

# REGULATING CRISIS PREGNANCY CENTERS: THE STATE ATTORNEY GENERAL PERSPECTIVE

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## INTRODUCTION

On June 24, 2022, the United States Supreme Court released its decision in *Dobbs v. Jackson Women’s Health Organization*, overturning the constitutional right to abortion established in *Roe v. Wade* and *Planned Parenthood v. Casey* decades ago.<sup>1</sup> This decision marks a concrete step forward for the pro-life movement while curtailing abortion access for many women.<sup>2</sup> As women search for abortion help online and offline in this new legal landscape, many of them often encounter

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<sup>1</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022).

<sup>2</sup> Casey Tolan, Majlie de Puy Kamp & Isabelle Chapman, *The Crisis Pregnancy Center Next Door: How Taxpayer Money Intended for Poor Families Is Funding a Growing Anti-Abortion Movement*, CNN (Oct. 25, 2022), <https://www.cnn.com>.

crisis pregnancy centers (“CPCs”), non-profit agencies that provide free pro-life pregnancy services.<sup>3</sup> However, contrary to the perception of many who walk into the CPC facilities,<sup>4</sup> these facilities do not provide abortion resources or contraception.<sup>5</sup>

Today, CPCs far outnumber abortion clinics across the United States,<sup>6</sup> and various states are implementing new initiatives to provide funding for CPCs.<sup>7</sup> Despite their rapid expansion, CPCs have been at the forefront of criticism for their problematic measures to attract and counsel clients, often pursuant to their own ideology on reproductive issues.<sup>8</sup> CPCs usually present themselves as medical clinics, with their staff wearing white coats when seeing clients in exam rooms.<sup>9</sup> However, many of them in fact do not have licensed medical professionals to conduct medical procedures.<sup>10</sup> Unlicensed CPCs are subject to a less stringent standard of compliance in comparison with licensed abortion clinics, causing growing concerns about CPCs’ accountability with respect to the potential harm they may generate.<sup>11</sup> For example, there have been instances in which CPCs offered misleading information regarding fetal development and baseless assertions regarding fetal pain.<sup>12</sup>

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com/2022/10/25/us/crisis-pregnancy-centers-taxpayer-money-invs [https://perma.cc/Q2AP-UEYA].

<sup>3</sup> See Laurretta Brown, *Pro-Life Pregnancy Centers Help Women — Why Are They Being Targeted?*, NAT’L CATH. REG. (July 8, 2022), <https://www.ncregister.com/blog/pro-life-pregnancy-centers-targeted> [https://perma.cc/8L9T-L96F]; CARE NET, *THE TRUTH ABOUT “CRISIS PREGNANCY CENTERS”* 19 (2019), [https://www.care-net.org/hubfs/Downloads/The\\_Truth\\_About\\_Crisis\\_Pregnancy\\_Centers.pdf](https://www.care-net.org/hubfs/Downloads/The_Truth_About_Crisis_Pregnancy_Centers.pdf) [https://perma.cc/3XJE-N9W7].

<sup>4</sup> See Tolan, de Puy Kamp & Chapman, *supra* note 2.

<sup>5</sup> See *id.*

<sup>6</sup> See JENIFER MCKENNA & TARA MURTHA, *THE ALLIANCE, DESIGNED TO DECEIVE: A STUDY OF THE CRISIS PREGNANCY CENTER INDUSTRY IN NINE STATES* 4 (2021) [hereinafter *ALLIANCE REPORT*], [https://alliancestateadvocates.org/wp-content/uploads/sites/107/Alliance\\_CPC\\_Report\\_FINAL2-1-22.pdf](https://alliancestateadvocates.org/wp-content/uploads/sites/107/Alliance_CPC_Report_FINAL2-1-22.pdf) [https://perma.cc/HD6W-D4QW].

<sup>7</sup> See Tolan, de Puy Kamp & Chapman, *supra* note 2.

<sup>8</sup> See *ALLIANCE REPORT*, *supra* note 6, at 10.

<sup>9</sup> Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 *AMA J. ETHICS* 269, 270–71 (2018) (“Lay volunteers who are not licensed clinicians at CPCs often wear white coats and see women in exam rooms.”).

<sup>10</sup> Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California’s Reproductive FACT Act*, 12 *Nw. J.L. & Soc. POL’Y* 78, 83 (2017).

<sup>11</sup> Teneille R. Brown, *Crisis at the Pregnancy Center: Regulating Pseudo-Clinics and Reclaiming Informed Consent*, 30 *YALE J.L. & FEMINISM* 221, 224–25 (2018).

<sup>12</sup> Andrea Swartzendruber et al., *Crisis Pregnancy Centers in the U.S.: Lack of Adherence to Medical and Ethical Practice Standards*, 65 *J. ADOLESCENT HEALTH* 821, 823 (2019).

As a result, visitors may miss the appropriate timing to decide whether to proceed with abortion or not.<sup>13</sup>

States and localities have been wrestling with CPC regulations for a long time. In the last century, attempts to regulate CPCs relied on states' existing consumer protection statutes to sanction misleading CPC marketing.<sup>14</sup> Beginning with Baltimore in 2009, state and local legislators passed acts and ordinances that mandated CPCs to disclose facts about their services and license status, which has become the major route to regulate CPCs since then.<sup>15</sup>

In response to these efforts, CPCs have constantly challenged the constitutionality of the mandated-disclosure legislation.<sup>16</sup> In the 2018 case of *National Institute of Family and Life Advocates v. Becerra* ("NIFLA"), the Supreme Court reviewed California's Reproductive FACT Act, which required CPCs to disclose whether they are licensed on a posted notice at the entrance of the facility and in at least one waiting room, as well as on all advertisements.<sup>17</sup> In *NIFLA*, the Supreme Court decided that California's FACT Act violated the First Amendment.<sup>18</sup> Following *NIFLA*, mandated disclosure requirements seem to have reached a dead end.<sup>19</sup> In light of the recent changes in reproductive healthcare, new solutions to address potential CPC harms are more necessary than ever.

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<sup>13</sup> See *id.*

<sup>14</sup> See, e.g., *Fargo Women's Health Org. v. Larson*, 391 N.W.2d 627, 629 (N.D. 1986); *Mother & Unborn Baby Care of N. Tex., Inc. v. Tex.*, 749 S.W.2d 533, 536 (Tex. App. 1988).

<sup>15</sup> Hayley E. Malcolm, Note, *Pregnancy Centers and the Limits of Mandated Disclosure*, 119 COLUM. L. REV. 1133, 1153–56 (2019).

<sup>16</sup> *Id.* at 1154.

<sup>17</sup> *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2368, 2370 (2018).

<sup>18</sup> *Id.* at 2378.

<sup>19</sup> Kate Vlach, *What's Old is New Again: How State Attorneys General Can Reinvent UDAP Enforcement to Combat Crisis Pregnancy Center Deception*, 39 COLUM. J. GENDER & L. 140, 142 (2019). However, there are still local governments trying to use this method to regulate local CPCs. Seattle's recent proposal, for example, is modelled on a 2011 San Francisco Disclosure Law that targeted CPCs. See Erica C. Barnett, *Seattle Legislation Aims to Stop "Crisis Pregnancy Centers" from Lying Quite So Much*, PUBLICOLA (Aug. 15, 2022), <https://publicola.com/2022/08/15/seattle-legislation-aims-to-stop-crisis-pregnancy-centers-from-lying-quite-so-much/> [https://perma.cc/AB73-7AAD].

As the people's attorneys<sup>20</sup> and the chief law officers of the states,<sup>21</sup> state Attorneys General ("state AGs") are perfectly situated to solve the legal problem posed by CPCs.<sup>22</sup> Acting for the people, a state AG possesses broad common-law power to act on behalf of the public.<sup>23</sup> As the chief law officer, the state AG has a wide array of effective tools to combat unlawful practices.<sup>24</sup> State AGs have also risen to prominence in the national policymaking process,<sup>25</sup> and are able to regulate questionable CPC practices to protect citizens. Moreover, legal analysis and case studies have shown that existing state statutes are useful devices to curb deceptive CPC practices while avoiding the constraints imposed by *NIFLA*.<sup>26</sup> Thus, state AGs may regulate CPCs by looking to these available statutes at hand.

This Note will discuss state AGs' role in addressing CPC regulations and in fighting questionable CPC practices. Part I introduces CPCs and their history, describes some of the earlier efforts in combating deceptive CPC practices, and summarizes the Supreme Court's *NIFLA* ruling that invalidated legislation designed to curb CPC harm. Part II grapples with the core of the Note—a proposed solution to regulate CPCs through state AG enforcement: subpart A lists the advantages of state AGs' position in battling problematic CPC practices, particularly its broad common law enforcement power, robust enforcement tools and thriving influences; subpartss B and C introduce different types of problematic practices by the CPCs, point to the state statutes that can address the issues, and suggest solutions through case studies of past AG actions. The Note concludes by reiterating the importance of state AGs in protecting the health of the citizens of their states and updating readers on recent developments in CPC regulations.

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<sup>20</sup> See, e.g., *Commonwealth ex rel. Beshear v. Kentucky Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 363 (Ky. 2016) (holding that the Kentucky Attorney General's primary obligation is to serve the people). See also Mark R. Herring, *The People's Lawyer: The Role of the Attorney General in the Twenty-First Century*, 53 U. RICH. L. REV. 1, 2 (2018).

<sup>21</sup> See, e.g., KY. REV. STAT. ANN. § 15.020(1) (West 2021) (declaring that the Kentucky Attorney General is the chief law officer of the Commonwealth); see also William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452–53 (2006).

<sup>22</sup> For a similar discussion see Vlach, *supra* note 19, at 159–63.

<sup>23</sup> See discussion *infra* Section II.A.

<sup>24</sup> See discussion *infra* Section II.A.

<sup>25</sup> Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 45 (2018).

<sup>26</sup> See discussion *infra* Sections II.B & II.C.

## I

## THE CRISIS PREGNANCY CENTERS AND THE PAST EFFORTS TO REGULATE

## A. The Rise of the Crisis Pregnancy Centers

As mentioned in the Introduction, CPCs are organizations offering pregnancy counseling and services, often pursuant to their pro-life ideology in reproductive healthcare.<sup>27</sup> Many CPCs in the United States are correlated with a national umbrella organization such as Care Net, Heartbeat International, or, the National Institute of Family and Life Advocates (“NIFLA”), one of the petitioners in *NIFLA*.<sup>28</sup> These umbrella organizations are religious in nature and lead thousands of CPCs by providing resource support and CPC operation guidelines.<sup>29</sup>

Birthright, which opened in Canada in 1968, was among the initial networks of CPCs.<sup>30</sup> Birthright and other CPC networks were part of a faith-based movement in response to states that legalized abortion.<sup>31</sup> Many major umbrella organizations nowadays emerged during this period to prevent women from choosing abortion by intervening in a woman’s decision process with respect to the termination of her pregnancy. For example, in 1980, the Christian Action Council founded its first center in Baltimore, Maryland and changed its name to Care Net.<sup>32</sup>

However, many of these facilities employed deceptive practices to attract as many clients as possible. A prime example is the Pearson Foundation and its affiliated CPCs established by Robert Pearson, who was the main force behind the manual titled “How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center” (“the Pearson Manual”).<sup>33</sup> The

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<sup>27</sup> See *supra* notes 4, 7 and accompanying text.

<sup>28</sup> See Brown, *supra* note 11, at 228; see also Tolan, de Puy Kamp & Chapman, *supra* note 2 (describing Heartbeat International as one of the largest global networks of CPCs); About NIFLA, NAT’L INST. OF FAM. & LIFE ADVOCs, <https://nifla.org/about-nifla/> [<https://perma.cc/A28D-WLDE>]; Nat’l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2361 (2018).

<sup>29</sup> See, e.g., About Care Net, CARE NET, <https://www.care-net.org/about> [<https://perma.cc/39U7-VTILS>].

<sup>30</sup> See also Brown, *supra* note 11, at 228.

<sup>31</sup> In 1970, Hawaii, New York, and Alaska repealed their abortion laws, with Hawaii becoming the first state to legalize abortion upon the request of the woman. See Malcolm, *supra* note 15, at 1137.

<sup>32</sup> History, CARE NET, <https://www.care-net.org/history> [<https://perma.cc/4APE-NLKA>].

<sup>33</sup> Jane Gross, *Pregnancy Centers: Anti-Abortion Role Challenged*, N.Y. TIMES, Jan. 23, 1987, at B1, <https://www.nytimes.com/1987/01/23/nyregion/pregnancy-centers-anti-abortion-role-challenged.html> [<https://perma.cc/>]

manual, described by law enforcement officials as a 93-page guidebook to trick consumers, lays out several approaches that could mislead women into foregoing abortion.<sup>34</sup>

For example, the manual encourages affiliated centers to use “neutral advertising,” list their names in the Yellow Pages telephone directory alongside abortion clinics, and use “dual names” to attract visits from “abortion-bound women” and donations from “people against abortion” at the same time.<sup>35</sup> In addition, the manual instructs the centers to call their pregnancy tests, which are the same as those available in drugstores, “a refined form of the old rabbit test” and “[a]t no time do you need to tell them what you’re doing.”<sup>36</sup> In 1987, the New York State Attorney General investigated a CPC that employed such practices for deceptive advertising.<sup>37</sup>

In recent years, a more modernized and proliferating CPC industry has emerged. According to a report by the non-profit organization The Alliance (“Alliance Report”), as of 2021, common CPC services have included drugstore-level pregnancy tests, “free” goods contingent on the pregnant person’s participation in ideological programming, and reproductive health counseling<sup>38</sup> likely provided by unlicensed professionals.<sup>39</sup> In addition, CPCs have also used geofencing advertising that intrudes on individual privacy, promoted and administered “Abortion Pill Reversal” which has unascertained health risks, and used non-diagnostic ultrasounds.<sup>40</sup>

In addition to financial support from their umbrella organizations, CPCs receive federal and state funding.<sup>41</sup> CPCs started receiving public funding in the 1990s.<sup>42</sup> In 2019, CPCs obtained federal funds through the Teen Pregnancy Prevention and Title X Family Planning Programs for low-income

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G537-BD2P] (noting however, that some CPC organizations, such as Birthright, opposed Pearson’s approach described in the manual).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See ALLIANCE REPORT, *supra* note 6, at 5–6.

<sup>39</sup> *Id.* For further discussion about the license status of CPCs, see *infra* Section II.C.

<sup>40</sup> ALLIANCE REPORT, *supra* note 6, at 5–6. For further discussion about these questionable practices, see *infra* Sections II.B & II.C.

<sup>41</sup> ALLIANCE REPORT, *supra* note 6, at 29.

<sup>42</sup> *Id.*



individuals.<sup>43</sup> In particular, the Trump administration gave \$1.7 million from funds reserved for Title X to the California-based religious crisis pregnancy network Obria.<sup>44</sup> During the COVID-19 pandemic in 2020, CPCs also obtained forgivable federal loans through the payment protection program under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.<sup>45</sup> At the state level, at least ten states have provided fundings to CPCs from the diversion of welfare reform funds under the Temporary Assistance for Needy Families (TANF) program, originally designed to support the basic life necessities of low-income pregnant people and families with children.<sup>46</sup>

## B. The Impeded Mandated Disclosure Regulations

While state AGs pursued consumer protection claims against CPCs in the 1980s and 1990s,<sup>47</sup> abortions rights groups began advocating for mandatory disclosure laws in the 2000s.<sup>48</sup> Since then, mandated-disclosure legislation targeting CPCs has seemed to become the predominant route to combat CPC deceptive conduct. As of 2020, seven municipalities and two states have passed CPC mandated-disclosure legislation.<sup>49</sup>

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<sup>43</sup> Andrea Swartzendruber & Danielle N. Lambert, *A Web-Based Geolocated Directory of Crisis Pregnancy Centers (CPCs) in the United States: Description of CPC Map Methods and Design Features and Analysis of Baseline Data*, JMIR PUB. HEALTH SURVEILLANCE (Mar. 27, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7148549/> [<https://perma.cc/DC5T-YYUU>]. For information about the federal Title X Program, see Off. of Population Affs., *Fact Sheet: Final Title X Rule Detailing Family Planning Grant Program*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://opa.hhs.gov/grant-programs/archive/title-x-program-archive/compliance-statutory-program-integrity-6> [<https://perma.cc/86RB-XVQJ>].

<sup>44</sup> Off. of Population Affs., *HHS Awards Title X Family Planning Service Grants*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Mar. 29, 2019) <https://opa.hhs.gov/about/news/grant-award-announcements/hhs-awards-title-x-family-planning-service-grants> [<https://perma.cc/PE3R-FGMS>]; Kenneth P. Vogel & Robert Pear, *Trump Administration Gives Family Planning Grant to Anti-Abortion Group*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/us/politics/trump-grant-abortion.html> [<https://perma.cc/89P6-CCCP>].

<sup>45</sup> Jessica GlENZA, *Anti-Abortion Centers Receive at Least \$4M from US Coronavirus Bailout*, THE GUARDIAN (Aug. 3, 2020), [https://www.theguardian.com/world/2020/aug/03/anti-abortion-centers-paycheck-protection-program?CMP=share\\_btn\\_link](https://www.theguardian.com/world/2020/aug/03/anti-abortion-centers-paycheck-protection-program?CMP=share_btn_link) [<https://perma.cc/FR3P-ZKEX>].

<sup>46</sup> Emily Crockett, *States Are Using Welfare Money to Fund Anti-Abortion Propaganda*, VOX (Oct. 3, 2016), <https://www.vox.com/identities/2016/10/3/13147836/states-tanf-welfare-crisis-pregnancy-centers> [<https://perma.cc/A563-37AL>].

<sup>47</sup> See, e.g., Carr v. Axelrod, 798 F. Supp. 168, 176 (S.D.N.Y. 1992); Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc., 498 N.E.2d 1044, 1045–46 (Mass. 1986).

<sup>48</sup> See Vlach, *supra* note 19, at 158.

<sup>49</sup> *Id.* at 143.

Disclosure laws usually require CPCs to post signs in their space or include disclaimers in their advertisements to warn clients that CPCs do not provide abortion services or have licensed medical providers.<sup>50</sup> Baltimore was the first city to pursue this measure by passing Ordinance 09-252 in 2009.<sup>51</sup> Amending the city health code, the ordinance required “limited-service pregnancy centers” to post a disclaimer “substantially to the effect that the center does not provide or make referral for abortion or birth-control services.”<sup>52</sup> The amended health code defined a “limited-service pregnancy center” as any person whose primary purpose is to give pregnancy-related services, and who provides information about such services, for a fee or for free, but does not provide or refer for any abortions or nondirective and comprehensive birth-control services.<sup>53</sup> This narrow definition ruled out any person or organization that provides pregnancy-related services relating to abortion, which essentially targeted the CPCs. The amended health code also provided further requirements for the language, accessibility, and location of the disclaimer.<sup>54</sup> A violation of such requirements would trigger a written notice order by the State’s Health Commissioner.<sup>55</sup> Further failure to comply could be punished by a fine up to \$500 for each day of non-compliance for misdemeanor.<sup>56</sup>

Subsequently, other governments, such as Montgomery County, New York City, and the City of Austin, passed similar

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<sup>50</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 123472 (West 2016) (California’s FACT Act).

<sup>51</sup> Malcolm, *supra* note 15, at 1153.

<sup>52</sup> BALT., MD., HEALTH CODE §§ 3-501, 3-502(a) (2022).

<sup>53</sup> *Id.* § 3-501.

<sup>54</sup> See *id.* § 3-502.

<sup>55</sup> See *id.* § 3-503.

<sup>56</sup> See *id.* § 3-506. However, Baltimore’s legislative move certainly received backlash from the CPCs. See Malcolm, *supra* note 15, at 1154. In particular, Greater Baltimore Center for Pregnancy Concerns brought a suit, claiming that the ordinance violated the Center’s First and Fourth Amendment rights. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 721 F.3d 264, 272–73 (4th Cir. 2013). A federal district court in Maryland enjoined the enforcement of the ordinance, explaining that Baltimore could have “use[d] or modified] existing regulations governing fraudulent advertising” that would cover the deceptive advertising practices by the CPCs, thus a new law was rather unnecessary. *Id.* at 279. Baltimore appealed the decision, but its attempt was eventually not successful, considering the impact of the *NIFLA* decision, which was issued in 2018 and will be discussed in the following paragraphs. See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 879 F.3d 101, 113 (4th Cir. 2018) (declaring that the Fourth Circuit affirmed the district court’s decision), *cert. denied*, 138 S. Ct. 2710 (2018).



mandated-disclosure legislation.<sup>57</sup> This wave eventually reached the state level in 2015 when California enacted its Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act.<sup>58</sup> The FACT Act required licensed facilities providing services, such as ultrasounds, contraception, pregnancy tests, and abortions, to post notices in their waiting rooms informing patients of free and low-cost family planning, prenatal care, and abortion services in California.<sup>59</sup> The FACT Act required unlicensed facilities providing ultrasounds, prenatal care, or pregnancy tests in California to disclose their lack of license to perform medical procedures on-site and in advertising.<sup>60</sup>

The FACT Act received considerable opposition from the CPCs and their affiliated umbrella organizations, such as NIFLA.<sup>61</sup> NIFLA argued that the FACT Act violated their rights to free speech and free exercise of religion under the First Amendment.<sup>62</sup> The district court rejected the plaintiffs' request for an injunction.<sup>63</sup> The court found the notice requirement for licensed facilities survived intermediate scrutiny because it was "neutral as to any particular view or opinion and merely provides information" regarding alternative options.<sup>64</sup> With respect to the unlicensed facilities, the court held that the Act was valid as the state had a compelling interest in ensuring pregnant women knew whether a provider was licensed, and the law was narrowly tailored to that interest.<sup>65</sup> A Ninth Circuit panel affirmed this decision, noting that the FACT Act regulated professional speech with a purpose "to advance the welfare of the clients, rather than to contribute to public debate."<sup>66</sup>

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<sup>57</sup> See Malcolm, *supra* note 15, at 1154.

<sup>58</sup> CAL. HEALTH & SAFETY CODE §§ 123470 to 123473 (West 2016).

<sup>59</sup> *Id.* §§ 123471(a), 123472(a). In addition, such a notice should be "posted in a conspicuous place," printed and distributed to clients, or given digitally upon arrival. See *id.* § 123472(a)(2).

<sup>60</sup> *Id.* § 123472.

<sup>61</sup> See, e.g., Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2370 (2018).

<sup>62</sup> Nat'l Inst. of Family & Life Advocs v. Harris, No. 15cv2277 JAH(DHB), 2016 WL 3627327, at \*3 (S.D. Cal. Feb. 9, 2016).

<sup>63</sup> *Id.* at \*11.

<sup>64</sup> *Id.* at \*8.

<sup>65</sup> See *id.* at \*9.

<sup>66</sup> Nat'l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823, 839 (9th Cir. 2016). The panel rejected the argument that nonprofits were not "professional," holding that the clinics entered the market in a professional context despite being nonprofits. *Id.* at 841.

However, in June 2018, a 5–4 Supreme Court reversed the Ninth Circuit’s decision and held that the FACT Act violated the petitioners’ right to free speech by compelling speech on content-based grounds.<sup>67</sup> The Court held that strict scrutiny, instead of intermediate scrutiny, applied to the mandated notice for licensed facilities, because the mandated notice was content-based and did not (1) require professionals to disclose factual, noncontroversial information in their commercial speech, nor (2) regulate professional conduct.<sup>68</sup> Instead, the Court found the mandated notice required disclosure of highly controversial information and regulated speech.<sup>69</sup> The Court further decided that the notice requirement for licensed facilities was not valid even under intermediate scrutiny, as it interfered with the facilities’ communication with their clients, while alternatives, such as a public information campaign about abortion, were clearly available.<sup>70</sup> With respect to the disclosure requirement for unlicensed facilities, the Court held that it unduly burdened speech, as the state-designated content in the disclosure requirement interfered with the facilities’ ability to deliver their own messages, and thus failed to survive any level of scrutiny.<sup>71</sup>

The impact of the Supreme Court’s decision has been profound. In essence, the decision firmly established the heightened standard of review for mandated disclosure laws, making the chance of success for this form of CPC regulation extremely slim.<sup>72</sup>

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<sup>67</sup> Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2378 (2018).

<sup>68</sup> *Id.* at 2372–74.

<sup>69</sup> *Id.* at 2372.

<sup>70</sup> *Id.* at 2376.

<sup>71</sup> *Id.* at 2378.

<sup>72</sup> The standard of review is always a murky area in the First Amendment context, and in this case, the majority rejected the Ninth Circuit’s intermediate scrutiny approach. *Id.* at 2371–72. Instead, the majority identified two exceptions to the strict scrutiny standard that applied to content-based regulations: “laws that require professionals to disclose factual, non-controversial information in their ‘commercial speech,’” and laws regulating professional conduct that “incidentally involves speech.” *Id.* at 2372. Accordingly, the majority declared that strict scrutiny should apply to the notice requirement for licensed facilities as it did not fall under either exception. The Act failed the first exception because it was related to services provided by the state, not the clinics, that involved a highly controversial topic. *Id.* The Act failed the second exception because it was “not tied to a procedure at all” and applied to all interactions at a covered facility, making it a regulation of speech rather than professional conduct. *Id.* at 2373–74. In essence, the majority applied a heightened standard of review on the mandated disclosure CPC regulations. However, the dissent pointed out that the heightened scrutiny announced could lead to *Lochner*-like judicial assessments

## II

## REGULATING MODERN CPCs: A STATE ATTORNEY GENERAL APPROACH

## A. General Advantages of State Attorney General Actions

1. *Broad Common Law Powers.* The state attorney general is a position with broad powers granted by the common law to initiate actions on behalf of the people of the state to promote the public interest.<sup>73</sup> In most states, the attorney general retains its common-law powers unless the state legislature has chosen to abrogate them.<sup>74</sup> According to the National Association of Attorneys General (“NAAG”), courts have recognized that state AGs possess common-law powers including the authority to “[p]rotect the public interest,” to “[c]ontrol litigation and appeals,” and to “[i]ntervene in legal proceedings on behalf of the public interest.”<sup>75</sup> With these expansive common-law powers, state AGs can act as long as the action serves the public interest, including initiating lawsuits to enforce state laws, without the authorization of the government or agency.<sup>76</sup> Therefore, the state AGs can always initiate actions and seek injunctive relief in state courts against CPCs if their conduct violates state laws.

Moreover, because the state AGs possess broad common law power and discretion to act on behalf of the public, they

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of a large range of ordinary social and economic regulations, potentially endangering the significant reliance interest in the legitimacy of mandated disclosure requirements as seen in commercial speech regulations such as pharmaceutical drugs advertisement. *See id.* at 2381–82. Yet the majority decided to proceed with this standard by distinguishing CPCs as facilities that were neither commercial nor medical, which puts higher burdens on states and localities if they want to regulate the CPCs through a categorical approach. *Id.* at 2371; Vlach, *supra* note 19, at 151.

<sup>73</sup> Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268 n.6 (5th Cir. 1976) (“The Attorney General is . . . entrusted by [the people] with the common law power to legally represent them or some of them in matters deemed by him to affect the public interest.” (citation omitted)).

<sup>74</sup> Shevin, 526 F.2d at 268 (“Their duties and powers typically are not exhaustively defined by either constitution or statute [of the states] but include all those exercised at common law.”).

<sup>75</sup> Powers and Duties, NAT’L ASSOC. OF ATT’YS GEN., <https://www.naag.org/powers-and-duties/> [<https://perma.cc/36KT-F8BP>].

<sup>76</sup> Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 374 (2005) (“In her representation of the people, the attorney general has the power to initiate or intervene in almost any action as long as a real public interest is involved.”). For the common law power to enforce state laws, see, for example, Lund *ex rel.* Wilbur v. Pratt, 308 A.2d 554, 558 (Me. 1973) (holding that the Attorney General, as the chief law officer of the State, may exercise all common law power and authority as public interests require and as he or she deems necessary for the enforcement of the laws of the State).

do not need to prove standing when filing claims in court and face a less rigid threshold for enjoining harmful behavior.<sup>77</sup> The standard for state AGs to obtain a court injunction is a showing of necessity to protect the public interest, which is considerably easier to meet than the demonstration of irreparable harm required for private plaintiffs.<sup>78</sup> Thus, it is arguably more effective and efficient for state AGs to initiate legal action against CPCs than private individuals who do not enjoy the same legal advantages.

2. *Robust Tools of the Office.* Apart from the broad common law power to act for the public interest, a state attorney general has other important tools that can affect how state agencies, private parties, and the courts react to substantive legal issues. For example, state AGs can conduct extensive investigations on consumer complaints about CPCs and approach the parties involved in the complaint with settlement agreements to stop harmful behaviors.<sup>79</sup> Additionally, state AGs can issue advisory legal opinions and file amicus curiae briefs to express their viewpoints on issues of interest,<sup>80</sup> which can extend to questionable CPC practices.<sup>81</sup> The overturning of *Roe v. Wade* makes this issue more relevant than ever.

3. *Thriving Influence of the State AGs.* In addition to the legal powers and practical tools endowed in the position, state AGs are important statewide actors in the state governmental systems. As one scholar observes, “[b]esides a governorship, state attorney generals are arguably the most prominent statewide office one can hold in state politics.”<sup>82</sup> Moreover, state attorneys general are also drawing national attention to their collective efforts in the fights against tobacco companies’

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<sup>77</sup> See Vlach, *supra* note 19, at 161.

<sup>78</sup> See *id.*

<sup>79</sup> For the authority of investigative power, see, for example, N.Y. GEN. BUS. LAW §§ 352, 354–55 (McKinney 2023) (authorizing the New York Attorney General to Commence investigations, public or confidential, into potentially fraudulent business practices). For the authority to enter into settlement agreements, see, for example, ARIZ. REV. STAT. ANN. § 41-192(B)(4) (2022) (stating that the Arizona Attorney General may “[c]ompromise or settle any action or claim by or against this state or any department, board or agency of this state”).

<sup>80</sup> See *Powers and Duties*, *supra* note 75.

<sup>81</sup> For further discussion of potential unfair trade practices by the CPCs, see *infra* Section II.B. For further discussion of potential unauthorized practice of medicine by the CPCs, see *infra* Section II.C.

<sup>82</sup> Nick Robinson, *The Decline of the Lawyer-Politician*, 65 BUFF. L. REV. 657, 691 (2017).

misleading advertisements and the opioid epidemic.<sup>83</sup> Therefore, a campaign launched by interested state AGs to regulate CPCs can also emphasize to the nation the importance of reproductive healthcare regulation in the post-*Dobbs* landscape.<sup>84</sup>

## B. Before Entering the CPC: Mobile Geofencing Advertisements

1. *CPCs' Practice.* Modern-day CPCs utilize technological developments to advance their goals more effectively and efficiently, and one prime example is their use of mobile geofencing advertisements. Mobile geofencing is a digital advertising technique that allows marketers to target individuals in a particular physical area by delivering ads to their smartphones, frequently by utilizing the individual's GPS (Global Positioning System) location, IP (Internet Protocol) address, or other device identification data.<sup>85</sup> Taking advantage of this tacit targeting

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<sup>83</sup> See *The Master Settlement Agreement*, NAT'L ASSOC. OF ATT'YS GEN., <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/> [<https://perma.cc/66DP-VSB7>] (describing the influence of the collective efforts by fifty-two state and territory attorneys general in reaching a master settlement agreements with major U.S. tobacco companies to curb their harmful advertising and marketing practices); *Opioids*, NAT'L ASSOC. OF ATT'YS GEN., <https://www.naag.org/issues/opioids/> [<https://perma.cc/U83K-LP6Y>] (summarizing the impact of the bipartisan endeavor by multiple state attorneys general to settle with pharmaceutical companies in preventing the opioid epidemic from spreading further).

<sup>84</sup> Several AGs have already started to combat questionable CPC practices in their states and beyond. In November 2022, a multistate coalition of ten Attorneys General filed a letter to Apple, urging the technology giant to shield their users' reproductive health privacy against intrusion from third parties, including CPCs. See Press Release, Cal. Off. of the Att'y Gen., Attorney General Bonta Joins Multistate Coalition Urging Apple to Take Action to Better Protect Reproductive Health Data in Third-Party Apps (Nov. 21, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-joins-multistate-coalition-urging-apple-take-action> [<https://perma.cc/C4RQ-KMPQ>]. In addition, Attorneys General from California, Massachusetts and Minnesota have issued consumer alerts to warn the state citizens about the potential risks posed by the CPCs. See Press Release, Cal. Off. of the Att'y Gen., Attorney General Bonta Issues Consumer Alert Warning Californians That Crisis Pregnancy Centers Do Not Offer Abortion or Comprehensive Reproductive Care (June 1, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-consumer-alert-warning-californians-crisis> [<https://perma.cc/89Y4-GEJC>]; Press Release, Mass. Off. of the Att'y Gen., AG Healey Warns Patients About Crisis Pregnancy Centers (July 6, 2022), <https://www.mass.gov/news/ag-healey-warns-patients-about-crisis-pregnancy-centers> [<https://perma.cc/UY6C-DS4A>]; Press Release, Minn. Off. of the Att'y Gen., Attorney General Ellison Issues Consumer Alert About Crisis Pregnancy Centers (Aug. 22, 2022), [https://www.ag.state.mn.us/Office/Communications/2022/08/23\\_CrisisPregnancyCenters.asp](https://www.ag.state.mn.us/Office/Communications/2022/08/23_CrisisPregnancyCenters.asp) [<https://perma.cc/Q58X-XLRL>].

<sup>85</sup> Justin Sherman, *The Data Broker Caught Running Anti-Abortion Ads—to People Sitting in Clinics*, LAWFARE (Sept. 19, 2022), <https://www.lawfareblog.com/>

method, CPCs have set up geofences around abortion clinics to reach patients in the waiting room.<sup>86</sup> With cooperation from geofencing advertisement companies, CPCs have managed to send those in abortion clinics ads titled “Pregnancy Help” or “You Have Choices” in order to get them to go to CPCs instead.<sup>87</sup> Moreover, a CPC marketing firm went even further by suggesting that CPCs get “creative” with their geofencing and set it up around “high schools, universities, shopping malls, movie theaters, and abortion clinics.”<sup>88</sup>

2. *Available Legal Solution.* In order to combat this form of exploitative data collection and usage, state AGs can look to existing consumer protection statutes, especially unfair or deceptive acts or practices (“UDAP”) laws to address the issue.<sup>89</sup> With the encouragement of the Federal Trade Commission (“FTC”),<sup>90</sup> states adopted UDAP laws modelled on Section 5 of the FTC Act, which is the federal UDAP statute.<sup>91</sup> Similar to Section 5 of the FTC Act,<sup>92</sup> the typical language of a state UDAP statute bans “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>93</sup>

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data-broker-caught-running-anti-abortion-ads%E2%80%94people-sitting-clinics [https://perma.cc/DN3P-4P3N].

<sup>86</sup> See ALLIANCE REPORT, *supra* note 6, at 35.

<sup>87</sup> See Press Release, Mass. Off. of the Att’y Gen., AG Reaches Settlement with Advertising Company Prohibiting ‘Geofencing’ Around Massachusetts Healthcare Facilities (Apr. 4, 2017), <https://www.mass.gov/news/ag-reaches-settlement-with-advertising-company-prohibiting-geofencing-around-massachusetts-health-care-facilities> [https://perma.cc/3KWC-DMYZ].

<sup>88</sup> See ALLIANCE REPORT, *supra* note 6, at 35.

<sup>89</sup> For further discussion about the viability of state AGs’ enforcement of state UDAP laws see Vlach, *supra* note 19, at 154–57.

<sup>90</sup> See Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 912 (2017).

<sup>91</sup> See Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 754 (2016); 15 U.S.C. § 45(a)(2) (granting FTC authority to regulate “unfair methods of competition”).

<sup>92</sup> See 15 U.S.C. § 45(a)(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”)

<sup>93</sup> See MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2023); see also OHIO REV. CODE ANN. § 1345.02(A) (West 2023) (prohibiting “unfair or deceptive act[s] or practice[s] in connection with a consumer transaction”). Some states retain “deceptive” but leave out “unfair” practices in their UDAP-like statutes. See, e.g., N.Y. GEN. BUS. LAW §§ 349, 350 (McKinney 2023) (prohibiting only “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service”). Nevertheless, these statutes function the same as their counterparts with the “unfair” prong in actions against data privacy intrusion. See, e.g., Assurance of Voluntary Compliance Between Att’y Gen. and Google, LLC, at 1



In fact, many states' UDAP statutes were enacted with the intention to be guided by the FTC's interpretations of Section 5 of the FTC Act.<sup>94</sup>

As guidance, the FTC has brought claims against and entered consent orders with location data collectors using its Section 5 authority, including a claim against a marketing service provider which provided geofencing service to third parties.<sup>95</sup> In its Section 5 actions against data collectors, the FTC clarifies that the (1) "failure to give clear disclosures to the individual"; (2) "failure to obtain valid consent or failure to honor opt-out" from the individual; and (3) "collection of location data in conflict with stated privacy policies" constitute unfair or deceptive practices.<sup>96</sup>

Given the sheer number of CPCs<sup>97</sup> and the FTC's increasingly curtailed ability to address more localized unfair trade practices,<sup>98</sup> state AGs are better situated to address the issue. In contrast with the FTC's limited outreach,<sup>99</sup> state AGs, with their broad powers and tools, can proceed by investigating consumer complaints, negotiating settlement agreements, and seeking injunctions. Also, state AGs' UDAP claims against CPC

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n.3 (Nov. 14, 2022), [https://ag.ny.gov/sites/default/files/google\\_location\\_aod\\_final.pdf](https://ag.ny.gov/sites/default/files/google_location_aod_final.pdf) [<https://perma.cc/TV6M-HKG7>] (a multistate coalition of AGs reaching a settlement with Google for its practice of location data tracking with the AGs' claims including the violation of N.Y. GEN. BUS. LAW §§ 349, 350).

<sup>94</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 93A, § 2(b) (West 2023) ("It is the intent of the legislature that . . . the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), as from time to time amended."); TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (West 2023) ("It is the intent of the legislature that . . . the courts to the extent possible will be guided by . . . the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. § 45(a) (1)].").

<sup>95</sup> See, e.g., Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *United States v. InMobi Pte. Ltd.*, No. 3:16-cv-3474, (N.D. Cal. June 22, 2016) (FTC's consent order under Section 5 of the FTC Act with a marketing service provider whose targeted advertising software tracked app user location in order to identify an individual user's precise location for purposes of ad targeting).

<sup>96</sup> Paige M. Boshell, *The Power of Place: Geolocation Tracking and Privacy*, A.B.A. BUS. L. TODAY (Mar. 25, 2019), <https://businesslawtoday.org/2019/03/power-place-geolocation-tracking-privacy/> [<https://perma.cc/5F9C-VDK9>].

<sup>97</sup> See ALLIANCE REPORT, *supra* note 6, at 4.

<sup>98</sup> James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practice Laws: An Economic and Empirical Analysis*, 81 ANTI-TRUST L.J. 947, 953 (2017); see also Vlach, *supra* note 19, at 159 ("[B]ut [FTC as a lone agency] lacked the capacity to tackle the full breadth of fraudulent and harmful activity. . . .").

<sup>99</sup> See Pridgen, *supra* note 90, at 915–16. For discussion about the advantages of state Attorneys General enforcement, see *supra* Section II.A.

deception in the last century survived First Amendment challenges, clearing the constitutional hurdle posed by *NIFLA*.<sup>100</sup>

It seems feasible that a state attorney general could also address this problem by enforcing the state's corresponding consumer privacy law if there is one. Yet, as of October 2022, only a handful of states have passed specific consumer privacy acts: California has a comprehensive consumer privacy act effective as of January 1, 2020, while most of the acts signed in other states will be effective in mid-2023.<sup>101</sup> In addition, in light of the possibility of the enactment of a federal privacy law, the preemptive effect of this act on state consumer privacy statutes is unclear.<sup>102</sup> Therefore, the existing state UDAP statutes, which cover a broad range of unfair trade practices, are arguably the more practicable tool available for state AGs at this stage.

3. *A Case Study of State AG Action.* Massachusetts Attorney General Maura Healey has demonstrated how to deal with

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<sup>100</sup> See, e.g., Carr v. Axelrod, 798 F. Supp. 168, 175–76 (S.D.N.Y. 1992) (“Therefore, [Plaintiff] cannot show that the enforcement proceeding will irreparably damage his first amendment right to speak on the abortion issue.”); Fargo Women’s Health Org. v. Larson, 391 N.W.2d 627, 629 (N.D. 1986) (“We further concluded that the preliminary injunction did not unconstitutionally infringe upon the Help Clinic’s First Amendment rights.”).

<sup>101</sup> CAL. CIV. CODE § 1798.100 (West) (effective Jan. 1, 2020); Colorado S.B. 21-190 (Colorado Privacy Act) (effective July 1, 2023), [https://coag.gov/app/uploads/2022/01/SB-21-190-CPA\\_Final.pdf](https://coag.gov/app/uploads/2022/01/SB-21-190-CPA_Final.pdf) [<https://perma.cc/YZL7-2DXR>]; Connecticut S.B. 6 (effective July 1, 2023), <https://www.cga.ct.gov/2022/ACT/PA/PDF/2022PA-00015-R00SB-00006-PA.PDF> [<https://perma.cc/B2VF-9YWF>]; Virginia S.B. 1392 (Virginia Consumer Data Protection Act) (effective Jan. 1, 2023), <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1392> [<https://perma.cc/DAJ5-XG3H>]; Utah S.B. 227 (Utah Consumer Privacy Act) (effective Dec. 31, 2023), <https://le.utah.gov/~2022/bills/static/SB0227.html> [<https://perma.cc/Y7AW-P9GK>].

<sup>102</sup> See JONATHAN M. GAFFNEY, CHRIS D. LINEBAUGH & ERIC N. HOLMES, CONG. RSCH. SERV., LSB10776, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT, H.R. 8152, at 5 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10776> [<https://perma.cc/3ZVT-HAQ2>] (presenting different stances about the preemptive effect of American Data Privacy and Protection Act (“ADPPA”) on state privacy law enforcement and leaving the federal preemption an unresolved question). In response to the possibility of a sweeping preemption by the ADPPA, a coalition of ten AGs led by California Attorney General Rob Bonta called on Congress to create a baseline of consumer privacy laws that do not preempt states’ ability to address data protection issues. Press Release, Cal. Off. of the Att’y Gen., Attorney General Bonta Leads Coalition Calling for Federal Privacy Protections That Maintain Strong State Oversight (July 19, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-leads-coalition-calling-federal-privacy-protections> [<https://perma.cc/3MXP-UKUV>]. Whether consumer privacy protection would enjoy the same enforcement model as that of antitrust, with state agencies filling the gap of federal actions, is still unclear. See Note, *Antitrust Federalism, Preemption, and Judge-Made Law*, 133 HARV. L. REV. 2557, 2558–59 (2020) (discussing the federal-state dual enforcement model in antitrust legal landscape).

CPC geofencing using the state's UDAP statute. In 2017, the Massachusetts Attorney General reached a settlement with Copley Advertising, a data broker, for its practice of monitoring individuals who visited abortion clinics and geofencing advertisements around those clinics. The settlement resolved allegations of unfair and deceptive trade practices in violation of Massachusetts consumer protection laws.<sup>103</sup> In particular, Copley Advertising helped CPCs display ads with titles like "You Have Choices" to people sitting in abortion clinic waiting rooms.<sup>104</sup> Although the settlement agreement did not find that Copley Advertising provided geofencing services in Massachusetts, the Attorney General believed that it would still be unlawful for an entity like Copley Advertising to implement this strategy under Massachusetts' UDAP statute.<sup>105</sup> The statute makes illegal "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."<sup>106</sup> According to the settlement, the Massachusetts Attorney General believed the kind of geofencing practiced by Copley Advertising violated the aforementioned statute as it "intrudes upon a consumer's private health or medical affairs and/or results in the gathering or dissemination of private health or medical facts about the consumer without his or her knowledge or consent."<sup>107</sup> This emphasis on intrusion of privacy without consent was consistent with and echoed the FTC's interpretation in its consent order with another marketing company that provided similar services.<sup>108</sup>

As a result, the settlement mandated that Copley Advertising provide assurance that it would refrain from using geofencing technology at or near Massachusetts healthcare facilities to infer any person's "health status, medical condition, or medical treatment."<sup>109</sup> Thus, the Massachusetts Attorney General has provided a viable option for other interested state AGs to prevent CPCs and relevant marketing service providers from employing a geofencing advertising strategy. The scope of these settlements can be expansive, as state AGs may reach CPCs

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<sup>103</sup> Sherman, *supra* note 85.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2023).

<sup>107</sup> Assurance of Discontinuance at 4–5, *In re Copley Advertising, LLC*, No. 1784-cv-01033 (Mass. Super. Ct. Apr. 4, 2017), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2452&context=historical> [<https://perma.cc/L6YU-NBYB>].

<sup>108</sup> *See Boshell, supra* note 96.

<sup>109</sup> *See* Press Release, *supra* note 87.

and marketing companies outside their states based on the reasonable deduction that these entities have the capacity to geofence citizens of their states.<sup>110</sup>

### C. Sitting in the CPC: “Abortion Pill Reversal” and Non-Diagnostic Ultrasound

1. *CPCs’ Practice.* In recent years, many CPCs began to promote and administer “abortion pill reversal” (“APR”) to their visitors.<sup>111</sup> APR refers to the “experimental administration of high doses of progesterone” to pregnant people who have only taken the first of the two medicines for a medication abortion.<sup>112</sup> Many CPCs claim APR can “reverse” an abortion, but medical experts state such claims “are not based on science and do not meet clinical standards.”<sup>113</sup> APR’s effects on the human body are still unascertained, and a recent clinical study was even terminated because a quarter of the participants experienced severe bleeding.<sup>114</sup> According to the Alliance Report, 35% of

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<sup>110</sup> See Assurance of Discontinuance, *supra* note 107.

<sup>111</sup> See ALLIANCE REPORT, *supra* note 6, at 6–7.

<sup>112</sup> See *id.*

<sup>113</sup> *Facts Are Important: Medication Abortion “Reversal” Is Not Supported by Science*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS <https://www.acog.org/advocacy/facts-are-important/medication-abortion-reversal-is-not-supported-by-science> [<https://perma.cc/8RBD-NEHF>].

<sup>114</sup> Mitchell D. Creinin, Melody Y. Hou, Laura Dalton, Rachel Steward & Melissa J. Chen, *Mifepristone Antagonization with Progesterone to Prevent Medical Abortion: A Randomized Controlled Trial*, 135 *OBSTETRICS & GYNECOLOGY* 158, 162 (2020). The research project was initiated partially in response to a previous experiment led by George Delgado, a physician and the main architect behind the promotion of APR. See Mara Gordon, *Controversial ‘Abortion Reversal’ Regimen Is Put to the Test*, NPR (Mar. 22, 2019), <https://www.npr.org/sections/health-shots/2019/03/22/688783130/controversial-abortion-reversal-regimen-is-put-to-the-test> [<https://perma.cc/5QAC-J2XE>]. Prior to Creinin’s project, Delgado had also conducted an experiment, reaching the outcome that abortion could be effectively reversed by progesterone. See George Delgado et al., *A Case Series Detailing the Successful Reversal of the Effects of Mifepristone Using Progesterone*, 33 *ISSUES L. & MED.* 21 (2018). However, this experiment failed to randomly assign women to receive a placebo or mifepristone and was called into question by other researchers. See, e.g., Daniel Grossman & Kari White, *Abortion “Reversal” — Legislating without Evidence*, 379 *NEW ENG. J. MED.* 1491, 1491 (2018) (questioning the scientific validity of the conclusion of Delgado’s 2018 research). Despite the ongoing debate about whether APR is scientific or not, many states have passed informed consent laws that require abortion facilities to inform a woman prior to, or soon after taking the first drug in a two-dose medication abortion, that it may be possible to reverse the effects of the abortion. See, e.g., KY. REV. STAT. ANN. § 311.774(2) (West 2023); W. VA. CODE § 16-2I-2(4) (West 2023). Nevertheless, many of these state statutes have been challenged, and federal and state courts have issued preliminary injunctions against the enforcement of the statutes. See, e.g., *All-Options Inc. v. Att’y Gen. of Ind.*, 546 F. Supp. 3d 754, 757 (S.D. Ind.

CPCs promote APR. Moreover, 5% of CPCs said they provide APR, but none of them clarified who administers it, how it is administered into the patient's body, or whether follow-up care was provided.<sup>115</sup>

Another common practice within CPCs is the non-diagnostic ultrasound, which is offered by 56% of CPCs.<sup>116</sup> These “non-diagnostic” ultrasounds cannot detect fetal abnormality or distress,<sup>117</sup> and may lead to inaccurate results about a pregnancy.<sup>118</sup> The American Institute of Ultrasound in Medicine has warned against the use of ultrasounds for any non-medical purpose: “The use of ultrasound without a medical indication to view the fetus, obtain images of the fetus, or identify the fetal external genitalia is inappropriate and contrary to responsible medical practice.”<sup>119</sup>

However, fewer than half (47%) of the CPCs in the Alliance Report indicated whether they had a licensed medical professional on staff or not, with the rest providing no information about whether there were licensed medical professionals associated with the center at all.<sup>120</sup> Only 16% of the CPCs investigated indicated an affiliated physician and 25% indicated an affiliated registered nurse, while none of the CPCs indicated whether licensed medical professionals were employees or volunteers, full- or part-time.<sup>121</sup> Anecdotal reports also indicate that some physicians affiliated with CPCs are licensed in fields unrelated to reproductive health.<sup>122</sup> It is thus reasonably possible that an unignorable number of CPCs have been marketing APR, administering APR, and/or conducting ultrasounds without licensed professionals with appropriate skills and knowledge.

2. *Available Legal Solution.* To address these issues, state AGs can look to medical licensing laws which prohibit

2021); *Planned Parenthood of Mont. v. State ex rel. Knudsen*, 515 P.3d 301, 317 (2022).

<sup>115</sup> See ALLIANCE REPORT, *supra* note 6, at 7.

<sup>116</sup> See *id.* at 6.

<sup>117</sup> See *id.*

<sup>118</sup> *Crisis Pregnancy Centers (CPCs)*, MASS. OFF. OF THE ATT'Y GEN., <https://www.mass.gov/service-details/crisis-pregnancy-centers-cpcs> [<https://perma.cc/8B3L-NFBC>].

<sup>119</sup> *Prudent Use and Safety of Diagnostic Ultrasound in Pregnancy*, AM. INST. OF ULTRASOUND IN MED. (May 19, 2020), <https://www.aium.org/officialStatements/79> [<https://perma.cc/3FAY-2LAQ>].

<sup>120</sup> See ALLIANCE REPORT, *supra* note 6, at 6.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* at 26.

unauthorized practice of medicine. Every state has a long history of unauthorized-practice-of-medicine jurisprudence, with state AGs as the main enforcers against such practices, which often includes a definition of what constitutes “practice of medicine.”<sup>123</sup> For example, Virginia’s medical licensing statute defines the practice of medicine as the “prevention, diagnosis, and treatment of human physical or mental ailments, conditions, diseases, pain, or infirmities by any means or method.”<sup>124</sup> Many states further include the practice of presenting oneself in a manner that such an individual is authorized to practice medicine would also constitute a violation.<sup>125</sup>

Since progesterone is a medicine available only through a doctor’s prescription,<sup>126</sup> the CPCs who administer APR, which is essentially high doses of progesterone, would be engaging in the practice of medicine by the term’s plain language. CPCs which promote the use of APR may also fall under the scope of state medical licensing statutes that include the presentation of oneself as practicing medicine in their definition of “practice of medicine.” By promoting the use of APR as a sound method to “reverse” a medication abortion, the CPCs are presenting themselves as facilities with the capacity to give suggestions on interference with a medical procedure. The use of a non-diagnostic ultrasound image can also fit into the definition of “practice of medicine,” as one of the main purposes behind obtaining an ultrasound image is to diagnose whether a person is pregnant or not.<sup>127</sup>

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<sup>123</sup> In the 1970s, many state AGs brought criminal actions against unauthorized practice of medicine claims against acupuncturists, and state courts upheld the convictions of acupuncture practitioners because the use of needles to reduce pain constituted the practice of medicine. See Brown, *supra* note 11, at 264–65. In particular, a Washington state court found that acupuncturists “offer[ed] services to people with various afflictions and tell them they can help them feel better” and therefore practiced medicine under the plain language of its relevant unauthorized practice of medicine statute. See *State v. Pac. Health Ctr., Inc.*, 143 P.3d 618, 626 (Wash. Ct. App. 2006),.

<sup>124</sup> VA. CODE ANN. § 54.1-2900 (West 2023).

<sup>125</sup> See, e.g., MINN. STAT. ANN. § 147.081 (West 2023) (defining the practice of medicine to include anyone who “advertises, holds out to the public, or represents in any manner that [she] is authorized to practice medicine in this state”); ARIZ. REV. STAT. ANN. § 32-1401(22) (2023) (defining the practice of medicine to include “the attempt or the claim to be able to diagnose, treat or correct” any health-related issues).

<sup>126</sup> *Progesterone*, MEDLINEPLUS (Apr. 15, 2016), <https://medlineplus.gov/druginfo/meds/a604017.html> [<https://perma.cc/LW9J-CT8B>].

<sup>127</sup> *Ultrasound*, MAYO CLINIC (Apr. 30, 2022), <https://www.mayoclinic.org/tests-procedures/fetal-ultrasound/about/pac-20394149> [<https://perma.cc/5UP7-JKB5>].



Similar to state AGs' UDAP actions, enforcing the unauthorized practice of medicine statutes usually does not pose a First Amendment issue.<sup>128</sup> Medical licensing laws have survived most of the constitutional challenges against them, such as claims based on the free exercise of religion<sup>129</sup> and violations of due process.<sup>130</sup> Although the threshold determination on whether CPCs are practicing medicine is still not settled, the state AGs can proceed to employ their states' medical licensing laws without much worry about the statutes' validities. The First Amendment hurdle in *NIFLA* is unlikely to bar state AGs' actions to regulate the administration of APR and the use of non-diagnostic ultrasound, as these actions are regulations of conduct instead of speech.<sup>131</sup> To regulate the *promotion* of APR alone through medical licensing law may raise a First Amendment question, as it involves the regulation that targets expression or expressive conduct.<sup>132</sup> Thus, viewing the promotion of APR during counseling together with conduct such as the use of non-diagnostic ultrasound and the production of ultrasound images raises a stronger claim for regulating CPCs based on unauthorized practice of medicine. These practices, not limited to speech, all amount to the presentation of oneself as someone who practices medicine. Therefore, the promotion of APR, along with other conduct that may fall under the scope of "practice of medicine," could provide a sufficient factual basis for a state AG to successfully proceed with the initial step of regulation—investigate whether there is the unauthorized practice of medicine through subpoena requiring relevant documents.<sup>133</sup> The case study of this section can illustrate the direction to pursue this measure.

3. *A Case Study of State AG Action.* The New York Attorney General's Office has provided a path in regulating the unlicensed practice of medicine by the CPCs. In 2013, the former

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<sup>128</sup> See Brown, *supra* note 11, at 264–65.

<sup>129</sup> See, e.g., Smith v. People, 117 P. 612, 614–15 (Colo. 1911) (holding a Colorado unauthorized practice of medicine statute constitutional as it did not interfere with the free exercise of religion).

<sup>130</sup> See, e.g., Hitchcock v. Collenberg, 140 F. Supp. 894, 900–02 (D. Md. 1956) (holding a Maryland unauthorized practice of medicine statute did not deprive the defendant-naturopaths of property without due process).

<sup>131</sup> See Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018) (stating that regulating conduct that incidentally burdens speech does not violate First Amendment).

<sup>132</sup> See *id.* at 2373–74.

<sup>133</sup> See Evergreen Ass'n, Inc. v. Schneiderman, 54 N.Y.S.3d 135, 143–44 (N.Y. App. Div. 2017).

New York Attorney General Eric Schneiderman issued a subpoena on Evergreen Association, a CPC network in the New York City area, in order to investigate whether it was engaged in the unauthorized practice of medicine.<sup>134</sup> Evergreen, in response, asserted that the subpoena interfered with its First Amendment right to free expression and lacked a sufficient factual basis.<sup>135</sup> The issue was brought to the Appellate Division of the Supreme Court of New York, and the Attorney General presented evidence that Evergreen's centers were designed to resemble medical facilities with its staff members dressed in scrubs or lab coats.<sup>136</sup> The Attorney General further provided that Evergreen took clients' medical history, conducted diagnoses of pregnancies and determinations of gestational age, and gave misleading medical advice.<sup>137</sup> The court thus found that the Attorney General had sufficiently demonstrated a "legitimate factual basis" to issue the subpoena and conduct the investigation in order to determine whether Evergreen was engaged in the unauthorized practice of medicine.<sup>138</sup> The investigation could thus proceed with the scope of its document requests determined by the court that the Attorney General could reach documents that were related to medical care.<sup>139</sup>

The investigation by the former New York Attorney General sheds light on the method to pursue for state AGs concerned with unauthorized practice of medicine that would endanger the health of their citizens. Given the unascertained nature of the health risks associated with APR and the importance of valid ultrasound images for reproductive healthcare, the fact that some are managed to engage in these measures without medically licensed professionals associated should raise legitimate concerns. State medical licensing statutes are the precise laws to address the problem, and state AGs may proceed with their enforcement actions with their powers and tools.

#### CONCLUSION

The debate over abortion is undoubtedly heated on the political and legal battlefield, especially after the release of the *Dobbs* decision in 2022. Nevertheless, apart from the

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<sup>134</sup> See *id.* at 138–40.

<sup>135</sup> See *id.* at 140.

<sup>136</sup> See *id.* at 143.

<sup>137</sup> See *id.* at 143.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* at 147.

controversy surrounding this topic, questionable CPC practices can hurt citizens of both pro-life and pro-choice states. Thus, concerned actors who want to counter these problematic practices may need to seek adaptive tools beyond what has been proved ineffective before. State AGs, as the lawyer of the people, are undoubtedly among those actors who can make a change. With the powers and tools granted in the position, they could look to existing state statutes to regulate CPCs.

In addition, federal and state legislatures have also chimed in. At the federal level, several Senators and Congresswomen introduced the Stop Anti-Abortion Disinformation Act, which directs the Federal Trade Commission (FTC) to issue and enforce rules that prohibit misleading or false advertising related to the supply of abortion services.<sup>140</sup> At the state level, Governor Hochul signed a Comprehensive Six-Bill Package including one bill that directs the New York State Department of Health commissioner to conduct a study and issue a report examining the impact of limited service pregnancy centers.<sup>141</sup> With these additional resources, state AGs and agencies who are also interested in the regulation of CPCs may be able to proceed further and protect the health of citizens.

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<sup>140</sup> Press Release, Senator Elizabeth Warren, Maloney, Bonamici, Menendez Introduce Legislation to Stop Anti-Abortion Disinformation by Crisis Pregnancy Centers (June 23, 2022), <https://www.warren.senate.gov/newsroom/press-releases/warren-maloney-bonamici-menendez-introduce-legislation-to-stop-anti-abortion-disinformation-by-crisis-pregnancy-centers> [<https://perma.cc/3G8B-NQVR>].

<sup>141</sup> Press Release, N.Y. Off. of the Governor, Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All (June 13, 2022), <https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive> [<https://perma.cc/3FWS-H2BS>].