CENTER FOR REPRODUCTIVE RIGHTS

Testimony in Favor of Intro 371
New York City Council
Committee on Women's Issues

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Nancy Northup, J.D.[1]
President
Center for Reproductive Rights

I. Introduction

Thank you for the opportunity to submit testimony before your committee. My name is Nancy Northup and I am President of the Center for Reproductive Rights. I am testifying in favor of Intro 371.[2]

The Center is a global human rights organization that uses constitutional and international human rights law to promote women's equality by establishing and protecting their access to reproductive health care and their control over reproductive health decisions as fundamental rights that all governments around the world must respect, protect, and fulfill. We work in the U.S., Latin America, Sub-Saharan Africa, Eastern Europe and Asia on a wide-range of reproductive health and rights issues, including access to contraception, pregnancy care, abortion services, and medically accurate and unbiased reproductive health information. In the U.S., we have litigated scores of reproductive rights cases in state and federal courts, including the U.S.

[1] Ms. Northup is admitted to practice in the State of New York; the U.S. Supreme Court; the U.S. Courts of Appeals for the Second, Third, Eighth, Tenth, and Eleventh Circuits; and the U.S. District Courts for the Southern and Eastern Districts of New York. She is a Lecturer-in-Law at Columbia University School of Law and a former Adjunct Assistant Professor of Law at New York University School of Law.
[2] Int. 0371-2010, New York City Council (N.Y.C. 2010).

120 Wall Street
New York, New York 10005
Tel. 917 637 3600 Fax. 917 637 3666
www.reproductiverights.org

Supreme Court. We have been involved in litigation over deceptive practices of so-called "crisis pregnancy centers" ("CPCs").

This bill would require facilities that hold themselves out to the public as offering pregnancy-related services, but do not provide a full range of reproductive health services or referrals for those services, to disclose to the public several key facts: (1) that they do not provide abortion or contraception or refer for those services, and (2) that they do not have medical professionals available (if a licensed medical provider is not present). Moreover, the bill would require these centers to keep the personal and health information they solicit from their clients confidential, unless they are authorized to release it by the clients themselves. The disclosures must be in writing on a sign posted in the entrance and in any areas where individuals wait, on any websites and in advertisements. The Commissioner of the Department of Consumer Affairs will promulgate rules about the size and style of such notices.[3]

Intro 371 would serve several compelling governmental interests, including preventing consumer deception, preventing delay in access to health care for those who seek it, and protecting private information from disclosure, along with reducing the risk for those whose information could be used to endanger them.

I will testify today about why this proposed bill is constitutional under relevant First Amendment standards, both because of the type of speech being regulated and because of the compelling governmental interests furthered by the bill.

II. Intro 371 Promotes Compelling Governmental Interests Consistent with the First Amendment

Intro 371 would address serious harms posed to public health by the misleading and

[3] *Id.* at § 20-816 to -817.

deceptive practices of CPCs, while respecting those organizations' First Amendment rights. The standard used to determine whether a law compelling speech is constitutional depends on whether it compels commercial speech or noncommercial speech. Speech that relates to advertising of services and solicitation of clients, including speech that communicates the types of services offered by an enterprise, is inherently commercial in nature,[4] even if there is no fees are charged for the services.[5] Laws that compel commercial speech are analyzed under a standard similar to the rational basis standard, and are permissible if their "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[6] In this case, the disclosures required by Intro 371 are commercial speech because they concern only the types of services offered to consumers by CPCs, and are intended to prevent "deception of consumers." Specifically, the disclosures require the CPCs to state that they do not provide or refer for abortion or contraception and, when applicable, that there is no medical provider available.[7]

Even if the disclosures required by Intro 371 were viewed as impacting a mix of commercial and non-commercial speech, the legislation would still withstand constitutional scrutiny. Laws that compel mixed commercial and noncommercial speech are viewed under strict scrutiny, and will be permissible so long as there is a compelling governmental interest and the means used to further that interest are narrowly tailored. [8] In this case, there is a close nexus between the requirements found in Intro 371 and the compelling government interests served by them.

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[4] *See* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66-68 (1983).
[5] *See* Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 482 (1989).
[6] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).
[7] Int. 0371-2010 at § 20-816.
[8] U.S. v. Playboy Entertainment Group, 429 U.S. 803, 813 (2000).

A. Intro 371 Promotes the Government's Compelling Interest in Consumer Protection and Public Health, Particular in the Time Sensitive Context of Pregnancy Services

Intro 371 would prevent women from being misled or deceived into going to a CPC when they are really seeking full-range reproductive health care, including abortion or contraception. All over the country, so-called "crisis pregnancy centers" engage in practices designed to draw women into visiting their clinics even if the women would not have done so if they knew the nature or quality of the services actually provided.[9] These organizations often imply that they offer abortion or contraception services or referrals, which they do not, all with the goal of drawing in "clients" that are seeking abortion services in an effort to dissuade them.

In 2009, the City of Baltimore, like the City of New York, confronted the harms associated with deceptive and misleading CPCs and enacted legislation similar to Intro 371 to address them. At a hearing on the proposed legislation, women testified about having been mislead into going to such centers, in some cases because of the vagueness in the CPCs' advertisements. One woman described visiting such a facility when, as a teenager, she thought she was pregnant. She testified that once she arrived at the CPC, she thought she was at a

[9] *See* COMMITTEE ON GOVERNMENT REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, PREPARED FOR REP. HENRY A. WAXMAN 1 (July 2006) [hereinafter "Waxman Report"]; *see also* NARAL PRO-CHOICE NEW YORK FOUNDATION, "SHE SAID ABORTION COULD CAUSE CANCER": A REPORT ON THE LIES, MANIPULATIONS AND PRIVACY VIOLATIONS OF CRISIS PREGNANCY CENTERS IN NEW YORK CITY (2010) [hereinafter "NARAL NY Report], *available at* http://www.prochoiceny.org/assets/files/cpcreport2010.pdf; NARAL PRO-CHOICE VIRGINIA FOUNDATION, CPCS REVEALED: VIRGINIA CRISIS PREGNANCY CENTERS INVESTIGATIONS AND POLICY PROPOSALS (2009), *available at* http://www.naralva.org/assets/files/cpcsrevealed.pdf; NARAL PRO-CHOICE MARYLAND FUND, THE TRUTH REVEALED: MARYLAND CRISIS PREGNANCY CENTER INVESTIGATIONS (2008); NATIONAL ABORTION FEDERATION, CRISIS PREGNANCY CENTERS: AN AFFRONT TO CHOICE 3 (2006), *available at* http://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf (noting that "some CPCs intentionally choose their name to mislead women into believing that they offer a wide range of services, including family planning and abortion care" and that in 1998, "[t]he Family Research Council investigated what names would be most likely to appeal to women, particularly pro-choice women [and concluded that] Women's Resource Center, which gives the impression of a full range of services, [had[the most strategic value in reaching women 'at risk for abortion.'" (quoting Curtis J. Young, *Turning Hearts Toward Life: Market Research for Crisis Pregnancy Centers*, Family Research Council, 1998, p. 9)).

medical facility because she was greeted at a desk that looked like a medical reception desk, there were staff people around in lab coats, and she was asked for a urine sample to run a pregnancy test, which she was told would take 45 minutes to analyze. However, she ultimately discovered she was not at a medical facility at all, when during the 45 minutes they required her to wait, the staff members attempted to dissuade her from seeking an abortion. [10]

The testimony given in Baltimore is similar to some of the findings documented in other studies, such as NARAL NY's report described today, which found that many CPCs in this city behave in a manner that suggests to clients that they are medical facilities, even though the staff at the facility are not medical providers and the information collected from the clients is not protected by medical confidentiality laws.[11] Likewise, a 2006 Congressional study commissioned by Congressman Henry Waxman demonstrated that many "pregnancy resource centers" "mask their pro-life mission in order to attract 'abortion-vulnerable clients," then provide those women with false information about the medical risks of abortion.[12] The Waxman study noted that many CPCs "obscur[e] the fact that [they] do[] not provide referrals to abortions in the text of an advertisement . . . purchase advertising on internet search engines under keywords that include 'abortions' or 'abortion clinics," and in some cases the "advertisements represent that the center will provide pregnant teenagers and women with an understanding of all of their options" even though the facilities have no intention of providing a full range of counseling.[13]

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[10] *See An Ordinance Concerning Limited Service Pregnancy Centers—Disclaimers*: *Hearing Before Baltimore City Council Committee on Judiciary and Legislative Investigations*, October, 27, 2009 (Testimony of Tori McReynolds & Jodi Kelber-Kaye, Ph.D).
[11] NARAL NY Report, *supra* note 6, at 7-8.
[12] Waxman Report, *supra* note 6, at 1.
[13] *Id.* at 1-2.

The Baltimore City Council ultimately enacted an ordinance that requires limited pregnancy centers in that city to post signs stating that they do not provide or refer for abortions or contraception. Soon after the ordinance was passed, the Archdiocese of Baltimore, along with several individual CPCs, filed suit against the city in federal court, in an attempt to get the ordinance struck down. They raise purported constitutional objections to Baltimore's notice law that opponents of Intro 371 raise here today.

The Center for Reproductive Rights is Of Counsel to the City of Baltimore Law Department in defending the ordinance against the claims of the CPCs. The CPCs have raised a number of claims under the speech protections of the First Amendment, but those claims are without merit.

The Baltimore CPCs allege that the Baltimore ordinance violates their rights to free speech by requiring them to post signs. However, the First Amendment does not protect commercial speech that is inherently false or misleading[14] and both the Baltimore ordinance and Intro 371 address just that type of speech. These facilities advertise services and solicit clients in order to provide commercially valuable services, and their speech is therefore considered commercial speech, regardless of whether they charge a fee for their services.[15] The United States Supreme Court has upheld disclosure requirements about services provided when they are "reasonably related to the State's interest in preventing deception of customers."[16]

The Baltimore ordinance, just like Intro 371, is reasonably related to this goal: While these centers provide some services, they clearly intend to attract women who are seeking services that they do not provide, and evidence given at the legislative hearings on the Baltimore

[14] *See* Central Hudson Gas & Elec. Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 565 (1980); *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 n.22 (1984).
[15] *See, e.g.*, Bd. of Trustees of State University of New York v. Fox, 492 U.S. 469, 482 (1989).
[16] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

ordinance, in addition to several public reports, documents a pattern of their deceptive practices.[17]

The Baltimore plaintiffs argue that their speech is not commercial but rather a mix of commercial and ideological speech. Therefore, they claim that any regulation of their speech must be subjected to strict scrutiny, a more rigorous constitutional standard. While it is clear that the speech regulated by the Baltimore ordinance is commercial, the ordinance would still be constitutional even if it were viewed under the strict scrutiny standard.

The Baltimore ordinance serves at least two compelling governmental interests, and the disclosure requirements are the least restrictive means of addressing those interests: First, the City has a compelling interest in ensuring that women who seek abortion or birth control services have prompt access to those services. Overall, abortion is a very safe procedure when performed by a properly-trained medical professional.[18] Nonetheless, all abortions carry some risk and both the health risks and cost associated with abortion increase over the course of pregnancy, particularly after thirteen weeks.[19] Similarly, delays in access to the birth control method of a woman's choice can leave the woman vulnerable to unintended pregnancy and sexually transmitted diseases.[20] Second, the City has a compelling interest in protecting consumers from deceptive advertising and other deceptive business practices, including those found to be engaged in by CPCs.[21] As I noted earlier, limited-service pregnancy centers often engage in

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[17] *See* Waxman Report, *supra* note 6, at 1-2; NARAL Maryland Report, *supra* note 6, at 3-4. *See also An Ordinance Concerning Limited Service Pregnancy Centers—Disclaimers*: *Hearing Before Baltimore City Council Committee on Judiciary and Legislative Investigations*, October, 27, 2009 (Testimony of Tori McReynolds & Jodi Kelber-Kaye, Ph.D).

[18] *See* E. Steve Lichtenberg, MD and David A. Grimes, MD, Surgical complications: Prevention and management, *in* Management of Unintended Pregnancy and Abnormal Pregnancy 224 (Maureen Paul et al. ed. 2009);

[19] *Id.*; *see also* Bartlett et al., Risk factors for legal induced abortion-related mortality in the United States, 103 J. Obstetrics & Gynecology 729, 732, 736 (2004).

[20] *See generally* Centers for Disease Control, Women's Reproductive Health: Home, http://www.cdc.gov/reproductivehealth/WomensRH/index.htm (last visited November 16, 2010).

[21] *See* Waxman Report, *supra* note 6, at 1-2.

deceptive advertising to attract women seeking abortions to their facilities.

The disclaimer required by the Ordinance is closely tied to the City's dual interests in ensuring that women who seek abortion or birth control services have prompt access to those services and protecting consumers from deceptive advertising and other deceptive business practices.[22] The disclaimer will inform women seeking abortion and comprehensive birth control services immediately upon their arrival at a limited-service pregnancy center that those services are not available there, and will thus prevent women from being unduly delayed in accessing those services. The disclaimer will also discourage limited-service pregnancy centers from using deceptive advertising and delay tactics, as well as inform women who have been lured to limited-service pregnancy centers under false pretenses of the truth about what kinds of services are offered there.

Like the Baltimore ordinance, Intro 371 meets constitutional requirements – it seeks to protect women's health and safety, compelling government interests, and the disclosures required are narrowly written, requiring the centers only to inform clients that they do not provide certain services that those clients may in fact be seeking, and that the intensely private information asked for by these centers will not be shared without the client's permission.

B. Intro 371 Promotes the Government's Compelling Interest in Protecting the Privacy and Safety of Pregnant Women

While in many ways similar to the legislation enacted in Baltimore, Intro 371 addresses an additional significant harm posed by CPCs—the potential for public dissemination of a woman's private and confidential personal and health care information. The facilities that would

[22] *Cf. Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876, 914 (2010). Moreover, disclosure requirements have been found in general to be less restrictive than other kinds of regulations of speech. *Id.*; *accord Zauderer*, 471 U.S. at 651 ("[D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech.").

be regulated under this law are not medical facilities bound by federal or state laws or professional ethics that would require them to keep client information private and confidential. Nonetheless, these facilities engage in practices designed to imply that they are medical facilities, with the likely outcome that clients believe that the personal and health-related information they are asked for will be protected in the same way it is when they go to their doctor's offices. NARAL New York's study shows that many CPCs in New York ask their clients to fill out forms "soliciting personal information," including "work information [and] the personal information of the 'father of the baby.'"[23]

The Center for Reproductive Rights has a long track record of fighting to help women keep their reproductive health care decisions and health care information private and confidential. The important role that confidentiality plays in the context of health care is well-understood.[24] Patients possess privacy rights in their health care information, even against government inspections of patient records in some cases,[25] and federal and state law both provide

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[23] NARAL NY Report, *supra* note 6, at 8.

[24] *See* American Medical Association, Code of Medical Ethics, Opinion 5.05, 2007 ("The information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations."), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion505.shtml. Even in the context of adolescents seeking reproductive healthcare, clinicians and academics have documented the critical role that assured confidentiality plays in allowing minors to seek the health care they need. *See, e.g.*, Rebecca J. Cook, Joanna Erdman, and Bernard Dickens, *Respecting Adolescents' Confidentiality and Reproductive and Sexual Choices* , 98 Int. J. of Gynecology & Obstetrics 182 (2007); Ian Bennett, M.D. et al., Editorial, *Confidential Reproductive Care for Adolescents* Am Fam Physician. 2004 Mar 1;69(5):1056-1058 ("The American Academy of Family Physicians, the American Academy of Pediatrics, and the American College of Obstetricians and Gynecologists have issued policy recommendations that endorse providing confidential care to adolescents when not doing so would lead to adverse health outcomes.").

[25] *See, e.g. Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (recognizing constitutionally protected interests in "the nondisclosure of private information and also their interest in making important decisions independently," while upholding state law requiring compilation of database of certain prescriptions). *See also* Alpha Medical Clinic v. Anderson, 280 Kan. 903, 128 P.3d 364, 376-80 (Kan. 2006) (noting two relevant "federal constitutional privacy interests" including "the right to maintain the privacy of certain information," and a "perhaps related, federal constitutional right to obtain confidential health care," holding that even in context of criminal investigation of physician, *unredacted* patient records could not be subpoenaed and a judge must enter a protect order" with special

strong protections for patient information to prevent it from being shared with non-governmental third parties without patient consent.[26] In the highly charged context of sexual and reproductive health, in which abortion clinics and patients are targeted for harassment and "outing,"[27] medical privacy is a paramount concern.

The Center has litigated many cases involving patient confidentiality, protecting the rights of women to have their reproductive health information kept private even against government officials.[28] In addition, both through its litigation and in its policy work, the Center has brought to light the types of harms that can impact women whose privacy and confidentiality around their reproductive-decision-making is broken.[29]

For example, this year, Fort Wayne County in Indiana enacted a new ordinance that would have given county health inspectors discretion to inspect patient records at will. We sued in Federal Court on behalf of an abortion provider to ensure that patient privacy would be maintained unless there was a valid state reason to investigate those records and a U.S. District

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safeguards before any redacted patient records can be delivered to judges' chambers where they then must be evaluated by a lawyer and physician to ensure that only information related to the criminal prosecution is revealed); *see* Fort Wayne Women's Health v. Bd. of Commissioners, Allen County, __ F. Supp. 2d ___, 2010 WL 3219153, No. 1:10-CV-192 RM, at *12 (Aug. 11, 2010) ("Unconsented or non-judicially sanctioned entry onto a private medical facility's property to conduct a search of medical records would be unreasonable under the Fourth Amendment.").

[26] *See* 45 C.F.R. § 160 & § 164(A) & (D) (2010) (regulations governing the Health Insurance Portability and Accountability Act); N.Y. Pub. Health Law § 18 (McKinney 2010) (providing protections for patient records maintained by health care providers). *See also* Rachel Benson Gold, *Unintended Consequences: How Insurance Processes Inadvertently Abrogate Patient Confidentiality*, Guttmacher Policy Review, Fall 2009, at 1, *available at* http://www.guttmacher.org/pubs/gpr/12/4/gpr120412.pdf ("Since the early 1970s, federal regulations have ensured that the medical records of anyone seeking federally funded substance abuse treatment will be considered confidential. More recently, the so-called privacy rule issued following the passage of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) established, for the first time, national standards for the protection of certain health information. This federal regulation seeks to assure that individuals' health information is properly protected, while allowing the flow of data needed for the delivery of high-quality health care.").

[27] *See* CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT 59, 74, 84 (2009).

[28] *See, e.g.*, Tiller v. Corigan, 182 P.3d 719 (Kan. 2008); Alpha Medical Clinic v. Anderson, 128 P.3d 364 (Kan. 2006); Fort Wayne Women's Health v. Bd. of Commissioners, Allen County, __ F. Supp. 2d ___, 2010 WL 3219153, No. 1:10-CV-192 RM, (Aug. 11, 2010).

[29] *See infra* note 30.

Judge granted an injunction blocking enforcement of some of the ordinances' provisions.[30] The judge stated unambiguously that "[m]edical patients have an actual expectation of privacy in their medical records and society sees this expectation as reasonable."[31]

When CPCs collect private, personal information of their clients under the guise of "medical care," these organizations give clients the impression that the private information they hand over will be protected. However, that information is not currently protected, and it is not difficult to imagine how such information could be used—for example, a phone call to follow up with a client at work could alert that woman's supervisors that she is pregnant when she is not yet ready to tell them or when she has decided to terminate the pregnancy.

Moreover, in the context of reproductive healthcare and decision-making, patient confidentiality is paramount,[32] and, for some women, can be a question of personal safety. In addition to fighting for patients' interest in keeping health information private in general, the Center for Reproductive Rights has also documented situations in which state laws could result in the inadvertent release of a woman's decision to seek reproductive health care could endanger that woman's safety. Women in abusive relationships who are considering abortion risk harm if their pregnancies are disclosed to their partners, and state laws that impose delays or other barriers increase the risk of disclosure. [33]

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[30] *Fort Wayne Women's Health*, 2010 WL 3219153, No. 1:10-CV-192 RM, at *16 (Aug. 11, 2010).
[31] *Id.* at *12.
[32] *See* ACOG statements; Rachel Benson Gold, *Unintended Consequences: How Insurance Processes Inadvertently Abrogate Patient Confidentiality*, Guttmacher Policy Review, at 1 (Guttmacher Institute, New York, NY Fall 2009) (noting that "[c]onfidentiality is almost universally accepted as a fundamental principle underlying the provision of health care" and that the potential for breaches of confidentiality in medical care due to new electronic record keeping are particularly problematic "for individuals seeking sensitive services, such as mental health, substance abuse and reproductive health care").
[33] *See* Center for Reproductive Rights, Arizona Two Trip Law: Fear of Retaliation http://reproductiverights.org/en/feature/arizonas-two-trip-law-fear-of-retaliation, last visited Nov. 15, 2010 (documenting women's concerns about the risks of disclosure associated with the 2009 Arizona law requiring women to visit a clinic at least twenty-four hours before an abortion to receive state mandated counseling before being allowed to return for an abortion); CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT 89 (2009) (documenting two cases in which

Studies have also proven that battering increases in frequency and severity when women are pregnant, [34] and the CDC's most recent Pregnancy Risk Assessment Management study found that between 4% and 9% of pregnant women are abused by their spouses or partners.[35] With no confidentiality requirements in place, CPCs are not currently bound to keep that information private and could, for example, call the "father of the baby" to inform him that his partner is pregnant or that she sought information about an unintended pregnancy. It is clear how such a phone call which could have serious unforeseen consequences.

By appearing to be medical facilities, some CPCs lead women to believe that the private information they are asked for will be kept confidential. It is not hard to imagine how this information could endanger a woman's safety at home and make it harder for her to access reproductive healthcare. The new confidentiality provisions contained in Intro 371 will serve an important purpose in protecting the privacy and, in some cases, possibly the safety of women who seek services at CPCs in New York City.

III. Conclusion

New York City has been a leader in protecting access to reproductive health care services. The City has policies and programs in place that require hospitals to provide emergency contraception for sexual assault victims; that require pharmacists to inform women about whether they sell emergency contraception; that require abortion provider training for ob/gyn residents trained in public hospitals; and that provide free condoms to organizations and individuals. In addition to these policies, the City's clinic access law, strengthened just two

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women living in domestic violence shelters "trade[d] their physical safety for access to abortion" because they were forced to leave the safehouse twice by state laws requiring two clinic trips for abortions); Junda Woo, M.D., Paul Fine, M.D., & Laura Goetzl, M.D., M.P.H., Abortion Disclosure and the Association with Domestic Violence, 105 J. Obstetrics & Gynecology 1329, 1332 (2005) (concluding that women who keep their decisions to terminate their pregnancies secret from their partners do so out of fear of abuse).

[34] R. Gelles, *Violence and Pregnancy: Are Pregnant Women At Greater Risk for Abuse*, 50 J. of Marriage & the Family 841 (1988).

[35] Centers for Disease Control, *Pregnancy Risk Assessment Monitoring Report 2002, Surveillance Report* 90 (200)

years ago, demonstrates the City's commitment to ensuring that women can safely access reproductive health care, while protecting the first amendment rights of those who oppose abortion.

Intro 371 is necessary legislation that would address deceptive practices by CPCs in this city that, while clouding the range of their services in their advertising and elsewhere, refuse to provide or refer clients to health care providers who do provide a full range of reproductive health care. We urge the City Council to adopt this legislation, which will help to ensure that women in New York will access the reproductive heath services they seek. Thank you.