Nos. 11-1111 and 11-1185

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; 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,

Defendants-Appellants.

and

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION, INC.; and ARCHBISHOP WILLIAM E. LORI, as successor to Archbishop Edwin F. O'Brien, Archbishop of Baltimore, and his successors in office, a corporation sole,

Plaintiffs-Appellants,

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,

Defendants-Appellees.

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

PETITION FOR REHEARING *EN BANC*

Suzanne Sangree
Chief Solicitor
City of Baltimore Law Department
City Hall
100 North Holliday Street, Room 109
Baltimore, MD 21202
Phone: (410) 396-3249
Fax: (410) 659-4077

Stephanie Toti
Special Assistant City Solicitor
Center for Reproductive Rights
120 Wall Street
14th Floor
New York, NY 10005
Phone: (917) 637-3600
Fax: (917) 637-3666

Attorneys for Defendants-Appellants & Defendants-Appellees

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RULE 35(b)(1) STATEMENT

The Mayor and City Council of Baltimore and individual defendants (collectively, the "City") respectfully seek rehearing *en banc* of the City's appeal from the district court's judgment permanently enjoining enforcement of Baltimore City Ordinance 09-252 ("Ordinance"). As set forth below, the decision issued by the panel majority conflicts with prior decisions of the U.S. Supreme Court and this Court. As a result, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions. *See* Fed. R. App. P. 35(b)(1).

First, in holding that it was proper for the district court to award summary judgment to the plaintiff before the City had any opportunity to conduct discovery, despite the fact that material facts were in dispute, the panel majority's decision conflicts with the decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *Nader v. Blair*, 549 F.3d 953, 961 (4th Cir. 2008); *Harrods, Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002); and *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 958 (4th Cir. 1996).

Second, in holding that the Ordinance regulates noncommercial speech, the panel majority's decision conflicts with the decisions in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474-75 (1989); *Riley v. Nat. Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 541 (1987); and *Va. Vermiculite, Ltd. v. W.R. Grace & Co.—Conn.*, 156 F.3d 535, 541 (4th Cir. 1998).

Third, in holding that the Ordinance is viewpoint discriminatory, the panel majority's decision conflicts with the decisions in *Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2994 (2010); *Madsen v. Women's Health Ctr.,*

Inc., 512 U.S. 753, 763 (1994); and *Am. Life League v. Reno*, 47 F.3d 642, 649 (4th Cir. 1995).

Fourth, in holding that the Ordinance's disclosure requirement is not narrowly tailored to serve a compelling state interest, the panel majority's decision conflicts with the decisions in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 915 (2010); and *Nat'l Fed'n of the Blind v. Fed. Trade Comm'n*, 420 F.3d 331, 343 (4th Cir. 2005).

Fifth and finally, in affirming *sub silentio* the district court's facial invalidation of the Ordinance, the panel majority's decision conflicts with the decisions in *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); and *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

STATEMENT OF FACTS

The Ordinance requires "limited-service pregnancy centers"—service-providers whose primary purpose is to provide pregnancy-related services but who do not provide or refer for abortions or comprehensive birth-control services—to post signs in their waiting rooms stating that they do not provide or refer for abortions or comprehensive birth-control services. J.A. at 25-28. The Ordinance was enacted in response to evidence of consumer confusion caused by deceptive business practices employed by some limited-service pregnancy centers. For example, a 2006 report prepared for U.S. Representative Henry A. Waxman ("Waxman Report") found that limited-service pregnancy centers often engage in deceptive advertising to attract women seeking abortion and comprehensive birth-control services to their facilities. J.A. at 417-18. The centers then use delay tactics to stall women from accessing those services. J.A. at 331-32. The Waxman Report's findings were corroborated by a 2008 report ("Maryland Report") that documented how similar deceptive practices were being used by limited-service pregnancy centers in the State of Maryland, including in Baltimore City. J.A. at 326-37.

The City Council also heard testimony from numerous individuals complaining about deceptive practices used by limited-service pregnancy centers and collected specific examples of deceptive advertising by such centers. *See, e.g.*, J.A. at 257-58, 261, 273-76, 381. One on-line advertisement for affiliates of Heartbeat International and Care Net, which are both multi-million dollar pregnancy center franchises,[1] states that the affiliated centers provide the following services: "Abortion and Morning After Pill information, including procedures and risks;" "Medical services, including STD tests, early ultrasounds and pregnancy confirmation;" and "Confidential pregnancy options." J.A. 381 (annexed hereto as Exhibit A). The advertisement does not indicate that the "medical services" and "confidential pregnancy options" offered by the centers exclude abortion and comprehensive birth control services. *Id.*

Evidence also showed that consumer confusion concerning the scope of services offered at limited-service pregnancy centers poses a threat to public health. Although abortion is a safe medical procedure, the risks of abortion, as well as the costs, increase as a woman advances through her pregnancy. As a result, delays in access to abortion expose a woman to greater risks and increased costs. Similarly, delays in access to the birth-control method of a woman's choice can leave the woman and her partner vulnerable to unintended pregnancy and sexually transmitted disease.

Prior to any enforcement of the Ordinance, the Greater Baltimore Center for Pregnancy Concerns, Inc. ("Pregnancy Center"), together with other plaintiffs, filed this lawsuit against the City to challenge the Ordinance. J.A. at 7-24. Claiming that the Ordinance violates their

[1] Two limited-service pregnancy centers in Baltimore are affiliates of Care Net, J.A. at 228, and the Option Line internet search tool featured in the advertisement at J.A. 381 directs consumers to these affiliates. According to Care Net's 2009 I.R.S. Form 990, which is publicly available, its total revenue in 2009 was $6,037,762. Its revenue from program services totaled $687,902, and its revenue from gross sales of inventory totaled $364,081. *See* https://www.care-net.org/public/file_server.php?id=1260&xcf=MTI2MA==.

constitutional rights to free speech, free assembly, free exercise of religion, and equal protection of the laws, as well as their rights under Section 20-214 of the Maryland Health Code, the plaintiffs sought invalidation of the Ordinance both on its face and as-applied to the Pregnancy Center. J.A. at 13-18. Before the deadline for the City to respond to the Complaint had expired, the plaintiffs moved for partial summary judgment on their free speech and equal protection claims. The City responded pursuant to Fed. R. Civ. P. 56(f), requesting that the district court dismiss the motion without prejudice to afford the City an opportunity to conduct discovery and develop expert testimony. J.A. at 41-43. The City also filed a motion to dismiss asserting, in relevant part, that the Complaint fails to state a claim.

The district court (Garbis, J.) disposed of the plaintiffs' motion for partial summary judgment and the City's motion to dismiss in a single Decision & Order ("Decision & Order"). J.A. at 431-59. The district court converted the City's motion to dismiss into a motion for summary judgment and held that, with respect to the plaintiffs' free speech and equal protection claims, the parties' respective motions would be treated as cross-motions for summary judgment. J.A. at 437. The district court concluded that entry of summary judgment was not premature, notwithstanding the City's lack of opportunity to conduct discovery, because, in defending the Ordinance, the City was limited to the evidence in the legislative record and could not submit any additional evidence. J.A. at 438. On the merits, the district court granted summary judgment to the Pregnancy Center on its free speech claim, holding that the Ordinance was invalid on its face. J.A. at 457-59. Subsequently, the district court entered a permanent injunction against enforcement of the Ordinance. J.A. at 460-61.

The City appealed, and a divided panel of this Court (Niemeyer & Agee, JJ.) affirmed the judgment entered by the district court. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor*

and City Council of Balt., Nos. 11-1111/11-1885, slip op. at 21 (4th Cir. July 6, 2012) ("Slip Op."). Judge King authored a dissenting opinion. The City now requests that the full Court vacate the opinion of the panel majority and rehear the case.

ARGUMENT

I. The Panel Majority Disregards Fundamental Principles of Civil Procedure.

The opinions of the district court and panel majority repeatedly ignore the rules of civil procedure, flouting decades of precedent by the Supreme Court and this Court. As the dissent explains, "[r]ushing to summary judgment, the court subverted the Federal Rules of Civil Procedure . . . by, *inter alia*, denying the City essential discovery, refusing to view in the City's favor what evidence there is, and making untoward findings of fact, often premised on nothing more than the court's own supposition." Slip Op. at 43 (King, J., dissenting). These unwarranted procedural anomalies led the dissent to conclude that "these proceedings have thus followed a course more fitting a kangaroo court than a court of the United States." *Id.* at 44.

A. The City Was Denied An Opportunity To Discover Information Essential To Its Opposition To The Plaintiffs' Motion For Summary Judgment.

It is well-settled that summary judgment is appropriate only after "adequate time for discovery." *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 961 (4th Cir. 1996) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A motion for summary judgment must be denied "where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Nader v. Blair*, 549 F.3d 953, 961 (4th Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)); *accord Harrods, Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (reversing district court's grant of summary judgment on the ground that it was premature in the absence of discovery).

Here, the City was not permitted to conduct any discovery prior to the district court's award of summary judgment to the Pregnancy Center, despite the fact that its attorney filed a Rule 56(f) affidavit explaining that "Defendants are unable to present certain facts necessary to justify their opposition to Plaintiffs' motion for partial summary judgment because Defendants have not had the opportunity to conduct discovery or fully develop expert testimony."[2] J.A. at 41. As a result, the award of summary judgment to the Pregnancy Center is a flagrant violation of controlling authority. *See Anderson*, 477 U.S. at 250 n.5; *Celotex Corp.*, 477 U.S. at 322; *Nader*, 549 F.3d at 961; *Harrods, Ltd.*, 302 F.3d at 244; *Evans*, 80 F.3d at 961.

B. The Panel Majority Relies on Disputed Material Facts And Fails To Draw Inferences In The Light Most Favorable To The City.

It is axiomatic that summary judgment is appropriate only when "there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a); *accord Anderson*, 477 U.S. at 247; *Evans*, 80 F.3d at 958, and a court considering a motion for summary judgment must "view[] the facts and inferences drawn from the facts in the light most favorable to . . . the nonmoving party," *Evans*, 80 F.3d at 958 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986)). Here, in awarding summary judgment to plaintiffs, the district court and panel majority relied on disputed material facts and failed to draw inferences in the light most favorable to the City.

For example, the panel majority relied on the Pregnancy Center's factual assertion that, absent a legal mandate, it would not engage in speech of the type required by the Ordinance. Slip Op. at 28. But there is conflicting evidence in the record on this point. On one hand, the Pregnancy Center's Executive Director testified that, "[i]f not required by law, the Center would

[2] In particular, the City sought discovery concerning the advertising practices of limited-service pregnancy centers in Baltimore, as well as the economics of the provision of services at the centers. J.A. at 41-42.

not post the disclaimer compelled by [the Ordinance]." J.A. at 30. Yet on the other hand, the General Counsel of Care Net, the Pregnancy Center's parent organization, testified that the Pregnancy Center discloses, "in both signage and client in-take forms" that "We do not offer, recommend, or refer for abortions or abortifacients (birth control), but we are committed to offering accurate information about abortion procedures and risks." J.A. at 228. Given the procedural posture of the case, it was improper for the panel majority to resolve this genuine issue of material fact in the Pregnancy Center's favor. Fed. R. Civ. P. 56(a); *accord Anderson*, 477 U.S. at 247; *Evans*, 80 F.3d at 958.

II. The Panel Majority's First Amendment Analysis Ignores Controlling Authority.

The panel majority's First Amendment analysis is tainted by the procedural errors described above. The panel majority penalizes the City for failing to present sufficient evident concerning matters about which the City was denied discovery, and it relies on disputed facts proffered by the plaintiffs. In addition, it disregards controlling precedents from the Supreme Court and this Court because those precedents lead unequivocally to a conclusion that the panel majority did not want to reach: the Ordinance does not violate the First Amendment.

A. The Panel Majority's Application Of Strict Scrutiny To The Ordinance Conflicts With Prior Decisions Of The Supreme Court And This Court.

i. The Ordinance Regulates Commercial Speech.

The panel majority's conclusion that the speech regulated by the Ordinance is non-commercial speech is improper in several respects. First, as the dissent explains, the district court "short-circuited the analysis that was essential to properly deciding the appropriate level of judicial scrutiny" by denying the City the opportunity to gather information to support its argument that the speech regulated by the Ordinance is commercial speech. Slip Op. at 56

(King, J., dissenting). Although the City had specifically requested the opportunity to conduct discovery on this issue, J.A. at 42, the panel majority reasoned that discovery was unnecessary because the district court had held that the Ordinance, on its face, was not narrowly tailored, Slip Op. at 40-41. But if the City had had the opportunity to demonstrate that at least some of the speech regulated by the Ordinance is, in fact, commercial speech, then the narrow tailoring requirement would not have applied to the court's determination of the Ordinance's facial validity. *See Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). Instead, rational basis scrutiny would have applied. *See id.*

Second, the panel majority maintains that, because the Pregnancy Center is motivated primarily by religious and ideological concerns, its advertising cannot constitute commercial speech. Slip Op. at 30-31. But this reasoning is in direct conflict with prior decisions of the Supreme Court and this Court, decisions that the panel majority simply ignores. For example, the Supreme Court held that a nonprofit summer camp with a religious mission engaged in commercial transactions when it provided goods and services to campers, *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997), and this Court held that a nonprofit environmental organization engaged in a commercial transaction when it accepted a donation of commercially valuable land without any money changing hands, *Va. Vermiculite, Ltd. v. W.R. Grace & Co.—Conn.*, 156 F.3d 535, 541 (4th Cir. 1998). It follows that the speech proposing those commercial transactions is commercial speech, notwithstanding the religious and ideological motivations of the speakers. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (explaining that "the test for identifying commercial speech" is whether the speech "propose[s] a commercial transaction"). Similarly, in *San Francisco Arts & Athletics, Inc.*, the Supreme Court held that advertisements promoting an athletic event called

the "Gay Olympic Games," which were sponsored by a nonprofit corporation dedicated to seeking equal rights for gays and lesbians, constituted commercial speech because the term "Olympic" has value in the commercial marketplace. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 541 (1987) ("The SFAA's expressive use of the word cannot be divorced from the value the USOC's efforts have given to it. The mere fact that the SFAA claims an expressive, as opposed to a purely commercial purpose does not give it a First Amendment right to appropriate to itself the harvest of those who have sown.") (internal quotation marks omitted).

Unlike the decision of the panel majority, the North Dakota Supreme Court's decision in *Larson* is consistent with relevant Supreme Court precedent. *See Fargo Women's Health Org. v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986). It held that a limited-service pregnancy center's advertisements constituted commercial speech notwithstanding the center's ideological motivations because "the Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Id.* The court concluded that, "[i]n effect, the Help Clinic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech." *Id.* The same is true of the Pregnancy Center's advertisements and, indeed, all of the speech regulated by the Ordinance. *See, e.g.*, J.A. at 381.

The third error in the panel majority's commercial speech analysis is its conclusion that the disclaimer required by the Ordinance is inextricably intertwined with non-commercial speech uttered by limited-service pregnancy center staff members. The Supreme Court has explained that, when "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley v. Nat.*

Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988). But when the commercial elements of speech can be separated from the non-commercial elements, the two must be treated separately. *See Fox*, 492 U.S. at 474-75. Here, there is no "single speech" that combines commercial and noncommercial elements. The written disclaimer required by the Ordinance is silent, discrete, and completely independent of any other speech that might occur at a limited-service pregnancy center. J.A. at 26. Therefore, the panel majority's conclusion that the disclaimer required by the Ordinance is inextricably intertwined with a center's non-commercial speech is in conflict with the Supreme Court's decisions in *Riley* and *Fox*. *See Fox*, 492 U.S. at 474-75; *Riley*, 487 U.S. at 796.[3]

ii. The Ordinance Is Viewpoint-Neutral.

The panel majority's analysis of viewpoint neutrality also conflicts with prior decisions of the Supreme Court and this Court.[4] The Supreme Court has repeatedly held that the fact that a litigant objects to a law on grounds related to the litigant's religious or ideological point of view does not render the law viewpoint-discriminatory. *See, e.g., Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2994 (2010); *Madsen v.*

[3] Likewise, the panel majority's endorsement of the district court's assertion that "the City's position would mean that 'any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection,'" Slip Op. at 31, is inconsistent with these precedents. When the offer of sacramental wine and communion wafers, for example, is part of a religious ceremony, as in a Catholic mass, then the offer and the religious speech are inextricably intertwined and therefore subject to the highest level of constitutional protections. *See Fox*, 492 U.S. at 474; *Riley*, 487 U.S. at 796.

[4] In addition, the panel majority relies on a factual finding that the Ordinance "burdens only the expression of pro-life speakers" because they have "declined to adopt the City's preferred perspective on appropriate reproductive decisions." Slip Op. at 34 n.4. This factual finding is improper in two respects. *See supra* at 5-7. First, the City disputes that, as an empirical matter, all service-providers in Baltimore that are subject to the Ordinance have a "pro-life" viewpoint. A provider of pregnancy-related services with a "pro-choice" viewpoint may decline to provide abortion services or referrals because the provider fears attracting anti-abortion protestors, lacks the requisite expertise or resources, or simply has no interest in providing those services. Nevertheless, such a pro-choice provider would be subject to the Ordinance. *See* Slip Op. at 64-65 (King, J., dissenting). Second, the City is neutral as to what kind of reproductive health care services an entity provides or a consumer chooses; its goal is simply to ensure that a consumer knows where to go to obtain the services he or she wants.

Women's Health Ctr., Inc., 512 U.S. 753, 763 (1994); *accord Am. Life League v. Reno*, 47 F.3d 642, 649 (4th Cir. 1995).

In *Martinez*, the Supreme Court rejected a claim that a public law school's policy prohibiting student groups from excluding prospective members based on their religion or sexual orientation discriminated against student groups with certain religious views. *Martinez*, 130 S. Ct. at 2994. The Court explained that the policy was viewpoint-neutral because it was directed at the act of excluding certain individuals from participation in student groups without regard to the reasons motivating that exclusion. *Id.* Similarly, in *Madsen*, the Supreme Court rejected the claim that an injunction prohibiting anti-abortion protestors from entering a buffer zone surrounding an abortion clinic is viewpoint discriminatory. *Madsen*, 512 U.S. at 757. The Court explained that the injunction was aimed at restraining the harmful conduct of the protestors, not their message. *See id.* at 762-63. In *American Life League*, this Court likewise rejected the claim that the Freedom of Access to Clinic Entrances ("FACE") Act, which prohibits conduct that obstructs people from entering abortion clinics, is viewpoint-discriminatory. *See Am. Life League*, 47 F.3d at 645. The Court concluded that: "[T]he Act was not passed to outlaw conduct because it expresses an idea. Instead, Congress passed the Act to promote public safety and health and to protect interstate commerce from disruption." *Id.* at 649.

Like the laws upheld in *Martinez*, *Madsen*, and *American Life League*, the Ordinance regulates conduct that poses a threat to public welfare, and it does so without reference to the motivations of those engaging in the conduct. The only permissible conclusion that can be drawn from the undisputed facts in the record, viewed in the light most favorable to the City, is that the City enacted the Ordinance to mitigate the harms arising from consumer confusion about the types of services provided by limited-service pregnancy centers. Pursuant to *Martinez*,

Madsen, and *American Life League*, the panel majority should have held that the Ordinance was viewpoint-neutral.[5] Notably, the panel majority makes no effort to distinguish these controlling cases; its opinion makes no reference to them whatsoever.

B. The Panel Majority's Conclusion That The Ordinance Fails Strict Scrutiny Conflicts With Controlling Authority.

i. The Ordinance Serves Compelling State Interests.

The Ordinance serves both to discourage the use of deceptive business practices by limited-service pregnancy centers and to mitigate the harm that flows from such practices by ensuring that consumers are informed immediately upon entering a center that it does not provide abortion or comprehensive birth-control services. Accordingly, the Ordinance serves at least two compelling state interests. First, it serves the City's compelling interest in protecting the public from deceptive business practices. *See Riley*, 487 U.S. at 792; *Nat'l Fed'n of the Blind v. Fed. Trade Comm'n*, 420 F.3d 331, 339 (4th Cir. 2005). Second, it serves the City's compelling interest in protecting public health by ensuring that individuals have timely access to the medical services of their choice. *See Am. Life League*, 47 F.3d at 651-52.

Although the panel majority acknowledges that the legislative record establishes "instances of misconduct by pregnancy centers," Slip Op. at 36, it concludes that the City failed to demonstrate a sufficient number of instances of misconduct to "carry its burden to show a compelling interest," *id.* at 35. Yet, as the dissent points out, the City was denied the opportunity to conduct discovery and present evidence to supplement the legislative record. *See id.* at 63

[5] The Supreme Court's decision in *Sorrell* is not to the contrary. *See Sorrell v. IMS Health Inc.*, 130 S. Ct. 2653, 2663 (2011). Notwithstanding the panel majority's characterization of that case, Slip Op. at 34 n.4, the Supreme Court did not hold that the challenged statute was viewpoint discriminatory because it imposed a disparate impact on one group of speakers, *Sorrell*, 130 S. Ct. 2663. Rather, it held that "[t]he law *on its face* burdens disfavored speech by disfavored speakers." *Id.* (emphasis added). The challenged statute expressly prohibited pharmaceutical manufacturers from using certain information in marketing campaigns, though other speakers were permitted to use the same information for other purposes. *Id.*

(King, J., dissenting) ("The majority does not deny that there was a substantial pre-enactment record supporting adoption of the Ordinance; rather, my colleagues simply deem that record insufficient to establish a compelling interest. . . . But criticizing the record as somehow lacking merely begs the real question underlying the errors of the district court: Why was the City denied a full and fair opportunity to conduct discovery and present a proper record?").

The City disputes that the evidence before the district court was insufficient to establish that the Ordinance serves compelling state interests. But even if it was, the panel majority's award of summary judgment to the Pregnancy Center conflicts with prior cases holding that a motion for summary judgment must be denied when the non-moving party has not had the opportunity to discover information that is essential to its opposition. *See supra* at 5-6. Once the panel majority concluded that the record was insufficient to establish a compelling state interest, the only course permitted by controlling authority was to remand the case to afford the City an opportunity to conduct discovery.[6] *Id.*

ii. The Ordinance Is Narrowly Tailored.

The Supreme Court has consistently held that disclosure requirements are less restrictive alternatives to laws that limit speech. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 915 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."); *see also Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010).

[6] The panel majority also asserts that the City's claim to be promoting a compelling interest is undermined by the fact that it refers women seeking alternatives to abortion and birth control to the Pregnancy Center. It states that the City "has referred and continues to refer women to the Pregnancy Center without any forewarning as to the danger of misinformation the City believes the women will encounter there." Slip Op. at 37. This reasoning suggests that the panel majority fundamentally misunderstands the purpose of the Ordinance and the nature of the harm it seeks to remediate. The Ordinance seeks to ensure that a consumer seeking abortion or comprehensive birth-control services is not deceived into thinking that those services are offered at a limited-service pregnancy center. The City does not refer consumers seeking abortion or comprehensive birth-control services to the Pregnancy Center; it only refers consumers seeking services that the Center actually offers. Thus, there is no conflict between the Ordinance and the City's practice of referring appropriate consumers to the Pregnancy Center.

The Ordinance does no more than require that limited-service pregnancy centers post a sign stating that they do not provide or make referrals for abortion or comprehensive birth-control services. J.A. at 26. It does not prevent such centers from speaking, nor does it limit their speech in any way. Accordingly, the Ordinance imposes a disclosure requirement, not a restriction on speech. Nevertheless, the panel majority repeatedly characterizes the Ordinance as a restriction on speech. *See* Slip Op. at 33 (explaining that the Ordinance is more akin to a prohibition on speech than a disclosure requirement); *id.* at 37 (stating that the Ordinance serves to "restrict the Pregnancy Center's speech"); *id.* at 39 (stating that "the City resorted to speech restrictions"). This apparent misunderstanding about the nature of the Ordinance leads the panel majority to conclude erroneously that the Ordinance is not narrowly tailored.

Consistent with the Supreme Court's guidance about disclosure requirements, this Court held that a statute requiring a professional fundraiser making unsolicited calls on behalf of a charity to disclose the name of the charity and the purpose of the call was narrowly tailored for purposes of strict scrutiny. *Nat'l Fed'n of the Blind*, 420 F.3d at 343; *accord Riley*, 487 U.S. at 799 n.11 (explaining that a statute requiring a fundraiser "to disclose unambiguously his or her professional status" would be "narrowly tailored" for purposes of strict scrutiny). Similarly, in *Hersh*, the Fifth Circuit held that a statute requiring debt relief agencies to provide their clients with written notice of certain basic information regarding bankruptcy proceedings was narrowly tailored for purposes of strict scrutiny. *See Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 766-67 (5th Cir. 2008). The panel majority's holding that the Ordinance's disclosure requirement is not narrowly tailored is inconsistent with these precedents.[7]

[7] The panel majority suggests that instead of imposing a disclosure requirement on limited-service pregnancy centers, the City could undertake a public education campaign or distribute documents on City-government property that list local pregnancy centers and note what services are available at each. Slip Op. at 38. But there is no

III. In Affirming *Sub Silentio* the District Court's Facial Invalidation Of The Ordinance, the Panel Majority Flouts Well-Settled Caselaw.

The Supreme Court has explained that, in constitutional adjudication, "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). A statute should not be invalidated on its face unless its challenger establishes that no set of circumstances exists under which the Act would be valid; that the statute lacks a plainly legitimate sweep; or, in overbreadth cases, that the statute's unconstitutional applications are substantial in relation to its plainly legitimate sweep. *See United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). Here, the district court invalidated the Ordinance on its face without applying any of these tests, and the panel majority affirmed this facial invalidation *sub silentio*.[8] Slip Op. at 21, 43. The panel majority's failure to conduct any analysis of whether departure from the "normal rule" of constitutional adjudication is warranted in this case flouts well-settled precedent. *Ayotte*, 546 U.S. at 329.

CONCLUSION

For the reasons set forth above, the City respectfully requests that its petition for rehearing *en banc* be granted.

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guarantee that such efforts would reach all or even most consumers who are mistaken about the services provided by limited-service pregnancy centers; thus, they would not effectively serve the City's compelling interests. Requiring limited-service pregnancy centers to post signs in their lobbies ensures that accurate information reaches all affected consumers.

[8] As the dissent observes, the district court's First Amendment analysis focuses on the application of the Ordinance to the Pregnancy Center, and the panel majority follows suit. *See* Slip Op. at 52-54 (King, J., dissenting). The dispositive factual findings made by the district court—such as the Pregnancy Center is religiously motivated; the Pregnancy Center has no economic interest in providing goods and services to consumers; and, but for the Ordinance, the Pregnancy Center would not make reference to abortion or birth-control in its conversations with consumers—are all specific to the Pregnancy Center. But the district court invalidates the Ordinance with respect to all limited-service pregnancy centers in Baltimore without any inquiry as to whether other centers share the plaintiff's characteristics.

Respectfully submitted,

/S/ Suzanne Sangree
Suzanne Sangree
Chief Solicitor
City of Baltimore Law Department
City Hall, Room 109
100 North Holliday Street
Baltimore, Maryland 21202
Telephone: (410) 396-3249
Fax: (410) 659-4077
Email: suzanne.sangree@baltimorecity.gov

/S/ Stephanie Toti
Stephanie Toti
Special Assistant City Solicitor
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, New York 10005
Telephone: (917) 637-3684
Fax: (917) 637-3666
Email: stoti@reprorights.org

Attorneys for Defendants-Appellants
& Defendants-Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 11, 2012, a true and correct copy of the foregoing petition was electronically filed with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to the following individuals:

Counsel of Record for Plaintiff-Appellee & Plaintiffs-Appellants

Peter J. Basile
Ferguson, Shetelich & Ballew, PA
Email: pbasile@fsb-law.com

David W. Kinkopf
Gallagher, Evelius & Jones, LLP
Email: dkinkopf@gejlaw.com

Stephen G. Metzger
Gallagher, Evelius & Jones, LLP
Email: smetzger@gejlaw.com

Mark L. Rienzi
Columbus School of Law
Catholic University of America
Email: rienzi@law.edu

Counsel of Record for Amici Curiae

Douglas W. Baruch
Fried, Frank, Harris, Shriver & Jacobson, LLP
Email: douglas.baruch@friedfrank.com

Matthew Scott Bowman
Alliance Defense Fund
Email: mbowman@telladf.org

Samuel Brown Casey, III
Jubilee Campaign, Law of Life Project
Email: sbcasey@advocatesinternational.org

John C. Eastman
Chapman University School of Law
Email: jeastman@chapman.edu

Anna Franzonello
Americans United for Life
Email: anna.franzonello@aul.org

Colby M. May
American Center for Law & Justice
Email: cmmay@aclj-dc.org

Kimberly A. Parker
Wilmer Cutler Pickering Hale & Dorr
Email: kimberly.parker@wilmerhale.com

David Timothy Raimer
Jones Day
Email: dtraimer@jonesday.com

Priscilla Joyce Smith
Yale Law School Information Society Project
Email: priscilla.smith@yale.edu

Simona G. Strauss
Simpson, Thacher & Bartlett, LLP
Email: sstrauss@stblaw.com

Maria T. Vullo
Paul, Weiss, Rifkind, Wharton & Garrison, LLP
Email: mvullo@paulweiss.com

Dated: July 11, 2012

/S/ Stephanie Toti
Stephanie Toti

EXHIBIT A

SPECIAL INITIATIVES

Option Line

Established in 2003, Option Line is ready to provide pregnancy information, help and resources any hour of the day or night.

Pregnancy resource centers are widely distributed, operating in all 50 states and overseas. Experience has shown, however, that more clients of pregnancy centers are finding information and making contact using the Internet at late hours when centers are closed. To supplement the local providers' hours of operation and to accommodate privacy concerns of women seeking help, Heartbeat International and Care Net co-established Option Line in 2003.

This live contact center based in Columbus, Ohio, provides 24/7 assistance to women and girls seeking information about pregnancy resources. The contact center and web site at www.optionline.org are able to provide immediate information and to link callers in real time with services in their community. Increasingly, Option Line is able to use online tools to enter center scheduling calendars and set appointments for callers. A model of inter-group collaboration, Option Line now averages more than 20,000 contacts per month while its web site averages 800,000 to 1,000,000 visitors per year.

Option Line's growing network can be reached at 1-800-395-HELP as well as the online address shown above. The web site has an easy-to-use center locator system powered by MapQuest® that allows visitors to find the five closest pregnancy centers to their zip code. Option Line also features a Spanish presence online at www.estasembarazada.com, as well as bilingual consultants who answer the phone 24 hours a day.

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