No. _____

In the Supreme Court of the United States

MAYOR & 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,

***Petitioners*,**

v.

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Molly Duane
Autumn Katz
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street
22nd Floor
New York, NY 10038
(917) 637-3600
mduane@reprorights.org
akatz@reprorights.org

Stephanie Toti
LAWYERING PROJECT
25 Broadway, 9th Floor
New York, NY 10004
(646) 490-1083
stoti@lawyeringproject.org

Dana P. Moore
Deputy City Solicitor

Suzanne Sangree
Counsel of Record
Senior Counsel
BALTIMORE CITY DEPARTMENT OF LAW
City Hall, Room 101
100 N. Holliday Street
Baltimore MD 21202
(443) 388-2190
suzanne.sangree2@baltimorecity.gov

Counsel for Petitioners

---

*Gibson*Moore Appellate Services, LLC
206 East Cary Street♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS
Appendix

Page:

[ENTERED JANUARY 5, 2018]

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2325

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INCORPORATED,

Plaintiff - Appellee,

and

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION INCORPORATED; ARCHBISHOP EDWIN F. O'BRIEN, ARCHBISHOP OF BALTIMORE AND HIS SUCCESSORS IN OFFICE, A CORPORATION SOLE,

Plaintiffs,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE RAWLINGS-BLAKE, Mayor of Baltimore, in her Official Capacity; LEANA S. WEN, M.D., in her official capacity as Baltimore City Health Commissioner,

Defendants - Appellants,

and

OLIVIA FARROW, Esq., Acting Baltimore City Health Commissioner, in her official capacity; BALTIMORE CITY HEALTH DEPARTMENT; OXIRIS BARBOT,

Defendants,

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; PUBLIC HEALTH ADVOCATES; THE INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL; NARAL PRO-CHOICE MARYLAND; NARAL PRO-CHOICE AMERICA; CATHOLICS FOR CHOICE; BALTIMORE ABORTION FUND; DC ABORTION FUND, ("DCAF"); NATIONAL ABORTION FEDERATION; MARYLAND CHAPTER FOR THE NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD OF MARYLAND; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; WHOLE WOMAN'S HEALTH OF BALTIMORE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; THE HONORABLE CHRISTOPHER VAN HOLLEN, JR.; THE HONORABLE ELIJAH CUMMINGS,

Amici Supporting Appellant,

EBONY HARRIS; ETHAN TAYLOR; LINDA HOLLIDAY; NICOLE HOWARD; DESTINIE JACKSON; JENNERA SMALLS; AMERICAN CENTER FOR LAW AND JUSTICE; NATIONAL AND LOCAL PREGNANCY CARE ORGANIZATIONS; DEMOCRATS FOR LIFE OF AMERICA; INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE; CHRISTIAN LEGAL SOCIETY; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES; HEARTBEAT INTERNATIONAL; NATIONAL LEGAL FOUNDATION; STATE OF WEST VIRGINIA; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF KANSAS; STATE OF MICHIGAN; STATE OF NEBRASKA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF TEXAS; STATE OF UTAH; DR. KESTEN C. GREEN; LAW PROFESSORS; ETHICS & RELIGIOUS LIBERTY COMMISSION; INTERNATIONAL

SOCIETY FOR KRISHNA CONSCIOUSNESS, INCORPORATED; ARCHDIOCESE OF BALTIMORE,

Amici Supporting Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:10-cv-00760-MJG)

Argued: October 24, 2017 Decided: January 5, 2018

Before WILKINSON, DUNCAN, and AGEE, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Duncan and Judge Agee joined.

ARGUED: Suzanne Sangree, BALTIMORE CITY LAW DEPARTMENT, Baltimore, Maryland, for Appellants. David William Kinkopf, GALLAGHER EVELIUS & JONES LLP, Baltimore, Maryland, for Appellee. **ON BRIEF:** Molly R. Duane, Autumn C. Katz, Stephanie Toti, CENTER FOR REPRODUCTIVE RIGHTS, New York, New York, for Appellants. Peter J. Basile, FERGUSON, SHETELICH & BALLEW, PA, Baltimore, Maryland; Steven G. Metzger, Anatoly Smolkin, GALLAGHER EVELIUS & JONES LLP, Baltimore, Maryland; Mark L. Rienzi, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C., for Appellee. Simona G. Strauss, P. Casey Mathews, Palo Alto, California, Veronica R. Jordon-Davis, SIMPSON

THACHER & BARTLETT LLP, New York, New York, for Amicus Public Health Advocates. Douglas W. Baruch, Washington, D.C., Janice Mac Avoy, Jennifer L. Colyer, Andrew B. Cashmore, Leigh G. Rome, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, New York, New York, for Amicus International Municipal Lawyers Association. Priscilla Joyce Smith, YALE LAW SCHOOL, Brooklyn, New York, for Amicus The Information Society Project at Yale Law School. Kimberly A. Parker, Lesley Fredin, Washington, D.C., Paloma Naderi, WILMER CUTLER PICKERING HALE AND DORR LLP, Boston, Massachusetts, for Amici NARAL Pro-Choice Maryland, NARAL Pro-Choice America, Baltimore Abortion Fund, Catholics for Choice, DC Abortion Fund, Maryland Chapter for the National Organization for Women, National Abortion Federation, Planned Parenthood of Maryland, Religious Coalition for Reproductive Choice, Whole Woman's Health of Baltimore, Incorporated, Women's Law Center of Maryland, The Honorable Christopher Van Hollen, Jr., and The Honorable Elijah Cummings. Andrea Picciotti-Bayer, THE CATHOLIC ASSOCIATION, McLean, Virginia; Jack Ryan Terziu, Baltimore, Maryland, for Amici Ebony Harris, Ethan Taylor, Linda Holliday, Nicole Howard, Destinie Jackson, and Jennera Smalls. Edward L. White III, Erik M. Zimmerman, Ann Arbor, Michigan, Frances J. Manion, Geoffrey R. Surtees, AMERICAN CENTER FOR LAW AND JUSTICE, New Hope, Kentucky, for Amicus American Center for Law and Justice. Anna F. Paprocki, Deanna M. Wallace, AMERICANS UNITED FOR LIFE, Arlington, Virginia, for Amicus National and Local Pregnancy Care Organizations. Thomas C. Berg, Religious Liberty Appellate Clinic, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW, Minneapolis,

Minnesota; Kimberlee Wood Colby, Christian Legal Society, CENTER FOR LAW AND RELIGIOUS FREEDOM, Springfield, Virginia, for Amici Democrats for Life of America, Institutional Religious Freedom Alliance, and Christian Legal Society. Kevin H. Theriot, Elissa M. Graves, Scottsdale, Arizona, David A. Cortman, ALLIANCE DEFENDING FREEDOM, Lawrenceville, Georgia, for Amici National Institute of Family and Life Advocates and Heartbeat International. Frederick W. Claybrook, Jr., CLAYBROOK LLC, Washington, D.C.; Steven W. Fitschen, THE NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia, for Amicus National Legal Foundation. Patrick Morrisey, Attorney General, Elbert Lin, Solicitor General, Thomas M. Johnson, Jr., Deputy Solicitor General, Erica N. Peterson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Amicus State of West Virginia. Steven T. Marshall, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ALABAMA, Montgomery, Alabama, for Amicus State of Alabama. Leslie Rutledge, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARKANSAS, Little Rock, Arkansas, for Amicus State of Arkansas. Derek Schmidt, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF KANSAS, Topeka, Kansas, for Amicus State of Kansas. Bill Schuette, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MICHIGAN, Lansing, Michigan, for Amicus State of Michigan. Douglas J. Peterson, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEBRASKA, Lincoln, Nebraska, for Amicus State of Nebraska. Michael DeWine, Attorney

General, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Amicus State of Ohio. Alan Wilson, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Amicus State of South Carolina. Ken Paxton, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF TEXAS, Austin, Texas, for Amicus State of Texas. Sean D. Reyes, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF UTAH, Salt Lake City, Utah, for Amicus State of Utah. Blaine H. Evanson, Daniel Nowicki, GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California, for Amicus Dr. Kesten C. Green. C. Kevin Marshall, David T. Raimer, Catherine Maggio Schmucker, JONES DAY, Washington, D.C., for Amici Law Professors. Daniel P. Collins, Adam P. Barry, MUNGER, TOLLES & OLSON LLP, Los Angeles, California, for Amici Ethics & Religious Liberty Commission, International Society for Krishna Consciousness, Incorporated, and Archdiocese of Baltimore.

WILKINSON, Circuit Judge:

A Baltimore City ordinance requires pregnancy clinics that do not offer or refer for abortions to disclose that fact through signs posted in their waiting rooms. The district court held that the law, as applied to appellee, the Greater Baltimore Center for Pregnancy Concerns, Inc., violates the First Amendment's Free Speech Clause. We affirm. The City has considerable latitude in regulating public health and deceptive advertising. But Baltimore's chosen means here are too loose a fit with those ends,

and in this case compel a politically and religiously motivated group to convey a message fundamentally at odds with its core beliefs and mission.

I.

A.

The Greater Baltimore Center for Pregnancy Concerns is a non-profit Christian organization committed to "providing alternatives to abortion to women who find themselves in the midst of an unplanned pregnancy." J.A. 360. Operating from rent-free space provided by a Catholic Church, the Center provides pregnant women with free services, including counseling, bible study, pregnancy tests, sonograms, and education on child care, life skills, and abstinence. It also provides free prenatal vitamins, diapers, clothing, books, and other assistance. The Center does not charge for its goods or services. In keeping with its religious mission, the Center does not provide or refer for abortions. That fact is clearly stated in a "Commitment of Care" pamphlet available in the Center's waiting room. J.A. 362, 375.

The Center advertises its pregnancy-related services, but does not expressly broadcast its religious opposition to abortion in those ads. For example, a 2010 campaign on Baltimore buses touted "FREE Abortion Alternatives," "FREE Confidential Options Counseling," "FREE Pregnancy Tests," and "FREE Services." J.A. 698. A 2013 spread in the local *Penny Saver* advertised, among other things, "Pre-natal development information," "Information about procedures and risks of abortion," "Bible Study," and "Post Abortion Counseling & Education." J.A. 693. The Center is

also affiliated with two pro-life umbrella organizations, Care Net and Heartbeat International, which refer women to their affiliates through national call centers and websites.

Concerned that women seeking abortions might be misled into visiting pro-life pregnancy centers and delaying the abortion, the Mayor and City Council of Baltimore enacted Ordinance 09-252 on December 4, 2009. The ordinance requires any "limited-service pregnancy center" to post a disclaimer in its waiting room notifying clients that it "does not provide or make referral for abortion or birth-control services." *See* Balt. City Health Code §§ 3-501 to 3-506 (2010). Under the ordinance, a "limited-service pregnancy center" means any entity "whose primary purpose is to provide pregnancy-related services" and which "provides information about pregnancy-related services," but "does not provide or refer for" abortions or "nondirective and comprehensive" birth control. *Id*. at § 3-501. The required signs must be "conspicuously posted" and "easily readable" in English and Spanish. *Id*. at § 3-502(b).

In the event of a violation, the ordinance authorizes Baltimore City's Health Commissioner to issue a notice directing an offending pregnancy center to correct the violation. *Id*. at § 3-503. Failure to comply is punishable by the issuance of a $150 citation. *Id*. at § 3-506; Balt., Md. City Code Art. I, §§ 40-14, 41-14.

B.

The Center filed suit against the City Council, Mayor Stephanie Rawlings-Blake, and acting Health Commissioner Olivia Farrow in the District of Maryland on March 29, 2010. The suit, brought under 42 U.S.C. §

1983, sought to enjoin enforcement of the ordinance for violating the Center's First Amendment rights to free speech, assembly, and free religious exercise; the Fourteenth Amendment's guarantee of equal protection; and Maryland law's so-called "conscience clause," Md. Code Ann., Health-Gen. § 20-214. The Center filed a motion for partial summary judgment on First Amendment grounds supported by an affidavit from its executive director, and the City responded with a motion to dismiss for failure to state a claim. The City also filed a Rule 56(f) affidavit informing the district court that it believed additional discovery was necessary to resolve the case.

The district court granted summary judgment for the Center. It held that the ordinance violated the Free Speech Clause because it was not narrowly tailored to accomplish a compelling government interest. *O'Brien v. Mayor & City Council of Baltimore*, 768 F. Supp. 2d 804, 808 (D. Md. 2011). A panel of this court affirmed that decision on appeal. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 683 F.3d 539 (4th Cir. 2012).

Rehearing the case en banc, the court vacated the district court's judgment and remanded for further proceedings. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013) (en banc). The court concluded that discovery was needed to determine the Center's economic motivation, the scope and content of its advertisements, the effect of the ordinance, and "evidence substantiating the efficacy of the Ordinance in promoting public health, as well as evidence disproving the effectiveness of purported less restrictive alternatives to the Ordinance's disclaimer." *Id.* at 285-88.

On remand, the parties conducted extensive discovery and filed cross-motions for summary judgment. The City objected to some discovery limitations below, but does not raise that issue on appeal. As it acknowledges, "[t]he evidence that the City was able to gather through discovery is more than sufficient" to decide this case. Appellant Opening Br. 17.

The district court held that the ordinance, as applied to the Center, violated the First Amendment right to freedom of speech. J.A. 1243. First, it 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 [the ordinance] is thus subject to strict scrutiny." J.A. 1256. Second, the district court determined that the record failed to demonstrate that the ordinance furthers a compelling government interest because "there is insufficient evidence to demonstrate that deception actually takes place and that health harms are in fact being caused by delays resulting from deceptive advertising." J.A. 1280. Finally, the court concluded that the ordinance is not narrowly tailored because it applies to pregnancy centers "regardless of whether they advertise nonfraudulently or do not advertise at all." J.A. 1286.

This appeal followed. We review the grant of a motion for summary judgment de novo. *See Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 (4th Cir. 2009). Summary judgment is appropriate where there is no genuine dispute of material fact and "the moving party is entitled to

judgment as a matter of law." *Couch v. Jabe*, 679 F.3d 197, 200 (4th Cir. 2012).

II.

We must first consider what level of scrutiny applies to the ordinance.

In general, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to . . . rigorous scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). However, the City contends that a relatively relaxed level of scrutiny applies because the regulation is a routine exercise of the state's police power that targets commercial speech, or alternatively that targets professional speech.

A.

The ordinance, as applied to the Center, does not regulate commercial speech.

As we explained in our prior en banc decision, "commercial speech is 'usually defined as speech that does no more than propose a commercial transaction.'" *Greater Baltimore Ctr.*, 721 F.3d at 284 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)). However, because "application of this definition is not always a simple matter," *Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999), some speech outside this "core notion" may also be deemed commercial. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). Courts rely on three factors to identify such commercial speech: "(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*

Baltimore Ctr., 721 F.3d at 285 (citing *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990)).

Because of the "difficulty of drawing bright lines that will clearly cabin commercial speech," the inquiry is fact-intensive. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993). It is also one in which "context matters." G*reater Baltimore Ctr.*, 721 F.3d at 286. That is why this court remanded this case for discovery to determine, among other things, "evidence concerning the Center's economic motivation (or lack thereof) and the scope and content of its advertisements." *Id.*

The ordinance, as applied to the Center, does not regulate speech that "propose[s] a commercial transaction." *United Foods*, 533 U.S. at 409. Nothing in the record suggests that the Center proposes any transactions in the waiting room where the disclaimer would appear. Even if pregnancy-related services are discussed there, the Center collects no remuneration of any kind, including referral fees from physicians. A morally and religiously motivated offering of free services cannot be described as a bare "commercial transaction."

The City contends that the ordinance regulates commercial speech because the Center advertises its services, some of which have commercial value in other contexts. But that fact alone does not suffice to transform the Center's ideological and religious advocacy into commercial activity.

First, it is not clear that the ordinance directly regulates the Center's "advertisement." *Greater Baltimore Ctr.*, 721 F.3d at 285. The City analogizes this case to *First Resort, Inc. v. Herrera*, 80 F. Supp.

3d 1043 (N.D. Cal. 2015), *aff'd*, 860 F.3d 1263 (9th Cir. 2017), and *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176 (N.D. 1986), in which courts applied commercial speech doctrine to suits involving allegedly misleading advertisements by pregnancy centers. But both those suits involved laws that directly regulated misleading advertising itself. *See First Resort*, 80 F. Supp. 3d at 1047 (applying an ordinance that "prohibit[ed] the use of false or misleading advertising"); *Larson*, 381 N.W.2d at 177 (applying "the North Dakota false advertising law, Chapter 51–12, N.D.C.C."). While motivated by similar concerns, the ordinance here requires a waiting-room disclosure without any effect on advertising *qua* advertising. Indeed, the Baltimore ordinance applies to pregnancy centers regardless of whether they advertise at all.

Second, the record gives no indication that the Center harbors an "economic motivation." *Greater Baltimore Ctr.*, 721 F.3d at 285. Again, the Center is a non-profit organization whose clearest motivation is not economic but moral, philosophical, and religious. It provides free services and collects no fees. And after extensive discovery, the only evidence the City can muster in support of its contention that the Center is economically motivated is its assertion that the Center's "fundraising efforts . . . depend on its ability to attract clients." Appellant Opening Br. 29. That may or may not be true. But the City's evidence is speculative at best. Without more, the relationship here between clinic patronage and fundraising is too attenuated to amount to "economic motivation."

We do not foreclose the possibility that another facility in different circumstances could engage in commercial speech. But with a "fully developed

record" now before us, *Greater Baltimore Ctr.*, 721 F.3d at 286, we agree with the district court. The ordinance, as applied to this Center, does not regulate commercial speech.

B.

Nor does the ordinance, as applied to the Center, regulate professional speech.[1]

"The power of government to regulate the professions is not lost whenever the practice of a profession entails speech." *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the judgment). But at the same time, "individuals [do not] simply abandon their First Amendment rights when they commence practicing a profession." *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014). Thus, "[w]hen the First Amendment rights of a professional are at stake, the stringency of review . . . slides along a continuum from public dialogue on one end to regulation of professional conduct on the other." *Id.* at 248 (internal quotation marks omitted).

Because the state has a strong interest in supervising the ethics and competence of those professions to which it lends its imprimatur, this sliding-scale review applies to traditional occupations, such as medicine or accounting, which are subject to comprehensive state licensing, accreditation, or disciplinary schemes. *See e.g.*, *Stuart*, 774 F.3d 238 (doctors); *Accountant's Soc'y of*

[1] Contrary to the Center's arguments, the City did not forfeit this argument by failing to advance a professional speech theory earlier. The professional speech issue was fully briefed, analyzed, and decided on remand to the district court. There is no bar to considering it here.

Va. v. Bowman, 860 F.2d 602 (4th Cir. 1988) (accountants). More generally, the doctrine may apply where "the speaker is providing personalized advice in a private setting to a paying client." *Moore-King v. Cty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013).

The Center fits none of these characteristics of a professional speaker. In Maryland, pregnancy centers are not required to be licensed or otherwise subject to a state regulatory scheme.[2] There is no medical or professional board that certifies the Center's employees, nor any disciplinary panel that regulates their conduct. Although the Center has a volunteer "medical director" who is a licensed physician, she is "very rarely" on site and does not meet directly with clients. J.A. 921. Simply put, no one in the Greater Baltimore Center is practicing a "profession" in the traditional sense contemplated by our First Amendment jurisprudence.

Nor does the Center fit the more general criteria laid out in *Moore-King*. Although the Center "provid[es] personalized advice in a private setting," 708 F.3d at 569, and describes its patrons as "clients," J.A. 827, none of those clients are "paying," 708 F.3d

---

[2] The lack of a licensing scheme distinguishes this case from a recent Ninth Circuit decision analyzing a California clinic disclosure law under the rubric of professional speech. *See Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), *cert. granted sub nom.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. Nov. 13, 2017). In that case, the court applied the professional speech doctrine only to compelled disclosures in clinics licensed by the state. *Id.* at 839. The Ninth Circuit did not reach the question of whether the doctrine applied to disclosures required in unlicensed pregnancy centers like the one at issue here. *Id.* at 843.

at 569. Again, the Center does not charge for its services. "The mere fact that [a pregnancy center] provides its program participants with the promise of confidentiality does not transform its message into professional speech." *Tepeyac v. Montgomery Cty.*, 5 F. Supp. 3d 745, 761 (D. Md. 2014).

With no record of comprehensive state regulation or paying clients before us, we cannot say that the ordinance regulates professional speech.

C.

Because the commercial speech and professional speech doctrines are inapplicable in this case, the Baltimore ordinance's compulsion "to utter or distribute speech bearing a particular message" receives heightened scrutiny. *Turner Broad. Sys.*, 512 U.S. at 642. As a result, the ordinance calls for more searching review than the relaxed standards advocated by the City.

The essentially factual nature of the compelled disclaimer does not diminish the need for rigorous review. Because a statement's factuality "does not divorce the speech from its moral or ideological implications," *Stuart*, 774 F.3d at 246, a person's right to refrain from speaking "applies . . . equally to statements of fact the speaker would rather avoid," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

The compelled speech at issue here raises particularly troubling First Amendment concerns. At bottom, the disclaimer portrays abortion as one among a menu of morally equivalent choices. While that may be the City's view, it is not the Center's. The message conveyed is antithetical to the very moral,

religious, and ideological reasons the Center exists. Its avowed mission is to "provid[e] alternatives to abortion." J.A. 360. Its "pro-life Christian beliefs permeate all that the Center does." J.A. 354. Its staff and volunteers are trained "in encouraging women not to have an abortion." J.A. 366. Of course, this mission gives the Center no license at all to lie to women, and, indeed, there is no such suggestion here. But it does provide some latitude in how to broach a sensitive topic. The Center currently explains its opposition to abortion in its "Commitment of Care" pamphlets. But it does so on its own terms. None of that changes the fact that the ordinance forces the Center to utter in its own waiting room words at odds with its foundational beliefs and with the principles of those who have given their working lives to it.

The classic First Amendment violation has always been thought to involve an outright prohibition by the state of certain speech. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (holding that a state may not prosecute someone for wearing a jacket bearing the words "Fuck the Draft"); *Near v. Minnesota*, 283 U.S. 697 (1931) (holding that a state may not exercise a prior restraint on publishing a newspaper). But over time, adjunct First Amendment rights have emerged, which in their own way have become as significant for expressive liberty as the right not to be silenced by a disapproving public entity. One of those adjunct rights is the right to listen. *See Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (observing that the First Amendment "protects both a speaker's right to communicate information and ideas to a broad audience and the intended recipients' right to receive that information and those ideas"). Another is the right to express oneself through conduct. *See Tinker*

v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that a public school may not, without evidence of substantial disruption, punish students for wearing armbands protesting the Vietnam War). Yet another is the right not to utter political and philosophical beliefs that the state wishes to have said. *See W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that a public school cannot compel students to perform the pledge of allegiance). These adjunct rights have become crucial to speech freedoms because, without them, states can bend individuals to their own beliefs and use compelled speech as a weapon to run its ideological foes into the ground. Preserving some distance between the state and the message is thus the aim of preventing banned speech and compelled speech alike, and it is what gives the right in this case its fundamental character.

III.

We now consider whether the Baltimore ordinance satisfies heightened scrutiny. "[E]xacting First Amendment scrutiny" requires that compelled disclosures be "narrowly tailored" to achieve a "weighty" government interest. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 798 (1988). "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 City's interests are plainly important. Baltimore's stated goals in enacting the ordinance were to address allegedly deceptive advertising and to prevent health risks that can accompany delays in seeking to end a pregnancy. States must have ample

room to regulate deceptions and health risks. Courts have long recognized those sorts of aims as weighty. *See, e.g.*, *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376-77 (4th Cir. 2013) ("promoting disclosure to avoid misleading [consumers]"); *Varandani v. Bowen*, 824 F.2d 307, 311 (4th Cir. 1987) ("assuring safe health care for the public"). Where there is solid evidence of such dangers, courts will not hesitate to give government the deference it is due.

However, as the district court found, "there is insufficient evidence to demonstrate that deception actually takes place and that health harms are in fact being caused by delays resulting from deceptive advertising." J.A. 1280. The City's only support for its contention that women might have read a bus ad mentioning "abortion *alternatives*" to mean "abortion *services*" is a reported increase in phone calls to the Center's hotline from "abortion minded callers." J.A. 705. After seven years of litigation and a 1,295-page record before us, the City does not identify a single example of a woman who entered the Greater Baltimore Center's waiting room under the misimpression that she could obtain an abortion there. What the record does show is affirmative advocacy of abortion alternatives by a lawful non-profit group. None of the public advocacy of alternatives, however, suggests that the Center would provide help or assistance in obtaining an abortion. Truthful affirmative assertions are not, without more, misleading.

Additionally, scrutiny of means creates difficulties with the City's view. It is scrutiny of means that helps identify the point on the spectrum where valid disclosures slip silently into the realm of

impermissible compelled speech. Particularly troubling in this regard is (1) that the ordinance applies solely to speakers who talk about pregnancy-related services but not to speakers on any other topic; and (2) that the ordinance compels speech from pro-life pregnancy centers, but not other pregnancy clinics that offer or refer for abortion. It is well established that "[t]he government may not regulate . . . based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). A speech edict aimed directly at those pregnancy clinics that do not provide or refer for abortions is neither viewpoint nor content neutral. Especially in this context, content-based regulation "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). We do not begrudge the City its viewpoint. But neither may the City disfavor only those who disagree.

Further, there are serious questions here as to narrow tailoring. First, we are unpersuaded that the City could not pursue its goals through less restrictive means. As the Supreme Court has noted in compelled speech cases, the government itself may "communicate the desired information to the public without burdening a speaker with unwanted speech." *Riley*, 487 U.S. at 800. In this case, that would mean informing citizens about the scope of services offered at various facilities through a public advertising campaign. *See Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 250 (2d Cir. 2014) (noting that "the City can communicate this message through an advertising campaign"); *Centro Tepeyac*

v. Montgomery Cty., 722 F.3d 184, 190 (4th Cir. 2013) (en banc) (stating that the government had "several options less restrictive than compelled speech," such as "launch[ing] a public awareness campaign" (internal quotation marks omitted)). The City could also pursue its goals through the direct application of laws against misleading advertising. *See First Resort*, 80 F. Supp. 3d at 1047; *Larson*, 381 N.W.2d at 177; *cf. Riley*, 487 U.S. at 800 ("Alternatively, the State may vigorously enforce its antifraud laws . . . .").

Second, and more fundamentally, there is only a loose fit between the compelled disclosure at issue and the purported ills identified by the government. "[W]hen [laws] affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 805 (2011). Baltimore seeks to combat deceptive advertising and consequent delays in abortion services. In that respect the ordinance is quite overinclusive. It applies to pregnancy centers without regard to whether their advertising is misleading, or indeed whether they advertise at all. As illustrated by *Larson* and *First Resort*, the direct application of laws prohibiting misleading advertising might provide a better fit for the problems about which the City is concerned. *See First Resort,* 80 F. Supp. 3d 1043; *Larson*, 381 N.W.2d 176.

There are, in short, too many problems with the City's case. The dangers of compelled speech in an area as ideologically sensitive and spiritually fraught as this one require that the government not overplay its hand. Without proving the inefficacy of less restrictive alternatives, providing concrete evidence of deception, or more precisely targeting its

regulation, the City cannot prevail. The Baltimore ordinance, as applied to the Center, fails to satisfy heightened First Amendment scrutiny.[3]

IV.

The abortion debate in our country has a long and bitter history. Vast disagreement on the merits has led both sides to retributive speech restrictions and compulsions. See, e.g., Stuart, 774 F.3d at 242. To be sure, states must have room for reasonable regulation. But there is a limit to how much they can dictate core beliefs. This court has in the past struck down attempts to compel speech from abortion providers. *Id.* And today we do the same with regard to compelling speech from abortion foes. We do so in belief that earnest advocates on all sides of this issue should not be forced by the state into a corner and required essentially to renounce and forswear what they have come as a matter of deepest conviction to believe.

---

[3] Our holding does not conflict with the Ninth Circuit's decision in *Harris*. *See* 839 F.3d 823, *cert. granted*, No. 16-1140 (U.S. Nov. 13, 2017). The law at issue in that case involved two compelled disclosures. First, the law in *Harris* required licensed clinics to post a notice informing women of the availability of state-sponsored services, including abortion, and a phone number to call for more information. *Id.* at 830. The content of that disclaimer—and, because it only applied to licensed facilities, the scrutiny which it received—was markedly different from the Baltimore ordinance. Second, the law in *Harris* required unlicensed pregnancy centers to post a notice stating that their facilities are not licensed by the state. *Id.* Because the compelled message did not mention abortion, the burden on the speaker—and therefore the First Amendment analysis—was different in kind.

Weaponizing the means of government against ideological foes risks a grave violation of one of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. It may be too much to hope that despite their disagreement, pro-choice and pro-life advocates can respect each other's dedication and principle. But, at least in this case, as in *Stuart*, it is not too much to ask that they lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

[ENTERED OCTOBER 4, 2016]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC. *

Plaintiff *

vs. CIVIL ACTION NO. MJG-10-760

MAYOR AND CITY COUNCIL OF BALTIMORE, et al. *

Defendants *

* * * * * * * * *

DECISION RE: SUMMARY JUDGMENT

The Court has before it Plaintiff's and Defendants' Cross Motions for Summary Judgment [ECF 101, 104] and the materials submitted relating thereto. The Court conducted a hearing and received the benefit of the arguments of counsel.

I. BACKGROUND

A. Factual Background

On December 4, 2009, Defendants, Mayor and City Council of Baltimore, et al., ("the City"), enacted Ordinance 09- 252 (the "Ordinance"),[1] which requires a "limited-service pregnancy center" ("LSPC") to post a disclaimer in its waiting room notifying clients that it "does not provide or make referral for abortion or birth-control services."[2] The Disclaimer must consist of one or more signs that are written in English and Spanish, "easily readable" and "conspicuously posted"

[1] See Balt. City Health Code §§ 3-501 to 3-506 (2010)

[2] Hereinafter "the Disclaimer."

in the waiting room or equivalent area. Balt. City Health Code § 3-502 (2010). The Ordinance defines an LSPC 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."

Id. at § 3-502. If an LSPC fails to post the Disclaimer, the Health Commissioner will issue a notice requiring the LSPC to correct the violation in ten days. Id. at § 3-503. If an LSPC violates the notice, the Commissioner can issue an environmental or civil citation of $150 pursuant to the Baltimore City Code. Id. at § 3-506.

On September 27, 2010, the Baltimore City Health Department adopted a final Regulation defining "nondirective and comprehensive birth-control services" to mean" birth-control services which only a licensed healthcare professional may prescribe or provide." [ECF 101- 2, Ex. H]. The Regulation also stipulated that "[an LSPC] may indicate on the disclaimer sign what birth-control services it does provide and/or refer for" and may indicate on the disclaimer sign that the sign is required by Baltimore City ordinance." Id.

The Plaintiff, Greater Baltimore Center for Pregnancy Concerns, Inc. ("the Center"), provides free pregnancy- related services and counseling and falls

under the Ordinance's definition of a "limited service pregnancy center." The Center operates at two locations within Baltimore City, in buildings owned by the Catholic Church. The Center will not, for religious reasons, provide or refer for abortions or specific methods of birth- control that are contrary to the views of the Catholic Church. According to the Center, the Disclaimer mandated by the Ordinance is compelled speech that "undermines the supportive message and religious mission of the Center." [ECF 1 01-1, at 7].

B. Procedural History

The Plaintiff[3] filed the instant lawsuit, a 42 U.S.C. § 1983 civil rights action, on March 29, 2010, asserting claims against the City Council of Baltimore, Mayor Stephanie Rawlings-Blake, in her official capacity as Mayor of Baltimore, and Olivia Farrow Esq., in her official capacity as acting Baltimore City Health Commissioner (collectively, "the City"). [ECF 1]. The Center seeks to enjoin enforcement of the Ordinance, contending that the Ordinance is unconstitutional on its face and as- applied to the Center. Plaintiff's Complaint for Declaratory and Injunctive Relief presents four Counts:

> Count I. First Amendment (Free Speech and Assembly)

---

[3] Originally, the Center was joined by two other plaintiffs, St. Brigid ' s Roman Catholic Congregation and then- Archbishop Edwin F. O' Brien, who rented the building to the Center. These two other plaintiffs were dismissed for lack of standing in this Court's initial Decision and Order, dated January 28, 2011. [ECF 32]. The Fourth Circuit affirmed this Court's standing decision. See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 721 F.3d 264, 291 (4th Cir. 2013).

Count II. First Amendment (Free Exercise of Religion)

Count III. Fourteenth Amendment (Equal Protection)

Count IV. Maryland Stat e Law (Conscience Clause).[4]

On June 4, 2010, the Center filed a Motion for Partial Summary Judgment on its Free Speech, Free Assembly, and Equal Protection Claims, supported by an affidavit from the Center's Executive Director Carol Ann Clews. [ECF 9]. The City responded to the summary judgment motion and filed its own Motion to Dismiss the complaint under Federal Rule of Civil Procedure 12 (b)(6) [ECF 11] on June 8, 2010. The City included evidence from the Ordinance's legislative record,[5] and also filed a Rule 56(f) Affidavit informing the Court that the City believed that additional discovery was required. [ECF 18]. The Court converted the City's motion to dismiss into a cross-motion for summary judgment under Rule 12(d) because the City had submitted and relied on material outside the Complaint.

On January 28, 2011, this Court issued a Decision and Order on the summary judgment motion and concluded that under strict scrutiny the Ordinance was facially invalid under the Free Speech Clause of the First Amendment because, even if it was enacted to further a compelling government interest, it was

---

[4] Md. Code Ann. Health-General § 20- 214.

[5]For a more detailed description of the evidence presented to the Court in 2010, see Greater Baltimore Ctr. for Pregnancy Concerns, Inc., 721 F.3d at 274- 75.

not narrowly tailored to accomplish that interest.[6] This Court also dismissed the claims asserted by Plaintiffs St. Brigid's and the Archbishop for lack of standing. [ECF 32, a t 13].

On appeal, a panel of the United States Court of Appeals for the Fourth Circuit affirmed this Court's decision. See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012), on reh'g en banc, 721 F.3d 264 (4th Cir. 2013) [ECF 45]. On August 15, 2012, the Fourth Circuit granted a petition for rehearing en banc. Subsequently, the Fourth Circuit issued a judgment affirming this Court's decision regarding standing, but vacating the judgment as to the Center's First Amendment claims on procedural grounds and remanding for further proceedings. See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 721 F.3d 264 (4th Cir. 2013).

The Fourth Circuit, en banc, held that the Court improperly denied the City discovery, which should have been allowed before the Court converted the City's 12(b)(6) motion into a motion for summary judgment.[7] Id. at 291. Since that decision, both parties have conducted extensive discovery.

---

[6] O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 808 (D. Md. 2011), aff'd sub nom. Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012) , on reh'g en banc, 721 F.3d 264 (4th Cir. 2013), and aff'd in part, vacated i n part , remanded sub nom . Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 721 F.3d 264 (4th Cir. 2013).

[7] Specifically, the Fourth Circuit concluded that discovery was needed regarding : the Center' s economic motivation (if any), the scope and content of its advertisements, the effect of the

By the instant Motion, the Plaintiff seeks summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on its Free Speech (Count I) and Free Exercise claims (Count II). [ECF 101]. The City sets forth a Cross Motion for Summary Judgment on all claims asserted by the Center, including the Free Assembly (Count I), Equal Protection (Count III), and State Conscience Clause claims (Count IV). [ECF 104].

As discussed herein, the Court holds that, as applied to the Center, the Ordinance violates the Freedom of Speech Clause of the First Amendment of the Constitution of the United States.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted if the pleadings and supporting documents " show [ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The well-established principles pertinent to summary judgment motions can be distilled to a simple statement: the Court may look at the evidence presented through the non-movant's rose-colored glasses, but must view it realistically. After so doing, the essential question is whether a reasonable fact finder could return a verdict for the non- movant or whether the movant would, at trial, be entitled to judgment as a matter of law. See, e.g., Celotex Corp.

Ordinance on the Center' s noncommercial speech, the application of the Ordinance to LSPCs with no moral objections to birth control or abortion, and" evidence substantiating the efficacy of the Ordinance in promoting public health, as well as evidence disproving the effectiveness of purported less restrictive alternatives to the Ordinance' s disclaimer." Id. at 285-88.

v. Catrett, 477 U. S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248 (1986); Shealy v. Winston, 929 F.2d 1009, 1012 (4th Cir. 1991). Thus, in order to defeat a motion for summary judgment, "the party opposing the motion must present evidence of specific facts from which the finder of fact could reasonably find for him or her." Mackey v. Shalala, 43 F. Supp. 2d 559, 564 (D. Md. 1999) (emphasis added).

When evaluating a motion for summary judgment, the Court must bear in mind that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Feder al Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

Cross motions for summary judgment "do not automatically empower the court to dispense with the determination whether questions of material fact exist." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 349 (7th Cir. 1983). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987). The court may grant summary judgment in favor of one party, deny both motions, or grant i n part and deny in part each of the parties' motions. See Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003).

III. DISCUSSION

A. Undisputed Facts[8]

1. The Ordinance and Legislative Record

The Baltimore City Council and Mayor enacted Ordinance 09-252 to remedy potential consumer confusion about the scope of services offered by LSPCs. The Ordinance requires an organization providing pregnancy- related services, but not providing or referring abortions or birth control, an "LSPC", to conspicuously post a disclaimer in its waiting room stating that it "does not provide or make referral for abortion or birth control services." Balt. City Health Code § 3- 502. The Ordinance applies regardless of whether an LSPC provides services for free and whether an LSPC advertises or not.

The City passed the Ordinance in response to information concerning LSPCs and delays in accessing reproductive health services that can threaten public health.

Along with other testimony, the City Council considered two reports before passing the Ordinance: (1) a 2006 report prepared f or U. S. Representative Henry A. Waxman ("the Waxman Report") [ECF 18-2], which details results from an investigation into 23 LSCPs nationwide and (2) a 2008 report by NARAL Pro-Choice Maryland Fund ("the Maryland Report") [ECF 18-3], which summarizes an investigation of LSPCs in Maryland, including Plaintiff.[9] The Waxman

---

[8] Both sides insist that there are no disputes of material fact in this case.

[9] "Our investigation included personal visits to CPCs in Montgomery, Prince George's, Harford, and Baltimore counties,

Report states that the investigated LSPCs provided "false and misleading information" over the phone about" a link between abortion and breast cancer," "the effect of abortion on future fertility," and "the mental health effects of abortion." [ECF 18-2, at i].

The Maryland Report echoes these findings and also states that many Maryland LSPCs use medical services, such as STI testing and sonograms , as a tactic to delay women in getting an abortion. [ECF 18-3, at 7] ("By persuading women to visit the center, [LSPCs] effectively push their antiabortion agenda while delaying access to abortion services. By delaying access to abortion services these centers make abortion more costly, dangerous, and difficult or impossible to obtain.").

2. LSPCs in Baltimore

There are two LSPCs in Baltimore City. One is Plaintiff, Greater Baltimore Center for Pregnancy Concerns, Inc., a religious non- profit organization that operates in a rent- free space provided by St. Ann's Catholic Church. Second Affidavit of Carol Clews ("Clews Aff."), at ¶ 13. [ECF 101- 2, Ex. B]. The other is Baltimore Pregnancy Center, a small, volunteer- run organization that offers women "practical alternatives to abortion, providing testing, counseling, maternity clothes, baby clothes, formula" and more for free. [ECF 101- 2, Ex. L, at 18]. Both centers are pro- life organizations that do not offer, or refer for, abortion or birth control. Id.

The City has not visited these Baltimore LSPCs either before or after the Ordinance was passed.

---

as well as Baltimore City. We visited eleven centers in total." [ECF 18-3, at 5].

Deposition of Jacquelyn Dual-Harvey ("Dual-Harvey Depo."), at 51, 55 [ECF 101-2, Ex. E].

3. Plaintiff's Mission and Activities

The Center began counseling women in Baltimore in 1980. It now operates in four locations, one in Baltimore City (Plaintiff) and three in Baltimore County.[10] According to its Mission Statement, the Center "is 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." Clews Aff., at ¶¶ 20-21 [ECF 101-2, Ex. B]. "The Center assists over 1,200 women per year at its four locations and also provides assistance to roughly 8,000 women per year via the Center's telephone helpline." Id. at ¶ 9. The Center has eight paid employees and many unpaid volunteers. All Center staff, volunteers, and board members must agree to the Center's Statement of Principles, its Mission Statement, and its Statement of Faith. Id. at ¶ 18.

> [T]he motivation for all the Center does is the belief in Jesus Christ and belief that the Bible and Christianity are strongly opposed to abortion and strongly value life. The motivation of the board, staff, volunteers, and donors to the Center is the Christian, pro- life mission of the Center.

[ECF 101-1, at 10] (internal citations omitted).

The Center provides the following services to its clients: "material assistance (such as diapers, bottles and formula, cribs, strollers, baby and maternity

---

[10] All further references to "the Center" refer only to the Plaintiff's Baltimore City location.

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, abstinence information, sonograms, pre-natal development information, and a 24-hour helpline." Clews Aff., at ¶ 36 [ECF 101-2 , Ex . B]. The Center does not offer, or refer for, contraceptives or abortions. However, "if someone calls to make an appointment and they ask about our abortion services, or if [the Center] perform[s] abortions, the first thing [staff members] say to them is we do not perform or refer for abortions." Deposition of Carol Clews ("Clews Depo."), at 18 [ECF 104-3]. If a woman walks in seeking an abortion, she is told immediately, or very soon after arriving, that the Center does not provide or refer for abortion services. Id. It i s the policy of the Center to conduct an approximately 45 minute counseling session with a woman seeking a pregnancy test before giving her the test. Id. at 25.

The Center has a medical director who" oversees the medical aspect of the clinic," and reviews ultrasound images taken by the sonographer. Id. at 29. The medical director is "very rarely" at the location and does not meet directly with clients. Id.

The Center is an affiliate member of the National Institute of Family Life Advocates ("NIFLA"), which provides legal and medical resources for pregnancy centers, since 2009. Typically, the Center will not give a sonogram to a woman who is less than seven weeks pregnant because it is then that a beating heart becomes discernible. Id. at 28. Once a woman is seven weeks along in her pregnancy, she can schedule a free sonogram, but she will usually have to return a day or two later to get the sonogram because the Center

only has one sonographer who must travel between the four locations. Id. at 30.

The Center and its staff and volunteers have no economic interest in their actions or speech with clients, nor does the Center propose any commercial transactions with clients. The Center's motivation is "deeply spiritual and religious." Clews Aff., at ¶ 95 [ECF 101-2, Ex. B]. All services at the Center are provided free of charge. The Center makes referrals to adoption agencies and for services such as health care and housing. The Center is not paid for, and does not receive money for, any referrals. Id. at ¶ 101; Clews Depo., at 26 [ECF 104-3]. The Center does not receive money from the Baltimore City government. Clews Aff., at ¶ 7 [ECF 101-2, Ex. B]. Instead, it is funded primarily through private donations and fundraising. Clews Depo., at 21 [ECF 104-3].

4. The Center's Advertisements

Additionally, the Center has engaged in paid advertising. In December 2010, the Center participated in an advertising campaign with another national pro-life organization, the Vitae Caring Foundation, which placed advertisements in city buses around Baltimore. The ads featured a picture of a young woman with large text stating: "FREE Abortion Alternatives." [ECF 104-24]. The ad also included in slightly smaller text:

- "FREE Confidential Options Counseling"
- "FREE Pregnancy Tests"
- "FREE Services."

Id. The ad then listed the phone numbers and locations of the Center and four other LSCPCs in surrounding areas. During the month of December

when the bus ads were running, a volunteer from the Center reported that she spoke on the telephone with several "abortion minded callers" who were "under the impression from the bus advertisements that we assisted in paying for abortions . . . . Another did not seem to understand, 'abortion alternatives' and wanted to schedule an abortion." Email from Alice Steck to Carol Clews, Jan. 5, 2011 [ECF 104-28, at 2].

From April to July 2013, the Center ran ads in the Pennysaver, a publication that features local advertisements. [ECF 104-22]. The full page ad listed the Center's contact information and stated: "The Center's FREE services include:

- 24- hour helpline [number]
- Pregnancy testing
- Confidential peer counseling with trained volunteers
- Pre- natal development information
- Information about procedures and risks of abortion
- Hannah' s Cupboard (maternity and infant supplies)
- Earn While You Learn Program (Education)
- Abstinence Program & Speakers Bureau
- Bible Study
- Referrals to community resources, including housing, healthcare & adoption
- Post Abortion Counseling & Education
- Sonograms (limited), prenatal vitamins."

[ECF 104-22, at 3].

The Center also paid for a "short- run radio advertising campaign on a local radio station." Clews Depo., at 11 [ECF 104-3]. The Center has installed no signage other than on the facade at the Center itself. Id. at 16.

The Center receives an indirect benefit from the advertising of third- parties. The Center pays annual dues to be an affiliate of two large "umbrella" organizations, Care Net and Heartbeat International, which serve pregnancy centers nationwide. Id. at 10. The Center can take advantage of training materials and conferences provided by the national organizations. Id. Also, as an affiliate, the Center is listed in the referral databases for Care Net's Pregnancy Decision Line[11] and Heartbeat's Option Line,[12] which are call centers and websites that connect people with local pregnancy centers in their areas. [ECF 104, at 10]. Option Line's website stated that its affiliates listed in the database provide: "Abortion and Morning After Pill information, including procedures and risks," "Medical services, including STD tests, early ultrasounds and pregnancy confirmation," and "Confidential pregnancy options." [ECF 104-27]. Both Care Net and Heartbeat advertise their services and referral databases, which

[11] Pregnancy Decision Line is "the only national call center and Internet website designed to reach people considering abortion with immediate pregnancy decision coaching, information, and referrals." [ECF 104, at 10].

[12] The Option Line database "connects those experiencing an unplanned pregnancy with their local pregnancy center 24 hours a day, 7 days a week." [ECF 104- 10, at 2].

potentially direct individuals to the Center in Baltimore.[13]

5. Effect of the Disclaimer on the Center

The Center in Baltimore occupies a small office space. Director Carol Clews stated that much of the organization's ministry, including praying, talking with clients, and peer counseling takes place in the small waiting area itself. Clews Aff., at ¶ 40 [ECF 101-2, Ex.B]. A majority of the conversations in the waiting room are related to clients' "pregnancies and related personal, religious, and moral concerns." Id. at ¶ 41. Clews stated that "[t]he mission oriented communication between Center and client that begins when the client enters the facility, continues during the entire time the client is at the Center." Id. at ¶ 35.

To that end, the Center tries to make the waiting room as welcoming and inviting as possible. The waiting room contains "copies of the Bible, children's books and toys, a poster on pre-natal development, and a small statue of Jesus Christ." Id. at ¶ 30. The Center also displays a document titled "Commitment of Care" that lists values and promises to clients.

---

[13] The Baltimore City Health Department has also referred women to the Center through its "Reproductive Health & Pregnancy" webpage that linked to the "B'more for Healthy Babies" website, which lists locations that offer free pregnancy tests and prenatal care.

After January 1, 2012, the Health Department webpage contained a notice stating that "the Center for Pregnancy Concerns and the Baltimore Pregnancy Center do not perform or make referrals for abortions, morning after pills, or other birth control," but the notice was not there prior to 2012. [ECF 101-2, Exs. J, P]. Since 2014, that webpage with the notice has been removed, but the B' more for Healthy Babies website still exists and lists the Center as a resource. See Affidavit of Charlotte Hoffman, at ¶ 4. [ECF 101-2, Ex. O].

Clews. Depo., at 5 [ECF 104-3] ("Each Center has a copy of this in full view of clients , generally in the reception area."). Number seven on the list states, "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." Clews. Aff., Ex. iii. [ECF 101-2, Ex. B]. There are no advertisements in the waiting room, and no goods or services are offered for sale anywhere in the Center. Id. at ¶¶ 57-58.

According to the Center, "[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." Id. at ¶¶ 65, 70; see also Clews Depo. , at 6 [ECF 104-3] ("Any client who came in to be counseled would not be able to avoid seeing that sign.") The Disclaimer as mandated

> forces pregnancy centers to begin their conversations with a stark government disclaimer, divorced from the support offered by the Center, and suggesting that abortion is available elsewhere and might be considered a good option by pregnant women - a message that the Center expressly finds morally offensive and would not otherwise provide.

Clews Aff., at ¶ 80 [ECF 101- 2 , Ex . B]. This impact could affect all visitors, regardless of why they were coming or how they heard about the Center. Indeed, the City wants "everyone who comes to the Center to be aware of the disclaimer in connection with the conversations they have at the Center." Dual-Harvey Depo., at 183 [ECF 101-2, Ex. E].

B. Free Speech Claim

1. Legal Standard

To determine whether the Ordinance violates the Free Speech Clause of the First Amendment the Court must decide what level of scrutiny applies, which necessitates determining what type of speech is regulated by the Ordinance. The parties disagree on what level of scrutiny the Court should apply to the Ordinance.

The City contends that either "rational basis" or "intermediate" scrutiny is appropriate because the speech that is regulated is commercial or professional speech. The Center maintains that "strict scrutiny" applies because the Ordinance is not content or viewpoint- neutral and regulates noncommercial speech.

The City chose to regulate allegedly deceptive commercial speech - not by enjoining deceptive advertising directly – but by compelling speech in a different context, the waiting rooms of the Center where no advertising takes place. Because this case involves speech in many different forms and contexts, both written and oral, inside and outside the Center, the analysis is complex. Nevertheless, the Court finds that the underlying principles animating the First Amendment case law are instructive and lead this Court to conclude 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.

The First Amendment, as applied to the states by the Fourteenth Amendment, prohibits regulations "abridging the freedom of speech." U.S. CONST. amend I. This protection necessarily includes "the right to refrain from speaking at all." Wooley v. Maynard, 430 U. S. 705, 714 (1977). Therefore, compelled speech, such as the Disclaimer at issue here, ordinarily is subject to strict scrutiny as a content- based regulation because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." Riley v. Nat'l Fed' n of the Blind of N. Carolina, Inc., 487 U.S. 781, 795 (1988).

This sentiment holds true even when the compelled speech is a true statement of fact, because "an individual's 'right to tailor [his] speech' or to not speak at all 'applies . . . equally to statements of fact the speaker would rather avoid.'" Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014) (quoting Hurley v. Irish-Am . Gay, Lesbian & Bisexual Grp. Of Bos., 515 U.S. 557, 573 (1995)). "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." Riley, 487 U.S. at 791. Therefore, "[w]hile it is true that the words the [City] puts into the [Center]'s mouth are factual, that does not divorce the speech from its moral or ideological implications." Stuart, 774 F.3d at 246.

However, there are two exceptions to strict scrutiny in compel led speech cases that the City argues are applicable here: the commercial speech exception and the professional speech exception. Each will be addressed in turn.

a. Commercial Speech

The first exception applies to regulations of commercial speech. "Disclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny, by being 'reasonably related to the State's interest in preventing deception of consumers.'" Greater Baltimore Ctr. for Pregnancy Concerns, Inc., 721 F.3d at 283 (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court, 471 U.S. 626, 651 (1985)).

Traditionally, commercial speech, as defined by the Supreme Court, is an "expression related solely to the economic interests of the speaker and its audience," Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm' n of New York, 447 U.S. 557, 561 (1980), or "speech that does no more than propose a commercial transaction." United States v. United Foods, Inc., 533 U.S. 405, 409 (2001). But, as the Fourth Circuit advised, speech can be commercial even when it does not propose a commercial transaction under the holding in Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

> From Bolger, courts of appeals have gleaned "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 Baltimore Ctr. for Pregnancy Concerns, Inc., 721 F.3d at 285 (quoting U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 933 (3d Cir. 1990)). The presence of all three Bolger factors makes it more likely that the speech is commercial, but it is

not necessary for all three to be present for a court to properly characterize the speech as commercial. See id.

On remand, the Fourth Circuit instructed this Court to conduct a factual inquiry into the issue of commercial speech, including whether the Center possesses economic interests, and to consider the context of the speech, including the viewpoint of the consumer. Id. at 285-86.

The Center denies that any of its advertisements constitute commercial speech because it has no economic motivation for its provision of services and its advertisement s do not reference specific products. Furthermore, the Center receives no money for referrals. But, as the City correctly points out, the Bolger test "does not hinge solely on whether the Center has an economic motive." Id. at 285. The City points to the Center's advertisements that promote its services, such as the provision of prenatal vitamins and sonograms, as evidence of the first two Bolger factors. To support its proposition, the City cites to Fargo Women' s Health Org., Inc. v. Larson, a case in which the North Dakota Supreme Court held that a pregnancy center engaged in commercial speech because its "advertisements are placed in a commercial context and are directed at the providing or services rather than toward an exchange of ideas. " 381 N.W.2d 176, 181 (N.D. 1986).

Additionally, the City, through its expert witness, economist Anirban Basu, theorizes that the Center could be engaging in commercial transactions even though it provides services to clients for free because its donors pay the Center money "in exchange" for

services to third parties. Declaration of Anirban Basu, at ¶ 7 [ECF 104-36]. Mr. Basu stated that

> [t]ypically, donors make payments to these centers because 1) they want the centers to make certain services available to members of the public; 2) they think it important that the group being served have access to those services; and/or 3) they appreciate the manner in which services are delivered.

Id. at¶ 9. If this were true, then the Center's motives for advertising its free services and attracting clients could theoretically be commercial in additional to religious. However, the evidence presented to the Court does not bear this out. Instead, the only evidence relating to donor motivations came from a donor to the Center who stated that her reason for donating to the Center is 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. Deposition of Elizabeth Dickenson, at 30 [ECF 101-2, Ex. C].

Although, there are clear distinctions between the facts of this case and that in Bolger,[14] there is an

---

[14] For example, in Bolger, the plaintiff engaged in the sale of contraceptives and undertook "a campaign of unsolicited mass mailings" of flyers, including advertisements for contraceptives, as well as "informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs' products in particular." Bolger, 463 U S. at 62. It was Youngs' economic motive to sell its product, combined with the advertisement and reference to the specific contraceptive product, that led the Court to characterize the informational flyer as commercial speech. Id. at 67. It was the link of a product, sold by Youngs, to a current public debate, that downgraded the pamphlet from noncommercial speech to less protected commercial speech. Id. at 68.

argument to be made that the Center's advertisements could be considered commercial speech, even if the Center has no economic interest, because it is not necessary to meet all of the Bolger factors. Nevertheless, even if the Court assumes for purposes of this motion that the Center does engage in commercial speech, the question of what level of scrutiny applies is not answered. Rather, the essential inquiry is whether the Ordinance actually regulates that commercial speech or does it instead regulate the noncommercial, religiously-motivated speech taking place in the waiting room, or perhaps both.

In this case, the Court is not considering a single instance of the Center's speech standing alone, such as a set of advertisements or a single dialogue. Rather the Court must consider that the City is compelling the Center to act in a way that directly impacts the Center's most essential communications about sensitive and morally-laden topics. The City seeks to thrust the topics of abortion and birth control into the face of women at the beginning of their in person interaction with the center. The City maintains that the Ordinance "does not regulate any aspects of Pregnancy Centers' noncommercial speech" because it does not "regulate the manner in which Pregnancy Centers discuss abortion or birth- control services with consumers" and "does not prevent Pregnancy Centers from telling consumers that they believe abortion and certain methods of birth- control are

---

Unlike Youngs, the Center is not a manufacturer or seller of any of the products or services it provides for free to clients. Instead, it is the current public ideological debate about abortion and birth control that spurs the Center's services and advertisements, not the other way around.

immoral or unhealthy." [ECF 104, at 29]. The Center disagrees with the City's assessment: "[t]he speech regulated by the waiting room disclaimer is the speech in the waiting room." [ECF 107, at 24]. The Center argues that the relevant context of the Center's speech is the waiting room itself since the Disclaimer is not required to be included in the advertisements, and indeed must be posted in the Center regardless of what an advertisement says or, indeed, if there are any advertisements at all. Id. at 28.

The Ordinance regulates the Center's noncommercial speech by mandating the timing and content of the introduction of the subjects of abortion and birth control in its conversations with clients. On its face, 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 affects both the speaker (the Center) and the listener (the client) if and when the client enters the waiting room. The Center presented evidence of the impact that the Disclaimer will have on its speech and activities in the waiting room. Executive Director Clews stated that "[t]he Disclaimer would undermine the Center's attempt to convey care, comfort, support, and a family-friendly, appropriately spiritual setting through its first communications with visitors" and would" alter the course of the Center's communications with its visitors." Clews Aff., at ¶¶ 67, 65 [ECF 101-2, Ex. B]. A client of the Center declared that if she had seen the disclaimer in the Center's waiting room

> [The Disclaimer] would have been upsetting to me and would have impacted how I viewed the Center, especially if I had seen it when I first

> visited the Center, at a time when I was dealing with fear and worry over how I would care for my children . . .
>
> I would be uncomfortable bringing my children to the Center with the Ordinance displayed because it would expose my older child, who can read, to the concept of abortion.

Affidavit of Carolyn Ambrose, at ¶¶ 10-11 [ECF 101-2, Ex. F].

The City claims that the Disclaimer does not alter the Center's speech because the Center displays a "Commitment of Care" document that notifies clients that the Center "do[es] not offer, recommend, or refer for abortions or abortifacients (birth control), but we are committed to offering accurate information about abortion procedures and risks." This argument ignores the First Amendment mandate "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 791 (emphasis added). Neither does the fact that the Regulation allows the Center to explain that the Disclaimer is government mandated change the legal analysis. As the Fourth Circuit noted in Stuart when considering a similar argument about another compelled disclosure, "That the doctor may supplement the compelled speech with his own perspective does not cure the coercion - the government's message still must be delivered." Stuart, 774 F.3d at 246. The same rule applies here. The Center maintains that its preferred disclosure, given in the context of the Commitment of Care, expresses what it wants to say about the topics of birth control and abortion in the style and way it wishes to say it - in line with its mission.

Judge Chasanow's reasoning on the topic of commercial speech in Tepeyac v. Montgomery County, a case that also involved a required disclosure[15] to be posted on the waiting rooms walls of LSPCs in Montgomery County, is persuasive and can be adopted to directly apply to the case at hand. As Judge Chasanow said:

> Here, unlike the advertisements in [Fargo Women's Health Org., Inc. v.] Larson, 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 [the Center's] four walls, much closer to their ideological message. There is nothing in the record indicating that [the Center] is advertising its provision of services in its waiting room. Nor does the record contain evidence that [the Center's] physical facility advertises its services to passers-by whereby a pregnant woman would want to know the qualifications of those providing these services. Plaintiff advertises its services [on the internet through third- party affiliates, and through a limited number of other mediums, such as the bus ad and Pennysaver ad], which could be considered commercial speech. From that, Defendants incorrectly attempt to extrapolate that it can regulate all of Plaintiff's speech as

---

[15] The ordinance at issue in Tepeyac required LSPCs to post a sign in their waiting rooms that reads: (1) "the Center does not have a licensed medical professional on its staff"; and (2) "the Montgomery County Health Officer encou rages women who are or may be pregnant to consult with a licensed health care provider." Tepeyac, 5 F. Supp. 3d at 748.

> commercial speech, including that within its waiting room. But as the Fourth Circuit stated: "context matters." Greater Balt. Ctr., 721 F.3d at 286. Defendants' arguments and the record do not demonstrate that a website advertising services out to the world is equivalent to a center's waiting room where there is no indication that advertisements take p l ace and it is undisputed that [the Center] does not charge for its services. Even under the broader, contextual analysis of commercial speech, the evidence in the record does not demonstrate that the Resolution regulates Plaintiff's commercial speech.

Tepeyac v. Montgomery Cty., 5 F. Supp. 3d 745, 760 (D. Md. 2014), reconsideration denied (Mar. 26, 2014) (footnote omitted). The Baltimore Ordinance and Disclaimer are completely distinguishable from the facts in Larson where the court imposed a preliminary injunction against the pregnancy center, enjoining the use of false and deceptive advertising. Larson, 382 N.W.2d at 177. Here, because the Ordinance actually regulates and impacts the noncommercial speech taking place in the waiting room, the alleged commercial speech taking place outside the waiting room, which the Ordinance was passed to address, does not dictate the standard of scrutiny to apply. Thus, this Court will not use a lower form of scrutiny based on the commercial speech doctrine.

b. Professional Speech

The City contends that the Ordinance could be viewed as a regulation of professional speech, which is not subject to strict scrutiny. As Justice Jackson

explained in Thomas v. Collins, the government may incidentally regulate speech in its legitimate quest "to protect the public from those who seek for one purpose or another to obtain its money. . .[and may shield] the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency." Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). However, as Justice Jackson further clarified in his concurrence, "[v]ery many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press." Id.

In Stuart v. Camnitz, the Fourth Circuit applied a "sliding scale" model of scrutiny to a regulation of professional speech. 774 F.3d 238, 248 (4th Cir. 2014), cert. denied sub nom. Walker-McGill v. Stuart, 135 S. Ct. 2838 (2015) ("When the First Amendment rights of a professional are at stake, the stringency of review thus slides ' along a continuum' from ' public dialogue' on one end to ' regulation of professional conduct' on the other.") (internal citations omitted). In Stuart, which involved a law compelling physicians to provide certain disclosures and information to women about to get an abortion while the doctor was performing a sonogram, the Fourth Circuit determined that the law was both a compelled, content- based regulation of speech and a regulation of professional speech, and thus, intermediate scrutiny was appropriate. Id. at 245. Here, likewise, the City agrees that, if the Center engages in professional speech that is being regulated by the Ordinance, intermediate scrutiny should apply. [ECF 104, at 37].

"[W]hether, when, and to what extent the government can compel speech by a professional cannot be established with hard and fast rules." Stuart v. Loomis, 992 F. Supp. 2d 585, 597 (M.D.N.C.), aff'd sub nom. Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), cert. denied sub nom. Walker-McGill v. Stuart, 135 S. Ct. 2838 (2015). In Lowe v. SEC, Justice White describes the difference[16] between a regulation of a profession and regulation of speech:

> Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such.

Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring). To this end, the Fourth Circuit directs courts to consider "whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary." Moore-King v. Cty. of Chesterfield, Va., 708 F.3d 560, 569 (4th Cir . 2013). Facts to consider

---

[16] Justice Jackson also drew a "rough distinction" between permissible professional regulation and impermissible First Amendment infringement: "the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." Thomas v. Collins, 323 U.S. at 544 (Jackson, J., concurring) (emphasis added).

include "the regulatory context, the nature of the professional relationship, the degree of intrusion into it, the reasons for the intrusion and evidentiary support for the intrusion, and the connection between the compelled speech and the government's interests." Stuart v. Loomis, 992 F. Supp. 2d at 600-01 (citing Riley, 487 U.S. at 796).

To support its argument that the Ordinance is a regulation of professional speech, the City contends that the "Pregnancy Centers, including the Plaintiff, hold themselves out as medical facilities that provide professional, medical services." [ECF 104, at 37]. The following evidence is relevant to the City's professional speech contention:

- The Center provides limited ultrasound services to clients. If the sonographer sees a problem with a sonogram "she immediately advises the client that there is a problem and advises her to get to a medical doctor." Clews Depo., at 29 [ECF 104-3].
- A medical director "oversees the medical aspects of the Center." Id. The medical director is on-site rarely and does not meet directly with clients. The director reviews ultrasound images and is available to answer questions from the sonographer. The director has taken one or two Center clients on as personal clients. Id.
- A representative of NIFLA, an affiliate of the Center, stated in his deposition that "They [the Center] are health care providers. They have a licensed physician providing health care services, limited ultrasound . . . They are

a medical practice." Deposition of Thomas Glessner, at 4 [ECF 104-26].

- Volunteers meet with clients on an individual and group basis to perform the following services, sometimes in the waiting room: confidential peer- counseling, Earn While You Learn classes, Bible studies, and pre-natal education. Clews Aff., at ¶ 36 [ECF 101-2, Ex. B].

In response the Center argues that the professional speech doctrine should not apply because the Center is not engaged in a "profession," it is not regulated or licensed by the City or state, it does not charge for its services, and it does not attempt to exercise judgment on behalf of its clients. It has a moral and religious pro-life mission instead of a medical or professional one.

The Court concludes that to apply the professional speech exception here would be an impermissible doctrinal stretch when viewed in the context and regulatory environment of the speech taking place. When courts have held that the professional speech exception applies, the facts almost always involve the context of a professional's relationship with a paying client. Often these professionals are lawyers, accountants, doctors, or other health professionals. See, e.g., Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014) (physicians); Accountant's Soc. Of Virginia v. Bowman, 860 F.2d 602, 603 (4th Cir. 1988) (accountants). In cases that do not involve these professions, the regulated party was required to be licensed or was subject to a state regulatory scheme. See, e. g., Moore-King, 708 F.3d at 569 (involving a fortune teller who gave personalized services to a paying client and who was subject to a "generally applicable licensing and regulatory regime for fortune tellers").

An Eastern District of California case, currently on appeal, involves a First Amendment challenge to a California statute requiring pregnancy centers to post a sign informing patients that public programs are available to provide access to prenatal care, contraception, and birth control.[17] See A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168 (E.D. Cal. 2015), appeal docketed, 15-17517 (9th Cir. Dec. 23, 2015). In that case, the district court held that the statute regulated professional speech and should be reviewed under intermediate scrutiny at the most. Id. at 1195. However, the district court's conclusion rested on facts that are materially different than those presented here. The district court distinguished its case from other pregnancy center cases, saying:

> Unlike the pregnancy centers in Evergreen and Tepeyac, plaintiffs' declarations here establish that each clinic holds a medical license in the State of California, has Licensed Medical personnel on staff, and provides medical services. These facts weigh in favor of treating the relationship between plaintiffs and their clients or patient s as a professional relationship.

Id. at 1201 (internal citations omitted). In addition, the plaintiff pregnancy center in that case performed

---

[17] The sign must say:
"California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."
153 F. Supp. 3d at 1180.

holistic personal assessments of each client, offered medical consults based on individual ultrasounds, created medical charts, employed registered nurses to assess and take medical histories of each client , and offered "a variety of health services 'depending upon the needs and requests of the client.'" Id. at 1202.

The Center in the instant case resembles the center in Tepeyac more than that in A Woman's Friend Pregnancy Resource Clinic. The Center is not a licensed facility, it is not regulated by state health regulations, the staff are not registered nurses performing medical histories and assessments, and the volunteer medical direct or does not regularly take referrals, does not meet with clients, and only serves as an occasional resource for the sonographer. The bulk of the Center's services are religious, educational, and consist of giving free services to clients in order to further its pro-life mission. And while the Center volunteers meet personally and confidentially with clients as part of their mission, the record does not reveal, nor does the City make the argument, that the Center staff exercises medical or other judgment or makes decisions on behalf of its clients.

To summarize, again using the words of Judge Chasanow in Tepeyac:

> [T)he County reaches too far. The mere fact that Centro Tepeyac provides its program participants with the promise of confidentiality does not transform its message into professional speech. The County has offered no evidence that Centro Tepeyac does anything other than provide pregnancy-related information to these women. Indeed, the record

> is devoid of any indication that Centro Tepeyac "purports to exercise judgment on behalf of" its program participants, a critical component of professional speech. At bottom, the County seeks to blur - and perhaps eliminate – the distinction between discussion of professional subject matter and the practice of a profession. Such an outcome would represent a breathtaking expansion of the narrow professional speech doctrine and would ensnare countless charitable organizations based solely on their provision of information to program participants in a private setting. Accordingly, in evaluating whether the Resolution violates Centro Tepeyac's First Amendment rights, strict scrutiny will be applied.

Tepeyac, 5 F. Supp. 3d at 761-62 (internal citations omitted).

As in Tepeyac, because neither the commercial speech or the professional speech exception applies, the Court will apply strict scrutiny to the Ordinance.

c. Intertwined Speech

Even 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, and thus strict scrutiny nevertheless shall apply. See Riley, 487 U.S. at 796 ("[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."). When "component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase

and another test to another phrase." Id. (overturning a law requiring professional fundraisers to disclose to potential donors the percentage of charitable contributions collected that were actually turned over to charity).

The Supreme Court clarified the meaning of "inextricably intertwined" in Board of Trustees of State University of New York v. Fox, saying that parts of speech are not "inextricable" when "[n]othing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." 492 U.S. 469, 474 (1989) (concluding that noncommercial discussions of home economics were not "inextricably intertwined" with commercial sales speech at Tupperware parties). The Fox Court elaborated saying, "[i]ncluding these home economics elements no more converted AFS' presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." Id. at 474-75.

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 provisions of services, which may include professional or commercial speech. The record reveals that the dialogue between the Center and its clients starts as soon as the client steps into the waiting room and that services are rendered in conjunction with counseling and pro- life conversations. See Clews. Aff., at ¶ 35 [ECF 101-2, Ex. B] The Center's staff is trained not to provide a woman with services, such as pregnancy

tests, without first speaking on a personal level with her. See Clews Depo. at 25 [ECF 104-3]. Furthermore, some of the Center's speech, such as Bible studies, have no medical or commercial element at all, yet the Disclaimer impacts those conversations equally. As Director Clews stated, "[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." Clews Aff., at ¶¶ 65, 70 [ECF 101-2, Ex. B]. The Disclaimer would "hover over the sensitive personal, moral, and religious communications that are held in the Center's waiting room." Id. at ¶¶ 67-68.

The religious and political conversations about abortion and contraception that are at the heart of the Center's mission are not equivalent to "opening sales presentations with a prayer," as in Fox. Instead, the Disclaimer would introduce the topic of abortion and birth control, making it impossible for the Center to frame the conversation on those issues as it wishes. Therefore, strict scrutiny should apply, even if some of the Center's speech were considered commercial or professional.

2. Strict Scrutiny Analysis

The Court shall herein conduct an analysis of the Ordinance using strict scrutiny. The Center brings facial and as-applied challenges to the Ordinance under the First Amendment. Although strict scrutiny will apply to both, the burden of proof differs according to which type of challenge is being made. In a facial challenge, the plaintiff must bring a prima facie case of invalidity, whereas in as-applied challenge under strict scrutiny, the government bears

the burden of proof. See Educ. Media Co. at Virginia Tech v. Swecker, 602 F.3d 583, 588 (4th Cir. 2010).

> [A] court considering a facial challenge is to assess the constitutionality of the challenged law "without regard to its impact on the plaintiff asserting the facial challenge." Swecker, 602 F.3d at 588. In contrast, an as - applied challenge is "based on a developed factual record and the application of a statute to a specific person [.]" Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 172 (4th Cir. 2009) (en banc).

Educ. Media Co. at Virginia Tech v. Insley, 731 F.3d 291, 298, n.5 (4th Cir. 2013). Thus, this Court must analyze the Center's facial challenge and as - applied challenge separately.

a. As Applied Strict Scrutiny Analysis

In analyzing the Ordinance as it applies to the Center, t he Court considers whether the City has met its burden to demonstrate that the Ordinance survives strict scrutiny. See United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000) (Government bears the burden of proving constitutionality of regulations of protected speech). To overcome the presumptive invalidity of the Ordinance, the City must show that the Ordinance is "narrowly tailored to promote a compelling Government interest," id. at 813, and it must use the least restrictive means available. See Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004); Am. Life League, Inc. v. Reno, 47 F. 3d 642, 648 (4th Cir. 1995).

The City identifies two interests to support the Ordinance: (1) to protect the public from deceptive business practices, and (2) to promote public health by "ensuring that individual s who seek reproductive health services have access to truthful information about the services available at Pregnancy Centers." [ECF 104, at 41].

These interests must actually be promoted by the Ordinance. See Tepeyac, 5 F. Supp. 3d at 764 ("[T]he restriction on speech must actually further that [compelling] interest."). Furthermore, the City must satisfy what the Supreme Court calls a "demanding standard" in that it 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 Merchants Ass' n, 564 U.S. 786, 799 (2011) (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818, 822-23 (2000). The Supreme Court admitted that it is "rare" for a content- based regulation to ever be permissible. Id.

For purposes of this motion, the Court assumes, without deciding, that promoting public health by protecting the public from deception are compelling interests in the context of this case. Cf. Am. Life League, Inc. v. Reno, 47 F.3d 642, 656 (4th Cir. 1995) (finding that "protect[ing] public health by promoting unobstructed access to reproductive health facilities" is a compelling interest).

The City's expert in medicine and public health, Dr. Robert Blum, discusses how the City's dual interests are related:

> Women seeking family planning services or pregnancy-related care are at a disadvantage

> relative to service providers. . . [because] providers possess more information than consumers . . . As a result, full disclosure of what services a provider is offering, as well as what biases underlie the provision of those services, is needed to ensure that consumers are not deceived or taken advantage of; consumers are able to make fully informed, autonomous decisions about family planning or pregnancy-related care; and consumers have timely access to the services they seek.
>
> Furthermore, family planning services and pregnancy-related care are frequently time-sensitive. Women who are delayed in accessing comprehensive information about contraception or the contraceptive method of their choice may be vulnerable to unintended pregnancy and sexually transmitted infection. . . [Additionally], both the risks and costs of abortion increase with the gestational age of the pregnancy. Accordingly, women who are delayed in accessing abortion services are subject to increased health risks and other obstacles to obtaining care.

See Declaration of Robert W. Blum at ¶¶ 7-8 [ECF 104-30]

The City contends that the Ordinance furthers its interest in preventing public deception "[b]y eliminating the benefit that Pregnancy Centers gain through deceptive advertising – by delaying women' s access to abortion and certain forms of birth control in an effort to deter women from utilizing those services - the Ordinance also discourages use of deceptive advertising in the first place." [ECF 104, at 41].

Certainly, the health care delays described by Dr. Blum present a potential problem - even a serious one. However, there is insufficient evidence to demonstrate that deception actually takes place and that health harms are in fact being caused by delays resulting from deceptive advertising. Instead the City relies on evidence of "misinformation" being disseminated within LSPCs, which is a different problem and interest than the Ordinance purportedly serves.

Both the Maryland Report and the Waxman Report, which were considered by the City Council and are described supra, focus on alleged deceptive speech that occurs inside an LSPC or when an individual is on the phone with an LSPC volunteer. The report s 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. According to the Waxman Report, LSPCs "often mask their pro-life mission in order to attract 'abortion vulnerable clients.' This can take the form of advertising under 'abortion services' in the yellow pages or obscuring the fact that the center does not provide referrals to abortions i n the text of an advertisement." [ECF 18-2, at 1] (footnotes removed). The Maryland Report' s only mention of advertising states that LSPCs can use advertising to attract clients and suggests that university newspapers "investigate" if "an advertisement offers 'pregnancy options counseling' and does not clearly state a position on abortion and birth control . . If the advertisers refuse to provide a referral for abortion services, they are likely a CPC using misleading advertising." [ECF 18-3, at 9].

These references to the use of advertising and that it is misleading do not show if, and how, women react to these messages and if they are harmed as a result of them. This is an important missing link because the City claims the Ordinance targets deceptive advertising. Additionally, none of the Maryland Report investigators who called or visited the LSPCs and received alleged misinformation were harmed, in that none of them were prevented or delayed in getting desired reproductive health care.

Indeed, Jacquelyn Dual-Harvey, the Interim Commissioner of Health for Baltimore City, stated that the City does not know of any instance when a person who has visited an LSPC in Baltimore City was harmed or delayed medical care because of an act or omission or information provided by the LSPC. [ECF 101-2, Ex. E at 109-10]. Despite Ms. Dual-Harvey's testimony, the City argues that LSCPs do harm women, and point s only to Dr. Blum's testimony that "he has seen adolescent patients who delayed visiting medical clinics by two or three weeks after receiving misinformation about the mental and physical harms of abortion." [ECF 104, at 42]. But Dr. Blum provides no evidence to show that these adolescents who were "misinformed" were deceived by advertising into going to an LSPC in the first place. The Ordinance itself is not meant to remedy alleged misinformation being provided by the Centers - it is meant to cure or prevent any ill effects resulting from deceptive advertising.

Other evidence before the City at the time of the Ordinance's passing included testimony by Jodi Kelber-Kaye, PhD, who reported:

> As an educator of college- aged women, I have heard countless stories from students who go [to] these centers, assuming they will get a full range of services and counseling and wind up feeling harassed, coerced, and misinformed. . .
>
> These clinics, usually established near high schools and colleges, will usually refuse to give out Information by phone and insist potential clients come into the Office. Women who go to these clinics, under the assumption that they will be getting advice on all their options, report being harassed, intimidated and given false information by center staff.

[ECF 18-5]. This testimony recounts stories from others and does not come from personal knowledge, making it inadmissible hearsay.[18] Moreover, it does not provide any evidence of the problem of false advertising. The only thing Ms. Kelber-Kaye stated about advertising is that "there should be truth in advertising and, like all other consumer products, limited service pregnancy centers need to kept honest about what services they actually provide." This is a conclusion or aspiration - not factual evidence of a problem that is necessarily solved by compelled speech.

Additionally, the City Council also relied on the testimony of one woman who recounted feeling "tricked" when she was in high school by an LSPC in central Maryland that was listed in the phone book

---

[18] "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c) (emphasis added).

under "Abortion Counseling." Testimony of Tori McReynolds , Bill Hearing, 10/27/09 [ECF 18-4]. She stated that "[h]ad my mother and I seen a sign at that reception desk informing us that we could not get referrals for abortion or birth control, we would have simply moved on." Id. This encounter, which took place decades ago and somewhere outside Baltimore City, is not pertinent to show that there is an actual problem with deceptive advertising leading to harmful delays in healthcare in Baltimore City that would justify restricting protected speech.

The City presents evidence that was not considered by the City Council and which occurred after the Ordinance was passed in 2009. The record shows that the Center participated in the Pennysaver and bus advertisement campaigns. [ECF 104-24, at 21]. There is evidence showing that after the bus campaign some women called the Center asking for or believing the Center referred for abortions. [ECF 104-28]. These women were immediately informed that the Center does not provide abortion services. Clews Depo., at 19 [ECF 104-3]. There is no evidence that any women actually came to the Center seeking abortions or contraception because they were misled by advertising. In fact, according to Center Direct or Clews, most women call before coming to the Center (giving the staff an opportunity to correct any confusion regarding scope of services before a woman's time is wasted), and that when women do walk-in, which is "not a lot," and are seeking an abortion, they are immediately told that the Center does not provide or refer for abortions. Id. at 18.

The sparse evidence, such as it is, offered by the City is inadequate to justify the heavy burden imposed on Plaintiff's speech. The Court notes that

when considering First Amendment challenges to very similar disclosures, two other courts, in Tepeyac and Evergreen, have held that the compelled disclosures failed strict scrutiny. This court in Tepeyac found a similar lack of evidence when considering an almost identical legislative record. Judge Chasanow stated:

> the critical flaw for the County is the lack of any evidence that the practices of LSPRCs 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. The County attempts to elide this distinction by providing no evidence for the effect, only the alleged cause. The Waxman and NARAL [Maryland] reports focus on the misinformation problem. So too do all of the comments made to the County Council in support of the Resolution. These commenters - who were universally volunteers from a pro-choice organization sent to investigate LSPRCs' practices - discussed the alleged misinformation they were provided and that that [sic] the LSPRCs were not forthcoming with the fact that they are not a medical center and that they do not provide referrals for abortions. But even assuming all that is true - that LSPRC are presenting themselves as medical providers and thus pregnant women are accepting their misinformation as sound medical advice, the County must still demonstrate the next supposition on the logical chain: that these practices are having the effect of harming the health of pregnant women.

5 F. Supp. 3d at 768. Likewise, here, 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. Thus, the City has not satisfied the "demanding standard" of showing that the Ordinance actually promotes a compelling interest in solving a specific problem.

> Moreover, the Ordinance is not narrowly tailored.
>
> A statute is narrowly tailored only "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, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1 988). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touch stone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

Greater Baltimore Ctr. for Pregnancy Concerns, Inc., 721 F.3d at 304-05 (Niemeyer, J., dissenting).

Again, the missing element is the existence of deceptive advertising - the very problem that the City contends it is targeting with the Ordinance. Because the Ordinance applies to LSPCs regardless of whether they advertise nonfraudulently or do not advertise at all, it is over inclusive and fails to advance the purported compelling interest. The Ordinance does not mention false advertising, does not target only false advertising, and has no stated link to advertising. An organization falling under the definition of an LSPC that does no advertising would nonetheless be swept up in the City's regulatory

fervor, leaving just another free speech casualty. Thus, the Ordinance is a "blunt" instrument that fails to "curtail speech only to the degree necessary to meet the particular problem at hand, and [fails to] avoid infringing on speech that does not pose the danger that has prompted regulation." Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 265 (1986).

Even in Evergreen, where the Second Circuit Court of Appeals upheld a compelled status disclosure, the court determined unconstitutional another part of the law that mandated LSPCs disclose that they do not provide or refer for abortions - even if it were viewed as narrowly tailored.

> Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives. "[E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values." . . 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.

Evergreen Ass' n, Inc. v. City of New York, 740 F.3d 233, 249 (2d Cir. 2014), cert. denied sub nom. Evergreen Ass' n, Inc. v. City of New York, N. Y., 135 S. Ct. 435 (2014), and cert. denied sub nom. Pregnancy Care Ctr. of New York v . City of New York, N. Y., 135 S. Ct. 435 (2014) (quoting NAACP v.

Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (internal quotation marks omitted)).

For these reasons, the Court determines that the Ordinance is unconstitutional as applied to the Center.

b. Facial Challenge Analysis

In a facial challenge, the plaintiff bears the burden of making a prima facie case of invalidity.

> In the First Amendment context, there are two ways for a plaintiff to mount a facial challenge to a statute. First, the plaintiff may demonstrate "that no set of circumstances exists under which [the law] would be valid, or that the [law] lacks any plainly legitimate sweep." Second, the plaintiff may show that the law is "overbroad [because] a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."

Greater Baltimore Ctr. for Pregnancy Concerns, Inc., 721 F.3d at 282 (quoting United States v. Stevens, 559 U.S. 460 (2010) (citations and internal quotation marks omitted)). The Fourth Circuit also instructed this Court to consider evidence "concerning the distinctive characteristics of Baltimore's various limited-service pregnancy centers." Id.

In this case, the Plaintiff has not presented evidence adequate to establish that there are "no set of circumstances" wherein the Ordinance would be valid against any LSPC in Baltimore; nor is there adequate evidence to determine if a "substantial number" of the Ordinance's applications are unconstitutional in relation to its "legitimate sweep."

In addition to the Center, Baltimore Pregnancy Center ("BPC") is an LSPC affected by the Ordinance. The record includes BPC's list of objections to the City's subpoena for documents, a document with BPC's address, phone number, and hours of operation, a document listing the free services BPC provides stating "all services are free and confidential," and a document requesting donations that summarizes BPC's mission as a "pro-life pregnancy resource center." [ECF 101-2, Ex. L]. However, there is no evidence showing the potential impact of the Ordinance on BPC's speech, whether and how BPC advertises, whether it provides any professional services, its religious motivations, if any, or the nature of the speech that may take place in its waiting room. See id.

The Court does not foreclose the possibility that BPC would be able successfully to assert an as-applied challenge to the Ordinance. However, the Court concludes that, on the record of the instant case, the Center has not presented evidence adequate to establish that the Ordinance is facially unconstitutional.

C. Counts II, III, and IV

As discussed herein, the Center is entitled to summary judgment on Count I, the First Amendment freedom of speech claim. Thus, the Center's remaining claims are rendered moot.

IV. CONCLUSION

For the foregoing reasons:

1. Plaintiff Greater Baltimore Center for Pregnancy Concerns, Inc.'s Motion for

Summary Judgment [ECF 101] is GRANTED.

2. Defendants Mayor and City Council of Baltimore, et al.'s Cross Motion for Summary Judgment [ECF 104] is DENIED.

3. By October 23, 2016 the parties shall provide an agreed, as to form,[19] Judgment Order or separate proposed Judgment Orders consistent with this decision.

SO ORDERED, this Tuesday, October 4, 2016.

/s/
Marvin J . Garbis
United States District Judge

[19] Agreement with the Judgment Order constitutes agreement only with the fact that the said Order accurately states the effect of the instant decision. It does not constitute agreement with the instant decision or any action by the Court. All appellate rights are retained.

[ENTERED SEPTEMBER 29, 2016]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. MJG-10-760

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC. *
Plaintiff *
vs. *
*
MAYOR AND CITY COUNCIL OF BALTIMORE, et al. *
Defendants *

* *

ORDER RESOLVING MOTIONS

As to be set forth more fully in a Memorandum and Order to be issued shortly hereafter:

1. Plaintiff Greater Baltimore Center for Pregnancy Concerns, Inc.'s Motion for Summary Judgment [ECF 101] is GRANTED.

2. Defendants Mayor and City Council of Baltimore, et al.'s Cross Motion for Summary Judgment [ECF 104] is DENIED.

SO ORDERED, this Thursday, September 29, 2016.

_____ /s/_____
Marvin J. Garbis

United States District Judge

[ENTERED: JULY 3, 2013]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1111

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INCORPORATED,

Plaintiff – Appellee,

and

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION INCORPORATED; ARCHBISHOP WILLIAM E. LORI, as successor to Archbishop Edwin F. O'Brien, Archbishop of Baltimore, and his successor in office, a corporation sole,

Plaintiffs,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE RAWLINGS-BLAKE, Mayor of Baltimore, in her Official Capacity; OXIRIS BARBOT, Baltimore City Health Commissioner,

Defendants – Appellants,

and

OLIVIA FARROW; BALTIMORE CITY HEALTH DEPARTMENT,

Defendants.

TAUNYA LOVELL BANKS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; C. CHRISTOPHER BROWN, Associate Professor Emeritus of Law, University of Maryland School of Law; ERWIN CHEMERINSKY, Dean and Distinguished Professor of Law, University of California, Irvine School of Law; ROBERT J. CONDLIN, Professor of Law, University of Maryland School of Law; NORMAN DORSEN, Frederick I. and Grace A. Stokes Professor of Law, New York University School of Law; LEIGH GOODMARK, Associate Professor of Law, University of Baltimore School of Law; STEVEN P. GROSSMAN, Dean Julius Isaacson Professor of Law, University of Baltimore School of Law; MARTIN GUGGENHEIM, Fiorello LaGuardia Professor of Clinical Law, New York University School of Law; DEBORAH HELLMAN, Professor of Law and Jacob France Research Professor, University of Maryland School of Law; MARGARET E. JOHNSON, Assistant Professor of Law, University of Baltimore School of Law; KENNETH LASSON, Professor of Law, University of Baltimore School of Law; SYLVIA A. LAW, Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, New York University School of Law; SUSAN PAULA LEVITON, Professor of Law, University of Maryland School of Law; AUDREY MCFARLANE, Professor of Law, University of Baltimore School of Law; PAULA A. MONOPOLI, Professor of Law, University of Maryland School of Law; BURT NEUBORNE, Inez Milholland Professor of Civil Liberties, New York University School of Law; JOHN T. NOCKLEBY, Professor of Law, Loyola Law

School; HELEN L. NORTON, Associate Professor of Law, University of Colorado School of Law; DAVID A.J. RICHARDS, Edwin D. Webb Professor of Law, New York University School of Law; ELIZABETH J. SAMUELS, Professor of Law, University of Baltimore School of Law; ELIZABETH M. SCHNEIDER, Rose L. Hoffer Professor of Law, Brooklyn Law School; JANA B. SINGER, Professor of Law, University of Maryland School of Law; BARBARA ANN WHITE, Professor of Law, University of Baltimore School of Law; TOBIAS BARRINGTON WOLFF, Professor of Law, University of Pennsylvania Law School; DIANE L. ZIMMERMAN, Samuel Tilden Professor of Law Emerita, New York University School of Law; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; ROBERT BLUM; WILLARD CATES, JR.; CHESAPEAKE REGIONAL CHAPTER OF THE SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; ERIC LEVEY; MATERNAL AND CHILD HEALTH ACCESS; NADINE PEACOCK; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; MARK SEIGEL; LAURIE SCHWAB ZABIN; EVA MOORE; CATHOLICS FOR CHOICE; DC ABORTION FUND; DIANA DEGETTE; DONNA EDWARDS; LAW STUDENTS FOR REPRODUCTIVE JUSTICE; CAROLYN MALONEY; MARYLAND CHAPTER FOR THE NATIONAL ORGANIZATION FOR WOMEN; NARAL PRO-CHOICE AMERICA; NARAL PRO-CHOICE MARYLAND; NATIONAL ABORTION FEDERATION; NATIONAL ADVOCATES FOR PREGNANT WOMEN; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; PLANNED

PARENTHOOD OF MARYLAND; MIKE QUIGLEY; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE; LOUISE SLAUGHTER; JACKIE SPEIER; WHOLE WOMAN'S HEALTH OF BALTIMORE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; HUMAN RIGHTS WATCH; SUSAN DELLER ROSS, Professor; ELIJAH CUMMINGS,

Amici Supporting Appellants,

PREGNANCY CARE ORGANIZATIONS CARE NET; HEARTBEAT INTERNATIONAL, INCORPORATED; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES; ROCKA-MY-BABY PREGNANCY CRISIS CENTER; BOWIE CROFTON PREGNANCY CLINIC, INCORPORATED; CARE NET PREGNANCY CENTER OF FREDERICK; CARE NET PREGNANCY CENTER OF SOUTHERN MARYLAND; LAUREL PREGNANCY CENTER; ROCKVILLE PREGNANCY CENTER, INCORPORATED; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; CATHOLIC MEDICAL ASSOCIATION; HELEN M. ALVARE, Associate Professor of Law, George Mason University School of Law; ROBERT JOHN ARAUJO, S.J., John Courtney Murray, S.J. University Professor, Loyola University of Chicago School of Law; ROBERT F. COCHRAN, JR., Louis D. Brandeis Professor of Law, Pepperdine University School of Law; DAVID DEWOLF, Professor, Gonzaga University School of Law; DWIGHT G.

DUNCAN, Professor of Law, University of Massachusetts Dartmouth School of Law; JOHN C. EASTMAN, Henry Salvatori Professor of Law & Community Service, former Dean, Chapman University School of Law; SCOTT T. FITZGIBBON, Professor, Boston College Law School; RICHARD W. GARNETT, Associate Dean and Professor of Law, Notre Dame Law School; BRADLEY P. JACOB, Associate Professor, Regent University School of Law; DREW L. KERSHEN, Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law; LYNNE MARIE KOHM, John Brown McCarty Professor of Family Law, Regent University School of Law; RICHARD S. MYERS, Professor of Law, Ave Maria School of Law; MICHAEL STOKES PAULSEN, Distinguished University Chair and Professor, University of St. Thomas School of Law; ROBERT J. PUSHAW, James Wilson Endowed Professor of Law, Pepperdine University School of Law; MICHAEL SCAPERLANDA, Professor of Law, Gene & Elaine Edwards Family Chair in Law, The University of Oklahoma College of Law; GREGORY C. SISK, Pio Cardinal Laghi Distinguished Chair in Law and Professor, University of St. Thomas School of Law; O. CARTER SNEAD, Professor of Law, Notre Dame Law School; RICHARD STITH, Professor of Law, Valparaiso University School of Law; TIMOTHY J. TRACEY, Assistant Professor of Law, Ave Maria School of Law; LYNN D. WARDLE, Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University; THE NATIONAL LEGAL FOUNDATION,

Amici Supporting Appellees.

No. 11-1185

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION INCORPORATED; ARCHBISHOP WILLIAM E. LORI, as successor to Archbishop Edwin F. O'Brien, Archbishop of Baltimore, and his successor in office, a corporation sole,

Plaintiffs – Appellants,

and

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INCORPORATED,

Plaintiff,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE RAWLINGS-BLAKE, Mayor of Baltimore, in her Official Capacity; OXIRIS BARBOT, Baltimore City Health Commissioner,

Defendants – Appellees,

and

OLIVIA FARROW; BALTIMORE CITY HEALTH DEPARTMENT,

Defendants.

HELEN M. ALVARE, Associate Professor of Law, George Mason University School of Law;

AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS; ROBERT JOHN ARAUJO, S.J., John Courtney Murray, S.J. University Professor, Loyola University of Chicago School of Law; BOWIE CROFTON PREGNANCY CLINIC, INCORPORATED; CARE NET PREGNANCY CENTER OF FREDERICK; CARE NET PREGNANCY CENTER OF SOUTHERN MARYLAND; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; CATHOLIC MEDICAL ASSOCIATION; ROBERT F. COCHRAN, JR., Louis D. Brandeis Professor of Law, Pepperdine University School of Law; DAVID DEWOLF, Professor, Gonzaga University School of Law; DWIGHT G. DUNCAN, Professor of Law, University of Massachusetts Dartmouth School of Law; JOHN C. EASTMAN, Henry Salvatori Professor of Law & Community Service, former Dean, Chapman University School of Law; SCOTT T. FITZGIBBON, Professor, Boston College Law School; RICHARD W. GARNETT, Associate Dean and Professor of Law, Notre Dame Law School; HEARTBEAT INTERNATIONAL, INCORPORATED; BRADLEY P. JACOB, Associate Professor, Regent University School of Law; DREW L. KERSHEN, Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law; LYNNE MARIE KOHM, John Brown McCarty Professor of Family Law, Regent University School of Law; LAUREL PREGNANCY CENTER; RICHARD S. MYERS, Professor of Law, Ave Maria School of Law; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES; MICHAEL STOKES

PAULSEN, Distinguished University Chair and Professor, University of St. Thomas School of Law; PREGNANCY CARE ORGANIZATIONS CARE NET; ROBERT J. PUSHAW, James Wilson Endowed Professor of Law, Pepperdine University School of Law; ROCKA-MY-BABY PREGNANCY CRISIS CENTER; ROCKVILLE PREGNANCY CENTER, INCORPORATED; MICHAEL SCAPERLANDA, Professor of Law, Gene & Elaine Edwards Family Chair in Law, The University of Oklahoma College of Law; GREGORY C. SISK, Pio Cardinal Laghi Distinguished Chair in Law and Professor, University of St. Thomas School of Law; O. CARTER SNEAD, Professor of Law, Notre Dame Law School; RICHARD STITH, Professor of Law, Valparaiso University School of Law; TIMOTHY J. TRACEY, Assistant Professor of Law, Ave Maria School of Law; LYNN D. WARDLE, Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University; THE NATIONAL LEGAL FOUNDATION,

Amici Supporting Appellants,

TAUNYA LOVELL BANKS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; C. CHRISTOPHER BROWN, Associate Professor Emeritus of Law, University of Maryland School of Law; ERWIN CHEMERINSKY, Dean and Distinguished Professor of Law, University of California, Irvine School of Law; ROBERT J. CONDLIN, Professor of Law, University of Maryland School of Law; NORMAN DORSEN, Frederick I. and Grace A. Stokes Professor of Law, New York University School of

Law; LEIGH GOODMARK, Associate Professor of Law, University of Baltimore School of Law; STEVEN P. GROSSMAN, Dean Julius Isaacson Professorof Law, University of Baltimore School of Law; MARTIN GUGGENHEIM, Fiorello LaGuardia Professor of Clinical Law, New York University School of Law; DEBORAH HELLMAN, Professor of Law and Jacob France Research Professor, University of Maryland School of Law; MARGARET E. JOHNSON, Assistant Professor of Law, University of Baltimore School of Law; KENNETH LASSON, Professor of Law, University of Baltimore School of Law; SUSAN PAULA LEVITON, Professor of Law, University of Maryland School of Law; SYLVIA A. LAW, Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, New York University School of Law; AUDREY MCFARLANE, Professor of Law, University of Baltimore School of Law; PAULA A. MONOPOLI, Professor of Law, University of Maryland School of Law; BURT NEUBORNE, Inez Milholland Professor of Civil Liberties, New York University School of Law; JOHN T. NOCKLEBY, Professor of Law, Loyola Law School; HELEN L. NORTON, Associate Professor of Law, University of Colorado School of Law; DAVID A.J. RICHARDS, Edwin D. Webb Professor of Law, New York University School of Law; ELIZABETH M. SCHNEIDER, Rose L. Hoffer Professor of Law, Brooklyn Law School; ELIZABETH J. SAMUELS, Professor of Law, University of Baltimore School of Law; JANA B. SINGER, Professor of Law, University of Maryland School of Law; BARBARA ANN WHITE, Professor of Law, University of

Baltimore School of Law; TOBIAS BARRINGTON WOLFF, Professor of Law, University of Pennsylvania Law School; DIANE L. ZIMMERMAN, Samuel Tilden Professor of Law Emerita, New York University School of Law; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; MATERNAL AND CHILD HEALTH ACCESS; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; CHESAPEAKE REGIONAL CHAPTER OF THE SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; ROBERT BLUM; WILLARD CATES, JR.; ERIC LEVEY; NADINE PEACOCK; MARK SEIGEL; LAURIE SCHWAB ZABIN; EVA MOORE; NARAL PRO-CHOICE MARYLAND; NARAL PRO- CHOICE AMERICA; CATHOLICS FOR CHOICE; DC ABORTION FUND; LAW STUDENTS FOR REPRODUCTIVE JUSTICE; NATIONAL ABORTION FEDERATION; MARYLAND CHAPTER FOR THE NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ADVOCATES FOR PREGNANT WOMEN; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; PLANNED PARENTHOOD OF MARYLAND; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE; WHOLE WOMAN'S HEALTH OF BALTIMORE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; DIANA DEGETTE; DONNA EDWARDS; CAROLYN MALONEY; MIKE QUIGLEY; LOUISE SLAUGHTER; JACKIE SPEIER; HUMAN RIGHTS WATCH; SUSAN DELLER ROSS, Professor; ELIJAH CUMMINGS,

Amici Supporting Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:10-cv-00760-MJG)

ARGUED: December 6, 2012 Decided: July 3, 2013

Before TRAXLER, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, SHEDD, DUNCAN, AGEE, KEENAN, WYNN, FLOYD, and THACKER, Circuit Judges.

No. 11-1111 vacated and remanded, and No. 11-1185 affirmed, by published opinion. Judge King wrote the majority opinion, in which Chief Judge Traxler and Judges Motz, Duncan, Keenan, Wynn, Floyd, and Thacker joined. Judge Wilkinson wrote a dissenting opinion. Judge Niemeyer wrote a dissenting opinion, in which Judges Wilkinson, Shedd, and Agee joined.

ARGUED: Suzanne Sangree, CITY OF BALTIMORE LAW DEPARTMENT, Baltimore, Maryland, for Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. David William Kinkopf, GALLAGHER EVELIUS & JONES, LLP, Baltimore,

Maryland, for Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop William E. Lori. **ON BRIEF:** Stephanie Toti, Special Assistant City Solicitor, CENTER FOR REPRODUCTIVE RIGHTS, New York, New York, for Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Peter J. Basile, FERGUSON, SHETELICH & BALLEW, PA, Baltimore, Maryland; Steven G. Metzger, GALLAGHER EVELIUS & JONES, LLP, Baltimore, Maryland; Mark L. Rienzi, COLUMBUS SCHOOL OF LAW, Catholic University of America, Washington, D.C., for Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop William E. Lori. Maria T. Vullo, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, New York, New York, for Amici Curiae Law Professors in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Douglas W. Baruch, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, Washington, D.C.; Janice Mac Avoy, Alexander T. Korn, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, New York, New York, for International Municipal Lawyers Association, Amicus Curiae in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris

Barbot, Baltimore City Health Commissioner. Simona G. Strauss, Melissa D. Schmidt, SIMPSON THACHER & BARTLETT LLP, Palo Alto, California; Jayma M. Meyer, SIMPSON THACHER & BARTLETT LLP, New York, New York, for Amici Curiae Public Health Advocates in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Kimberly A. Parker, Zaid A. Zaid, Lesley Fredin, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Catholics for Choice, DC Abortion Fund, Donna Edwards, Maryland Chapter for the National Organization for Women, Naral Pro-Choice America, Naral Pro-Choice Maryland, National Abortion Federation, National Advocates for Pregnant Women, National Asian Pacific American Women's Forum, Planned Parenthood of Maryland, Mike Quigley, Religious Coalition for Reproductive Choice, Louise Slaughter, Jackie Speier, Whole Woman's Health of Baltimore, Women's Law Center of Maryland, Incorporated, Elijah Cummings, Amici Curiae in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Anna R. Franzonello, Mailee R. Smith, Mary E. Harned, Denise M. Burke, AMERICANS UNITED FOR LIFE, Washington, D.C., for Pregnancy Care Organizations Care Net, Heartbeat International, Incorporated, National Institute of Family and Life Advocates, Rocka-My-Baby Pregnancy Crisis Center,

Bowie Crofton Pregnancy Clinic, Incorporated, Care Net Pregnancy Center of Frederick, Care Net Pregnancy Center of Southern Maryland, Laurel Pregnancy Center, and Rockville Pregnancy Center, Incorporated, Amici Curiae in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop William E. Lori. Colby M. May, James Matthew Henderson, Sr., Tiffany N. Barrans, AMERICAN CENTER FOR LAW & JUSTICE, Washington, D.C.; Cecilia N. Heil, Erik M. Zimmerman, AMERICAN CENTER FOR LAW & JUSTICE, Virginia Beach, Virginia; Carly F. Gammill, AMERICAN CENTER FOR LAW & JUSTICE, Franklin, Tennessee, for American Center for Law and Justice, Amicus Curiae in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop William E. Lori. Matthew S. Bowman, ALLIANCE DEFENDING FREEDOM, Washington, D.C.; Samuel B. Casey, David B. Waxman, JUBILEE CAMPAIGN-LAW OF LIFE PROJECT, Washington, D.C., for American Association of Pro-Life Obstetricians and Gynecologists, Christian Medical & Dental Associations, and Catholic Medical Association, Amici Curiae in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop William E. Lori. John C. Eastman, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, Chapman University School of Law, Orange, California; David

T. Raimer, Noel J. Francisco, JONES DAY, Washington, D.C., for Amici Curiae Professors in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop William E. Lori. Steven W. Fitschen, THE NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia; John P. Tuskey, BINGHAM AND LOUGHLIN, P.C., Mishawaka, Indiana, for The National Legal Foundation, Amicus Curiae in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop William E. Lori.

KING, Circuit Judge:

Invoking the First Amendment, the district court fully and permanently enjoined enforcement of a City of Baltimore Ordinance requiring limited-service pregnancy centers to post disclaimers that they do not provide or make referrals for abortions or certain birth-control services. The injunction emanated from the court's award of summary judgment to plaintiff Greater Baltimore Center for Pregnancy Concerns, Incorporated, on its claim that the Ordinance is facially invalid under the Free Speech Clause. See O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 812-17 (D. Md. 2011). Crucially, however, the summary judgment decision was laden with error, in that the court denied the defendants essential discovery and otherwise disregarded basic rules of civil procedure. We therefore vacate the judgment and remand for further proceedings, without comment on how this matter ultimately should be resolved.[1]

---

[1] To be clear, we vacate and remand in the appeal (No. 11-1111) noted by defendants Mayor and City Council of Baltimore; Stephanie Rawlings-Blake, in her official capacity as Mayor of Baltimore; and Oxiris Barbot, in her official capacity as Baltimore City Health Commissioner. We affirm, however, in the cross-appeal (No. 11-1185) of St. Brigid's Roman Catholic Congregation Incorporated and Archbishop William E. Lori, contesting the district court's ruling that they lack standing to be co-plaintiffs with the Greater Baltimore Center for Pregnancy Concerns. See O'Brien, 768 F. Supp. 2d at 811-12. On initial review by a three-judge panel of our Court, the majority affirmed both the district court's summary judgment decision and its standing ruling. See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012). The panel opinion was subsequently vacated, however, with the grant of rehearing en banc. See

I.

A.

The challenged Ordinance — City of Baltimore Ordinance 09-252 — was passed by the City Council on November 23, 2009, and approved by the Mayor on December 4, 2009. See J.A. 25-28.[2] The Ordinance applies to limited-service pregnancy centers, 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.

Id. at 25-26. Under the Ordinance, "[a] limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services." Id. at 26. The disclaimer is to be given by way of one or more signs that are "written in English and Spanish," "easily

---

Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., No. 11-1111(L) (4th Cir. Aug. 15, 2012).

[2] Citations herein to "J.A. " refer to the contents of the Joint Appendix filed by the parties in these appeals

readable," and "conspicuously posted in the center's waiting room or other area where individuals await service." Id.

By an implementing Regulation of the Baltimore City Health Department, nondirective and comprehensive birth-control services are defined as "birth-control services which only a licensed healthcare professional may prescribe or provide." See J.A. 39-40.[3] The Regulation specifies that, if a "center provides or refers for some birth-control services, it may indicate on the disclaimer sign what birth-control services it does provide and/or refer for." Id. at 40. Additionally, the Regulation authorizes a center to "indicate on the disclaimer sign that the sign is required by Baltimore City ordinance." Id.

The Ordinance vests enforcement powers in the Baltimore City Health Commissioner, who, upon "learn[ing] that a pregnancy center is in violation of [the Ordinance]," must "issue a written notice ordering the center to correct the violation within 10 days of the notice or within any longer period that the Commissioner specifies in the notice." J.A. 26. If a center fails to comply with a violation notice, the Commissioner may issue an environmental or a civil citation pursuant to the Baltimore City Code. Id. at

[3] The Joint Appendix contains the original version of the Regulation, adopted on July 15, 2010, which indicated that nondirective and comprehensive birth-control services "may also include other birth-control services." J.A. 39. That language was deleted from the Regulation on September 27, 2010, after being deemed problematic in the course of this litigation. Otherwise, there are no substantive differences between the original and superseding versions of the Regulation.

27. The Commissioner may also "pursu[e] any other civil or criminal remedy or enforcement action authorized by law." Id.

B.

This 42 U.S.C. § 1983 action — challenging the constitutionality of the Ordinance — was initiated in the District of Maryland on March 29, 2010, by the Greater Baltimore Center for Pregnancy Concerns (the "Center"), together with St. Brigid's Roman Catholic Congregation and then-Archbishop Edwin F. O'Brien. The plaintiffs' Complaint names as defendants the Mayor and City Council of Baltimore; Stephanie Rawlings-Blake, in her official capacity as Mayor of Baltimore; and Olivia Farrow, in her official capacity as then-Acting Baltimore City Health Commissioner (collectively, the "City"). Since then, two of the parties have been succeeded: now-Cardinal O'Brien by Archbishop William E. Lori, and Farrow by Baltimore City Health Commissioner Oxiris Barbot.[4]

1.

The Complaint reflects that the Center qualifies under the Ordinance as a limited-service pregnancy center, in that it "has as its primary purpose providing pregnancy-related services and provides information about pregnancy-related services as a free service"; "does not refer for or provide abortions"; and "does not refer for, or provide information regarding birth

[4] The plaintiffs consented to dismiss without prejudice their claims against an additional defendant, the Baltimore City Health Department. See O'Brien, 768 F. Supp. 2d at 808 n.5. Meanwhile, the City voluntarily refrained from enforcing the Ordinance prior to the entry of the district court's judgment.

control, other than natural family planning and abstinence." Complaint ¶¶ 25-26. The Center offers pregnancy-related services at two locations in Baltimore, including a space owned by St. Brigid's and the Archbishop. Id. ¶¶ 10, 16-18. According to the Complaint, the plaintiffs share sincerely held religious beliefs that cause them to oppose abortion and certain forms of birth control. Id. ¶¶ 40-41, 43-44. The Complaint alleges that the Ordinance violates the First Amendment rights of free speech, free assembly, and free exercise of religion, plus the Fourteenth Amendment guarantee of equal protection and Maryland's statutory "conscience clause," see Md. Code Ann., Health-Gen. § 20-214(a)(1) (providing, inter alia, that "[a] person may not be required to . . . refer to any source for[] any medical procedure that results in . . . termination of pregnancy"). The Ordinance is attached to the Complaint as its sole exhibit.

On June 4, 2010, before the City even had answered the Complaint and when there were four days remaining for it to do so, the plaintiffs filed a motion for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Specifically, the plaintiffs sought judgment on their free speech, free assembly, and equal protection claims, contending that the Ordinance is unconstitutional on its face and as applied to them. The plaintiffs insisted that the strict scrutiny standard applies and cannot be satisfied, because the Ordinance fosters viewpoint discrimination against what they termed "pro-life pregnancy centers" and unjustifiably compels only those centers to engage in government-mandated speech. The plaintiffs portrayed the Ordinance-

mandated sign as ensuring that every conversation at a limited-service pregnancy center begins with the subject of abortion, and conveying the morally offensive message that abortion is available elsewhere and might be considered a good option.

The plaintiffs supported their summary judgment motion with an affidavit of Carol Clews, the Center's Executive Director, corroborating several of the factual allegations in the Complaint. See J.A. 29-31 (the "Clews Affidavit" of June 3, 2010). The Clews Affidavit asserted that, "[i]f not required by law, the Center would not post the disclaimer compelled by Baltimore City Ordinance 09-252." Id. at 30. The plaintiffs also proffered an excerpt from the "Journal of the City Council" reflecting that the Council rejected proposed amendments to the Ordinance aimed at expanding its disclosure requirements to, e.g., pregnancy centers that refer for abortions but not adoptions. Id. at 296-99.

On June 8, 2010, the City filed a motion to dismiss the Complaint in its entirety, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, or alternatively to dismiss the claims of St. Brigid's and the Archbishop, under Rule 12(b)(1), for lack of standing. The City characterized the Ordinance as a consumer protection regulation, referring to evidence in the Ordinance's legislative record showing that limited-service pregnancy centers often engage in deceptive advertising to attract women seeking abortion and comprehensive birth-control services, and then use delay tactics to impede the women from accessing those services. According to the City, limited-service

pregnancy centers thereby pose a threat to public health, in that the risks and costs of abortion increase as a woman advances through her pregnancy, and that delays in access to the birth control of a woman's choice can leave the woman vulnerable to unintended pregnancy and sexually transmitted diseases.

The parties' respective dispositive motions prompted the district court to enter a Scheduling Order specifying deadlines for further related submissions. In compliance with the Scheduling Order, the plaintiffs filed a response to the City's motion to dismiss on July 2, 2010; the City submitted a reply concerning its dismissal motion, combined with a response to the plaintiffs' motion for summary judgment, on July 16, 2010; and the plaintiffs filed a reply with respect to their summary judgment motion on July 23, 2010.

2.

a.

The City's July 16, 2010 submission included four pieces of evidence from the Ordinance's legislative record that had previously been referenced in the City's motion to dismiss. The first such piece of evidence was a July 2006 report prepared for Congressman Henry A. Waxman entitled "False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers." See J.A. 413-30 (the "Waxman Report"). The Waxman Report concerned pro-life pregnancy centers referred to as "pregnancy resource centers," and it recited, in pertinent part, that

> [p]regnancy resource centers often mask their pro-life mission in order to attract "abortion-vulnerable clients." This can take the form of advertising under "abortion services" in the yellow pages or obscuring the fact that the center does not provide referrals to abortions in the text of an advertisement. Some centers purchase advertising on internet search engines under keywords that include "abortion" or "abortion clinics." Other advertisements represent that the center will provide pregnant teenagers and women with an understanding of all of their options. For example, "Option Line," a joint venture of [national umbrella organizations] Heartbeat International and Care Net, is a 24-hour telephone hotline that connects pregnant teenagers and women with pregnancy resource centers in their communities. The main page of Option Line's website states at the top, "Pregnant? Need Help? You Have Options," but does not reveal that both Heartbeat International and Care Net represent only pro-life centers or that only non-abortion options will be counseled.

Id. at 417-18 (footnotes omitted). Otherwise, the Waxman Report focused on information that was provided over the telephone by federally funded pregnancy resource centers in fifteen states to investigators posing as pregnant seventeen-year-old girls.

The City's second piece of evidence from the Ordinance's legislative history — a January 2008 report of the NARAL Pro- Choice Maryland Fund

entitled "The Truth Revealed: Maryland Crisis Pregnancy Center Investigations" — was premised on visits by investigators to "crisis pregnancy centers" or "CPCs" all located in Maryland. See J.A. 326-412 (the "Maryland Report"). The Maryland Report's findings included the following:

> Maryland Crisis Pregnancy Centers attract clients with their advertisements offering free pregnancy tests and "pregnancy options counseling." This is a very appealing offer for women in a vulnerable time in their lives. After providing free urine pregnancy tests (the kind available at any drug store), women are counseled with only negative information about the option of abortion. They are given wildly inaccurate information about the physical and mental health risks associated with abortion, and informed only about the joys of parenting and adoption. If a client continues to consider abortion, she is given false information about abortion service availability and encouraged to delay her decision. CPCs that offer ultrasounds and [sexually transmitted infection] testing are able to delay clients further through appointment wait times, while also gaining a sense of authority and credibility in their client's eyes as a medical service provider. However, CPCs are not medical centers. They are operated by volunteers who are, in general, poorly trained in women's reproductive health issues and well trained in anti-choice propaganda.

Id. at 334.

The City's third and fourth pieces of evidence from the Ordinance's legislative record consisted of written testimony. Tori McReynolds recounted that, sixteen years earlier, when she was a sixteen-year-old girl who needed to know if she was pregnant, her mother arranged for her to visit a limited-service pregnancy center in central Maryland that "was listed in the phone book under 'Abortion Counseling.'" J.A. 261 (emphasis omitted). McReynolds produced a urine sample for a pregnancy test "and was told that it would take about 45 minutes to know the result." Id. During the waiting period, a woman at the center subjected McReynolds to anti-abortion propaganda. Id. McReynolds testified: "I felt tricked; I was a frightened teenager expecting a discussion about my options and instead I was bullied by an opinionated adult twice my age. . . . Had my mother and I seen a sign at that reception desk informing us that we could not get referrals for abortion or birth control, we would have simply moved on." Id.

Dr. Jodi Kelber-Kaye of the University of Maryland, Baltimore County, testified that, "[a]s an educator of college- aged women," she had "heard countless stories from students who go [to limited-service pregnancy centers], assuming they will get a full range of services and counseling and wind up feeling harassed, coerced, and misinformed." J.A. 273. Dr. Kelber-Kaye also said she was "distressed by the existence of centers that, on purpose, appear to be medical facilities and are not staffed by licensed medical personnel, nor even licensed counselors." Id. "Simply put," Kelber-Kaye concluded, "there should be truth in advertising and, like all consumer products, limited-service pregnancy centers

need to be kept honest about what services they actually provide." Id.

b.

In addition to discussing the foregoing evidence, the City asserted in its July 16, 2010 submission that the plaintiffs' summary judgment request was premature, in that the City had not been afforded the opportunity to conduct discovery or to fully develop expert testimony on key factual issues.[5] The City contended that discovery was needed to test the veracity of the plaintiffs' allegations and to develop evidence tending to refute their claims. Pursuant to former Rule 56(f), the City submitted an affidavit of Special Assistant City Solicitor Stephanie Toti, identifying issues that required discovery. See J.A. 41-43 (the "Rule 56(f) Affidavit" of July 16, 2010); see also Fed. R. Civ. P. 56(f) (2010) (providing that, "[i]f a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may," inter alia, "deny the motion" or "order a continuance to enable . . . discovery to be undertaken").[6]

The Rule 56(f) Affidavit specified that the City needed "to conduct discovery concerning the advertising that the [plaintiff] Center and other

---

[5] In accordance with Federal Rule of Civil Procedure 26(d)(1), the City was constrained to respond to the plaintiffs' summary judgment motion without the benefit of discovery because the parties had not yet conferred as required by Rule 26(f).

[6] By amendment that took effect on December 1, 2010, former Rule 56(f) was carried forward into subdivision (d) without substantial change.

limited-service pregnancy centers employ, [to] demonstrate its deceptive character." J.A. 42. The Affidavit also deemed discovery necessary "to develop factual support for [the City's] argument that the services offered by [the Center] are a form of commerce, and, therefore, the disclaimer required by the Ordinance is commercial speech, subject only to rational basis scrutiny — not strict scrutiny." Id. Additionally, the Affidavit maintained that the City "require[d] the opportunity to develop expert testimony to provide factual support for the propositions that deceptive advertising by limited-service pregnancy centers threatens public health in a variety of ways." Id. at 41. The Affidavit explained that one potential expert, Dr. Laurie Schwab Zabin, had "agreed to provide [the City] with a declaration detailing the harms that can result from delays in women's access to abortion or comprehensive birth control services." Id. at 42. Dr. Zabin had not completed her declaration, however, and was then abroad on vacation. Id.

The Rule 56(f) Affidavit further disclosed that another potential expert, Dr. Robert Blum, had already provided a declaration to the City, which the City in turn included in its July 16, 2010 submission to the district court. See J.A. 44-46 (the "Blum Affidavit" of June 17, 2010). In his Affidavit, Dr. Blum, the Director of the Johns Hopkins University Urban Health Institute, confirmed that "[p]ublic health is advanced when individuals are provided with complete and accurate information about their health care options and the availability of health care services. This is especially true for women who are facing unintended

pregnancies or seeking to control their fertility." Id. at 45. The Blum Affidavit elaborated:

> Women seeking family planning services or pregnancy- related care are at a disadvantage relative to service providers in two ways. First, providers possess more information than consumers. Second, providers possess more power than consumers. As a result, full disclosure of what services a provider is offering, as well as what biases underlie the provision of those services, is needed to ensure that consumers are not deceived or taken advantage of; consumers are able to make fully informed, autonomous decisions about family planning or pregnancy-related care; and consumers have timely access to the services they seek.

Id. at 45-46. According to the Blum Affidavit, the Ordinance "serves important public health goals" by "provid[ing] women with key information they need to make decisions about where to go for reproductive health care." Id. at 45. The City indicated that the Blum Affidavit was representative of evidence it sought to develop during discovery proceedings.

3.

The state of the evidentiary record was discussed during a motions hearing conducted by the district court on August 4, 2010. See J.A. 47-141. The City reiterated its need for discovery to counter the plaintiffs' summary judgment motion, and it requested the opportunity to submit the Ordinance's entire legislative record so that the court could "review all of

it and not just the portions that" were included in the City's submission of July 16, 2010. Id. at 127.

For their part, the plaintiffs maintained that no discovery was warranted, in that the district court could apply strict scrutiny and "strike [the Ordinance] down on its face." J.A. 90. In that regard, the plaintiffs asserted that the court could "very clearly rule as a facial matter," looking solely to the Ordinance, its legislative history, and the pertinent case law. Id. According to the plaintiffs, the court would need to consider their as-applied challenge only if it rejected their facial challenge, and even then discovery could be circumscribed. See id. at 90-92 (explaining that the breadth of any discovery, including discovery into the plaintiff Center's operations, "might depend on how wide [the court] feels [the Ordinance is] not facially invalid").

The district court indicated its agreement with the plaintiffs that discovery was unnecessary for a facial review of the Ordinance. See J.A. 108. The court assured the City, however, that discovery would be authorized before the court engaged in any as-applied analysis. Id. at 130. In the court's words, "if what [the Center] did is relevant in this case [the City] will have the discovery . . . . But . . . I don't see where we would advance the ball one way or the other on the facial challenge by knowing what these particular people did." Id.

Following the motions hearing, the City filed the Ordinance's entire legislative record, including written opinions provided to the City Council by the City Solicitor and Acting Health Commissioner prior to the

Ordinance's passage vouching for its legality and efficacy. See J.A. 207-08 (October 23, 2009 letter from City Solicitor George A. Nilson advising that, because the Ordinance "merely requires the disclosure of truthful, non-misleading information relevant to a woman's decision to seek services at a particular location[, it] does not violate the 1st Amendment right to freedom of speech"); id. at 209 (October 21, 2009 memorandum of Acting Health Commissioner Olivia D. Farrow supporting the Ordinance because "[i]t is imperative that all Baltimore City women have the ability to obtain factual and timely advice on all available health care options"). Meanwhile, in response to the district court's inquiry during the motions hearing about whether the plaintiffs might ever refer for abortion (e.g., in the case of incest), the plaintiffs submitted an official statement of the Catholic Church "affirm[ing] the moral evil of every procured abortion." Id. at 178. The court thereafter issued its summary judgment decision and permanent injunction without allowing the City any discovery.

C.

1.

By its summary judgment decision of January 28, 2011, the district court determined that, because the City had submitted and relied upon materials beyond the plaintiffs' Complaint — i.e., the legislative record of the Ordinance — it was appropriate to treat the City's motion to dismiss as a cross- motion for summary judgment. See O'Brien, 768 F. Supp. 2d at 809-10 (citing Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings

are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.")). The court then rebuffed the City's request for discovery, characterizing it as an improper "attempt to generate justifications for the Ordinance following its enactment." Id. at 810 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)). In the court's view, its duty was to "examine whether the Ordinance, on its face, is subject to, and satisfies, the applicable level of scrutiny" — an assessment confined to "the evidence relied on by the Baltimore City Council at the time the Ordinance was passed." Id.

Focusing on the plaintiffs' free speech claim and turning to the question of the applicable standard for its facial review, the district court rejected the City's contention that rational basis scrutiny applies because the Ordinance is directed at misleading commercial speech. See O'Brien, 768 F. Supp. 2d at 813-14. In doing so, the court looked to the specific characteristics of the plaintiff Center, which the court referred to as the "CENTER." For example, the court observed that

> [t]he overall purpose of the advertisements, services, and information offered by the CENTER is not to propose a commercial transaction, nor is it related to the CENTER's economic interest. The CENTER engages in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives. The notion that human life must be respected and protected absolutely from the moment of conception is a central tenet of the CENTER's belief system.

Id. at 813 (internal quotation marks omitted). The court deemed it insignificant that "[t]he CENTER offers services that have value in the commercial marketplace," given that "the offering of free services such as pregnancy tests and sonograms in furtherance of a religious mission fails to equate with engaging in a commercial transaction." Id. at 813-14 (footnote omitted). Indeed, the court likened the free services provided by the Center with "sacramental wine, communion wafers, prayer beads, [and] other objects with commercial value" offered by churches to their congregants. Id. at 814. Tying the former to commercial speech, the court warned, would "subject [the latter] to diminished constitutional protection." Id.

In any event, the district court concluded that strict scrutiny would apply even if "the CENTER's speech includes some commercial elements," because any commercial speech "'is inextricably intertwined with otherwise fully protected speech.'" O'Brien, 768 F. Supp. 2d at 814 (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988)). The court explained that "[t]he 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," and that the presence of an Ordinance-mandated sign (as "a stark and immediate statement about abortion and birth-control") would alter the course of the center's communications with its clients and prospective clients. Id. "At the very least," according to the court, "a disclaimer conspicuous to anyone visiting the CENTER regarding the lack of abortion and birth-control services, mandates the inclusion of a

government message concurrent, and intertwined with, [the CENTER's] delivery of fully protected speech." Id.

As an additional reason to apply strict scrutiny, the district court declared that the City "enacted the Ordinance out of disagreement with Plaintiffs' viewpoints on abortion and birth-control," thereby engaging in "a particularly offensive form of content-based discrimination." See O'Brien, 768 F. Supp. 2d at 814-16 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.")). The court reasoned that, because "the Ordinance is applicable only to those who will never provide or refer for abortion or [certain] birth-control services," it must have been discriminatorily aimed at "those with strict moral or religious qualms regarding abortion and birth-control." Id. at 815. Again raising the specific characteristics of the plaintiff Center, the court emphasized that "[t]he CENTER's viewpoint, formed on the basis of sensitive religious, moral, and political beliefs, is the overarching reason for its stark refusal to perform or refer for abortions and certain types of birth-control." Id.

Applying strict scrutiny, the district court recognized that the City was obliged to demonstrate that the Ordinance is "'narrowly tailored to promote a compelling [G]overnment interest.'" O'Brien, 768 F. Supp. 2d at 816 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000)). On the "compelling interest" question, the court noted that the

Ordinance's legislative record was "uneven when demonstrating the depth and severity of the problem relating to limited- service pregnancy centers and deceptive advertising." Id. Nevertheless, the court "assume[d], for purposes of discussion, that the Ordinance was enacted in response to a compelling governmental interest." Id. at 817. Such an assumption was appropriate because the court concluded that "the Ordinance falls considerably short of meeting the 'narrowly tailored' standard." Id.

There were two grounds for the district court's ruling on the narrow tailoring issue. First, "the Ordinance does not provide a 'carve-out' provision for those limited-service pregnancy centers which do not engage in any deceptive practices"; rather, "[t]he disclaimer requirement is imposed irrespective of how forthcoming and transparent a pregnancy center presents itself." O'Brien, 768 F. Supp. 2d at 817. Second, "[i]n lieu of the disclaimer mandate of the Ordinance, [the City] could use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers," or it "could enact a new content-neutral advertising ordinance applicable to noncommercial entities that directly ameliorate [its] concerns regarding deceptive advertising." Id.

Having resolved that the Ordinance is not narrowly tailored, the district court summarized "that the Ordinance does not meet the strict scrutiny standard," and, thus, "Plaintiffs are entitled to summary judgment with regard to their Freedom of Speech

claim." O'Brien, 768 F. Supp. 2d at 817.[7] The court entered its permanent injunction three days later, prohibiting "any action to enforce Baltimore City Ordinance 09-252" on the premise that the Ordinance is facially unconstitutional. See O'Brien v. Mayor of Balt., No. 1:10-cv-00760 (D. Md. Jan. 31, 2011), ECF No. 35.

2.

Notably, although it referred throughout its summary judgment decision to the claims and contentions of the "Plaintiffs," the district court ruled early therein that St. Brigid's and the Archbishop lack standing to be co-plaintiffs with the Center. See O'Brien, 768 F. Supp. 2d at 811-12. Specifically, the court determined that St. Brigid's and the Archbishop could not make the requisite showing of "the existence of a concrete and particularized injury in fact." Id. at 811 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (outlining the three elements of standing, including "an injury in fact" that is "concrete and particularized," as well as "actual or imminent" (internal quotation marks omitted))). The court explained that — because St. Brigid's and the Archbishop simply allow the Center to use a portion of their facilities free of charge, and do not themselves operate any limited-service pregnancy center — they are not subject to either the requirements or penalties

[7] In view of its summary judgment award on the free speech claim, the district court deemed the Complaint's other claims to be moot and dismissed them without prejudice. See O'Brien, 768 F. Supp. 2d at 817-18 (addressing free assembly, free exercise, equal protection, and Maryland conscience clause claims).

set forth in the Ordinance. Id. Moreover, the court found "speculative, at best, the contention that a sign required by the Ordinance on the CENTER's wall will be attributed to the landlord." Id. at 812 (elaborating that "the sign refers to the services provided by the CENTER and would have no reference to the owner of the building in which the CENTER operates").

Accordingly, the district court granted in part the City's dismissal motion, dismissing the claims made by St. Brigid's and the Archbishop for lack of standing. See O'Brien, 768 F. Supp. 2d at 812. Nevertheless, the court permitted St. Brigid's and the Archbishop to participate in the proceedings as amicus curiae and persisted in referring to the "Plaintiffs" collectively. Id.

D.

The parties timely noted these cross-appeals, invoking our jurisdiction under 28 U.S.C. § 1291. As explained below, in the City's appeal, we vacate the district court's judgment and remand for further proceedings on the claims asserted by the Center. In the cross-appeal of St. Brigid's and the Archbishop, We affirm the court's dismissal of their claims for lack of standing.

II.

The City points to a multitude of flaws in the summary judgment decision, going so far as to contend that we should direct a final judgment in the City's favor. We refrain today from evaluating the ultimate merits of the Center's claims, however, focusing instead on the preliminary errors made by the district court as it rushed to summary judgment. Those errors

include the court's denial to the City of essential discovery, its refusal to view in the City's favor what evidence there is, and its verboten factual findings, many premised on nothing more than its own supposition. In these circumstances, it is fitting to simply vacate and remand for properly conducted proceedings.

A.

Chief among its errors was the district court's award of summary judgment to the Center without allowing the City any discovery. As a general proposition, "summary judgment is appropriate only after 'adequate time for discovery.'" Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir. 1996) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). Discovery is usually essential in a contested proceeding prior to summary judgment because "[a] party asserting that a fact . . . is genuinely disputed must support the assertion by," inter alia, "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). Obviously, "by its very nature, the summary judgment process presupposes the existence of an adequate record." Doe v. Abington Friends Sch., 480 F.3d 252, 257 (3d Cir. 2007). A district court therefore "must refuse summary judgment 'where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition.'" Nader v. Blair, 549 F.3d 953, 961 (4th Cir. 2008) (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986)).

We review for abuse of discretion a district court's denial of discovery prior to ruling on a summary judgment motion. See Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir. 1995). "Of course, a district court by definition abuses its discretion when it makes an error of law." Rice v. Rivera, 617 F.3d 802, 811 (4th Cir. 2010) (internal quotation marks omitted). Here, the district court's rationale for denying the City its right to discovery was patently erroneous.

1.

The City took "the proper course" when it filed the Rule 56(f) Affidavit, "stating that it could not properly oppose . . . summary judgment without a chance to conduct discovery." See Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244 (4th Cir. 2002) (internal quotation marks omitted) (deeming summary judgment award premature where, inter alia, court made its award only six weeks after complaint was filed, before significant discovery). Such a request is "broadly favored and should be liberally granted because the rule is designed to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." Raby v. Livingston, 600 F.3d 552, 561 (5th Cir. 2010) (internal quotation marks omitted); accord Harrods Ltd., 302 F.3d at 245 n.18.

It is no justification for the district court's denial of discovery that the court first converted the City's motion to dismiss into a cross-motion for summary judgment. There are two requirements for a proper Rule 12(d) conversion. The first is that "all parties be given some indication by the court that it is treating the 12(b)(6) motion as a motion for summary

judgment"; such notice exists, e.g., "[w]hen a party is aware that material outside the pleadings is before the court." Gay v. Wall, 761 F.2d 175, 177 (4th Cir. 1985) (alterations and internal quotation marks omitted). Here, the court deemed conversion appropriate because the City had submitted and relied upon materials that the court believed to be beyond the plaintiffs' Complaint — specifically, portions of the legislative record of the Ordinance. The City had alerted the court to precedent, however, that "[f]or purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law." Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1312 (4th Cir. 1995), vacated on other grounds, 517 U.S. 1206, readopted with modifications by 101 F.3d 325 (4th Cir. 1996).

Even more damaging to the district court's summary judgment decision, the second requirement for proper conversion of a Rule 12(b)(6) motion is that the parties first "be afforded a reasonable opportunity for discovery." Gay, 761 F.2d at 177 (internal quotation marks omitted); accord E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 450 (4th Cir. 2011) (relying on Gay for conclusion that, because record indicated that parties had not had "opportunity to conduct reasonable discovery," court would have erred by converting dismissal motion to one for summary judgment). Indeed, Rule 12(d) itself prescribes the same discovery required by our case law. See Fed. R. Civ. P. 12(d) (instructing that, when a Rule 12(b)(6) motion is treated as a summary judgment motion, "[a]ll parties must be given a

reasonable opportunity to present all the material that is pertinent to the motion").

2.

Despite the foregoing authorities, the district court denied the City discovery on the theory that, because the Center was pursuing a facial challenge to the Ordinance, discovery was not warranted. In the First Amendment context, there are two ways for a plaintiff to mount a facial challenge to a statute. First, the plaintiff may demonstrate "that no set of circumstances exists under which [the law] would be valid, or that the [law] lacks any plainly legitimate sweep." United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (citations and internal quotation marks omitted). Second, the plaintiff may show that the law is "overbroad [because] a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Id. (internal quotation marks omitted). In this case, however, the district court did not fairly examine whether the Ordinance is invalid in all or even a substantial number of its applications. Rather, the district court merely accepted the Center's description of itself, and then assumed that all limited-service pregnancy centers share the Center's self-described characteristics.

In effect, by focusing almost exclusively on the Ordinance's application to the Center, the district court conducted an as-applied analysis, rather than a facial review. But to properly employ an as-applied analysis, the court was obliged to first afford the City discovery. See Richmond Med. Ctr. for Women v.

Herring, 570 F.3d 165, 172 (4th Cir. 2009) (en banc) (explaining that as-applied challenges, i.e., those "based on a developed factual record and the application of a statute to a specific person," entail "case-by-case analyses"). The court acknowledged as much during its August 4, 2010 motions hearing, when it recognized that discovery proceedings would be necessary to properly evaluate an as-applied challenge to the Ordinance. See J.A. 130 (promising that "if what [the Center] did is relevant in this case [the City] will have the discovery"); see also id. at 127-28 (explaining that the plaintiffs would not presently be entitled to summary judgment "if I'm concerned about what their individual status is").

Furthermore, the City was also entitled to discovery as a precursor to any true facial analysis. In the circumstances of the Center's facial challenge, the district court could not properly evaluate the Ordinance's validity in all or most of its applications without evidence concerning the distinctive characteristics of Baltimore's various limited-service pregnancy centers. Cf. Free Speech Coal., Inc. v. Att'y Gen. of the U.S., 677 F.3d 519, 538 (3d Cir. 2012) (concluding that the district court erred in dismissing a First Amendment facial claim without the factual record needed to "intelligently weigh the legitimate versus problematic applications of the [challenged statutes]"). Thus, regardless of the type of analysis utilized — facial or as-applied — the court abused its discretion by failing to recognize and honor the City's right to discovery.

3.

The district court further abused its discretion by restricting its analysis to the legislative record and dismissing the City's discovery request as a forbidden post- enactment effort to justify the Ordinance. The court relied on the Supreme Court's decision in United States v. Virginia, 518 U.S. 515, 533 (1996), for the proposition that the City's justification cannot be "invented post hoc in response to litigation." The City, however, sought only to augment the record with evidence to support its existing justification — not to invent a new one. As we have previously observed, "courts have routinely admitted evidence . . . to supplement a legislative record or explain the stated interests behind challenged regulations." 11126 Balt. Blvd. v. Prince George's Cnty., Md., 886 F.2d 1415, 1425 (4th Cir. 1989), vacated on other grounds, 496 U.S. 901 (1990). Although "'supplemental' materials cannot sustain regulations where there is no evidence in the pre-enactment legislative record," id., that simply is not the case here.

B.

In addition to indefensibly denying the City discovery, the district court flouted the well-known and time-tested summary judgment standard. Under that standard, summary judgment is appropriate only if, as Rule 56 is currently written, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). It is elementary that, when a court considers a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Liberty Lobby, 477 U.S. at

255. Moreover, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249; see also Redd v. N.Y. State Div. of Parole, 678 F.3d 166, 174 (2d Cir. 2012) ("The court's role in deciding a motion for summary judgment is to identify factual issues, not to resolve them." (emphasis and internal quotation marks omitted)); PHP Healthcare Corp. v. EMSA Ltd. P'ship, 14 F.3d 941, 944 n.3 (4th Cir. 1993) ("By definition, no findings of material facts that were in genuine issue are possible in granting summary judgment." (internal quotation marks omitted)).

We review an award of summary judgment de novo, guided by the same legal principles that were applicable below. See News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth., 597 F.3d 570, 576 (4th Cir. 2010). Heeding those principles, we conclude that summary judgment was inappropriate on the present record.

1.

The district court's denial of discovery and failure to adhere to the summary judgment standard marred its assessment of, inter alia, the City's contention that the Ordinance targets misleading commercial speech and thus is subject to rational basis (rather than strict) scrutiny. While the strict scrutiny standard generally applies to content-based regulations, including compelled speech, see Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994), less-demanding standards apply where the speech at issue is commercial. Disclosure requirements aimed at misleading commercial speech

need only survive rational basis scrutiny, by being "reasonably related to the State's interest in preventing deception of consumers." Zauderer v. Office of Disciplinary Counsel of the Supreme Court, 471 U.S. 626, 651 (1985) (explaining that, "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception" (alterations and internal quotation marks omitted)); accord Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339-40 (2010).[8]

a.

Although it may not ultimately prove meritorious, the City's commercial speech theory should not have been so easily dismissed by the district court. Under that theory, a limited- service pregnancy center

> proposes a commercial transaction every time it offers to provide commercially valuable goods and services, such as pregnancy testing, sonograms, or options counseling, to a consumer. Such an offer may take the form of an

[8] While disclosure requirements aimed at misleading commercial speech are subject to the rational basis test, "restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny — that is, they must 'directly advanc[e]' a substantial governmental interest and be 'n[o] more extensive than is necessary to serve that interest.'" Milavetz, 130 S. Ct. at 1339 (alterations in original) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)). Because the City contends that the Ordinance regulates misleading commercial speech, our focus is on the potential applicability of rational basis scrutiny.

> advertisement in the phone book, on the internet, or on a sign above the [center's] door. It may also take the form of an oral solicitation from a [center] staff member to a consumer. The City Council received evidence that many [centers] intentionally mislead consumers about the scope of services they offer to obtain the patronage of those seeking abortion and comprehensive birth control services. The Ordinance regulates a [center's] offer to provide services to consumers by making clear that the offer does not include abortion and comprehensive birth control services.

Reply Br. of Appellants 9-10 (citations omitted).

The threshold question presented is whether the speech regulated by the Ordinance is actually commercial. That analysis is fact-driven, due to the inherent "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993). On one occasion, in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, the Supreme Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. 557, 561 (1980). But the Court has noted that commercial speech is "usually defined as speech that does no more than propose a commercial transaction." United States v. United Foods, Inc., 533 U.S. 405, 409 (2001); see also Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473-74 (1989) (pronouncing "propose a commercial transaction" to be "the test for identifying commercial speech" (emphasis added)).

The Court has also described the proposal of a commercial transaction — e.g., "'I will sell you the X prescription drug at the Y price,'" Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 761 (1976) — as "the core notion of commercial speech." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983). The City insists that limited-service pregnancy center advertising easily satisfies the "propose a commercial transaction" test. See Br. Of Appellants 22 ("When a [center] proposes that a woman patronize its establishment for the purpose of obtaining commercially valuable goods and services[,] . . . it is proposing a commercial transaction.").

Nevertheless, even where speech "cannot be characterized merely as proposals to engage in commercial transactions," the speech may yet be deemed commercial; in that event, "proper classification as commercial or noncommercial speech . . . presents a closer question." Bolger, 463 U.S. at 66; see also Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin., 191 F.3d 429, 440 (4th Cir. 1999) ("In the abstract, the definition of commercial speech appears to be fairly straightforward, if somewhat circular: it is speech that proposes a commercial transaction. In practice, however, application of this definition is not always a simple matter." (citations and internal quotation marks omitted)). From Bolger, courts of appeals have gleaned "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." U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898

F.2d 914, 933 (3d Cir. 1990) (citing Bolger, 463 U.S. at 66-67); accord, e.g., Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403, 412 (D.C. Cir. 2012); United States v. Benson, 561 F.3d 718, 725 (7th Cir. 2009); Adventure Commc'ns, 191 F.3d at 440-41. While "[t]he combination of all these characteristics . . . provides strong support for the . . . conclusion that [speech is] properly characterized as commercial speech," Bolger, 463 U.S. at 67, it is not necessary that each of the characteristics "be present in order for speech to be commercial," id. at 67 n.14.

Here, the district court abruptly concluded, "[u]nder both Bolger and Central Hudson," that "the speech regulated by the Ordinance is not commercial speech." O'Brien, 768 F. Supp. 2d at 813. Focusing on the plaintiff Center, the court reasoned that "[t]he overall purpose of the advertisements, services, and information offered by the CENTER is not to propose a commercial transaction, nor is it related to the CENTER's economic interest." Id. Rather, the court determined, "[t]he CENTER engages in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives." Id. (citing official statement of Catholic Church).

Ruling thusly, the district court accepted as fact the Center's assertion that its motives are entirely religious or political. But that assertion was not at all undisputed. Thus, discovery is needed to substantiate, inter alia, whether the Center possesses economic interests apart from its ideological motivations. Such discovery is "especially important" where, as here, "the relevant facts are exclusively in the control of the

[summary judgment movant]" or the "case involves complex factual questions about intent and motive." See Harrods Ltd., 302 F.3d at 247.[9]

In any event, the potential commercial nature of speech does not hinge solely on whether the Center has an economic motive, as even Bolger does not preclude classification of speech as commercial in the absence of the speaker's economic motivation. See 463 U.S. at 67 n.14. Because the Ordinance compels a disclaimer, 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." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988). In other words, context matters. From a First Amendment free speech perspective, that context includes the viewpoint of the listener, for "[c]ommercial

---

[9] Even though the Center has averred that it does not charge women for its services, inquiring into the Center's potential profit motives may not be a futile endeavor. We know that nonprofit entities with religious or political motives can engage in commerce. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 573 (1997) ("Even though petitioner's camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser, but also as a provider of goods and services." (citations omitted)); Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 156 F.3d 535, 541 (4th Cir. 1998) (explaining that nonprofit land preservation organization's acceptance of land donation "was fundamentally commercial"). Furthermore, although outwardly the Center appears to be driven by religious purposes only, certain operational intricacies may prove otherwise. For example, as another court observed in a similar case at the preliminary injunction stage, if the Center were "referring women to pro- life doctors in exchange for 'charitable' contributions, the analysis could change." See Evergreen Ass'n, Inc. v. City of N.Y., 801 F. Supp. 2d 197, 206 n.5 (S.D.N.Y. 2011).

expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." See Cent. Hudson, 447 U.S. at 561-62; see also Va. State Bd. of Pharmacy, 425 U.S. at 756 ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." (footnote omitted)).

The Supreme Court of North Dakota employed just such an analysis in Fargo Women's Health Organization, Inc. v. Larson, 381 N.W.2d 176 (N.D.), cert. denied, 476 U.S. 1108 (1986). There, the plaintiffs alleged that the defendant Help Clinic, "through false and deceptive advertising and related activity, misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda." Id. at 177. The trial court entered a preliminary injunction barring "all deceptive advertising and related solicitation practices," and the Help Clinic appealed. Id. Notwithstanding the Help Clinic's assertion "that its communication is not commercial speech because no financial charges are assessed against persons receiving services from the clinic," the state supreme court deemed the clinic's advertisements to be commercial speech. Id. at 180-81. The court explained that "the degree, if any, that monies are received by the Help Clinic from its clients [is not] dispositive [of the commercial speech issue]." Id. at 180. It was "[m]ore important[]" to the court that "the Help Clinic's advertisements are placed in a commercial context and are directed at the providing

of services rather than toward an exchange of ideas." Id. at 181. "In effect," the court concluded, "the Help Clinic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech." Id. [10]

In contrast to the preliminary injunction at issue in Larson, our review today is of a permanent injunction entered in the absence of a fully developed record. Without all the pertinent evidence — including evidence concerning the Center's economic motivation (or lack thereof) and the scope and content of its advertisements — we cannot properly analyze the speech regulated by the Ordinance. Cf. Milavetz, 130 S. Ct. at 1344-45 (Thomas, J., concurring in part and concurring in the judgment) ("[B]ecause no record evidence of Milavetz's advertisements exists to guide our review, we can only speculate about the ways in which the [disclosure requirement] might be applied to Milavetz's speech."). Put succinctly, the district court should have likewise refrained from immediately deciding the commercial speech issue.[11]

---

[10] The Larson decision, though certainly not binding here, illuminates the potential inefficacy of the analogy drawn by the district court between the Center's free services and "sacramental wine, communion wafers, prayer beads, [and] other objects with commercial value" offered by churches to their congregants. See O'Brien, 768 F. Supp. 2d at 814. Unlike the latter, the former are alleged by the City to be the subject of advertisements "placed in a commercial context," "directed at the providing of services rather than toward an exchange of ideas," and designed to solicit patronage of the Center. See Larson, 381 N.W.2d at 181.

[11] Although discovery is needed before this matter can be fairly decided, the existing record is not devoid of relevant evidence.

b.

The district court's hasty decision cannot be excused by its ruling that any commercial speech regulated by the Ordinance "'is inextricably intertwined with otherwise fully protected speech,'" thus triggering strict scrutiny. See O'Brien, 768 F. Supp. 2d at 814 (quoting Riley, 487 U.S. at 796). The Riley decision addressed the constitutionality of North Carolina's "requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity." 487 U.S. at 795. Defending that statutory provision, the State argued that it "regulates only commercial speech because it relates

---

For example, the Maryland Report included in the Ordinance's legislative record contains an online advertisement for Option Line, the "live contact center" co-established by national umbrella organizations Heartbeat International and Care Net that "provides 24/7 assistance to women and girls seeking information about pregnancy resources." J.A. 381. The advertisement states, inter alia, that Option Line's "consultants will connect you to nearby pregnancy centers that offer the following services": "Free pregnancy tests and pregnancy information"; "Abortion and Morning After Pill information, including procedures and risks"; "Medical services, including STD tests, early ultrasounds and pregnancy confirmation"; and "Confidential pregnancy options." Id. (emphasis omitted). The City characterizes the advertisement as deceptive, because it "does not indicate that the 'medical services' and 'confidential pregnancy options' offered by the centers exclude abortion and comprehensive birth control services." Br. of Appellants 8. Additionally, the City connects the advertisement to the plaintiff Center and several other Baltimore limited-service pregnancy centers, in that each is an affiliate of Heartbeat International or Care Net. See J.A. 228, 241.

only to the professional fundraiser's profit from the solicited contribution." Id. The Supreme Court assumed "that such speech in the abstract is indeed merely 'commercial,'" but concluded that the speech loses "its commercial character when it is inextricably intertwined with otherwise fully protected speech," i.e., the informative and persuasive aspects of the fundraiser's solicitation. Id. at 796.

Equating Baltimore's Ordinance with the statutory requirement at issue in Riley, the district court relied on its own speculative finding that "[t]he 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." See O'Brien, 768 F. Supp. 2d at 814. Furthermore, the court prematurely and perhaps inaccurately characterized that disclaimer as "a stark and immediate statement about abortion and birth-control," i.e., a declaration that abortion and birth control are morally acceptable options. Id.

Significantly, discovery could refute the district court's factual assumptions. Discovery might also show that any commercial aspects of a limited-service pregnancy center's speech are not "inextricably intertwined" with its fully protected noncommercial speech. See Hunt v. City of L.A., 638 F.3d 703, 715 (9th Cir. 2011) ("[W]here the two components of speech can be easily separated, they are not 'inextricably intertwined.'" (citing Fox, 492 U.S. at 473-74 (concluding that commercial speech aspect of "Tupperware parties" was not inextricably intertwined with noncommercial instruction on home economics))).

That is, a fully developed record could demonstrate that "[n]othing in the [Ordinance] prevents [a center] from conveying, or the audience from hearing, . . . noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." See Fox, 492 U.S. at 474. In those circumstances, the rational basis test would be the applicable one.

2.

The district court further erred in precipitately concluding that the Ordinance is an exercise of viewpoint discrimination — the court's additional basis for applying strict scrutiny. See Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 616 n.4 (4th Cir. 2002) ("The Supreme Court has indicated that a viewpoint-based restriction of private speech rarely, if ever, will withstand strict scrutiny review." (citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 395-96 (1992))). That is, the court merely surmised that the Ordinance must have been discriminatorily aimed at pregnancy centers "with strict moral or religious qualms regarding abortion and birth-control," premised on its assumption that only those centers would never provide or refer for abortion or birth control. See O'Brien, 768 F. Supp. 2d at 815. But see Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762-63 (1994) (explaining, in declining to apply strict scrutiny to "an injunction that restricts only the speech of antiabortion protestors," that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based").

The district court failed to view the legislative record in the light most favorable to the City, and thus to credit evidence for summary judgment purposes that the Ordinance was enacted to counteract deceptive advertising and promote public health. Moreover, the court ignored the possibility that 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.

Finally, applying strict scrutiny, the district court erred by determining that the Ordinance is not narrowly tailored because "a less restrictive alternative would serve the [City's] purpose." See United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000). Even if strict scrutiny proves to be the applicable standard, the City must be accorded the opportunity to develop evidence relevant to the compelling governmental interest and narrow tailoring issues, including, inter alia, evidence substantiating the efficacy of the Ordinance in promoting public health, as well as evidence disproving the effectiveness of purported less restrictive alternatives to the Ordinance's disclaimer. See id. at 816 ("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.").

C.

In sum, under the Federal Rules of Civil Procedure and controlling precedent, it was essential to the City's opposition to the Center's summary judgment motion

— and to a fair and proper exercise of judicial scrutiny — for the district court to have awaited discovery and heeded the summary judgment standard. Meanwhile, the court could have averted any constitutional injuries that the Ordinance may inflict by preliminarily enjoining its enforcement. See Fed. R. Civ. P. 65; see also, e.g., Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) (concluding that Newsom was entitled to a preliminary injunction on his First Amendment overbreadth claim, while cautioning that "our holding, like any ruling on a preliminary injunction, does not preclude a different resolution of Newsom's claims on a more fully developed record").

The district court in Centro Tepeyac v. Montgomery County, another Maryland pregnancy center-compelled disclosure case, proceeded in just that measured fashion. See 779 F. Supp. 2d 456 (D. Md. 2011). Mindful that the record was undeveloped and the County therefore unprepared to show otherwise, the court accepted at the preliminary injunction stage that strict scrutiny applied to the challenged disclosure requirement. See id. at 462-68. Importantly, however, the court did not foreclose the possibility that evidence adduced in future discovery proceedings might render lesser scrutiny appropriate, e.g., if the County's Resolution were shown to regulate commercial speech. See id. at 463. Employing strict scrutiny to resolve the motion before it, the court preliminarily enjoined one portion of the Resolution's disclosure requirement (that "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider"), but not the other (that

"the Center does not have a licensed medical professional on staff"). See id. at 469-72. In doing so, the court credited the County's asserted compelling interest in preserving public health, and deemed "the record . . . at least colorable at this stage to suggest that the [non- enjoined portion of the disclosure requirement] is narrowly tailored to meet the interest." Id. at 471. The court further concluded that the County was unlikely to prove narrow tailoring of the enjoined portion of the disclosure requirement, articulating particular concern that it constituted "unneeded speech," and also noting several possible less restrictive alternatives. Id. at 468-69 & n.9, 471.

Today, alongside this opinion, we issue a separate opinion in which we affirm the Centro Tepeyac preliminary injunction decision, concluding that "the district court acted well within its discretion" and "commend[ing] the court for its careful and restrained analysis." See Centro Tepeyac v. Montgomery Cnty., No. 11-1314(L), slip op. at 3, 18 (4th Cir. July , 2013) (en banc). Our good dissenting colleagues overplay Centro Tepeyac, repeatedly invoking it as the ultimate word on the First Amendment issues presented herein. See, e.g., post at 81 (Niemeyer, J., dissenting) (characterizing our remand of this case for discovery on the commercial speech issue as "curious" in view of our affirmance of "the district court's conclusion in Centro Tepeyac that a similar Montgomery County, Maryland provision compelled noncommercial speech"); id. at 98 (asserting that Centro Tepeyac "hold[s]" that the County is not entitled to discovery on the effectiveness of purported less restrictive alternatives); id. at 101 (citing Centro

Tepeyac for the proposition that City of Baltimore Ordinance 09-252, "[o]n its face, . . . is overbroad and unconstitutional"). The dissenters thereby ignore crucial differences between that case and this one — most significantly, that Centro Tepeyac involves a mere preliminary injunction decision, rather than a final judgment bestowing permanent injunctive relief on the basis of a summary judgment award.

As the Supreme Court has instructed, where a preliminary injunction is under an interlocutory examination, determining whether the district court abused its discretion "is the extent of our appellate inquiry." See Doran v. Salem Inn, Inc., 422 U.S. 922, 934 (1975), followed by Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) ("We make no prediction as to the outcome at trial but simply hold, as the Supreme Court did [in Doran], that '[i]n these circumstances, and in the light of existing case law, we cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief.'" (second alteration in original) (quoting Doran, 422 U.S. at 934)). Faithful to the abuse-of-discretion standard, we are obliged to affirm in Centro Tepeyac because the district court "applied a correct preliminary injunction standard, made no clearly erroneous findings of material fact, and demonstrated a firm grasp of the legal principles pertinent to the underlying dispute." See slip op. at 18. Neither the district court's Centro Tepeyac decision — nor ours in that case — settles the constitutional questions posed; rather, both leave those issues to be decided on a more fully developed record in properly conducted proceedings.

Consistently with Centro Tepeyac, we conclude herein that the district court erred by entering a permanent injunction without allowing discovery or adhering to the applicable summary judgment standard. Despite this prudent, restrained, and — above all — evenhanded ruling, the dissenters accuse us of all manner of improprieties. Most disappointingly, they depict us, on the one hand, as pro-choice zealots who have engaged in "gratuitous shaping of the issues" and "become seduced by [our] own elaboration of abortion policy." Post at 81-82 (Niemeyer, J., dissenting); see also post at 74 (Wilkinson, J., dissenting) ("In strongly implying that the Ordinance will survive First Amendment scrutiny, the majority has established a principle that will bite the very hands that feed it. For compelled speech can serve a pro-life agenda for elected officials as well as a pro-choice one.").

On the other hand, we are reproached for "an amorous affair with litigation," an "enchantment with extended procedures," and an "infatuation with discovery," as well as for "opin[ing] on various points of civil procedure" when we could be discussing "the dangers of state-compelled speech." Post at 62, 68, 71 (Wilkinson, J., dissenting). The dissenters would wholly exempt the Center from fundamental procedures to which all civil litigants are both subject and entitled. And, though the dissenters candidly acknowledge that "the district court engaged hypothetically from time to time in discussion about the potential relevance of facts," they unhesitatingly endorse the court's summary judgment decision. Post at 82 (Niemeyer, J., dissenting). Indeed, the dissenters freely layer their own supposition on the district

court's, admitting of no other conclusion than that the Ordinance should be enjoined against all Baltimore limited-service pregnancy centers for all time.

We, however, are not so dismissive of the Federal Rules of Civil Procedure, which, as the Supreme Court has underscored, "are designed to further the due process of law that the Constitution guarantees." Nelson v. Adams USA, Inc., 529 U.S. 460, 465 (2000). Esteem for our bedrock procedural rules should be expected, rather than ridiculed. And it is particularly appropriate here, where because of the ready availability of preliminary injunctive relief, there simply is no need to abridge the City's due process rights in favor of the Center's free speech guarantee.[12]

---

[12] It bears noting that the dissenters find it necessary to distort our decision in an effort to refute it. For example, they erroneously say that we "fail[] to recognize that the challenge addressed by the district court was the plaintiffs' facial challenge," and that we "recharacterize[] the proceeding as an as-applied challenge" just so we can "identify questions of fact to support [our] remand." Post at 79 (Niemeyer, J., dissenting); see also post at 71-72 (Wilkinson, J., dissenting) (asserting that, in "a tragedy for free expression," we insist the district court "undertook an as-applied analysis"). In reality, we amply discuss the facial/as-applied distinction, ultimately concluding that "regardless of the type of analysis utilized — facial or as-applied — the court abused its discretion by failing to recognize and honor the City's right to discovery." Supra Part II.A.2.

The dissenters also incorrectly assert that we "fail[] to recognize the scrutiny applicable to regulations that compel speech," going so far as to claim that we "do[] not even discuss 'compelled speech.'" Post at 78-79 (Niemeyer, J., dissenting) (citing Turner Broad. Sys., 512 U.S. at 641-42). But see supra Part II.B.1 (explaining that, "[w]hile the strict scrutiny standard generally applies to content-based regulations, including

Notwithstanding the dissenters' unfair and overwrought characterization, our ruling today is simply this: the district court improperly denied the City essential discovery and otherwise flouted the

---

compelled speech, less-demanding standards apply where the speech at issue is commercial" (also citing Turner Broad. Sys., 512 U.S. at 641-42)). Even so, the dissenters concede that the Ordinance regulates both commercial and noncommercial speech, but surmise that enough noncommercial speech is implicated to render the Ordinance facially unconstitutional. See post at 92-93 (Niemeyer, J., dissenting) (contending that any "commercial motive" of the plaintiff Center is irrelevant, because the Ordinance "reaches beyond this one pregnancy center and imposes the requirement of a disclaimer sign on every speaker — commercial or not — who provides information 'for a fee or as a free service'"). But see Stevens, 130 S. Ct. at 1587 (explaining that, to prove overbreadth, a plaintiff may show that "a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (internal quotation marks omitted)); Bolger, 463 U.S. at 67 n.14 (declining to preclude classification of speech as commercial in absence of speaker's economic motivation).

Finally, we note that the dissenters also distort the existing record, repeatedly asserting that "the City's stated interest [is] in prohibiting [limited-service] pregnancy centers, as a health concern, from misrepresenting information about abortions." Post at 77 (Niemeyer, J., dissenting); see also id. at 83, 93-94, 100, 101. To be sure, the record includes allegations that such centers provide misinformation about abortion (e.g., that it causes breast cancer). The City has clearly and consistently articulated its position, however, that the Ordinance is aimed at the pregnancy center practice of employing deceptive advertising to attract women seeking abortion and comprehensive birth-control services, and then using delay tactics to impede the women from accessing those services. The City has not asserted, as the dissenters claim, that the Ordinance is intended "to remedy misrepresentations being made by these pregnancy centers about abortion." See id. at 100.

Federal Rules of Civil Procedure. Consequently, we vacate the judgment and remand for further proceedings.

III.

Nevertheless, we affirm the district court's ruling that St. Brigid's and the Archbishop lack standing to be co- plaintiffs in this action with the Center. See O'Brien, 768 F. Supp. 2d at 811-12. We do so having carefully considered the contentions made by St. Brigid's and the Archbishop in their cross-appeal, and having reviewed the dismissal of their claims de novo. See Benham v. City of Charlotte, N.C., 635 F.3d 129, 134 (4th Cir. 2011) ("The issue of standing to sue is a legal question that we assess de novo.").

IV.

Pursuant to the foregoing, we vacate the district court's judgment against the City and remand for such other and further proceedings as may be appropriate. We affirm, however, the court's dismissal of the claims of St. Brigid's and the Archbishop for lack of standing, leaving only the Center's claims for resolution on remand.

No. 11-1111 VACATED AND REMANDED
No. 11-1185 AFFIRMED

WILKINSON, Circuit Judge, dissenting:

In a case concerning a law that requires private, noncommercial organizations to convey a government-authored message, one would expect to find at least some acknowledgement of the dangers of state-compelled speech. But one will search the majority's opinion in vain for any such recognition. Instead, the majority opts to opine on various points of civil procedure, apparently oblivious to the fact that litigation is not an end in itself, but a means of vindicating the substantive values underlying our legal order, among which I had hitherto supposed were the freedoms of conscience and belief.

Those freedoms are at the heart of this case, though one would never know it from the majority's opinion, which glosses over the impact of the Baltimore Ordinance on the right of the plaintiff Center not to be compelled by the state to express a message at odds with its most intimate beliefs. Today it is the Center; tomorrow it is who knows what speaker and who can guess what view. Because the majority fails to respect the Center's right not to utter a state-sponsored message that offends its core moral and religious principles, and because it launches a litigious fusillade aimed at smothering the Center's right to simple silence, I respectfully dissent.

I.

A.

Given the dearth of discussion about the evils of compelled speech in the majority opinion, it is worth pausing to consider what is at stake when government

forces private individuals or organizations to speak on its behalf. We now take it for granted that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). Regrettably, this constitutional star was not always so fixed. In fact, the Supreme Court had earlier upheld a law that required school children to participate in a daily flag-salute ceremony in Minersville School District v. Gobitis, 310 U.S. 586 (1940). In his opinion for the Court in Gobitis, Justice Frankfurter declared the flag-salute ceremony an essential means of fostering "[n]ational unity," which, in turn, he regarded as "the basis of national security." Id. at 595. When opponents of a compelled flag salute protested, Justice Frankfurter retorted that forced salutes helped to inculcate "that unifying sentiment without which there can ultimately be no liberties, civil or religious." Id. at 597.

In confusing mere statism with patriotism, Justice Frankfurter also posited a cramped conception of the freedom of speech. Specifically, he denied that the right to speak entails a right not to speak. In a lone dissent, Frankfurter reaffirmed this view even as the Court reversed course and declared compulsory flag-salute laws unconstitutional. So long as a law "suppresses no belief nor curbs it," he insisted -- so long as it permits individuals to "believe what they please, avow their belief and practice it," leaving "[a]ll channels of affirmative free expression . . . open" -- it does not violate the freedom of speech guaranteed by

the First Amendment. Barnette, 319 U.S. at 664 (Frankfurter, J., dissenting).

Justice Frankfurter's opinions in the flag-salute cases mark a singular blot on a long and storied career. He simply failed to grasp a truth that had been "well known to the framers of the Bill of Rights," id. at 633 (majority opinion): that "[t]he 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) (quoting Barnette, 319 U.S. at 637). Because government can infringe this freedom not only through naked censorship but by compelling individuals to utter words that the state wishes uttered, courts must scrutinize both kinds of regulation with the same skepticism. No American is the mere mouthpiece of the state. That is the enduring lesson of the flag-salute cases.

B.

It is a lesson the majority has failed to learn. While it perfunctorily acknowledges that laws compelling speech are "generally" subject to strict scrutiny, maj. op. at 41, it follows Justice Frankfurter in downplaying the impact of such laws on the individuals who are compelled to speak. As the majority apparently sees it, the Ordinance requires organizations like the Center to make nothing more than an anodyne factual statement identifying the services they do not provide, without having to condone those services. See maj. op. at 51-52.

But the majority utterly fails to appreciate the nature of the Center's beliefs. The Center has

"sincerely held" "moral, ideological, political, and religious beliefs" that abortion and at least some forms of birth control are profoundly wrong and thus are not to be chosen. Complaint ¶¶ 43, 40. The Ordinance requires the Center to state that it "does not provide or make referral for abortion or birth-control services." J.A. 26. The conflict between the Center's beliefs and the mandated disclosure is thus plain: where the Center wishes to guide women toward alternatives to abortion and birth control, the Ordinance requires it to indicate at the outset that those services are readily available, just not at the Center itself.

The flag-salute ceremony may not have compelled Jehovah's Witnesses to affirm the American flag as an idol or the United States as a deity in so many words, but from their perspective, that was the import of the ritual. The same is true here. Although the Ordinance does not compel the Center to explicitly countenance abortion and birth control, it does compel the Center to present them as viable options -- which, of course, is precisely what the Center denies they are. Putting aside altogether the matter of abortion, about which people of good will may and do differ, imagine any of us being told by the state to renounce ourselves in such a basic way.

Echoing Justice Frankfurter's rejoinder to the Jehovah's Witnesses in the flag-salute cases, the City responds by noting that pregnancy centers remain free to express their disapproval of abortion and birth control alongside the mandatory disclaimer. But the Supreme Court rightly found this response unavailing in Barnette, and it is no more persuasive here. In each case, the speaker is put in the position of having to

explain a statement made in its voice but not from its heart. Only because the Ordinance compels the Center to mention abortion and birth control in the first place must it start from a stance of opposing those options, rather than from one of simply advocating alternatives like adoption and abstinence.

Compelled speech can be all the more pernicious because of its context. So it is here. Whether or not the Ordinance is technically viewpoint-discriminatory, this much can be said: it compels groups that oppose abortion to utter a government- authored message without requiring any comparable disclosure -- or indeed any disclosure at all -- from abortion providers. Seventy years after the flag-salute cases, it should be axiomatic that the First Amendment prohibits the government from dictating the terms of private expression, let alone in such a one-sided manner. Faced with the inadequacy of its reasons, the majority responds with only noise, making believe it has somehow been accused of various "improprieties," maj. op. at 57, and "zealous" pro-choice views, id., when the only issue in reality is that the grand neutrality at the heart of the First Amendment has been compromised. Those who support most firmly a woman's right to reproductive choice should find it the most disheartening that the court's First Amendment jurisprudence is trampling expressive privacy and marching backward through time.

II.

The majority would have us believe that it has issued nothing more than a cut-and-dried procedural ruling, merely ordering "essential discovery" into a few

key factual questions in the case. Maj. op. at 33. Don't be fooled. The majority is conducting an amorous affair with litigation that is anything but benign. For the infatuation here is indiscriminate. The majority neglects to pose the most relevant question: whether its enchantment with extended procedures will serve to vindicate the assertion of a constitutional right or to suffocate it. Perhaps it evades this question because the answer is so obvious. By bringing the full brunt of the litigative process to bear on the Center, the majority is imposing a high price on the Center (and by extension any speaker) for attempting to vindicate its free-speech rights.

Most troubling, the majority has licensed a fishing expedition into the Center's motivations and operations on the off chance that it might turn up some vaguely "commercial" activity. The majority appears to recognize that the Center's speech clearly lies far from "the core notion of commercial speech," since none of its advertisements propose a commercial transaction. Maj. op. at 43 (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983)); see United States v. United Foods, Inc., 533 U.S. 405, 409 (2001) (noting that commercial speech is "usually defined as speech that does no more than propose a commercial transaction"). Nevertheless, the majority believes that "discovery is needed to substantiate, inter alia, whether the Center possesses economic interests apart from its ideological motivations." Maj. op. at 45-46. Not even the City had the temerity to second-guess the Center's motives in this way. And yet, the majority displays no compunction about doing so, subjecting the Center to intrusive and burdensome discovery based

on a few far-fetched hypotheticals regarding "the Center's potential profit motives" and its "operational intricacies." Maj. op. at 46 n.9.

Ordering discovery on this tenuous a basis would entail delays and costs even in the ordinary case. But the delays and costs are especially onerous where, as here, the party that is subjected to discovery has so plainly suffered a violation of its constitutional rights. By encouraging the City to pry into every corner of the Center's operations, the majority heavily penalizes this organization for attempting to defend its constitutional rights, a penalty that will only dissuade future victims of constitutional violations -- and especially those who hold to the Center's persuasion -- from bringing suit in the first place. Where discovery should be a means of vindicating constitutional rights, the majority converts it into a process that strangles them.

The majority's approach also excuses the City's rush to regulate the Center's speech, rather than consider other ways of achieving the purposes underlying the Ordinance. There has never been any dispute that the Ordinance forces organizations like the Center to communicate a message they would otherwise never utter. Given the dangers of compelled speech, this kind of mandated disclosure should be a last resort, not a first recourse. See Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (1988) (noting "the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored").

Thus, before enacting the Ordinance, the City should at least have considered less restrictive

alternatives and indicated why those alternatives would be ineffective. And yet, the City points to not a single portion of the 239-page legislative history submitted as part of this litigation indicating that it ever took these elementary steps. See J.A. 192-430. What testimony was delivered and evidence presented before the City Council appears to have focused on the City's interest in enacting the Ordinance rather than the question of whether the Ordinance was a narrowly tailored means of serving that interest. Especially telling is the absence of any statement of legislative findings indicating why less restrictive alternatives would come up short. This is not for a lack of such alternatives. As the district court noted, many suggest themselves. See O'Brien v. Mayor & City Council of Balt., 768 F. Supp. 2d 804, 817 (D. Md. 2011). Posting warning signs in its own voice outside the Center, undertaking a public information effort of its own, or applying the anti-fraud provisions in state law are all alternatives that the City now seems eager to reject but nowhere indicates it ever considered or tried.

Without ever having contemplated these options, the City now asserts that they will prove ineffective, and based on that bald assertion, the majority unlocks the doors of discovery. The lesson of the majority's ruling for other legislative bodies is clear: compel speech before considering less restrictive alternatives, and you will be granted discovery to prove why those alternatives are ineffective after the fact. This upends the notion that compelled speech should be a last resort, encouraging legislatures to adopt the most constitutionally offensive option rather than the least.

In this respect as well, the majority renders litigation a threat to liberty rather than its safeguard.

The majority's infatuation with discovery is compounded by its similarly misguided affection for as-applied challenges. Although the district court construed the Center's claim as a facial challenge, the majority insists it actually undertook an as-applied analysis. See maj. op. at 37-38. But this conclusion, aside from being incorrect, is a tragedy for free expression. For it means that, even if the Center ultimately prevails on its First Amendment claim, other centers with similar moral or religious beliefs will each have to bring their own suits challenging the Ordinance as applied to them. This is a war of attrition. By requiring every pregnancy center to bring its own as-applied challenge and to submit to separate investigation, the majority invites piecemeal litigation that will dramatically increase the costs for the centers of vindicating their First Amendment rights. Free speech should never be held hostage to this kind of duplicative and intrusive litigation.

The majority responds by doubling down on the virtues of extended litigation. It pens a final ode to discovery, maj. op. at 59, again ignoring the question of when that discovery serves a salutary purpose and when it simply chokes off constitutional rights as it does here. This is by no means to suggest that affording the government discovery is inappropriate in every constitutional case. But one does not need discovery to discover the obvious. Here, the infringement of the Center's free-speech rights is patent and profound, and the alternatives to a mandatory disclaimer are myriad. I recognize that the

Center's views on the issues surrounding abortion rights are controversial. But the First Amendment is not needed to protect speech that elicits broad popular approbation. "The test of [freedom's] substance is the right to differ as to things that touch the heart of the existing order." Barnette, 319 U.S. at 642. If there was ever a case for entering judgment in order to forestall government action that threatens to deter disfavored speakers from defending their First Amendment rights, this case is it.

Indeed, the Supreme Court has only recently reiterated the "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." Agency for Int'l Development v. Alliance for Open Society Int'l, Inc., No. 12-10, slip op. at 6 (U.S. June 20, 2013) (internal quotation marks omitted). Even when direct appropriations are involved, the government may not control an organization's core message outside of the confines of the program being funded. See id. at 15 (holding that a government requirement that "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. . . . violates the First Amendment"). Here, of course, funding conditioned upon speech is not at issue. Compelled speech becomes all the more invasive when it is simply commanded without any corresponding benefit to the recipient. The recipient of public funds at least theoretically has some choice about whether to accept the aid with its attendant conditions. Id. at 7. In the instant case, the Center gains no benefit and has no choice but to speak, and the coercion is complete.

III.

To my good colleagues in the majority, all I can say is, "Be careful what you wish for." In strongly implying that the Ordinance will survive First Amendment scrutiny, the majority has established a principle that will bite the very hands that feed it. For compelled speech can serve a pro-life agenda for elected officials as well as a pro-choice one. Cf. Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889 (8th Cir. 2012) (en banc). It is easy to imagine legislatures with different ideological leanings from those of the Baltimore City Council enacting measures that require organizations like Planned Parenthood to post a statement in their waiting rooms indicating what services they do not provide. Indeed, after today's decision, I would expect a flurry of such measures.

When this court finally confronts a pro-life analogue of the Baltimore Ordinance, it will face a dilemma. Either it will uphold the measure, in which case it will simply confirm what today's decision suggests: that the government does have the power after all to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion [and to] force citizens to confess by word or act their faith therein." Barnette, 319 U.S. at 642. Or it will invalidate the measure, in which case the First Amendment will have ceased to function as a neutral arbiter of our nation's ideological disputes, but will instead have become a tool to serve the policy predilections of the judges who happen to be applying it in any given case. Either way, we will have warped First Amendment doctrine beyond recognition, and we shall have but ourselves to blame.

IV.

Compelled speech can get tricky quickly. The state possesses a broad police power to regulate for the health and safety of its citizens, which includes the authority to require the disclosure of limited amounts of accurate information. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 650-53 (1985). Compelled speech is thus not an all-or-nothing matter. See Centro Tepeyac v. Montgomery Cnty., No. 11-1314 (4th Cir. 2013) (en banc) (Wilkinson, J., concurring). But as the flag-salute cases teach us, the state generally may not force individuals to utter statements that conflict with beliefs so profound that they define who we are. How to balance the state's responsibility to protect its citizens with the individual's interest in staying true to conscience is a perennial question that will prove vexing in many cases.

This case, however, is not vexing. The Baltimore Ordinance demands that organizations like the Center affirm a proposition they vehemently deny. It is, moreover, a law in search of a problem about which the City and majority speculate but cannot identify. The City made no attempt to try or even consider alternative approaches that would have allowed it to achieve its purposes without compelling the Center to say a word. Wherever the First Amendment might draw the line between state regulation and individual conscience, this law crosses it. To the infirmities of the law, the majority adds burdens beyond measure on freedom of the mind.

I respectfully dissent.

NIEMEYER, Circuit Judge, dissenting:

Baltimore City Ordinance 09-252 mandates that pregnancy centers that do not offer abortions or refer for abortions must post one or more signs in their waiting rooms, stating that they "do[] not provide or make referral for abortion or birth-control services." On the plaintiffs' assertion that such a sign requires them to speak contrary to their moral and religious beliefs, the district court held, as a matter of law, (1) that the ordinance, on its face, compels speech that is not content neutral; (2) that such compelled speech is subject to strict scrutiny; and (3) that the ordinance is not narrowly tailored to serve the City's stated interest in prohibiting such pregnancy centers, as a health concern, from misrepresenting information about abortions. It thus found the ordinance unconstitutional.

A ruling of this kind does not implicate a need to have discovery of factual circumstances, as the majority opinion orders, because every point on which the district court's ruling depended was a question of law that construed the ordinance on its face and assessed its scope against well-established First Amendment principles. In determining to vacate the district court's order and remand the case, the majority opinion addresses a case not before us. The opinion fails in three fundamental respects.

First, it fails to address the actual holding of the district court insofar as the district court applied established legal principles to conclude, as a matter of law, that the ordinance was unconstitutional. Rather, it dismisses the district court's ruling as "laden with

error," pointing to a raft of circumstantial factual questions, irrelevant to the necessary legal propositions, and concluding that the legal issues therefore cannot be resolved by summary judgment.

Second and more fundamentally, it fails to recognize the scrutiny applicable to regulations that compel speech -- regulations that require a person to say that with which the person would not otherwise say and might well disagree. Such regulations are among the most pernicious invasions of First Amendment rights, and for that reason, they are subject to "the most exacting scrutiny." Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994). Although distinct from laws that regulate what persons have chosen to say, regulations that compel people to speak the government's message are equally invasive of our most basic freedom. Id. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." See Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988). And because it is "content-based," it is subject to strict scrutiny. Turner Broadcasting, 512 U.S. at 642. Indeed, "[c]ontent-based [speech] regulations are presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (emphasis added). The majority opinion not only fails to recognize these principles, it does not even discuss "compelled speech." Rather, it implies, by its silence on the subject, that compelled speech or content-based speech, when including potentially commercial speech, is subject to a relaxed level of scrutiny, a position never countenanced by the Supreme Court.

And third, it fails to recognize that the challenge addressed by the district court was the plaintiffs' facial challenge. In an effort to identify questions of fact to support its remand, the opinion ignores the issue presented -- i.e., whether a facial review would render the ordinance unconstitutional -- and recharacterizes the proceeding as an as- applied challenge. With that erroneous maneuver, it concludes that facts need to be developed to conduct such an as-applied challenge. Ante, at 38 ("But to properly employ an as-applied analysis, the court was obliged to first afford the City discovery"). To be sure, the complaint challenged the ordinance both facially and as-applied, but the plaintiffs argued before the district court that on Count I (violation of free speech), the court could rule on the ordinance "as a facial matter." And in its opinion, the district court accepted this, repeating that in the plaintiffs' claims against the City, the plaintiffs "contend[ed] that the Ordinance [was] facially invalid." O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 808 (D. Md. 2011). The court then proceeded to address the case as a facial challenge, stating, "In the instant case, the Court must examine whether the Ordinance, on its face, is subject to, and satisfies, the applicable level of scrutiny." Id. at 810 (emphasis added).

Thus, to conclude that the district court's holding was "laden with error," ante, at 10, the majority opinion itself is error-laden, giving the governing core principles the back of the hand and broadening, by recharacterization, the issues so as to be able to conclude that the City should have been given the opportunity to engage in discovery, even as to subjects

that would be irrelevant or unnecessary to the legal questions decided by the district court. It is apparent that the majority opinion, which is some 50 typewritten pages, roams in supposition about what pregnancy centers that do not offer abortion have said to their clients; about whether their advice could have been commercial in nature; and about the facts that might have been misrepresented, as identified by pro-choice groups in their stated policy positions. For example, the majority opinion quotes at length: (1) the Waxman report, which suggests the pregnancy centers "often mask their pro-life mission" to mislead pregnant women; (2) the report of the NARAL Pro-Choice Maryland Fund that pregnancy centers give "wildly inaccurate information" about abortion; (3) the legislative testimony of a woman who stated she had "felt tricked" by a pregnancy center 16 years before; and (4) the legislative testimony of a professor who stated that she was "distressed by the existence of centers" that misrepresent their mission. The majority sets forth no similar evidence provided by the plaintiffs, yet it relies on the City's claimed need to respond to the plaintiffs' facts.

In its gratuitous shaping of the issues, the majority also devotes pages to speculation about whether the ordinance regulates commercial speech or noncommercial speech -- failing to recognize that, on its face, the ordinance regulates both. The majority's position is curious in view of the fact that it has today affirmed the district court's conclusion in Centro Tepeyac that a similar Montgomery County, Maryland provision compelled noncommercial speech and that any commercial speech was intertwined with

regulated noncommercial speech. See Centro Tepeyac v. Montgomery Cnty., ___ F.3d ___, No. 11-1314(L), at ___ (4th Cir. June ___, 2013) (en banc) (observing that the district court "demonstrated a firm grasp of the legal principles"). Here, in contrast, the majority concludes that resolution of the question must be "fact-driven." It states, "Without all the pertinent evidence -- including evidence concerning the Center's economic motivation (or lack thereof) and the scope and content of its advertisements -- we cannot properly analyze the speech regulated by the Ordinance." Ante, at 49. But this speculation is irrelevant because Ordinance 09- 252 regulates both commercial and noncommercial speech and addresses all persons who provide pregnancy services without providing abortions or referring for abortions.

Were our court grappling with the abortion issue itself, the majority's fulsome and overstated facts might mean something. But the case before us presents the much narrower question about the scope of the ordinance on its face. It appears that the majority has become seduced by its own elaboration of abortion policy from the viewpoint of some interested groups, thereby blinding it from the narrow legal issue raised by the terms of the ordinance.

The district court, on the other hand, correctly focused on the relevant legal issue and, in a reasoned fashion, supported its holding by analyzing the ordinance's language. To be sure, the district court engaged hypothetically from time to time in discussion about the potential relevance of facts, but it quickly left them, recognizing that the well-established First Amendment principles on which it relied provided for

a resolution of the issue as a matter of law. As it stated, "In the instant case, the Court must examine whether the Ordinance, on its face, is subject to, and satisfies, the applicable level of scrutiny." O'Brien, 768 F. Supp. 2d at 810 (emphasis added). And from the language of the ordinance, it concluded that the strict-scrutiny standard applied and that the ordinance did not meet that standard. Nowhere did the district court consider or decide an as-applied review.

I respectfully submit that under the well-established First Amendment principles relating to compelled speech, Baltimore City Ordinance 09-252 cannot, on its face, withstand strict scrutiny. The ordinance is content-based, telling a person, not otherwise regulated, what to say to a client, even though the person may disagree with the speech and would not otherwise say what is commanded. The mandate is imposed on all pregnancy centers not providing or referring for abortion, whether they are commercial or noncommercial or whether they provide services for free or for a fee. Although the City may have a compelling interest in prohibiting the misrepresentation of information about abortion, as it claims, the ordinance on its face does not prohibit misrepresentation. Indeed, it mandates speech regardless of whether the pregnancy center misrepresents or not. These statutorily based observations lead to the legal conclusion that the ordinance is overbroad and therefore unconstitutional. To reach that conclusion does not require discovery of the circumstantial facts about how the ordinance might apply in any given circumstance. I conclude that

the majority's decision to remand for the development of irrelevant facts is simply misguided.

The district court's decision should be affirmed.

I

By way of background, the City of Baltimore enacted Ordinance 09-252 in December 2009, regulating all pregnancy centers that provide pregnancy related services for free or for a fee and that either do not provide abortions or refer for abortions. The ordinance requires each one of those centers to post one or more signs in its waiting room stating that the center "does not provide or make referral for abortion or birth- control services."

The legislative record indicates that the President of the Baltimore City Council introduced Bill 09–0406 (the future Ordinance 09–252) after meeting with abortion-rights advocacy groups. Those groups complained that some pregnancy clinics provide inaccurate information to women about abortions. A spokesperson for the City Council President explained in a public statement: "The bill deals with whether women are told up front what the facts are. Women need to know up front what to expect when they go into these centers." The "Bill Synopsis" presented to the City Council stated that the Bill was "introduced because of the 'importance of choice.'" And the Baltimore City Health Department backed the Bill, based on the "purpose of the bill to require limited-service pregnancy centers to provide accurate information about available services to clients and potential clients." (Emphasis added). The Bill was

enacted in November and became law on December 4, 2009.

In March 2010, before any enforcement of Ordinance 09–252, the Archbishop of Baltimore, St. Brigid's Roman Catholic Church, and the Greater Baltimore Center for Pregnancy Concerns, Inc. ("the Pregnancy Center") commenced this action against the Mayor and City Council of Baltimore, challenging the constitutionality of the ordinance and alleging that it violates the Free Speech and Free Assembly Clauses of the First Amendment, the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Conscience Clause in Maryland Code Ann., Health–Gen. § 20–214(a).

The complaint alleges that the Pregnancy Center is a "limited-service pregnancy center," as defined in Ordinance 09– 252, operating in Baltimore City from two locations. The Center provides free services to pregnant women, such as pregnancy testing; classes in prenatal development, post-pregnancy parenting, and life skills; Bible studies; and material support for women through its "Hannah's Cupboard" program, including diapers, formula, baby and maternity clothes, toys, and books. It also provides women with information on "abstinence and natural family planning, which are recognized forms of birth control," but does not provide referrals for abortions or other methods of birth control, asserting that it does not do so "[b]ased on moral and religious beliefs." The Pregnancy Center does not charge its clients for its services.

The complaint alleges that Ordinance 09–252 specifically targets pro-life pregnancy centers such as the Pregnancy Center and thus "regulates communications at the Pregnancy Center that are personal, moral, religious, and political." It also states that "[b]y requiring a disclaimer that the Center does not provide or refer for abortions, the Ordinance compels Plaintiffs to deliver the implied message that these services are available elsewhere and should be considered," thus appearing to legitimize such services, in violation of the plaintiffs' beliefs. The complaint objects to the ordinance's requirement that the Pregnancy Center "post a sign saying that it does not provide birth-control services," when in fact it does "in the form of education about abstinence and natural family planning." The plaintiffs seek a declaratory judgment that the ordinance is unconstitutional on its face and/or as applied to them and an injunction prohibiting the ordinance's enforcement. Some two months after they filed their complaint, but before the City filed its answer, the plaintiffs also filed a motion for partial summary judgment on their free speech and equal protection claims.

The City argued that the plaintiffs' summary judgment request was premature in that the City had not been afforded the opportunity to conduct discovery or to fully develop expert testimony on key factual issues. The City contended that it needed "to conduct discovery concerning the advertising that the Pregnancy Center and other limited-service pregnancy centers employ . . . [to] demonstrate its deceptive character." The City also asked for discovery "to develop factual support for [the City's] argument that

the services offered by [the Center] are a form of commerce, and, therefore, the disclaimer required by the Ordinance is commercial speech, subject only to rational basis scrutiny -- not strict scrutiny." Finally, the City asked for "the opportunity to develop expert testimony to provide factual support for the propositions that deceptive advertising by limited-service pregnancy centers threatens public health in a variety of ways."

Following a hearing on the motion for summary judgment, as well as on other motions, the district court entered an order dated January 28, 2011, denying the City's request for further discovery on the ground that it was not necessary to the issue being decided; granting the Pregnancy Center's motion for summary judgment on its free speech claim; and entering a judgment permanently enjoining the enforcement of the ordinance. In granting summary judgment to the Pregnancy Center, the court held that Ordinance 09-252 was unconstitutional based on its legal conclusions that the ordinance compelled speech; that it was content-based and therefore subject to strict scrutiny; and that it was not narrowly tailored to fit the City's stated interest in enacting the ordinance. O'Brien, 768 F. Supp. 2d at 812-14, 816-17.

II

This is not a hard case, and the First Amendment analysis is straightforward.

For a facial challenge, we look to the face of the ordinance and are "careful not to go beyond [its] facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Wash. State Grange v. Wash. State

Republican Party, 552 U.S. 442, 449-50 (2008). But the assessment may consider the application of the regulation to others, not just to the plaintiffs, to determine whether there are conceivable instances of overbreadth. See Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483-84 (1989). Thus, when conducting a facial review under the First Amendment, we "construe the statute and determine whether 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" Preston v. Leake, 660 F.3d 726, 739 (4th Cir. 2011) (quoting United States v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 1587 (2010)).

Ordinance 09–252 targets "limited-service pregnancy centers," which are 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.

Baltimore City Health Code § 3–501 (emphasis added). Under the ordinance, "[a] limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or

birth-control services." Id. § 3-502(a). This disclaimer must be made through one or more "easily readable" signs that are "conspicuously posted in the center's waiting room" and written in English and Spanish. Id. § 3–502(b). The failure to comply with the terms of the ordinance is punishable by a citation carrying a maximum civil penalty of $150. Id. § 3-506(a).

On its face, Ordinance 09-252 compels speech. A pregnancy center that does not provide or refer for abortions must post the sign containing the mandated language. A pregnancy center is thus required to participate in the City's effort to tell pregnant women that abortions are available elsewhere as a presumably acceptable alternative, regardless of the moral and religious beliefs of the center.

As a matter of logic and Supreme Court precedent, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." Riley, 487 U.S. at 795. Accordingly, compelled speech must be addressed as "a content-based regulation of speech." Id. (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974)). Of course, a content-based speech regulation is subject to the "most exacting scrutiny," the strict scrutiny standard. Turner Broadcasting, 512 U.S. at 642; Riley, 487 U.S. at 796; see also United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000). Indeed, strict scrutiny applies even in cases where the compelled disclosure is limited to factually accurate or non- ideological statements. Riley, 487 U.S. at 797-98; Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) ("[The] 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").

In an effort to avoid strict scrutiny of Ordinance 09-252, the City contends that the ordinance compels only commercial speech and therefore is subject to a lower level of scrutiny. Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980). The hallmark of commercial speech is that it "does no more than propose a commercial transaction." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (internal citation and quotation marks omitted). In some circumstances, speech may be classified as commercial even when it "cannot be characterized merely as proposals to engage in commercial transactions." Id.; see also id. at 67-68 (holding that advertisements discussing the health benefits of contraceptives were commercial speech); Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 370 (4th Cir. 2012) (holding that business' outdoor mural was commercial speech where business conceded that the mural was advertising, the mural included part of the business' logo, and the business "had an economic motivation for displaying the painting"). But speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." Riley, 487 U.S. at 796.

Here, the enacted text forecloses the City's argument that the ordinance targets only commercial speech because the ordinance imposes a disclosure requirement on all speakers, regardless of economic motivation. The ordinance applies wholesale to any

person who "for a fee or as a free service" provides information about pregnancy. The ordinance thus imposes its disclosure requirement wholly indifferent to whether the speaker "propos[es] a commercial transaction." Central Hudson, 447 U.S. at 562; see also Centro Tepeyac v. Montgomery Cnty, 779 F. Supp. 2d 456, 463-65 (D. Md. 2011) (noting that similar provisions applying to persons who provide services for free "cannot rely on commercial speech cases"), affirmed, Centro Tepeyac, ___ F.3d at ___, No. 11-1314(L), at 11-12.

In a similar effort to avoid the application of strict scrutiny, the majority maintains that the commercial speech inquiry is "fact-driven" and that therefore "discovery is needed to substantiate . . . whether the Center possesses economic interests apart from its ideological motivations." Ante, at 45-46. But this approach is flawed. The Pregnancy Center's motivation for its provision of free information is irrelevant to the inquiry of whether the ordinance, on its face, compels noncommercial speech. The ordinance reaches beyond this one pregnancy center and imposes the requirement of a disclaimer sign on every speaker -- commercial or not -- who provides information "for a fee or as a free service." The plain language of the ordinance focuses not on the economic motive of the person, but on the content of the person's speech. It is therefore untenable for the majority to assert that the commercial motive of this pregnancy center is a relevant fact yet to be determined.

Thus, as a noncommercial, content-based regulation, the ordinance is subject to strict scrutiny, see Centro Tepeyac, 779 F. Supp. 2d at 468 (holding, with respect

to a similar provision, that "strict scrutiny applies"), affirmed, Centro Tepeyac, ___ F.3d at ___, No. 11-1314(L), at 12, and "[c]ontent-based [speech] regulations are presumptively invalid," R.A.V., 505 U.S. at 382. The City bears the burden of rebutting the presumption of invalidity. See Playboy Entm't Group, 529 U.S. at 816-17. Indeed, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." Id. at 818. The City can, nonetheless, rebut the presumption if it is able to show that the ordinance is "narrowly tailored to promote a compelling Government interest." Id. at 813. And to do this, it must show that the ordinance is the least restrictive alternative to serve the government's purpose. Id.; Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).

The City maintains that it has a compelling government interest in assuring, as a health concern, that pregnancy centers do not misrepresent information about abortion, a concern that it grounds in the Waxman Report and the report of the NARAL Pro-Choice Maryland Fund. It also contends that the ordinance narrowly addresses this concern by requiring pregnancy centers to post the mandated sign in their waiting rooms.

The district court accepted the City's stated interest in the ordinance as a compelling one and elected to assess the question of whether the ordinance was narrowly tailored to serve that interest. I too would bypass any inquiry about the sufficiency of the City's stated government interest and address the question of whether it is narrowly tailored. If the ordinance is not narrowly tailored to serve the City's

stated interest, then it must be invalidated as unconstitutional.

The inquiry into whether Ordinance 09-252 is narrowly tailored is a purely legal question: "Whether [a] regulation meets the 'narrowly tailored' requirement is of course a question of law . . . ." United States v. Doe, 968 F.2d 86, 88 (D.C. Cir. 1992); see also Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (whether an ordinance is overbroad is "a question of law that involved no dispute about the characteristics of" the plaintiff). A statute is narrowly tailored only "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). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted).

A regulation is not narrowly tailored when, among other things, (1) it does not advance the purported compelling interest, e.g., Meyer v. Grant, 486 U.S. 414, 426 (1988); (2) it is overinclusive, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121–23 (1991); or the government has other, less speech-restrictive alternatives available, e.g., Playboy Entm't Group, 529 U.S. at 816–17. Ordinance 09–252 fails under all three tests.

First, the ordinance does not target the stated government interest of eliminating false advertising. It

does not even mention false advertising, and its substance does not address it.

Second, the ordinance is overinclusive because it applies equally to pregnancy centers regardless of whether they advertise and, if they advertise, regardless of whether they engage in false advertising. See FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 265 (1986) (stating that for a law to be narrowly tailored "government must curtail speech only to the degree necessary to meet the particular problem at hand" and "must avoid infringing on speech that does not pose the danger that has prompted regulation").

Third, several alternatives to address the problems purportedly targeted by the ordinance are available and would impose a lesser burden on speech. Most obviously, the City could speak with its own voice. It might, for example, use its own resources to undertake public education campaigns addressing the alleged dangers of pregnancy centers or, more generally, promoting consultations with physicians for pregnant women. Cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. . . . [E]ducational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective"). This is the same alternative that the district court found available in Centro Tepeyac, 779 F. Supp. 2d at 469 n.9, to support in part its finding that a similar provision was likely unconstitutional and that this court affirmed in Centro Tepeyac, ___ F.3d at ___, No. 11-1314(L) at 13-14.

As another alternative, the City could produce a document or website listing local pregnancy centers and noting what services are available at each. See Riley, 487 U.S. at 800 ("[T]he State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech").

And as yet another alternative, the City could always pursue the option of prosecuting violations of its criminal and civil laws that proscribe false or deceptive advertising. See Riley, 487 U.S. at 800; see also Nefedro v. Montgomery Cnty., 996 A.2d 850, 863 (Md. 2010) (holding that fraud laws were a less restrictive alternative to a law prohibiting remuneration for fortune-telling).

That the City resorted to speech restrictions before trying these or other less restrictive alternatives is more than enough to render the ordinance unconstitutional. See Thompson v. Western States Med. Ctr., 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last -- not first -- resort").

The additional discovery ordered by the majority would not eliminate or even mitigate these narrow-tailoring problems. The ordinance's infirmity in this regard is apparent on its face. Cf. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989) (affirming district court's grant of preliminary injunction where the pre-enactment record contained "no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means,

short of a total ban, to achieve the Government's interest"); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1274 (11th Cir. 2005) (invalidating content-based sign regulation on appeal from the denial of a preliminary injunction because "[t]he First Amendment questions . . . [were] purely legal" and "only minimally intertwined with the facts").

Tellingly, the majority does not dispute the fact that discovery would not be needed to determine whether the language of the ordinance advances the stated government interest or is overinclusive -- two of the three ways that can render an ordinance not narrowly tailored. But it nonetheless states that the City "must be accorded the opportunity to develop evidence disproving the effectiveness of purported less restrictive alternatives to the Ordinance's disclaimer." Ante, at 53; cf. Centro Tepeyac, ___ F.3d at ___, No. 11-1314(L), at 13-14 (holding to the contrary with respect to a similar provision). It is remarkable that this is discovery that the City never requested.

Finally, the majority adds the careless declaration that:

> [T]he City must be accorded the opportunity to develop evidence relevant to the compelling governmental interest and narrow tailoring issues, including, inter alia, evidence substantiating the efficacy of the Ordinance in promoting public health.

Ante, at 53. This declaration of loosely mixed principles is, as it stands, irrelevant to any issue, but it appears mostly to collapse two burdens that the government has under strict scrutiny. First, the government was

required to advance a compelling governmental interest in mandating speech. With respect to that, the majority fails to recognize that the district court assumed that the government had appropriately claimed a compelling interest in prohibiting the misrepresentation of information about abortion. Thus, there is no issue of fact to resolve. Second, the government had the burden to show that its regulation of speech -- i.e., mandating the posting of a sign with specific content in pregnancy centers' waiting rooms -- was narrowly tailored to serve the compelling governmental interest. As to this, the majority fails to recognize that that issue was a question of law. See Village of Schaumburg, 444 U.S. at 634; Doe, 968 F.2d at 88. To resolve such a question of law, all that need be done is an analysis of the statute's language to determine if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby, 487 U.S. at 485.

In short, to respond to the self-evident proposition that discovery is not needed in resolving questions of law, the majority fabricates fact issues where none exist and then criticizes the dissenting opinions, stating, "The dissenters would wholly exempt the Center from fundamental procedures to which all civil litigants are both subject and entitled." Ante, at 58. Indeed, it inflates the postured balloon, suggesting even a constitutional issue in denying discovery. See ante, at 59 ("We, however, are not so dismissive of the Federal Rules of Civil Procedure, which, as the Supreme Court has underscored, 'are designed to further the due process of law that the Constitutional guarantees'"). The majority's drama about its role in

protecting the Federal Rules of Civil Procedure and the U.S. Constitution does not, however, advance its argument that it can ignore the reality that the district court ruled on questions of law, questions that do not need discovery to resolve.

III

At bottom, we have a City ordinance that targets, on its face and by design, all pregnancy centers that do not provide abortions or do not refer clients for abortions. Purportedly to remedy misrepresentations being made by these pregnancy centers about abortion, the ordinance requires each center to put a sign in its waiting room announcing to clients that the abortion alternative is not provided at the center, even though such center might hold the view that abortion should not be considered as an alternative at all. Such an approach invades the most fundamental freedom of speech, mandating that the pregnancy centers speak a message with which they profoundly disagree. Even though the City may have a compelling interest in preventing misrepresentations about abortion, it is not free to impose a requirement of speech on those who do not misrepresent. Ordinance 09-252 mandates the antidote on all persons who refuse to provide or refer for abortion, regardless of whether they have misrepresented or are misrepresenting abortion information. On its face, the ordinance is overbroad and unconstitutional. See Centro Tepeyac, 779 F. Supp. 2d at 468-69 (holding similar provision likely not narrowly tailored), affirmed, Centro Tepeyac, ___ F.3d at ___, No. 11-1314(L), at 13-14.

The majority, however, refuses to consider the legal questions raised by the Pregnancy Center's facial challenge and reaches, in its far-ranging opinion, irrelevant and ideological facts about a case not presented to conclude that summary judgment was inappropriate. I disagree and conclude that the district court properly recognized the issues that could be decided as a matter of law and found the ordinance unconstitutional. That legal analysis is not a difficult one and, I submit, readily leads to the district court's conclusion. Accordingly, I would affirm.*

Judges Wilkinson, Shedd, and Agee have asked me to show them as joining this opinion.

* While I dissent from the court's remand, I concur in its judgment that the Archbishop and St. Brigid's Catholic Church lack standing to challenge the ordinance.

[ENTERED: JULY 27, 2012]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1111

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INCORPORATED,

Plaintiff-Appellee,

and

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION INCORPORATED; ARCHBISHOP EDWIN F. O'BRIEN, ARCHBISHOP OF BALTIMORE AND HIS SUCCESSORS IN OFFICE, A CORPORATION SOLE,

Plaintiffs,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE RAWLINGS-BLAKE, MAYOR OF BALTIMORE, IN HER OFFICIAL CAPACITY; OXIRIS BARBOT, BALTIMORE CITY HEALTH COMMISSIONER,

Defendants-Appellants,

and

OLIVIA FARROW; BALTIMORE CITY HEALTH DEPARTMENT,

Defendants.

TAUNYA LOVELL BANKS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; C. CHRISTOPHER

BROWN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ERWIN CHEMERINSKY, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ROBERT J. CONDLIN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; NORMAN DORSEN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; LEIGH GOODMARK, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; STEVEN P. GROSSMAN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; MARTIN GUGGENHEIM, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; DEBORAH HELLMAN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; MARGARET E. JOHNSON, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; KENNETH LASSON, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; SYLVIA A. LAW, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; SUSAN PAULA LEVITON, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; AUDREY MCFARLANE, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; PAULA A. MONOPOLI, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; BURT NEUBORNE, Jacob A. France Professor of Equality Jurisprudence, University of Maryland

School of Law; JOHN T. NOCKLEBY, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; HELEN L. NORTON, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; DAVID A. J. RICHARDS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ELIZABETH J. SAMUELS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ELIZABETH M. SCHNEIDER, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; JANA B. SINGER, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; BARBARA ANN WHITE, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; TOBIAS BARRINGTON WOLFF, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; DIANE L. ZIMMERMAN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; ROBERT BLUM; WILLARD CATES, JR.; CHESAPEAKE REGIONAL CHAPTER OF THE SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; ERIC LEVEY; MATERNAL AND CHILD HEALH ACCESS; NADINE PEACOCK; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; MARK SEIGEL; LAURIE SCHWAB ZABIN; CATHOLICS FOR CHOICE; DC ABORTION FUND; DIANA DEGETTE; DONNA EDWARDS; LAW STUDENTS FOR

REPRODUCTIVE JUSTICE; CAROLYN MALONEY; MARYLAND CHAPTER FOR THE NATIONAL ORGANIZATION FOR WOMEN; NARAL PRO-CHOICE AMERICA; NARAL PRO-CHOICE MARYLAND; NATIONAL ABORTION FEDERATION; NATIONAL ADVOCATES FOR PREGNANT WOMEN; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; PLANNED PARENTHOOD OF MARYLAND; MIKE QUIGLEY; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE; LOUISE SLAUGHTER; JACKIE SPEIER; WHOLE WOMAN'S HEALTH OF BALTIMORE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; HUMAN RIGHTS WATCH; SUSAN DELLER ROSS, Professor,

Amici Supporting Appellant,

PREGNANCY CARE ORGANIZATIONS CARE NET; HEARTBEAT INTERNATIONAL, INCORPORATED; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES; ROCKA-MY-BABY PREGNANCY CRISIS CENTER; BOWIE CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; CATHOLIC MEDICAL ASSOCIATION; HELEN M. ALVARE, Associate Professor of Law, George Mason University School of Law; ROBERT JOHN ARAUJO, S.J., John Courtney Murray, S.J. University Professor, Loyola University of Chicago School of Law; ROBERT F. COCHRAN, JR., Louis D. Brandeis Professor of Law, Pepperdine University School of Law; DAVID DEWOLF, Professor, Gonzaga University School of Law; DWIGHT G. DUNCAN, Professor of Law, University of Massachusetts Dartmouth School of Law; JOHN

C. EASTMAN, Henry Salvatori Professor of Law & Community Service, former Dean, Chapman University School of Law; SCOTT T. FITZGIBBON, Professor, Boston College Law School; RICHARD W. GARNETT, Associate Dean and Professor of Law, Notre Dame Law School; BRADLEY P. JACOB, Associate Professor, CROFTON PREGNANCY CLINIC, INCORPORATED; CARE NET PREGNANCY CENTER OF FREDERICK; CARE NET PREGNANCY CENTER OF SOUTHERN MARYLAND; LAUREL PREGNANCY CENTER; ROCKVILLE PREGNANCY CENTER, INCORPORATED; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN ASSOCIATION OF Regent University School of Law; DREW L. KERSHEN, Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law; LYNNE MARIE KOHM, John Brown McCarty Professor of Family Law, Regent University School of Law; RICHARD S. MYERS, Professor of Law, Ave Maria School of Law; MICHAEL STOKES PAULSEN, Distinguished University Chair and Professor, University of St. Thomas School of Law; ROBERT J. PUSHAW, James Wilson Endowed Professor of Law, Pepperdine University School of Law; MICHAEL SCAPERLANDA, Professor of Law, Gene & Elaine Edwards Family Chair in Law, The University of Oklahoma College of Law; GREGORY C. SISK, Pio Cardinal Laghi Distinguished Chair in Law and Professor, University of St. Thomas School of Law; O. CARTER SNEAD, Professor of Law, Notre Dame Law School; RICHARD STITH, Professor of Law, Valparaiso University School of Law; TIMOTHY J. TRACEY, Assistant Professor of Law, Ave Maria School of Law; PRO-LIFE OBSTETRICIANS AND

GYNECOLOGISTS; LYNN D. WARDLE, Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University,

Amici Supporting Appellee.

No. 11-1885

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION INCORPORATED; ARCHBISHOP EDWIN F. O'BRIEN, ARCHBISHOP OF BALTIMORE AND HIS SUCCESSORS IN OFFICE, A CORPORATION SOLE,

Plaintiffs-Appellants,

and

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INCORPORATED,

Plaintiff,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE RAWLINGSBLAKE, Mayor of Baltimore, in her Official Capacity; OXIRIS BARBOT, Baltimore City Health Commissioner,

Defendants-Appellees,

and

OLIVIA FARROW; BALTIMORE CITY HEALTH DEPARTMENT,

Defendants.

HELEN M. ALVARE, Associate Professor of Law, George Mason University School of Law; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN ASSOCIATION OF PRO - LIFE OBSTETRICIANS

AND GYNECOLOGISTS; ROBERT JOHN ARAUJO, S.J., John Courtney Murray, S.J. University Professor, Loyola University of Chicago School of Law; BOWIE CROFTON PREGNANCY CLINIC, INCORPORATED; CARE NET PREGNANCY CENTER OF FREDERICK; CARE NET PREGNANCY CENTER OF SOUTHERN MARYLAND; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; CATHOLIC MEDICAL ASSOCIATION; ROBERT F. COCHRAN, JR., Louis D. Brandeis Professor of Law, Pepperdine University School of Law; DAVID DEWOLF, Professor, Gonzaga University School of Law; DWIGHT G. DUNCAN, Professor of Law, University of Massachusetts Dartmouth School of Law; JOHN C. EASTMAN, Henry Salvatori Professor of Law & Community Service, former Dean, Chapman University School of Law; SCOTT T. FITZGIBBON, Professor, Boston College Law School; RICHARD W. GARNETT, Associate Dean and Professor of Law, Notre Dame Law School; HEARTBEAT INTERNATIONAL, INCORPORATED; BRADLEY P. JACOB, Associate Professor, Regent University School of Law; DREW L. KERSHEN, Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law; LYNNE MARIE KOHM, John Brown McCarty Professor of Family Law, Regent University School of Law; LAUREL PREGNANCY CENTER; RICHARD S. MYERS, PROFESSOR of LAW, AVE MARIA SCHOOL of LAW; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES; MICHAEL STOKES PAULSEN, Distinguished University Chair and Professor, University of St. Thomas School of Law; PREGNANCY CARE ORGANIZATIONS CARE NET; ROBERT J. PUSHAW, James Wilson Endowed

Professor of Law, Pepperdine University School of Law; ROCKA-MY-BABY PREGNANCY CRISIS CENTER; ROCKVILLE PREGNANCY CENTER, INCORPORATED; MICHAEL SCAPERLANDA, Professor of Law, Gene & Elaine Edwards Family Chair in Law, The University of Oklahoma College of Law; GREGORY C. SISK, Pio Cardinal Laghi Distinguished Chair in Law and Professor, University of St. Thomas School of Law; O. CARTER SNEAD, Professor of Law, Notre Dame Law School; RICHARD STITH, Professor of Law, Valparaiso University School of Law; TIMOTHY J. TRACEY, Assistant Professor of Law, Ave Maria School of Law; LYNN D. WARDLE, Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University,

Amici Supporting Appellant,

TAUNYA LOVELL BANKS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; C. CHRISTOPHER BROWN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ERWIN CHEMERINSKY, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ROBERT J. CONDLIN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; NORMAN DORSEN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; LEIGH GOODMARK, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; STEVEN P. GROSSMAN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; MARTIN GUGGENHEIM, Jacob A. France Professor of Equality Jurisprudence, University of Maryland

School of Law; DEBORAH HELLMAN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; MARGARET E. JOHNSON, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; KENNETH LASSON, Jacob A. France Professor of Equality Jurisprudence, University of ü Maryland School of Law; SUSAN PAULA LEVITON, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; SYLVIA A. LAW, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; AUDREY MCFARLANE, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; PAULA A. MONOPOLI, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; BURT NEUBORNE, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; JOHN T. NOCKLEBY, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; HELEN L. NORTON, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; DAVID A . J. RICHARDS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ELIZABETH M. SCHNEIDER, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; ELIZABETH J. SAMUELS, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; JANA B. SINGER, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; BARBARA ANN WHITE, Jacob A. France Professor of Equality Jurisprudence, University of Maryland

School of Law; TOBIAS BARRINGTON WOLFF, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; DIANE L. ZIMMERMAN, Jacob A. France Professor of Equality Jurisprudence, University of Maryland School of Law; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; MATERNAL AND CHILD HEALH ACCESS; PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH; CHESAPEAKE REGIONAL CHAPTER OF THE SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; ROBERT BLUM; WILLARD CATES, JR.; ERIC LEVEY; NADINE PEACOCK; MARK SEIGEL; LAURIE SCHWAB ZABIN; NARAL PRO-CHOICE MARYLAND; NARAL PRO-CHOICE AMERICA; CATHOLICS FOR CHOICE; DC ABORTION FUND; LAW STUDENTS FOR REPRODUCTIVE JUSTICE; NATIONAL ABORTION FEDERATION; MARYLAND CHAPTER FOR THE NATIONAL ORGANIZATION FOR WOMEN; NATIONAL ADVOCATES FOR PREGNANT WOMEN; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; PLANNED PARENTHOOD OF MARYLAND; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE; WHOLE WOMAN'S HEALTH OF BALTIMORE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; DIANA DEGETTE; DONNA EDWARDS; CAROLYN MALONEY; MIKE QUIGLEY; LOUISE SLAUGHTER; JACKIE SPEIER; HUMAN RIGHTS WATCH; SUSAN DELLER ROSS, Professor,

Amici Supporting Appellee

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, Senior District Judge.
(1:10-cv-00760-MJG)

Argued: March 23, 2012

Decided: June 27, 2012

Before NIEMEYER, KING, and AGEE,
Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Agee joined. Judge King wrote a dissenting opinion.

COUNSEL

ARGUED: Suzanne Sangree, BALTIMORE CITY DEPARTMENT OF LAW, Baltimore, Maryland, for Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. David William Kinkopf, GALLAGHER EVELIUS & JONES, LLP, Baltimore, Maryland, for Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop Edwin F. O'Brien, Archbishop of Baltimore and His Successors in Office, A Corporation Sole. **ON BRIEF:** Stephanie Toti, Special Assistant City Solicitor, Dipti Singh, Special Assistant City Solicitor, CENTER FOR REPRODUCTIVE RIGHTS, New York, New York, for Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official

Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Peter J. Basile, FERGUSON, SHETELICH & BALGREATER LEW, PA, Baltimore, Maryland; Steven G. Metzger, GALLAGHER EVELIUS & JONES, LLP, Baltimore, Maryland; Mark L. Rienzi, COLUMBUS SCHOOL OF LAW, Catholic University of America, Washington, D.C., for Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop Edwin F. O'Brien, Archbishop of Baltimore and His Successors in Office, A Corporation Sole. Maria T. Vullo, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, New York, New York, for Amici Curiae Law Professors in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Douglas W. Baruch, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, Washington, D.C.; Janice Mac Avoy, Alexander T. Korn, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, New York, New York, for International Municipal Lawyers Association, Amicus Curiae in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Simona G. Strauss, Melissa M. Derr, SIMPSON THACHER & BARTLETT LLP, Palo Alto, California; Jayma M. Meyer, Sarah L. Dunn, SIMPSON THACHER & BARTLESS LLP, New York, New York, for Amici Curiae Public Health Advocates in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of

Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Kimberly A. Parker, Zaid A. Zaid, Stephanie Wright, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Catholics for Choice, DC Abortion Fund, Diana Degette, Donna Edwards, Law Students for Reproductive Justice, Carolyn Maloney, Maryland Chapter for the National Organization for Women, Naral Pro-Choice America, Naral Pro-Choice Maryland, National Abortion Federation, National Advocates for Pregnant Women, National Asian Pacific American Women's Forum, Planned Parenthood of Maryland, Mike Quigley, Religious Coalition for Reproductive Choice, Sistersong Women of Color Reproductive Justice Collective, Louise Slaughter, Jackie Speier, Whole Woman's Health of Baltimore, Women's Law Center of Maryland, Incorporated, Amici Curiae in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Priscilla J. Smith, YALE LAW SCHOOL INFORMATION SOCIETY PROJECT, Brooklyn, New York, for Human Rights Watch and Susan Deller Ross, Amici Curiae in Support of Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, Mayor of Baltimore, in her Official Capacity, and Oxiris Barbot, Baltimore City Health Commissioner. Anna Franzonello, Mailee R. Smith, AMERICANS UNITED FOR LIFE, Washington, D.C., for Pregnancy Care Organizations Care Net, Heartbeat International, Incorporated, National Institute of Family and Life Advocates, Rocka-My-Baby Pregnancy Crisis Center, Bowie Crofton Pregnancy Clinic, Incorporated, Care Net Pregnancy

Center of Frederick, Care Net Pregnancy Center of Southern Maryland, Laurel Pregnancy Center, and Rockville Pregnancy Center, Incorporated, Amici Curiae in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop Edwin F. O'Brien, Archbishop of Baltimore and His Successors in Office, A Corporation Sole. Cecilia N. Heil, Erik M. Zimmerman, AMERICAN CENTER FOR LAW & JUSTICE, Virginia Beach, Virginia; Carly F. Gammill, AMERICAN CENTER FOR LAW & JUSTICE, Brentwood, Tennessee; Colby M. May, James Matthew Henderson, Sr., Thomas J. Dolan, III, Tiffany N. Barrans, AMERICAN CENTER FOR LAW & JUSTICE, Washington, D.C., for American Center for Law and Justice, Amicus Curiae in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop Edwin F. O'Brien, Archbishop of Baltimore and His Successors in Office, A Corporation Sole. Matthew S. Bowman, ALLIANCE DEFENSE FUND, Washington, D.C.; Samuel B. Casey, David B. Waxman, JUBILEE CAMPAIGN-LAW OF LIFE PROJECT, Washington, D.C., for American Association of Pro-Life Obstetricians and Gynecologists, Christian Medical & Dental Associations, and Catholic Medical Association, Amici Curiae in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop Edwin F. O'Brien, Archbishop of Baltimore and His Successors in Office, A Corporation Sole. John C. Eastman, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, Chapman University School of Law, Orange, California; David T. Raimer, Noel J.

Francisco, JONES DAY, Washington, D.C., for Amici Curiae Professors in Support of Greater Baltimore Center for Pregnancy Concerns, Incorporated, St. Brigid's Roman Catholic Congregation, Incorporated, Archbishop Edwin F. O'Brien, Archbishop of Baltimore and His Successors in Office, A Corporation Sole.

OPINION

NIEMEYER, Circuit Judge:

Archbishop Edward F. O'Brien, St. Brigid's Roman Catholic Congregation, Inc., and the Greater Baltimore Center for Pregnancy Concerns, Inc. ("the Pregnancy Center") commenced this action against the Mayor and City Council of Baltimore, challenging the constitutionality of the City's Ordinance 09-252, which requires that "limited-service pregnancy centers," such as the Pregnancy Center, post signs disclaiming that they "do[ ] not provide or make referral for abortion or birth control services." The complaint alleges that the ordinance, both facially and as applied to the plaintiffs, violates the plaintiffs' free speech, free exercise, and equal protection rights under the First and Fourteenth Amendments to the U.S. Constitution, as well as the plaintiffs' rights under the Conscience Clause of Maryland's health law. The district court granted summary judgment to the Pregnancy Center on its freedom of speech count, dismissed the Archbishop and St. Brigid's as plaintiffs for lack of standing, and dismissed the remaining counts without prejudice, in view of its free speech ruling. The court held that the disclaimer required by Ordinance 09-252 is "a form of compelled speech" that "alters the course of a [pregnancy] center's communication with a client or

prospective client about abortion and birth-control" and "is based, at least in part, on disagreement with the viewpoint of the speaker." The court entered a permanent injunction barring enforcement of the ordinance. For the reasons that follow, we affirm.

I

In December 2009, the City of Baltimore enacted Ordinance 09-252. The ordinance applies to "limited-service pregnancy centers," which are 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.

Baltimore City Health Code § 3-501. Under the ordinance, "[a] limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services." *Id.* § 3-502(a). This disclaimer must be made through one or more "easily readable" signs that are "conspicuously posted in the center's waiting room" and written in English and Spanish. *Id.* § 3-502(b). The failure to comply with the terms

of the ordinance is punishable by a citation carrying a maximum civil penalty of $150. *Id.* § 3-506.[1]

The legislative record indicates that the President of the Baltimore City Council introduced Bill 09-406 (later to become Ordinance 09-252), after the City Council President had met with abortion rights advocacy groups, which complained that some pregnancy clinics provide inaccurate information to women about abortions. A spokesperson for the City Council President explained in a public statement: "The Bill deals with whether women are told up front what the facts are. Women need to know up front what to expect when they go into these centers." The "Bill Synopsis" presented to the City Council stated that the Bill was "introduced because of the 'importance of choice.'"

At the hearings on the Bill, representatives of Planned Parenthood of Maryland, NARAL Pro-Choice Maryland, and other pro-choice groups spoke in favor of the Bill, and representatives of the Archbishop, the Maryland Right to Life Committee, and other pro-life groups spoke in opposition. The Bill was enacted in November and became law on December 4, 2009.

---

[1] The Baltimore City Health Department enacted a regulation clarifying certain aspects of its enforcement of the ordinance, which it made effective July 15, 2010. Among other things, the regulation provides a definition of "non-directive and comprehensive birth-control services" and allows a pregnancy center to indicate on its disclaimer sign what birth control services it does provide and/or refer for. The regulation's definition of "non-directive and comprehensive birth-control services" was subsequently amended to define that term as including all "birth-control services which only a licensed health care professional may prescribe or provide."

The Pregnancy Center is a "limited-service pregnancy center," as defined in Ordinance 09-252, operating in Baltimore City from two locations and providing services to pregnant women, such as pregnancy testing; classes in prenatal development, post-pregnancy parenting, and life skills; Bible studies; and material support for women through its "Hannah's Cupboard" program, including diapers, formula, baby and maternity clothes, toys, and books. It also provides women with information on "abstinence and natural family planning, a form of birth control," but does not provide referrals "for abortions or other methods of birth control." The Pregnancy Center does not charge its clients for any of its services, which it provides through paid employees and volunteers, each of whom must sign a statement affirming his or her Christian faith and belief that abortion is immoral.

Archbishop Edward F. O'Brien, the Archbishop of Baltimore, is a corporate entity that owns the property on which the Pregnancy Center operates one of its locations and on which St. Brigid's Roman Catholic Church operates. Neither the Archbishop nor St. Brigid's charges the Pregnancy Center for the use of its space on the property.

In March 2010, before any enforcement of Ordinance 09-252, the Archbishop, St. Brigid's, and the Pregnancy Center commenced this action against the Mayor and City Council of Baltimore,[2]

---

[2] The complaint names as defendants the Mayor and City Council of Baltimore, the Baltimore Health Department, Stephanie Rawlings-Blake, in her official capacity as Mayor of Baltimore, and Olivia Farrow, in her official capacity as Acting Baltimore City Health Commissioner. Dr. Oxiris Barbot became Baltimore City Health Commissioner on June 7, 2010,

alleging violations of the Free Speech and Free Assembly Clauses of the First Amendment, the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Conscience Clause in Maryland Code, Health-General, § 20-214(a)(1) (providing that a "person may not be required to . . . refer . . . for . . . any medical procedure that results in . . . termination of pregnancy" and that the refusal to provide abortion referrals "may not be a basis for . . . [c]ivil liability to another person . . . or . . . [d]isciplinary or other recriminatory action"). The complaint alleges that the Pregnancy Center does not provide or refer for abortions, "based on moral and religious beliefs," and that Ordinance 09-252 specifically targets pro-life pregnancy centers such as the Pregnancy Center and thus "regulates communications at the Pregnancy Center that are personal, moral, political, and religious." It also states that "by requiring a disclaimer that the [pregnancy] center does not provide or refer for abortions, the ordinance compels plaintiffs to deliver the implied message that these services are available elsewhere and should be considered," thus appearing to legitimize such services, in violation of the plaintiffs' beliefs. The complaint also objects to the ordinance's requirement that the Pregnancy Center "post a sign saying that it does not provide birth control services," when in fact it does "in the form of education about abstinence and natural family planning," which, the complaint asserts, are medically recognized means of birth control. The plaintiffs seek a declaratory judgment that the

---

and he was then substituted as a defendant in place of Olivia Farrow.

ordinance is unconstitutional on its face and/or as applied to plaintiffs and an injunction prohibiting the ordinance's enforcement. Some two months after they filed their complaint but before the City filed its answer, the plaintiffs also filed a motion for partial summary judgment on their free speech and equal protection claims.

The City filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), alleging that the Archbishop and St. Brigid's lacked standing to sue and that the complaint otherwise failed to state a claim on which relief could be granted. In response to the plaintiffs' motion for summary judgment, the City submitted an affidavit of an expert witness, along with a motion under Rule 56(f), requesting further discovery to amplify its response.

Following a hearing on the motions, the district court entered an order dated January 31, 2011, granting the City's motion to dismiss the Archbishop and St. Brigid's for lack of standing; denying the City's motion to dismiss, which it converted to a motion for summary judgment in view of the additional materials submitted by the parties; denying the City's request for further discovery as not necessary to the issue being decided; granting the Pregnancy Center's motion for summary judgment on its free speech claim, as set forth in Count 1; dismissing without prejudice the plaintiffs' remaining claims in view of its ruling on the free speech claim; and entering a judgment permanently enjoining the enforcement of the ordinance. In granting summary judgment to the Pregnancy Center on its free speech claim, the court applied strict scrutiny as the result of its conclusion that the

ordinance compelled speech and was not viewpoint neutral and concluded that the ordinance violated the Pregnancy Center's free speech rights.

From the district court's judgment, the City appealed, challenging all of the court's rulings except the dismissal of the Archbishop and St. Brigid's. And the Archbishop and St. Brigid's filed a cross-appeal, challenging their dismissal for lack of standing.

II

We address first the plaintiffs' cross-appeal challenging the district court's dismissal of the Archbishop and St. Brigid's for lack of standing to challenge Ordinance 09-252. The district court reasoned that because the Archbishop and St. Brigid's "are not, and do not operate, limited-service pregnancy centers subject to the Ordinance," the ordinance "does not require the Archbishop and St. Brigid's to take any action and does not subject them to liability" under the law. The court concluded, therefore, that the Archbishop and St. Brigid's did not suffer a "concrete and particularized" injury, as required under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The Archbishop and St. Brigid's argue that the district court ignored the injury that they suffer as a result of the ordinance's infringement of their right to freedom of speech. They maintain that because they own the building in which the Pregnancy Center is located, they "suffer a constitutional harm when they are forced 'to use their private property as a . . . billboard for the State's ideological' message" (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)). They also argue that "the Baltimore City Health Code leaves open the possibility that the City

might seek to enforce the ordinance against the owner of the property [used by the Pregnancy Center]," citing Baltimore City Health Code § 5-201.

Although Ordinance 09-252 does require speech to be posted on property owned by the Archbishop and St. Brigid's, its mandate only applies to the space operated by the Pregnancy Center. The Archbishop and St. Brigid's do not qualify as a pregnancy center and they do not operate the Pregnancy Center. Indeed, the space where the disclosure would be located is separate from the church-operated portions of the building, and a regular visitor to the church would not see the disclaimer sign unless visiting the Pregnancy Center itself. In these circumstances it would be most doubtful that anyone would attribute the government's message to the Archbishop or St. Brigid's, rather than to the Pregnancy Center or the City.

The Archbishop and St. Brigid's suggestion that they do not charge for the use of their space and thus are not "ordinary landlords" does not change the analysis. If anything, this fact might cut against them because, by their own admission, their interest in the ordinance is related primarily to a "desire to promote life over abortion." Ideological injuries of this sort, without more, have routinely been held insufficient to support standing, *see, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), even when those ideologies are intertwined with religious beliefs, *see, e.g.*, *Harris v. McRae*, 448 U.S. 297, 320- 21 (1980).

We also conclude that there is little likelihood that the Archbishop or St. Brigid's could face liability if the Pregnancy Center violated Ordinance

09-252. By its terms, the ordinance only authorizes the issuance of environmental or civil citations to pregnancy centers themselves, and contains no provisions for joint-and-several liability of landlords. *See* Baltimore City Health Code § 3-506. And the portion of the City Health Code that the Archbishop and St. Brigid's cite as a potential basis for liability, § 5-201, relates only to nuisance abatement; it has no connection to Ordinance 09-252 and does not indicate that a failure to comply with the other, non-nuisance-related regulations can be penalized. *See* Baltimore City Health Code § 5-101 (defining nuisances); *id.* § 5-209 (enforcement provisions).

Accordingly, we affirm the district court's ruling that the Archbishop and St. Brigid's lack standing to challenge the ordinance.

III

In its appeal, the City contends first that the district court erred in applying strict scrutiny to the ordinance. It argues that the ordinance, even though compelling speech, compels *commercial* speech, which is subject to a lower level of scrutiny, involving the determination of whether the "disclosure requirements are *reasonably related* to the State's interest in preventing deception of customers." Alternatively, the City urges us to draw on the disclosure requirements of election law and abortion regulation, with respect to which cases have applied an "exacting" scrutiny standard or other intermediate scrutiny standard.

The Pregnancy Center contends that compelling someone to speak a message that the speaker would not otherwise make is a content-based regulation that is subject to strict scrutiny. Responding to the City's

argument that Ordinance 09-252 compels *commercial* speech, the Pregnancy Center maintains that, to the contrary, the ordinance targets its free provision of information about pregnancy and not any proposal for a commercial transaction. Indeed, it notes that it does not sell any goods or services. At bottom, it asserts that no case supports the City's claim that "government can require private speakers to post a government-mandated message in their waiting room (to all visitors, at all times) unrelated to any commercial transaction being proposed by the speaker."

We begin by noting that the ordinance does indeed compel the Pregnancy Center to speak, mandating it to post a sign that it "does not provide or make referral for abortion or birth-control services." Moreover, in compelling that speech, the Pregnancy Center is, in this case, required to participate in the City's effort to tell pregnant women that abortions are available elsewhere as a morally acceptable alternative, contrary to the moral and religious beliefs of the Pregnancy Center. A representative of the Pregnancy Center stated that absent the ordinance's mandate, the Pregnancy Center would not speak to clients and potential clients in the manner required by the ordinance.

It is well-established that a regulation compelling noncommercial speech is subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). The First Amendment protects not only "the right to speak freely," but also "the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*,

515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say" (internal quotation marks omitted)). Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," laws that compel speech are normally considered "content-based regulation[s] of speech" and therefore are subject to strict scrutiny. *Riley*, 487 U.S. at 795. Indeed, strict scrutiny applies even in cases where the compelled disclosure is limited to factually accurate or non-ideological statements. *Id.* at 797-98 (invalidating a requirement that professional fund-raisers disclose to potential donors the percentage of charitable contributions collected during the previous 12 months that were actually turned over to the charity); *see also Hurley*, 515 U.S. at 573 (the "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 City does not take issue with these First Amendment principles, generally. Rather, it argues that the speech mandated here is *commercial* speech and therefore is subject to the lower standard of judicial scrutiny applicable to commercial speech. Alternatively, it argues that the speech mandated here is analogous to election-law disclosures or abortion-regulation disclosures, both of which have been evaluated under a lower level of scrutiny than strict scrutiny. We address each of these arguments in order.

A

In making the argument that Ordinance 09-252 regulates commercial speech, the City contends that

"when a Pregnancy Center offers to provide commercially valuable, pregnancy-related goods or services to a consumer, the Pregnancy Center is proposing a commercial transaction." Specifically, the City asserts that although many pregnancy centers operate as non- profits, they effectively engage in commerce by offering pregnancy testing, sonograms, and options counseling, "all of which have commercial value, garnering payments and fees in the marketplace." Appellants Br. at 16 (citing *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997) (holding that a nonprofit summer camp was engaged in commerce for purposes of the dormant Commerce Clause)). The City's formulation of the commercial speech doctrine, however, is not supported by the law.

The Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). Stated in another way, the hallmark of commercial speech is that it "does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (internal quotation marks omitted); *see also* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev., 67, 75 (2007) ("[T]he [Supreme] Court has unambiguously adopted the view that commercial speech is confined to expression advocating purchase"). In some circumstances, such as when expression clearly promotes a speaker's economic interests, speech may be classified as commercial even when it "cannot be characterized

merely as proposals to engage in commercial transactions." *Bolger*, 463 U.S. at 67- 68 (holding that advertisements discussing the health benefits of contraceptives were commercial speech); *see also Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, __ F.3d __, 2012 WL 1851326 (4th Cir. May 22, 2012) (holding that business's outdoor mural was commercial speech where business conceded mural was advertising and "had an economic motivation for displaying the painting"). But speech does not "retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796.

Rather than regulating traditional commercial advertising, Ordinance 09-252 targets speech regarding the provision of "free services." While this fact alone might not be dispositive, it becomes so in this case because there is no indication that the Pregnancy Center is motivated by any economic interest or that it is proposing any commercial transaction. The Pregnancy Center seeks to provide free information about pregnancy, abortion, and birth control as informed by a religious and political belief. This kind of ideologically driven speech has routinely been afforded the highest levels of First Amendment protection, even when accompanied by offers of commercially valuable services. *See, e.g.*, *In re Primus*, 436 U.S. 412, 422, 439 (1978) (holding that a lawyer's solicitation of pro-bono client was protected by the First Amendment because the lawyer's actions "were undertaken to express personal political beliefs and to advance . . . civil-liberties objectives . . . rather than to derive financial gain").

The City's argument does not address what commercial transaction is proposed by the Pregnancy Center's speech or what economic interest motivates the Pregnancy Center's speech. Instead, the City would define commercial speech to include any speech that offers services "*which have commercial value*, garnering payments and fees in the marketplace" generally. Adopting this definition of commercial speech would effect an unprecedented expansion of the commercial speech doctrine and is unsupported by citation to any applicable Supreme Court precedent. As the district court explained, the City's position would mean that "any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection." Indeed, it is difficult to imagine any charitable organization whose speech would not be considered "commercial" under the City's proposed broad definition.

In short, we agree with the district court that the pregnancy centers are not engaged in commercial speech and that their speech cannot be denied the full protection of strict scrutiny on that basis.

B

The City argues alternatively that if the Pregnancy Center's speech is not considered commercial speech, it should still be accorded reduced protection because the disclaimer required by Ordinance 09-252 is analogous to the disclosure requirements imposed on abortion providers and in campaign finance laws, both of which are subject to a lower level of scrutiny than strict scrutiny. *See*

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion) (applying intermediate scrutiny to disclosure requirements under Pennsylvania's abortion law); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (applying "exacting scrutiny" to campaign finance disclosure requirements).

The differing contexts of the speech restrictions in those cases, however, render the cases inapplicable to the compelled speech before us. In *Casey*, the mandatory disclosures focused on the speech of licensed medical professionals, and the regulations were upheld because, even though they implicated a physician's right not to speak, they did so "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884. More particularly, the regulations there were permissible because they facilitated the process of obtaining a patient's informed consent prior to performing a medical procedure. Thus the regulation of such professional speech was imposed incidental to the broader governmental regulation of a profession and was justified by this larger context. In contrast, the pregnancy centers that are subject to Ordinance 09-252 do not practice medicine, are not staffed by licensed professionals, and need not satisfy the informed consent requirement.[3]

---

[3] The Supreme Court has not recognized the notion that "professional speech," unconnected to state regulation or licensing, is entitled to less protection under the First Amendment. We have, however, recognized that the government may regulate the professions and, as necessary to serve the state's interest in such regulation, so regulate the professionals' speech. *See Accountant's Soc'y of Va. v. Bowman*,

Similarly, the exacting scrutiny standard applied to finance disclosure laws in the campaign finance cases is justified by circumstances that are also not applicable here. In the Supreme Court's cases of *Citizens United* and *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court drew a distinction between regulations that limit campaign contributions and restrict campaign activities and regulations that merely require the disclosure of objective financial information. The Supreme Court has never suggested that *Buckley*'s holding that disclosure requirements do not substantially burden speech applies to speech regulations more generally. *See Doe v. Reed*, 130 S. Ct. 2811, 2818 (2001) ("We have a series of precedents considering First Amendment challenges to disclosure requirements *in the electoral context*" (emphasis added)). While disclosure of campaign contributions or expenditures will always be limited to factual information, the line between fact and opinion in most compelled speech cases will be much harder to draw. Thus, campaign finance disclosure laws are less likely to be impermissibly content- or viewpoint-based and pose a lower risk of altering the speaker's message. The regulation imposed by Ordinance 09-252, however, burdens the content of speech generally, requiring pregnancy centers to speak in a manner that they might otherwise wish to avoid. This type of regulation is significantly more analogous to the restrictions on

---

860 F.2d 602, 603-05 (4th Cir. 1988) (noting that "governmental regulation of the professions is constitutional if the regulations have a rational connection with the applicant's fitness or capacity to practice the profession" (internal quotation marks omitted)). The City, however, does not claim that the Pregnancy Center's employees and volunteers are state-regulated professionals.

campaign speech that the Court held were subject to strict scrutiny. *See Citizens United*, 130 S. Ct. at 898; *Buckley*, 424 U.S. at 58-59.

Accordingly, we affirm the district court's conclusion that Ordinance 09-252 regulates the Pregnancy Center's fully protected, non-commercial speech and therefore is subject to strict scrutiny.[4]

IV

"Content-based [speech] regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The City thus bears the burden of rebutting the presumption of invalidity. *Playboy Entm't Group*, 529 U.S. at 817. Indeed, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818. The City can, nonetheless, rebut the presumption if it is able to show that the ordinance is "narrowly

---

[4] Strict scrutiny would generally be appropriate also because the Ordinance is not viewpoint neutral. By its terms, Ordinance 09-252 does not apply to all speakers who "provide information" about pregnancy. Rather, the law targets *only* those speakers who refuse to provide or refer for abortions or certain types of birth control. This qualification effectively limits the law's disclosure obligations to organizations whose moral or religious codes lead them to oppose abortion and birth control. *Cf. Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (2011) (concluding that law was speaker- and content-based where the "practical effect" was to burden one group of speakers). These speakers are disfavored because they have chosen, for whatever reason, not to adopt the City's preferred perspective on appropriate reproductive decisions. Although it is true that disparate impact alone is not enough to make a law viewpoint discriminatory, *see Hill v. Colorado*, 530 U.S. 703, 724–25 (2000), the text of the ordinance and its legislative history demonstrate that it burdens only the expression of pro-life speakers, as it was intended to do.

tailored to promote a compelling Government interest," such that the ordinance is the "least restrictive alternative" to serve the government's purpose. *Id.* at 813; *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

The City claims it can satisfy this strict scrutiny standard, arguing that it has at least two compelling interests served by the ordinance and that the ordinance is narrowly tailored to promote those interests. First, the City claims that it has an interest in countering what it maintains are the "deceptive business practices" of certain pregnancy centers. According to the City, these practices include deceptive advertising, delaying tactics intended to prevent women from obtaining abortions, and misleading statements about the medical and psychological impact of abortion. To support this argument, the City cites two reports that purport to document the deceptive practices of pregnancy centers: A 2006 report prepared for U.S. Representative Henry Waxman, and a 2008 report compiled by the NARAL Pro-Choice Maryland Fund detailing the results of its investigation of pregnancy centers in Maryland.

Second, the City argues that it has an interest in protecting the health of pregnant women and in ensuring that pregnant women who seek abortions have prompt access to medical services. The City notes that the risks and costs associated with abortion increase as a woman advances through her pregnancy. Similarly, the City contends that "delays in access to the birth-control method of an individual's choice can leave the individual and his or her partner vulnerable to unintended pregnancy and sexually transmitted disease." Thus, the City

argues, delays in obtaining abortion services pose a clear threat to public health.

To be sure, the City has a considerable interest in promoting the general health and well-being of its citizens. But as the Supreme Court recently reiterated, to demonstrate the existence of a *compelling* interest, a government "must specifically identify an 'actual problem' in need of solving." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2740 (2011) (quoting *Playboy Entm't Group*, 529 U.S. at 822-23). Although the existence of such a problem need not be exhaustively documented, "the Government must present more than anecdote and supposition" to support a speech restriction. *Playboy Entm't Group*, 529 U.S. at 822. With respect to Ordinance 09-252, and the Pregnancy Center, the City failed to carry its burden to show a compelling interest.

Here, the record establishes, at most, only isolated instances of misconduct by pregnancy centers generally, and, as the City concedes, none by the Pregnancy Center itself. Indeed, the record contains no evidence that any woman has been misled into believing that any pregnancy center subject to Ordinance 09-252 was a medical clinic or that a woman in Baltimore delayed seeking medical services because of such a misconception. The City instead cites allegations of deceptive practices occurring in other locations or second-hand reports of "stories about harassment." The City's failure to provide more than speculative evidence of problems at Baltimore's pregnancy centers strongly suggests that the need for regulation of those centers is not as pressing as the City asserts.

The City's claim of a compelling interest is also called into question by its selective pursuit of its interest. While the City asserts that it is primarily concerned with ensuring that women receive accurate information about their pregnancies, Ordinance 09-252 does not focus on or reach the vast majority of sources that pregnant women would likely consult. Bookstores, websites, religious leaders, and pregnant women's friends and family — all of whom might potentially provide a woman with "incorrect" information about her pregnancy — are unaffected by the ordinance. This kind of underinclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 131 S. Ct. at 2740; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling").

Moreover, the City's claim to be promoting a *compelling* interest is seriously undermined by its failure to pursue any other course to promote its interest other than to restrict the Pregnancy Center's speech. This fact is particularly salient based on the City's admission that the record reflects that it has done nothing other than enact Ordinance 09-252 to combat the perceived danger of misleading information from the Pregnancy Center and like facilities. The need was thus not so compelling as to cause the City to post a single notice in any City

building or facility, to place a warning on its own website, or to give any public service information in furtherance of its interest. The City also conceded that it has referred and continues to refer women to the Pregnancy Center without any forewarning as to the danger of misinformation the City believes the women will encounter there. To find, with these facts, that the City has shown a compelling interest would be dubious at best.

We need not, however, rely entirely on the weakness of the City's demonstration that in enacting the ordinance, it was promoting a compelling government interest, because the more significant problem for the City — the one that we find fatal—is that the ordinance is not narrowly tailored to serve the City's interest. "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). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted). Courts may find that a statute is not narrowly tailored when, among other things, the statute does not advance the purported compelling interests, *e.g.*, *Meyer v. Grant*, 486 U.S. 414, 426 (1988); or when the statute is overinclusive, *e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-21 (1991); or when the government has other, less speech-restrictive alternatives available, *e.g.*, *Playboy Entm't Group*, 529 U.S. at 816-17. We conclude that Ordinance 09-252 is an example of all three of these indicators.

First, the ordinance purports to target false advertising, yet it fails actually to regulate "deceptive practices" or false advertising. Further, the ordinance applies to all pregnancy centers *regardless* of whether they advertise at all.

Second, the ordinance is overinclusive in that it applies equally to pregnancy centers that engage in deceptive practices and those whose speech is entirely truthful. *See Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986) (stating that for a law to be narrowly tailored "government must curtail speech only to the degree necessary to meet the particular problem at hand" and "must avoid infringing on speech that does not pose the danger that has prompted regulation").

Finally, there are also several alternatives that would address the problems targeted by the ordinance while imposing a lesser burden on speech. Most obviously, the City could speak with its own voice. It might, for example, use its own resources to undertake public education campaigns addressing the alleged dangers of pregnancy centers, or more generally, promoting consultation with physicians for pregnant women. *Cf. Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. . . . [E]ducational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective"). The City could also produce a document or website listing local pregnancy centers and noting what services are available at each. *See Riley*, 487 U.S. at 800 ("[T]he State may itself publish the detailed financial

disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech"). And the City always retains the option of prosecuting violations of its criminal and civil laws that proscribe deceptive advertising and deceptive statements made by pregnancy centers. *See Riley*, 487 U.S. at 800; *see also Nefedro v. Montgomery Cnty.*, 996 A.2d 850, 863 (Md. 2010) (holding that fraud laws were a less restrictive alternative to a law prohibiting remuneration for fortunetelling).

That the City resorted to speech restrictions before trying these or other similar options is more than enough to doom the ordinance. *See Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first — resort").

The City seeks to salvage the ordinance by arguing that it imposes on pregnancy centers a burden that is *de minimis*, and that the signage requirement is less restrictive than other methods of communicating the disclaimer. The City suggests, for example, that it could have required the disclaimer to be included on "every page of a pregnancy center's website, as well as text in all paid advertisements, brochures, and other written materials." But this argument does not save the law. First, the impact is not minimal. As the district court found below, the ordinance inevitably "alters the course of a center's communications with a client or potential client" by requiring that the Pregnancy Center's initial communication occur in "the presence of a stark and immediate statement about

abortion and birth-control." Second, even a *de minimis* restriction on speech would not make the ordinance the *least* restrictive option, as required to survive strict scrutiny. *See Playboy Entm't Group*, 529 U.S. at 813.

In sum, while the city has not demonstrated a *compelling* government interest rather than simply its disfavor with a particular speaker's speech, we do not rest on that failure because Ordinance 09-252 is not narrowly tailored to promote the City's interest so as to justify its intrusion on the Pregnancy Center's speech. Accordingly, we hold that Ordinance 09-252 is invalid, in violation of the First Amendment presumption that "speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 791.

V

Finally, the City contends that the district court abused its discretion (1) in converting its motion to dismiss into a motion for summary judgment, without giving it prior notice and without allowing it discovery before deciding the motion, and (2) in dismissing the plaintiffs' remaining counts (other than the free speech count) without prejudice, rather than with prejudice. We find no error in these rulings and also see no prejudice to the City.

By converting the City's Rule 12(b)(6) motion into a summary judgment motion, the district court did not deny the City its opportunity to press its claim that the complaint failed to state a claim upon which relief could be granted. This procedural ruling, in the context of the plaintiffs' pending motion for summary judgment, simply gave recognition to the fact that the court would be looking at the case more

broadly on plaintiffs' summary judgment motion. Because of that motion, the City was on notice that the court would be considering matters beyond the complaint to resolve the plaintiffs' free speech claim and that the City should, if it wished, file a response to that motion for summary judgment. The procedural conversion in this context had the effect simply of allowing the court to consider the parties' dispositive motions as cross-motions for summary judgment and take into account any evidence that the parties might wish to submit. And indeed, the City did submit matters outside of the complaint and its motion to dismiss for consideration by the court.

The City argues that additional discovery would have given it "the opportunity to gather additional support for key factual propositions, including that Pregnancy Centers engage in deceptive advertising, such deception threatens public health, and the provision of services by Pregnancy Centers is a form commerce." The dissent adopts the same position. But as the district court explained, additional discovery was unnecessary. The district court assumed for purposes of its analysis that the Ordinance served the compelling interests that the City claimed. Instead of exploring any factual context that might be relevant to that proposition, the court struck down Ordinance 09-252 because it was not narrowly tailored, a problem that was apparent on the face of the Ordinance. "Whether [a] regulation meets the 'narrowly tailored' requirement is of course a question of law." *United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992); *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (overbreadth is "a question of law that involved no dispute about the characteristics of"

the law being challenged). Because additional discovery could not eliminate the narrow tailoring problems, as we have discussed above, the court was well within its rights to decide the First Amendment issues on the record before it. *Cf. Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989) (affirming district court's grant of preliminary injunction where the pre-enactment record contained "no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest"); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1274 (11th Cir. 2005) (invalidating content-based sign regulation without discovery because "[t]he First Amendment questions [were] purely legal" and "only minimally intertwined with the facts").

The City's remaining justification for discovery—that it was necessary to show that pregnancy centers engage in commercial speech—is also unavailing. The district court found that the law *on its face* regulated protected, non-commercial speech. The individual characteristics of any particular pregnancy center would thus be irrelevant to this determination, a fact the City itself acknowledged during a hearing on the parties' motions:

> The Court: [T]he City Council wasn't concerned about this individual center. There's the legislative history. They were concerned about the generalities of it. So I don't see where we would advance the ball one way or the other on the facial challenge by knowing what these particular people [i.e. the plaintiffs] did.

Counsel for the City: I agree with you.

J.A. 130.

Moreover, as the district court recognized, even if *some* speech of regulated pregnancy centers included commercial elements, strict scrutiny would still apply because those elements would be "inextricably intertwined" with otherwise fully protected speech. Thus, for example, an advertisement offering a pregnant woman the opportunity to "see a picture of your baby" is both an offer to provide a service—a sonogram—and a political statement regarding the status of fetal life. Contrary to the dissent's claims, the commercial and political aspects of a statement of this kind cannot be "easily separated," as the dissent suggests. Indeed, the Supreme Court rejected precisely this argument in *Riley* in the course of holding that solicitations by professional fundraisers were not commercial speech. *See Riley*, 487 U.S. at 796 ("[W]e cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression"). Thus, even if additional discovery could somehow uncover facts suggesting that the Pregnancy Center itself or other pregnancy centers engaged in some amount of commercial speech (because, for instance, they may have charged money for some of their services), the district court's reasoning would still have led to the application of strict scrutiny.

In sum, the city has been unable to point to any item of discovery or fact that would have assisted the district court in addressing the issues that have been appealed.

Finally, the City's contention that the district court abused its discretion in dismissing the Pregnancy Center's remaining counts *without prejudice*, rather than *with prejudice*, lacks merit. The district court did not reach the merits of the Pregnancy Center's other claims, which on their face were not frivolous. It simply dismissed those counts because it awarded the Pregnancy Center all the relief that it had requested, based on its ruling on the free speech count.

For the reasons given, the judgment of the district court is

AFFIRMED.

KING, Circuit Judge, dissenting:

I lament that, in its haste to wholly and permanently enjoin the City of Baltimore's enforcement of its duly enacted Ordinance, the district court has flouted foundational legal principles. Rushing to summary judgment, the court subverted the Federal Rules of Civil Procedure — time-tested rules designed to further the venerable constitutional principle of due process, *see Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) — by, inter alia, denying the City essential discovery, refusing to view in the City's favor what evidence there is, and making untoward findings of fact, often premised on nothing more than the court's own supposition. Meanwhile, thinly disguising its First Amendment as-applied analysis of the Ordinance as a facial review, the court prematurely and unfairly discounted the real possibility that the Ordinance targets only commercial speech, condemned the Ordinance as viewpoint discriminatory, and, applying strict scrutiny, nullified the Ordinance for

lack of narrow tailoring. The court's decision is, in a word, indefensible.

Nevertheless, the panel majority not only endorses the district court's unseemly approach, but engages in further imprudence. As but one example, while the district court was at least willing to assume that the Ordinance is undergirded by a compelling interest, the majority opines at length on the insufficiency and insincerity of the interests and positions advanced by the City. Because these proceedings have thus followed a course more fitting a kangaroo court than a court of the United States, I write separately in dissent.[1]

I.

In order to properly explain the defective rulings of the district court and the panel majority, I briefly retrace the genesis of the Ordinance and the fleeting procedural history of this case.

A.

In response to congressional and statewide reports that women were being deceived by limited-service pregnancy centers, Baltimore's City Council conducted hearings on the issue in 2009. As the majority acknowledges, the City Council, prior to its adoption of the Ordinance, specifically considered the 2006 Waxman and 2008 NARAL reports documenting a pattern of deceptive practices by limited service pregnancy centers nationwide. The Waxman report found that several such centers

[1] I dissent from the majority's constitutional ruling in the City's appeal, No. 11-1111. I have no quarrel with its disposition of the cross-appeal, No. 11-1885, deeming plaintiffs St. Brigid's and the Archbishop to be without standing.

throughout the county were using deceptive advertising techniques to attract women seeking abortions and comprehensive birth-control services. Those techniques included placing ads in the telephone book's yellow pages under "abortion services" and on the Internet generated by keyword searches of "abortion" and "abortion clinics." *See* J.A. 417-18.[2] The NARAL report found that similar deceptive practices were being used by limited-service pregnancy centers in Maryland, including in the City of Baltimore. During its 2009 hearings, the City Council heard evidence from a number of women complaining about being deceived by pregnancy center advertising. *See id.* at 212. One witness related her experience as a teenager, being subjected to anti-abortion advocacy when she visited a pregnancy center because it advertised in the telephone book under "Abortion Counseling." *Id.* at 261. A college professor referenced "countless stories" from female students who had similar experiences when they visited pregnancy centers. *Id.* at 273.

The evidence relied on by the City Council revealed that limited-service pregnancy centers were using questionable tactics to delay women from accessing abortions. Such tactics included counseling women to undergo pregnancy tests and sonograms that were scheduled weeks after their initial pregnancy center visit, and misinforming women about abortion services, including when abortions could be lawfully obtained. Such delays placed the health of women who decided to have abortions at

---

[2] Citations herein to "J.A.___" refer to the contents of the Joint Appendix filed by the parties in these appeals.

risk, as "[n]umerous studies have shown that it is safest to have an abortion within the first trimester." *See* J.A. 331.

Importantly, the City's Health Department studied the matter and supported the Council's adoption of the proposed Ordinance, agreeing that it was "imperative that all Baltimore City women have the ability to obtain factual and timely advice on all available health care options." J.A. 209. Before taking action, the City Council prudently sought the views of the City Solicitor, who concluded that the proposed Ordinance did not contravene the First Amendment. By letter opinion of October 23, 2009, the Solicitor advised the Council that

> [the Ordinance] requires disclosure of factual, truthful, non-misleading information; namely, whether or not abortion or birth control services are provided at a given facility. The [Ordinance] serves the purpose of preventing misleading advertising practices of pregnancy services centers and furthers the City's interest in ensuring a woman seeking these services in the City is fully informed of what services are available at any given location and can find the services that she needs in a timely manner whether they be abortion or birth control services or any of the many other pregnancy related services that a woman may be seeking. . . . The [Ordinance], therefore, does not violate the 1st Amendment right to freedom of speech.

Id. at 208. During a public hearing on the proposed Ordinance, its sponsor in the Council clarified that the "bill is not about an abortion

debate, but a simple sign . . . to make sure no one is misled and [pregnancy center clients] know what to expect." *Id.* at 211.

Thus, after considering the matter thoroughly, the Council concluded that the various deceptive practices of limited service pregnancy centers posed a danger to public health. As a result, on December 5, 2009, the City Council enacted the Ordinance, which took effect on January 4, 2010.

B.

On March 29, 2010, the plaintiffs in this case — including the Greater Baltimore Center for Pregnancy Concerns, Incorporated (the "Center") — challenged the Ordinance in federal court, asserting various constitutional defects, including free speech, free assembly, free exercise, and equal protection, plus related state law claims. On June 4, 2010, barely two months after service of the Complaint — and four days before the City's responsive pleading was due — the Center moved for summary judgment on its free speech and equal protection challenges. No party had by then either initiated or conducted discovery.[3] Consistent with the lack of discovery, the City, on June 8, 2010, filed a Rule 12(b)(6) motion seeking dismissal of the Complaint. Then, on July 16, 2010, in response to the Center's summary judgment motion, the City filed a declaration pursuant to Rule 56(f), averring that it could not

[3] By applicable rule, no party had the right to serve or seek discovery when the Center's summary judgment motion was filed. *See* Fed. R. Civ. P. 26(d)(1) (providing that, unless otherwise stipulated or ordered, "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)").

adequately oppose summary judgment without first conducting discovery (the "Declaration").[4]

The Declaration specified that the City needed "the opportunity to develop expert testimony to provide factual support for the propositions that deceptive advertising by limited service pregnancy centers threatens public health in a variety of ways." J.A. 41. The Declaration also explained that the City desired and required "the opportunity to conduct discovery concerning the advertising that the Center and other limited-service pregnancy centers employ, so [it] may demonstrate [the advertising's] deceptive character." *Id.* at 42. The City requested "discovery to develop factual support for [its] argument that the services offered by [the Center] are a form of commerce, and, therefore, the disclaimer required by the Ordinance is commercial speech." *Id.*

Additionally, the City filed the declaration of an expert, Robert W. Blum, M.D., M.P.H., Ph.D. (the "Blum declaration"), seeking to substantiate the City's compelling interests advanced by the

---

[4] The Declaration was filed pursuant to the version of Rule 56(f) then in effect. Under the 2010 Amendments to the Civil Rules, "[s]ubdivision (d) carries forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56 advisory committee's note. The current subdivision (d) of Rule 56 provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

Ordinance. More specifically, Dr. Blum explained that, because family planning improves "the health and well-being" of women and their children, public health is promoted by providing "complete and accurate information to women about their health care options." J.A. 45. "Women who can plan the number and timing of their births," Dr. Blum observed, "experience fewer unwanted pregnancies and births and have lower rates of abortion." *Id.* Young and poor women, however, are "particularly vulnerable to being deceived by limited-service pregnancy centers that fail to disclose the scope of services that they provide." *Id.* at 46.

On August 4, 2010, the district court heard argument on the City's motion to dismiss and the Center's summary judgment motion. The court advised the parties, however, that if it intended to award summary judgment to the Center on its as-applied challenge, discovery would be necessary. By its January 28, 2011 decision, the court denied the City's discovery requests and converted the City's pending Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. *See O'Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 809-10 (D. Md. 2011). The court then treated the parties' respective submissions as cross-motions for summary judgment, ruling for the Center on its free speech claim and dismissing without prejudice (and as moot) each of the Center's remaining claims. On January 31, 2011, the court fully and permanently enjoined enforcement of the Ordinance.[5]

---

[5] At the outset of this litigation, the City agreed not to enforce the Ordinance until December 31, 2010, or until the district court had made a final decision, whichever was earlier. That

II.

A.

As a general proposition, "summary judgment is appropriate only after adequate time for discovery." *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996) (internal quotation marks omitted). In the main, discovery is essential in a contested proceeding prior to summary judgment because a party can show that the relevant facts are undisputed only by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Hence, "by its very nature, the summary judgment process presupposes the

---

commitment apparently expired at the end of 2010, prior to the summary judgment award. Nevertheless, had the district court reasonably ascertained from the parties' submissions that, inter alia, the Center was likely to succeed on its free speech claim, the court should have adhered to Rule 65 and entered a temporary restraining order ("TRO") against the Ordinance. After entering a TRO, the court should have conducted appropriate proceedings to entertain preliminary and permanent injunction requests. Instead, the court elected to award summary judgment on the merits of the free speech issue, entering a permanent injunction based on an undeveloped record.

existence of an adequate record." *Doe v. Abington Friends Sch.*, 480 F.3d 252, 257 (3d Cir. 2007). At minimum, a court "must refuse summary judgment where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *See Nader v. Blair*, 549 F.3d 953, 961 (4th Cir. 2008) (internal quotation marks omitted).

The City took "the proper course" when it filed the Declaration, "stating that it could not properly oppose . . . summary judgment without a chance to conduct discovery." *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (internal quotation marks omitted) (deeming summary judgment award premature where, inter alia, court made its award only six weeks after complaint was filed, before significant discovery). Such a declaration is "broadly favored and should be liberally granted because the rule is designed to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010) (internal quotation marks omitted); *accord Harrods Ltd.*, 302 F.3d at 245 n.18. Nevertheless, the district court decided that the City's discovery requests were merely "an attempt to generate justifications for the Ordinance following its enactment." *O'Brien*, 768 F. Supp. 2d at 810. The court explained that discovery was unnecessary in examining "whether the Ordinance, on its face, is subject to, and satisfies, the applicable level of scrutiny." *Id.* Indeed, the court considered itself constrained to "base its decision on the evidence relied on by the [City] at the time the Ordinance was passed." *Id.*

We review for abuse of discretion a district court's denial of "discovery before ruling on a summary judgment motion." *Nader*, 549 F.3d at 959-60. A court abuses its discretion, however, when "its conclusion is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Belk, Inc. v. Meyer Corp., U.S.*, No. 10-1664, ___ F.3d ___ (4th Cir. 2012) (internal quotation marks omitted). As explained below, the district court's rationale for denying the City its right to discovery was patently erroneous.

1.

As an initial matter, the district court legally erred in denying discovery prior to converting the City's motion to dismiss into a request for summary judgment. The majority states that "the City was on notice that the court would be considering matters beyond the complaint to resolve the plaintiffs' free speech claim." *Ante* at 40. As we have previously explained, however, "notification that a Rule 12(b)(6) motion may be converted is only one of the requirements" for a proper conversion; "[o]nce notified, a party must be afforded a reasonable opportunity for discovery before a Rule 12(b)(6) motion may be converted and summary judgment granted." *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985) (internal quotation marks omitted); *see E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 450 (4th Cir. 2011) (concluding that the court erred in converting a motion to dismiss to a summary judgment motion where the "record indicates that the parties had not yet had the opportunity to conduct reasonable discovery"). The explicit authorization of discovery articulated by Judge Ervin in the *Gay* decision is applicable precedent here, and is also prescribed by Rule 12(d). That rule provides that, when a Rule 12(b)(6) motion is "treated

as one for summary judgment under Rule 56," the "parties *must* be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d) (emphasis added). This controlling authority has been ignored entirely by the district court and by the majority.

The district court's justification for refusing to authorize or permit the City to conduct discovery rested on an erroneous perception that further factual development was not germane to the Center's facial free speech challenge to the Ordinance. I acknowledge that a court may, in the proper circumstances, rule on a "summary judgment motion without allowing further discovery," where "a facial challenge to an ordinance . . . may be resolved as a question of law." *Penn Adver. of Balt., Inc. v. Mayor of Balt.*, 63 F.3d 1318, 1322-23 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996). In such limited circumstances, discovery is unnecessary because "the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect," *id.* at 1323, "without regard to [an ordinance's] impact on the plaintiff asserting the facial challenge," *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 588 (4th Cir. 2010). In this situation, however, the court neither undertook nor properly conducted a facial analysis of the constitutionality of the Ordinance.

In the First Amendment context, there are two ways for a plaintiff to mount a facial challenge to a statute. First, the plaintiff may demonstrate "that no set of circumstances exists under which the [law] would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v.*

Wash. State Republican Party, 552 U.S. 442, 449 (2008) (internal quotation marks omitted). Or, second, the plaintiff may show that the law is "overbroad [because] a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal quotation marks omitted). Here, the district court did not conclude that the Ordinance is invalid in *all* its applications. For example, it never assessed the potential application of the Ordinance to limited-service pregnancy centers that charge a fee for their services. Indeed, the majority emphasizes instead the Ordinance's application to "the provision of 'free services.'" *Ante* at 30-31.[6]

The district court also failed to address "a substantial number" of the Ordinance's other applications. Put succinctly, its analysis was an as-applied one, focusing almost exclusively on the Ordinance's application to *the Center*. For example, on the question of whether the Ordinance regulates commercial or noncommercial speech, the court conducted an as-applied free speech analysis, amply demonstrated by its repeated (and inappropriate) *findings* on the specific characteristics of the Center:

- "The overall purpose of the advertisements, services, and information offered by *the CENTER* is not to propose a commercial transaction, nor is it related to *the CENTER's* economic interest." *O'Brien*, 768 F. Supp. 2d at 813 (emphasis added);

---

[6] The majority also excludes from its analysis limited-service pregnancy centers that practice medicine or are staffed by licensed professionals. *See ante* at 32.

- "*The CENTER* engages in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives." *Id.* (emphasis added);
- "The notion that 'human life must be respected and protected absolutely from the moment of conception' is a central tenet of *the CENTER's* belief system." *Id.* (emphasis added);
- "[T]he disclaimer mandated by the Ordinance introduces the topics of abortion and birth-control. This has an immediate effect on any speech and information offered by *the CENTER* on these subjects." *Id.* at 814 (emphasis added); and
- "At the very least, a disclaimer conspicuous to anyone visiting *the CENTER* regarding the lack of abortion and birth-control services, mandates the inclusion of a government message concurrent, and intertwined with, Plaintiffs' delivery of fully protected speech." *Id.* at 814 (emphasis added).

Similarly, in assessing whether the Ordinance is viewpoint neutral, the Opinion made what can only be deemed to be as applied *findings*. More specifically, it related that:

- "*The CENTER's* viewpoint, formed on the basis of sensitive religious, moral, and political beliefs, is the overarching reason for its stark refusal to perform or refer for

abortions and certain types of birth-control." *Id.* at 815 (emphasis added); and

- "It is revealing that Defendants refer to the Ordinance as a means of mitigating the 'harm' caused by *Plaintiffs'* underlying 'propaganda' speech relating to abortion and contraception. Such descriptions can only support the conclusion that Defendants enacted the Ordinance out of disagreement with *Plaintiffs'* viewpoints on abortion and birth-control." *Id.* at 816 (emphasis added).

The panel majority elaborates on several of these same factual points. *See ante* at 31, 32, 34, 36-37.

In dissenting, I cast no aspersions on the use of the as applied approach in the proper setting. Indeed, it is clear that "[a]s-applied challenges," with specific factual records, "are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (internal quotation marks omitted). For a variety of reasons, a court should entertain an as-applied constitutional challenge prior to assessing a facial one and, if the as-applied challenge succeeds, neither reach nor rule on the facial one. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985). As the Supreme Court has explained, "[f]acial challenges are disfavored" because they "often rest on speculation" and thus "raise the risk of premature interpretation of [laws] on the basis of factually barebones records." *Wash. State Grange*, 552 U.S. at 450 (internal quotation marks omitted). Moreover, a facial challenge may contravene "the principle of judicial restraint that courts should [not] formulate a rule of

constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotation marks omitted). As my friend Judge Niemeyer has emphasized, a facial challenge "must be treated cautiously . . . because slipping into the embrace of a facial challenge can tend to leave behind the limitations imposed by Article III and [thus] trample on legislative prerogatives, in violation of separation of powers principles." *Preston v. Leake*, 660 F.3d 726, 738 (4th Cir. 2011) (internal quotation marks omitted).

Because an as-applied analysis was employed by the district court in this case, the City was unquestionably entitled to conduct discovery proceedings. *See Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995) (Niemeyer, J.) (explaining that, when confronted with an as-applied challenge, a "court is given the task of finding the facts defining that circumstance and determining how the circumstance is impacted by the . . . enactment"), *vacated on other grounds*, 517 U.S. 1206 (1996). The district court acknowledged as much during its August 4, 2010 hearing on the parties' respective motions, when it recognized that discovery proceedings would be necessary to properly evaluate an as applied challenge to the Ordinance. *See* J.A. 127-28, 130 (observing that "[the Center] can't prevail on [summary judgment] if I'm concerned about [its] individual status," and assuring that "if what [the Center] did is relevant in this case[, the City] will have the discovery").

Alternatively, discovery would be warranted if we were to "treat[ ] this as a true facial challenge, rather than . . . an as applied challenge in the guise of a facial attack." *Cf. Martin v. Stewart*, 499 F.3d 360, 378 (4th

Cir. 2007) (Wilkinson, J., dissenting). As the City points out, a facial challenge would "weigh[ ] in favor of discovery, not against it." Reply Br. of Appellants 26. For example, "even if [the Center] did not engage in commercial transactions, it [would not necessarily] prevail on a facial challenge [even] if other [limited-service pregnancy centers] in Baltimore did," including those within the Ordinance's scope that charge fees. *Id.* at 26-27 & n.12. Thus, regardless of the type of analysis utilized — facial or as-applied — the district court abused its discretion by denying the City its right to conduct discovery.

2.

In declining to approve the City's discovery requests concerning the potential commercial nature of speech targeted by the Ordinance, the district court short-circuited the analysis that was essential to properly deciding the appropriate level of judicial scrutiny. That analysis should have been fact-driven, due to the inherent "difficulty of drawing bright lines that . . . clearly cabin commercial speech in a distinct category." *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993). The Supreme Court has long grappled with the concept of commercial speech, describing it at various times as speech "confined to the promotion of specific goods or services," *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 n.12 (1981), or "related solely to the economic interests of the speaker and its audience," *In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982) (internal quotation marks omitted). More recently, the Court has explained that it "usually define[s]" commercial speech "as speech that does no more than propose a commercial transaction." *United States v. United*

Foods, Inc., 533 U.S. 405, 409 (2001).[7] The proposition of a commercial transaction — "I will sell you the X . . . at the Y price," *see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) — is the "core notion" of commercial speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

On the periphery, the distinction between commercial and noncommercial speech "presents a closer question." *Bolger*, 463 U.S. at 66. The Supreme 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." *Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008) (internal quotation marks omitted); *accord Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 441 (4th Cir. 1999). We have recognized that, although none of the factors is dispositive, "the confluence of these considerations may permit the conclusion that the speech at issue is commercial in nature." *Adventure Commc'ns*, 191 F.3d at 441.

a.

The speech targeted by the Ordinance indubitably satisfies the first two of the *Bolger* factors — i.e., advertisements referring to a service.

---

[7] Notably, we have recognized that, although "speech that proposes a commercial transaction" is "a fairly straightforward" definition of commercial speech, it is also "somewhat circular." *Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999) (alteration and internal quotation marks omitted).

The majority surmises, however, that the third factor is absent, because "there is no indication that the Pregnancy Center is motivated by any economic interest." *Ante* at 31. Ironically, my good colleagues fault the City for not addressing "what economic interest motivates the Pregnancy Center's speech," *id.*, while ratifying the district court's denial of the City's discovery requests that were aimed at, inter alia, obtaining such information. The majority simply accepts — as did the district court — the Center's assertion (by counsel only) that its motives are entirely religious or political. But that assertion — although quite material — was not at all undisputed. The City's discovery proceedings should have substantiated, inter alia, whether the Center possesses economic interests apart from its ideological motivations.[8] Such discovery is "especially

---

[8] Inquiring into the Center's potential profit motives may not be a futile endeavor. We know that nonprofit entities with religious or political motives can engage in commerce. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997) (summer camp sponsored by Christian Science nonprofit substantially affected interstate commerce though camp was not profitable and indeed at times operated on deficit); *Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 541 (4th Cir. 1998) (nonprofit land preservation organization's acceptance of land donation "was commercial"). And, although outwardly the Center appears to be driven by religious purposes only, certain operational intricacies may prove otherwise. For instance, as observed in a similar case, if the Center were "referring women to pro-life doctors in exchange for 'charitable' contributions, the analysis could change." *Evergreen Ass'n, Inc. v. City of N.Y.*, 801 F. Supp. 2d 197, 206 n.5 (S.D.N.Y. 2011). There was "no such evidence" of referrals in exchange for charitable contributions in *Evergreen Association*, but there the parties had an opportunity to conduct discovery. *Id.* Here, the prospect that such evidence exists is not

important when the relevant facts are exclusively in the control of [the movant]" or "when a case involves complex factual questions about intent and motive." *See Harrods Ltd.*, 302 F.3d at 247.

In any event, the potential commercial nature of its speech does not hinge solely on whether the Center has an economic motive. Not all of the *Bolger* factors "must necessarily be present for speech to be commercial." *Bolger*, 463 U.S. at 67 n.14. Because the Ordinance compels a disclaimer, a court's "lodestars" in distinguishing commercial from noncommercial speech are the "nature of the speech" regulated by the Ordinance "taken as a whole and the effect of the compelled [disclaimer] thereon." *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). In other words, context matters. From a First Amendment free speech perspective, that context includes the viewpoint of the listener, for "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 561-62, 567 (1980) (evaluating commercial nature of regulated speech based in part on impact to consumers of electricity); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 14 (2000) (observing that "[t]he Court has . . . focused its

---

so farfetched. According to certain of the amici curiae — national organizations that network individual pregnancy care centers ("Amici PCCs") — all of their affiliated centers "make referrals to prenatal care providers for their patients who are pregnant." Br. of Amici PCCs 7.

analysis on the need to receive information, rather than on the rights of the speakers").

The Supreme Court of North Dakota's decision in *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176 (N.D. 1986), *cert. denied*, 476 U.S. 1108 (1986), illustrates the proper contextual analysis. The *Larson* case involved false and deceptive advertising by the Help Clinic, which, like the Center, provided pregnancy tests and anti-abortion counseling services to its clients at no cost. In determining that the Help Clinic's advertising constituted commercial speech, the *Larson* court concluded that the provision of free services was not "dispositive." 381 N.W.2d at 181. Rather, the court emphasized that

> the Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas . . . . In effect, the Help Clinic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech.

Id. We are unable to properly assess the context of any speech regulated by the Ordinance "because no record evidence of [the Center's] advertisements exists to guide our review, [thus] we can only speculate about the ways in which the [Ordinance] might be applied to [the Center's] speech." *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1344-45 (2010) (Thomas, J., concurring in part) (observing that neither as-applied nor facial challenges could be reviewed

properly where there was no evidence of subject advertisements). Nor is there any evidence concerning the Ordinance's impact on consumers of such information. In ruling as it did, the district court was unconcerned with the full context, because it decided that, even if the Center's speech "includes some commercial elements, strict scrutiny would nonetheless apply," since any commercial element was "'inextricably intertwined with otherwise fully protected speech.'" *O'Brien*, 768 F. Supp. 2d at 814 (quoting *Riley*, 487 U.S. at 796).

b.

In my view, it was legally erroneous for the district court to conclude, without the benefit of discovery, that the speech at issue blends commercial and noncommercial elements. The court necessarily premised that conclusion on its own finding that 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." *O'Brien*, 768 F. Supp. 2d at 814. But such a dialogue may actually begin much earlier, when a prospective client views a limited-service pregnancy center's advertisements. Indeed, the purpose of the Ordinance was to curb any deceptive advertising. Even if the disclaimer in the waiting room were the "initial communication," however, the court mischaracterized the disclaimer as "a stark and immediate statement about abortion and birth-control." *Id.* The disclaimer does not, as the majority suggests, convey a message that abortion and birth control are "morally acceptable alternative[s]." *Ante* at 28. The disclaimer simply does not speak to what is or may be morally acceptable. It merely discloses that a particular

pregnancy center does not provide or refer for abortions or nondirective and comprehensive birth-control services. That is, the dis- claimer relates to the services offered, not to the religious or ideological beliefs of a pregnancy center.

Moreover, "where the two components of speech can be easily separated, they are not 'inextricably intertwined.'" *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473- 74 (1989)). Because the Ordinance merely requires a disclosure that "the center does not provide or make referrals for abortion or birth-control services" — but does not otherwise prescribe the language or terminology to be used — a limited-service pregnancy center could disassociate itself completely from the required disclaimer. Indeed, a limited-service pregnancy center would be free to express its disapproval alongside the disclaimer, or otherwise qualify its viewpoint vis-àvis the disclaimer.[9] More to the point,

---

[9] Notably, had the City been permitted to conduct discovery, it could have shown that the Center's website already provides a disclaimer explaining its position: "Our mission is to protect the physical, emotional and spiritual lives of women and their unborn children. We do not perform or refer for abortions because of the physical and emotional risks involved." Center For Pregnancy Concerns, http://www.cpcforhelp.org (last visited June 19, 2012). The existence of such a disclaimer featured conspicuously on the website contradicts the assertion of the Center's "representative," referenced by the majority, that "the Pregnancy Center would not speak to clients and potential clients in the manner required by the ordinance." *Ante* at 28. Furthermore, Amici PCCs inform us that they counsel their affiliates to disclose that they do not offer or refer for abortions and, in their advertisements, to "avoid implying that abortion services or professional counseling is available." *See* Br. of Amici PCCs 9, 21-22.

however, "[n]othing in the [Ordinance] prevents [a pregnancy center] from conveying, or the audience from hearing, . . . noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." *See Fox*, 492 U.S. at 474; *see also Fargo*, 381 N.W.2d at 181 (concluding it was unnecessary to extend First Amendment protections to the clinic's "commercial solicitation of clientele" because the clinic could "advocat[e] . . . outside the commercial context and receive full First Amendment protection"). Put simply, the Ordinance does not prohibit or restrict a limited-service pregnancy center's speech about abortion and birth-control.

In sum, the district court's finding that the Ordinance targeted noncommercial speech or, at most, intertwined commercial and noncommercial speech — as echoed by the majority — was premature and inappropriate. Under the applicable rules of procedure and our precedent, it was essential to the City's opposition to the Center's summary judgment motion — and to a fair and proper exercise of judicial scrutiny — for the court to have the benefit of discovery. *See, e.g.*, *Gay*, 761 F.2d at 177; Fed. R. Civ. P. 12(d) (providing reasonable opportunity for discovery after conversion of Rule 12(b)(6) motion to summary judgment motion). Those discovery proceedings should have yielded, inter alia, any economic motivations of the Center, the context of the Center's advertisements in relation to the disclaimer, and the degree of

entanglement, if any, of the commercial and noncommercial elements of the regulated speech.[10]

3.

In rejecting the City's right to conduct discovery proceedings regarding the compelling interests advanced by the Ordinance, the district court improperly characterized the City's request as solely "an attempt to generate justifications for the Ordinance following its enactment." *O'Brien*, 786 F. Supp. 2d at 810. The court relied on the Supreme Court's decision in *United States v. Virginia*, 518 U.S. 515, 533 (1996), for the proposition that the City's justification should not be "invented post-hoc in response to litigation." The City, however, sought only to augment the record with evidence to support its existing justification — not to invent a new one. As we have previously observed, "courts have routinely admitted evidence . . . to supplement a legislative record or explain the stated interests behind challenged regulations." *11126 Balt.*

---

[10] Although not addressed by the district court, and raised only indirectly by the City on appeal, there may well be a legitimate question as to whether the speech targeted by the Ordinance constitutes professional speech. The majority dismisses that possibility because "the pregnancy centers that are subject to Ordinance 09-252 do not practice medicine, are not staffed by licensed professionals, and need not satisfy the informed consent requirement." *Ante* at 32. I am simply unable to understand how the majority can make such factual findings. In truth, there may be licensed professionals who are subject to the Ordinance. Indeed, Amici PCCs assert that some of its affiliates "operate under the licensure of a physician-medical director [and] provide medical services . . . by certified and licensed professionals," and that "there are 750 such clinics nationwide, including [the Center]." Br. of Amici PCCs 6-7. Therefore, discovery concerning the possible professional nature of the regulated speech is also warranted.

Blvd. v. Prince George's Cnty., Md., 886 F.2d 1415, 1425 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990). Although "'supplemental' materials cannot sustain regulations where there is *no* evidence in the pre-enactment legislative record[, that] is not the case here." *Id.*

The majority does not deny that there was a substantial pre-enactment record supporting adoption of the Ordinance; rather, my colleagues simply deem that record insufficient to establish a compelling interest. *See Ante* at 36 (observing that "the record establishes, at most, only isolated instances of misconduct by pregnancy centers generally" and "the record contains no evidence that any woman has been misled into believing that any pregnancy center . . . was a medical clinic or that a woman in Baltimore delayed seeking medical services because of such a misconception"). But criticizing the record as somehow lacking merely begs the real question underlying the errors of the district court: Why was the City denied a full and fair opportunity to conduct discovery and present a proper record?

As Judge Niemeyer recently explained, "the Constitution does not mandate a specific method by which the government must satisfy its burden under heightened judicial scrutiny. . . . [I]t may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require." *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012) (remanding "to allow the government to develop a record sufficient to justify its argument" concerning interests advanced by statute). And, when the court's record is deficient, the government has been permitted

to marshal the relevant evidence. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994) (remanding "to permit the parties to develop a more thorough factual record" because government had failed to 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"); *see also Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 215 (4th Cir. 1993) (indicating that remand for discovery would be warranted had the "City . . . asked the district court for additional discovery to respond to . . . summary judgment, or for additional time to 'develop the factual record' in support of its alleged compelling state interest"). We have no discernible reason to stray from such precedent.

B.

Apart from abusing its discretion by denying the City of Baltimore its right to conduct discovery, the district court also erred in concluding that the Ordinance is not viewpoint neutral — its alternative basis for applying strict scrutiny. *See O'Brien*, 768 F. Supp. 2d at 815-16. The majority endorses that conclusion by way of footnote only, agreeing that, because the Ordinance applies solely to persons who do not provide or refer for abortions or nondirective and comprehensive birth-control services, it burdens only "pro-life speakers," "whose moral or religious codes lead them to oppose abortion and birth control." *Ante* at 34 n.4. It requires no lengthy deliberation to specify examples that entirely undermine the majority's supposition:

- A Lamaze instructor, who teaches pregnant women and their partners strategies for having a natural, healthy

pregnancy and childbirth, may not provide referrals for abortion or birth-control services simply because that is not the objective of her job;

- A doula, who gives advice and emotional assistance to pregnant women during childbirth, would have no cause to even discuss abortion or birth-control, much less make referrals;
- A pregnancy shelter, supplying material assistance and information about pregnancy-related products, may not make referrals for abortion or nondirective and comprehensive birth-control services so as to avoid liability because it has no licensed or trained professionals to address those subjects; and
- A center, encouraging or facilitating adoption services or surrogate pregnancies, may be neither qualified nor disposed to make referrals for abortion or birth-control services.[11]

---

[11] The foregoing examples are more appropriate than the district court's effort, made during its hearing on the parties' respective motions, to compare the Ordinance to a regulation requiring "a non-American car dealership . . . to post a sign that says, 'We do not offer cars built in the United States.'" J.A. 131. The court posed the hypothetical dealership regulation to suggest that in the same way that "BMW salespeople would . . . be handicapped by having their customers read the sign that they don't want their customers to think about that issue," the Ordinance disfavors the Center because when a woman "comes in and [the Center] says we don't offer abortions" the woman thinks, "Oh, abortions, yeah, I guess I better ask about that." *Id.* The court thus remarked the Ordinance is "not neutral." *Id.*

Absent the premise that the Ordinance burdens only prolife speakers, the majority's fallback position is legislative history, which, it asserts, demonstrates that the Ordinance was enacted because of an improper animus of the City Council against the Center's viewpoint on abortion and birth-control. As the majority points out, however, the City "has referred and continues to refer women to the Pregnancy Center." *Ante* at 37. If the City disfavors the Center's viewpoint, or possesses an improper animus against the Center, its continual referrals of women to the Center constitutes an unexplained oddity. In any event, the record validates the City's un-contradicted contention that the Ordinance was enacted to curtail deceptive advertising, not because the City disagreed with or wanted to suppress the Center's speech.[12] And the majority has failed to identify any aspects of the record that show otherwise. If there were some ambiguity, however, that would be more reason to conduct full discovery.[13]

Comparing a woman's right to seek lawful medical treatment to a salesperson's economic interest in keeping his customers ignorant is, as the court initially thought before it made the comparison anyway, "a stupid example." *Id.*

[12] As explained in Part I.A *supra*, the City Council acted carefully and prudently in its adoption of the Ordinance. Even on this limited record, the evidence supports its action, and the record shows that the Council secured and relied on the advice of counsel. That record, which must be viewed in the light most favorable to the City, fatally undermines any assertion of improper animus against the Center or other limited-service pregnancy centers. Indeed, the record shows conclusively that the animus assertion has been created from whole cloth

[13] Notably, the need for discovery was evident in the Opinion's description of the legislative record as "uneven when demonstrating the depth and severity of the problem relating to limited-service pregnancy centers and deceptive advertising." *O'Brien*, 768 F. Supp. 2d at 816.

C.

Even if all I have said to this point misses the mark, the district court's award of summary judgment to the Center must nevertheless be vacated. Put simply, there are genuine disputes of material fact regarding the issues of compelling interests and narrow tailoring that must be assessed.

1.

Although the district court assumed that the Ordinance serves a compelling interest, the majority disparages the two such interests espoused by the City: (1) an "interest in protecting the public from ongoing deceptive business practices"; and (2) a "public health interest in ensuring that individuals who seek abortion or comprehensive birth-control services have prompt access to those services." Br. of Appellants 35-36. In addition to criticizing the incompleteness of the pre-enactment record — which, as previously explained, would be readily remedied with discovery — the majority "question[s] [the City's] selective pursuit of its interest." *Ante* at 36. My fine colleagues protest in their majority opinion that the City is not actually interested in combating inaccurate information about pregnancy services, because the Ordinance does not regulate "the vast majority of sources that pregnant women would likely consult." *Id.*

The City, however, had an obligation to deal with existing public health problems, without addressing the likelihood of deception from every possible source of information available to pregnant women. *See Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (observing that a "statute is not invalid under the Constitution

because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (citations and internal quotation marks omitted)). The majority persists, however, that the City could have posted a "notice," placed a "warning on its own website," or provided "public service information," rather than target a pregnancy center's speech, if it were really interested in combating deceptive practices. *Ante* at 37. But such criticisms by unelected judges are more a critique on the particular means of serving the City's compelling interests, discussed *infra*, than a valid argument that those interests are not compelling.

In any event, the majority's criticisms are lodged against the City's first identified compelling interest, with no more than a nod to the second. The City undoubtedly possesses a compelling interest in defending a woman's right to obtain timely information and medical care in connection with her pregnancy. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) (agreeing that Florida had a "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"). Indeed, the City filed the Blum declaration to further substantiate that very interest. *See* J.A. 44. Dr. Blum therein explained that public health is advanced by providing complete and accurate information to women about their health care options because, inter alia:

- "The evidence is crystal clear that family planning is one of the best strategies for

> women in the United States . . . to improve their health and well-being, as well as that of their offspring." *Id.* at 45;
>
> • "Women who can plan the number and timing of their births experience fewer unwanted pregnancies and births and have lower rates of abortion." *Id.*; and

"Certain people are particularly vulnerable to being deceived by limited-service pregnancy centers that fail to disclose the scope of services that they provide. Those people include adolescents and those who are poor or otherwise marginalized in society." *Id.* at 46. Notwithstanding the foregoing, the Blum declaration — which is uncontroverted — was never referenced by the district court. And, because this is an appeal from summary judgment, the Blum declaration must be viewed in the light most favorable to the City. *See Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 551 (4th Cir. 1999) (observing that, in reviewing the propriety of summary judgment, an appellate court considers "the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences from the affidavits . . . submitted below in his or her favor"). Dr. Blum's evidence alone was more than sufficient to create a genuine dispute of material fact on the compelling interest requirement. *Cf. TFWS, Inc. v. Shaefer*, 325 F.3d 234, 241-42 (4th Cir. 2003) (vacating summary judgment award because nonmoving party proffered expert reports demonstrating genuine disputes of material fact); *McTernan v. City of York, Pa.*, 564 F.3d 636, 651 (3d Cir. 2009) (concluding factual disputes concerning city's compelling interests barred summary judgment).

2.

Both the district court and the panel majority described the lack of narrow tailoring as the Ordinance's "fatal" constitutional defect. *See ante* at 37; *O'Brien*, 768 F. Supp. 2d at 817. On this record, however, such a conclusion simply cannot be sustained.

a.

Notwithstanding all the controversy and litigation this Ordinance has engendered, we must be mindful that we are dealing with a one-sentence, non-verbal, truthful disclaimer posted on a sign in a waiting room. The Ordinance does not otherwise prohibit or inhibit a limited-service pregnancy center's speech. Indeed, the Ordinance is so minimally burdensome that the majority condemns it as underinclusive — failing "to regulate 'deceptive practices' or false advertising," the City's first identified compelling interest. *Ante* at 38.

The courts have consistently recognized, however, that, when confronted with false or misleading advertising, "the preferred remedy is more disclosure, rather than less." *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (observing that a "disclaimer might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception" (alteration and internal quotation marks omitted)). As we have explained, "[d]isclosure laws perform the important function of deterring actual corruption and avoiding the appearance of corruption, but unlike other types of restrictive laws," disclosures have the added

advantage of promoting "speech by making more information available to the public and thereby bolstering the 'marketplace of ideas.'" *Master Printers of Am. v. Donovan*, 751 F.2d 700, 710 (4th Cir. 1984). Nevertheless, to go further than a simple waiting room sign — by, for example, legislating precisely what a limited-service pregnancy center must say in an advertisement — could "chase [the City] into overbroad restraints of speech." *Cf. Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 345-46 (4th Cir. 2005).

b.

In the same vein that it condemns the Ordinance as *under*inclusive, the majority maintains that the disclaimer is *over*inclusive because "it applies equally to pregnancy centers that engage in deceptive practices and those whose speech is entirely truthful." *Ante* at 38. But the Ordinance applies equally to all limited-service pregnancy centers, due to the inherent potential for consumer confusion and deception concerning the services provided. *Cf. Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (rejecting contention that statute likely applicable to violators and nonviolators alike was overinclusive because it aimed "to prevent both actual and apparent corruption" and "it is the potential for such influence that demands regulation"). In that regard, exempting certain limited-service pregnancy centers could undermine "the efficacy of [the Ordinance's] overall scheme." *See Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 610 (4th Cir. 2001) (deeming ordinance applicable to commercial and noncommercial entities as nevertheless narrowly tailored); *cf. Borgner v. Brooks*, 284 F.3d

1204, 1214 (11th Cir. 2002) (concluding that disclaimer constituted "constitutional alternative, one which is less restrictive, yet sufficient to cure the potential deception and ultimately serving the state's interest").

c.

Finally, my good colleagues of the majority suggest that the Ordinance is not the least restrictive means of preventing deceptive advertising by limited-service pregnancy centers. They insist that the City could have undertaken a public education campaign to raise awareness, that it could have distributed information or operated a website about the services offered by such pregnancy centers, or that it simply could have prosecuted offenders of deceptive advertising laws. Pursuant to Supreme Court precedent, "[w]hen 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." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). Put simply, however, the City has never been accorded a meaningful opportunity to satisfy that burden. The Center did not, until it replied concerning its own summary judgment request, propose any less restrictive alternatives. Thereafter, the district court denied the City its right to conduct discovery and awarded summary judgment to the Center. In so doing, the court suggested other less restrictive alternatives. Of course, the City has argued — in both the district court and on appeal — that these alternatives would be ineffectual or less effective. Importantly, however, the City has never had a chance to adduce evidence with respect to those alternatives.

At the very least, however, the City has identified a genuine dispute of material fact on the narrow tailoring requirement. The Ordinance requires only the disclaimer, which is critical to the analysis. As the Supreme Court has most recently again emphasized, a "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 915 (2010). Moreover, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Zauderer*, 471 U.S. at 651 n.14 (1985) (observing that "disclosure requirements trench much more narrowly . . . than do flat prohibitions on speech"). Public education campaigns and websites may be successful to some degree, but they do not ensure that every woman who visits a limited-service pregnancy center will be apprised of the services offered there, at a time when such information is most needed. Inadequate or unenforceable deceptive advertising statutes, problems of proof, and scarcity of resources can also impact efforts to prosecute limited-service pregnancy centers. It is worth reiterating that the least restrictive alternatives must be "*as effective* in achieving the [Ordinance's] legitimate purpose." *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 846 (1997) (emphasis added).

Summary judgment is never appropriate where, as here, there are genuine disputes of material fact on the narrow tailoring requirement. *See, e.g.*, *Snell v. City of York, Pa.*, 564 F.3d 659, 669-70 (3d Cir. 2009) (identifying factual issues regarding whether police officer's restrictions against protester were narrowly tailored to meet government's compelling

interests); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 989 (9th Cir. 2008) (holding that the court erred in awarding summary judgment "[b]ecause disputed issues of material fact exist as to whether the policy of prohibiting group worship by maximum security prisoners is the least restrictive means of maintaining security"); *729, Inc. v. Kenton Cnty. Fiscal Court*, 515 F.3d 485, 504-05 (6th Cir. 2008) (vacating summary judgment award where factual issues were apparent on whether ordinance regulating sexually oriented businesses was narrowly tailored); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1395 (D.C. Cir. 1990) (remanding for development of factual issues concerning whether regulation was sufficiently narrowly tailored to survive First Amendment scrutiny).

III.

Because the district court erred in denying discovery to the City, and in awarding summary judgment to the Center in the face of genuine disputes of material fact, I would vacate the judgment and remand for such further proceedings as may be appropriate.

In these circumstances, I respectfully dissent.

[ENTERED JANUARY 28, 2011]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. MJG-10-760

ARCHBISHOP EDWIN F. O'BRIEN, ARCHBISHOP OF BALTIMORE AND HIS SUCCESSORS IN OFFICE, A CORPORATION SOLE, et al.	*
Plaintiffs	*
vs.	*
MAYOR AND CITY COUNCIL OF BALTIMORE, et al.	*
Defendants	*

****

DECISION & ORDER

The Court has before it Plaintiffs' Motion for Partial Summary Judgment [Document 9], Defendants' Motion to Dismiss [Document 11], and the materials submitted relating thereto. The Court has held a hearing and had the benefit of the arguments of counsel.

I. INTRODUCTION

The Greater Baltimore Center for Pregnancy Concerns, Inc. (the "CENTER") provides pregnancy-related counseling. The CENTER operates at locations within Baltimore City and is provided space, rent-free, by Archbishop Edwin F. O'Brien, Archbishop of Baltimore and His Successors in Office, A Corporation

Sole. (the "Archbishop") and St. Brigid's Roman Catholic Congregation, Inc. ("St. Brigid's"). The CENTER will not, for religious reasons, provide or refer for abortions or specific methods of birth-control that are contrary to the views of the Catholic Church.[1]

On December 4, 2009, the City of Baltimore enacted Ordinance 09-252 (the "Ordinance").[2] The Ordinance is directed toward any organization [3] that provides information about pregnancy-related services but does not provide or refer for abortions or certain types of birth-control services. Under the Ordinance, such an organization – referred to as a "limited-service pregnancy center" - must post a conspicuous sign in its waiting room notifying its clients that the center "does not provide or make referral for abortion or birth-control services."[4]

As discussed herein, the Court holds that the Ordinance violates the Freedom of Speech Clause of Article I of the Constitution of the United States and is unenforceable. Whether a provider of pregnancy-related services is "pro-life" or "pro- choice," it is for the provider – not the Government - to decide when and how to discuss abortion and birth-control methods.

The Government cannot, consistent with the First Amendment, require a "pro-life" pregnancy-related service center to post a sign as would be required by the Ordinance.

---

1 Each employee of the CENTER must sign a statement affirming his or her Christian faith and the belief that abortion is immoral.

2 See BALT. CITY HEALTH CODE §§ 3-501 to 3-506 (2010).

3 Whose primary purpose is to provide pregnancy related services.

4 Id. at § 3-502(A).

II. PROCEDURAL SETTING

The CENTER, the Archbishop, and St. Brigid's (collectively "Plaintiffs") have filed the instant lawsuit, seeking to enjoin enforcement of the Ordinance. Plaintiffs, contending that the Ordinance is facially invalid, assert claims against the Mayor and City Council of Baltimore, Stephanie Rawlings-Blake, in her official capacity as Mayor of Baltimore, and Olivia Farrow Esq., in her official capacity as acting Baltimore City Health Commissioner (collectively "Defendants").[5] Plaintiffs' Complaint for Declaratory and Injunctive Relief presents four Counts:

Count I. First Amendment (Free Speech and Assembly)

Count II. First Amendment (Free Exercise of Religion)

Count III. Fourteenth Amendment (Equal Protection)

Count IV. Maryland Code[6] (Conscience Clause)

By the pending motions, Defendants seek (1) dismissal of claims made by the Archbishop and St. Brigid's pursuant to Rule 12(b)(1)[7] due to a lack of standing and (2) dismissal of all claims pursuant to

---

[5] Plaintiffs also named the Baltimore City Health Department as a defendant but agree that claims against the Baltimore City Health Department be dismissed without prejudice (Pls.' Opp'n in [Document 17] at 34).

[6] MD. CODE ANN., HEALTH-GEN. §20-214 (West 2011)

[7] All "rule" references herein are to the FEDERAL RULES OF CIVIL PROCEDURE.

Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs, on the other hand, seek summary judgment pursuant to Rule 56 on their claims contained in Counts I and III.

A. Dismissal Standard

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). When evaluating a 12(b)(6) motion to dismiss, a plaintiff's well- pleaded allegations are accepted as true and the complaint is viewed in the light most favorable to the plaintiff. However, conclusory statements or a "formulaic recitation of the elements of a cause of action" will not suffice. Id. A complaint must allege sufficient facts to "cross 'the line between possibility and plausibility of entitlement to relief.'" Francis v.Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (quoting Twombly, 550 U.S. at 557).

Inquiry into whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. Thus, if the well-pleaded facts contained within a complaint "do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." Id. (quoting Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1950 (2009).

B. Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings and supporting documents "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2).

The well-established principles pertinent to summary judgment motions can be distilled to a simple statement: The Court may look at the evidence presented in regard to a motion for summary judgment through the non-movant's rose-colored glasses, but must view it realistically. After so doing, the essential question is whether a reasonable fact finder could return a verdict for the non-movant or whether the movant would, at trial, be entitled to judgment as a matter of law. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Shealy v. Winston, 929 F.2d 1009, 1012 (4th Cir. 1991). Thus, in order to defeat a motion for summary judgment, "the party opposing the motion must present evidence of specific facts from which the finder of fact could reasonably find for him or her." Mackey v. Shalala, 43 F. Supp. 2d 559, 564 (D. Md. 1999) (emphasis added). When evaluating a motion for summary judgment, the Court must bear in mind that the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327 (quoting Rule 1 of the Federal Rules of Civil Procedure).

C. Standard Applicable

Defendants seek dismissal of all Counts, while Plaintiffs seek summary judgment on Counts I (Free Speech and Assembly) and III (Equal Protection). In their presentations regarding these Counts both sides have submitted and/or relied upon materials from outside of the Complaint. Rule 12(b)(6), provides that, in the context of a motion to dismiss, "if matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." FED. R. CIV. PRO. 12(b)(6).

Accordingly, as to Counts I and III, the parties' respective motions shall be treated as cross-motions for summary judgment. Moreover, in view of the absence of any genuine issues of material fact with respect to these Counts, resolution of the claims therein by summary judgment is appropriate.

D. Rule 56(f)

Summary judgment is appropriate only "after adequate time for discovery." Celotex, 477 U.S. at 322. Defendants assert that summary judgment would be premature because they have not had an adequate opportunity to conduct discovery or fully develop expert testimony, this despite having passed the Ordinance in December 2009. Specifically, Defendants seek discovery regarding the harm the Ordinance seeks to address, the commercial nature of Plaintiffs' activities, as well as actual evidence of deceptive advertising. (See Defs.' Reply [Document 18], Ex. 6 ¶ 3-6).

Defendants may not, however, use discovery in an attempt to generate justifications for the Ordinance following its enactment. The requisite scrutiny is not satisfied through the use of post-hoc justifications created after the start of litigation. See U.S. v. Virginia, 518 U.S. 515, 533 (1996) (noting that the government's justification, even under intermediate scrutiny, may not be "invented post-hoc in response to litigation").

In the instant case, the Court must examine whether the Ordinance, on its face, is subject to, and satisfies, the applicable level of scrutiny. The Court must base its decision on the evidence relied on by the Baltimore City Council at the time the Ordinance was passed.

III. DISCUSSION

A. Plaintiffs

At all times relevant hereto, the CENTER has offered pregnancy-related services at locations within Baltimore City. The CENTER presents classes in prenatal development, parenting, and life skills. The CENTER offers its clients bible study, pregnancy testing, sonograms, prenatal vitamins, and mentoring. The CENTER also provides information on "Catholic compliant" birth-control techniques such as abstinence and natural family planning.The CENTER will not, under any circumstances, provide or refer for abortions or certain methods of birth-control.

As stated above, Plaintiffs, the Archbishop and St. Brigid's allow the CENTER to use facilities on their respective premises rent-free.

B. The Ordinance

Ordinance 09-252, enacted by the City of Baltimore on December 4, 2009, provides, in pertinent part:

> A limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services.

Id. §3-502(A).

The Ordinance further provides:

> The disclaimer required by this section must be given through 1 or more signs that are:
>
> (1) written in English and Spanish;
>
> (2) easily readable; and
>
> (3) conspicuously posted in the center's waiting room or other area where individuals await service.

Id. §3-502(B).

The Ordinance defines a "limited-service pregnancy center" as:

> (1) Any person 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.

Id. §3-501.

The Ordinance does not include a definition of "nondirective and comprehensive birth-control services." However, prior to the hearing in the instant case, the Baltimore City Health Department had defined "nondirective comprehensive (sic) birth-control services" as including "birth-control services which only a licensed healthcare professional may prescribe or provide but may also include other birth-control services." As became apparent at the hearing, this "definition" was essentially useless. Following the hearing, Defendants provided a "corrected" definition for the term "nondirective and comprehensive birth-control services" as including "birth-control services which only a licensed healthcare professional may prescribe or provide." Inasmuch as Plaintiffs seek prospective relief, the Court will utilize the "corrected" definition herein. Therefore, the Ordinance's disclaimer requirements apply to any pregnancy service center that will not provide or refer for abortions and certain physician provided birth-control methods.

The Ordinance authorizes the Baltimore City Health Commissioner to issue a notice to any limited-service pregnancy center that is in violation of the Ordinance,

directing the center to correct the violation within 10 days. Id. § 3-53. Failure to comply with a violation notice is punishable by the issuance of an environmental or civil citation, each of which carries a penalty of $150.[8] Id. at § 3-506; BALT. CITY HEALTH CODE ART. I, §§ 40-14, 41-14.

C. Standing

Defendants contend that the Archbishop and St. Brigid's lack standing to bring the instant case. Standing to sue requires (1) the existence of a concrete and particularized injury in fact; (2) a causal connection between the injury suffered and the conduct complained of; and (3) that a favorable adjudication would redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

The evidence of record does not establish that the CENTER operated in any capacity other than separately and apart from the Archbishop and St. Brigid's. The Archbishop and St. Brigid's are not, and do not operate, limited-service pregnancy centers subject to the Ordinance. Rather, they allow the CENTER – which is subject to the Ordinance – to utilize a portion of their respective facilities free of charge. The Ordinance does not require the Archbishop and St. Brigid's to take any action and does not subject them – as landlords - to liability for

[8] A non-compliant pregnancy center may also be subject to a criminal misdemeanor charge under Health Article §2-211. If convicted of the misdemeanor, the pregnancy center is subject to a fine of $200, plus $50 for each day the offense continues. The non-payment of fines could result in the pregnancy center being held in contempt of court. BALT. CITY CODE ART. I, §§ 40-41.

their tenant's failure to post a required sign in the space utilized by the CENTER.

The Archbishop and St. Brigid's contend that they will suffer a "concrete and particularized injury" because the required signs would be attributed to them. The Court finds speculative, at best, the contention that a sign required by the Ordinance on the CENTER's wall will be attributed to the landlord. Indeed, the sign refers to the services provided by the CENTER and would have no reference to the owner of the building in which the CENTER operates.

Certainly, the Archbishop and St. Brigid's share the CENTER's beliefs regarding birth-control and strongly object to an Ordinance compliant sign posted in the CENTER. The Court does not find, however, that the CENTER's compliance with the Ordinance would cause Archbishop and St. Brigid's "concrete and particularized injury in fact" so as to meet the Lujan test for standing.

Accordingly, the Court concludes that it must dismiss all claims made by the Archbishop and St. Brigid's for lack of standing. However, the Court finds it appropriate to allow the Archbishop and St. Brigid's to participate in the instant case as amici curiae. Also, for the sake of consistency, the Court shall, herein, refer to the positions taken by the amici and the CENTER, as those of "Plaintiffs."

D. Freedom of Speech

Freedom of speech "is the matrix, the indispensible condition, of nearly every other form of freedom." Palko

v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.). The First Amendment, as applied to the states by the Fourteenth Amendment, prohibits regulations "abridging the freedom of speech." U.S. CONST. amend I. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotation marks and citations omitted). Accordingly, the government cannot inhibit, suppress, or impose differential content-based burdens on speech. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-642 (1994).

The Ordinance regulates speech. The Ordinance applies to limited-service pregnancy centers whose primary mission is to provide information on topics relating to pregnancy and birth- control.It is true that the Ordinance does not directly regulate the content of a limited-service pregnancy center's speech in the sense of restricting what it can say. However, requiring the placement of a "disclaimer" sign in the center's waiting room is, on its face, a form of compelled speech. Moreover, the Ordinance regulates the center's speech by mandating the timing and content of the introduction of the subjects of abortion and birth-control.

1. Level of Scrutiny

The parties disagree as to whether the Ordinance is subject to strict scrutiny review. Strict scrutiny review, in the context of the First Amendment, requires that a speech regulation "be narrowly tailored to promote a

compelling Government interest" and "if a less restrictive alternative would serve the governments purpose, the legislature must use that alternative." U.S. v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

Plaintiffs contend that the Ordinance is subject to strict scrutiny review for two principal reasons. First, the Ordinance regulates non-commercial speech by compelling a disclosure relating to abortion and birth-control information. Second, the Ordinance regulates speech based on Defendants' disagreement with Plaintiffs' viewpoint and ideology. Defendants argue that the Ordinance is subject to a lower level of scrutiny because it regulates strictly commercial speech and is viewpoint-neutral.

a. Commercial or Non-Commercial Speech

In determining the appropriate level of scrutiny, this Court must analyze the nature of speech regulated by the Ordinance. Plaintiffs contend that strict scrutiny should apply as the Ordinance compels a disclaimer introducing the topic of abortion, thus regulating Plaintiffs' non-commercial speech. Regulations which restrict or mandate non-commercial speech receive greater scrutiny than those governing purely commercial speech. In re R.M.J., 455 U.S. 191 (1982).

Defendants argue that the Ordinance regulates speech that is commercial in nature. Laws that compel or regulate commercial speech are permissible if their "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

Milavetz, Gallop & Milavetz, P.A. v. U.S., ___ U.S. ___, 130 S. Ct. 1324, 1339-40 (2010); Zauderer v.Office of Disciplinary Counsel of Supreme Court of Ohio, 471U.S. 626, 651 (1985) (addressing the regulation of attorney advertising via disclaimers).

The Supreme Court has defined commercial speech as speech that proposes a commercial transaction. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-68 (1983). Commercial speech has also been defined as "expression related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

Defendants claim that the commercial transaction at issue is the CENTER'S offer of valuable goods and services to pregnant women. The goods and services offered include pregnancy tests, sonograms, and options counseling.

Under both Bolger and Central Hudson, the speech regulated by the Ordinance is not commercial speech. The overall purpose of the advertisements, services, and information offered by the CENTER is not to propose a commercial transaction, nor is it related to the CENTER's economic interest. The CENTER engages in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives. The notion that "human life must be respected and protected absolutely from the moment of conception" is a central tenet of the CENTER's belief

system. See Catechism of the Catholic Church, Art. Five §§ 2258- 2330. [Document 24 Ex. 1]

The CENTER offers services that have value in the commercial marketplace. However, the offering of free services[9] such as pregnancy tests and sonograms in furtherance of a religious mission fails to equate with engaging in a commercial transaction. Were that the case, any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection.

The nature of speech regulated by the Ordinance bears little resemblance to the speech at issue in Milavet[10] and Zauderer. Both Milavetz and Zauderer addressed the regulation of highly commercial activities relating to attorney advertisements, most notably offering legal services for a fee. In regard to the disclaimer requirements on transactions proposed in the attorney advertisements, only economic interests were impacted. In sharp contrast, the disclaimer mandated by the Ordinance introduces the topics of

---

[9] Determining whether speech is commercial does not depend on the speaker's status as a non-profit entity, but rather on the nature of the transaction proposed by the speaker. Vill. of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980). See also Virginia Vermiculite Ltd. v. W.R. Grace & Co., 156 F.3d 535, 541 (4th Cir. 1998) (explaining "the dispositive inquiry is whether the transaction is commercial, not whether the entity engaging in the transaction is commercial").

[10] In Milavetz, the parties agreed that the challenged provisions only regulate commercial speech. 130 S. Ct. at 1339.

abortion and birth-control. This has an immediate effect on any speech and information offered by the CENTER on these subjects. The nature of information transmitted by the CENTER includes, by any measure, speech generally afforded the highest level of constitutional protection.

Even if the Court were to assume that the CENTER's speech includes some commercial elements, strict scrutiny would nonetheless apply. The Supreme Court has held that "we do not believe that speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." Riley v. Nat'l Fed'n of the Blind v. North Carolina, Inc., 487 U.S. 781, 796 (1988)(overturning a law requiring professional fundraisers to disclose to potential donors the percentage of charitable contributions collected that were actually turned over to charity).

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. Contemporaneous with the center's initial communication is the presence of a stark and immediate statement about abortion and birth-control. Contrary to Defendants' assertion, the disclaimer indeed alters the course of a center's communications with a client or prospective client about abortion and birth-control.

Defendants claim that the terms of the disclaimer apply only to the purported commercial components of Plaintiffs' speech. This argument is unavailing. The Supreme Court has held that commercial and non-

commercial elements of speech "cannot be separated or parceled out, applying one standard of review to one phrase, and another test to another phrase." Id. at 796. At the very least, a disclaimer conspicuous to anyone visiting the CENTER regarding the lack of abortion and birth-control services, mandates the inclusion of a government message concurrent, and intertwined with, Plaintiffs' delivery of fully protected speech.

Accordingly, the Court concludes that the Ordinance regulates the Plaintiffs' fully protected non-commercial speech so that strict scrutiny is triggered.

b. Lack of Viewpoint Neutrality

Under well established First Amendment principles, the "government must abstain from regulating speech when the specific motivation, ideology, or the opinion of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Thus, viewpoint-based discrimination is considered a particularly offensive form of content-based discrimination.

Plaintiffs contend that the very terms of the Ordinance impermissibly regulate only those who speak about pregnancy- related services from a particular disfavored viewpoint. Defendants assert that the Ordinance applies to any persons offering pregnancy-related information including Lamaze instructors, maternity clothing retailers, lactation consultants, et cetera. (Mot. Hr'g Tr. 5:17). However, the Ordinance is applicable only to those who will never provide or refer for abortion or birth-control

services. Such a qualification limits the application of the Ordinance primarily (if not exclusively) to those with strict moral or religious qualms regarding abortion and birth-control.

The CENTER's viewpoint, formed on the basis of sensitive religious, moral, and political beliefs, is the overarching reason for its stark refusal to perform or refer for abortions and certain types of birth-control. Under the First Amendment, a government cannot "impose special prohibitions on those speakers who express views on [governmentally] disfavored subjects." R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

Defendants contend that even though the Ordinance applies only to limited-service pregnancy centers who are opposed to abortions and certain methods of birth-control, its purpose is to mitigate the effect of deceptive advertising, not to express disagreement with a particular viewpoint.[11] In support, Defendants point to the legislative record compiled during consideration of the Ordinance as evidence[12] that certain limited-service

---

[11] It is worth noting that during consideration of the Ordinance, an amendment was offered requiring pro-life and pro- choice pregnancy centers alike to provide disclosures regarding the services offered. The amendment was defeated by a 10 to 5 margin. (Pls.' Mot. [Document 9], Ex. E).

[12] A principal component of the evidence presented to the Baltimore City Council regarding deceptive advertising was a 2006 report released by U.S. Representative Henry Waxman. See Minority Staff, Special Investigations Division, Committee on Government Reform, U.S. House of Representatives, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS at 1-2 (2006). (Defs. Surreply [Document 27], Ex. 1).

pregnancy centers engage in deceptive advertising in order to attract women seeking abortions and comprehensive birth-control services to their facilities. Moreover, certain limited-service pregnancy centers proceed to employ delay tactics in an effort to dissuade women from accessing those services. The Supreme Court has stated that "the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of partisans on one side of a debate is without support." Hill v. Colorado, 530 U.S. 703, 724 (2000).

In Hill, the Supreme Court found constitutional a Colorado statute creating a 100-foot buffer zone around medical facilities. The statute prohibited all unwanted approaches within eight feet of anyone inside the buffer zone. The Court found that that "the principal inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Hill, 530 U.S. at 719 (quoting Ward v. Rock Against Racism, 491 U.S. 791 (1989)).

The statute in Hill, however, is not analogous to the Ordinance. The Supreme Court held that the speech restricted in Hill was content and viewpoint neutral because the statute "was concerned with the safety of individuals seeking wide ranging health care services, not merely abortion counseling and procedures." Hill, 530 U.S. at 714. In contrast, the Ordinance applies exclusively to information communicated at limited-service pregnancy centers, not, as did the statute in Hill, to any type of speech communicated at every health care facility in the jurisdiction.

It is revealing that Defendants refer to the Ordinance as a means of mitigating the "harm" caused by Plaintiffs' underlying "propaganda" speech relating to abortion and contraception**.** (Defs.' Reply [Document 18], at 9]. Such descriptions can only support the conclusion that Defendants enacted the Ordinance out of disagreement with Plaintiffs' viewpoints on abortion and birth-control.

In sum, the Ordinance regulates fully protected non- commercial speech and is based, at least in part, on disagreement with the viewpoint of the speaker. Therefore, the Ordinance is subject to strict scrutiny review.

c. Application of Strict Scrutiny

Strict scrutiny review is a standard traditionally used when examining regulations of fully protected speech rather than the 'exacting scrutiny' standard described in Citizens United v. Fed Election Comm'n., ___ U.S. ___, 130 S. Ct. 876 (2010) (addressing a First Amendment Challenge to political campaign laws).

Any statute that regulates protected speech is presumptively invalid and the government bears the burden to rebut that presumption. Playboy Entm't, 529 U.S. at 817. However, a statute that regulates speech may comply with the First Amendment if the statute is "narrowly tailored to promote a compelling government interest." Id. at 813. A statute is not narrowly tailored if a "less restrictive alternative would serve the Government's purpose." Id. Thus, in assessing whether a statute is narrowly tailored, the Court must determine whether "the challenged regulation is the

least restrictive means among available effective alternatives." Ashcroft v. ACLU, 542 U.S. 656, 666 (2004). Defendants burden to "demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

Defendants assert that the Ordinance is both narrowly tailored and promotes a compelling government interest. The Ordinance advances the Defendants' interest in protecting and informing women seeking abortion and comprehensive birth-control services from misleading advertisements. Defendants seek to limit the incentive for limited-service pregnancy centers to engage in deceptive advertising by posting a disclaimer in their waiting areas.

The legislative record, however, is uneven when demonstrating the depth and severity of the problem relating to limited-service pregnancy centers and deceptive advertising. The record reflects only sporadic instances of limited-service pregnancy centers engaging in deceptive advertising.

Balancing the governmental interests in providing the fullest level of disclosure to women entering a limited-service pregnancy center against protecting Plaintiffs' First Amendment rights is a difficult endeavor. However, the Court will assume, for purposes of discussion, that the Ordinance was enacted in response to a compelling governmental interest. Nevertheless, Defendants need to demonstrate that the

Ordinance is narrowly tailored, ensuring that no less restrictive alternatives are available.

Defendants contend that the Ordinance's disclaimer requirement is narrowly tailored, truthful, [13] and only a de minimis burden on Plaintiffs' right to free speech. However, the disclaimer requirement mandated by the Ordinance falls considerably short of meeting the "narrowly tailored" standard.

By no means is the disclaimer requirement the least restrictive means of combating false advertising. Defendants claim that in passing the Ordinance, they seek only to mitigate the impact of deceptive advertising. Yet the Ordinance does not provide a "carve-out" provision for those limited-service pregnancy centers which do not engage in any deceptive practices. The disclaimer requirement is imposed irrespective of how forthcoming and transparent a pregnancy center presents itself.

---

[13] Plaintiffs assert that the disclaimer forces them to state untruthfully that the CENTER "does not provide or make referral for abortion or birth-control services" when in fact the CENTER promotes abstinence and natural family planning as effective birth-control techniques. Defendants contend that the Ordinance allows for flexibility in phrasing the disclaimer. Those subject to the disclaimer requirement must only indicate "substantially to the effect" that they do not provide or refer for abortions or [certain] birth-control methods, leaving open the ability to list the services they actually offer as exceptions to the general disclaimer. The Court would note that such an "exception" statement would increase the effect of the disclaimer upon a center's freedom of speech by highlighting (in a negative manner) those birth-control methods the center supports.

In lieu of the disclaimer mandate of the Ordinance, Defendants could use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers. Such an alternative was suggested in Riley where the Supreme Court noted that instead of mandating a disclaimer requirement, "the state may vigorously enforce its anti-fraud laws." 487 U.S. at 800.

Defendants claim that existing anti-fraud regulations do not apply to Plaintiffs, as the regulations are limited to "any person, firm or corporation that offers for sale merchandise, commodities, or service." BALT. CITY CODE ART. II, § 4-1 (2003)(emphasis added). However, subjecting pregnancy centers to existing anti-fraud provisions would require only minor modifications. Alternatively, Defendants could enact a new content-neutral advertising ordinance applicable to non- commercial entities that directly ameliorate the Defendants' concerns regarding deceptive advertising.

In sum, the Court holds that the Ordinance does not meet the strict scrutiny standard. Accordingly, Plaintiffs are entitled to summary judgment with regard to their Freedom of Speech claim in Count I.

E. Additional Claims

In addition to their Freedom of Speech claim, Plaintiffs assert, in Count I (Free Assembly), Count II (Free Exercise), Count III (Equal Protection), and Count IV (State Conscience Provision) that the Ordinance should be held unenforceable. These claims are moot in light of the Court's grant of summary judgment on Plaintiffs' Freedom of Speech

claim in Count I. Moreover, to an extent, some contentions pertinent to Counts II and III have been considered as intertwined with contentions regarding Plaintiffs' Freedom of Speech claim in Count I. Cf. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (addressing Equal Protection as a component of First Amendment interests).

As to Count IV, it appears that there may be genuine issues of material fact that would prevent summary judgment for either side. Moreover, Count IV raises significant issues of first impression under state law that need not, and should not, first be addressed by this Court unless absolutely necessary.

Under the circumstances, the Court shall dismiss without prejudice, Plaintiffs' Freedom of Assembly claim in Count I and all claims in Counts II, III, and IV.

IV CONCLUSION

For the foregoing reasons:

1. Plaintiffs' Motion for Partial Summary Judgment [Document 9] is GRANTED IN PART AND DENIED IN PART.
2. Defendants' Motion to Dismiss [Document 11] is GRANTED IN PART AND DENIED IN PART.
3. All claims asserted by Plaintiffs Archbishop Edwin F. O'Brien and St. Brigid's Roman Catholic Congregation are DISMISSED due to lack of standing.

4. Plaintiff Greater Baltimore Center for Pregnancy Concerns is GRANTED summary judgment on Count I (Free Speech).
5. Plaintiffs' Freedom of Assembly claim and all claims in Counts II, III, and IV are DISMISSED WITHOUT PREJUDICE.
6. A Permanent Injunction and Judgment shall be entered by separate Orders.

SO ORDERED, on Friday, January 28, 2011.

/s/
Marvin J. Garbis
United States District Judge

SUBTITLE 5

LIMITED-SERVICE PREGNANCY CENTERS

§ 3-501. "Limited-service pregnancy center" defined.

In this subtitle, "limited-service pregnancy center" means 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.

(Ord. 09-252.)

§ 3-502. Disclaimer required.

(a) *In general.*

A limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birthcontrol services.

(b) *How given.*

The disclaimer required by this section must be given through 1 or more signs that are:

(1) written in English and Spanish;

(2) easily readable; and

(3) conspicuously posted in the center's waiting room or other area where individuals await service.

(Ord. 09-252.)

§ 3-503. Violation notice.

If the Health Commissioner learns that a pregnancy center is in violation of this subtitle, the Commissioner shall issue a written notice ordering the center to correct the violation within 10 days of the notice or within any longer period that the Commissioner specifies in the notice.

(Ord. 09-252.)

§§ 3-504 to 3-505. *{Reserved}*

§ 3-506. Enforcement by citation.

(a) *In general.*

The failure to comply with an order issued under § 3-503 {"Violation notice"} of this subtitle may be enforced by issuance of:

(1) an environmental citation under City Code Article 1, Subtitle 40 {"Environmental Control Board"}; or

(2) a civil citation under City Code Article 1, Subtitle 41 {"Civil Citations"}.

(b) *Process not exclusive.*

The issuance of a citation to enforce this subtitle does not preclude pursuing any other civil or criminal remedy or enforcement action authorized by law.

(Ord. 09-252.)

12/31/09

I. FINAL REGULATION

A. Definitions

i. "Limited-service pregnancy center" means any person:

a) Whose primary purpose is to provide pregnancy-related services; and

b) Who

(1) For a fee or as a free service, provides information .about pregnancy-related services; but

(2) Does not provide or refer for:

(a) Abortions; or

(b) Nondirective and comprehensive birth-control services.

ii. "Nondirective and comprehensive birth-control services" means birth-control services which only a licensed healthcare professional may prescribe or provide.

B. Disclaimer Sign Posting.

i. Except as provided in subsection ii. below, each limited-service pregnancy center shall post in its waiting room or other area where individuals await service:

a) one or more disclaimer signs

b) in English and Spanish

c) indicating that the center does not provide or i:efer for abortions or nondirective and comprehensive birth-control services.

ii. If the center provides or refers for some birth-control services, it may indicate on the disclaimer sign what birth-control services it does provide and/or refer for.

iii. A center may indicate on the disclaimer sign that the sign is required by Baltimore City ordinance.

C. Ability to Read Disclaimer Sign

i. An individual with normal vision should be able to read at least one disclaimer sign from any location in the waiting area.

ii. The disclaimer sign need not use any particular words but its content shall be limited to statements of fact as provided in Section B. above.

D. Enforcement

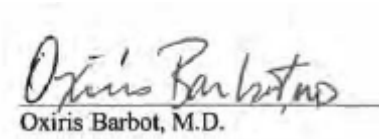
i. If the Health Commissioner learns that a center is in violation of this subtitle, the Commissioner shall issue a written notice ordering the center to correct the violation within 10 days of the notice or within any longer period that the Commissioner specifies in the notice.

ii. If the center fails to comply with the order, then the Commissioner may issue:

a) one or more environmental citations under City Code Article I> Subtitle 40; or

b) one or more civil citations under City Code Article 1, Subtitle 41.

Approved:



Health Commissioner
Baltimore City Health Department

Date Adopted: September 27, 2010
Date Effective: September 27, 2010

Carol Clews
carol@centerforpregnancyconcerns.org

(no subject)
3 messages

Wed, Jan 5, 2011 at 10:00 AM

Alice Steck <dastec@verizon.net>

To: Carol@centerforpregnancyconcems.org

Happy New Year Carol-

Just a quick overview of the helpline phone stats for December of 2010. Unfortunately, we did not see an increase in calls, however there was an increase in abortion minded callers. We had a total of 15 abortion minded calls throughout the month of December which is relatively higher considering that the overall calls were lower. For example, in November we had 709 calls; 18 of those calls were from abortion minded callers. In December we had 362 calls; 15 of those call were from abortion minded callers.

I spoke with several of these women myself. They were under the impression from the bus advertisements that we assisted in paying for abortions. One client stated that she had lost her health insurance and wanted us to assist with the cost of the abortion. Another did not seem to understand, "abortion alternatives" and wanted to schedule an abortion.

Whatever the premise for the call, I spoke with them and gave each abortion risks and procedures. Unfortunately the calls I received came in during the Christmas break so I was not able to schedule an appointment for them on the spot I did encourage

them to call back and schedule an appointment affording them an opportunity to gather as much information about the alternatives, (adoption and abortion risks and procedures) fetal development and other resources before they made their choice. I did give them the information over the phone and they did seem to listen!

I believe that we do not measure success based on numbers, but on the souls that were ministered to whether it be 100 or 1. God can do great and marvelous things. We trust Him for the work that he is able to do in the hearts of the women that all of the Helpliners spoke to in truth and love.

Blessings and love in the New Year-

Alice Jude 1:2

Carol Clews<carol@centerforpregnancyconcems.org>

To: Alice Steck <dastec@verizon.net>

Wed, Jan 2011 at 3:04 PM

http://mail.google.com/a/centerforpregnancyconcerns.org/?ui=2&ik=54a80efaf8&view=pt&... 1/6/2011

Alice - Thanks for your insight and overview of the situation. I'm passing it along to Dr. Grace Morrison. Incidentally, Vitae has been granted a 2-month extension on the ads. They feel it would be prudent to have a meeting to discuss the campaign, responses to advertisement-induced callers, etc. To that end, they have scheduled a lunch meeting at Bahama Breeze on Monday, January 10. (don't know time yet; will tomorrow). It would be really good if you could be there. Let me know. Thanks, Carol

[Quoted text hidden]

--

Carol A. Clews,
Executive Director
Center for Pregnancy Concerns
410-243-6699

Carol Clews Wed, Jan 5, 2011 at 3:06 PM

<carol@centerforpregnancyconcerns.org>

To: gracemmorrison@aol.com

Grace ~ what follows are some comments from Alice Steck (helpline coordinator) on ad responses. BTW, I've asked her to join us on Monday ~ am waiting to see if she's available. Regards, Carol

Carol Clews
carol@centerforpregnancyconcerns.org

Gmail

Vitae Ads in Bo.
1 message

Wed, Dec 22, 2010 at 9:57 AM

Carol Clews carol@centerforpregnancyconcerns.org
To: gracemmorrison@aol.com

Happy New Year Carol-

Grace - Good morning! Just wanted to let you & Tom know that we have some people checking the buses. As of right now, one individual did see an ad on the #3 and #19. That is alt I have to report right now. I suspect that I will hear more as the week goes on. Emails went out to a LOT of people, some of whom ride the city buses regularly. Will keep you posted. Also, there still has been no increase in# of Helpline calls. One woman did tell Alice Steck that she saw an ad, tho. (she also said she didn't understand "what we do") I told Alice that those ads are purposely vague, of course. Merry Christmas! Carol

Carol A. Clews,
Executive Director
Center for Pregnancy Concerns
410-243-6699