No. _____

In the Supreme Court of the United States

MAYOR & CITY COUNCIL OF BALTIMORE; CATHERINE E. PUGH, IN HER OFFICIAL CAPACITY AS MAYOR OF BALTIMORE; AND LEANA S. WEN, M.D., IN HER OFFICIAL CAPACITY AS BALTIMORE CITY HEALTH COMMISSIONER,

Petitioners,

v.

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Free Speech Clause of the First Amendment prohibits the City of Baltimore from requiring an unlicensed entity to make truthful disclosures via a posted sign about the scope of medical services it offers when the entity holds itself out to the public as a medical practice and engages in "purposely vague" advertising.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court of appeals are listed in the caption.

None of the parties are publicly held corporations, none have parent corporations, and none issue stock.

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OPINIONS BELOW

The court of appeals' opinion is reported at 879 F.3d 101 and reprinted in the Appendix to the Petition ("App.") at 1a. The district court's unreported order (Sept. 29, 2016) and opinion (Oct. 4, 2016) granting summary judgment to Respondent are reprinted, respectively, at App. 72a and App. 24a.

The court of appeals' earlier en banc opinion vacating the district court's earlier judgment and remanding the case for further proceedings is reported at 721 F.3d 264 and reprinted at App. 73a. The court of appeals' earlier panel opinion is reported at 683 F.3d 539 and reprinted at App. 168a. The district court's earlier opinion is reported at 768 F. Supp. 2d 804 and reprinted at App. 245a.

JURISDICTION

The court of appeals entered judgment on January 5, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The Free Speech Clause of the First Amendment to the U.S. Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The text of Baltimore City Ordinance 09-252 is reprinted at App. 270a.

The text of Baltimore City Health Department Final Regulation on Limited-Service Pregnancy Center Disclosures in Baltimore City (Sept. 27, 2010) is reprinted at App. 273a.

INTRODUCTION

It is undisputed that the Greater Baltimore Center for Pregnancy Concerns, Inc. (the "Baltimore Center") completed a "medical conversion" process led by the National Institute of Family and Life Advocates ("NIFLA") so that it could provide medical services to the public; that a licensed physician oversees the Baltimore Center's provision of medical services but never meets directly with patients; that the Baltimore Center solicits patronage through paid advertising and paid membership in professional associations that advertise on its behalf; that such advertising promotes medical services such as "pregnancy tests," "sonograms," and "Abortion and Morning After Pill information, including procedures and risks"; that some of the Baltimore Center's advertisements are "purposely vague"; and that the advertisements have led some women to believe that the Baltimore Center provides abortions, which it does not.

Despite these undisputed facts, the court of appeals held that the Mayor and City Council of Baltimore (the "City") could not require the Baltimore Center to post a sign in its waiting room informing prospective patients that it does not provide contraceptives or abortions. In so doing, it ignored this Court's First Amendment precedents concerning commercial speech, viewpoint discrimination, and the regulation of medical practitioners. Instead, the court of appeals substituted its own view that the First Amendment requires government to give speech by mission-driven organizations more "latitude" than speech by profit-driven organizations, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 110 (4th Cir. 2018);

App. 17a, and that speech about abortion should be exempt from regulation in most circumstances. *Id.* at 113; App. 22a-23a. The court of appeals' decision deepens a circuit split concerning the extent to which the First Amendment permits state and local governments to impose disclosure obligations on pregnancy centers concerning the medical services that they provide or their patients may seek.

This Court granted certiorari in *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*") to address this very issue. No. 16-1140, 138 S. Ct. 464 (Nov. 13, 2017), *argued* Mar. 20, 2018. At a minimum, the Court should hold this case pending resolution of *NIFLA*, and then grant the petition, vacate the court of appeals' judgment, and remand the case for further proceedings. Petitioners ask the Court to grant plenary review, however, to address whether and when the speech of pregnancy centers may be regulated as commercial speech. This case presents a far better vehicle than *NIFLA* to address the commercial speech issue because that issue was thoroughly litigated in the courts below on a fully developed factual record. In contrast, the parties and lower courts in *NIFLA* viewed the First Amendment issues primarily through the lens of professional speech. The Ninth Circuit addressed commercial speech only in a brief footnote. Further, given that *NIFLA* is an interlocutory appeal from the denial of a preliminary injunction, the incomplete evidentiary record provides a poor basis for the fact-intensive analysis required by this Court's commercial speech jurisprudence.

Finally, the City repudiates the court of appeals' suggestion that it harbors animus toward pregnancy centers. The City appreciates the charitable work

that pregnancy centers do and values the assistance that they provide to people in need. Indeed, the City refers its residents to the Baltimore Center when they are seeking services that the Center provides. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. 1:10-cv-00760-MJG, slip op. at 17 n.13 (D. Md. Oct. 4, 2016); App. 38a. Nevertheless, the record demonstrates that sometimes pregnancy centers use tactics that are deceptive to attract patients to their clinics. The City's enactment of a modest disclosure requirement to ensure that consumers have accurate information about the scope of medical services that pregnancy centers provide is a reasonable and proportional response to this problem, designed to ensure that consumers are not unduly delayed in accessing time-sensitive medical services.

STATEMENT OF THE CASE

I. The Ordinance.

Responding to evidence of deceptive advertising and marketing practices by pregnancy centers in Baltimore and nationwide, the City enacted Baltimore City Ordinance 09-252 (the "Ordinance") (codified at Balt. City Health Code §§ 3-501 to 3-506); App. 270a-272a, in December 2009. Many pregnancy centers hold themselves out as medical practices, advertising medical services related to contraception and abortion without disclosing that they do not provide contraceptives or abortions and will not make referrals for those services. The Baltimore Center's executive director characterized the Baltimore Center's own advertisements as "purposely vague," App. 279a, and its hotline director reported that those advertisements led women to call the hotline seeking

help in accessing abortion, App. 276a. The Ordinance seeks to remedy consumer confusion about the nature and scope of medical services offered by pregnancy centers in a manner that does not subject those centers to undue burden or expense; namely, by requiring them to post a sign in their waiting rooms disclosing that they do not provide contraceptives or abortions and will not refer patients to medical practices that do.

The Ordinance applies to "limited-service pregnancy center[s]," 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; App. 270a. It requires such centers to make "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); App. 270a, 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); App. 270a-271a. A regulation promulgated by the Baltimore City Health Department provides 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." Balt. City Health Dep't, Final Regulation: Limited-Service Pregnancy Center Disclosures in Baltimore City, § (B)(ii) (Sept. 27, 2010); App. 274a. Failure to comply with the Ordinance triggers issuance of a violation

notice, and failure to correct the violation is punishable by a civil fine. *See* Balt. City Health Code §§ 3-503, 3-506; App. 271a; *see also* Balt. City Code Art. I, §§ 40-14, 41-14.

II. Initial Grant of Summary Judgment.

The Baltimore Center filed a pre-enforcement challenge to the Ordinance, claiming that it violates the Free Speech, Free Assembly, and Free Exercise Clauses of the First Amendment; the Equal Protection Clause of the Fourteenth Amendment; and a Maryland statute.[1] Prior to the commencement of discovery, the district court granted summary judgment to the Baltimore Center, holding that the Ordinance violated the Free Speech Clause of the First Amendment.[2] *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804, 817-18 (D. Md. 2011); App. 245a. A divided panel of the court of appeals affirmed the district court's judgment, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539, 548 (4th Cir. 2012); App. 183a, but the full court of appeals subsequently vacated the judgment and remanded the case for further proceedings, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 271 (4th Cir. 2013) (en banc); App. 88a.

The en banc court of appeals held that the district court had abused its discretion in denying the City

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[1] At the outset, the lawsuit included additional plaintiffs and defendants, but the other parties were subsequently dismissed and did not participate in the most recent proceedings at the court of appeals.

[2] The district court did not reach the Baltimore Center's other claims.

discovery and granting summary judgment to the Baltimore Center on an inadequate factual record. *Greater Balt. Ctr.*, 721 F.3d at 280-82; App. 108a-113a. Although the en banc court of appeals declined to reach the merits of the Baltimore Center's free speech claim, it explained that the district court's legal analysis had been faulty in several respects. Notably, it explained that "the City's commercial speech theory should not have been so easily dismissed by the district court." *Id.* at 284; App. 116a. After noting that the commercial speech analysis is "fact-driven," *id.*; App. 117a, the en banc court of appeals explained that that analysis could not be properly conducted "[w]ithout all the pertinent evidence—including evidence concerning the [Baltimore Center's] economic motivation (or lack thereof) and the scope and content of its advertisements." *Id.* at 286; App. 122a. In addition, the en banc court of appeals explained that the district court "erred in precipitately concluding that the Ordinance is an exercise of viewpoint discrimination," where evidence in the legislative record supported the conclusion that "the Ordinance was enacted to counteract deceptive advertising and promote public health." *Id.* at 288; App. 125a-126a.

III. Proceedings on Remand.

On remand, discovery yielded the following undisputed facts:

According to a 2009 report co-authored by Care Net, Family Research Council, Heartbeat International, Life International, and NIFLA, "[o]ver the past quarter century the pregnancy resource center (PRC) movement has developed an increasing array of services, extended its reach to every state of

the Union and dozens of countries overseas, and grown in both volunteer and professional capacity." J.A. at 193; *Greater Balt. Ctr.*, 879 F.3d at 101 (No. 16-2325), ECF No. 26 ("J.A."). The report's second edition noted that "[a]nnual combined [pregnancy] center income nationwide is at least $200 million," and "the largest centers have budgets as high as $4 million." J.A. 645. Most pregnancy centers in the United States, including the Baltimore Center, are dues-paying members of two large professional associations: Care Net and Heartbeat International. *See* J.A. 843, 846. The benefits of Care Net membership include a license to use its logo, which is registered with the U.S. Department of Commerce's Patent and Trademark Office. J.A. 660, 662-65. Members are also included in the referral database for Pregnancy Decision Line, "the only national call center and Internet website designed to reach people considering abortion with immediate pregnancy decision coaching, information, and referrals." J.A. 668. Similarly, Heartbeat International members are included in the referral database for Option Line, which "advertises the services of pregnancy help organizations and connects women in need with their nearest Heartbeat International affiliate." *See* J.A. 653. Heartbeat International describes the Option Line as "a conduit for national and regional marketing campaigns designed to reach abortion-vulnerable and abortion-minded women." J.A. 615. Like the Care Net logo, the Option Line logo is registered as a trademark with the U.S. Department of Commerce. J.A. 670.

Both Care Net and Heartbeat International use sophisticated, commercial advertising and marketing techniques to advertise their respective hotlines, and

by extension, the pregnancy centers such as the Baltimore Center that receive direct referrals from them. These techniques include search engine optimization ("SEO"), which is a process that maximizes the number of visitors to a particular website by ensuring that the site appears high on the list of results returned by a search engine. *See, e.g.*, J.A. 672-73 ("To reach more at-risk women you need a successful client marketing strategy. Ad America is an approved vendor for Care Net and Heartbeat. With proven SEO methods, we can help you get more results with your Google Places listing and website . . . ."). Additionally, Care Net assists its members tailor their marketing efforts to developments in the healthcare field, such as the enactment of the Affordable Care Act. *See* J.A. 682-83 (promoting a recorded seminar) ("We all know that the Affordable Care Act (aka Obamacare) changes how consumers interact with health insurance companies and providers. But how will it affect your client marketing? And how should your center adjust to attract more clients in this new environment?"). Heartbeat International offers its members "a web hosting and design service specifically for pregnancy help organizations operated as a program of Heartbeat International." J.A. 689.

The Baltimore Center also engages in paid advertising independently of Care Net and Heartbeat International. It has a standing committee on advertising and marketing. J.A. 851-52. In recent years, it has run paid advertisements in the *Pennysaver*, on local radio, and on public buses. J.A. 692-94, 696, 698, 850-53, 872-74. In addition, the Baltimore Center is a dues-paying member of the

Chamber of Commerce and other business networks that aid its marketing efforts. J.A. 840-41.

Many pregnancy centers, including the Baltimore Center, present themselves to the public as medical practices. J.A. 210-11, 921. For a fee, NIFLA leads Pregnancy Centers through a "medical conversion" process that results in them attaining "medical clinic" status. J.A. 193, 211, 700, 1210-11, 1216-17. NIFLA's Executive Director testified that the Baltimore Center, which completed the medical conversion process, is a "medical clinic" because "[t]hey have a licensed physician licensed in Maryland . . . who supervises the medical services" that the center provides. J.A. 1217. Indeed, the Baltimore Center has a "medical director," who "oversees the medical aspect of the clinic," but the medical director is "very rarely" at the Baltimore Center and does not ever meet directly with patients. *Greater Balt. Ctr.*, slip op. at 13; App. 34a. None of the Baltimore Center's other staff members or volunteers are licensed medical practitioners.

Pregnancy centers and their professional associations frequently advertise medical services related to contraception and abortion without disclosing that they do not provide contraceptives or abortions and that patients will not have the opportunity to speak with a licensed medical practitioner. For example, an on-line advertisement for Option Line stated that affiliated pregnancy 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. 703. The advertisement did not indicate that the "medical

services" and "confidential pregnancy options" offered by the centers exclude abortion and most forms of birth control.

Similarly, a bus advertisement for the Baltimore Center promoted "FREE Abortion Alternatives," "FREE Confidential Options Counseling," "FREE Pregnancy Tests," and "FREE Services." J.A. 698. But it did not indicate that the Baltimore Center would not provide abortion services or referrals. After the bus advertisement began to run, the director of the Baltimore Center's telephone hotline reported an increase in "abortion minded callers" who "were under the impression from the bus advertisements that we assisted in paying for abortions." App. 276a. These women "did not seem to understand 'abortion alternatives'" and sought help in obtaining abortion procedures. App. 276a. The Baltimore Center's executive director told the hotline director that "those ads are purposely vague, of course." App. 279a.

As a result of such "purposely vague" paid advertising, some women are led to believe 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.

On remand, the City presented unrebutted testimony from two expert witnesses. Dr. Robert W. Blum, Director of the Johns Hopkins University Urban Health Institute and William H. Gates, Sr., Professor & Chair of the Department of Population, Family & Reproductive Health at the Johns Hopkins University Bloomberg School of Public Health, testified that the Ordinance advances important public health goals. J.A. 711. He explained that

"[p]ublic health is advanced when health care consumers are provided with timely, comprehensive, and accurate information about their health care options and the availability of health care services." J.A. 711. Dr. Blum further testified that "family planning services and pregnancy-related care are frequently time-sensitive"; and that women who are delayed in accessing contraceptives or abortion care face increased health risks. J.A. 712. Additionally, he noted that "[c]ertain populations are particularly vulnerable to deception by limited-service pregnancy centers that fail to disclose the scope of services they provide[,]" including "adolescents, individuals with low literacy skills, and others who are economically disadvantaged or marginalized in society because they have even less general knowledge and access to accurate reproductive health information than other consumers." J.A. 712.

Anirban Basu, Chairman, C.E.O., and Chief Economist of the Sage Policy Group, Inc., testified about the definition of commerce and the nature of commercial transactions, explaining that "[i]ndividuals engage in commerce when they exchange goods or services for something of value"; "[t]he participants in a commercial transaction need not be motivated by a desire to earn a profit"; and "[n]ot all commercial transactions entail direct payment for goods or services"; but rather, "[s]ome involve third-party payers." J.A. 773. Citing the work of influential economists including Henry Hansmann, he further explained that "private nonprofit institutions account for a sizeable and growing share of our nation's economic activity." J.A. 773 (footnotes omitted). He noted that Maryland's largest employer, Johns Hopkins University, is a nonprofit organization. J.A. 773, 1114.

Following the close of discovery, the parties cross-moved for summary judgment, agreeing that none of the material facts were in dispute. The district court again granted summary judgment to the Baltimore Center on its free speech claim and dismissed its other claims as moot. *Greater Balt. Ctr.*, slip op. at 53; App. 70a. A panel of the court of appeals affirmed the district court's judgment. *Greater Balt. Ctr.*, 879 F.3d at 105; App. 6a.

IV. The Court of Appeals' Opinion.

The court of appeals held that the Ordinance violates the First Amendment's Free Speech Clause as applied to the Baltimore Center. *Id.*; App. 6a. First, it rejected the City's argument that the Ordinance regulates commercial speech. Notwithstanding that the Ordinance seeks to remedy consumer confusion created by "purposely vague" statements in paid advertising about the medical services that the Baltimore Center provides, the court of appeals concluded that the speech regulated by the Ordinance constitutes "ideological and religious advocacy," not "commercial activity." *Id.* at 108; App. 12a. In reaching this conclusion, the court of appeals expressed doubt that the Ordinance addressed the problem of deceptive advertising, given that the City elected the less burdensome remedy of requiring the Baltimore Center to post a disclosure sign in its waiting room rather than the more burdensome remedy of requiring the Baltimore Center (and all of the third parties who advertise on its behalf) to include the disclosure on all print and digital advertising and billboards. *See id.*; App. 13a ("While motivated by similar concerns [about misleading advertisements], the ordinance here requires a waiting-room disclosure without any effect on advertising *qua* advertising.").

Seeming to confuse economic motivation with profit motivation, the court of appeals also held that the Baltimore Center lacks an economic motivation for advertising medical services to the public because "the Center is a non-profit organization whose clearest motivation is not economic but moral, philosophical, and religious." *Id.* at 109; App. 13a. The court of appeals did not comment on the unrebutted testimony from the City's economics expert that mission-driven, non-profit organizations can, and often do, engage in economic activity, *see* J.A. 773-74; nor on the undisputed evidence that the Baltimore Center markets itself to the public as a commercial actor—through its membership in the Chamber of Commerce, J.A. 840-41; its paid advertising of medical services, J.A. 696, 698; and its membership in Care Net and Heartbeat International, which advertise on its behalf using search engine optimization and trademarks registered with the U.S. Department of Commerce. J.A. 653, 660, 668, 670, 672-73, 703.

Second, the court of appeals rejected the argument that the Ordinance should be subject to the same constitutional standards that it applies to mandatory disclosure laws regulating medical professionals, such as abortion providers. *Greater Balt. Ctr.*, 879 F.3d at 109-10; App. 14a-16a. Even though the Baltimore Center advertises and provides medical services under the supervision of a licensed medical director, the court of appeals held that the City cannot treat it as a professional medical practice for regulatory purposes unless and until it is subject to "comprehensive state licensing, accreditation, or disciplinary schemes." *Id.* at 109; App. 14a.

Third, the court of appeals held that the Ordinance discriminates on the basis of viewpoint because it applies only to limited-service pregnancy centers that do not provide abortions or refer patients to abortion providers, notwithstanding the absence of evidence that full-service pregnancy centers engage in misleading advertising or withhold information from patients about their options. *Id.* at 112; App. 20a ("A speech edict aimed directly at those pregnancy clinics that do not provide or refer for abortions is neither viewpoint nor content neutral.").

The court of appeals ultimately applied strict scrutiny to the Ordinance and concluded that it did not satisfy that standard. Despite the Baltimore Center's admission that its advertisements are "purposely vague," App. 279a; the City's unrebutted expert testimony that people with low literacy skills are particularly vulnerable to deceptive advertising, J.A. 712; and the increase in women calling the Baltimore Center for help obtaining an abortion following the Center's advertising campaign on public buses, App. 276a, the court of appeals held that there was insufficient evidence that the Baltimore Center's advertising was actually misleading consumers. *Greater Balt. Ctr.*, 879 F.3d at 111-12; App. 19a. The court of appeals also held that the simple disclosure sign required by the Ordinance raised "serious questions . . . as to narrow tailoring." *Id.* at 112; App. 20a. It opined that, as an alternative to the Ordinance's disclosure requirement, the City could have undertaken its own advertising campaign to compete with the misleading advertisements run by the Baltimore Center and its professional associations or enact a law that prohibits misleading advertising akin to the one challenged in *First Resort,*

Inc. v. Herrera, 860 F.3d 1263, 1274 (9th Cir. 2017), *petition for cert. docketed*, No. 17-1087 (Feb. 2, 2018). *See Greater Balt. Ctr.*, 879 F.3d at 112-13; App.20a-21a.

REASONS FOR GRANTING THE PETITION

I. The First Amendment Issues in This Case, Which Have Divided the Courts of Appeals, Overlap with the Issues in *NIFLA*.

The Second, Fourth, and Ninth Circuits have issued conflicting decisions concerning the extent to which state and local governments may require pregnancy centers to make truthful, factual disclosures about the medical services that they offer or their patients may seek. *Compare Greater Balt. Ctr.*, 879 F.3d at 105, App. 6a-7a, *with NIFLA*, 839 F.3d 823, 829 (9th Cir. 2016), *and Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 237-38 (2d Cir. 2014).

In *Evergreen Association,* the Second Circuit reviewed a New York City local law that required pregnancy centers meeting certain criteria to make the following disclosures "at their entrances and waiting rooms, on advertisements, and during telephone conversations": (1) "whether . . . they 'have a licensed medical provider on staff who provides or directly supervises the provision of all the services at such pregnancy service center' (the 'Status Disclosure')"; (2) "'that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider' (the 'Government Message')"; and (3) "whether . . . they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care' (the 'Services Disclosure')." 740 F.3d at 238 (citing N.Y.C. Admin. Code § 20-816(a)-(f)).

In *NIFLA*, the Ninth Circuit reviewed a California statute that imposes a two-tiered disclosure requirement on pregnancy centers. Pregnancy centers that are licensed by the State must disclose that: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." 839 F.3d at 830 (quoting Cal. Health & Safety Code § 123472(a)(1)) ("Licensed Notice"). This disclosure may be made either by a sign posted in a pregnancy center's waiting room; a handout distributed to all patients; or a digital notice that patients can read at the time of check-in or arrival. *Id.* Unlicensed pregnancy centers must disclose that: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.* (quoting Cal. Health & Safety Code § 123471(b)(1)) ("Unlicensed Notice"). This disclosure must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." *Id.* at 830-31 (quoting Cal. Health & Safety Code § 123472(b)).

The courts of appeals disagree about critical elements of the First Amendment analysis—including whether requiring pregnancy centers to make factual disclosures is per se viewpoint discrimination and whether mandatory disclosures concerning abortion should be subject to different standards than mandatory disclosures concerning other topics.

The Fourth Circuit, for example, held that a mandatory disclosure law cannot be viewpoint neutral if it is "aimed directly at those pregnancy clinics that do not provide or refer for abortions." *Greater Balt. Ctr.*, 879 F.3d at 112; App. 20a. The Ninth Circuit, in contrast, held that the California statute is viewpoint neutral despite applying only to clinics that do not provide a full spectrum of pregnancy services, because it "does not discriminate based on the particular opinion, point of view, or ideology" of a clinic. *NIFLA*, 839 F.3d at 835.

Additionally, the Fourth Circuit held that mandatory disclosures concerning abortion are subject to more rigorous scrutiny than mandatory disclosures concerning other topics. *See Greater Balt. Ctr.*, 879 F.3d at 110, 113 & n.3; App. 17a, 21a-22a. Indeed, in attempting to distinguish the Baltimore Ordinance from the Unlicensed Notice upheld in *NIFLA*, the Fourth Circuit stated that mere inclusion of the word "abortion" in a mandatory disclosure was sufficient to trigger strict scrutiny even if another disclosure imposed on the same speaker to serve the same governmental interest would be subject to lesser scrutiny. *See id.* at 113 n.3; App. 22a ("Because the compelled message did not mention abortion, the burden on the speaker—and therefore the First Amendment analysis—was different in kind."). The Second Circuit reached a similar conclusion, holding that the Services Disclosure was subject to heightened scrutiny because it "requires centers to mention controversial services." *Evergreen Ass'n.*, 740 F.3d at 245 n.6; *accord id.* at 250. The Ninth Circuit, in contrast, rejected the argument that "abortion-related disclosure[s]" are subject to *sui generis* standards. *NIFLA*, 839 F.3d at 837-38.

These analytical differences have led the courts of appeals to apply different levels of scrutiny to pregnancy center disclosure laws and reach different results. *Compare Greater Balt. Ctr.*, 879 F.3d at 112; App. 21a-22a (striking down the Baltimore Ordinance under strict scrutiny), *with NIFLA*, 839 F.3d at 844 (upholding the Licensed Notice under intermediate scrutiny and the Unlicensed Notice under any standard of review), *and Evergreen Ass'n*, 740 F.3d at 245 (preliminarily enjoining enforcement of the Services Disclosure and Government Message under unspecified heightened scrutiny and upholding the Status Disclosure under any standard of review).

This Court granted review in *NIFLA* to clarify the First Amendment doctrines applicable to pregnancy center disclosure laws. It should do the same in this case.

The City seeks plenary review because the commercial speech issue at the heart of this case is only tangentially raised in *NIFLA*. There, the parties and the lower courts viewed the First Amendment question primarily through the lens of professional speech. Here, the parties developed a thorough record concerning commercial speech and fully briefed the issue to the court of appeals. *See Greater Balt. Ctr.*, 721 F.3d at 284-87; App. 116a-122a (remanding the case for discovery concerning commercial speech). Nevertheless, as explained below, the court of appeals' ruling concerning commercial speech is an erroneous application of this Court's precedents. If left unreviewed, it will lead to future misapplication of the law.

As an alternative to plenary review, the City asks the Court to hold this petition pending its resolution of *NIFLA*, then grant the petition, vacate the court of appeals' judgment, and remand the case for further proceedings.[3]

II. The Fourth Circuit's Decision is Inconsistent with This Court's First Amendment Precedents.

The court of appeals' decision is inconsistent with this Court's precedents concerning commercial speech, viewpoint discrimination, and the regulation of medical practitioners.

A. The Speech Regulated by the Ordinance Satisfies This Court's Test for Commercial Speech.

This Court has long held that the "core notion of commercial speech" is speech that proposes a commercial transaction. *Bolger v. Young Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983); *accord Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976). Speech outside of this core notion may also be classified as commercial if the totality of the circumstances suggests that it has a commercial

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[3] This case also raises questions concerning professional speech and viewpoint discrimination, which were fully briefed below and decided by the court of appeals. *See Greater Balt. Ctr.*, 879 F.3d at 109 n.1; App. 14a ("The professional speech issue was fully briefed, analyzed, and decided on remand to the district court. There is no bar to considering it here."); *id.* at 112; App. 20a (addressing viewpoint discrimination). This Court's resolution of those issues in *NIFLA* will directly impact the analysis of those issues in this case.

character. *See Bolger*, 463 U.S. at 66-68. In *Bolger*, for example, this Court held that, although an informational 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 the pamphlet was "properly characterized as commercial speech." *Id.* at 67-68. The Court relied on the fact that the pamphlet was a form of advertising, it referred to a specific product, and the pamphlet's author had an economic motivation for disseminating the pamphlet to the public. *Id.*

The speech regulated by the Ordinance falls within the core notion of commercial speech. The Baltimore Center offers a variety of commercially-valuable goods and services to consumers, including pregnancy tests, sonograms, and counseling about healthcare options. The Baltimore Center promotes these goods and services through traditional advertisements, membership in professional associations that engage in online advertising, in-person solicitation, signage, and other methods, some of which are "purposely vague" or otherwise misleading. App. 279a. The Ordinance relates to the Baltimore Center's offers to provide commercially-valuable goods and services to consumers by requiring the Center to clarify the scope of goods and services that it is offering. It thus regulates proposals by the Baltimore Center to engage in commercial transactions with respect to those goods and services.[4]

[4] It is well settled that disclosure laws regulating commercial speech must be upheld if reasonably related to the government's interest in preventing consumer deception. *See Milavetz, Gallop*

Contextual analysis further supports the conclusion that the speech regulated by the Ordinance is commercial in nature. Like the pamphlet at issue in *Bolger*, the Baltimore Center's advertising refers to specific products and services, and advances the Center's economic interest—namely, its interest in ensuring that consumers obtain pregnancy-related healthcare services from the Baltimore Center rather than from its competitors.[5] *See Bolger*, 463 U.S. at 66-68. Additionally, the Baltimore Center presents itself to the public as a business enterprise. Few of its advertisements mention a religious or advocacy mission; instead, they tout "medical services" and "sonograms." J.A. 696, 703. The Baltimore Center is a dues-paying member of the Chamber of Commerce, J.A. 840-41, and belongs to two professional associations—Care Net and Heartbeat International—that promote its services using sophisticated advertising and marketing tools, including search engine optimization and registered trademarks. *See* J.A. 653, 660, 668, 670, 672-73, 703, 843, 846. The Baltimore Center is also a member of NIFLA, which helps it present itself to the public as a "medical practice," just like "other medical clinics." J.A. 1210-11, 1217.

In concluding that the Ordinance regulates non-commercial speech, the court of appeals relied heavily

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& Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010); *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

[5] Economics is defined as "[t]he social science dealing with the production, distribution, and consumption of goods and services." Black's Law Dictionary (10th ed. 2014).

on the fact that the Baltimore Center is a religiously-motivated, nonprofit organization. *See Greater Balt. Ctr.*, 879 F.3d at 108-09. But this Court's precedents make clear that such entities may engage in both commercial speech and commercial transactions. In *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, for example, the Court held that a nonprofit organization dedicated to seeking equal rights for gays and lesbians engaged in commercial speech when it used the term "Olympic" to promote an athletic event featuring gay and lesbian athletes because the term has value in the commercial marketplace. 483 U.S. 522, 540-41 (1987) (noting that "[t]he mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose" does not alter the First Amendment analysis).

Similarly, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, the Court rejected Maine's argument that a nonprofit summer camp with a religious mission was not protected by the dormant Commerce Clause. 520 U.S. 564, 573 (1997). It explained that, "[e]ven 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." *Id.* (citations omitted); *accord id.* at 585-86 ("Whether operated on a for-profit or nonprofit basis, [summer camps] purchase goods and services in competitive markets, offer their facilities to a variety of patrons, and derive revenues from a variety of sources . . . ."). Indeed, the Court held that mission-driven, nonprofit organizations are equally capable of participating in commerce as for-profit companies. *See id.* at 583-86 ("There are a number of lines of commerce in which both for-profit and nonprofit entities participate.

Some educational institutions, some hospitals, some child care facilities, some research organizations, and some museums generate significant earnings; and some are operated by not-for-profit corporations.").

Applying this Court's precedents, the North Dakota Supreme Court concluded that a pregnancy center's advertisements constituted commercial speech because they were "placed in a commercial context and . . . directed at the providing of services rather than toward an exchange of ideas." *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986). It reasoned that the pregnancy center's advertisements "constitute promotional advertising of services through which patronage of the clinics is solicited, and in that respect constitute classic examples of commercial speech." *Id.* Likewise, in a challenge to a city ordinance prohibiting the use of false or misleading advertising by pregnancy centers, the Ninth Circuit applied commercial speech standards to the ordinance because it "regulates advertising designed to attract a patient base in a competitive marketplace for commercially valuable services." *First Resort,* 860 F.3d at 1274.

The court of appeals' assertion that "[a] morally and religiously motivated offering of free services cannot be described as a bare 'commercial transaction,'" *Greater Balt. Ctr.*, 879 F.3d at 108, without any consideration of the circumstances in which that offer is made, is contrary to this Court's precedents and in direct conflict with decisions of the Ninth Circuit and North Dakota Supreme Court.[6]

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[6] Of course, the fact that pregnancy centers engage in commerce does not mean that *all* of their speech is commercial speech. The disclosure requirement contained in the Baltimore Ordinance

Review by this Court is warranted to correct this error and ensure uniform application of the Court's commercial speech jurisprudence.

B. Under This Court's Precedents, the Ordinance is Viewpoint Neutral.

The court of appeals' conclusion that the Ordinance constitutes viewpoint discrimination merely because it applies to "pregnancy clinics that do not provide or refer for abortions," *Greater Balt. Ctr.*, 879 F.3d at 112, is contrary to this Court's precedents. The Court has made clear that, because First Amendment values are best served when legislatures tailor solutions to the problems they are designed to address, a law does not constitute viewpoint discrimination solely because it has a disparate impact on people with a particular point-of-view. *See, e.g., McCullen v. Coakley*, __ U.S. __, 134 S. Ct. 2518, 2531 (2014); *Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 695 (2010); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); *see also* Brief for United States as *Amicus Curiae* Supporting Neither Party at 31-33, *NIFLA* (No. 16-1140).

In *McCullen*, the Court held that a law creating buffer zones outside abortion clinics was viewpoint neutral, even though it applied only to abortion clinics and was enacted to remedy harms specifically caused by abortion opponents. 134 S. Ct. at 2531-34. Indeed, the Court recognized that the Massachusetts Legislature enacted the buffer zone law "in response

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pertains only to the scope of medical services that pregnancy centers are offering to consumers. Thus, the particular speech that the Ordinance regulates is commercial speech.

to a problem that was, in its experience, limited to abortion clinics." *Id.* at 2532. It noted that: "There was a record of crowding, obstruction, and even violence outside such clinics. There was apparently no similar recurring problems associated with other kinds of healthcare facilities . . . ." *Id.* Ultimately, the Court concluded that: "In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *Id.*; *accord Madsen*, 512 U.S. at 763 ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction . . . viewpoint based."); *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."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992) ("[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." (citations omitted)).

Similarly, in *Martinez*, this Court held that a public law school's policy requiring that registered student organizations permit all students to participate, regardless of their status or beliefs, was viewpoint neutral. 561 U.S. at 696. A Christian student organization had claimed that the 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 670-72. The Court explained 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 696 (internal quotation marks omitted). It rejected the argument that the policy was viewpoint-based because it had a disparate impact on religious groups, holding that, where the language and the purpose of a law are viewpoint neutral, it is constitutionally irrelevant whom the law impacts. *Id.* at 695-96. Ultimately, the Court concluded that the challenger was "simply confusing its own viewpoint-based objections" to the policy at issue "with viewpoint discrimination." *Id.* at 696.

Like the policies reviewed in *McCullen* and *Martinez*, the Ordinance is both viewpoint neutral on its face and justified by a neutral objective. Any entity whose primary purpose is to provide pregnancy-related services but who does not provide or make referrals for contraceptives or abortions 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; App. 270a-271a. A provider of pregnancy-related services with a "pro-choice" viewpoint may decline to provide contraceptives or abortions because the provider fears attracting anti-abortion protestors, lacks the requisite expertise or resources, or seeks to avoid exclusion from governmental programs.[7] Such a

[7] Many federal and state laws prohibit those who provide or make referrals for abortions from participating in governmental programs. *See generally* Guttmacher Institute, *Family Planning*

provider must comply with the Ordinance in the same manner as one with a "pro-life" viewpoint. Moreover, the Ordinance was enacted in response to evidence that pregnancy centers in Baltimore and nationwide are engaging in misleading advertising and marketing practices that lead some consumers to believe that they provide contraceptives and abortions. There was absolutely no evidence in either the legislative record or the district court record that other kinds of healthcare providers are engaging in practices that lead to consumer confusion about what medical services they provide.

At least 32 states impose disclosure requirements on abortion providers, but not on limited-service pregnancy centers.[8] Under the court of appeals'

Funding Restrictions (Feb. 14, 2018), https://www.guttmacher.org/evidence-you-can-use/family-planning-funding-restrictions ("Often these laws prohibit family planning providers that use private funds to offer abortion from being eligible for state family planning dollars and other types of public funding."); *see also Rust v. Sullivan*, 500 U.S. 173, 178-80 (1991) (upholding federal regulations that bar recipients of Title X grants from engaging in counseling, referrals, or advocacy concerning abortion as a method of family planning).

[8] *See* Ala. Code § 26-23A-4; Alaska Stat. §§ 18.16.060, 18.05.032; Ariz. Rev. Stat. Ann. § 36-2153; Ark. Code Ann. §§ 20-16-1703 – 20-16-1705; Conn. Gen. Stat. § 19a-601; Fla. Stat. §§ 390.0111(3), 390.025; Ga. Code Ann. §§ 31-9A-3 – 31-9A-4 ; Idaho Code Ann. § 18-609; Ind. Code § 16-34-2-1.1 (§ 16-34-2-1.1(a)(1)(K), *invalidated by Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017), *appeal docketed*, No. 17-3163 (7th Cir. Oct. 19, 2017)); Kan. Stat. Ann. §§ 65-6709 – 65-6710; Ky. Rev. Stat. Ann. §§ 311.725, 311.727, *invalidated by EMW Women's Surgical Ctr., P.S.C. v. Beshear*, ___ F. Supp. 3d ___, 2017 WL 4288906 (W.D. Ky. Sept. 27, 2017), *appeal docketed*, No. 17-6183 (6th Cir. Oct. 12, 2017); La. Stat. Ann. §§ 40:1061.15 – 40:1061.17; Me. Rev. Stat. tit. 22, §§ 1597-A, 1599-A; Mich. Comp. Laws § 333.17015;

reasoning, all of these constitute per se viewpoint discrimination. That is a radical departure from this Court's approach to assessing the validity of such laws. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

Review by this Court is warranted to correct the court of appeals' misapplication of the viewpoint discrimination doctrine.

C. Under This Court's Precedents, the Ordinance is a Reasonable Regulation of Medical Practice.

This Court has long held that medical practitioners, including abortion providers, are subject to reasonable state regulation, even when that regulation impacts speech. *See, e.g., id.* In refusing

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Minn. Stat. §§ 145.4242 – 145.4243; Miss. Code Ann. §§ 41-41-33, 41-41-35; Mo. Rev. Stat. §§ 188.027, 188.039; Neb. Rev. Stat. §§ 28-327 – 28-327.01 (provisions requiring disclosure of risk factors of abortion procedures held likely to violate First Amendment and enjoined in *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1048 (D. Neb. 2010)); Nev. Rev. Stat. § 442.253; N.C. Gen. Stat. §§ 90-21.82, 90-21.83; N.D. Cent. Code §§ 14-02.1-02 – 14-02.1-02.1; Ohio Rev. Code Ann. §§ 2317.56, 2919.192; Okla. Stat. tit. 63, §§ 1- 738.2, 1-738.3, 1-746.2, 1-746.3; R.I. Gen. Laws § 23-4.7-3; S.C. Code Ann. §§ 44-41-330, 44-41-340; S.D. Codified Laws §§ 34-23A-10.1, 34-23A-10.3 (upheld on First Amendment challenge in *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc)); Tex. Health & Safety Code Ann. §§ 171.012, 171.0123, 171.013, 171.015 (upheld on First Amendment challenge in *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574-80 (5th Cir. 2012)); Utah Code Ann. §§ 76-7-305, 76-7-305.5, 76-7-305.6; Va. Code Ann. § 18.2-76; W. Va. Code §§ 16-2I-2–16-2I-3; Wis. Stat. § 253.10.

to apply the same First Amendment standards to the Ordinance that it applies to the regulation of medical practitioners' speech, *see Greater Balt. Ctr.*, 879 F.3d at 109-10; App. 14a-16a, the court of appeals was unfaithful to this precedent.

The court of appeals held that the Baltimore Center's speech could not be regulated as professional speech because the State of Maryland does not require pregnancy centers to be licensed or otherwise subject to a comprehensive regulatory scheme. *See id.* at 109; App. 15a. This logic is faulty. State regulation does not confer professional status on a practitioner. To the contrary, the fact that someone is engaged in the practice of a profession provides a basis for state regulation.

Here, it is undisputed that the Baltimore Center underwent a medical conversion so that it could provide medical services; that its provision of medical services is supervised by a licensed physician; and that it advertises medical services to the public. *See Greater Balt. Ctr.*, slip op. at 13-17; App. 34a-37a. If the Baltimore Center holds itself out as a medical practitioner, then it is reasonable for the City to regulate it as such. The court of appeals reasoned that the Baltimore Center's medical director is not "practicing a 'profession' in the traditional sense" because "she is 'very rarely' on site and does not meet directly with clients." *Greater Balt. Ctr.*, 879 F.3d at 110. But the medical director's failure to conform to norms of professional conduct strengthens the City's interest in regulating rather than diminishes it.

The Baltimore Center's advertising and the way it presents itself lead some members of the public to believe that they are in a traditional medical clinic

staffed by qualified medical professionals who provide a full range of medical services, but the reality is something different. The Ordinance's disclosure requirement helps to bridge this gap with information about the scope of medical services that the Center provides.

This Court should grant certiorari to correct the court of appeals' erroneous application of precedent.

III. The Court of Appeals' Decision Invites Substantial Overregulation of Speech.

If allowed to stand, the court of appeals' decision would invite substantial overregulation of speech by state and local governments, undermining core First Amendment values.

First, the court of appeals' decision implies that a state or local government that wants to impose a modest disclosure requirement should first impose a comprehensive regulatory scheme. The court of appeals held that the regulation of speech incidental to the practice of a profession is subject to less rigorous scrutiny than "public dialogue." *Greater Balt. Ctr.*, 879 F.3d at 109; App. 14a. It declined, however, to apply less rigorous scrutiny to the Ordinance because, "[i]n Maryland, pregnancy centers are not required to be licensed or otherwise subject to a state regulatory scheme. *Id.*; App. 15a. In its view, this fact distinguished the Ordinance, which it struck down, from the Licensed Notice upheld in *NIFLA*. *See id.* at 109 n.2; App. 15a ("The lack of a licensing scheme distinguishes this case from a recent Ninth Circuit decision analyzing a California clinic disclosure law under the rubric of professional speech."). The clear message is that state and local governments seeking a remedy for the dissemination

of incomplete or misleading information should opt for comprehensive regulatory schemes over targeted disclosure requirements.

Second, the court of appeals' decision penalizes the City for selecting a less burdensome method of disclosure—posting a single sign in a waiting room—over a more burdensome method of disclosure—imprinting disclosure language on all print and digital advertising, billboards, and signage. Part of the court of appeals' rationale for declining to treat the Ordinance as a regulation of commercial speech was that it does not require the prescribed disclosure to appear on a pregnancy center's advertising. *Id.* at 108; App. 13a. Its decision creates an incentive for state and local governments to opt for this more costly and burdensome approach to regulation, even when a less burdensome signage requirement would serve their interests.

Third, as discussed above, the court of appeals held that the Ordinance constitutes viewpoint discrimination because it applies only to pregnancy centers that do not provide contraceptives and abortions—even though the record lacks evidence of consumer confusion about the type of medical services that other clinics offer. *See id.* at 111-12. This interpretation of the viewpoint discrimination doctrine will encourage state and local governments to regulate speech more broadly in the future, sweeping in more speakers than necessary to serve their interests.

Contrary to the court of appeals' reasoning, this Court has consistently held that First Amendment values are best served when governments pursue remedies that minimize burdens on speech. *See, e.g.,*

Williams-Yulee v. Fla. Bar, __ U.S. __, 135 S. Ct. 1656, 1668 (2015) ("We have . . . upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests."); *McCullen*, 134 S. Ct. at 2532 ("When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more."). It has also held that disclosure requirements are less burdensome than other methods of regulating speech. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 368-69 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."); *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) ("[D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech . . . .").

Accordingly, review of the court of appeals' decision is necessary to discourage state and local governments within its jurisdiction from engaging in overly broad and unduly burdensome regulation of speech.

CONCLUSION

The Court should grant plenary review of the court of appeals' judgment. Alternatively, the Court should hold this petition pending resolution of *NIFLA*, then grant the petition, vacate the court of appeals' judgment, and remand the case for further proceedings.

Respectfully submitted,

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