Nos. 11-1111 & 11-1185

In the United States Court of Appeals for the Fourth Circuit

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,
Appellee/Plaintiff,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.*,
Appellants/Defendants.

and

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION, INC., *et al.*,
Cross-Appellants/Plaintiffs

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.*,
Cross-Appellees/Defendants.

On Appeal from the United States District Court for the District of Maryland
Judge Marvin J. Garbis, No. 1:10-cv-00760-MJG

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law and the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and participated as *amicus curiae* in a number of significant cases involving abortion and the freedoms of speech and religion.[1] The outcome of this case is of great interest to the ACLJ, as it will impact litigation in other areas of the country involving laws similar to Baltimore Ordinance 09-252 ("the Ordinance"). In particular, the ACLJ represents the Plaintiffs in *Evergreen Association, Inc. v. City of New York*, No. 1:11-cv-02055-WHP (S.D.N.Y. 2011), a case challenging a New York City law similar to the Ordinance in key respects.[2]

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[1] *See, e.g.*, *Pleasant Grove v. Summum*, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (participated as *amicus curiae*; Court held that the Partial Birth Abortion Ban Act of 2003 was facially constitutional); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (holding that the creation of floating buffer zones around persons seeking to use abortion clinics violated the First Amendment rights of pro-life speakers); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (holding that a federal law did not provide a cause of action against pro-life speakers who obstructed access to abortion clinics).

[2] Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amicus curiae* represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made such a monetary contribution.

The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Ordinance and similar laws recently enacted in Montgomery County, Maryland, Austin, Texas, and New York City target an exceedingly narrow category of organizations for burdensome disclaimer requirements: organizations commonly known as "crisis pregnancy centers" (CPCs) that assist women who are or may become pregnant but do not provide referrals for abortion or contraceptives on religious or moral grounds. A reasonable person might ask why these so-called "truth in advertising" laws apply to these organizations without regard to whether their advertisements are allegedly false or misleading, or without regard to whether they actually make *any* advertisements at all. The answer is that these laws intentionally target organizations for burdensome, unnecessary regulation because they hold disfavored viewpoints on matters of sexual morality, abortion, and birth control. Given that the stated goal of these widespread anti-CPC legislative efforts is to "bring them down" [3] through viewpoint discriminatory means, it is unsurprising that Baltimore and the other jurisdictions wholly ignored less restrictive means available to deal with any actual (as opposed to hypothetical) harms, such as government-sponsored ad campaigns communicating the government's viewpoints or narrowly tailored laws prohibiting false advertising,

[3] NARAL Pro-Choice New York, http://www.prochoiceny.org (Nov. 12, 2010).

the unauthorized practice of medicine, or falsely holding oneself out as a doctor or medical office.

ARGUMENT

As the District Court observed, "Defendants enacted the Ordinance out of *disagreement with Plaintiffs' viewpoints on abortion and birth-control*." *O'Brien v. Mayor & City Council of Baltimore*, No. MJG-10-760, 2011 U.S. Dist. LEXIS 17072, at *24 (D. Md. Jan. 28, 2011) (emphasis added). Although this kind of "bare . . . desire to harm a politically unpopular group" is not a legitimate government interest, let alone a compelling one, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985), the Ordinance is just the first of several ill-conceived, unnecessary laws designed by pro-abortion advocates to greatly minimize the effectiveness of pro-life organizations that assist women who are pregnant or may become pregnant by taking away their ability to craft their own message.

The Ordinance is part of a nationwide campaign waged by pro-abortion groups, particularly NARAL Pro-Choice America and its affiliates and legislative allies, to target, marginalize, and distort the message of CPCs, organizations that do not provide or refer for abortion or contraceptives due to their sincerely held religious or moral beliefs. The various laws imposing disclaimer mandates upon CPCs are not based upon actual evidence of a concrete, non-hypothetical problem

necessitating government intervention, but rather are based upon a self-reinforcing echo chamber of pro-abortion advocates' rhetoric and accusations passed from city to city for the purpose of hampering the efforts of CPCs. The detrimental impact of disclaimer mandates upon CPCs cannot be understated, as "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

Although a law is not viewpoint-discriminatory *per se* "simply because its enactment was motivated by the conduct of the partisans on one side of a debate," *Hill v. Colorado*, 530 U.S. 703, 724 (2000), "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker *is the rationale for the restriction*," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (emphasis added). Just as the government lacks the authority "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules," *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992), it cannot subject one side of a debate to burdensome disclaimer mandates while leaving the other side free to design its own message. This is especially true where, as here, there are ample existing, or readily available, means of addressing the government's stated interests that are less restrictive than the Ordinance. *See, e. g.*, *O'Brien*, 2011 U.S. Dist. LEXIS 17072, at *28.

Baltimore

The Ordinance was the first of its kind, imposing disclaimer requirements upon CPCs that assist women who are or may become pregnant but do not provide or refer for abortions or nondirective and comprehensive birth-control services. *See id.* at *9-10. It was based in large part upon biased, unreliable "evidence" offered by NARAL Pro-Choice Maryland as the result of an undercover "investigation," including the claim that CPC staff did not maintain "professional neutrality," used "emotionally manipulative tactic[s], such as offering congratulations for a positive pregnancy test, referring to the pregnancy as a baby, and giving the investigator hand-knitted baby booties," or were allegedly rude to some women.[4] Baltimore followed NARAL Pro-Choice Maryland's lead in this regard, acknowledging that the Ordinance sought to address the "harm" of "traumatizing anti-abortion advocacy" and "propaganda." Resp. Br. of Appellee at 22. The desire to burden private expression that some may consider offensive, biased, or rude is rarely, if ever, a legitimate basis for government regulation. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not.").

[4] NARAL Pro-Choice Maryland Fund, *The Truth Revealed: Maryland Crisis Pregnancy Center Investigations*, at 9 (2008).

Montgomery County

Similarly, in February 2010, the Montgomery County, Maryland Council enacted Resolution Number 16-1252, requiring "Limited Service Pregnancy Resource Centers," defined as entities with the primary purpose of providing pregnancy-related services that do not have a licensed medical professional on staff, to make various disclaimers. *Centro Tepeyac v. Montgomery Cnty.*, No. 10-1259, 2011 U.S. Dist. LEXIS 26532, at *2 (D. Md. Mar. 15, 2011). The Council relied heavily upon the same NARAL Pro-Choice Maryland report and statements from NARAL Pro-Choice Maryland staff in enacting the Resolution. [5] While an amendment removed discriminatory language expressly limiting the Resolution's application to centers that do not refer for abortion or comprehensive contraceptive services, it is abundantly clear that pro-life centers were the target of the Resolution.[6] With this amendment, the Resolution covers all pro-life CPCs, while it exempts virtually all entities that refer for abortion or contraceptives because

[5] *Memorandum of Amanda Mihill, Legislative Analyst to County Council*, Jan. 29, 2010, at 2, *Centro Tepeyac v. Montgomery Cnty.*, No. 10-1259 (D. Md. May 19, 2010), ECF No. 1-4.

[6] *See, e.g.*, *Montgomery Council Approves Regulation Requiring Pregnancy Centers in County To Disclose Actual Scope of Their Services*, *Centro Tepeyac v. Montgomery Cnty.*, No. 10-1259 (D. Md. May 19, 2010), ECF No. 1-3 (Councilmember Trachtenberg stated that CPCs often discourage women from seeking contraception or abortion and discuss harmful health effects associated with abortion; the news release cited a 2006 report of Congressman Henry Waxman targeting pro-life CPCs as well as the support of numerous pro-abortion groups).

they have a licensed medical professional on staff (such as an abortion clinic or doctor's office) or do not have as their *primary* purpose providing pregnancy-related services.

Austin

Pro-abortion advocates have targeted pro-life CPCs in other cities by offering legislation similar to the Maryland provisions that would take away CPCs' right to design their own message. NARAL Pro-Choice New York and its affiliate, The National Institute for Reproductive Health, [7] launched the Urban Initiative for Reproductive Health, a collection of public officials and advocates holding regular summits throughout the country to collaborate and advance greater access to abortion and reproductive health services. [8] A summit held in Denver in the fall of 2009 was highly influential in getting a similar anti-CPC ordinance proposed and enacted in Austin, Texas. [9] In April 2010, the Austin City Council enacted Code

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[7] NARAL Pro-Choice New York/ National Institute for Reproductive Health, Apr. 8, 2011, http://foundationcenter.org/pnd/jobs/job_item.jhtml?id=334700009.

[8] *Background: A Strategy for Change*, http://www.urbaninitiative.org/About/Background.

[9] NARAL Pro-Choice NY, *Exposing Crisis Pregnancy Centers One City at a Time*, http://www.youtube.com/watch?v=Tpya05pQGAQ, at 2:45 to 3:10 (last visited May 20, 2011) [hereafter "NARAL NY Video"] (statement of Sara Cleveland, Executive Director, NARAL Pro-Choice Texas) ("At the time of the summit, Baltimore was already in the process of introducing the disclosure ordinance for crisis pregnancy centers. From that idea, our contact with the City of Austin and the political director for NARAL had the realization that this is an ordinance that could probably work in Austin as well."); *id.* at 3:10 to 3:46 (statement of Heidi Gerbracht, Policy Director, Councilmember Spelman's Office)

Section 10-9-1 *et seq.*, imposing disclaimer mandates upon "limited service pregnancy centers," defined as organizations providing pregnancy counseling or information that do not provide or refer for abortion or comprehensive birth control services and are not a licensed medical office. Austin City Code § 10-9-1(C). It was based in large part upon a NARAL Pro-Choice Texas report criticizing the work of CPCs.[10]

New York City

Those who helped ensure the enactment of the Austin provision have worked with officials in Baltimore, New York, and other parts of Texas to "discuss how we can move these things forward" and try to "pass[] this ordinance in other cities in the State. . . . with less effort on their part."[11] The New York City Council did just that in March 2011, enacting Local Law 17, which imposes disclaimer mandates upon a "pregnancy services center," defined as a facility that has the primary purpose of providing services to women who are or may become pregnant that either offers ultrasounds, sonograms, or prenatal care or meets various factors such as offering pregnancy testing, operating in the same building as a medical

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("The conversation at the Denver Urban Initiative was fundamental to us getting our crisis pregnancy center ordinance started and then passed.").

[10] NARAL Pro-Choice Texas Found., *2009 Annual Report: Taxpayer Financed Crisis Pregnancy Centers in Texas: A Hidden Threat to Women's Health* (2009).

[11] NARAL NY Video, at 3:46 to 3:57 (statement of Sara Cleveland, Executive Director, NARAL Pro-Choice Texas); *id.* at 3:57 to 4:12 (statement of Heidi Gerbracht, Policy Director, Councilmember Spelman's Office).

office, or using a semi-private area containing medical supplies. N.Y. Admin. Code § 20-815(g). The law exempts facilities that are licensed to provide medical or pharmaceutical services or that have a licensed medical provider present to directly provide or supervise all services described in the law, intentionally leaving abortion clinics exempt from the law's requirements. *Id.*

Local Law 17 was clearly enacted as a "pro-choice" measure targeting CPCs that do not refer for abortion or contraceptives. The Council relied heavily upon a report issued by NARAL Pro-Choice New York, which was modeled on the Maryland NARAL report and criticized all aspects of CPCs' work.[12] Christine Quinn, Speaker of the New York City Council, said, "The NARAL Pro-Choice New York report was more than helpful. It was critical."[13] Speaker Quinn introduced the bill at a rally sponsored by NARAL Pro-Choice New York in front of a crowd holding signs such as "Keep Abortion Legal" and "I stand with Planned Parenthood."[14] A few days before the first Committee hearing on the legislation in November 2010, the homepage of NARAL Pro-Choice New York's website

[12] NARAL Pro-Choice New York and the National Institute for Reproductive Health, *She Said Abortion Could Cause Breast Cancer: A Report on the Lies, Manipulations, and Privacy Violations of Crisis Pregnancy Centers in New York City* (2010), at 21.
[13] NARAL NY Video, at 4:56 to 5:08.
[14] *Id.* at 6:25.

included the heading "Fighting CPCs in NYC" and stated, "Have you had an experience with a CPC in the city? *Your testimony can help bring them down*."[15]

After Local Law 17's enactment, Angela Hooton, Interim Executive Director of the National Institute for Reproductive Health, reiterated the goal of enacting similar "pro-choice" laws targeting pro-life CPCs across the country:

> The Urban Initiative really provided strategy for thinking that you can do this work locally and that you can create real positive change and victories, *pro-choice* victories, at the local level. Our goal is to create a movement, to have each of these bills be not just an isolated victory, but really to address these crisis pregnancy centers one urban area at a time.[16]

Other Proposals

Similar legislation targeting CPCs that do not refer for abortion or contraceptives has been proposed in other parts of the country.[17] For example, in January 2010, NARAL Pro-Choice Virginia created a report similar to the other NARAL documents in support of burdensome legislation targeting CPCs.[18] Both houses of the Virginia legislature, recognizing that they lacked any evidence of a need for legislation targeting CPCs, rejected the proposed NARAL legislation.

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[15] NARAL Pro-Choice New York, http://www.prochoiceny.org (Nov. 12, 2010) (emphasis added).
[16] NARAL NY Video, at 6:19 to 6:41 (emphasis added).
[17] *See, e.g.*, N.M. H.B. 291 (2011); N.Y. A.B. 3328 (2011); Ore. H.B. 3425 (2011); Ore. S.B. 769 (2011); Tex. H.B. 3230 (2011); Va. House Bill 452 (2010); Va. Senate Bill 188 (2010); Wash. H.B. 1366 (2011); Wash. S.B. 5274 (2011).
[18] NARAL Pro-Choice Virginia Foundation, *Crisis Pregnancy Centers Revealed: Virginia Crisis Pregnancy Center Investigations and Policy Proposals* (2010) (supporting House Bill 452 (2010) and Senate Bill 188 (2010)).

Instead, both houses adopted resolutions commending CPCs for their work, noting, among other things, that CPCs "encourage women to make positive life choices by equipping them with complete and accurate information regarding their pregnancy options and the development of their unborn children" and "provide women with compassionate and confidential peer counseling in a nonjudgmental manner regardless of their pregnancy outcomes."[19]

In sum, the Ordinance and similar laws proposed or enacted around the country violate the First Amendment rights of crisis pregnancy centers. The Supreme Court spoke directly to the concerns raised by passage of the Ordinance and similar laws when it explained,

> [a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Laws [requiring the utterance of a government-favored message] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994). The Ordinance improperly "manipulate[s] the public debate through coercion rather than persuasion," *see id.*, without being the least restrictive means of achieving a compelling government interest and, therefore, violates the First Amendment.

[19] 2010 Va. S.J.R. 265 (passed House Mar. 11, 2010); 2010 Va. H.J.R. 435 (passed Senate Mar. 12, 2010).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court.

Respectfully submitted June 7, 2011,

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CERTIFICATE OF COMPLIANCE WITH RULES 29 AND 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29 (d) because an *amicus* brief may not exceed 7,000 words and this brief contains 2,731 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2004 in 14-point Times New Roman font.

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Dated: June 7, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 7, 2011, a true and correct copy of the foregoing brief was filed with the Clerk of Court through the CM/ECF system. An electronic copy will be served on all counsel of record through the CM/ECF system, including the following individuals:

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