24-2481

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, GIANNA'S HOUSE, INC., CHOOSE LIFE OF JAMESTOWN, INC., d/b/a Options Care Center,
Plaintiffs-Appellees,

v.

LETITIA JAMES,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of New York

RESPONSE BRIEF OF APPELLEES

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DISCLOSURE STATEMENT

National Institute of Family and Life Advocates is a nonprofit corporation organized under Virginia law. Gianna's House, Inc. and Choose Life of Jamestown, Inc. (d/b/a Options Care Center) are nonprofit corporations organized under New York Law. None of these corporations issue stock or have a parent company.

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INTRODUCTION

Progesterone therapy is a lawful, life-saving medical treatment that expands women's choice. Not all women who take mifepristone want to complete their chemical abortion. Some experience immediate regret, while others were tricked or forced into taking the abortion drug against their will. Progesterone therapy offers these women hope and their babies a second chance at life.

No one knows this better than Maranda Halstead, a New York mother who immediately regretted taking mifepristone and frantically sought an alternative to completing her chemical abortion. JA645–46. After learning about progesterone therapy on abortionpillreversal.com, Maranda was connected with a faith-based, life-affirming pregnancy center that referred her to a physician who administered free treatment. JA646. Months after receiving progesterone therapy, Maranda's healthy and beloved daughter, Myli'anna, was born. *Id.* "If it wasn't for the information about Abortion Pill Reversal online, [Maranda] would have completed the abortion and Myli'anna would not be alive today." JA647.

Defendant-Appellant Attorney General Letitia James seeks to silence advocates who speak about this life-saving treatment. She targeted life-affirming pregnancy centers for enforcement actions under the state's business-fraud statutes, alleging that their progesterone-therapy advocacy is false or misleading. To avoid prosecution, Plaintiffs-

Appellees National Institute of Family and Life Advocates ("NIFLA"), Gianna's House, and Options Care Center (collectively, "the NIFLA plaintiffs") chilled their speech.

To vindicate their First Amendment rights to advocate for progesterone therapy, the NIFLA plaintiffs filed suit in federal court. The district court declined to abstain from exercising its jurisdiction and granted a preliminary injunction barring the Attorney General's enforcement of the state business-fraud statutes against the NIFLA plaintiffs for their progesterone-therapy advocacy.

The district court was correct on both fronts. The abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), does not bar the claims of federal plaintiffs who are neither involved in nor seek to directly interfere with ongoing state proceedings. And the district court did not abuse its discretion in enjoining the Attorney General from pursuing her content- and viewpoint-based targeting of the NIFLA plaintiffs' noncommercial, life-saving speech. This Court should affirm.

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that *Younger* abstention is inapplicable?
2. Did the district court abuse its discretion in preliminarily enjoining the Attorney General's targeting of the NIFLA plaintiffs' noncommercial, true speech?

STATEMENT OF THE CASE

NIFLA is a faith-based nonprofit association of life-affirming pregnancy centers. JA14. It empowers women and families to choose life for their unborn children by providing legal counsel, education, and training to its member centers. *Id.* Plaintiffs-Appellees Gianna's House and Options Care Center are two faith-based, nonprofit NIFLA member centers in New York. JA16–18. They provide a variety of life-affirming services to clients for free as part of their Christian mission to protect unborn life and serve mothers in need. JA14, 16–19.

The NIFLA plaintiffs support women at many different stages of motherhood, including women who are pregnant, postpartum, post-abortive, or even mid-abortion. JA16–18. Some of these women regret their decision to begin the abortion-drug process, or have done so only under duress or by trick or force, and they seek a way to save their children's lives before their chemical abortions are complete. JA27.

Progesterone therapy provides hope. Progesterone therapy, otherwise known as Abortion Pill Reversal ("APR"), refers to a lawful, life-saving method of medical treatment that seeks to prevent a chemical abortion by administering progesterone to counteract the adverse effects of the abortion pill (mifepristone) on an unborn child. The NIFLA plaintiffs believe they are compelled by their faith to help interested women save their children's lives by referring them to licensed medical providers who can assess a woman and her child and,

if appropriate, administer progesterone therapy. JA16, 19, 626–27. Pursuant to their religious mission, the NIFLA plaintiffs offer such referrals for free and receive no remuneration for them. JA15. Moreover, they refer only to medical providers who provide progesterone therapy at no cost to women. *Id.*

A. The science behind "Abortion Pill Reversal"

As the FDA explains, chemical abortions function by "block[ing] a hormone called progesterone that is needed for a pregnancy to continue." JA25. The current abortion-drug regimen consists of mifepristone—which blocks intracellular progesterone receptors, thereby cutting off oxygen and nutrition to the developing child and, in most cases, ending its life—followed by misoprostol two days later to induce uterine contractions and expel the child from the womb. JA627–28.

Progesterone plays a critical role in maintaining a healthy pregnancy. JA627. For over half a century, medical professionals have prescribed the naturally occurring hormone "off-label" to treat various female fertility issues, including to prevent miscarriage or preterm birth and to facilitate in vitro fertilization. JA638–40. APR is likewise off-label. JA639–40. Its basic premise is supported by a biochemical principle called "reversible competitive inhibition"—by increasing the

concentration of the receptor agonist (progesterone), the treatment can inhibit the function of the receptor antagonist (mifepristone). JA630.

B. The safety and efficacy of progesterone therapy

The scientific literature demonstrates progesterone therapy's ability to safely and effectively counteract the effects of mifepristone:

The 1989 Model Study. In a 1989 study, researchers investigated "the role of progesterone in the maintenance of pregnancy" by studying groups of pregnant rats. JA29, 439–53. Because of ethical and practical limitations to human studies, biomedical researchers often use rats as subjects because of their anatomical, physiological, and genetic similarity to humans. JA29. Using three groups—a control group, a mifepristone group, and a mifepristone-and-progesterone group—researchers concluded that while the progesterone levels of the mifepristone group "decreased significantly after 72 hours of administration," the rats in the mifepristone-and-progesterone group "remained within the levels of the control group." JA439. After four days, only a third of the mifepristone rats remained pregnant, while *all* the rats who received progesterone remained pregnant. Researchers concluded "that progesterone can spare the effect of [mifepristone] on the corpus luteum during pregnancy." JA440.

The 2023 Model Study. A 2023 study using rats produced similar results. Researchers staggered the administration of the drugs to

replicate how progesterone is clinically administered to counteract mifepristone. Using the same three study groups as the 1989 study, researchers found that providing progesterone after mifepristone "reverses the effects of the mifepristone, resulting in living offspring at the end of gestation in the majority (81.3%) of rats." JA477. Administering progesterone resulted in a "clear reversal of the termination process." JA479.

The 2018 Case Study. A large 2018 observational case study followed women who took mifepristone but expressed interest in "reversing" its effects through progesterone therapy. JA29. Researchers followed 754 pregnant women, 547 of whom met the inclusion criteria and underwent progesterone treatment within 72 hours of consuming mifepristone. JA459–60. For women who received progesterone intramuscularly, fetal survival was 64%. JA460. For those who received an initial high dose of oral progesterone followed by daily oral progesterone during the first trimester, fetal survival was 68%. *Id.* These survival rates far exceeded the 8 to 25% survival rate when mifepristone is used alone, without misoprostol or supplemental progesterone. JA458. And there was no increased risk of birth defects or preterm delivery. *Id.* Researchers concluded that "[t]he use of progesterone to reverse the

effects of the competitive progesterone receptor blocker, mifepristone, appears to be both safe and effective." JA463.[1]

C. The NIFLA plaintiffs' speech about progesterone therapy

Compelled by their faith, the NIFLA plaintiffs shared information about the life-saving potential of progesterone therapy. JA967–68, 970–74, 976–77. Examples of their statements include:

- "If you have recently taken the abortion pill and changed your mind about completing the abortion, it may be possible to stop the effects of the abortion drug and continue your pregnancy. Learn more here." (linking to abortionpillreversal.com). JA577.
- "If a woman changes her mind after taking the first abortion drug, she may be able to save her baby through abortion pill reversal." JA586.
- "'The reversal of the effects of mifepristone using progesterone is safe and effective.'" JA570 (quoting the 2018 case study).
- "Go to the website ... time is of essence for effectiveness." JA571 (linking to abortionpillreversal.com).

[1] A smaller 2012 case study observed similar results. Of the six women who completed that study, four were able to carry their pregnancies to term after receiving progesterone therapy. JA467–70.

- "[R]eversal is possible if action is taken after the first dose. Since mifepristone cuts off progesterone, introducing it again has been known to reverse the effects. Progesterone has been used to support pregnancies in danger of miscarriage for decades. If you have recently taken the first dose (mifepristone) and decided not to take the second, please contact [the Abortion Pill Reversal Network]. While the outcome of your particular pregnancy cannot be guaranteed, according to initial studies, the reversal process is 64-68% effective if taken within the first 24-72 hours." JA45.
- "[I]f you've taken the first [chemical abortion] pill and had doubts or changed your mind, you still have a chance to save your pregnancy! ... The abortion pill reversal is 64-68% effective when taken 24-48 hours after the first abortion pill. It has been known to be effective if taken up to 72 hours in some cases. The sooner you take it, the better your chances of saving your baby." *Id.*

D. The Attorney General's state civil enforcement action

Defendant-Appellant, Attorney General Letitia James, has long opposed life-affirming pregnancy centers and their mission. She has repeatedly and publicly attacked these centers, calling them "[f]ake clinics" and accusing them of "actively trick[ing] and lur[ing]" women,

JA604, 619; pressured Google Maps to mark them with derogatory labels, JA54; and joined an open letter from state attorneys general criticizing such centers and vowing to "take numerous actions aiming to mitigate [their] harmful effects," JA604.

On May 6, 2024, the Attorney General instituted an enforcement action against 11 nonprofit, life-affirming pregnancy centers and Heartbeat International, a nonprofit that operates a network of life-affirming pregnancy centers, the Abortion Pill Rescue Network, the Abortion Pill Reversal website (abortionpillreversal.com), and the Abortion Pill Reversal hotline. JA499, 503–05. None of the defendants in this state court action is a party here. SPA6.

The enforcement action alleges that the defendants' progesterone-therapy advocacy, including linked-to statements on abortionpillreversal.com, constitute "deceptive acts or practices" and "false advertising" under New York's business-fraud statutes. JA557, 562. Specifically, the Attorney General alleges there "is no competent and reliable scientific evidence to substantiate Defendants' claims about APR's efficacy and safety." JA502. This enforcement action is currently stayed pending an interlocutory appeal regarding venue. *See Heartbeat Int'l v. James*, No. E2024007242 (Sup. Ct. Monroe Cnty. 2024), *appeal pending,* 4th Dep't No. CA 24-00921.

E. Proceedings below

The NIFLA plaintiffs have made and would like to make statements about progesterone therapy, some identical to, and others substantially similar to, those targeted by the Attorney General in her lawsuit. JA40, 47–48, 933–44, 970–71; *supra* at 7–8. But the Attorney General's suit, coupled with her open hostility to pregnancy centers writ large, has caused the NIFLA plaintiffs to cease engaging in such speech for fear they will be prosecuted, too. JA967–72, 976–77. To protect their First Amendment rights to resume their speech, along with their free-exercise and due-process rights, the NIFLA plaintiffs filed this suit and asked the district court to preliminarily enjoin the Attorney General from enforcing the state business-fraud statutes against them based on their progesterone-therapy advocacy. In support of their motion, the NIFLA plaintiffs filed declarations from staff members attesting to their desire to resume or otherwise engage in progesterone-therapy advocacy. JA967–77. The NIFLA plaintiffs also submitted the declaration of Dr. Christina Francis, a licensed obstetrician who administers progesterone therapy. JA625–27. She testified to the safety and efficacy of progesterone therapy as demonstrated by the scientific literature.

The Attorney General argued in opposition that the complaint should be dismissed for lack of standing; that the district court should abstain from exercising jurisdiction; and that the NIFLA plaintiffs'

progesterone-therapy advocacy is false and misleading commercial speech that is unprotected by the First Amendment. The Attorney General also submitted the declaration of Dr. Courtney Schreiber who shared her theories for why progesterone therapy may not be effective and discussed her views on the scientific literature, JA794–816, including proffering the unsupported claim that a halted study of progesterone therapy involving patient hemorrhaging "rais[ed] concerns about the safety of APR." JA804. In reality, the only women who required medical intervention were in the control group that did *not* receive progesterone therapy. JA473.

F. The district court's order

The district court issued a preliminary injunction barring future state business-fraud enforcement actions against the NIFLA plaintiffs based on their progesterone-therapy advocacy. First, the court found standing because the NIFLA plaintiffs had demonstrated a credible threat of enforcement in light of their chilled speech, which "mirror[ed] statements against which the [AG] has already taken enforcement action." SPA12–13. Next, the district court concluded that *Younger* abstention did not apply because the NIFLA plaintiffs are not parties to the state enforcement action and the requested relief would not interfere with those proceedings. SPA15–19.

On the merits, the district court held that the NIFLA plaintiffs demonstrated a likelihood of success because the Attorney General's targeted enforcement was a content- and viewpoint-based restriction of noncommercial speech that cannot survive strict scrutiny. Because the NIFLA plaintiffs' progesterone-therapy advocacy proposed no transaction, concerned a treatment that would be provided free of charge, and was motivated by moral and religious rather than economic interests, it was not commercial speech. SPA23–31. Because the court found the NIFLA plaintiffs likely to succeed on the merits of their free-speech claim, it did not address any other claim.

The district court also found that the NIFLA plaintiffs would suffer irreparable harm in the absence of the injunction, that the balance of equities tipped in their favor, and that an injunction would serve the public interest. SPA33–34.

STANDARD OF REVIEW

This Court reviews a district court's *Younger* analysis *de novo*, *see Spargo v. N.Y. State Comm'n on Jud. Conduct*, 351 F.3d 65, 74 (2d Cir. 2003), and the decision to grant a preliminary injunction for abuse of discretion, *see Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016). "A district court abuses its discretion when it rests its decision on a clearly erroneous finding of

fact or makes an error of law." *Almontaser v. N.Y.C. Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (per curiam).

SUMMARY OF ARGUMENT

The preliminary injunction should be affirmed. First, the district court was obligated to exercise its federal jurisdiction. *Younger* abstention does not bar federal claimants, like the NIFLA plaintiffs, who are third parties to ongoing state proceedings and do not seek to interfere with them. The NIFLA plaintiffs' interests are not inextricably intertwined with those of the state defendants because plaintiffs assert their own First Amendment rights and injuries, and merely overlapping interests are insufficient to trigger *Younger*.

Second, granting the injunction was not an abuse of discretion. The NIFLA plaintiffs are likely to succeed on the merits because their progesterone-therapy advocacy is fully protected noncommercial speech, or at the very least, it is neither false nor misleading, and the Attorney General does not attempt to satisfy heightened scrutiny. Because the Attorney General's enforcement would violate the NIFLA plaintiffs' free-speech rights, they would suffer irreparable harm absent the injunction, which serves the public interest by protecting free speech. And given the lack of evidence that anyone has been harmed by progesterone therapy, the balance of equities tips decisively in the NIFLA plaintiffs' favor.

ARGUMENT

I. The *Younger* abstention doctrine does not bar the NIFLA plaintiffs' claims, because they do not seek or even threaten interference with ongoing state proceedings against unrelated third parties.

"[A] federal court's obligation to hear and decide a case is virtually unflagging." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (cleaned up). Abstention under doctrines like the one announced in *Younger* "remains the exception, not the rule." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (cleaned up). Where, as here, the federal plaintiff is not a party to the state proceedings and there is no risk of interference, the federal court is bound to exercise jurisdiction.

As this Court has long recognized, the doctrine announced in "*Younger*[] is directed toward those actually involved in a [state] proceeding" and generally "exclud[es] ... those plaintiffs who [are] not." *Citizens for a Better Env't, Inc. v. Nassau Cnty.*, 488 F.2d 1353, 1360–61 (2d Cir. 1973); *see also Mass. Delivery Ass'n v. Coakley*, 671 F.3d 33, 41 (1st Cir. 2012) ("*Younger* does not typically apply where the federal-court plaintiff is not itself a party to the state-court proceedings."). When a state proceeding is not "pending" against a federal plaintiff, "the principles given effect in *Younger* do not … militate against federal injunctive relief." *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1161 (2d Cir. 1974).

The Supreme Court applied these principles in *Steffel v. Thompson*, 415 U.S. 452 (1974). There, two men handbilling were threatened with arrest. One left, but the other was arrested and prosecuted. The man who chilled his speech sought a federal injunction of the state law's enforcement against him. *Id.* at 454–56. Despite the ongoing state prosecution against his fellow handbiller, the Supreme Court held that *Younger* did not bar the federal plaintiff's claim because no state proceeding was pending against him. *Id.* at 462.

The Court confirmed this principle in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). There, three bar owners sued in federal court challenging an ordinance prohibiting topless dancing. Two of these bars complied with the ordinance, but one violated it and faced prosecution in state court. The Court held that the state defendant's federal claims were barred while those of the two compliant bar owners were not, because "[n]o state proceedings were pending against [the latter]." *Id.* at 928, 930. Even though the three bar owners had "similar business activities and problems," they were "unrelated in terms of ownership, control, and management." *Id.* at 928–29. Thus, the two compliant bar owners' requested relief would not interfere with the state's prosecution of the third bar owner because that relief would not "directly interfere with enforcement of [the] contested … ordinance[] except with respect to [those two] particular [bars]." *Id.* at 928–29, 931.

These cases dictate the outcome here. The NIFLA plaintiffs have chilled their speech to avoid being targeted by state enforcement proceedings, and no state proceeding is pending against them. Because the NIFLA plaintiffs and state defendants are distinct legal entities who seek to vindicate their own First Amendment rights, the district court's injunction in no way interferes with pending state proceedings. And without "direct interference," *Younger* does not apply. *Spargo*, 351 F.3d at 82; *Hicks v. Miranda*, 422 U.S. 332, 348–49 (1975) (applying *Younger* to bar company's federal claims that "sought to interfere with the pending state prosecution" against it and its employees).

Despite the Attorney General's attempts to muddy the waters,[2] the case law is clear: The NIFLA plaintiffs and some state defendants

[2] The Attorney General erroneously frames its argument within the third *Middlesex* factor, asking whether "the state-court case … affords the plaintiffs an adequate opportunity for judicial review." AG.Br.22 (citing *Spargo*, 351 F.3d at 75). But that inquiry is distinct from the threshold question whether *Younger* applies to a federal plaintiff who is not subject to a state court proceeding. *See Mass. Delivery Ass'n*, 671 F.3d at 40 ("The question of whether interference exists is a threshold issue.") (cleaned up). Indeed, this distinction is highlighted by this Court's decision in *Spargo*, which treated the analysis of whether *the state defendant* had an adequate opportunity to raise his constitutional claim in the state proceedings as entirely distinct from its analysis of whether the *Younger* abstention doctrine even applied to the two plaintiffs who were not parties to the state proceedings. *Compare* 351 F.3d at 77–81 (entitled "B. Adequate Opportunity to Raise Constitutional Claims in State Proceedings"), *with id.* at 81–85 (entitled "C. Abstention Over the Related Claims of Third-Parties").

having "similar interests" is not enough to warrant *Younger* abstention. *Mass. Delivery Ass'n*, 671 F.3d at 41; *see also Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 882 (8th Cir. 2002) (declining to abstain even though the federal plaintiff's "interests are generally aligned with those of [the state defendant]"). Indeed, given that *Doran* held "two businesses were not barred from pursuing a federal suit despite having interests and representation in common with a state-court criminal defendant, … it is difficult to see how a[nonprofit] association with some interests in common with a few of its members who are state-court civil defendants would be barred by *Younger* from pursuing its own federal suit." *Mass. Delivery Ass'n*, 671 F.3d at 43.

In fact, this Court has already held that *Younger* is inapplicable in circumstances nearly identical to those at issue here. In *Citizens for a Better Environment*, a nonprofit organization brought a First Amendment challenge against an anti-solicitation ordinance in federal court while multiple prosecutions against its members were pending in state court. 488 F.3d at 1356–59. *Younger* could not bar the organization's claims for "injunctive relief against *future* police action against it"—only claims "seek[ing] to enjoin the individual cases already pending" against its members in state court. *Id.* at 1361. The same is true here.

This Court's decision in *Spargo* does not say otherwise. First and foremost, those plaintiffs sought to directly enjoin an ongoing state

proceeding. 351 F.3d at 85. Full stop. Moreover, the plaintiffs uninvolved in the state proceeding were "not directly regulated by the challenged" restriction and thus had no independent First Amendment rights to assert in federal court. *Id.* at 83. As "recipients" of the prohibited speech, their free-speech rights were "entirely derivative of whatever rights [the state defendant] may have [had] to engage in the prohibited speech." *Id.* at 83–84 (cleaned up). Thus, "the legal analysis" of the state defendant's claims and these federal plaintiffs were "unavoidably intertwined and inseparable." *Id.* at 84. Indeed, the plaintiffs' requested relief ran against *the state defendant alone*. *Id.* at 85. Because "direct interference" was "inevitable," *Younger* applied. *Accord Herrera v. City of Palmdale*, 918 F.3d 1037, 1048 (9th Cir. 2019) (plaintiffs' requested relief sought to enjoin parallel state proceedings); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1231 (10th Cir. 2004) (the federal court would need to resolve the merits of a state litigant's defense to resolve the federal plaintiffs' derivative claim).

The Attorney General strains to fit the square peg of this case into the round hole of *Spargo*. She argues that the NIFLA plaintiffs' claims are "derivative" of the state defendants' rights. AG.Br.26. That's wrong. The Attorney General does not (and indeed, cannot) contest that the NIFLA plaintiffs assert their own independent rights. She seems to confuse "common speech" with "derivative rights," but the two are not the same. Indeed, the federal plaintiffs and state defendants in *Steffel*

and *Doran* were engaged in identical speech—in *Steffel*, the two parties were passing out the same handbills in the same place at the same time. This did not render their free-speech rights "derivative" or "codependent." "So long as the [federal plaintiff] has its own distinct claim to pursue, it may even be aligned with the state-court litigant in a common enterprise of vindicating the policy that gives rise to their individual claims" without triggering *Younger*. *D.L.*, 392 F.3d at 1230–31.

Nor does the complaint's references to the Attorney General's ongoing enforcement action, which demonstrates a credible threat of future enforcement against the NIFLA plaintiffs, somehow render the plaintiffs' claims derivative or require the district court to "decide whether the Attorney General acted unlawfully with respect to the … defendants in the state-court action." AG.Br.27. As the Attorney General acknowledges, it is the mere "existence of that state-court action"—not its merits or lack thereof—that "serves to chill [the NIFLA plaintiffs'] speech." AG.Br.26. The district court needed only to take judicial notice of these proceedings and apply that fact to its Article III analysis to confirm the NIFLA plaintiffs' standing, and that is precisely what it did. SPA11–13.

The Attorney General's remaining attempts to conjure evidence of interference likewise fall short. She makes the baseless claim that permanent injunctive relief could hypothetically "preclude the Attorney

General from proceeding in the state-court action, depending on the injunction's terms." AG.Br.28. But she offers no credible basis for her unfounded fear that the district court might substantially expand the scope of this injunction later in the litigation, let alone that it will do so beyond the four corners of the NIFLA plaintiffs' requested relief. *See* SPA1, 17.

The Attorney General also claims that the mere possibility of the state-court defendants invoking the district court's decision as persuasive authority or mounting a preclusion argument "is itself a form of interference contemplated by ... *Younger* abstention." AG.Br.29. Not so. "Normal res judicata effects of federal actions on state actions ... are of course not enough to trigger *Younger*." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 71 (1st Cir. 2005); *see also* 57 A.L.R. Fed. 2d 355 (2011) (same). And even if a district court's adjudication of federal claims "may well affect, or for practical purposes pre-empt, a future—or ... even a pending—state-court action," the Supreme Court has held that does not warrant *Younger* abstention: "[t]here is no doctrine that ... the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 373; *see also* 57 A.L.R. Fed. 2d 355 (2011) ("[T]he mere possibility of inconsistent results in the future is insufficient to justify *Younger* abstention."). Indeed, *Younger* did not apply in *Steffel* and *Doran* even though "the outcomes of the federal suits would create judicial precedent which

might or might not coincide with the determinations made by the state courts as to other parties under the same state statutes." *Mass. Delivery Ass'n*, 671 F.3d at 47; *see also D.L.*, 392 F.3d at 1230–31 (explaining that Younger is not triggered when "a federal decision clearly could influence the state proceeding by resolving legal issues identical to those raised in state court"). The same is true here.

In sum, the Attorney General's argument is "irreconcilable with [the Supreme Court's] dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the exception, not the rule." *Sprint Commc'ns*, 571 U.S. at 81–82 (cleaned up). This case is the rule, not the exception, so the district court was obliged to exercise its jurisdiction.

II. The district court did not abuse its discretion in issuing the preliminary injunction.

The NIFLA plaintiffs are entitled to a preliminary injunction prohibiting the Attorney General's targeted and unlawful enforcement of the state business-fraud statutes against their speech advocating for progesterone therapy. "To obtain a preliminary injunction against governmental action taken pursuant to a statute, the movant has to demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction. The movant also must show that the balance of equities tips in his or her favor." *Libertarian Party of Conn.*

v. Lamont, 977 F.3d 173, 176 (2d Cir. 2020) (cleaned up). In the First Amendment context, "the likelihood of success on the merits is the dominant, if not the dispositive, factor." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

The Attorney General erroneously invokes a heightened standard requiring a "clear" or "substantial" likelihood of success. AG.Br.31. This Court imposes that "particularly exacting" standard only when the preliminary injunction sought against government action is "mandatory" and will thus "alter, rather than maintain, the status quo," or when the "injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Libertarian Party of Conn.*, 977 F.3d at 176 (cleaned up).

Neither circumstance applies to the preliminary injunction here, which is "prohibitory"—rather than "mandatory"—and "seeks only to maintain the status quo pending a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995); *see also id.* ("A mandatory injunction … is said to alter the status quo by commanding some positive act."); *Daileader v. Certain Underwriters at Lloyds London Syndicate 1861*, 96 F.4th 351, 356 (2d Cir. 2024) (defining a "prohibitory" injunction as one that commands the defendant "to refrain from taking some action"). Thus, although the

NIFLA plaintiffs readily satisfied both standards, the Attorney General is wrong that the heightened standard applied here.

She cites *Sussman v. Crawford*, 488 F.3d 136 (2d Cir. 2007) (per curiam), to support her position. But, as other decisions of this Court make clear, *Sussman* confused what some precedents have called "the more rigorous likelihood-of-success standard" with the clear-or-substantial-likelihood-of-success standard. *Id.* at 140 (quoting *Wright v. Giuliani*, 230 F.3d 543, 547 (2000), and *Beal v. Stern*, 184 F.3d 117, 122–23 (2d Cir. 1999)).

They are not the same thing. The phrase "the more rigorous likelihood-of-success standard" has been used by this Court to describe the likelihood-of-success standard as compared to the less rigorous merits standard that asks whether there is "a serious question going to the merits to make them a fair ground for trial." *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011) (per curiam); *Wright*, 230 F.3d at 547; *Beal,* 184 F.3d at 122. "The more rigorous likelihood-of-success standard" does *not* refer to the wholly separate clear-or-substantial-likelihood-of-success standard, which applies only to mandatory injunctions or those that irreversibly provide all the requested relief, as the consensus of this Court's precedents before and after *Sussman* makes clear. *E.g.*, *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020); *Friends of the E. Hampton Airport*, 841 F.3d at 143; *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d

Cir. 2010); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005); *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (per curiam); *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir. 1999) (per curiam).

Because *Sussman* did not expressly overrule this Court's longstanding preliminary injunction standard—which requires only a likelihood of success on the merits for prohibitory injunctions like this one—that standard applies here. *See Tanasi v. New All. Bank*, 786 F.3d 195, 200 n.6 (2d Cir. 2015) ("Where a second panel's decision seems to contradict the first, and there is no basis on which to distinguish the two cases, [this Court has] no choice but to follow the rule announced by the first panel.").

A. The NIFLA plaintiffs are likely to succeed on the merits of their free-speech claim.

Enforcing the business-fraud statutes against the NIFLA plaintiffs for their progesterone-therapy advocacy would violate the Free Speech Clause. Generally, in First Amendment challenges, "it is all but dispositive" to conclude that a law is content- or viewpoint-based. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571 (2011). Either is "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

The Attorney General's threatened enforcement action is both. It is content-based because it would "target speech based on its communicative content." *Id.* at 163. And it is viewpoint-based because it targets "particular views taken by speakers on a subject," punishing speech that supports progesterone therapy while protecting speech that opposes it. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also United States v. Caronia*, 703 F.3d 149, 165 (2d Cir. 2012) (holding that "to prohibit off-label promotion [of a pharmaceutical] … distinguishes between favored speech and disfavored speech on the basis of the ideas or views expressed") (cleaned up); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 112 (4th Cir. 2018) (speech restrictions "aimed directly at those pregnancy clinics that do not provide or refer for abortions is neither viewpoint nor content neutral").

Because the Attorney General "stifles speech on account of its message," her actions "pose the inherent risk that the Government seeks … to suppress unpopular ideas or information or manipulate public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). Indeed, the record is replete with evidence of the Attorney General's hostility toward the NIFLA plaintiffs' life-affirming speech. *See, e.g.*, JA54 (summarizing the Attorney General's efforts to direct women away from such centers by pressuring Google Maps to include derogatory labels); JA81

(threatening pro-APR pregnancy centers with "restitution, damages, civil penalties, auditing and compliance review, [and] costs"). It is particularly dangerous for the government to censor such debate "in the fields of medicine and public health, where information can save lives." *Sorrell*, 564 U.S. at 566.

The Attorney General argues that her content- and viewpoint-based restriction of progesterone-therapy advocacy does not run afoul of the First Amendment because such speech is (1) commercial and (2) false or misleading. She is wrong on both points.

1. The NIFLA plaintiffs' progesterone-therapy advocacy does not constitute commercial speech.

The Constitution fully protects the NIFLA plaintiffs' rights to advocate for life-saving, lawful medical treatment that licensed physicians can provide to women who regret taking the abortion pill. Such advocacy is not commercial speech.

Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980); *see also Caronia*, 703 F.3d at 163 (same). In other words, it's speech that "does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). When speech proposing a transaction is "combin[ed]" with "noncommercial elements," courts will consider whether the communication (1) qualifies as "an

advertisement," (2) refers "to a specific product," and (3) is made by a "speaker [who] has an economic motivation for the communication." *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)). One of these characteristics, standing alone, is insufficient to turn expression with noncommercial elements into commercial speech. *Bolger*, 463 U.S. at 66–67. But "*all* these characteristics" taken together "provide[] strong support for the ... conclusion that the [communication is] properly characterized as commercial speech." *Id.* at 67.

On the other hand, a communication that neither proposes a transaction nor bears *any* relation to the economic interests of the speaker and its audience cannot constitute commercial speech. *See Cent. Hudson*, 447 U.S. at 561. The Attorney General claims this is "contrary to well-settled law," AG.Br.36, but the opposite is true. Both the Supreme Court and this Court have long defined commercial speech as implicating the economic interests of the speaker. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) ("Our commercial speech doctrine rests heavily on the common-sense distinction between speech proposing a commercial transaction and other varieties of speech." (cleaned up)); *Caronia*, 703 F.3d at 163. In explaining why commercial speech is entitled to less protection, *Central Hudson* referred to such speech as "the offspring of economic self-interest." 447 U.S. at 564 n.6.

The only support the Attorney General can muster for her theory that economic interest is not a necessary element of commercial speech comes from out-of-circuit dicta that misconstrues *Bolger*. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 285–86 (4th Cir. 2013) (en banc). But *Bolger*'s three-factor analysis only applies to speech that "combin[es] commercial and noncommercial elements," *Anderson*, 294 F.3d at 460, a prerequisite that presupposes some relation to the transactional or economic interests of the speaker and its audience, *Bolger*, 463 U.S. at 66–67. And, while *Bolger* left open the possibility that speech could be considered "commercial" even if it did not meet *all three Bolger* factors, it never purported to gut the "core" economic-interest component of commercial speech. 463 U.S. at 67 n.14; *see also Cent. Hudson*, 447 U.S. at 561; *Caronia*, 703 F.3d at 163.

The immediate case does not present *Bolger*'s "closer question" about mixed speech, 463 U.S. at 66, because the NIFLA plaintiffs' progesterone-therapy advocacy is purely noncommercial. It bears no relation to their economic interests or those of the women who receive their messages, and it proposes no commercial transaction. The NIFLA plaintiffs, motivated solely by their moral and religious interests in saving lives and helping mothers who regret taking mifepristone, provide information on progesterone therapy and advocate for its use. But they do not sell or administer progesterone. JA15. Instead, they

refer interested women—free of charge—to licensed medical professionals who can explore treatment options and, if appropriate, administer progesterone—at no cost to the women. JA15–18, 20.

The Attorney General insists that despite the complete absence of any economic interest on the part of the speaker or listener, progesterone-therapy advocacy is commercial because "*someone* must bear th[e] cost, be it insurance, the medical provider, or a charity." AG.Br.34. That unsupported and astonishingly broad definition would upend commercial speech doctrine, encompassing nearly all speech so long as it involves something that someone at some point had to purchase. For example, a pro-life student solely motivated by her desire to help those in need could be said to engage in commercial speech when she writes an op-ed in her college newspaper urging classmates who regret taking the abortion drug to speak to a doctor who offers free progesterone therapy—after all, some third party eventually has to bear the cost of those services. Such a definition would stretch commercial speech doctrine beyond recognition.

Indeed, nearly all charities provide free "services in the stream of commerce" that "*someone*" must pay for. AG.Br.34. It would be passing strange if communications regarding free social services could be considered commercial speech "akin to a business proposition," while their solicitation of funds from donors to cover the costs of such services is not. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 787–

88 (1988); *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Both forms of communication are "inextricably intertwined" with a charity's advocacy and informational speech, and thus should be considered "fully protected." *Riley*, 487 U.S. at 796; *contra First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017) (discussed *infra* at 35).

Ignoring *Riley*, *Village of Schaumburg*, or any precedential case involving the mission-driven speech of nonprofits, the Attorney General almost exclusively relies on decisions involving commercial advertisements by for-profit entities promoting the sale of their specific products and services. *See, e.g.*, *Bolger*, 463 U.S. at 62 (a contraceptive manufacturer and distributor's pamphlets promoting its products); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 365 (2002) (pharmacies issuing "promotional materials" of their products); *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998) (beer labels); *Kiser v. Kamdar*, 831 F.3d 784, 787–89 (6th Cir. 2016) (dentist's promotional materials regarding his services); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (physicians' and surgeons' promotional materials regarding their services). These cases involving undisputed economic interest are inapposite, because here, no one disputes the *lack* of economic motivation behind the NIFLA plaintiffs' mission-driven speech.

Consider *Bigelow v. Virginia*, 421 U.S. 809 (1975). The Attorney General broadly describes the speech in that case as an "advertisement about the availability of abortions." AG.Br.40–41. But she ignores that the advertisement promoted a specific for-profit agency's "low cost" services relating to abortions, and therefore both "reflected the advertiser's commercial interests" and directly involved proposed "sales or 'solicitations.'" *Bigelow*, 421 U.S. at 812, 818. Notably, the lower court in that case contrasted the for-profit agency's interests with those of similar nonprofit organizations who provided the same services for free. *Bigelow v. Commonwealth*, 191 S.E.2d 173, 175 (Va. 1972), *vacated and remanded on other grounds*, 413 U.S. 909 (1973).

Unable to deny the purely noncommercial motives of the NIFLA plaintiffs' speech, the Attorney General seeks to minimize them, characterizing progesterone-therapy advocacy as advertisements that merely "link a product to a current debate," citing *Bad Frog Brewery* and *Bolger*. AG.Br.40. But the economically motivated, product-specific advertisements in those cases are nothing like the speech at issue here. In *Bad Frog Brewery*, this Court considered a for-profit company's beer label, which sought to promote the sale of a specific beer with an image of an "insolent frog" giving the middle finger, which was purportedly "intended as a general commentary on an aspect of contemporary culture." 134 F.3d at 90–91, 94 n.2. But the company's primary motivation behind the label was "the hawking of beer." *Id.* at 97. And in

Bolger, the Supreme Court considered a for-profit company's mailer that provided information on family planning while promoting its specific brand of contraceptives, all in an effort to sell more of its products. 463 U.S. at 62.

The NIFLA plaintiffs' progesterone-therapy advocacy stands in stark contrast. "[E]ven if [the] statements could be construed as 'advertising' APR," SPA27,[3] they do not propose a transaction, and they lack any economic motivation or reference to a specific product. Rather, their speech reflects their faith-based mission to save lives by advocating for the use of a free medical treatment that is prescribed in consultation with an independent doctor and employs a medication sold by various companies in various forms. Thus, the NIFLA plaintiffs' pro-life message—their *raison d'être*—cannot be likened to the "family planning" sales tactic employed by the contraceptive manufacturer in *Bolger*, 463 U.S. at 68, or the brewery's disingenuous attempt to avoid government regulation of indecency in *Bad Frog Brewery*, 134 F.3d at 94 n.2, 97.

[3] The Supreme Court has broadly used the term "advertisement" in the First Amendment context to refer to "the promulgation of information and ideas by persons." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Given that broad definition, it makes sense that a communication's status as an advertisement "clearly does not compel the conclusion that [it is] commercial speech." *Bolger*, 463 U.S. at 66 (citing *N.Y. Times Co.*, 376 U.S. at 265–65).

The Attorney General complains that distinguishing between a mission-driven nonprofit's advocacy and a for-profit company's efforts to sell its products "violate[s] the principle that the 'identity of the speaker is not decisive in determining whether speech is protected.'" AG.Br.38 (quoting *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986)). The Attorney General even goes so far as to claim "there is a strong argument that economic motivation"—the touchstone of commercial speech, *Cent. Hudson*, 447 U.S. at 561; *Caronia*, 703 F.3d at 163—is somehow "the least significant of the three commercial-speech considerations." AG.Br.38 (discussing *NIFLA v. Becerra*, 585 U.S. 755, 777–78 (2018)).

But the cases cited provide no support for the Attorney General's incredible claim. In *Pacific Gas*, the Court's reference to speaker identity was merely recognizing that corporations have the same First Amendment rights as individuals. 475 U.S. at 8. That discussion was entirely separate from the Court's commercial speech analysis. *Id.* at 9 (concluding that the expression "extend[ed] well beyond speech that proposes a business transaction"). Likewise, in *NIFLA v. Becerra*, the Court was objecting to the potential for viewpoint discrimination in a statute that expressly targeted a certain type of speaker, namely "a facility that advertises and provides pregnancy tests" while exempting a similarly situated "facility across the street that advertises and provides nonprescription contraceptives." 585 U.S. at 777. Neither case

supports the Attorney General's distortion of the commercial speech doctrine.

As the Attorney General appears to acknowledge, AG.Br.38, it would be impossible to assess "the economic interests of the speaker" under *Central Hudson* without at least *considering* that speaker's identity. 447 U.S. at 561. If *Pacific Gas* and *NIFLA* had required courts to put on blinders as to a speaker's identity, those decisions would have silently upended multiple First Amendment doctrines that require courts to assess a speaker's identity. *E.g.*, *Cent. Hudson*, 447 U.S. at 561 (commercial speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (campaign finance restrictions); *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (incitement). But, of course, they did not.

Left without any on-point precedent, the Attorney General relies on inapt out-of-circuit cases. In *Greater Baltimore Center for Pregnancy Concerns, Inc.*, the en banc Fourth Circuit considered a city ordinance compelling certain disclosures by life-affirming pregnancy centers. In dicta, the majority misread *Bolger* to suggest that speech could be "classifi[ed] … as commercial in the absence of the speaker's economic motivation." 721 F.3d at 285–86 (citing *Bolger*, 463 U.S. at 67 n.14). But as explained above, *Bolger* did no such thing, and that suggestion is foreclosed by the well-settled law of both the Supreme Court and this Circuit. *See supra* at 28. Regardless, the majority still acknowledged the

importance of economic motivation by remanding for further record development regarding the center's economic interests. *Greater Balt. Ctr. for Pregnancy Concerns*, 721 F.3d at 286.

What's more, the Fourth Circuit affirmed the centrality of economic motivation when the case returned to it five years later with a complete record. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 879 F.3d 101. Reiterating the *Bolger* factors, it did not suggest that economic motivation was optional. And it ultimately held that the center's speech was noncommercial because "the record gives no indication that the Center harbors an 'economic motivation.'" *Id.* at 109 (cleaned up).

Next, the Attorney General relies on the Ninth Circuit's outlier decision in *First Resort*, which declined to limit commercial speech "to circumstances where clients pay for services." 860 F.3d at 1273. Instead, it based its commercial speech holding on the nonprofit speaker's purported economic motivation, which the court found based on that case's unique record regarding the center's fundraising[4] and employee incentives. *Id.* (noting that the center provided bonuses to its

[4] Notably, in the second iteration of *Greater Baltimore Center for Pregnancy Concerns*, the Fourth Circuit concluded that any connection between clientele numbers and fundraising is "too attenuated" to establish an "economic motivation" on the part of nonprofits. 879 F.3d at 109.

employees based, in part, on the number of new clients it served). There is no record support for such economic motivation here. JA20.

Finally, the Attorney General cites an unpublished decision from the Fourth Circuit for the proposition that the nonprofit status of a speaker does not render the speech noncommercial. AG.Br.37 (citing *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 260–61 (4th Cir. 2017)). But that case concerned a nonprofit's highly commercial communication "tout[ing] itself as a superior, more reliable, and therefore [a] better economic partner," which the court found to be "indistinguishable from that of a for-profit organization." *Handsome Brook Farm*, 700 F. App'x at 260–61.

Because the NIFLA plaintiffs' progesterone-therapy advocacy neither proposes a transaction nor bears any relation to the economic interests of the NIFLA plaintiffs or the women they serve, the speech is wholly noncommercial and entitled to full First Amendment protection.

2. Even if the NIFLA plaintiffs' speech was commercial, the First Amendment protects it.

The First Amendment would protect the NIFLA plaintiffs' progesterone-therapy advocacy even if it were considered commercial speech. The Free Speech Clause extends to commercial expression so long as it concerns lawful activity and is neither false nor misleading. *Cent. Hudson*, 447 U.S. at 566. The NIFLA plaintiffs' progesterone-therapy advocacy readily satisfies both conditions.

a. Progesterone therapy is a lawful, life-saving medical treatment.

The Attorney General does not appear to contest that a licensed medical provider's administration of progesterone therapy is legal. In fact, she admits that the science supporting progesterone therapy could justify a physician's decision to prescribe it to his patients. AG.Br.43. But while the Attorney General disclaims any effort to "enjoin medical providers from offering [APR]," she doubles down on her efforts to silence its promotion. AG.Br.43.

That is precisely what the federal government sought to do with off-label drug use and its promotion by pharmaceutical companies in *Caronia*. This Court found those efforts unconstitutional. 703 F.3d at 165–68. "[B]ecause off-label prescriptions and drug use are legal, the government's [approach] permit[ed] physicians ... to speak about off-label use without consequence, while the same speech [was] prohibited when delivered by pharmaceutical manufacturers." *Id.* at 165. This violated the manufacturers' freedom of speech. *Id.* Likewise, here, physicians are permitted to speak about off-label progesterone therapy, while the NIFLA plaintiffs are silenced. The First Amendment does not permit such censorship.

Failing to even acknowledge *Caronia*, the Attorney General asserts that *NIFLA v. Becerra* supports her approach by "acknowledg[ing] a qualitative difference between professional services

and the advertising of those services." AG.Br.46 (citing *NIFLA*, 585 U.S. at 771). But the cited discussion merely observed that a lawyer's informational speech outside the context of commercial advertising is fully protected as noncommercial speech. 585 U.S. at 771 (citing *Zauderer*, 471 U.S. at 637 n.7). It's unclear how this principle assists the Attorney General here.

The Attorney General's citation to *Kiser*—an out-of-circuit case—is equally mystifying. It's not a case of the government allowing the provision of certain services but prohibiting their promotion. *Contra* AG.Br.46. Instead, the regulations allowed a specialist to "practic[e] outside of his specialty" but "ban[ned] him from doing so *while advertising that he is a[specialist].*" *Kiser*, 831 F.3d at 787 (emphasis in original). The Sixth Circuit held that this advertising was *protected* commercial speech and remanded for further proceedings under *Central Hudson*. *Id.* at 787–90.

b. The NIFLA plaintiffs' progesterone-therapy advocacy is neither false nor misleading.

The Attorney General advances three theories for why the NIFLA plaintiffs' progesterone-therapy advocacy is purportedly false or misleading: (1) the term "abortion pill reversal" implies the resurrection of a deceased child after a completed abortion, which is a scientific impossibility; (2) statements that progesterone therapy is "safe and effective" are unsupported because the studies proving progesterone

therapy's safety and efficacy are flawed or otherwise invalid; and (3) by advocating for the use of progesterone therapy, the NIFLA plaintiffs suggest it is "generally accepted," which it is not because pro-abortion medical organizations like the American College of Obstetricians and Gynecologists ("ACOG") do not recommend it. AG.Br.42.

At the outset, the Attorney General suggests that the NIFLA plaintiffs "waived their right to resolution of [these] fact question[s] in their favor," because they did not request an evidentiary hearing. AG.Br.46 (citing *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 256 (2d Cir. 1989)). But a party that fails to request such a hearing waives only their "right to [that] hearing," not to a favorable resolution based on the affidavits submitted by both parties to the court. *Consol. Gold Fields PLC*, 871 F.2d at 256. And the Attorney General cannot now complain of the lack of an evidentiary hearing that she, too, waived below. When the district court was scheduling the preliminary injunction hearing, the Attorney General declined the opportunity to present her medical expert's testimony in an evidentiary hearing. And when asked *twice* by the court *during* the hearing whether there was "[a]nything else that [it] missed" or that the parties needed "to talk about" prior to the court ruling on the motion, counsel for the Attorney General answered in the negative. JA1023. Because "a party that elects to gamble on a 'battle of affidavits' must live by that choice," *Holt v. Continental Grp., Inc.*, 708 F.2d 87, 90 n.2 (2d Cir.1983) (cleaned up),

the Attorney General cannot now sandbag the district court and the NIFLA plaintiffs by belatedly claiming error, *see United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007).

Turning to the merits of the Attorney General's arguments, they all fail. First and foremost, the Free Speech Clause doesn't allow courts to label the NIFLA plaintiffs' progesterone-therapy statements "false" or "misleading," because they accurately reflect scientific opinions on one side of a legitimate, ongoing scientific debate. *See ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013). And, in any event, the Attorney General cannot demonstrate that the district court clearly erred in finding that these statements were neither false nor misleading because they are well-supported and would not mislead the reasonable consumer.

i. The NIFLA plaintiffs' progesterone-therapy advocacy reflects scientific opinions that cannot be deemed "false" under the First Amendment.

In asserting that the NIFLA plaintiffs' progesterone-therapy advocacy is false or misleading, the Attorney General does not argue that they "distorted [scientific studies'] findings," but rather that they "present[ed] accurately [studies'] allegedly inaccurate conclusions." *Id.* at 499. Indeed, the NIFLA plaintiffs' statements that progesterone therapy is "safe and effective" and that it can "reverse the abortion pill" or its "process," simply reiterate conclusions published in peer-reviewed

scientific literature. *See* JA456 ("The reversal of the effects of mifepristone using progesterone is safe and effective."); JA490 ("Mifepristone antagonization with progesterone to avert medication abortion is a safe and effective treatment."); JA479 (Progesterone administration can result in the "clear reversal of the termination process."); JA463 ("The use of progesterone to reverse the effects of the competitive progesterone receptor blocker, mifepristone, appears to be both safe and effective."); JA477 (Progesterone "reverses the effects of the mifepristone.").

When it comes to certain areas of ongoing research, like those pertaining to progesterone therapy, scientific opinions taking the form of "propositions of empirical 'fact' … may be highly controversial and subject to rigorous debate by qualified experts. Needless to say, courts are ill-equipped to undertake to referee such controversies." *ONY*, 720 F.3d. at 497; *see also Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) (Easterbrook, J.) ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation."). For these reasons, this Court has held that "to the extent a speaker or author draws conclusions from non-fraudulent data, based on accurate descriptions of the data and methodology underlying those conclusions, on subjects about which there is legitimate ongoing scientific disagreement," those conclusions cannot be deemed false by courts under the First Amendment. *ONY*, 720 F.3d at 498.

Such statements are protected even if commercial. Indeed, the speech at issue in *ONY*, included a pharmaceutical company's promotional materials touting a recent scientific study (that the company funded) finding that the company's medication outperformed its competitors. 720 F.3d at 493–95. Because the company did not distort the study's findings and the study did not distort or manufacture the data, the statements were nonfraudulent scientific opinions that, under First Amendment principles, could not be restricted as "false" commercial speech. *Id.* at 498. The same is true of the NIFLA plaintiffs' progesterone-therapy advocacy, even if this Court characterizes it as commercial.

ii. The district court did not clearly err in finding that the speech was neither false nor misleading.

In the event this Court decides to weigh in on the merits of the ongoing scientific debate regarding progesterone therapy, it should affirm the district court's conclusion that the NIFLA plaintiffs' advocacy is neither false nor misleading. SPA31 n.15 (finding statements were protected under *Central Hudson* and thus "not ... misleading" (quotation omitted)); *see also* AG.Br.43 (acknowledging this factual finding). Such "factual conclusions" "underpinning [a district court's] decision" to "grant a preliminary injunction" can only be reversed on appeal "for clear error." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 58 (2d Cir. 2020). The Attorney General cannot meet this high bar. *See*

U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 583 U.S. 387, 394 (2018) (explaining that the "deferential[]" clear error standard requires "a serious thumb on the scale" for the district court's findings).

The record overwhelmingly demonstrates the truth of the NIFLA plaintiffs' statements about progesterone therapy. Indeed, the Attorney General has failed to cite "any evidence of deception," *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 145 (1994) (cleaned up), or anything that makes it "likely" a "reasonable consumer would be deceived" or misled, *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 641 (D. Vt. 2015) ("Courts have recognized that restrictions on commercial speech to prevent consumer deception should be limited to those instances when actual deception is likely, or when a reasonable consumer would be deceived."). And the Attorney General's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Ibanez*, 512 U.S. at 145 (cleaned up).

Lacking any evidence that progesterone therapy or the NIFLA plaintiffs' advocacy has ever harmed anyone, SPA30 n.14; JA949–50, the Attorney General mischaracterizes the science, while invoking as authoritative the speech of pro-abortion organizations on the opposite side of the APR debate. These attempts to paint the NIFLA plaintiffs' statements as "clearly" false or misleading fall short.

(i) *"Abortion Pill Reversal."* The Attorney General claims the phrase "Abortion Pill Reversal" and related terminology are false or misleading because "an abortion cannot be reversed." AG.Br.42. But the NIFLA plaintiffs nowhere say that a completed abortion can be reversed. They state that progesterone therapy can reverse the effects of mifepristone, the first "abortion pill." As explained above, *supra* at 40–41, this terminology is derived from the scientific literature on progesterone therapy, which opines that it can result in the "clear *reversal* of the termination process." JA479 (emphasis added); *see also* JA463 ("The use of progesterone to *reverse* the effects of the competitive progesterone receptor blocker, mifepristone, appears to be both safe and effective." (emphasis added)); JA477 (Progesterone "*reverses* the effects of the mifepristone." (emphasis added)). Indeed, the basic premise of APR derives from a biochemical principle called "*reversible* competitive inhibition" in which, by increasing the concentration of the receptor agonist (progesterone), the treatment can inhibit the function of the receptor antagonist (mifepristone). JA28 (emphasis added).

It is, of course, true that once a child has been "expelled from the uterus," he or she "can[not] be returned." JA527. But the NIFLA plaintiffs' communications make clear that progesterone therapy is available only for women who have taken the first abortion pill—mifepristone—and not yet taken the second—misoprostol, which expels the deceased child from the womb. *See* JA569 ("A chemical abortion

utilizes two drugs, mifepristone and misoprostol, and the abortion procedure may be 'reversed' with progesterone treatment if the second drug (which causes the unborn to be expelled) has not been ingested."). No reasonable consumer reading the NIFLA plaintiffs' statements would understand them to be suggesting that progesterone can resurrect deceased children, let alone return them to their mothers' wombs. *Cf. Werbel v. Pepsico, Inc.*, No. C09-04456, 2010 WL 2673860, at *1, *3–5 (N.D. Cal. July 2, 2010) (dismissing claim and concluding that, as a matter of law, no "reasonable consumer" examining the entire packaging would believe that "Cap'n Crunch's Crunch Berries" cereal "derives any nutritional value from berries"); *Videtto v. Kellogg USA*, 2009 WL 1439086, at *1, *3 (E.D. Cal. May 21, 2009) (dismissing without leave to amend claims that consumers reasonably believed that "Froot Loops" cereal contained "real, nutritious fruit" because the cereal's packaging could not "reasonably be interpreted to imply that [Froot Loops] contains or is made from actual fruit").

(ii) *"Safe and effective."* In her attempt to prove that progesterone therapy is neither safe nor effective, the Attorney General either ignores or mischaracterizes the scientific literature demonstrating the opposite. The Attorney General's efforts to discredit one side of this scientific debate fail to prove that these researchers' conclusions are "clearly erroneous."

Take, for example, the large 2018 observational case study that included 547 women who took mifepristone but expressed interest in "reversing" its effects through progesterone therapy. JA29. For women who received progesterone intramuscularly, fetal survival was 64%, while those who received a high dose of oral progesterone followed by daily oral progesterone during the first trimester had a fetal survival rate of 68%. JA460. And there was no increase in birth-defect or preterm-delivery rates. *Id*. Because studies show that when mifepristone is used alone, without misoprostol or supplemental progesterone, embryo and fetal survival is between eight to 25 percent, the researchers concluded that "[t]he use of progesterone to reverse the effects of the competitive progesterone receptor blocker, mifepristone, appears to be both safe and effective." JA458, JA463.

The Attorney General faults this study as having been "widely discredited." AG.Br.42. But she offers only one article disputing its findings. *See* JA516 n.6. The authors of this article are leaders of organizations with missions to greatly expand abortion access.[5] The article contends that, although the rates of continuing pregnancies were higher for progesterone-therapy users, the results weren't statistically

[5] *See Who We Are*, Resound Research for Reproductive Health (2024), https://resoundrh.org/about/ (Kari White serves as Executive and Scientific Director); *About*, ANSIRH (2025), https://www.ansirh.org/about (Daniel Grossman serves as the Director).

significant. But to support that conclusion, the authors cherry-picked and combined subsets of the study's most unfavorable data. For example, as the 2018 study itself explained, progesterone therapy is less effective earlier in pregnancy. JA462. Although the 2018 study considered reversal rates in each week of pregnancy up to week 9,[6] the criticizing authors only considered the statistical significance of data from weeks 5 to 7. JA462.

The article's critique is also flawed because its authors did not consider the effectiveness of progesterone therapy vis-à-vis route of administration and dosage. The study showed that some methods and dosages were far more effective than others. *See* JA461. All the data taken together resulted in a reversal effectiveness of 48%, but the more effective methods and dosages (which are those used by physicians the NIFLA plaintiffs refer to, *see* JA 631–32) resulted in 64% and 68% reversal rates. JA460. The article ignores these distinctions. This one anti-APR article cannot possibly be said to "widely discredit" the 2018 case study, let alone prove that its conclusions are "clearly erroneous."

The Attorney General further suggests that the 2018 case study and the two rat-model studies discussed above, *supra* at 5–7, are all "scientifically [in]valid." AG.Br.42. But the conclusions of medical research are not "clearly erroneous" simply because they are not based

[6] The FDA approves mifepristone for use in chemical abortions up to week 10 of pregnancy. JA574.

on a "double-blind, placebo-controlled randomized clinical trial" involving humans. JA517.[7] The use of rat subjects or historical control groups is a well-established and legitimate practice in medical research, particularly research involving pregnancy where the use of human subjects or control groups "may not be practical or ethical." JA633, 636. In fact, the Journal of the American Medical Association specifically encourages historical controls in medical situations "with particularly severe outcomes or that affect vulnerable populations such as children," because "randomization may be viewed as unacceptable, even in the absence of a proven effective treatment." JA634. Indeed, it is difficult to imagine a medical situation with a more "severe outcome" for "vulnerable populations" and "children" than an unwanted abortion, which, if not prevented, results in death for the child and devastation for the mother. For these reasons, the 2018 case study did not employ "a randomized placebo-controlled trial" on "the population of women who regret their abortion and want to save the pregnancy"; such a study

[7] It is worth noting that the two rat-based studies supporting progesterone therapy's efficacy *were* controlled experiments. JA439, 472. To be sure, "medical treatments administered to laboratory rats do not *automatically* produce the same results in humans." AG.Br.12 (emphasis added). But due to the ethical and practical limitations of human studies in certain contexts, medical researchers often use rats as subjects because of their anatomical, physiological, and genetic similarity to humans. JA29. This does not render their conclusions "scientifically invalid" or otherwise "clearly erroneous."

would be "unethical," the researchers concluded, because they had hypothesized that a continued pregnancy was more likely with progesterone therapy than with no treatment at all, based on clinical experience, animal trials, and basic pharmacology. JA462–63, 640.

Indeed, contrary to Dr. Schreiber's affidavit, "randomized control trials," are not "generally required to recommend a clinical practice" in the fields of obstetrics and gynecology. JA797. In fact, "the majority of the American College of Obstetricians and Gynecologists['] clinic practice recommendations are not based on 'good and consistent evidence,' but rather are based on 'consensus and opinion' (32%), or 'limited or inconsistent evidence' (37%)." JA953. This reflects the reality that, compared to other medical fields, "there are few randomized controlled trials in obstetrics and gynecology." JA924 (citation omitted). For example, none of the studies the FDA considered when approving mifepristone were randomized control trials. JA640.

Finally, the Attorney General's characterization of the controlled trial that researchers put on hold is itself misleading. She asserts that "several subjects suffered severe hemorrhaging," AG.Br.42, yet fails to acknowledge that "all hemorrhages requiring medical treatment occurred *in the placebo group*" that received only mifepristone, not progesterone therapy, JA489 (emphasis added); *see also* JA642 (noting that mifepristone, not progesterone, is "known to increase risk of hemorrhage"). Indeed, Dr. Schreiber severely undermined her

credibility when she contended that the study "raise[ed] concerns about the safety of APR," necessarily implying that the women who required medical intervention were women who had received progesterone therapy. JA804. Because the only participants requiring medical intervention were members of the control group *not* receiving progesterone therapy, that expert conclusion is grossly misleading.

The halted study actually *supports* the NIFLA plaintiffs' position that progesterone therapy is safe and effective. The experiment's "preliminary results, though too low of a sample size to imply statistical significance, suggest the potential for progesterone to successfully reverse a mifepristone-induced abortion." JA473. Of the women who remained in the study, 80% in the APR group were still pregnant two weeks after taking mifepristone, versus only 40% of those in the placebo group. *Id.*

The Attorney General is simply wrong to claim there is an "absence of science substantiating APR." JA518. Multiple studies published in peer-reviewed journals employing well-accepted methods of medical research confirm progesterone therapy's safety and efficacy. Even researchers during the development and study of the abortion drug recognized progesterone therapy's efficacy when they explicitly stated that supplemental progesterone could reverse mifepristone's effects. JA631. And in several studies on progesterone, including those performed by the FDA, there have been no findings of any increased

risk of birth defects or preterm birth. JA259, 637–39. Although the FDA has yet to approve progesterone to reverse mifepristone's effects, off-label use of medication is common in pregnancy. For example, ACOG recommends the off-label usage of misoprostol (the second drug in the chemical abortion regimen) to induce cervical ripening during pregnancy. JA639–40. And physicians have been prescribing progesterone in first-trimester pregnancy both on and off-label for over half a century. *Id.*

This substantial record evidence, along with the fact that such claims are the subject of an ongoing scientific debate, forecloses the possibility that the district court's factual finding amounts to clear error.

iii) Generally accepted. The Attorney General argues that the NIFLA plaintiffs' progesterone-therapy advocacy misleads women to believe progesterone therapy is "generally accepted," which she asserts it is not because pro-abortion organizations like ACOG oppose it. AG.Br.42. As with her objections to the NIFLA plaintiffs' "reversal" terminology, the Attorney General mischaracterizes the NIFLA plaintiffs' speech in an effort to make it appear misleading.

Nowhere do the NIFLA plaintiffs' statements about progesterone therapy use the phrase "generally accepted." Instead, the Attorney General points to statements on abortionpillreversal.com (the website referenced in the NIFLA plaintiffs' progesterone-therapy advocacy),

which respond to the FAQs, "What about birth defects? Is my baby going to be OK?" *Frequently Asked Questions,* Abortion Pill Reversal, https://www.abortionpillreversal.com/abortion-pill-reversal/faq. These statements accurately assert that "[n]either the standard abortion pill nor progesterone is associated with birth defects." *Id.* They then faithfully quote an ACOG bulletin indicating that mifepristone—the "abortion pill"—does not appear to cause birth defects and, in a separate paragraph, reference a 1999 FDA review of injectable progesterone that indicated no increased risks for birth defects. *Id.*; JA534.

The Attorney General admits that these statements accurately reflect the content of the cited sources, but nevertheless claims they are misleading because ACOG and the FDA have not approved the safety and efficacy of APR, which *combines* mifepristone and progesterone. But the NIFLA plaintiffs do not say otherwise. Basic principles of grammar make this clear. The sentence the Attorney General objects to employs the disjunctive "neither/nor" rather than the conjunctive "and," which indicates that the sentence (and supporting citations that follow) deals with mifepristone and progesterone *separately*. And the overall context of these statements makes clear that they concern risks of "birth defects," not the overall safety or efficacy of progesterone therapy. *Avis Rent A Car Sys. Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986) (explaining that courts should consider advertisements in context

when determining if it's misleading). Thus, they pose no credible risk of misleading the reasonable consumer to believe that ACOG and the FDA accept or support progesterone therapy. In fact, in at least one of the promotional materials the NIFLA plaintiffs produced, NIFLA specifically noted that "ACOG, which strongly supports abortion, stated that it does not support APR," and calls out ACOG for "refusing to accept ... science." JA570–71.

Even in the materials that do not reference ACOG's position on progesterone therapy, the NIFLA plaintiffs' omission of divergent viewpoints does not render such speech "misleading." If the NIFLA plaintiffs' progesterone-therapy advocacy is commercial speech promoting a specific product, as the Attorney General claims it is, such speech is necessarily one-sided. Indeed, a company's advertisement is not deemed misleading just because it declines to include the viewpoints of its competitors. *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 264–65 (2d Cir. 2014) (explaining that the government cannot require a company to "choose between silence about the products and services" and giving "free advertisement for a competitor"). The district court did not commit clear error in applying that same principle here.

3. Under either strict scrutiny or intermediate scrutiny, the Attorney General's threatened enforcement violates the NIFLA plaintiffs' free-speech rights.

The Attorney General does not attempt to satisfy any level of heightened scrutiny. SPA29. Her appeal of the district court's First Amendment holding thus hinges entirely on her ability to prove that the NIFLA plaintiffs' progesterone-therapy advocacy is both commercial and misleading. In other words, she concedes that, if the speech is either noncommercial or not misleading, the NIFLA plaintiffs are likely to prevail on their free-speech claims.

As explained above, the NIFLA plaintiffs' speech is neither commercial nor misleading. Applying either strict or intermediate scrutiny, the Attorney General's threatened enforcement targeting the NIFLA plaintiffs' progesterone-therapy advocacy would violate their free-speech rights. The government has neither a compelling nor a substantial interest in insulating New Yorkers from speech with which it disagrees. Indeed, the "State cannot engage in content-based discrimination to advance its own side of a debate." *Sorrell*, 564 U.S. at 580. And even if the State had a sufficient interest, forbidding the NIFLA plaintiffs' speech about progesterone therapy would neither satisfy the direct-advancement requirement nor be narrowly tailored. SPA28–31 & n.15. "'[R]egulating speech must be a last—not first—resort,'" and yet, as the district court put it, "'it seems to have been the

first strategy the Government thought to try.'" SPA30 (quoting *Thompson*, 535 U.S. at 373).

Because the NIFLA plaintiffs' progesterone-therapy advocacy is protected under the First Amendment and the Attorney General cannot (and indeed, does not attempt to) satisfy either strict or intermediate scrutiny, the NIFLA plaintiffs are likely to succeed on the merits of their free-speech claim.

B. The district court properly weighed the remaining preliminary injunction factors.

The remaining factors support the NIFLA plaintiffs—a fact that the Attorney General does not contest. AG.Br.47–53 (basing all her arguments regarding these factors on the assumption that the NIFLA plaintiffs are not likely to succeed on the merits). They will face irreparable harm absent the injunction, the injunction serves the public interest, and the balance of equities weighs in the NIFLA plaintiffs' favor. *Walsh*, 733 F.3d at 486, 488 (explaining that "the likelihood of success on the merits is the dominant, if not the dispositive, factor" for First Amendment claims).

1. The NIFLA plaintiffs face irreparable harm absent a preliminary injunction.

First, the district court did not abuse its discretion in holding that the NIFLA plaintiffs would suffer irreparable harm without the preliminary injunction. As the Supreme Court has long held, "[t]he loss

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam). Because the district court correctly found that an enforcement action against the NIFLA plaintiffs would likely violate their free-speech rights, it necessarily follows that they would suffer irreparable harm without the injunction.

The Attorney General suggests there is no irreparable harm because "she would not have premised an enforcement action against the NIFLA plaintiffs on any statements they were already making." AG.Br.49–50. But as the district court found—as part of a holding that the Attorney General does not contest on appeal—the NIFLA plaintiffs' "statements mirror statements against which the Attorney General has already taken enforcement action." SPA12. "And 'there is every reason to think that similar speech in the future will result in similar proceedings.'" SPA13 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014)). Indeed, during the preliminary injunction hearing, the Attorney General refused to disavow an enforcement action against the NIFLA plaintiffs for their progesterone-therapy advocacy. JA995–96. Thus, absent a preliminary injunction, this credible threat of future enforcement chills the NIFLA plaintiffs' speech in violation of their First Amendment rights. SPA12–13. That constitutes irreparable harm. *Elrod,* 427 U.S. at 373.

2. A preliminary injunction serves the public interest and the balance of equities tips in the NIFLA plaintiffs' favor.

Nor did the district court abuse its discretion in holding that an injunction was in the public interest and that the balance of equities weighs in the NIFLA plaintiffs' favor. Because the government opposes the preliminary injunction, these final two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). And although this Court ordinarily "assumes that by definition the interests of the State are aligned with those of the public," that assumption falls away in the First Amendment context because "securing First Amendment rights is in the public interest." *Walsh*, 733 F.3d at 488.

These factors weigh heavily in the NIFLA plaintiffs' favor. Although the Attorney General claims a generalized enforcement interest in the State's consumer protection laws, she admits that she cannot name a single person harmed by progesterone therapy or the NIFLA plaintiffs' advocacy, despite a thorough "investigat[ion] [of] the advertising of APR to the public." AG.Br.52. More fundamentally, she cannot claim an interest in an unconstitutional enforcement action. *Walsh*, 733 F.3d at 488 (citing *Am. Civ. Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)). On the other hand, a preliminary injunction protecting the freedom of speech *does* serve the public interest. *Id.* Specifically, it "furthers the societal interest in the fullest possible dissemination of information," *Cent. Hudson*, 447 U.S. at 561–

62, which is at its apex in cases concerning "medicine and public health, where information can save lives," *NIFLA*, 585 U.S. at 771 (quoting *Sorrell*, 564 U.S. at 566). Indeed, the NIFLA plaintiffs' statements about the availability of progesterone therapy are of particularly acute "interest to women who have begun a chemical abortion and seek ways to save their unborn child's life." SPA34. For people like Maranda and her daughter, who was saved by progesterone therapy thanks to messages like those the NIFLA plaintiffs seek to share, such information may have been the most consequential of their lives.

Because all of these factors weigh in favor of the NIFLA plaintiffs, the district court did not abuse its discretion in granting the preliminary injunction.

CONCLUSION

For the foregoing reasons, the district court's order granting the preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2025, I electronically filed the foregoing Response Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the ACMS system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rule 28.1.1(b) because, excluding the portions exempted by Fed. R. App. R. 32(f), this brief contains 12,781 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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