Statement in Opposition to Raised S.B. No. 835:
"An Act Concerning Deceptive Advertising Practices of Limited Services Pregnancy Centers"
State of Connecticut General Assembly, Joint Committee on Public Health
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-By-
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This statement is **in OPPOSITION to SB No. 835 entitled: "An Act Concerning Deceptive Advertising Practices of Limited Services Pregnancy Centers."**

In my more than 12 years of professionally working with pregnancy service centers throughout the nation, I have found them to be valuable to their communities and often under vicious attacks simply because they do not support a pro-abortion viewpoint. My background and status as an attorney also gives me insight into the constitutional and legal concerns that legislation like SB No. 835 poises.

Thousands of citizens of the state of Connecticut—women, men, and children—have been assisted by pregnancy service centers during their greatest time of need. Pregnancy service centers provide pregnancy support and have promoted healthy sexual choices in adolescents, provided parenting classes, offered needed medical and prenatal health services, and organized support groups for post-abortive women and men. Pregnancy service centers offer these services at virtually no cost to their clients. After today, I am confident you will understand the positive impact pregnancy service centers provide to Connecticut and its citizens, and understand that the proposed legislation needlessly and unfairly attacks the integrity of these worthy institutions. I also am confident that you will see the numerous constitutional and legal concerns, which very likely will subject the proposed legislation to costly legal challenge, needlessly wasting the State's resources.

I. Constitutional Violations

The proposed regulation raises clear Constitutional concerns. When successfully challenged in a court of law, Raised S.B. No. 835 (the "Bill") will result in the unnecessary waste of public resources and funds that could be used to provide for the citizens of Connecticut. The proposed regulation would mandate heightened regulation of only pregnancy service centers, which by definition in the Bill are only those that do not provide abortions or emergency contraception.

A. Unconstitutional Viewpoint Discrimination

On its face, the proposed legislation is not viewpoint neutral. Specifically, the proposed legislation regulates only those pregnancy service centers that do "*not* provide referrals to clients for abortions or emergency contraception," and only is designed to protect those clients who are "inquiring or seeking services at a *pregnancy services center*" (emphasis added). In other words, it would not matter how professional, honest, forthright, and/or legally compliant the pregnancy service center is; the proposed legislation would still apply only because the pregnancy service center holds a pro-life viewpoint. Conversely, clients of organizations that provide abortion or emergency contraception are afforded no protection regardless of how blatant any lies or deception might be from abortion providers.

Courts have found that "viewpoint discrimination" is an egregious form of content discrimination and that the government must, accordingly, abstain from regulating speech when a specific motivating ideology or opinion of the speaker is the rationale for the restriction. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995). Because this proposed legislation regulates only pregnancy service centers that oppose abortion, the proposed regulation constitutes unconstitutional viewpoint discrimination.

B. Freedom of Speech Violation

In application, the Bill would necessarily regulate the speech of pregnancy services centers in an arbitrary and unconstitutional manner. The proposed bill empowers the Connecticut Attorney General to seek injunctive relief and courts to force the speech of pregnancy service centers in the following ways;

"(1) Pay for and disseminate appropriate corrective advertising…";
"(2) Post a remedial notice…"; and
"(3) Provide such other narrowly-tailored relief as the court deems necessary."

The Bill further allows the State to recover civil penalties between $50 and $500 per violation, plus attorney's fees and costs. Additionally, the Bill does not cap the amount of money a pregnancy service center may be required to pay in "corrective advertising."

Such compelled speech triggers the First Amendment's strict scrutiny test, under which courts will find a law unconstitutional unless it is narrowly tailored to serve a compelling state interest.

> The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between

> content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *NIFLA v. Becerra*, 585 U.S.____(2018); 138 S. Ct. 2361; 201 L. Ed. 2d 835. (citing *Reed v. Town of Gilbert, 576 U.S. ____.) See also Riley v. National Federation of the Blind*, 487 U.S. 781, 798 (1988); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (statute compelling speech held unconstitutional).

The U.S. Supreme Court has made it clear that Freedom of Speech includes both the right to speak and the right "not to speak." See *Wooley v. Maynard*, 430 U. S. 705 (1977).

The Court also is concerned about allowing states too much discretion in deciding what is and what is not free speech, "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *NIFLA v. Becerra***,** 585 U.S. ___ (2018); 138 S. Ct. 2361; 201 L. Ed. 2d 835 (*citing Cincinnati v. Discovery Network, Inc*., 507 U. S. 410, 423–424, n. 19 (1993). Furthermore, "Speech is not unprotected merely because it is uttered by "professionals." *NIFLA v. Becerra*, 585 U.S.____(2018); 138 S. Ct. 2361; 201 L. Ed. 2d 835.

"[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781 (1988). In this context, government action restricting speech must meet the highest standard of scrutiny: it must be ***narrowly tailored*** to serve a ***compelling state interest.*** *See*, *e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Shelton v. Tucker*, 364 U.S. 479 (1960) (emphasis added).

1. The Bill fails to serve a *compelling state interest, thereby failing to meet the requirements to pass the strict standard level of review*.

The stated purpose of the Bill is "[t]o prohibit deceptive advertising practices by limited services pregnancy centers." The Bill articulates no other purpose or interest. Regulation of advertising fails to amount to a "compelling state interest." Examples of interests that the U.S. Supreme Court has recognized as compelling include:

- upholding military conscription laws, *Gillette v. United States*, 401 U.S. 437 (1971).
- prohibiting racial discrimination, *Palmore v. Sidoti*, 466 U.S. 429 (1984) and *Bob Jones University v. United States*, 461 U.S. 574 (1983);
- maintaining the tax system, *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

- winning wars, *Texas v. Johnson* 491 U.S. 397 (1989);
- prohibiting child pornography, *Osborne v. Ohio*, 495 U.S. 103 (1990); and
- protecting voters from intimidation at the polling place, *Burson v. Freeman*, 504 U.S. 191 (1992).

Connecticut will be hard-pressed to argue that regulating advertising amounts to an interest important enough to be considered "compelling" under the strict scrutiny test. In fact, the U.S. Supreme Court recently found that California's interests expressed in a similar bill failed to arise to even the lesser level of "substantial interest," which is required for the lower "intermediate scrutiny" standard of judicial review. *NIFLA v. Becerra*, 585 U.S.____(2018); 138 S. Ct. 2361; 201 L. Ed. 2d 835.

Additionally, the fact that the proposed legislation regulates only those pregnancy service centers that oppose abortion also "suggests that the government itself does not see the interest as compelling enough to justify a broader statute." Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pennsylvania L. Rev. 2417 (1997); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (law's under-inclusiveness indicated that its true purpose was something else).

2. The Bill is not "*narrowly tailored*," thereby failing to meet the requirements to pass the strict scrutiny standard of review.

To meet the second prong of the strict scrutiny standard, Connecticut is obligated to demonstrate that the law is "narrowly tailored." The Bill fails to do meet this prong. Similar to the legislation in the *NIFLA* case, SB 835 is "wildly underinclusive." *NIFLA v. Becerra*, citing *Brown v. Entertainment Merchants Assn.*, 564 U. S. 786, 802. In *NIFLA*, the Supreme Court noted that the legislation in question "applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services." Similarly, here, SB 835 applies only to "limited service pregnancy centers" providing a "pregnancy-related service," which is defined as "any medical or health counseling service related to pregnancy or pregnancy prevention, including, but not limited to, contraception and contraceptive counseling…" It is not enough to simply modify the Bill from previous versions to include the words "narrowly-tailored relief." Connecticut must, instead, demonstrate that the relief is actually narrowly tailored.

Like California, Connecticut could have resorted to other options, such as engaging in a public information campaign. *See NIFLA v. Becerra,* 585 U.S. _____(2018); 138 S. Ct. 2361; 201 L. Ed. 2d 835. Instead, Connecticut empowers its Attorney General to arbitrarily determine whether a pro-life pregnancy service center's speech is "false, misleading or deceptive," and mandate a pregnancy service

center engage in (and pay for) forced "corrective advertising," (See "D. Due Process Violations" below).

Accordingly, S.B. 835 will necessarily violate the First Amendment and is unlikely to achieve success on the merits when it is challenged in a Court of Law. In fact, the U.S. Supreme Court recently reversed and remanded an option of the 9th Circuit concerning a similar bill arising from California. *See NIFLA v. Becerra,* 585 U.S. _____(2018); 138 S. Ct. 2361; 201 L. Ed. 2d 835.

C. Equal Protection Violation

Along the same vein, the proposed legislation violates the rights of pro-life pregnancy service centers provided under the Equal Protection Clause of the Fourteenth Amendment of the Constitution by failing to regulate similar organizations and organizations with differing ideologies, such as abortion clinics or family planning organizations. Such organizations are not subject to regulation or punishment for deceptive advertisements they might provide. Likewise, there are many companies and organizations that discuss medical issues with customers and clients that are not subject to the regulations of the Bill, such as GNC stores, pharmacies, and Weight Watchers. Such regulatory underinclusiveness is a strong indication that that the proposed legislation's purpose is merely to subject pregnancy service centers that oppose abortion to heightened regulation. See *Carey v. Brown*, 447 U.S. 455, 465 (1980) (underinclusiveness of a picketing statute undermined state's claim of interest); *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and in the judgment) (content-discriminatory law unconstitutional because it was underinclusive).

D. Due Process Violations

The proposed legislation also presents serious due process concerns. The language of the proposed legislation is **vague and ambiguous**, yet it would subject pro-life pregnancy service centers to action by the Attorney General and courts, which could result in civil sanctions for violations. In order to be constitutional, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply the statute in order to avoid arbitrary and discriminatory enforcement. *See Upton vs. S.E.C.,* 75 F.3d 92, Fed. Sec. L. Rep. (CCH) ¶99011 (2d Cir. 1996); U*.S. v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996); *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996).

Important language in the proposed regulation is undefined and utterly subjective, such as, "The Attorney General may apply to any court of competent jurisdiction for injunctive relief to compel compliance…and correct the effects of deceptive advertising." What constitutes "deceptive" advertising is not defined by

the statute and is subject to the Attorney General's subjective understanding. Furthermore, the Bill fails to require the Attorney General to provide any evidence indicating a pregnancy service center's advertising is "deceptive" to justify their decision to bring action against a pregnancy service center before subjecting it to costly court proceedings potentially resulting in harsh civil sanctions.

This concern is amplified by the fact that the power to bring legal action against pregnancy service centers lies solely within the Attorney General, and not the clients themselves, who overwhelmingly report high levels of satisfaction.[i]

Likewise, the proposed regulation does not define what constitutes "advertising." This is problematic because many pregnancy service centers provide information on their services through religious organizations (e.g., church bulletins and pulpit announcements) and by way of oral communication when with clients or potential clients.

Moreover, as noted above, the Bill fails to cap what a pregnancy service center may be required to pay for "corrective advertising" and allows a court unlimited power to punish a pregnancy service center for exercising its right to free speech by allowing the court to require a pregnancy service center to "Provide such other relief as the court deems necessary." The potential for mass civil prosecution due to vagueness appears limitless.

II. The Proposed Legislation Improperly Infringes on Federal and State Rights of Conscience Protections

The proposed legislation improperly infringes upon rights of conscience protections provided by Federal and Connecticut law by subjecting pregnancy service centers that by definition oppose abortion to regulation involving civil discipline.

The Federal government has long protected the rights of citizens to engage in services without compromising their religious, moral and philosophical objections to abortion, abortion referrals, and related services. *See* 42 U.S.C. § 300a-7 et seq. (the "Church Amendment."); 42 U.S.C. § 238n (Public Health Service Act); and Pub. L. No. 111-117, 123 Stat 3034 (the "Weldon Amendment).

Additionally, Connecticut Public Health Code 19-13-D54 provides: "No person shall be required to participate in ***any phase*** of an abortion that violates his or her judgment, philosophical, moral or religious beliefs." Conn. Agencies Reg. § 19-13-D54(f) (emphasis added). The proposed regulation, however, specifically seeks to punish "[any] pregnancy service center that does not provide referrals to clients for abortion or emergency contraception."

The proposed regulation subjects pregnancy service centers to regulation and the potential for sanctions and limitless civil actions in violation of both Federal and Connecticut state law, merely because they hold religious and moral conscience beliefs about abortion.

III. The Proposed Legislation Is Ideologically Driven by Politically Charged Individuals' Misuse of a Government Actor and Outside the Jurisdiction of Connecticut.

Pro-abortions advocates, such as NARAL Pro-choice Connecticut and Planned Parenthood of Southern New England have been the primary proponents of this legislation. The abortion debate is better suited for the public square without abortion advocates enlisting a government actor to needlessly harass pro-life charities. This is a misuse of the resources of the State of Connecticut and is outside its jurisdiction and proper functions. Neither pro-abortion proponents nor the State of Connecticut have demonstrated a need for the proposed legislation. Rather, the proposed legislation is designed to emphasize an ideological complaint that pro-abortion advocates have with regard to pregnancy service centers. Due to the strong likelihood of the Bill being challenged and struck down in a court of law due to the Constitutional concerns, Connecticut should protect its resources now before costly litigation ensues.

A. The Pro-Abortion Lobby's promotion of SB 835 is a Grossly Irresponsible Action that Harms the Citizens of Connecticut.

The Bill will result in costly lawsuits, which are unnecessary and highly likely to result in avoidable costs to the state of Connecticut.

1. Connecticut abortion lobby's efforts to regulate pregnancy service centers are not new or unique.

Connecticut's pro-abortion lobby is simply mimicking the failed efforts of numerous states attempting to needlessly impose regulation on pregnancy service centers. In fact, similar bills have been wisely rejected by legislatures in at least nine (9) states, between 2007 and 2020. In addition to two failed attempts in Connecticut, other states include:

- Connecticut: RB 7070 (2019) and SB 144 (2020)
- Maryland: SB 690/HB 1146 (2008)
- Michigan: HB 5158 (2009)
- New York: A03639 (2009) and A06591 (2007)
- Oregon: SB 776 (2007)
- Texas: HB 2592 (2009)
- Virginia: HB 452 and SB 188 (2010)[ii]
- Washington: SB 6452 and HB 2837 (2010)

- West Virginia: HB 2373 (2009)

2. Courts in multiple jurisdictions, including the United States Supreme Court have struck down similar legislation, sometimes requiring the jurisdiction to pay costly attorney's fees.

Every time a state or locality has imprudently enacted similar legislation, a lawsuit has been filed. In all but one lawsuit (San Francisco), a Court has struck down the legislation, including the Supreme Court of the United States. As a result, states/localities have wasted needed taxpayer resources on defending obviously unconstitutional legislation. Not only that, but Courts have also ordered these states/localities to pay the fees of the pregnancy service centers' attorneys:

- In *NIFLA v. Becerra*, California was ordered to pay $399,000 to compensate for pregnancy service centers' legal fees[iii]
- In *Centro Tepeyac v. Montgomery County,* Montgomery County, Maryland paid $375,000 in attorney's fees and nominal damages.[iv]
- In *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore,* Baltimore paid a pregnancy service center $1.1 million to cover legal fees[v]
- The City of Austin settled on attorney's fees for an unknown amount after pregnancy service center attorneys filed with court to recover $997,144.95 in attorney's fees.[vi] The Liberty Institute (representing one of the three pregnancy service centers which won their court case) reported being paid $480,000 in attorney's fees by the City of Austin.[vii]

It is also worth noting that the State of Hawaii promptly struck down similar legislation which was subject to a lawsuit following decision in *Becerra.*[viii]

3. Connecticut has made significant efforts to balance its budget without raising taxes, and the Bill threatens to mitigate these efforts

For the 2021-22 fiscal year, Connecticut is projected to run a $1.2 billion budget deficit, and a $1.3 billion deficit in FY22-23, even when accounting for a recent revenue increase of $843 million.[ix] Governor Lamont's administration is taking significant effort to balance Connecticut's budget without resorting to tax increases, in light of the extra burdens imposed by the Covid-19 pandemic. [x] Office of Policy and Management Secretary, Melissa McCaw, has indicated that to accomplish the Governor's budget objectives, Connecticut's budget reserve, which the State has spent years to build up, will have to be tapped.[xi]

When combining sales and income tax rates, Connecticut, at 12.6%, is the second highest behind New York which narrowly takes the lead at 12.7%.[xii] As such,

raising taxes to cover the inevitable costs the Bill will impose is not a preferable option.

At best, it is regrettable that Connecticut's pro-abortion lobby has not considered the drastic implications and impact that the Bill will cause Connecticut to suffer during these uncertain times.

IV. The Proposed Legislation Unnecessarily and Unfairly Targets Centers for Regulation

In a similar vein, the regulation unnecessarily regulates pregnancy service centers, which already voluntarily operate under high standards of professionalism. National pregnancy service center affiliation organizations such as Care Net, the National Institute for Family and Life Advocates (NIFLA), and Heartbeat International provide centers with legal education, marketing compliance, medical service training/education, client service education, and other services. The legal education and other services offered by these groups are designed to ensure that centers are operating in compliance with state and federal laws and providing only truthful and accurate information. All centers within these affiliation networks agree to abide by the "Commitment of Care and Competence," which I include as an attachment with my testimony.

The approximately 2,700 pregnancy service centers in the United States today effectively served two million (2,000,000) people in 2019 with a wide range of services at virtually no cost to the clients, valued at nearly $270 million.[xiii] As the Covid-19 pandemic rages on, the no-cost assistance of pregnancy service centers is needed now more than ever. Communities have recognized the value of pregnancy service centers. In fact, an overwhelming majority of Americans, regardless of whether they self-identify as "pro-life" or "pro-choice," consider pregnancy centers a valuable community resource.[xiv]

Of course, no group can better determine the honesty, care and quality of services provided at pro-life pregnancy service centers than the clients themselves. In 2015, clients of pregnancy service centers affiliated with Care Net reported a 97.7% satisfaction rate.[xv]

Pregnancy service centers are credible institutions held to high standards set by professionals in the industry. Pregnancy service centers comply with laws and offer a tremendous service to their communities saving millions of dollars annually. The proposed regulation seeks only to unfairly discredit these worthy organizations and will ultimately harm the clients and communities they serve.

For these reasons, **I urge the Connecticut General Assembly, Joint Committee on Public Health to vote against Raised Bill 835 entitled: "An Act Concerning Deceptive Advertising Practices of Limited Services Pregnancy Centers."**

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[i] *See* "The Truth About Crisis Pregnancy Centers." Care Net. 2015. Available at: https://www.care-net.org/hubfs/Downloads/The_Truth_About_Crisis_Pregnancy_Centers.pdf?hsCtaTracking=a06cb313-a1fe-45c0-813a-236ab3c8fbfe%7C19a83cca-5f9e-4352-8c70-bb7f26222f7c (Accessed 2 Feb. 2021).
[ii] On January 26, 2010, the bills were heard in both House and Senate Subcommittees and were "passed-by" (dropped).
[iii] Neilsen, A. "California to Pay Damages to Pregnancy Centers." Care Net. 25 Feb. 2019. Available at: https://www.care-net.org/center-insights-blog/california-to-pay-damages-to-pregnancy-centers (Accessed 8 Feb. 2021).

[iv] "Md. county pays $375,000 for anti-pregnancy care law." Alliance Defending Freedom. 18 June 2014. Available at: http://www.adfmedia.org/News/PRDetail/4673#:~:text=Md.,-county%20pays%20%24375%2C000&text=In%20March%2C%20a%20federal%20court,nationwide%20battle%20against%20such%20ordinances. (Accessed 8 Feb. 2021).
[v] Richman, T. "Baltimore to pay $1.1 million after losing First Amendment case involving pregnancy clinic signs" The Baltimore Sun. 12 Sept. 2018. Available at:https://www.baltimoresun.com/politics/bs-md-ci-pregnancy-center-settlement-20180912-story.html (Accessed 8 Feb. 2021).
[vi] Lim, A. "Austin City Council to vote on settlement in pregnancy center lawsuit. Statesman. 23 Sept. 2016. Available at: https://www.statesman.com/NEWS/20160923/Austin-City-Council-to-vote-on-settlement-in-pregnancy-center-lawsuit (Accessed 8 Feb. 2021).
[vii] "Austin Pregnancy Resource Center." Liberty Institute. Available at: https://www.libertyinstitute.org/liberty_case/austin-pregnancy-resource-center (Accessed 8 Feb. 2021).
[viii] "Court strikes down Hawaii law require pregnancy centers to advertise abortion." Catholic News Agency. 23 Sept. 2018. Available at: https://cruxnow.com/church-in-the-usa/2018/09/court-strikes-down-hawaii-law-requiring-pregnancy-centers-to-advertise-abortion/ (Accessed 8 Feb. 2021).
[ix] Phaneuf, K.M. "Spiking tax revenue will wipe out state budget deficit, analysts say." The CT Mirror. 15 Jan. 2021. Available at: https://ctmirror.org/2021/01/15/spiking-tax-revenue-will-wipe-out-state-budget-deficit-analysts-say/ (Accessed 8 Feb. 2021).
[x] Ibid.
[xi] Phaneuf, K.M. "Lawmakers expect lean budget from Lamont. But how lean will it be?" The CT Mirror 8 Feb. 2021. Available at: https://ctmirror.org/2021/02/08/lawmakers-expect-lean-budget-from-lamont-but-how-lean-will-it-be/ (Accessed 8 Feb. 2021).
[xii] "States with the Lowest Taxes and the Highest Taxes: Updated for Tax Year 2020." Intuit Turbo Tax. Available at: https://turbotax.intuit.com/tax-tips/fun-facts/states-with-the-highest-and-lowest-taxes/L6HPAVqSF (Accessed 8 Feb. 2021).
[xiii] "Pro-life Pregnancy Centers Served 2 Million People with Essential Medical, Education and Support Services in 2019." Charlotte Lozier Institute. 21 Oct. 2020. Available at: https://lozierinstitute.org/pro-life-pregnancy-centers-served-2-million-people-with-essential-medical-education-and-support-services-in-2019/ (Accessed 8 Feb. 2021).
[xiv] Donovan, C. "Pregnancy Help Centers: A Consensus Service to Women and Children." Charlotte Lozier Institute. 13 Apr. 2017. Available at: https://lozierinstitute.org/pregnancy-help-centers-a-consensus-service-to-women-and-children/ (8 Feb. 2021).
[xv] *See* "The Truth About Crisis Pregnancy Centers." Care Net. 2015. Available at: https://www.care-net.org/hubfs/Downloads/The_Truth_About_Crisis_Pregnancy_Centers.pdf?hsCtaTracking=a06cb313-a1fe-45c0-813a-236ab3c8fbfe%7C19a83cca-5f9e-4352-8c70-bb7f26222f7c (Accessed 8 Feb. 2021).