IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

THE PREGNANCY CARE CENTER OF ROCKFORD, et al.,	)	
Plaintiffs,	)	
v.	)	No. 2016MR741
BRUCE RAUNER and BRYAN A. SCHNEIDER,	)	Judge Eugene Doherty
Defendants.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs the Pregnancy Care Center of Rockford, Anthony Caruso, MD, A Bella Baby OBGYN, Inc., and Aid for Women, Inc., by and through their undersigned attorneys, and pursuant to 735 ILCS 5/11-102, respectfully request that the Court grant them a preliminary injunction against Defendants' enforcement of Senate Bill 1564, an amendment to 745 ILCS 70/1 *et seq*. (hereinafter "SB 1564"), to the extent enforcement would penalize health facilities or professionals who object to providing information about doctors who may offer abortion or object to describing abortion as a beneficial treatment option. In support of this motion, Plaintiffs state as follows:

1. Plaintiffs filed their First Amended Complaint on August 17, 2016. The complaint sets forth clearly and concisely the specific facts that support injunctive relief. The complaint explains the Plaintiffs are facilities and health professionals who offer medical services to support women in giving birth and discourage them from seeking abortion. SB 1564 forces the Plaintiffs to tell pregnant women the names of other doctors they believe offer abortions, and to tell them that abortion has unspecified "benefits" and is a "treatment option" for pregnancy.

Plaintiffs have religious and moral objections to speaking about abortion in these ways. SB 1564 will be enforceable by Defendants against Plaintiffs on January 1, 2017.

2. The complaint identifies several Illinois laws and constitutional provisions that provide protectable rights to Plaintiffs and are violated by SB 1564's compelled speech provisions. The Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.*, bans the operation of SB 1564 against Plaintiffs' religious beliefs unless it serves a compelling government interest in a least restrictive way. SB 1564 fails this test because, *inter alia*, every citizen can easily find the contact information for doctors who provide abortion and will discuss its benefits without forcing Plaintiffs to provide that information directly. For the same reason, SB 1564 is a classic example of compelled speech that violates Plaintiffs' Freedom of Speech rights as protected by Art. I, § 4 of the Illinois Constitution.

3. By alleging that SB 1564 and Defendants' enforcement thereof violate these laws and constitutional clauses, the complaint contends that Plaintiffs have a likelihood of success on the merits of these claims. The complaint further pleads that Plaintiffs face irreparable harm to their free speech and religious free exercise rights if Defendants are not enjoined from enforcing SB 1564 against them. Their irreparable harm begins not merely on January 1, 2017, but in the weeks leading up to that date when Plaintiffs would have to develop SB 1564's required "protocol" for reciting its objectionable speech. The complaint urges that Plaintiffs have no adequate remedy at law. Violation of one's rights to freedom of speech and free exercise of religion cannot be adequately remedied by monetary damages, but require equitable remedies including injunctive relief.

4. On October 17, 2016, counsel for Plaintiffs Mr. Bowman spoke with counsel for Defendants Ms. Newman by telephone, to discuss whether Defendants would agree not to

enforce the challenged provisions of SB 1564 when it goes into effect on January 1, 2017, and while this case is pending, in lieu of Plaintiffs filing a motion for preliminary injunction. Ms. Newman said that SB 1564 is a duly enacted law and as of that day Defendants would not agree not to enforce SB 1564 against the Plaintiffs. During the telephonic hearing this Court held on October 20, 2017, Ms. Newman reiterated that her clients were not prepared at that time to say they will not enforce SB 1564 against Plaintiffs while the case is pending, and she consented to the briefing and hearing schedule for the Court's consideration of this motion. This further demonstrates Plaintiffs' need for the Court to grant their motion for preliminary injunctive relief before SB 1564 goes into effect. SB 1564 is a recently and duly enacted law whose effectiveness is presumed, especially when the state is asked to disavow enforcement but refuses to do so.

5. This motion is made in good faith and not for the purpose of improper delay. The motion will not prejudice any party, and the public is benefitted—not prejudiced—when the government is required to comply with the Illinois Religious Freedom Restoration Act and the Illinois Constitution.

6. This is Plaintiffs' first request for a preliminary injunction.

7. Plaintiffs include the attached memorandum of law, affidavits affirming the facts asserted in the complaint, and proposed form of order, in support of this motion.

Respectfully submitted this 27th day of October, 2016.

s/ Matthew S. Bowman

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs the Pregnancy Care Center of Rockford, Anthony Caruso, MD, A Bella Baby OBGYN, Inc., and Aid for Women, Inc., by and through their undersigned attorneys, hereby submit this memorandum of law in support of their Motion for Preliminary Injunction, filed simultaneously with this memorandum.

INTRODUCTION

The State of Illinois enacted a law, Senate Bill 1564 (SB 1564, amending 745 ILCS 70/1 *et seq*.) (attached to the Complaint as Exhibit A), which targets pro-life medical professionals and facilities and requires them to promote abortions by giving women a list of doctors who may perform them and forces them to discuss the "benefits" of abortion. This mandate is unnecessary since women can easily obtain information about abortion providers on the internet or in a phone directory. The law's effect would be to drive pro-life health professionals from medicine and social service, depriving them of their livelihood, and therefore also restricting patient choices and the free help that patients receive from these professionals. Plaintiffs are two non-profit pro-life pregnancy centers and a pro-life Ob/Gyn and his practice. Their moral and religious beliefs,

and the moral and religious beliefs of those who work and volunteer three, prohibit them from speaking in favor of abortion or facilitating its access as required by SB 1564. See attached Affidavits, Exhs. 1–3. Indeed, their whole corporate purpose is to advocate for the life of the unborn children.

SB 1564 did not amend the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.* (RFRA). RFRA declares that the state cannot force religious people and groups to violate their beliefs unless it has a compelling interest and has no less restrictive means of doing so. SB 1564 cannot satisfy that test. Women can access lists of abortion doctors on their computers or smartphones. Thus the State can have no compelling interest in forcing Plaintiffs to provide the same readily available information. Nor can the State show that any of Plaintiff's patients would be injured by the failure to provide the information. The only likely impact of this law will be to deprive the Plaintiffs and other conscientious objectors to abortion of their free exercise and free speech rights and deprive Plaintiffs' patients of the pro-life viewpoint that Plaintiffs express.

SB 1564 violates the Illinois Constitution, particularly the freedom of speech protections in Art. I, § 4. By forcing Plaintiffs to speak particular messages about abortion and its providers, the law compels speech in a content-based way and also targets conscientious objectors because of their viewpoint. SB 1564 fails to satisfy constitutional scrutiny for this violation of free speech rights, since compelling Plaintiffs to provide such information is unnecessary.

The last time the state attempted to violate the conscience of pro-life health professionals, the Illinois Supreme Court allowed the plaintiffs to seek pre-enforcement relief, and the Circuit Court enjoined the law under RFRA. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 490–95 (2008); *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, slip op. at 5–7 (Ill. 7th Jud. Cir. Sangamon Co. Apr. 5, 2011) (attached as Exhibit 4).

SB 1564 goes in effect on January 1, 2017, and impacts Plaintiffs at least a week or two prior since they must develop SB 1564's speech "protocol." But under the status quo Plaintiffs' patients have never needed SB 1564's mandatory abortion information. Unless the Court issues a preliminary injunction prohibiting Defendants and their agents from enforcing SB 1564, Plaintiffs face immediate and irreparable harm to their rights.

FACTUAL BACKGROUND

Plaintiffs Offer Pregnancy Services to Women and Pro-Life Patients

Plaintiffs are two pro-life pregnancy centers and a medical doctor and his practice. The pregnancy centers, Pregnancy Care Center of Rockford (PCCR) and Aid for Women of Chicago, are religious non-profit organizations that exist to inform and help women be able to choose to give birth rather than have an abortion. They offer all of their information and services free of charge. Some of the services they offer are medical services, including but not limited to ultrasound procedures. Their medical services are performed by nurses or other authorized staff under the supervision of a physician medical director. PCCR has multiple registered nurses on staff. Aid for Women's medical director is Plaintiff Dr. Anthony Caruso.

Dr. Caruso, in addition to supervising Aid for Women's medical services, owns his own Ob/Gyn practice in Downers Grove, A Bella Baby OBGYN. A Bella Baby is a religious and pro-life medical practice. It attracts women from all around Northern Illinois who wish to have a specifically pro-life doctor for their births, prenatal care, fertility, and related medical needs. A Bella Baby and Aid for Women are also explicitly Catholic organizations that follow the Catholic Church's teachings on family planning and contraception. They teach natural methods of fertility awareness but do not promote or refer women to obtain contraception.

The Plaintiffs treat every unborn child as a human being with inalienable dignity, and as a

patient along with the child's mother. Therefore their religious and pro-life beliefs prohibit them from providing women with the names of doctors who may perform abortions for them, because that would implicate them in destroying a human life and violate one of the prime principles of the Hippocratic Oath, "First, do no harm." Plaintiffs' ethical and religious beliefs also lead them to not consider abortion to have significant medical "benefits," and do not consider it a "treatment option." Dr. Caruso has many patients who would be offended if he suggested that abortion is a "treatment option" or has medical "benefits," or if he promoted contraception.

Contact information about doctors who perform abortions is ubiquitous. It is available on the internet, including through most people's smartphones, and in any paper phone directory still distributed, or in both sources at a local library. Contraception is available in nearly every pharmacy in the state. More detailed information about abortion and contraception is available from doctors or pharmacists who provide those items.

SB 1564 Forces Pro-Life Medical Providers to Distribute Abortion Doctor Information

Defendant Governor Rauner signed Senate Bill 1564 (attached to the Complaint as Exhibit A) into law on July 29, 2016. SB 1564 amended the Illinois Healthcare Right of Conscience Act, 745 ILCS 70/1 *et seq*. ("the HRC Act").

SB 1564 declares, in section 6.1, that "[a]ll health care facilities shall adopt written access to care and information protocols" requiring the facilities or their personnel to provide certain information to patients if the facilities or medical professionals have a conscientious objection to providing certain services. Complaint Exh. A. Under the protocols the "facility, physician, or health care personnel shall inform a patient of the patient's … legal treatment options, and risks and benefits … consistent with current standards of medical practice or care." *Id.* If the facility, physician, or health care personnel object to a particular health care service,

"then the patient shall either be provided the requested health care service by others in the facility" or they "shall: (i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service." *Id.* The HRC Act defines the Plaintiff pregnancy centers and A Bella Baby as health care facilities because they provide some medical services to patients.

SB 1564 specifies that if its required speech and speech protocols do not occur, "[t]he protections of Sections 4, 5, 7, 8, 9, 10, and 11 of this [HRC] Act" do not apply. *Id*. Notably, section 4 of the HRC Act otherwise protects physicians and health care personnel from being "civilly … liable to any … public … entity or public official," and section 5 bans any "public … institution … or public official [from] discriminat[ing] against any person in any manner, including … licensing" because they object to providing health information such as SB 1564 section 6.1 requires. 745 ILCS 70/4 & 70/5.

Thus SB 1564 allows Defendant state officials and their entities to enforce SB 1564's mandates on the Plaintiffs' and their licensed medical staff. The Illinois Department of Financial and Professional Regulation (IDFPR) has preexisting statutory authority to discipline physicians, nurses, or other licensed medical professionals. *See* 225 ILCS 60/22 ("The Department" may discipline licensed physicians); 225 ILCS 65/70-5 (same for nurses); 225 ILCS 60/2 & 65/50-10 (defining the "Department" as IDFPR).

IDFPR may revoke physicians' and nurses' licenses and impose fines up to $10,000 per offense. 225 ILCS 60/22 (physicians); 225 ILCS 65/70-5(a) (nurses). IDFPR asserts that it can punish physicians for activities that are "violative of ... respect [for] the rights of patients" or of "laws ... pertaining to any relevant specialty," or that "[c]onstitute a breach of the physician's responsibility to a patient." Ill. Admin. Code tit. 68, § 1285.240(a)(1). IDFPR asserts it can

punish nurses for activities it deems are "likely to deceive, defraud or harm the public, or demonstrating a willful disregard for the health, welfare or safety of a patient," or that it deems "[a] departure from or failure to conform to the standards of practice," and in either case "[a]ctual injury need not be established." Ill. Admin. Code tit. 68, § 1300.90(a)(1). Defendant Schneider of IDFPR carries out his responsibilities under Governor Rauner.

On October 14, and again on October 20, counsel for Plaintiffs asked counsel for Defendants if Defendants would disavow enforcement of SB 1564 against Plaintiffs during the pendency of this lawsuit so as to obviate the need to file a preliminary injunction request. Counsel for Defendants stated they were unable to do so.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction under RFRA and the Freedom of Speech Clause of the Illinois Constitution. "[T]he purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits." *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 231 Ill. App. 3d 619, 625, 596 N.E.2d 726, 730 (Ill. App. 1st 1992). "The status quo is defined as the last, actual, peaceable, uncontested status which preceded the controversy." *Id.*

"To be entitled to preliminary injunctive relief, a plaintiff must demonstrate that she (1) possesses a protectable right; (2) will suffer irreparable harm without the protection of an injunction; (3) has no adequate remedy at law; and (4) is likely to be successful on the merits of her action." *Rodrigues v. Quinn*, 990 N.E.2d 1179, 1182 (Ill. App. 1st 2013).

I. Plaintiffs Possess Protectable Rights and Have a Likelihood of Success on the Merits.

Plaintiffs' claims under RFRA and the Freedom of Speech Clause assert protectable rights. Likelihood of success on the merits of their claims does not require a plaintiff to show she is entitled to judgment at trial, but is satisfied if the plaintiff has raised a "fair question

concerning the constitutionality of a statute." *Id.* Plaintiffs have raised more than fair questions showing that SB 1564 is invalid under RFRA and the Freedom of Speech Clause.

A. SB 1564 Violates RFRA.

SB 1564 violates RFRA. This case is similar to *Morr-Fitz*, where the State tried to force pharmacists to violate their conscience by promoting emergency contraception. The plaintiffs sued the governor and the IDFPR to obtain injunctive and other relief, and the Circuit Court for the Seventh Judicial Circuit enjoined the law under RFRA, among other provisions. *See* Exh. 4, *Morr-Fitz*, No. 2005-CH-000495, slip op. at 1, 5–7 (Apr. 5, 2011).

Under RFRA, "Government may not substantially burden a person's exercise of religion … unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." 775 ILCS 35/15. RFRA imposes the burdens of evidence and of persuasion on the government, not on the Plaintiffs, to show the compelling interest and least restrictive means tests are satisfied. 775 ILCS 35/5 ("demonstrates"). "Person" includes individuals, organizations, and corporations. 5 ILCS 70/1.05; *see also* 775 ILCS 5/1-103.

In RFRA the legislature adopted the free exercise of religion scrutiny of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). 775 ILCS 35/10. "[T]he hallmark of a substantial burden on one's free exercise of religion is the presentation of a coercive choice of either abandoning one's religious convictions or complying with the governmental regulation." *Diggs v. Snyder*, 333 Ill. App. 3d 189, 195, 775 N.E.2d 40, 45 (Ill. App. 5th 2002) (citing *Yoder*, 406 U.S. at 217–18).

RFRA's compelling interest test is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and is implicated only by "the gravest

abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The Court must look "beyond broadly formulated interests" and determine whether "particular religious claimants" cannot be exempted. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). If the government's "evidence is not compelling," it fails its burden. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011).

The least restrictive means test requires a "serious, good faith consideration of workable … alternatives that will achieve" the alleged interests. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court should not assume that "plausible, less restrictive alternative[s] would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). Even when the government insists it must force persons to speak, the least restrictive means test requires the government to use alternative methods such as engaging in its own speech itself, or prosecuting alleged harms directly instead of imposing prophylactic disclosures. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 799–800 (1988).

1. SB 1564 Substantially Burdens Plaintiffs' Exercise of Religion

SB 1564 is a "hallmark" of a law that substantially burdens religious exercise. *Diggs*, 333 Ill. App. 3d at 195. Its terms are mandatory: Plaintiffs "shall adopt" written protocols, which "must" include provisions by which Plaintiffs and their medical staff "shall" tell women of the abortion's "benefits" and that it is a "treatment option" for pregnancy, and then they must either provide abortion or inform women of providers they reasonably believe may offer her an abortion. Complaint Exh A. But Plaintiffs have deep religious objections to doing so. Exhs. 1–3. The penalties for violating SB 1564 are draconian. The IDFPR has broad authority to not only revoke the licenses of Plaintiffs' doctors and nurses, but to fine those professionals $10,000 per offense. 225 ILCS 60/22; 225 ILCS 65/70-5(a).

IDFPR has given itself expansive power to deem non-compliance with laws such as SB 1564 as "violative of ... respect [for] the rights of patients" or a "departure from or failure to conform to the standards of practice" even with no "actual injury." Ill. Admin. Code tit. 68, § 1285.240(a)(1); Ill. Admin. Code tit. 68, § 1300.90(a)(1). Given that SB 1564 declares it "the public policy of the State of Illinois to ensure that patients receive timely access to information," and given Defendants' refusal in this case to disavow enforcement of SB 1564, the burden that law imposes on Plaintiffs' beliefs is both substantial, if not impossible, and imminent.

2. The Government Cannot Demonstrate a Compelling Interest for SB 1564, Nor Can It Show the Law's Compelled Speech is a Least Restrictive Means.

The government cannot meet the burden—which it bears under 775 ILCS 35/5 & 35/15—to show it has a compelling interest to force SB 1564's compelled disclosures on pro-life doctors and pregnancy centers. Generic interests, such as protecting "health" or patient "information," are not compelling under RFRA. *O Centro Espirita*, 546 U.S. at 431. The government must show a compelling interest to force "particular claimants"—pro-life pregnancy centers and doctors—to tell women the names of abortion providers, or that abortion is a "treatment option" for pregnancy. But this is impossible. The names of abortion providers are available instantly online—even in most people's pockets on their phones—by a simple internet search. Even positing someone without internet access, they could go to a library and look up those names, or a gas station to ask to borrow the phone book (phone books do still exist).

SB 1564 also does not serve a compelling interest because it singles out conscientious objectors rather than imposing its mandate on all medical facilities. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989)).

SB 1564's mandatory speech only applies in the context of "conscience-based refusals." Complaint Exh. A. Thus it coerces the Plaintiffs because they do not provide abortions as a matter of conscience. Exhs. 1–3. But SB 1564 does not impose its disclosures on all medical facilities and professionals treating pregnancy, nor even on all that refrain from abortions. SB 1564 only imposes its compelled speech on medical providers who do not do abortions *because of their conscience*. If they do not do abortions for any other reason, SB 1564 does not apply. This leaves "appreciable damage" to the government's claimed interest. If a woman goes to a medical provider who does not do abortions for some other, non-conscience reason, the state is content to leave her without SB 1564's mandatory information. There is no compelling interest to discriminatorily target conscientious beliefs.

The State also has no interest in forcing Plaintiffs to discuss the "benefits" of abortion they disagree with, or to tell women it is a "treatment option" to destroy the unborn child. SB 1564 does not force Plaintiffs to perform abortions—only to *either* perform them, *or* give out information about providers. But in that case, a woman who wants an abortion must see another provider. This is a built-in less restrictive means, because it is necessarily true that the other provider who is willing to perform the abortion can tell the woman its benefits and affirm it as a treatment. There is no need to require pro-life pregnancy centers, doctors, and nurses to speak what a woman will necessarily be able to learn from a doctor she must see if she wants an abortion. She can find that doctor in an instant online.

The same conclusion is true regarding Dr. Caruso and Aid for Women's objections to promoting contraception as Catholic persons and organizations. Contraception is available at practically every pharmacy in the state, and those pharmacists as well as most doctors are available to tell women of its benefits and treatment options. Moreover, Dr. Caruso has many

patients who come to him precisely because he respects human life and fertility in all circumstances. *See* Exh. 3. Forcing him to speak about abortion or contraception in the way SB 1564 mandates would deprive his patients of the pro-life, pro-fertility physician they want to see.

B. SB 1564 Violates the Freedom of Speech.

Article I, § 4 of the Illinois Constitution declares that "All persons may speak, write and publish freely." The Illinois Supreme Court has explained that this clause "may afford greater protection than the first amendment in some circumstances." *City of Chicago v. Pooh Bah Enter., Inc.*, 224 Ill. 2d 390, 446-47, 865 N.E.2d 133, 168 (2006). The court has looked at other jurisdictions with similar speech provisions for guidance on that issue. *Id*. Notably, the California Supreme Court has concluded that its similar state constitutional clause protects "commercial speech" more rigorously than the First Amendment does, if it is truthful and not misleading, and therefore such speech is given the same protection as noncommercial speech. *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 497, 12 P.3d 720, 738 (2000).

"In the context of protected speech," any "difference between compelled speech and compelled silence . . . is without constitutional significance"—both are equally protected. *Riley*, 487 U.S. at 796.[1] Similarly there is no distinction between "compelled statements of opinion" and "compelled statements of 'fact': either form burdens protected speech." *Id.* at 797–98. "Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws banning speech. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 624, 642 (1994). "If the First Amendment means anything, it means that regulating speech *must* be a last—not first—resort. *Yet here it seems to have been the first strategy the Government thought to try.*" *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (emphasis added).

[1] Federal cases also provide guidance for interpreting Article I, § 4. Though the First Amendment may provide less protection, a speech regulation that cannot survive scrutiny there necessarily falls under Illinois' constitution.

1. SB 1564 Is Subject to Strict Scrutiny and Fails that Test.

SB 1564 is subject to strict scrutiny because it is a content-based law. A compelled speech law is "content-based," because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. "A law that is content based on its face is subject to strict scrutiny." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015); *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (laws that are content or viewpoint based "must satisfy strict scrutiny"). SB 1564 is subject to strict scrutiny because it forces Plaintiffs to give information about doctors who may offer abortions, to speak about abortion as a treatment option with benefits, and to do the same for Dr. Caruso and Aid for Women regarding contraception.

In fact, SB 1564 goes further than being simply content-based. It is a law disfavoring Plaintiffs' viewpoint. "Viewpoint discrimination is [] an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). As discussed above, SB 1564 does not apply to all medical providers or all those that do not provide abortions: it singles out conscientious objectors and only applies its compelled speech in the context of "conscience-based refusals." Complaint Exh. A. The law is an explicit attack grounded on one's conscientious belief. Therefore it is viewpoint based. Such a rule is unconstitutional *per se*. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995) ("The Speech Clause has no more certain antithesis" than to "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.")

As discussed above regarding RFRA, SB 1564 fails the strict scrutiny test.

2. SB 1564 Does Not Receive Lower Scrutiny, and Would Fail Those, Too.

SB 1564 should not receive a lower level of scrutiny under the commercial speech or professional speech doctrine sometimes used for the First Amendment, for several reasons. First, as discussed above, the Illinois Constitution provides broader protection than the First Amendment. It should be deemed to require full speech protection—strict scrutiny—in the context of speech that is truthful and not misleading, even in a medical context. *See Gerawan Farming*, 24 Cal. 4th at 497. Second, PCCR and Aid for Women offer all their services free of charge, and thus they are not commercial speakers. Exhs. 1 & 2. Regulated professionals acting for no charge and to advance public advocacy receive the highest level of protection for their speech. *See In re Primus*, 36 U.S. 412 (1978) (requiring strict scrutiny, not intermediate scrutiny, to be imposed on a law burdening the speech of attorneys at the ACLU).

Third, in either a non-profit or for-profit context the doctor-patient relationship is sacrosanct and should receive strict scrutiny. Speech by doctors to patients about controversial issues "may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (striking down a law regulating whether doctors can recommend medical marijuana) (quoting *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995)); *but see NIFLA v. Harris*, No. 3:15-02277, 2016 WL 5956734 (9th Cir. Oct. 14, 2016) (upholding under the First Amendment a pregnancy center disclosure law).

Lower scrutiny levels are especially inapplicable when the state is not ensuring that informed consent happens for a medical procedure. SB 1564 is not an informed consent law such as can be required before an abortion. *See Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 881–83 (1992). It is an attempt to force speech when a medical facility or professional is *not* performing a procedure. This pursues none of the government's interests in ensuring that when a

patient does have a surgery, she provides informed consent. SB 1564 is a simple attempt to force medical professionals to speak messages about controversial health issues to which they object.

Even if a lower scrutiny level applied, SB 1564 should be deemed to fail freedom of speech scrutiny. The Fourth Circuit struck down disclosures relating to abortion in *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014), where it held that a law that requires doctors to describe fetal facts to a woman prior to an abortion, because those facts "fall on one side of the abortion debate." The Second Circuit also ruled that forcing a pro-life center to speak about abortion and refer to medical providers is unconstitutional either under the strict scrutiny test or under intermediate scrutiny. *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 249–50 (2d Cir. 2014). Likewise, the Supreme Court has struck down content-based speech restrictions in the commercial pharmaceutical context. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–65 (2011).

II. Plaintiffs Face Irreparable Harm and Inadequate Remedy at Law.

"[A] continuing violation of a constitutional right that cannot be adequately compensated with money, coupled with an inadequate remedy at law, constitutes a *per se* irreparable harm." *C.J. v. Dep't of Human Servs.*, 331 Ill. App. 3d 871, 891, 771 N.E.2d 539, 557 (Ill. App. 1st 2002). No adequate remedy exists where there is a "continuing violation" of rights and where damages cannot be determined. *Id.* This is a case of irreparable harm and an inadequate remedy at law. Beginning on January 1, 2017, and before that date when Plaintiffs must develop speech "protocols," SB 1564 will subject Plaintiffs to a continuing violation of their right to freedom of speech and their rights under RFRA. RFRA explicitly authorizes appropriate judicial relief, 775 ILCS 35/20, and the legislature intended it to embody the constitutional right to free exercise of religion. 775 ILCS 35/10. SB 1564's violations are not subject to damages calculations allowing adequate remedies at law. They force the Plaintiffs to either violate their core beliefs or cease

engaging in their expressive activities, serving the community, and indeed practicing medicine. The women and patients who rely on Plaintiffs' services cannot be remedied at law if SB 1564 deprives them of their doctor or the services of a pregnancy center. Equitable relief is necessary to protect the Plaintiffs' rights.

III. The Balance of Equities and the Public Interest Favor Relief for the Plaintiffs.

In balancing the equities for granting injunctive relief, the merits of the claim itself in the Plaintiffs' favor can suggest the equities also favor the Plaintiffs. *Lucas v. Peters*, 318 Ill. App. 3d 1, 17, 741 N.E.2d 313, 326 (Ill. App. 1st 2000). This is true here. RFRA requires the State not to burden religious beliefs without a compelling interest and pursuing a least restrictive means. The State suffers no inequity by being required to comply with RFRA and the constitution, and indeed to do otherwise would harm the public interest.

IV. The Court Should Issue the Injunction with No Bond Required

Whether to impose a bond is within the Court's discretion, and should pertain to the monetary damages the defendant would suffer if the injunction is wrongfully entered. 735 ILCS 5/11-103. Defendants would suffer no monetary damages by enjoining their enforcement of SB 1564 against Plaintiffs. Indeed, Defendants would save money by refraining from the enforcement process. Therefore Plaintiffs ask the Court to impose no bond.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for preliminary injunction.

Respectfully submitted this 27th day of October, 2016.

s/ Matthew S. Bowman

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