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

REPLY BRIEF FOR PETITIONERS

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Respondent does not dispute that it provides medical services to consumers, and it does not dispute that it engages in "purposely vague" advertising about those medical services. App. 279a. Instead, it contends that the Court should deny certiorari because the record lacks evidence of consumer confusion and the parties agree on the applicable legal standards. Both contentions are erroneous. Further, contrary to Respondent's assertions, the Greater Baltimore Center for Pregnancy Concerns, Inc. ("Baltimore Center") will suffer no harm should the Court grant the petition or hold it pending the disposition of *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140, *argued* Mar. 20, 2018 ("*NIFLA*"), because the challenged Ordinance has never gone into effect, *see* J.A. 279, 290, 298, 1229 (stipulations of nonenforcement), and its enforcement is currently enjoined, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 113 (4th Cir. 2018) (affirming district court judgment), App. 23a; *Greater Balt. Ctr.,* No. 1:10-cv-00760-MJG (D. Md. Oct. 21, 2016), J.A. 1291 (district court judgment permanently enjoining enforcement of the Ordinance).

I. The Record Contains Undisputed Evidence That Some Consumers Are Confused About the Medical Services Offered by the Baltimore Center.

Respondent's Brief in Opposition ("BIO") erroneously contends that "the record contained no evidence of even a single instance of a pregnant woman thinking that going to a pregnancy center . . . would enable her to procure an abortion." BIO at 2.

The record includes admissions by the Baltimore Center's hotline director that an advertising campaign for the Center prompted calls from fifteen women seeking abortion services. She stated that:

> 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.

App. 276a. On another occasion, the hotline director told the Baltimore Center's executive director that a caller who had seen the Center's advertisements "didn't understand 'what we do.'" App. 279a. The executive director responded that "those ads are purposely vague, of course." *Id.*

The executive director also testified that the Baltimore Center objects to the Ordinance in large part because it would interrupt the Center's conversations with consumers who believe that the Center provides abortions:

> Q. If the disclaimer merely had to hang on the wall in the Pregnancy Center, but nobody had to verbally speak it out loud, do you still think it would interfere in the discussions between Center staff members or volunteers and clients?
>
> * * *
>
> THE WITNESS: Not necessarily. It would really depend on the reason for the client's visit to the Center.
>
> * * *

Q. Can you elaborate on that a little bit?

A. Clients come in for different reasons. Sometimes they come in because they want a pregnancy test. Sometimes they come in because they need material assistance. Sometimes they come in because they are thinking about having an abortion and would like to talk to somebody about that. They come in for Earn While You Learn. . . . We have classes. So, it really depends.

Q. In which of those circumstances do you think a posted disclosure would interfere with the discussion?

* * *

THE WITNESS: Which do I think would be an interference problem?

Q. Right. So, in which of those circumstances that we just described do you think there might be interference in the conversation between the Pregnancy Center staff member or volunteer and the client as a result of the posted disclaimer?

* * *

THE WITNESS: If a woman was coming in to get abortion information, or was under the impression for some reason that we do abortions, that sign would certainly interrupt, or that statement would interrupt, wherever it is, it would probably interrupt that conversation.

J.A. 836-38.

The record contains other evidence of deceptive advertising and consumer confusion in addition to Respondent's admissions. *See, e.g.,* J.A. 109, 121, 122-24, 1145-46; Pet. at 10-11.

II. Certiorari Is Needed to Correct the Court of Appeals' Application of Erroneous Legal Standards.

Contrary to Respondent's contentions, the parties are not in agreement about the applicable legal standards. The City seeks certiorari so that this Court may correct the court of appeals' application of erroneous legal standards, which Respondent advocates should stand.

First, the court of appeals incorrectly held that the Baltimore Center's promotional advertising of medical services for the purpose of attracting patients in a competitive marketplace cannot constitute commercial speech because the Center does not charge patients for its services. *See Greater Balt. Ctr.*, 879 F.3d at 108, App. 12a ("[T]he 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.'"); *id.* ("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."). The court of appeals' application of the commercial speech doctrine is inconsistent with this Court's precedents, *see* Pet. at 20-25, and is in direct conflict with the Ninth Circuit's decision in *First Resort, Inc. v. Herrera*, 860 F.3d

1263, 1274 (9th Cir. 2017) (holding that a pregnancy center's advertising constitutes commercial speech because it is "designed to attract a patient base in a competitive marketplace for commercially valuable services" even though the center does not charge consumers for the advertised services), *petition for cert. docketed*, No. 17-1087 (Feb. 2, 2018).

Second, the court of appeals held that it was barred from evaluating whether the Ordinance constituted "reasonable" regulation of the practice of medicine, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.), because "[i]n Maryland, pregnancy centers are not required to be licensed or otherwise subject to a state regulatory scheme." *Greater Balt. Ctr.*, 879 F.3d at 109, App. 15a. This, too, is inconsistent with this Court's precedents.[1] *See* Pet. at 29-31.

Third, the court of appeals held that requiring pregnancy centers to make factual disclosures concerning the medical services they provide constitutes *per se* viewpoint discrimination. This holding constitutes an erroneous application of the viewpoint discrimination doctrine and directly conflicts with the Ninth Circuit's holding in *NIFLA*. *See* Pet. at 18, 25-29; *NIFLA*, 839 F.3d at 835-36.

Fourth, the court of appeals erred in holding that mandatory disclosures concerning abortion should be subject to more stringent scrutiny than mandatory disclosures concerning other topics. *See Greater Balt. Ctr.*, 879 F.3d at 113 n.3, App. 22a n.3 ("Because the

[1] Respondent's contention that the City waived this argument is without merit, and the court of appeals expressly rejected it. *See Greater Balt. Ctr.*, 879 F.3d at 109 n.1, App. 14a n.1.

compelled message did not mention abortion, the burden on the speaker—and therefore the First Amendment analysis—was different in kind."). This holding is in direct conflict with the Ninth Circuit's holding in *NIFLA*. *See* Pet. at 18; *NIFLA*, 839 F.3d at 8338 (rejecting the argument that abortion-related disclosures are subject to *sui generis* standards).

Thus, Respondent is wrong in asserting that Petitioners merely object to the application of agreed upon legal standards to the facts of this case. The relevant legal standards are themselves in dispute, not just among the parties but also among the courts of appeals. Certiorari is needed to resolve these disputes and ensure uniform application of constitutional law.

III. Further Proceedings Will Not Harm Respondent.

Respondent will suffer no harm should the Court grant the Petition or hold it pending resolution of *NIFLA*. The district court entered a permanent injunction against enforcement of the challenged Ordinance. *Greater Balt. Ctr., Inc.,* No. 1:10-cv-00760-MJG (D. Md. Oct. 21, 2016), J.A. 1291. The court of appeals affirmed it, *Greater Balt. Ctr.*, 879 F.3d at 113, App. 23a, and it remains in effect. The City has not sought a stay of the injunction. Indeed, throughout most of the litigation, the City agreed to voluntary non-enforcement of the Ordinance. *See* J.A. 279, 290, 298, 1229 (stipulations of nonenforcement).

CONCLUSION

The Court should grant plenary review of the court of appeals' judgment. Alternatively, the Court should

hold this petition pending resolution of *NIFLA*, then grant the petition, vacate the court of appeals' judgment, and remand the case for further proceedings.

Respectfully submitted,

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