THE NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES

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Pregnancy Centers and the Law

INTRODUCTION

There are more than 2,750 life-affirming pregnancy centers nationwide performing incredible work supporting women and their choice for life. In 2022 alone, these centers provided more than $385 million in free services and goods in their communities.[1] This workshop will review the current legal challenges that pregnancy centers are facing and review legal topics that are of concerns for pregnancy centers.

History of Attacks against Pregnancy Centers

Pregnancy centers have been in existence for more than 50 years. From almost the beginning they have been under attack by those that oppose them. In 1987, Dr. Marvin Olasky, Ph.D., a professor of journalism at the University of Texas in Austin, undertook research to uncover the roots of the ongoing hostile opposition to the work of pregnancy centers. His findings were published in *Anatomy of a Negative Campaign, Public Relations Review, Autumn 1987*. The impact of the negative public relations campaign generated political and legal activity by abortion proponents against the work of pregnancy centers. Since the 1980s, pregnancy centers have face the following types of opposition: Congressional hearings, state legislation, legal actions, not to mention the onslaught of attacks from media and academia.

Recent Litigation Involving Pregnancy Centers

NIFLA v. Becerra, 138 S. Ct. 2361 (2018). US Supreme Court held (5-4) that the California law requiring pregnancy center to post certain signs and statements unduly burdened their free speech rights.

In 2015 California passed the "Reproductive FACT Act." Under the law, medically licensed pregnancy centers were required to post signs and in all advertising that the state offers free or low-cost abortions. Not only that, but the pregnancy centers must also include a phone number where women can call to get referrals for abortion

[1] Hope for a New Generation, Charlotte Lozier Institute, 2023, www.lozierinstitute.org/pcr

providers. The law required the disclosure be in at least 48-point font, or font the size of the advertisement. It also required centers to make the state-imposed disclosure stand out against their own advertisement. Furthermore, the law required non-medical centers to disclose that they were not medical facilities.

NIFLA, represented by Alliance Defending Freedom, sued on behalf of pregnancy centers in the United States District Court for the Southern District of California requesting a preliminary injunction while the court decided if the law was constitutional. The District Court denied the preliminary injunction, and NIFLA appealed to the Ninth Circuit, which affirmed the District Court. NIFLA then sought review by the United States Supreme Court on a writ of certiorari. The writ was granted on November 13, 2017, and argument took place on March 20, 2018.

The United States Supreme Court held that the law's requirement was underinclusive in relation to the stated goal of the FACT Act and the FACT Act's requirement that unlicensed covered facilities give notice of their unlicensed status was unjustified and unduly burdensome, even if subject to deferential review. Even if California had offered more than a hypothetical justification for the notice, the FACT Act unduly burdened protected speech by imposing a government-scripted, speaker-based disclosure requirement that was wholly disconnected from California's informational interest.

NIFLA v. Raoul, Case No. 3:23-cv-50279 (N.D. Illinois 2023). The District Court entered a permanent injunction on December 14, 2023 against an Illinois law that targeted the advertising of pregnancy centers as a violation of the First Amendment.

Illinois passed a law (SB1909) in 2023 targeting pregnancy centers by labeling their constitutionally protected speech—but not abortion facilities' speech—as so-called "deceptive business practices," on account of their pro-life viewpoint. NIFLA, represented by the Thomas More Society, challenged the law on behalf of its member centers. The law openly targeted alleged pro-life "misinformation" on the basis that that pro-life views conflict with Illinois's rampant pro-abortion ideology. In doing so the law ran headlong into bedrock protections of the First Amendment, which prohibit government from cutting off one side of ongoing controversies by censoring speech with which it disagrees, and from discriminating against religiously motivated speech. The "Deceptive Practices of Limited Services Pregnancy Centers Act" was a blatant attempt to stamp out access to vital women's pregnancy resources across the state, simply because pregnancy help centers do not provide abortions and "emergency contraception."

Judge Johnston issued a Preliminary Injunction against the law in August 2023. In his order granting the preliminary injunction, Judge Johnston wrote:

> *SB 1909 is both stupid and very likely unconstitutional. It is stupid because its own supporter admitted it was unneeded and was unsupported by evidence when challenged. It is likely unconstitutional because it is a blatant example of government taking the side of whose speech is sanctionable and whose speech is immunized—on the very same subject no less. SB 1909 is likely classic content and viewpoint discrimination prohibited by the First Amendment.*

NIFLA v. Treto, Case No. 16 C 50310 (N. D. Ill. 2017). At Issue: Constitutionality of Illinois law requiring medical providers who oppose abortion to provide referrals to abortion providers and to counsel their patients on the benefits of abortion.

The state of Illinois SB 1564 passed in 2016 which would force pregnancy care centers, medical facilities, and physicians who conscientiously object to involvement in abortions to adopt policies that provide women who ask for abortions with a list of providers "they reasonably believe may offer" abortion and to counsel them on the benefits of abortion. NIFLA, represented by Alliance Defending Freedom, filed suit requesting a preliminary injunction against the law. In July of 2017 the United States District Court for the Northern District of Illinois granted the preliminary injunction. A bench trial occurred in September 2023 and a decision is being awaited.

Compass Care, NIFLA and First Bible Baptist Church v. Andrew Cuomo, et al. Case No. 1:19-CV-1409 (N.D. N.Y.). In 2019, then N.Y. Governor Cuomo signed the "Boss Bill" which forces pro-life organizations to hire employees who are pro-abortion. We were not able to obtain an injunction preventing the law from going into effect and the District Court held the law was not unconstitutional (except for a compelled speech component required in employee handbooks). The case was appealed to the Second Circuit Court of Appeals. On February 27, 2023, our companion case, *Slattery v. Hochul*, Case No. 21-911(2nd Cir. 2023) received a ruling from the Second Circuit which held that there is a plausible claim that the Boss Bill unconstitutionally burdens the center's right to freedom of expressive association—as guaranteed by the First and Fourteenth Amendments—by preventing it from disassociating itself from employees who, among other things, seek or advocate for abortions. Oral Argument in our case occurred on December 12, 2023 in the Second Circuit Court of Appeals in New York City. Awaiting the decision.

Sisters of Life v. McDonald, Case No. 22-cv-7529 (S.D. N.Y. 2022). New York passed a law targeting life-affirming pregnancy centers by authorizing the New York Commissioner of Health to demand private information from pregnancy centers that do not offer abortion services. The law would have allowed government officials access to sensitive internal documents and force centers to turn over private information that would jeopardize their trusting relationships with women in need. Sisters of Life sued New York in federal court challenging the law and the State agreed to back down in a settlement agreeing not to seek enforcement against the Sisters.

NIFLA v. Clark, Case No. 2:23-cv-00229 (D.C. VT 2023). Vermont passed a new unfair and deceptive act prohibiting pregnancy centers from publishing any untrue or misleading. It also made it unprofessional conduct to implement APR. Alliance Defending Freedom is representing NIFLA and our member centers in Vermont challenging the constitutionality of the law. Hearing on the State's Motion to Dismiss is scheduled for May 16, 2024.

Obria v. Fergusen, Case No. 3:23-cv-06093 (W.D. WA 2023). Obria, a network of pregnancy centers, filed a lawsuit against Washington Attorney General Robert Ferguson after he conducted civil investigations into the organizations. While AG Ferguson claims that the investigations were made to ensure compliance with Washington's Consumer Protection Act, the nonprofits argue that the investigations are both unlawful and unrelated to the AG's stated purpose. The nonprofit organizations, represented by attorneys at ADF, argue that the civil investigative demands are unconstitutional and unlawfully target the organizations' free speech and religious exercise. Oral Arguments were held in District Court on Feb 28, 2024 for Declaratory Relief.

State of California v. Heartbeat International, Case No.: 23CV044940 (CA Sup. Crt.) The California Attorney General, Robert Bonta, filed suit against Heartbeat International (HBI) and a pregnancy medical center in September 2023 alleging their advertisements about APR are fraudulent and misleading. Thomas More Society is representing HBI and Real Options and they have filed a Demurrer to the Complaint.

First Choice Women's Resource Center v. Platkin, AG of New Jersey. The Attorney General served extensive subpoena requests upon two centers in New Jersey asking for years' worth of advertising, all their manuals, etc. ADF Alliance Defending Freedom filed a constitutional challenge in federal court but on December 12, 2023, the judge dismissed the complaint stating that the case was not ripe because it had to be litigated in state court first. An appeal to the federal appellate court was unsuccessful. ADF petitioned for a Writ of Mandamus to the US Supreme Court on February 26, 2024 asking the Court to require the District Court to address the constitutional issues in the case.

Heartbeat International v. State of New York. In April 2024, the Attorney General served a Notice to Sue upon 12 pregnancy centers and Heartbeat International for advertising Abortion Pill Reversal (APR) in violation of General Business Law Article 22-A, §§349 and 350. The centers, represented by attorneys with the Thomas More Society, proactively filed a complaint in state court asking for declaratory and injunctive relief from the latest politically motivated threatened legal action by the Attorney General targeting prolife centers for helping women who want to try to reverse the chemical abortion process.

Legal Concerns for Pregnancy Centers

1. State abortion laws. Since *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the landmark case overturning *Roe v. Wade*, 410 U.S. 113 (1973), abortion laws have returned to the states. State laws regarding abortion limitations vary widely and are ever changing. For example, the Florida Supreme Court in a 6-1 ruling upheld a 15 week ban on April 1, 2024 in *Planned Parenthood v. Florida*, No. SC2022-1050. A 6-week ban was set to go into effect 30 days after that ruling. See 2023 Fla. SB 300. Codified at Fla. Stat. § 390.0111. The same day, the Supreme Court in a 4-3 ruling approved a ballot measure under way for the November election that would enshrine abortion in their state constitution. No. SC2023-1392, *Advisory Opinion to The Attorney General Re: Limiting Government Interference with Abortion.*

2. Religious freedom. Centers need to make sure their religious foundations are in place in their non-profit Article of Incorporation, Bylaws, Mission Statement, Statement of Faith, etc. *Spencer v. World Vision,* 633 F. 3d 723(2011).

   The Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4, forbids the federal government from 'substantially burdening a person's exercise of religion' unless it shows that burden is in furtherance of a compelling governmental interest and is the least restrictive means of doing so. *Singh v. Berger*, 56 F.4th 88 (D.C. Cir. 2022). As many as 36 states have RFRAs or RFRA-like laws as well. See https://www.becketlaw.org/research-central/rfra-info-central/map/

   Employment protections through the Title VII exemption — *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) — Section 702 of the Civil Rights Act of 1964, exempts religious organizations from the Act's ban in Section 703 on religious discrimination, holding it does not violate the Establishment Clause. Centers need to make sure they are formed with religious purposes in order to be exempt under Title VII.

   The "ministerial exemption" applies to employees of pregnancy centers as it did for other religious entities such as in the U.S. Supreme Court cases of *Hosanna-Tabor v. EEOC,* 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) — in regards to employment decisions by religious entities with respect to ministerial and teaching positions which are not subject to review under civil rights and employment discrimination laws.

3. Medical Record Privacy. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191 and state medical privacy laws provide protection of patient's private health information. This entail setting up systems to ensure that patient information is held securely and confidentially and that a policy is in place for medical records requests and security risk assessments. States often add to

HIPAA, so state law must be researched as well. See for example California's Confidentiality of Medical Information Act (CMIA), Civil Code Sections 56-56.37.

4. Medical Record Retention. State laws address how long medical records must be retained and thereafter may be appropriately destroyed. For example, in Virginia, practitioners shall maintain health records for a minimum of six years following the last patient encounter. Va. Code § 54.1-2910.4. However, practitioners are required to maintain health records for minors for a longer period: until the child reaches 18 or is emancipated, with a minimum time for record retention of six years from the last patient encounter regardless of age of the minor.

5. State medical licensing laws and scope of practice. Pregnancy centers that offer medical services do so under the direction and supervision of a licensed physician. State laws vary as to clinic licensing, scope of practice of medical professionals, use of standing orders, medical record retention periods, release of records, etc. Some states have clinic licensing laws (i.e., CA H&S 1200, MA 150 CMR 140). And medical professionals cannot act outside the scope of their license, so care needs to be taken that RNs are not diagnosing pregnancy and LPNs are not performing ultrasounds.

6. Mandatory Reporting Requirements. Medical professionals and facilities are most likely mandatory reporters for child abuse/neglect. Centers as mandatory reporters must report all reasonable suspicions of abuse or neglect of a minor. Balancing this responsibility with the accompanying right to privacy most states recognize can be challenging. For example, in New Jersey, N.J. Stat. Ann. §9:6-8.10 "*Any* person having reasonable cause to believe that a child has been subjected to child abuse, including sexual abuse, or acts of child abuse *shall* report the same immediately…" What makes this matter more complicated is in the area of consensual sexual relations with a minor. State laws vary as to the age of consent and the age gap between partners for making abuse reports. Many states would require reporting only if the actor is in a place of authority over the child, like a parent, coach, teacher. For example, see Va. Code § 63.2-100 (4). Many states have Romeo-Juliet laws that state if both parties are minors and the age difference is less than 4 years than the older minor will not be prosecuted for statutory rape. See for example North Carolina's Chapter 14, Article 7B, NC G.S. 14-27.

7. Minor's ability to consent to medical services. It is a well-established principle that minors are deemed to lack the capacity to consent to medical services and need a parent or guardian to consent on their behalf. H. Rodham, "Children under the law" *Harv Educ Rev*. 1973;43(4):487–514. Today, laws reveal a complex array of exceptions to this principal, including many states who permit a minor to consent to pregnancy related healthcare. This is helpful for pregnancy centers who then can perform pregnancy testing and ultrasound for minors based on her own consent. See this American Academy of Pediatrics publication for information about the different state laws: "State-by-State Variability in Adolescent Privacy Laws." https://publications.aap.org/pediatrics/article/149/6/e2021053458/187003/State-by-State-Variability-in-Adolescent-Privacy.

8. Telehealth. Telehealth policies continue to evolve since becoming popular during covid. It is a growing area in the medical world and is governed by federal and state law. The U.S. Health and Human Services branch gives guidance in this regard at: https://telehealth.hhs.gov/providers/telehealth-policy/telehealth-policy-updates State regulations can vary: https://www.cchpca.org/all-telehealth-policies/. If centers want to add telehealth services, they need to comply with federal and state law that most likely includes telehealth consents, health portals and HIPAA compliance.

9. Employment laws. While the Fair Labor Standards Act, 29 U.S.C. Chapter 8 provides federal guidelines, states can pre-empt those rules in many areas, including increase of the minimum wage, sick time and rest period, etc... Pregnancy centers need assistance in figuring out labor laws that apply to their employment practices. An area of concern is in determining which employees are exempt vs. non-exempt. To be exempt from overtime pay, an employee must be paid a certain salary for an executive, administrative or professional job. The U.S. Supreme Court analyzed what it means to be paid on an "salary basis" in its recent decision *Helix Energy Solutions Group, Inc. v. Hewitt*, No. 21-984 U.S. LEXIS 944 (Feb. 22, 2023). Another area of concern is in the wrongful termination arena.

Action Going Forward

Join NIFLA's Attorney Coalition (NAC) to network with like-minded attorneys and provide services to local pregnancy centers. For more information go to: https://nifla.org/training/nifla-attorney-coalition-nac/

NIFLA's Leadership Summit is March 17-20, 2025 in historic Williamsburg, Virginia. This conference brings together those leaders foremost in the fight for life and on the front lines at pregnancy centers. It is geared towards center leadership, medical providers and attorneys. CLEs will be provided for attorneys. For more information visit: https://niflaleadershipsummit.com

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NIFLA has existed for 31 years to protect life-affirming pregnancy centers targeted by pro-abortion groups and legislation. Through legal counsel, education, and training, NIFLA enables member centers to avoid legal pitfalls in their operations. NIFLA now represents more than 1,750 pregnancy centers nationwide. Thomas Glessner, J.D. is the founder and President of NIFLA. Anne O'Connor, J.D. is the Vice President of Legal Affairs.

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