**C.A. 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. 10-cv-760-MJG*
*The Honorable Marvin J. Garbis, United States District Judge*

## BRIEF OF *AMICI CURIAE* ETHICS & RELIGIOUS LIBERTY COMMISSION; INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.; and ARCHDIOCESE OF BALTIMORE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26 and Fourth Cir. R. 26.1, *Amici Curiae* Ethics & Religious Liberty Commission; International Society for Krishna Consciousness, Inc.; and the Archdiocese of Baltimore (whose official legal name is "Most Reverend William E. Lori, Roman Catholic Archbishop of Baltimore, and his successors in office, a corporation sole") (collectively, "*Amici*") state that:

1) None of the *Amici* are publicly held corporations or other publicly held entities.

2) None of the *Amici* has a parent corporation.

3) No publicly held corporation or other publicly held entity owns ten (10) percent or more of the stock of any one of the *Amici*.

4) To Amici's knowledge, no publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

DATE: April 3, 2017

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

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Daniel P. Collins

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## LOCAL ORDINANCES

## STATEMENT OF INTEREST OF THE *AMICI CURIAE*

*Amici curiae* are religious organizations that engage in religious speech and in charitable work that forms a critical part of fulfilling their religious mission.[1] *Amici* may vary in creed, but they strongly support the freedom of religious entities and other charities to engage in speech that promotes their efforts to assist those in need in accordance with the entity's own religious dictates. *Amici* are particularly concerned by the City's effort in this case to broadly and erroneously extend the commercial speech doctrine to speech by charitable organizations that, in fact, is fully protected by the First Amendment and to burden such speech with mandatory disclosure requirements that violate the organization's sincerely held religious beliefs.

The **Ethics and Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Scripture teaches that every person is an image-bearer of

[1] All parties to the instant appeal have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their current counsel, has made a monetary contribution to the preparation or submission of this brief.

God and that the womb is his domain. SBC members believe God's knowledge of unborn life even precedes the creative act of conception. Therefore, abortion is incongruent with SBC beliefs. The ERLC is committed to upholding the freedom of Christian ministries who care for women in unplanned pregnancies because we believe mothers and their unborn children are known and loved by God.

The **International Society for Krishna Consciousness, Inc.** ("ISKCON") is a monotheistic, or Vaishnava, faith within the Hindu tradition. As part of its tradition, ISKCON engages in service to others in society. It is a core belief among ISKCON's members that ISKCON members should act as appropriate role models in their belief, practice, and application of spiritual ethics, including when they serve others. Based on the Vedic scriptures as well as scientific evidence, members of ISKCON, and other Vaishnava Hindus, believe that life begins at conception. Thus, they encourage mothers to not abort an unwanted pregnancy, but instead to seek counseling and other systems of support such as those offered at the Greater Baltimore Center for Pregnancy Concerns.

The **Archdiocese of Baltimore**[2] teaches that God calls the Catholics of the

[2] The official legal name for the Archdiocese is the "Most Reverend William E. Lori, Roman Catholic Archbishop of Baltimore, and his successors in office, a corporation sole." The Archdiocese was initially a putative party plaintiff to the underlying suit, but the district court held that the Archdiocese lacked the Article III standing required to be a party plaintiff, and this Court affirmed that ruling. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 291 (4th Cir. 2013) (en banc).

Archdiocese to be a welcoming, worshipping community of faith, hope, and love, and that, through his Spirit, the Lord Jesus lives in those who believe, and reaches into our world with his saving message and healing love. The mission of the Archdiocese has many aspects, including evangelization, education in the truths of the Gospel and in the formation of conscience, and outreach in love and service to those in need. The Archdiocese assists more than 1,000,000 individuals annually through the many institutions within its jurisdiction.

## SUMMARY OF ARGUMENT

"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. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790-91 (1988). This mandate "involves choices of what to say and what to leave unsaid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). "Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* The actions of the City of Baltimore ("City") in this case contravene these settled First Amendment principles.

The City has enacted an Ordinance that requires the Appellee, the Greater Baltimore Center for Pregnancy Concerns ("Center"), to greet its visitors with a

government-mandated sign that abortion and other forms of birth control are available elsewhere. The Center, however, promotes a pro-life message that is consistent with its strongly held religious beliefs. Consistent with those beliefs, the Center provides counseling and other services to individual women who are confronting an unplanned pregnancy in an effort to persuade them to choose to carry their pregnancies to term. The Center contends that, if the required sign is posted at the Center, its visitors would immediately be presented with the implicit message that abortion is a legitimate, or even preferable, option. The Center thus contends that, in requiring such a sign, the City's Ordinance directly burdens the fully protected speech of the Center.

In defending the application of the Ordinance, the City has relied on dangerously overbroad notions of what constitutes "commercial speech" that is subject to lesser First Amendment scrutiny and to more substantial regulation. The City has effectively argued that, if a charitable organization engages in any publicizing of its charitable services, then the government may broadly deem the speech of the entity to be "commercial" and it may burden the entity's speech through mandatory disclosure signs posted at the place where the entity engages in fully protected advocacy. If upheld, the City's deeply flawed theories threaten to seriously dilute the protection that the First Amendment affords to the advocacy and activities of charitable organizations.

As the district court correctly found, well-settled law confirms that the City's Ordinance cannot constitutionally be applied to the Center, because the Ordinance impermissibly seeks to directly regulate the content of the Center's fully protected speech. The district court's judgment invalidating the application of the Ordinance to the Center should be affirmed.

## ARGUMENT

### I. The Ordinance Violates the First Amendment by Regulating Fully Protected Speech on the Basis of Its Content

In its opening brief, the City contends that "the speech regulated by the Ordinance" is either "commercial speech" or "professional speech" and that the City's Ordinance is therefore subject to less exacting First Amendment scrutiny. (Appellants' Opening Brief ("AOB") 25, 41.) But in making these arguments, the City overlooks the crucial threshold step in any First Amendment analysis, which is to identify *the speech that is regulated* by the challenged law—*i.e.*, the speech that triggers the law's applicability or that is otherwise burdened by the law's restrictions. *See, e.g.*, *Satellite Broad. & Commc'ns Ass'n v. F.C.C.*, 275 F.3d 337, 353 (4th Cir. 2001) (law that "on its face, … confers benefits or imposes burdens based upon the content of the speech it regulates" must meet applicable First Amendment standards); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (even a law directed at conduct must satisfy "'a more demanding standard'" under the First Amendment when, "as applied to plaintiffs the conduct

triggering coverage under the statute consists of communicating a message"). Here, the speech that triggers the applicability of the Ordinance, as well as the speech that is burdened by the Ordinance, is fully protected speech rather than commercial or professional speech. *See* section I(A) *infra*. Because the Ordinance regulates that speech based on its content, the Ordinance is subject to strict scrutiny. *See* section I(B) *infra*. The record confirms that the Ordinance fails that scrutiny; indeed, it cannot even satisfy the intermediate scrutiny that would apply if commercial speech were all that were being regulated. *See* section II *infra*.

### A. The Ordinance Regulates Fully Protected Speech

Contrary to the City's contention that the Ordinance regulates only commercial advertising, the Ordinance directly regulates the Center's provision of a wide range of information to women who are confronting unplanned pregnancy, including information about alternatives to abortion, information about why the Center thinks that a particular client may wish to consider such alternatives, and information about the practical assistance that the Center might be able to provide to assist the client in making that decision. The Center's speech on all of these subjects is fully protected.

#### 1. The Ordinance Is Triggered by, and Burdens, the Center's Fully Protected Speech

By its terms, the Ordinance applies only to a person "whose primary purpose is to provide pregnancy-related services" *and* "*who … provides information about*

*pregnancy-related services*" but "does not provide or refer for … abortions" or "nondirective and comprehensive birth-control services." Balt. City Health Code § 3-501 (emphasis added). Accordingly, to the extent that the Ordinance applies to the Center at all, that is *only* because the Center "provides information about pregnancy-related services" but does not "refer" for "abortions" or "comprehensive birth-control services." The applicability of the Ordinance is thus triggered by the Center's speech, and the extensive record developed in the district court confirms that the "information about pregnancy-related services" that is provided by the Center includes a broad range of fully protected speech.

In furtherance of its overall "objective" to persuade women not to choose an abortion (Joint Appendix ("J.A.") 368), the Center provides information about "alternatives to abortion to women who find themselves in the midst of an unplanned pregnancy." (J.A. 374.) As declared in its "Mission Statement," the Center also "strive[s] to provide accurate and complete information about prenatal development and abortion," because the Center considers such information to be essential to enabling women "to make informed decisions" about whether to choose an abortion or instead to carry their pregnancies to term. (*Id*.) Visitors to the Center therefore receive what the Center considers to be "accurate information about pregnancy, fetal development, lifestyle issues, and related concerns,"

including "accurate information about abortion procedures and risks." (J.A. 375.)[3]

In support of its effort to persuade women not to choose abortion, the Center also provides "a range of free services," including "material assistance" (such as diapers, strollers, etc.), "pregnancy testing, confidential peer counseling, abstinence information, sonograms, pre-natal development information," as well as "[r]eferrals … to shelters, healthcare options, and adoption services." (J.A. 362-63.) In its conversations with clients, the Center provides information about these services, but—consistent with its "religious and moral opposition to abortion"—the Center does not "perform or refer for abortions." (J.A. 368, 370.) In a nine-point "Commitment of Care" posted in the Center's waiting room, the Center discloses (in point seven) that it does not "offer, recommend or refer for abortions or abortifacients (birth control)." (J.A. 375.) Because the Center's work is motivated by the "belief that the Bible and Christianity are strongly opposed to abortion," the Center's conversations with its clients are "permeate[d]" by the "Center's pro-life Christian beliefs" and include a discussion of the "sensitive personal, moral and religious" aspects of pregnancy and abortion. (J.A. 361, 366.) These discussions may include prayer between Center personnel and clients. (J.A.

[3] Although there was evidence in the legislative record that some pregnancy centers provide what the City considers to be factually inaccurate information concerning abortion, there is no evidence in the record on summary judgment that *the Center* provided factually inaccurate information to its clients *at the Center*. *See* section II *infra*.

365.) Moreover, each new client is "given a free Bible" when she leaves the Center. (J.A. 367.)

On this record, the "information about pregnancy-related services" that the Center provides—which is what brings the Center within the scope of the Ordinance—is the Center's provision of information about "alternatives to abortion," including "adoption services"; its provision of "information about abortion procedures and risks" and about "pregnancy" and "fetal development"; and its provision of information about the pregnancy-related services the Center provides, including "pregnancy testing, confidential peer counseling, abstinence information, sonograms, [and] pre-natal development information." (J.A. 363, 374-75.) The Center's provision of this information, which is undertaken in the context of its efforts to dissuade women from choosing to have an abortion, is unquestionably fully protected speech under the First Amendment. *See*, *e.g.*, *Riley v. National Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 794 (1988) ("advocacy and dissemination of information" on matters of political, moral, or public concern are fully protected); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980) ("the First Amendment 'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern'") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 287

(4th Cir. 2013) (en banc) ("informative and persuasive aspects" of Center's speech are "'fully protected'").

The record also confirms that the same fully protected speech that triggers the applicability of the Ordinance is also the same speech that is directly *burdened* by the Ordinance's disclosure requirement. The disclosure that is mandated by the Ordinance must be made by a prescribed sign "conspicuously posted in the center's waiting room," Balt. City Health Code § 3-502(b)(3), which is where the Center provides information about pregnancy-related services and engages in its pro-life counseling. (J.A. 830 ("I mean, the Center literally exists in one small office space.").) If the Center were required to post the City-required sign prominently and starkly announcing that the Center does not provide or refer for abortions, that would burden the Center's pro-life advocacy by conspicuously and immediately communicating that abortion is an option that the woman should be considering. As the Center's Director testified in her deposition, the required sign "would very likely subject someone [to the idea of abortion] … who was having a counseling session and had not thought about abortion. She could very easily see that sign and all of a sudden abortion would possibly become an option of something she would consider because she saw the sign." (*Id*.) Regardless of whether the compelled statement required by the Ordinance is or is not true, that "compulsion burdens protected speech" by "[m]andating speech that a speaker

would not otherwise make." *Riley*, 487 U.S. at 795, 797-98.

### 2. The City Is Wrong in Contending That the Ordinance Regulates Only "Commercial Speech"

The City nonetheless argues that the Ordinance regulates only "commercial speech" (AOB 22-41), but that is wrong.

The City devotes a significant portion of its brief to arguing that the Center engages in *advertising* that should be considered to be "commercial speech." Specifically, the City contends that the Center's limited advertising on buses and in the "Pennysaver" magazine, as well as the separate advertising conducted by national organizations with which the Center is affiliated, should be considered to be "commercial speech." (AOB 7, 25-30.) This advertising constitutes commercial speech, according to the City, because the Center "offers a variety of commercially-valuable goods and services to consumers, including pregnancy tests, sonograms, and counseling about health care options," and the Center "promotes these goods and services through traditional advertisements." (AOB 26.) These arguments are flawed, *see infra* at 13-16, but they are ultimately beside the point, because the Ordinance does not regulate such advertising.

As the district court correctly recognized, the referenced advertising by the Center is simply irrelevant to the applicability of the Ordinance, because the Ordinance applies to the Center "*regardless* of whether [it] advertise[s] nonfraudulently or do[es] not advertise at all." (J.A. 1286, emphasis added.) What

triggers the applicability of the Ordinance is *not* that the Center advertises the availability of its services, but that the Center "provides information about pregnancy-related services." Balt. City Health Code § 3-501. The City has not contended, and could not plausibly contend, that the latter phrase should be narrowly construed to apply only to those communications by the Center that do no more than offer the availability of the Center's services. *See Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 165 (2002) (ordinance regulated fully protected speech because the city had never contended, and could not persuasively contend, that the ordinance applied "only to commercial activities and the solicitation of funds"). Even assuming that the Center's advertising that the City claims is commercial counts as the provision of "information about pregnancy-related services," the text of the Ordinance indisputably is not *limited* to such advertising. Moreover, the City's advertisements publicizing its services are *not* the speech that is burdened by the Ordinance, because (as the City concedes) the Ordinance does not require any disclosure in such advertising. (AOB 51-52.) Rather, the Ordinance requires that the disclosure be made by a prominent sign in the Center's waiting room, where it will burden the fully protected pro-life counseling of the Center that takes place there. *See supra* at 9-11.

Accordingly, the City is quite wrong in thinking that, merely because the Center publicizes its services, the City can "extrapolate" from that a power to

"regulate *all* of [the Center's] speech as commercial speech, including that within its waiting room." *Centro Tepeyac v. Montgomery County*, 5 F. Supp. 3d 745, 760 (D. Md. 2014) (emphasis added). Indeed, the City's expansive and slipshod approach to the commercial speech doctrine would have very troubling implications for a wide range of religious and charitable nonprofits and for the benevolent work that they do. Under the City's theory, a broad array of publicizing by churches and charities could be reclassified as commercial speech and then the church or charity could be required to post the City's preferred disclosure notices in its primary service center, where those notices could burden all of the entity's speech. The free distribution of Bibles and religious literature, the provision of meals at a soup kitchen, and the offering of beds and clothing at homeless shelters all equally involve the provision of "commercially-valuable goods and services to consumers" (AOB 26), but that does not mean that publicizing the availability of such alms constitutes "commercial speech." Nor does the fact that a church or charity engages in such publicizing give the government the right to require the posting of state-mandated disclosures that burden the entity's advocacy or proselytizing.

Well-settled First Amendment law precludes the City's effort to effectively assert a power to "regulate all of [the Center's] speech as commercial speech[.]" *Centro Tepeyac*, 5 F. Supp. 3d at 760. As the Supreme Court recently reaffirmed,

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). At its furthest reach, the commercial speech doctrine may also reach communications that only *implicitly* propose a commercial transaction, *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983) (brochures by contraceptive manufacturer discussing the benefits of condoms and identifying the manufacturer's products or company were "commercial speech"), and this Court has identified "'three factors to consider in deciding whether speech is commercial: (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.'" *Greater Balt. Ctr. for Pregnancy Concerns*, 721 F.3d at 285. Applying these factors, the district court correctly concluded that *none* of the Center's speech meets all three factors because there is no evidence in the record that the Center has an economic interest in publicizing its services. (J.A. 1260-61 (noting that there is no evidence that the Center's publicity sought donations or otherwise reflected an economic motive).) *Cf. Greater Balt. Ctr. for Pregnancy Concerns*, 721 F.3d at 285 (instructing the district court to address, after discovery, "whether the Center possesses economic interests apart from its ideological motivations").

Although this Court held that speech could theoretically be determined to be "commercial in the absence of [an] economic motivation," the inquiry in such a

case, at least in the context of a compelled disclosure requirement, would turn on "'the nature of the speech taken as a whole and the effect of the compelled statement thereon.'" *Id*. at 285-86 (quoting *Riley*, 487 U.S. at 796). Here, the district court undertook that inquiry and correctly concluded that "the Ordinance actually regulates and impacts the *noncommercial* speech taking place in the waiting room." (J.A. 1266, emphasis added); *accord National Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834 n.5 (9th Cir. 2016) ("*NIFLA*") (California disclosure requirement for pregnancy clinics "primarily regulates the speech that occurs within the clinic, and thus is not commercial speech"); *Centro Tepeyac*, 5 F. Supp. 3d at 760 ("the speech being regulated takes place within [a pregnancy center's] waiting room … within [Plaintiff's] four walls, much closer to their ideological message").[4]

Furthermore, even if some subset of the Center's speech that is regulated by the Ordinance is commercial, that speech is so "inextricably intertwined with otherwise fully protected speech" that the speech does not "retain[] its commercial character" and cannot be regulated as commercial speech. *Riley*, 487 U.S. at 796. The City protests that this doctrine cannot apply here because nothing requires the

[4] Contrary to what the City contends, *Fargo Women's Health Organization, Inc. v. Larson*, 381 N.W.2d 176 (N.D. 1986), is distinguishable in a way that confirms the City's error here. The statute applied there was not a speaker-based disclosure requirement that directly burdened a wide range of a clinic's speech; rather, it was a generic false advertising statute that was applied only to allegedly misleading descriptions of the services that the clinic offered. *Id*. at 179-82.

Center to combine its noncommercial speech with its commercial speech. (AOB 33-34.) The argument fails, because the City overlooks that *the City is the one who is doing the intertwining*: ostensibly to address instances of advertising that the City considers misleading, the City has imposed a disclosure requirement that is triggered by, and directly burdens, the Center's fully protected speech rather than the alleged commercial speech.

By imposing disclosure requirements that are untethered from specific instances of allegedly misleading commercial speech, and instead broadly burdening a nonprofit entity's advocacy, the City's extraordinary approach to the commercial speech doctrine threatens substantially to weaken the First Amendment's free speech protections. *Cf. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring in judgment) ("Because 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.") (footnote omitted).

### 3. The Center's Speech That Is Regulated by the Ordinance Is Not "Professional Speech"

The City contends, in the alternative, that *all* of the speech that takes place at the Center is "professional speech" subject to lesser scrutiny (AOB 41-45), but that is plainly wrong. Although the City notes that the Center has a "licensed

physician" on its staff (AOB 43), the City concedes that the undisputed record evidence establishes that this physician "does not ever meet directly with [C]enter clients." (AOB 8.) Moreover, the disclosure required by the City indisputably does not relate to the safe and consensual performance of any medical procedure that the clinic actually performs. Because this case involves neither "the First Amendment rights of a professional" nor the disclosure of "information sufficient for patients to give their informed consent to medical procedures," there simply is no factual basis in the district court record for applying the professional speech doctrine. *Stuart v. Camnitz*, 774 F.3d 238, 247-48 (4th Cir. 2014); *cf. NIFLA*, 839 F.3d at 839 ("professional speech is speech that occurs between professionals and their clients in the context of their professional relationship").

### B. The Ordinance Is Subject to Strict Scrutiny Because It Regulates the Center's Fully Protected Speech Based on Its Content

The Ordinance is plainly a *content-based* regulation of the Center's fully protected speech. Because "providing information about pregnancy-related services is a message which triggers the [Ordinance's] disclosure requirement[]," the Ordinance "thereby exact[s] a content-based penalty." *Centro Tepeyac*, 5 F. Supp. 3d at 755; *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("[c]ontent-based laws" are "those that target speech based on its communicative content"). And because the Ordinance "[m]andate[s] speech that a speaker would not otherwise make," it "necessarily alters the content of the

speech" that it burdens and is for that additional reason a "content-based regulation of speech." *Riley*, 487 U.S. at 795. As such, the Ordinance is "presumptively unconstitutional and may be justified only if the [City] proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Moreover, strict scrutiny applies here regardless of whether the compelled speech is a statement of fact: even if factual information might be "relevant to the listener, … a law compelling its disclosure would clearly and substantially burden the protected speech" and is subject to strict scrutiny. *Riley*, 487 U.S. at 798.

What is more, the legislative history confirms that the Ordinance's regulation of speech is impermissibly based on *viewpoint* discrimination. In imposing its disclosure requirement, the City's focus was *not* on whether or not limited-service pregnancy centers did or did not engage in off-site advertising seeking to draw women in, *it was on the perceived incompleteness of the options that would be discussed once a woman arrived at the center*. The City Council's official "synopsis" of the Ordinance states that it "was introduced because of the 'importance of choice,'" *i.e.*, the City's belief that, because a woman who is confronting an unplanned pregnancy "must decide which choice is right for her and should explore the options available," pregnancy centers should be made to disclose "certain services and/or referrals not offered by the center." (J.A. 137-38,

emphasis omitted.) And as the City Health Department explained, the pregnancy centers covered by the Ordinance "do not provide *complete and comprehensive information* regarding *all* pregnancy options and birth control prevention." (J.A. 57, emphasis added.) Because the very purpose of the Ordinance is to remind a client that she has an option in addition to the ones that the Center advocates, the Ordinance is a viewpoint-discriminatory burdening of the Center's pro-life advocacy. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (claim of impermissible viewpoint discrimination may be asserted on an as-applied basis).

The Ordinance, however, remains subject to strict scrutiny even if it is not considered to be viewpoint-discriminatory. To trigger strict scrutiny, it is sufficient that a regulation targets fully protected speech based on its content, "even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2230. As explained below, the Ordinance cannot survive even intermediate scrutiny, and it therefore necessarily cannot survive the strict scrutiny applicable to content-based restrictions.

## II. The Ordinance Cannot Survive Intermediate Scrutiny, Much Less Strict Scrutiny

Even assuming (contrary to the reality) that the speech regulated by the Ordinance were commercial speech, the Ordinance would fail the intermediate

scrutiny that is applicable to regulations of such speech.[5] It follows, therefore, that the Ordinance obviously cannot satisfy strict scrutiny.

Under the "*Central Hudson* test" applicable to regulations of commercial speech that is not inherently misleading, the Court must consider (1) "'whether the asserted governmental interest is substantial'"; (2) "'whether the regulation directly advances the governmental interest asserted'"; and (3) "'whether it is not more extensive than is necessary to serve that interest.'" *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367-68 (2002) (quoting *Central Hudson*, 447 U.S. at 566). "Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional." *Id*. "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger*, 463 U.S. at 71 n.20. The City has not carried its burden.

[5] The City is wrong in contending (AOB 38-39) that, under *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985), the Ordinance may be upheld on the ground that it merely requires the disclosure of "purely factual and uncontroversial information" and therefore need only be "reasonably related" to preventing consumer deception. *Id*. at 651. *Zauderer* cannot be applied where, as here, the required disclosure is untethered to the supposedly misleading commercial speech that allegedly justifies it and where, as a result, the disclosure directly burdens a wide range of speech. *Id*. (recognizing that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment" even "by chilling protected *commercial* speech") (emphasis added). Moreover, as the Second Circuit has held, a requirement to "mention controversial services that some pregnancy services centers, such as Plaintiff[] in this case, oppose" goes beyond the "disclosure of 'uncontroversial' information" and cannot be justified under *Zauderer*. *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 245 n.6 (2d Cir. 2014).

In particular, the record confirms that the City has failed to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). On the contrary, the record refutes the City's contention that the disclosure required by the Ordinance will do anything to advance the City's asserted interest in avoiding consumer confusion about the services that the Center offers. As the district court explained, a woman would only see the disclosure if she physically came to the Center, but "[t]here is no evidence that any women actually came to the Center seeking abortions or contraception because they were misled by advertising." (J.A. 1284.) Nor is there any evidence in the record "that women were coming to the Center under false pretenses and suffering harmful health consequences because of it." (J.A. 1285.) *See Centro Tepeyac*, 5 F. Supp. 3d at 768. Moreover, the undisputed evidence confirms that, if a woman has not already figured out upon arrival at the Center (which is located on the grounds of what is very obviously a Roman Catholic church) that the Center does not provide abortions, that fact is promptly disclosed to the woman, in the Center's own words, in its "Commitment of Care" and in the Center personnel's oral comments. (J.A. 370, 375.)

On this record, the Ordinance serves literally no purpose other than to burden the Center's protected speech with the City's preferred reminder about the availability of abortions elsewhere. And, for the same reason, the Ordinance is not

sufficiently tailored to a substantial government interest, because the "'fit' between the [City's] ends and the means chosen to accomplish those ends" is, on this record, simply non-existent. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

## CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

DATE: April 3, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments), this brief contains 5,160 words.

This brief complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point type in Microsoft Word.

Dated: April 3, 2017

*/s/ Daniel P. Collins*
Daniel P. Collins

**CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: April 3, 2017

By: */s/ Daniel P. Collins*
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