No. 11-1111

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,

Appellee/Plaintiff,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE RAWLINGS-BLAKE, in her official capacity as Mayor of Baltimore; and OXIRIS BARBOT, M.D., in her official capacity as Baltimore City Health Commissioner,

Appellants/Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENT OF INTEREST OF THE AMICI CURIAE

The Amici are twenty professors of law,[1] many of whom are constitutional law scholars whose areas of teaching and research involve First Amendment jurisprudence. Amici have no financial interest in the outcome of this litigation; they are interested in contributing to the sound and principled interpretation of the First Amendment. Because Ordinance 09-252 impermissibly regulates Appellee's noncommercial speech, Amici respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29(a).[2]

STATEMENT OF THE CASE

In December 2009, the City of Baltimore (the "City") enacted Ordinance 09-252 (the "Ordinance"). The Ordinance, ostensibly adopted to combat consumer deception, applies only to entities the City deems "limited-service pregnancy centers." Balt. City Code § 3-501. Such centers include organizations that "provide pregnancy related services;" and who "for a fee or as a free service, provide[] information about pregnancy-related services;" but "do not provide or refer for: (A) abortions; or (B) nondirective and comprehensive birth-control

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[1] Amici join this brief as individuals: institutional associations are for informational purposes only and do not reflect institutional endorsement of any position taken in this brief.

[2] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel, or any person, other than the amici curiae or their counsel contributed money intended to fund the preparation or submission of this brief.

services." *Id.* These entities must post "a disclaimer substantially to the effect that [they] do[] not provide or make referral for abortion or birth-control services." *Id.* § 3-502(a). The "disclaimer" consists of "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 Greater Baltimore Center for Pregnancy Concerns (the "Center") challenged the Ordinance in federal district court. The Center "provides pregnancy-related counseling" for free, but "will not, for religious reasons, provide or refer for abortions or specific methods of birth control." *O'Brien v. Mayor & City Council of Balt.*, No. MJG-10-760, 2011 WL 572324, at *1 (D. Md. Jan. 28, 2011). Holding, among other things, that "the speech regulated by the Ordinance is not commercial speech," *id.* at *6, the district court applied strict scrutiny to strike down the Ordinance under the First Amendment. The City now appeals that decision.

SUMMARY OF THE ARGUMENT

The First Amendment guarantees all speakers "the autonomy to choose the content of [their] own message" and the right to "tailor" that message as they see fit. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). As the rulings of not one, but two district courts indicate, the

Ordinance runs afoul of this "fundamental rule." *Id.*; 2011 WL 572324, at *10; *Centro Tepeyac v. Montgomery County*, No. DCK 10-1259, 2011 WL 915348 (D. Md. Mar. 15, 2011).

First, because the Center has no economic motive for providing "free service[s]" as part of its religious mission, Balt. City Code § 3-501, the Ordinance regulates the Center's core speech and is subject to strict scrutiny. Second, strict scrutiny remains the appropriate standard even if the Center were erroneously found to engage in commercial speech. Any allegedly commercial speech uttered by the Center is inextricably intertwined with noncommercial speech and, in any event, the compelled disclaimer is not "purely factual and uncontroversial." Finally, the Ordinance not only fails strict scrutiny, but also any other applicable standard of review.

Accordingly, the district court's judgment should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE ORDINANCE REGULATES CORE POLITICAL SPEECH AND IS THEREFORE SUBJECT TO STRICT SCRUTINY.

The Supreme Court's "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006). "'[F]reedom of speech,'. . . necessarily

compris[es] the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796–97 (1988). It includes "the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), as well as the "right to tailor" and "shape" speech to a particular audience or circumstance, *Hurley*, 515 U.S. at 573–74. As the Supreme Court explained in *Hurley*:

> Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say. Although the State may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information, outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . . Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.

Id. (internal citations and quotation marks omitted). The Supreme Court has thus repeatedly rebuffed State efforts to compel speakers to engage in government-dictated speech. *See, e.g.*, *Riley*, 487 U.S. 781 (disclosure of contribution

percentages); *Wooley*, 430 U.S. 705 (license plates bearing a state motto); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (pledge of allegiance).

As the district court held, "requiring the placement of a 'disclaimer' sign in the center's waiting room is, on its face, a form of compelled speech." 2011 WL 572324, at *5. The Ordinance is thus subject to strict scrutiny for at least three separate and independent reasons. First, because the Center does not engage in commercial speech, the Ordinance regulates core political speech. *Id.* at *6; *Centro Tepeyac*, 2011 WL 915348, at *5 (concluding, on similar facts, that a pregnancy center's speech was not commercial). Second, at a minimum, the Center's commercial and noncommercial speech are inextricably intertwined. *Riley*, 487 U.S. at 796. Third, the mandated disclaimer is not "purely factual and uncontroversial." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

A. The Ordinance Regulates Core Political Speech.

"[T]he difference between commercial and noncommercial speech" is that the former is "define[d]" as "speech that *proposes* a commercial transaction." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *Adventure Commc'ns, Inc. vs. Ky. Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999) (same). For years, the Supreme Court has relied on this "'commonsense' distinction between speech proposing a commercial transaction, which occurs in an

area traditionally subject to government regulation, and other varieties of speech." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)). Indeed, the Court has flatly stated that "*the* test" for commercial speech is whether the language at issue "'propose[s] a commercial transaction.'" *Fox*, 492 U.S. at 473–74 (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (emphasis added); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (explaining that *Fox* identified "the proposal of a commercial transaction" as "'*the test*'" for commercial speech (quoting 492 U.S. at 473–73)).

This standard reflects the Court's understanding of commercial speech as "expression related solely to the *economic interests* of the speaker and its audience." *Cent. Hudson*, 447 U.S. at 561 (emphasis added); *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 248 (4th Cir. 2009) (same); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983) (concluding that "[t]he combination of" an "economic motivation" for circulating "advertisements" containing "reference[s] to a specific product" "provides strong support" for classifying speech as commercial). Such economically motivated speech warrants diminished First Amendment protection because the profit motive makes it "more durable than other kinds" of speech. *Va. Pharmacy Bd.*, 425 U.S. at 771 n.24. As

the Court has repeatedly explained, because "advertising is the *sine qua non* of commercial profits," "there is little likelihood of its being chilled by proper regulation." *Id.*; *see also Cent. Hudson*, 447 U.S. at 564 n.6 ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." (internal quotation marks and citation omitted)); *Friedman v. Rogers*, 440 U.S. 1, 10 (1978) ("Commercial speech, because of its importance to business profits [is] less likely than other forms of speech to be inhibited by proper regulation."). In short, contrary to the assertions of Appellants' Amici, the "archetypical example of commercial speech" is not the mere "provision of information concerning the nature and cost of goods and services,"[3] Br. of Amici Curiae Law Professors at 5 (hereinafter "Speech Br."), but rather "I will *sell* you the X [product] at the Y price," *Va. Pharmacy Bd.*, 425 U.S. at 761 (emphasis added); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 75 (2007) (reasoning that "the

[3] This impossibly broad standard is not the law. Though inexplicably absent from the brief of Appellants' Amici, "the test" for commercial speech asks whether the speech proposes a commercial transaction. *Fox*, 492 U.S. at 473–74. Deeming speech that merely "provides information relevant to consumer decisions" commercial would subject core speech on a host of protected subjects—such as calls for corporate boycotts—to diminished constitutional protection. Speech Br. at 5; *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–12 (1982) (protecting speech related to a boycott under the First Amendment).

Court has unambiguously adopted the view that commercial speech is confined to expression advocating purchase").

Here, the Ordinance explicitly targets speech regarding the provision of "free service[s]." Balt. City Code § 3-501. It purports to regulate entities, such as the Center, that propose no commercial transactions and have no economic motivation for their speech. Where a party renders services without charge, regardless of whether those goods or services are "commercially valuable," Appellants' Br. at 17, that party "does not engage in any commercial transactions with its patrons." *Centro Tepeyac*, 2011 WL 915348, at *5; 2011 WL 572324, at *6.[4] As the district court explained, to hold otherwise would mean, for example, that "any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would

[4] The City's citation to Commerce Clause precedents is unavailing. That Clause merely authorizes Congress to regulate activities that have a substantial effect on interstate commerce. But that does not transform speech about those activities into commercial speech. Again, for example, boycotts exert substantial effects on interstate commerce. Speech calling for such action nonetheless remains core political speech.

Moreover, the cases cited by the City for the proposition that "[o]ffers to provide pregnancy related-goods and services to consumers are routinely classified as commercial speech" all involved the *sale* of goods or services or an economic motive. *See Bolger*, 463 U.S. at 62, 67; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977); *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975).

find their accompanying speech subject to diminished constitutional protection." 2011 WL 572324, at *6.[5]

Indeed, if noneconomically motivated speech were classified as commercial speech, it would receive *less* protection than offers to sell goods and services. After all, commercial speech regulations are subject to lesser scrutiny because the profit motive makes such speech more "durable." *See supra* pp. 6–7. Speech *not* motivated by profit does *not* have the same "durab[ility]." In other words, eleemosynary speech and commercial speech are not the same "hardy breed of expression." *Cent. Hudson*, 447 U.S. at 564 n.6. Yet the City and its Amici would subject them to the same diminished standard of review. That is not the law.

This case, moreover, should be a particularly easy one. In addition to the undisputed *absence* of an economic motive, it involves the equally undisputed *presence* of religious, social, and political motives: 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." 2011 WL 572324, at *6. Courts have repeatedly found this distinction dispositive.

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[5] The assertion that nonprofit entities can engage in commercial speech is a non sequitur. Speech Br. at 8. Nonprofit entities, of course, can offer goods and services for sale or act with an economic motive. It is the nature of the proposed transaction that must be evaluated.

The Supreme Court, for example, relied on the presence/absence of a profit motive to distinguish two cases decided on the same day in 1978. In *Ohralik*, the Court upheld a prohibition on "[i]n-person solicitation by a lawyer of remunerative employment," 436 U.S. at 457, 468, concluding that such speech proposed a commercial transaction, *see id.* at 455–57. However, in *In re Primus*, the Court held that an attorney could *not* be punished for soliciting, by mail, a pro bono client. *See* 436 U.S. 412, 439 (1978). The Court explained that "[u]nlike the situation in *Ohralik*, . . . [t]his was not in-person solicitation for pecuniary gain." *Id.* at 422. Instead, the attorney "was communicating an offer of free assistance . . ., not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to express personal political beliefs and to advance . . . civil-liberties objectives . . . , rather than to derive financial gain." *Id.* The lawyer was thus "engaged in associational activity for the advancement of beliefs and ideas" rather than "the advancement of h[er] own commercial interest." *Id.* at 437–38 & n.32.

Similarly, in *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), the court found the nature of a speaker's motive case-determinative. There, Amway distributors had circulated a rumor that "a large portion" of a competitor's profits went "to support a satanic church." *Id.* at 542 n.2. The Fifth Circuit held that the statement's constitutional status turned on "whether the speaker ha[d] an

economic motivation for the speech," and remanded the case to the district court to make that determination. *Id.* at 552. "[I]f the trier of fact finds that the [Amway distributors'] motivation . . . was not economic, the speech is not commercial," but "if an economic motivation is found, the speech is commercial." *Id.*; *see also Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1275 (10th Cir. 2000) (concluding, on the same facts, that though "the bare fact that the subject message contains a 'theological' component is insufficient to transform it into noncommercial speech," if "appellees had argued that a significant theological, political, or other noncommercial purpose underlay the subject message, the message might be accorded the substantially greater First Amendment protections enjoyed by 'core' religious speech and the other varieties of noncommercial First Amendment speech"); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710–11 (9th Cir. 1999) (relying both on the religious nature of appellees' speech and the fact that it ran contrary to their economic interests in holding that their expression was not commercial speech), *reh'g granted and withdrawn*, 192 F.3d 1208 (9th Cir. 2000); *Centro Tepeyac*, 2011 WL 915348, at *5 (concluding that where a pregnancy center provides services "free of charge" and "motivated by social concerns" it does not engage in commercial speech).

The reasoning of these cases applies here with equal force. The Ordinance impacts speech offered not for the advancement of "commercial interest," but

instead "for the advancement of beliefs and ideas" regarding the nature of human life. *Primus*, 436 U.S. at 438 & n.32. It chills speech uttered "not for economic reasons, but out of religious conviction." *Thomas*, 165 F.3d at 711. As these cases demonstrate, where a "significant theological, political, or other noncommercial purpose underl[ies a] message," that message must be afforded maximum First Amendment protection. *Haugen*, 222 F.3d at 1275. Thus, the district court rightly concluded that although this case involves "services that have value in the commercial marketplace," "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." 2011 WL 572324, at *6.

Finally, as the Ordinance regulates noncommercial speech, the allegedly "factual" nature of the compelled disclosure is irrelevant. *See, e.g.*, Speech Br. at 4, 10, 11, 13, 14. Supreme Court precedent addressing compelled speech "cannot be distinguished simply because [it] involved compelled statements of opinion [as opposed to] compelled statements of 'fact': either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797–98. 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." *Hurley*, 515 U.S. at 573.

Accordingly, the district court correctly held that because the Ordinance burdens core protected speech, it is subject to strict scrutiny.

B. At a Minimum, the Ordinance Regulates Commercial Speech Inextricably Intertwined with Noncommercial Speech.

Even if the Ordinance regulates commercial speech, it would still be subject to strict scrutiny. Such speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796. A court's "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Id.* Here, those lodestars inescapably point to the application of strict scrutiny.

First, a review of the Center's speech, "taken as a whole," reveals that any allegedly commercial speech is "inextricably intertwined" with plainly protected noncommercial speech. *Id.* In *Riley*, the Supreme Court confronted a law requiring professional fundraisers, "before an appeal for funds," to disclose "the gross percentage of revenues retained in prior charitable solicitations." *Id.* at 784. Assuming that some portion of the fundraisers' speech was commercial, the Court refused to "parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* at 796. Believing that "[s]uch an endeavor would be both artificial and impractical," the Court instead acknowledged "'the reality that

solicitation is characteristically intertwined with informative and perhaps persuasive speech.'" *Id.* (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1979)). Because any commercial aspect of the fundraisers' speech was "inextricably intertwined" with core speech, the Court "appl[ied its] test for fully protected expression." *Id.*

Here, as in *Riley*, any allegedly commercial speech is inseparable from noncommercial speech. Both the solicitation in *Riley* and the Center's offer of services (assuming that constitutes commercial speech) are thoroughly enmeshed in "'informative and perhaps persuasive speech.'" *Id.* (quoting *Schaumburg*, 444 U.S. at 632). A simple question—"Would you like to see your baby?"—illustrates the point. The query is both an offer to provide a service (a sonogram), and a statement regarding the status of the unborn that warrants the highest level of First Amendment protection. Offers from entities such as the Center, who operate to further "strongly held religious and political beliefs," 2011 WL 572324, at *6, will invariably be made in the context of "fully protected" expression, *Riley*, 487 U.S. at 796. It would be both "artificial and impractical"—and in fact, impossible—to "parcel out" their speech. *Id.*[6]

[6] The Ordinance itself further entangles the Center's noncommercial speech with allegedly commercial speech. Given the "conspicuous[]" and ever-present nature of the sign and the inquiries it will prompt, Balt. City Code § 3-502(b), a

Second, the "compelled statement" will have a profound "effect" on the content of the Center's noncommercial speech, *id.*, even assuming it is "aimed" at allegedly commercial speech. Appellants' Br. at 17; Speech Br. at 10. After all, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. "Compelled access" likewise "forces speakers to alter their speech to conform with an agenda they did not set." *PG&E v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (plurality opinion). Accordingly, "[t]he danger that [an] appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude." *Id.* at 16.

Specifically, it is undisputed that the Center provides at least some noncommercial counseling on abortion and birth control. Though purportedly targeting only commercial speech, the Ordinance "alter[s]" this core speech, not only by requiring the posting of a government-dictated message, but also "by

(continued…)

"law of man" makes it effectively "impossible" for the Center to engage in noncommercial speech without discussing the services it does and does not offer. *Fox*, 492 U.S. at 474. The City's assertion that "no one who works for a Pregnancy Center is required to utter or make reference to the disclaimer," Appellants' Br. at 18, is beside the point, as the sign itself constantly "speaks" for the Center.

mandating the timing and content of the introduction of the subjects of abortion and birth control." 2011 WL 572324, at *5. As the district court observed,

> [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. 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.

Id. at *7. The disclaimer thus "introduces the topics of abortion and birth-control," an introduction which "has an immediate effect on any speech and information offered by the Center on these subjects." *Id.*; *cf. Riley*, 487 U.S. at 798 (condemning compelled disclosures that force speakers to begin an communication with factual statements not of their choosing).

It is one thing to discuss abortion and birth control in the context of the Center's firmly held religious views on those matters. It is another thing entirely to greet a potential client with a government-dictated, stark declaration on those issues the moment she walks in the door. The City and its Amici are thus wrong to contend that the "Ordinance does not regulate [the Center's ideological] speech" or "the manner in which Pregnancy Centers discuss abortion or birth-control services with members of the public." Speech Br. at 11; Appellants' Br. at 17. It is simply impossible to regulate the allegedly commercial components of the Center's

speech in the manner chosen by the City without impermissibly impacting core speech. The compelled disclaimer forces all aspects of the Center's "speech to conform with an agenda [it] did not set," *PG&E*, 475 U.S. at 9, and impedes the Center's ability to "tailor" and "shape" its message as it sees fit, *Hurley*, 515 U.S. at 573–74.

Moreover, the effect of the compelled speech may well "prevent the [Center] from conveying, or the audience from hearing, [its] noncommercial messages." *Fox*, 492 U.S. at 474. For example, in *Riley*, the Supreme Court expressed concern about the possible impact of mandatory disclosures regarding the disposition of donations. "[I]f the potential donor is unhappy with the [compelled statement]," the Court observed, "the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Riley*, 487 U.S. at 800. The Ordinance has precisely the same potential effect. If a prospective client walks into the Center and sees a sign reading "no abortions provided here," it is entirely possible that she will turn on her heel and walk out before the Center has an opportunity to explain *why* it does not provide abortions. The government-dictated message will be the first and last words the woman sees. Contrary to the claims of Appellants' Amici, therefore, the Ordinance does in fact "burden [the Center's] right to express opinions on [the] moral or religious implications of birth control or abortion." Speech Br. at 12.

To be sure, as the City and its Amici repeatedly assert, *see, e.g.*, Appellants' Br. at 20–21; Speech Br. at 7–8, 12–13, a party cannot transform commercial speech into noncommercial speech by tacking on an ideological component or "link[ing]" that speech to a public debate. *Cent. Hudson*, 447 U.S. at 562 n.5. Thus, adding a discussion of home economics to a sales pitch for housewares "no more covert[s such] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Fox*, 492 U.S. at 474–75. "[I]f a communication, at bottom, proposes a commercial transaction," the fact that it also contains "some commentary about issues of public interest will not alter its nature." *Adventure Commc'ns, Inc.*, 191 F.3d at 441; *see also Bolger*, 463 U.S. at 68 (stating that advertisers cannot "immunize false or misleading product information from government regulation simply by including references to public issues"). In short, "the Court has continued to reject attempts to evade a regulation by appending a message aimed at transforming the speech." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 981 (9th Cir. 1998).

But it strains credulity to imply that the Center is attempting to "evade" the Ordinance by "appending" an ideological message to its otherwise-commercial speech. After all, the Center provides its services for free in order to further its "strongly held religious and political beliefs." 2011 WL 572324, at *6. Its speech,

therefore, cannot possibly be described as a proposal for a commercial transaction that merely "touch[es] on other subjects." *Fox*, 492 U.S. at 474; Appellants' Br. at 20–21. Those "other subjects"—for example, the belief that "human life must be respected and protected absolutely from the moment of conception"—are the Center's *raison d'être*, not fig leaves employed to mask commercial activity. 2011 WL 572324, at *6 (internal quotation marks and citation omitted).

Accordingly, even assuming the Center engages in commercial speech, the Ordinance would still be subject to strict scrutiny because the Center's commercial and noncommercial speech would be inextricably intertwined.

C. Even If the Ordinance Only Regulated Commercial Speech, It Would Still Be Subject to Strict Scrutiny Because the Compelled Disclosure Is Not "Purely Factual and Uncontroversial."

As discussed above, compelled speech is generally subject to strict scrutiny. *See supra* pp. 3–5. Although a limited exception to this rule permits the State to require certain commercial disclosures that are "reasonably related to [its] interest in preventing deception of consumers," *Zauderer*, 471 U.S. at 651, that exception applies only in the context of "commercial advertising," *id.*, and even then, only if the disclosures are "purely factual and uncontroversial," *id.* As the Supreme Court has explained, "[a]lthough the State may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information, outside that context it may not compel affirmance of a

belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573–74. This exception is doubly inapplicable here. First, because the Center's speech is not commercial, *see supra* Part I.A, an exception governing compelled speech in "commercial advertising" is irrelevant to the case at hand. *Zauderer*, 471 U.S. at 651. Second, the compelled statement is not "purely factual and uncontroversial." *Id.*

Case law from the Supreme Court and lower courts helps illustrate the line between permissible "purely factual and uncontroversial" disclosures and impermissible compelled speech. For example, in *Zauderer*, the Court upheld an attorney-disciplinary rule requiring contingency-fee advertisements to disclose that contingent-fee clients "would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful." 471 U.S. at 633. Likewise, in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010), a law firm was required to disclose that it functioned as a debt relief agency. *Id.* at 1340. Both *Zauderer* and *Milavetz* thus involved limited, straightforward factual disclosures "intended to combat the problem of inherently misleading commercial advertisements." *Id.*

In contrast, in *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), the Seventh Circuit invalidated a commercial disclosure that would have required video game retailers to wade into the highly charged debate over

which video games are appropriate for under-18 viewing. There, the court confronted an Illinois law requiring video-game retailers to affix a sticker stating "18" onto games that fell within State's definition of "sexually explicit." *Id.* at 651–52. In so holding, the Court rejected the State's argument that the sticker merely required the disclosure of "purely factual and uncontroversial" information, because the sticker "ultimately communicate[d] a subjective and highly controversial message—that the game's content is sexually explicit." *Id.* at 652. The State, the court reasoned, could not compel the dissemination of this "opinion-based" message where "video game manufacturer[s] or retailer[s] may have an entirely different definition of this term." *Id.*

Here, as in *Blagojevich*, the sign mandated by the Ordinance forces the Center to communicate a "subjective and highly controversial message," *id.*, namely, that "abortion" and "nondirective and comprehensive birth-control services" are legitimate "pregnancy related services." Balt. City Code § 3-501. Organizations, such as the Center, strongly believe that abortion is the taking of a human life and likewise promote deeply held convictions regarding birth control. 2011 WL 572324, at *6. Such organizations, therefore, would never discuss these topics outside the context of their larger religious views and would strongly reject their classification as pregnancy related services—they "have an entirely different definition of this term." *Blagojevich*, 469 F.3d at 652. The Ordinance, however,

requires the Center to display a sign depicting "abortion" and "birth-control services" as equally legitimate alternatives to the services that the Center *does* provide. Balt. City Code § 3-502. One may agree or disagree with that position. But regardless, it is crystal clear that by compelling the Center to promulgate the City's opinion-based message, the Ordinance transgressed the bounds of what is "*purely* factual and uncontroversial." *Zauderer*, 471 U.S. at 651 (emphasis added).[7]

Accordingly, even if erroneously understood as applying solely to commercial speech, the Ordinance still would be subject to strict scrutiny, because it compels the Center to issue a disclaimer that is not "purely factual and uncontroversial."

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[7] Furthermore, the speech purportedly regulated here is neither "inherently" misleading, *Milavetz*, 130 S. Ct. at 1340, nor is it professional speech, *see Centro Tepeyac*, 2011 WL 915348, at *5–9. Even assuming *Zauderer* and *Milavetz* apply outside those contexts, the cases cited by the City and its Amici involved factual and uncontroversial disclosures. The compelled speech here does not involve "a speaker's identity, professional status, [the] purpose of [a] solicitation," Speech Br. at 22, 25 (citing *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005); *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979)); *see also* Appellants' Br. at 37–38, or statements about the presence of hazardous material, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001).

II. THE ORDINANCE CANNOT SURVIVE UNDER ANY STANDARD OF REVIEW.

As noted above, the Ordinance is subject to strict scrutiny. It cannot survive that stringent standard of review. In any case, it also fails under the less rigorous tests set forth in *Central Hudson* and *Zauderer*.

A. The Ordinance Is Not the Least Restrictive Means of Promoting a Compelling Government Interest.

"Only rarely are statutes sustained in the face of strict scrutiny," which "is strict in theory but usually fatal in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (internal quotation marks omitted). The City's 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). As the district court recognized, the City did not come close to satisfying this standard.

While the government has a generalized interest in protecting consumers from fraud, *Riley*, 487 U.S. at 792, the City must still establish that the specific harms identified "are real, not merely conjectural, and that the [Ordinance] will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Here, given the impact the compelled statement will have on the centers' protected speech, *see supra* Part I.B, there is reason to believe that "the Government seeks not to advance a legitimate regulatory goal, but

to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 664. Moreover, the evidentiary record was so "uneven" and "sporadic," that the district court questioned the City's asserted "interest in protecting and informing women seeking abortion and comprehensive birth-control services from misleading advertisements." 2011 WL 572324, at *9. Nor has the City adduced evidence that the Ordinance would "alleviate" the propounded harms in a "*direct and material* way." *Turner*, 512 U.S. at 664 (emphasis added). After all, the Ordinance itself does not prohibit any allegedly deceptive advertising. While a sign may put an individual on notice that the Center does not provide abortion or birth control, this does not materially alter the status quo, where individuals are already "free to inquire" about the services centers provide: "if the [Center] refuses to give the requested information, the potential [client] may (and probably would)" walk out. *Riley*, 487 U.S. at 799.

In any event, the Ordinance is not even arguably the least restrictive means of preventing deceptive advertising. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."). The City, for example, could more "vigorously enforce its antifraud laws." *Riley*, 487 U.S. at 800. Or it could amend those laws as necessary to alleviate concerns about their application to the centers.

2011 WL 572324, at *10. In addition, the City could "accomplish [its] goal with a broader educational campaign" informing women of the types of pregnancy-related care that was available and encouraging them to ask about the services provided when seeking such care. *Blagojevich*, 469 F.3d at 652. Or the City itself could "publish" lists of pregnancy centers and the services they provide. *Riley*, 487 U.S. at 800. "These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."[8] *Id.* The Ordinance, in contrast, eschews all of these less restrictive alternatives. Instead, it is "precisely the kind of blunderbuss legislation" the First Amendment forbids. *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 509 (6th Cir. 2008). As the Supreme Court has recognized, these sorts of "[b]road 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).

[8] The deterrent effect of antifraud laws or the information provided by an educational campaign further the City's interest even if it is described as preventing deception "prior to" its occurrence. Speech Br. at 20, 24. Similarly, the fact that the City purports to be able to impose *more* onerous requirements does not mean the alternative it selected is the *least* restrictive. Appellants' Br. at 37.

B. The Ordinance Violates the *Central Hudson* Test for Commercial Speech Restrictions.

For many of the same reasons, even if improperly classified as a commercial speech regulation, the Ordinance cannot withstand scrutiny under *Central Hudson*. Under that test, the City must prove (among other things) that the Ordinance (1) "directly and materially advance[s]" a substantial governmental interest, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995), and (2) "is not more extensive than is necessary to serve that interest," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367, 373 (2002); *see also Cent. Hudson*, 447 U.S. at 566.[9] The Ordinance meets neither of these requirements.

First, the Ordinance does not "directly and materially advance" the asserted government interest in preventing consumer deception. To satisfy this component of *Central Hudson*, the State must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Fane*, 507 U.S. at 771. This prong also "seeks to ferret out whether a law ostensibly premised on legitimate public policy objectives in truth serves those objectives." *BellSouth*,

[9] Even assuming the Ordinance regulates misleading speech, the City "must satisfy the remainder of the *Central Hudson* test" because it would also "snare[]" "truthful and nonmisleading expression." *Edenfield v. Fane*, 507 U.S. 761, 768–69 (1993).

542 F.3d at 507. A court cannot "turn away if it appears that the stated interests are not the actual interests served by the restriction." *Fane*, 507 U.S. at 768.

Here, the Ordinance purports to serve the City's interest in preventing women from being deceived into thinking that a pregnancy center provides abortion and certain types of birth control when, in fact, it does not. But again, the Ordinance does not *directly* address this interest because it does not prohibit such deceptive conduct. *See supra* Part II.A. Instead, it requires pregnancy centers which do not and have never been alleged to have engaged in such conduct to post signs identifying services they do not provide. This fact, combined with the Ordinance's impact on the Center's speech, *see supra* Part I.B, also makes the City's asserted interests suspect.

Second, the Ordinance is "more extensive than is necessary to serve" the asserted governmental interest. *Cent. Hudson*, 447 U.S. at 566. Under this prong, "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson*, 535 U.S. at 371. For example, in *Thompson*, the Court struck down a speech restriction because "[s]everal non-speech-related means of drawing [the] line might [have] be[en] possible," and the government failed to explain "why these possibilities, alone or in combination, would be insufficient." *Id.* at 372–73.

Here, the City failed to employ numerous alternatives that would serve its interests at least as effectively as the Ordinance, but without restricting speech (or as much speech). *See supra* Part II.A. Because these alternatives "could advance the [City]'s asserted interest in a manner less intrusive to . . . First Amendment rights," the Ordinance is "more extensive than necessary." *Rubin*, 514 U.S. at 491; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (same). Ultimately, the City has not shown that the Ordinance is "a necessary as opposed to merely convenient means of achieving its interests. If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373.

Accordingly, the Ordinance cannot withstand scrutiny, even if evaluated under the *Central Hudson* standard for commercial speech restrictions.

C. The Ordinance Violates *Zauderer* Because the Disclaimer Is "Unjustified and Unduly Burdensome."

Finally, as noted, the Ordinance does not require a "purely factual and uncontroversial" disclosure in "commercial advertising" and, therefore, is not governed by *Zauderer*. *See supra* Part I.C. But regardless, even under *Zauderer*, the Ordinance violates the First Amendment because the compelled speech is "unjustified or unduly burdensome" and is thus not "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651.

To justify imposition of the Ordinance, the City must provide both evidence of the existence of the specific harm it seeks to remedy and evidence that its chosen regulation will effectively combat that harm. *See Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). Here, evidence that pregnancy centers in Baltimore deceive potential clients is "uneven" and "sporadic." 2011 WL 572324, at *9. The Supreme Court has rejected speech restrictions where, as here, there was insufficient evidence of the targeted harm. *Cf. Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 146–47 (1994) (invalidating a disclaimer requirement where the State did not identify "any harm that is potentially real, not purely hypothetical"). Likewise, the City has failed to show that the "specific requirements" of the Ordinance "will effectively prevent consumer deception." *Public Citizen*, 632 F.3d at 229.

Furthermore, the Ordinance imposes significant and undue burdens on the centers. They are forced to alter the content of their speech and compelled to disseminate a government-dictated message. In some cases, the disclosure "effectively rules out" the centers' ability to convey their own, noncommercial messages to potential clients. *See supra* Part I.B–C; *cf. Ibanez*, 512 U.S. at 146–47 (invalidating a requirement that the term "specialist" be accompanied by a disclaimer where the disclaimer's length "effectively rule[d] out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages

listing"); *Public Citizen*, 632 F.3d at 229 (striking a similar rule that "effectively rule[d] out the ability of Louisiana lawyers to employ short advertisements"). If disclosures may be "unjustified or unduly burdensome" where they "chill[] protected commercial speech," *Zauderer*, 471 U.S. at 651, the same must certainly be true of disclosures that "chill[]" *non*commercial speech.

CONCLUSION

For the reasons stated above, the opinion of the district court should be affirmed.

Respectfully submitted,

Dated: June 7, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief contains 6,983 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and has been prepared in proportionally spaced typeface using 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word-processing system in preparing this certificate.

Dated: June 7, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2011, the undersigned filed a true and correct copy of the foregoing Brief of Amici Curiae Law Professors in Support of Appellee and Affirmance with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all counsel of record, including the following individuals:

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