IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2325

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; and 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
(Case No. 1:10-cv-00760-MJG)

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JURISDICTIONAL STATEMENT

Appellee (the "Center") concurs with Appellants' (collectively, the "City") jurisdictional statement regarding subject matter and appellate jurisdiction.

STATEMENT OF THE ISSUE

Whether the district court correctly ruled that Baltimore City Ordinance 09-252 ("the Ordinance") violates the Center's rights under the First Amendment's Free Speech Clause.

INTRODUCTION

This case concerns the government's effort to compel speech by forcing the Center, a religious nonprofit committed to providing free assistance to women, to post a government warning inside its own property. The government seeks to compel only speakers who discuss one particularly important social issue (pregnancy) and, even worse, the government targets only those who discuss the issue of pregnancy from one viewpoint (pro-life). The City's mandated disclaimer must be posted inside the Center where women engage in highly personal and religious conversations, and it is actually the government's intent to influence the substance of these private conversations. The City persists in advancing this content- and viewpoint-based compelled speech requirement despite the fact that the Center already informs women—in its own chosen manner rather than with the

words compelled by the government—that it does not provide or refer for abortions.

To avoid the strict scrutiny review that applies to such an intrusive speech regulation, the City claims that the Ordinance merely regulates the Center's "commercial speech" or (despite waiving the claim below) the Center's "professional speech." But the Center's walls do not propose a commercial transaction, and the Center's religiously-motivated offers of help to women require no license from the government.

Four years ago, an *en banc* decision of this Court remanded this case to allow the City to take discovery to try to prove its defenses. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013). Rather than showing that the Center speaks from economic motives, extensive discovery confirmed the obvious: that the Center speaks from the religious and social motives that animate its ministry to women in need. And when forced to explain why the City could not allow pro-life speakers to talk about abortion in their own words, the City admitted that it wants to interject its *own* discussion of abortion so it can be "more … objective, if you will, and less subjective" than the Center. JA1005. The City wants a sign that is "separate," and "objective," and apart from any "social interaction that brings with it a certain level

of commitment and engagement." JA1002-03. The City seeks to control the message of private speakers given within the speakers' property.

These facts and admissions doom the Ordinance, just like they doomed the similar law at issue in the *Tepeyac* case decided by Judge Chasanow after remand. *Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d 745, 760 (D. Md. 2014). Simply put, a religious charity is not a commercial speaker, and the First Amendment prohibits the government from dictating and editing how a religious charity talks about abortion. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). And that principle covers both "things that do not matter much," as well as "things that touch the heart of the existing order." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Summary judgment against the Ordinance was correct, and this Court should affirm.

STATEMENT OF THE CASE

1. The Center and its Motivation for Helping Women.

The Center is a non-profit Christian, pro-life ministry committed to exercising its faith through sharing religious truths. JA353. Therefore, the Center "is committed to presenting the gospel of our Lord to women with crisis pregnancies—both in word and deed." JA360 (Center's "Statement of Principles").

As an "outreach ministry of Jesus Christ through His Church," the Center's Board, staff, and volunteers all "are expected to know Christ as their Savior and Lord." *Id.* All Board members, staff, and volunteers subscribe to a detailed written statement of faith describing their work as a "ministry of the Holy Spirit" allowing them to perform the "good works" that "are the necessary fruit and evidence of faith." JA353, 360-61.

To live out this religious mission, the Center commits itself to provide emotional and practical support to women, truthful information and advertising, and assistance "free-of-charge at all times," but never to provide or refer for abortion or abortifacients. *Id.* Thus, the Center gives a range of free services, including material assistance (such as diapers, strollers, baby and maternity clothing, baby and parenting books, etc.), educational programs through its Earn While You Learn Program (such as parenting skills and Bible study), pregnancy testing, confidential peer counseling, sonograms, pre-natal development information, and a 24-hour helpline. JA362-63. The Center also gives information on abstinence and "natural family planning," a form of birth control that is consistent with the Center's religious and moral beliefs. JA363. The Center helps over 1,200 women per year at its four locations and roughly 8,000 women per year

via the Center's telephone helpline. *Id.*[1] The Center's one Baltimore City location operates from a rent-free space provided by and on the property of a Roman Catholic Church. JA359.

With most women, a majority of time is spent talking about their pregnancies and related personal, religious, and moral concerns. JA363. The Center's staff and volunteer peer counselors are trained to communicate the Christian, pro-life mission of the Center using a Christian training program called "Equipped to Serve." *Id*. These staff members are instructed that:

> [s]peaking truth in love . . . is key as we seek to minister to women faced with the decisions of an unplanned pregnancy. . . . [We must] join Christ in engaging the hearts of those He brings to us rather than trying to fix, heal and convert others to our point of view. . . .

JA364. This passage describes the kind of conversations that occur in the Center, and women often choose to pray with counselors during their time together at the Center. JA365, 438.

All of the Center's assistance to women is provided free of charge. JA361, 57, 967, 983-84. Rather than seeking money, the Center provides this free help to women in fulfillment of the Christian mission that unites the Center's board, staff, volunteers, and supporters. JA353, 361, 1181-83. Thus, the Center does not

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[1] All references herein to physical spaces are to the Center's location in Baltimore City. JA359. The other three locations are in Baltimore County. JA361.

propose any commercial transactions with any clients or prospective clients. JA367. The Center is not motivated by economics in its actions or communications with the women it serves. *Id*. And even the City concedes that it has no economic motivation for its own free services and pregnancy-related referrals. JA1030, 1034-35 ("No. None at all."; "No. There is absolutely none.").

2. The Center's Welcoming Communications and its "Commitment of Care."

The Center works to ensure that it meets with women in a space that "conveys welcome, comfort, security, and a warm spiritual message" to all who enter, immediately upon entry. JA354. Materials in the room include copies of the Bible, children's books and toys, a poster on pre-natal development, the Center's nine-point "Commitment of Care," and a small statue of Jesus Christ. JA362.

The "Commitment of Care," JA375, communicates the Center's commitments to nondiscrimination, honesty, confidentiality, and providing accurate information in the loving, supportive way that comports with the Center's mission. JA362. In the context of that loving and supportive commitment to those the Center serves, the Commitment of Care also plainly states the Center's position on abortion and certain contraceptives: "We do not offer, recommend or refer for abortions or abortifacients (birth control), but we are committed to offering accurate information about abortion procedures and risks." JA362, 375; *see also*

JA801 (same message on "Welcome" form). Staff and volunteers at the Center also are trained to give truthful information immediately if any visitor asks or is confused about what kind of services are available at the Center. JA366.

3. The Ordinance and Baltimore's Two LSPCs.

On December 4, 2009, Baltimore's Mayor signed the Ordinance into law. JA34-37. The Ordinance requires a Limited-Service Pregnancy Center ("LSPC") to post a Disclaimer in the "waiting room or other area where individuals await service ... substantially to the effect that the center does not provide or make referral for abortion or birth-control services" (the "Disclaimer"). JA35.

A LSPC 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.

JA34-35. The Ordinance thus defines a LSPC expressly based on the content ("provides information about") and viewpoint ("does not provide or refer for abortions") of the person's speech.

There are only two LSPCs in the City—the Center and the Baltimore Pregnancy Center ("BPC"). JA365, 454-55, 461, 468.

BPC is a small entity, open approximately thirteen-and-a-half hours per week. JA490. Much like the Center, BPC is a "pro-life pregnancy resource center," "[s]taffed completely by volunteers," whose mission is "to offer women practical alternatives to abortion, providing testing, counseling, maternity clothes, baby clothes, formula," etc. JA492. BPC states that "all services are free and confidential" and contributions are "tax deductible." JA491. Because both the Center and BPC are openly pro-life, the only speakers covered by the Ordinance refrain from referring or providing for the specified services because of moral and religious objections. JA456-57.

4. The Center's Objection to the Disclaimer.

The Center does not post the Disclaimer mandated by the Ordinance. JA365. In the loving, supportive, and Christian context of its Commitment of Care, the Center already informs women that it does not refer or provide for abortion or certain kinds of birth control. JA355. But the Center objects to being forced to post the City's Disclaimer, which would undermine the Center's loving message, singles out and highlights abortion as particularly important, and would require the Center to make false statements about birth control. JA366-67, 370.

The Center designed its entire space to convey a welcoming, supportive, and loving Christian environment. JA354-55. Within that environment—including in the "waiting room" where the Disclaimer would be posted—sensitive personal and

religious conversations occur, including prayer and conversations regarding religion, the Bible, abortion, Jesus Christ, adoption, and available supports for women. JA365, 438-39. For example, one woman discussed how she received counseling and engaged in personal, religious conversations with the Center, including group prayer, in the Center's waiting room. *Id.* No goods or services are offered for sale in the Center's waiting room or anywhere in the Center. JA365.

The Center's ministry and dialogue with visitors begins when a visitor enters the Center's waiting room. JA354-55, 365, 368. Center staff and volunteers are trained to always be supportive in encouraging women not to have an abortion. *Id*. The Center's religious and moral approach to conveying the loving message of Christ forms the basis of every communication its staff and volunteers have with visitors. JA366, 354.

In contrast to the Center's own speech, the City's Disclaimer isolates and highlights abortion in a separate statement and a separate sign. In the Center's view, such a sign would be a stark, immediate, and uncontextualized introduction of the topic of abortion and birth control. JA366. The Center believes that the Disclaimer would undermine its efforts to convey care, comfort, support, and a family-friendly, appropriately spiritual setting throughout its communications with visitors. *Id*. The Disclaimer immediately interjects abortion as an isolated reality and suggests that abortion could be considered a good option or the only available

option because the woman does not have access to the support she needs—support actually provided by the Center. *Id*.

When the Executive Director of the Center was asked in deposition about her objections to the Disclaimer mandated by the Ordinance, she stated:

> This Commitment of Care ... is our statement that we present to our clients and anyone who comes in. It is ours. It is written in truth and love and it's written exactly the way we want it to be written …. The sign that the city is potentially wanting to put up in our Center would have to be some place in that very small area. Any client who came in to be counseled would not be able to avoid seeing that sign. It's government speech and it's government mandated.... It impugns our integrity. We say what we want to say in our Commitment of Care. I don't feel we need the government telling us how to say it. The sign is inaccurate.

JA830-31.

Posting the Disclaimer as required by the Ordinance would ensure that every conversation at the Center begins with the government's chosen framing of the subject of abortion and a government warning. JA367. This government compulsion would impact all conversations at the Center regardless of why the visitor comes, regardless of what topics the visitor or the Center wants to discuss, regardless of how the visitor came to learn about the Center, regardless of whether the visitor is at all interested in abortion or birth control, and regardless of how

many times the visitor has been informed that the Center does not provide or refer for abortions or certain birth control services. *Id*.

When new clients leave the Center, they are given a free Bible. JA367. The Center wants women to leave the Center understanding the Christian love and support available there, not with the government-mandated Disclaimer—highlighting abortion out of context and undermining the Center's credibility—being the last thing women see on their way out the door. JA366-68.

Conversely, the City intends the government-mandated Disclaimer to affect all conversations the Center has with everyone who visits regardless of the reason they come. JA1056. Likewise, the City intends the Disclaimer to convey permanence and immediacy so that "anyone who walks in becomes immediately aware" of the particular services the government wants to highlight that the Center does not provide. JA1062-64.

The City objects to the way in which the Center—through its Commitment of Care and handout—chooses to tell women about its services in the context of care and compassion. JA988, 992-93, 1056. The City testified that it wants its chosen information presented in a sign that is "separate" and "objective" and "less subjective." JA1002-1005. Context matters, and "depending on the context in which" a LSPC tells women about its services, the center' speech "could have a very different impact on the individual" than the Disclaimer. JA1002. As the City

sees it, the government's Disclaimer is beneficial precisely because it is "separate[d]" from any "social interaction" that "brings with it a certain level of commitment and engagement." JA1003.

The Center also objects to the Disclaimer because it is false. The Ordinance requires the Center to say that it "does not provide or make referral for birth control services" even though it provides abstinence education and information about natural family planning. JA358. The City's regulations define "nondirective and comprehensive birth-control services" as "birth-control services which only a licensed healthcare professional may prescribe." JA445. But the City admits that this excludes condoms and abstinence education, both which are commonly provided forms of "birth control services." JA1041-42; JA472-73. The Center objects to posting a sign that misrepresents the Center's view – namely, that it provides important and effective birth control services. JA865-67.

5. Procedural History.

On March 29, 2010, the Center filed suit in the District of Maryland pursuant to 42 U.S.C. § 1983, alleging that the Ordinance violates the First and Fourteenth Amendments. The Complaint sought a declaratory judgment that the Ordinance is unconstitutional and a permanent injunction against its enforcement. JA17-33. Both parties filed dispositive motions—the City filed a motion to dismiss for failure to state a claim, and the Center filed for summary judgment.

The district court denied the motion to dismiss, and granted the Center's motion for summary judgment, finding the law facially invalid under the First Amendment.

On appeal, a divided panel of this Court affirmed, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012), but the Court granted the City's petition for rehearing *en banc*.

The *en banc* Court vacated and remanded, emphasizing that it was "refrain[ing] today from evaluating the ultimate merits" of the case. 721 F.3d at 280. Rather than address the merits, the Court focused on what it viewed as the district court's procedural errors: "den[ying] the defendants essential discovery" and ignoring rules of civil procedure. *Id.* at 271. The Court highlighted several issues it thought the City should be permitted to explore in discovery, including:

- "whether the Center possesses economic interests apart from its ideological motivations" (*id.* at 285);
- whether the "dialogue between a limited-service pregnancy center and an expectant mother begins when the client or prospective client enters the waiting room of the center" (*id.* at 287); and
- whether "[d]iscovery might show that any commercial aspects of a limited-service pregnancy center's speech are not 'inextricably intertwined' with its fully protected noncommercial speech (*id.*).

The *en banc* Court emphasized that it was remanding "without comment on how this matter ultimately should be resolved." *Id.* at 271.

On remand, the parties "conducted extensive fact discovery." JA1242. Afterwards, the parties filed cross-motions for summary judgment, with both sides "insist[ing] that there are no disputes of material fact in this case." JA1245, n.8. The court held that the Ordinance was unconstitutional as applied to the Center. JA1243. Based on the undisputed evidence, the court found that

- "The Center and its staff and volunteers have no economic interest in their actions or speech with clients," JA1250;
- "A majority of the conversations in the waiting room are related to clients' "pregnancies and related personal, religious, and moral concerns." JA1254; and
- "Analyzing the Center's regulated speech as a whole, it is clear that the moral and political conversations that take place in the waiting room are inextricably intertwined with its provision of services" such that "[e]ven if some of the Center's speech could be considered commercial or professional, that type of speech is intertwined with the Center's undoubtedly protected political, ideological, and religious speech." JA1274-75.

In light of this evidence on remand, the court concluded "that the Ordinance is a content-based regulation that regulates noncommercial speech, or, at the least, that the Center's commercial and professional speech is intertwined with its noncommercial speech, and is thus subject to strict scrutiny." JA1256. Applying strict scrutiny, the court assumed, without deciding, that the promotion of "public health by protecting the public from deception are compelling interests in the context of the case." JA1278. But the court concluded that there was "insufficient

evidence to demonstrate that deception actually takes place and that health harms are in fact being caused by delays resulting from deceptive advertising." JA1280.

The court further concluded that the City failed to show "that the Ordinance actually promotes a compelling interest" because "even if there had been bountiful evidence of misleading advertising, there is no evidence that women were coming to the Center under false pretenses and suffering harmful health consequences because of it." JA1285. Finally, the court held that the Ordinance is not narrowly tailored because "[t]he Ordinance does not mention false advertising, does not target only false advertising, and has no stated link to advertising." JA1286. Indeed, "[b]ecause the Ordinance applies to [LSPCs] regardless of whether they advertise nonfraudulently or do not advertise at all, it is overinclusive and fails to advance the purported compelling interest." *Id.* The court held the Ordinance unconstitutional as applied and permanently enjoined enforcement against the Center. JA1287, 1291.[2]

SUMMARY OF ARGUMENT

No reasonable view of the First Amendment tolerates the idea that the government can compel a religious speaker, on religious property, to proclaim the government's message within the speaker's building before engaging in prayer,

[2] The court found that because it lacked evidence about the speech of the one other LSPC in Baltimore City, it would limit its relief to the Center. JA1288.

Bible study, or personal discussions regarding parenting and pregnancy. Strict scrutiny applies because the Ordinance compels speech and is a content- and viewpoint-based regulation: it forces a religious nonprofit to preface all conversations in its own space with the government's mandated preferred phrasing about abortion, solely because the Center talks about pregnancy and is pro-life. The undisputed facts prove that the Ordinance does not regulate commercial or professional speech, but rather that the mandated Disclaimer is given in the context of, adversely impacts upon, and is intertwined with the fully-protected personal, moral, and religious speech at the Center.

The undisputed facts also demonstrate that the City has failed to meet its burden under strict scrutiny of showing that the Ordinance serves a compelling interest and is narrowly tailored. The undisputed facts prove that the Center *already tells women* about the services it does not offer, but using the words it chooses to use, not parroting the City's words. No evidence suggests that *any* woman has been harmed by alleged false or deceptive advertising by LSPCs. Further, the Ordinance does not even regulate the alleged deceptive advertising that forms the basis for the City's claimed interest. Finally, the Ordinance also fails because the City ignored readily available, less restrictive alternatives, such as enforcing anti-fraud laws or providing government education programs. So lacking is the City's evidence of harm, and so poor is the fit between the City's

regulation and the supposed harm, that the Ordinance also fails intermediate or even rational basis scrutiny.

ARGUMENT

I. The District Court Correctly Ruled that the Ordinance is Subject to Strict Scrutiny under the First Amendment.

A. *Strict scrutiny applies because the Ordinance compels speech.*

The "right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, laws like the Ordinance "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner I*"), 512 U.S. 622, 642 (1994).

Compelled speech forces speakers to "adopt—as their own—the Government's view on an issue," or otherwise continue to express their own beliefs "only at the price of evident hypocrisy." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330-31 (2013). The government candidly admits its purpose is to inject its own allegedly "objective" message into the Center's conversations. JA1002-05. But "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say

and how to say it." *Riley*, 487 U.S. at 790-91; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

Mandated disclaimers pose a unique danger to the free dissemination of ideas because they may cause a listener to leave (and are sometimes *intended* to cause the listener to leave) without hearing the speaker's message. As the Supreme Court recognized in *Riley*, if "the [listener] is unhappy with the [disclosure], the [speaker] will not likely be given a chance to explain the [disclosure]; the disclosure will be the last words spoken as the [listener] closes the door or hangs up the phone." *Riley*, 487 U.S. at 800. This is exactly the intent of the Ordinance here—that some visitors to the Center would leave immediately upon reading the sign, before the Center has the opportunity to discuss the issue of abortion in the Center's chosen "context," which may involve "social interaction" and "bring[] with it a certain level of commitment and engagement." JA1003. Accordingly, strict scrutiny applies to the Disclaimer's compelled speech requirement.

B. *Strict scrutiny also applies because the Ordinance is content-based.*

While this case was on remand, the Supreme Court clarified that a law "that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228 (2015) (internal quotation and citation omitted). Government

regulation of speech is content based if the law applies to particular speech because of the topic discussed or the message expressed. *Id.* at 2227. No evidence of "illicit legislative intent" is required. *Id*. at 2228. Conversely, an improper justification can transform even a facially content-neutral law into a suspect content-based restriction.

This Court has recognized that *Reed* abrogated this Circuit's previous holdings that the government's purpose controlled content neutrality, explaining that the controlling factor instead is whether application of the law depends upon the message of the regulated speech. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) ("This formulation conflicts with, and therefore abrogates, our previous descriptions of content neutrality"). The law in *Cahaly* was content-based—despite the government's claimed purpose of targeting "commercial" calls—because its application turned on the content of the speech: the law "applie[d] to calls with a consumer or political message but [did] not reach calls made for any other purpose." *Id.*

So too here: a speech regulation that applies to speakers who "provide information about pregnancy-related services," JA34-37—but not to speakers who talk about any other important topic—is content-based and subject to strict scrutiny.

C. *Strict scrutiny applies because the Ordinance is viewpoint-based.*

The Ordinance is also subject to strict scrutiny and presumptively invalid because it is viewpoint-based. *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992). This is true even if the Ordinance regulated commercial speech (which it does not). "The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys" and "[c]ommercial speech is no exception." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (quotation omitted); *see also Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1248 (11th Cir. 2015) ("merely wrapping a law in the cloak of 'commercial speech'" does not immunize from strict scrutiny).

Under *Reed*, viewpoint-neutrality first requires looking to the face of the Ordinance. *Reed*, 135 S.Ct. at 2228 (quotations omitted). Here, the Ordinance targets only speakers who wish to discuss pregnancy-related services without referring for or providing abortions. The Ordinance favors speakers who are willing to recommend, provide, or refer for abortion and *any and every* method of contraception, over speakers like the Center who have an opinion favoring or opposing certain methods of birth control. The City's preference for those who share the City's allegedly "objective" view means that pro-choice speakers can discuss pregnancy without providing "disclaimers" about the services they do not provide (such as adoption referrals or parenting classes). *See* JA1066-67.

Reed makes clear that no further inquiry (such as into the motivation behind the speech regulation) is required. 135 S.Ct. at 2228-29. Nonetheless, the City's impermissible justification for the Ordinance provides an additional, distinct basis for applying strict scrutiny. Discovery confirmed that the law was passed based on disagreement with and hostility toward the Center's and other LSPCs' viewpoint. The City has repeatedly admitted that the Ordinance was passed to mitigate the supposed "harm" caused by pro-life centers' speech—what the City refers to as "traumatizing anti-abortion advocacy" and "propaganda." *See* City's Panel Br. at 9 (4th Cir. Doc. No. 26, Case 11-1111); Defs.' Mot. Dismiss at 2-3 (D. Md. Doc. No. 11-1, Case 1:10cv760-MJG) (stating that centers subject women to "anti-abortion anti-contraception propaganda"); and 10, 13 (justifying the ordinance because of centers' "traumatizing and false propaganda"). Indeed, the two "reports" relied on by the City to support the Ordinance are almost entirely about substantive disagreements with pro-life speech, rather than allegedly commercial advertising. *E.g*, JA1280 (district court conclusion that the reports focus on speech occurring inside pregnancy centers not on alleged deceptive advertising). The City might not agree with the LSPCs' speech, but regulating that speech because the government considers it "propaganda" or "emotionally manipulative"—or because it involves too much "social interaction," may prompt "commitment and engagement," or is supposedly more "subjective" than the City's

preferred "objective" speech, JA1002-05—is exactly the kind of viewpoint discrimination the First Amendment prohibits.

The City's targeting is reinforced by its refusal to impose similar requirements on speakers who provide more preferred pregnancy-related services. Despite an asserted interest in full disclosure by *any* "facilities that primarily provide pregnancy-related care and information," JA57, the City rejected a proposed amendment that also would have required pro-choice centers to disclose services they might not provide, such as "adoptions" and "prenatal services through delivery." JA144-46; *compare NIFLA v. Harris*, 839 F.3d 823, 835 n.5 (9th Cir. 2016) (holding that a pregnancy center disclosure law was viewpoint neutral where it applied to any pregnancy center, including centers that offer abortions).

In remanding this case for discovery, the *en banc* Court hypothesized (pre-*Reed*) that discovery might demonstrate that the Ordinance is not viewpoint-based because "there may be limited-service pregnancy centers with no moral or religious qualms regarding abortion and birth-control, and who refrain from providing or referring for abortion or birth control for other reasons." 721 F.3d at 288 (internal quotations omitted). *Reed* abrogates any such analysis, instead requiring a focus on the discriminatory face of the law. Nevertheless, discovery confirmed that the only LSPCs in Baltimore City refuse for religious and moral

reasons, JA368, 455, 461, and the City concedes it knows of no one who refuses for any other reason. JA456-57.

The City's attempt to analogize the Ordinance to the abortion clinic buffer zone found to be viewpoint neutral in *McCullen v. Coakley*, 134 S.Ct. 2518, 2531 (2014), is misplaced. In *McCullen*, the buffer zone applied *without* regard to the content or viewpoint of speech. The Court was crystal clear that "[t]he Act would be content-based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *Id.* (internal quotes and citations omitted). That is precisely the case here, where a violation can occur only if a speaker talks about pregnancy and will not make referrals for abortion.

D. *Strict scrutiny applies because the Ordinance regulates non-commercial speech*

The Ordinance's compelled Disclaimer requirement restricts fully-protected religious and spiritually motivated non-commercial speech. The Supreme Court recently reaffirmed that its "precedents define commercial speech as speech that does no more than propose a commercial transaction." *Harris v. Quinn*, 134 S.Ct. 2618, 2639 (2014). Discussions about pregnancy and abortion—deeply important social, religious, and political issues—cannot be crammed into the category of commercial speech to allow for government regulation.

This Ordinance expressly regulates speech inside the Center. *See* JA34-35. It is undisputed that the Center does not propose or engage in any commercial transactions or commercial speech in the waiting room where the Disclaimer would hang. Rather, in that space the Center offers free material, emotional, and spiritual support to women and speaks to women in furtherance its sincerely held religious and moral beliefs. JA355, 368-369. The Center has routinely engaged in sensitive, personal, and religious conversations in its waiting room, where no advertisements are found and no goods or services are offered for sale. JA369.

The nearest hook the City can find for its commercial speech argument is its claim that the Center's ads—which of course do not appear in its own waiting room at all—are examples of commerce. But the Ordinance does not regulate the Center's ads, and the City admits that the Ordinance applies even if the Center never advertises at all. JA1070-71. Rather than regulating any "ads" or any commercial transaction allegedly proposed by the Center in offering free services, the Ordinance mandates a Disclaimer in the waiting room and thereby alters the Center's communication during every visit, directly impacting the personal, religious, and moral conversations at the Center. JA369.

1. The "non-commercial" context of the speech regulated by the Ordinance.

The *en banc* Court suggested that determining whether the speech regulated by the Ordinance is commercial or non-commercial requires a "contextual" analysis guided by *Bolger v. Young Drug Products*, 463 U.S. 60 (1983). In *Bolger*, the Supreme Court invalidated a law prohibiting a contraceptive manufacturer from mailing unsolicited contraceptive advertising and informational pamphlets to the public. In determining whether the speech at issue was commercial, the Court examined three factors: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech. *Id*. at 66-67. Although the *Bolger* Court indicated that a combination of all the factors provides strong support for speech being commercial, it noted that the "mere fact" that the pamphlets were advertisements "does not compel the conclusion that they are commercial speech;" that "reference to a specific product does not by itself render the pamphlets commercial speech;" and that the fact that the defendant "has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech." *Id*.

This Court stated that the "lodestars in deciding what level of scrutiny to apply . . . must be the nature of the speech taken as a whole and the effect of the

compelled statement thereon," including consideration of the "viewpoint of the listener." *Greater Balt. Ctr.*, 721 F.3d at 286 *(quoting Riley*, 487 U.S. at 796). The *Bolger* factors, the undisputed nature of the Center's speech as a whole, and the viewpoint of the listener confirm that the Ordinance does not regulate commercial speech.

(a) The Ordinance regulates protected speech in the Center—not advertisements.

Unlike the law in *Bolger*, the Ordinance does not regulate any "advertisements" by pregnancy centers. The contraceptive pamphlets found commercial in *Bolger* were "conceded to be advertisements," "reference[d] a specific product," were sent with "an economic motivation," and were linked to family planning by a commercial company to promote its commercial product and avoid regulation. 463 U.S. at 66-67. The law under review in *Bolger* directly regulated the advertisements that constituted the commercial speech, "prohibit[ing] the mailing of unsolicited advertisements for contraceptives." *Id.* at 61.

Here, the Ordinance does not even apply to advertisements, but instead requires that the Disclaimer be posted at the Center. *See* JA34-35, 1003, 1056, 1064. The Ordinance applies regardless of whether LSPCs advertise and regardless of whether any advertisements are false. *See* JA34-37, 1070-71.

The fact that the Center may periodically publicize the free services it offers on church property through advertisements does not somehow transform *all* its speech inside its own property into commercial speech—anymore than the fact that a church advertises its worship services turns its sermons into commercial speech. No court has ever held that *all* of a speaker's speech becomes commercial speech just because some of its speech is commercial speech. When analyzing a similar pregnancy ordinance enacted in Montgomery County, Maryland, the court recognized that the ordinance did not regulate advertisements, but instead restricted the speech occurring within centers' "four walls, much closer to their ideological message." *Tepeyac*, 5 F. Supp. 3d at 760. There, like here, there was no evidence that the plaintiff-center advertised in its waiting room, and the government could not use the center's other advertisements, such as on the center's website, "to extrapolate that it can regulate all of Plaintiff's speech as commercial speech, including that within its waiting room." *Id.*; JA369.

The Center discusses information about general services such as abortion and birth control—but *Bolger* suggests that only the mention of a "specific" product (*e.g.*, a Ford Taurus or Campbell's Tomato Soup) might make speech "commercial" as opposed to discussion of general topics or categories (*e.g.*, cars or soup) which by their nature do not imply a commercial proposition. Moreover, it is absurd to apply this portion of *Bolger* to make the speech of someone whose

social and political speech *opposes* use of a product—like an anti-smoking or anti-fossil-fuels group—into less-protected commercial speech. By definition, those who oppose a particular product are obviously not "propos[ing] a commercial transaction." *Harris v. Quinn*, 134 S. Ct. at 2639.

The City's reliance on *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535 (1987) is misplaced. There, the Court held that Congress could regulate the word "Olympic" where used "for the purpose of trade [or] to induce the sale of any goods or services" as commercial speech. *Id.*at 528. (internal citation omitted, emphasis added). The Court found that "prohibiting the use of one word for particular purposes," *i.e*. "Olympic" in connection with the defendant's publicizing of a planned gay athletic competition through the sale of T-shirts, buttons, and bumper stickers, did not prevent the defendant from making a political statement about the status of gay persons. The Court emphasized that it was protecting the Olympic Committee's property right in the word "Olympic" as having special *commercial* value. *Id*. at 536, 539. Because of the unique commercial value of the word "Olympic" (recognized by Congress as the use for trade and to induce the sale of goods or services), there was no free speech violation in the restriction of its promotional usage. The Court did not hold, as the City suggests, that as to any entity that "promotes goods and services" the government can regulate all of such entity's speech under rational basis review. If

that were true, the government could force its message to be delivered during every church pancake breakfast, every political rally with t-shirts and bumper stickers, and every advertised interest group meeting. No case supports such an outlandish proposition.

(b) The Center does not have an economic motivation for the speech regulated by the Ordinance.

Discovery also confirmed that the Center has no economic interests in its speech to women in furtherance of its religious and moral mission. JA369. The Center receives no remuneration or contributions for providing its free services or in exchange for referring women to pro-life doctors or anyone else. JA363, 369, 911-12. The district court thus correctly found that—after years of discovery—there is still no evidence that the Center's speech has an economic motivation. JA1250.

In providing free services without an economic motivation, the Center is not unlike the City itself, which provides free services such as referrals, wound care, HIV testing, and needle exchanges because of the public health benefits, not economics. JA1030, 1034-35. When asked if the City has an economic motivation for its own free services, the City stated: "No. None at all." and "No… absolutely none." *Id*. This is true, of course, even though the City could not

provide its free medical services without funding for its programs (and would not receive funding if it did not provide free services). JA1081-82.

(c) Larson and First Resort are distinguishable and demonstrate that the Ordinance does not regulate commercial speech.

The City's reliance on *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 177 (N.D. 1986) and *First Resort v. Herrera*, 80 F. Supp. 3d 1043 (N.D. Cal. 2015) likewise fails. *Larson* involved a suit by an abortion provider under North Dakota's false advertising law against a pro-life group that allegedly engaged in false advertising by mimicking the advertisements and name of an abortion provider and implying that the pro-life group performed abortions. The court found that the alleged false advertisements at issue constituted commercial speech because *the advertisements* were "placed in a commercial context and [] directed at the providing of services rather than toward an exchange of ideas." *Larson*, 381 N.W.2d at 181. The court approved "a narrowly prescribed order" restraining actual false advertising, yet permitted the organization to advertise "its services so long as those activities are conducted in a nondeceptive manner." *Id*. at 182.

Thus, *Larson* involved a direct regulation of an "advertisement" itself, which was found to be false, and a simple, viewpoint-neutral, prohibition against false and deceptive advertising. The *Larson* court specifically recognized that to "the

extent that the [organization] is interested in advocating a social or political position on any issue it can do so outside the commercial context," (namely, inside its four walls), and "receive full First Amendment protection." *Larson*, 381 N.W.2d at181. But that is exactly the type of speech regulated by the Ordinance—the sensitive speech occurring at the Center itself. Notably, the *Larson* court itself actually struck down part of the injunction that required the pro-life center to include a disclaimer (that the center did not perform abortions) in any advertisements using the term abortion. *Id*. at 179. *Larson* thus reached only advertisements, and only false ones, and without mandating speech, while protecting all other speech. That is a far cry from the Ordinance.

Herrera likewise involved a law that prohibits false and misleading public *advertising* by LSPCs. 80 F. Supp. 3d at 1047. But unlike the Ordinance here, the law in *Herrera* restricted only advertisements, was triggered only by deceptive advertisements, and did not require a disclaimer in a center's waiting room. *Larson* and *Herrera* thus confirm the unprecedented nature of the City's effort to regulate the Center's social and political speech that is neither false nor advertising.

Subsequent to the district court decision in *Herrera*, the Ninth Circuit held in *Harris* that the government's claim that a pregnancy center disclosure law that required notices to be given to visitors at the centers "regulate[d] commercial speech" was "unpersuasive." 839 F.3d at 834 n.5. As noted by the court,

"commercial speech does no more than propose a commercial transaction" but the California law at issue "primarily regulates speech that occurs within the clinic, and thus is not commercial speech." *Id*.

(d) The nature of the Center's speech and the impact of the Disclaimer on the Center's speech and listeners confirm that strict scrutiny applies.

The Center objects to the City's sign because it undermines the Center's credibility and starkly singles out abortion as a possible solution—an out-of-context message the Center finds morally offensive and would not otherwise provide. JA366-68. The undisputed testimony of a woman helped by the Center—the only evidence about how listeners receive the Center's message—shows that the Disclaimer would have a negative impact on the Center's communications and relationship with the women it serves. JA439. In particular, the woman testified that she talked with staff about God, prayed, and expressed personal feelings about her family in the Center's waiting room, which also served as the location for private counseling. JA438. The witness also stated she always found the Center's waiting room to be open and inviting, and she never discussed abortion because she sought the Center's help to keep her child. JA439. The woman further stated that the Disclaimer singling out abortion would have been upsetting to her and would have affected how she viewed the Center, at a time when she was dealing with fear and worry over how she would care for her children. *Id*. The woman

also expressed concern over her children (who frequently accompanied her to the Center) reading the Disclaimer. *Id.*[3]

(e) The Center's affiliation with other pro-life, religious, and business groups does not change the non-commercial nature of the speech regulated by the Ordinance.

The City's extended preoccupation with the Center associating with other pro-life and religious groups is unavailing. Appellants' Br. at 4-7, 27-28. Constitutional speech analysis is not a guilt-by-association game. The Center's religious, social, and moral speech does not become "commercial" just because the Center advertises, utilizes commercial products to further its mission, or simply associates with those who engage in commerce.

(f) Zauderer and Milavetz are inapplicable.

The City's invocation of *Zauderer* and *Milavetz* is also misplaced. Appellants' Br. at 38-39. The Supreme Court's authorization of mandatory disclosures on attorney advertising in the cases of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) and *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) does not

[3] The City claims that the woman's concern is invalid because the Center already refers to abortion in its posted Commitment of Care. But, as the *en banc* Court recognized, context matters. Of course the Center discusses abortion when appropriate and in the Christian manner it has chosen to convey. *See*, supra, at 6, 8-10.

support the City's defense. *See Harris*, 839 F.3d at 834 n.5 (rejecting state's claim that *Zauderer* applied to pregnancy center disclosure law). At issue in those cases was the direct regulation of "advertising pure and simple." *Zauderer*, 471 U.S. at 637. *Zauderer* approved a professional conduct rule requiring attorneys "who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses," because the regulation took "the form of a requirement that appellant include *in his advertising* purely factual and uncontroversial information." *Id* at 650-51 (emphasis added). Similarly, *Milavetz* upheld a disclosure in advertisements for bankruptcy services by debt relief agencies, including certain law firms, where the "parties agree[d] ... that the challenged provisions regulate only commercial speech." 559 U.S. at 249. Neither case generally authorizes the government to regulate speech concerning the free provision of help to pregnant women, completely divorced from commercial advertising.

2. Even if the Ordinance regulated some commercial speech, the district court correctly concluded that the Center's regulated speech is intertwined with its non-commercial speech.

Even commercial speech "does not retain its commercial character when it is inextricably intertwined with the otherwise fully protected speech involved in charitable solicitations." *Riley*, 487 U.S. at 782. *Riley* cautioned against attempts to "parcel out the speech," *id.* at 796, by looking solely at the

government-compelled disclaimer while ignoring the noncommercial speech that occurs at the Center. In *Riley*, the Court examined the conversation between the nonprofit caller and the listener, of which the mandated disclaimer would have been only the initial part, and determined that because the speaker's other speech might convey noncommercial information, the disclosure was subject to strict scrutiny.

The core of the Center's speech (such as conversations between staff and visitors about spirituality, Jesus, abortion's risks and alternatives) is "plainly noncommercial," as the City concedes. City's *en banc* Br. at 24 (Doc. No. 157, Case No. 11-1111). The Center's speech is filled with information and religiously-motivated discussion (albeit information and discussion with which the government disagrees). It is precisely that discussion that the City wishes to alter with its sign: "Q. And you want everyone who comes to the center to be aware of that disclaimer in connection with the conversations they have at the center; is that accurate? A. That's correct." JA1056. As the City well knows and plainly intends, "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. That is precisely why the First Amendment forbids the attempt.

The City nevertheless tries to impermissibly "parcel out the speech" by mischaracterizing Carol Clews' testimony as if she said that the *only* conversations

impacted by the Disclaimer are those in which a woman is confused about whether the Center provides abortion. Appellants' Br. at 37. But Clews was not asked to provide an exhaustive list of each and every possible way the Disclaimer would interfere with the Center's speech. JA836-40.[4] Moreover, in the same deposition, Clews testified more broadly about the impact of the Disclaimer, *supra* at 9-10, and also as follows:

> If a client is coming in to discuss her pregnancy, has questions, is being counseled about whatever, assuming she's pregnant.... Heretofore, she has not thought about having an abortion. Having that sign right in front of her suggesting that we do not do abortions ... or refer for them is giving her something to think about that she may very well never have thought about before."

JA864. The City's attempt to distort Clews' testimony does not change the undisputed facts that the Disclaimer interferes with non-commercial speech occurring the Center's waiting room—just what the City says it is designed to do.

The City's claim that the Ordinance is nevertheless acceptable because it "does not prevent Pregnancy Centers from telling consumers that they believe abortion and certain methods of birth-control are immoral or

[4] Indeed, reviewing the cited passage in full makes clear that Clews was testifying about the potential impact the Center's own Commitment of Care would have on conversations, not the impact of the Disclaimer. JA839-40.

unhealthy," Appellants' Br. at 34, has been specifically rejected by this Court and the Supreme Court. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (although the speaker "may supplement the compelled speech with his own perspective does not cure the coercion—the government's message still must be delivered (though not necessarily received).")

E. *Strict scrutiny applies because the Ordinance regulates non-professional speech and the City has waived any professional speech argument.*

The City's professional speech argument, Br. 41-45, has already been waived, multiple times.

In any event, that doctrine applies only in the context of licensing schemes for professionals who provide services for money. But the Ordinance is not a licensing requirement, and the regulated LSPCs are not licensed professionals who provide services for money.[5]

[5] The City's professional-speech argument is flatly inconsistent with its commercial-speech argument: the commercial-speech argument turns on the City's contention that the Ordinance regulates the Center's "advertisements and other forms of solicitation," Appellants' Br. at 27, while the professional-speech argument forces the City to concede that the Ordinance regulates speech occurring inside the Center itself, *see id.* at 43. The City is right that the Ordinance regulates inside-the-Center speech, but wrong that this constitutes professional speech.

1. The City has waived any professional speech argument.

Six years ago the City waived its professional speech argument by telling the district court that the Ordinance does *not* regulate licensed professionals—and indeed that the City lacks authority to regulate licensed professionals in the first place:

> Finally, I wish to clarify seemingly contradictory statements that I made during the heat of oral argument concerning the Ordinance's application to licensed medical professionals. . . . [T]he Ordinance is preempted by state law from regulating licensed professionals because they are already pervasively regulated as to disclosure and informed consent.

D. Md. Doc. No. 22, Case 1:10cv760-MJG.

The City confirmed this waiver expressly during the deposition of its Fed.R.Civ.P 30(b)(6) designee: "Q: "Do--do the ordinance and the regulation regulate the practice of medicine by physicians? A: No. Q: Do they regulate other licensed healthcare professionals? A: No. Q: Does the–does the Baltimore City Health Department regulate the provision of medical services? A: No. Q: Who does? A: The state." JA1081.

The City's express disavowal of its professional-speech argument constitutes waiver, precluding consideration of that argument on appeal. *Kinder* v. *White*, 609 F. App'x 126, 132 (4th Cir. 2015) (although mere failure to raise an argument in the district court waives it, a party's "*contrary* assertion to the district court

disavowing any" such argument is "an even more compelling basis not to address" it on appeal); *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 237 (4th Cir. 2008).

The City also waived this argument by failing to raise it in its first appeal. "'It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.'" *Omni Outdoor Advertising, Inc.* v. *Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (citations omitted). In its first appeal, the City fully briefed the merits of the First Amendment issue, including which standard of scrutiny should apply, but it never argued that the Ordinance regulates "professional speech."

2. The professional-speech doctrine applies only when the government licenses and regulates professionals who provide services for money.

Regardless of waiver, the professional-speech doctrine does not apply. "Under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation." *Moore-King v. Cnty. of Chesterfield, Va*, 708 F.3d 560, 569 (4th Cir. 2013). The City points to no case holding, however, that the professional-speech doctrine can justify regulating the speech of persons whom the state does *not* license or regulate as professionals. Here, it is undisputed that the speakers regulated by the

Ordinance—LSPCs—are not "required to be licensed or" otherwise "subject to a state regulatory scheme." JA1270-71. In other words, the Ordinance is a naked speech regulation, utterly unconnected to any larger licensing or regulatory scheme governing the practices of pregnancy centers—or indeed to any other state law or City ordinance applying specifically to pregnancy centers. Because there can be no regulation of "professional speech" where there is no *licensed and regulated profession*, this alone dooms the City's professional-speech argument.

To apply the professional-speech doctrine absent any licensing requirement or general regulatory scheme would dramatically change the law and divorce the doctrine from its underlying rationale. The doctrine derives from two Supreme Court concurrences, both of which clarified that the permissibility of professional-licensing laws "is not lost whenever the practice of a profession entails speech." *Lowe v. S.E.C*, 472 U.S. 181, 228 (1985) (White, J., concurring); *see also Thomas v. Collins*, 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring). Some lower courts have extended the doctrine to justify not just licensing requirements proper but also regulations on the speech of the licensed profession's members—but their logic presupposes the existence of a licensing scheme in the first place. In the Third Circuit's words, when clients place their trust in licensed professionals, they "by extension" place trust "in the State that licenses them." *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); *see also Accountant's*

Soc'y of Va. v. Bowman, 860 F.2d 602, 605 (4th Cir. 1988) (when a person holds himself out as having a professional license, "members of the public" may "believe [he] has the state's imprimatur" (internal quotation marks omitted)). Thus, once a state has given a professional its "imprimatur" by granting a license, additional "regulatory oversight" is arguably needed to "provide clients with the confidence they require to put their health or their livelihood in the" professional's hands. *King*, 767 F.3d at 232; *accord Stuart*, 774 F.3d at 247 (citing *King* for this point and grounding the professional-speech doctrine in the power to license). This logic plainly cannot justify the Ordinance: because LSPCs are *not* subject to licensing requirements, no "member[] of the public would believe" that they have "the state's imprimatur," *Bowman*, 860 F.2d at 605; *King*, 767 F.3d at 232.[6]

The City's argument would also stretch the professional-speech doctrine by applying it to entities who provide their services for free. As Justice Jackson explained, the professional-speech doctrine is grounded in a desire to protect the public from those who seek "to obtain its money." *Thomas*, 323 U.S. at 544–45

[6] And indeed, the government *could not* make into a licensed, regulated "profession" the practice of talking about pregnancy options. As the district court found, the City did not argue and the record reveals no evidence "that the Center staff exercises medical or other judgment or makes decisions on behalf of its clients." JA1273. As Judge Chasanow has explained, such pregnancy discussions do not constitute a "profession"; to so hold would "blur—and perhaps eliminate" the crucial "distinction between discussion of professional subject matter and the practice of a profession." *Tepeyac*, 5 F. Supp. 3d at 762.

(Jackson, J., concurring). Accordingly, this Court has held that the "relevant inquiry" to determine whether the professional-speech doctrine applies is whether the speaker "is providing personalized advice in a private setting *to a paying client*." *Moore-King*, 708 F.3d at 569 (emphasis added) ("for compensation"). Here, neither the Center nor any other LSPC speaks to women to extract "compensation" from them as "a paying client." *Id.* The professional-speech doctrine therefore does not apply.

Nothing in the City's brief supports expanding the doctrine here. The City relies primarily on two other compelled-disclosure cases—the Ninth Circuit's decision in *Harris* and this Court's decision in *Moore-King*. But in *Harris*, the portion of the statute the court found to regulate professional speech applied only to *licensed* medical providers, *see* 839 F.3d at 838–41, not *unlicensed* centers like the Center.[7] *Cf. Tepeyac*, 5 F. Supp. 3d at 760–62 & n.6 (refusing to apply professional-speech doctrine to regulation of unlicensed pregnancy centers); *Evergreen Ass'n, Inc. v. City of N.Y.*, 801 F. Supp. 2d 197, 207 (S.D.N.Y. 2011) ("[B]ecause no … license is required, this Court cannot evaluate [the pregnancy-center regulation] through the lens of lowered scrutiny accorded to professional speech."), *aff'd in part, vacated in part on other grounds*, 740 F.3d

[7] *Harris* also recognized that this Court has taken a different view as to whether "paying client[s]" are required. 839 F.3d at 841 n.8 (citing *Moore-King*).

233 (2d Cir. 2014). And *Moore-King* involved "a generally applicable licensing and regulatory regime for fortune tellers," *see* 708 F.3d at 569, which, again, is precisely the type of regime missing here.

Finally, the City points out that the Center has a volunteer "licensed physician" "and its sonographers are certified by NIFLA." Appellants' Br. at 43. This argument is simple misdirection. As the City acknowledged in waiving the argument this case's outset, the Ordinance does not regulate licensed providers at all and has no authority to regulate them.

The district court correctly concluded that the Ordinance does not regulate professional speech.

II. The Ordinance Fails Any Level of Scrutiny.

A. *Strict Scrutiny.*

The City carries the burden on strict scrutiny review to prove the Ordinance is "narrowly tailored to promote a compelling Government interest" and if "a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Strict scrutiny "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The City "must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown v. Entm't Merch.*

Ass'n, 564 U.S. 786, 799 (2011) (internal citation and quotation omitted). The City cannot meet this burden because it cannot show there is any problem to be solved, much less one that can only be solved by commandeering the Center's walls to address advertising elsewhere.

1. The Ordinance does not serve a compelling interest.

The compelling-interest test is reserved for demonstrated interests "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Reed*, 135 S. Ct. at 2232. Further, the City "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664. The compelling-interest test cannot be satisfied where the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546-47; *Reed* 135 S. Ct. at 2232. Nor can it be satisfied when the government has failed to prove the existence of an "actual problem" to be solved. *Brown*, 564 U.S. at 799.

The City asserts that it has a "compelling interest in protecting consumers from deception and confusion" and in "protecting public health." Appellants' Br. at 47. With respect to both alleged compelling interests, the City claims that the Ordinance prevents LSPCs from harming women by delaying women's access to

abortion and contraception until the procedure is too expensive or no longer available. Appellants' Br. at 48-50.

(a) The City offers no evidence that the Center's advertising delays women's access to abortion or has harmed anyone.

The City cannot show a compelling interest because it offers no evidence that the Center (or any other Baltimore LSPC) has harmed anyone. This is not surprising, given that the Center *already* informs women that the Center does not refer or provide for abortions, and that each woman who enters the Center is given the same information in writing. JA362, 375, 801. And all the information in the record suggests that when a caller has even momentary confusion on this point, the Center immediately states the obvious: that the pro-life center operating on the property of a Catholic Church opposes abortion. JA366, 879-881. The City has no evidence to rebut these facts and therefore cannot establish a compelling interest.

There is no evidence that any advertisements by the Center caused any women to visit the Center seeking an abortion or contraception, to delay receiving medical care as a result of such visit, or to suffer harm as a result of a delay. In particular, the City's 30(b)(6) witness was not aware of any evidence of harm caused by LSPCs in Baltimore City, any evidence of delay in medical treatment caused by LSPCs in Baltimore City, or any evidence that pregnant women who visit LSPCs in Baltimore City are less likely to receive medical care. JA1009-11.

The City could not identify even a single pregnant woman who delayed receiving access to medical services (much less any woman who was harmed by such delay) as a result of visiting a center. JA1010. The City therefore certainly has no evidence that such delay or harm happens with sufficient frequency to be an interest "of the highest order," much less that regulating the Plaintiff's speech is "actually necessary" or will even be efficacious in solving this hypothetical problem. *Brown*, 564 U.S. at 799; *see also Playboy*, 529 U.S. at 821–22.

The City acknowledged further that it was unaware of any City investigation being done "into harm or delay in medical care" caused by LSPCs, either before or after the Ordinance was enacted. JA1011. Two comprehensive health reports by the City, in 2008 and 2015, fail to even mention LSPCs or any associated health risks. JA494-564. Despite a budget of $126,000,000 and roughly 1,200 employees, no one at the City's Health Department has been assigned to investigate LSPCs or to organize the City's enforcement efforts related to the Ordinance. JA1065-66. The Health Department did not test the effectiveness of the Disclaimer or any alternative disclaimers before passage of the Ordinance, even though the Health Department "typically" does test such disclaimers in the community and seeks feedback regarding effectiveness. JA998-1000.

The City has never even visited a LSPC and disclaims any knowledge of what occurs at them. JA980, 984. Dr. Duval-Harvey, the City's Interim Health

Commissioner and 30(b)(6) designee, admitted that she had never even heard of LSPCs prior to the existence of the Ordinance. JA976-77. Dr. Duval-Harvey did not know how many LSPCs were in the City, at the time of the Ordinance's enactment or her deposition, what services they provide, or how often they are used. JA977, 979-80, 983-85, 1053.

The City's own purported public health expert, Dr. Blum, admitted that he had no evidence that women in Baltimore were delayed in accessing comprehensive information about contraceptives because they went to a crisis pregnancy center or were harmed by going to a center or by the "risks and costs of an abortion [that] increase with the gestational age of the pregnancy," because they first went to a center. JA1142-43. Dr. Blum admitted he was "not aware of a single situation in which an actual human being has been harmed … because she has been to a crisis pregnancy center," and acknowledged that he had no idea whether going to a crisis center made women more likely to get medical care than woman who do not visit a center. *Id*. Dr. Blum also provides no evidence to show that women who allegedly received misinformation from a LSPC "were deceived by advertising into going to an LSPC in the first place." JA1282.

The City relies on two "reports" from pro-choice political advocates (the so-called "Waxman Report" prepared for U.S. Rep. Henry A. Waxman and NARAL Pro-Choice Maryland's "Maryland Report") for the notion that LSPCs

engage in deceptive advertising practices and solicitation to attract women. JA174-278. These reports are principally concerned with factual disagreements between pro-choice and pro-life groups; they barely address the alleged deceptive advertising around which the City subsequently built its case.

As the district court recognized, these reports "do not focus on interactions or effects of deceptive advertising, and barely mention advertising at all, except to conclusory state that LSPCs use advertising and that this advertising can be misleading." JA1280. And neither report supplies any evidence of deceptive advertising by a Baltimore City LSPC nor of any woman ever being harmed by LSPC advertising or visiting a LSPC.

The City also relies on the written Council testimony of two individuals—McReynolds, a NARAL Pro-Choice Maryland Board member who admittedly had never visited a pregnancy center in Baltimore and who last visited a center decades ago, and Kelber-Kaye, an "educator of college-aged women" who relayed only "stories" she had heard, provided no first-hand knowledge of the activities of Baltimore LSPCs, and made biased and inaccurate comments like LSPCs "exist simply to make sure women are not able to access a full range of reproductive options and services"—to allege that the Council had heard evidence that LSPCs use deceptive tactics. JA109; 121. Neither individual offers any actual evidence about deceptive advertising by the Center, or any other LSPC in Baltimore, or

evidence of any woman being harmed by a Baltimore LSPC and neither was offered by the City as a witness having personal knowledge of any interest served by the Ordinance. JA450-52. Such politically-motivated hearsay cannot substitute for evidence of an "actual problem." *Brown*, 564 U.S. at 799.

Despite its assertion of a compelling interest in informing women who visit the Center about the lack of abortion services, the City actually refers women to the Center without giving the women any kind of "disclaimer." JA567, 588, 592. Further, the City has never utilized any other method to inform pregnant women about services not available at LSPCs—methods available to the City such as advertisements, billboards, Facebook, Twitter, radio ads, or signs in its buildings, streets, or public areas. JA1076-77.

Not only does the City fail to produce evidence of actual harm caused by the allegedly false ads of LSPCs, the City also fails to prove any deceptive or false advertising, instead focusing on ads that are vague. For example, the City characterizes as evidence of "deceptive advertising" an advertisement that refers to "Free Abortion Alternatives," which was run on City busses by a national pro-life group called the Vitae Foundation. It was undisputed that ad is "vague," and also that the purpose of the advertisement was not to deceive women, but to "cast as broad a net as possible and have an opportunity to talk to as many women as possible regardless of what their reasons for coming to see us are … [a] regardless

of their circumstance." JA877-78. In any case, there is no valid First Amendment interest in prohibiting speakers from casting a wide net to find a broad audience. And the undisputed evidence shows that whenever a caller was even momentarily confused, the caller was immediately informed that the Center does not provider or refer for abortion. JA880-81.

The City offers no evidence that even a single pregnant woman actually came to the Center seeking abortions or contraception because they were misled or deceived by advertising. JA1280. And while the law does not regulate advertisements, it is also noteworthy that the Center's "advertisements" in the record are actually not deceptive. A center's advertising that it offers "abortion alternatives" should not imply to a reasonable reader that the center is a location to receive an abortion (but rather an alternative to an abortion), and, indeed, the vast majority of those who called the Center during the period the advertisement ran were not confused regarding the scope of the Center's services. JA705. The City's argument that an ad is inherently deceptive if it does not describe services the advertiser does not offer would make nearly every advertisement ever published deceptive.

The "sparse evidence, such as it is, offered by the City is inadequate" (JA1284) and is far weaker than the evidence the Court rejected in *Brown*, 564 U.S. at 800. In *Brown*, the Court considered whether a law that imposed

restrictions on selling violent video games to minors and required the games to be labeled for ages "18" could survive strict scrutiny. The government relied primarily on psychological research that "purport[ed] to show a connection between exposure to violent video games and harmful effects on children." *Id.* The Court, however, found that these studies "d[id] not prove that violent video games *cause* minors to act aggressively … ." *Id.* Rather, they indicated only some correlation, and the Court found that this "evidence is not compelling." *Id.* Here, too, the City may not make a "predictive judgment" that women will be harmed by alleged misinformation of LSPCs. Demonstrating a compelling interest requires proof that LSPCs are actually negatively impacting women's health and the City is undisputedly without any such evidence.

This is precisely the same reason that Montgomery County's similar law died in the district court after remand. There, as here, "the critical flaw for the [government] is the lack of any evidence that the practices of [LSPCs] are causing pregnant women to be misinformed which is negatively affecting their health. It does not necessarily follow that misinformation will lead to negative health outcomes." *Tepeyac*, 5 F. Supp. 3d at 768. There, as here, even if one assumes arguendo that LSPCs provide misinformation, "the [government] must still demonstrate the next supposition on the logical chain: that these practices are having the effect of harming the health of pregnant women." *Id.* And there, as here,

there has been "no evidence that those women failed to get the medical services and counseling they desired or that the time spent at the [LSPC] was to the detriment of their health. Quite simply, the [government] has put no evidence into the record to demonstrate that" the Center's actions "ha[ve] led to any negative health outcomes." *Id.* at 768-69. Relying on the Supreme Court's decision in *Brown* that "ambiguous proof will not suffice"—and deeming the parallels to that case to be "striking"—Judge Chasanow correctly found that the government "has been given th[e] opportunity" but has failed to carry its burden. *Id.* The district court below correctly found the same to be true here. JA1285.

(b) The City offers no evidence that the Ordinance serve its interests a direct and material way.

The City also fails to satisfy the "compelling interest" prong of strict scrutiny because it offers no evidence that the Ordinance will further its alleged interests in a direct and material way. While the City claims that the Ordinance addresses the harms caused by "deceptive advertising," by discouraging its use [] in the first place," Appellants' Br. at 48, the Ordinance does not prohibit or mandate disclaimers on deceptive advertising, is not triggered by advertising, covers entities who advertise truthfully, and even covers pro-life speakers who never advertise at all. Further, the City does not show that the mandated disclaimer is necessary to decrease any confusion regarding the Center's services—a failure

that is not surprising given the robust social-science literature indicating that government-mandated disclaimers may have the opposite effect. *See, e.g.*, Molly Mercer & Ahmed E. Taha, *Unintended Consequences: An Experimental Investigation of the (in)effectiveness of Mandatory Disclosures*, 55 Santa Clara L. Rev. 405, 409 (2015).

The Ordinance pursues the City's alleged interests against only a tiny sliver of speakers on healthcare issues—namely pro-life pregnancy counselors—and ignores the vast majority of sources pregnant women are likely to consult. Nor does it even regulate pro-choice facilities—who apparently may say anything they wish, deceptive or not, so long as at the end of the discussion they are willing to refer for abortions. The City has failed to "demonstrate its commitment to advancing [its interests] by applying its prohibition evenhandedly" and, accordingly, cannot pass strict scrutiny. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (strict scrutiny failed where government cannot show that rule "actually furthers" stated interest); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 238 (4th Cir. 2004) ("a statute that leaves appreciable damage to the supposedly compelling interest uncorrected is invalid") (quotation omitted).

2. The Ordinance is not narrowly tailored.

The City failed to carry its burden of showing that the Ordinance is narrowly tailored and there are no less restrictive alternatives that would further its alleged compelling interest. *Playboy*, 529 U.S. at 813. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

The Ordinance fails narrow tailoring review because the City has at least two viable, less restrictive alternatives. *Riley*, 487 U.S. at 800. First, *Riley* notes that the government itself can publish the information compelled by the Disclaimer. The City admits that it ignored this easy, inexpensive, and less restrictive alternative. JA849-51, 1075-77; *See 44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 507-08 (1996) (plurality opinion); *Sorrell*, 564 U.S. at 575, 578 (noting that "the State offer[ed] no explanation why remedies other than content-based rules would be inadequate," where it "can express [its] view through its own speech"). Having failed to ever use its own resources (*e.g.*, its own buildings, websites, ads, etc.) to spread this allegedly important message, the City cannot plausibly claim that forcing someone *else* to convey the government's message through its walls is narrowly tailored.

Second, *Riley* directs that "the State may vigorously enforce its antifraud laws." 487 U.S. at 800; *see also Nefedro v. Montgomery County*, 996 A.2d 850,

863 (Md. 2010) ("There is at least one less restrictive, effective means for combating fraud: laws making fraud illegal without respect to protected speech."). Insofar as general anti-fraud laws apply to pregnancy centers, they should be utilized; if not, the City can amend its laws to combat fraud directly, in a way that does not target disfavored speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 350 (1995); *Wollschlaeger v. Governor, Fl.*, 848 F.3d 1293, 1316 (11th Cir. 2017). The City admits that it has taken no other steps to address the alleged false advertising of LSPCs and it is unaware whether other efforts at combatting false advertising would be more or less effective than the Disclaimer. JA1074-75. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Grp.*, 529 U.S. at 816.

"In short, the [City] has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective" in dealing with alleged false advertising. *McCullen*, 134 S.Ct. at 2539. Rather, the City is just like the government in *McCullen*, which lost because it could "identify not a single prosecution brought under those laws within at least the last 17 years." *Id.* If the alleged "evil" is false advertising, the City must at least *try* to use its false

advertising laws, and cannot seriously claim that it needs to control religious and mission-driven speech instead of trying to regulate false advertisements directly. Nor can it defend the law as targeting the effects of false advertising by preemptively stopping the conversation. *See Riley*, 487 U.S. at 800 (noting the First Amendment harm if the speaker "will not likely be given a chance to explain" and the disclaimer becomes "the last words spoken as the donor closes the door or hangs up the phone.").

The lack of narrow tailoring also is seen in the Ordinance's failure to carve out entities who do not engage in any deception or in any advertising at all. This is another basis on which the Supreme Court has struck down speech regulations as not sufficiently tailored, for example stating: "As the facts of this case demonstrate, the ordinance plainly applies even when there is no hint of falsity or libel." *McIntyre*, 514 U.S. at 344. As the Supreme Court has explained, "[b]road prophylactic rules in the area of free expression are suspect" and "[p]recision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The Ordinance is thus overinclusive by applying to all pregnancy centers regardless of whether they advertise falsely (or even advertise at all); while at the same time the Ordinance is underinclusive in applying only to those centers who will not refer for procedures they find morally objectionable. In *Brown*, the Supreme Court noted the Free Speech dangers of such an overinclusive and

underinclusive law in striking down a California law regulating video games, including through compelled statements on packaging. *Brown*, 564 U.S. at 805 (state's interests, "when they affect First Amendment rights [] must be pursued by means that are neither seriously underinclusive nor seriously overinclusive.").

The City also claims, Br. 54, that the Disclaimer can survive strict scrutiny because it is, in the City's view, more narrowly tailored than the nearly identical disclaimer found unconstitutional by the Second Circuit in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2nd Cir. 2014). The City would distinguish *Evergreen's* disclaimer, which likewise required a pregnancy center to state that it does not provide or refer for abortion, on the basis that the ordinance in *Evergreen* required the disclaimer to be posted, but also to be made orally and in advertisements. The *Evergreen* court found that the disclaimer was not sufficiently tailored under either strict or intermediate scrutiny. The court based its decision on the fact that a "requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins." *Id. at* 249. The same concern exists for the Disclaimer required by the Ordinance, because the Disclaimer will nonetheless be viewed at the beginning of and impact each conversation occurring at the Center. *See*, *supra*, at 8-12. Further, even though the *Evergreen* court

parsed the New York ordinance and upheld certain parts of it, the court struck down the posted disclaimer portion of the law that is identical to the requirement of the City's Ordinance. Recognizing the "context" of the disclaimer as a "public debate over the morality and efficacy of contraception and abortion," the Second Circuit found the disclaimer overly burdened the plaintiff pregnancy center's speech and rejected the disclaimer at issue "regardless of whether less restrictive means exist." *Id.* [8]

The City's claim that the Disclaimer is analogous to other disclosures that have been upheld is similarly misplaced. Rules requiring professional fundraisers making unsolicited phone calls to disclose their professional status, like those in *Riley* and *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 344-45 (4th Cir. 2005), can hardly be analogized to burdening all of the speech, including indisputably fully protected speech, occurring at a non-profit religious ministry providing free services in support of its religious and moral mission. Indeed, the court expressly rejected the same attempted analogy in *Tepeyac*, 5 F. Supp. 3d at 755. The court also ably explained why *Maryland v. Universal Elections, Inc.*, 729 F.3d 370 (4th

[8] The Ninth Circuit in *Harris* upheld a disclosure requirement for unlicensed pregnancy centers that provided only that the "facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." 839 F.3d at 830. The notice does not mention or refer to abortion.

Cir. 2013), which the City references, is inapplicable, noting that this Court's decision to uphold the Telephone Consumer Protection Act's requirement that robocall senders identify the entity supporting the phone call and provide the entity's telephone number was based on the Court's holding that the disclosure requirement was a "content neutral regulation" that "applies regardless of the content of the message that is related to the recipient" and is not subject to strict scrutiny. *Tepeyac*, 5 F. Supp. 3d at 756.

B. *Intermediate Scrutiny.*

The Ordinance also fails intermediate scrutiny, where the "state bears the burden of demonstrating 'at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.'" *Stuart*, 774 F.3d at 250. Here, the Ordinance not only burdens substantially more speech than necessary, it burdens *all* the Center's speech. Moreover, requiring the Disclaimer in the Center's waiting room can certainly not be said to "directly" advance the government's stated interest of addressing the Center's alleged deceptive advertising and is not drawn to achieve that interest, considering it in no way regulates the Center's advertising and there is no evidence that it is required to reduce confusion.

Even in the context of intermediate scrutiny, the government must establish that other less restrictive alternatives were tried and failed. *McCullen*, 134 S. Ct. at

2539. There is no evidence that the City considered such alternatives, and it certainly has not claimed to have tried *anything*. Moreover, as described above in Section IIA1(a), *supra*, the City has offered no evidence that the "harms it recites are real," nor has the City demonstrated that the Center's existing Commitment of Care and welcome form fail to achieve the Disclaimer's purported objective of informing women visiting the Center of the types of services not offered by the Center. Thus, the City has failed to demonstrate that the Disclaimer will advance the government's purported interest.

C. *Rational Basis.*

For the same reasons, the Ordinance would fail under even the most permissive standard of review, as it does not "reasonably relate[] to the State's interest in preventing" deceptive commercial advertising. *Zauderer*, 471 U.S. at 628. Indeed, the Ordinance does not regulate advertising at all. But even if it did, the lack of evidence of (1) any women ever being harmed or deceived by a LSPC; (2) that the Center's own speech does not adequately address the City's purported interest, or (3) that the disclaimer dispels any confusion or deception precludes a finding that the Ordinance "reasonably relates" to any legitimate governmental interest.

Moreover, the government's forced statement about contraceptives—which is not even *true*, *see supra* at 11-12, fails under any level of scrutiny. The

government may wish that speakers have a "nondirective" viewpoint about contraceptives, but it surely has no valid interest in making the Center lie and say that it provides *no* birth control or referrals given that it provides information on some methods.

CONCLUSION

For the foregoing reasons, the Ordinance is unconstitutional and the district court was correct to enjoin it. Although the district court limited its relief to the Center, this Court can also uphold that ruling by finding that the Ordinance is facially invalid for the reasons set forth above. Simply put, there is no constitutional application of the Ordinance because it deliberately compels speech, in a content- and viewpoint-based way, where the government has never tried any less restrictive alternatives to achieve its asserted interests at all.[9]

[9] The Center prevailed below on its as-applied challenge, and "[a]n appellee may defend, and this Court may affirm, the district court's judgment on any basis supported by the record." *Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 388 n.5 (4th Cir. 2010). As the Supreme Court has explained, a facial challenge is not a "new claim" from an as-applied challenge but rather an additional argument to support the existing claim that the law violates the First Amendment. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329-31 (2010).

REQUEST FOR ORAL ARGUMENT

The Center respectfully requests that the Court hear oral argument in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 13,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).[10] This brief therefore complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14pt Times New Roman. This brief therefore complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

[10] Pursuant to this Court's Notice Regarding Implementation of December 1, 2016 Amendments to the Federal Rules of Appellate Procedure, the date of the Court's briefing order controls the word limits for all briefs filed under that order. *See* http://www.ca4.uscourts.gov/docs/pdfs/notice-implementation-frap-amendments-dec2016.pdf. Because the briefing order in this appeal was entered on November 30, 2016, *see* Doc. 15, the pre-amendment rules apply to all briefs in this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2017, a copy of the foregoing Response Brief of Appellee was served on all counsel of record via the Court's CM/ECF system. I further certify that I have caused the required copies of the Response Brief of Appellees to be dispatched for hand delivery to the Clerk of the Court.

/s/ David W. Kinkopf