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 successors in office, a corporation sole,

Plaintiffs-Cross-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-Cross-Appellees.

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

APPELLANTS/CROSS-APPELLEES' BRIEF FOR THE *EN BANC* COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and L.R. 26.1, the 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, who are Appellants in this case, make the following disclosures:

(a) The Mayor and City Council of Baltimore, the Mayor of Baltimore, and the Baltimore City Health Commissioner are not publicly held corporations or other publicly held entities or affiliates or parents of any corporation.

(b) No publicly owned corporation or other publicly held entity owns ten (10) percent or more of the stock of the Mayor and City Council of Baltimore, the Mayor of Baltimore, or the Baltimore City Health Commissioner.

(c) The Mayor and City Council of Baltimore, the Mayor of Baltimore, and the Baltimore City Health Commissioner are not trade associations.

(d) No publicly held corporation that is not a party to this litigation has a financial interest in the outcome of this litigation as defined in L.R. 26.1(b).

(e) This case does not arise out of a bankruptcy proceeding.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution, laws or treaties of the United States. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the appeal is taken from a final decision of a United States district court. The orders appealed from were entered on January 28, 2011, and January 31, 2011. A notice of appeal was filed on February 2, 2011. This appeal is from a final order and judgment that disposes of all the parties' claims.

STATEMENT OF THE ISSUES

Whether the district court erred in holding that a Baltimore City Ordinance, which requires limited-service pregnancy centers to post signs on their premises disclosing truthful information about the scope of services that they provide, is facially unconstitutional because it violates the Free Speech Clause of the First Amendment.

Whether the district court erred in awarding summary judgment to Plaintiff Greater Baltimore Center for Pregnancy Concerns given that it denied Defendants an opportunity to discover information essential to their opposition and relied on disputed material facts.

Whether the district court erred in dismissing without prejudice Plaintiffs' free assembly, free exercise, equal protection, and State law claims when

Defendants demonstrated that dismissal of those claims with prejudice was warranted under Fed. R. Civ. P. 12(b)(6).

STATEMENT OF THE CASE

Responding to evidence that limited-service pregnancy centers ("Pregnancy Centers") in Baltimore and throughout the country are engaging in deceptive practices that mislead consumers and endanger the public health, the City of Baltimore enacted Baltimore City Ordinance 09-252 ("Ordinance") (codified at Balt. City Health Code §§ 3-501 to 3-506 and Balt. City Code Art. I, §§ 40-14, 41-14) in December 2009. J.A. 25-28. The Ordinance protects consumers by requiring that each Pregnancy Center post a notice in its waiting room disclosing that it does not provide abortion services or certain types of birth-control services.

On March 29, 2010, prior to any enforcement of the Ordinance, the Archbishop of Baltimore ("Archbishop"); St. Brigid's Roman Catholic Congregation, Inc. ("St. Brigid's"); and the Greater Baltimore Center for Pregnancy Concerns, Inc. ("Plaintiff Pregnancy Center") (collectively, the "Plaintiffs"), filed this lawsuit against the Mayor and City Council of Baltimore; Stephanie Rawlings-Blake, in her official capacity as Mayor of Baltimore; Olivia Farrow, in her official capacity as Acting Baltimore City Health Commissioner; and the Baltimore City Health Department ("Health Department") (collectively, the "City") to challenge the Ordinance both on its face and as-applied to Plaintiff

Pregnancy Center.[1] J.A. 7-24. Plaintiffs claimed that the Ordinance violates their rights to free speech, free assembly, free exercise of religion, and equal protection of the laws as guaranteed by the U.S. Constitution. J.A. 13-16. Plaintiffs further claimed that the Ordinance violates Section 20-214 of the Maryland Health Code. J.A. 17. They sought a declaratory judgment that the Ordinance is unconstitutional on its face and/or as-applied to Plaintiff Pregnancy Center and a permanent injunction against enforcement of the Ordinance. J.A. 17-18.

On June 4, 2010, before the deadline for the City to respond to the Complaint had expired, Plaintiffs moved for partial summary judgment. Pls.' Mot. Partial Summ. J., ECF No. 9. They sought judgment as a matter of law on their claims that the Ordinance violated their rights to free speech and equal protection of the laws. *Id.* The City responded pursuant to Fed. R. Civ. P. 56(f), requesting that the district court dismiss Plaintiffs' motion without prejudice to afford the City an opportunity to conduct discovery and develop expert testimony. Reply Supp. Defs.' Mot. Dismiss & Resp. in Opp'n to Pls.' Mot. Partial Summ. J., ECF No. 18; J.A. 41-43.

[1] On June 7, 2010, Oxiris Barbot, M.D., became the Baltimore City Health Commissioner, succeeding Acting Commissioner Olivia Farrow. As a result, pursuant to Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(c)(2), Dr. Barbot was automatically substituted for Ms. Farrow as a party to this action.

On June 8, 2010, the City filed a motion to dismiss on the grounds that the Complaint fails to state a claim; the Archbishop and St. Brigid's lack standing; and the Health Department lacks the capacity to be sued. Defs.' Mot. Dismiss, ECF No. 11. At oral argument, the Plaintiffs agreed to dismiss the claims asserted against the Health Department. J.A. 433. Otherwise, they opposed the City's motion to dismiss. Pls.' Opp'n to Defs.' Mot. Dismiss, ECF. No. 17.

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. 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' claims concerning free speech and equal protection of the laws, the parties' respective motions would be treated as cross-motions for summary judgment. J.A. 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. 438.

On the merits, the district court held that the Archbishop and St. Brigid's lacked standing to challenge the Ordinance. J.A. 443. As a result, it granted summary judgment to the City on the claims asserted by those two Plaintiffs. J.A.

438. It further held that the Ordinance violated Plaintiff Pregnancy Center's right to free speech and granted summary judgment to Plaintiff Pregnancy Center on its free speech claim. J.A. 457-59. The district court held that the remaining claims asserted by Plaintiff Pregnancy Center were moot in light of the disposition of the free speech claim and dismissed those claims without prejudice. J.A. 458-59. On January 31, 2011, the district court entered a permanent injunction against enforcement of the Ordinance. J.A. 460-61.

The City appealed, and a divided panel of this Court affirmed the judgment entered by the district court. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012). Subsequently, the City filed a petition for rehearing *en banc*, and this Court granted that petition on August 15, 2012.

STATEMENT OF FACTS

I. Terms of the Ordinance.

The Ordinance, enacted in December 2009, took effect on January 4, 2010. J.A. 28. It is a consumer protection regulation that applies to "limited-service pregnancy centers," defined as "any person: (1) whose primary purpose is to provide pregnancy-related services; and (2) who: (I) for a fee or as a free service, provides information about pregnancy-related services; but (II) does not provide or refer for: (A) abortions; or (B) nondirective and comprehensive birth-control

services." Balt. City Health Code § 3-501. The Ordinance provides that "[a] limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services." Balt. City Health Code § 3-502(A). The Ordinance requires a Pregnancy Center to give this disclaimer through one or more signs that are: "(1) written in English and Spanish; (2) easily readable; and (3) conspicuously posted in the center's waiting room or other area where individuals await service." Balt. City Health Code § 3-502(B). The Ordinance authorizes the Health Commissioner to issue a violation notice to a Pregnancy Center that is violating the Ordinance, directing the center to correct the violation. Balt. City Health Code § 3-503. Failure to comply with a violation notice is punishable by the issuance of an environmental citation or a civil citation, each of which carries a civil penalty of $150. Balt. City Health Code § 3-506; Balt. City Code Art. I, §§ 40-14, 41-14.

After the City enacted the Ordinance, the Health Department enacted a regulation, which became effective on September 27, 2010, concerning its enforcement of the Ordinance. Balt. City Health Dep't, Final Regulation: Limited-Service Pregnancy Center Disclaimers in Baltimore City (Sept. 27, 2010) ("Regulation"). The Regulation clarifies the permissible content of a sign required by the Ordinance by providing that, "[i]f the center provides or refers for some

birth-control services, it may indicate on the disclaimer sign what birth-control services it does provide and/or refer for." Regulation, § (B)(ii). The Regulation further provides that "[a] center may indicate on the disclaimer sign that the sign is required by Baltimore City ordinance." Regulation, § (B)(iii).

II. The City's Basis for Enacting the Ordinance.

The City enacted the Ordinance in response to evidence presented to the City Council documenting a pattern of deceptive practices by Pregnancy Centers both in Baltimore and nationwide. A 2006 report prepared for U.S. Representative Henry A. Waxman ("Waxman Report") found that Pregnancy Centers often engage in deceptive advertising and other forms of solicitation to attract women seeking abortion and comprehensive birth-control services to their facilities. J.A. 417-18. The centers then use delay tactics to stall women from accessing those services. J.A. 331-32. The Waxman Report's findings were confirmed by a 2008 report ("Maryland Report") that documented similar deceptive practices used by Pregnancy Centers in the State of Maryland, including in Baltimore City. J.A. 326-37.

The City Council also heard testimony from numerous individuals complaining about deceptive practices used by Pregnancy Centers and collected specific examples of deceptive advertising by such centers. *See, e.g.*, J.A. 257-58, 261, 273-76, 381. One on-line advertisement for affiliates of Care Net and

Heartbeat International, which are both multi-million dollar Pregnancy Center franchises with affiliates in Baltimore,[2] 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."[3] J.A. 381. 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.* As a result of such deceptive advertising, some women are misled into thinking that Pregnancy Centers are medical clinics that provide a full range of medical services and do not understand, on arrival at a Pregnancy Center, what kind of facility they are in. *See, e.g.*, J.A. 261, 274.

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[2] According to Care Net's 2009 I.R.S. Form 990, which is publicly available, its total revenue in 2009 was $6,037,762, including $687,902 from program services and $364,081 from gross sales of inventory. *See* https://www.care-net.org/public/file_server.php?id=1260&xcf=MTI2MA==. According to Heartbeat International's 2011 I.R.S. Form 990, its total revenue in 2011 was $2,032,243, including $358,225 from program services. *See* http://www.heartbeatinternational.org/images/hbImages/campaign/Downloads/2011%20990%20Heartbeat%20International.pdf.

[3] Two Pregnancy Centers in Baltimore, including Plaintiff Pregnancy Center, are affiliates of Care Net. J.A. 228. Five Pregnancy Centers in Baltimore are affiliates of Heartbeat International. J.A. 241. The Option Line internet search tool featured in the advertisement at J.A. 381 directs consumers to these affiliates. *See* http://www.optionline.org/ (last visited Aug. 31, 2012). If you enter the location "Baltimore, MD" into the search tool, Plaintiff Pregnancy Center is the first result you will obtain. *Id.* It is identified as "Center for Pregnancy Concerns (686)." *Id.*

In addition, testimony documented that Pregnancy Centers purposefully endeavor to delay women from accessing desired health services through deceptive tactics once at the center. *See, e.g.*, J.A. 274-75. The Maryland Report found that women are encouraged to wait to make the abortion decision because "[a]bortion is legal through all nine months of pregnancy. . .," even though abortion procedures are not available in Maryland through all nine months of pregnancy. J.A. 331. Women are also pressured to delay decisions about birth-control and abortion until they undergo additional tests at the Pregnancy Center, such as pregnancy tests and sonograms, which may be scheduled for weeks after a women's initial visit. J.A. 332.

Evidence also showed that consumer confusion concerning the scope of services offered by Pregnancy Centers poses a threat to public health. *See* J.A. 274-75, 331-32. Although abortion is a safe medical procedure, the risks of abortion, as well as the costs, increase as a woman advances through her pregnancy. J.A. 274, 331-32. As a result, the longer a woman is delayed in having an abortion, the riskier and costlier the procedure becomes. 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.

SUMMARY OF ARGUMENT

The district court committed three fatal errors in its Decision and Order. First, the court erred in concluding that the Ordinance violates the Free Speech Clause of the First Amendment. The court erroneously adopted the Plaintiffs' assertion that strict scrutiny should apply to the Ordinance because it "compels a disclosure introducing the topic of abortion, thus regulating Plaintiffs' noncommercial speech." J.A. 446. Yet the Supreme Court has made clear that speech is not necessarily noncommercial merely because it touches on a matter of public concern. *See infra* at 26-28. While the district court acknowledged that the goods and services offered by Plaintiff Pregnancy Center "have value in the commercial marketplace," it held that Plaintiff Pregnancy Center's religious motivation in offering the goods and services negated their commercial value for the purpose of constitutional analysis, J.A. 447-48, ignoring ample precedent to the contrary, *see infra* at 22-24.

The district court also held that, even if the required disclosure concerning the services available at a Pregnancy Center included "some commercial elements," strict scrutiny would still apply because that speech is "inextricably intertwined with otherwise fully protected speech" between a Pregnancy Center's staff and its prospective customers. J.A. 448-49. But the requirement of posting a written disclosure in a waiting room in no way interferes or intertwines with a staff

person's conversation with a consumer. *See infra* at 25-26. Further, the district court mistakenly held that the Ordinance discriminates on the basis of viewpoint. J.A. 453-54. The court inexplicably concluded that the Ordinance targets Pregnancy Centers based on their "sensitive religious, moral and political beliefs," J.A. 451, when in fact, the Ordinance, on its face, applies to a center based on the scope of services it provides, regardless of its viewpoint, Balt. City Health Code § 3-501; *see infra* at 28-34.

Applying strict scrutiny, the court accepted for purposes of discussion that the Ordinance "was enacted in response to a compelling governmental interest" in protecting the public from deception and promoting public health. J.A. 455. However, the court held that the Ordinance does not withstand strict scrutiny because less restrictive means are available to serve that interest. J.A. 456. In particular, the Court reasoned that the City could amend its deceptive advertising ordinance or "enact a new content-neutral advertising ordinance applicable to noncommercial entities." J.A. 457. But the court's reasoning is plainly flawed, as an ordinance that applies to all "noncommercial entities" is not less restrictive than one that targets advertising by a specific type of service provider with a documented history of engaging in deceptive business practices. Contrary to the court's conclusion, the Ordinance is the least restrictive means to advance the City's compelling interests in protecting the public from deceptive business

practices and promoting public health, and therefore survives constitutional review even under strict scrutiny. *See infra* at 41-44.

The district court's second fatal error consists of its flawed procedural holdings. The district court granted summary judgment to Plaintiff Pregnancy Center before the City had any opportunity to conduct discovery, flouting well-settled precedent. *See infra* at 45-50. Further, the district court made erroneous factual findings concerning disputed material facts, which then served as the basis for its ruling that the Ordinance violates the First Amendment. *See infra* at 45-46.

Third and finally, the district court erred in dismissing Plaintiff Pregnancy Center's free assembly, free exercise, equal protection, and State law claims without prejudice. The City demonstrated that, with respect to those claims, Plaintiff Pregnancy Center failed to state a claim upon which relief can be granted. *See infra* at 50-54. Accordingly, those claims should have been dismissed with prejudice.

ARGUMENT

I. Standard of Review.

This Court reviews the denial of a motion to dismiss and the grant of a motion for summary judgment *de novo*. *Holly v. Scott*, 434 F.3d 287, 288-89 (4th Cir. 2006) (motion to dismiss); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 (4th Cir. 2009) (summary judgment). The district court's decision to deny the City an opportunity to conduct discovery is reviewed for abuse of discretion. *Harrods, Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002).

A motion to dismiss must be granted when the complaint fails to show "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 12(b)(6).

A motion for summary judgment may be granted only when "there is no genuine dispute as to any material fact," and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247(1986).

Here, the City maintains that, even if all of the facts alleged in the Complaint were accepted as true, the district court should have dismissed Plaintiffs' free speech claim because well-settled principles of law permit the City to impose a modest disclosure requirement on service-providers for the purpose of preventing

consumer deception or confusion. But, if the district court concluded that Plaintiffs succeeded in stating a claim, then it should *not* have accepted Plaintiffs' allegations as true for the purpose of evaluating their summary judgment motion. In that procedural posture, Plaintiffs have the burden of proving their claims, and the City is entitled to discovery of relevant facts.

II. The District Court Erred in Concluding That the Ordinance Violates the Free Speech Clause of the First Amendment.

A. Disclosure Requirements Like the Ordinance Have Been Enacted by Numerous Jurisdictions in a Wide Variety of Contexts and are Routinely Upheld by Courts.

Numerous state and local governments, as well as the federal government, require purveyors of health care goods, services, and information to make written disclosures, often via posted signs, about limitations on the scope of their offerings. For example, at least two States require health care facilities that do not provide abortion services to post signs so indicating. *See* Cal. Health & Safety Code § 123420(c) ("Any such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility or clinic that is open to patients and prospective admittees."); 16 Pa. Code § 51.31(e) ("Such policy shall be freely available and conspicuously posted for public inspection."). Numerous other states require health care providers and insurance companies to inform consumers orally or in writing of their

unwillingness to provide or cover certain reproductive health care services.[4] Likewise, under federal Medicaid law, if a managed care plan is unwilling to cover certain reproductive health care services whose coverage is authorized by law, disclosures must be made concerning the "extent to which, and how, enrollees may obtain benefits, including family planning services, from out-of-network providers." 42 C.F.R. § 438.10(f)(6)(vii); *see also* 42 C.F.R. §§ 438.10(e)(2)(ii)(E), 438.10(f)(2), 438.10(f)(6)(v), 438.10(f)(6)(xii).

At least three states require abortion providers to post signs stating that they cannot provide abortion services in the absence of freely given consent. *See* Okla. Stat. tit. 63, §§ 1-737.4 – 1.737.5; Tenn. Code Ann. § 39-15-202(a)(2) – (3); Kan. Stat. Ann. § 65-6709(k). In each of those states, the required sign must contain language that is substantially similar to the following:

[4] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 20-826Z, 20-1057.08C, 20-1402M, 20-1404V, 20-2329C; Conn. Gen. Stat. § 38a-503e(c), Del. Code Ann. tit. 18, § 3559(d); Haw. Rev. Stat. §§ 327E-7(e) & (g)(1), 431:10A-116.7(c)(1); 720 Ill. Comp. Stat. 510/13; La. Rev. Stat. Ann. § 40:1299.35.9(A)(4); Me. Rev. Stat. tit. 18-A, § 5-807(e) & (g)(1); Me. Rev. Stat. tit. 24, § 2332-J(2); Me. Rev. Stat. tit. 24-A §§ 2756(2), 2847-G(2), 4247(2); Md. Code Ann., Ins. § 15-826(c)(2); Mich. Comp. Laws § 333.20183(1); Miss. Code Ann. §§ 41-41-215(5) & 7(a); Neb. Rev. Stat. § 28-337; Nev. Rev. Stat. §§ 689A.0415(5), 689A.0417(5); 689B.0376(5), 689B.0377(5); N.J. Stat. Ann. § 17:48-6ee(1); N.M. Stat. Ann. §§ 24-7A-7(E) & (G)(1); N.Y. Ins. Law § 3221(I)(16)(A)(2); N.Y Comp. Codes R. & Regs. tit. 10, § 405.9(b)(10); N.C. Gen. Stat. § 58-3-178(e); Or. Rev. Stat. §435.475(1); R.I. Gen. Laws §§ 27-18-57(e), 27-19-48(d), 27-20-43(d), 27-41-59(d); Wash. Rev. Code § 48.43.065(2)(b); W. Va. Code §§ 16-30-12(b)(2), 33-16E-7(c); Wyo. Stat. Ann. § 35-6-105.

> Notice: It is against the law for anyone, regardless of his or her relationship to you, to force you to have an abortion. By law, we cannot perform, induce, prescribe for, or provide you with the means for an abortion unless we have your freely given and voluntary consent. It is against the law to perform, induce, prescribe for, or provide you with the means for an abortion against your will. You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened physical abuse or violence.

Okla. Stat. tit. 63, § 1-737.4(A); *accord* Kan. Stat. Ann. § 65-6709(k); Tenn. Code Ann. § 39-15-202(2)(A).

Colorado law requires pharmacies to inform customers when they do not have emergency contraception in stock by "plac[ing] a conspicuous notice in the area where customers obtain prescription drugs that states 'Plan B Emergency Contraception Not Available.'" Colo. Rev. Stat. Ann. § 25-3-110(4). Madison, Wisconsin, and New York, New York, have enacted similar requirements. *See* Madison, Wisc., Leg. File No. 04663 (2006); New York, N.Y., Local Law No. 25 (2003). In addition, sixteen states and the District of Columbia require emergency rooms to disclose information about the availability of emergency contraception to sexual assault survivors.[5]

[5] *See* Ark. Code. Ann. § 20-13-1403; Cal. Penal Code § 13823.11; Colo. Rev. Stat. § 25-3-110; Conn. Gen. Stat. § 19a-112e; D.C. Code § 7-2123; 410 Ill. Comp. Stat. 70/2.2; Ill. Admin. Code tit. 77, §§ 545.20, .35, .60, .95; Mass. Gen. Laws ch. 41, § 97B; Mass. Gen. Laws ch. 111, § 70E; Minn. Stat. § 145.4712; N.J. Stat. Ann. §§ 26:2H-12.5b to -12.6g; N.M. Stat. Ann. §§ 24-10D-1 to -5; N.Y. Pub. Health Law § 2805-p; Or. Rev. Stat. § 435.254; 28 Pa Code §§ 117.53; Tex. Health & Safety Code Ann. § 323.005; Utah Code Ann. § 26-21b-201; Wash. Rev. Code §§ 70.41.020, .350, .360; Wis. Stat. § 50.375.

Outside the context of reproductive health care, written disclosure requirements have been enacted to ensure that the public is notified of important information on a wide variety of subjects ranging from:

- nutrition, *see N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (upholding New York City law requiring certain restaurants to post calorie content information on their menus and menu boards), to
- hazardous materials, *see Envt'l Defense Ctr. v. E.P.A.*, 344 F.3d 832 (9th Cir. 2003) (upholding federal regulation requiring storm sewer providers to distribute information concerning the environmental hazards of stormwater discharges and steps the public can take to reduce pollutants in stormwater runoff); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (upholding Vermont law requiring manufacturers of products containing mercury to include a warning label on product packaging that informs consumers of the presence of mercury and states that, on disposal, the product should be recycled or disposed of as hazardous waste), to
- employee rights, *see UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (upholding executive order requiring that federal contractors post notices at all of their facilities informing employees of rights under federal labor law that protect employees from being forced to join a union or pay certain dues), to

- bankruptcy, *see Milavetz, Gallop & Milavetz, P.A. v. United States*, __ U.S. __, 130 S. Ct. 1324 (2010) (upholding a provision of the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requiring debt relief agencies to include certain disclosures in their advertisements); *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008) (upholding a provision of the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requiring debt relief agencies to provide their clients with written notice of certain basic information regarding bankruptcy proceedings), to
- conflicts of interest in the pharmaceutical industry, *see Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005) (upholding Maine law requiring intermediaries between drug companies and pharmacies to disclose their conflicts of interest and financial arrangements), to
- the identities of political advertisers, *see Citizens United v. Fed. Election Comm'n*, __ U.S. __, 130 S. Ct. 876 (2010) (upholding federal law requiring that televised electioneering communications funded by anyone other than a candidate include a disclosure that "[-----] is responsible for the content of this advertising").

Courts have consistently sanctioned such written disclosure requirements in the context of both commercial and noncommercial speech—provided that they

compel only truthful, non-misleading, and non-ideological statements—because they are less restrictive than other kinds of speech regulations and do not prevent anyone from speaking.[6] *See, e.g., Doe v. Reed*, ___ U.S. ___, 130 S. Ct. 2811, 2818 (2010); *Citizens United*, 130 S. Ct. at 914; *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

B. The District Court Erred in Holding That the Ordinance is Subject to Strict Scrutiny.

The standard to which the Ordinance is subject depends, in large part, on whether it regulates commercial speech or noncommercial speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). Laws that regulate commercial speech by compelling disclosures are permissible if their "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Laws that regulate noncommercial speech by compelling disclosures are subject to strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 798 (1988). The Ordinance regulates commercial speech because it targets speech that solicits consumers to patronize Pregnancy Centers for the purpose of obtaining commercially valuable goods and services. *See infra* at 20-28. Therefore, it should be subject to rational basis

[6] Disclosure requirements that consist not merely of words, but also of graphic images, have fared less well. *See, e.g., R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, ___ F.3d ___, 2012 WL 3632003, * 1 (D.C. Cir. Aug. 24, 2012) (striking down regulations requiring display of color graphics depicting the negative health consequences of smoking). The Ordinance does not fall in this category.

scrutiny. Ultimately, though, the Ordinance withstands scrutiny under any standard. *See infra* at 34-44.

1. The Ordinance regulates commercial speech.

a. <u>The Speech Regulated by the Ordinance Constitutes Commercial Speech as Defined by the Supreme Court.</u>

i. The Core Notion of Commercial Speech is Speech That Does no More Than Propose a Commercial Transaction, But Speech Outside This Core Notion May Also be Classified as Commercial Speech Based on its Context.

The "core notion of commercial speech" is "speech which does no more than propose a commercial transaction."[7] *Bolger*, 463 U.S. at 66 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (internal quotation marks omitted); *accord Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989). Speech outside of this "core notion" may also be classified as commercial based on its context. *Id.* at 66-67. For example, in *Bolger*, the Supreme Court held that, although an informational

[7] The test for commercial speech is sometimes identified as "expression related solely to the economic interests of the speaker and its audience" based on *dicta* in the Supreme Court's decision in *Central Hudson*. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). But the Supreme Court has not mentioned that formulation of the commercial speech test since 1982, *see In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982), except to note that it has been abandoned, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993).

pamphlet concerning the benefits of condoms in preventing the spread of sexually transmitted diseases fell outside the core notion of commercial speech, a contextual analysis demonstrated that pamphlet was quintessentially commercial. *Id.* The Court relied on the fact that the pamphlet was a form of advertising, the pamphlet referred to a specific product, and the pamphlet's author had an economic motivation for disseminating the pamphlet to the public. *Id.* Similarly, 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). And in a case that is exactly on point, the North Dakota Supreme Court held that a Pregnancy Center's advertisements constituted commercial speech because they were placed in a "commercial context." *See Fargo Women's Health Org. v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986) (affirming provisions of a preliminary injunction that banned a North Dakota Pregnancy Center from using a deceptive name, engaging in deceptive advertising, and luring consumers to its premises under false pretenses). In particular, the court stated that the Pregnancy Center's "advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Id.* It concluded

that, "[i]n effect, the [Pregnancy Center'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.*

Here, the speech regulated by the Ordinance falls within the core notion of commercial speech because it is speech that does no more than propose a commercial transaction. In addition, the context in which the speech occurs indicates that it should be treated as commercial.

ii. The Speech Regulated by the Ordinance Falls within the Core Notion of Commercial Speech.

When a Pregnancy Center proposes that a woman patronize its establishment for the purpose of obtaining commercially valuable goods and services—such as "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—it is proposing a commercial transaction. This is true even with respect to the subset of Pregnancy Centers that operate as nonprofit corporations and/or have religious motivations. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997) (holding, in a challenge brought under the dormant Commerce Clause, that a nonprofit summer camp with a religious mission engaged in commercial transactions) ("Even though petitioner's camp does not make a profit, it is

unquestionably engaged in commerce, not only as a purchaser, but also as a provider of goods and services.") (citations omitted); *Va. Vermiculite, Ltd. v. W.R. Grace & Co.—Conn.*, 156 F.3d 535, 541 (4th Cir. 1998) (holding that a nonprofit environmental organization engaged in a commercial transaction when it accepted a donation of commercially valuable land) ("[T]he dispositive inquiry is whether the transaction is commercial, not whether the entity engaging in the transaction is commercial.")

The Ordinance regulates Pregnancy Centers' proposals to provide commercially valuable goods and services to the public, which may take the form of traditional advertising, internet advertising, in-person solicitation, or signage. Even though the Ordinance does not require the mandatory disclosure to appear directly on Pregnancy Center advertisements and other forms of solicitation, it regulates these forms of speech by mitigating the confusion and deception that arises from them.[8] Accordingly, the speech regulated by the Ordinance is speech that does no more than propose a commercial transaction. It therefore falls within the core notion of commercial speech. *See Bolger*, 463 U.S. at 66.

[8] Rather than requiring that Pregnancy Centers post the mandatory disclosure on their premises, the City could have required that they include the mandatory disclosure in all of their advertising and other forms of solicitation. But the method that the City chose has three distinct advantages over this alternative: it is less burdensome for Pregnancy Centers; it is easier to enforce; and it ensures that every woman who actually enters a Pregnancy Center seeking abortion or comprehensive birth control services is informed that she is in the wrong place.

iii. The Speech Regulated by the Ordinance Promotes Goods and Services for the Purpose of Soliciting Pregnancy Center Patronage.

In addition, contextual analysis of Pregnancy Center advertisements and other forms of solicitation provides further support for the conclusion that these forms of speech are commercial. Like the pamphlet at issue in *Bolger*, Pregnancy Center solicitations refer to specific products and services. *Id.* at 66-67. Like the term "Olympic" in *S.F. Arts & Athletics, Inc.*, the goods and services promoted by Pregnancy Centers have value in the commercial marketplace. *See S.F. Arts & Athletics, Inc.*, 483 U.S. at 541. And like the Pregnancy Center solicitations at issue in *Fargo Women's Health Org.*, the Pregnancy Center solicitations at issue here are directed at the providing of goods services rather than toward an exchange of ideas, and they promote those goods and services for the purpose of soliciting Pregnancy Center patronage. *See Fargo Women's Health Org.*, 381 N.W.2d at 181.

iv. The Ordinance Does Not Regulate Noncommercial Speech by Pregnancy Centers.

Of course, all Pregnancy Center speech is commercial speech. For example, a conversation between a Pregnancy Center staff member and a consumer about abortion's risks and alternatives, just like a conversation between a doctor and a patient about abortion's risks and alternatives, is plainly noncommercial. But the

Ordinance does not regulate any aspects of Pregnancy Centers' noncommercial speech. In particular, the Ordinance does not regulate the manner in which Pregnancy Centers discuss abortion or birth-control services with consumers. *See* Balt. City Health Code § 3-502. Furthermore, it does not prevent Pregnancy Centers from telling consumers that they believe abortion and certain methods of birth-control are immoral or unhealthy. *See id.* It requires only that Pregnancy Centers disclose via a posted sign that they do not provide abortion or comprehensive birth-control services and that they do not refer consumers to providers of those services. *See id.* Accordingly, the speech regulated by the Ordinance is purely commercial speech.

b. The Disclosure Required by the Ordinance is Not Inextricably Intertwined with Noncommercial Speech.

The disclosure required by the Ordinance is not intertwined with any speech of a noncommercial nature. 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 noncommercial 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 disclosure required by the Ordinance is silent, discrete, and completely independent of any other speech that might occur at a Pregnancy Center. J.A. 26. Therefore, the Court should measure the constitutionality of the Ordinance by the standard applicable to purely commercial speech.[9]

c. Speech May Be Properly Classified as Commercial Even When it Touches on Important Matters of Public Concern, Such as Abortion and Birth-Control.

Speech may be properly classified as commercial even when it touches on important matters of public concern. The dispositive consideration in determining whether speech is commercial is not the subject-matter that the speech addresses, but whether the speech proposes a commercial transaction. *See Bolger*, 463 U.S. at 67-68; *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 n.5 (1980).

For example, in *Bolger*, a company engaged in the manufacture and distribution of contraceptives challenged the Postal Service's threatened enforcement of a federal statute that would bar the company from mailing certain

[9] 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," J.A. 448, is plainly incorrect. 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 protection. *See Fox*, 492 U.S. at 474; *Riley*, 487 U.S. at 796.

items to the public on an unsolicited basis. Among other things, the statute forbade the company from mailing informational pamphlets discussing the desirability and availability of condoms. *Id.* at 62. One such pamphlet, entitled "Condoms and Human Sexuality," was "a 12-page pamphlet describing the use, manufacture, desirability, and availability of condoms, and providing detailed descriptions of various Trojan-brand condoms manufactured by [the plaintiff]." *Id.* at 62 n.4. Another such pamphlet, entitled "Plain Talk about Venereal Disease," was "an eight-page pamphlet discussing at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease." *Id.* The Supreme Court rejected the plaintiff's contention that the pamphlets should be classified as noncommercial speech because they contained educational information concerning important matters of public concern. *Id.* at 67-68. It declared: "The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning." *Id.* (footnote omitted); *accord Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 562 n.5 (distinguishing between "direct comments on public issues," which constitute noncommercial speech, and "advertising that links a product to a current public debate," which constitutes commercial speech).

Thus, a Pregnancy Center's offer to provide commercially valuable goods and services to consumers is commercial speech, notwithstanding that the speech

touches on the subjects of abortion and birth-control, which are important matters of public concern. *Cf. Bolger*, 463 U.S. at 67-68.

2. The Ordinance is viewpoint-neutral.

The minimal burdens imposed on speech by the Ordinance are unrelated to the viewpoint of the speaker. Any entity whose primary purpose is to provide pregnancy-related services but who does not provide or make referrals for both abortion and comprehensive birth-control services must post a sign stating that those services are unavailable, regardless of the reason that the entity does not provide or make referrals for those services. *See* Balt. City Health Code §§ 3-501, 3-502. 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. Notwithstanding the provider's viewpoint, the provider must comply with the Ordinance. *See id.*

a. The Supreme Court's Decision in *R.A.V.* Does Not Support the Contention That the Ordinance Lacks Viewpoint-Neutrality.

The district court's reliance on it notwithstanding, the Supreme Court's decision in *R.A.V.* does not provide any support for the contention that the Ordinance should be subject to strict scrutiny on the ground that it lacks viewpoint-neutrality. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388-89 (1992). In

R.A.V., the Court held that the First Amendment imposes a "'content discrimination' limitation upon a State's prohibition of proscribable speech" such that regulations targeting proscribable speech based on its content (including its viewpoint) are generally subject to strict scrutiny. *Id.* at 387. This limitation applies to forms of speech that are less than fully protected though not proscribable, including commercial speech. *See id.* at 388-89. However, the content discrimination limitation described in *R.A.V.* is inapplicable when, like here, the content discrimination is based on one of the characteristics of speech that justifies depriving it of full First Amendment protection. *See id.* at 388. As the Supreme Court stated: "[A] State may choose to regulate price advertising in one industry but not in others because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there." *Id.* at 388-89 (citations omitted).

Similarly, the City may choose to impose disclosure requirements on limited-service pregnancy centers but not on full-service pregnancy centers because it believes that solicitations made by limited-service pregnancy centers pose a greater risk of deceiving or confusing the public. *Id.* Under the principles articulated in *R.A.V.*, this content-based distinction does not constitute viewpoint discrimination because it classifies speech according to its likelihood to deceive,

not according to the viewpoint of the speaker.[10] *Id.* at 388-89. Thus, the content discrimination limitation described in *R.A.V.* does not require the Court to subject the Ordinance to strict scrutiny.

b. <u>The Supreme Court's Limited Public Forum Cases Do Not Support the Contention That the Ordinance Lacks Viewpoint-Neutrality.</u>

Likewise, the Supreme Court's limited public forum cases do not provide any support for the contention that the Ordinance should be subject to strict scrutiny on the ground that it lacks viewpoint-neutrality.[11] *See, e.g., Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, ___ U.S. ___, 130 S. Ct. 2971, 2994 (2010); *Rosenberger v. Rector and Visitors of*

[10] The district court found it significant that the City Council rejected an amendment to the Ordinance that would have required Pregnancy Centers to make disclosures concerning a broader range of pregnancy-related services, including financial assistance and prenatal care. J.A. 21 n.11. The fact, however, that the City narrowly tailored the Ordinance to remedy a specific and well-documented problem does not raise First Amendment concerns. *See Burson v. Freeman*, 504 U.S. 191, 207 (1992) ("States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.").

[11] In traditional public forums, such as public streets and parks, any restriction based on the content of speech must satisfy strict scrutiny. *Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, ___ U.S. ___, 130 S. Ct. 2971, 2984 n.11 (2010). The same is true when government property not traditionally regarded as a public forum is intentionally opened up for that purpose. *Id.* When governmental entities establish limited public forums, however, by creating property that is limited to use by certain groups or dedicated solely to the discussion of certain subjects, restrictions on the content of speech are subject only to the requirement that they be reasonable and viewpoint-neutral. *Id.*

Univ. of Va., 515 U.S. 819, 831 (1995). To the contrary, those cases make clear that the Ordinance is viewpoint-neutral. *See Martinez*, 130 S. Ct. at 2994.

In *Martinez*, for example, a student organization with a religious mission challenged a public law school's policy requiring that registered student organizations ("RSOs") permit all students to participate, regardless of their status or beliefs. *Martinez*, 130 S. Ct. at 2978. The plaintiff organization claimed that this policy discriminated against its religious viewpoint, which required it to exclude non-Christians and non-heterosexuals from the ranks of its membership and leadership. *Id.* at 2979-80. The Supreme Court rejected the plaintiff's claim of viewpoint discrimination, explaining that: "The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' desire to redress the perceived harms of exclusionary membership policies provides an adequate explanation for its all-comers condition over and above mere disagreement with any student group's beliefs or biases." *Id.* at 2994 (internal quotation marks and omitted) (emphasis in original). The Court similarly rejected the claim that the policy was viewpoint-based because it has a disparate impact on religious groups, holding that, where the language and purpose of a law are viewpoint-neutral, it is constitutionally irrelevant whom the law impacts. *Id.* at 2994; *cf. Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with

a particular viewpoint does not itself render the injunction content or viewpoint based.").

Like the policy at issue in *Martinez*, the Ordinance is viewpoint-neutral because it aims at a Pregnancy Center's act of excluding certain services from its commercial offerings without reference to the reasons motivating that exclusion. *See* Balt. City Health Code § 3-501. The term "limited-service pregnancy center" is defined, in relevant part, as "[a]ny person whose primary purpose is to provide pregnancy-related services" but who "[d]oes not provide or refer for: (A) Abortions; or (B) Nondirective and comprehensive birth-control services." *Id.* It is *not* defined as any person with a moral objection to abortion or nondirective and comprehensive birth-control services. *Id.* The latter definition would discriminate on the basis of viewpoint; the former does not. *See Martinez*, 130 S. Ct. at 2994; *see also Am. Life League, Inc. v. Reno*, 47 F.3d 642, 649 (4th Cir. 1995) ("The neutrality inquiry does not focus on the motive of the violator. Rather, a statute regulating expressive conduct is neutral if it is justified without reference to the content of the violator's message or point of view.").

Moreover, the City's "desire to redress the perceived harms" that result from consumer confusion about the scope of services offered by Pregnancy Centers "provides an adequate explanation for" the Ordinance, "over and above mere disagreement with" any person's views about abortion and birth-control.

Martinez, 130 S. Ct. at 2994 (internal quotation marks omitted). In arguing to the contrary, Plaintiff Pregnancy Center is "simply confusing its *own* viewpoint-based objections to [the Ordinance] . . . with viewpoint *discrimination*." *Id.* (emphasis in original); *cf. Hill v. Colorado*, 530 U.S. 703, 724 (2000) ("The contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of partisans on one side of a debate is without support.").

Rosenberger, on which the district court relied, is inapposite. *See Rosenberger*, 515 U.S. at 831. In that case, a student organization that published a newspaper with a Christian editorial viewpoint was denied university funding generally available to student newspapers on the basis of its religious viewpoint. *Id.* at 822-23. In holding that denial of funding to be an instance of improper viewpoint discrimination within a limited public forum, the Supreme Court relied on the fact that the university "selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. The Court explained that: "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835. That danger is not present in this case because the Ordinance does not classify Pregnancy Centers based on their ideas, but rather, based on the scope of services they provide to consumers. *See* Balt. City Health Code § 3-501. A Pregnancy Center's

motivations for including certain services within the scope of its commercial offerings and excluding others is completely irrelevant to application of the Ordinance. *Id.* Accordingly, the Ordinance, unlike the University's policy in *Rosenberger*, is viewpoint-neutral.[12] *Cf. Rosenberger*, 515 U.S. at 835.

C. The Ordinance is Constitutional under any Standard of Scrutiny.

Regardless of whether the Court applies rational basis scrutiny or strict scrutiny, the outcome will be the same: the Ordinance satisfies the applicable level of constitutional scrutiny.

1. The Ordinance's disclosure requirements are reasonably related to the City's interest in preventing deception of consumers.

Laws that compel commercial speech are permissible if their "disclosure requirements are reasonably related to the State's interest in preventing deception

[12] The Ordinance is also distinguishable from the law struck down in *Sorrell*. *See Sorrell v. IMS Health, Inc.*, ___ U.S. ___, 131 S. Ct. 2653, 2662-63 (2011). In that case, the Supreme Court held that a law that applies differentially to prospective purchasers of information based on their reasons for wanting to purchase the information is viewpoint-based. *See id.* The law at issue banned the purchase of prescriber-based pharmacy records by individuals who wanted to use the information in a marketing campaign, but not by individuals who wanted the information for other reasons, such as for educational purposes. *Id.* In contrast, the Ordinance applies to all Pregnancy Centers that exclude certain services from their commercial offerings, regardless of the reason for the exclusion. *See* Balt. City Health Code §§ 3-501 to 3-502. Therefore, the Ordinance is not analogous to the law struck down in *Sorrell*, and it is viewpoint-neutral. *See Martinez*, 130 S. Ct. at 2994.

of consumers."[13] *Zauderer*, 471 U.S. at 651; *accord Milavetz, Gallop & Milavetz*, 130 S. Ct. at 1339-40. The Supreme Court first announced this mandatory disclosure standard in *Zauderer*, a case examining the validity of a rule of professional conduct that required attorneys who advertised contingency-fee services to disclose in their advertisements that a losing client might still be responsible for certain litigation fees and costs. *Zauderer*, 471 U.S. at 630. Upholding the rule, the Court explained that, "[b]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warnings or disclosures might be appropriately required in order to dissipate the possibility of consumer confusion or deception." *Id.* at 651. It ultimately concluded that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

The Supreme Court applied the *Zauderer* standard most recently in *Milavetz. See Milavetz, Gallop & Milavetz*, 130 S. Ct. at 1339-41. There, the Court addressed a First Amendment challenge to certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, including a provision that requires debt relief agencies to include certain disclosures in their advertisements.

[13] *See generally* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. ___ (forthcoming 2012).

The Court held that: "Because [the Act's] requirements that Milavetz identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services are 'reasonably related to the [Government's] interest in preventing deception of consumers,' we uphold those provisions as applied to Milavetz." *Id.* at 1341 (quoting *Zauderer*, 471 U.S. at 651) (citations omitted). In the course of its opinion, the Court rejected the plaintiff's argument that the Government had failed to present evidence that the plaintiff's advertisements are misleading. It stated: "Evidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost is adequate to establish that the likelihood of deception in this case is hardly a speculative one." *Id.* at 1340 (citations and internal quotation marks omitted).

Here, it is plain that the Ordinance satisfies the *Zauderer* standard. As noted, the statute at issue in *Zauderer* required an attorney who provides contingency-fee services to disclose that a losing client might still be responsible for certain litigation fees and costs. And the statute at issue in *Milavetz* required an entity that provides bankruptcy-assistance services to disclose the nature of its services. Analogous to the requirements in *Zauderer* and *Milavetz*, the Ordinance requires that an entity that provides pregnancy-related services disclose that it does not provide or refer for abortion or comprehensive birth-control services. The

disclosure required by the Ordinance, like those in *Zauderer* and *Milavetz*, is reasonably related to the government's interest in protecting consumers from deception and confusion.

Moreover, the evidence in the legislative record concerning the Ordinance, just like the evidence in the legislative record concerning the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, is sufficient to establish a likelihood of deception. The City Council had the benefit of two recent reports, one prepared for a member of the U.S. House of Representatives, documenting a pattern of deceptive practices by Pregnancy Centers. *See supra* at 7. In addition, during the legislative hearings on the Ordinance, the City Council heard testimony from numerous individuals complaining about the deceptive practices used by Pregnancy Centers and collected specific examples of deceptive advertising. *See supra* at 7-8.

Plaintiffs allege in their Complaint that the disclosure required by the Ordinance is itself deceptive. In particular, they claim that, because Plaintiff Pregnancy Center provides "information and education on natural family planning and abstinence," the Ordinance's requirement that it post a sign that contains "a disclosure substantially to the effect that [it] does not provide or make referral for abortion or birth-control services" is false and misleading. J.A. 17. That argument is unavailing. The Ordinance does not require Plaintiff Pregnancy Center to use a

specific set of words in its disclosure. *See* Balt. City Health Code § 3-502; Regulation, §§ (B)-(C). Plaintiff Pregnancy Center can satisfy the requirements of the Ordinance by posting a sign that says: "We do not provide or make referral for abortion or birth-control services other than natural family planning and abstinence." *See* Balt. City Health Code § 3-502; Regulation, §§ (B)-(C). There is nothing false or misleading about that statement; indeed, Plaintiffs allege a substantially similar statement in their Complaint. J.A. 15.

The Supreme Court rejected a similar argument by the plaintiff in *Milavetz*, noting that the statute at issue "gives Milavetz flexibility to tailor the disclosures to its individual circumstances, as long as the resulting statements are 'substantially similar' to the statutory examples." *Milavetz*, 130 S. Ct. at 1341; *see also Hersh*, 553 F.3d at 767 ("[C]ontrary to Hersh's arguments, [the statute] does not require Hersh or other debt relief agencies to make false and misleading statements. Most of the statements that Hersh cites as examples of false and misleading material are simply generalizations that she is free to expand upon and clarify for her clients.").[14]

[14] In *Hersh*, the Fifth Circuit considered a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 not addressed by the Supreme Court in *Milavetz*, Section 527(b). *See Hersh*, 553 F.3d at 764. That provision requires debt relief agencies to provide their clients with written notice of certain basic information regarding bankruptcy proceedings. *Id.* Without deciding what standard of scrutiny was required, the court concluded that Section 527(b) satisfied strict scrutiny and was therefore constitutional. *Id.* at 766-67. It noted that the Supreme Court's reasoning in *Milavetz* supported its conclusion. *Id.* at 768.

In sum, the Ordinance is a permissible regulation of commercial speech because its flexible disclosure requirements are reasonably related to the City's interests in preventing consumer deception and confusion.

2. The Ordinance's disclosure requirements are narrowly tailored to serve a compelling governmental interest by the least restrictive means available.

Laws that are subject to strict scrutiny must be narrowly tailored to serve a compelling governmental interest by the least restrictive means available. *See Burson*, 504 U.S. at 198; *Am. Life League*, 47 F.3d at 648. The Ordinance satisfies these requirements.

a. <u>The Ordinance Serves the City's Compelling Interests in Protecting the Public from Deceptive Business Practices and Promoting Public Health.</u>

The Ordinance serves at least two governmental interests that are sufficiently compelling to warrant the *de minimis* burden that the disclosure requirement imposes on Pregnancy Centers. First, the City has a compelling interest in protecting the public from ongoing 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); *see also Ill. ex rel. Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 612 (2003) (holding that public deception is unprotected speech). As discussed above, Pregnancy Centers often engage in deceptive advertising and other forms of solicitation to attract women seeking abortion or

comprehensive birth-control services to their facilities. *See supra* at 7-8. As a result of such deceptive practices, some women are misled into thinking that Pregnancy Centers are medical clinics that provide a full range of medical services, and they do not understand, on arrival at a Pregnancy Center, what kind of facility they are in. *See supra* at 8. Pregnancy Centers then use deceptive delay tactics to string women along, stalling them for hours, days, or even weeks from accessing the services they seek. *See supra* at 9. The Ordinance serves the City's interest in protecting the public from such deceptive practices by ensuring that women seeking abortion and comprehensive birth-control services are informed promptly upon their arrival at a Pregnancy Center that those services are not available there. *See* Balt. City Health Code § 3-502. By eliminating the benefit that Pregnancy Centers gain through deceptive advertising—that of delaying women's access to abortion and certain birth control services in an effort to deter women from utilizing those services—the Ordinance also discourages use of deceptive advertising in the first place.

Second, the City has a compelling interest in promoting public health by ensuring that individuals who seek abortion or comprehensive birth-control services have prompt access to those services. *See Am. Life League*, 47 F.3d at 651-52 (holding that government has a substantial interest in protecting public health, which extends to preserving access to all reproductive health care services).

Although abortion is a safe medical procedure, the risks of abortion, as well as the costs, increase as a woman advances through pregnancy. *See supra* at 9. As a result, the longer a woman is delayed in having an abortion, the riskier and costlier the procedure becomes. *See supra* at 9. 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. *See supra* at 9. By discouraging Pregnancy Centers from engaging in deceptive practices and by ensuring that individuals seeking abortion and comprehensive birth-control services are informed promptly upon their arrival at such centers that those services are not available, the Ordinance serves the City's compelling interest in promoting public health. *See* Balt. City Health Code § 3-502.

b. The Ordinance is the Least Restrictive Means of Serving the City's Compelling Interests.

To assess whether a law subject to strict scrutiny is narrowly tailored, courts apply a least restrictive means test. *See generally Am. Life League*, 47 F.3d at 648. Here, the Ordinance is the least restrictive means of serving the City's compelling interests in protecting the public from deceptive business practices and promoting public health.

The Ordinance does no more than impose a modest disclosure requirement on Pregnancy Centers. *See* Balt. City Health Code § 3-502. It does not prevent such centers from speaking, nor does it limit their speech. *See id.* As the Supreme

Court has repeatedly stated, disclosure requirements are less restrictive than other kinds of speech regulations. *See Reed*, 130 S. Ct. at 2818; *Citizens United*, 130 S. Ct. at 914; *Zauderer*, 471 U.S. at 651.

Further, the signage requirement of the Ordinance is less restrictive than other methods of communicating the disclosure. For example, the City could require Pregnancy Center personnel to communicate the required disclosure orally to consumers who call or visit a center. Likewise, it could require that every page of a Pregnancy Center's website, as well as text in all advertisements, brochures, and signage, contain the disclosure. But such measures would impose considerably greater burden and cost on Pregnancy Centers than the disclosure requirement contained in the Ordinance.

The content of the required disclosure is also less restrictive than any alternatives. Signs required by the Ordinance must state only that the Pregnancy Center does not provide abortion or comprehensive birth-control services and does not refer consumers to providers of those services. *See* Balt. City Health Code § 3-502; Regulation, §§ (B)-(C). In *Riley*, the Supreme Court explained that a statute requiring a fundraiser "to disclose unambiguously his or her professional status" would be narrowly tailored. *Riley*, 487 U.S. at 799 n.11 ("[S]uch a narrowly tailored requirement would withstand First Amendment scrutiny."). Subsequently, this Court upheld 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. *See Nat'l Fed'n of the Blind*, 420 F.3d at 343.

The disclosure required by the Ordinance is analogous to those endorsed by the Supreme Court in *Riley* and this Court in *National Federation of the Blind* in that it does not require the provision of more information than is absolutely necessary to achieve the relevant governmental interests and imposes only a modest burden on the speaker. *Cf. id.* at 344-45 ("[The required disclosure]—designed only to identify quickly the nature and purpose of the call—is much more modest than an obligation to reveal how much one is being paid for the call. Not only does the latter requirement compel more speech, but it also adversely affects how receptive a listener will be to the remainder of what is said.") (citations omitted).

As an alternative to the Ordinance's disclosure requirement, the district court suggests that the City enact a "new content-neutral advertising ordinance applicable to noncommercial entities that directly ameliorates the Defendants' concerns regarding deceptive advertising." J.A. 457. This proposed alternative to the Ordinance suffers from two fatal flaws. First, it is logically inconsistent; an ordinance that regulates deceptive advertising cannot be content-neutral. A law that regulates speech because of its deceptive content is necessarily content-based, and the same is true of a law that classifies speech based on whether it is

advertising. Second, a law that applies broadly to regulate all advertising by nonprofit entities is not less restrictive than a law that targets advertising by a specific type of service provider with a documented history of engaging in deceptive business practices. The district court also suggests that the City expand the scope of its anti-fraud laws to encompass deceptive practices by entities, like many Pregnancy Centers, that do not operate on a fee-for-service basis. J.A. 457. But such expansion, again, would be considerably broader and more restrictive than the targeted disclosure requirement of the Ordinance.

In sum, the Ordinance is narrowly tailored to serve the City's compelling interests in protecting the public from ongoing deceptive business practices and promoting public health. Accordingly, it satisfies the requirements of strict scrutiny. *See Burson*, 504 U.S. at 198; *Am. Life League*, 47 F.3d at 648.

III. The District Court Made Critical Procedural Errors in Granting Summary Judgment to Plaintiff Pregnancy Center.

As explained above, the district court's First Amendment analysis was fatally flawed; moreover, the procedure by which the court came to rule on the First Amendment was equally faulty. The district court erred in granting summary judgment to Plaintiff Pregnancy Center without affording the City any opportunity for discovery, and also in relying on disputed factual allegations made by Plaintiffs.

A. The District Court Erred in Granting Summary Judgment to Plaintiff Pregnancy Center before the City had any Opportunity to Conduct Discovery and in Relying on Disputed Factual Allegations.

It is well-settled that summary judgment is appropriate only after "adequate time for discovery." *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 his opposition." *Nader v. Blair*, 549 F.3d 953, 961 (4th Cir. 2008) (quoting *Anderson, Inc.*, 477 U.S. at 250 n.5). To successfully defend against summary judgment, the nonmoving party must set forth evidence establishing a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323-25; *Anderson*, 477 U.S. at 250. Here, the district court's ruling on the merits of Plaintiff Pregnancy Center's motion for partial summary judgment was premature because it came before the City had the opportunity to conduct any discovery or fully develop expert testimony on key factual issues.[15] *See Harrods, Ltd.*, 302 F.3d at 244 (reversing district court's grant of summary judgment on the ground that it was premature in the absence of discovery).

In addition, the district court improperly relied on disputed factual allegations made by the Plaintiffs. For example, the district court made factual findings that: "[T]he disclaimer mandated by the Ordinance introduces the topics

[15] That was not the result of any delay on the part of the City. Plaintiffs filed their motion for partial summary judgment before the deadline for the City to respond to the Complaint had expired and, thus, before the opportunity to conduct discovery even arose. *See* Pls.' Mot. Partial Summ. J., ECF No. 9.

of abortion and birth-control. This has an immediate effect on any speech and information offered by [Plaintiff Pregnancy Center] on these subjects," J.A. 448; "The dialogue between a limited-service pregnancy center and an expectant mother begins when the client or the prospective client enters the waiting room of the center," J.A. 449; and "[T]he disclosure . . . alters the course of a center's communications with a client or prospective client about abortion and birth-control," J.A. 449.[16] The City could not test the veracity of these and other factual allegations because the district court denied it the opportunity to conduct discovery. It also could not develop factual evidence beyond that contained in the legislative record concerning the commercial transactions engaged in by Pregnancy Centers, their publicity, or other factual matters in dispute.[17] This lack of discovery improperly prejudiced the City and requires reversal of the district court's judgment. *See Harrods, Ltd.*, 302 F.3d at 244.

[16] The district court made these factual findings notwithstanding that the legislative record contains an advertisement for Plaintiff Pregnancy Center that uses the word "abortion" seven times and also makes reference to the "morning after pill," which is a method of contraception. *See* J.A. 381.

[17] Pursuant to Fed. R. Civ. P. 56(f), the City filed the Declaration of Stephanie Toti explaining why it could not adequately oppose Plaintiffs' motion for partial summary judgment without the opportunity to conduct discovery and develop expert testimony. J.A. 41-43. In particular, the City sought discovery concerning the advertising practices of Pregnancy Centers in Baltimore, as well as the economics of the provision of services at the centers. *Id.*

B. The District Court Erred in Holding that, as a Matter of Constitutional Law, the City was not Entitled to Discover or Submit any Evidence beyond that Contained in the Legislative Record.

In concluding that summary judgment for Plaintiff Pregnancy Center was appropriate, the district court mistakenly relied on the premise that, as a matter of constitutional law, the City was not entitled to discover or submit any evidence beyond that contained in the legislative record. *See* J.A. 438 ("The Court must base its decision on the evidence relied on by the Baltimore City Council at the time the Ordinance was passed."). Such a categorical denial to the City of any opportunity to submit evidence supplementing the legislative record is patently inconsistent with the decisions of the Supreme Court and this Court. *See e.g.*, *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 667-68 (1994) ("*Turner I*"); *11126 Balt. Blvd. v. Prince George's Cnty.*, 886 F.2d 1415, 1425 (4th Cir 1989), *vacated on other grounds*, 496 U.S. 901 (1990).

Courts "routinely admit[ ] evidence . . . to supplement a legislative record or explain the stated interests behind challenged regulations." *11126 Balt. Blvd.*, 886 F.2d at 1425; *see United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity*, 465 U.S. 208, 223 (1984). Courts also admit evidence showing that challenged regulations advance those interests. *See e.g.*, *Turner I*, 512 U.S. at 667-68 (remanding so government could produce "evidence upon which Congress relied" as well as "additional evidence" demonstrating narrow tailoring of statute);

Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 515 (4th Cir. 2007). That a law is challenged on First Amendment grounds affords no basis for departing from these well-settled principles. *See Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *vacated*, 517 U.S. 1206 (1996), *readopted*, 101 F.3d 325 (4th Cir. 1996) ("[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.") (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)) (internal quotation marks omitted). Such supplemental evidence is particularly important because a legislature "is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner I*, 512 U.S. at 666.

Indeed in *Turner I.*, the Supreme Court remanded to the district court to afford the parties an opportunity to develop a more thorough factual record. *Id.* There, cable television operators and programmers challenged the constitutionality of a federal statute on First Amendment grounds. *Id.* at 635. A three-judge panel of the district court granted the government's summary judgment motions, ruling that the challenged provisions were consistent with the First Amendment. *Id.* On direct appeal, the Supreme Court concluded that Congress created the challenged

provisions to serve interests that were important in the abstract. *Id.* at 663. But it held that genuine issues of material fact remained regarding whether the problems Congress perceived actually existed, and if they did, whether Congress' remedy burdened more speech than needed to address those problems. *Id.* at 665. On remand, the parties developed a "record of tens of thousands of pages" of evidence. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 520 U.S. 180, 187 (1997) ("*Turner II*"). This evidence included pre-enactment hearings, as well as "additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand." *Id.* The Supreme Court relied on this record—consisting of both evidence presented to Congress and additional evidence supplementing the congressional record—to uphold the constitutionality of the challenged provisions. *See generally id.* at 196-225.

Like the U.S. Supreme Court, this Court has also relied on trial testimony and supplemental materials in determining whether challenged laws are consistent with the First Amendment. In *11126 Balt. Blvd.*, for example, the district court refused to consider evidence prepared for litigation and collected after the county approved challenged regulations, discounting the material as "post-hoc rationalizations." *11126 Balt. Blvd.*, 886 F.2d at 1425 (internal quotations omitted). On appeal, however, this Court held that the government could (and indeed that it did) prove the constitutionality of regulations based on pre-enactment

legislative history, as well as "trial testimony" and "supplemental materials."[18] *Id.* (internal quotations omitted).

Here, as in *11126 Baltimore*, the district court declined to consider any post-enactment material, discounting it as "post hoc rationalizations." J.A. 438. Instead, it denied the City the opportunity to conduct discovery and entered summary judgment for Plaintiff Pregnancy Center on an incomplete factual record. *Id.*

Because the City was entitled to discovery and the district court's entry of summary judgment was premature in its absence, this Court should reverse the summary judgment.

IV. The District Court Erred in Dismissing Without Prejudice Plaintiff Pregnancy Center's Free Assembly, Free Exercise, Equal Protection, and State Law Claims.

The City demonstrated that, under Fed. R. Civ. P. 12(b)(6), it was entitled to dismissal with prejudice of Plaintiff Pregnancy Center's free assembly, free exercise, equal protection, and State law claims.

[18] Although post-enactment "materials cannot sustain regulations where there is *no* evidence in the pre-enactment legislative record," *11126 Balt. Blvd.*, 886 F.2d at 1425 (emphasis in original), here, there is substantial evidence in the pre-enactment legislative record that justifies enactment of the Ordinance, including witness testimony, two studies documenting Pregnancy Centers' deceptive practices, and an example of deceptive advertising. *See supra* at 7-9.

A. Plaintiff Pregnancy Center's Free Assembly Claim Should Have Been Dismissed with Prejudice under Rule 12(b)(6).

The Ordinance imposes no limitation on a Pregnancy Center's ability to assemble or to meet with others; it merely requires a Pregnancy Center to post a sign containing a disclosure in its waiting area. *See* Balt. City Health Code § 3-502. In *San Jose Christian College*, the court held that a religiously affiliated college failed to assert a colorable claim that a city's denial of its rezoning application violated its right of freedom of assembly because the city's action did not "impose[ ] a serious burden upon, affect[ ] in any significant way, or substantially restrain[ ]" the college's efforts to gather its members together for education and worship." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1033 (9th Cir. 2004). Similarly, Plaintiff Pregnancy Center cannot sustain a claim that the Ordinance violates its right of freedom of assembly because the Ordinance does not impose a serious burden upon, affect in any significant way, or substantially restrain a Pregnancy Center's ability to assemble or to meet with others. Accordingly, Plaintiff Pregnancy Center's free assembly claim should have been dismissed with prejudice under Fed. R. Civ. P. 12(b)(6).

B. Plaintiff Pregnancy Center's Free Exercise Claim Should Have Been Dismissed with Prejudice under Rule 12(b)(6).

The Ordinance does not impose any burden on Plaintiff Pregnancy Center's right of free exercise of religion. Notably, it does not require Plaintiff Pregnancy

Center to provide abortion or comprehensive birth-control services to anyone or to make referrals for such services. *See* Balt. City Health Code § 3-502. The Ordinance merely requires Plaintiff Pregnancy Center to disclose via a posted sign that it does not provide or make referrals for such services. *See id.*

It is well-settled that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). In *Smith*, the plaintiffs claimed that Oregon's criminal prohibition on use of the hallucinogenic drug peyote violated the Free Exercise Clause of the First Amendment because they ingested the drug for sacramental purposes during religious ceremonies at their church. *See id.* at 874. In that case, unlike here, the plaintiffs were forced to choose between foregoing a religious practice and violating the law. *See id.* Nevertheless, the Supreme Court rejected the plaintiffs' free exercise claim, holding that the right of free exercise did not relieve the plaintiffs of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prohibited conduct essential to a religious practice of the plaintiffs. *Id.* at 882.

A fortiorari, the right of free exercise does not relieve Plaintiff Pregnancy Center of its obligation to comply with the Ordinance. Disclosure that Plaintiff Pregnancy Center does not provide or make referral for certain services does not conflict with any tenet of its religious beliefs. *See id.* at 879. Accordingly, Plaintiff Pregnancy Center's free exercise claim should have been dismissed with prejudice under Fed. R. Civ. P. 12(b)(6).

C. Plaintiff Pregnancy Center's Equal Protection Claim Should Have Been Dismissed with Prejudice under Rule 12(b)(6).

In the district court, Plaintiff Pregnancy Center argued that the Ordinance violates its right to equal protection of the laws by subjecting it to a classification that burdens its fundamental right to free speech. Even if the Ordinance did subject Plaintiff Pregnancy Center to such a classification, it would not be entitled to a higher standard of scrutiny on its equal protection claim than on its free speech claim. *Cf. Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 544-45 (9th Cir. 2004). Thus, because the Pregnancy Center is unable to prevail on its free speech claim, *see supra* at 14-40, it will likewise be unable to prevail on its equal protection claim. Accordingly, Plaintiff Pregnancy Center's equal protection claim should have been dismissed with prejudice under Fed. R. Civ. P. 12(b)(6).

D. Plaintiff Pregnancy Center's Claim That the Ordinance Violates Section 20-214 of the Maryland Health Code Should Have Been Dismissed with Prejudice under Rule 12(b)(6).

The Ordinance does not violate Section 20-214 of the Maryland Health Code, which provides:

> (a)(1) A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy.
>
> (2) The refusal of a person to perform or participate in, or refer to a source for, these medical procedures may not be a basis for:
>
> (i) Civil liability to another person; or
>
> (ii) Disciplinary or other recriminatory action against the person.

Md. Code Ann., Health Gen. § 20-214(a)(1)-(2). The statute prohibits the act of compelling a person to facilitate the provision of certain medical services to which the person objects. The Ordinance in no way violates the statute because it does not require any person to facilitate the provision of any medical service. In particular, it does not require any person to facilitate the provision of abortion or comprehensive birth-control services. It merely requires Pregnancy Centers to disclose, via a posted sign, that they do not, in fact, facilitate the provision of such services. *See* Balt. City Health Code § 3-502. Accordingly, Plaintiff Pregnancy Center's claim concerning violation of Section 20-214 of the Maryland Health Code should have been dismissed with prejudice under Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the reasons set forth above, the City respectfully requests that this Court:

(a) reverse the Decision & Order of the district court insofar as it granted summary judgment to Plaintiff Pregnancy Center on its free speech claim and denied the City's motion to dismiss with respect to the claims asserted by Plaintiff Pregnancy Center;

(b) vacate the permanent injunction entered by the district court; and

(c) remand with instructions to grant the City's motion to dismiss with respect to all claims asserted by Plaintiff Pregnancy Center, or in the alternative, remand with instructions to permit the City to conduct discovery concerning any claim not dismissed.

Respectfully submitted,

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Dated: September 4, 2012

/S/ Stephanie Toti
Stephanie Toti

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 4, 2012, a true and correct copy of the foregoing brief was electronically filed with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to counsel for all parties and *amici curiae*.

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