UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COMPASSCARE, a New York nonprofit corporation; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation; FIRST BIBLE BAPTIST CHURCH, a New York nonprofit corporation,

Plaintiffs,

vs.

ANDREW M. CUOMO, in his official capacity as the Governor of the State of New York; ROBERTA REARDON, in her official capacity as the Commissioner of the Labor Department of the State of New York; and LETITIA JAMES, in her official capacity as the Attorney General of the State of New York,

Defendants.

1:19-cv-01409 (TJM/DJS)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Oral Argument Requested

Please take notice that as soon as the matter may be heard before the Honorable Judge Thomas J. McAvoy, of the United States District Court for the Northern District of New York, located at 15 Henry St., Binghamton, NY 13901, Plaintiffs will and hereby do move for a preliminary injunction. Specifically, Plaintiffs request that this Court preliminary enjoin Defendants, acting in their respective official capacities as Governor of the State of New York, Commissioner of the Labor Department of the State of New York, and Attorney General of the State of New York, along with anyone acting pursuant to the private right of action contained in the challenged law, from enforcing against Plaintiffs New York Senate Bill 660 (SB 660), as amended by New York Senate Bill 4413 (SB 4413) and codified in N.Y. Lab. Law § 203-e.

Plaintiffs are CompassCare Pregnancy Services, a pro-life pregnancy care center located in Rochester, New York (CompassCare); National Institute of Family and Life Advocates, a national non-profit, religious pro-life pregnancy care center membership organization with 41 member centers

in New York (NIFLA); and First Bible Baptist Church, located in Hilton, New York (First Bible).

SB 660 works an active interference with Plaintiffs' religious beliefs and pro-life missions, and would prevent them from hiring to those beliefs and missions, as they are constitutionally entitled to do. As explained in the accompanying Memorandum of Law, a preliminary injunction is warranted because SB 660 violates Plaintiffs' rights under the First Amendment to the United States Constitution, including their right to expressive association, free speech, religious autonomy, and free exercise of religion. Additionally, because SB 660 is unconstitutionally vague, it violates Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution. Plaintiffs will suffer irreparable harm in the absence of a preliminary injunction, the balance of hardships tips strongly in their favor, and protecting their constitutional rights is in the public interest. In support of this motion, Plaintiffs rely on their Verified Complaint for Injunctive and Declaratory Relief, the accompanying Memorandum of Law, and the affidavits of James R. Harden, Thomas Glessner, and Kevin Pestke in support of Plaintiffs' Motion for Preliminary Injunction.

Plaintiffs request that this matter be set for oral argument.

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1:19-cv-01409 (TJM/DJS)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In passing SB 660, the so-called "Boss Bill," New York has sacrificed the United States Constitution to advance a legislative agenda preferencing abortion and contraception. The state's calculated action in this regard runs roughshod over the constitutional rights of Plaintiffs and other similarly-situated religious and pro-life employers. Absent declaratory and injunctive relief from this Court, Plaintiffs will be prevented from making employment decisions consistent with their religious beliefs and missions, and could be saddled with existentially threatening monetary penalties for merely refusing to comply with this affront to their religious autonomy.

SB 660 provides, in pertinent part, that "[a]n employer shall not . . . discriminate . . . against an employee . . . because of or on the basis of the employee's . . . reproductive health decision making." Verified Complaint (hereinafter "VC"), Exh. 1.[1] Although the legislature sold it as a matter rooted in simple fairness, the legislative record reveals not one single instance of employment discrimination based upon reproductive health decisions ever having taken place in New York State. That is not surprising, however, because SB 660 is not a law designed to remedy a demonstrable problem, but rather a state-wielded cudgel designed to compel religious and pro-life employers to hew to the state's chosen orthodoxy on abortion, contraception, and sexual morality.

SB 660 forces pro-life pregnancy care centers, religious schools, and even churches to hire and employ those who refuse to abide by organizational codes of conduct and statements of faith on these fundamentally important and hotly contested issues. It does so by prohibiting these organizations

[1] SB 660 created a new section in New York's labor law, § 203-e. *See* VC, Exh. 1. After the legislature passed SB 660 but before it became law, the legislature passed SB 4413, which amended the employee handbook notice provision contained in SB 660 so that it would take effect "on the sixtieth day after" SB 660 took effect. *See* SB 4413 at §3, https://legislation.nysenate.gov/pdf/bills/2019/s4413. When Plaintiffs filed their complaint, the state had not yet delivered SB 4413 to Governor Cuomo and it was therefore not operative. However, after the Plaintiffs filed their complaint, the legislature delivered SB 4413 to the governor and he subsequently signed it on November 25, 2019. SB 4413's passage has no effect on the arguments raised by Plaintiffs here. For the sake of continuity and ease of reference, Plaintiffs continue to refer to the law being challenged as "SB 660."

from enforcing codes of conduct essential to accomplishing their core missions, and by compelling them to speak the government's message that their employees are free, without consequence, to violate organizational religious beliefs regarding abortion, contraception, and sexual morality.

SB 660 enforces these unconstitutional strictures by providing for draconian enforcement mechanisms and penalties, including state enforcement proceedings, private rights of action, liquidated damages, and awards of attorneys' fees. As explained in more detail below, SB 660 violates Plaintiffs' rights to expressive association, free exercise of religion, religious autonomy, and free speech under the First Amendment to the United States Constitution. Furthermore, because it relies on vague terms and standards in purporting to regulate them, SB 660 also violates Plaintiffs' right to due process under the Fourteenth Amendment. Plaintiffs have no recourse but to seek refuge from SB 660 in this Court, as its operation against them will otherwise result in irreparable harm. Plaintiffs therefore merit preliminary injunctive relief.

FACTUAL BACKGROUND

Plaintiffs

Plaintiffs are pro-life and religious organizations who spread a faith-informed message that all life is sacred. They exist to protect unborn life, to advocate against abortion and abortifacient drugs, and to provide support to women so they may choose life for their unborn children. Predictably and of necessity, Plaintiffs require their employees to live out their pro-life missions and beliefs, or in other words, to practice what they preach. VC ¶¶ 19-22; 55-96; 97-113; 114-140.

Plaintiff **Compass Care Pregnancy Services** ("CompassCare") is a faith-based non-profit pregnancy care center located in Rochester, NY which offers assistance to women free of charge. Harden Aff. at ¶¶ 4-6. It receives no government funding and provides, among other services, clinical pregnancy testing, ultrasound exams, and comprehensive pregnancy, abortion, and adoption options consultations. It also maintains a number of websites and a blog through which it regularly

communicates its pro-life message. *Id.* at ¶ 28. In the clinic setting CompassCare provides its patients accurate and comprehensive information concerning prenatal development, abortion procedures and risks, and alternatives to abortion. However, because it believes that every abortion claims an innocent life, and that every such life is a gift from God that should not be destroyed, it does not and cannot recommend, provide, or refer for abortions or abortifacient drugs or devices. *Id.* at ¶¶ 10-11; 21. CompassCare's religious beliefs permeate its mission and all of its activities, and it views itself as an outreach ministry of Jesus Christ through His church. During every patient interaction, a CompassCare staff member offers to share the Gospel message of God's love and hope to those who wish to hear it. *Id.* at ¶ 7. Employees are expected to communicate CompassCare's pro-life message and to live that message out in their daily lives. Anything less would compromise its life-saving mission and run counter to the pro-life ethic and message it exists to foster and communicate. VC ¶¶ 14-18.

Plaintiff **National Institute of Family and Life Advocates ("NIFLA")** is a non-profit membership organization comprised of a network of both medical and non-medical pregnancy care centers providing pro-life services and information to women facing unplanned pregnancies. Glessner Aff. at ¶¶ 3-4. NIFLA is incorporated as a religious organization and has 41 member centers in New York. *Id.* at ¶ 3. A central part of NIFLA's mission is to help its member centers advance their pro-life objectives. As with NIFLA itself, its New York member centers pursue their pro-life mission and spread their pro-life message as an exercise of their religious beliefs. *Id.* at ¶ 9.

Plaintiff **First Bible Baptist Church** ("First Bible") is a Christian church in Hilton, N.Y. which has been spreading the Gospel message of Jesus Christ to the greater Rochester area for over 50 years. Pestke Aff. at ¶ 4. First Bible also operates as one of its ministries Northstar Christian Academy, a traditional curriculum school educating approximately 350 students from preschool/daycare through 12th grade. *Id.* at ¶¶ 14-15. First Bible—as both church and school—holds, actively professes, and teaches historic and orthodox Christian beliefs on the sanctity of human

life, including the belief that each human life, from the moment of conception, is formed by God and bears His image. *Id.* at ¶¶ 5-7. First Bible therefore holds that participation in, facilitation of, or payment for abortion in any circumstance is a grave sin. *Id.* at ¶ 6.

SB 660

SB 660, which was signed into law by Governor Cuomo on November 8, 2019, provides that "[a]n employer shall not. . . discriminate nor take any retaliatory personnel action against an employee . . . because of or on the basis of the employee's or dependent's reproductive health decision making." VC, Exh. 1. It further provides that "[a]n employer shall not . . . require an employee to sign a waiver or other document which purports to deny an employee the right to make their own reproductive health care decisions." *Id.* Finally, it provides that "[a]n employer that provides an employee handbook to its employees must include in the handbook notice of employee rights and remedies under this section." *Id.*

Although SB 660 purports to remedy employment discrimination based upon the reproductive health decisions of employees, its legislative history contains not one documented instance of any such discrimination ever having taken place, whether in New York State or elsewhere. VC ¶ 8. The lack of any government interest supporting SB 660 does not mean, however, that the state lacked a motive in passing it. In fact, SB 660's legislative history reveals an intent to target religious and pro-life organizations for disfavored treatment. The locus of such disfavor is made patently clear by SB 660's legislative history. The state disapproved of the many cases filed by religious employers against the federal Affordable Care Act's (hereinafter "ACA") contraceptive mandate, and wanted to ensure that going forward religious employers in New York would have no ability to run their operations consistent with their faith and conscience—instead they would be compelled to bow to the state's own orthodoxy regarding matters of "reproductive health." VC ¶¶ 10-16.

In its official justification for SB 660 the legislature characterized employer challenges to the ACA as a denial of reproductive healthcare, rather than what they actually were—religious employers' lawful petitioning of the courts to protect their free exercise rights in the wake of the federal government's attempt to coerce them into providing abortifacient drugs. *See* New York State Assembly Bill A584 Bill Transcript at 433, https://bit.ly/2FH81pv (last visited Dec. 17, 2019), VC, Exh. 2; *see also* Senate Bill S660 Bill Summary, https://bit.ly/2CIhJ9o (last visited Dec. 17, 2019), VC, Exh. 3 (characterizing ACA lawsuits by employers as attempts to "prevent employees from accessing [contraceptive] benefit[s]" and stating that SB 660 was necessary to "ensure that legal loopholes are corrected to ensure that employees' decisions about pregnancy, contraception, and reproductive health are . . . protected under state law"). The main sponsor of SB 660 in the Senate, Senator Jennifer Metzger, went even further in this vein, decrying as "dangerous" the United States Supreme Court's holding in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which recognized that a closely-held for-profit corporation had a right to the free exercise of religion. Senator Metzger openly declared that SB 660 was designed to prevent lawsuits filed by religious employers, and the Supreme Court's decision vindicating the constitutional right to the free exercise of religion, from "further encroach[ing]" on the "private decisions of employees." *See* VC, Ex. 2 at 433-34; VC ¶¶ 12-13.

These comments themselves are amply sufficient to establish religious targeting, but the legislative record reveals still more evidence of animus. For instance, although state officials knew SB 660 would sweep into its ambit religious and pro-life organizations the state had no business regulating in this manner, they refused to provide any religious exemption to the law—unlike other New York laws. *See* VC ¶ 15-16.[2] Assemblywoman Ellen Jaffee, SB 660's main Assembly sponsor, acknowledged

[2] For example, New York's Human Rights Law, which protects employees from discrimination based on almost every other conceivable category, including "age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status," N.Y. Exec. Law

the existence of a "ministerial exception" but stated that SB 660 nonetheless applies to every employer in the state. *See* VC, Exh. 3 at 125. She explained that religious employers who may merit the exception under extant precedent would not be able to enjoy it outright, but would instead have to raise it as a defense to any suit brought under SB 660, as if the trauma and expense of litigation to defend one's rights was a *good* outcome for religious employers. *Id.* In other words, through SB 660 the state is forcing religious employers—including churches—to prove their right to operate according to their religious beliefs, even though it knows from the outset that those employers most assuredly have that right. The state's decision to inflict this "process as punishment" against religious entities is another clear marker for religious targeting.

Alarmingly, the disabilities visited upon pro-life and religious organizations by SB 660 threaten the very existence of Plaintiffs, all of which are non-profits with limited budgets. *See* VC ¶¶ 203-06. That is because SB 660 not only permits state authorities to enforce the law against Plaintiffs, but also deputizes private individuals to bring suit against them. With respect to such private lawsuits, SB 660 permits depredations which could financially cripple Plaintiffs. SB 660, for instance, permits courts to "award damages, including, but not limited to, back pay, benefits and reasonable attorneys' fees and costs," along with "liquidated damages equal to one hundred percent of the award for damages." VC, Exh. 1. Plaintiffs are thus faced with the choice of denying their faith and doing the state's bidding, or shutting down their ministries. Because the state may not constitutionally impose this choice on Plaintiffs, injunctive relief is necessary and appropriate. Without such relief Plaintiffs will suffer irreparable harm.

§ 296(1)(a), *does* contain a religious exemption. *See* N.Y. Exec. Law § 296 (11). Thus, although SB 660 essentially adds a protected class to New York State's employment discrimination laws based on "reproductive health decision making," the legislature intentionally chose not to grant the appropriate religious exemption, thereby further evincing religious targeting.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) the balance of hardships tips in their favor; and (4) an injunction is in the public interest. *ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). In the First Amendment context, "the likelihood of success on the merits is the dominant, if not dispositive, factor." *N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). But Plaintiffs "need not show that success is an absolute certainty" to demonstrate a likelihood of success on the merits. *Broker Genius, Inc. v. Zalta*, 280 F. Supp. 3d 495, 510 (S.D.N.Y. 2017) (quoting *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988)). Rather, they must merely demonstrate that "the probability" of prevailing "is better than fifty percent." *Id.* Additionally, Plaintiffs may also be granted an injunction by showing that there are "sufficiently serious questions going to the merits to make them a fair ground for litigation," and that the "balance of hardships tip[s] decidedly toward" them. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Because Plaintiffs comfortably satisfy each of these requirements, they are entitled to injunctive relief.

I. SB 660 coerces Plaintiffs to hire and retain employees who dissent from and act contrary to their beliefs and missions, which is a violation of Plaintiffs' right to expressive association under the First Amendment to the United States Constitution.

The right to expressive association prevents the very type of intrusive, majoritarian meddling represented by SB 660. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000) (warning against "[g]overnment actions" that "intru[de] into the internal structure or affairs of an association like a regulation that forces the group to accept members it does not desire," and explaining that the right to expressive association "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas")(internal quotations and citations omitted). Indeed, by virtue of the First and Fourteenth Amendments Plaintiffs have the "freedom . . . to associate for the purpose of advancing [their] beliefs and ideas." *Abood v. Detroit Bd. of Ed.*, 431 U.S.

209, 233 (1977). This freedom entails not only the right to "associate with others in the pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), but also the freedom not to associate with those who express contrary views. *Dale*, 530 U.S. at 648; *Roberts*, 468 U.S. at 623 ("[f]reedom of association . . . presupposes a freedom not to associate").

In assessing whether SB 660 violates Plaintiffs' right to expressive association, this Court must determine whether they "engage[] in expressive activity," whether the law "would significantly affect [their] ability to advocate public or private viewpoints," and whether the state has a compelling interest which justifies interfering with Plaintiffs' expression, and assuming it can identify one, whether the state has advanced that interest using the least restrictive means. *Dale*, 530 U.S. at 648, 650, 657-58. Taking each inquiry in its turn reveals that SB 660 cannot pass constitutional muster.

A. Plaintiffs engage in expressive activity.

An organization comes within the protection of the First Amendment's right to expressive association if it "engage[s] in some form of expression, whether it be public or private." *Dale*, 530 U.S. at 648. Put another way, an organization "engages in expressive activity" when it "seeks to transmit a system of values." *Id.* at 650. Based on these guideposts, by joining together for the purpose of communicating their religiously-informed pro-life worldview, Plaintiffs clearly engage in expressive activity. *See Roberts*, 468 U.S. at 626-27 (characterizing the Jaycees as an expressive association as a result of its "civic, charitable, lobbying, fundraising, and other activities").

CompassCare engages in expressive activity each time it meets with a patient and provides comprehensive information regarding pregnancy and childbirth in hopes that the woman will choose life for her unborn child, each time it offers to share the Gospel with patients as an outreach ministry of Jesus Christ through his church, and each time it authors a blog post or radio spot to provide the community insight into the effect that abortion, contraception, and related issues have on our culture.

See VC ¶¶ 20, 76, 96. Plaintiff NIFLA engages in expressive activity by establishing a network of pregnancy care centers dedicated to achieving an abortion-free America; by equipping such centers with legal counsel, support, and guidance on how best to communicate a pro-life message and vision in their communities; and by holding educational seminars to help centers more effectively transmit their pro-life message and thereby save more unborn lives. *See* VC ¶¶ 97; 99-101. And Plaintiff First Bible engages in expressive activity by preaching the Gospel, by inculcating the Christian faith to its students at Northstar Christian Academy, by working with local pro-life pregnancy centers, and by transmitting Christ's message of love and hope to the broader world through its vibrant missionary program. *See* VC ¶¶ 114-115; 125-27; 135, 247-248.

B. SB 660 would significantly hinder Plaintiffs' ability to accomplish their pro-life missions and express their pro-life messages.

Courts must "give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. This Court, however, need not rely on Plaintiffs' own say-so here—the language of SB 660 demonstrates how it would greatly impair Plaintiffs' expression.

Plaintiffs associate with others of like mind and beliefs to protect life by assisting pregnant women to bring their babies into the world and by spreading the message that life is sacred. SB 660 would thwart Plaintiffs' right to expressive association—and their very reason for being—precisely because it would compel them to associate with employees who disagree with and refuse to live by Plaintiffs' pro-life principles. The law would alter Plaintiffs' pro-life messages, require them to adopt standards of conduct at odds with their beliefs, and even conscript them into giving their employees notice that the state's views on reproductive health decisions trump the organizations' own. It would force Plaintiffs to employ messengers who would compromise and even contradict the message for which Plaintiffs associate to convey. For instance, CompassCare and NIFLA's member pregnancy care centers would be forced to counsel pregnant women considering abortion with dissenting staff who insist on personally having abortions, using abortifacient drugs, or advocating positions contrary

to the pro-life beliefs of Plaintiffs. Meanwhile, First Bible would have to rely on preachers, teachers, and other employees who similarly fail to adhere to the church's teaching and beliefs on these subjects. Even more astonishing, Plaintiffs would have to tolerate employees who not only fail to abide by Plaintiffs' principles in their personal lives, but also those who publicly and privately advocate for reproductive health choices directly at odds with Plaintiffs' missions and beliefs.

In sum, it cannot be seriously doubted that Plaintiffs' pro-life efforts to save unborn lives would be compromised by employee exemplars who fail or refuse to live up to Plaintiffs' pro-life standards of conduct. SB 660 would work a perverse transformation of Plaintiffs' operations by forcing them to communicate a contrary message about abortion. Finally, Plaintiffs' ability to continue to attract funding from donors and members would be severely hampered if not entirely destroyed, precisely because SB 660 impairs their speech and destroys their pro-life character and witness.

C. SB 660 Fails Strict Scrutiny.

Because SB 660 violates Plaintiffs' right to expressive association, it must pass strict scrutiny to survive. *Roberts*, 468 U.S. at 623. Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). In order for the state to meet its burden, it must show that SB 660 serves interests "of the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and is "narrowly tailored" to serve that paramount interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). The state must "present more than anecdote and supposition," and must show an "actual problem" to be solved. *Id.* at 822.

1. SB 660 lacks any interest to support it, much less a compelling one.

The state has come nowhere close to surmounting such a high threshold. SB 660's legislative history reveals no problem which needs solving. *See* VC ¶¶ 8-9; 148-150. In fact, when directly queried as to why SB 660 was necessary, Assemblywoman Jaffee, SB 660's main Assembly sponsor, could not cite even one instance of employment discrimination based on the reproductive health decisions of

employees ever having taken place in New York State. Rather, she merely noted that *other* states and locales had passed similar legislation, again without citing any evidence of discrimination which might have prompted those laws. *See* VC ¶¶ 153-54. Collectively, the Assembly and Senate also came up woefully short, opting instead to advance nothing more than a generic interest in eradicating abstract discrimination as justification for SB 660. *See* VC, Exh. 4 ("New York has a long history of protecting individuals from discrimination in the workplace."). In other words, the state couldn't even be bothered to import an interest from elsewhere to support SB 660—it apparently considered its own *ipse dixit* sufficient.

Controlling law requires much more than this to sustain SB 660. The state's generic interest in combatting discrimination in the abstract is not compelling, and its attempt to rely on imagined harm to justify SB 660 is fatal to the law's survival. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (internal quotations and citations omitted) (state "must do more than simply posit the existence of the disease sought to be cured," and "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (state must show regulation is "actually necessary to the solution"); *see also Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 822 (E.D. Mo. 2018) (granting summary judgment on expressive association claim in favor of Archdiocesan Catholic school and pro-life home, based on finding that ordinance similar to SB 660 would hinder plaintiffs' pro-life messages, and finding that general public concern voiced by legislative sponsor to justify law was not compelling interest).

Further undercutting any notion that SB 660 is supported by a compelling interest is the fact that it requires employers to give notice of its provisions to employees *only* when those employers maintain employee handbooks. If the state's proffered interests were so compelling, it would have

required all employers to give notice to their employees of their rights under the law. That it did not signals that SB 660 is clearly not the compelling concern the legislature gave lip service to. *See Lukumi*, 508 U.S. at 546-47 (noting that "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited").

Moreover, although the legislature posited SB 660 as an antidiscrimination law which "ensures that employees or their dependents are able to make their own reproductive health care decisions without incurring adverse employment consequences," VC. Exh. 4, such abstractions are not sufficient to satisfy the compelling interest calculus. The state is instead required to justify the application of SB 660 to the individual Plaintiffs themselves. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (noting that the compelling interest test requires courts to look "beyond broadly formulated interests justifying the general applicability of government mandates" to "particular religious claimants").

2. SB 660 is not narrowly tailored to meet the state's purported interest.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy" *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal citations omitted). SB 660 is the antithesis of narrow tailoring. In the absence of any documented problem or harm, it wields a blunderbuss, shooting in all directions to impose its so-called cure on everyone, including religious and pro-life organizations it has no business regulating in this sphere. Such clumsiness is unacceptable and unconstitutional. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801, (1988) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

The state, for instance, failed to exempt those who exist precisely to communicate their own pro-life messages regarding reproductive health decisions, including churches and religious schools, even though SB 660's supporters knew they had no business interfering with the internal operations

of these religious organizations. The cynical suggestion to let churches and ministries suffer the travails and costs of litigation and raise the ministerial exception as a defense reveals the mindset in play. *See* VC ¶¶ 14-16; 171-75. If SB 660 were narrowly tailored, the legislature would have granted exemptions to such groups. The state knows well how to do this, and has done so before. *See supra* n. 2.[3]

SB 660 also fails narrow tailoring because the state could have used less restrictive means to achieve its alleged interests. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813 (the state bears the burden of demonstrating that there are no less restrictive alternatives that would further its alleged interests). "The least-restrictive-means standard is exceptionally demanding," and will not be met where the government has "other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Hobby Lobby*, 573 U.S. at 728. First, as discussed above, the state could have exempted those pro-life and religious organizations the law now impairs without constitutional warrant. *See id.* at 730 (concluding that where the government already "has at its disposal an approach that is less restrictive than requiring employers . . . to . . . violate their religious beliefs," least restrictive means test failed). Second, the state could have relied upon the pre-existing ban on sex discrimination contained in its Human Rights Law, which covers pregnancy discrimination, to advance its supposed interest. *See Union Free Sch. Dist. No. 6 of Towns of Islip & Smithtown v. New York State Human Rights Appeal Bd.*, 35 N.Y.2d 371, 375 (1974) (finding pregnancy discrimination covered by ban on sex discrimination in state human rights law). That provision, however, is subject to a religious exemption, and SB 660's legislative history shows that the government here deliberately rejected any such carve out, even as it recognized the need for one.

[3] SB 660 is both overbroad and underinclusive. As to the former it regulates all employers, including expressive associations and religious organizations it clearly should not. As to the latter, it fails to require that employers give notice of the law's provisions to their employees if the employer does not have an employee handbook, thereby inexplicably exempting all employers without such handbooks from having to comply with that portion of the law. *See* VC ¶¶ 143, 195, 313.

Supported by no interest and entirely lacking in any tailoring, narrow or otherwise, SB 660 cannot survive strict scrutiny. SB 660 must therefore be enjoined.

II. SB 660 violates Plaintiffs' right to free speech under the First Amendment to the United States Constitution.

A. By requiring Plaintiffs to give notice to their employees of an unconstitutional law, SB 660 violates the compelled speech doctrine.

Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This latter aspect, known as the compelled speech doctrine, bars the government from coercing unwanted expression. "[T]he fundamental rule of protection under the First Amendment" is "that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

Plaintiffs have the right to determine what must be put in, and what must be left out of, their employee handbooks. Further, as faith-based non-profits, they have the right to decline advising potential employees that organizational views may be flouted and ignored. This freedom is essential to their ability to carry out their missions. But SB 660 works an active interference with that right, requiring Plaintiffs to include in their employee handbooks a "notice of employee rights and remedies" contained in the law. VC, Exh. 1. SB 660 thereby compels Plaintiffs to tell prospective and current employees that it is acceptable to procure abortions, use abortifacient drugs, and ignore traditional Christian teachings on sexual morality, ensuring them that such dissenting behavior will have no effect on their employment status. This "notice" provision thus compels Plaintiffs to say what they would not, and radically alters the way they operate their organizations, by forcing them to employ messengers who do not embody and in fact may flatly contradict their message. This the state cannot do. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (rejecting attempt by state to compel pregnancy centers to provide government notice of availability of abortions, "the very practice the [centers were] devoted to opposing").

SB 660's notice provision violates the compelled speech doctrine, and accordingly must be subjected to strict scrutiny. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 19 (1986) (applying strict scrutiny to law compelling speech). But for the reasons already outlined above, SB 660 cannot survive that exacting standard. *See supra* at 10-14.

B. SB 660 unconstitutionally regulates speech based on both content and viewpoint.

SB 660's notice provision compels Plaintiffs to convey speech that they would not otherwise convey. Meanwhile, its "no waiver" provision restricts and chills speech by prohibiting Plaintiffs and other similarly-situated employers from asking their employees to signify compliance with their statements of faith and/or codes of conduct by signing or assenting to them. *See* VC, Exh. 1 ("An employer shall not . . . require an employee to sign a waiver or other document which purports to deny an employee the right to make their own reproductive health care decisions, including use of a particular drug, device, or medical service."). Both provisions regulate speech based on its content and viewpoint and cannot be sustained.

1. SB 660's "notice" and "no waiver" provisions are content-based regulations that cannot withstand strict scrutiny.

The Supreme Court has noted that "[m]andating speech that a speaker would not otherwise make necessarily alters the content" and constitutes "a content-based regulation of speech." *Riley*, 487 U.S. at 795; *NIFLA*, 138 S. Ct. at 2371 (same). The Court has further noted that a law is content-based if "on its face [it] draws distinctions based on the message a speaker conveys" or it "cannot be justified without reference to the content of the regulated speech. . . ." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In addition to facial distinctions, speech regulations based upon the "function or purpose" of the speech are also infirm. *Id.*

Based on this controlling guidance, SB 660's "notice" and "no waiver" provisions are both content based. The "notice" provision compels speech Plaintiffs would never otherwise utter. And its

impact is worsened from a constitutional perspective because the speech it compels comes at the very beginning of Plaintiffs' relationship with their potential employees. At the very time Plaintiffs need to convey to their employees the centrality of living the organizations' messages, the state forces them to inform potential employees that such conduct is not required at all, thereby undermining Plaintiffs' efforts to establish a team-oriented approach to accomplishing their respective missions. *Riley*, 487 U.S. at 799-800. The "no waiver" provision is likewise infirm. It facially bans speech involving "particular subject matter," *Reed*, 135 S. Ct. at 2227, namely "reproductive health care decision making." But it bans nothing else, permitting employers to ask for employee compliance with all other subjects outside of those decisions. Plaintiffs for instance may ask their employees to sign documents waiving their right to dress contrary to a dress code, or behave and work in certain ways, but they are chilled in speaking to their employees regarding their beliefs about abortion, contraception, and human sexuality.

Because they are content-based regulations of speech, SB 660's "notice" and "no waiver" provisions are "presumptively invalid" and must survive strict scrutiny. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *see also Reed*, 135 S. Ct. at 2228 (internal citations omitted) (holding that a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech"). As established above, SB 660 cannot survive that searching inquiry. *See supra* at 10-14.

2. SB 660's requirement that employers express only one preferred view regarding reproductive health decision making is a viewpoint-based regulation that cannot withstand strict scrutiny.

SB 660 also founders because it discriminates based on viewpoint. Viewpoint discrimination is an "egregious form of content discrimination" which prohibits the government from "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Here, SB 660 targets not only the particular subject matter of reproductive health decisions but also the "particular views taken by speakers on [that] subject." *Id.* For instance, with respect to its "notice" provision SB 660 compels Plaintiffs to communicate the state's message that decisions of employees to have abortions, use contraception, or engage in sexual activity outside the context of a marriage between one man and one woman should and will have no effect on their employment status. But it forbids Plaintiffs from telling their employees that such reproductive health decisions will be cause for employee discipline or even termination. Similarly, its "no waiver" provision prevents employers from requiring compliance with their organizational codes of conduct regarding abortion, contraception, and sexual morality. SB 660 thereby prevents Plaintiffs from expressing any opposition to such decisions, or from gaining agreement by prospective or active employees that such conduct matters to their employment status. In this way the "no waiver" provision ensures that the state's view on these matters supplants Plaintiffs'.

SB 660's legislative history confirms that it was designed to make one viewpoint reign supreme—namely, that pro-abortion beliefs and actions triumph over the contrary views of religious employers. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (finding viewpoint discrimination where "the legislature's expressed statement of purpose . . . impose[d] burdens . . . based on the content of speech and . . . aimed at a particular viewpoint"); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (noting that "contemporary statements by members of the decisionmaking body" may be "highly relevant" to ascertaining intent or motive).

Here the official legislative justification for SB 660 is bereft of any documented instance of any employment discrimination based on reproductive health decisions. VC ¶¶ 8; 153-54. The legislature instead papered over that conspicuous omission, justifying SB 660 by reference to the many cases filed by religious employers against the federal ACA's contraceptive mandate. VC, Exh. 2 at 433. SB 660's main Senate sponsor followed suit by parroting the official justification for the law and

lamenting that it had become necessary to prevent "encroachment[s]" like the contraceptive mandate lawsuits filed by religious employers, and the Supreme Court's decision in *Hobby Lobby*, from supposedly interfering with the provision of reproductive healthcare. *Id.* at 433-34. Finally, SB 660's main Assembly sponsor all but admitted that a religious exemption was likely necessary but nevertheless did not include one, leaving religious organizations to navigate even the vagaries of unwarranted litigation merely to vindicate their patently clear constitutional rights. VC, Exh. 3 at 125.

Taken together, the absence of even a legitimate legislative purpose, along with the legislature's targeting of religion and its unvarnished attempt to ignore controlling precedents handed down by the United States Supreme Court as to the scope of the First Amendment's protections for religious liberty, all evince an improper motive which dismantles any pretense that SB 660 is viewpoint-neutral. Blatant viewpoint discrimination of the kind represented by SB 660 calls for strict scrutiny. *See Rosenberger*, 515 U.S. at 829. But for the same reasons already explained above, SB 660 cannot overcome that hurdle. *See supra* at 10-14.

III. By interfering with their ability to order their internal affairs in accord with their religious beliefs, SB 660 violates Plaintiffs' right to religious autonomy as guaranteed by the religion clauses of the First Amendment to the United States Constitution.

History teaches—and our Constitution recognizes—that religious freedom demands that the government refrain from interfering with the internal affairs of churches and other religious organizations. *See Watson v. Jones*, 80 U.S. 679, 730 (1872); *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696 (1976). Indeed, in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012), the Supreme Court unanimously held that the Religion Clauses together barred the government from applying even a neutral and generally applicable nondiscrimination law to a religious organization, when doing so would interfere with the organization's ability to operate consistently with its faith convictions by selecting its teachers in

accordance with those convictions. To permit otherwise, the Court explained, would impermissibly "affect[]the faith and mission of the [religious organization] itself." *Id.* at 190.

By imposing its onerous requirement that religious employers hire without regard to their faith and beliefs, SB 660 subjects Plaintiffs to the very sort of government intrusion *Hosanna-Tabor* forbids. CompassCare and NIFLA's New York member centers exist precisely to promote their religious views, thereby spreading a pro-life message of love in the hope of making abortion unnecessary. First Bible, as both a church and a Christian school, exists precisely to teach the truth that all human beings are made in the image and likeness of God and thus are of inestimable value. Yet SB 660 foists messengers upon them who refuse to speak or live a pro-life message.

Where CompassCare seeks to act as an outreach ministry of Jesus Christ through His church and offers to share the Gospel with its patients as it tends to their medical and other needs, SB 660 would compel them to undermine that faith through the state's desired employment restrictions. Where NIFLA's member centers, through their religious beliefs, seek to show women that an unplanned pregnancy is a navigable challenge and that giving birth to their children is a beautiful choice, SB 660 would compel them to hire spokespersons who openly flout those beliefs. And where First Bible would preach and teach that all life is sacred, SB 660 would require it to hire ministers, teachers, and employees who cannot and will not say or live what the church believes and preaches.

Put simply, the transparent attempt by the state to make religious organizations over in its image cannot survive the right to religious autonomy guaranteed by the Religion Clauses of the First Amendment to the United States Constitution. For if it means anything, religious autonomy has to mean that Plaintiffs cannot be forced by the state to hire and employ those who would hijack their religious missions and messages in both word and deed.[4] Indeed, while the "the right to freedom of

[4] *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (stating that the "First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles

association is . . . enjoyed by religious and secular groups alike," the "First Amendment . . . gives special solicitude to the rights of religious organizations," which includes among other things the "freedom to select [their] own ministers." *Id.* at 189. And this protection is not limited to those strictly labeled or traditionally considered "ministers," but rather extends considerably more broadly, to those who communicate the religious organization's faith. As Justice Alito, joined by Justice Kagan, noted in his *Hosanna-Tabor* concurrence, the ministerial exception includes employees "who serve in positions of leadership, . . . who perform important functions in worship services and in the performance of religious ceremonies and rituals, and . . . who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 199 (J. Alito, concurring). That formulation, which is consistent with the First Amendment protections accorded religious groups throughout our Nation's history, includes those employees Plaintiffs choose to help spread their religious message and to help them accomplish their pro-life mission. SB 660's active interference with Plaintiffs' religious autonomy means it cannot pass constitutional muster.

IV. SB 660 violates Plaintiffs' right to the free exercise of religion under the First Amendment to the United States Constitution.

Burdens on religiously-motivated conduct are subject to strict scrutiny under the Free Exercise Clause when a regulation lacks neutrality or general applicability. *Employment Division v. Smith*, 494 U.S.

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that are so fulfilling and so central to their lives and faiths"); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (stating that the "church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school," and "see[ing] no escape from conflicts flowing from the . . . exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow"); *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) (upholding termination of teacher at Catholic school who endorsed advertisement supporting *Roe v. Wade* and abortion rights, and refusing to "meddl[e] in matters related to a religious organization's ability to define the parameters of what constitutes orthodoxy"); *Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 950 (6th Cir. 1985) (concluding that "when the state penalizes particular hiring practices with respect to an individual employed to provide religious instruction and act as a religious role model when the employment is governed by religious principles, a burden on religion exists").

872, 879 (1990). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533. And a law that is "underinclusive" to the government's asserted interest is not generally applicable. *Id.* at 543. A court "may determine the [state's] object from both direct and circumstantial evidence," including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 535, 540 (internal citations omitted).

Here the evidence reveals that the legislature targeted religion in crafting SB 660 and that the law in any event is not generally applicable. Fortunately, the state's decision to target religious employers boldly, clearly, and without apology renders the judicial calculus an easy one. Such targeting is clearly impermissible and therefore fatal to SB 660. *See id.* at 546.

A. Because SB 660 targets religion for disfavored treatment, it is not neutral.

A "law targeting religious beliefs as such is never permissible." *Id.* at 533. Moreover, "[f]acial neutrality is not determinative," and even "subtle departures from neutrality" and "covert suppression of particular religious beliefs" are prohibited. *Id.* at 534. In this case, no one could accuse the state of employing subtle or covert measures—in fact its targeting of religion was transparently and emphatically overt. SB 660's legislative history reveals that the state conceived of the law as a way to directly "infringe upon [and] restrict [Plaintiffs' employment] practices because of their religious motivation." *Id.* at 533. SB 660's legislative memorandum reveals that the legislature disapproved of lawsuits filed by religious employers which challenged the federal ACA's contraceptive mandate. The state likened these lawsuits to mere "discriminat[ion]" and interfere[nce]" with reproductive health decisions, rather than what they really were, attempts by religious employers to vindicate their constitutional free exercise rights not to be implicated in providing abortifacient medications to their

employees. VC ¶ 156. The state viewed these meritorious challenges as intolerable and crafted SB 660 to forestall similar acts of free exercise in New York State.

Lest there be any doubt that the state's intention was to visit disfavor upon religious employers, Senator Metzger openly confirmed it in her floor speech, bemoaning the ACA lawsuits filed by religious employers, decrying the Supreme Court's decision in *Hobby Lobby* protecting the religious liberty of closely held corporations, and declaring that SB 660 was designed to prevent "further encroachment[s]" like these. VC, Ex. 2 at 433-34.[5] These overt admissions confirm that SB 660 was specifically designed to punish religious objectors who are not on board with the state's own orthodoxy regarding reproductive health services. *Id.* That the law appears neutral is of no moment, given that it was expressly designed to prevent recalcitrant religious employers from challenging the state's own beliefs on these matters. This intentional targeting destroys any pretense of neutrality.[6]

B. Because it does not apply in all respects to all employers in the state, SB 660 is underinclusive and not generally applicable.

SB 660 does not apply to all employers in the state. Its "notice" provision applies only to those employers who maintain employee handbooks. An appreciable if not substantial number of employers

[5] Metzger's comments are reminiscent of those recently condemned by the Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm*'n, 138 S. Ct. 1719, 1729 (2018), and are fatal to any claim of neutrality advanced by the state. In *Masterpiece* government officials in public hearings improperly "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in [the] community." The state here was similarly guilty of hostility to religion, by suggesting that religious employers were somehow suspect for merely seeking to conduct their affairs in accord with their religious beliefs, and by suggesting that the rights announced by the Supreme Court's in *Hobby Lobby* needed curtailing. *See also Buck v. Gordon*, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019) (finding religious targeting was the basis of state action where eventual attorney general made comments critical of legislation designed to protect rights of religious adoption agencies to operate according to their faith principles, and where state threatened to terminate contract with faith-based adoption agency because the agency could not make certain placements because of its religious beliefs).

[6] The fact that the legislature refused to include a religious exemption, when it knew the law would improperly sweep into is ambit religious organizations protected by *Hosanna-Tabor*, *see* VC, Exh. 3 at 125, further cements the conclusion that the state targeted religious actors for disfavored treatment.

are therefore free to leave their employees in the dark as to their new "rights" under SB 660. Such underinclusivity is not only fatal to any claim that the state's interest is compelling but also dispenses with any assertion that SB 660 is generally applicable. *Lukumi*, 508 U.S. at 543-44.

C. *Smith* cannot salvage SB 660.

Even if it had not so blatantly targeted religion, the state would still be unable to salvage SB 660 by resorting to *Smith*. The Supreme Court has rejected the idea "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017). Indeed, *Hosanna-Tabor* confirms a long line of authority concluding that incursions into church autonomy like those worked by SB 660 are not properly analyzed under *Smith*. *See* 565 U.S. at 182-191 (detailing history of First Amendment protections for religious organizations and their autonomy to make employment decisions unfettered by state control); *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (confirming the "freedom [of] religious organizations . . . independen[t] from secular control or manipulation . . . to decide for themselves, . . . matters of church government as well as those of faith and doctrine"). That is because such incursions go straight to the heart of the "faith and mission of the church itself," *Hosannna-Tabor*, 565 U.S. at 190, and not just to the "outward physical acts" *Smith* was concerned with. Therefore, even if this Court were to find that SB 660 is neutral and generally applicable, the burden worked upon Plaintiffs' religious autonomy means the law must be declared unconstitutional.

Finally, the general rule articulated in *Smith* should not apply to this case for another reason, quite apart from religious autonomy concerns. *Smith* is bad law and should be overturned. While Plaintiffs recognize that this Court is bound by Supreme Court precedent, it is undeniable that *Smith* has fostered conflict and confusion in the lower courts and that it has "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637

(2019) (Alito, J., concurring).[7] As such it cannot absolve the state's blatant overreach.

V. SB 660 is Void for Vagueness.

A law may be void for vagueness if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or if it "authorize[s] [or] encourage[s] arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56 (1999). A "heightened vagueness standard" applies when a law implicates First Amendment rights. *Brown*, 564 U.S. at 793. SB 660 suffers from both infirmities—it fails to let employers know what is prohibited or permitted, and it vests in state enforcement officials and private parties unbridled discretion to enforce the law based on its undefined and therefore malleable language. For instance, SB 660 fails to define its central term, "reproductive health decision making." *See* VC ¶¶ 332-35. It is therefore unclear what decisions are protected by the law; whether it pertains to past, present, and future decisions; and whether the decisions protected are only those kept private or are also those that are publicly expressed or communicated in the workplace and beyond. Additionally, SB 660 fails to define how state officials can and may enforce SB 660's provisions against employers, when they can do so, and what penalties they can impose on employers found to be in violation of the law.

This lack of clarity is not tolerated by the Fourteenth Amendment's guarantee of due process. The state was required to properly delimit SB 660 and to inform employers not only precisely what the law covers, but also how it will be enforced by state officials. Its failure to do so in this regard means SB 660 must fail.

VI. Plaintiffs satisfy all remaining injunction factors.

The foregoing establishes that Plaintiffs are likely to succeed on the merits of their claims. At the very least they have shown "sufficiently serious questions going to the merits," *Citigroup Glob.*

[7] Plaintiffs preserve this additional argument for any potential appeal.

Mkts., 598 F.3d at 35, to warrant a preliminary injunction. *See* Order, *New Hope Family Servs., Inc. v. Poole*, No. 19-1715 (2d. Cir. Nov. 4, 2019), ECF No. 160 (granting motion for preliminary injunction pending appeal in case raising free exercise, free speech, and expressive association claims, where plaintiff raised "plausible First Amendment claim" and would suffer irreparable injury absent requested relief).

Plaintiffs will suffer irreparable harm absent an injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). SB 660 requires Plaintiffs to employ those who will compromise their mission and message, in violation of their First Amendment rights to expressive association, free speech, religious autonomy, and the free exercise of religion. The law also threatens Plaintiffs with ruinous financial harm in the form of litigation costs precipitated by its harsh and unwarranted enforcement mechanisms. The balance of hardships sharply favors Plaintiffs. Without an injunction Plaintiffs will suffer immediate and continuing constitutional violations and potentially crippling financial losses. Meanwhile, the state will suffer no harm if an injunction is granted, because the state "does not have an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n. 11 (3d Cir. 2003) (internal quotations and citations omitted). Finally, an injunction would also serve the public interest, because "securing First Amendment rights is in the public interest." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that the Court enter a preliminary injunction against the enforcement of SB 660.

Respectfully submitted this 19th day of December, 2019.

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