

No. 16-2325

**In the United States Court of Appeals
for the Fourth Circuit**

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,

PLAINTIFF-APPELLEE,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; CATHERINE E. PUGH, in
her official capacity as Mayor of Baltimore; 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)

**BRIEF *AMICUS CURIAE* OF DEMOCRATS FOR LIFE OF AMERICA,
INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND
CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PLAINTIFF-APPELLEE
AND AFFIRMANCE**

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April 3, 2017

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 16-2325 Caption: Greater Baltimore Center for Pregnancy Concerns v Mayor, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

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If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: Kimberlee Wood Colby

Date: April 3, 2017

Counsel for: Amicus Democrats for LifeofAmerica

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I certify that on April 3, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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April 3, 2017
(date)

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No. 16-2325 Caption: Greater Baltimore Center for Pregnancy Concerns v Mayor, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Institutional Religious Freedom Alliance
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Signature: Kimberlee Wood Colby

Date: April 3, 2017

Counsel for: Amicus InstitutionalRel.Free.Alliance

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No. 16-2325 Caption: Greater Baltimore Center for Pregnancy Concerns v Mayor, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christian Legal Society
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
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If yes, identify any trustee and the members of any creditors' committee:

Signature: Kimberlee Wood Colby

Date: April 3, 2017

Counsel for: Amicus Christian Legal Society

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**STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE
CASE, AND SOURCE OF AUTHORITY TO FILE¹**

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, health care, and life's other basic necessities. DFLA has been committed to supporting the free speech rights of pro-life individuals and organizations. For example, it filed an *amicus* brief in support of the successful plaintiffs in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

The **Institutional Religious Freedom Alliance** (IRFA), founded in 2008 and now a division of the Center for Public Justice, a nonpartisan Christian policy research and citizenship education organization, works to protect the religious

¹ In accordance with FRAP 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based services.

Christian Legal Society (CLS) is a nonpartisan association of attorneys, law students, and law professors, founded in 1961, with attorney chapters nationwide and law student chapters at nearly 90 law schools. CLS's advocacy arm, the Center for Law and Religious Freedom, works to defend religious liberty and the sanctity of human life in the courts, the legislatures, and the public square. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected. CLS's legal aid arm provides resources and training to assist approximately 60 local legal aid clinics nationwide. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities.

SUMMARY OF ARGUMENT

The City of Baltimore ("City"), by ordinance, mandates a disclaimer within the waiting room of a "limited-service pregnancy center" (LSPC) stating that the center "does not provide or make referral for abortion or birth-control services."

Balt. City Health Code §§ 3-501 to 3-506 (2010). The Greater Baltimore Center for Pregnancy Concerns (“the Center”) has objected that the ordinance violates the Free Speech Clause by compelling it to speak about abortion and birth control, in terms dictated by the government, in the waiting area where it provides religiously-motivated counseling and other assistance to pregnant women.

Amici agree that the City’s ordinance unconstitutionally compels the Center to communicate a message it does not wish to communicate. We agree with the district court that the ordinance must satisfy strict constitutional scrutiny; we also agree that it fails that test because, under the undisputed facts, there is no showing that the Center engages in deceptive advertising or that its advertising has delayed women from seeking abortion or birth control. *Greater Baltimore Ctr. for Pregnancy Concerns v. Mayor and City Council of Baltimore*, No. MJG-10-760, at 43-48 (D. Md. Oct. 4, 2016) (“Dist. Ct. Op.”).

Amici file this brief to controvert the City on a key issue: its assertion that the ordinance need only satisfy rational basis scrutiny because it regulates “commercial speech,” in particular, that its “[d]isclosure requirements [are] aimed at misleading commercial speech” that might deceive consumers. City Br. 22 (citations omitted).

The ordinance does not regulate any speech by the Center that might be called “commercial,” such as its advertisements to potential clients. Instead, the

ordinance mandates disclosures in the waiting room where the Center provides personal moral and religious counseling to women. The Supreme Court and this Court have held that whether speech is commercial must be determined by its nature in the relevant context, and the City's argument disregards that teaching.

Even more important, by applying the commercial-speech category in disregard of the relevant context, the City's argument would expand that category to sweep in not just the Center, but a wide range of organizations and ministries that provide free services to those in need. This effect would follow, first, from the City's arguments that the Center "proposes a commercial transaction" and has an "economic motivation." The City argues that the Center fits within those categories because, although it offers services for free, the services are "commercially valuable"—that is, they could be provided for money. But nonprofit or religious soup kitchens, pastoral counseling services, immigrant/refugee ministries, and countless other organizations all offer free services that could be provided for money. By the City's rationale, all of these organizations could be subjected to disclosure mandates and other intrusive regulation.

Similarly broad consequences would follow from the City's argument that the commercial-speech doctrine can justify mandatory disclosures not connected to the Center's advertising, but rather in the waiting room, where it engages in religious and moral counseling and other noncommercial speech with clients. That

rationale would allow the government to mandate intrusive disclosures throughout the facilities of service organizations and ministries: the church building where a pastoral counseling center is located, the classrooms and hallways of a religious school, or the counseling areas of an immigrant/refugee support center.

Allowing the City to dictate, through a mandated disclaimer, when and how a sensitive topic is broached within the Center's ministry will directly undercut the protection of speech for scores of churches, ministries, and nonprofit organizations that work to help those in need.

ARGUMENT

I. Whether Speech Is “Commercial” Depends on Its Nature in the Relevant Context, Not on One or Two Isolated Factors.

The City claims that its ordinance should be upheld under deferential First Amendment review, based on the proposition that “[d]isclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny.” *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 283 (4th Cir. 2013) (en banc) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). The key question for this purpose, therefore, is whether the ordinance's disclosure requirement aims at commercial speech.

The “core” definition of commercial speech, the Supreme Court has repeatedly held, is speech that does “no more than propose a commercial

transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)); see also *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014). But the Court has also provided a fuller definition in *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983). In *Bolger*, the Court highlighted three characteristics that, when considered together, can warrant defining particular speech as “commercial”: (1) if the speech is an advertisement; (2) if it “refer[s] to a specific product;” and (3) if the speaker “has an economic motivation for” engaging in the speech. *Id.* at 66-67. This Court reaffirmed these factors in its *en banc* decision in this case in *Greater Baltimore Ctr. for Pregnancy Concerns*, 721 F.3d at 285.

In the *en banc* decision, this Court emphasized that no single factor from *Bolger* is conclusive for or against a finding of commercial speech. Rather, “context matters”: 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.” *Id.* at 286 (quoting *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1987)).

As the phrase “context matters” makes clear, the approach of the Supreme Court and this Court requires a close attention to the relevant statements of the speaker and to the regulation imposed by the government. The government may not use the mere presence of commercial speech somewhere in an organization’s

activities as a ground to regulate the organization's noncommercial, core First Amendment speech. But as we will now discuss, the City's arguments commit that very error.

II. The City's Argument that Mandatory Displays in the Center's Waiting Room Involve Commercial Speech Ignores the Nature and Context of the Relevant Speech and Would Expand the Commercial-Speech Doctrine to Sweep In a Wide Range of Service Organizations and Ministries.

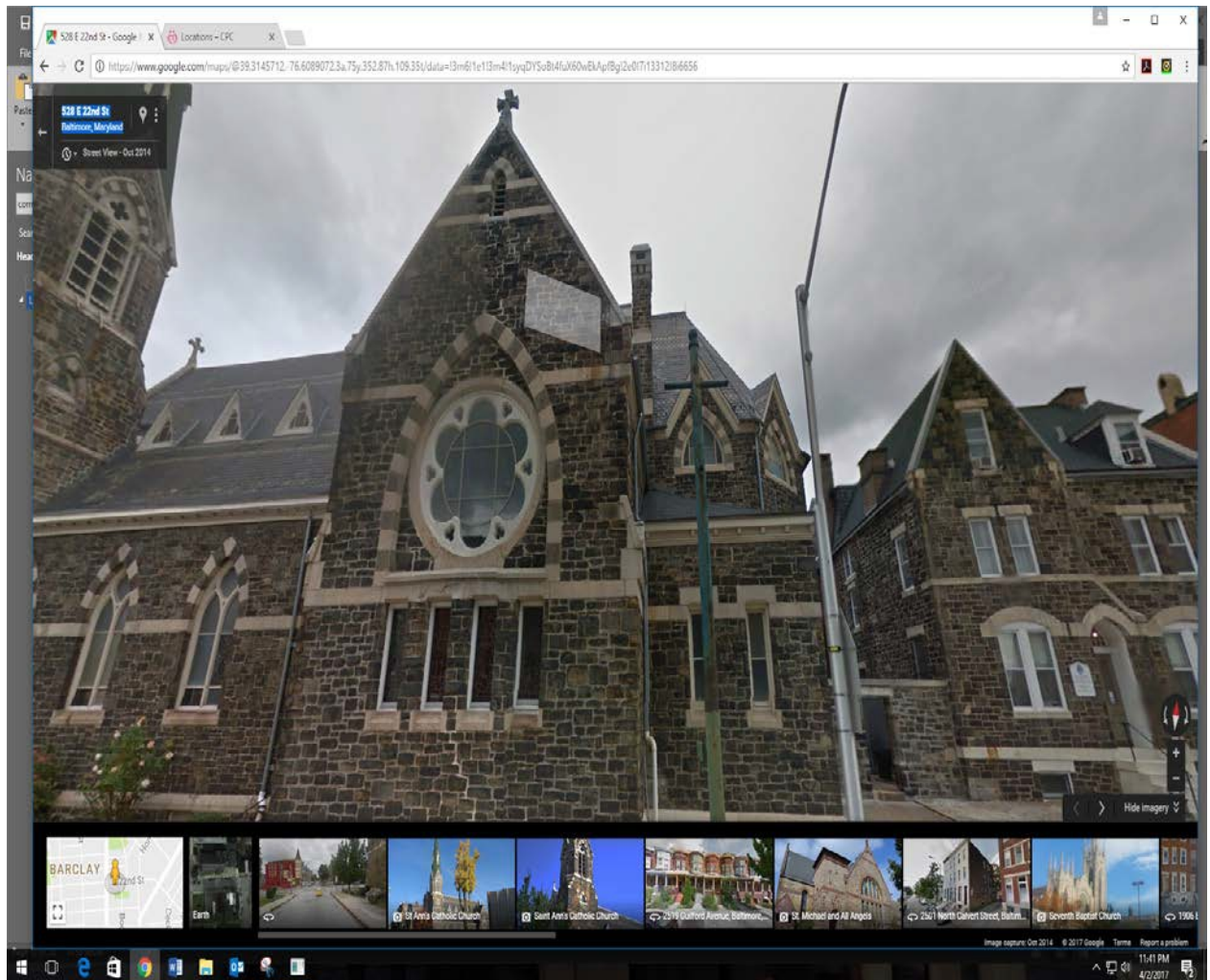
In granting summary judgment for the Center, the district court properly considered the overall nature of the speech involved in the relevant context. The court acknowledged the possibility that the Center's advertisements of its services could be considered commercial speech. Dist. Ct. Op. 25. But the ordinance does not regulate advertisements, as the court pointed out. *Id.* at 27 ("the Ordinance does nothing to alter what the Center says in its advertisements, nor does it matter if an LSPC advertises at all."). Instead, the ordinance only applies "if and when the client enters the waiting room," and there "it regulates the Center's noncommercial speech by mandating the timing and content of the introduction of the subjects of abortion and birth control in its conversations with clients." *Id.* at 27.

The court was entirely correct to hold that the Center's waiting room conversations are noncommercial, highly protected religious and moral speech. "A majority of the [waiting room] conversations" involve "clients' 'pregnancies and related personal, religious, and moral concerns'"; this "mission-oriented

communication between Center and client . . . continues during the entire time the client is at the Center.” *Id.* at 18. Along with this religiously based counseling, the Center offers pregnant women a range of other free services, including “material assistance (such as diapers, bottles and formula, cribs, strollers, baby and maternity clothing, baby and parenting books, etc.), educational programs . . . (such as parenting skills and Bible study), pregnancy testing, confidential peer counseling, abstinence information, sonograms, pre-natal development information, and a 24-hour helpline.” *Id.* at 12-13.

All of these activities grow out of the Center’s Mission Statement: to act as “‘a locally organized and funded volunteer ministry demonstrating the love of Jesus Christ by providing alternatives to abortion,’ and ‘shar[ing] the love of Jesus Christ, including the plan of redemption from our sins.’” Dist. Ct. Op. 12. The Center aims to provide spiritual guidance and care to the 1,200 women who visit its four locations each year, and the 8,000 women whom it aids via telephone helpline. *Id.* The Center at its Baltimore City location “operates in a rent-free space provided by St. Ann’s Catholic Church” (Dist Ct. OP. 11), on the property of that church (J.A. 359; see photo)²:

² The photograph below may be found by going to the website for the Greater Baltimore Pregnancy Center at <http://pregnantandneedhelp.org/> and clicking on “Locations,” which then shows that the Center’s Baltimore City location has the address of “St. Ann’s Center, 528 E. 22nd Street, Baltimore, Maryland 21218.” The picture below may be found as a view of that address on Google Maps at



The City nevertheless argues that this case involves commercial speech. But its arguments contravene the approach to speech set forth by the Supreme Court and this Court. The City ignores the “nature of the speech” involved in the relevant context: the noncommercial religious and moral counseling in the waiting room where the disclosure about abortion services is mandated. Instead, the City seizes on a few features of the Center and seeks to bootstrap those features into the

<https://www.google.com/maps/@39.3145712,-76.6089072,3a,75y,352.87h,109.35t/data=!3m6!1e1!3m4!1syqDYSoBt4fuX60wEkApfBg!2e0!7i13312!8i6656>.

conclusion that nearly all of what the Center does involves commercial speech. Moreover, by claiming that these features are sufficient to make the speech commercial, the City proposes a breathtaking expansion of the scope of the commercial speech doctrine, one that would sweep in a vast range of similar ministries and organizations offering free services to those in need.

A. Categorizing the Center’s Free Services as Commercial or Commercially Motivated Would Sweep In a Vast Range of Similar Ministries Serving Those in Need.

The City cannot avoid the undisputed facts that the Center charges no money for any of its services, Dist. Ct. Op. 14; receives no money for any of its referrals to adoption, housing, or other service agencies, *id.*; and provides all of its services out of a motivation that “is ‘deeply spiritual and religious.’” *Id.* (quoting Clews Aff., at ¶ 95 [ECF 101-2, Ex. B]). Because the City simply cannot show that the Center makes a “commercial” offer of goods and services, it tries to fill the void by arguing that the Center offers goods and services that *could* be provided commercially—that is, they “have value in the commercial marketplace.” City Br. 27; see also *id.* at 25 (arguing that the Center “proposes a commercial transaction” because it provides women—albeit for free—with “commercially valuable goods and services” like pregnancy tests, sonograms, and prenatal vitamins).

This fact, however, cannot justify characterizing all or most of the Center’s activities as involving “commercial speech.” A vast range of nonprofit

organizations and ministries provide free goods or services that have “commercial value”: *i.e.*, that can be provided for money. Many of these organizations operate directly in or through churches; others have a religious affiliation; and still others are secular. To take just a few examples:

- Food pantries and soup kitchens for the poor or homeless offer free food, which obviously has commercial value. Moreover, they often advertise its availability to populations they serve. Under the City’s rationale, government could require such ministries to post intrusive signs in their service areas.
- Pastoral or religious counselors, many of them clergy members in churches, provide free counseling on personal issues or marriage and family issues, a kind of service for which some other counselors charge money. Under the City’s rationale, government could require clergy or church counselors to state, for example, that they do not provide secular counseling—a statement that, like the compelled disclosures here, would intrude on the counselors’ relationship with their counselees/clients.
- Immigration and refugee ministries and organizations “welcome the stranger among us”³ by providing a host of services, such as English-language instruction and temporary housing, which have commercial

³ See *Matthew* 25:35 (New Revised Standard Version) (“for . . . I was a stranger, and you welcomed me”); see also *Leviticus* 19:33-34.

value and could be provided for money. Under the City's rationale, such a ministry could be compelled to display signs stating that it cannot provide certain services to illegal or undocumented immigrants. Such signs could easily alarm immigrant clients, undercut any atmosphere of comfort or trust, and therefore intrude on the provision of immigration services—just as the mandated signs in the Center's waiting room intrude on its provision of services to pregnant women.

Baltimore, of course, has its share of organizations and ministries dedicated to serving those in need. The following small sample is drawn from an online directory of homeless services in the city:

- Moveable Feast, a secular nonprofit that delivers medically-tailored meals to people with HIV/AIDS and other life-threatening illnesses free of charge. <http://www.mfeast.org/about-moveable-feast/mission-vision/> (last visited April 2, 2017). Moveable Feast's website displays, among other things, the "cash value" of the time volunteers gave in 2015. <http://www.mfeast.org>.
- Franciscan Center, a ministry of the Sisters of St. Francis of Assisi, which provides a wide range of outreach services. <http://fcbmore.org/guest-services/> (last visited April 1, 2017). These

include a meal program, a food pantry, clothing, IDs, eviction prevention, and counseling.

- The City Temple of Baltimore, a Baptist church, runs a soup kitchen and provides HIV/AIDS counseling, general counseling, and several other services, all free of charge.

<http://www.thecitytemple.org/submenu.php?p=outreach> (last visited April 1, 2017).

The City's argument that the Center's services can be regulated as commercial speech, without a showing of misrepresentation or deceptive advertising, would extend to these ministries and to countless other nonprofits. Under the City's definition, Moveable Feast, The Franciscan Center, and the City Temple of Baltimore all engage in commercial speech.

In addition to pointing to services that could have commercial value, the City attempts to bootstrap a few other isolated features into a finding of commercial speech. The City argues that the Center has an economic motivation because it associates and cooperates with third-party networks, for example, by being listed on third-party website directories. City Br. 27-28. All three of the nonprofit social service providers above are listed under the Baltimore page of the online Homeless Shelter Directory, which is not associated with any government entity. *See* <http://www.homelessshelterdirectory.org/cgi->

bin/id/cityfoodbanks.cgi?city=Baltimore&state=MD (last visited April 1, 2017). In today's digital age, it is helpful for such service centers to be organized in online directories maintained by third parties.

Next, the City relies on the fact that the Center refers to the individuals it serves as "clients." City Br. 28. But the term "client," although it certainly appears in professional settings involving commercial exchange, is also commonly used by organizations and ministries, including churches, that serve others free of charge. These providers need a term to refer to the individuals they serve; and "client" is broad-ranging, respectful, and courteous. Thus a national survey of homeless programs—including food pantries, as well as shelters, and church-based and religious, as well as secular, programs—defines "client" simply as "anyone who uses a program and is not accompanied by a parent." Martha A. Burt et al., *Homelessness: Programs and the People They Serve* 4 (August 1999), available at <http://www.urban.org/sites/default/files/publication/66286/310291-Homelessness-Programs-and-the-People-They-Serve-Findings-of-the-National-Survey-of-Homeless-Assistance-Providers-and-Clients.PDF> (last visited April 2, 2017). Likewise, a leading statement of Christian counselors, including clergy serving in churches, says, "[W]e use the term 'client' to refer to clients, patients, *congregants*, *parishioners*, or *helppees*." American Association of Christian Counselors, *AACC Code of Ethics* 4 (2004), available at aacc.net/wp-

images/fammed/aacc_code_of_ethics.doc (emphasis added) (last visited April 2, 2017).

Finally, the City asserts that the Center has an economic incentive to bring in clients so that it can procure more donations. City Br. 29 (asserting that the Center's "fundraising efforts . . . depend on its ability to attract clients"). The district court correctly rejected that argument, holding that the only evidence admitted concerning donor motivations was of a donor who gave to the Center "because she supports its pro-life, Christ-centered mission, not 'so that something can be purchased' or so that certain goods or services can be provided." Dist. Ct. Op. 24-25 (quoting Deposition of Elizabeth Dickenson at 30 [ECF 101-2, Ex. C]). The Center has a moral incentive to pursue its mission by serving as many clients as possible, and donors help it further that mission. But that is true of every charitable and humanitarian entity, including churches. To call the pursuit of mission an "economic incentive" and, therefore, conclude that the entity's speech is commercial, would allow the government to impose its message on the operations of any charitable entity that relies on donations.

B. Using Commercial-Speech Doctrine to Validate Disclosure Requirements Beyond the Context of Advertisements Would Allow Widespread Government Interference with the Speech of Religious Ministries and Other Service Organizations.

Notwithstanding the weakness of the assertion that any of the Center's speech is commercial, the district court was willing to assume that the Center's

advertisements could fit within that category. Dist. Ct. Op. at 25. But as already noted, the court then emphasized that the ordinance compels speech in the very different context of the Center's waiting room, thus "mandating the timing and content of the introduction of the subjects of abortion and birth control in its conversations with clients." *Id.* at 27.

Compelled speech in the Center's waiting room has a major practical impact on a small ministry, especially where the waiting room includes other activities and all of its client traffic. The City's broad expansion of commercial speech steps past an arguably commercial activity (advertisement) to include the Center's speech in providing its services. In *Centro Tepeyac v. Montgomery Cty.*, 5 F. Supp. 3d 745 (D. Md. 2014), another Maryland district judge granted summary judgment for a pregnancy center where, like here, a regulation required a disclosure statement to be prominently displayed in the waiting room. The court noted that "the speech being regulated takes place within an LSPRC's waiting room, not amongst the general discourse between and among pregnancy-service providers and pregnant women, but within Centro Tepeyac's four walls, much closer to [its] ideological message." *Id.* at 760. Similarly, because the plaintiff in *Tepeyac* advertised on a website, which "could be considered commercial speech," the "[d]efendants incorrectly attempt to extrapolate that it can regulate all of Plaintiff's speech as commercial speech, including that within its waiting room." *Id.*

The waiting room, which is the beginning of the relationship between the Center and its clients, is meant to provide a welcoming and comforting atmosphere. As the district court recognized, the Center emphasized that “[t]he Disclaimer would alter the course of the Center’s communications with its visitors’ because it would ‘ensure that every conversation at the Center begins with the subject of abortion and a government warning.’” Dist. Ct. Op. at 19 (quoting Clews Aff. at ¶ 65, 70 [ECF 102–2, Ex. B]). The disclaimer would affect all visitors and clients, “regardless of why they were coming or how they heard about the Center.” *Id.* The clients could be there to have a sonogram checking on the progress of their pregnancy, to receive counseling or prayer, or to pick up clothing or diapers for their infant children. Anything prominently displayed within that small space will attract attention and elicit a response, potentially changing the course that the communications would otherwise follow. *Id.*

Despite the uncontroverted facts showing the importance of the waiting room to the Center’s supportive mission, the City argues that its ordinance regulates only commercial speech because “[t]he disclosure required by the Ordinance concerns only the scope of services provided by [the Center].” City Br. 35. But this ignores the fact that even speech about the scope of an organization’s services can be unwanted and can interfere with the organization’s core, noncommercial message. Under the City’s rationale, government can force its own

message about the organization's services into places far removed from advertisements, including sensitive parts of the organization's facilities and operations. To take just a few examples:

- A church that offers free pastoral counseling to parishioners could be required to state that it does not provide professional or secular counseling—and post that statement not merely in its advertisements, but in the counseling office itself, or in other sensitive places throughout the church building.
- A religious school that does not teach the same scientific curriculum as public schools could be required to state that fact—not merely in its admissions materials, but in its main office, or even in classrooms and hallways, to ensure that all children and parents are aware of the difference.
- Immigration/refugee service organizations could be forced to post disclaimers about serving illegal immigrants (see *supra* p. 11) not merely in advertisements but throughout their facilities, including in counseling rooms.

If the City can use claims of harm from organizational advertisements to extend regulation throughout an organization's facilities, the result will affect these organizations and countless more. It will harm their speech in areas where they

deserve the strongest protection of the First Amendment. The government should not be able to alter or distort the messages in the core of their services without satisfying strict scrutiny.

CONCLUSION

The fact that the Center provides free services and advertises its services should not make it vulnerable to compelled government speech within its walls. Allowing the City to mandate a disclaimer that dictates when and how a sensitive topic is broached within the Center's ministry will directly affect the protection of speech available to churches, homeless shelters, and all similar nonprofits who work to help those in need.

The judgment of the district court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief contains 4,026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief therefore complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B).

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