No. 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, *et al.*
Plaintiffs-Appellees,

v.

Letitia James,
Defendants-Appellant.

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

BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF APPELLEES

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INTERST OF AMICUS CURIAE[1]

Liberty Counsel is a national civil liberties organization that provides education and legal defense on issues relating to religious liberty, the family, and sanctity of life. Liberty Counsel has been substantially involved in advocating for the sanctity of human life and family. Liberty Counsel attorneys have represented pro-life pregnancy centers before the United States Supreme Court, including in many cases involving pro-life pregnancy centers and freedom of speech, *e.g.*, *Shurtleff v. City of Boston*, 596 U.S. 243 (2022); *Mountain Right to Life v. Becerra*, 585 U.S. 755 (2018); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), *True Life Choice, Inc. v. Dep't of Health & Rehab. Servs.*, 74 F.3d 1251 (11th Cir. 1995), and frequently represent clients in First Amendment litigation in every federal circuit court of appeals and federal district court. Its attorneys have spoken and testified before Congress on matters relating to government infringement on First Amendment rights.

[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

Amicus has an interest in ensuring that pro-life pregnancy centers and their partner and parent organizations retain the freedom and autonomy to offer, and thus advertise, lifesaving medical aid for children in the womb. This includes the fundamental right to speak and promote medical solutions that can reverse the effects of the abortion pill such as progesterone therapy.

INTRODUCTION

Appellant, in the name of the pro-abortion movement, seeks to eliminate a parent's choice to save their child's life. It is bewildering that Appellant displays such an eerily malevolent desire to limit *even the potential* lifesaving treatment for children. If parents fall prey to the deceptive tactics of the pro-abortion movement, are lured into an abortion clinic, decide to initiate the killing of their unborn child by ingesting mifepristone, but change their mind and wish to seek emergency care for their child, it would be beyond sinister to trap that family in the clinic until the child dies. Yet that is precisely what the State seeks to do here with this litigation. Restricting Appellees ability to inform the public about progesterone is no different than locking the abortion clinic door. The key, wielded by Appellant, is an attempt to re-define commercial

speech to prosecute crises pregnancy centers with irrelevant business-fraud statutes and baseless claims that widely used, FDA approved, and scientifically studied progesterone therapy is dangerous and ineffective.

Appellant's pro-abortion movement is a bit unique in the fact that you have the *choice* to seek medical abortion, but once you take the mifepristone, you lose the *choice* to reverse its effects with progesterone. This "limit of choices" veiled as freedom, is yet another case where the government is attempting to permanently degrade First Amendment protections due to political disagreements regarding the sanctity of human life. These political disagreements, and Letitia James's mission to silence Appellees' speech, if actualized by this Court, would erode First Amendment protection for all speech deemed an "advertisement" that somewhere along the stream of commerce involves an economic transaction. Appellant's proposed definition for commercial speech would overrule some 80+ years of commercial speech precedent and bar crisis pregnancy centers from advertising lifesaving medical treatment, which will cost the lives of children whose parents desperately search but fail to find a way to reverse chemical abortion.

Beyond their request to classify Appellees' speech as "commercial," Appellant asks this Court to classify Appellees' advertisements as false or misleading – a particular classification of commercial speech afforded relatively little First Amendment protection. Br. for Appellant, 19; *Central Hudson Gas & Elec. Corp. v. Public Service*, 447 U.S. 557, 563 (1980) (internal citations omitted). The lower court has already rejected Appellant's attempt to circumvent the First Amendment by classifying Appellees' speech as both "commercial" and "false or misleading," instead granting Appellees' request for a preliminary injunction to protect them from prosecution for their speech. The lower court's decision was correct. Appellees, the National Institute of Family and Life Advocates ("NIFLA"), Gianna's House, and Options Care Center, all offer pregnancy services, including referrals for progesterone therapy, free of charge, rather than for economic gain, placing their speech outside of the confines of commercial speech. Instead, these faith-based organizations and their staff are called to use their collective voices to inform the public about the availability of their free pregnancy resources, which can save the lives of children. There is nothing false or misleading about their speech, and the First Amendment fully protects it.

SUMMARY OF THE ARGUMENT

The District Court correctly held that Appellees were likely to succeed on the merits of their First Amendment claim, properly classifying their speech as non-commercial. Appellees' identities, that of non-profit Christian organizations, along with the lack of economic transactions associated with their speech, makes clear that Appellees' advertisements for progesterone therapy are non-commercial. The First Amendment does not, and cannot, allow courts to wear a blindfold, shielding their eyes to the identity of the speaker and context of the speech when making decisions regarding the First Amendment protections afforded that speech. Identity and context are crucial to the Court's fact intensive inquiry of speech. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 879 F.3d 101, 108 (4th Cir. 2018) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993)).

Appellees have no economic incentive to promote free progesterone therapy, nor is their speech motivated by economic concern. That alone should end the inquiry. But, even if this Court were to classify Appellees' speech as "commercial" (which it is not), the First Amendment still

immunizes that speech from Appellant's weaponized business fraud statutes. Even off-label pharmaceutical marketing is a form of expression protected by the First Amendment. And, the Constitution plainly blocks Appellant's content- and viewpoint-based discriminatory regulations, regardless of any alleged commercial nature to Appellees' speech, so long as that speech is not false or misleading. Appellees' speech is neither and is thus protected by the First Amendment.

ARGUMENT

There is no dispute between the parties that Appellees' advertisements for progesterone treatment to counteract mifepristone is "speech." The lower court determined that this speech is "non-commercial" and thus protected by the First Amendment, granting Appellees a preliminary injunction due to the likelihood that Appellees would succeed on the merits of their First Amendment claim.

There is no question that Appellees stood to suffer irreparable harm at the behest of Appellant. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 529 U.S. 14, 19 (2020) (quoting *Elrod v. Burns*, 427 U.S. 374, 373 (1976) (plurality

opinion)). If any question remained about Appellees' harm, in *Roman Cath. Diocese of Brooklyn v. Cuomo*, the Supreme Court determined that a Governor forcing a Catholic to miss a single instance of communion struck at the heart of the First Amendment. 427 U.S. at 19-20. Appellant's actions strike deeper, as they attempt to restrict parents from information that can save their children's lives. So, what remains, and the seminal issue of this case, is whether Appellees were likely to succeed on the merits of their First Amendment claim, and, more specifically, whether there speech is "non-commercial."

I. APPELLEES' SPEECH IS NON-COMMERICAL AND APPELLANT'S ATTEMPTS TO REGULATE IT ARE UNCONSTITUTIONAL.

Appellant contends Appellees' speech is "commercial," despite Appellees' motive and lack of economic incentive to offer their free services. Regardless of the classification of their speech, Appellant's attempt to weaponize business-fraud statutes to ban crises pregnancy centers from advertising progesterone therapy remains unconstitutional content- and viewpoint-based discrimination. This Court must affirm the lower court's holding classifying Appellees' speech as non-commercial,

and, more generally, affirm the definition of commercial speech to prevent further erosion of the First Amendment's speech protections.

Appellant's ambitious goal of unwinding "commercial speech" legal precedent can be broken down into two components. First, Appellant asks this Court to consider neither the speaker's identity nor its intent when determining the protections afforded its speech. Br. for Appellant, 34. Second, Appellant desires the strictures of commercial speech close-in on any "advertisement" involving any service that, somewhere along the stream of commerce, involves an economic transaction. *Id.* That cannot be the law. And the consequences of such a sweeping change would be catastrophic, eroding constitutional protections for all "advertisements," a broad swath of speech that would become subject to government regulation on the basis of the viewpoint or identity of the speaker.

It would be difficult to envision any speech that, somehow, along the stream of commerce, does not involve an economic transaction. Appellant outlines what limited protection would remain if her definition of commercial speech were adopted by this Court – "If the NIFLA plaintiffs simply wish to communicate their religious objections to abortion and their consequential support of a treatment like APR that

might avoid an abortion, they are free to do so." Br. for Appellant, 39. However, an advertisement of this type would equally invoke the strictures of commercial speech as defined by Appellant.

Somewhere along the stream of commerce, "*someone* must bear that cost, be it insurance, the medial provider, or a charity." Br. for Appellant, 34 (emphasis in original). Even if the advertisement were merely to promote a religious service, somewhere along the stream of commerce, an economic transaction occurs for the sacraments of wine and wafers used in communion. Or, take for instance the offering collected. Does an advertisement for a religious worship service somehow become commercial speech because the Church may collect alms for the poor or pass the collection plate for the Church's ministries? Heaven forfend. Yet, under James's theory, the Church's speech receives no protection.

And the same could be said for Appellant's own advertisements for abortion. For instance, in Appellant's "Open Letter From Attorneys General Regarding CPC Misinformation and Harm," she promotes the safety of procedural abortion, the cost effectiveness of medical abortion, and encourages women seek treatment at abortion clinics rather than crises pregnancy centers. Letitia James, et. al., Open Letter From

Attorneys General Regarding CPC Misinformation and Harm (Oct. 23, 2023) ("Delays can also force patients who would have otherwise chosen medication abortion to undergo procedural abortions – which, although safe, are unnecessarily invasive procedures for those for whom medical abortion would have been recommended, and are generally more costly to provide and to obtain.")[2] According to Appellant's proposed definition of "commercial speech," Appellants' letter is as much "commercial speech," and thus subject to government regulation, as Appellees' advertisements. After all, she specifically mentions surgical abortions that some physician somewhere is going to charge to provide.

A. The Supreme Court has clearly established that speech cannot be deemed commercial merely because it is delivered in the form of an advertisement or discusses a product or service.

"The First Amendment, as applied to the States by the Fourteenth Amendment, prohibits the states from passing laws 'abridging the freedom of speech.'" *National Institute for Family and Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018) ("*NIFLA*") (quoting U.S. Const. amend.

[2] Available at https://oag.ca.gov/system/files/attachments/press-docs/Open%20Letter%20re%20Crisis%20Pregnancy%20Centers%20FINAL.pdf

I). "As a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, it subject matter, or its content.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Despite this general principle prohibiting the regulation of speech based on its content, speech can be given varying levels of constitutional protection depending on the context of the speech and the identity of its speaker. *National Institute for Family and Life Advocates v. James*, 746 F. Supp. 3d 100, 119 (W.D.N.Y. 2024) (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995)).

Among these varying levels of protection, is a distinction between "commercial" and "non-commerical" speech. *Bolger*, 463 U.S. at 65 ("[T]he degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech."). "[S]peech is typically found to be 'commercial' when the speaker is *engaged* in commerce, the intended audience is actual or potential buyers or customers *of the speaker's goods or services* and the factual content is commercial in character." *Yelp, Inc. v. Superior Court*, 17 Cal.App.5th 1, 11 (2017) (emphasis added); *See also Valentine*

v. Chrestensen, 316 U.S. 52, 55 (1942) ("The Court below appears to have taken this view since it adverts to the difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit."). The "core notion of commercial speech" is "speech which does 'no more than propose a commercial transaction.'" *Bolger*, 463 U.S. at 66 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

Appellant cites to, yet misinterprets, the *Bolger* definition of commercial speech, applying to it a more expansive definition that incorporates all speech that, somewhere along the stream of commerce, involves products or services. Br. for Appellant, 33. Specifically, Appellant asks this Court to, "[w]hen determining whether speech is, on the whole, commercial speech… consider whether (1) the speech is about a specific product, (2) the speech is an advertisement, and (3) the speaker has an economic motive." Br. for Appellant, 19 (citing *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d. Cir. 2002)). However, the Supreme Court in *Bolger*, outlined these same factors using language that more broadly protects speech, rather than restricts it:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech."

Bolger, 463 U.S. at 66 (cleaned up).

Appellant correctly notes that "the combination of *all* these characteristics," "provides strong support" that speech is commercial. *Id.* at 67 (emphasis in original). This requires a fact intensive analysis, especially "[b]ecause of the 'difficulty of drawing bright lines that will clearly cabin commercial speech." *Greater Baltimore Ctr.*, 879 F.3d at 108 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 419). "It is also one in which context matters." *Id.* (internal citations omitted).

Appellant asks this Court dispose of its nuanced, fact intensive inquiry that weighs context of speech, among the other factors enumerated above, in exchanged for a jumbled approach that labels all "advertisements of prescription medication and other medical services" commercial speech, Br. for Appellant, 35, lessens the importance of the subjective motivation of the speaker, Br. for Appellant, 36, and eliminates an assessment of the economic interest of the speaker. Br. for

Appellant, 37. Instead, Appellant asks this Court to wear a blindfold when determining whether speech is commercial, ignoring the identity of the speaker and the context of her speech, to better focus on whether the speech "proposes a commercial transaction." Br. for Appellant, 37. That logic does not comport with the First Amendment nor this Court's, or any Court's, precedent regarding commercial speech. Indeed, as the Supreme Court held in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), not all advertisements relating to prescription medication constitute commercial speech. *Id.* at 572-76. *Sorrell* alone is sufficient to dispel Appellant's proposed standard and warrants affirming the district court.

B. The Court must necessarily consider Appellees' identities to determine whether their speech is motivated by economic concerns, or in this case, the lack thereof, and consequently the Constitutional protections afforded their speech.

The identity of the speaker and the context of the speech are *the* central focuses of a commercial speech analysis. Speech is dynamic and there is purposefully no bright line to identify it. Instead, similar to the *Jacobellis v. Ohio*, "I know it when I see it" test to classify pornography, 378 U.S. 184, 194 (1964), "[w]e expect that courts will likewise be able to identify cases where expressive elements have merely been affixed to

items with a dominant non-expressive purpose for the purpose of evading regulation," or as is the case here, the non-economic expression is *the* purpose of the speech. *Mastrovincenzo v. City of New York*, 435 F.3d at 96 n.12 (2d. Cir. 2006).

For example, in *Valentine v. Chrestensen*, a salesman who purchased a former United States Navy submarine attempted to exhibit it for profit, and, to advertise for his new venture, sought to hand out leaflets in New York City. 316 U.S. at 53. The police informed the salesman that he could not distribute "commercial and business advertising matter" on the street. *Id.* The salesman attempted to circumvent this law by printing on the backside of his leaflets a protest message regarding the City Dock Department's refusal to house his submarine, which was clearly not commercial, and, on its face was constitutionally protected speech. *Id.* The Court knew the salesman's speech was commercial when it saw it, and thus extended it less constitutional protection than non-commercial speech. *Id.* at 55. No bright line rule, especially not the Appellant's blind-folded "propose a commercial transaction" test, would have properly classified the salesman's protest message as commercial, nor protected a similar

message if it lacked an advertisement on the backside of the page. Instead, the Court kept its eyes open to the identity of the speaker and the context of his speech.

As is depicted in *Valentine*, the definition of commercial speech is a "starting point" which requires "common-sense distinction between commercial speech and other varieties of speech." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2012). Appellant attempts to find shelter from this commonsense approach in the shadow of *Greater Baltimore Ctr.*, 721 F.3d at 286. Similar to Appellant's reading of *Bolger*, Appellant misinterprets the holding of this case and construes it as support for unconstitutionally broadening the definition of commercial speech. Appellant cites *Greater Baltimore Ctr.* as an analogous case this Court should turn to for guidance, and Amicus agrees. Br. for Appellant, 36. To better understand the Fourth Circuit's guidance on commercial speech the Court must *not* stop at the Fourth Circuit's 2013 decision, as Appellant does, but continue to the Court's later opinions in that same case. After the Fourth Circuit reversed and remanded, the United States District Court for the District of Maryland granted summary judgement in favor of the crisis pregnancy centers.

Greater Baltimore Ctr., 879 F.3d 101. The City appealed and the Fourth Circuit affirmed, authoring a second opinion in 2018. *Id.*

In this second opinion, the Court went to great length to describe the identity of the speaker and the context of its speech. "The Greater Baltimore Center for Pregnancy Concerns is a non-profit Christian organization committed to 'providing alternatives to abortion to women who finds themselves in the midst of an unplanned pregnancy.'" *Id.* at 106. "[T]he Center provides pregnant women with free services[.]" *Id.* "The Center does not charge for its goods or services." *Id.* "The Center advertises its pregnancy-related services but does not expressly broadcast its religious opposition to abortion in those ads." *Id.* The Centers advertisements included "'FREE Pregnancy Tests," and "'FREE Services.'" *Id.*

But surely, somewhere along the stream of commerce there must be "economic transactions" because "*someone* must bear that cost, be it insurance, the medical provider, or a charity." Br. for Appellant, 34 (emphasis in original). The Fourth Circuit held that "[t]he ordinance, as applied to the Center, does not regulate speech that 'propose[s] a

commercial transaction.'" *Greater Baltimore Ctr.*, 879 F.3d at 108. The Fourth Circuit clearly dispels what Appellant seeks here, stating:

> *A morally and religiously motivated offering of free services cannot be described as a bare 'commercial transaction.'* The City contends that the ordinance regulates commercial speech because the Center advertises its services, some of which have commercial value in other contexts. But that fact alone does not suffice to transform the Center's ideological and religious advocacy into commercial activity.

Id. at 109 (emphasis added). The same is true here, and Appellees' speech is more properly characterized as religious expression and advocacy, fully protected by the First Amendment.

Appellant argues that Appellees' progesterone therapy advertisements are commercial speech because they propose an economic transaction. Br. for Appellant, 34. The lower court was unable to locate that economic transaction, especially because Appellee's services, including referrals for progesterone therapy are free of charge. Appellant nonetheless classifies these advertisements as containing "economic transactions" because "*someone* must bear that cost, be it insurance, the medical provider, or a charity." Br. for Appellant, 34. That is an incorrect analysis.

"NIFLA is a faith-based nonprofit association of life-affirming pregnancy centers." Br. for Appellees, 3. Gianna's House and Options Care Center are also faith-based organizations. *Id.* "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." *Id.* It would be difficult, if not impossible, to draw meaningful lines distinguishing the faith-based free services offered by *Greater Baltimore Ctrs.* and Appellees free services here. Thus, the constitutional protection *Greater Baltimore Ctrs.*' non-commercial speech was afforded must likewise be identical for Appellees. Appellant argues that "there is a strong argument that economic motivation is the least significant of the three commercial-speech considerations," but this argument lacks supporting precedent.

As Appellant points out, "'context matters.'" Br. for Appellant, 34 (quoting *Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 286 (4th Cir. 2013) (en banc). It is the identity of the speakers and their lack of economic concerns, i.e. the "economic motivation" of the speaker, that distinguishes Appellees' speech from a "progesterone manufacturer." Br. for Appellant, 38.

C. The Court should equally consider the context of Appellant's use of business-fraud statutes to regulate Appellees' speech, context that makes clear Appellant's aim is to target pro-life speech.

Context equally helps courts determine the commercial nature of speech and the rationale for regulations that chill speech. The context in this case includes Appellant's October 23, 2023, Open Letter references above. *Id.* This letter states:

> The Attorneys General of California, Connecticut, Delaware, Hawai'i, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, *New York*, Oregon, Vermont, Washington, and the District of Columbia oppose efforts by CPCs to mislead consumers and delay or impede access to the full spectrum of reproductive healthcare, including abortion. That is why our states continue *to take numerous actions aiming to mitigate the harmful effects of CPC misinformation and delays*.

Letitia James, et. al., Open Letter From Attorneys General Regarding CPC Misinformation and Harm (Oct. 23, 2023), 8 (emphasis added).

The letter goes on to claim that the existence of CPCs causes "*dire* health consequences." *Id.* (emphasis added). *Dire* being an odd turn of phrase when the consequence of this litigation would be the lives of children lost to a lack of information about abortion pill reversal. This Court must consider the aims of Appellant's regulations, context made clear in her own writing.

On May 6, 2024, Appellant more clearly defined the "context" surrounding her regulations in a press release, wherein she claims, "abortions cannot be reversed," crisis pregnancy centers spread "misinformation," and denotes abortion pill reversal as "not an accepted mainstream practice." Letitia James, Attorney General James Sues Anti-Abortion Group and 11 New York Crisis Pregnancy Centers for Promoting Unproven Abortion Reversal Treatment (May 6, 2024), 1-2.[3] The context makes clear that Appellant is engaging in both content- and viewpoint-based discrimination. She rejects Appellees' speech because that speech attempts to save unborn children and it projects a Christian, and therefore pro-life, worldview that Appellee rejects.

This is no different that the historical practices used by past governments to increase state power and suppress minority thought. *NIFLA*, 585 U.S. at 771 ("Throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities." (cleaned up)). Indeed,

> For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet

[3] Available at https://ag.ny.gov/press-release/2024/attorney-general-james-sues-anti-abortion-group-and-11-new-york-crisis-pregnancy

> government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.

NIFLA, 585 U.S. at 771-72. Appellees' Press Release here would have made these communist regimes proud. The lower court rightfully deemed the Appellant's actions unconstitutional and granted Appellees a preliminary injunction. This Court should affirm.

D. Appellees are not engaged in commerce and have no economic incentive for offering their services, rendering prospective services non-economic and the intended speech non-commercial.

Because Appellees' speech is noncommercial, restrictions on their speech are subject to strict scrutiny, *National Institute for Family and Life Advocates v. James*, 746 F. Supp. 3d at 119, in contrast to "the *Central Hudson* test for commercial speech restrictions… a form of intermediate scrutiny." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster* Bay, 868 F.3d 104, 113 (2d Cir. 2017)). "Strict

scrutiny permits speech restrictions only when the government proves that its restrictions 'are narrowly tailored to serve or promote a compelling government interest.'" *National Institute for Family and Life Advocates v. James*, 737 F. Supp. 3d 246, 263 (D. Vt. 2024) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). And, it was Appellant's burden to demonstrate that restrictions on speech survive constitutional scrutiny, *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (noting that the government bears the burden on whether its policies survive First Amendment scrutiny), and "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Appellant did not even attempt to satisfy her burden (and she cannot do so here).

"At the preliminary injunction hearing, the State conceded that it does not attempt to satisfy strict scrutiny. And the record is devoid of anything to suggest that this standard could be met." *National Institute for Family and Life Advocates v. James*, 746 F. Supp. 3d at 121. Instead, Appellant relies entirely on her argument that Appellees' speech is false and/or misleading and the residents of New York need to be protected from misleading advertising. Br. for Appellant, 41. Despite Appellant's

concession, "[i]t is well-established that 'falsity alone may not suffice to bring the speech outside the First Amendment.'" *National Institute for Family and Life Advocates v. James*, 746 F. Supp. 3d at 119. "Rather, the Constitution 'requires that the government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest." *Id.* Appellant's aim to prevent the spread of misinformation cannot suffice strict scrutiny, therefore, an injunction is required to prevent Appellant from trampling Appellee's constitutionally protected speech rights.

II. IF APPELLEES' SPEECH IS CONSIDERED PHARAMCEUTCAL MARKETING, THAT SPEECH MANTAINS FIRST AMENDMENT PROTECTIONS THAT SHIELDS IT FROM APPELLANT'S CONTENT- AND VIEWPOINT-BASED DISCRIMINATION.

Even if this Court were to classify Appellees' speech as "commercial" (which it is not), that speech would still receive First Amendment protections which would require enjoining Appellant's infringement on Appellees' speech. "The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson*, 447 U.S. at 561 (citing *Virginia Pharmacy Board*, 425 U.S. at 762).

"*303 Creative* reminds us first that the First Amendment extends its protections to certain forms of expression even when the speaker is engaged in commerce." *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 103 (2d. Cir. 2024). "[L]ong before *303 Creative*, '[i]t [was] well settled that speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Id.* (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*,m, 487 U.S. 781, 801 (1988)). The same holds true for pharmaceutical advertisements. *See Sorrell*, 564 U.S. 552.

A. Courts have consistently held that speech in aid of pharmaceutical marketing is a form of expression protected by the First Amendment.

"The *Sorrell* Court held that '[s]peech in aid of pharmaceutical marketing – is a form of expression protected by … the First Amendment.'" *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012) (quoting *Sorrell*, 564 U.S. at 558). In *Caronia*, this protection was extended to off-label promotion. *Id.* at 165; see also U.S. Food and Drug Administration, FDA Drug Bulletin, 12 FDA Drug Bull. 1, 5 (1982) ("Once a drug has been approved for marketing, a physician may prescribe it for uses or in treatment regimens that are not included in

approved labeling. Such 'unapproved' or, more precisely, 'unlabeled' uses may be appropriate and rational in certain circumstances, and may, in fact, reflect approaches to drug therapy that have been extensively reported in medical literature.") Specifically, government regulations that prohibit off-label promotion were deemed content-based discrimination "because it distinguishes between favored speech and disfavored speech on the basis of the ideas for views expressed." *Id.* (internal citations omitted).

If Appellees' speech were considered "commercial," which it most certainly is not, it should be granted at least the same constitutional protections afforded abortion clinics, classifying their ads as constitutionally protected speech. After all, such clinics are actually proposing a commercial transaction, that the clinic *itself* will offer and for which the clinic *itself* will be paid. Appellees' speech, that does not even offer the service described cannot receive no First Amendment protection while an abortion clinic that actually provides such service and receives funds received heightened scrutiny. In *Bigelow v. Virginia*, 21 U.S. 809 (1975), the Court "reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the

processing of an abortion in Virginia a misdemeanor." *Virginia Pharmacy Board*, 425 U.S at 759-60. The Court held, "the Virginia courts erred in their assumptions "that advertising, as such, was entitled to no First Amendment protection," and we observed that the relationship of speech to the marketplace of services does not make it valueless in the marketplace of ideas." *Id.* at 760.

In *Virginia Pharmacy Board*, the Court, presuming the pharmaceutical advertisements at issue received some First Amendment protections, focused on the individual parties to determine what level of protection would be afforded the speech. *Id.* at 762. The pharmacist in the case did "not wish to editorialize on any subject, cultural, philosophical, or political." *Id.* at 761. Rather, "[t]he 'idea' he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."' *Id.* The Court determined that even this purely economic speech is not "wholly outside the protection of the First Amendment." *Id.* The State sought to ban this speech because it "feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers." *Id.* at 769. The Court held that "there is, of course,

an alternative to this highly paternalistic approach." *Id.* at 770. Instead, the Court can assume that *more* information is not in itself harmful, "that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.*

The Appellant equally fears that more information—namely, information she disagrees with or dislikes because it contradicts her political ideology and viewpoint—will confuse the lay-woman, rather than providing her sufficient information to make her own choice regarding her child's life. "[T]he Attorney General takes no position on what physicians or other medical professionals may discuss about APR with patients," so long as the public at large is not granted equal access to that information. Br. for Appellant, 45-46. The First Amendment knows no such statist paternalism, and this Court, too, should reject it.

B. Appellant intentionally aims state action at muting Crises Pregnancy Centers, targeting Appellees' speech because of its content, without compelling government interest.

"Mindful of these concerns," courts engage in "'intermediate' scrutiny of restrictions of commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995). Unless, of course, and as Appellant argues, the commercial speech is false and/or misleading. "[T]here are no protections for messages that do not accurately inform the public about lawful activity, speech that is more likely to deceive the public than inform it, or commercial speech related to illegal activity. *Central Hudson*, 447 U.S. at 563 (internal citations omitted).

Commercial speech that is neither false nor misleading, "may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. at 624.

States have a compelling interest in the protection of the public health and safety of their citizens. *Id.* But, "[u]nder *Central Hudson's* second prong, the State must demonstrate that the challenged regulation advances the Government's interest in a direct and material way." *Id.*, 515 U.S. at 625 (internal citations omitted). "That burden, we have explained, is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 626 (internal citations omitted).

This Court should reject assessing this case through the lenses of intermediate scrutiny. Regardless of the commercial nature of the speech, as the Supreme Court made clear in *Reed* and *NIFLA*, "[c]ontent based speech restrictions are subject to 'strict scrutiny' – that is, the government must show that the regulation at issue is narrowly tailored to serve or promote a compelling government interest." *Caronia*, 703 F.3d at 163. And, strict scrutiny is warranted regardless of the government's motive, *Reed*, 576 U.S. at 165, because "illicit legislative intent is not the *sina qua non* of a violation of the First Amendment." *Id.* (cleaned up).

"Meanwhile non-content based regulations and regulation of commercial speech—expression solely related to the economic interests of the speaker and its audience—are subject to intermediate scrutiny." *Id.* "This stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *NIFLA*, 585 U.S. at 766 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). Yet, that is exactly what Appellant sought to do – target Appellees' speech because of its content.

"Indeed, the record is replete with evidence of the Attorney General's hostility toward the NIFLA plaintiffs' life-affirming speech." Br. for Appellees, 25. The evidence to support this claim of hostility is readily available online, including in Appellant's own press releases as Amicus cited above. On October 23, 2023, Appellant signed an open letter of pro-choice Attorneys General promising to "oppose efforts by [crises pregnancy centers]…." Letitia James, et. al., Open Letter re Crises Pregnancy Centers, 8. The Letter continued by admitting Appellant is taking "numerous actions aiming to mitigate the harmful effects of CPC misinformation and delays." *Id.* Thus, even if this Court classifies Appellees' speech as commercial, due to the record replete with evidence

of the discriminatory nature of Appellant's actions, this Court must subject the State's regulations to strict scrutiny. *Reed*, 576 U.S. at 165-66.

Appellant admits she is targeting crisis pregnancy centers because of the viewpoint and content offered in the advertisements. She targets their speech to ensure New Yorkers have "access to reproductive care" (while stripping away the opportunity for women to have access to progesterone therapy). *Id.* It would be naïve to ignore the Appellant's own statements, including her signed letters, directing our attention to her aims – disrupting crises pregnancy center operations. These aims, directed at the content of Appellee's speech, triggers strict scrutiny. And, Appellant has conceded that she cannot meet that standard, nor is there evidence in the record to support such a claim. Indeed, she did not even try below.

It would be far from an exaggeration to claim Appellant's weaponization of business fraud statutes to silence crises pregnancy centers is viewpoint-based discrimination, as well as content-based discrimination. "The Attorney General targets statements supporting the APR protocol. Indeed, a 'speech edict aimed directly at those pregnancy

clinics that do not provide or refer for abortions is neither viewpoint nor content neutral.'" *National Institute for Family and Life Advocates v. James*, 746 F. Supp. 3d at 121 (2024) (quoting *Greater Baltimore Ctr.*, 879 F.3d at 112)).

"Viewpoint discrimination 'is thus an egregious form of content discrimination.'" *National Institute for Family and Life Advocates v. James,* 746 F. Supp. 3d at 119 (quoting *Rosenberger,* 515 U.S. at 828). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger,* 515 U.S. at 828. "[G]overnment must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. In this case, all evidence demonstrates that the Attorney General has attempted to regulate Appellees' speech due to its content and viewpoint. That is a clear violation of Appellees' First Amendment rights, and thus requires this Court affirm the lower court's order.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rule 29.1(c) because, excluding the portions exempted by Fed. R. App. R. 32(f), this brief contains 6,419 words, which is no more than one-half the maximum length authorized by Local Rule 28.1.1 for a party's principal brief.

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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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2025, I electronically filed the foregoing Amicus 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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