is not considered a "limited services pregnancy center." *See* Sec. 1(7). But, if a facility offers *all* of those other services, but *not* referrals for abortion or emergency contraception, it is considered to have "limited services." This absurd result can only be explained by an attempt to purposely single out pro-life pregnancy centers, since they are the only facilities that cannot, for reasons of conscience or conviction, provide referrals for abortion or emergency contraception.[3]

Further, offering referrals for abortion or emergency contraception is insufficient to qualify a facility as a "pregnancy services center." But not providing referrals, while providing other pregnancy-related services, is sufficient to qualify the facility as a "limited services pregnancy center." Again, this illogical inconsistency can only be explained by a blatant desire to single out pro-life pregnancy centers.

H.B. 7070 targets pro-life pregnancy centers because of their pro-life views.

H.B. 7070 singles out and targets pro-life pregnancy centers *because of* their pro-life views. In *NIFLA,* the Supreme Court explained that the Court is "deeply skeptical" of regulations that target speakers, not speech, and that distinguish among different speakers, effectively allowing speech by some but not others.[4] A law's underinclusiveness raises "serious doubts" that the government is not "disfavoring a particular speaker or viewpoint."[5] On its face, the Act does little to hide its true purpose. The Statement of Purpose declares that the Act seeks to "prohibit deceptive advertising practices by limited services pregnancy centers." In other words, the explicit purpose of the Act is to target pro-life pregnancy centers. In effect, the Act does not prohibit false, misleading, or deceptive statements by *all* pregnancy centers and does not apply to *all* pregnancy centers that offer limited services, but to *only* pregnancy centers that do not refer for abortion or emergency contraception. H.B. 7070's blatant underinclusiveness reveals that the Act's purpose is to disfavor a particular speaker or viewpoint, and particularly pro-life pregnancy centers and the pro-life viewpoint.

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[3] Hypothetically, there could be a non-pro-life pregnancy center that does not provide referrals for abortion or emergency contraception, but if such a center did exist in reality, it could easily exclude itself from the contours of the Act by providing referrals for abortion or emergency contraception. *Only* pregnancy centers holding pro-life views will be unable, for reasons of conscience and conviction, to self-exempt from the Act's requirements.

[4] *NIFLA*, 138 S. Ct. at 2378. Although *NIFLA* involved a law that was different that H.B. 7070, its principles still apply. Likewise, just because the Supreme Court denied certiorari in *First Resort*, does not mean that it agrees with the Ninth Circuit's opinion that San Francisco's Ordinance (which is very similar to H.B. 7070) does not violate the First Amendment.

[5] *NIFLA*, 138 S. Ct. at 2376 (quoting *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 802 (2011)).

The origins of H.B. 7070 also reveal that its primary purpose is to target and silence pro-life views. This bill was drafted in response to an unscientific report by NARAL Connecticut, a pro-abortion political organization.[6] The Report makes broad allegations of so-called "deceptive advertising," but in support merely cites unsubstantiated anecdotes and hearsay, and fails to provide any concrete examples of *actual* false or deceptive advertising.[7] Instead the Report blatantly targets pro-life pregnancy centers because they do not share NARAL's viewpoint on abortion.[8]

The targeting of the pro-life viewpoint was also made apparent during Connecticut's Capitol News Briefing Concerning the 46th Anniversary of *Roe v. Wade* and Proposed Legislation for the 2019 Session, when Connecticut State Senator Mae Flexer stated, in reference to H.B. 7070, that it is a "serious problem" that "there are *more* crisis pregnancy centers in the State of Connecticut than there are licensed reproductive health care clinics in Connecticut."[9] Moreover, no Connecticut legislator has yet publicly provided any justification for why this targeting of pro-life pregnancy centers is warranted, given any examples of what specific statements "limited services" pregnancy centers have made that are considered deceptive advertising, or pointed to a single instance in which a woman had been harmed by the alleged deceptive advertising. Instead, the Act is merely a pretext to target and shut down pro-life pregnancy centers because they hold a "disfavored" view on abortion.

H.B. 7070 is overbroad, vague, and chills constitutionally protected speech.

As written, H.B. 7070 is overbroad since it goes much further than prohibiting just deceptive advertising practices. First, the Act is overbroad since it applies to all "limited services" pregnancy centers regardless whether they advertise at all. *See* Sec. 2 ("No limited services pregnancy center shall make or disseminate or cause to be made or disseminated . . . ."). Second,

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[6] NARAL PRO-CHOICE CONNECTICUT FOUNDATION, 2018 CRISIS PREGNANCY CENTERS: A THREAT TO REPRODUCTIVE FREEDOM (2018) [hereinafter NARAL REPORT], https://connecticut.prochoiceamericaaffiliates.org/wp-content/uploads/sites/17/2018/03/2018-CPC-Report.pdf. The NARAL Report concludes with a call to action: "To limit deception, we recommend that *the state limit the advertising practices of crisis pregnancy centers in Connecticut, targeting their deceptive commercial speech*. As a proactive measure we also recommend passing legislation to prevent ideologically-driven anti-choice organizations from receiving state funding, since their work undermines the healthcare needs of Connecticut residents." *Id.* at 30 (emphasis added). It is clear that H.B. 7070 was based on NARAL's Report since it adopts some of the Report's language verbatim. *Compare* NARAL REPORT, at 4 (defining "crisis pregnancy center"), *with* H.B. 7070, Sec. 1(9) (defining "pregnancy services center").

[7] Some of the most absurd examples of "deceptive advertising" in the Report include: complaints that Google searches for the term "abortion" return pro-life pregnancy center websites, pro-life pregnancy centers using names such as "women's center" or "pregnancy center" (as if pro-life pregnancy centers don't help women who are pregnant), pro-life pregnancy centers being located near hospitals or pro-abortion facilities, and pro-life pregnancy centers using "similar" signage (by adopting the business complex's uniform signage). *See, e.g.*, NARAL REPORT at 16, 19, 26, 27.

[8] *See id.* at 2 (labeling pro-life pregnancy centers as "faith-based anti-abortion counseling centers whose mission is to counsel people facing unplanned pregnancies away from choosing abortion").

[9] Capitol News Briefing Concerning the 46th Anniversary of *Roe v. Wade* and Proposed Legislation for the 2019 Session, at 18:19–:25 (Connecticut Network Jan. 22, 2019) (emphasis added), http://www.ctn.state.ct.us/ctnplayer.asp?odID=15931.

the Act is overbroad since it is not limited to advertising as it prohibits "*any* statement concerning *any* pregnancy-related service or the provision of any pregnancy-related service" that is "false, misleading or deceptive." Sec. 2 (emphasis added).

"False, misleading, or deceptive" is not defined and thus both vague and overbroad. It is unclear whether the standard for determining whether a statement is "false, misleading, or deceptive" is an objective standard based on what a reasonable person would think or a subjective standard based on how a potential client allegedly feels. The Act also goes one step further and prohibits statements "that a limited services pregnancy center *reasonably should know* to be false, misleading or deceptive." Sec. 2 (emphasis added). This vague and expansive definition of prohibited speech unconstitutionally covers protected speech. Moreover, H.B. 7070 is unnecessary to prevent deceptive advertising. Connecticut already has a statute that prohibits false advertising in commerce. *See* Conn. Gen. Stat. § 42-110b. The Act's overbroad and vague regulation of speech will only serve to chill protected speech by pro-life pregnancy centers and keep the pregnancy centers from helping the very women the Act claims to protect.

H.B. 7070 is a content-based, viewpoint discriminatory speech regulation and subject to strict scrutiny.

Speech regulations, such as H.B. 7070, are content-based when they cannot be "justified without reference to the content of the regulated speech," or were "adopted by the government '*because of* disagreement with the message [the speech] conveys.'"[10] Viewpoint-based regulations are a "more blatant" and "egregious form of content discrimination" and occur when the government regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[11] In his *NIFLA* concurrence, Justice Anthony Kennedy (joined by Chief Justice John Roberts and Justices Samuel Alito and Neil Gorsuch) pointed out that "viewpoint discrimination [wa]s inherent in the design and structure of [California's] Act" since "the State require[d] primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions."[12] Both content-based and viewpoint discriminatory regulations are subject to strict scrutiny.[13] To satisfy strict scrutiny the government must prove that the speech regulation "furthers a compelling governmental interest and is narrowly tailored to that end."[14]

The Act is content-based and viewpoint discriminatory because the law cannot be justified without reference to the content of pro-life pregnancy centers' speech and was proposed because of disagreement with pro-life pregnancy centers and their pro-life viewpoint. Viewpoint

[10] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (alteration in original) (emphasis added) (citing *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)).
[11] *Id.* at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995)); *see also NIFLA*, 138 S. Ct. at 2378 (Kennedy, J., concurring) (writing to "underscore that the apparent viewpoint discrimination [by California was] a matter of serious constitutional concern").
[12] *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).
[13] *See Reed*, 135 S. Ct. at 2227; *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 658 (1994).
[14] *Reed,* 135 S. Ct. at 2231.

discrimination is inherent in the design and structure of H.B. 7070 because it singles out and targets pro-life pregnancy centers and pro-life views. As such, H.B. 7070 is subject to strict scrutiny.

Classifying the speech regulated by H.B. 7070 as "commercial" or "professional" speech does not change the level of scrutiny. The Supreme Court has held that, even within the context of commercial speech, the government has no authority to selectively regulate speech since commercial speech is not an exception from the general prohibition on viewpoint discrimination and strict scrutiny.[15] And just last year in *NIFLA*, the Court refused to adopt "professional speech" as a separate category of speech that is subject to lesser scrutiny.[16]

H.B. 7070 fails strict scrutiny and violates the First Amendment.

As discussed above, H.B. 7070 singles out and targets pro-life pregnancy centers and pro-life views. Because the Act is a remedy in search of a problem, Connecticut has no compelling governmental interest in regulating *only* pro-life pregnancy centers' speech. In addition, the speech regulation is not narrowly tailored to combat the alleged purpose of preventing "deceptive advertising." As a result, the Act both regulates protected speech and will lead to the chilling of other protected speech. In sum, H.B. 7070 fails strict scrutiny and violates the First Amendment.

H.B. 7070's remedies allow for unconstitutional targeting, harassment, and silencing of pro-life pregnancy centers and pro-life views.

H.B. 7070's statutory remedies allow pro-life pregnancy centers to be targeted and harassed. The Act provides that Connecticut's Attorney General may sue a pro-life pregnancy center for allegedly violating the Act. Sec. 3(a). Connecticut's unfettered ability to bring suit, coupled with the expansive and undefined nature of the speech prohibited, opens up pro-life pregnancy centers to targeting and harassment by an Attorney General who does not share their views.

The Act provides several remedies for violating its speech restrictions, including forcing pregnancy centers to "pay for and disseminate appropriate corrective advertising" and "post[ing] a remedial notice that corrects the effects of the false, misleading or deceptive advertising for clients entering the facility that may have seen the original false, misleading or deceptive advertisements." Sec. 3. In general, "[l]aws that compel speakers to utter or distribute speech

[15] *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) ("[I]t is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance."); *Matel v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring) ("[V]iewpoint based discrimination . . . necessarily invokes heightened scrutiny," and "remains of serious concern in the commercial context."); *id.* at 1769 (Thomas, J., concurring) (even content-based regulations of commercial speech should be subject to strict scrutiny).

[16] *NIFLA*, 138 S. Ct. at 2375 ("[N]either California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.").

bearing a particular message are subject to . . . rigorous scrutiny."[17] For example, in *NIFLA*, the Supreme Court found that requiring pregnancy centers to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them" violated the First Amendment.[18] The California law at issue in *NIFLA* is "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression" and a law that "imperils" the freedom of speech, thought, and belief.[19] Likewise, the Fourth Circuit Court of Appeals recently found that a Baltimore City ordinance, which required pregnancy centers that do not offer or refer for abortions to disclose that fact through signs posted in their waiting rooms, violated the First Amendment.[20] Thus, since H.B. 7070's remedies compel speech, something that the government likely cannot do directly, the remedial speech regulations would likely be subject to strict scrutiny and found to violate the First Amendment.

On top of these "corrective" remedies, pregnancy centers found in violation of the Act are subject to monetary penalties, as well as attorney's fees and costs. *See* Sec. 3(b). These fines and fees would not only funnel money away from the good work pregnancy centers do to help Connecticut women in crisis pregnancies, but just one such lawsuit could financially cripple and shut down the offending pro-life pregnancy center since most pregnancy centers offer their services at low cost or free of charge, are funded mainly by donations, and are staffed by unpaid volunteers. In the end, this would harm Connecticut women who choose to rely on pro-life pregnancy centers for care and support.

This Committee should reject H.B. 7070.

In conclusion, H.B. 7070 is an effort to silence pro-life pregnancy centers' pro-life viewpoint. While Connecticut can disagree with pregnancy centers' pro-life speech, it cannot constitutionally under the First Amendment suppress their free speech by government fiat. As such, this Committee should reject H.B. 7070.

Sincerely,

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[17] *Turner Broad. Sys.*, 512 U.S. at 642.
[18] *NIFLA*, 138 S. Ct. at 2371.
[19] *Id.* at 2379 (Kennedy, J., concurring).
[20] *See Greater Balt. Pregnancy Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101 (4th Cir. 2018).