No. 24-2481

In the United States Court of Appeals
for the Second Circuit

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, GIANNA'S HOUSE, INC, CHOOSE LIFE OF JAMESTOWN, INC., d/b/a Options Care Center,
Plaintiffs-Appellees,
v.
LETITIA JAMES,
Defendant-Appellant.

On Appeal from the U.S. District Court for the Western District of New York

Brief *Amicus Curiae* of
America's Future,
Free Speech Coalition, Free Speech Defense and Education Fund,
U.S. Constitutional Rights Legal Defense Fund,
One Nation Under God Foundation,
Fitzgerald Griffin Foundation, WakeUp.Mom, and
Conservative Legal Defense and Education Fund
in Support of Plaintiffs-Appellees and Affirmation

PATRICK M. MCSWEENEY
Powhatan, VA
JEFFREY C. TUOMALA
Winchester, VA
RICK BOYER
Lynchburg, VA

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
(703) 356-5070
*Attorney of Record
Attorneys for Amici Curiae
March 24, 2025

DISCLOSURE STATEMENT

The corporate *amici curiae* herein, America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, One Nation Under God Foundation, Fitzgerald Griffin Foundation, WakeUp.Mom, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, One Nation Under God Foundation, Fitzgerald Griffin Foundation, WakeUp.Mom, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Some of these *amici* filed *amicus* briefs in the U.S. Supreme Court supporting NIFLA in a prior First Amendment case, *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140, both at the Petition stage (Brief *Amicus Curiae* of United States Justice Foundation, *et al.* (Apr. 20, 2017)), and on the Merits (Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, *et al.* (Jan. 16, 2018)).

---

[1] All of the parties consented to the filing of this *amicus* brief. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE CASE

In May 2024, three pro-life organizations, National Institute for Family and Life Advocates ("NIFLA"), along with Gianna's House, Inc. and Options Care Center, both New York affiliates of NIFLA, filed suit against New York Attorney General Letitia James. *Nat'l Inst. for Fam. & Life Advocates v. James*, 746 F. Supp. 3d 100, 2024 U.S. Dist. LEXIS 150635 at *4-5 ("*NIFLA*"). Appellant's Brief explains:

> the underlying action arises from the NIFLA plaintiffs' alleged **intent to advertise** to the public a medical treatment referred to as "**abortion pill reversal**" or "APR"... APR proponents contend that pregnant individuals who have taken **mifepristone** can reverse its effects, and thus continue with a healthy pregnancy, if they do not take **misoprostol** and instead take supplemental doses of **progesterone**. [Aplt. Br. at 3-4 (emphasis added).]

The NIFLA Response Brief explains this therapy further:

> Progesterone therapy, otherwise known as Abortion Pill Reversal ("APR"), refers to a lawful, life-saving method of medical treatment that seeks to prevent a chemical abortion by administering **progesterone to counteract** the adverse effects of the abortion pill **(mifepristone)** on an unborn child. [Response Br. at 3 (emphasis added).]

Attorney General James's sole expert falsely asserted that the use of progesterone is an "experimental and possibly dangerous treatment." Aplt. Br. at 44. The use of progesterone is a well-established therapy for "spontaneous pre-

term birth prevention." Rather than being an experimental method to preserve a pregnancy, it is a widely established, repurposed or "off label" use of progesterone.[2]

Attorney General James previously brought enforcement actions attempting to prevent certain pro-life organizations from also promoting APR through advertisements, using New York General Business Law Article 22-A, §§ 349 and 350 and New York Executive Law § 63(12). *NIFLA* at *9. James claimed that the other groups' advocacy of APR is "misleading advertising." *Id.* She sought to prevent certain other organizations from promoting APR, and to impose civil penalties for "fraudulent and unlawful" statements supporting use of APR. *Id*.

Plaintiffs sought a preliminary injunction against James and the State of New York in the Western District of New York. *Id.* at *9-10. Finding that "[t]he First Amendment protects Plaintiffs' right to speak freely about APR protocol," the district court ruled that the Plaintiffs are likely to succeed on the merits. *Id.* at *25. The district court also determined that the Plaintiffs demonstrated irreparable

---

[2] *See, e.g.,* J.M. O'Brien, *et al.*, "Progesterone Vaginal Gel Study Group. Effect of progesterone on cervical shortening in women at risk for preterm birth: secondary analysis from a multinational, randomized, double-blind, placebo-controlled trial," ULTRASOUND OBSTET GYNECOL. 34(6):653-659 (2009) (PubMed 19918965).

harm: "Plaintiffs are irreparably harmed each day that their First Amendment freedoms are infringed." *Id.* at *26.

Finding that a "preliminary injunction ... would further the societal interest in the fullest possible dissemination of information," the district court also determined that the public interest and the balance of the equities favored Plaintiffs. *Id.* at *37-38 (internal quotation omitted). The district court granted a preliminary injunction preventing enforcement of these statutes to stop the advertising efforts of the NIFLA Plaintiffs. *Id.* at *39.

ARGUMENT

I. THE NEW YORK STATUTES RELIED ON BY THE ATTORNEY GENERAL SHOULD NOT BE USED TO CENSOR PRO-LIFE VOICES SUCH AS THE NIFLA PLAINTIFFS.

The Attorney General seeks to preserve her authority to proceed against Plaintiffs and other pro-life organizations, and possibly pro-life individuals, under three New York laws: New York General Business Law Article 22-A, §§ 349 and 350, and New York Executive Law § 63(12).

A. New York General Business Law Article 22-A, §§ 349 and 350.

Section 349 provides: "**[d]eceptive acts or practices** in the conduct of any **business, trade or commerce** or in the furnishing of any **service** in this state are hereby declared **unlawful**." (Emphasis added.) It authorizes the Attorney General

to seek injunctive relief and "obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices." It also provides a private right of action for restitution to consumers damaged by such practices, including attorney's fees. Lastly, it permits the Attorney General to take action against any company she believes "is about to engage in" any unlawful trade practice.

Section 350 consists of one sentence which states: "**[f]alse advertising** in the conduct of any **business, trade or commerce** or in the furnishing of any **service** in this state is hereby declared **unlawful**." (Emphasis added.)

Under both statutes, there are specific elements which the Attorney General would be required to prove to bring an action, and she has gone to great lengths in her brief to evade and confuse those requirements. It should be noted that neither section defines its terms, and thus the ordinary use of these terms should be the starting point.

First, both statutes require that the Attorney General be able to demonstrate that a nonprofit organization advertising to inform the public about progesterone therapy, without charging a fee, are somehow engaged "in the conduct of any business, trade or commerce or in the furnishing of any service." Appellant's Brief **never once** wrestled with the statutory requirement that the speech or

advertising had to be conducted "in the conduct of any business, trade or commerce or in the furnishing of any service."[3] Contrast that with the Attorney General's discussion of "commercial speech" 45 times, in an effort to obscure its failure to meet the requirement of the statute as to whether the NIFLA Plaintiffs were engaged in the conduct of "business, trade or commerce." The Attorney General sought to make the issue about whether the advertising by the NIFLA Plaintiffs constituted "commercial speech" under various court cases. The two issues are fundamentally different.

Second, in truth, section 349 has no application here. The Attorney General does not seriously argue that informing New Yorkers about the availability of progesterone therapy constitutes "**deceptive acts or practices** in the conduct of any business, trade or commerce" under section 349. (Emphasis added.) Appellant's Brief alleges that the speech of the NIFLA Plaintiffs "concerns a specific product: APR, which is a medical treatment protocol in which a pregnant individual foregoes the misoprostol prescribed for a medication abortion and

---

[3] Demonstrating that the Attorney General attempted to finesse the elements it is required to demonstrate, Appellant's Brief used the word "**business**" only three times — to quote from a statute (at 5), to describe the complaint in the enforcement action involving HBI (at 8), and to describe the holding of a case (at 51). The word "**trade**" did not appear at all. The word "**commerce**" appears only once in the phrase "stream of commerce" (at 34).

instead takes repeated doses of prescribed progesterone" and "[t]he gravamen of the state-court action is that APR is not accepted." *Id*. at 33-34, and at 34, n.4. The Appellant's Brief describes the case as follows:

> the **underlying action** arises from the NIFLA plaintiffs' alleged **intent to advertise** to the public a medical treatment referred to as "**abortion pill reversal**" or "APR...." APR proponents contend that pregnant individuals who have taken mifepristone can reverse its effects, and thus continue with a healthy pregnancy, if they do not take misoprostol and instead take supplemental doses of progesterone.... The safety and efficacy of the treatment has yet to be tested ... **APR thus remains "experimental**."[4] [Aplt. Br. at 3-4 (emphasis added).]

Thus, the Attorney General's only contention is that in advertising to advocate for progesterone therapy, the pro-life pregnancy centers are engaged in **false advertising** for an "unaccepted" treatment. Thus, the Attorney General must show that the advertisements are "false" under section 350. However, the Attorney General first admits the issue is false advertising, but then seeks to water down the requirement to show actual falsity by asserting she "seeks **only** to ensure

---

[4] The COVID-19 shot was mandated by many governments for many years when it was approved only under an "Emergency Use Authorization" ("EUA") to be used only during a declared state of emergency, as an "unapproved" experimental drug. To this day, Moderna COVID-19 shots are being given under an EUA for individuals 6 months through 11 years of age; Novavax shots are being given under an EUA for individuals 12 years of age and older; and Pfizer-BioNTech shots are being given under an EUA for individuals 6 months through 11 years of age. FDA, "COVID-19 Vaccines for 2024-2025."

that the *advertisement* of APR, like the advertisement of any medical treatment, is not false **or misleading**." Aplt. Br. at 46 (bold added). "Misleading" statements are irrelevant under the statutes, but this is of no concern to the Attorney General, who claims no fewer than **32 times** that the ads are only either **"false or misleading."** Aplt. Br. at 3, 5-8, 10-11, 15, 19-20, 30, 32, 40-43, 45-46, 51-53 (emphasis added). "Misleading" is **not** the standard set out in the statute.[5] An advertisement can be misleading and yet not false. This is not just the view of these *amici* — it is also the position of the U.S. Supreme Court.

Just days ago, the U.S. Supreme Court issued a unanimous decision, ruling that when a statute requires a statement be proven to be "false," that standard cannot be met by proving a statement is "misleading." In *Thompson v. United States*, 2025 U.S. LEXIS 1071 (Mar. 21, 2025), the Supreme Court addressed the requirement of 18 U.S.C. § 1014, which criminalizes "knowingly mak[ing] any false statement or report." The Court explained that: "[g]iven that some misleading statements are also true, it is significant that the statute uses only the word 'false.'" *Id*. at *8. "Yet false and misleading are two different things. A

[5] In no way do these *amici* believe that the advertisements could ever be considered "misleading," but want to stress that this Court must read the statute as it was written by the legislature to require the Attorney General to prove actual falsity, which it certainly has not done.

misleading statement can be true." *Id*. at *7. The Court concluded: "[u]nder the statute, it is not enough that a statement is misleading. It must be 'false.'" *Id*. at *14.

B. New York Executive Law § 63(12).

The "big gun" in the Attorney General's arsenal is New York Executive Law § 63(12), which authorizes the Attorney General to seek injunctive relief to stop "**repeated fraudulent or illegal acts or ... persistent fraud or illegality** in the carrying on, conducting or transaction of **business**." (Emphasis added.) It provides for unspecified "restitution and damages." Finally, it permits the state to revoke a business's certification, effectively destroying any business entity without the need to demonstrate intent, or indeed, to show very much at all. Thus, § 63(12) provides for penalties so stiff that it makes it almost indistinguishable from a criminal statute. However, by styling this law "civil" in nature, it allows the Attorney General to circumvent the normal protections provided by the criminal law.

The term "**fraud**," as defined in this statute, includes "any device, scheme or artifice to defraud and **any deception**, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual

provisions." (Emphasis added.) This definition is wholly unhinged from any notion of fraud at common law.

There are various configurations of the traditional elements of fraud. One often-discussed case involving claims brought by a lawyer against a dry cleaner, alleging both common law fraud and violations of the District of Columbia Consumer Protection Procedures Act ("CPPA"), identifies the five elements of fraud:

> To prevail on a common law fraud claim, a plaintiff must establish by clear and convincing evidence that there was "(1) a false representation (2) made in reference to a material fact, (3) with knowledge of its falsity, (4) with the intent to deceive, and (5) an action that is taken in reliance upon the representation...." [*Pearson v. Chung*, 961 A.2d 1067, 1074 (D.C. Ct. App. 2008).]

An article by a practicing attorney has teased out not seven, but nine elements needed to establish common law fraud:

> (1) a representation of fact; (2) its falsity; (3) its materiality; (4) the representer's knowledge of its falsity or ignorance of its truth; (5) the representer's intent that it should be acted upon by the person in the manner reasonably contemplated; (6) the injured party's ignorance of its falsity; (7) the injured party's reliance on its truth; (8) the injured party's right to rely thereon; and (9) the injured party's consequent and proximate injury.[6]

---

[6] R. Mitchell, "What are the Elements of Common Law Fraud?" (citations omitted).

As viewed by the Attorney General, the definition of "fraud" in the New York law would appear to be met even by an innocent omission of an immaterial fact which had no bearing on the person receiving the information. Truly, under the New York law, almost anything could be said to constitute a violation: "any device, scheme or artifice to defraud and any deception, misrepresentation, **concealment**, suppression, false pretense, false promise or unconscionable contractual provisions." To avoid a violation of the First Amendment, the statute must be given a narrowing construction by the courts to save it from facial invalidity. It should be read to incorporate the common law elements to demonstrate fraud. Just as the court concluded in *Pearson v. Chung*: "In the end, whether Pearson's claims are considered under a common law fraud claim or under the CPPA makes no difference because he was unable to establish the underlying factual basis for relief." *Id*. at 1076.

Importantly, this section cannot be invoked absent a well-established pattern of fraud. The statute further defines the term "**persistent fraud**" to include the "continuance or carrying on of any **fraudulent** ... act or conduct." (Emphasis added.) It defines the term "**repeated fraud**" to include: "repetition of any separate and **distinct fraudulent** or illegal act, **or** conduct which affects more than one person." (Emphasis added.) Since the purpose of this statute clearly was to

prevent a long period of abusive business practices fleecing the People of New York, it has no application here.

C. The Original Plan.

Not surprisingly, § 63(12) has been referred to as the "most potent resource" available to the Attorney General to punish business practices.[7] A recent commentary by a New York practicing attorney explains the narrow purpose for which this draconian statute was enacted — to allow the Attorney General to stop a business engaged in a pattern of repeated criminal activities:

> Looking at the legislative history of Executive Law §63(12), the original intent behind the broad sweeping powers granted to the NYAG was to "enjoin the continuation in business as partners or under a trade style name of persons who are guilty of repeated fraud or illegality...." The bill jacket includes a letter from Governor Harriman's Consumer Counsel pointing to **an underlying criminal conviction** as the basis for the NYAG's use of the statute.[8]

There is no such criminal conviction here. When § 63(12) was enacted in 1956, "[t]he New York State Bar Association opposed the bill because it was drafted 'in too loose a manner' and argued, in advocating a veto, that that [sic] the

---

[7] W. Mulroney, "Deceptive Practices in the Marketplace: Consumer Protection By New York Government Agencies," 3 FORDHAM URB. L.J. 491, 502 (1975).

[8] E. Buckley, "Martin Act Investigatory Tools—An Overview," *New York Law Journal* (Dec. 6, 2024) (emphasis added).

description of 'fraud' was too broad and ill-defined."[9] State Comptroller Arthur Levitt also opposed the bill:

> His department argued that the broad authority in the bill was "too expansive" because a "mere preponderance of the evidence" would be sufficient to establish the illegal fraud and result in the closure of a business "without a criminal conviction for any wrongdoing." The bill authorized perpetual punishment of individuals without evidence or regard to the inherent dangers to the general public of the business activity involved, Levitt argued. [*Id.*]

D. An Abusive Law.

Modern commentators from both right and left have argued that New York's laws of the sort involved here, with their vague standards and limitless penalties, are ripe for abuse by politicized attorneys general. Recently, New York Judge Arthur Engoron imposed a nearly $400 million fraud verdict against then-presidential candidate Donald Trump and his business entities.[10] At oral argument on Trump's appeal, New York Supreme Court Appellate Decision Judge Peter H. Moulton raised the "question of mission creep,"[11] asking "[h]as 6312" — the

---

[9] R. Dollinger, "N.Y. fraud law that punished Trump was a Republican idea," *Rochester Beacon* (Mar. 27, 2024).

[10] M. Sisak and J. Colvin, "Appeals court signals it might be open to altering Donald Trump's $489 million civil fraud penalty," *Associated Press* (Sept. 26, 2024).

[11] E. Orden, "Massive civil fraud verdict against Trump gets frosty reception at New York appeals court," *Politico* (Sept. 26, 2024).

statute in question there — "morphed into something that it was not meant to do?" *Id.* Noting the apparently limitless penalty amounts allowed by the law, Moulton stated that the "immense penalty in this case is troubling."[12]

Both sides of the political spectrum agree § 63(12) has turned into a political weapon. Conservative law professor Jonathan Turley has written:

> You have an attorney general, Letitia James, who literally ran on a pledge of selective prosecution. That's what it was to say, if you elect me, I'll nail Trump for something. She didn't even bother to say what it would be.... We see a legal system that is really disassembling, that is devolving. **People look at New York now as a place where you really don't want to do business**. You [don't] want to get pulled into this vortex, where politics plays such a major role in how you are treated.[13]

Voices from the opposite side of the political spectrum have echoed the concerns about the abuse of this law. *Washington Post* columnist Ruth Marcus wrote about the Trump case: "forcing the sale or other disposition of his businesses, as the judge ordered in his opinion last week, seems both unnecessary and unduly punitive, disproportionate to the offenses charged. And I worry that this consequence would not have been meted out to a different defendant who

---

[12] B. Singman, "New York Appeals Court appears receptive to reversing or reducing $454M Trump civil fraud judgment," *Fox News* (Sept. 26, 2024).

[13] J. Turley, "The US legal system is 'devolving' amid Trump lawfare: Jonathan Turley," *Fox News* (Mar. 19, 2024) (emphasis added).

engaged in similar misconduct."[14] Columbia Law School professor Eric Talley said, "[t]his is a version of business law capital punishment. I'm not aware of a precedent at this scale." *Id*.

The New York law which the Attorney General seeks to keep available demonstrates the truth of the statement attributed to Senator Daniel O. Hastings about a federal law: "More power than any good man should want, and more power than any other kind of man ought to have."[15] The concerns of the New York Bar Association and the state Comptroller that § 63(12) was subject to abuse have come to fruition. Plaintiffs here have good cause for concern that they will be the next organizations targeted for "fraud" because their political speech does not align with the political views of New York's Attorney General.

E. The Attorney General's Assurances Cannot Be Relied Upon.

In a desperate effort to moot this case, the Attorney General has claimed to have disavowed in the district court any possibility that she would find the NIFLA advertisements to violate any of these statutes, but that representation is not

---

[14] R. Marcus, "Does the New York fraud case against Trump go too far?" *Washington Post* (Oct. 3, 2023).

[15] Senator Daniel O. Hastings, remarks in the Senate on the power to be given President Franklin D. Roosevelt by the proposed work-relief program (Mar. 23, 1935).

correct, and is at total odds with her analysis of the ads, and such late assurances to thwart litigation are of no avail. Aplt. Br. at 49. *See also* discussion in Section II, *infra*. If she truly had no intent to pursue advertisements about progesterone therapy, the Attorney General would consent to the entry of injunctive relief.

However, Attorney General Letitia James is not just a long-term supporter of abortion rights, but she also appears to be a passionate crusader for abortion itself:

> New York Attorney General Letitia James, who has long been outspoken about defending abortion rights, publicly disclosed Tuesday that she had an abortion herself almost two decades ago.
>
> Pregnant as a **newly elected** New York City Council member, **"I chose to have an abortion,**" James told protesters who gathered in Manhattan to decry a U.S. Supreme Court draft opinion that would overturn the 1973 Roe v. Wade ruling that legalized the constitutional right to an abortion nationwide.
>
> James, a Democrat, said she makes "**no apologies**" for her decision.
>
> "**I was just elected** and I was faced with the decision of whether to have an abortion or not, and I chose to have an abortion," she said. "I walked **proudly** into Planned Parenthood, and **I make no apologies** to anyone." ["'No Apologies:' NY AG Letitia James Tells Protesters 'I Chose to Have an Abortion,'" *4 New York* (May 4, 2022) (emphasis added).]

She appears to have explained that her decision to abort her child was to pursue her schedule and her political career:

> Listen, I had an abortion. It was a personal decision between me, my doctor, my God, and no one else. It was at the time when I was a

> member of the New York City Council, **beginning my career** as a public official with a **lot of demands on my schedule**. As a single woman, **it was best for me.** [M. Kabas, "Tish James on Her Decision to Get an Abortion, the Post-Roe Future, and the Midterms," *TeenVogue* (Oct. 18, 2022) (emphasis added).]

Her affinity for abortion is not just her personal view, but also her political platform which she promised to use her position to advance:

> James has **proposed a New York fund to help provide abortions** to women who can't access the procedures in their own states....
>
> "We will not go backward," she told the protesters Tuesday. **"No judge of the Supreme Court can dictate to me** or to you how to use your body." [*No Apologies, supra* (emphasis added).]

II. THE DISTRICT COURT'S INJUNCTION SHOULD BE UPHELD DESPITE NEW YORK'S EFFORT TO DISCLAIM ANY INTENT TO BRING ENFORCEMENT AGAINST NIFLA PLAINTIFFS.

In granting the preliminary injunction, the district court determined that the NIFLA Plaintiffs had standing since the State already was pursuing enforcement proceedings against other pro-life pregnancy centers for advertisements quite similar to those which NIFLA sought to place. The district court concluded: "Plaintiffs allege a 'credible threat' of future enforcement," especially in light of the fact that "the Attorney General does not disavow enforcement as to Plaintiffs." *Id*. at *14-15.

On appeal, the Attorney General has attempted to challenge the district court's finding of irreparable harm, declaring it had reviewed the NIFLA Plaintiffs' statements on their website and has no intention to bring an enforcement action against the NIFLA Plaintiffs. Aplt. Br. at 49-50.[16] The Attorney General's statements about her intentions should be disregarded for three reasons.

First, it is her actions, not her statements, that are important, and she has already brought an enforcement action against other pro-life nonprofits for substantially similar conduct.

Second, the Supreme Court has long ruled that a party's voluntary cessation of an unlawful practice after suit is filed cannot be used to moot a challenge to that action. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) (It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (Citations omitted.)). The reason for the rule, known as the Voluntary Cessation Doctrine, is obvious. Without that rule, a government defendant could moot challenges brought to its actions at will to

---

[16] Although Appellant's Brief does not assert mootness based on its representation that it does not plan to bring an enforcement action, one can expect such an argument could be forthcoming.

evade a prompt judicial resolution, chilling speech by causing unjustified fear that the government would later repeat the same unlawful enforcement action which would force the private party to again incur the expense of litigation. The same rule should apply here, at the preliminary injunction stage, to prevent the filing of an enforcement action.

Third, in her brief, Appellant cites to a declaration submitted below which claims that the statements that the NIFLA Plaintiffs previously made or would like to make are different from the statements made by the other organizations facing enforcement actions. *See* Aplt. Br. at 49, citing JA774-778. In that declaration, the Appellant tried to distinguish the different statements using a game of semantics. For example, Appellant focused on Plaintiff Gianna's House's use of the words "undo" or "stop" instead of the word "reversal" as used by the enforcement defendants. *See* JA775.

Appellant claims it used certain criteria which caused it to go after the enforcement defendants, and the NIFLA Plaintiffs did not happen to meet those criteria for one vague reason or another. "In sum, the various statements alleged by Plaintiffs are not comparable to the statements at issue in the Enforcement Action because they do not include 'reverse' or 'reversal' claims; they do not appear in the context of consumer-oriented advertising; and/or they are not

accompanied by language directing consumers to abortionpillreversal.com/ or the APR Hotline for APR services." JA778-79. But those criteria are arbitrary, cobbled together by Appellant, and they could easily change at a later time to include the statements previously made the NIFLA Plaintiffs. Also, since they are arbitrary, they support the NIFLA Plaintiffs' claims of chilling, because they will have to steer far clear of any statements **that could later become impermissible with changed criteria**. And just because Appellant says it did not go after the NIFLA Plaintiffs this time, it is not enough. The district court appropriately found that Appellant's enforcement actions are unconstitutional.

The district court determined that the Plaintiffs are likely to succeed on the merits because: "The Attorney General's enforcement of the New York Statutes against Plaintiffs, based on statements about [abortion pill reversal], is a content and viewpoint-based regulation on non-commercial speech that cannot survive strict scrutiny." *Id*. at *27. The district court relied on *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995), stating:

> When the government targets particular *views* taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. And the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." [*NIFLA* at *28 (cleaned up).]

New York argued both in the district court and here (Aplt. Br. at 33, *et seq.*) that the speech of the Plaintiffs is commercial speech, and thus Plaintiffs' claims are worthy of only intermediate scrutiny. *NIFLA* at *30. The district court considered the three factors that the Supreme Court established for determining whether speech is commercial or not, and found that it was not commercial, as "there is no evidence of any underlying economic motivation." *Id*. at *31. It concluded, a "'morally and religiously motivated offering of free services cannot be described as a bare "commercial transaction."'" *Id*. (quoting from *Greater Baltimore Ctr. for Pregnancy Concerns, Inc., v. Mayor & City Council of Baltimore*, 879 F.3d 101, 108 (4th Cir. 2018)).

New York also tried to claim it was protecting the public against "false and/or misleading business and advertising practices," but the district court explained that "regulating [Plaintiffs'] speech must be a last — not first — resort." *Id*. at *34 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002)). The district court found Plaintiffs' speech benign: "Plaintiffs' speech ... would — *at most* — encourage a woman to speak with her doctor about her treatment options." *Id*. And it pointed out New York's concession that "no one has been harmed by Plaintiffs' statements." *Id*.

III. THE DISTRICT COURT'S DECISION SHOULD BE RESOLVED BASED ON THE FIRST AMENDMENT, NOT THE FLAWED ATEXTUAL DOCTRINE OF COMMERCIAL SPEECH.

The Attorney General believes she should have greater power to regulate commercial speech than religious or political advocacy. There have been cases where "commercial speech" has been given less protection by the Supreme Court than "political speech." *See, e.g., Central Hudson Gas v. Public Service Comm. of New York*, 447 U.S. 557 (1980). However, the record is clear that the NIFLA Plaintiffs are nonprofit organizations offering free services, not commercial entities. *NIFLA* at *32. Even if NIFLA's advertisement was actually commercial in nature, the "commercial speech" doctrine should not be relied on, as it is deeply flawed.

Questions under the First Amendment are determined not by a gradation of the identity of the speaker or the kind of speech, but whether the communication at issue is one made within the **marketplace of ideas** entirely outside the jurisdiction of the State or within the **marketplace of goods and services** where some speech falls inside the jurisdiction of the State. Compare *Breard v. Alexandria*, 341 U.S. 622 (1951) (door-to-door solicitation of magazine subscriptions is protected by the First Amendment) with *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (street

distribution of a handbill inviting visitors to submarine exhibit upon payment of a fee for admission).

Indeed, even the marketplace distinction was abandoned by this Court in *Bigelow v. Virginia*, 421 U.S. 809 (1975), which struck down the application of a Virginia law that prohibited the advertisement of availability of legal abortion at low cost in New York as a violation of the First Amendment. In *Bigelow*, Justice Blackmun ruled that the commercial advertiser's "First Amendment interests coincided with the constitutional interests of the general public," as reflected in the recently decided cases of *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973),[17] also written by Justice Blackmun. Fittingly, one year after *Bigelow*, Justice Blackmun explained, "in *Bigelow v. Virginia* ... the notion of unprotected 'commercial speech' all but passed from the scene." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976).

In truth, the Attorney General's desire to preserve her right to shut down the pro-life advertisements of Plaintiffs is an exercise of raw political power by a weaponized public official in an increasingly politicized and ideologically

---

[17] These cases later were overruled by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

monolithic State. Overwhelmingly dominated by one party, the increasingly bold New York government uses punitive measures designed to coerce the people of the state to conform to its collective will in flagrant disregard of the First Amendment.

Under the First Amendment, it is not the job of governments to correct the people; rather, it is the job of the people to correct their governments. As James Madison observed in his Report on the Virginia Resolutions of 1800: "The people, not the government, possess the absolute sovereignty." *See* R. Perry & J. Cooper, eds., Sources of Our Liberties (Rev. ed.) at 426 (ABA Found.: 1978). Consequently, in America there is no place for government oversight of the opinions of its citizenry, such as would be the case if the government should, for example, establish an Orwellian "Ministry of Truth" to weed falsehoods out of the public debate. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012). Instead, the marketplace of ideas is to be entirely free from the coercive power of the State, as a matter of jurisdiction.

The Commonwealth of Virginia planted this jurisdictional seed in 1785 when it enacted into law Thomas Jefferson's 1779 Virginia Bill for Establishing Religious Freedom. That principle grew into the 1791 First Amendment of the United States Constitution a dozen years later. The Virginia premise rings as true

today as the day it was passed by the Virginia General Assembly, because it is based on the eternal Biblical principle recognized by the Virginia legislature that even creator God who could have coerced his creation, left such matters to individual choice:

> Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens ... tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being **Lord both of body and mind**, yet **chose not to propagate it by coercions** on either, as was in his Almighty power to do.... [Virginia Act for Establishing Religious Freedom, reprinted in P. Kurland & R. Lerner, eds., 5 The Founders Constitution at 84 (Univ. of Chi. Press: 1987) (emphasis added).]

In contrast, the Attorney General seeks to have the flexibility to impose her opinions on all the People of New York on the issue of abortion through clever manipulation of a statute meant to address business wrongdoing.

> that the impious **presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, **setting up their own opinions and modes of thinking as the only true and infallible**, and as such endeavouring to impose them on others, hath established and maintained **false religions** over the greatest part of the world, and through all time; that to **compel** a man to furnish contributions of money for the **propagation** of opinions which he **disbelieves**, is sinful and tyrannical.... [*Id.* (emphasis added).]

The Attorney General insists on preserving the flexibility to have the State censor and punish those who would seek to protect unborn life by allowing a

woman who had second thoughts after choosing to take mifepristone, or being coerced to take mifepristone, to still keep her baby. Such a manipulation of these statutes would take the tax dollars of all New Yorkers and expend them to "propagate" an opinion which many not only "disbelieve" but also strongly oppose. To shut down such speech is both "sinful and tyrannical." Or, to put it in more modern terms, after review of a city ordinance comparable to the California Act, the Fourth Circuit recently has declared that:

> **Weaponizing** the means of government against ideological foes risks a grave violation of one of our nation's dearest principles: "that no official, high or petty, can **prescribe what shall be orthodox** in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [*Greater Baltimore* at *23 (emphasis added).]

Jefferson understood that the First Amendment jurisdictional line was not subject to existential judicial override by any "important" or even "compelling state interest" or by any level of scrutiny, "intermediate," "strict," or "rational basis." Rather, his Bill, as introduced, explained that all such matters of opinion were outside the jurisdiction of government, stating: "[T]he **opinions** of men are **not** the **object** of **civil government, nor under its jurisdiction**." As adopted, it asserts the same principle in a slightly different way:

> That to suffer the **civil Magistrate to intrude** his powers into the **field of opinion**, and to restrain the profession or propagation of

> principles on supposition of their ill tendency, is a dangerous fallacy ... because he, being of course Judge of that tendency, will **make his own opinions the rule of judgment**, and approve or condemn the sentiments of others only as they shall square with, or differ from his own.... [Jefferson, in 5 The Founders Constitution at 77 (item # 37) (emphasis added).]

In the First Amendment marketplace of ideas, the State legislature simply has **no jurisdiction** to censor NIFLA's pro-life view. As long-serving Fourth Circuit Judge J. Harvie Wilkinson concluded in *Greater Baltimore*, the opposing sides in the abortion debate must "lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it." *Id.* at *24.

CONCLUSION

The district court's order granting the preliminary injunction should be affirmed.

Respectfully submitted,

/s/ *William J. Olson*

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
(703) 356-5070
*Attorney of Record
Attorneys for Amici Curiae

PATRICK M. MCSWEENEY
3358 John Tree Hill Rd.
Powhatan, VA 23139

JEFFREY C. TUOMALA
114 Creekside Ln.
Winchester, VA 22602

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

March 24, 2025

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amicus Curiae* of America's Future, *et al.* in Support of Plaintiffs-Appellees and Affirmation complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 6,230 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.194 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae* America's Future, *et al.*
Dated: March 24, 2025

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of America's Future, *et al.*, in Support of Plaintiffs-Appellants and Affirmation, was made, this 24th day of March 2025, by the email upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae* America's Future, *et al.*