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The History and Constitutionality of Maryland's Pregnancy Speech Regulations

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THE HISTORY AND CONSTITUTIONALITY OF MARYLAND'S PREGNANCY SPEECH REGULATIONS

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On December 4, 2009, Baltimore, Maryland enacted the nation's first law regulating the speech of individuals and groups who want to talk to pregnant women about whether to have an abortion.[1] Less than two months later, nearby Montgomery County, Maryland enacted the second.[2] These regulations only apply to speakers who want to talk about one particular subject: pregnancy. As a practical matter, the regulations only apply to speakers who oppose abortion. Counselors who work for organizations willing to provide abortions are entirely exempt.[3]

Immediately after these laws passed, abortion providers and their allies across the country began plans to pursue similar speech regulations in other jurisdictions. For example, an NARAL activist in California explained that "here in California when we look at [the Baltimore] model we're excited and curious as to how we can use the model in our own state."[4] NARAL and

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1. *See* Scharper, Julie, *Pregnancy Center Sign Bill Passes*, BALTIMORE SUN, Nov. 24, 2009, 1A *available at* http://articles.baltimoresun.com/2009-11-24/news/bal-md.abortion24nov24_1_jeffrey-d-meister-pregnancy-centers-poor-women; BALTIMORE, MD. CITY ORDINANCE 09-252 (2009) *amending* BALTIMORE CITY HEALTH CODE §§ 40-14(e)(7), 41-14(6), *available at* http://www.baltimorecity.gov/Government/CityCharterCodes.aspx.

2. *See* MONTGOMERY COUNTY, MD. COUNTY COUNCIL RESOLUTION 16-1252 (Feb. 2, 2010), *available at* http://www.montgomerycountymd.gov/content/council/pdf/res/2010/20100202_16-1252.pdf.

3. *See id.* (Montgomery law does not apply to clinics where a licensed person performs medical services); *see also* BALTIMORE, MD. CITY CHARTER (2010), *available at* http://www.baltimorecity.gov/Government/CityCharterCodes.aspx (Baltimore law only applies to clinics that refuse to provide or refer for abortion).

4. *See* Julia Marsh, *Baltimore Puts Heat on Crisis Pregnancy Centers*, WOMEN'S E-NEWS, December 2, 2009, http://www.womensenews.org/story/abortion/091201/baltimore-puts-heat-crisis-pregnancy-centers.

Planned Parenthood are planning similar campaigns in other states,[5] and several state legislatures are already considering similar speech restrictions.[6]

Why are these legislatures trying to regulate discussions of pregnancy by speakers who oppose abortion?

The answer lies in the rise of centers known by a variety of names, including "limited service pregnancy centers," "pregnancy resource centers," and "crisis pregnancy centers." In many cases, these centers are not medical facilities. Rather, they provide a range of non-abortion resources to pregnant women, usually in the hopes that women will choose not to have an abortion.[7] The services they provide vary, but often include talking with women about abortion and its alternatives; free pregnancy tests and ultrasounds; baby clothes, diapers, and related material assistance; and information about adoption and help connecting with an adoptive family.[8] Some centers also offer emergency housing, education assistance, and life skills classes.[9] Supporters claim that tens of thousands of Maryland women sought help and services at these centers last year, and that they were very satisfied with the services received.[10]

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5. *See id.* (noting NARAL and Planned Parenthood offices in Oregon and Texas are also "in the beginning stages of such campaigns").

6. *See* H.B. 452, 2010 Reg. Sess. (Va. 2010), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+HB452; S.B. 6452, 61st Leg., 2010 Reg. Sess. (Wa. 2010), *available at* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Bills/6452.pdf.

7. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Peggy Hartshorn).

8. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Carol Buchanan).

9. *Id.*

10. *See* Penny Starr, *Baltimore Law Aims to Undermine Charitable Work of Pregnancy Resource Centers, Say Pro-life Activists*, CNSNEWS.COM, Dec. 30, 2009, http://www.cnsnews.com/news/article/59128 ("Not one witness at the hearings who had used the services of a pregnancy resource center testified that they felt misled, Young said, adding that groups like NARAL Pro-Choice America and Planned Parenthood have a vested interest in undermining the work done by the centers. It ultimately cuts into the profit margins of abortion centers."); *see also* Kristin Hanson, *Care Net Calls Baltimore Pregnancy Center Bill Nonsensical, and Unconstitutional*, CHRISTIAN NEWSWIRE, Dec. 7, 2009, http://www.earnedmedia.org/carenet1207.htm ("The first center Care Net opened, the Greater Baltimore Center for Pregnancy Concerns, has been faithfully serving the women of Baltimore for nearly 30 years. In contrast to the accusations made by groups

Critics of the pregnancy centers tell a very different story. They charge that counselors at these centers often have no medical training and mislead women with false information about abortion.[11] In particular, they charge that the centers provide false information about the alleged physical and mental health risks of abortion, including a claimed link between abortion and breast cancer.[12] Critics fear that women will come to these centers believing they will be provided with access to abortion—or at least receive unbiased information about abortion—and receive neither.[13] Worse, pregnancy center critics fear that these women will be delayed in seeking medical care early in pregnancy.[14] As a result, they have sought restrictions requiring pregnancy counselors who do not refer for or provide abortions to take a variety of steps, including posting signs indicating their position on abortion, advising women that the counselors are not medical professionals, and advising them that they should seek counseling from a licensed medical professional.[15]

As legislators across the country are asked to consider these and other speech regulations governing pregnancy discussions, they may benefit from a fuller understanding of the history of pregnancy counseling regulations in Maryland, and from a discussion of the constitutionality of these laws, particularly under the First Amendment's Free Speech clause. Accordingly, Part I of this Article will describe the legislative process leading to the Baltimore and Montgomery County speech regulations. Part II will address

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like NARAL and Planned Parenthood, not one client has ever complained about their experience there." (quoting the president of a group of pregnancy center)).

11. NARAL Pro-Choice Maryland Fund, The Truth Revealed: Maryland Crisis Pregnancy Center Investigations, 1 (Melissa Kleder, & S. Malia Richmond-Crum eds., 2008) [hereinafter NARAL Report].

12. *See* Minority Staff of HR. Comm. On Government Reform Special Investigations Division, 109th Cong., Report on False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers (2006), *available at* http://www.chsourcebook.com/articles/waxman2.pdf [hereinafter Waxman Report].

13. *Id.*

14. *See* Press Release, Montgomery Council Approves Regulation Requiring Pregnancy Centers in County To Disclose Actual Scope of Their Services (Feb. 2, 2010), http://www.montgomerycountymd.gov/Apps/Council/PressRelease/PR_details.asp?PrID=6223 [hereinafter Scope Disclosure Press Release].

15. BALTIMORE, MD. CITY ORDINANCE 09-252 (2009).

the key questions on which the constitutionality of pregnancy counseling regulations will turn. Those questions include: what First Amendment standard should govern regulations requiring pregnancy centers to make certain statements or disclosures; whether the laws are content-neutral or content-based; and whether the asserted government interests are sufficient to support the laws.[16] Ultimately this analysis shows that the Baltimore and Montgomery County pregnancy speech regulations—and likely the proposed laws in other jurisdictions—violate the First Amendment.

I. THE HISTORY OF MARYLAND'S PREGNANCY COUNSELING REGULATIONS

The Baltimore and Montgomery County regulations were not the first such regulations considered in Maryland. Rather, during the 2008 legislative session, the Maryland General Assembly considered a proposed statewide law to regulate the speech of pregnancy counselors who opposed abortion.[17]

The proposed law would have required counselors opposed to abortion to give the following disclaimers before discussing pregnancy options with a woman:

> 1. The information provided by the center is not intended to be medical advice or to establish a doctor-patient relationship;
>
> 2. The client or potential client should consult with a healthcare provider prior to proceeding on any course of action regarding the pregnancy of the client or potential client; and
>
> 3. The center is not required to provide factually accurate information to clients.[18]

The law required all three of these disclaimers to be given "during the first communication or first contact with the client or potential client."[19]

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16. This Article focuses on the Free Speech analysis of pregnancy center speech restrictions. Of course, specific regulations may also raise a host of additional constitutional problems, including violations of the Free Exercise clause, overbreadth, and vagueness. Such arguments are beyond the scope of this Article.

17. *See* S.B. 690 2008 Leg., 425th Sess., at 2 (Md. 2008) *available at* http://mlis.state.md.us/2008RS/bills/sb/sb0690f.pdf/. In addition to its focus on abortion, the law also applied to centers that do not provide "nondirective and comprehensive contraceptive services." *Id.*

18. *Id.*

19. *Id.*

The disclaimers were only required for counselors who were unwilling to "provide or refer for abortions."[20] Thus, for example, a counselor at an abortion clinic would not have to inform a client that he or she is not a medical professional and that the client should see a health care provider before making a decision. Nor would a counselor for an abortion clinic be required to disclose which services were not offered by the clinic (for example, adoption services or material assistance during and after pregnancy). Nor would a counselor for an abortion clinic be required to disclose that the clinic would make money if she chose abortion, but not if she chose parenthood or adoption. Rather, a mere willingness to refer for abortion would exempt such a counselor from the law entirely.

A. Two Conflicting Views of Pregnancy Centers

1. Pregnancy Centers Provide False and Misleading Information

Not surprisingly, the debate over the law produced two very different views of pregnancy centers and the information they provide. Supporters of the law argued that the pregnancy centers mislead women, and suggested that they were "engaging in a systematic pattern and practice of deception and manipulation in an effort to dissuade women from exercising their right to choose."[21] The legislative evidence offered to support this view of the centers is exemplified by two reports considered in connection with the law: a July 2006 Report from the Minority Staff of the United States House of Representatives Committee on Governmental Reform, Special Investigations Division titled "False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers" (the Waxman Report), and a January 2008 report by NARAL Pro-Choice Maryland Fund titled "The Truth Revealed: Maryland Crisis Pregnancy Center Investigations" (the NARAL Report).

a. The Waxman Report

The Waxman Report[22] is based on telephone calls made by investigators working for United States Representative Henry A. Waxman of California. The investigators called twenty-five pregnancy resource centers that had received federal funding under various programs, none of which were in

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20. *Id.*

21. NARAL Report *supra* note 11, at 1.

22. *See* Waxman Report, *supra* note 12.

Maryland. Each investigator posed as a pregnant seventeen-year-old trying to decide whether to have an abortion.[23] The investigators told center staff that they were already two months into their pregnancies.[24]

The Waxman Report found three principal problems with the information offered by the pregnancy centers. First, the report found that the centers "provided false and misleading information about a link between abortion and breast cancer."[25] The report notes that "[t]here is a medical consensus that induced abortion does not cause an increased risk of breast cancer," but that about one-third of the centers called indicated that abortion does cause an increased risk of breast cancer.[26]

Second, the Waxman Report found that the centers "provided false and misleading information" about other physical health risks of abortion, particularly related to future fertility.[27] The report cites a study explaining that "women who have their first pregnancy terminated by vacuum aspiration are at no increased risk of subsequent infertility."[28] Despite this study, the report notes that approximately one-third of the centers contacted "informed the caller that she would be at increased risk of fertility problems from abortion."[29]

Third, the Waxman Report found that centers "provided false and misleading information about the mental health effects of abortion."[30] The report cites various studies that concluded that "severe negative reactions [to abortion] are rare, and they parallel those following other normal life stresses," and that women who undergo abortions need psychological treatment at the same rate as women who continue a pregnancy and give birth.[31] The report notes that "[d]espite the scientific evidence that abortion

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23. *Id.*

24. *Id.* at 6.

25. *Id.* at i.

26. *Id.* at ii.

27. *Id.* at 9.

28. Waxman Report, *supra* note 12, at 9.

29. *Id.*

30. *Id.* at 11.

31. *Id.*

does not cause significant long-term psychological harm" about half of the pregnancy centers informed women that they may in fact suffer psychological harm.[32] These warnings included an elevated risk of suicide, "guilt, numbness, dreams and nightmares, changes in relationship . . . sexual problems . . . sadness, anxiety . . . alcohol, drug use, eating disorders" and other effects.[33]

The Waxman Report concluded that pregnancy resource centers "frequently fail to provide medically accurate information" and while "[t]his tactic may be effective in frightening pregnant teenagers and women and discouraging abortion . . . [it] prevents them from making an informed decision and is not an accepted public health practice."[34]

b. The NARAL Report

While the Waxman Report focused on centers nationwide that received federal funding, the NARAL Report focused specifically on pregnancy centers in Maryland. Like the Waxman investigators, the NARAL investigators posed as pregnant women seeking help from the centers.[35] The NARAL Report found that the centers "provide deceptive antiabortion messages to women" on a number of issues.[36] For example, although the NARAL Report finds that "[t]he medical community has firmly established that no link exists between abortion and the development of breast cancer," the centers reportedly told investigators that abortion does increase the risk.[37] Likewise, "[d]espite abundant scientific evidence to the contrary," the NARAL Report found that the centers "continue to cite problems with future fertility and potential multiple miscarriages."[38] For example, one counselor reportedly told investigators that "if 'they' do not take out all the

32. *Id.* at 12.

33. *Id.*

34. Waxman Report, *supra* note 12, at 14.

35. NARAL Report *supra* note 11, at 3.

36. *Id.*

37. *Id.*

38. *Id.*

'body parts' an infection can occur."[39] The Report also found that the centers claimed that abortion can cause problems with alcohol and depression.[40]

2. Pregnancy Centers Provide Accurate Information and Support for Women

Supporters of pregnancy resource centers offered a very different picture of the information and services they provide. For example, the president of one group of centers in operation since 1971 testified that the centers provide services including "pregnancy tests, childbirth and parenting classes, abstinence education, ultrasounds, post-abortion support, and more."[41] Counselors at these centers are bound by a "commitment of care" that includes "always [providing] honest and open answers" and "accurate information about pregnancy . . . [and] abortion procedures and risks."[42]

The executive director of another center that has been open for thirty-five years testified that her center's mission

> is to help anyone facing an unplanned or untimely pregnancy with the support and resources they may need to have their baby. . . . [O]ur focus is to care for this woman. While we do not provide or refer for abortions, we also do not turn our backs on her if that is the choice she has made.[43]

Another testified that "[o]ver the past 10 years we have served over 37,000 women" who were pregnant, or thought they were, or who needed referrals for medical, legal, food, or housing and counseling for themselves or their families.[44]

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39. *Id.* Interestingly, this comment is very similar to the account provided by Dr. Lisa Harris (an abortion provider) in a recent article in the journal *Reproductive Health Matters* in which she describes "the task of reassembling the fetal parts in the metal tray [as] an odd ritual that abortion providers perform—required as a clinical safety measure to ensure that nothing is left behind in the uterus to cause a complication." Lisa H. Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, REPRODUCTIVE HEALTH MATTERS 2008:16 (31 Supp.), at 74-81.

40. NARAL Report *supra* note 11, at 4.

41. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Peggy Hartshorn).

42. *Id.*

43. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Carol Maglov).

44. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Carol Buchanan).

Pregnancy centers took particular issue with being required to start conversations with pregnant women by stating that they are "not required to provide factually accurate information."[45] The centers argued that this statement severely diminishes the effectiveness of their speech by attacking their integrity and suggesting that they are untrustworthy.[46] Volunteer counselors from a range of professional backgrounds testified as to the quality, accuracy, and honesty of the counseling.[47]

Women who had been to both abortion clinics and pregnancy centers also offered testimony in support of the centers.[48] For example, Jennifer June VanSant testified about her experiences with two prior pregnancies, both of which occurred while she was addicted to drugs.[49] As to the first pregnancy, VanSant reported:

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45. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Jennifer June VanSant).

46. *See, e.g.*, S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Carol Maglov) (noting that the statement about factually accurate information "is unfair [and] singles out our type of organization by forcing us to unnecessarily undermine our integrity"); S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Peggy Hartshorn) (noting that the disclaimer "could discourage visitors from accessing our wide-range of free services").

47. *See, e.g.*, S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Pamela M. Thomas, registered nurse and Coordinator of Health Education Center at Prince Georges Community College) (noting that pregnancy centers "give full, factual, and medically accurate information" and therefore "regularly receive referrals from the college"); S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Beverly Walling, registered nurse of fifteen years who is currently a licensed psychologist in Maryland) (stating that the quality of service provided by pregnancy center is "of the highest professional quality . . . [n]ever has coercion or duplicity been part of our mission."); S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Jacqueline M. Stippich, clinical social worker licensed in the State of Maryland with twenty-five years of experience in women's reproductive health, including five with Planned Parenthood) (stating that the centers "uphold the highest level of professional standards in providing care to their clients"); S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Sandy Christiansen, obstetrician-gynecologist of twenty years) (noting that centers are trained "to provide accurate medical information about induced abortion and its risks").

48. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Jennifer June VanSant).

49. *Id.*

> At this point I did not believe that it was possible to have a viable pregnancy. Using a Baltimore clinic, I scheduled an appointment one day and had the procedure the next. When I arrived I sat in a large waiting room filled with people and we all seemed to be called back rather rapidly. When it was my turn, I was asked a few questions and given Zanax. The Zanax mixed with the other drugs I already had in my system. The interaction of these drugs left me physically and emotionally numb. I returned to the waiting room. "Scary Movie 2" was being shown on the television in the waiting room. . . . The procedure lasted maybe 5 minutes. . . . At this point I was not conscious or sober enough to recognize the ramifications of my decision nor did anyone at this clinic present them to me . . . . Three days later I was using even more heavily, spiraled further into the cycle of addiction and chose not to deal with any of [the] physical and emotional results of my decisions.[50]

Two years later, VanSant was still using drugs and became pregnant again.[51] Although she was "still heavily under the influence of drugs and addiction" and "thought [she] might kill [her]self," VanSant went to an appointment at a pregnancy resource center arranged by her mother.[52] She described her experience as follows:

> After greeting me, I waited for a few moments before a young lady my age walked me back to a room. It was nicely decorated, like a home. Emily was kind, considerate, and patient [while] at this particular time, I was rude, disrespectful, and terrified. She began by clearly informing me what would happen during my visit. I would have a pregnancy test, she and I would talk, and then I would be given a sonogram joined by my mother if I so wished. Emily and I talked about my circumstance, my boyfriend (who didn't know I was pregnant), my desire to terminate once again, and what life would look like if I chose to become a parent. . . . We did talk about abortion since I had already had one. No decisions were made. Emily just listened and asked questions that made me think, which made me really not like her because the last thing I wanted to do was really think about this decision.

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50. *Id.*

51. *Id.*

52. *Id.*

> Then I met Susan the sonogram nurse . . . The moment came to view the fetus on the monitor. She asked if I wanted to look. I refused. A few moments later I could not deny the deep loud heartbeat as I turned my face to see. A tear streamed down my cheek. I turned my head shocked that I could actually see any resemblance to a human being. Susan spoke briefly to the health of the baby and what would be necessary to provide optimum health for the child. Susan told me about State funding because I did not have a job or insurance to pay for medical expenses. She emphasized the need for proper prenatal medical care and prenatal vitamins. As I got dressed, I cried tears of relief because these people gave me a sense that it was going to be all right. Even though I wasn't completely convinced, no final decisions had been made.[53]

Ms. VanSant testified that she eventually decided to continue the pregnancy and, later, that she "was not ready to be a parent and would make an adoption plan" for her son.[54] Ms. VanSant testified that her life today is better as a result of the decision she reached, and that she and her son are "living example[s] of the power of what [pregnancy centers] do."[55]

Although tens of thousands of women a year seek service from pregnancy centers, the only ones to attend the hearing came to praise the centers; not a single woman who had actually sought service at a pregnancy center testified that she had been or felt misled or mistreated in any way.[56]

a. The Statewide Bill Does Not Proceed

Ultimately, the General Assembly did not take action on the statewide bill. After hearings in the Senate Finance Committee and the House Health and Government Operations Committees, the 2008 legislative session ended without a final vote on the bill.[57]

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53. *Id.*

54. S.B. 690, 2008 Leg., 425th Sess. (Md. 2008) (statement of Jennifer June VanSant).

55. *Id.*

56. *See* Star, *supra* note 10; *see also* Hanson, *supra* note 10.

57. *See* Steven Ertelt, *Maryland Pro-Abortion Bill Threatening Pregnancy Centers Dies as Session Ends*, LIFENEWS.COM, Apr. 9, 2008, http://www.lifenews.com/state3102.html. Planned Parenthood concluded that the bill failed because they could not counter the grass-roots support generated for the pregnancy centers. *See* Planned Parenthood of Md., 2008 Maryland State Legislative Summary, *available at*

b. The Baltimore Regulation

Although the legislation has not been re-introduced at the statewide level, in October 2009, a pregnancy center speech regulation was introduced for consideration by the Baltimore City Council.[58] The Baltimore bill was signed into law on December 4, 2009.

The Baltimore law applies to "limited service pregnancy centers" which are 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.[59]

The law does not explain what it means for a person to have "a primary purpose" to provide pregnancy-related services; nor does it explain what services qualify as "pregnancy-related services."[60]

Regulated centers must provide a disclaimer to "its clients and potential clients" indicating that "the center does not provide or refer for abortion or birth-control services," but the regulation does not require abortion providers to advise clients of the services that they do not provide (such as adoption help, baby clothes, etc.).[61] In fact, amendments requiring these types of disclosures were rejected by the City Council.[62] Nor does the law require any disclaimer from abortion providers about whether they have a financial interest in a woman choosing abortion as opposed to, for example, adoption or parenthood.[63] Instead, the regulation is focused solely on speakers who

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http://www.plannedparenthood.org/maryland/files/Maryland/2008_legislative_wrap-up(1).pdf (last visited March 15, 2010).

58. BALTIMORE, MD. CITY ORDINANCE 09-252 (2009) *amending* BALTIMORE CITY HEALTH CODE §§ 40-14(e)(7) and 41-14(6), *available at* http://www.baltimorecity.gov/Government/CityCharterCodes.aspx.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See* Ertelt, *supra* note 57.

63. BALTIMORE, MD. CITY ORDINANCE 09-252 (2009) *amending* BALTIMORE CITY HEALTH CODE §§ 40-14(e)(7), 41-14(6), *available at* http://www.baltimorecity.gov/Government/CityCharterCodes.aspx.

"provide information about pregnancy-related services" and oppose abortion.

As at the state level, the focus on speakers who oppose abortion was deliberate. In fact, the lead sponsor of the bill, Council President Stephanie Rawlings-Blake, explained upon passage that the law was necessary because, according to the NARAL Report, women had been misled by centers that do not provide abortion.[64]

c. The Montgomery County Regulation

At approximately the same time, the Montgomery County Council began considering a similar bill. The initial press release from the Council describing the bill quoted Councilmember Trachtenberg as saying that the "regulation is needed because [crisis pregnancy centers] often provide false and misleading information to women . . . [and] discourage women from seeking contraception or abortion."[65] The proposed regulation would ensure that centers opposed to abortion would need to "make sure women are given accurate information about the [center] from the start of their visits."[66] Rather than requiring disclaimers about services that are not provided, the Montgomery County bill focused on requiring disclosures by centers who did not have a licensed medical professional on staff and requiring that they advise women that they should consult with a center that does.[67]

As in Baltimore, the Montgomery County Council considered evidence and arguments similar to those presented at the state level. Unlike Baltimore, however, the Montgomery County Council made several changes to its proposed legislation in response to these arguments. In particular, in response to arguments from opponents that the law impermissibly targeted only centers that oppose abortion, "Council staff conclude[d] that[,] as introduced[,] the regulation could violate the First Amendment's prohibition against viewpoint discrimination because it singles out for regulation only

64. *See generally* Scharper, *supra* note 1.

65. Montgomery County Council, Worksession Memorandum, January 21, 2010, at 5.

66. Press Release, Councilmember Trachtenberg Introduces Resolution Requiring 'Pregnancy Centers' To Disclose Actual Scope of Their Services, (Nov. 10, 2009), http://www.montgomerycountymd.gov/Apps/Council/PressRelease/PR_details.asp?PrID=6024.

67. *Id.*

those [centers] that have a particular view of abortion."[68] To address that concern, a subcommittee proposed an amendment that would regulate centers without medical personnel "regardless of their view on abortion."[69] Accordingly, the Council rejected the Baltimore approach and removed from text of the law the provision that expressly focused only on centers that refuse to refer or provide for abortion.[70]

The law was enacted on February 2, 2010, and requires the regulated centers to post the following two disclaimers: "(a) the Center does not have a licensed medical professional on staff; and (b) the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider."[71]

Upon passage, the Council issued a press release making clear that the law was designed to target centers that "often discourage women from seeking contraception or abortion," citing the Waxman Report's investigation of speech by centers that oppose abortion.[72]

II. CONSTITUTIONAL ANALYSIS OF THE BALTIMORE AND MONTGOMERY COUNTY PREGNANCY SPEECH REGULATIONS

As legislators across the country are asked to consider the competing factual stories about the nature, accuracy, and quality of services provided by pregnancy centers that oppose abortion, they will likely also consider the constitutionality of any proposed legislation. While the exact form of regulation considered will of course vary across jurisdictions, these efforts to regulate pregnancy center speech will likely fail because they violate a host

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68. Memorandum from Amanda Mihill, Legislative Analyst on Resolution to Adopt Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers, at 4 (Jan. 29, 2010), http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2010/100202/20100202_13.pdf.

69. *Id.*

70. *See generally id.*

71. Montgomery County, Md., Resolution No. 16-1251, Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers, at 2 (Nov. 10, 2009), *available at* http://www.montgomerycountymd.gov/content/council/pdf/res/2010 /20100 202_16-1252.pdf.

72. Scope Disclosure Press Release, *supra* note 14.

of core First Amendment doctrines designed to address precisely this type of government regulation of speech.[73]

A. The First Amendment Generally Prohibits Government-Required Speech

Pregnancy counseling regulations generally require the regulated speakers to engage in some form of forced government speech. In Baltimore, that speech takes the form of a required statement, issued to all patients, stating that the center does not refer or provide for abortion or birth control. In Montgomery, centers are required to state that they do not have licensed medical personnel on staff, and that the County Health Director "encourages women who are or may be pregnant to consult with a licensed health care provider."[74]

Generally speaking, the First Amendment forbids the government from requiring private citizens to engage in government-dictated speech. As the Supreme Court has explained:

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.[75]

The Court also has held that "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."[76] Accordingly, government efforts to force speakers to

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73. The Baltimore and Montgomery County laws are likely invalid for a wide-range of reasons. This Article is only intended to provide a brief overview of some key Free Speech Clause issues, and is not an attempt to fully catalogue the ways in which these laws infringe the constitutional rights of the centers and their clients.

74. *See* Montgomery County, Md., Resolution No. 16-1251, Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers, at 2 (Nov. 10, 2009), *available at* http://www.montgomerycountymd.gov/content/council/pdf/res2010/20100202_16-1252.pdf.

75. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 348, 776, 244 N.E.2d 250, 255 (1968)).

76. Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). The Court's opinion in Wooley v. Maynard, 430 U.S. 705 (1977), also is instructive. In *Wooley*, the Court considered whether New Hampshire could require citizens to use license plates with the state's motto "Live Free or Die" on them. Plaintiffs

convey government messages are subject to strict scrutiny, and are only permissible when the government's interest is "sufficiently compelling."[77]

This analysis does not change merely because the required speech is purportedly factual. Rather, the Supreme Court has held that the general prohibition on forced speech applies to the exact sorts of mandatory factual statements implicated by the Baltimore and Montgomery County laws. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Court considered several North Carolina regulations concerning the speech of charities.[78] The government argued that prior forced speech cases were inapplicable because the government was only requiring true statements of fact.[79] Rejecting this idea, the Court explained:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from

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alleged that the inclusion of the motto on the required license plate forced them to engage in speech with which they disagreed. The Court began its analysis "with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714 (citing Board of Education v. Barnette, 319 U.S. 624, 633-634 (1943)). The Court then explained that "a system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Wooley*, 430 U.S. at 714.

77. *Wooley*, 430 U.S. at 716. This general prohibition applies equally to speech by non-profit charitable organizations like most pregnancy centers. *See* Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) (speech by charities "involve[s] a variety of speech interests . . . that are within the protection of the First Amendment").

78. Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 797-798 (1988).

79. *Id.*

> making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.[80]

For the same reason, the Baltimore and Montgomery County regulations are impermissible. These local governments, like North Carolina (in *Riley*), cannot defend their compelled speech regulations by claiming that they are merely forcing the centers to state facts, or that the information would be relevant to listeners.

B. The Baltimore and Montgomery County Pregnancy Counseling Restrictions Are Not Permissible Under Casey and Rounds

Despite the First Amendment's protection against forced speech, proponents of pregnancy speech regulations have argued that they are permissible under cases upholding the state's power to require medical professionals to provide government-specified information as part of obtaining informed consent. In particular, Maryland's Attorney General asserted that proposed restrictions were permissible under *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*.[81]

These cases, however, concerned state law requirements enacted as part of the state's regulation of the medical profession and as part of the requirement that physicians obtain informed consent before providing medical services.[82] As explained below, they do not permit the type of regulations of speech by pregnancy counselors at issue here.

In *Casey*, the Supreme Court held that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion" implicates a physician's First Amendment right not to speak, "but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[83] The Court found no violation of the physician's right not to speak where they were merely required to give "truthful, nonmisleading information" related to the patient's decision to have an

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80. *Id.*

81. Letter from Attorney General's Office to Delegate Roger P. Manno, March 14, 2008 at 2-3 *citing* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884 (1992) and Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 733-34 (8th Cir. 2008).

82. *Id.*

83. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884 (1992).

abortion.[84] Accordingly, the Court permitted requirements that physicians provide information about the medical risks of abortion and about organizations and agencies offering alternatives to abortion.[85] The Court found that this type of information could be required because it "furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[86]

In the *Rounds* case, the Eighth Circuit addressed a South Dakota requirement that physicians provide certain information to patients as part of obtaining informed consent. Among other things, the law required doctors to inform patients that "the abortion will terminate the life of a whole, separate, unique, living human being."[87] Relying on *Casey*, the court found that "while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion."[88] The Eighth Circuit found that the required statement was permissible, noting that it was largely consistent with statements by Planned Parenthood's own experts.[89]

Despite the Attorney General's suggestions to the contrary, any attempt to rely on *Casey* and *Rounds* to insulate the pregnancy counseling regulations should fail for two reasons. First, unlike the doctors in *Casey* and *Rounds*, the counselors in the regulated pregnancy centers are not engaged in the practice of medicine. They do not seek to perform medical procedures or practice medicine, but rather to *talk about* medical procedures and the practice of medicine. As such, their discussions of abortion are simply beyond the state regulatory powers that supported the regulations in *Casey*

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84. *Id.* at 882.

85. *Id.* at 902-03.

86. *Id.* at 882; *see also* Gonzales v. Carhart, 550 U.S. 124 (2007), in which the Court reaffirmed in the context of abortion that "it is clear the State has a significant role to play in regulating the medical profession" and that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 128.

87. Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008).

88. *Id.*

89. *Id.* at 736.

and *Rounds*. In fact, proponents of the regulations at all levels have been exceedingly clear in explaining that the pregnancy centers are generally not engaged in the practice of medicine, and, therefore, not subject to the state's regulatory authority over the medical profession.[90]

Second, unlike the doctors in *Casey* and *Rounds*, pregnancy counselors generally are not seeking to perform surgery or any other procedure that requires them to obtain informed consent. Doctors performing medical procedures need to obtain informed consent because, absent such consent, the procedure would constitute a battery and would expose them to liability. Thus, while it is entirely consistent with historical practice for state courts and legislatures to dictate the terms on which informed consent must be obtained by a doctor, these courts and legislatures have no similar role in requiring informed consent before merely *talking about* medical issues, much less as a required step before merely offering support and assistance to help someone through a pregnancy.[91] Nor is there any precedent for state and local governments imposing required disclaimers or statements of government views before citizens may speak about healthcare issues.[92]

For these reasons, state and local governments cannot use their powers to regulate the actual practice of medicine and the terms of informed consent as a basis to regulate speech by pregnancy counselors. *Casey* and *Rounds* do not apply.

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90. *See, e.g.*, Montgomery County Council, Worksession Memorandum, January 21, 2010, at 4 ("Although they discuss issues related to medical conditions (i.e., pregnancy) [the centers] remain unregulated unless they have a licensed medical professional on staff or they perform laboratory services."); Letter from Attorney General's Office to Delegate Roger P. Manno, March 14, 2008, at 2 (pregnancy centers "are subject to no state licensing or permit requirement, and there is no agency oversight of their activities").

91. For example, while Michelle Obama spends much of her time talking about medical issues related to proper diet and exercise, she is not engaged in the practice of medicine, nor could any state or local government regulate her speech by forcing her to give disclaimers about her lack of training, any biases she has related to food, and/or any stock holdings she has in food companies. Rather, the First Amendment leaves Mrs. Obama free to speak about this and any other medical issue of her choice.

92. Indeed, if such disclaimers could be required simply because the speaker wishes to discuss health-related issues, then the recent discussions over health care policy in the United States, and likely every issue of this *Journal*, would be subject to state and local imposition of speech regulations.

C. The Baltimore and Montgomery County Pregnancy Counseling Restrictions Cannot be Justified Based on Claims that Counselors Previously Provided False and Misleading Information

Proponents of pregnancy speech regulations argue that the laws are necessary and justified as a response to the "false and misleading" past speech of pregnancy centers. This argument fails for four reasons.

First, peer-reviewed articles in prestigious medical journals provide scientific support for the three chief alleged "lies" told by the pregnancy centers—that there is a link between abortion and breast cancer, that abortion can cause subsequent fertility problems, and that abortion is linked to subsequent mental health problems.[93] What the Waxman Report and NARAL Reports claim to be "lies" are ultimately different conclusions drawn from conflicting evidence. For example, while the Waxman and NARAL Reports are correct that the National Cancer Institute in 2003 found no evidence of a link between abortion and breast cancer, other reputable sources support an alternative view. Specifically, a 1997 study of 1.5 million Danish women that appeared in the *New England Journal of Medicine*, concluded that abortion did not lead to an increase in breast cancer when judged across the entire population; but the same study showed an increase in breast cancer rates of thirty-eight percent when looking at women who had abortions in the second trimester.[94] Indeed, the American Cancer Society acknowledges that "study findings vary" on this issue.[95]

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93. Mads Melbye, M.D. et al., *Induced Abortion and the Risk of Breast Cancer*. N. ENGL. J. MED. 81, 83 (1997); American Cancer Society, Cancer Reference Information: Is Abortion Linked to Breast Cancer? http://www.cancer.org/docroot/CRI/content/CRI_2_6x_Can_Having_an_Abortion_Cause_or_Contribute_to_Breast_Cancer.asp (acknowledging that "study findings vary" and that some studies show "a slight increase" in abortion risk); Peng Xing, et al., A Case-control study of reproductive factors associated with subtypes of breast cancer in Northeast Chine, 26 MEDICAL ONCOLOGY 37 (2009), *available at* http://www.springerlink.com.content/60h727v546373185/fulltext.prd.

94. *See* Melbye, *supra* note 93, at 83.

95. *See* American Cancer Society, *supra* note 93 (acknowledging that "study findings vary" and that some studies show "a slight increase" in abortion risk). *Wooley* prohibits the government from requiring forced speech to support the alleged majority view of conflicting evidence.

> The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Likewise, recent studies in other journals have continued suggesting a link between abortion and breast cancer,[96] and several states actually affirmatively require that women be informed of the breast cancer and other health risks in order to provide informed consent.[97] Thus, because the speech has scientific support, the laws cannot be justified as responses to "false and misleading" speech.[98]

In any case, speech about a different interpretation of conflicting evidence is not proscribable, because "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the

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Wooley, 430 U.S. at 705.

96. *See* Peng Xing, *supra* note 93.

97. MINN. STAT. § 145.4242 (2010) (prohibiting abortions without informed consent and providing that such consent is only effective if the women is informed of "the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility); *see also* TEX. HEALTH & SAFETY CODE § 171.012 (2009) (consent only valid if woman is told of "the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer").

98. Similar scientific evidence exists to support the centers' claims about the physical and mental health risks of abortion, or at the very least demonstrate the existence of a legitimate medical dispute over which the government should not pass laws to penalize speakers with one view or another. *See* David M. Ferguson et al., *Abortion and mental health disorders: evidence from a 30-year longitudinal study*, 193 BRIT J. PSYCHIATRY 444, 449 (2008) (finding that "women who had had abortions had rates of mental disorder that were about 30% higher than other women"); "The specific issue of whether or not induced abortion has harmful effects on women's mental health remains to be fully resolved. The current research evidence base is inconclusive – some studies indicate no evidence of harm, whilst other studies identify a range of mental disorders following abortion." The Royal College of Psychiatrists, Position Statement on Women's Mental Health in Relation to Induced Abortion, Mar. 14, 2009, *available at* http://www.rcpsych.ac.uk/member/currentissues/mentalhealthandabortion.aspx; P.S. Shah on behalf of Knowledge Synthesis Group of Detrimants of preterm/LBW births, *Induced termination of pregnancy and low birthweight and preterm birth: a systematic review and meta-analysis*, 116 BRIT. J. OBSTETRICS & GYNAECOLOGY 1425 (2009), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/122591273 /PDFSTART (finding that abortion increased risks of preterm delivery and low birth weight in future pregnancies).

competition of other ideas."[99] Thus it is no surprise that, even while purporting to regulate the centers *because of this speech*, Montgomery County specifically acknowledged that the centers "can cite alternate studies to their clients."[100]

Third, it is well established that the government cannot regulate present and future speech based on past legal speech.[101] Thus, just as the government cannot outlaw discussion of conflicting study results, it is also barred from regulating pregnancy counselors' speech based on their past discussions of this information.

Finally, governments cannot defend pregnancy speech regulations by defining them as "commercial speech." Although regulations to ensure the accuracy of commercial speech can be permissible in certain circumstances,[102] those circumstances do not apply here. As explained by the Court in *Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n*, the ability to regulate commercial speech extends only to "expression solely related to the economic interests of the speaker and its audience."[103] Here, the pregnancy centers have no economic interests at all—they are non-profit centers that do not charge for their services. Moreover, the primary argument against these centers is that they have a political, social, and/or religious agenda to dissuade women from seeking abortion—in other words, the exact opposite of the "solely economic" speech to which the commercial speech analysis applies.[104]

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99. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-341 (1974).

100. Montgomery County Council, Worksession Memorandum, January 21, 2010, at 2.

101. *See, e.g.*, Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 310-11 (1980); Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 520-21 (1st Cir. 1989); Eller Media Co. v. Montgomery County, 143 Md.App. 562, 601, 795 A.2d 728, 751 (Md. App. 2002) (deeming "well-founded" the claim that the First Amendment prohibits regulation of future speech based on past lawful speech).

102. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

103. *Id.* at 561.

104. Nor can the government deem the centers' speech commercial simply because it is speech about a commercial enterprise, namely abortions provided for money. The Supreme Court expressly rejected this argument. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976) ("[T]he speech whose contend deprives it of protection cannot simply be speech on a commercial

D. The Baltimore and Montgomery County Pregnancy Counseling Restrictions Are Impermissibly Targeted in That They Are Content-Based, Viewpoint-Based, and Speaker-Specific

1. The Laws Are Content-Based And Invalid

As the Supreme Court has explained, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[105] Thus, while content-neutral speech restrictions can be permissible in certain circumstances, the Supreme Court has repeatedly stated that *content-based* restrictions of speech are presumptively unconstitutional.[106]

The Baltimore and Montgomery County regulations are content-based because they single out speech regarding one, and only one, subject—pregnancy—for special restrictions and financial penalties. The laws are clearly content-based, and, therefore, unconstitutional, because their application is entirely governed by whether or not speakers discuss a single regulated topic—pregnancy.

For example, imagine three different groups want to open centers in Montgomery County. One group wishes to use its center to offer citizens information about heart health and obesity. A second group wishes to use its center to educate people about the dangers of smoking and illegal narcotics. A third wishes to offer information about adoption, childbirth, and available free support for women who wish to carry a pregnancy to term. None of the proposed centers employs a doctor or nurse; all three will be discussing important medical and health-related information to some extent.

Under the proposed law, only one of these centers needs to post a sign to expressly tell their audience that they are not doctors, and that the Health Director recommends that they see a doctor. How does one tell which center needs the sign and which do not? The answer turns on the content of their speech. The center that wishes to talk about options for pregnant women has

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subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical process should be regulated or their advertisement forbidden."). Thus, for example, while the sale of cigarettes is undoubtedly a commercial enterprise and can be regulated as such, an anti-smoking campaign would not be. *Id.*

105. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828-29 (1995) (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

106. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

to post a sign or risk burdensome fines. The others remain free to speak on their own terms, because the content of their speech—while involving important medical information conveyed by non-doctors—does not concern pregnancy. The application of the law thus turns *entirely* upon the content of speech. This is the essence of content-based regulation, and it is precisely what the First Amendment forbids.[107]

2. The Laws Are Viewpoint-Based And Invalid

Viewpoint discrimination is a particularly pernicious form of content discrimination. For this reason, it is presumptively unconstitutional and essentially forbidden. As the Supreme Court has explained:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The 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.[108]

Here, the text, history, operation, and public justification for the Baltimore and Montgomery County pregnancy speech regulations confirm that they target speakers with a particular viewpoint. The laws are therefore invalid viewpoint-based speech restrictions.

The text of the Baltimore law is viewpoint-discriminatory. The law does not apply to all discussions relating to pregnancy, nor does it apply to all discussions of pregnancy by speakers without medical licenses. Rather, it applies only to those discussions of pregnancy by a particular group of speakers who are, thus, regulated solely because they refuse to "refer or provide for abortion." By using a speaker's position on abortion to determine whether or not to regulate speech, the law is impermissibly viewpoint-based.[109]

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107. *See Rosenberger*, 515 U.S. at 828-29; *R.A.V.*, 505 U.S. at 382.

108. *Rosenberger*, 515 U.S. at 828-29.

109. Indeed, the *Washington Post* editorialized that this type of regulation "is suspect because it singles out pregnancy centers while absolving abortion clinics of any disclosure requirements regarding adoption or parenting options." Editorial, *Pregnant and In Need of Help*, WASH. POST, Nov. 23, 2009, at A18, *available at* http://www.washingtonpost.com/wpdyn/content/article/2009/11/22/AR2009112201605.html. Likewise, the Montgomery County Council staff concluded that the Baltimore approach "could violate the First Amendment's prohibition against viewpoint discrimination because it singles out for regulation only those [centers] that have a

Because county officials recognized the potential constitutional problems with the Baltimore approach, Montgomery County amended its bill in a purported effort to eliminate viewpoint discrimination.[110] The County's proposed solution, however, fails to solve the viewpoint discrimination problem. Rather than regulate pro-life pregnancy centers and abortion clinics in the same way—requiring each, for example, to clearly disclose what other services they do not provide, or requiring each to disclose any financial interest they have in a woman choosing one option over others—the council instead expanded its regulation to a group of facilities that appear not to exist: abortion clinics without medical staff. There was no evidence before the legislature that a single such facility exists in Montgomery County or anywhere else. Thus, the Montgomery County law simply uses a different mechanism—the proxy of a health care provider—to sort between pro-life and pro-choice facilities. Worse, when the law was enacted, the Council continued to explain to the public that the point of the law was to regulate pro-life centers.[111]

3. The Laws Discriminate Among Speakers And Are Invalid

As set forth above, the history and text of the Baltimore and Montgomery County pregnancy counseling laws confirm that they are aimed only at specified speakers. Thus, for example, counselors at abortion clinics remain entirely unregulated in their discussions of pregnancy, while counselors at pregnancy centers opposed to abortion are regulated. This leads pregnancy center speech regulations to another First Amendment problem: the government is not free to decide to regulate the speech only one side of a contentious public debate.[112]

Given the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, this type of speaker regulation is impermissible under

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particular view of abortion." Montgomery County Council, Worksession Memorandum, January 21, 2010, at 2.

110. *See id.*

111. Scope Disclosure Press Release, *supra* note 14.

112. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"); *see also* City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) ("[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978)).

the First Amendment.[113] In *Citizens United*, the Court addressed regulations on campaign-related speech by certain corporations. The Court explained that the First Amendment does not permit the government to make such speaker distinctions:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. *Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.* As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content. *Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.* By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. . . . *We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.*[114]

Here, the proposed speech regulations apply only to certain speakers who wish to talk about abortion—the most contentious political and social issue of our time. In this manner, the government would be "impos[ing] restrictions on certain disfavored speakers" in precisely the way forbidden by the Court.[115] *Citizens United* makes clear that the Constitution does not permit the government to create different rules for different speakers.

E. The Baltimore and Montgomery County Regulations Fail Strict Scrutiny

Because the Baltimore and Montgomery County laws involve forced speech, and because they impose content-based, viewpoint-based, and speaker-specific speech restrictions, they are presumptively unconstitutional and can only be upheld if they survive strict scrutiny. Strict scrutiny requires that a law be narrowly tailored to serve a compelling state interest. The pregnancy speech regulations fail this test for three reasons.

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113. *See generally* Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ___ (2010), 187 L.R.R.M. (BNA) 2961 (US, Jan. 21, 2010).

114. *Id.* at *24-25 (emphasis added).

115. *Id.*

1. Absence of Evidence

First, the relevant legislative bodies lacked evidence that any of the tens of thousands of clients of the pregnancy centers were coerced, misled, or mistreated in any way. In fact, the Montgomery County Council publicly declared that it was "unfair" to expect the council to have evidence that any of the women utilizing the centers were misled.[116] The law does not permit the government to regulate speech—much less to regulate it in a content, viewpoint, and speaker-based manner—when it is merely assuming the existence of a problem. To the contrary, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured."[117] The absence of evidence that any person was actually misled is fatal because the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[118]

2. Underinclusivity

Second, the laws are fatally underinclusive in several respects. An underinclusive law can violate the First Amendment where it "represent[s] a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'"[119] An examination of the underinclusiveness of regulations concerning pregnancy counseling here confirms the content- and viewpoint-discriminatory nature of such provisions. These regulations tend to be underinclusive in three principal ways: they leave unregulated all discussions of critical healthcare issues by non-medical speakers discussing topics other than pregnancy; they leave unregulated discussions of pregnancy by non-medical counselors at abortion clinics; and they leave unregulated all discussions of pregnancy by school guidance counselors, teachers, friends, parents, priests, and any number of other individuals who may be asked for advice concerning pregnancy. This

116. Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers, Hearing on Resolution No. 16-1252 before the Health and Human Services Committee, Montgomery County Council (January 25, 2010) (Statement of At-Large Council Member George Leventhal).

117. Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 664 (1994).

118. *Id.*

119. City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978)).

type of underinclusiveness reveals that the government's allegedly neutral interest either is not the true motivating factor, or that the government itself does not view that interest as compelling enough to regulate all instances of speech in which that interest is threatened.[120]

a. Failure to Regulate Other Discussions of Medical Issues by Non-Licensed Speakers

The law is underinclusive in that it leaves unregulated the vast majority of discussions of medical issues by non-licensed speakers. Citizens learn about health issues from a wide variety of sources. Yet the regulations only require disclaimers for one particular group of pregnancy centers. Thus, for example, speakers at Jenny Craig and Weight Watchers centers and trainers at health clubs, remain free to discuss health, lifestyle, nutrition, and obesity without required disclosures as to their services, viewpoints, or status as non-physicians. Likewise, employees at GNC stores, health food stores, anti-drug and anti-smoking groups, health and hygiene teachers, and countless other speakers, also remain free to speak without making required disclosures as to their services, viewpoints, or status as non-physicians. The failure to protect the same alleged interest in these other instances where non-doctors communicate about serious medical issues renders the laws fatally underinclusive.

b. Failure to Regulate Pregnancy Discussions at Abortion Clinics

The laws are also underinclusive as to pregnancy discussions. While the governments assert an interest in ensuring that women receive complete and accurate information about pregnancy options, and that they be advised of services they will not receive at a pregnancy center, the laws do not apply these restrictions to abortion clinics. In Baltimore, this underinclusiveness arises from limiting the application of restrictions to centers that refuse to provide abortions or refer women to abortion providers. In Montgomery County, the underinclusiveness stems from the County's unwillingness to regulate discussions of pregnancy options at abortion clinics, even if those discussions are conducted by someone who is not a licensed medical professional. If the government were neutrally pursuing its asserted interests, abortion clinics should be required to provide truthful information, and women who speak with non-doctors at the clinics should be advised that

120. *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1105 (2009) ("The statute's discriminatory purpose is further evidenced by its substantial . . . underinclusiveness with respect to the State's asserted interest in passing the legislation."); Hill v. Colorado, 530 U.S. 703. 724 (2000) (a content-neutral statute is one that "does not distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds").

they should seek help from a medical professional. The failure to regulate speech at abortion clinics reveals that the even the government does not view its asserted interests as compelling.

c. Failure to Regulate Other Discussions of Pregnancy

Even the treatment of pregnancy discussions is underinclusive. For example, if the County's concern is with discussions about pregnancy by non-doctors, why does the Montgomery County law *only* focus on those discussions at centers that discuss pregnancy but do not employ a doctor for twenty hours per week? Pregnant women have discussions with all sorts of non-medical speakers about their options. For example, some pregnant women presumably discuss their options with school guidance counselors and/or teachers. Yet the proposed law makes no effort to regulate these discussions. Likewise, other pregnant women presumably discuss options with social workers—these discussions, too, remain unregulated. Indeed, it is fair to say that most discussions of pregnancy options occur with speakers such as friends, family members, and others who are *not* covered by the proposed law. If the law were motivated by a governmental interest in regulating these conversations—as opposed to targeting a specific group of discussions at pro-life pregnancy centers—the law would apply far more broadly.

3. Lack of Tailoring

Finally, the law fails strict scrutiny because it is not tailored to the government's asserted interests. To be narrowly tailored, a restriction on speech must target the "exact source of the 'evil'" sought to be avoided.[121] If the government wishes to outlaw the centers' statements about the health effects of abortion, it should attempt to pass a law to that effect. Likewise, if the government wishes to publicize the message that the County Health Director thinks pregnant women should see a doctor, the government should advertise and distribute that message directly, rather than doing so indirectly by forcing unwilling citizens to post the sign on private property.

Rather than tailoring the law to these assertedly neutral justifications, Baltimore and Montgomery County have enacted laws that are tailored not toward addressing allegedly neutral problems, but toward requiring one specific group of speakers to provide government-dictated disclosures.

III. CONCLUSION

For the reasons set forth above, pregnancy speech regulations are likely unconstitutional, both in Maryland and beyond. Fundamentally, this problem stems from an improper motive to regulate speakers on only one

121. Frisby v. Schultz, 487 U.S. 474, 475 (1988).

side of a contentious public debate, a lack of evidence of actual dissatisfied clients, and a law that focuses only on speech about a single issue, from a single perspective, and from a single type of speaker. Particularly where, as here, there is conflicting evidence about the impact of a medical procedure, there is no basis for the state to punish speakers for espousing a minority viewpoint. Rather, the First Amendment protects the rights of pregnancy centers and their counselors to speak freely about abortion and other issues, without subjecting themselves to greater liability or to targeted restrictions of their speech.