No. 16-2325

In the United States Court of Appeals for the Fourth Circuit

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,
Plaintiff-Appellee,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; CATHERINE E. PUGH, in her official capacity as Mayor of Baltimore; and LEANA S. WEN, M.D., in her official capacity as Baltimore City Health Commissioner,
Defendants-Appellants

On Appeal from the United States District Court for the District of Maryland
(Case No. 1:10-cv-00760-MJG)

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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Dated April 3, 2017.

/s/ Francis J. Manion
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INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law and the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and participated as *amicus curiae* in a number of significant cases involving abortion and the freedoms of speech and religion.[2]

The outcome of this case is of great interest to the ACLJ, as it has represented, and is currently representing, clients in litigation in other

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[1] Pursuant to Fed. R. App. P. 29, *amicus curiae* certifies that all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made such a monetary contribution.

[2] *See, e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (participated as amicus curiae; Court held that the Partial Birth Abortion Ban Act of 2003 was facially constitutional); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (holding that the creation of floating buffer zones around persons seeking to use abortion clinics violated the First Amendment rights of pro-life speakers); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (holding that a federal law did not provide a cause of action against pro-life speakers who obstructed access to abortion clinics).

areas of the country involving laws similar to Baltimore Ordinance 09-252 ("the Ordinance"). For example, the ACLJ represented the Plaintiffs in *Evergreen Association, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), successfully challenging a New York City law similar to the Ordinance in key respects. The ACLJ also currently represents three California crisis pregnancy centers in *Livingwell Medical Clinic v. Becerra*, No. 15-17497, 2016 U.S. App. LEXIS 18532 (9th Cir. Oct. 14, 2016), *petition for cert. filed,* No. 16-1153 (March 20, 2017), a case challenging a California statute similar to the Ordinance.

SUMMARY OF ARGUMENT

The Ordinance and similar laws enacted in Montgomery County, Maryland, Austin, Texas, New York City, and California target an exceedingly narrow category of organizations for burdensome disclaimer requirements: organizations commonly known as "crisis pregnancy centers" (CPCs) that assist women who are or may become pregnant but do not provide referrals for abortion or certain contraceptives on religious or moral grounds. A reasonable person might ask why these so-called "truth in advertising" laws apply to these organizations without regard to whether their advertisements are allegedly false or

misleading, or without regard to whether they actually make any advertisements at all. The answer is that these laws intentionally target CPCs for burdensome, unnecessary regulation because they hold disfavored viewpoints on matters of sexual morality, abortion, and birth control. Given that the stated goal of these widespread anti-CPC legislative efforts is to "bring them down"[3] through viewpoint discriminatory means, it is unsurprising that Baltimore and other state and local governments have wholly ignored less restrictive means available to deal with any actual (as opposed to hypothetical) harms, such as government-sponsored ad campaigns communicating the government's viewpoints or narrowly tailored laws prohibiting false advertising, the unauthorized practice of medicine, or falsely holding oneself out as a doctor or medical office.

[3] *See* Testimony of the American Center for Law and Justice in Opposition to the Proposed Anti-Crisis Pregnancy Center Bill (Int. No. 371), November 16, 2010, *available at* http://savethelifecenters.com/ACLJ.pdf (quoting NARAL Pro-Choice New York, http://www.prochoiceny.org, as it existed as of Nov. 12, 2010).

ARGUMENT

It is an understatement to call abortion "one of the most contentious and controversial [issues] in contemporary American society." *See Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring). Partisans on both sides of the debate advance their particular viewpoints in the public square with passion befitting an issue which, for one side, involves literally a matter of life and death, and for the other side, involves egregious governmental interference with fundamental autonomy and privacy. As the plurality observed in *Planned Parenthood of Southeastern Pa. v. Casey*:

> [Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

505 U.S. 833, 852 (1992).

Given such high stakes, and in the present context, it should surprise no one that both so-called "pro-choice" and "pro-life" advocates hold markedly different viewpoints on how women seeking help in dealing with crisis pregnancies should be presented with information

about abortion. And, again, given the stakes involved, it is hardly less surprising to find partisans accusing each other of engaging in misleading and outright deceitful conduct in advancing those viewpoints.

Thus, by way of example, the proponents of the Baltimore Ordinance relied heavily on a report of a nationwide investigation into allegedly misleading and deceitful practices of CPCs ("the Waxman report"), and a separate report by NARAL Pro-Choice Maryland which focused on allegedly similar activities occurring in Maryland CPCs ("the NARAL report"). JA 1246-47.[4] At the same time, however, Planned Parenthood, one of the most visible supporters of the Ordinance, has itself recently been accused of, *inter alia*, disseminating misinformation about its pregnancy-related practices—including which particular services it does and does not offer—by both a Congressional committee and private investigators. *See Report of Committee on Oversight and Government Reform* (September 29, 2015), available at: https://oversight.house.gov/wp-content/uploads/2015/09/Committee-

[4] For analysis and rebuttal of the main allegations of both the Waxman and NARAL reports, *see, e.g.*, Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. Contemp. Health L. & Pol'y 223 (Spring 2010).

Findings-Planned-Parenthood-Investigation.pdf; *see also*, *The Prenatal Care Deception*, https://www.youtube.com/watch?v=ekgiScr364Y (last visited March 28, 2017). And NARAL itself has long stood accused—by one of its own co-founders no less—of engaging in misinformation and deception on a grand scale regarding the availability and safety of abortion procedures as a means of advancing its pro-choice viewpoint. *See* Robert P. George, *Bernard Nathanson: A Life Transformed by Truth*, The Public Discourse (Feb. 27, 2011), http://www.thepublicdiscourse.com/ 2011/02/2806.

The point of these examples is merely to illustrate how, on this issue as, indeed, on any similarly controversial matter, charges are often leveled by one side at the other by advocates motivated by deeply held ethical, moral, or religious viewpoints. To the extent that governments can and sometimes must implement measures that touch upon some aspect of controversial medical or other issues, they must be wary of doing so in such a way as to throw their weight on one side of an underlying philosophical, moral, and political debate. Mere differences of interpretation drawn from conflicting evidence are not the proper subject of government regulation since "[u]nder the First

Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-41 (1974). When governments overstep this bound by deliberately favoring one side under the guise of under-inclusive regulations that, both on their face and in their operation target the opposing side, governments engage in impermissible viewpoint discrimination.

It is crucial in the context of this case to recognize that the specific difference in viewpoints at play here is not merely the underlying difference about the rightness or wrongness of abortion itself. Rather, the difference that matters here—as in every case involving attempts by government to dictate the speech of CPCs—is the contending parties' contrasting viewpoints about how and when the subject of abortion is best discussed with clients seeking assistance. The Plaintiff in this case, like the crisis pregnancy center operators in the *Evergreen* case, wish to remain free to approach the subject of abortion and certain abortifacient forms of birth control in a manner they believe to be in the best interest of their clients. *See Evergreen*, 740 F.3d at 249. The City of Baltimore,

on the other hand, by requiring the posting of a waiting room sign about abortion, mandates that "every conversation at the Center begins with the government's chosen framing of the subject of abortion and a government warning." JA367. As the Court below described the effect of the mandated disclaimer: "[T]he City seeks to thrust the topics of abortion and birth control into the face of women at the beginning of their in person interaction with the center." JA1262. This approach tracks the strongly held viewpoint of NARAL, Planned Parenthood, and others of their ilk who lobbied for the Ordinance. Nevertheless, to the extent that it compels speech that both in substance as well as in manner and time of delivery Plaintiff would not otherwise choose to make, it constitutes impermissible viewpoint discrimination.

It is well established that "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Laws that discriminate against the speech of individuals or groups based on the viewpoints they seek to express are presumptively invalid and, for all intents and purposes, forbidden. *See, e.g.*, *R.A.V. v. City of*

St. Paul, 505 U.S. 377, 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules"); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'") (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978)).

Most recently, in *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), the Supreme Court unequivocally reaffirmed that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2222 (citation omitted). In other words, regardless of the government's alleged purpose in enacting the law, if that law is content-based on its face, strict scrutiny follows. *Id.* at 2227. Since viewpoint discrimination, such as that inherent in the Ordinance, is an especially "egregious form of content discrimination," *Rosenberger*, 515 U.S. at 828-29, the principles of *Reed* obviously apply here.

On its face, the Ordinance purports to address a need for women to have maximum information about their options when facing pregnancy. This alleged goal is in keeping with the City's stated interest in assuring that women receive full and accurate information about which services are being offered at "all facilities that primarily provide pregnancy-related care and information." JA 57. *But the Ordinance does not do that*. JA 43-49. On the contrary, it applies only to those providers who, like the Plaintiff, wish to approach the matter without leading off the conversation by trumpeting the availability of the abortion option. Providers of "pregnancy-related care and information" who take the opposite viewpoint, and who are engaged in speech on the same subject but from a different viewpoint, are not regulated at all. They are under no legal compulsion to disclose which pregnancy-related services they do or do not provide. Under *Reed*, this is enough to doom the Ordinance.

While *Reed* does not demand further inquiry into the subjective motivation for enactments that are facially content-discriminatory (or, *a fortiori*, viewpoint discriminatory) in order for strict scrutiny to apply, the evidence of the City's discriminatory motivation is telling and adds

further support to Plaintiff's argument. For example, throughout this litigation the City has identified the source of the problem it purports to be addressing as "traumatizing anti-abortion advocacy" and "traumatizing and false propaganda." *See* City's Br. at 9, 10, and 13 (4th Cir. Case No. 11-1111, Doc. 26). But surely "advocacy" is pure speech, and "propaganda," at least in this context, is pure speech one happens to disagree with. Neither may be regulated or controlled under a system of government founded on the notion that "there is no such thing as a false idea." *Gertz*, 418 U.S. at 339.

Further evidence of the City's discriminatory animus toward Plaintiff's viewpoint is the City's rejection of a proposed amendment that would have required all pregnancy-related care and information providers, regardless of their viewpoints, to disclose information about the full range of services they provide. JA 144-46. The failure to adopt this commonsense amendment,[5] which would have at least done something to level the playing field, bespeaks an effort to hamper one

[5] See the editorial in *The Baltimore Sun*, dated Nov. 1, 2009, supporting passage of the Ordinance but with the proviso that it first be amended to place the same disclosure requirements on centers that do provide abortion and contraception services. "If the goal is truth in advertising, it should apply to everyone." JA 53.

side of a public debate while allowing its opponents to operate unhindered.

Finally, it is worth considering the provenance of the Ordinance. Hardly the brainchild of the Baltimore City Council working in isolation to address a specific local problem, the Ordinance is instead part of a nationwide campaign waged by pro-abortion groups, particularly NARAL Pro-Choice America and its affiliates and legislative allies, to target, marginalize, and distort the message of CPCs, organizations that do not provide or refer for abortion or contraceptives due to their sincerely held religious or moral beliefs. The various laws imposing disclaimer mandates upon CPCs are not based upon actual evidence of a concrete, non-hypothetical problem necessitating government intervention,[6] but rather are based upon a self-reinforcing echo chamber of pro-abortion advocates' rhetoric and accusations passed from city to

[6] *See* Penny Starr, *Baltimore Law Aims to Undermine Charitable Work of Pregnancy Centers*, http://www.cnsnews.com/news/article/baltimore-law-aims-undermine-charitable-work-pregnancy-resource-centers-say-pro-life, CNSNEWS.com (Dec. 29, 2009), noting the absence of testimony from any clients of the Baltimore CPCs that they had been misled.

city for the purpose of hampering the efforts of CPCs.[7] Indeed, regarding the Baltimore Ordinance, a review of publicly available information on NARAL Pro-Choice Maryland reveals that this self-described "advocacy" organization lists as its primary program the policing of the speech and activities of the state's CPCs. *See* https://www.guidestar.org/profile/52-2013901. The group (with justification it would seem) touts as its greatest success its efforts to counter the "deceptive messages" of Maryland CPCs and boasts of having been instrumental in the passage of the Ordinance at issue in this case.

While it is true that a law is not viewpoint-discriminatory *per se* "simply because its enactment was motivated by the conduct of the partisans on one side of a debate," *Hill v. Colorado*, 530 U.S. 703, 724

[7] *See, e.g.*, *NARAL Pro-Choice NY, Exposing Crisis Pregnancy Centers One City at a Time*, http://www.youtube.com/watch?v=Tpya05pQGAQ, at 2:45 to 3:10 (statement of Sara Cleveland, Executive Director, NARAL Pro-Choice Texas) ("At the time of the summit, Baltimore was already in the process of introducing the disclosure ordinance for crisis pregnancy centers. From that idea, our contact with the City of Austin and the political director for NARAL had the realization that this is an ordinance that could probably work in Austin as well."); *id.* at 3:10 to 3:46 (statement of Heidi Gerbracht, Policy Director, Councilmember Spelman's Office) ("The conversation at the Denver Urban Initiative was fundamental to us getting our crisis pregnancy center ordinance started and then passed.") (last visited March 29, 2017).

(2000), surely it is the case that governments should not permit themselves to become ventriloquist's dummies for advocacy groups on either side of any hotly contested political or philosophical debate. Nor should courts ignore transparent efforts to control speakers' viewpoints on controversial issues under the guise of "truth in advertising" laws, particularly where one of the things the contending parties differ on is the "truth" of the facts underlying their respective viewpoints.

The late Justice Scalia once drew the following analogy which is certainly *apropos* to Baltimore's "truth in advertising" Ordinance:

> If, just a few decades ago, a State with a history of enforcing racial discrimination had enacted a statute like this one, regulating "oral protest, education, or counseling" within 100 feet of the entrance to any lunch counter, our predecessors would not have hesitated to hold it was content based or viewpoint based.

Hill, 530 U.S. at 767 (Scalia, J., dissenting).

In enacting the Ordinance, the City of Baltimore did exactly what the First Amendment forbids. It gave partisans of the pro-choice side of the abortion debate a decided advantage in expressing their views on how conversations should be shaped with women considering the options facing them in crisis pregnancies. Those favoring a different approach—such as the Plaintiff in this case—must either agree to

promote a viewpoint they reject on numerous grounds or face civil and criminal sanctions. The court below was correct in finding that Plaintiff was entitled to summary judgment on its Free Speech claim. Although that court limited its holding to the obvious content-discriminatory nature of the Ordinance, the Ordinance, as argued herein, is also viewpoint discriminatory.

CONCLUSION

The decision of the district court should be affirmed.

Dated: April 3, 2017.

Respectfully submitted,

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CERTIFICATION PURSUANT TO FED. R. APP. P. 29 AND 32

This *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 2,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using CM/ECF, which will send notification of such filing to counsel of record.

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