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June 26, 2023

Assemblymember Chris R. Holden, Chair
Assembly Appropriations Committee
1021 O Street, Suite 8220
Sacramento, CA 95814

Assemblymember Marc Berman, Chair
Committee on Business and Professions
Legislative Office Building, Room 379
Sacramento, CA 95814

Re: Letter in Opposition to AB 602, a bill targeting pro-life advertising

Dear Chair and Members of the Assembly Appropriations Committee and the Committee on Business and Professions,

On behalf of the Right to Life League and our supporters, we urge you to reject AB 602, the most recent “gut and amend” version of AB 315 and AB 710, to impermissibly regulate pro-life professional speech.

Existing state law already prohibits false and misleading advertising by all business entities.¹ AB 602’s attempted modification of California’s Business and Professions Code § 17200 is vague and overbroad, and is yet another attempt by the state to control the content of pro-life advertising.

In *NIFLA v. Becerra*², the United States Supreme Court found that California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the “FACT Act”), which mandated that crisis pregnancy centers provide certain disclosures about state services, violated the free speech and free exercise rights under the First Amendment:

Content-based laws “target speech based on its communicative content” and “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U. S. ___, ___. The licensed notice is a content-based regulation. By compelling petitioners to speak a particular message, it “alters the content of [their] speech.” *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795. For example, one of the state-sponsored services that the licensed notice requires petitioners to advertise is abortion—the very practice that petitioners are devoted to opposing.³

¹ See Cal. Bus. & Prof. Code § 17200, *et. sec.*

² 585 U.S. ___ (2018).

³ *Id.* Pp. 6–7.

Like the “FACT Act”, AB 602 is another attempt by the state to dictate to pro-life clinics and pregnancy centers how they are permitted to advertise their services. AB 602 runs afoul of the Due Process Clause because the bill fails to give adequate guidance as to what conduct is prohibited.

The bill seeks to prevent an entity performing a “pregnancy-related services” from using false or misleading statements about providing such services. AB 602 will add Section 17620 to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code to include the following:

Article 10. Pregnancy-Related Services

17620. For purposes of this article: . . .

(e) “Pregnancy-related service” means a medical or health counseling service related to pregnancy or pregnancy prevention, including contraception and contraceptive counseling, pregnancy testing, pregnancy diagnosis, pregnancy options counseling, obstetric ultrasound, obstetric sonogram, and prenatal care. . . .

17621. A person doing business in California shall not advertise using a statement that a reasonable person would believe indicates that the person provides a pregnancy-related service, including abortion, emergency contraception, and prenatal care, if the person does not provide that pregnancy-related service or does not make a timely referral to a provider of that pregnancy-related service.

Applying the objective test of a reasonable person standard to determine whether advertising is misleading does not clarify the matter. For example, may a duly licensed medical clinic that provides free ultrasounds and gestational dating but does not provide abortion services advertise as follows without running afoul of AB 602?

Pregnant? Considering abortion? We provide free testing, ultrasound and no judgment. Learn about all your options. Call Women’s Medical Clinic for a same day appointment.

The hypothetical medical clinic provides a “pregnancy-related service”, namely free testing and ultrasound. The advertising does not state whether or not the clinic provides abortion. Is that misleading? Do the questions posed (“Pregnant? Considering abortion?”) require the advertiser to provide all pregnancy-related services, including abortion? Do the words “all your options” necessarily demand a clinic provide everything from STI testing to ultrasound, to abortion and prenatal care through delivery? If the clinic in the hypothetical does not provide abortion and does not refer for abortion, does such advertising run afoul of AB 602? If so, why? AB 602 gives no explanation or guidance.



Laws must be sufficiently clear so that one can know whether or not he is in violation of the law. Vague laws violate constitutional rights to Due Process.⁴ Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In *Rabe v. Washington*,⁵ the U.S. Supreme Court ruled that state law violates the due process clause of the 14th Amendment when its language fails to explain exactly what conduct is prohibited.

AB 602's vague, overbroad language invites arbitrary enforcement by the state that threatens constitutionally protected professional speech by pro-life clinics and centers. "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *NIFLA v. Becerra*, 585 U.S. ___, ___ (2018) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 423–424, n. 19 (1993)).

AB 602 is designed to chill constitutionally protected pro-life professional speech. In an effort to avoid crushing statutory penalties of up to ten thousand dollars (\$10,000) per violation, including restitution, attorney's fees and costs, small pro-life clinics and centers across California will alter the way in which they advertise their services to abortion-minded women in fear of targeted prosecution under AB 602.

The state's failed defense of the unconstitutional FACT Act cost California taxpayers dearly. If SB 602 is enacted, similar legal constitutional challenges to AB 602 may also add significant litigation costs to California's budget deficit. For these reasons, these committees should vote NO on AB 602.

Very Truly Yours,



Susan Swift, Esq.
Vice President of Legal Affairs
Right to Life League

⁴ Library of Congress. (n.d.). *AMDT14.S1.7.3 void for vagueness - constitution.congress.gov*. Constitution Annotated. Retrieved February 10, 2023, from https://constitution.congress.gov/browse/essay/amdt14-S1-7-3/ALDE_00000261/.

⁵ 405 U.S. 313 (1972)

