IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, TRI-COUNTY CRISIS PREGNANCY CENTER, THE LIFE CENTER, INC.,and MOSAIC PREGNANCY & HEALTH CENTERS, Plaintiffs, v. MARIO TRETO, JR., Defendant.	No. 16 CV 50310 Judge Iain D. Johnston Magistrate Judge Lisa A. Jensen

NIFLA PLAINTIFFS' REPLY IN SUPPORT OF POST-TRIAL MEMORANDUM OF LAW

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INTRODUCTION

Ironically, the State conditions the Illinois Conscience Act's protection on Plaintiffs' willingness to violate their religious conscience by discussing the "benefits" of abortion with patients and telling them where they can get one. Controlling Supreme Court precedent prevents Illinois from "co-opt[ing] [pregnancy centers] to deliver its message" about where to get abortion. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018). So, it's no surprise Defendant effectively concedes the amended Act's new referral requirement is unconstitutional.[1] And the benefits-discussion's compelled speech requirement fairs no better under *NIFLA* which rejected California's attempt to compel pregnancy centers to speak about abortion, finding it was no mere regulation of conduct. Plaintiffs respectfully urge this Court to strike down the Act's benefits-discussion and referral requirements.

ARGUMENT

I. Heightened scrutiny applies to Plaintiffs' free speech claims under *NIFLA*.

In *NIFLA*, the Supreme Court held that content-based regulations of professional speech are subject to heightened scrutiny, subject to two narrow exceptions. 138 S. Ct. at 2371–72. The State argues that the exception for "regulations of professional conduct that incidentally burden speech," *id.* at 2373, applies here. Def.'s Post-Trial Mem. of Law 8–10, ECF No. 275 (Def.'s Mem.). But the State has

[1] Defendants' sole argument against the referral requirement is that it is less than what is "required under widely accepted ethical guidelines." Def.'s Mem. 25. But that is wrong under even their own expert's testimony. NIFLA Pls.' Suppl. Findings of Fact ¶ 37, ECF No. 271-1 (NIFLA Pls.' FOF); Schroeder Plaintiffs' Proposed Findings of Fact at ¶ 164, *Schroeder v. Treto*, No. 17-cv-04663 (N.D. Ill. Nov. 20, 2023), ECF No. 236-1.

failed to prove the Act "facilitate[s] informed consent to a medical procedure" provided by Plaintiffs. *NIFLA*, 138 S. Ct. at 2373. So heightened scrutiny applies. *Id.* at 2375.

A. The State mischaracterizes *Casey*, *NIFLA*, and *Rokita*.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court upheld Pennsylvania's law requiring informed consent for abortion. 505 U.S. 833, 881 (1992). That law requires "the physician *who is to perform the abortion* or the referring physician" to inform the woman of the "risks and alternatives" to the abortion, along with "[t]he probable gestational age of the unborn child" and "[t]he medical risks associated with carrying the child to term." 18 Pa. Cons. Stat. § 3205(a)(1) (emphasis added). The Court held that "a requirement that a doctor give a woman certain information *as part of obtaining her consent to an abortion* is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." *Casey*, 505 U.S. at 884 (emphasis added). In other words, the Court did not uphold the Pennsylvania statute because it "required giving information that was pertinent to patients' choices" generally, Def.'s Mem. 12, but because it was "relevant" to a woman's specific "decision" whether "to give her written informed consent to an abortion." *Casey,* 505 U.S. at 881–82.

The State's attempts to expand the scope of *Casey*'s truthful and nonmisleading test fall flat. It misleadingly quotes *Casey* for the proposition that "informed choice need not be defined in such narrow terms." Def.'s Mem. 14. But the full quote states that "informed choice need not be defined in such narrow terms *that all considerations of the effect on the fetus are made irrelevant*." *Casey*, 505 U.S. at 883 (emphasis added). That sentence discusses whether the scope of the information

provided is relevant to the abortion procedure performed by the doctor, not whether the physician is providing general information.

NIFLA and *Rokita* confirm this reading of *Casey*. In *NIFLA*, the Court explained that *Casey* "upheld a law requiring physicians to obtain informed consent *before they could perform an abortion*." 138 S. Ct. at 2373 (emphasis added). The Court then held that California's law regulating pregnancy centers did not qualify as an informed consent law because "it is not tied to a procedure at all" but "applies . . . regardless of whether a medical procedure is ever sought, offered, or performed." *Id.* It also explained that, like the Act in this case, "the notice provides no information about the risks and benefits" of the procedures that the covered facilities actually performed. *Id.*

In *Doe v. Rokita*, the Seventh Circuit confirmed that *Casey*'s holding that the "government may require physicians" to "provide information that enables informed consent to risky procedures such as surgery" remains good law. 54 F.4th 518, 520 (7th Cir. 2022). But it specifically limited that holding to "information that facilitates patients' choices directly linked to *procedures that have been or may be performed*." *Id.* at 521 (emphasis added). Like the Pennsylvania statute in *Casey*, the Indiana statute applied only to "the physician *who is to perform the abortion*, the referring physician," or another medical professional "to whom the responsibility has been delegated by the physician *who is to perform the abortion* or the referring physician." Ind. Code § 16-34-2-1.1(a) (emphasis added). Indeed, the State has not cited a single

case applying the *Casey* standard to a statute outside the context "when a healthcare provider secures authorization to perform a procedure." Def.'s Mem. 13.

B. The Act is not an informed consent law and does not qualify for any exception to heightened scrutiny under *NIFLA*.

The Supreme Court acknowledged in *NIFLA* that it has "upheld regulations of professional conduct that incidentally burden speech," like "[l]ongstanding torts for professional malpractice," commercial speech, and informed consent laws. 138 S. Ct. at 2373. But the Act is not an informed consent law and Defendant doesn't claim it regulates commercial speech or creates a tort. Thus, heightened scrutiny applies.

The "professional conduct" regulated by an informed consent statute is "perform[ing]" a "medical procedure" without the patient's "informed consent." *Casey*, 505 U.S. at 881. *Casey*, *NIFLA*, and *Rokita* together require that an informed consent law relate to a medical procedure that Plaintiffs perform. *See supra* Part I.A. Here, Plaintiffs do not perform abortions. Joint Stips. of Fact ¶ 25, ECF No. 267-1. Indeed, it is this very refusal to perform abortions that triggers the Act's application. 745 Ill. Comp. Stat. 70/6.1.

Under Illinois law, a plaintiff must show that she actually "consented to medical treatment without being adequately informed" to succeed on an informed consent claim. *Bailey v. Mercy Hosp. & Med. Ctr.*, 186 N.E.3d 366, 377 (Ill. 2021). A plaintiff may not argue that a physician is liable "for *not* performing. . . medical treatment. *Id.* (emphasis added). The Illinois standard of care does *not* require medical professionals to discuss the benefits of or refer as part of informed consent for treatments they don't provide. That is confirmed by the State's own expert, Dr.

Burcher, who admitted that the standard of care requires neither "a full explanation of all treatment options and the risks and benefits" nor "giving the patient a written list of names of physicians that will actually provide" the procedure. NIFLA Pls.' FOF ¶¶ 35, 37.

Plaintiffs do not argue that "their counseling is unrelated to abortion," Def.'s Mem. 14, but that the requirements of the Act are unrelated to the risks, benefits, or alternatives of any medical procedure that Plaintiffs do provide. As the State acknowledges, abortion is an "alternative to proceeding with childbirth," *id.*, not to "ultrasounds, pregnancy testing, and STI testing," *id.* at 11; Trial Tr. 661:5–9 (State expert agrees abortion is not alternative to the ultrasounds provided by the Centers). Pregnancy testing and ultrasounds are *prerequisites* to abortion, NIFLA Pls.' FOF ¶ 17, and STI testing may be relevant to pregnancy center clients regardless of whether they are pregnant or considering abortion. And "prenatal care is not a 'procedure,' 'operation,' or 'surgery'" at all. *Torres v. Carrese,* 90 A.3d 256, 273 (Conn. App. Ct. 2014). The California pregnancy centers in *NIFLA* provided the "exact same services" as the Illinois NIFLA members here, and that law requiring abortion referral was not a mere regulation of conduct. 138 S. Ct. at 2373. Thus, the Act "regulates speech as speech." *Id.* at 2374.

C. The Act is a content- and viewpoint-based regulation of pure speech, not professional conduct.

The Supreme Court has long held that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963). The State argues that "even if Plaintiffs [a]re correct" about

the "standards of 'informed consent,'" the State may still regulate medical options counseling as professional conduct. Def.'s Mem. 13, 17–19. But medical options counseling, like other types of counseling, "consists—entirely—of words." *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020). Thus, the Act "sanction[s] speech directly, not incidentally—the only 'conduct' at issue is speech." *Id.* at 866.

The State tries to distinguish *Otto* because it "did not concern a physician-disclosure law of the kind at issue in *Casey* and *Rokita*." Def.'s Mem. 18. But that argument is circular: as explained above, the Act is *not* an informed consent law under *Casey* or *Rokita*. *See supra* Part I.B. And while the Ninth Circuit disagreed with *Otto* in *Tingley v. Ferguson*, it did so because "[w]hat licensed mental health providers do . . . is [medical] *treatment*." 47 F.4th 1055, 1082 (9th Cir. 2022), *cert. denied* 144 S. Ct. 33 (2023) (emphasis added). Options counseling, on the other hand, is not medical treatment, but is the discussion of possible "legal treatment options." 745 Ill. Comp. Stat. 70/6.1(1). The Pregnancy Centers counsel patients *not* to obtain abortion as a "treatment" of their pregnancy and that counsel is even not necessarily provided by medical professionals. *See Nat'l Inst. of Family & Life Advocs. v. Raoul*, No. 23-cv-50279, 2023 WL 5367336, at *6 (N.D. Ill. Aug. 4, 2023).

Thus, the Act regulates Plaintiffs' "pure speech." *303 Creative v. Elenis*, 600 U.S. 570, 587 (2023). The State tries to distinguish *303 Creative* because the parties there "stipulat[ed] that the plaintiff was engaged in 'expressive' conduct." Def.'s Mem. 19. But such a stipulation is unnecessary where, as here, the challenged law "restict[s] the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

And Plaintiffs *did* "allege that their medical options counseling is 'expressive,'" Def.'s Mem. 19, in their complaint. Compl. ¶¶ 41, 114, ECF No. 1.

The Act "alters the content of [Plaintiffs'] speech by compelling [them] to . . . share particular pieces of information," *Raoul*, 2023 WL 5367336, at *8, namely, the benefits of abortion and a list of healthcare providers that they "reasonably believe may offer" abortion, 745 Ill. Comp. Stat. § 70/6.1. *Casey* and *Rokita* do not provide otherwise; instead, they create a limited exception for informed consent laws "regardless of whether they affect the 'content' of providers' speech." Def.'s Mem. 16. The Act does not qualify for that exception. *See supra* Part I.B.

The Act is also viewpoint-based because it targets only those speakers who have religious or conscience-based viewpoints opposing particular medical procedures. *See NIFLA*, 138 S. Ct. at 2378. And as explained above, *see supra* Part I.B, it does not "reflect a standard of care that applies broadly to all healthcare providers." Def.'s Mem. 15. Strict scrutiny therefore applies. *Raoul*, 2023 WL 5367336, at *9.

II. Heightened scrutiny applies to Plaintiffs' free exercise claim because the Act targets religious objectors for differential treatment.

The Free Exercise Clause prohibits States from enforcing "laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). By singling out medical providers with conscience objections, the amendments to the Act make

"religious exercise" their "object." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022).

The State argues that the Act is somehow exempt from this rule "since the Act is itself a religious accommodation." Def.'s Mem. 25. But it cites no case excusing the State from targeting religious objectors in the name of narrowing a religious objection. Indeed, the State eschews the Supreme Court's recent free exercise decisions in favor of *United States v. Lee,* 455 U.S. 252 (1982), which was decided eight years before *Emp. Division v. Smith*, 494 U.S. 872 (2020). It thus did not hold that the federal law at issue was neutral and generally applicable, but "concluded that the strong public interest in the financial soundness of the Social Security system was enough to defeat the farmer's claim for an exemption." *Korte v. Sebelius*, 735 F.3d 654, 680 (7th Cir. 2013). More recently, the Court has struck down laws and regulations that target religious exercise or fail to impose neutral, generally applicable regulations.[2]

Chief Judge Pallmeyer's summary judgment opinion did not reject this theory, Def.'s Mem. 25, but held that it was subject to a material dispute of fact: whether "the law does no more than bring the regulations of conscience objectors into conformity

[2] *See, e.g.*, *Carson v. Makin*, 596 U.S. 767, 778 (2022) ("[W]e have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."); *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1878 (2021) ("We have never suggested that the government may discriminate against religion when acting in its managerial role."); *Roman Cath. Archdiocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) ("[T]he regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."); *Trinity Lutheran Church*, 582 U.S. at 462 ("To condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." (cleaned up)).

with that of other medical professionals." *Nat'l Inst. of Fam. & Life Advocs. v. Schneider*, 484 F. Supp. 3d 596, 625 (N.D. Ill. 2020). The State points to no law imposing similar requirements on medical professionals without conscience objections. And as explained above, the standard of care does not require doctors to discuss the risks and benefits of all legal treatment options or to refer for all legal treatment options, *see supra* Part I.B, meaning that the Act does far more than "bring the regulations of conscience objectors into conformity with that of other medical professionals," *Schneider*, 484 F. Supp. 3d at 625.

Although the Act does not allow Secretary Treto to grant individualized exemptions to the amendments, Def.'s Mem. 26, the State concedes that it "allow[s] healthcare providers to limit the discussion of medical options and their risks and benefits based on the patient's particular circumstances," *id.* at 2 n.1, but not based on a "conscientious objection," *id.* at 1. This disparity undermines the legislature's asserted interest in "ensur[ing] that patients receive timely access to information and medically appropriate care." 745 Ill. Comp. Stat. § 70/2. Thus, the Act "lacks general applicability" because "it prohibits religious conduct while permitting secular conduct that undermines the government's interests in a similar way." *Fulton*, 141 S. Ct. at 1877.

Finally, Plaintiffs' free speech claim, *see supra* Part I, "reinforce[s]" their free exercise claim. *Smith*, 494 U.S. at 882. A plaintiff alleges a "hybrid rights claim" by combining a free exercise claim with a *meritorious* "claim of the violation of another alleged fundamental right." *Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 641 (7th

Cir. 2017). Because Plaintiffs have alleged a meritorious free speech claim along with their free exercise claim, Compl. ¶¶ 128–45, 162–71, they have not waived this argument as the State asserts, Def.'s Mem. 26. The cases cited by the State reject hybrid rights theories because the plaintiffs' other constitutional claims lacked merit, not because the hybrid rights theory is a claim for relief that must be alleged separately. *Ill. Bible Colls. Ass'n*, 870 F.3d at 641; *Civ. Liberties for Urb. Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003). And *Martinez v. Colvin* did not concern a free exercise claim. No. 12-cv-50016, 2014 WL 1305067, at *1 (N.D. Ill. 2014). Regardless, strict scrutiny applies because the Act is not neutral and generally applicable. *See Kennedy*, 142 S. Ct. at 2421–22.

III. The Act imposes unconstitutional conditions on a government benefit.

The unconstitutional conditions doctrine "prevents the government from awarding or withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his exercise of a constitutional right." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012). Here, the Act imposes unconstitutional conditions on medical providers, who "[b]y choosing to invoke the Conscience Act," must agree to violate their religious beliefs and speak a government message with which they disagree. Def.'s Mem. 27.

The State argues that the unconstitutional conditions doctrine doesn't apply because "the Conscience Act's shield is purely elective." *Id.* But *all* unconstitutional conditions cases concern "elective" government benefits. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("We have often concluded that denials

of governmental benefits were impermissible under the unconstitutional conditions doctrine."). Indeed, the very purpose of the constitutional conditions doctrine is "to prevent the government from achieving indirectly what the Constitution prevents it from achieving directly" by "den[ying] . . . a public benefit" in order to "creat[e] an incentive" to relinquish constitutional rights. *Planned Parenthood of Ind.*, 699 F.3d at 986.

The cases cited by the State do not require otherwise. Each of those cases dealt with federal spending programs or taxation, where "Congress [has] broad discretion to tax and spend for the 'general Welfare.'" *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 210 (2013); *accord. Rust v. Sullivan*, 500 U.S. 173, 178 (1991); *Grove City Coll. v. Bell*, 465 U.S. 555, 557 (1984); *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 544 (1983). In contrast, the Act places unconstitutional conditions on statutory protection from civil and criminal liability for medical professionals who practice medicine in accordance with their religious and pro-life beliefs. 745 Ill. Comp. Stat. § 70/4. Civil and criminal liability are much more coercive and punitive than the typical federal spending program. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("[I]f a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate."); *cf. United States v. Lippitt*, 180 F.3d 873, 877 (7th Cir. 1999) (explaining that most civil and criminal sanctions "contain both coercive and punitive elements"). And the Supreme Court has held that professionals need not relinquish their First Amendment rights as either a condition of practicing medicine, *see NIFLA*, 138 S. Ct. at 2374–75, or of

doing business, *see 303 Creative*, 600 U.S. at 589–92. The Act thus imposes an unconstitutional condition.

IV. The Act fails heightened scrutiny because Defendant asserts only a general interest in protecting health and concedes the State did not try alternatives to compelled speech.

Strict scrutiny applies to the Act under both the Free Speech and Free Exercise Clauses. *See supra* Parts I–II. But as in *NIFLA*, the Act "cannot survive even intermediate scrutiny." 138 S. Ct. at 2375.

A. The Act does not serve a substantial government interest unrelated to suppressing free speech and free exercise.

The State has no legitimate interest in "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). For this reason, even regulations of conduct incidentally affecting speech cannot be justified based on a government interest related to the suppression of free expression. *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also Church of Lukumi*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

The State's asserted interest is in "ensur[ing] that *conscience-based objections* do not cause impairment of patients' health." Def.'s Mem. 21 (emphasis added). But that interest relates to both the suppression of Plaintiffs' pro-life message by requiring them to refer for, and discuss the "benefits" of, abortion, NIFLA Pls.' FOF ¶ 18, and their religious exercise by requiring them to "facilitate access to[] abortion" in contradiction to their conscience, Joint Stips. ¶ 25.

Nor does the Act serve the State's broader interest in "regulating the medical profession to protect patients." Def.'s Mem. 21. Under heightened scrutiny, the State must show that it has an important interest *and* offer "evidence to support the finding that the interest is under attack." *Raoul*, 2023 WL 5367336, at *9. The evidence at trial did not show that patients "are being denied" information about the alleged "benefits" of abortion or where to obtain one, Def.'s Mem. 21. It showed that such information is readily available to patients, NIFLA Pls.' FOF ¶¶ 38–46, and there is no evidence that exempting pregnancy centers would undermine the State's interest.[3] The State mischaracterizes this argument as relating to the applicable free speech test, rather than its interest. Def.'s Mem. 17. But *Casey* and *Rokita* are inapposite here because they do not apply heightened scrutiny. Thus, the fact that patients can "access relevant information elsewhere" undercuts the State's interest.

B. The Act is not narrowly drawn to achieve the State's interest in regulating the medical profession, protecting women's health, or any other substantial government interest.

Regardless, the Act is not "sufficiently drawn to achieve" any of the interests asserted by the State or any other important state interest. *NIFLA*, 138 S. Ct. at 2375. The Act is not "narrowly tailored to conform to the existing medical standard of care," Def.'s Mem. 22. *See supra* Part I.B. Moreover, whether a statute complies with the AMA Code of Ethics, Def.'s Mem. 22–23, does not determine its constitutionality: The AMA is a private organization that need not comply with the

[3] ACOG's amicus brief alleges several incidents of the Act causing harm that are largely repetitive of the State's examples. None of them involved pregnancy centers or concerned medical professionals that invoked the Act as a defense.

First Amendment, but the State of Illinois must. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837 (N.D. Ill. 1998) ("[T]he imposition of tort liability constitutes state action which implicates the First and Fourteenth Amendments."). And as the State concedes, "consistency with medical standards of care is not a prerequisite to lawful government regulation under *Casey*." Def.'s Mem. 12. Thus, professional standards of care are not relevant to the constitutional question in this case. *Cf. Est. of Burns v. Williamson*, No. 11-cv-3020, 2015 WL 4465088, at *10 (C.D. Ill. July 21, 2015).

Nor is it relevant that the Act "does not require providers to promote materials scripted by the government." Def.'s Mem. 23. Compelled speech is not limited to the context where the government provides a precise script; it also applies where the government seeks "to force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative*, 600 U.S. at 586. And the State's concession that "the Act leaves judgment and discretion to healthcare providers to determine which treatment options are appropriate in each case based on medical facts and the patient's circumstances," Def.'s Mem. 23, only underscores the fact that it is "wildly underinclusive." *NIFLA*, 138 S. Ct. at 2375.

Finally, the State objects to Plaintiffs' argument that "the State should fund public awareness campaigns." Def.'s Mem. 23. But that is precisely what the Supreme Court held in *NIFLA*. 138 S. Ct. at 2376. And the State has not carried its burden of showing less restrictive alternatives like enforcement of what it alleges is the standard of care have been tried and failed. *McCullen v. Coakley*, 573 U.S. 464, 494–

95 (2014). *See* Def's Memo. 6 (conceding pregnancy centers have not been the subject of any enforcement actions). The State ignores these cases and relies on a single 35-year-old, out-of-circuit case. Def.'s Mem. 24 (citing *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1232 (4th Cir. 1989)). Regardless, narrow tailoring analysis does not turn on whether "information on billboards and commercials is fundamentally different from medical options counseling," Def.'s Mem. at 23–24, but on whether the State could achieve its interest "without burdening a speaker with unwanted speech." *NIFLA*, 138 S. Ct. at 2376. It has made no attempt to do so. NIFLA FOF ¶ 40.

CONCLUSION

For these reasons, this Court should grant final judgment to the Pregnancy Centers, declare the Act is unconstitutional both on its face and as applied to Plaintiffs, and permanently enjoin it.[4]

[4] Contrary to the State's assertions, Def.'s Mem. 29, NIFLA Plaintiffs did address their facial challenge in their opening brief, NIFLA Pls.' Post-Trial Mem. of Law 6, ECF No. 271 ("SB 1564 is content- and viewpoint-based on its face and as applied."). Regardless, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). And *Whole Woman's Health v. Jackson*, which concerned whether a state law could be enjoined against a government official who has no enforcement power, 595 U.S. 30, 44 (2021), is inapplicable where, as here, the State concedes that Secretary Treto may bring enforcement actions under the Act. Def.'s Mem. 30.

Respectfully submitted this 9th day of January, 2024.

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