# WHEN CARE AND CONSCIENCE CONFLICT: COMPELLED SPEECH IN THE AMENDMENT TO THE ILLINOIS HEALTH CARE RIGHT OF CONSCIENCE ACT

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## I. INTRODUCTION

She is too young to take care of a baby. It is the only thought that races through her mind as she climbs the stone steps of the church. She's always admired this church's gothic exterior, with its towering spires and formidable arches. Now that she's inside the church's medical clinic, she feels safe within the four walls, the smell of incense impregnated into the ornate drapes framing the stained glass windows. The rapid pulse in her veins competes with the slow, methodical ticking of the grandfather clock hoisted on the wall as she anxiously waits for the receptionist to call her name. While staring at the checkered marble floor beneath her cold feet, she hears the constant ringing of the receptionist's telephone, amidst the piano music that lulls in the background. She nervously picks at the frayed hole in the left knee of her jeans, as she skims the pamphlet the receptionist handed her when she arrived. She's here to learn about her options. She has questions that cannot be asked of her close family and friends. She trusts the strangers within these four walls. She believes that they can provide the answers she seeks. But what happens if she asks for a service that they cannot, in good conscience, provide? Will they be required to tell her where she may obtain it?

In Illinois, under the amended Healthcare Right of Conscience Act ("the Act"),[1] the health care provider at this church clinic will be required to refer this patient for services they may find morally objectionable. This could include controversial services such as abortion, sterilization, and providing emergency contraception.[2] The amended Act arguably compels health care

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1. 745 ILL. COMP. STAT. ANN. §§ 70/1-14 (West 2017).
2. Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, THE HASTINGS CENTER, http://www.thehastingscenter.org/briefingbook/conscience-clauses-health-care-providers-and-parents/ (last visited Feb. 13, 2017).

providers to provide information they may not have given because of a conscientious objection.[3]

Senate Bill 1564 ("SB 1564") amended the Act.[4] As amended, the Act requires health care providers who refuse to perform a service to refer the patient to a facility that may offer the service.[5] Opponents of SB 1564 have questioned its constitutionality,[6] while proponents argue SB 1564 will ensure women are given medically accurate information even if a healthcare provider is unable to provide the care they need.[7]

Prior to its effective date, the constitutionality of SB 1564 was challenged.[8] The lawsuit raises the question of whether this amendment runs afoul of the Illinois Constitution[9] and Illinois Religious Freedom Restoration Act.[10] However, similar legislation has been challenged in federal courts across the nation as violating the federal constitution, and federal courts have taken varying approaches to analyzing constitutionality.[11] In the context of the federal courts' variegated approach to this important question of federal constitutional law, this Note analyzes the constitutionality of SB 1564 under the First Amendment of the United States Constitution.[12]

Specifically, this Note proposes a test for analyzing the constitutionality of speech restrictions like those in SB 1564, and, applying that test, argues SB 1564 does not unconstitutionally compel speech by the medical providers who are affected by the bill.[13] Part II of this Note provides background on the enactment of SB 1564, the legal challenge that has led to a preliminary injunction against the law, and similar laws adopted in other states. Part III of this Note analyzes compelled-speech case law to develop a test for

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3. *Id.* at 35. (A conscientious objection is "the refusal to perform a legal role of responsibility because of personal beliefs.").
4. Health Care Right of Conscience Act, S. 1564, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2016).
5. 745 ILL. COMP. STAT. ANN. § 70/6.1 (Westlaw 2017).
6. Jay Hobbs, *Illinois Gov. Signs Bill Forcing Christian Doctors and Pregnancy Centers to Promote Abortion*, LIFE NEWS (Aug. 1, 2016), http://www.lifenews.com/2016/08/01/illinois-gov-signs-bill-bill-forcing-christian-doctors-and-pregnancy-centers-to-promote-abortion/.
7. Dean Olsen, *Rauner Signs Bill Altering Health Care Right of Conscience Law*, STATE JOURNAL-REGISTER (Aug. 2, 2016), http://www.sj-r.com/news/20160802/rauner-signs-bill-altering-health-care-right-of-conscience-law.
8. *See* Tina Sfondeles, *Anti-Abortion Centers Doctor Sue Rauner Over Conscience Law*, CHI. SUN TIMES (Aug. 5, 2016), http://chicago.suntimes.com/news/anti-abortion-centers-doctor-sue-rauner-over-conscience-law/ (discussing a lawsuit filed against Gov. Rauner brought by a women's health non-profit, a Rockford medical center and a Downers Grove physician which challenges the constitutionality of SB 1564).
9. *See* ILL. CONST. art. I, §§ 2-4.
10. *See* Religious Freedom Restoration Act, 775 ILL. COMP. STAT. ANN. §§ 35/1-99 (West 2016).
11. *See* A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168 (E.D. Cal. 2015), *aff'd*, 2016 WL 5956744 (9th Cir. 2016); Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Baltimore, 683 F.3d 539 (4th Cir. 2012); Evergreen Ass'n v. City of New York, 740 F.3d 233, 245 (2d Cir. 2014).
12. *See* U.S. CONST. amend. I.
13. This Note focuses only on compelled speech doctrine, without delving into issues related to the Free Exercise Clause.

evaluating the constitutionality of laws like SB 1564. It begins with an overview of First Amendment compelled speech doctrine. It then analyzes and compares three federal circuit cases that have adjudicated challenges to other states' factual disclosure laws similar to SB 1564, and develops from those cases a two-part test for evaluating the constitutionality of such laws. Part IV of this Note applies the test developed in Part III to the text of SB 1564. This analysis concludes SB 1564 does compel speech, but is only subject to intermediate scrutiny. Further, an examination of the law's purposes demonstrates the law satisfies intermediate scrutiny, therefore SB 1564 is constitutional.

## A. Senate Bill 1564

### *1. Senate Bill 1564—Purposes and Legislative History*

Following the landmark decision in *Roe v. Wade*,[14] several state legislatures enacted laws permitting health care professionals and institutions to refuse to provide services related to reproductive health without facing legal, financial, or professional consequences.[15] In 1977, Illinois became one of those states by enacting the Healthcare Right of Conscience Act ("the Act").[16] Prior to enactment, on May, 17, 1977, Representative Edmund Kucharski introduced House Bill 905, the predecessor of the Act, to the House Floor.[17] Representative Kucharski explained the bill would allow "hospitals, doctors, nurses, and hospital aides to refuse to perform or participate in abortions" and also "protect them from any discrimination for such moral or conscientious actions."[18] House Bill 905 passed in the house on its third reading by an overwhelming majority.[19]

As a result, Illinois passed legislation embodying a comprehensive scheme designed to protect the right of conscience of all persons engaged in delivery of health care.[20] The Act demonstrates the "public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to . . . act contrary to their conscience or conscientious

14. *See* Roe v. Wade, 410 U.S. 113 (1973).
15. Adam Sonfield, *Provider Refusal and Access to Reproductive Services: Approaching a New Balance*, GUTTMACHER INST. (May 19, 2008), https://www.guttmacher.org/gpr/2008/05/provider-refusal-and-access-reproductive-health-services-approaching-new-balance.
16. 745 ILL. COMP. STAT. ANN. §§ 70/1-14 (West 2017).
17. House Floor Transcript, 80th Gen. Assemb., 1st Reg. Sess. (Ill. 1977), http://www.ilga.gov/House/transcripts/Htrans80/HT051777.pdf.
18. *Id.*
19. *Id.* (124 voted "aye", while 18 voted "no").
20. §§ 70/1-14.

convictions."[21] It allows faith-based institutions and professionals the right to deny services that conflict with their beliefs.[22]

However, SB 1564 places a new limit on the broad protections afforded by the Act.[23] SB 1564 still permits healthcare professionals to refuse to perform services contrary to their conscience, but "only if the refusal occurs in accordance with written access to care and information protocols designed to ensure (1) the patient receives material information in a timely fashion; and (2) the refusal will not impair the patient's health by causing delay of or inability to access the refused health care service."[24]

SB 1564 was first proposed by Senator Daniel Biss in February 2015.[25] A few months later, the bill was fiercely debated on the Senate Floor.[26] Senator Biss explained the bill would "ensure that patients will be given timely, medically accurate information about the range of legal treatment options available."[27] SB 1564 was characterized by Senator Biss as a compromise between the Catholic Conference, the Catholic hospitals, the Medical Society, the American Civil Liberties Union, and Planned Parenthood.[28] According to Senator Biss, the bill achieved "the goal of ensuring access to information on the part of patients while also protecting an ironclad right of providers to refuse" to provide care that is inconsistent with their "religious or ethical beliefs." [29]

Some senators were skeptical. Senator Barickman reminded the senators that "the First Amendment allows us to speak, but it also allows us not to speak."[30] Senator Righter argued the bill crossed the line regarding crisis pregnancy centers.[31] Crisis pregnancy centers provide numerous social services, such as parenting classes, options counseling, baby supplies, and other financial aid; however, these pro-life centers typically do not provide abortion services.[32] Senator Righter argued requiring crisis pregnancy centers to provide information about abortion is "exactly contrary to why they were formed and is flatly contrary to the ideal of what is the right of conscience."[33]

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21. *Id.* § 70/2.
22. Olsen, *supra* note 7.
23. § 70/6.1.
24. Health Care Right of Conscience Act, S. 1564, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2016).
25. *Id.*
26. Senate Floor Debate, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2015), http://www.ilga.gov/Senate/transcripts/Strans99/09900031.pdf.
27. *Id.* at 181.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 188.
32. *What is a Crisis Pregnancy Center?*, STUDENTS FOR LIFE OF AM., http://studentsforlife.org/prolifefacts/cpcs/. (last visited Feb. 13, 2017).
33. Senate Floor Debate, 99th Gen. Assemb., 1st Reg. Sess.,189 (Ill. 2015), http://www.ilga.gov/Senate/transcripts/Strans99/09900031.pdf.

Proponents of SB 1564 remained undeterred and continued to voice support for the legislation during the debate. Senator Hutchinson argued "the door has to stop when your right of consciousness then infringes on my rights as a patient."[34] Senator Holmes pushed it a step further, declaring "to any doctor out there, and certainly any doctor I'm ever going to, your moral beliefs, frankly, I could give a damn. That's not my concern."[35] Senator Raoul asserted it was "not a bill about abortion," but "a bill about health care."[36]

To reiterate the bill was indeed about health care, Senator Biss told the story of Mindy Swank.[37] Ms. Swank testified at a prior judiciary committee about a "pregnancy gone wrong."[38] Due to a medical provider's conscientious objection, Ms. Swank did not receive information about her options, concerning terminating a dangerous pregnancy,[39] in a timely fashion.[40] This resulted in Ms. Swank enduring extraordinary physical pain. She had to return to the hospital weeks later "with a tremendous volume of bleeding pads to demonstrate that it was urgent that they provide her with information regarding availability of care."[41] Senator Biss emphasized the purpose of SB 1564 was to "make sure that [sic] information about what the different treatment options are and what the upsides and downsides and medical consequences of those treatments are is provided on the front end to all patients so as to avoid that kind of situation."[42]

At the conclusion of the debate, SB 1564 was passed in the Senate.[43] About a month later, the bill was passed in the House.[44] Subsequently, Governor Rauner signed SB 1564 into law on July 29, 2016.[45] The bill became effective on January 1, 2017.[46] This snippet of SB 1564's legislative history sheds light on the intent of the Illinois legislature in enacting SB 1564, which is an important consideration in analyzing whether SB 1564's mandatory disclosures are constitutional.

Also of importance, at least contextually, is what proponents and opponents argued. Proponents of the bill, such as the American Civil

34. *Id.* at 203.
35. *Id.* at 204.
36. *Id.* at 206.
37. *Id.* at 207.
38. *Id.* at 183.
39. *Id.* (A determination was made that Ms. Swank's pregnancy was not going to be viable. There was medical information regarding the medical consequences of terminating the pregnancy that was not given to Ms. Swank in a timely manner.)
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 208.
44. Health Care Right of Conscience Act, S. 1564, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2016).
45. *Id.*
46. *Id.*

Liberties Union of Illinois ("ACLU") and Planned Parenthood of Illinois, argued prior to the passage of SB 1564, conscientious objections by medical providers left patients without the information they needed to make informed medical decisions.[47] Proponents asserted SB 1564 allows health care providers who object to providing certain care and information for religious reasons, do so according to clear procedures that protect them and their patients.[48]

For example, the ACLU highlighted the story of Angela and Stel.[49] Angela desired to have a tubal ligation ("tubes tied") if a C-section was required during the delivery of her fourth child.[50] She included this in a written birth plan she gave to her doctor.[51]

During the pregnancy, Angela's obstetrician sold her practice to a Catholic health care institution.[52] At her 36-week check-up, she was sent to a Catholic hospital, induced, and, after Angela labored unsuccessfully for three days, she was told she needed a C-section.[53] Angela and Stel reminded the doctors that Angela wanted to have her tubes tied at the same time.[54] Angela's request was denied because of the hospital's religious affiliation.[55] Additionally, even though Angela's doctor prescribed birth control to her for fifteen years, her doctor could not anymore because of the new practice's religious restrictions.[56] SB 1564 would have still allowed the doctor to refuse to perform the tubal litigation and prescribe the birth control; however, the doctor would be required to timely refer Angela to another provider who could give her access to the care she desired.[57]

On the other hand, opponents of SB 1564 argued the bill deprived Illinois women of their right to choose a pro-life doctor.[58] According to opponents, SB 1564 would force medical facilities and physicians to refer patients for procedures they conscientiously object to.[59] Matthew Bowman, Senior Legal Counsel with Alliance Defending Freedom, stressed when

47. Olsen, *supra* note 7.
48. *Id.*
49. *Why We Need Senate Bill 1564: Angela & Stel's Story*, AM. CIV. LIBERTIES UNION OF ILL., http://www.aclu-il.org/why-we-need-senate-bill-1564-angela-stels-story/ (last visited Nov. 28, 2016).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. Health Care Right of Conscience Act, 745 ILL. COMP. STAT. ANN. § 70/6.1 (West 2017).
58. Letter from Matthew Bowman, Senior Legal Counsel, Alliance Defending Freedom, to Illinois Legislators (Apr. 21, 2015), https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/resources/media-resources/the-pregnancy-care-center-of-rockford-v.-rauner/ilphysiciansletter.pdf?sfvrsn=4.
59. *Id.*

women choose to be served by pro-life doctors and organizations "they are exercising their right to be assisted by a medical professional who shares their respect for human life."[60] Mr. Bowman argued not only would SB 1564 "deprive Illinois women of their right to choose a pro-life doctor," but, in addition, "[t]he state could lose its federal funding, including reimbursements through the Medicaid program."[61]

The potential loss of federal funding is a risk recognized prior to the passage of SB 1564.[62] In a Department of Healthcare and Family Services fiscal note, the Illinois legislature mentioned how it was "unclear if the passage of SB 1564 would jeopardize federal funding for the Illinois Medical Assistance Program."[63] SB 1564's requirement that health care providers refer individuals to other providers who perform procedures like abortion or sterilization potentially conflicts with the federal Church Amendment since "such a referral could be interpreted as assistance with a morally objectionable procedure."[64]

Furthermore, opponents argued SB 1564 violated the First Amendment of the United States Constitution.[65] Mr. Bowman argued under the free speech clause, "no state may force a person or entity to refer or provide information for abortion, birth control, or other services to which the person objects."[66] Since SB 1564 "requires medical facilities and physicians to refer or provide information for abortion, it forces them to engage in speech that directly contradicts their [sic] mission."[67]

*2. Illinois Lawsuit Challenging SB 1564*

Following this line of reasoning, a preliminary injunction was recently issued enjoining SB 1564.[68] The Pregnancy Care Center of Rockford, along with other plaintiffs, brought a multi-count suit against Governor Rauner and Bryan Schneider, Secretary of the Illinois Department of Financial and Professional Regulation, alleging SB 1564 violated the Illinois Religious

60. *Id.*
61. *Id.*
62. Health Care Right of Conscience Act, S. 1564, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2016).
63. *Id.*
64. *Id.* ("The Church Amendment, 42 U.S.C. § 300a-7, stipulates that for healthcare services funded in whole or in part by a program administered by the U.S. Department of Health and Human Services (HHS), no person may be required to 'perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such a procedure or abortion would be contrary to his religious beliefs or moral convictions.")
65. Letter from Matthew Bowman, *supra* note 58.
66. *Id.*
67. *Id.*
68. Memorandum Opinion and Order, Pregnancy Care Center of Rockford v. Rauner, No. 2016-MR-741, http://www.adfmedia.org/files/OrderGrantingPrelimInjunction.pdf.

Freedom Restoration Act,[69] as well as the free speech, free exercise, and equal protection clauses of the Illinois Constitution.[70] The Plaintiffs argued SB 1564 imposed "government compelled speech and referral for abortion" despite the fact "patients have easy access to lists of abortion providers through internet searches and phone directories available both in print and online."[71]

Judge Eugene Doherty of the Winnebago County Circuit Court agreed with the Plaintiffs.[72] According to Judge Doherty, the issue was "neither the merits of the State's goal of informing the patients nor the propriety of Plaintiffs' moral objections; the issue [w]as whether the State may compel Plaintiffs to speak a message to which they object."[73] So, since the Plaintiff's raised a "fair question" as to "whether SB 1564 impermissibly compels speech and violates their rights under the Illinois constitution," Judge Doherty issued a preliminary injunction.[74]

Of particular interest for this Note is how Judge Doherty analyzed the free speech claim.[75] Article I, section 4 for the Illinois constitution affords greater free speech protection than the First Amendment of the United States Constitution in some circumstances, but it does not afford greater protection in every context.[76] Judge Doherty analyzed the issue by referencing persuasive federal case law,[77] and noted "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves."[78] The judge held SB 1564 does, in fact, compel speech.[79]

Specifically, SB 1564 "explicitly includes . . . an affirmative obligation to inform a patient of his or her 'legal treatment options,' as well as the benefits of those options . . . this is clearly government compelled speech."[80] In addition, Section 6.1 compels speech by requiring "the development of

69. 775 ILL COMP. STAT. ANN. §§ 35/1-99 ("SB 1564 forces medical facilities and physicians to violate their religious convictions without serving a compelling government interest in a least restrictive way, and it treats some religious beliefs more favorably than others.")
70. ILL. CONST. art. I, § 2 ("SB 1564 treats similarly situated in individuals and organizations differently based upon their beliefs about abortion").
71. Complaint at 2, Pregnancy Care Center of Rockford v. Rauner, No. 2016-MR-741, http://www.adfmedia.org/files/PCCofRockfordComplaint.pdf.
72. Memorandum Opinion and Order, Pregnancy Care Center of Rockford v. Rauner, No. 2016-MR-741, http://www.adfmedia.org/files/OrderGrantingPrelimInjunction.pdf.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* (citing City of Chi. v. Pooh Bah Enters., 224 Ill. 2d 390, 446-47 (2006)).
77. Memorandum Opinion and Order, Pregnancy Care Center of Rockford v. Rauner, No. 2016-MR-741, http://www.adfmedia.org/files/OrderGrantingPrelimInjunction.pdf.
78. *Id.* (citing Knox v. SEIU, Local 1000, 132 S. Ct. 2277 (2012)).
79. *Id.*
80. *Id.*

protocols which much be followed by providers who seek to use the Act as a shield."[81]

Judge Doherty concluded the Plaintiffs raised a "fair question" as to whether "SB 1564 unnecessarily burdens their right to be free from government compelled speech to a degree more than necessary to serve the State's interest in educating patients."[82] Judge Doherty enjoined Defendant Schneider from enforcing (1) the requirement in Section 6 of SB 1564 that a medical provider must inform a patient of "legal treatment options, and risks and benefits of treatment options," and (2) all of Section 6.1, with the exception of subparagraph 4, "specifically including the development of protocols, to the extent it requires conduct to which Plaintiffs have conscientious objection."[83] The relief was limited to those entered as plaintiffs in the instant case.[84] The injunction is effective until the conclusion of the case or further order of the court.[85]

*3. Other States' Analogous Laws*

Many states have similar conscience laws but there is debate over how far that right of conscience should extend.[86] Laws like SB 1564 have been challenged in courts under the First Amendment, with mixed analysis and mixed results.[87] This section will compare challenged provisions enacted in California, the City of Baltimore, and New York City, however, this by no means is an exhaustive list of challenged legislation. For now, only the text and history of the provisions will be addressed.

First, in California, a Woman's Friend Pregnancy Resource Clinic and other crisis pregnancy centers sought a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("the FACT Act").[88] The FACT Act was passed in response to the "thousands of women" who were "unaware of the California programs available that provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or

81. *Id.*
82. Memorandum Opinion and Order, Pregnancy Care Center of Rockford v. Rauner, No. 2016-MR-741, http://www.adfmedia.org/files/OrderGrantingPrelimInjunction.pdf.
83. *Id.*
84. *Id.*
85. *Id.*
86. Adam Sonfield, *Provider Refusal and Access to Reproductive Services: Approaching a New Balance*, GUTTMACHER INST. (May 19, 2008), https://www.guttmacher.org/gpr/2008/05/provider-refusal-and-access-reproductive-health-services-approaching-new-balance.
87. *See* A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168 (E.D. Cal. 2015), *aff'd*, No. 15-17517, 2016 WL 5956744 (9th Cir. 2016); Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Baltimore, 683 F.3d 539 (4th Cir. 2012); Evergreen Ass'n v. City of New York, 740 F.3d 233, 245 (2d Cir. 2014).
88. CAL. HEALTH & SAFETY CODE § 123470 (2016); *Harris*, 153 F. Supp. 3d 1168.

delivery."[89] The California legislature passed the FACT Act to ensure residents could make their personal reproductive health care decisions in an informed manner.[90]

Crisis pregnancy centers utilizing "intentionally deceptive advertising and counseling practices [which] (*sic*) often confuse, misinform, and . . . intimidate women from making fully-informed, time-sensitive decisions about critical healthcare."[91] To support this allegation, Assemblyman Chiu and Assemblywoman Autumn Burke, the co-authors of the FACT Act, based their findings in part on a 2015 report by the National Abortion Rights Action League (NARAL).[92] The NARAL sent several researchers into crisis pregnancy centers and discovered some of these centers were providing inaccurate information regarding the risks of abortion.[93] Cognizant of potential First Amendment challenges, the California legislators decided to regulate all pregnancy centers, including but not limited to, crisis pregnancy centers.[94]

Two specific provisions were contested.[95] The first required "licensed covered facilities"[96] to post a notice in either a "conspicuous place" written in no less than 22-point type; "a printed notice distributed to all clients in no less than 14-point type;" or "a digital notice distributed to all client that can be read at the time of check-in or arrival, in the same point type as other digital disclosures."[97] The notice was required to state: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."[98]

The second provision required "unlicensed covered facilities" to post a notice "conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services" and in "advertising material."[99] The notice was required to state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical

89. *Harris*, 153 F. Supp. 3d at 1181 (citing Assemb. B. 775, 2015 Cal. Leg. Serv., Reg. Sess. (Cal. 2015) (This enacted the FACT Act).
90. *Id.*
91. *Id.* at 1182.
92. *Id.* (The NARAL is a vocal pro-choice organization)
93. *Id.*
94. *Id.* at 1183.
95. *Id.* at 1179.
96. *Id.* ("'licensed covered facility' means a facility . . . whose primary purpose is providing family planning or pregnancy-related services . . . .")
97. CAL. HEALTH & SAFETY CODE § 123472(a)(2) (2016).
98. *Id.* § 123472(a)(1).
99. *Id.* § 123472(b)(2).

provider who provides or directly supervises the provision of services."[100] Second, in the City of Baltimore, the Greater Baltimore Center for Pregnancy Concerns, Inc., sought an injunction, amongst other relief, against enforcement of City Ordinance 09-252.[101] This ordinance was introduced after the City Council President met with abortion rights advocacy groups, which complained some pregnancy clinics provide inaccurate information to women about abortions.[102] A spokesperson for the City Council President explained in a public statement,"[t]he Bill deals with whether women are told up front what the facts are."[103]

Ordinance 09-252 required "limited-service pregnancy center[s]"[104] to post signs disclaiming they "do[] not provide or make referral for abortion or birth control services."[105] This disclaimer was required to be made through one or more "easily readable" signs that were "conspicuously posted in the center's waiting room."[106] The failure to comply with the terms of Ordinance 09-252 was punishable by a citation carrying a maximum civil penalty of $150.[107]

Lastly, in New York City, providers of various pregnancy-related services sought an injunction against enforcement of Local Law 17.[108] New York City Council Member Jessica S. Lappin introduced Local Law 17 in order to regulate practices of crisis pregnancy centers.[109] During a hearing on the bill, Council Member Julissa Ferreras, as chair of the Committee on Women's Issues, testified the proposed disclosures were required because "[i]f such disclosures are not made, women seeking reproductive health care may be confused and/or misle[]d (*sic*) by unclear advertising or may unnecessarily delay prenatal care or abortion."[110] The New York City Council enacted the law to ensure "consumers in New York City have access to comprehensive information about and timely access to all types of reproductive health services including, but not limited to, accurate pregnancy diagnosis, prenatal care, emergency contraception and abortion."[111]

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100. *Id*. § 123472(b)(1).
101. Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Baltimore, 683 F.3d 539 (4th Cir. 2012).
102. *Id.*
103. *Id*. at 549.
104. *Id*. at 548 ("limited-service pregnancy centers" are defined as "any person" whose primary purpose is to provide pregnancy-related services, and "who (i) for a fee or as a free service, provides information about pregnancy-related services; but (ii) does not provide or refer for: (A) abortions; or (B) nondirective and comprehensive birth-control services.")
105. BALTIMORE, MD., ORDINANCE 09-252 (2009).
106. *Id.*
107. *Id.*
108. Evergreen Ass'n v. City of New York, 740 F.3d 233 (2d Cir. 2014).
109. *Id.*
110. *Id.*
111. *Id.* at 241.

The disclosures required under Local Law 17 were at issue in this case.[112] Under the law "pregnancy services centers"[113] were required to disclose: (1) whether or not they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center" (the "status disclosure"); (2) "the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed providers" (the "government message"); and (3) whether or not they "provide or provide referrals for abortion, emergency contraception, or prenatal care" (the "services disclosure").[114] The centers were required to provide the disclosures "at their entrances and waiting rooms, on advertisements, and during telephone conversations."[115] Local Law 17 exempted facilities that are "licensed . . . . to provide medical or pharmaceutical services" or have a medical provider on staff.[116]

B. First Amendment Compelled Speech Doctrine

With the background of SB 1564 in mind, along with similar provisions that have also faced First Amendment challenges, this Part will examine the First Amendment compelled speech doctrine. First, this Part will briefly provide general principles pertaining to protections granted by the First Amendment. Then, it will give an overview of the compelled speech doctrine in the Supreme Court and federal circuit courts. Lastly, this Part will analyze how courts have reviewed compelled-speech challenges to laws like SB 1564, specifically the FACT Act,[117] Ordinance 09-252,[118] and Local Law 17.[119]

*1. First Amendment General Principles*

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."[120] "The right to speak and the right to refrain from speaking are complementary components of the broader concept

112. *Id.*
113. *Id*. at 239 ("pregnancy services facility" is defined as a "facility, . . . the primary purpose of which is to provide services to women who are of may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal car; or (2) has the appearance of a licensed medical facility.").
114. N.Y.C. ADMIN. CODE § 20-816.
115. *Id.*
116. *Id.*
117. CAL. HEALTH & SAFETY CODE § 123470 (2016).
118. BALTIMORE, MD., ORDINANCE 09-252 (2009).
119. ADMIN. § 20-816.
120. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

of 'individual freedom of mind.'"[121] The First Amendment is "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."[122] At the heart of the First Amendment is the principle "that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[123]

*2. Compelled Speech Doctrine in the Supreme Court and Federal Circuit Courts*

Generally, compelled speech is speech the government forces a person or entity to say.[124] Statutes suppressing or restricting speech are judged by the principles of the First Amendment.[125] It is a basic First Amendment principle that freedom of speech usually prohibits the government from telling people what they must say.[126] The Constitution prohibits individuals from being forced to speak rather than to remain silent.[127] "Government action that stifles speech on account of its message, or that requires utterance of particular message favored by the government,"[128] contravenes the essential constitutional right of each person to "decide for himself the ideas and beliefs deserving of expression, consideration, and adherence."[129] The First Amendment protects the rights of individuals to hold points of view different from the majority and to refuse to foster ideas that they find to be morally objectionable.[130]

With respect to compelled speech imposed by the government, the government bears the burden of proving the constitutionality of its actions.[131] If the government defends restrictions on speech as means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of disease sought to be cured"; it must demonstrate recited harms are real, not merely conjectural, and regulation will in fact alleviate these harms in direct and material way.[132] Regulations that burden speech

121. *Id*. (quoting W. Va. State Bd. of Education v. Barnette, 319 U.S. 624, 637 (1943)).
122. McCutcheon v. FEC, 134 S. Ct. 1434, 1448 (2014).
123. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2327 (2013).
124. *See* United States v. Alvarez, 567 U.S. 709 (2012).
125. *Id*. at 715.
126. *Agency for Int'l Dev*., 133 S. Ct. at 2327.
127. Wooley v. Maynard, 430 U.S. 705 (1977); *see also* William M. Howard, Annotation, *Constitutional Challenges to Compelled Speech—General Principles*, 72 A.L.R.6th 513 (2016).
128. Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994).
129. *Agency for Int'l Dev*., 133 S. Ct. at 2327.
130. *Wooley*, 430 U.S. at 715.
131. United States v. Playboy Entm't Grp., 529 U.S. 803, 816 (2000).
132. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 475 (1995); *see also* Krislov v. Rednour, 226 F.3d 851, 865 (7th Cir. 2000).

incidentally or control the time, place, and manner of expression must be evaluated in terms of their general effect.[133]

It is important to note not all speech is of equal First Amendment importance.[134] Speech or conduct ordinarily protected by the Constitution may lose that protection because of the intent of speaker or actor, or context within which it occurs.[135] Accordingly, certain categories of speech receive a lesser degree of constitutional protection.[136] Most relevant to this Note, courts have suggested both commercial speech,[137] and also perhaps professional speech,[138] receive lesser protection. When evaluating whether a State has met its burden concerning compelled speech, the courts have traditionally applied either strict scrutiny or intermediate scrutiny, depending on the content of the speech.[139]

First, the differences between commercial and noncommercial speech will be examined. Then, the differences between strict scrutiny and intermediate scrutiny. After that, the differences between content-neutral and content-based regulations will be analyzed. Lastly, whether professional speech is able to fit neatly into any of the categories established will be addressed.

Commercial speech is "speech that does no more than propose a commercial transaction."[140] It includes speech which "relate[s] solely to the economic interests of the speaker and its audience."[141] The central questions pertaining to commercial speech could include whether the speech is an advertisement, whether it refers to a product or service, and whether the speech is economically motivated.[142] Government regulations on commercial speech are not subject to scrutiny as rigorous as that applied to fully protected, noncommercial speech.[143] While scholars do question

133. United States v. Albertini, 472 U.S. 675, 688–89 (1985).
134. Snyder v. Phelps, 562 U.S. 443, 452 (2011); *see also* Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 515 (7th Cir. 2014).
135. United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971).
136. *Jordan*, 743 F.3d at 515.
137. Erin Bernstein & Theresa J. Lee, *Where the Consumer is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 56 (2013).
138. Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992).
139. Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 804 (2004).
140. Bernstein & Lee, *supra* note 137, at 42 n.10 (citing United States v. United Foods, Inc., 533 U.S. 405, 409 (2001)).
141. *Id*. at 56 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–62 (1980)).
142. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1285 (2014).
143. Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 239 (1994); *see also* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (courts apply intermediate scrutiny to commercial speech under the four-part Central Hudson test. The test asks: 1) whether the speech is inherently false or misleading 2) whether the government asserts a substantial interest; 3) whether

whether the line between commercial and noncommercial speech is clearly delineated,[144] for purposes of this Note, the focus is on noncommercial speech because SB 1564 does not regulate speech pertaining to commercial transactions.[145]

Noncommercial speech is accorded a greater degree of protection than commercial speech;[146] therefore, laws which target this type of speech receive more stringent scrutiny.[147] There is a lack of a clear definition distinguishing commercial from noncommercial speech.[148] The rules for commercial speech are applied inconsistently.[149] Yet, once the courts have determined government speech is noncommercial, the regulation must typically pass either strict scrutiny or intermediate scrutiny, depending on whether the regulation is content-based or content-neutral.[150]

Strict scrutiny looks to whether a law which compels speech is narrowly drawn to serve a compelling governmental interest.[151] Courts apply strict scrutiny whenever it is determined legislation significantly interferes with the exercise of a fundamental right.[152] A "fundamental right" is one which has its source in and is guaranteed by a state or the federal Constitution.[153] However, strict scrutiny does not apply automatically any time an enumerated right is involved.[154] Under strict scrutiny, the law must: (1) advance compelling or overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive means to advance the ends.[155]

In contrast, intermediate scrutiny looks to whether a law which compels speech is no more extensive than necessary to serve a substantial governmental interest.[156] "Laws pass this lower level of scrutiny 'so long as they are designed to serve a substantial government[al] interest and do not

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the restriction directly advances that interest; and 4) whether there is a reasonable fit between the government's ends and the means it uses).

144. *See* Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2366 (2013) (boundaries of the commercial speech definition are fuzzy at best).
145. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).
146. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981).
147. Nathan Cortez, *Can Speech by FDA-Regulated Firms Ever be Noncommercial?*, 37 AM. J.L. & MED. 388, 391 (2011).
148. Berstein & Lee, *supra* note 137, at 56.
149. Corbin, *supra* note 142, at 1289-90 (2014).
150. Cortez, *supra* note 147, at 390-91.
151. Evergreen Ass'n v. City of New York, 740 F.3d 233, 245 (2d Cir. 2014).
152. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973); *see* 16A AM. JUR. 2D Constitutional Law § 403 (2016).
153. *Rodriguez*, 411 U.S. 1.
154. United States v. Marzzarella, 614 F.3d 85, 96 (3d Cir. 2010).
155. R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 294 (2016).
156. *Evergreen Ass'n*, 740 F.3d at 245.

unreasonably limit alternative avenues of communication.'"[157] "Laws are designed to serve a substantial government interest when the government can demonstrate a connection between the speech regulated by the law and the secondary effects that motivated the adoption of the law.[158] Under intermediate scrutiny, the government must prove the government action: (1) advances substantial government ends; (2) is substantially related to advancing those ends; and (3) is not substantially more burdensome than necessary to advance those ends.[159] Additionally, the restriction must leave open ample alternative channels for communication of the information.[160]

Whether strict scrutiny or intermediate scrutiny applies to a regulation depends on whether the regulation's restrictions are content-neutral or content-based.[161] Content-neutral restrictions impose an incidental burden on speech[162] and serve some purpose unrelated to the content of regulated speech.[163] Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.[164] Additionally, courts may consider government regulations that restrict the time, place, or manner of protected speech as content-neutral.[165] The principal inquiry in determining whether restriction on free speech is "content-neutral" is whether the government has adopted the restriction because of its disagreement with the message that speech conveys.[166] A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[167]

In contrast, content-based regulations suppress, disadvantage, or impose differential burdens upon speech on basis of its content, and compel speakers to utter or distribute speech bearing a particular message.[168] Laws that distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.[169] A regulation neutral on its face may be content-based if its purpose is to regulate speech because of the message it conveys.[170] Content-based speech regulations are presumptively

157. Andy's Rest. & Lounge, Inc., v. City of Gary, 466 F.3d 550, 555 (7th Cir. 2006) (citing R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 408 (7th Cir. 2004).
158. *Id.*
159. Kelso, *supra* note 155; *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968).
160. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
161. Huhn, *supra* note 139, at 814.
162. Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994).
163. *Ward*, 491 U.S. at 791.
164. *Turner Broad. Sys.*, 512 U.S. at 643.
165. *Ward*, 491 U.S. at 791.
166. *Id.*
167. *Id.*
168. *Turner Broad Sys.*, 512 U.S. at 642.
169. *Id.* at 643.
170. *Id.* at 645.

invalid.[171] Therefore, when challenged, the State bears the burden of rebutting the presumption of invalidity.[172]

The standard for determining whether a law is content-based or content-neutral is an intent test where the government's purpose is the controlling consideration.[173] However, scholars have questioned whether it is presently possible to determine whether a law is "content-based" or "content-neutral" in cases where the law has both content-based and content-neutral objectives.[174] Nevertheless, these distinctions are generally controlling when determining whether to apply strict scrutiny or intermediate scrutiny to a regulation.[175] Laws that mandate speech are usually considered content-based regulations subject to strict scrutiny.[176] However, laws that mandate professional speech may be considered content-neutral and subject to the lesser, intermediate scrutiny standard.[177]

The relationship between the First Amendment and physicians' professional speech is undeveloped and unclear.[178] The Supreme Court has yet to articulate the scope of physicians' First Amendment rights when the physicians are engaged in the practice of medicine.[179] The Fifth and Eighth Circuits have held as long as the compelled speech is truthful, non-misleading, and relevant to the decision at hand, the states can dictate what physicians say.[180] The Ninth Circuit has noted "being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights."[181] Even murkier are the professional speech rights of crisis pregnancy centers.

Justice White's concurrence in *Lowe v. SEC* suggested "professional speech occurs when a party offers individualized advice that engenders a relationship of trust with a client."[182] Professional speech can include speech "given in the context of a quasi-fiduciary—or actual fiduciary—relationship, wherein the speech is tailored to the listener and made on a person-to-person basis."[183] Although regulations imposing disclosures on crisis pregnancy centers could conceivably fit into the mold of professional speech, at least one court has declined to hold the disclosures regulate professional speech

171. R. A. V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
172. Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Baltimore, 683 F.3d 539, 556 (4th Cir. 2012).
173. Huhn, *supra* note 139, at 815.
174. *Id.* at 826.
175. *Id.* at 818.
176. Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988).
177. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
178. Jennifer M. Keighley, *supra* note 144, at 2368.
179. *Id.* at 2348–49.
180. *Id.* at 2356–57.
181. Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002).
182. Tepeyac v. Montgomery Cty., 779 F. Supp. 2d 456, 466 (D. Md. 2011) (White, J., concurring) (paraphrasing Lowe v. SEC, 472 U.S. 181, 232 (1985)).
183. *Tepeyac*, 779 F. Supp. 2d at 467.

because the centers act as "generic information provider[s]."[184] The distinction matters because if the regulations are classified as professional speech they could be subjected to intermediate scrutiny,[185] instead of the rigorous requirements of strict scrutiny for noncommercial speech. One scholar aptly noted "courts will soon play a decisive role in balancing pregnant women's demonstrated need for disclosure regulations with pregnancy centers' First Amendment protections."[186]

*3. Circuit Challenges to, and Confusion Over, Factual Disclosure Laws Related to Pregnancy Centers*

Statutes and ordinances similar to SB 1564 have been challenged recently in federal courts across the nation.[187] Although the text of the various statutes and ordinances differ, the main commonality is the provisions compel health care providers to provide information that they otherwise may not have given because of conscientious objections.[188] In analyzing these challenges, the circuit courts have disagreed about the appropriate level of scrutiny to apply to these types of provisions.

For example, in *A Woman's Friend Pregnancy Res. Clinic*, crisis pregnancy centers providing alternatives to abortion challenged the constitutionality of California's newly enacted the FACT Act.[189] As mentioned, the plaintiffs sought declaratory judgment and a preliminary injunction against enforcement of the law arguing it violated the plaintiffs' First Amendment Rights.[190] The district court held, and the Ninth Circuit affirmed, the law regulated professional speech within the confines of the patient-provider relationship, and was therefore subject to, and survived, intermediate scrutiny.[191]

The district court determined the FACT Act regulated professional speech because the Plaintiffs' licensing statute and facts provided in their declarations supported the characterization of their communications as professional speech uttered in the context of individualized client care.[192]

184. *Id.*
185. Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992)
186. Kirsten Gallacher, *Protecting Women from Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 WOMEN'S RIGHTS L. REP. 113, 136 (2011).
187. A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168 (E.D. Cal. 2015); Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Baltimore, 683 F.3d 539 (4th Cir. 2012); Evergreen Ass'n v. City of New York, 740 F.3d 233 (2d Cir. 2014).
188. CAL. HEALTH & SAFETY CODE § 123470 (West 2016); BALT., MD., ORDINANCE 09-252; N.Y. ADMIN. CODE § 20-816 (2017).
189. *A Woman's Friend Pregnancy Res. Clinic,* 153 F. Supp. 3d at 1178, *aff'd*, No. 15-17517, 2016 WL 5956744 (9th Cir. 2016).
190. *Id.*
191. *A Woman's Friend Pregnancy Res. Clinic,* 153 F. Supp. 3d at at 1195, 2016 WL 5956744 at 1.
192. *Id.*

Next the court determined where the FACT Act landed on the Ninth Circuit's "*Pickup* speech continuum."[193]

In *Pickup*, the plaintiffs sought to enjoin the enforcement of a bill which banned state-licensed mental health providers from engaging in "sexual orientation change efforts" ("SOCE") with patients under 18 years of age.[194] The court held the bill did not violate the First Amendment free speech rights of SOCE practitioners or minor patients.[195] The court found the bill was subject to rational basis review since it regulated only treatment.[196] Since the bill was rationally related to a legitimate government interest of protecting the well-being of minors, it survived rational basis review.[197] The court used a continuum in its analysis.[198]

At one end of the continuum, First Amendment protection is at its greatest where a professional is engaged in public dialogue on matter of public concern.[199] At the midpoint, First Amendment protection of a professional's speech is "somewhat diminished" within the confines of a professional relationship.[200] This includes informed consent requirements, licensing requirements, professional disciplinary proceedings, and negligence actions.[201] At the other end of the continuum, the state's power is at its greatest where the state is primarily regulating professional conduct, such as prohibiting administration of certain drugs or forms of treatment, but to do so must impose some incidental or ancillary restrictions on speech.[202]

Because the FACT Act regulated speech within the confines of a professional relationship, the speech fell at the midpoint of the *Pickup* continuum.[203] Therefore, the protection of the professional's speech was "somewhat diminished."[204] The district court determined the FACT Act was subject to no greater than intermediate scrutiny.[205]

According to the district court, "intermediate scrutiny properly account[ed] for the intersection of compelled speech and the government's

193. *Id.*
194. Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*at 1227.
200. *Id.*
201. *Id.*
202. *Id.*
203. A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168 (E.D. Cal. 2015), *aff'd*, No. 15-17517, 2016 WL 5956744 (9th Cir. 2016).
204. *See A Woman's Friend Pregnancy Res. Clinic*, 153 F. Supp. 3d at 1205 (Other circuits have made similar distinctions when deciding the appropriate level of scrutiny to apply to laws regulation professional speech.); *see also* Stuart v. Camnitz, 774 F.3d 238, 248 (4th Cir. 2014), *cert. denied sub nom*; Walker-McGill v. Stuart, 135 S. Ct. 2838 (2015); King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014), *cert. denied sub nom.*
205. *A Woman's Friend Pregnancy Res. Clinic*, 153 F. Supp. 3d at 1205.

regulatory interests in the context of the facts of [the] case."[206] The court reasoned the FACT Act regulated speech made within the confines of the patient-provider relationship in the course of a client's visit and it was relevant to the client's medical decisions.[207] The district court found the FACT Act was narrowly drawn to achieve the State's interest while providing the plaintiffs with manageable options, and the means chosen accomplished the State's ends, so the FACT Act passed intermediate scrutiny.[208]

This contrasts with the Fourth Circuit's holding in *Greater Balt. Ctr. For Pregnancy Concerns, Inc*.[209] In this case, plaintiffs challenged the facial validity and constitutionality of Ordinance 09-252.[210] The district court permanently enjoined enforcement of the ordinance on the ground that it was invalid under the Free Speech Clause.[211]

Initially, the Fourth Circuit panel affirmed the judgment, and found the ordinance regulated fully protected, non-commercial speech and was therefore subject to strict scrutiny.[212] The Fourth Circuit panel then held the ordinance failed to survive strict scrutiny because the government was not promoting a compelling interest, and the ordinance was not narrowly tailored to serve the government's interest.[213] However, in an *en banc* opinion, the Fourth Circuit held the district court erred by entering a permanent injunction without allowing the defendants to discovery or adhering to the applicable summary judgment standard.[214] Thus, the Fourth Circuit vacated the judgment and remanded for further proceedings.[215]

On October 4, 2016, after the parties conducted extensive discovery, the district court held, as applied to the plaintiff, a provider of free pregnancy-related services and counseling, Ordinance 09-252 violated the free speech clause of the First Amendment.[216] The court found Ordinance 09-252 "is a content-based regulation that regulates noncommercial speech, or, at the least, that the Center's commercial and professional speech is intertwined

206. *Id.*
207. *Id.* at 1202.
208. A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, *aff'd*, No. 15-17517, 2016 WL 5956744 (9th Cir. 2016).
209. Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore, 683 F.3d 539 (4th Cir. 2012), *on reh'g en banc*, 721 F.3d 264 (4th Cir. 2013).
210. *Greater Balt. Ctr. For Pregnancy Concerns*, 683 F.3d at 548.
211. *Id.*
212. *Id.* at 560.
213. *Id.*
214. *Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 721 F.3d at 271.
215. *Id.*
216. Decision Re: Summary Judgment, Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore, No. MJG-10-760, (D. Md. 2016), https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/greater-baltimore-center-for-pregnancy-concerns-v.-mayor-and-city-council-of-baltimore/gbcpc-v-mayor-and-city-council-of-baltimore---district-court-opinion.pdf?sfvrsn=4.

with its noncommercial speech, and is thus subject to strict scrutiny."[217] The court held "to apply the professional speech exception here would be an impermissible doctrinal stretch when viewed in the context and regulatory environment of the speech taking place."[218]

The district court distinguished the instant case from the Ninth Circuit's decision in *A Woman's Friend Pregnancy Res. Clinic* by noting the pregnancy center in that case "performed holistic personal assessments of each client, offered medical consults based on individual ultrasounds, created medical charts, employed registered nurses to assess and take medical histories of each client, and offered 'a variety of health services "depending upon the needs and requests of the client."[219] In contrast, the plaintiff in the Baltimore case was not a licensed medical facility, it was not regulated by state health regulations, and it did not staff registered nurses.[220] Furthermore, the record did not reveal "the Center staff exercise[d] medical or other judgment or ma[de] decisions on behalf of its clients.[221] The court reasoned "because neither the commercial speech or the professional speech exception applie[d]", the ordinance had to pass strict scrutiny.[222] The court found the sparse evidence offered by the City of Baltimore was inadequate to justify the burden imposed on the plaintiff's speech, therefore the City failed to show that the ordinance actually promoted a compelling interest in solving a specific problem.[223] The court therefore granted summary judgment in favor of the plaintiff.[224]

Finally, in *Evergreen Ass'n*,[225] the Second Circuit held portions Local Law 17 violated the First Amendment.[226] In *Evergreen Ass'n*, pregnancy services centers brought an action against the City, alleging Local Law 17 infringed on their free speech rights under the federal and New York Constitutions.[227] The district court granted the plaintiffs' motion for a preliminary injunction enjoining enforcement of the ordinance.[228] The Second Circuit held the "status disclosure" and "governmental message disclosure" violated the First Amendment because they were more extensive than necessary to serve the city's substantial interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her

217. *Id.*
218. *Id.*
219. *Id.* (citing A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1202 (E.D. Cal. 2015)).
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. Evergreen Ass'n v. City of New York, 740 F.3d 233, 242 (2d Cir. 2014).
226. N.Y.C. Administrative Code § 20-816.
227. *Evergreen Ass'n*, 740 F.3d at 242.
228. *Id.*

pregnancy.[229] The court declined to decide the appropriate level of scrutiny to apply to the ordinance, stating "our conclusions are the same under either intermediate scrutiny or strict scrutiny."[230]

Consequently, there is uncertainty surrounding the appropriate level of scrutiny courts should apply to the provisions that conflict with conscious objections. The Supreme Court has remained silent on the issue.

## II. ANALYSIS

This portion of the Note concludes SB 1564 does compel speech. Then, it analyzes the nature of the speech restriction imposed by SB 1564, concluding it is professional speech, and therefore most properly subject to the *Pickup* continuum test, under which the law is subject to intermediate scrutiny. Finally, applying intermediate scrutiny, I conclude that the law is constitutional.

### A. SB 1564 Does Compel Speech

The plain language of SB 1564 serves as the starting point for an inquiry into whether the regulation compels speech.[231] The specific provision that directly compels speech is Section 6.1:

> All health care facilities *shall* adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. . . . These protocols must, at minimum, address the following:
>
> (1) The health care facility, physician, or health care personnel *shall* inform a patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care.
> (2) When a health care facility, physician, or health care personnel is unable to permit, perform, or participate in a health care service that is a diagnostic or treatment option *requested by a patient* because the health care service is contrary to the conscience of the

229. *Id.* at 249. (Status disclosure is whether or not they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center." Government message is "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider.")
230. *Id.* at 245.
231. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

> health care facility, physician, or health care personnel, then the patient *shall* either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be refereed, transferred, or given information in accordance with paragraph (3).
> (3) If *requested by the patient* or the legal representative of the patient, the health care facility, physician, or health care personnel *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 the health care facility, physician, or health personnel refuses to permit, perform, or participate in because of a conscience-based objection.[232]

Section 6.1 compels speech because it requires health care facilities, physicians, and health care personnel to speak, through adopting the written protocols, rather than remain silent.[233] Specifically, it requires health care providers to give information about contraceptives, sterilization, or abortion procedures when requested by the patient.[234]

What is not clear is the meaning of "legal treatment options" and "benefits of treatment options."[235] SB 1564 added this language to the Act without defining the clauses.[236] Ordinarily, words in a statute should be given their plain meaning, but here, that would lead to an odd result.[237]

If "legal treatment options" and "benefits of treatment options" were interpreted to include *all* treatment options, this interpretation would contradict the purpose of the Act. The Act purports to shield conscientious objectors from engaging in "health care services" that are contrary to their convictions.[238] Furthermore, "health care" includes any advice "in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment" intended for "the physical, emotional, and mental well-being of persons."[239]

An interpretation that viewed "legal treatment options" and "benefits of treatment options" as including literally *all* treatment options could potentially include advice covered by the "health care" definition. This interpretation is precisely what the Illinois legislature intended to avoid in

232. 745 ILL. COMP. STAT. ANN. § 70/6.1 (West 2016) (emphasis added).
233. Wooley v. Maynard, 430 U.S. 705 (1977).
234. § 70/6.1(2)-(3).
235. § 70/6.1; *see also* § 70/6.
236. § 70/3.
237. United States v. Ron Pair Enterprises, 489 U.S. 235 (1989).
238. § 70/2.
239. § 70/3(a).

1977.[240] The legislators wanted to allow professionals to refuse to perform or participate in abortions.[241]

The duty imposed on physicians in Section 6 highlights this seeming contradiction. Section 6 explicitly states:

> Nothing in this Act shall relieve a physician from any duty . . . to inform his or her patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of treatment options, provided, however, that such physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience.[242]

If the physician is under no duty to perform a "health care" service contrary to his or her conscience, then "legal treatment options" and "benefits of treatment options" cannot be read to include the "use or procurement of contraceptives and sterilization or abortion procedures."

So what do the clauses mean? What, exactly, did the legislature intend to be the default duty? It is unclear. What is clear is that the remaining provisions in Section 6.1 are only triggered when requested by the patient. Keeping this in mind, this Part now turns to how SB 1564 should be analyzed.

## A. Analyzing the Constitutionality of the Compelled Speech Provisions of SB 1564

### *1. SB 1564 is Content-Neutral and Regulates Professional Speech*

SB 1564 is content-neutral because the plain language of SB 1564 does not indicate a disagreement with the message of conscientious objectors.[243] It was meant to provide an avenue for patients to receive medical information if requested.[244] The limited legislative history reveals the legislators were concerned about patients receiving delayed medical service due to the convictions of medical providers.[245] To prevent delay in medical treatment, SB 1564 imposes an incidental burden on conscientious objectors.[246] The

240. House Floor Transcript, 80th Gen. Assemb., 1st Reg. Sess. (Ill. 1977), http://www.ilga.gov/house/transcripts/htrans80/HT011277.pdf
241. *Id.*
242. § 70/6.
243. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
244. § 70/6.1.
245. Senate Floor Debate, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2015), http://www.ilga.gov/senate/transcripts/strans99/09900001.pdf.
246. *Ward*, 491 U.S. at 791.

burden is incidental because the provisions of Section 6.1 are only trigged upon the request of patients.[247]

Furthermore, SB 1564 regulates professional speech. The provisions of Section 6.1 apply to medical professionals, such as "physicians" and "health care personnel," as well as "health care facilities."[248] A physician is defined as "any person who is licensed by the State of Illinois under the Medical Practice Act of 1987."[249] "Health care personnel means any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes . . . health care services."[250] A health care facility is "any public or private hospital, clinic, center, medical school . . . or other institution . . . wherein health care services are provided."[251]

Unlike Local Law 17 and Ordinance 09-252, SB 1564 is regulating the speech of mainly licensed medical professionals.[252] In this context, "information is the patient's only shield against fear and uncertainty, which can reduce even powerful, educated, and self-assertive individuals to quaking passivity."[253] The speech being regulated here resembles what Justice White mentioned should be considered as professional speech in his concurrence in *Lowe v. SEC*.[254] It is speech which occurs when "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances."[255]

*2. The Ninth Circuit's Pickup Continuum Should Be Applied to SB 1564*

The *Pickup* continuum was meant to give guidance on how to evaluate professional speech in the context of a professional relationship.[256] Speech that occurs between a professional and a client is distinct from other types of speech because professionals "through their education and training, have access to a corpus of specialized knowledge that their clients usually do not" and clients put "their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no

247. § 70/6.1(2)-(3).
248. § 70/6.1.
249. § 70/3(b).
250. § 70/3(c).
251. § 70/3(d).
252. Compare Decision Re: Summary Judgment, Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore, No. MJG-10-760, https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/greater-baltimore-center-for-pregnancy-concerns-v.-mayor-and-city-council-of-baltimore/gbcpc-v-mayor-and-city-council-of-baltimore---district-court-opinion.pdf?sfvrsn=4.
253. Berg, supra note 143, at 237–38 (1994).
254. Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring).
255. *Id.*
256. Nat'l Inst. Of Fam. & Life Advocates v. Harris, 839 F.3d 823, 838 (9th Cir. 2016).

familiarity."[257] The continuum offers a fluid approach to analyzing professional speech. It provides guidance in an area of compelled speech doctrine that has remained undeveloped and unclear.[258] The *Pickup* continuum should be applied to SB 1564 because SB 1564 regulates professional speech, and the continuum offers a clear method of determining which level of scrutiny should apply.

*3. Applying the Pickup Continuum–SB 1564 is Subject to Intermediate Scrutiny*

As a refresher, at one end of the *Pickup* continuum, First Amendment protection is at its greatest where a professional is engaged in *public dialogue* on matters of public concern.[259] At the midpoint, First Amendment protection of a professional's speech is "somewhat diminished" within the *confines of a professional relationship*.[260] At the other end of the continuum, the state's power is at its greatest where the state primarily regulates *professional conduct*.[261]

SB 1564 does not regulate the speech of professionals engaged in public dialogue because it focuses on information relayed in the context of private health care services. SB 1564 does not strictly regulate professional conduct because while licensed physicians fall under the scope of SB 1564, so do unlicensed facilities. Accordingly, SB 1564 falls at the midpoint of the *Pickup* continuum because it primarily regulates professional speech in the confines of professional relationships. Under *Pickup*, since SB 1564 is not afforded the "greatest" First Amendment protection, nor the least, it should be subject to intermediate scrutiny.[262]

*4. SB 1564 Survives Intermediate Scrutiny*

To survive intermediate scrutiny, the government must show that the government action: (1) advances substantial government ends; (2) is substantially related to advancing those ends; and (3) is not substantially more burdensome than necessary to advance those ends.[263] Additionally, the action must leave open ample alternative channels for communication of the information.[264]

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257. *Id.* (quoting King v. Governor of New Jersey, 767 F.3d 216, 232 (3d Cir. 2014)).
258. Keighley, *supra* note 144, at 2368.
259. Pickup v. Brown, 740 F.3d 1208, 1227 (9th Cir. 2014).
260. *Id.* at 1228.
261. *Id.* at 1229.
262. *Id.*
263. Kelso, *supra* note 155.
264. *Id.* at 298.

SB 1564 advances a substantial government end, that end being to ensure conscientious objections do not deprive patients of the information they need to make informed medical decisions. Although the legislative history is limited, it shows there is a connection between the speech regulated by SB 1564 and the secondary effects that motivated adoption of the law. During the Senate Floor debate in April 2015, Senator Biss told the story of Ms. Swank to demonstrate that doctors denying patients access to medical information due to conscientious objections was a real harm.[265] In all fairness, it is hard to tell whether Ms. Swank is the exception, rather than the rule. Nonetheless, if her story is just one of many, then SB 1564 relieves the harms in a direct and material way, by placing control in the hands of the patients.

SB 1564 is substantially related to achieving the end because it amends the Act under which conscientious objectors could justify denying treatment. Judge Doherty mentioned one of the most problematic aspects of SB 1564 was it singles out conscientious objectors instead of applying to health care providers in general. This is true. But one must consider what is at stake. The First Amendment applies to both the conscientious objectors and the patients. A patient should be allowed to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[266]

SB 1564 is not substantially more burdensome than necessary to achieve the desired end. The provisions of Section 6.1 are only triggered when the patient requests a service the health care provider does not provide. Although Section 6.1 requires adoption of written protocols, it does not mandate the manner in which they are to be disbursed or the precise wording they must include. This gives the health care providers discretion when approaching conversations about procedures they conscientiously object to.

Since SB 1564 advances a substantial government end, is substantially related to advancing those ends, and is not substantially more burdensome than necessary to achieve those ends, it survives intermediate scrutiny.

## III. CONCLUSION

SB 1564 was passed in order to ensure patients were not denied access to medical information based on the conscientious convictions of health care providers. While the Illinois legislators recognized the importance of the right to refuse certain procedures, it was also aware of how that right could deprive patients of access to medical care. SB 1564 offers a constitutional

265. Senate Floor Debate, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2015), http://www.ilga.gov/Senate/transcripts/Strans99/09900031.pdf.

266. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. 133 S. Ct. 2321 (2013). (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

compromise between accommodating an individual's religious or moral beliefs, while avoiding the imposition of those beliefs on patients who need timely access to health care.[267]

267. *The Limits of Conscientious Refusal in Reproductive Medicine*, AM. CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG, (Nov. 2007), http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine.