No. 17-1369

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit correctly held that Baltimore City Ordinance 09-252, which compels pregnancy centers that do not provide or refer for abortions to post a government-composed message about abortion in their waiting rooms, violated the First Amendment as applied to Respondent the Greater Baltimore Center for Pregnancy Concerns.

CORPORATE DISCLOSURE STATEMENT

Respondent the Greater Baltimore Center for Pregnancy Concerns, Inc., is not a publicly held corporation, does not issue stock, and does not have a parent corporation.

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INTRODUCTION

Nine years ago, Baltimore made the ill-informed decision to prioritize forcing a pregnancy center that operates rent-free space on the property of a Catholic parish church to post large signs informing pregnant women that they will not be able to procure an abortion there. And Baltimore has not stopped fighting the Greater Baltimore Center for Pregnancy Concerns since, appealing twice to the Fourth Circuit, once en banc, and now to this Court. Long after Montgomery County gave up defending its companion ordinance, see *Centro Tepeyac* v. *Montgomery County*, 5 F. Supp. 3d 745 (D. Md. 2014), Baltimore has pressed on.

But persistence in a bad cause is not usually a virtue, and this case is no exception. None of Baltimore's grab bag of arguments justify even holding this petition pending the decision in *National Institute of Family and Life Advocates* v. *Becerra*, No. 16-1140, much less granting it afterward.

Baltimore's main argument is that its petition should be held pending the outcome of *NIFLA*. The false premise of this argument is that how *NIFLA* is decided will affect how Baltimore's petition ought to be decided. In fact, whether the decision in *NIFLA* is for Petitioners or Respondents, the outcome should be the same here. If NIFLA wins, then certiorari here should of course be denied. But even if California wins, certiorari should still be denied, because Baltimore's Ordinance cannot stand even under California's view of the law.

This case is also a poor vehicle for addressing any of the issues raised in the various pregnancy-center

cases because its resolution below turned on the particular factual record Baltimore created, which was entirely insufficient to justify the speech impact of the Ordinance. The case survived this long only because, in 2013, the en banc Fourth Circuit accepted Baltimore's argument that its claims turned on detailed, case-specific factual inquiries. As Judge Wilkinson pointed out five years later, Baltimore eventually did assemble a 1,295 page factual record—but still lost, because that record contained no evidence of even a single instance of a pregnant woman thinking that going to a pregnancy center on the property of a Catholic parish church would enable her to procure an abortion. Pet. App. 19a. The fact-bound nature of Baltimore's failure makes this a poor vehicle.

Baltimore gamely tries to turn one of its petition's chief vices into a virtue, arguing that despite the Fourth Circuit's express reliance on a North Dakota Supreme Court commercial-speech case, and the Ninth Circuit's express reliance on the Fourth Circuit's discussion, there is nevertheless a split of authority among those courts. But there can be no split when all three courts rely on the same legal standard. The reason for the different outcome here is not differing legal standards, but the fact that Baltimore's Ordinance is so egregious that it fails even Baltimore's overbroad variant of commercial-speech doctrine.

Baltimore's short closing complaint about the Fourth Circuit's viewpoint-discrimination holding is both beside the point and wrong on the law. It is beside the point because strict scrutiny would apply regardless. It is wrong on the law because singling out a particular subcategory of speech for disfavor—here,

only speech about pregnancy options *not* referring for abortion—is quintessential viewpoint discrimination.

There is one more thing. Holding this case or issuing a GVR order would work an injustice towards the Center, which has had to fight Baltimore for almost a decade for its right to speak as it sees fit. Five years ago, Judge Wilkinson rightly observed that keeping this case alive would "suffocate" speech rights and impose a "high price" on the Center for trying to defend them. Pet. App. 139a. The Center has persevered through those obstacles, and Baltimore's case remains as baseless as ever. Allowing Baltimore to keep the case alive even longer would only extend the unfair and high price the Center has been forced to pay for no good reason—a result especially intolerable given that the Fourth Circuit expressly indicated that the Ordinance must fail on independent bases from those being considered in *NIFLA*.

The Court should therefore deny the petition forthwith, without holding it for *NIFLA*.

STATEMENT OF THE CASE

1. The Greater Baltimore Center for Pregnancy Concerns is a nonprofit religious ministry dedicated to providing emotional and practical support to pregnant women in need. Pet. App. 7a. Its work is founded on its religious beliefs: the Center views its mission as "presenting the gospel of our Lord to women with crisis pregnancies." C.A. App. 360; Pet. App. 17a. In support of that mission, the Center provides women with a range of services—all free of charge—including material assistance (diapers, baby and maternal clothing and the like), pregnancy testing, counseling, sonograms, and information about absti-

nence and natural family planning. Pet. App. 7a. Because of its pro-life religious beliefs, the Center does not provide or refer for abortion or abortifacients. *Ibid.*

The Center's Baltimore location operates in rent-free space provided by, and on the premises of, a 144-year-old Roman Catholic parish, St. Ann's Catholic Church. Pet. App. 7a. Much of its work with women consists in counseling them within the space's waiting room. *Id.* 38a. In the waiting room, the Center's staff and volunteer counselors speak with women about their pregnancies, assist them in navigating the religious and moral dimensions of the decisions required by an unplanned pregnancy, and often pray with them. The Center thus "make[s] the waiting room as welcoming and inviting as possible," adorning it with, among other things, copies of the Bible, children's books and toys, and a statuette of Jesus Christ. *Ibid.*

Also in the waiting room the Center displays a document called its "Commitment of Care." Pet. App. 38a. The Commitment of Care outlines the Center's commitments to nondiscrimination and to providing honest, confidential, and accurate pregnancy information in a loving and supportive environment. C.A. App. 362. The Commitment of Care also "clearly state[s]" (Pet. App. 7a) the Center's position on abortion and certain contraceptives:

> We do not offer, recommend, or refer for abortions or abortifacients (birth control), but we are committed to offering accurate information about abortion procedures and risks.

Id. 39a. This same information appears in the Center's welcome pamphlet, which is provided to women who come to the Center for help. C.A. App. 801. And Center staff are also trained to explain it to any visitor who asks or is confused about the scope of the Center's services. *Id.* 366.

2. In 2009, Baltimore's Mayor signed into law City Ordinance 09-252. Balt. City Health Code §§ 3-501 to 3-506; see also Pet. App. 270a-272a. The Ordinance requires "Limited-Service Pregnancy Center[s]" ("LSPCs"), on pain of civil fines, to post a disclaimer in their "waiting room[s] * * * substantially to the effect that the center does not provide or make referral for abortion or birth-control services." Pet. App. 270a-271a; see also *id.* 8a. The disclaimer must be "conspicuously posted" and "easily readable" in English and Spanish. *Id.* 270a-271a. An LSPC, in turn, is defined as any person:

> (1) whose primary purpose is to provide pregnancy-related services; and
>
> (2) who:
>
> (i) for a fee or as a free service, provides information about pregnancy-related services; but
>
> (ii) does not provide or refer for:
>
> (A) abortions; or
>
> (B) nondirective and comprehensive birth-control services.

Id. 270a.

Because of the LSPC definition, the Ordinance regulates the speech only of persons who speak about

certain topics—"pregnancy-related services"—and, within that category, only those speakers who speak about pregnancy-related services without "provid[ing] or refer[ring] for abortions." Besides the Center, there is only one other such entity in Baltimore: Baltimore Pregnancy Center. Pet. App. 32a. Baltimore Pregnancy Center, like the Center, is an openly pro-life, mission-oriented pregnancy center that provides all its services for free. *Ibid.*

3. The Center did not post the disclaimer. The disclaimer would undermine the message the Center wishes to convey to the women that come to it for help, and "compel [it] to convey" instead a message "antithetical to the very moral, religious, and ideological reasons the Center exists." Pet. App. 6a-7a, 16a-17a. Through its Commitment of Care, welcome pamphlet, and trained staff, the Center already "clearly state[s]" to women that it does not provide or refer for abortions—but it does so "on its own terms," in the context of expressing its loving commitment to providing them with the very support they need in order to be in a position to choose to continue their pregnancies. *Id.* 7a, 17a. The disclaimer, by contrast, is a stark, uncontextualized statement about abortion, one that portrays it as just "one among a menu of morally equivalent choices," *id.* 16a-17a; and would ensure that all conversations between Center counselors and the women they serve "begin[] with the subject of abortion and a government warning." *Id.* 39a.

The Center also objected to the disclaimer because it believes that the disclaimer would force it to deliver a message that is not true. In the disclaimer, the Center would have to convey that it "does not provide

or make referral for * * * birth control services." Pet. App. 270a. But the Center *does* provide birth control services, in the form of abstinence education and information about natural family planning.

4. The Center filed this suit in March 2010, alleging, *inter alia*, that the Ordinance unconstitutionally compelled its speech in violation of the First Amendment. The district court agreed and granted the Center summary judgment.

Although the Center is a religiously motivated nonprofit that provides all of its services for free, Baltimore argued before the district court that the Ordinance regulated only the Center's "commercial speech" and thus should be held to a lesser standard of review. Pet. App. 257a-261a. But the district court rejected that argument and subjected the Ordinance to strict scrutiny. Baltimore's proposed definition of commercial speech, the district court explained, was too broad. Baltimore argued that speech offering free services is "commercial" provided the "services * * * have value in the commercial marketplace." *Id.* 259a. But that 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." *Ibid.* Applying strict scrutiny, the district court then held that the Ordinance failed that test. *Id.* 264a-268a.

5. A Fourth Circuit panel affirmed. Before the panel, the "City d[id] not take issue with" the principle that compelled-speech laws like the Ordinance are normally subject to strict scrutiny. Pet. App.

192a. Instead, it reprised its argument that the speech mandated by the Ordinance was "*commercial* speech and therefore * * * subject to [a] lower standard of judicial scrutiny." *Ibid.* As in the district court, Baltimore argued that the Ordinance regulated only commercial speech because, even though the Center gives away all its services for free, the services are "commercially valuable," rendering its "offers to provide" them to "consumer[s]" commercial speech. *Id.* 192a-193a. But the panel rejected this argument, holding that the fact that the Center provided only free services, combined with the fact that the record gave "no indication that the [Center] is motivated by any economic interest," was "dispositive." *Id.* 194a.

The panel then held that the Ordinance failed strict scrutiny, because Baltimore had "not demonstrated a *compelling* government interest rather than simply its disfavor with a particular speaker's speech." *Id.* 205a.

6. Baltimore sought en banc review. At the en banc stage, Baltimore's lead argument was not that the district court and panel were wrong on the law, but that the case was fact-specific and those courts had decided it based on incomplete facts. According to Baltimore, the district court and panel had "ignore[d] the rules of civil procedure," "rushing to summary judgment" while "denying [it] essential discovery." C.A. No. 11-1111, Baltimore Pet. for Reh'g En Banc 5-7 (internal quotation marks omitted). The case turned on certain "key factual issues," Baltimore explained—such as the Center's specific "advertising practices" and "the economics of the provision of services at the centers"—on which it needed "the opportunity to conduct * * * discovery" and "fully develop

expert testimony." C.A. No. 11-1111, Baltimore En Banc Br. 45-46 & n.17.

The Fourth Circuit granted en banc review, vacated the district court's decision, and remanded the case. The en banc court agreed with Baltimore that the district court had too "hast[il]y" granted summary judgment before Baltimore had time for "essential discovery." Pet. App. 123a, 132a. Although the district court had faulted Baltimore's evidentiary showing, the en banc court said that the district court had not permitted Baltimore to develop "an adequate record." *Id.* 109a. The en banc court thus remanded for discovery, without deciding "the ultimate merits of" the case. *Id.* 108a.

The en banc court said that more discovery was needed in particular on the commercial-speech question. According to the en banc court, it was "not dispositive of the commercial speech issue" that the Center does not sell any of its services. *Id.* 121a. Instead, the en banc court said that the Center's speech could under some circumstances be regulated as "commercial" if it constituted "advertisements," even for free services, "placed in a commercial context" with "an economic motive." *Id.* 120-122a. The en banc court said that this was a "fact-driven" inquiry not conducive to any "bright lines." *Id.* 117a (internal quotation marks omitted). It thus remanded for further discovery into whether, despite its "outward[] appear[ance]" of being religiously motivated, the Center in fact "possesses economic interests apart from its ideological motivations"—a "complex factual question[]" for which discovery was "especially important." *Id.* 119-120a & n.9 (internal quotation marks omitted).

The en banc court also ordered more discovery on the fit between the Ordinance and Baltimore's alleged purpose, saying that Baltimore "must be accorded the opportunity to develop 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.* 126a.

The parties thus returned to the district court and conducted the "extensive discovery" the en banc court had called for. *Id.* 28a. The parties then filed cross-motions for summary judgment, both "insist[ing] that there are no disputes of material fact in th[e] case." *Id.* 31a n.8. The district court again held the Ordinance unconstitutional as applied to the Center. Pet. App. 29a.

7. In an opinion carefully surveying the evidence and applying the earlier en banc decision, the Fourth Circuit affirmed.

As in the earlier panel decision, it was again largely undisputed that the Ordinance was a content-based speech regulation, because it compelled LSPCs to engage in speech that they otherwise would not. Thus, the primary question was whether the Ordinance regulated only commercial speech.

The panel held that it did not. Faithful to the en banc court's holding that a religious pregnancy center's advertisements for free-but-commercially-valuable services might nonetheless be commercial speech in particular factual circumstances, the panel did not end the inquiry after determining that the Center did not "propose[] any transactions" or "collect[] * * * remuneration of any kind." Pet. App. 12a.

Instead, the panel explained that because the disclaimer "would appear" "in the waiting room," the Ordinance—unlike the law at issue in the North Dakota Supreme Court's decision in *Fargo Women's Health Organization, Inc.* v. *Larson*, 381 N.W.2d 176 (1986)—did not regulate *advertisements* at all. *Id.* 12a-13a. Further, the panel held that the record, developed through "extensive discovery," "g[ave] no indication that the Center harbors an 'economic motivation.'" *Id.* 13a (quoting en banc decision). Instead, the record showed that the Center's "clearest motivation [wa]s not economic but moral, philosophical, and religious." *Ibid.* Thus, without "foreclos[ing] the possibility that another facility in different circumstances could engage in commercial speech," *id.* 13a-14a, the court rejected Baltimore's commercial-speech argument.

Next, the panel considered an argument Baltimore had not raised in its previous appeal: that the Ordinance was subject to lesser scrutiny because it regulated only "professional," rather than fully protected, speech. Pet. App. 14a. The panel explained that in the Fourth Circuit, "[b]ecause the state has a strong interest in supervising the ethics and competence of those professions to which it lends its imprimatur," regulations of professional speech are subject to a "sliding-scale review." *Id.* 14a-15a. But, the panel reasoned, the "professional speech" doctrine is generally limited to "traditional occupations, such as medicine or accounting, which are subject to comprehensive state licensing, accreditation, or disciplinary schemes," or, "[m]ore generally," any speaker "providing personalized advice in a private setting to a paying client." *Ibid.* The Center, meanwhile, "fit[] none of

these characteristics of a professional speaker." *Id.* 15a. Maryland had no comprehensive licensing and regulatory scheme for pregnancy centers, so operating a pregnancy center was not a licensed profession. *Id.* 15a n.2. And the Center did not give advice in "a paying" setting because "none of [the Center's] clients are 'paying.'" *Id.* 15a-16a.

Finally, the panel applied strict scrutiny to the Ordinance, finding it not "'narrowly tailored' to achieve a 'weighty' government interest." Pet. App. 18a-22a (quoting *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988)). It reached this holding on numerous, fact-specific grounds.

First, the panel thoroughly examined the record and explained that Baltimore had failed to carry its burden of showing that a weighty government interest was at stake. Baltimore's "stated goals in enacting the [O]rdinance"—"to address allegedly deceptive advertising and to prevent health risks that can accompany delays in seeking to end a pregnancy"—were important. Pet. App. 18a-19a. But Baltimore had shown no "solid evidence of such dangers." *Id.* 19a. Indeed, "[a]fter seven years of litigation and a 1,295-page record before us, the City d[id] not identify a single example of a woman who entered the * * * Center's waiting room under the misimpression that she could obtain an abortion there." *Ibid.*

Second, the panel found "serious questions * * * as to narrow tailoring." Pet. App. 20a. First, the panel explained, "the City could * * * pursue its goals through less restrictive means," such as by using its own voice to warn women about allegedly deceptive pregnancy centers or by enforcing preexisting "mis-

leading advertising" laws. *Ibid.* Moreover, and "more fundamentally," the panel found "only a loose fit between the compelled disclosure at issue and the purported ills identified by the government," because although Baltimore asserted that it sought "to combat deceptive advertising and consequent delays in abortion services," the Ordinance "applies to pregnancy centers without regard to whether their advertising is misleading, or indeed whether they advertise at all." *Id.* 21a.

Third, although the Ninth Circuit in *NIFLA* had upheld a disclosure requirement compelling unlicensed pregnancy centers to disclose their unlicensed status, the panel explained that the disclosure requirement here and the unlicensed disclosure requirement in *NIFLA* were distinct. The unlicensed disclosure in *NIFLA* did not require centers to mention abortion, while the disclaimer here required the Center to convey the message that abortion is just "one among a menu of morally equivalent choices"—effectively requiring it "to renounce and forswear what [it] ha[s] come as a matter of deepest conviction to believe." Pet. App. 16a-22a & n.3. Between *NIFLA* and this case, then, "the burden on the speaker" was heavier here, further supporting that Baltimore had not shown the Ordinance to be narrowly tailored to its alleged interest. *Id.* 22a n.3.

Given this, there were, "in short, too many problems with the City's case." Pet. App. 21a. Because Baltimore had failed to submit evidence aimed at "proving the inefficacy of less restrictive alternatives, providing concrete evidence of deception, or more precisely targeting its regulation," the fact-intensive inquiry requested by Baltimore and required by the

en banc court yielded the same result as the earlier panel decision: summary judgment for the Center. *Id.* 21a-22a.

REASONS FOR DENYING THE PETITION

I. There is no need to hold this petition pending *NIFLA* because the result should stand regardless of how *NIFLA* is decided.

Baltimore's primary argument is that the issues in this case overlap with those in *NIFLA* v. *Becerra*, No. 16-1140, such that the Court should hold this petition pending its resolution of that case. But there is no need to hold the petition: No matter which side the Court holds for in *NIFLA*, it should not change the result here. If the Court rules for NIFLA, then there would be no need to reconsider the result here. And if the Court rules for California, the result still should not change, because Baltimore's arguments on each point of overlap with *NIFLA* are significantly more extreme than California's arguments there.

The Court should therefore deny the petition outright.

1. ***Viewpoint Discrimination.*** Baltimore points out that *NIFLA*, like this case, involves a claim that a pregnancy-center speech regulation discriminates on the basis of viewpoint because it applies only to pro-life centers. Pet. 18; see Br. for Pet'rs, *NIFLA* v. *Becerra*, No. 16-1140 (Mar. 20, 2017) ("NIFLA Br."), at 31-39. But the viewpoint discrimination in this case is much more obvious. While in this case, the Ordinance by its terms applies only to pregnancy centers that do not provide or refer for abortion, the text of the law at issue in *NIFLA* (the California Re-

productive FACT Act) does not facially turn on whether or not a center provides or refers for abortions. Instead, the law applies to facilities "whose primary purpose is providing family planning or pregnancy-related services" and that satisfy certain other statutorily listed criteria. NIFLA Br. at 9. Thus, the *NIFLA* plaintiffs' argument is not that the FACT Act is by its terms limited to pregnancy centers that do not provide or refer for abortions, but that it is "gerrymandered" to apply only to such centers by way of certain statutory carveouts. *Id.* at 31-37; Oral Arg. Tr., *NIFLA*, at 13:25-15:1; see also *id.* at 37:22-38:7 (Kagan, J.) ("[I]f [the law] has been gerrymandered, that's a serious issue."). The Ninth Circuit rejected this argument, reasoning that the carveouts had abortion-neutral justifications. *NIFLA* v. *Harris*, 839 F.3d 823, 835 (9th Cir. 2016) ("the Act applies to all * * * facilities," and its "exceptions * * * do not disfavor any particular speakers").

This case, by contrast, does not present the question whether the Ordinance is "gerrymandered" to apply only to pregnancy centers that do not provide or refer for abortions. Instead, the Ordinance does that *by its express terms*. Again, the Ordinance's disclaimer requirement applies only to LSPCs, and LSPCs are defined as pregnancy centers that "do[] not provide or refer for abortions" or "comprehensive birth-control services." Pet. App. 270a. Thus, if the Court agrees with NIFLA that the *NIFLA* law was unconstitutionally gerrymandered to apply only to centers that do not provide or refer for abortions, the same result would inexorably follow here, where the law takes the more direct route and simply says as much. But even if the Court were to affirm the Ninth

Circuit's holding that the FACT Act was not a viewpoint-based gerrymander, that would not disturb the Fourth Circuit's conclusion that the Ordinance was "aimed directly at those pregnancy clinics that do not provide or refer for abortions" and thus is viewpoint-discriminatory. Pet. App. 20a.

2. ***Professional Speech.*** Baltimore also argues that this Court's resolution of *NIFLA* "will directly impact" Baltimore's argument that the Ordinance should be subjected to a lower level of scrutiny because it regulates only "professional speech." Pet. 20 n.3. But again, Baltimore's position here is so much more extreme than California's position in *NIFLA* that even an affirmance in *NIFLA* would be unlikely to affect the proper outcome of this case.

This Court has "never formally endorsed" a doctrine that "professional speech" is subject to lower tiers of constitutional scrutiny. *Serafine* v. *Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). But in concurrences, Members of this Court have, in the course of deciding the constitutionality of professional-licensing laws, reasoned that "[t]he 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); see also *Thomas* v. *Collins*, 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring). From these scattered materials, as well as "a single paragraph in the plurality opinion of three Justices in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 884 (1992)," *Wollschlaeger* v. *Governor of Fla.*, 848 F.3d 1293, 1311 (11th Cir. 2017) (en banc), some lower courts have carved out a general First Amendment principle that "a licensed professional does not enjoy

the full protection of the First Amendment when speaking as part of the practice of her profession." *King* v. *Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); see also, *e.g.*, *Stuart* v. *Camnitz*, 774 F.3d 238, 247-48 (4th Cir. 2014).

In *NIFLA*, the Ninth Circuit applied this principle to uphold under intermediate scrutiny the portion of the FACT Act requiring disclosures from licensed clinics, reasoning that because those clinics are licensed professionals "engag[ing] in speech that occurs squarely within the confines of their professional practice," all of the speech "within their walls related to their professional services is professional speech." *NIFLA*, 839 F.3d at 839-40. At oral argument before this Court in *NIFLA*, however, no Justice assumed the professional-speech doctrine's applicability, and one expressly questioned its existence. Oral Arg. Tr., *NIFLA*, at 34:9-35:12 (Alito, J.) ("trouble[d]" by "the government's request that [this Court] recognize a new category of speech called professional speech, which is subject to a -- a lesser standard of review"). But even if this Court were to affirm the *NIFLA* court's professional-speech holding, that wouldn't change the result here.

That is because this case is missing a key ingredient for application of the professional-speech doctrine that is present in *NIFLA*: a licensed profession. Again, the putative rationale for the doctrine flows from the government's ability to license professions; courts have reasoned that when clients place their trust in licensed professionals, they "by extension" place trust "in the State that licenses them." *King*, 767 F.3d at 232; *Accountant's Soc'y of Va.* v. *Bowman*, 860 F.2d 602, 605 (4th Cir. 1988) (when a per-

son holds himself out as having a professional license, "members of the public" may "believe [he] has the state's imprimatur"). But this rationale evaporates when the speaker to be regulated is not a licensed professional. Thus, in *NIFLA*, the Ninth Circuit applied the professional-speech doctrine *only* to the portion of the FACT Act that applied to licensed clinics. 839 F.3d at 838-42.

Here, it is undisputed that neither Maryland nor Baltimore "require[s pregnancy centers] to be licensed or otherwise subject[s them] to a state regulatory scheme." Pet. App. 15a. Thus, the government "interest in supervising the ethics and competence of those professions to which it lends its imprimatur" is nonexistent. *Id.* 14a. The Fourth Circuit was therefore correct to distinguish *NIFLA*'s professional-speech holding on the ground that it applied only to licensed centers. *Id.* 15a n.2. And even if this Court affirmed that holding in *NIFLA*, it wouldn't mean that the professional-speech doctrine can apply to the speech of speakers who are *not* licensed professionals.[1]

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[1] Baltimore's professional-speech argument was also waived below. Baltimore argues that the Center's speech is professional because it has a medical director (one who "is 'very rarely' on site and does not meet directly with clients," Pet. App. 15a). Pet. 14. But in the district court, Baltimore expressly denied that the Ordinance applied to "licensed medical professionals," acknowledging that in fact Baltimore "is preempted by state law from regulating licensed professionals." D. Md. No. 1:10-760, Doc. 22 at 2.

3. ***Commercial Speech.*** Finally, Baltimore notes that in *NIFLA*, as here, the government argues that its compelled-speech requirements should be subject to lower-tier constitutional scrutiny because they apply only to "commercial speech." Pet. 19. But again, as with the first two points of overlap between this case and *NIFLA*, Baltimore's arguments go beyond even what California asks this Court to hold in *NIFLA*.

In *NIFLA*, the compelled-speech requirements for unlicensed centers apply to their advertising; centers must include the required disclaimer "in any print and digital advertising materials" they generate. NIFLA Br. at 12. The commercial-speech question there, then, is whether a pregnancy center's advertisements for its free services constitute commercial speech.[2] NIFLA argues that they do not, because an

[2] The Ninth Circuit in *NIFLA* rejected California's commercial-speech argument on the ground that the law there "primarily regulates the speech that occurs within the clinic, and thus is not commercial speech." 839 F.3d at 834 n.5. Before this Court, California appears to rely on the commercial-speech doctrine only as to the portion of the law applying to unlicensed centers, which regulates not just those centers' intra-clinic speech but also their advertising. Br. for State Resp'ts, *NIFLA* v. *Becerra*, No. 16-1140, at 19-27 (Feb. 20, 2018) (invoking *Zauderer* v. *Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985)). California attempts to defend the portion of the law applying to licensed centers—which regulates only intra-clinic speech—as a regulation of "professional speech." *Id.* at 31-37.

advertisement to provide free services is not a proposal of a commercial transaction, as required by this Court's commercial-speech precedents. NIFLA Br. at 40-41; see also, *e.g.*, *Harris* v. *Quinn*, 134 S. Ct. 2618, 2639 (2014) ("Our precedents define commercial speech as speech that does no more than propose a commercial transaction * * * ." (internal quotation marks omitted)). California argues that they do, on the theory that an offer to provide free services can be commercial speech if the services, although actually provided for free, are "commercially valuable" in the "marketplace." Appellees' Br. at 34-38, *NIFLA* v. *Harris*, 839 F.3d 823, No. 16-55249 (9th Cir. Apr. 14, 2016); see also Br. for State Resp'ts, *NIFLA* v. *Becerra*, No. 16-1140, at 19-27 (Feb. 20, 2018) (commercial-speech caselaw applies to "one who offers services to the public").

Neither way of resolving the *NIFLA* dispute would disturb the Fourth Circuit's decision here. First, the Center, like the *NIFLA* centers, provides all its services for free and in support of its religious and moral mission. Thus, if NIFLA is right and this Court's precedents mean what they say in "defin[ing] commercial speech as speech that does no more than propose a commercial transaction," then neither NIFLA's nor the Center's speech is commercial. *Harris*, 134 S. Ct. at 2639 (internal quotation marks omitted).

But even if the standard California has proposed in *NIFLA* were correct, that *still* would not change the result below, because the Ordinance, unlike the FACT Act, does not regulate pregnancy centers' advertisements. Instead, the Ordinance requires the Center to post a government-mandated disclaimer *in*

its waiting room. Thus, as the Fourth Circuit held, the speech regulated by the Ordinance is not "advertising *qua* advertising" but instead the Center's conversations with women in its waiting room, during which it "proposes [no] transactions" at all. Pet. App. 12a-13a. In *NIFLA*, the Ninth Circuit rejected California's commercial-speech theory because even though the FACT Act applies to unlicensed centers' advertising, it "primarily regulates the speech that occurs within the clinic," 839 F.3d at 834 n.5; here, the Ordinance *exclusively* regulates intra-clinic speech. So even if this Court were to break with its precedent and hold that an advertisement to provide free but "commercially valuable" services could under some circumstances be regulated as commercial speech, that would not change the result here.

And indeed, we *know* that it wouldn't change the result, because California's commercial-speech theory from *NIFLA* is in fact the one the Fourth Circuit applied. Again, the en banc Fourth Circuit held that "advertisements" that "are placed in a commercial context and are directed at the providing of services," can sometimes be commercial speech, even if the services are provided for free, at least so long as the speaker "possesses economic interests apart from its ideological motivations." Pet. App. 117a-122a (quoting *Larson*, 381 N.W.2d at 180-81). This is precisely the same standard that California has urged in *NIFLA*. Indeed, in the Ninth Circuit, California relied on the en banc decision here to support its argument. See Appellees' Br. at 36-37, *NIFLA* v. *Harris*, 839 F.3d 823, No. 16-55249 (9th Cir. Apr. 14, 2016) ("As the Fourth Circuit has reasoned, * * * ." (citing en banc decision's commercial-speech holding)).

Here, Baltimore lost not because the Fourth Circuit held that an offer of free services can never be commercial speech but because it found, after scrutinizing a voluminous factual record, that the Ordinance did not even regulate the Center's advertising, and that in any event, the "record," "after extensive discovery," "g[ave] no indication that the Center harbors an 'economic motivation.'" Pet. App. 12a-13a (citation omitted). That fact-intensive application of the very standard California urges in *NIFLA* will not be affected by the *NIFLA* result.[3]

II. The commercial-speech ruling does not warrant this Court's review.

Beyond asking for a hold pending *NIFLA*, Baltimore asserts that this case warrants plenary review on the commercial-speech issue because the Ninth Circuit in *NIFLA* "addressed commercial speech only in a brief footnote." Pet. 3, 19. But there would be little use in this Court granting certiorari to resolve that question here, because Baltimore's factual showing below was so poor that even a holding in its favor on the definition of commercial speech wouldn't change the result.

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[3] The district court also held that even if the Ordinance regulated some commercial speech, that speech was "inextricably intertwined" with the Center's fully protected speech. Pet. App. 56a-58a (citing *Riley*, 487 U.S. at 796). That holding, which the Fourth Circuit did not have to reach, would be an alternative ground for affirmance here.

In any event, the commercial-speech split Baltimore purports to identify among the Fourth Circuit, North Dakota Supreme Court, and Ninth Circuit does not exist. These courts have expressly agreed with one another on the test for commercial speech. The Fourth Circuit's decision here was merely a "fact-driven" application of that agreed-upon, fact-intensive standard. Pet. App. 117a. Baltimore tries to twist an unfavorable factual ruling that the Center's relevant speech is noncommercial into a split on the applicable legal standard. But particularly because the result reached under that standard here is consistent with the one that would be reached under the correct commercial-speech standard articulated by this Court—that commercial speech is speech proposing a commercial transaction—there is no reason to disturb the lower court's decision.

A. Baltimore's factual showing was woefully inadequate.

Review of the commercial-speech issue is unwarranted because there were so "many problems with the City's" factual record that even a holding that the Ordinance regulated commercial speech wouldn't change the result. Pet. App. 21a. Even if the Ordinance regulated commercial speech, it would still be subject to *some* level of constitutional scrutiny. See, *e.g.*, *Sorrell* v. *IMS Health*, 564 U.S. 552, 565-66 (2011) ("content-based burden[s]" on expression trigger "heightened judicial scrutiny," and "[c]ommercial speech is no exception"). And here, the City's factual showing was so woefully inadequate that the Ordinance would fail any level of review.

First, Baltimore utterly failed to show that the problem it purports to be solving through the Ordinance is anything other than hypothetical. Baltimore's asserted interest is in "address[ing] allegedly deceptive advertising" and "prevent[ing]" LSPCs like the Center from delaying women's access to abortion and contraception until the procedure is too expensive or no longer available. Pet. App. 18a-19a. Yet, "after extensive discovery," *id.* 13a, Baltimore has been unable to point to a single example of this scenario's ever having occurred. Baltimore has identified no evidence that any advertisements by the Center caused any women to visit the Center seeking an abortion or contraception, to delay receiving medical care as a result of such visit, or to suffer harm as a result of a delay. Instead, as Judge Wilkinson explained: "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." *Id.* 19a.

Indeed, the courts below correctly found as a fact that there was no deceptive advertising by pregnancy centers and no harm to the health of any woman. The en banc Fourth Circuit remanded this case for discovery as to "the scope and content of" the Center's advertisements. Pet. App. 122a. After discovery on this issue—discovery that Baltimore conceded to be exhaustive—the district court found and the Fourth Circuit affirmed that "there is insufficient evidence to demonstrate that deception actually takes place and that health harms are in fact being caused by delays." *Id.* 19a. The district court noted that Baltimore

admitted it "does not know any instance when a person who has visited an LSPC in Baltimore City was harmed or delayed medical care because of * * * the LSPC." *Id.* 63a.

Finally, Baltimore made no showing whatsoever that less speech-restrictive alternatives were tried and failed before it adopted the draconian measure of compelling speech. This Court has held that rather than compelling speech, a less-restrictive alternative can often be simply the government itself "communicat[ing] the desired information to the public without burdening a speaker with unwanted speech." Pet. App. 20a (quoting *Riley*, 487 U.S. at 800). For instance, if the government is concerned that speakers are deceiving the public about the scope of their services, it could "inform[] citizens about the scope of services offered * * * through a public advertising campaign." *Id.* 20a-21a. Here, Baltimore admitted that it ignored this easy, inexpensive, and less restrictive alternative. Baltimore also ignored another less-restrictive alterative to compelling speech specifically identified by this Court: "vigorous[] enforce[ment]" of generally applicable "antifraud laws." *Riley*, 487 U.S. at 800.

Given Baltimore's weak facts, this is not a clean vehicle for this Court to address the applicability of its commercial-speech doctrine to pregnancy centers, because that doctrine would not be outcome-determinative.

B. There is no conflict between the commercial-speech decision below and decisions of the Ninth Circuit and North Dakota Supreme Court.

Setting aside the obstacle that not even a favorable holding on commercial speech would make the Ordinance constitutional, Baltimore's alleged split between the Fourth Circuit and the Ninth Circuit and North Dakota Supreme Court is illusory.

Baltimore purports to identify a conflict between *First Resort, Inc.* v. *Herrera*, 860 F.3d 1263 (9th Cir. 2017), *petition for cert. filed*, No. 17-1087 (Feb. 2, 2018), the North Dakota Supreme Court's decision in *Larson*, and the decision below over whether a religiously motivated offer of free services can constitute less-protected "commercial speech." Pet. 24. But in fact the opposite is true. The Fourth Circuit, Ninth Circuit, and North Dakota Supreme Court have all agreed that such speech *can* be "commercial" under some circumstances, including when the services offered are "commercially valuable" and the speaker has an "economic interest" in offering them. Pet. App. 116a-122a; *First Resort*, 860 F.3d at 1272-74; *Larson*, 381 N.W.2d at 180-81. This standard is problematic, given that this Court has clearly identified a commercial-transaction proposal as the *sine qua non* of commercial speech. But this is not the case to solve that problem, since the wrong standard the Fourth Circuit applied nevertheless led to the right result.

"[*T*]*he test*" for whether speech is commercial, this Court has repeatedly emphasized, is whether it is a "proposal of a commercial transaction." *Cincinnati* v. *Discovery Network*, 507 U.S. 410, 423 (1993) (quoting

Bd. of Trustees of State Univ. of N.Y. v. *Fox*, 492 U.S. 469, 473-74 (1989)) (emphasis in *Discovery Network*). And the "distinction between speech proposing a commercial transaction * * * and other varieties of speech" is "commonsense," *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980)—the former takes the form of "I will *sell* you the X [product] at the Y price." *Va. Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (emphasis added). This definition, focused on "expression advocating purchase," Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 75 (2007), accords with this Court's articulation of why the commercial-speech doctrine exists in the first place—because speech in which the speaker offers to sell something to the listener is "more durable than other kinds" of speech. *Va. Pharm. Bd.*, 425 U.S. at 771 n.24.[4]

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[4] This Court did not depart from this transaction-proposal requirement in *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). There, the Court held that speech that does not "*merely* * * * propose[] to engage in commercial transactions," but also "contain[s] discussion[] of important public issues," may also be characterized as commercial if it satisfies certain factors. *Id.* at 66-67 (emphasis added). So under *Bolger*, the addition of noncommercial elements cannot "immunize" a commercial-transaction proposal from being considered commercial speech. *Id.* at 68. But nothing in *Bolger* dispenses with the bedrock requirement that for speech to be considered commercial, the speaker must propose a commercial

Based on this precedent, the Center argued below that its speech was not commercial because it did not propose any commercial transactions at all to the women who come to it for help. *E.g.*, Pet. App. 120a n.9. But the en banc Fourth Circuit remanded for discovery, stating that even speech that does not propose a commercial transaction might sometimes be "commercial." *Id.* 118a. This is so, the Fourth Circuit reasoned, when the speech constitutes "advertisements * * * placed in a commercial context and * * * directed at the providing of services," particularly when the speaker "possesses economic interests apart from its ideological motivations." *Id.* 119a-122a. The court therefore ordered a demanding and "complex factual" inquiry into the Center's "intent and motive" in helping needy women facing unplanned pregnancies, remanding for discovery into whether the Center's "operational intricacies" would reveal that the Center's "outward[]" appearance of being religiously motivated disguised "potential profit motives." *Id.* 120a-122a; see also *id.* 139a-140a (Wilkinson, J., dissenting) ("the majority has licensed a fishing expedition into the Center's motivations and operations," "subjecting [it] to intrusive and burdensome discovery based on * * * far-fetched hypotheticals").

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transaction in the first place. See *Fox*, 492 U.S. at 482 (explaining, post-*Bolger*, that "the difference between commercial and noncommercial speech" is that commercial speech is "define[d]" as "speech that *proposes* a commercial transaction") (emphasis in original).

In articulating this standard, the en banc Fourth Circuit relied on the very North Dakota Supreme Court decision with which Baltimore now alleges there is a conflict. The en banc court engaged in a lengthy discussion of the North Dakota Supreme Court's decision in *Larson*, relying on it as its sole authority for the assertion that it is "not dispositive" that a speaker does not sell any goods or services, and that its advertisements may nevertheless be commercial speech if they are "placed in a commercial context." Pet. App. 121a-122a (quoting *Larson*, 381 N.W.2d at 181). Far from disagreeing with the North Dakota Supreme Court, then, the Fourth Circuit relied on its approach. *Ibid.*; see also *id.* 228a (King, J., author of en banc decision, dissenting from original panel decision) ("The Supreme Court of North Dakota's decision in [*Larson*] * * * illustrates the proper contextual analysis.").

Nor is there any conflict between the Fourth Circuit and the Ninth Circuit's decision in *First Resort*. Pet. 24. Again, it is just the opposite. Just as the en banc court here expressly relied on *Larson* in articulating its commercial-speech test, the Ninth Circuit in *First Resort* expressly relied on the en banc opinion here. *First Resort* involved a pregnancy center's challenge to a law restricting advertising only by pregnancy centers that do not provide or refer for abortions. 860 F.3d at 1269-70. The Ninth Circuit, just like the en banc Fourth Circuit here, rejected the pregnancy center's argument that its speech was necessarily noncommercial because it did not propose any commercial transactions but instead provided all of its services for free. *Id.* at 1272-74. Instead, relying on both the en banc decision in this case and *Larson*,

the Ninth Circuit held that advertisements for free services constitute commercial speech if the free services would be "commercially valuable" in a marketplace and if the speaker has "an economic motive" for advertising. *Ibid.* (citing en banc decision numerous times and "find[ing] *Larson* * * * persuasive").

There is no conflict between these decisions, but merely different factual applications, rendering certiorari unwarranted. The reason the pregnancy centers in *Larson* and *First Resort* lost and the center in this case won does not lie in a disagreement about the legal definition of commercial speech. Rather, here, (1) it was "not clear that the [O]rdinance * * * regulat[ed] the Center's 'advertisement'" in the first place, Pet. App. 12a, while the *Larson* and *First Resort* laws applied only to advertising; and (2) the extensive "record" developed on remand "g[ave] no indication that the Center harbors an 'economic motivation,'" Pet. App. 13a (quoting en banc decision), while in *First Resort* the Ninth Circuit found that the regulated centers *did* "have an economic motivation for advertising their services," *First Resort*, 860 F.3d at 1273. As the Center argued below, the commercial-speech standard articulated by the en banc Fourth Circuit, by the Ninth Circuit in *First Resort*, and by the North Dakota Supreme Court in *Larson* is dangerously overbroad: if advertisements for free but "commercially valuable" services can constitute commercial speech, then a church's advertisements for its worship services may be commercial, because churches give away for free things of "commercial value" like musical performances, moral and spiritual instruction, and even "sacramental wine, communion wafers, [and] prayer beads." Pet. App. 195a.; see

also *ibid.* (Baltimore's "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."). But here, where application of even this fantastically overbroad standard nevertheless led to the correct result, there is no reason to disturb the Fourth Circuit's decision.[5]

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[5] Baltimore points to two of this Court's cases to support its view that the commercial-speech doctrine can apply to speakers who do not sell any goods or services for money. Neither does so. In *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Committee*, the Court held that Congress could regulate the word "Olympic" where used "for the purpose of *trade* [or] to *induce the sale* of any goods or services," applying the law to a speaker who *sold* T-shirts, buttons, and bumper stickers bearing the word. 483 U.S. 522, 528 (1987) (emphasis added). Here, the element of selling goods for money is entirely missing. As for *Camps-Newfound/Owatona, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997)—not even a speech case but a dormant Commerce Clause case—Baltimore cites it for the proposition that "mission-driven, nonprofit organizations are equally capable of participating in commerce as for-profit companies." Pet. 23-24. This is a non sequitur; of course entities structured as nonprofits *can* engage in commerce, including by making the sort of commercial-transaction proposals that could trigger the commercial-speech doctrine. The Center's speech isn't commercial not because it is structured as a nonprofit but because it does not offer to sell its services for money.

III. The Fourth Circuit's viewpoint-discrimination holding was unnecessary to the result, and in any event was correct.

Finally, although Baltimore asserts that only the commercial-speech issue warrants plenary review, it also argues that the Fourth Circuit erred in concluding that the Ordinance discriminated on the basis not just of content, but of viewpoint. Pet. 25-29. But that was an express alternative holding that this Court would not need to reach in order to resolve this case. In any event, the holding is a straightforward application of this Court's precedents.

First, the Fourth Circuit's holding that the Ordinance discriminated on the basis of viewpoint was inessential to the decision; strict scrutiny would have been applied regardless. Both laws that are viewpoint-based and laws that are content-based are generally subject to strict scrutiny. *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). Viewpoint discrimination is just a "more blatant" and "egregious form of content discrimination." *Ibid.* (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

Here, the lower court applied strict scrutiny because the Ordinance indisputably is a content-based regulation of speech: it "[m]andat[es] speech that [the Center] would not otherwise make," which "necessarily alters the content of the speech." *Riley*, 487 U.S. at 795; see also Pet. App. 11a. The court then held that the Ordinance was *also* viewpoint based, because it was "a speech edict aimed directly at those pregnancy clinics that do not provide or refer for abortions." Pet. App. 20a. But this belt-and-

suspenders holding did not change the result; because the Ordinance compelled speech and thus was content-based, it would have been subject to strict scrutiny anyway. *Id.* 16a ("Because the commercial speech and professional speech doctrines are inapplicable in this case, the [Ordinance]'s compulsion [of speech] receives heightened scrutiny."). Thus, this Court would have to disagree with the lower court's commercial- or professional-speech holdings (which it shouldn't) to even reach this issue.

In any case, Baltimore's suggested conflict between the lower court's viewpoint-discrimination holding and this Court's precedents is nonexistent. The Fourth Circuit held that the Ordinance discriminated on the basis of viewpoint because on its face it discriminates on the basis of viewpoint. Under this Court's precedents, a law discriminates on the basis of viewpoint if, from some larger "subject category" (*i.e.*, content), it "single[s] out * * * for disfavor" a "subset of messages based on the views expressed" (*i.e.*, a viewpoint). *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment); *Rosenberger*, 515 U.S. at 828-29. Here, the Ordinance expressly applies only to speakers who speak on a particular subject—"those who talk about pregnancy-related services"—and within that "subject category," only to speakers that do not refer for abortions. Pet. App. 20a. That is viewpoint discrimination.[6]

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[6] At the en banc stage, the Fourth Circuit suggested that the Ordinance could be viewpoint-neutral if there

None of the cases cited by Baltimore's are to the contrary. Baltimore says that in *McCullen* v. *Coakley*, the Court held a law creating buffer zones outside abortion clinics viewpoint-neutral, "even though it applied only to abortion clinics and was enacted to remedy harms specifically caused by abortion proponents." Pet. 25. But the *McCullen* law drew neither viewpoint- nor even "content-based distinctions on its face"; it facially prohibited anyone from standing within the buffer zone, no matter what they would say there and, indeed, no matter whether they would "utter[] a word" at all. 134 S. Ct. 2518, 2531 (2014). Here, by contrast, the Ordinance is triggered *only* by speech, and it applies not to everyone but only to those speakers who do not refer for abortions. Further distinguishing *McCullen*, the *McCullen* Court recognized that "[i]t would be a very different question if" pro-abortion speakers were allowed to speak within the buffer zone while everyone else was not—that would be "a clear form of viewpoint discrimination" because the law "would then facilitate speech on only one side of the abortion debate." *Id.* at 2534. This case presents that "very different question": speakers who do not refer for abortions have to post the disclaimer on their walls, while speakers who do refer don't have to. Thus, the Ordinance hampers speech "on only one side of the abortion debate." *Ibid.*

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were LSPCs "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." Pet. App. 126a. Extensive discovery on remand revealed no such pregnancy center.

Christian Legal Society v. *Martinez*, 561 U.S. 661 (2010), is similarly far afield. Pet. 26-27. There, too, the Court emphasized that the challenged policy applied to "*all*" speakers. *Martinez,* 561 U.S. at 694 (emphasis original). Here, the Ordinance does not apply to all pregnancy centers but only some—those that do not refer for abortions.

* * *

Nine years is long enough to wait for relief from a patently unconstitutional law. That is especially so here, where Baltimore's arguments on both the facts and the law are so weak. Further delay will only cause further harm to the Center, and issuing a GVR order after the decision in *NIFLA* would subject it to many more years of punitive litigation—even though the burden imposed by the law here is, as the Fourth Circuit recognized, "different in kind" from that at issue in *NIFLA*. Pet. App. 22a & n.3. The Court should deny certiorari rather than hold the petition.

CONCLUSION

The petition for a writ of certiorari should be denied, without being held for the decision in *NIFLA* v. *Becerra*.

Respectfully submitted.

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