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STUDY THE OPTIONS PLEASE INC. d/b/a CARE NET
JAMES, LETITIA

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JAMIE ROMEO

MONROE COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
MONROE COUNTY

HEARTBEAT INTERNATIONAL INC., on behalf of itself and its members and clients, and

CRISIS PREGNANCY SERVICES INC. d/b/a COMPASSCARE, CARING CHOICES PREGNANCY HELP COMMUNITY INC., STUDY THE OPTIONS PLEASE INC. d/b/a CARE NET PREGNANCY CENTER OF WAYNE COUNTY, PREGNANCY CENTER OF PENN YAN, INC. d/b/a CARE NET PENN YAN, ADIRONDACK PREGNANCY CENTER d/b/a ASCENTCARE, THE BRIDGE TO LIFE INC. d/b/a BRIDGE WOMEN'S SUPPORT CENTER, ALTERNATIVE CRISIS PREGNANCY CENTER, INC. d/b/a CARE NET PREGNANCY CENTER OF THE HUDSON VALLEY, 1ST WAY LIFE CENTER INC., NEW HOPE FAMILY SERVICES, INC., THE CARE CENTER d/b/a SOUNDVIEW PREGNANCY SERVICES AND SOUNDVIEW, CARE NET PREGNANCY CENTER OF CENTRAL NEW YORK d/b/a WILLOW NETWORK, on behalf of themselves and their clients,

Plaintiffs,

v.

LETITIA JAMES, in her official capacity as Attorney General of the State of New York.

Defendant.

Index No. E2024007242

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

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INTRODUCTION

Attorney General Letitia James has just blitzed Plaintiffs and other pregnancy help organizations ("PHOs") statewide with notifications that she intends to sue them for their *speech*. She alleges that Plaintiffs violate three statutes that ban deceptive business practices via "repeated and persistent misleading statements and omissions in the advertising of the Abortion Pill Reversal ('APR') protocol." Verified Complaint, at Ex. 1. Her position is meritless.

Plaintiffs engage in only noncommercial speech about APR, and no controlling state or federal court has ever held that any of the statutes James invokes applies to limit noncommercial speech on matters of public importance like those at issue here. In any event, all of Plaintiffs' communications about APR are soundly supported by decades of research and actual medical practice. Yet even so, James' threats are doing exactly what she presumably designed them to do: scare Plaintiffs, other targeted PHOs, and even PHOs not yet targeted into curtailing or abandoning their communications about APR.

James has long been a strident abortion advocate. From street marches to tweetstorms, she has not hesitated to use her power and platform to attack corporations, nonprofits, and even sister states with whose abortion viewpoint she disagrees. But last week, with her barrage of boilerplate, identically worded, evidence-free "Notices of Intention to Sue", James' official bullying of pro-life PHOs that offer invaluable free assistance to expectant mothers in need has risen to the level of massive, imminently threatened violations of Plaintiffs' civil and constitutional rights. Hence this action and its plea for emergent relief for the targets of James' intended *in terrorem* litigation.

The imminently threatened deliberate chill of the content of Plaintiffs' speech, and the intended suppression of a viewpoint James disfavors, violate Plaintiffs' free speech and free exercise

rights under the federal and state constitutions. Because those violations are causing Plaintiffs irreparable harm, Plaintiffs move the court for temporary and preliminary injunctive relief prohibiting James: (1) from further threatening to sue Plaintiffs under Sections 349 or 350 of the New York General Business Law or Section 63(12) of the New York Executive Law; (2) from initiating or maintaining the threatened *in terrorem* litigation; and (3) from imposing on Plaintiffs any injunctive relief, restitution, damages, civil penalties, auditing, compliance review, or any other penalties under those provisions, as she has threatened. Plaintiffs also seek a declaratory judgment establishing that Plaintiffs' protected speech and related expressive association do not violate Sections 349 or 350 of the New York General Business Law or Section 63(12) of the New York Executive Law.

BACKGROUND

Plaintiffs are non-profit PHOs, almost uniformly religiously motivated, that provide a range of charitable services without charge. *See* Verified Complaint, at ¶¶ 8, 28-34, 80-88, 108-13. They are compelled to provide information and assistance to women who want to stop a chemical abortion process they may regret, *see* Verified Complaint, at ¶¶ 33-34, 93, 113, and which has begun to kill their unborn children, while there is still time to save them, *see* Verified Complaint, at ¶¶ 46-58. The process, commonly known as "abortion pill reversal," involves the simple administration of a bioidentical form of the natural, pregnancy-protecting hormone progesterone, which is routinely and safely administered by physicians to prevent miscarriage or increase the odds of a successful IVF procedure. *See* Verified Complaint, at ¶¶ 144-48.

Determined to prevent women from exercising this reproductive choice, which defeats the abortions she favors, James last week bombarded the Plaintiffs with generic, identically worded "Notices of Intention to Sue" (NOIs) stating that she intends to sue them for "deceptive business

practices" and "false advertising" related to their speech about APR, which suits will "seek injunctive relief, restitution, damages, civil penalties, auditing and compliance review, costs, and such other relief as the court may deem just and proper"—in other words, the destruction of the targeted PHOs. *See* Verified Complaint, at ¶¶ 9-11. The threatened *in terrorem* lawfare by a powerful public official and her battalion of attorneys against charitable organizations with limited resources would jeopardize Plaintiffs' First Amendment-protected, Christian life-affirming missions, as well as the missions of all similarly situated PHOs in the State of New York that James has not yet gotten around to threatening.

Given the dates on which the Plaintiffs were served during James' barrage of evidence-free NOIs, all the Plaintiffs now face the imminent prospect of vexatious litigation designed to cripple or destroy their ability to assist women in need who wish to exercise their reproductive choices *in favor of life*.

James has commenced this blunderbuss lawfare without citing any evidence, and the NOIs fail to identify a single allegedly deceptive communication by any particular PHO. Yet, having made no substantive accusation of wrongdoing—because there is none—James has given the Plaintiffs a mere five business days to explain why they should not be sued for "injunctive relief, restitution, damages, civil penalties, auditing and compliance review." *See* Verified Complaint, at ¶ 11. The reason the NOIs lack even minimal detail is immediately obvious: the cited statutes do not apply to the First Amendment-protected and religiously motivated speech she targets (along with the related expressive activity). The purpose of James' blitz of evidence-free, boilerplate threats to sue every PHO in her sights is equally obvious: harassment and intimidation.

None of the statutes cited in the NOIs covers Plaintiffs' APR communications because the communications are entirely noncommercial. Lead Plaintiff Heartbeat International ("Heartbeat")

is a worldwide association for PHOs that provides model APR messaging materials to its affiliates for free. *See* Verified Complaint, at ¶¶ 28-34, 66, 70-71. Plaintiff CompassCare Pregnancy Services, Inc. ("CompassCare") and additional Plaintiffs, Caring Choices Pregnancy Help Community, Inc., Bridge To Life, Inc., d/b/a Bridge Women's Support Center, Alternative Crisis Pregnancy Center, Inc., d/b/a Care Net Pregnancy Center of the Hudson Valley, Pregnancy Center of Penn Yan, Inc. d/b/a Care Net Penn Yan, Adirondack Pregnancy Center, d/b/a AscentCare, 1st Way Life Center, Study The Options Please, Inc., d/b/a Care Net Pregnancy Center of Wayne County, New Hope Family Services, Inc., The Care Center, Inc., d/b/a Soundview Pregnancy Center, and Care Net Pregnancy Center of Central New York, d/b/a Willow Network (collectively referred to for convenience as "the Pregnancy Help Collective") are New York-based PHOs who advocate for the APR alternative to chemical abortion and whose materials and services pertaining to APR are provided free of charge to women urgently in need of assistance in matters of life and death for the children they choose to save. *See* Verified Complaint, at ¶¶ 108-13. No Plaintiff earns a penny from APR communications, directly or through a third party. *See* Verified Complaint, at ¶¶ 63, 70, 88. The lack of remuneration is fatal for an action brought under Section 349. True, that section forbids "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in the state." N.Y. Gen. Bus. Law § 349(a). But that section was enacted to combat novel commercial frauds flooding New York in the late 1960s. Richard F. Dole, Jr., *Merchant and Consumer Protection*, 53 Cornell L. Rev. 749, 750-57 (1968). And no court since then has held that this section also secretly regulates noncommercial speech on matters of public interest. *Genesco Enm't. Div. of Lymutt Indus., Inc. v. Koch*, 593 F. Supp. 743, 75152 (S.D.N.Y. 1984). Its companion section also forbids "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. L.

§ 350(a). But this provision is designed to protect consumers from losing money to advertising swindles such as bait and switch ads. *See* N.Y. State Bar Ass'n, Antitrust L. Symp. 186-99 (1959). No court in the six decades since then has read that loss requirement out of the statute.

The action brought under Section 63(12) of the New York Executive Law has an even greater defect because of the lack of remuneration. That law only gives the Attorney General standing to seek redress and remedies under Section 352 of the General Business Law. That section was enacted after the stock market crash of 1929 to prevent fraudulent communications about stocks, bonds, and other securities. *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'Ship*, 12 N.Y.3d 236, 243 (2009). No court since then has ever understood it to apply beyond that narrow context.

But even if all the statutes James frivolously and vexatiously brandishes in her threat to sue over APR communications were applicable—and none of them are—James could not carry her burden of demonstrating that *any* claim Plaintiffs make about APR's safety or efficacy is deceptive or misleading. Plaintiffs simply represent that APR "sometimes" "can" safely save a pregnancy from ending in abortion. *See* Verified Complaint, at ¶¶ 96-104, 115. This is true. Decades of peer-reviewed scientific evidence and Plaintiffs' own experience supports that claim, and no existing evidence refutes it. *See* Verified Complaint, at ¶¶ 46-56. Some quick scientific background shows that James has no business butting into this sensitive matter of an intimate medical decision by a woman seeking to save her unborn child in consultation with a medical professional who does not share James' politically motivated antipathy toward APR. A pregnant woman's body naturally secretes progesterone to, among other things, stimulate the flow of nutrients to her developing embryo. *See* Verified Complaint, at ¶ 36. The first drug in a chemical abortion regimen (mifepristone) blocks her progesterone receptors to trick her body into cutting off that flow of

nutrients. *See* Verified Complaint, at ¶ 37. The embryo slowly starves until the woman's body can fully restore its natural hormonal balance after the effects of the mifepristone wear off a few days later. *See* Verified Complaint, at ¶ 37. The embryo often, but not always, dies by then. *See* Verified Complaint, at ¶ 39. With luck, however, the child will sometimes survive the assault by mifepristone and, once the drug's effects subside, will come to term and be born. *See* Verified Complaint, at ¶¶ 39, 44, 74. Accordingly, to ensure death during an abortion, a second drug (misoprostol) is administered within one to two days to cause uterine contractions that expel the embryo, *whether the developing child is alive or dead at that point*. *See* Verified Complaint, at ¶ 39.

Because mifepristone does not always kill the embryo, a woman who chooses not to take misoprostol can sometimes save her child. *See* Verified Complaint, at ¶¶ 39, 44, 74. Believing that all women deserve a second chance to choose life, pro-life doctors and medical professionals began in the early 1990s to look for a safe, effective, and reliable way to help a woman's body more quickly detach mifepristone from the progesterone receptors. *See* Verified Complaint, at ¶¶ 44-49. One promising candidate was progesterone, a bioidentical hormone as safe as Tylenol, which had been used for decades to prevent miscarriage. *See* Verified Complaint, at ¶¶ 45-46.

The theory behind progesterone supplementation to prevent the completion of a chemical abortion relies on straightforward biochemistry that is outside Defendant James' area of expertise. Mifepristone starves the embryo by blocking progesterone receptors. *See* Verified Complaint, at ¶ 37. Dislodge the mifepristone from those receptors by giving it a new source of uterine progesterone to bind to, and a woman's body will more quickly reestablish embryo nutrition flow than it otherwise would. *See* Verified Complaint, at ¶¶ 44, 48-50. Sometimes those nutrients will get to the baby in time to save her from dying from starvation. *See* Verified Complaint, at ¶¶ 37,

48-50. In the words of a Yale Medical School professor not involved in developing or advocating for the APR protocol, the procedure is plain "biological sense." *See* Verified Complaint at ¶ 57 and Exhibits thereto. Scientific case studies and series soon confirmed the validity of that theory, showing that progesterone supplementation saves an average of about two out of every three pregnancies when timely administered. *See* Verified Complaint, at ¶¶ 46-47, 53-55. "Abortion pill reversal" was born. *See* Verified Complaint, at ¶47. Indeed, the fact that APR works (and is widely acknowledged to work even by non-prolife sources) apparently motivates James to attack every PHO in the State of New York that advocates for it.

The physician who pioneered the APR protocol set up a website and hotline at his own expense to connect interested women to medical professionals trained in the protocol. *See* Verified Complaint, at ¶ 47. Plaintiff Heartbeat acquired that website and hotline in 2018 and since then has shared it with the members of its Abortion Pill Rescue Network *at no charge*. *See* Verified Complaint, at ¶¶ 60, 62-66. For their part, Heartbeat is aware of more than 1,000 mothers who began chemical abortions but were able to continue their pregnancies and give birth to their babies through Abortion Pill Reversal, with the help of the APR Network. *See* Verified Complaint, at ¶ 67. No Plaintiff knows of any of its patients who ever has suffered a serious side effect from receiving progesterone supplementation, and none has faced a malpractice suit.

No completed scientific study has ever produced a result that even hints that APR is unsafe or ineffective, and the protocol is endorsed by a professional association of obstetricians and gynecologists speaking on behalf of the thousands of medical professionals in their ranks. *See* Verified Complaint, at ¶ 58. The soundness of the science and the lived experience of medical professionals is so compelling that at least twelve states enacted statutes *requiring* physicians administering mifepristone to inform women that the drug's effects sometimes can be reversed.

Clarke D. Forsythe & Donna Harrison, *State Regulation of Chemical Abortion After Dobbs*, 16 Liberty U. L. Rev. 377, 406-08 (2022). Defendant James' disbelief in the science and demonstrable efficacy of APR and disdain for the Plaintiffs' life-affirming message does not render Plaintiffs' speech about that science or lived experience with APR deceptive or misleading under any state statute James cites or that Plaintiffs have found.

Tellingly, James' boilerplate litigation threats do not even suggest that APR as such is dangerous to women, because it isn't. Rather, her baseless threats relate only to *speech about APR*. But because James must know she cannot win a commercial fraud case brought against noncommercial speech that is objectively true, her transparent intent is to terrorize Plaintiffs and other PHOs into a submissive self-censorship lest they be subjected to crippling, blatantly unconstitutional injunctions and ruinous civil penalties and damages, along with massive intrusions into their private affairs by "auditing and compliance monitoring" that would leave them unable to communicate *any* message to women in need. The distinguished history of the Office of the New York Attorney General extends back to 1626—but with her latest threats, James would turn that storied office into a ministry of truth to harass opponents and chill speech she dislikes.

What James is attempting here regarding protected speech about APR flatly contradicts the rationale of the United States Supreme Court in *Nat'l Inst. of Fam. & Life Advocs. v. Becerra,* 585 U.S. 755 (2018) ("*NIFLA*"), which holds that the state has no competence or authority under the First Amendment to impose on private parties, in the name of "science," the government's side of a First Amendment-protected medical debate on a matter of public importance. James' baseless threats also run afoul of the Second Circuit's teaching in *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 239 (2d Cir. 2014), which stands for the proposition that government may not force pro-life pregnancy help organizations like the Plaintiffs here to parrot government propaganda favoring

abortion (including chemical abortion) and disfavoring APR, nor force them to declare in the manner the government demands that they oppose abortion and will not provide or refer for abortion (including chemical abortion).

The New York and federal constitutions require this Court to enjoin James's attempt to impose her viewpoint on APR by using the threat of ruinous fines to suppress the Plaintiffs' freedom of speech and freedom of religion.

ARGUMENT

A court may grant a preliminary injunction if the party seeking relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. *Nobu Next Door, LLC v. Fine Arts Hous, Inc.*, 4 N.Y.3d 839, 840 (2005); *accord* N.Y. Civ. Prac. L. & R. § 6310(a). A temporary restraining order pending a hearing on a preliminary injunction additionally requires the movant to show that "immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the [preliminary injunction] hearing can be had." N.Y. Civ. Prac. L. & R. § 6310(a). Plaintiffs easily satisfy all of these requirements.

I. Likelihood of success on the merits.

Plaintiffs assert in their complaint causes of action against James for violation of their rights to free speech and free exercise of religion under the New York and U.S. Constitutions. They are likely to succeed on all those claims.

A. Defendant James' groundless, indiscriminate threats of *in terrorem* litigation chill plaintiffs' speech in violation of the First Amendment.

1. Strict scrutiny.

"While the law is free to promote all sorts of *conduct* in place of harmful behavior, it is not free 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." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)) (emphasis added). Indeed, the Supreme Court recently noted that it has "rejected [] time after time" the notion that "a government forcing an individual to create speech on weighty issues with which she disagrees" is merely an incidental burden on speech. *303 Creative LLC v. Elenis*, 600 U.S. 570, 559 (2023).

Government actions abridging noncommercial speech based on its content or viewpoint, such as Plaintiffs' communications concerning APR, are presumptively unconstitutional unless narrowly tailored to advance a compelling government interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). That standard of review—strict scrutiny—is the most stringent in all of constitutional law and is satisfied only by government actions that narrowly target "the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). That is because the First Amendment forbids the government from doing precisely what Defendant James imminently threatens to do: "excise certain ideas or viewpoints from the public dialogue*." 303 Creative*, 600 U.S. at 588 (cleaned up). A policy "'aim[ed] at the suppression' of views" is flatly prohibited. *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019).

First of all, that James intends to restrict Plaintiffs' speech based on its content is clear from the face of her "Notices of Intention to Sue." The NOIs explicitly say so, focusing only on Plaintiffs' *communications* about APR's safety and efficacy. Moreover, the NOIs and the litigation threats they contain clearly arise out of James's disagreement with Plaintiffs' favorable messaging on APR. *See Reed,* 576 U.S. at 164 (recognizing laws are content-based regulation of speech when adopted by the government "because of disagreement with the message [the speech] conveys.")

(citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). James' disagreement with PHOs, which she in an official report disdained as "fake 'abortion clinics'" that (in her view) "deceive" women, *see* Verified Complaint, at ¶ 160, demonstrates her antipathy toward PHOs and their prolife messaging *because* they do not provide access and support to what she considers essential for pregnancy-related clinics: abortion on demand. James' focus on speech about APR as an abortion alternative is merely the pretext for the indiscriminate firing of her blunderbuss at (apparently) every PHO of which she is aware.

It is also clear James intends to restrict Plaintiffs' speech based on its viewpoint regarding APR, which is contrary to her viewpoint on APR. That would be an even "more blatant" constitutional violation. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

As noted above, in *NIFLA* the Supreme Court made clear that the state does not have freewheeling authority to police the views of private citizens on medical issues touching on matters of public importance because medical professionals "might have a host of good-faith disagreements, both with each other *and with the government*, on many topics in their respective fields." *NIFLA*, 585 U.S. at 772 (emphasis added). Again, the debate over APR—that is, *speech* about it, with no claim and no evidence that APR has harmed anyone—is simply none of James' business.

Accordingly, the threatened *in terrorem* litigation must undergo strict scrutiny, which it cannot survive for at least two reasons. First, James fails to offer evidence of *any* deceptive or misleading speech by any Plaintiff about APR, let alone deception that is "repeated and persistent" enough to justify onerous speech restrictions. Second, even if James could find such evidence of a compelling need (she has not and cannot), silencing only the speech of Plaintiffs and other targeted

PHOs would be both underinclusive and overbroad as a means of preventing any alleged deception.

a. Defendant's enforcement does not advance an actual governmental interest.

Because James' targeted enforcement burdens speech based on the identity of the speaker, the content of their speech, and the views that they express, she bears the burden of demonstrating that it "furthers a compelling governmental interest. . ." *Reed*, 576 U.S. at 171. The government defendant "must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. It is rare that a regulation restricting speech because of its content will ever be permissible." *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 801 (2011) (internal citations omitted).

Thus does James' threatened enforcement action fail at the start because the Plaintiffs' speech about APR is true, or at worst the subject of free debate among physicians and indeed the public generally, as well as supported by decades of medical science and practice. James has not even tried to specify statements she claims are false. She does not show that the Plaintiffs' speech poses an actual problem; never mind that restricting their speech is actually necessary to the solution. James's threatened lawfare is the classic government "solution" in search of a nonexistent problem. *See American Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1235 (10th Cir. 2021) ("[T]he 'harm' [the state] seeks to avoid is the type of harm that is not only legally non-cognizable but legally protected: that arising out of true speech on a matter of public concern"); *see also Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 576 (2011) ("[T]he fear that speech might persuade [generally] provides no lawful basis for quieting it.").

b. James' threatened enforcement action is not narrowly tailored.

James has threatened to sue, and to subject to injunctions, civil penalties, damages, and "auditing and compliance monitoring," *only* the speech of pro-life pregnancy help organizations that speak positively about APR. But they are far from the only organizations in New York that opine on APR. Take Planned Parenthood of Greater New York (PPNY). That organization claims on its website, quite falsely, that APR has never "been tested for safety, effectiveness, or the likelihood of side effects." Emily, Planned Parenthood of Greater New York, *Ask the Experts: Can the Abortion Pill Be Reversed after You Have Taken It?* (Sept. 14, 2017), https://perma.cc/6Z2D-5EJD. As the Verified Complaint demonstrates, PPNY hides the evidence that reveals the falsity of its claims.

James herself has published misinformation about APR. A reproductive healthcare brochure her office publishes states her claims that "'abortion pill reversal' has not been accepted by any major medical association" or "demonstrated safe or effective through clinical trials." Letitia James, How New York Protects Your Right to Reproductive Health Care, https://ag.ny.gov/publications/reproductive-health-care. James' first claim is a transparent mistruth and her second is craftily misleading wordplay designed to hide the *observed* success of APR. James must know that "clinical studies" in this context are a practical impossibility given the very narrow window for success (only 72 hours) and the consequent lack of a cohort of volunteers sufficiently numerous for an adequately powered study—not to mention the ethical problem of giving pregnant women in James' imaginary "control group" a placebo while their children die in the womb.

James' own words—revealing her animus toward speech in defense of APR—are clearly intended to deceive the public into dismissing APR as an alternative to the chemical abortions she favors. Accordingly, *even if Plaintiffs' speech were unprotected*, and it certainly is not, James'

blatant viewpoint discrimination would still fail strict scrutiny. *See Kelly*, 9 F.4th at 1247 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383-84 (1992) (holding that ordinance prohibiting *some* fighting words but not others violates First Amendment)).

To be sure, James is free to convey her own (misguided) views on APR, "but not through the means of imposing unique limitations upon speakers who . . . disagree." *R.A.V.*, 505 U.S. at 396; Indeed, the Supreme Court has consistently noted that "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *NIFLA*, 585 U.S. at 774.

c. Overbreadth.

Because James vaguely inveighs against "deceptive" and "misleading" information without defining those terms, her planned suppression of PHO speech also likely would eliminate "more than the exact source of the evil [she] seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Because of uncertainty over what James on a given day might decide is deceptive, PHOs almost certainly will self-censor to avoid sharing even ironclad information about APR with their patients. Add to these dangers the fact that the laws under which James seeks to sue Plaintiffs lack scienter requirements as to the alleged false and misleading nature of the challenged advertisements. This makes her threats especially pernicious, as it would capture not only a willful or intentional misstatement, but also innocently uttered statements later deemed to be false as well.

That censorship can be predicted with even more certainty given James' strident abortion advocacy, which negates any claim that her proposed "Ministry of Truth" would be neutral. As one federal judge put it when striking down a law in another state (which similarly lacked a scienter requirement) that also tried to discriminate against PHOs based on the content and viewpoint of their communications: "Only fools would not have their First Amendment rights chilled under

these circumstances." *Nat'l Inst. of Fam. & Life Advocs. v. Raoul*, No. 23-cv-50279, 2023 WL 5367336, at *4, 2023 U.S. Dist. LEXIS 145807, at *12 (N.D. Ill., Aug. 4, 2023). That chill is incompatible with a First Amendment that curbs governmental authority to regulate even objectively false speech, lest an honest speaker "fear that he may accidentally incur liability for speaking." *United States v. Alvarez*, 567 U.S. 709, 723, 733 (2012) (plurality). Much less is it compatible with suppression of political speech nearly certain enough to be inscribed on tablets. Finally, "[a]lthough the State may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information,' … outside that context it may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (quoting *Zauderer*, 471 U.S. at 651); *accord NIFLA*, 585 U.S. at 768-69; *303 Creative*, 600 U.S. at 599.[1] This rule applies "not only to expressions of value, opinion, or endorsement, but equally to statements of fact" (or alleged fact) "the speaker would rather avoid." *Id.*

Indeed, only last year the Supreme Court recognized that "[n]o government ... may affect a speaker's message by forcing her to accommodate other views," nor "alter the expressive content of [the speaker's] message." *303 Creative*, 600 U.S. at 596 (cleaned up). In *NIFLA*, the Supreme Court reaffirmed this principle in a similar context when it struck down disclosure mandates on "licensed" and "unlicensed" pro-life pregnancy centers. *NIFLA*, 585 U.S. at 766.

Here, the speech targeted by James is obviously controversial—at least to those on the other side of the issue—because it concerns "a profound moral issue on which Americans hold sharply conflicting views." *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 223 (2022). That is all the more reason James's planned assault on pro-life pregnancy help organizations must be stopped in its tracks.

Moreover, James seeks to use her NOIs to silence speech that New York statutory law does not even permit her to regulate. That is, Plaintiffs' statements regarding APR—a protocol which is at heart the mere administration of supplemental progesterone—are in conformity with the teachings of the federal Food and Drug Administration, which instructs that "the abortifacient activity of RU 486 is antagonized by progesterone *allowing for normal pregnancy and delivery*." Mifeprex Drug Approval Package, Pharmacology Review(s), U.S. Food & Drug Admin. pp. 16-17 (Sept. 28, 2000) (emphasis added). Sections 349(d) and 350-d recognize a "complete defense" for an advertisement that is "subject to and complies with the rules and regulations of, and the statutes administered by . . . any official department, division, commission or agency" of the federal or state governments.[1] Moreover, this facial exception in §§ 349 & 350—immunizing government-approved messages, even if deceptive and misleading, whatever the topic (and presumably including abortion)—renders the statute non-content neutral. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 576 US at 163-164; *see also City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022) (regulating speech's "substantive message" is content-based). Plaintiffs are

[1] In addition to her enforcement authority, §§ 349 & 350 appear to vest James with the authority to grant exemptions to their dictates for speech she favors: she is head of the New York Department of Law, with statutory authority to regulate business fraud under those statutes, (*see* Executive Law § 63(12)), and presumably authority to promulgate rules for her Department in relation to that regulatory power. *Shuttlesworth v. Birmingham*, 394 US 147, 151 (1969) ("an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.") (quoting *Staub* v. *Baxley*, 355 U.S. 313, 322).

entitled to the benefits of this "complete defense," and either way, they are entitled to strict scrutiny review of James' lawfare against them.

2. **Intermediate scrutiny.**

Even assuming arguendo that strict scrutiny does not apply, James' impending lawfare assault on Plaintiffs' pro-life message supportive of APR, including her demand for auditing and monitoring of the pro-life speech she disfavors, fails intermediate scrutiny. *See NIFLA*, 585 U.S. at 773-79. Under intermediate scrutiny, James' imminently threatened speech restrictions would still have to be at least "narrowly tailored to serve a significant governmental interest," and thus "must not burden substantially more speech than necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014); *accord*, *Evergreen*, 740 F.3d at 245, 250 (pregnancy center disclosure mandate fails "under either intermediate scrutiny ... or strict scrutiny," "considering both the political nature of the speech and the" availability of less restrictive means).

The Supreme Court has already held that a substantially underinclusive speech regulation targeted at pro-life pregnancy centers, but not abortion facilities, fails intermediate scrutiny, *See NIFLA*, 585 U.S. at 773-75. In *NIFLA* the Supreme Court found that plaintiffs were entitled to a preliminary injunction against a California state mandate that licensed pro-life pregnancy centers, but not other facilities that served the same patient population, must inform women of the free public health services the State provides because it was "wildly underinclusive" as to its purpose of "educat[ing] low-income women about the services" while also observing that a "public-information campaign" would have been at least one obviously available more narrowly tailored means. *Id.*

The same is true here. The threatened regulation of *only pro-life pregnancy centers' speech,* but not that of abortion facilities, on a matter of public concern regarding chemical abortion on the one hand, and APR as a way to reverse it on the other, would be both "wildly" under- and over-inclusive as to any asserted government interest in providing what James might deem "true" information from the viewpoint she seeks to impose. James and the State of New York are free to mount a vigorous public information campaign with their preferred message—as James has already begun to do with the brochure published on her government webpage, decrying Plaintiffs as "fake" and attacking APR. *See* https://ag.ny.gov/publications/reproductive-health-care. Another less-restrictive alternative would be for James and the State of New York to provide what they fault Plaintiffs for lacking: a scientific study on APR that meets their arbitrary standards of sufficiency. They are free to devise such a study, to attempt to demonstrate the ineffectiveness or alleged risks of APR—though of course, its results may end up supporting the Plaintiffs' position and reaffirming the US FDA's teaching that progesterone reverses the effects of mifepristone, "allowing for normal pregnancy and delivery." *See* Mifeprex Drug Approval Package. Whatever the results, the women of New York could make their own risk-benefit assessments about APR. Instead of these less restrictive means, James would wield the State government's power to suppress pro-APR speech as "misleading," while taking no action against pro-abortion speech aimed at concealing the already-documented risks of chemical abortion, including death, in the *commercial* propaganda of pro-abortion businesses like Planned Parenthood.

The regime James threatens to impose here would amount to nothing more than her own interests in promoting "only *some* messages and *some* persons" by endeavoring to "eliminate disfavored [pro-life] ideas"—an unquestionably *illegitimate* interest under the First Amendment. *303 Creative*, 600 U.S. at 602 (cleaned up).

3. Commercial/professional speech.

Although the Supreme Court has not clearly defined commercial speech, it has held that three characteristics do justify treating speech as commercial: it (1) proposes no more than a commercial transaction; (2) references a specific product (or service); and (3) proceeds from an economic motivation. *See Bolger v. Youngs Drug Products*, 463 U.S. 60, 66-67 (1983). Significantly, the "existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment," *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975), and speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc*., 487 U.S. 781, 796 (1988).

Under these principles, courts have quickly rejected efforts to classify all speech about abortion as commercial because abortion is "anything but an 'uncontroversial' topic." *NIFLA*, 585 U.S. at 769, but rather, one of "public interest" of "value to a diverse audience," and thus of "constitutional" magnitude. *See Bigelow*, 421 U.S. at 822. Hence in *Evergreen*, the Second Circuit struck down an ordinance creating mandatory disclosures for pro-life pregnancy centers on the ground that it could not be considered a permissible regulation of "commercial speech" *precisely because* the topic of abortion is not "uncontroversial". *Id.* 740 F.3d at 245 n.6. Matters of legitimate controversy, of interest to the public, cannot be settled by the ham-fisted interventions of an attorney general demanding "auditing and compliance monitoring" to ensure that *her* viewpoint on APR is the only one that can be expressed by citizens without the threat of *in terrorem* penalties.

The cited precedents compel the conclusion that Plaintiffs' speech is not properly classified as commercial, and is thus beyond the reach of Defendant James. Plaintiffs' speech does not propose a commercial transaction but simply provides information about a treatment option to

women who have decided they wish to save their unborn children from the process of death by chemical abortion. Although APR is a specific treatment, Plaintiffs' speech concerning it is inextricably intertwined with their pro-life message and is designed to educate women who are looking for information about how to choose life instead of death for the life within them—an exercise of "reproductive rights" if there ever was one. And the Plaintiffs do not make a penny from their APR efforts. Their only reward is in helping women choose life. Plaintiffs' speech about APR is not commercial speech in any meaningful sense.

Neither is this a case involving permissible regulation of professional speech, such as that of doctors or lawyers, as to which government could require disclosure of "purely factual and uncontroversial information about the terms under which ... services will be available." *Zauderer*, 471 U.S. at 651. Nor is any purported regulation of professional *conduct* regarding APR at issue here. Indeed, James' boilerplate litigation threats do not even allege that administration of APR, a well-established medical practice, constitutes professional misconduct. On the contrary, as noted in the Verified Complaint, a dozen states require disclosure of the availability of APR in the informed consent process for a chemical abortion.

When all is said and done, James is attempting to silence speech with which she disagrees, in "the context [of] public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by [the law] provide alternatives." *Evergreen*, 740 F.3d at 249. As explained above, matters of legitimate controversy, of interest to the public, cannot be settled by the interventions of an attorney general demanding "auditing and compliance monitoring" to ensure that *her* opinion on APR is the only one that can be expressed by citizens without fear of *in terrorem* penalties. What James demands cannot satisfy even the lower First

Amendment requirements that would apply to purely commercial speech, much less the fully protected prolife speech of Plaintiffs.

B. Defendant James' threats of *in terrorem* litigation also violate Art. I, § 8 of the New York Constitution, which offers even broader protection of free speech rights.

The Constitution of the State of New York provides that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. Const. art. 1, § 8. This speech right is far broader than the speech right offered by the First Amendment to the federal constitution. *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521 (1988). And, as under the First Amendment, this state free speech right means that government officials may not accomplish what they perceive to be in the best interests of the people of New York by denying them information that is neither false nor misleading. *Harris v. Buffalo*, 394 N.Y.S. 794 (N.Y. Sup. Ct. 1977). Only a compelling state interest can justify limiting that speech right. *People ex rel. Serra v. Warden, Rikers Island Men's House of Detention*, 395 N.Y.S.2d 602, (N.Y. Sup. Ct. 1977).

Because Plaintiffs are likely to succeed on the merits of their federal free speech claim, they *a fortiori* are likely to succeed on their free speech claim under the much more protective New York constitutional protection of speech.

II. The Other Preliminary Injunction Factors Favor Relief.

Plaintiffs are experiencing and will continue to experience irreparable harm so long as James' threats of ruinous litigation (giving Plaintiffs only five business days to respond) hang over their heads because those threats (as discussed above) infringe their freedom of speech under both the federal and state constitutions. This is not a case where "damages sustained are calculable" such that Plaintiffs "would have an adequate remedy in the form of monetary damages" they would

receive after they win at trial. *See Credit Agricole Indosuez*, 94 N.Y.2d 541, 545 (2000). Very much to the contrary, "[t]he loss of First Amendment freedoms" such as speech and free exercise "for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (cleaned up). So, too, Plaintiffs' patients would be irreparably harmed in a very tangible way by being deprived of information about APR and forced into completing the process of putting to death the children they desperately want to save.

The balance of the equities also weighs in favor of granting a preliminary injunction because "the irreparable injury to be sustained … is more burdensome than the harm caused to defendant through imposition of the injunction." *Felix v. Brand Serv. Grp. LLC*, 957 N.Y.S.2d 545 (4th Dep't 2012). Here, because James's actions likely are unconstitutional, any interests the government might have are not enough to outweigh Plaintiffs' "interest in having [their] constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013). An injunction also would give some security to Plaintiffs in the operation of their PHOs while "merely restraining defendant from continuing any unlawful or wrongful activities." *Park S. Assoc. v. Blackmer*, 567 N.Y.S.2d 226, 228 (1st Dep't 1991).

Because the irreparable harm is "immediate" and ongoing with "loss or damage" that will continue to accrue "unless the defendant is restrained before the [preliminary injunction] hearing can be had," the grant of a temporary restraining order also is permitted and appropriate. *See* N.Y. Civ. Prac. L. & R. § 6310(a).

CONCLUSION AND PRAYER FOR RELIEF

Justice Robert Jackson, who studied law in New York and was himself once an attorney general, reminded his fellow Americans that in America no "official, high or petty, can prescribe

what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens by word or act their faith therein." *W. Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). James' campaign of intimidation against Plaintiffs and other PHOs on account of the content and viewpoint of their speech, motivated by a lived religious faith, is a no less unconstitutional attempt to impose as official orthodoxy James' negative view of the reproductive choice to save an unborn child from the horrors of chemical abortion while there is still time to do so by a method *James does not even allege is harmful*—because there is no evidence that it is. This case is all about the message concerning APR that *James* wants to issue, not the message these Plaintiffs have every right to promote under both the federal and state constitutions.

Accordingly, this Court should grant temporary and preliminary injunctive relief prohibiting James during the pendency of this case (1) from further threatening to sue Plaintiffs under Sections 349 or 350 of the New York General Business Law or Section 63(12) of the New York Executive Law; and (2) initiating or maintaining the threatened litigation under those laws; and (3) imposing on Plaintiffs any fee, penalty or disability thereunder.

May 1, 2024

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