RECORD NO. 16-2325

In The

United States Court Of Appeals
For The Fourth Circuit

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,

Plaintiff – Appellee,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; CATHERINE E. PUGH, in her official capacity as Mayor of Baltimore; LEANA S. WEN, M.D., in her official capacity as Baltimore City Health Commissioner,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS

Suzanne Sangree
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street
Room 156
Baltimore, MD 21202
(443) 388-2190

Counsel for Appellants

Molly R. Duane
Autumn C. Katz
Stephanie Toti
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street
22nd Floor
New York, NY 10038
(917) 637-3600

Counsel for Appellants

*Gibson*Moore Appellate Services, LLC ♦ 206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and L.R. 26.1, the Mayor and City Council of Baltimore, Catherine E. Pugh, in her official capacity as Mayor of Baltimore, and Leana S. Wen, M.D., in her official capacity as Baltimore City Health Commissioner, who are Appellants in this case, make the following disclosures:

(a) The Mayor and City Council of Baltimore, the Mayor of Baltimore, and the Baltimore City Health Commissioner are not publicly held corporations or other publicly held entities or affiliates or parents of any corporation.

(b) No publicly owned corporation or other publicly held entity owns ten (10) percent or more of the stock of the Mayor and City Council of Baltimore, the Mayor of Baltimore, or the Baltimore City Health Commissioner.

(c) The Mayor and City Council of Baltimore, the Mayor of Baltimore, and the Baltimore City Health Commissioner are not trade associations.

(d) No publicly held corporation that is not a party to this litigation has a financial interest in the outcome of this litigation as defined in L.R. 26.1(b).

(e) This case does not arise out of a bankruptcy proceeding.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES....................1

STATEMENT OF THE CASE....................2

I. Introduction....................2

II. Pregnancy Centers Are Part Of A Multi-Million Dollar Industry That Utilizes Sophisticated Commercial Advertising Techniques To Attract Clients 4

III. In Baltimore And Throughout The Country, Pregnancy Centers Engage In Deceptive Advertising 8

IV. Consumer Confusion About The Scope of Services Offered By Pregnancy Centers Poses A Threat To Public Health 10

V. The City Enacted The Ordinance To Remedy Consumer Confusion About The Scope of Services Offered by Pregnancy Centers....................12

VI. Procedural History 13

SUMMARY OF ARGUMENT 19

ARGUMENT 20

I. Standard Of Review....................20

II. The District Court Erred In Concluding That The Ordinance Violates Plaintiff's Freedom Of Speech 21

A. The Ordinance Is A Permissible Regulation Of Commercial Speech 22

1. The Ordinance Regulates Commercial Speech 22

a. The Ordinance Regulates Speech That Proposes A Commercial Transaction....................25

b. The Ordinance Regulates Speech That Promotes Goods And Services For The Purpose Of Soliciting Pregnancy Center Patronage....27

c. Given The Fact-Driven Nature Of The Commercial Speech Inquiry, Other Cases Concerning Pregnancy Center Disclosure Laws Are Inapposite....30

2. The Commercial Speech Regulated By The Ordinance Is Not Inextricably Intertwined With Noncommercial Speech....33

3. The Ordinance Is Reasonably Related To The City's Interest In Preventing The Deception Of Consumers....38

B. Alternatively, The Ordinance Is A Permissible Regulation Of Professional Speech....41

1. Under The "Sliding Scale" Announced In *Stuart*, The Ordinance Is Subject To Intermediate Scrutiny....41

2. The Ordinance Directly Advances A Substantial Governmental Interest And Is Drawn To Achieve That Interest....45

C. The Ordinance Is Viewpoint Neutral....45

D. The Ordinance Satisfies Strict Scrutiny....47

1. The Ordinance Serves The City's Compelling Interests In Consumer Protection and Public Health....47

2. The Ordinance Is Narrowly Tailored To Serve The City's Compelling Interests....51

CONCLUSION....55

TABLE OF AUTHORITIES

Page

CASES

Am. Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995)....................................46

Austin Lifecare, Inc. v. City of Austin,
No. A-11-CA-875-LY, slip op. (W.D. Tex. June 23, 2014) 30 n.10

A Woman's Friend Pregnancy Resource Clinic v. Harris,
153 F. Supp. 3d 1168 (E.D. Cal. 2015), *aff'd*, No. 15-17517,
2016 WL 5956744 (9th Cir. Oct. 14, 2016) (unpublished).......................30 n.11

Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).........................33

Burson v. Freeman, 504 U.S. 191 (1992) 50

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997)...25

Centro Tepeyac v. Montgomery Cty.,
5 F. Supp. 3d 745 (D. Md. 2014)...31, 32, 33

Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010) 45

Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)............................51

Couch v. Jabe, 679 F. 3d 197 (4th Cir. 2012)...21

Chiropractors United for Research & Educ., LLC v. Conway,
No. 3:15-CV-00556-GNS, 2015 WL 5822721, (W.D. Ky. Oct. 1, 2015),
aff'd, No. 15-6103 (6th Cir. July 1, 2016) (unpublished)............................21 n.7

Contest Promotions, LLC v. City & Cty. of S.F.,
No. 15-cv-00093-SI, 2015 WL 4571564 (N.D. Cal. July 28, 2015),
appeal docketed, No. 15-16682 (9th Cir. Aug. 25, 2015) 21 n.7

Dana's R.R. Supply v. Attorney Gen., Fla.,
807 F.3d 1235 (11th Cir. 2015) 21 n.7

Desmond v. PNGI Charles Town Gaming, L.L.C.,
564 F.3d 688 (4th Cir. 2009) 20

Doe v. Reed, 561 U.S. 186 (2010) 51

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

First Resort, Inc. v. Herrera, 80 F. Supp. 3d 1043 (N.D. Cal. 2015),
argued, No. 15-15434 (9th Cir. Nov. 15, 2016)..28, 29

Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 683 F.3d 539 (4th Cir. 2012)..........................14

Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 721 F.3d 264
(4th Cir. 2013) (*en banc*) .... *passim*

Livingwell Medical Clinic, Inc. v. Harris,
No. 4:15-CV-04939-JSW (N.D. Cal. Dec. 18, 2015),
aff'd, No. 15-17497, 2016 WL 5956743
(9th Cir. Oct. 14, 2016) (unpublished) 30 n.11

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994)..................................46

Maryland v. Universal Elections, Inc., 729 F.3d 370 (4th Cir. 2013).............47, 53

McCullen v. Coakley, __ U.S. __, 134 S. Ct. 2518 (2014)................46, 47, 52 n.17

Milavetz, Gallop & Milavetz, P.A. v. United States,
559 U.S. 229 (2010) 38, 39, 40, 49

Moore-King v. Cty. of Chesterfield, 708 F.3d 560 (4th Cir. 2013) 43, 44, 45

Nat'l Fed'n of the Blind v. Fed. Trade Comm'n,
420 F.3d 331 (4th Cir. 2005)..41, 52 n.17, 53

Nat'l Inst. of Family & Life Advocates v. Harris,
No. 15-CV-2277-JAH(DHB), 2016 WL 3627327
(S.D. Cal. Feb. 9, 2016), *aff'd*, 839 F.3d 823 (9th Cir. 2016).................. *passim*

O'Brien v. Mayor & City Council of Balt.,
768 F. Supp. 2d 804 (D. Md. 2011)...14

Reed v. Town of Gilbert, __ U.S. __, 135 S. Ct. 2218 (2015) 21 n.7

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S 781 (1998) 53

S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.,
483 U.S. 522 (1987) 24, 27

Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014) 41, 42, 43, 45

Timilsina v. W. Valley City,
No. 2:14-CV-00046-DN-EJF, 2015 WL 4635453
(D. Utah Aug. 3, 2015)...21 n.7

Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981) 33

Williams-Yulee v. Fla. Bar, __ U.S. __,
135 S. Ct. 1656 (2015)...47, 52 n.17, 55

Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.,
156 F.3d 535 (4th Cir. 1998) 26

Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio,
471 U.S. 626 (1985) .... *passim*

Statutes and Local Laws

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Balt., Md., City Code Art. I,

§ 40-14 ....2, 13

§ 41-14 ....2, 13

Balt., Md., City Health Code

§ 3-501 ....2, 12 n.3

§ 3-502 .... *passim*

§ 3-503 .... 2, 12

§ 3-504 2

§ 3-505 2

§ 3-506 .... 2, 13

RULES AND REGULATIONS

Fed. R. App. P. 43(c)(2).. 14 n.5

Fed. R. Civ. P. 25(d) 14 n.5

Balt., Md., City Health Dep't, Final Regulation: Limited-Service
Pregnancy Center Disclosures in Balt. City (Sept. 27, 2010)............... 13 & n.4, 52

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution, laws or treaties of the United States. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the appeal is taken from a final decision of a United States district court. The final judgment appealed from was entered on October 21, 2016. A notice of appeal was filed on November 16, 2016. This appeal is from a final order and judgment that disposes of all the parties' claims.

STATEMENT OF THE ISSUES

Whether a pregnancy center that engages in purposely vague advertising has a right under the First Amendment's Free Speech Clause to avoid making truthful disclosures via a posted sign about the scope of services it offers.

STATEMENT OF THE CASE

I. Introduction.

Responding to evidence that limited-service pregnancy centers ("Pregnancy Centers") in Baltimore and throughout the country are engaging in deceptive advertising practices that mislead consumers and endanger the public health, the Mayor and City Council of Baltimore enacted Baltimore City Ordinance 09-252 ("Ordinance") (codified at Balt., Md., City Health Code §§ 3-501 to 3-506 and Balt., Md. City Code Art. I, §§ 40-14, 41-14), J.A. 34-37, in December 2009. The Ordinance protects consumers by requiring that each Pregnancy Center post a notice in its waiting room or other areas where prospective clients wait for services disclosing that it does not provide abortion services or certain types of birth-control services.

Although Plaintiff, a Pregnancy Center operating in Baltimore, has portrayed itself in court as a religious ministry, it portrays itself to the public as a business. Its advertising rarely references Plaintiff's religious affiliation or principles; instead, it promotes "pregnancy tests," "sonograms," and other medical services. J.A. 696; *accord* J.A. 698. Further, Plaintiff belongs to the Chamber of Commerce and has a policy of referring to its patrons as "clients." J.A. 827, 840-41. Plaintiff objects to posting the required notice because it contains the word "abortion." Yet much of Plaintiff's advertising contains the word "abortion," as does the "Commitment of

Care" that Plaintiff displays "in full view of clients, generally in the reception area." J.A. 826.

Plaintiff's Executive Director admitted that Plaintiff's advertisements are "purposely vague" and lead some women to think that the center provides abortions. J.A. 708. She complained that the Ordinance hinders Plaintiff's ability to communicate with women who are confused about the services Plaintiff provides, acknowledging that: "If a woman was coming in to get abortion information, or was under the impression for some reason that we do abortions, that sign would certainly interrupt . . . that conversation." J.A. 838. The City agrees, and that is precisely the reason it enacted the Ordinance.

Plaintiff and other Pregnancy Centers have no First Amendment right to deceive consumers about the services they provide. The modest disclosure requirement imposed by the Ordinance discourages Pregnancy Centers from engaging in deceptive advertising tactics and ensures that consumers who arrive at a Pregnancy Center seeking abortion or contraception are promptly informed that they are in the wrong place. Because the Ordinance withstands review under any level of First Amendment scrutiny, this Court should reverse the district court's grant of summary judgment to Plaintiff and direct the district court to enter summary judgment for Defendants.

II. Pregnancy Centers Are Part Of A Multi-Million Dollar Industry That Utilizes Sophisticated Commercial Advertising Techniques To Attract Clients.

Pregnancy Centers are part of a multi-million dollar "industry." J.A. 76. Most Pregnancy Centers in the United States, including Plaintiff, belong to two umbrella organizations: Care Net and Heartbeat International. *See* J.A. 843, 846; *see also* J.A. 265. Care Net's total revenue was over $4.3 million in 2013, the most recent year for which it provided information during discovery. J.A. 601. Heartbeat International's total revenue was more than $3.1 million in 2011, the most recent year for which it provided information during discovery. J.A. 623. A report cited in the legislative record notes that "[a]nnual combined [pregnancy] center income nationwide is at least $200 million," and "the largest centers have budgets as high as $4 million." J.A. 645; *see* J.A. 89; *see also* J.A. 263 ("Since 2001, pregnancy resource centers have received over $30 million in federal funding.").

Affiliates of Care Net and Heartbeat International pay an annual membership fee and, in exchange, receive certain benefits. As Plaintiff's Executive Director put it, "[W]e pay our dues and we reap the benefits of the organization every year." J.A. 844; *accord* J.A. 1185-1202; J.A. 648-51; J.A. 652-54; J.A. 655-56; J.A. 657-58. The benefits of Care Net membership include a license to use its logo, which is registered with the U.S. Department of Commerce's Patent and Trademark Office. J.A. 659-60; J.A. 661-65. Members are also included in the referral database for

Pregnancy Decision Line, "the only national call center and Internet website designed to reach people considering abortion with immediate pregnancy decision coaching, information, and referrals." J.A. 666-68. Similarly, Heartbeat International members are included in the referral database for Option Line, which "advertises the services of pregnancy help organizations and connects women in need with their nearest Heartbeat International affiliate." J.A. 652-54. Like the Care Net logo, the Option Line logo is registered as a trademark with the U.S. Department of Commerce. J.A. 669-70.

Both Care Net and Heartbeat International use sophisticated commercial advertising techniques to advertise the Pregnancy Decision Line and Option Line, and by extension, the Pregnancy Centers, including Plaintiff, that are listed in their databases and receive direct referrals from them.[1] *See* J.A. 615 (describing the Option Line as "a conduit for national and regional marketing campaigns designed to reach abortion-vulnerable and abortion-minded women"). These techniques include search engine optimization ("SEO"), which is a process that maximizes the number of visitors to a particular website by ensuring that the site appears high on

---

[1] Indeed, Care Net employs an entire "Marketing/Communication Department," which includes a "Senior Graphic Designer" whose job is to "develop[] and supervise[] production of printed, electronic, and multimedia materials for advertising, publications, conference, Internet applications and websites, and other graphic needs for Care Net." J.A. 674-80.

the list of results returned by a search engine. *See* J.A. 671-73 ("To reach more at-risk women you need a successful client marketing strategy. Ad America is an approved vendor for Care Net and Heartbeat. With proven SEO methods, we can help you get more results with your Google Places listing and website, and bring a more positive user-experience to a girl in crisis to get more calls."); *see generally* J.A. 265-66. In a 2014 report directed to potential funders, Care Net noted that "[a]lmost 85,000 visitors to the [Pregnancy Decision Line] website have been a result of targeted keyword advertising supported by donations." J.A. 668.

Care Net and Heartbeat International also provide members like Plaintiff with general advice and assistance about advertising and marketing their services. For instance, the President and CEO of Care Net sent Plaintiff's Executive Director an e-mail entitled "Client Marketing after Obamacare." J.A. 681-83. The e-mail contained a link to a recorded seminar designed to address the following topics: "We all know that the Affordable Care Act (aka Obamacare) changes how consumers interact with health insurance companies and providers. But how will it affect your client marketing? And how should your center adjust to attract more clients in this new environment?" J.A. 682. Similarly, Heartbeat International offers its members "a web hosting and design service specifically for pregnancy help organizations operated as a program of Heartbeat International." J.A. 684-90.

Plaintiff also engages in paid advertising independently of Care Net and Heartbeat International. It has a standing committee on advertising and marketing. J.A. 851-52. In recent years, Plaintiff has run advertisements in the *Pennysaver*, on local radio, and on public buses. J.A. 691-98, 807-08, 850-53, 872-74. In addition, Plaintiff is a paying member of the Chamber of Commerce and the Catholic Business Network. J.A. 840-41.

Further, Plaintiff, like many Pregnancy Centers, markets itself as a medical service provider. It is a member of the National Institute of Family Life Advocates ("NIFLA"), another national association of Pregnancy Centers, which helped Plaintiff undergo a "medical conversion." J.A. 699-700; *see* J.A. 1210-11 ("The plaintiff is what we consider a medical clinic . . . ."). NIFLA also trains and certifies Plaintiff's sonographers and provides Plaintiff with guidance about Plaintiff's provision of medical services. J.A. 848 ("They do training and they certify sonographers and we have utilized NIFLA for that. Additionally, they send medical tips monthly."); *see also* J.A. 1269-70 (discussing Plaintiff's provision of ultrasound services). Plaintiff has a "medical director," who "[o]versees the medical aspect of the Center." J.A. 921; *accord* J.A. 1222 ("They have a licensed physician licensed in Maryland to provide medical services who supervises the medical services, they are a medical clinic."); J.A. 1249. Plaintiff's Executive Director admitted, however,

that the Medical Director is "[v]ery rarely" at the center and does not ever meet directly with center clients. J.A. 921; *see* J.A. 1249.

III. In Baltimore And Throughout The Country, Pregnancy Centers Engage In Deceptive Advertising.

The City enacted the Ordinance in response to evidence presented to the City Council documenting a pattern of deceptive practices by Pregnancy Centers both in Baltimore and nationwide. The 2006 report prepared at the Request of U.S. Representative Henry A. Waxman ("Waxman Report") found that Pregnancy Centers often engage in deceptive advertising and other forms of deceptive solicitation to attract women seeking abortion and contraception to their facilities. J.A. 261-78. The Waxman Report's findings were confirmed by a 2008 report ("Maryland Report") that documented similar deceptive practices used by Pregnancy Centers in the State of Maryland, including in Baltimore City. J.A. 174-85. After soliciting women seeking abortion and/or contraception, the centers then use delay tactics to stall women from accessing those services. J.A. 181-82. The City Council also heard testimony from numerous individuals complaining about Pregnancy Centers' use of deceptive practices, and it collected specific examples of deceptive advertising by such centers. *See, e.g.*, J.A. 109, 115-17, 121, 122-23, 124.

The legislative record included an on-line advertisement for Option Line, which stated that affiliated pregnancy centers provide the following services:

"Abortion and Morning After Pill information, including procedures and risks;" "Medical services, including STD tests, early ultrasounds and pregnancy confirmation;" and "Confidential pregnancy options."[2] J.A. 701-03. The advertisement does not indicate that the "medical services" and "confidential pregnancy options" offered by the centers exclude abortion and most forms of birth-control. J.A. 703. Nor does this advertisement indicate that the services provided are religious in nature, or that Plaintiff is a religious ministry.

Discovery has yielded additional evidence of deceptive advertising. For example, in 2010, Plaintiff participated in a campaign that ran advertisements on public buses touting "FREE Abortion Alternatives." J.A. 698. The advertisements promised "FREE Confidential Options Counseling," "FREE Pregnancy Tests," and "FREE Services," but did not indicate that the featured centers would not provide abortion services or referrals. J.A. 698. Moreover, the advertisements failed to provide any notice to consumers that Plaintiff is a religious ministry opposed to legal

---

[2] Two Pregnancy Centers in Baltimore, including Plaintiff, are affiliates of Care Net. J.A. 76. Five Pregnancy Centers in Baltimore are affiliates of Heartbeat International. J.A. 89. The Option Line internet search tool featured in the advertisement at J.A. 703 directs consumers to these affiliates. *See* OPTIONLINE, http://www.optionline.org (last visited Jan. 25, 2017). If you click on the link for "Find a Center Near Me" under "Contact Information" and enter the location "Baltimore, MD" into the search tool, Plaintiff is the first result you will obtain. *Id.* It is identified as "Center for Pregnancy Concerns (17771)." *Id.*

abortion. After the advertisements began to run, the Director of Plaintiff's telephone hotline reported an increase in "abortion minded callers" who "were under the impression from the bus advertisements that we assisted in paying for abortions." J.A. 704-06. These women "did not seem to understand 'abortion alternatives' and wanted to schedule an abortion." J.A. 705. Plaintiffs' Executive Director told the staff member that "those ads are purposely vague, of course." J.A. 708.

As a result of such "purposely vague" advertising, some women are misled into thinking that Pregnancy Centers are medical clinics that provide a full range of medical services and do not understand, on arrival at a Pregnancy Center, what kind of facility they are in. *See, e.g.*, J.A. 109.

IV. Consumer Confusion About The Scope Of Services Offered By Pregnancy Centers Poses A Threat To Public Health.

Consumer confusion concerning the scope of services offered by Pregnancy Centers poses a threat to public health by delaying women who seek abortion or birth-control from accessing those services. *See* J.A. 711-12. Although abortion is a safe medical procedure, the risks of abortion, as well as the costs, increase as a woman advances through her pregnancy. J.A. 712. As a result, the longer a woman is delayed in having an abortion, the riskier and costlier the procedure becomes. J.A. 712. Similarly, delays in access to the birth-control method of a woman's choice

can leave the woman and her partner vulnerable to unintended pregnancy and sexually transmitted disease. J.A. 712.

Delays caused by deceptive advertising are often compounded by delay tactics employed by Pregnancy Centers after consumers arrive there. *See, e.g.*, J.A. 109, 121, 122-23. The Maryland Report found that women are encouraged to wait to make the abortion decision because "[a]bortion is legal through all nine months of pregnancy," even though abortion procedures are not available in Maryland through all nine months of pregnancy. J.A. 179. Women are also pressured to delay decisions about contraception and abortion until they undergo additional tests at the Pregnancy Center, such as pregnancy tests and sonograms, which may not be scheduled until weeks after a women's initial visit. J.A. 180. Plaintiff's Executive Director testified that Plaintiff will not provide a pregnancy test until after a client has undergone counseling at the center. J.A. 903-04; *see* J.A. 757-58. Further, Plaintiff will not perform an ultrasound on a client less than seven weeks' pregnant "[b]ecause you cannot absolutely discern a child's beating heart" that early in pregnancy. J.A. 916. A client less than seven weeks' pregnant is asked to return for a sonogram after she reaches seven weeks. J.A. 917.

V. The City Enacted The Ordinance To Remedy Consumer Confusion About The Scope Of Services Offered By Pregnancy Centers.

The City enacted the Ordinance to discourage Pregnancy Centers from running "purposely vague" advertisements that confuse consumers, as well as to ensure that any woman who goes to a Pregnancy Center seeking abortion or contraception is immediately informed that the Pregnancy Center does not offer the services that she seeks.

The Ordinance provides that "[a] limited-service pregnancy center must provide its clients and potential clients with a disclosure substantially to the effect that the center does not provide or make referral for abortion or birth-control services."[3] Balt. City Health Code § 3-502(A). The Ordinance requires a Pregnancy Center to give this disclosure through one or more signs that are: "(1) written in English and Spanish; (2) easily readable; and (3) conspicuously posted in the center's waiting room or other area where individuals await service." Balt. City Health Code § 3-502(B). The Ordinance authorizes the Health Commissioner to issue a violation notice to a Pregnancy Center that is violating the Ordinance, directing the center to correct the violation. Balt. City Health Code § 3-503. Failure

[3] "Limited-service pregnancy center" is defined as "any person: (1) whose primary purpose is to provide pregnancy-related services; and (2) who: (I) for a fee or as a free service, provides information about pregnancy-related services; but (II) does not provide or refer for: (A) abortions; or (B) nondirective and comprehensive birth-control services." Balt. City Health Code § 3-501.

to comply with a violation notice is punishable by the issuance of an environmental citation or a civil citation. Balt., Md., City Health Code § 3-506; Balt., Md. City Code Art. I, §§ 40-14, 41-14.

After the City enacted the Ordinance, the Health Department adopted a regulation concerning its enforcement. Balt., Md., City Health Dep't, Final Regulation: Limited-Service Pregnancy Center Disclosures in Baltimore City (Sept. 27, 2010) ("Regulation"); J.A. 759-61.[4] As amended, the Regulation clarifies the permissible content of a sign required by the Ordinance by providing that, "[i]f the center provides or refers for some birth-control services, it may indicate on the disclosure sign what birth-control services it does provide and/or refer for." Regulation, § (B)(ii). The Regulation further provides that "[a] center may indicate on the disclosure sign that the sign is required by Baltimore City ordinance." Regulation, § (B)(iii).

VI. Procedural History.

Plaintiff filed a pre-enforcement challenge to the Ordinance on March 29, 2010, claiming that it violates the Free Speech, Free Assembly, and Free Exercise Clauses of the First Amendment as well as the Equal Protection Clause of the

[4] The final regulation is on file in the Department of Legislative Reference, where it is accessible to the public. *See* J.A. 764-65.

Fourteenth Amendment and a provision of Maryland law.[5] J.A. 28-32. It sought a declaratory judgment that the Ordinance is unconstitutional on its face and/or as-applied to Plaintiff, and a permanent injunction against enforcement of the Ordinance.[6] J.A. 32-33.

Prior to the commencement of discovery, the district court granted summary judgment to Plaintiff, holding that the Ordinance violated the Free Speech Clause of the First Amendment. *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804, 817-18 (D. Md. 2011). A divided panel of this Court affirmed the district court's judgment, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539, 548 (4th Cir. 2012), but the full Court subsequently vacated that judgment and remanded the case for further proceedings, *Greater Balt.*

[5] The Complaint was filed by three plaintiffs. The other two—the Archbishop of Baltimore and St. Brigid's Roman Catholic Congregation, Inc.—were dismissed for lack of standing. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 271 n.1 (4th Cir. 2013) (*en banc*) (affirming the dismissal). One of the original defendants—the Baltimore City Health Department—was voluntarily dismissed without prejudice. *See id.* at 272 n.4. The identities of the Baltimore Mayor and Health Commissioner have changed since this case was filed in 2010. The current officeholders have been substituted as defendants in accordance with Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c)(2). Throughout this brief, Defendants-Appellants are referred to collectively as "the City."

[6] The parties entered into a voluntary non-enforcement agreement at the outset of the case and renewed the agreement periodically until the district court entered final judgment. J.A. 279, 290, 298, 1229. As a result, Plaintiff has not been required to comply with the Ordinance during these proceedings.

Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 721 F.3d 264, 271 (4th Cir. 2013) (*en banc*).

The *en banc* Court held that the district court abused its discretion in denying the City discovery and granting summary judgment to Plaintiff on an inadequate factual record. *Greater Balt. Ctr.*, 721 F.3d at 280-81. Although the *en banc* Court declined to reach the merits of Plaintiff's free speech claim, it explained that the district court's legal analysis had been faulty in several respects.

First, the *en banc* Court explained that "the City's commercial speech theory should not have been so easily dismissed by the district court." *Id.* at 284. After noting that the commercial speech analysis is "fact-driven," *id.*, the *en banc* Court explained that that analysis could not be properly conducted "[w]ithout all the pertinent evidence—including evidence concerning the [Plaintiff's] economic motivation (or lack thereof) and the scope and content of its advertisements," *id.* at 286.

Second, the *en banc* Court explained that the district court "erred in precipitately concluding that the Ordinance is an exercise of viewpoint discrimination," where evidence in the legislative record supported the conclusion that "the Ordinance was enacted to counteract deceptive advertising and promote public health." *Id.* at 288.

Third, the *en banc* Court explained that the district court erred in concluding that a less restrictive alternative would have served the City's purpose in enacting the Ordinance. *Id.* It explained that, "[e]ven if strict scrutiny proves to be the applicable standard, the City must be accorded the opportunity to develop evidence relevant to the compelling governmental interest and narrow tailoring issues," including "evidence substantiating the efficacy of the Ordinance in promoting public health, as well as evidence disproving the effectiveness of purported less restrictive alternatives to the Ordinance's disclosure." *Id.*

On remand, the City sought discovery from Plaintiff, as well as the following nonparty organizations that have conducted advertising and marketing activities on Plaintiff's behalf: Care Net, Heartbeat International, NIFLA, and the Vitae Foundation. Those nonparties objected to the City's discovery requests, and the district court sustained their objections in part, through a series of rulings. J.A. 292, 300-45. The rulings resulted in discovery limitations that the City maintains are improper, including a prohibition on obtaining communications concerning advertising and marketing from the nonparties to Plaintiff that also went to other Pregnancy Centers in the nonparties' member networks, and a prohibition on deposing the nonparties about services that they provided to Plaintiff more than five years earlier, even though the Ordinance had been enacted more than five years prior to the depositions. J.A. 325-34, 343-50. Although the City preserved its objections

to these discovery limitations, in the interest of judicial economy, it is not raising the district court's discovery rulings as an issue on appeal. The evidence that the City was able to gather through discovery is more than sufficient to sustain the Ordinance against Plaintiff's challenge, and the City is eager to bring this litigation—which has now entered its seventh year—to a conclusion.

Following the close of discovery, the parties cross-moved for summary judgment, agreeing that their dispute is not about the material facts, but rather, the inferences and legal conclusions that may properly be drawn from those facts. J.A. 1231-35. On September 29, 2016, the district court issued an Order Resolving Motions stating that Plaintiff's motion for summary judgment was granted and the City's motion for summary judgment was denied. J.A. 1236. On October 4, 2016, the district court issued a Decision regarding Summary Judgment that explained the reasons for its ruling. J.A. 1237.

The Decision clarified that the district court rejected Plaintiff's contention that the Ordinance is unconstitutional on its face. J.A. 1289 ("[T]he Court concludes that, on the record of the instant case, the Center has not presented evidence adequate to establish that the Ordinance is facially unconstitutional."). The district court held, however, that the Ordinance violates the Free Speech Clause of the First Amendment as applied to Plaintiff. J.A. 1287.

The district court rejected the City's argument that the Ordinance regulates Plaintiff's commercial speech, once again "rel[ying] on its own speculative finding," *Greater Balt. Ctr.*, 721 F.3d at 287, that the speech regulated by the Ordinance is inextricably intertwined with noncommercial speech that occurs in Plaintiff's waiting room. J.A. 1261-66, 1274-76. The district court also declined to analyze the Ordinance as a regulation of professional speech, based on its assessment that precedent concerning professional speech "almost always involves the context of a professional's relationship with a *paying* client." J.A. 1266-73.

As a result, the district court applied strict scrutiny to the Ordinance. J.A. 1276. Despite undisputed evidence that Plaintiff engaged in "purposefully vague" advertising that misled individuals in Baltimore into believing that Plaintiff assisted women in obtaining abortion services, *see supra* at 9-10, and that delays in accessing abortion [and contraception] pose risks to women's health, *see supra* at 10-11, the district court concluded that the record fails to demonstrate that the Ordinance furthers a compelling governmental interest because "there is insufficient evidence to demonstrate that deception actually takes place and that health harms are in fact being caused by delays resulting from deceptive advertising," J.A. 1280. In addition, the district court concluded that the Ordinance is not narrowly tailored because it applies to Pregnancy Centers "regardless of whether they advertise nonfraudulently or do not advertise at all," J.A. 1286, despite undisputed evidence that Plaintiff—the

subject of the as-applied challenge—engaged in "purposefully vague" advertising, J.A. 708. The district court dismissed the remainder of Plaintiff's claims as moot. J.A. 1289. On October 21, 2016, the district court entered a Judgment Order, declaring the Ordinance unconstitutional as applied to Plaintiff and permanently enjoining the City from enforcing the Ordinance against Plaintiff. J.A. 1291. The City filed a notice of appeal on November 16, 2016. J.A. 1293. Plaintiff has not cross-appealed.

SUMMARY OF ARGUMENT

Given substantial evidence of deceptive practices by Pregnancy Centers, including Plaintiff's admission that it engages in purposely vague advertising, the First Amendment's Free Speech Clause does not prohibit the City from requiring Plaintiff to make truthful disclosures via a posted sign about the scope of services it offers.

The Ordinance is a permissible regulation of Plaintiff's commercial speech—namely, its offers to provide consumers with commercially valuable healthcare services. *See infra* at 22-30. Mandatory disclosures regulating commercial speech are permissible if they are reasonably related to the government's interest in preventing deception of consumers. *See infra* at 38. The Ordinance satisfies this standard by ensuring that consumers who are misled by Plaintiff's purposely vague advertising into believing that Plaintiff provides abortion and contraception will be

promptly informed upon arrival at Plaintiff's center that those services are not offered.

Alternatively, the Ordinance is a permissible regulation of Plaintiff's professional speech—namely, the personalized advice that it provides clients in a private setting. *See infra* at 41-45. Under the sliding scale that this Court applies to regulations of professional speech, the Ordinance is subject to intermediate scrutiny. *See infra* at 43. It satisfies that standard because it directly advances a substantial governmental interest and is drawn to achieve that interest. *See infra* at 45.

Contrary to Plaintiff's arguments throughout this case, the Ordinance is viewpoint neutral. It does not distinguish among speakers based on their viewpoint; rather, it distinguishes among speakers based on the likelihood that consumers will be confused about the scope of services they offer. *See infra* at 45-47.

Finally, even if the Court applies strict scrutiny to the Ordinance, it will withstand review because its modest disclosure requirement is narrowly tailored to serve the City's compelling interests in consumer protection and public health. *See infra* at 47-55.

ARGUMENT

I. Standard Of Review.

This Court reviews the grant or denial of a motion for summary judgment *de novo*. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 (4th Cir.

2009). Summary judgment is appropriate when there is no genuine dispute of material fact and "the moving party is entitled to judgment as a matter of law." *Couch v. Jabe*, 679 F.3d 197, 200 (4th Cir. 2012) (citing Fed. R. Civ. P. 56(a)).

II. The District Court Erred In Concluding That The Ordinance Violates Plaintiff's Freedom Of Speech.

The Ordinance should be subject to rational basis scrutiny because it regulates commercial speech—in particular, Plaintiff's speech soliciting consumers to patronize its center for the purpose of obtaining commercially valuable goods and services, such as pregnancy tests and sonograms.[7] *See infra* at 22-30. Alternatively, the Ordinance should be subject to intermediate scrutiny under the sliding scale for professional speech. *See infra* at 41-45. But even if the Court were to apply strict

---

[7] The Supreme Court's recent decision in *Reed v. Town of Gilbert*, __ U.S. __, 135 S. Ct. 2218 (2015), does not require application of strict scrutiny to the Ordinance. *Reed* clarified that "facially content-based" laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." 135 S. Ct. at 2226, 2228. *Reed* did not, however, disturb the "many subcategories and exceptions to the rule," including commercial speech, where the Court applies less stringent review. *Id.* at 2235 (Breyer, J., concurring). Indeed, courts addressing commercial speech regulations post-*Reed* have consistently found that *Reed*'s general rule that content-based restrictions trigger strict scrutiny is inapplicable to commercial speech. *See, e.g.*, *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015); *Chiropractors United for Research & Educ., LLC v. Conway*, No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015), *aff'd*, No. 15-6103 (6th Cir. July 1, 2016) (unpublished); *Timilsina v. W. Valley City*, 121 F.Supp.3d 1205, 1214 (D. Utah 2015); *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015), *appeal docketed*, No. 15-16682 (9th Cir. Aug. 25, 2015).

scrutiny to the Ordinance, it would withstand constitutional review because it is narrowly tailored to serve the City's compelling interests in consumer protection and public health. *See infra* at 47-55.

A. The Ordinance Is A Permissible Regulation Of Commercial Speech.

"While the strict scrutiny standard generally applies to content-based regulations, including compelled speech, less-demanding standards apply where the speech at issue is commercial." *Greater Balt. Ctr.*, 721 F.3d at 283 (citations omitted). "Disclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny, by being 'reasonably related to the State's interest in preventing deception of consumers.'" *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

1. The Ordinance Regulates Commercial Speech.

As this Court explained in its prior *en banc* decision, "[t]he threshold question presented is whether the speech regulated by the Ordinance is actually commercial." *Id.* at 284. After noting that "the City's commercial speech theory should not have been so easily dismissed by the district court," this Court explained that the commercial speech analysis "is fact-driven, due to the inherent 'difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.'" *Id.* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993)).

Surveying the relevant Supreme Court jurisprudence, this Court further explained that the "core notion of commercial speech" is speech that proposes a commercial transaction. *Id.* (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989); *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 66 (1983); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976)). Speech outside of this "core notion" may also be classified as commercial based on its context. *Id.* ("[E]ven where speech 'cannot be characterized merely as proposals to engage in commercial transactions,' the speech may yet be deemed commercial." (quoting *Bolger*, 463 U.S. at 66)). For example, in *Bolger*, the Supreme Court held that, although an informational pamphlet concerning the benefits of condoms in preventing the spread of sexually transmitted diseases fell outside the core notion of commercial speech, a contextual analysis demonstrated that the pamphlet was quintessentially commercial. 463 U.S. at 66-67. The Court relied on the fact that the pamphlet was a form of advertising, the pamphlet referred to a specific product, and the pamphlet's author had an economic motivation for disseminating the pamphlet to the public.[8] *Id.*

[8] Describing *Bolger*, this Court explained that, "[w]hile '[t]he combination of *all* these characteristics . . . provides strong support for the . . . conclusion that [speech is] properly characterized as commercial speech,' it is not necessary that each of the

Similarly, the Supreme Court held that advertisements promoting an athletic event called the "Gay Olympic Games," which was sponsored by a nonprofit organization dedicated to seeking equal rights for gays and lesbians, constituted commercial speech because the term "Olympic" has value in the commercial marketplace. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 541 (1987).

And in a case that is exactly on point, the North Dakota Supreme Court held that a Pregnancy Center's advertisements constituted commercial speech because they were placed in a "commercial context." *See Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986), cited with approval in *Greater Balt. Ctr.*, 721 F.3d at 286. In particular, the Court stated that the Pregnancy Center's "advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Larson*, 381 N.W.2d at 181. It concluded that, "[i]n effect, the [Pregnancy Center's] advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech." *Id.*

---

characteristics 'be present in order for speech to be commercial.'" *Greater Balt. Ctr.*, 721 F.3d at 285 (alterations in original) (citation omitted) (quoting *Bolger*, 463 U.S. at 67 & n.14).

Notably, this Court's *en banc* decision emphasized that "context matters" when analyzing "the potential commercial nature of speech." *Greater Balt. Ctr.*, 721 F.3d at 285-86. That context "includes the viewpoint of the listener" as well as that of the speaker because the interests of consumers are served by "further[ing] the societal interest in the fullest possible dissemination of information." *Id*. (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980)). As explained below, the speech regulated by the Ordinance falls within the core notion of commercial speech because it is speech that proposes a commercial transaction. In addition, the context in which the speech occurs provides an independent basis for classifying it as commercial.

a. The Ordinance Regulates Speech That Proposes A Commercial Transaction.

When a Pregnancy Center proposes that a woman patronize its establishment for the purpose of obtaining commercially valuable goods and services—such as "pregnancy tests," "sonograms," and "prenatal vitamins," J.A. 696—it is proposing a commercial transaction. This is true even with respect to Pregnancy Centers like Plaintiff that operate as nonprofit corporations and/or have religious motivations. Nonprofit entities can and do engage in commerce. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997) (holding, in a challenge brought under the dormant Commerce Clause, that a nonprofit

summer camp with a religious mission engaged in commercial transactions) ("Even though petitioner's camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser, but also as a provider of goods and services." (citations omitted)); *Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 541 (4th Cir. 1998) (holding that a nonprofit environmental organization engaged in a commercial transaction when it accepted a donation of commercially valuable land) ("[T]he dispositive inquiry is whether the *transaction* is commercial, not whether the *entity* engaging in the transaction is commercial."); *see also* J.A. 1114-17 (testimony from an expert in economics that nonprofit entities, such as Johns Hopkins University, regularly engage in commercial transactions) ("We, in Baltimore, are particularly aware of the economic power of nonprofits. The State's largest employer is a nonprofit . . . .").

Here, the record developed on remand demonstrates that Plaintiff offers a variety of commercially-valuable goods and services to consumers, including pregnancy tests, sonograms, and counseling about healthcare options. J.A. 696, 698, 703. Plaintiff promotes these goods and services through traditional advertisements, internet advertisements, in-person solicitation, signage, and other methods, some of which are "purposefully vague" or otherwise misleading. J.A. 696, 698, 703, 850-55, 870; *see supra* at 4-10. The Ordinance regulates Plaintiff's offers to provide commercially-valuable goods and services to consumers by requiring Plaintiff to

clarify the scope of goods and services that it is offering. Accordingly, the speech regulated by the Ordinance is speech that proposes a commercial transaction, which falls within the core notion of commercial speech. *See Greater Balt. Ctr.*, 721 F.3d at 284.

b. The Ordinance Regulates Speech That Promotes Goods And Services For The Purpose Of Soliciting Pregnancy Center Patronage.

Contextual analysis further supports the conclusion that the advertisements and other forms of solicitation regulated by the Ordinance constitute commercial speech. Like the pamphlet at issue in *Bolger*, Plaintiff's advertising refers to specific products and services. *Bolger*, 463 U.S. at 66-67. Like the term "Olympic" in *San Francisco Arts & Athletics, Inc.*, the goods and services promoted by Plaintiff have value in the commercial marketplace.[9] *See* 483 U.S. at 541. And like the Pregnancy Center solicitations at issue in *Larson*, Plaintiff's advertising is directed at the provision of goods and services, rather than at an exchange of ideas, and it seeks to solicit patronage of Plaintiff's center. *See* 381 N.W.2d at 181.

Additionally, Plaintiff presents itself to the public as a business enterprise. Its advertisements rarely mention a religious or advocacy mission; instead, they tout

---

[9] Indeed, a report cited in the legislative record, as amended, estimated that the total value of the services provided by U.S. Pregnancy Centers in 2010 was $100,888,000.00 based on data provided by affiliates of Care Net, Heartbeat International, and NIFLA. J.A. 630, 779-87.

"medical services" and "prenatal vitamins." J.A. 696, 703; *see supra* at 8-10. It is a dues-paying member of the Chamber of Commerce, J.A. 840-41, and refers to its patrons as "clients," J.A. 827. Further, it has affiliated with two national umbrella organizations—Care Net and Heartbeat International—that provide it with highly sophisticated advertising and marketing assistance, including use of registered trademarks and search engine optimization. *See supra* at 4-6. It has also affiliated with a third national organization, NIFLA, which helps it to present itself to the public as a "medical practice," just like "other medical clinics." J.A. 1216-20; *see supra* at 7-8.

In *First Resort, Inc. v. Herrera*, the Court rejected a Free Speech challenge to a San Francisco ordinance prohibiting the use of false or misleading advertising by Pregnancy Centers. *See* 80 F. Supp. 3d 1043, 1053-54 (N.D. Cal. 2015), *argued*, No. 15-15434 (9th Cir. Nov. 15, 2016). The Court held that the ordinance is a permissible regulation of commercial speech notwithstanding that the plaintiff Pregnancy Center is a mission-driven organization that does not charge clients for its services. *Id.* at 1045-46, 1052-53. After engaging in a contextual analysis of the regulated speech, the Court concluded that "all *Bolger* factors militate in favor of finding that the Ordinance targets commercial speech." *Id.* at 1052. Notably, the Court held that "the fact that First Resort does not charge a fee for its services is not dispositive of whether its advertising is economically-motivated." *Id*. at 1051. The

following facts led the Court to conclude that the plaintiff does have an economic motivation for advertising its services:

> First Resort [Pregnancy Center] uses targeted advertising to attract "abortion-minded" women facing unplanned pregnancies to its clinic. To reach that audience, First Resort pays to use Google's Adwords service, which ensures that First Resort's website appears in response to abortion-related search queries. First Resort considers its advertising as a means of competing with abortion providers for the attention of online viewers. Notably, First Resort's ability to attract clients to its clinic is critical to its fundraising efforts—which, in turn, are necessary to First Resort's operations, including the provision of free services.

Id. at 1052 (citations omitted). The record here is analogous, demonstrating that Plaintiff and the national umbrella organizations to which it belongs use targeted advertising to attract "abortion-minded women" to Plaintiff's center; *see supra* at 5-6, and that Plaintiff's fundraising efforts, which depend on its ability to attract clients, dictate the scope of its operations; J.A. 895-98 ("[I]f we didn't have support from our [fundraising] database, we would not . . . have been able to open the fourth center . . . . That opening enabled us to see more clients, because we now have the capability to see more people."); *see also* J.A. 668. Thus, like the plaintiff in *First Resort*, Plaintiff here has an economic motivation for advertising its services.

Accordingly, when the speech regulated by the Ordinance is evaluated in context, taking into account that it encompasses paid advertising and other attempts to solicit patronage of Plaintiff's center; focuses on the promotion of specific products and services that have commercial value; advances Plaintiff's economic

interests; and presents Plaintiff as a medical practice, it has all the hallmarks of commercial speech. *Greater Balt. Ctr.*, 721 F.3d at 285-86.

c. Given The Fact-Driven Nature Of The Commercial Speech Inquiry, Other Cases Concerning Pregnancy Center Disclosure Laws Are Inapposite.

Other cases reviewing Pregnancy Center disclosure laws provide little guidance concerning whether the Ordinance regulates commercial speech because they are factually distinguishable. The City is aware of three sets of cases, besides the instant case, concerning Pregnancy Center disclosure laws in which the courts have ruled on Free Speech grounds.[10] *See Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834-35 (9th Cir. 2016) (holding that the plaintiffs were unlikely to succeed on the merits of their Free Speech claims);[11] *Evergreen Ass'n,*

---

[10] An additional case held that a local ordinance adopted by Austin, Texas, was void for vagueness. *Austin Lifecare, Inc. v. City of Austin*, No. A-11-CA-875-LY, slip op. (W.D. Tex. June 23, 2014).

[11] Three cases challenging the California law, seeking preliminary and permanent injunctive relief, were filed in different federal district courts in California around the same time. One of the cases was filed by NIFLA, the national association of Pregnancy Centers which helped the Plaintiff in this case undergo a "medical conversion." J.A. 699-700; J.A. 1210-11. All three courts denied the plaintiffs' motions for preliminary injunctions, and the Ninth Circuit affirmed these decisions in one precedential opinion and two companion orders. *Nat'l Inst. of Family & Life Advocates v. Harris*, No. 15-CV-2277-JAH(DHB), 2016 WL 3627327 (S.D. Cal. Feb. 9, 2016), *aff'd*, 839 F.3d 823, 834-35 (9th Cir. 2016); *A Woman's Friend Pregnancy Resource Clinic v. Harris*, 153 F. Supp. 3d 1168 (E.D. Cal. 2015), *aff'd*, No. 15-17517, 2016 WL 5956744 (9th Cir. Oct. 14, 2016) (unpublished); *Livingwell*

Inc. v. City of New York, 740 F.3d 233, 245 (2d Cir. 2014) (holding that the plaintiffs were likely to succeed on the merits of their Free Speech claims with respect to certain required disclosures but not others); *Centro Tepeyac v. Montgomery Cty.*, 5 F. Supp. 3d 745, 748 (D. Md. 2014) (granting summary judgment to the plaintiffs on their Free Speech claims). The disclosures at issue in each set of cases are far broader than the disclosure required by the Ordinance, addressing subjects beyond the scope of services that covered Pregnancy Centers provide.

The California statute at issue in *Harris*, for example, requires licensed Pregnancy Centers to provide their clients with written notice that: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Harris*, 839 F.3d at 830 (quoting Cal. Health & Safety Code § 123472(a)(1)). It requires unlicensed Pregnancy Centers to provide their clients with written notice that: "This facility is not licensed as a medical facility by the State of California and has no

---

Medical Clinic, Inc. v. Harris, No. 4:15-CV-04939-JSW (N.D. Cal. Dec. 18, 2015), *aff'd*, No. 15-17497, 2016 WL 5956743 (9th Cir. Oct. 14, 2016) (unpublished).

licensed medical provider who provides or directly supervises the provision of services." *Id.* (quoting Cal. Health & Safety Code § 123472(b)(1)).

The New York City ordinance at issue in *Evergreen* requires Pregnancy Centers to disclose the following information to their clients both orally and in writing: (1) whether they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center"; (2) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider"; and (3) whether they "provide or provide referrals for abortion," "emergency contraception," or "prenatal care." *Evergreen*, 740 F.3d at 238 (quoting N.Y.C. Admin. Code § 20-816(a)-(e)).

The Montgomery County, Maryland, ordinance at issue in *Centro Tepeyac* had required Pregnancy Centers to provide their clients with written notice that: (1) "the Center does not have a licensed medical professional on staff"; and (2) "The Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed healthcare provider." 5 F. Supp. 3d at 748.

In addition, the factual records compiled by the parties in those cases are distinguishable from the record in this case. *Harris* and *Evergreen* both concerned requests for preliminary injunctions, and were therefore decided on preliminary

records. *See Harris*, 839 F.3d at 831-32;[12] *Evergreen*, 740 F.3d at 242; *see generally Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."). Similarly, the evidentiary record in *Centro Tepeyac* was sparse; evidence of Pregnancy Center advertising was limited to two screenshots of the plaintiff's website. *See* 5 F. Supp. 3d at 759.

Given the "fact-driven" nature of the commercial speech inquiry, *Greater Balt. Ctr.*, 721 F.3d at 286, these cases are inapposite.

2. <u>The Commercial Speech Regulated By The Ordinance Is Not Inextricably Intertwined With Noncommercial Speech</u>.

The district court erred in holding that any commercial speech regulated by the Ordinance is inextricably intertwined with noncommercial speech. It is well settled that, where the commercial elements of speech are discrete from the noncommercial elements, the two may be separated. *See Fox*, 492 U.S. at 473-74 (holding that commercial speech uttered at "Tupperware parties" is not inextricably intertwined with noncommercial speech concerning home economics); *Greater Balt.*

[12] On that limited record and in light of the scope of the disclosures required by the California statute, the Ninth Circuit indicated in a footnote that it found "unpersuasive [the State's] argument that the Act regulates commercial speech." *Harris*, 839 F.3d at 834 n.5. It nevertheless upheld the disclosure applicable to licensed pregnancy centers as a permissible regulation of professional speech and the disclosure applicable to unlicensed Pregnancy Centers as permissible under any level of scrutiny. *See id.* at 839-43.

Ctr., 721 F.3d at 287-88. The record in this case demonstrates that "[n]othing in the [Ordinance] prevents [a center] from conveying, or the audience from hearing, . . . noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." *Greater Balt. Ctr.*, 721 F.3d at 288 (quoting *Fox*, 492 U.S. at 474).

The Ordinance does not require Plaintiff to make any oral disclosures to its clients. *See* Balt. City Health Code § 3-502. It does not regulate what Plaintiff may tell its clients about the risks and alternatives of abortion and contraception. *See id.* Furthermore, the Ordinance does not prevent Plaintiff from telling consumers that it believes abortion and certain methods of contraception are immoral or unhealthy. *See id.* It requires only that Plaintiff disclose via a posted sign that it does not provide abortion or certain birth-control services and that it does not refer consumers to providers of those services. *See id.*

Notably, Plaintiff has provided no evidence that its ability to engage in religious or political speech about abortion and contraception depends on its ability to present itself to the public as a business, or to engage in "purposely vague" advertising that misleads consumers about the scope of services that it provides. Accordingly, the record does not support the conclusion that the commercial speech regulated by the Ordinance is inextricably intertwined with Plaintiff's noncommercial speech.

In reaching that erroneous conclusion, the district court focused on the fact that the disclosure required by the Ordinance must be posted in Plaintiff's waiting room, rather than printed on its advertising. It reasoned that, because the sign bearing the disclosure is physically present in Plaintiff's waiting room, the Ordinance regulates all of the speech that occurs in the waiting room, even speech that is unrelated to the substance of the disclosure. J.A. 1262-64, 1275. This logic is faulty. The disclosure required by the Ordinance concerns only the scope of services provided by Plaintiff. *See supra* at 12-13. Consequently, the only speech regulated by the Ordinance is Plaintiff's speech about the scope of services it offers.

The district court also reasoned that "[t]he Ordinance regulates the Center's noncommercial speech by mandating the timing and content of the introduction of the subjects of abortion and birth control in its conversations with clients." J.A. 1263. But this finding is not sustained by the record. To support it, the district court cited a statement in a declaration by Plaintiff's Executive Director that "[t]he Disclaimer would undermine the Center's attempt to convey care, comfort, support, and a family-friendly, appropriately spiritual setting through its first communications with visitors."[13] J.A. 1263. This conclusory statement, however,

[13] The district court also cited the testimony of one of Plaintiff's clients, who stated that: "I would be uncomfortable bringing my children to the Center with the Ordinance displayed because it would expose my older child, who can read, to the

does not establish that the Ordinance regulates Plaintiff's noncommercial speech. Further, the Executive Director testified at her deposition that the required notice would only interfere in communications between Plaintiff and clients seeking abortion services:

> Q. In what way does the disclaimer required by the ordinance interfere in the process of the Center having discussions with its clients?
>
> A. As director, I would hate for there to be some sort of a mandated rule that every client, every conversation had to begin exactly the same way with a disclaimer. That's a negative approach. I would have a problem with that if that were the case.
>
> Q. Is it your understanding that Center staff members or volunteers would have to verbally speak the disclaimer to the clients?
>
> A. That's sort of what this implies.
>
> Q. If the disclaimer merely had to hang on the wall in the Pregnancy Center, but nobody had to verbally speak it out loud, do you still think it would interfere in the discussions between Center staff members or volunteers and clients?
>
> * * *
>
> THE WITNESS: Not necessarily. It would really depend on the reason for the client's visit to the Center.
>
> * * *
>
> Q. Can you elaborate on that a little bit?

---

concept of abortion." J.A. 1263-64. That client was evidently unaware that Plaintiff already posts a "Commitment of Care" notice in its waiting room that references "abortions." *See supra* at 2-3; J.A. 375.

A. Clients come in for different reasons. Sometimes they come in because they want a pregnancy test. Sometimes they come in because they need material assistance. Sometimes they come in because they are thinking about having an abortion and would like to talk to somebody about that. They come in for Earn While You Learn classes. So there are a variety of reasons why we see clients. Pregnancy tests, material assistance, abortion information, Earn While You Learn. We have classes. So, it really depends.

Q. In which of those circumstances do you think a posted disclosure would interfere in the discussion?

* * *

THE WITNESS: Which do I think would be an interference problem?

Q. Right. So, in which of those circumstances that we just described do you think there might be interference in the conversation between the Pregnancy Center staff member or volunteer and the client as a result of the posted disclaimer?

* * *

THE WITNESS: If a woman was coming in to get abortion information, or was under the impression for some reason that we do abortions, that sign would certainly interrupt, or that statement would interrupt, wherever it is, it would probably interrupt that conversation.

J.A. 835-38. Her testimony illustrates that the Ordinance regulates Plaintiff's commercial speech—and only its commercial speech—by dispelling consumer confusion about the scope of services that Plaintiff provides.

Further, it is undisputed that the subjects of abortion and contraception are frequently mentioned in Plaintiff's advertising, *see supra* at 8-10, as well as in the

"Commitment of Care" notice that Plaintiff voluntarily displays in its waiting room, *see supra* at 2-3; J.A. 375. It is also undisputed that Plaintiff's counselors ask questions about abortion during their initial conversation with a client. J.A. 914-15. Thus, the Ordinance does not mandate the "introduction of the subjects of abortion and birth control" by Plaintiff, J.A. 1263; it merely serves to ensure that Plaintiff cannot deceive consumers about the fact that it does not provide those services.

3. **The Ordinance Is Reasonably Related To The City's Interest In Preventing The Deception Of Consumers.**

Mandatory disclosures regulating commercial speech are permissible if they are reasonably related to the State's interest in preventing deception of consumers. *Greater Balt. Ctr.*, 721 F.3d at 283; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). The Supreme Court first announced this standard in *Zauderer*, a case examining the validity of a rule of professional conduct that required attorneys who advertised contingency-fee services to disclose in their advertisements that a losing client might still be responsible for certain litigation fees and costs. 471 U.S. at 630, 633. Upholding the rule, the Court explained that, "[b]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warnings or disclosures might be appropriately required in order to dissipate the possibility of consumer

confusion or deception." *Id.* at 651. It ultimately concluded that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

The Supreme Court applied the *Zauderer* standard most recently in *Milavetz. See* 559 U.S. at 250-53. There, the Court addressed a First Amendment challenge to certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, including a provision that requires debt relief agencies to include certain disclosures in their advertisements. The Court held that: "Because [the Act's] requirements that Milavetz identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services are 'reasonably related to the [Government's] interest in preventing deception of consumers,' we uphold those provisions as applied to Milavetz." *Id.* at 252-53 (quoting *Zauderer*, 471 U.S. at 651) (citations omitted). It rejected the plaintiff's argument that the Government had failed to present evidence that the plaintiff's advertisements are misleading, stating: "Evidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost is adequate to establish that the likelihood of deception in this case is hardly a speculative one." *Id.* at 251 (citations and internal quotation marks omitted).

Here, the Ordinance satisfies the deferential standard of review for commercial disclosure requirements. Like the congressional record in *Milavetz*, the record here demonstrates a pattern of deceptive advertisements. *See supra* at 4-10. In this case, those advertisements target women seeking abortion care without alerting them that Pregnancy Centers do not offer abortion or most forms of contraception. The Ordinance's requirement that Plaintiff notify consumers that it does not provide abortion or comprehensive birth control services is reasonably related to the City's interest in protecting consumers from deception and confusion.

The district court mistakenly reasoned that the disclosure required by the Ordinance could not protect consumers from deception and confusion because it would not appear directly on Plaintiff's advertisements, but rather, on a sign in Plaintiff's waiting room. The required disclosure serves the same informational function when posted on a sign as it would if printed on an advertisement or displayed on a website, and the signage requirement has three distinct advantages: It is less burdensome for Pregnancy Centers; it is easier to enforce; and it ensures that every woman who actually enters a Pregnancy Center seeking abortion or contraception is informed that she is in the wrong place. Further, the record demonstrates that third-parties like Care Net and Heartbeat International—who are beyond the City's jurisdiction—engage in misleading advertising on Plaintiff's behalf. A signage requirement is the most effective way to protect consumers from

deception and confusion caused by third-party advertising. *Cf. Nat'l Fed'n of the Blind v. Fed. Trade Comm'n*, 420 F.3d 331, 348 (4th Cir. 2005) (holding that a regulator's "jurisdictional boundary" is a proper consideration for courts conducting a First Amendment analysis).

B. Alternatively, The Ordinance Is A Permissible Regulation Of Professional Speech.

Should the Court determine that the Ordinance regulates noncommercial speech, it should nevertheless uphold the Ordinance as a permissible regulation of professional speech. *See Stuart v. Camnitz*, 774 F.3d 238, 247-48 (4th Cir. 2014).

1. <u>Under The "Sliding Scale" Announced In *Stuart*, The Ordinance Is Subject To Intermediate Scrutiny</u>.

In *Stuart*, this Court adopted a "sliding scale" approach to the level of scrutiny that courts must apply to laws regulating professional speech: "When the First Amendment rights of a professional are at stake, the stringency of review . . . slides 'along a continuum' from 'public dialogue' on one end to 'regulation of professional *conduct*' on the other.'" *Stuart*, 774 F.3d at 248 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)); *accord Pickup*, 740 F.3d at 1227-29 ("At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest," but "[a]t the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished," and "[a]t the other end of the

continuum . . . is the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech."). Applying this "sliding scale" approach, the Court held that a North Carolina law mandating that a physician or ultrasound technician display and describe ultrasound images to abortion patients was professional speech and fell "somewhere in the middle on that sliding scale." *Stuart*, 774 F.3d at 248.

In *Harris*, the Ninth Circuit applied this sliding scale approach to a California statute mandating that licensed Pregnancy Centers provide certain written disclosures to their clients and likewise concluded that intermediate scrutiny should apply.[14] *See* 839 F.3d at 839 ("We conclude that the Licensed Notice regulates speech that falls at the midpoint of the *Pickup* continuum, and that intermediate scrutiny should apply."). The Court reasoned that, on one hand, the statute regulated speech, not conduct; but, on the other hand, Pregnancy Centers "are not engaging in a public dialogue when treating their clients, and they are not constitutionally equivalent to soapbox orators and pamphleteers." *Id.* at 840 (internal quotation marks omitted).

---

[14] The Ninth Circuit declined to determine whether the portion of the statute requiring unlicensed Pregnancy Centers to provide written disclosures also constituted a regulation of professional speech subject to intermediate scrutiny because it concluded that the requirement would survive review under any level of scrutiny. *Harris*, 839 F.3d at 843.

Should the Court analyze the Ordinance as a regulation of professional speech, rather than commercial speech, intermediate scrutiny would be the appropriate standard of review. Plaintiff's communications with its clients are part of a professional relationship pursuant to which Plaintiff provides pregnancy testing, sonograms, individualized counseling, and similar services under the supervision of a medical director. *See supra* at 7; J.A. 358, 837, 913-15. Accordingly, the speech regulated by the Ordinance, like the speech at issue in *Stuart* and *Harris*, lies at the midpoint of the continuum.

The district court erroneously held that the speech regulated by the Ordinance is not professional speech because Plaintiff does not hold any professional licenses and does not charge clients a fee for its services. Although Plaintiff, itself, is not licensed, it provides medical services under the supervision of a licensed physician, and its sonographers are certified by NIFLA. *See supra* at 7. More importantly, the services that Plaintiff provides—pregnancy testing, sonography, and counseling—are professional in nature, and Plaintiff presents itself to the public as a medical practice.

In *Moore-King v. County of Chesterfield*, this Court reviewed a regulatory scheme that imposed a licensing requirement on fortune tellers. *See* 708 F.3d 560, 563 (4th Cir. 2013). It determined that the proper rubric for analyzing the requirements was the professional speech doctrine, even though fortune tellers were

not subject to licensure before the enactment of the law under review. *See id.* at 569. The Court explained that "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary." *Id.* The Court also noted that, "[w]ith respect to an occupation such as fortune telling where no accrediting institution like a board of law examiners or medical practitioners exists, a legislature may reasonably determine that additional regulatory requirements are necessary." *Id.* at 570. Here, Plaintiff provides personalized advice to clients in a private setting, and it operates in a gray area that enables it largely to escape the professional oversight applicable to standard medical practices. Thus, Plaintiff's speech to clients constitutes professional speech, and the City acted reasonably in taking steps to regulate it. *See id.* at 569-70.

This conclusion is not altered by the fact that Plaintiff does not charge clients a fee for its services. The level of constitutional protection accorded to a professional's speech does not vary based on whether that professional provides services for a fee or on a *pro bono* basis. *See Harris*, 839 F.3d at 841 n.8 ("We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech."). Although this Court used the phrase "paying client" in *Moore-King*, 708 F.3d at 569, it was dicta. The plaintiff in that

case charged clients a fee for her fortune-telling services, so the Court had no occasion to consider whether the provision of services on a *pro bono* basis would alter the constitutional analysis. *See id.* at 565. There is no logical reason why it should.

2. <u>The Ordinance Directly Advances A Substantial Governmental Interest And Is Drawn To Achieve That Interest</u>.

Under intermediate scrutiny, the City must demonstrate that the Ordinance directly advances a substantial government interest and is drawn to achieve that interest. *Stuart*, 774 F.3d at 250. Given that the Ordinance satisfies strict scrutiny, *see infra* at 47-55, it necessarily satisfies intermediate scrutiny.

C. The Ordinance Is Viewpoint Neutral.

Contrary to Plaintiff's arguments throughout this case, the Ordinance is viewpoint neutral. It does not distinguish among speakers based on their viewpoint; rather, it distinguishes among speakers based on the likelihood that consumers will be confused about the services they offer. Given that the Ordinance has a viewpoint-neutral justification, the fact that it may disproportionately impact opponents of abortion and contraception is constitutionally irrelevant. *See Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 695 (2010) (rejecting the plaintiff's viewpoint discrimination argument where the plaintiff "is simply confusing its own viewpoint-based objections" to the law at issue

"with viewpoint discrimination"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 650 (4th Cir. 1995).

The Supreme Court's recent decision in *McCullen v. Coakley* confirms that the Ordinance is viewpoint neutral. *See* __ U.S. __, 134 S. Ct. 2518, 2531 (2014). There, the Supreme Court applied intermediate scrutiny to a law that required buffer zones outside abortion clinics after concluding that strict scrutiny was inappropriate. *Id.* at 2525, 2534. The Court held that the law was viewpoint neutral, even though it applied only to abortion clinics and was enacted to remedy harms specifically caused by abortion opponents. *Id.* at 2531-34. Indeed, the Court recognized that the Massachusetts Legislature enacted the buffer zone law "in response to a problem that was, in its experience, limited to abortion clinics." *Id.* at 2532. It explained that: "There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities . . . ." *Id.* It concluded that: "In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *Id.*

The Ordinance, like the statute at issue in *McCullen*, was enacted in response to a specific problem—in this case, deceptive advertising by Pregnancy Centers—and is tailored to address that problem. Accordingly, it does not discriminate on the basis of viewpoint.

D. The Ordinance Satisfies Strict Scrutiny.

Laws that are subject to strict scrutiny must be narrowly tailored to serve a compelling governmental interest. *See Williams-Yulee v. Fla. Bar*, __ U.S. __, 135 S. Ct. 1656, 1664-65 (2015). The Ordinance satisfies this requirement.

1. The Ordinance Serves The City's Compelling Interests In Consumer Protection and Public Health.

The Ordinance serves two independent governmental interests that are sufficiently compelling to warrant the modest burden imposed by its disclosure requirement. First, the City has a compelling interest in protecting consumers from deception and confusion. Second, the City has a compelling interest in protecting public health. The district court erred in conflating these interests, which should be analyzed separately.

Courts have long recognized the importance of protecting consumers from deception and confusion. *See, e.g.*, *Zauderer*, 471 U.S. at 651; *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 377 (4th Cir. 2013). The record demonstrates that Plaintiff engages in "purposefully vague" advertising that has led

Baltimore women to believe—mistakenly—that it assists women in obtaining abortions. *Supra* at 9-10. It further demonstrates that Plaintiff's purposely vague advertisements are not isolated occurrences; rather, they are part of a broader pattern of deceptive practices in the Pregnancy Center industry aimed at luring women who seek abortion and contraception to Pregnancy Centers under false pretenses. *See supra* at 4-9.

The Ordinance directly furthers the City's compelling interest in consumer protection by ensuring that women seeking abortion and contraception are informed promptly upon their arrival at a Pregnancy Center that those services are not available there. *See* Balt. City Health Code § 3-502. The Ordinance also discourages the use of deceptive advertising in the first place by eliminating the benefits that Plaintiff and others Pregnancy Centers derive from it. These benefits include the opportunity to engage in a bait-and-switch by offering consumers services that they were not seeking, and the opportunity to delay a woman's access to abortion until she reaches a gestational age at which the cost of the procedure is prohibitive or the procedure is no longer available. The City's interest in consumer protection, alone, is sufficient to sustain the Ordinance.

In concluding that "there is insufficient evidence to demonstrate that deception actually takes place," the district court simply ignored the evidence. J.A. 1280. Its contention that the record fails to "show if, and how, women react to"

deceptive Pregnancy Center advertising, J.A. 1281, is incorrect as a factual matter, *see* J.A. 109, 705. It also holds the City to an unreasonable burden of proof that is inconsistent with precedent. *See Zauderer*, 471 U.S. at 652-53 ("When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] has a tendency to mislead.'" (alterations in original) (quoting *Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965))); *accord Milavetz*, 559 U.S. at 251.[15]

The Ordinance also advances the City's compelling interest in public health. Contrary to the district court's conclusion, the City has identified an "actual" public health problem in need of solving. *Contra* J.A. 1278 (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011)). The record demonstrates that Pregnancy Centers often engage in delay tactics designed to interfere with women's access to

[15] The district court relied heavily on the testimony of Plaintiff's Executive Director that, when a consumer calls or comes to Plaintiff's center believing that it provides abortion care, she is immediately informed that Plaintiff does not provide abortion care, even though that testimony conflicts with her testimony that the disclosure required by the Ordinance would "interrupt" Plaintiff's conversations with women who were "under the impression for some reason that we do abortions." *Supra* at 37. Regardless of the veracity of the testimony, the City has a compelling interest in ensuring that, when a Pregnancy Center engages in "purposely vague" advertising, some mechanism exists to prevent consumer deception besides the Pregnancy Center's promise to make voluntary disclosures.

abortion and contraception. *See supra* at 11. Plaintiff, for example, requires women to undergo counseling before it will provide an advertised pregnancy test, and it requires pregnant women to wait until they reach seven weeks' gestation before it will provide an advertised sonogram. *See supra* at 11. The record further demonstrates that delays in access to abortion and contraception increase the health risks that women face.[16] *See supra* at 10-11. The district court erred in holding that the City could not satisfy strict scrutiny without the testimony of women who were delayed by Plaintiff's conduct in accessing reproductive healthcare in the years immediately preceding the enactment of the Ordinance. The City is entitled to rely on historic evidence as well as evidence of a pattern of conduct across the Pregnancy Center industry in concluding that Plaintiff's "purposely vague" advertising poses an actual threat to public health. *See Burson v. Freeman*, 504 U.S. 191, 200-11 (1992) (plurality decision) (relying on historical evidence and "common sense" to conclude that a restriction on campaign speech satisfied strict scrutiny).

The disclosure required by the Ordinance is necessary to minimize the delay in accessing abortion and contraception that women misled by Plaintiff's advertising will experience—and, by extension, the health harms caused by such delay. It

[16] The record in this case is thus a far cry from the record in *Brown*, which contained no credible evidence whatsoever that violent video games posed a threat to the health or welfare of minors. *See* 564 U.S. at 800.

ensures that individuals are informed promptly upon their arrival at Plaintiff's center that the services they seek are not offered.

2. <u>The Ordinance Is Narrowly Tailored To Serve The City's Compelling Interests</u>.

The Ordinance does no more than impose a modest disclosure requirement on Plaintiff. *See* Balt. City Health Code § 3-502. It does not prevent Plaintiff from speaking, nor does it limit Plaintiff's speech. *See id.* It is well settled that disclosure requirements are less restrictive than other kinds of regulations of speech. *See Doe v. Reed*, 561 U.S. 186, 196 (2010) ("Also pertinent to our analysis is the fact that the [challenged law] is not a prohibition on speech, but instead a *disclosure* requirement."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 368-69 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."); *Zauderer*, 471 U.S. at 651.

Further, the Ordinance's signage requirement is the least restrictive method of communicating the disclosure. The Ordinance does not require Plaintiff to communicate the disclosure orally to clients who call or visit a center. Nor does it require that Plaintiff's website, signage, advertisements, brochures, and other

marketing materials contain the disclosure. It merely requires Plaintiff to post a sign in its waiting room.[17] *See supra* at 12-13.

The content of the required disclosure is also minimally burdensome. Signs required by the Ordinance must state only that Plaintiff does not provide abortion or comprehensive birth-control services and does not refer consumers to providers of those services. *See* Balt. City Health Code § 3-502; Regulation, §§ (B)-(C); *cf. Harris*, 839 F.3d at 843 ("The Unlicensed Notice is . . . only one sentence long. . . . It says nothing about the quality of service women may receive at these clinics, and in no way implies or suggests California's preferences regarding unlicensed clinics.").

[17] Plaintiff and the district court assert that this is a flaw in the Ordinance. By their logic, the Ordinance could be sustained as a valid consumer protection measure if it required Plaintiff to print the required disclosure on all of its advertising and marketing materials, but not if it merely requires Plaintiff to post the disclosure in its waiting room. This logic runs contrary to Supreme Court precedent, which holds that the government may choose to enact minimally burdensome regulations of speech even when its interests would justify more expansive regulations. *See Williams-Yulee*, 135 S. Ct. at 1668 ("We have . . . upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests."); *McCullen*, 134 S. Ct. at 2532 ("When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more."); *see also Nat'l Fed'n of the Blind*, 420 F.3d at 349 ("[I]f we were to strike down these regulations as underinclusive, we could well provoke legislatures to pass broader regulations that would prove far more damaging to free speech.").

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, although the Supreme Court struck down a requirement that professional fundraisers disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations, it explained that a more modest requirement directing a fundraiser "to disclose unambiguously his or her professional status" would be constitutionally permissible. 487 U.S. 781, 799 n.11 (1998) ("[S]uch a narrowly tailored requirement would withstand First Amendment scrutiny."). Subsequently, this Court upheld a statute requiring a professional fundraiser making unsolicited calls on behalf of a charity to disclose the name of the charity and the purpose of the call. *See Nat'l Fed'n of the Blind*, 420 F.3d at 343. The disclosure required by the Ordinance is analogous to those endorsed by the Supreme Court in *Riley* and this Court in *National Federation of the Blind* in that it does not require the provision of more information than is absolutely necessary to achieve the relevant governmental interests and imposes only a modest burden on the speaker. *Cf. id.* at 344-45 ("[T]he [required] disclosure []—designed only to identify quickly the nature and purpose of the call—is much more modest than an obligation to reveal how much one is being paid for the call."); *Maryland*, 729 F.3d at 377 ("The . . . requirement that robocall sponsors identify themselves is narrowly tailored to protect citizens from fraud.").

The district court held that the Ordinance is not narrowly tailored for two reasons, both of which are erroneous. First, citing the dissent from this Court's *en banc* decision, the district court concluded that the Ordinance is not narrowly tailored because it applies to Pregnancy Centers regardless of whether they engage in deceptive advertising. J.A. 1286. But the district court went on to reject Plaintiff's facial challenge, *id.* at 1288-89, and the record demonstrates that Plaintiff engages in "purposefully vague" advertising that has misled women about the scope of services it provides. *Supra* at 9-10.

Second, the district court adopted the reasoning of *Evergreen*, which held that a similar disclosure requirement "overly burden[ed]" the speech of the plaintiff in that case by requiring "that pregnancy service centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients," which, in the court's view, "alters the centers' political speech by mandating the manner in which the discussion of these issues begins," J.A. 1287 (quoting *Evergreen*, 740 F.3d at 249). Regardless of the merit of *Evergreen*'s legal reasoning (which the City finds unpersuasive), that case is factually distinguishable in two critical ways: First, the law at issue in *Evergreen* requires Pregnancy Centers to make the specified disclosure orally as well as in writing. *See* 740 F.3d at 238 n.3. Oral disclosures are more burdensome than written ones, a fact that Plaintiff has acknowledged. *See supra* at 36. Second, the record here, unlike the record in

Evergreen, demonstrates that Plaintiff already addresses the subject of abortion in its advertisements, Commitment of Care, and counseling form. *See supra* at 37-38; *see also* J.A. 375, 696, 698, 703, 913-15.

In sum, the modest disclosure required by the Ordinance is narrowly tailored to serve the City's compelling interests. *Cf. Williams-Yulee*, 135 S. Ct. at 1670 (upholding a judicial conduct rule prohibiting judicial candidates from personally soliciting campaign funds) ("[I]n reality, [the rule] leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, 'Please give me money.' They can, however, direct their campaign committees to do so. Whatever else may be said of the [rule], it is surely not a wildly disproportionate restriction upon speech." (some internal quotation marks omitted)).

CONCLUSION

For the reasons set forth above, the City respectfully requests that the Court reverse the district court's judgment and direct the district court to enter summary judgment for the City.

Respectfully submitted,

*/S/ Suzanne Sangree*___________
Suzanne Sangree
Senior Public Safety Counsel
Federal Bar No. 26130
CITY OF BALTIMORE LAW DEPARTMENT
100 N. Holliday Street
Baltimore, Maryland 21202
Telephone: (443) 388-2190
Fax: (410) 539-0536
E-mail: Suzanne.Sangree2@baltimorecity.gov

Stephanie Toti
Special Assistant City Solicitor
New York Bar No. 4270807
Autumn Katz
New York Bar No. 4394151
Molly Duane
New York Bar No. 5318530
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3684
Fax: (917) 637-3666
E-mail: stoti@reprorights.org
akatz@reprorights.org
mduane@reprorights.org

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 12,909 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: January 30, 2017

*/S/ Stephanie Toti*____________
Stephanie Toti

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 30, 2017, a true and correct copy of the foregoing brief was electronically filed with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: January 30, 2017

*/S/ Stephanie Toti*____________
Stephanie Toti