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; 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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 9 OTHER STATES SUPPORTING PLAINTIFF-APPELLEE

PATRICK MORRISEY
ATTORNEY GENERAL

State Capitol Building 1, Room 26-E
Charleston, WV 25305
Telephone: (304) 558-2021
Email: tjohnson@wvago.gov

ELBERT LIN
SOLICITOR GENERAL
Thomas M. Johnson, Jr.
Deputy Solicitor General
Counsel of Record
Erica N. Peterson
Assistant Attorney General

Counsel for Amicus Curiae *the State of West Virginia*

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INTEREST AND IDENTITY OF *AMICI*

The States of West Virginia, Alabama, Arkansas, Kansas, Michigan, Nebraska, Ohio, South Carolina, Texas, and Utah file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.[1]

Amici States have a significant interest in the outcome of this case. Like the City of Baltimore, *amici* States have an interest in protecting the public from deceptive advertising and ensuring that the public has accurate information about public health issues. But *amici* States also firmly believe that, under our constitutional structure, these interests cannot justify the means selected by the City in this case—coercing private religious pregnancy centers and their staff into delivering a government message that conflicts with their strongly-held beliefs. The Ordinance enacted by the City is particularly onerous because the disclaimer it requires would deter the free and open exchange of ideas between center staff and their visitors.

Contrary to the City's approach, *amici* States believe that governments can play an important role in fostering an active marketplace of ideas. That includes protecting citizens' rights to tailor their messages as they see fit to persuade others without fear that the government will single them out for unfavorable treatment based on their viewpoints or religious beliefs. Protection of free speech is

[1] A State may "file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a).

particularly important where, as here, the speech at issue touches on one of the most important and contentious public issues of our time—abortion.

Amici States recognize that there are other circumstances in which States and municipalities must act to protect citizens against deceptive advertising or to inform them on important matters affecting public health. But furthering such interests does not require the blunt instrument of coercing speech in intimate, non-commercial settings, such as the waiting room at Greater Baltimore Center for Pregnancy Concerns (the "Center"). Rather, *amici* States have utilized and will continue to utilize alternative measures that are "less destructive of First Amendment interests." *Riley v. Nat'l Fed. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 788 (1988). Those measures include, among other things, consumer-protection laws and public information campaigns.

SUMMARY OF ARGUMENT

The City of Baltimore has enacted an Ordinance that purports to protect consumers from deceptive advertising and misinformation on public health issues, but does nothing of the sort. Instead, as the Center has set forth in its brief, the Ordinance targets the non-commercial speech of non-licensed charitable organizations and their employees who wish to communicate their own deeply and sincerely-held religious and moral convictions about abortion and contraception and provide assistance to pregnant women in need. Center Br. 17–37. It does this

by mandating that the Center and other pro-life organizations that provide "information about pregnancy" but do not "make [abortion] referral[s]" post a prominent disclaimer in their waiting rooms that runs counter to the Center's mission and could discourage women from engaging in dialogue with Center staff. *Id.* at 7. As the Center explains, the City has failed to demonstrate that the Ordinance furthers any compelling (or even legitimate) government interest or that it is a permissible regulation of commercial speech. *See id.* at 44–53.

Amici States agree with the Center's arguments and incorporate them herein by reference. *Amici* States focus this brief on one aspect of the First Amendment analysis—the woefully inadequate fit between the interests asserted by the City and the means adopted to further them. Under any standard of judicial scrutiny, the means selected by the City—compelling a private religious organization to convey the government's preferred message on a matter of pressing public concern—is unnecessary to achieve the interests it asserts and threatens significant harm to our tradition of free expression and open debate.

Amici States will also show, from their own extensive experience, that state and local governments have other, more narrowly-tailored options for advancing their interests in protecting citizens from misinformation and promoting public health than the blanket disclaimer required by the Ordinance. These alternatives may include: (1) regulating false and deceptive advertising directly; (2) engaging

in public health campaigns to provide citizens with relevant information; and (3) in appropriate cases, narrowly-tailored disclosure requirements appended to specific types of commercial advertisements.

ARGUMENT

The City has chosen to deliver its preferred message—promoting access to abortion and birth control services—by compelling private, pro-life pregnancy centers to proclaim that message in their waiting rooms, where center staff interact with visitors and seek to communicate their deeply and sincerely-held moral and religious beliefs, as well as accurate information about abortion procedures and risks. Even if the City could show that it has legitimate concerns about the Center's advertisements or that the Center was misinforming women about their health options (it cannot, Center Br. 44–53), it still has failed to select an appropriate means of addressing those concerns that does not unnecessarily chill protected speech.

When applying strict scrutiny, the government must show that a law is "narrowly tailored to promote a compelling Government interest" and that there is no "less restrictive alternative" that would equally serve the government's purpose. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). And under the less stringent test for commercial speech, which should not apply here (*see* Center Br. 17–43), the government must still show that there is a "reasonable fit

between the legislature's [substantial government interest] and the means chosen to accomplish those ends, a means narrowly tailored to achieve the desired objective." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (internal quotation marks omitted). "[I]f there are numerous and obvious less burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' . . . is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

The Center has correctly concluded that the Ordinance must be evaluated under strict scrutiny because it compels speech, is content-based, is viewpoint-based, and regulates non-commercial speech. Center Br. 17–43. But the Ordinance would fail under any form of scrutiny, because the City has failed to identify and use less restrictive alternatives to accomplish its professed objectives. The Ordinance, the means selected by the City, unnecessarily (a) compels speech from speakers who disagree with the message, (b) dissuades others from engaging with the affected speakers in further dialogue, and (c) compels dissemination of false or misleading information. By contrast, there are numerous less restrictive alternatives by which the City may prevent deception and promote public health without infringing on constitutionally protected speech. *Amici* States will focus on three categories of laws that States have enacted to address their interests without

commandeering private religious organizations to express the government's preferred message.

I. GOVERNMENTS SHOULD NEVER NEED TO RESORT TO THE SPECIFIC MEANS OF COMPELLED SPEECH MANDATED BY THE ORDINANCE.

"The Free Speech Clause exists principally to protect discourse on public matters," *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011), because "[f]reedom of speech plays a fundamental role in a democracy," *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986). Accordingly, *amici* States have a strong interest in protecting the free speech rights of their citizens against overly broad and burdensome restrictions on free speech.

Contrary to the purposes of the First Amendment, the Ordinance unnecessarily inhibits free discourse and debate in at least three ways. *First*, it compels private religious speakers to convey a government message that contradicts the speakers' deeply-held religious and moral beliefs and affects how the speakers can present their messages to others. *Second*, the Ordinance has both the purpose and effect of delegitimizing the Center's preferred message and discouraging members of the public from engaging with the Center who might otherwise be inclined to hear its point of view. *Third*, the Ordinance is false or misleading on its face as it could be read to suggest that the Center does not

provide any accurate or useful information about either family planning services or abortion procedures.

The government should not have to resort to such a heavy-handed and ham-fisted approach to further its purported interests. Rather, as explained further below, States have other less restrictive means at their disposal to promote truth in advertising and public health awareness that do not involve compelling speech in the intimate setting of a private pregnancy center's waiting room.

A. The Ordinance Compels Private Religious Organizations To Deliver A Message With Which The Speakers Strongly Disagree.

At its most basic level, the Ordinance uses private speakers as unwilling vehicles to convey the City's preferred message about important matters of public concern, namely, abortion and birth control. And the Ordinance specifically targets private charitable pro-life centers who disagree with the City's message on these issues and *only* those centers. JA1066-67.[2] Courts have recognized that such compelled speech is often impermissible and irreconcilable with the First Amendment.

The First Amendment protects against government compulsion of speech no less than government suppression of speech. *See, e.g.*, *Wooley v. Maynard*, 430

[2] As the Center has explained, the City earlier in this litigation conceded and waived any argument that the Ordinance regulates licensed professionals or the provision of medical services or should be analyzed as a permissible regulation of professional speech. *See* Center Br. 38–39.

U.S. 705, 714 (1977) ("the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (Murphy, J., concurring))); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (speakers have the right to decide both what to say and "what not to say"). That is true because compelled speech may impermissibly "force[] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. Because compelled speech is so odious to our traditions of free and open discourse, it rarely survives judicial scrutiny, regardless of the level of scrutiny applied or the government's purported interests. *See, e.g.*, *id.* at 716–17; *Hurley*, 515 U.S. at 578; *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19–20 (1986) (Powell, J., plurality op.).

If anything, the Ordinance is a more pernicious form of compelled speech than the statute struck down by the Supreme Court in *Wooley v. Maynard*, which forbade New Hampshire residents from obscuring language on their license plates that read "Live Free or Die." 430 U.S. at 707. In that case, the law at least applied evenhandedly to all motorists in the State. And it involved speech that was likely incidental to the average person's immediate concerns: Most motorists presumably

carried this license plate and interacted with their fellow travelers without confronting the existential choice between life and liberty.

By contrast, the Ordinance applies only to those private organizations most likely to disagree with its content (pro-life religious counseling centers), and it is placed in an intimate setting where visitors have come precisely to engage Center staff on the sensitive and practical issues raised by the government's disclaimer, i.e., pregnancy and family-planning services. The selective and targeted nature of the Ordinance, aimed at only those centers that espouse a pro-life viewpoint, can rarely if ever be justified as an appropriate means to promote the government's asserted interests. *See R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992); Center Br. 20 (collecting authorities).

B. The Ordinance In Purpose And Effect Stigmatizes The Speaker And Dissuades Citizens From Engaging In Open Discourse.

The Ordinance also is an inappropriate means of furthering government interests because it deters, rather than facilitates, the principal purpose of the First Amendment, namely, "to protect discourse on public matters." *Brown*, 564 U.S. at 790.

The Ordinance does more than merely compel a private facility to express speech with which it disagrees. Rather, it also in purpose and effect communicates to pregnant women visiting the Center that the Center cannot adequately address their needs and that they should look elsewhere, in the City's own words, for more

"objective," state-approved options. JA1005. The City wants Center visitors to encounter its "separate" message first, apart from any "social interaction that brings with it a certain level of commitment and engagement." JA1002-03. It thereby wishes to protect visitors from the Center's allegedly "traumatizing anti-abortion advocacy" and "propaganda." Center Br. 21 (quoting submissions by City in this lawsuit). The Ordinance, in other words, in intent and operation, impedes free and open discourse between the Center and its visitors, "harming . . . society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The City's supposed interest in protecting Center visitors from supposedly "traumatizing . . . advocacy" is insufficient, in and of itself, to justify the City's compelled disclaimer. To the contrary, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574. Even in cases arguably involving captive or unwilling audiences, the Supreme Court has concluded that the government cannot justify speech regulations on the basis that it may give offense to some viewers or listeners. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 459–60 (2011); *Cohen v. California*, 403 U.S. 15, 21 (1971). Rather, "the burden normally falls upon the viewer to avoid further bombardment of [her] sensibilities simply by averting [her] eyes." *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211 (1975) (internal quotation

marks omitted). Here, far from seeking to protect captive audiences, the City seeks to shield people from speech that they have actively sought out and wish to hear—at a point before they even have an opportunity to hear it. Such paternalism is not necessary or appropriate to advance the government's professed interests.

Moreover, it is well-established that the government "may not select which issues are worth discussing or debating." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). The Court in *Riley* correctly identified the problems with state disclosure requirements aimed at stifling debate: If "the [listener] is unhappy with the disclosure[ ] . . . , the [speaker] will not likely be given a chance to explain [it]; the disclosure will be the last words spoken as the [listener] closes the door or hangs up the phone." 487 U.S. at 800. Accordingly, the government may not use legal sanctions solely to prioritize certain issues or ideas and deemphasize or delegitimize others. *See, e.g.*, *Hurley*, 515 U.S. at 578; *Cook v. Gralike*, 531 U.S. 510, 530–32 (2001) (Rehnquist, J., concurring in judgment) (concluding candidate for office had First Amendment right "to have his name appear [on ballot] unaccompanied by pejorative language required by the State," which suggested that single campaign issue among many was of "paramount" importance).

Accordingly, the Ordinance improperly threatens to discourage discourse with pro-life pregnancy centers, as it is explicitly aimed at framing discussion about pregnancy around the City's paramount concern over access to abortion

services, rather than the Center's preferred welcoming communication embodied in its "Commitment of Care." JA362. Such compelled speech can rarely, if ever, be an appropriate means for the government to convey its message to the public.

C. The Ordinance Conveys False Or Misleading Information About The Center And Its Message.

Finally, the Ordinance is overbroad because it does not convey accurate information about the Center and its message. The problems with compelled government speech are magnified where, as here, the government's message is itself false or misleading.

The Ordinance requires the Center to state that it "does not provide or make referral for abortion or birth control services." JA35. But the Center *does* provide family planning services consistent with the Center's moral and religious mission, namely, abstinence education and natural family planning. JA358.[3] The Center also provides information about abortion alternatives and accurate information about abortion procedures and risks. JA362, 375, 801. The Ordinance thus falsely suggests that the Center provides *no* family-planning services and can offer no

[3] The City notes that a regulation implementing the Ordinance permits a regulated center to disclose that it provides for "some birth-control services," but not others. City Br. 13. But City regulations also limit the definition of "nondirective and comprehensive birth-control services" to those "which only a licensed healthcare professional may prescribe." *See* Center Br. 12; JA445. This definition would exclude abstinence education, as the City concedes (*see* Center Br. 12), as well as natural family planning.

meaningful information about abortion procedures. The clear implication is that visitors looking for competent advice on these topics must turn elsewhere.

To be sure, the City may desire or prefer that its citizens have access to and information about certain other prescribed forms of birth control (JA34–35) or that its citizens have recourse to pro-choice counselors or abortion providers. But that desire does not justify compelling a private speaker to convey false information about its own services to mislead the public into thinking there are no available alternatives to the City's preferred service providers.

No speaker has a significant interest in the communication of false speech. Rather, "[f]alse statements of fact are particularly valueless[,][because] they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *see also Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982) (false statements "are not protected by the First Amendment in the same manner as truthful statements"); *cf. U.S. v. Alvarez*, 567 U.S. 709 (2012) (Kennedy, J., plurality op.) (reaffirming these decisions while concluding that content-based restrictions in Stolen Valor Act were unconstitutional).

The potential damage that may be caused by false or misleading statements is magnified when the government itself crafts a false statement and places it in the

mouth of a private speaker. One of the principal purposes of the First Amendment is to protect against the risk of unchecked propaganda. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494, 503 (1951) ("the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and the] free debate o[f] ideas will result in the wisest governmental policies"). The Ordinance limits the ability of the Center and likeminded organizations to engage in speech that could effectively counter the government's preferred message.

Of course, to say that the Ordinance is false is not necessarily to say that the City, or any government, intentionally intends to deceive the public. But the problem of misleading listeners is inherent whenever the government presumes to speak on behalf of a private person. For that reason, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790–91; *see also Hurley*, 515 U.S. at 573 (same). The Ordinance presumes, by contrast, that the *City* knows better than the Center how best to inform the public about the nature and scope of the Center's services. For this reason, too, the Ordinance relies on inappropriate means to accomplish its preferred objectives.

II. STATES HAVE LESS RESTRICTIVE ALTERNATIVES AVAILABLE TO FURTHER THEIR LEGITIMATE INTERESTS IN REGULATING DECEPTIVE ADVERTISING AND PROMOTING PUBLIC HEALTH.

The Ordinance is neither the only nor the best way for the City to further any legitimate interest it may have in consumer protection or public health awareness. Rather, there are at least several less restrictive alternatives available to States and localities that do not require the government to compel non-commercial speech or dissuade discourse on matters of public concern.

Under strict scrutiny, to be narrowly-tailored, a law "must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Fed. Election Comm'n*, 479 U.S. at 265. In other words, there must be no "less restrictive alternative" that would serve the government's compelling purpose. *Playboy Entm't*, 529 U.S. at 813. Commercial speech similarly must be evaluated against whether there are "less-burdensome alternatives to the restriction on commercial speech." *City of Cincinnati*, 507 U.S. at 417 n.13. Under either standard, the Ordinance must be struck down.

Amici States highlight here three types of state laws that could serve as a model for less restrictive alternatives in this case. While *amici* States may not agree with all of these laws or particular applications of these laws as a matter of

policy, they represent examples of real tools at States' disposal that do not restrict speech to the same degree as the Ordinance (if at all). *First*, States protect consumers through express limitations on false and deceptive trade practices, including false advertising. *Second*, States provide their citizens directly, through public awareness campaigns, with information about certain topics including where to access health care and other social services. *Third*, States have adopted, in certain narrow circumstances, mandatory disclosures appended to particular commercial advertisements that protect consumer health and safety.

A. States Protect Consumers Through Direct Restrictions On False And Deceptive Advertising.

The City's purported concern about false or deceptive advertising cannot justify the Ordinance's imposition of a broad mandatory disclosure requirement that applies regardless of whether a pregnancy center advertises *at all*, let alone whether any ads mislead pregnant women into believing the center provides abortions. Center Br. 52–53. The City has a less restrictive approach available because it could regulate any false and deceptive advertising directly. Not only is this approach less restrictive of free speech, but it would further the City's purported purpose in enacting the Ordinance. Indeed, the Supreme Court in *Riley* noted that, in lieu of mandatory disclosures, "the State may vigorously enforce its antifraud laws." 487 U.S. at 800. That is also true here.

Regulation of false and deceptive commercial advertising is widespread throughout the States. Through tort law and statutes, States have long "served the consumers' interest in the receipt of accurate information in the commercial market by prohibiting fraudulent and misleading advertising." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996). Most States have a consumer protection statute generally aimed at false or deceptive statements, including those on advertisements, made in connection with the sale of a good or service.[4]

For example, West Virginia's Consumer Credit and Protection Act prohibits, among other things, "us[ing] . . . any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in

[4] Ala. Code § 8-19-5; Alaska Stat. Ann. § 45.50.471; Ariz. Rev. Stat. §§ 44-1522, 13-2203; Ark. Code Ann. §§ 4-88-107, -108; Cal. Bus. & Prof. Code § 17200; Colo. Rev. Stat. Ann. § 6-1-105; Conn. Gen. Stat. Ann. § 42-110b; 6 Del. Code Ann. Tit. 6, § 2532; D.C. Code § 28-3904; Fla. Stat. Ann. § 501.204; Ga. Code Ann. § 10-1-372; Haw. Rev. Stat. § 481A-3; Idaho Code Ann. § 48-603; Ind. Code § 24-5-.5-3; Iowa Code Ann. § 714.16; Kan. Stat. Ann. § 50-626; Ky. Rev. Stat. § 367.170; La. Rev. Stat. Ann. § 51:1405; Me. Rev. Stat. tit. 10, § 1212; Md. Code Ann. Com. Law § 13-301; Mass. Gen. Laws Ann. Ch. 266, § 91; Mich. Comp. Laws. Ann. § 445.903; Minn. Stat. Ann. §§ 325D.44, 325F.67; Miss. Code Ann. §§ 75-24-5, 97-23-3; Mo. Ann. Stat. § 407.020; Mont. Code Ann. §§ 30-14-103, -104; Neb. Rev. Stat. § 87-302; Nev. Rev. Stat. § 598.0915; N.M. Stat. Ann. § 57-12-3; N.Y. Gen. Bus. Law § 350; N.C. Gen. Stat. Ann. § 75-1.1; N.D. Cent. Code § 51-12-01; Ohio Rev. Code § 4165.02; Okla. Stat. Ann. Tit. 15, § 753; 73 Pa. Stat. Ann. §§ 201-2, -3; R.I. Gen. Laws §§ 6-13.1-1, -2; S.C. Code Ann. § 39-5-20; S.D. Codified Laws § 37-24-6; Tenn. Code Ann. § 47-18-104; Tex. Bus. & Com. Code Ann. § 17.46; Utah Code Ann. §§ 13-11a-1, -3; Vt. Stat. Ann. § 2453; Va. Code Ann. § 18.2-216; W. Va. Code § 46A-6-102; Wyo. Stat. § 40-12-105.

connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby." W. Va. Code § 46A-6-102. Similarly, New York's statute declares that "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." N.Y. Gen. Bus. Law § 350. Utah's truth in advertising law, in turn, makes it unlawful to "advertise[] goods or services with intent not to supply a reasonable expectable public demand" or "represent[] that goods or services have sponsorship, approval, characteristics, ingredients, uses, or qualities that they do not" or "engage[] in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." Utah Code Ann. § 13-11a-3.

These consumer protection statutes are enforced by the State's attorney general or through civil actions. For example, the Consumer Protection Division within the Arkansas Attorney General's office is authorized to enforce the State's provisions concerning deceptive trade practices. Ark. Code Ann. § 4-88-105. The Attorney General has authority to file a civil action in court for civil enforcement seeking restitution and "an injunction prohibiting any person from engaging in any deceptive or unlawful practice prohibited." *Id.* § 4-88-104. Under Kansas law, the attorney general, any county or district attorney, or any aggrieved consumer may bring an action to enforce the statute. Kan. Stat. Ann. §§ 50-632, -634.

It would also be less burdensome for States to enact a more specific statute prohibiting entities from falsely advertising that they perform a given service. For example, Louisiana has a statute that prohibits adoption agencies from operating without a license and prohibits any unlicensed facility from advertising that it provides adoption services. La. Rev. Stat. Ann. §§ 46:1401 *et seq.* Specifically, the statute provides that "[i]t shall be unlawful for any person other than a licensed child-placing agency or a Louisiana-based crisis pregnancy center to advertise through print or electronic media that it will adopt children or assist in the adoption of children." *Id.* § 46:1425. The attorney general, the Department of Children and Family Services, the appropriate district attorney, and any licensed child-placing agency or Louisiana-based crisis pregnancy center may seek injunctive relief to enforce the statute. *Id.*

On the federal level, the Food and Drug Administration ("FDA") also prohibits companies from marketing their products in certain ways that could be deemed misleading. For example, the FDA prohibits companies from marketing a tobacco product as "modified risk" unless it first determines that the product will significantly reduce the harm and risk of tobacco-related disease to individual users and benefit the health of the population as a whole. 21 U.S.C. § 387k(g)(1). The Sixth Circuit has upheld that provision against First Amendment challenge, because it "only applies to claims 'directed to consumers through the media or

otherwise . . . respecting the product' or on the labeling or advertising of the product." *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 536 (6th Cir. 2012) (Clay, J., majority op.), *cert. denied*, 133 S. Ct. 1996 (2013) The court further explained that "[t]here is no indication that the provision suppresses non-commercial speech relating to nonspecific tobacco products." *Id.*

In contrast to these less burdensome approaches, the Ordinance targets non-commercial speech directly, regardless of its relationship to any advertisement or the sale or promotion of any good or service. It therefore cannot be deemed narrowly tailored to serve the government's interest.

B. States Can Provide Their Citizens With Health Information Directly Through Public Awareness Campaigns.

To the extent the City's Ordinance is motivated by its view that pregnant women are under-informed or misinformed about the health care options available to them, the City is free to speak to women directly about any or all of those options. Without offending the First Amendment, the government is free to determine the content of its own speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–68 (2009). Indeed, the Ordinance cannot stand where, as here, "the State offers no explanation why remedies other than content-based rules would be inadequate," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 575 (2011), where it "can express [its] view through its own speech," *id.* at 578; *see also Riley*, 487 U.S. at 800.

Under the Ordinance, the government does not speak directly but rather compels private speakers to deliver the government's selected and selective message. This distinction is critical. As noted, the First Amendment "does not regulate government speech," and when the government speaks, it may "select the views that it wants to express." *Pleasant Grove City*, 555 U.S. at 467–68. But the government "offends the Constitution" when it forces a private party to advertise on its behalf, "even if it is clear that the government is the speaker." *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014) (citing *Wooley*, 430 U.S. at 715). The Ordinance falls squarely within the latter category, because it compels disclosure, requires the private pregnancy center to create and deliver the message, and provides only an option (but not a requirement) that the center note that "the sign is required by Baltimore City ordinance." City Br. at 13 (quoting Balt., Md., City Health Dep't, Final Regulation: Limited-Service Pregnancy Center Disclosures in Baltimore City § (B)(iii) (Sept. 27, 2010)). The required disclaimer thus differs in kind from posters, pamphlets, or other materials that are clearly created by, and distributed from, the government.

This distinction between compelled speech and government speech was critical to the Second Circuit's decision in *Evergreen Association, Inc. v. City of New York*. In that case, the court held that a requirement that pregnancy centers disclose that "the New York City Department of Health and Mental Hygiene

encourages women who are or who may be pregnant to consult with a licensed provider," *Evergreen Ass'n*, 740 F.3d at 238, was "insufficiently tailored" because the City could instead disseminate the message through its own advertising campaign, *id.* at 250.

States regularly further their legitimate interests in promoting the health of their citizens by disseminating their own messages about health issues, including pregnancy services. These programs can take the form of providing information directly to individuals seeking government services, advertising campaigns, and Internet outreach.

For example, in 2007 Missouri started the "Missouri Alternatives to Abortion Public Awareness Program" to inform its citizens about non-profit alternatives to abortion services such as maternity homes, pregnancy resource centers, and crisis pregnancy centers. Mo. Ann. Stat. § 188.335. This public awareness program uses "television, radio, outdoor advertising, newspapers, magazines, and other print media, and the internet to provide information on these alternatives to abortion." *Id.* § 188.335(2).

Missouri also has a public advertising campaign designed to inform the public about foster care and adoption. Mo. Ann. Stat. § 191.975. The "Adoption Awareness Law" tasks the department of social services and the department of health with "[d]eveloping and distributing educational materials, including but not

limited to videos, brochures and other media as part of a comprehensive public relations campaign about the positive option of adoption and foster care." *Id.* The materials are made available through "state and local public health clinics, public hospitals, family planning clinics, abortion facilities . . ., maternity homes . . ., child-placing agencies . . ., attorneys whose practice involves private adoptions, in vitro fertilization clinics and private physicians for distribution to their patients who request such educational materials." *Id.*

States have also created education programs designed to inform citizens about the health effects of tobacco use. Many of these programs are based on the federal Centers for Disease Control and Prevention's 1999 Best Practices for Comprehensive Tobacco Control Programs. The California Cigarette and Tobacco Products Surtax Fund, for example, supports "[t]obacco-related school and community health education programs." Cal. Rev. & Tax. Code § 30122. Maryland has enacted a "statewide counter-marketing and media campaign to counter tobacco advertisements and discourage the use of tobacco products." Md. Code Ann. Health-Gen. § 13-1013. Florida also has a "statewide tobacco education and use prevention program," including a "counter-marketing and advertising campaign" utilizing "Internet, print, radio, and television advertising." Fla. Stat. Ann. § 381.84. Similarly, Mississippi's program involves, among other things, the "use of mass media, including paid advertising and other communication tools to

discourage the use of tobacco products and to educate people, especially youth, about the health hazards from the use of tobacco products." Miss. Code Ann. § 41-113-3; *see also* Tex. Health & Safety Code § 161.301.

Finally, Florida has instituted a comprehensive public health program that touches on a variety of important public health areas. Specifically, the Florida Department of Health "conduct[s] health education campaigns for the purpose of protecting or improving public health." Fla. Stat. Ann. § 20.43(7)(b). The Department is authorized to purchase "advertising, such as space on billboards or in publications or radio or television time, for health information and promotional messages." *Id.* The messages are aimed at informing the public about the health hazards associated with, among other things, "unprotected sexual intercourse, other than with one's spouse;" "cigarette and cigar smoking;" "alcohol consumption or other substance abuse during pregnancy;" "alcohol abuse or other substance abuse;" and "lack of exercise and poor diet and nutrition habits." *Id.*

Rather than avail itself of these options, however, the City has chosen to select private speakers who disagree with its views on abortion and birth control to deliver the City's preferred message on its behalf. That cannot be narrowly tailored when the City has less restrictive and less burdensome means of promoting its own message at its disposal.

C. In Appropriate Cases, States May Enact Narrowly-Tailored Disclosure Laws.

Finally, in certain limited cases, the U.S. Supreme Court has approved the practice of mandatory, truthful disclosures appended directly to commercial advertisements to counter any potentially deceptive or misleading speech. While such disclaimers undoubtedly raise more serious First Amendment concerns than the two options set forth above, they can be permissible where a State "require[s] that a commercial message" itself "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). The Ordinance, by contrast, does not attempt to append a disclaimer to any specific advertisement, nor does the City make any attempt to show that such disclaimers are necessary, that is, that the Center's advertisements were in fact misleading or that any woman was misled into thinking that the Center provided abortion services.

To cite one example of a state disclosure law aimed at ensuring truth in advertising, New Jersey requires persons advertising or selling an information service to clearly disclose in all advertisements "[a]n accurate description of the service," "[t]he total price of the service" or the applicable rate, an "[i]nstruction to minors to obtain parental consent before engaging the information service," and "[t]he legal name and street address of the information service provider." N.J. Stat.

Ann. § 56:8-56. This provision imposes less burden on free speech than one that would, say, require every company in New Jersey to post a disclaimer at the customer-service counter of every store that implies that the store employees may not be competent to handle customer concerns.

Tobacco advertisements and packaging are likewise often required to contain government-mandated warnings. The federal government requires that specific warnings be printed on cigarette packages and any advertisement for cigarettes. 15 U.S.C. § 1333. The warnings are designed "to prevent consumers from being misled about the health risks of using tobacco," and are appropriately tailored to "'promote greater public understanding of [those] risks.'" *Discount Tobacco*, 674 F.3d at 561 (Stranch, J., majority op.). States, too, have similar warning requirements for the advertisement of smokeless tobacco products. *See, e.g.*, Utah Code Ann. § 76-10-102 ("Any advertisement for smokeless tobacco placed in a newspaper, magazine, or periodical published in this state must bear a warning which states: "Use of smokeless tobacco may cause oral cancer and other mouth disorders and is addictive."); Mich. Comp. Laws Ann. § 750.42a (requiring a health warning on outdoor signs used to advertise smokeless tobacco); W. Va. Code § 16-9A-5 (requiring a health warning on outdoor billboard advertisements for snuff and chewing tobacco products).

These disclosure laws may in specific cases be justified by the government's interest in informing the public about the health risks associated with a specific product, and these laws have a laser focus in requiring disclosures only in connection with commercial advertisements associated with that product. The Ordinance, by contrast, does not require that a covered pregnancy center advertise *any* product or service before it is compelled to deliver the government's message, and then only in connection with non-commercial speech in the intimate setting of the pregnancy center's waiting rooms, where women interact directly with the center's staff.

The First Amendment does not permit such an intrusion into voluntary, private conversations, especially when many more tailored options exist to further the City's asserted interests. Because the City did not avail itself of any of the above alternative options, the Ordinance must be invalidated.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

ELBERT LIN
SOLICITOR GENERAL

/s/ Thomas M. Johnson, Jr.
Thomas M. Johnson, Jr.
Deputy Solicitor General
Counsel of Record
Erica N. Peterson
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
OF WEST VIRGINIA
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Telephone: (304) 558-2021
Email: tjohnson@wvago.gov

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COUNSEL FOR ADDITIONAL *AMICI*

Steven T. Marshall
Attorney General
State of Alabama
501 Washington Ave
Montgomery, AL 36130
(334) 242-7300

Leslie Rutledge
Attorney General
State of Arkansas
323 Center St.
Little Rock, AR 72201
(501) 682-2007

Derek Schmidt
Attorney General
State of Kansas
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215

Bill Schuette
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

Douglas J. Peterson
Attorney General
State of Nebraska
State Capitol, Room 2115
1445 K Street
Lincoln, NE 68509
(402) 471-2683

Michael DeWine
Attorney General
State of Ohio
30 E. Broad St., 17th Floor
Columbus, OH 43215
(614) 466-8980

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

Ken Paxton
Attorney General
State of Texas
300 W. 15th Street
Austin, TX 78701
(512) 936-1700

Sean D. Reyes
Attorney General
State of Utah
State Capitol, Rm. 230
Salt Lake City, UT 84114
(801) 538-9600

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,261 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Thomas M. Johnson, Jr.

Thomas M. Johnson, Jr.
Office of the West Virginia Attorney General
State Capitol Building 1, Room E-26
Charleston, WV 25305
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: tjohnson@wvago.gov

Counsel for *Amicus Curiae* State of West Virginia

CERTIFICATE OF SERVICE

I certify that on April 3, 2017, the foregoing document was served on the counsel of record for all parties through the CM/ECF system. One paper copy of this brief will be sent to the Clerk of Court via Federal Express.

/s/ Thomas M. Johnson, Jr.
Thomas M. Johnson, Jr.

April 3, 2017
Date