STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

THE PREGNANCY CARE CENTER OF ROCKFORD, Incorporated as ROCKFORD AREA PREGNANCY CARE CENTER, an Illinois not-for-profit corporation; ANTHONY CARUSO, MD; A BELLA BABY OBGYN, INC., incorporated as BEST CARE FOR WOMEN, INC., An Illinois domestic corporation; and AID FOR WOMEN, INC., an Illinois not-for-profit corporation,	)	
Plaintiffs,	)	
vs.	)	No. 2016-MR-741
BRUCE RAUNER, in his official capacity as Governor of Illinois; and BRYAN A. SCHNEIDER, in his official Capacity as Secretary of the Illinois Department of Financial & Professional Regulation,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This case comes before the Court on Plaintiff's motion for entry of a preliminary injunction to prevent Defendant from enforcing a recently enacted statute against them. The statute in question, Public Act 99-690, also known as SB 1564, makes certain amendments to the Illinois Healthcare Right of Conscience Act, 745 ILCS 70/1 *et seq.* ("Conscience Act"). Signed into law by the Governor on July 29, 2016, it has a future effective date of January 1, 2017.

While the Conscience Act allows medical care providers to decline to participate in medical procedures to which they have moral objections, the amendments to the Act created by SB 1564 require providers to provide information and referral assistance with respect to a patient's "legal treatment options" as a precondition to invoking the Act's protections. It also requires immediate development of protocols to ensure compliance.

Plaintiffs are medical care providers with moral objection to the practice of abortion who contend that requiring them to give their patients information about or assistance in connection with abortion violates their statutory and constitutional rights. The issue here is neither the merits of the State's goal of informing patients nor the propriety of Plaintiffs' moral objections; the issue is whether the State may compel Plaintiffs to speak a message to which they object. Because Plaintiffs have raised a 'fair question' as to whether SB 1564 impermissibly compels speech and violates their rights under the Illinois constitution, the Court finds that they have satisfied the requirements for the issuance of a preliminary injunction.

Standard for a Preliminary Injunction

The requirements which must be met in order to justify the entry of a preliminary injunction are well established, and they have been summarized by the Appellate Court as follows:

> A preliminary injunction is an "extraordinary" remedy that "should be granted only in situations of extreme emergency or where serious harm would result if the preliminary injunction was not issued." The purpose of preliminary injunctive relief is not to determine controverted rights or decide the merits of the case, but to prevent a threatened wrong or continuing injury and preserve the status quo with the least injury to the parties concerned. In order to obtain preliminary injunctive relief, the plaintiff must establish: (1) a clearly ascertained right in need of protection; (2) irreparable injury in the absence of an injunction; (3) the lack of an adequate remedy at law; and (4) a likelihood of success on the merits of the case. If these elements are met, then the court must balance the hardships and consider the public interests involved. To obtain a preliminary injunction, the plaintiff must raise a "fair question" that each of the elements is satisfied.

Makindu v. Illinois High Sch. Ass'n, 2015 IL App (2d) 141201, ¶31 (citations omitted).

Where no answer has been filed, the well-pleaded allegations of a complaint for preliminary injunction will be taken as true. *Joseph Frazier, D.D.S., & George D. Dallas, D.D.S. v. Dettman*, 212 Ill. App. 3d 139, 148, 569 N.E.2d 1382, 1388 (2d Dist. 1991). There is also authority for the proposition that, where the defendant has not answered the complaint, the trial court may not receive or consider affidavits or other extraneous evidence when deciding whether to issue the preliminary injunction. *Russell v. Howe*, 293 Ill. App. 3d 293, 296, 688 N.E.2d 375, 378 (2d Dist. 1997); see also *Kurle v. Evangelical Hosp. Ass'n*, 89 Ill. App. 3d 45, 48, 411 N.E.2d 326, 328 (2d Dist. 1980). This issue was raised with counsel during the course of argument on the pending motion, however, and counsel for both parties agreed that the Court could consider any of the materials submitted by the parties in connection with the request for preliminary injunction.

The question of whether Plaintiffs have a right in need of protection, and the question of whether the Plaintiffs can demonstrate a likelihood of success on the merits of their claims, are separate and distinct questions. Still, it is not uncommon for these two issues to overlap. Such overlap is especially clear in this case, as the parties' briefs demonstrate that they have analyzed these two questions in almost the same way. The Court will also take them up together, as it seems clear that they rise and fall as one.

Analysis: Plaintiffs' RFRA Claim

The first basis Plaintiffs claim for relief is statutory: the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 ("RFRA"). However, to understand the statutory issues, the Court finds it helpful to summarize the legislative enactments at issue in chronological order.

Statutes at Issue

Effective January 1, 1998, the Illinois enacted the Conscience Act. See P.A. 90-246. Finding that "people and organizations hold different beliefs about whether certain health care services are morally acceptable," the legislature provided that no health care provider "shall be civilly or criminally liable … by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such" provider. 745 ILCS 70/4 (original 1998 version). "Conscience" is defined in the Conscience Act as "a sincerely held set of moral convictions arising from belief and in relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." 745 ILCS 70/3(e).

Later in 1998, Illinois enacted RFRA. P.A. 90-806, effective December 2, 1998. The law's declared purpose is to "guarantee that a test of compelling governmental interest will be imposed on all State and local (including home rule unit) laws, ordinances, policies, procedures, practices, and governmental actions in all cases in which the free exercise of religion is substantially burdened." 775 ILCS 35/10. To achieve this purpose, RFRA provides that "Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." 775 ILCS 35/15.

Finally, in 2016 the legislature passed Senate Bill 1564, which amended the provisions of the Conscience Act. The amendments to the statute can be summarized as follows:

- It amended Section 2 (findings and policy) to specify that the Conscience Act could be invoked as a matter of conscience in relation to "providing [or] paying for medical care which was contrary to the objector's convictions." In addition, the legislative amendment also specified that it was "also the public policy of the State of Illinois to ensure that patients receive timely access to information and medically appropriate care."

- It amended Section 3 to provide the following additional definition of "undue delay": "unreasonable delay that causes impairment of the patient's health."

- It amended Section 6 in the following manner:

> § 6. Duty of physicians and other health care personnel. Nothing in this Act shall relieve a physician from any duty, which may exist under any laws concerning current standards~~,~~ of ~~normal~~ medical practice or care ~~practices and procedures~~, to inform his or her patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of treatment options, provided, however, that such physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience.

- It added a new section to the Conscience Act which requires providers to develop protocols which must be followed for invocation of the Act's protections. These protocols must address and provide for the following:

    1. The provider must "inform a patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care."

    2. When the provider is unable to provide care because of an objection of conscience, "then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information in accordance with paragraph (3)."

    3. When the provider objects to providing the service in question, the provider must "(i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer" the service in question.

    4. If requested, the provider must provide copies of medical records to the patient or the new provider "without undue delay."

The Conscience Act, it must be remembered, is a shield designed to protect conscientious objectors from having to take actions which violate their moral beliefs. In Defendants' view, SB 1564's amendments to the Conscience Act do not require a provider seeking to invoke that shield to do *anything* that is not also required of him or her under "current standards of medical practice or care." Defendants contend, therefore, that the information, referrals, and protocols required per SB 1564 are simply not required of Plaintiffs as a condition of invoking the Conscience Act unless they are *also* already required of them (and, presumably, all such providers) as a matter of professional ethical responsibility.

Plaintiffs, for their part, dispute that certain of the practices to which they object and from which they wish to remain separate – specifically, abortion – are required under any professional standard of conduct. If the two sides' positions are taken at face value, there is no conflict here. In other words, if (a) SB 1564 does not apply unless the conduct is also required under professional standards of ethics; and (b) discussion of abortion options or referrals to abortion providers are *not* required of providers under applicable standards of professional ethics, then Plaintiffs can never be prevented from invoking the Conscience Act.

However, the very existence of this case suggests that the parties' positions should *not* be taken at face value. It is eminently clear that the parties have dramatically different ideas about whether professional standards of ethics would permit Plaintiffs to make the choices they have made to impose limits on what they will discuss with their patients or assist in referring their patients in obtaining. The Court finds that the professional ethical codes referenced by Defendants, which they concede are not definitive, do *not* establish this as a matter of

uncontested fact. Medical ethicists deserve our respect and the Court's attention, but matters of personal conscience are not solely within the province of the professions to decide. Lay persons are likely to fundamentally disagree about these morally challenging matters, and one suspects that the ethical conflict is not wholly resolved among practitioners in their fields.

The Court's concern is that the sharp edges of SB 1564 are obscured behind its invocation of professional ethical standards. Defendants argue that SB 1564 doesn't really change the standards of conduct already imposed on providers by professional licensing requirements, and yet they also argue that SB 1564 serves an important function of making available to patients information they would not otherwise receive. Defendants cannot have it both ways; they cannot argue that SB 1564 addresses an unmet health care need and at the same time argue that its requirements are already part of existing professional standards. Consequently, the Court undertakes its examination of this case on the premise that the question of whether professional standards of conduct require Plaintiffs to engage in the conduct to which they object is a disputed factual issue.

Plaintiffs' Statutory Argument

Plaintiffs' concern here is primarily focused on the newly added Section 6.1 and its requirement for the development of protocols which may limit the protections of the Conscience Act. They are concerned with the new and clearer requirement that health care providers must discuss with their patients treatment options to which they object and take action to assist the patient in transferring to a provider who will undertake those options.

Plaintiffs argue that SB 1564 "violates" RFRA.[1] Defendants take the view that the provisions of the Conscience Act are more specific than those of RFRA and the amendments at issue more recent; therefore, Defendants argue, the provisions of the Conscience Act control.

The General Assembly has an ongoing right to amend a statute, and there is no vested right in the mere continuance of a law. *Int'l Union of Operating Engineers Local 965 v. Illinois Labor Relations Bd., State Panel*, 2015 IL App (4th) 140352, ¶30. Plaintiffs do not disagree with this proposition in general terms. In other words, they do not dispute that the 2016 legislature could have specifically amended RFRA or declared it inapplicable to the requirements of the newly enacted SB 1564. They correctly note, however, that SB 1564 does not explicitly state that it is overruling application of RFRA or amending that statute. Because of this, Plaintiffs argue, the Court must pay particular attention to the superseding clause contained in the 1998 RFRA:

> This Act applies to all State and local (including home rule unit) laws, ordinances, policies, procedures, practices, and governmental actions and their

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[1] The idea that a later statute can "violate" the provisions of an earlier statute, or that the provisions of an earlier statute can override the provisions of a later one, presents a fundamental question about the nature of legislative power in our constitutional system. In researching the pending motion, the Court explored this rather arcane question of "entrenchment," but the end result of the inquiry is that the Court should resolve the issue under more traditional notions of statutory construction. In the interest of "showing its work," the Court sets forth in the appendix to this decision its analysis of how the concept of "entrenchment" plays out in this context.

> implementation, whether statutory or otherwise and whether adopted before or after the effective date of this Act.

775 ILCS 35/25. Plaintiffs are correct that this superseding clause explicitly purports to apply RFRA's provisions to "State ... statutory" enactments adopted "after the effective date" of the 1998 RFRA. Plaintiffs argue, therefore, that the 2016 legislature's freedom to enact the provisions of SB 1564 was constrained or limited by virtue of the action taken by a predecessor legislature in 1998.

Defendants offer a simple solution: the RFRA's superseding clause is, in effect, trumped by the superseding clause contained in the Conscience Act. The latter provides as follows:

> This Act shall supersede all other Acts or parts of Acts to the extent that any Acts or parts of Acts are inconsistent with the terms or operation of this Act.

745 ILCS 70/14. Defendants argue that the Court should honor the Conscience Act's superseding clause because that statute is more specific than RFRA. There seems to be little doubt as to the correctness of the latter proposition. See *Morr-Fitz, Inc. v. Quinn*, 2012 IL App (4th) 110398, ¶54 ("The Conscience Act is more specific than the Religious Freedom Act because the Conscience Act deals specifically with the issue of health care, while the Religious Freedom Act would apply to any governmental action that 'substantially burden[s] a person's exercise of religion.'")

Plaintiffs' argument in response is a temporal one. They argue that the superseding clause in RFRA was adopted at the end of 1998, whereas the superseding clause in the Conscience Act was adopted at the beginning of 1998. Because RFRA's superseding clause came later, Plaintiffs argue, it should be honored. This argument is wholly unpersuasive. The legislation at issue is SB 1564, which was added to the Conscience Act only a few months ago. True, SB 1564 does not contain its own superseding clause, but it was being added to a statute which *already had* a superseding clause and which SB 1564 did not disturb.[2] The Court is inclined to agree with Defendants that the Conscience Act's superseding clause at least counters, if not overrides, the one in RFRA.

Rather than decide the issue presented by reference to 'dueling' superseding clauses, however, the Court feels it should refer to the more familiar canons of statutory construction. The objective in construing a statute is to discern the legislature's intent:

> The fundamental rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. The plain language of a statute remains the best indication of the legislature's intent. When the statutory language is clear, it must be given effect without resort to other aids of interpretation.

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[2] SB 1564 began as a bill, and its purpose was to alter the language of the Conscience Act. The Conscience Act *already* had a superseding clause, so it is hardly surprising that that SB 1564 did not add *another* superseding clause to the statute. We can presume that the legislature was aware of the pre-existing superseding clause and that it would continue to be effective.

People v. Tara, 367 Ill. App. 3d 479, 484, 867 N.E.2d 961, 967 (2d Dist. 2006) (citations omitted).

The question presented is simply this: did the legislature, in enacting SB 1564, intend that its own enactment would be subject to RFRA, including the requirement of review under a strict scrutiny standard?

The Court begins with the observation that the statutes appear to be in conflict. The subject matter of the two statutes substantially overlaps, as least as far as health care providers are concerned. Both explicitly apply to persons with religious and/or moral objections, and the outcome for the objector may be dramatically different depending on which statute applies. This is not a situation in which the later legislative enactment is of general applicability, and the RFRA might be applied to carve out an exception to it. Here, *both* statutes deal with "religious" or "moral" objections to compliance. Where a health care worker is concerned, the two statutes tread almost exactly the same ground.

There is guidance in the case law on how the Court should proceed in such a circumstance:

> Where two statutes are allegedly in conflict, a court has a duty to interpret the statutes in a manner that avoids an inconsistency and gives effect to both statutes, where such an interpretation is reasonably possible. [Citation.]" *Barragan v. Casco Design Corp.,* 216 Ill.2d 435, 441–442, 297 Ill.Dec. 236, 837 N.E.2d 16 (2005). This court presumes that the legislature would not enact a law that completely contradicts an existing law without expressly repealing the existing law. *Moore v. Green,* 219 Ill.2d 470, 479, 302 Ill.Dec. 451, 848 N.E.2d 1015 (2006). "'For a later enactment to operate as a repeal by implication of an existing statute, there must be such a manifest and total repugnance that the two cannot stand together.' "

People v. McGuire, 2015 IL App (2d) 131266, ¶15.

It is presumed that the legislature, in enacting statutes, acts rationally and with full knowledge of all previous enactments. *Mut. Mgmt. Services, Inc. v. Swalve*, 2011 IL App (2d) 100778, ¶8. When the legislature adopts a new statute that appears to conflict with an earlier one, a partial modification of the earlier statute may be found:

> An implied amendment is an act which purports to be independent, but which in substance modifies or adds to a prior act. Amendment by implication is not favored; a statute will not be held to have implicitly amended an earlier statute unless the terms of the later act are so inconsistent with those of the prior act that they cannot stand together. If the two enactments are capable of being construed so that both may stand, the court should so construe them.

People v. Ullrich, 135 Ill. 2d 477, 483, 553 N.E.2d 356, 359 (1990).

Certainly RFRA the Conscience Act can stand together, but in some cases – and this appears to be one of them – they irreconcilably conflict. There are rare situations in a "subsequent

enactment may ... serve to modify an earlier enactment by implication." *Application of County Treasurer*, 283 Ill. App. 3d 913, 914, 671 N.E.2d 49, 51 (3d Dist. 1996). Two separate and well-established canons of construction require that the changes wrought by SB 1564 must be given effect:

> When a general statutory provision and a more specific one relate to the same subject, we will presume that the legislature intended the more specific statute to govern. We will also presume that the legislature intended the more recent provision to control.

Abruzzo v. City of Park Ridge, 231 Ill. 2d 324, 346, 898 N.E.2d 631, 644 (2008) (citations omitted).

Based on these presumptions, the Court concludes that, despite the superseding clause in RFRA, the legislature intended that SB 1564 would "govern" and "control," i.e., the Conscience Act would not become immediately ineffective because of a conflict with RFRA. For this reason, the Court finds that Plaintiffs have not demonstrated that they have a right in need of protection under RFRA or that they have a reasonable likelihood of success on their RFRA claim.

Analysis: Plaintiffs' Constitutional Claim

It is fundamental that the power of the legislature is subordinate to the rights granted to Plaintiffs under the Illinois constitution. Article I, Section 4 of the Illinois constitution provides, in pertinent part, as follows:

> All persons may speak, write and publish freely, being responsible for the abuse of that liberty.

Plaintiffs contend that their rights of free speech under the Illinois constitution are infringed by SB 1564 because it impermissibly mandates "compelled speech."

Illinois does not interpret its constitutional guarantees in lockstep with their Federal counterparts. Article 1, section 4 of the Illinois constitution may afford greater protection than the first amendment in some circumstances, but this does not mean that greater protection is afforded in every context. *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 446–47, 865 N.E.2d 133, 168 (2006). Plaintiffs have offered no concrete basis on which to conclude that the Illinois constitution's guarantee of free speech would, in this context, provide protections greater than those provided by the First Amendment to the United States Constitution. This means that the Court might properly analyze this issue by reference to cases interpreting either constitutional provision. Most of the caselaw cited by the parties in this regard is from the Federal appellate courts. In the context of deciding State guarantees, Federal authorities are not controlling precedent, as they merely guide the interpretation of State law. *People v. McCauley*, 163 Ill. 2d 414, 436, 645 N.E.2d 923, 935 (1994).

Compelled Speech and the Standard of Review

While we normally think of the constitutional guarantee of free speech as preventing the government from stopping citizens from engaging in speech, it is also true that free speech rights include the right to be free from government *compelling* citizens to speak:

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what *not* to say.

Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 796–97, 108 S. Ct. 2667, 2677, 101 L. Ed. 2d 669 (U.S. 1988). Thus, the "government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288, 183 L. Ed. 2d 281 (2012).

SB 1564 does, in fact, compel speech on the part of medical providers in the following respects:

- Section 6 of the Conscience Act previously stated that it did not relieve any provider from "any duty" of practice which may exist under any "current standard." SB 1564 explicitly includes within this provision an affirmative obligation to inform a patient of his or her "legal treatment options," as well as the benefits of those options. Setting aside for the moment the potential justifications for such a requirement, this clearly is government compelled speech.

- SB 1564 adds a new Section 6.1 to the Conscience Act which affirmatively requires the development of protocols which must be followed by providers who seek to use the Act as a shield. This include the requirement that the provider must "inform a patient of … legal treatment options, and the risks and benefits of legal treatment options … consistent with current standards of medical practice." Where a provider declines to provide an objected-to service to a patient, the provider must participate in the transfer of the patient to someone the provider "reasonably believe[s] may offer" the service; the three options for doing so include giving "in writing information to the patient about other health care providers."[3]

The threshold question is to decide what standard of review applies. Defendants contend that this is simply a matter of providing patients with the information to make informed treatment decisions, i.e., informed consent, and that such a well-established legal requirement should be subjected to the lowest level of scrutiny, i.e., the rational basis test. Plaintiffs argue that the

[3] Not all of the provisions of SB 1564 objected to by Plaintiffs involve compelled speech. For example, Plaintiffs have objections to another option available under the new Section 6.1 (transferring a patient to the non-objecting provider), but this does not appear to be a matter of *speech* per se. The requirement that Plaintiffs must identify providers who they "reasonably believe may offer" the service in question probably is compelled speech.

changes in SB 1564 are not content neutral, and so they trigger the highest level of judicial review, i.e., the test of strict scrutiny.

The Court has reviewed the United States Supreme Court decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), but finds that it gives little direction. Most of the discussion in *Casey* focuses on the separate question of whether an informed consent provision created an "undue burden" on a woman's right to have an abortion. In other words, the woman's right of conduct, not the physician's right to be free from compelled speech, was the focus of that decision. The Court did touch on the latter issue, but with minimal elaboration:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe,* 429 U.S. 589, 603, 97 S.Ct. 869, 878, 51 L.Ed.2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Casey, 505 U.S. at 884, 112 S. Ct. at 2824, 120 L. Ed. 2d 674. Though recognizing that informed consent provisions imposed on physicians do implicate concerns of compelled speech, the Court's treatment of the issue offers little guidance as to the proper standard of review. *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014) (this "single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech").

The Court therefore turns to Federal appellate decisions since *Casey* which have more directly analyzed the standard of review to be applied to informed consent provisions. It should not escape notice that the underlying practice at issue in most of these is the highly divisive issue of abortion. The statutes at issue in those cases, however, can be fairly characterized falling on both sides of the abortion divide. Some statutes were designed to bring women increased information about the fetus, which clearly reflects an effort by the legislatures in those States to convince women about the importance of fetal life. Other statutes had the opposite design: trying to ensure that patients were informed of their right to opt for abortion. In an odd sense, it should be reassuring to all that *both* types of statutes are, to the extent they involve compelled speech by the physician, subjected to the same type of review, because the issue is not the correctness of the position but the degree to which the government can require private speakers to endorse it.

Having reviewed the Federal appellate decisions relied on by the parties, the Court finds that the Third Circuit's decision in *King v. Governor of the State of New Jersey*, 767 F.3d 216, (3d Cir. 2014), and the Fourth Circuit's decision in *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014), are the most persuasive in concluding that an intermediate standard of review should be utilized. The intermediate standard of review recognizes the State's traditional interest in regulating

medical providers while still providing for meaningful protection of the providers' right to be free from compelled speech.

Applying the Intermediate Standard of Review

The Third Circuit discussed the countervailing interests involved in the regulation of professional speech:

> We believe that commercial and professional speech share important qualities and, thus, that intermediate scrutiny is the appropriate standard of review for prohibitions aimed at either category. Like commercial speech, professional speech is valuable to listeners and, by extension, to society as a whole because of the "informational function" it serves. [P]rofessionals have access to a body of specialized knowledge to which laypersons have little or no exposure. Although this information may reach non-professionals through other means, such as journal articles or public speeches, it will often be communicated to them directly by a licensed professional during the course of a professional relationship. Thus, professional speech, like commercial speech, serves as an important channel for the communication of information that might otherwise never reach the public.
>
> Additionally, like commercial speech, professional speech also "occurs in an area traditionally subject to government regulation." As we have previously explained, States have traditionally enjoyed broad authority to regulate professions as a means of protecting the public from harmful or ineffective professional services. Accordingly, as with commercial speech, it is difficult to ignore the "common-sense" differences between professional speech and other forms of protected communication.
>
> Given these striking similarities, we conclude that professional speech should receive the same level of First Amendment protection as that afforded commercial speech. Thus, we hold that a prohibition of professional speech is permissible only if it "directly advances" the State's "substantial" interest in protecting clients from ineffective or harmful professional services, and is "not more extensive than necessary to serve that interest."

King, 767 F.3d at 234–35 (citations omitted). The Fourth Circuit applied a similar rationale in *Stuart*, finding that compelled speech in the context of physician-patient interaction treads the same established ground as requirements pertaining to informed consent disclosures:

> Traditional informed consent requirements derive from the principle of patient autonomy in medical treatment. Grounded in self-determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has "the information she needs to meaningfully consent to medical procedures." As the term suggests, informed consent consists of two essential elements: comprehension and free consent. Comprehension requires that the physician convey adequate information about the diagnosis, the prognosis, alternative

> treatment options (including no treatment), and the risks and likely results of each option. Physicians determine the "adequate" information for each patient based on what a reasonable physician would convey, what a reasonable patient would want to know, and what the individual patient would subjectively wish to know given the patient's individualized needs and treatment circumstances. Free consent, as it suggests, requires that the patient be able to exercise her autonomy free from coercion. It may even include at times the choice *not* to receive certain pertinent information and to rely instead on the judgment of the doctor. The physician's role in this process is to inform and assist the patient without imposing his or her own personal will and values on the patient. The informed consent process typically involves a conversation between the patient, fully clothed, and the physician in an office or similar room before the procedure begins. Once the patient has received the information she needs, she signs a consent form, and treatment may proceed.

Stuart, 774 F.3d at 251–52 (citations omitted).

To survive intermediate scrutiny, a law concerning speech (1) must serve or advance a substantial governmental interest unrelated to the suppression of free speech; and (2) must not burden substantially more speech than necessary to further that interest. *People v. Minnis*, 2016 IL 119563, ¶36. "[I]n other words, it must be narrowly tailored to serve that interest without unnecessarily interfering with first amendment freedoms." *Id.*

Defendants argue that the State's interest in this arena is "protecting the health and autonomy of its citizens by ensuring that they receive the information that they need to make informed medical decisions." The Court agrees that this is a substantial government interest. The power of the legislature to license and regulate the provision of health care is long-standing and beyond doubt. *People for Use of Dep't of Registration & Educ., v. Graham*, 311 Ill. 92, 94, 142 N.E. 449, 450 (1924); *Lasdon v. Hallihan*, 377 Ill. 187, 193, 36 N.E.2d 227, 230 (1941).

In terms of the benefit of SB 1564, however, it must be noted that some of the more dire hypothetical circumstances Defendants suggest it would address are already covered by the Conscience Act as it existed prior to amendment. The Act continues to provide as follows:

> Nothing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care.

745 ILCS 70/6. Consequently, the benefit to be achieved by the statute is limited to non-emergency situations in which a patient may desire, or might benefit from, additional information about the "legal treatment option" of abortion. The question then turns to whether the State has, through SB 1564, compelled speech more than is necessary to serve this interest and without unduly interfering with Plaintiffs' freedoms.

Defendants argue that the State's action is here very narrowly tailored, because SB 1564 operates only within the confines of the conduct which is already required of providers per their professional ethics. As noted above, whether that is true remains an unresolved factual question.

Furthermore, Defendants' position raises another question: even if one were to assume that professional ethics codes do require the kind of conduct objected to by Plaintiffs, does the *law* already it require it? The Court has not been provided with authority to answer this question, and its own examination of the Medical Practice Act does not reveal that a basis for discipline of a physician for failure to adhere to professional standards *per se*. See 225 ILCS 60/22.

Either one of the two possible answers to this question creates a problem for Defendants. If professional codes of conduct are already incorporated into the *legal requirements* applicable to providers like Plaintiffs, what does SB 1564 accomplish? Conversely, if the ethical requirements cited by Defendants do not already have the force of law as to all providers, why does the legislature now impose them legally *only on conscientious objectors?*

Herein lies the critical concern with SB 1564. If the legislative purpose to be served by SB 1564 is to impose on providers the legal obligation to make the referrals or engage in the discussions objected to by Plaintiffs, why has the State singled out only conscientious objectors as providers who must carry that message? The Conscience Act and SB 1564 say nothing specific about particular issues such as abortion or contraception, but these issues lurk below the deceptively calm surface of the invocation of professional standards. The fact that Plaintiffs have brought this suit because of their concerns about counseling or referring their patients with respect to abortion certainly speaks to how close to the surface those concerns are; the focus of discussion in the legislative history of SB 1564 confirms it. The nature of Plaintiffs' concerns, and of the legislature's *sub silentio* purpose, implicate special concerns:

> When evaluating compelled speech, we consider the context in which the speech is made. *Riley,* 487 U.S. at 796–97, 108 S.Ct. 2667. Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives. "[E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values."

Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233, 249 (2d Cir. 2014).

It is, then, of particular concern that SB 1564 seeks to compel speech on "public issues," and that it imposes its restrictions selectively upon only those who may invoke a conscientious objection to participation in them.

There is some truth to Defendants' response, namely, that the legislature is simply placing a condition upon those who seek to invoke the statute's protections. See, e.g., *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d 1003, 1019, 922 N.E.2d 1143, 1156 (2d Dist. 2009) (granting churches a benefit may come with conditions not generally applicable to others). Still, short of its citation to professional standards which it agrees are not definitive and which do not bear the force of law, the State has offered little to establish that all providers of obstetric or prenatal care are required to do the things which SB 1564 will require of Plaintiffs.

It should be remembered that the physician-patient relationship is a consensual one. *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 466, 914 N.E.2d 1258, 1266 (5th Dist. 2009). If a patient decides to pursue treatment options to which the physician morally objects, there is nothing in

existing law which appears to require the physician's participation to assist the patient in that course. "[W]hen a physician refuses to treat a patient needing further treatment," his or her duty to the patient is not breached unless the patient is not given "a reasonable time to find substitute care." *Magana v. Elie*, 108 Ill. App. 3d 1028, 1034, 439 N.E.2d 1319, 1323 (2d Dist. 1982). It bears repeating: the Conscience Act, and therefore the entirety of the present discussion, involves only *non-emergent* medical situations. Consequently, SB 1564's amendments to the Conscience Act, though cloaked in the language of "professional standards," appear to expand the physician's duties to the patient. Again, it is highly problematic that this expansion is effective only as to conscientious objectors in particular, and not health care providers in general.

The State has really not addressed why it must rely on conscientious objectors like Plaintiffs to provide their non-emergent patients with information about the very procedures to which Plaintiffs object. There has not been a showing that Plaintiffs are somehow possessed of more or better information about the location of other providers willing to provide the objected-to services. There has not been an explanation of why the State could not as easily, and perhaps more efficaciously in the information age, maintain that information and make it available to the public. Why must the State, which licenses and regulates those who provide the objected-to services, rely on the very people who object to the services to be the source of information about them?

The Court concludes that Plaintiffs have raised a "fair question" about whether SB 1564 unnecessarily burdens their right to be free from government compelled speech to a degree more than necessary to serve the State's interest in educating patients. The Court now moves to consider the question of what, if any, injunctive relief is appropriate.

Other Factors Necessary for Injunction

Plaintiffs must show that they will suffer irreparable injury in the absence of an injunction. Where a violation of constitutional rights has been alleged, a further showing of irreparable injury is not required. *Makindu v. Illinois High Sch. Ass'n*, 2015 IL App (2d) 141201, ¶42. Plaintiffs allege that their right to be free from government compelled speech is in jeopardy, so this requirement is met.

Plaintiff must also show that they lack an adequate remedy at law. The Court finds that no legal remedy would suffice here. The requirement that Plaintiffs submit protocols for the State for approval is days away from being effective. The Appellate Court's affirmance of an injunction in a not dissimilar circumstance in *Morr-Fitz, Inc. v. Quinn*, 2012 IL App (4th) 110398, appears to support the conclusion that there is no remedy at law sufficient here.

The last factor for the Court to consider is whether the equities warrant the entry of such an order. In balancing the equities, the trial court must weigh the benefits of granting the injunction against the possible injury to the opposing party; the court should also consider the injunction's effect on the public interest. *Makindu*, 2015 IL App (2d) at ¶47. Defendants assert that there is significant injury to the public, and specifically to patients who may not be adequately informed of their options for procedures to which Plaintiffs object. However, the injury to the public is significantly diminished by virtue of the fact that the Conscience Act does not apply to situations in which emergency care is required; it offers Plaintiffs no refuge in such circumstances. The

Court finds that the balance favors protection of Plaintiffs' arguable constitutional speech rights against the convenience the State may achieve by utilizing Plaintiffs as the vehicle for communicating treatment options for non-emergent patients.

Consequently, the Court finds that Plaintiffs have proven their entitlement to the entry of a preliminary injunction to enjoin enforcement of the compelled speech aspects of SB 1564's amendments to the Conscience Act. The Court agrees with Defendants that there is no necessity that this injunction be entered as to Defendant Rauner, so it is entered only against Defendant Schneider in his official capacity as Secretary of the Illinois Department of Financial & Professional Regulation.

Specifically, Defendant Schneider is enjoined from enforcement of the following provisions of the Conscience Act as amended by SB 1564:

- The requirement in Section 6 that a medical provider must inform a patient of "legal treatment options, and risks and benefits of treatment options," with respect to a treatment option to which Plaintiffs have a conscientious objection as defined in the Conscience Act in order to invoke the Act; and

- With the exception of subparagraph 4, all of Section 6.1, specifically including the development of protocols, to the extent it requires conduct to which Plaintiffs have a conscientious objection.

Finally, the Court notes Plaintiffs request that this injunction should protect not only them, but also all health care providers who have a conscientious objection to the requirements of SB 1564, citing *Morr-Fitz* in support. The Court finds that Plaintiffs misreads *Morr-Fitz*. It is clear that the Appellate Court in that case restricted the approved injunctive relief to the plaintiffs *in that case*. See *Morr-Fitz*, 2012 IL App (4th) at ¶¶ 82-84 (defendants enjoined from enforcement "against plaintiffs"; trial court injunction modified to enjoin only enforcement "against these plaintiffs"). Consequently, the relief here is entered only as to Plaintiffs.

Conclusion

This case has been resolved by reference to the constitutional right to be free from compelled speech. It is prudent to remember that the issue here is not a dispute over the merits of the message, but the government's power to compel a citizen to speak it. For the reasons stated above, the Court concludes that Plaintiffs have raised a fair question as to whether their right to be free from government compelled speech is violated by SB 1564, and so the Court enjoins its enforcement against them as stated above. This injunction is effective until the conclusion of the case or further order of Court.

12/20/16
Date

Hon. Eugene G. Doherty, Circuit Judge

Appendix

As noted above, the Court has resolved the interplay between RFRA and SB 1564 as one of statutory construction. The Court could have reached the same conclusion by application of the prohibition against "entrenchment" – the ability of a legislature to bind future legislatures. Consequently, while discussion of that esoteric issue is not perhaps strictly required to reach the decision above, it remains highly germane to the analysis of Plaintiffs' RFRA claim. The Court therefore sets forth its analysis in that regard in this appendix.

What Plaintiffs are arguing for is application of what is generally considered impermissible: "entrenchment" of a law such that a subsequent legislature is constrained in its ability to depart from it:

> It has long been conventional wisdom among constitutional lawyers that "one legislature may not bind the legislative authority of its successors." More specifically, a legislature may not "entrench" a law by forbidding subsequent repeal or amendment, or by imposing heightened procedural hurdles, such as supermajority voting rules that were not necessary to enact the law in the first place. For example, Congress would not be permitted to enact a statute requiring a balanced federal budget "in perpetuity," or with an attached prohibition on repeal, or a prohibition on repeal by less than a two-thirds majority. If Congress did enact such a statute, the purported entrenchment would presumably be invalidated by courts (to the extent they would find the issue justiciable). And it could be legally ignored by subsequent Congresses: notwithstanding the statutory language, a congressional majority in pursuit of an unbalanced budget would be free to repeal or override the pre-existing statute pursuant to the standard second-in-time rule. This, at least, is the consensus view among constitutional theorists.

Daryl Levinson, Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400 (2015) (footnote citations omitted).

The United States Supreme Court has commented on the principle that a legislature may not generally bind or restrict future legislatures:

> In his Commentaries, Blackstone stated the centuries-old concept that one legislature may not bind the legislative authority of its successors:
>
> > "Acts of parliament derogatory from the power of subsequent parliaments bind not.... Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's *[sic]* ordinances could bind the present parliament." 1 W. Blackstone, Commentaries on the Laws of England 90 (1765).
>
> In England, of course, Parliament was historically supreme in the sense that no "higher law" limited the scope of legislative action or provided mechanisms for

> placing legally enforceable limits upon it in specific instances; the power of American legislative bodies, by contrast, is subject to the overriding dictates of the Constitution and the obligations that it authorizes.

United States v. Winstar Corp., 518 U.S. 839, 872, 116 S. Ct. 2432, 2453–54, 135 L. Ed. 2d 964 (1996) (plurality opinion) (footnote omitted). Ten years later, Justice Scalia restated the same understanding in a concurring opinion:

> Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them. Thus, in *Marcello v. Bonds,* 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), we interpreted the Immigration and Nationality Act as impliedly exempting deportation hearings from the procedures of the Administrative Procedure Act (APA), despite the requirement in § 12 of the APA that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly," 60 Stat. 244. The Court refused "to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act." 349 U.S., at 310, 75 S.Ct. 757. We have made clear in other cases as well, that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute. In *Great Northern R. Co. v. United States,* 208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908), we said of an express-statement requirement that "[a]s the section ... in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly *or by necessary implication* in a subsequent enactment." (Emphasis added.) A subsequent Congress, we have said, may exempt itself from such requirements by "fair implication"—that is, *without* an express statement. *Warden v. Marrero,* 417 U.S. 653, 659–660, n. 10, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974). See also *Hertz v. Woodman,* 218 U.S. 205, 218, 30 S.Ct. 621, 54 L.Ed. 1001 (1910).
>
> To be sure, legislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware. For example, we have asserted that exemptions from the APA are "not lightly to be presumed" in light of its express-reference requirement, *Marcello, supra,* at 310, 75 S.Ct. 757; see also *Shaughnessy v. Pedreiro,* 349 U.S. 48, 51, 75 S.Ct. 591, 99 L.Ed. 868 (1955). That assertion may add little or nothing to our already-powerful presumption against implied repeals.
>
> > "We have repeatedly stated ... that absent a clearly established congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith,* 538 U.S. 254, 273, 123 S.Ct. 1429,

> 155 L.Ed.2d 407 (2003) (plurality opinion) (internal quotation marks and citations omitted).
>
> See also *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other "magical password." For the reasons set forth in the majority opinion, in the Higher Education Technical Amendments and the Debt Collection Improvement Act, Congress unambiguously authorized, without exception, the collection of 10–year–old student-loan debt by administrative offset of Government payments. In doing so, it flatly contradicted, and thereby effectively repealed, part of § 207(a) of the Social Security Act. This repeal is effective, regardless of whether the express-reference requirement of § 207(b) is fulfilled.
>
> Despite our jurisprudence on this subject, it is regrettably not uncommon for Congress to attempt to burden the future exercise of legislative power with express-reference and express-statement requirements. See, *e.g.,* 1 U.S.C. § 109; 5 U.S.C. § 559; 25 U.S.C. § 1735(b); 42 U.S.C. § 2000bb–3(b); 50 U.S.C. §§ 1547(a)(1), 1621(b). In the present case, it might seem more respectful of Congress to refrain from declaring the invalidity of the express-reference provision. I suppose that would depend upon which Congress one has in mind: the prior one that enacted the provision, or the current one whose clearly expressed legislative intent it is designed to frustrate. In any event, I think it does no favor to the Members of Congress, and to those who assist in drafting their legislation, to keep secret the fact that such express-reference provisions are ineffective.

Lockhart v. United States, 546 U.S. 142, 148–50, 126 S. Ct. 699, 703–04, 163 L. Ed. 2d 557 (2005) (Scalia, J., concurring). Note that one of the statutes Scalia mentioned in *Lockhart* was the Federal version of the Illinois RFRA and its superseding clause. 42 U.S.C. § 2000bb–3(b). The concept of requiring a "magical password" to exempt a later statute from an earlier one is essentially the same as the position taken here by Plaintiffs, i.e., that the 2016 legislature could have made the 1998 RFRA inapplicable to SB 1564, but only by expressly declaring that this is what it was doing.

Plaintiffs argue that the United States Supreme Court has not invoked this limitation in the context of the Federal RFRA, which has been applied so as to invalidate subsequent Congressional action. Of the cases cited by Plaintiff for this proposition, one did not involve Congressional action, but administrative regulations. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014). Clearly, the issue under discussion is not present when the challenged law is a regulatory rule, rather than a legislative enactment. But Plaintiffs are correct; there have been such cases. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423, 126 S. Ct. 1211, 1216, 163 L. Ed. 2d 1017 (2006) (finding that provision of Controlled Substances Act violated Federal RFRA). However, the Court is unaware of any Federal or Illinois reviewing court decision in which the court ever actually

discussed whether RFRA (either the Federal or Illinois version) could limit a subsequent legislative enactment.

In this respect, the Court agrees with Justice Scalia that the superseding clauses should be certainly be considered in discerning legislative intent "as background canons of interpretation," but no "magical password" of express exclusion should be required. *Lockhart*, 546 U.S. at 148–50, 126 S. Ct. at 703–04, 163 L. Ed. 2d 557. The foregoing analysis of the concept of "entrenchment" would, therefore, would lead the Court, albeit in a much longer route, to the same destination at which it had already arrived: that any conflict between RFRA and SB 1564 should be resolved by reference to established canons of statutory construction.