No. 16-2325

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; CATHERINE E. PUGH, in her official capacity as Mayor of Baltimore; and LEANA S. WEN, M.D., in her official capacity as Baltimore City Health Commissioner,

Appellants/Defendants.

On Appeal from the
United States District Court for the District of Maryland
Case No. 1:10-cv-00760 MJG

BRIEF AMICUS CURIAE ON BEHALF OF THE INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Information Society Project at Yale Law School, an intellectual center addressing the implications of new information technologies for law and society and focusing on a wide range of issues concerning the intersections between health policy, technology policy, privacy concerns, and the regulation and dissemination of information. Many of the scholars associated with the ISP are especially concerned with the development of First Amendment doctrine and its impact on listeners in the marketplace. Accordingly, the ISP has an interest in ensuring that the constitutionality of the Baltimore Services Disclosure Ordinance, Ordinance 09-252, Balt. City Health Code §§ 3-501 to 3-506 (2010), is determined in accordance with settled First Amendment principles.[2]

STATEMENT OF THE CASE

As the district court held, the Defendants, the Baltimore City Council and Mayor ("Baltimore Officials") enacted Ordinance 09-252 ("the Ordinance" or the "Services Disclosure"),[3] in order "to remedy potential consumer confusion about the scope of services offered" by so-called "pregnancy centers." *Greater Balt. Ctr.*

[1] Counsel for both parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amici curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[2] This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

[3] Balt. City Health Code §§ 3-501 to 3-506 (2010).

for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., No. MJG-10-760, 2016 BL 339280 at *9 (D. Md. Oct. 4, 2016) ("Greater Balt. Ctr."). Evidence considered by the Baltimore Officials before enacting the Services Disclosure revealed that two types of deception lie at the very heart of the "pregnancy center" business model. First, pregnancy centers hold themselves out to be medical providers and hide their ideological mission. Second, they specifically target low-income women seeking abortions by offering services like pregnancy tests and ultrasounds for free, and listing among services offered "abortion information," "counseling," "pregnancy services." *See, e.g.,* NARAL PRO-CHOICE AMERICA, CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM (2015), http://www.prochoiceamerica.org/assets/download-files/cpc-report-2015.pdf. What's more, dangling free pregnancy tests and "counseling" ensures that those who come to the facilities are among the most vulnerable—low-income women seeking abortions at the lowest cost. In many of these clinics when women arrive, the staff attempt to delay them, mislead them about the availability of services, and about the health risks and benefits of abortion all in an attempt to stop the women from obtaining abortions. *Id*. In fact, appearing to be a medical clinic that provides abortion services is vital to the success of a facility: the more women seeking abortions a clinic can attract, the more abortions it can delay or obstruct, and the more successful it will be in its mission.

In response to this evidence, the Baltimore officials enacted a modest requirement that would correct any misunderstanding created by misleading or, as plaintiff's Executive Director puts it, "vague" advertising concerning the scope of services provided by a clinic. Joint Appendix ("JA") 708. The Services Disclosure simply requires that any "limited-service pregnancy center"[4] provide notice to its clients and potential clients "substantially to the effect that the center does not provide or make referral for abortion or birth-control services," Balt. City Health Code § 3-502(a), by "conspicuously post[ing] in the center's waiting room" or other areas where plaintiffs await services, an "easily readable" notice written in both English and Spanish, *Id.* at § 3-502(b).

The Plaintiff in this case, Baltimore Center for Pregnancy Concerns (the Plaintiff or the "medical clinic"), follows the national "pregnancy center" business model. First, as the district court recognizes, the plaintiff has become a health care provider. Working with the National Institute of Family Life Advocates ("NIFLA"), a national association of "Pregnancy Centers" which it joined, Plaintiff underwent a "medical conversion." (JA 699-700). *See Greater Balt. Ctr.* at 33 (describing testimony of NIFLA representative that plaintiff is a "health care

[4] The Disclosure Ordinance defines a "limited service pregnancy center" as "any person whose primary purpose is to provide pregnancy-related services" and who either, for a fee or for free, "provides information about pregnancy-related services" but does not provide or refer for abortions or birth-control services. *Id.* at § 3-501.

provider"); Deposition of Thomas Glessner ("Glessner Dep.) 15:15–16:5 ("The plaintiff is what we consider a medical clinic . . . .") (JA 1210-11). A physician licensed in Maryland serves as the clinic's medical director, "oversees the medical aspect of the clinic," Glessner Dep. at 82:17-21 (JA 921), and reviews all the ultrasound images taken by the sonographer. *Greater Balt. Ctr.*, 2016 BL 339280 at 13.[5]

Second, the clinic advertises its status as a medical clinic to the public, offering a range of "medical services" including "pregnancy tests," "confidential options counseling," "information about procedures," "sonograms" and "prenatal vitamins," and abortion information and other services. *Id.* at 15-16 (JA 826). The Plaintiff medical clinic's advertising as well as its "Commitment of Care" that it displays "in full view of clients, generally in the reception area," contains the word "abortion." Deposition of Carol Ann Clews 12:5-12 (JA 826). However, when the clinic mentions abortion in its advertising, it is, according to the clinic's Executive Director, "purposefully vague" so that some women will come to the clinic thinking that it provides abortions. *Id.* (JA 826). The Executive Director admits

[5] The district court makes much of the medical director's seeming inattention to the facility as a factor that undermines the professional speech argument. However, the medical director's inattention to the clinic and its clients doesn't change the clinic's status as a medical facility and would seem to argue for more rather than less government oversight.

that the Services Disclosure would correct this misimpression. Clews Dep. at 24:8-13 (JA 838).

SUMMARY OF ARGUMENT

The district court erred in applying strict scrutiny to the Services Disclosure for two reasons. First, as applied to the plaintiff medical clinic, the Services Disclosure is a regulation of professional speech because it takes place within the context of a physician-patient relationship. As a regulation of professional speech that neither compels nor prohibits any ideological speech, the Services Disclosure is subject to intermediate scrutiny under *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014), a standard it easily survives.

Second, if this Court declines to consider the regulation of speech in a medical clinic's waiting room a regulation of professional speech, then the regulation should be considered a regulation of commercial speech designed to insure that information flows to consumers "cleanly as well as freely."[6] As a regulation of commercial speech, the Ordinance would be subject to an even lower level of review, the rational basis review that applies to factual disclosures in the commercial speech context, which it clearly survives. That the Plaintiff medical

[6] *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748, 771-2 (1976). *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985); Jennifer Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment,* 15 U. PA. J. OF CONST. L. 539, 550-56 (2013).

clinic offers services free of charge does not defeat the Defendant Officials' argument that the regulated speech is commercial; it is only one factor relevant to the inquiry. Once again, the district court errs in considering it a dispositive factor.

Contrary to the district court's holding below and the Plaintiff medical clinic's claim, *Greater Balt. Ctr.,* 2016 BL 339280 at *27, the Services Disclosure does not introduce the subject of "abortion" into the conversation between the medical clinic and its patients. In fact, the clinic has already taken care to do that itself to induce women seeking abortions to come to the clinic. All the Services Disclosure does is insure that any misimpression a woman has about the scope of services provided by the clinic is corrected. In other words, the Services Disclosure does not compel or inhibit ideological speech; it serves the interest in protecting the integrity of physician-patient communications as a channel for the communication of accurate medical information. *See Camnitz*, 774 F.3d at 251-52; *NIFLA v. Harris*, 839 F.3d 823, 839-41 (9th Cir. 2016).

The medical clinic's real objection to the Services Disclosure is that, as the Executive Director acknowledges, the Services Disclosure will correct any misconceptions the clinic's advertising caused, alerting women to the fact that they have been tricked into thinking abortions are offered. Clews Dep. at 24:8–13 (admitting that if a woman came to the clinic to get abortion information or "was under the impression for some reason that we do abortions, that sign would

certainly interrupt . . . that conversation.") (JA 838). In other words, the Executive Director understands that the Ordinance is designed to insure that patients are properly informed about the scope of services offered; it is precisely this function of the ordinance to which she objects she objects, because misinformation is integral to the clinic's *modus operandi*. But the First Amendment's protections for professional and commercial speech are not designed to shield this kind of trickery by licensed professionals in the commercial sphere; instead the doctrines specifically allow the state to insure that professionals licensed by the state and other commercial entities can be prevented from using such trickery in their practices.

ARGUMENT

I. The Services Disclosure is Subject to Intermediate Scrutiny Under *Camnitz's* Professional Speech "Continuum," a Standard it Easily Meets.

Courts and scholars are giving increased attention to the relationship between the First Amendment and the regulation of "professional speech," as distinct from the private speech of professionals. See, e.g., Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 834, 843 (1999); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech,* 2007 U. ILL. L. REV. 939, 944-47 (2007) (discussing competing views of scholars

and providing citations); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2366 (2013); Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016). Professional speech conveys professional knowledge within a professional-client relationship for the purpose of giving professional advice, and allows the listener to make a decision based on knowledge she would not otherwise have. Haupt, *supra*, at 1250 ("The reason the professional's advice is valuable to the client is that she possesses knowledge that the client lacks.") A fiduciary relationship exists between the professional and the client, which requires the professional "to communicate *all information necessary* to make an informed decision to the client." *Id.* at 1271 (emphasis added). "The listener's interests are only served if the professional communicates information that is accurate . . ., reliable, and personally tailored to the specific situation of the listener." *Id*. As this Court has stated:

> Traditional informed consent requirements derive from the principle of patient autonomy in medical treatment. Grounded in self-determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has "the information she needs to meaningfully consent to medical procedures." . . . Free consent, as it suggests, requires that the patient be able to exercise her autonomy free from coercion.

Camnitz, 774 F.3d at 251.

A. Professional Speech Regulation is Subject to a Continuum Depending on the Context of the Speech and the Regulation's Impact on the Listener

Though a definitive professional speech doctrine has not yet emerged, a doctrine is taking shape in this Court and others that is context-dependent and responsive to the concerns of the listeners, considering the First Amendment values at stake to determine whether and how much First Amendment protection the speech deserves. *See*, *e.g.*, *Camnitz*, 774 F.3d at 248 (applying intermediate scrutiny to compelled speech by an abortion provider); *see also Pickup v. Brown*, 740 F.3d 1208, 1227-28 (9th Cir. 2014) (applying rational basis review to regulation of speech that constituted professional conduct "even though such regulation may have an incidental effect on speech); *NIFLA v. Harris*, 839 F.3d 823, 839-40 (9th Cir. 2016) (upholding law requiring factual disclosure concerning professional services be posted in waiting area of pregnancy center under intermediate scrutiny). As this Court held:

> When the First Amendment rights of a professional are at stake, the stringency of review thus slides "along a continuum" from "public dialogue" on one end to "regulation of professional *conduct* " on the other.

Camnitz, 774 F.3d at 248. Treating "professional speech" in the context of delivery of professional services differently than speech by professionals in public, viewing these types of speech along a continuum, *see Camnitz*, 774 F.3d at 248; *Pickup*, 740 F.3d at 1227, is consistent with the First Amendment values at stake in the

regulation of medical practice. On the one hand, where professionals speak publicly, "outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment." *Pickup*, 740 F.3d at 1227-28. *See also Camnitz,* 774 F.3d at 248; *King v. Governor,* 767 F.3d 216, 232 (3d Cir. 2014). As the Ninth Circuit noted, "a doctor who *publicly* advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment – just as any person is – even though the state has the power to regulate medicine." *Pickup*, 740 F.3d at 1227 (emphasis added). Whether one considers this speech outside the "professional speech" category altogether, *see* Post, *Informed Consent*, *supra*, at 952-60; Haupt, *supra*, at 1254-57, or just at one end of the professional speech continuum, *see Camnitz*, 774 F.3d at 248; *Pickup*, 740 F.3d at 1227-28, it receives the highest protection afforded by the First Amendment.

On the other hand, this Court held that a "heightened intermediate level of scrutiny is … consistent with Supreme Court precedent and appropriately recognizes the intersection of regulation of speech and regulation of the medical profession in the context of an abortion procedure." *Camnitz*, 774 F.3d at 249. Similarly, the Ninth Circuit and the Third Circuit declined to apply strict scrutiny to regulation of professional speech to uphold laws prohibiting licensed medical

providers from providing a discredited form of therapy to minors. The Ninth Circuit reasoned that the state was merely regulating professional conduct, "even though such regulation may have an incidental effect on speech," *Pickup*, 740 F.3d at 1229, and applied rational basis review. *See also* Post, *Informed Consent*, *supra*, at 952-53 n.72 ("[S]tate has broad power to establish and enforce standards of conduct . . . relative to the health of everyone there.").[7] The Third Circuit declined to find that the law regulated conduct, but still applied intermediate rather than strict scrutiny because the law regulated "a part of the practice of the profession." *King*, 767 F.3d at 232 (distinguishing professional speech in context of practice from speech by a professional in public sphere). Noting "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession," the court upheld the law because it was "enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services." *Id.* at 235.

Regulation of medical treatment and the provision of informed consent are areas traditionally regulated by the state in the interests of preserving public health and protecting patients from trickery and deception. As Dean Robert Post has noted, "in the context of medical practice we insist upon competence, not debate,

[7] Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 952-53 (2015) ("state has broad power to establish and enforce standards of conduct . . . relative to the health of everyone there.").

and so we subject professional speech to an entirely different regulatory regime. We closely monitor the messages conveyed by professional speech . . .'" Post, *Informed Consent, supra*, at 950.[8] As this Court wrote:

> Traditional informed consent requirements derive from the principle of patient autonomy in medical treatment. Grounded in self-determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has "the information she needs to meaningfully consent to medical procedures."

Camnitz, 774 F.3d at 251. *See also* Post, *Informed Consent to Abortion, supra,* at 972 (goal of informed consent is to enable patient to make "autonomous intelligent and accurate selection of what medical treatment to receive."); *see also* Haupt, *supra*, at 1287-89 (physician has duty to inform the patient of relevant information relating to the treatment").

This includes insuring that women are not misinformed about the type of facility at which they are receiving care, especially when the facility's own advertising is responsible for the confusion. Accordingly, when a state adopts a regulation of informed consent, courts should limit review to ensuring that the regulation does not undermine the First Amendment value of protecting professional speech in the first place, that is, the value of insuring patients are well informed to make appropriate medical decisions. As the Ninth Circuit wrote:

[8] *See also King,* 767 F.3d at 232 ("To handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm.").

> [T]he First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issue licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.

Pickup, 740 F.3d at 1228.

There are, however, limitations on the state's ability to regulate speech in the professional's sphere. *See* Post, *Informed Consent*, *supra*, at 977-79. Most importantly, the state may not compel a physician to become a mouthpiece for the state's ideology under the guise of regulating "informed consent," as this Court held. *See*, *e.g.*, *Camnitz*, 774 F. 3d at 254 ("these regulations look nothing like traditional informed consent); Post, *Informed Consent*, *supra*, at 939-40; Keighley, *Physician Speech, supra*, at 2378; Haupt, *supra*, at 1257-58; *King*, 767 F.3d at 235.

B. The Services Disclosure Regulates Speech in the Context of Delivery of Medical Services Supervised by a Licensed Professional.

Like the factual disclosure notice requirement applicable to pregnancy centers recently upheld by the Ninth Circuit in *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016), the Services Disclosure regulates professional speech, "speech that occurs between professionals and their clients in the context of their professional relationship," and "within the confines of a professional's practice." *Id*. at 839. *See also King*, 767 F.3d at 232. That the notice is provided in the medical clinic's

waiting rooms makes no difference because, as the Ninth Circuit recently recognized, "[a]ll of the speech related to the clinics' professional services that occurs within the clinics' walls, including within the waiting room, is part of the clinics' professional practice." *Id.* at 840. Because a posted notice is part of the communication that occurs within the professional-client relationship, it serves the client's interest in accurate and comprehensive advice. Whether or not a medical professional is involved, "[t]he counseling transaction itself looks like the kind of one-on-one, fiduciary relationship that . . . appears to be the hallmark of professional speech." B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J. L. Med. & Ethics 59, 66 (2015). As the Ninth Circuit noted, "pregnancy center" clients "go to the clinic precisely because of the professional services it offers," and "reasonably rely upon the clinic for its knowledge and skill." *NIFLA*, 839 F.3d at 840.

On its face and as applied to the plaintiff medical clinic, therefore the Services Disclosure is a regulation of professional speech, subject to review to determine whether the regulation serves the interest in protecting the integrity of physician-patient communications as a channel for the communication of accurate medical information. *See Camnitz*, 774 F.3d at 248; *Pickup v. Brown*, 740 F.3d 1208, 1227-28 (9th Cir. 2014); Post, *Informed Consent, supra*, at 940. It falls at the midpoint of the professional speech continuum, where the professionals have

"somewhat diminished" First Amendment protection, and an intermediate scrutiny standard should apply. *Camnitz*, 774 F.3d at 247; *NIFLA,* 839 F.3d at 840.

C. The Services Disclosure Survives Intermediate Scrutiny Because it Neither Compels Nor Prohibits Ideological Speech, and Only Insures Women Are Provided With Accurate Information About the Scope of Services Provided at the Clinic.

Courts have drawn careful distinctions between different kinds of notices in the context of pregnancy related care, taking care to evaluate whether the medical provider is being required to become a mouthpiece for the state's message. On the one hand, in *Camnitz*, this Court struck down a North Carolina statute that required doctors to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions, holding that it was compelled ideological speech that "convey[ed] a particular opinion." *Camnitz*, 774 F.3d. at 245-46. Similarly, in *Evergreen Association, Inc. v. City of New York*, 740 F.3d 233, 237-38 (2d Cir. 2014), the Second Circuit struck down a requirement that pregnancy centers post a notice encouraging women *to consult with* a licensed provider. *Id.*

On the other hand, also in *Evergreen*, the Second Circuit upheld a requirement that a pregnancy center provide notice of whether or not facility has "a licensed medical provider on staff." *Id.* Similarly, in *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 836 (9th Cir. 2016), the Ninth Circuit upheld a requirement that pregnancy centers post a notice informing patients that California

programs provided coverage for reproductive health care, including abortions. Unlike the statute in Camnitz, the California law "did not convey any opinion." *Id.*

Baltimore's Services Disclosure is firmly on the permissible side of the line the court's have drawn. It is not ideological, nor does it prohibit ideological speech by the clinic or its "volunteers" in the waiting room or elsewhere in the clinic. *Compare Camnitz,* 774 F.3d at 254-55. It requires a factual disclosure about the availability of services but does not express a State position on better and worse types of care or require the medical clinic to deliver the state's message.[9] *Cf. Camnitz*, 774 F.3d at 245-46; *Evergreen Ass'n*, *Inc.*, 740 F.3d at 237-38 (striking disclosure advocating the state's position and upholding disclosure concerning type of facility patient is in). Instead, it gives information about the limited range of services available at the pregnancy center and serves the City's interest in insuring that women are fully informed about the nature of the medical facility at which they are receiving services, correcting any misimpression they have received from advertising or other information available to the public.[10] This is integral to the

[9] Moreover, the notice required here is remarkably similar to a requirement upheld in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992), that physicians inform their patients of the availability of medical assistance benefits for prenatal care, childbirth and neonatal care. *Id.* at 884 (finding the requirement "no different from a requirement that a doctor give certain specific information about any medical procedure.").

[10] The district court objects that "[w]hen courts have held that the professional speech exception applies, the facts almost always involve the context of a professional's relationship with a paying client." *Greater Balt. Ctr.*, 2016 BL

patient's ability to give informed consent to any services they are to receive from the clinic.

Moreover, contrary to the district court's finding, the Plaintiff medical clinic's medical services are not so intertwined with its ideological speech that the regulation impacted the ideological speech. The religious speech of the clinic's volunteers is not impacted by the Services Disclosure. All that is impacted is the patient's knowledge about the scope of clinic services, and the efficacy of the clinic's plan to prey on confusion they have wrought. The clinic has no First Amendment right to prevent its patients from being properly informed by the state about the scope of the clinic's services. Though the state may not compel or prohibit ideological speech during medical treatment, a licensed professional cannot insulate professional speech from appropriate informed consent regulation by also expressing political or ideological opinions in medical offices. *See Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 66-68 (1983) (holding that informational pamphlets discussing "important public issues such as venereal disease and family planning," that were included with advertisements for plaintiff's

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339280 at *34 (D. Md. Oct. 4, 2016). But this concern, which is one factor in the commercial speech determination, *see infra*, has no place here and reveals a fundamental misunderstanding of the nature of professional speech. "In professional speech, . . . payment for services is secondary to the knowledge-based nature of the service provided." Haupt, *supra*, at 1270. A legal aid lawyers advice could be regulated as professional speech to the same degree as the corporate attorney charging the highest hourly rate.

products did not insulate the materials from the lower standard of review applicable to commercial speech).

The law easily survives this intermediate scrutiny. *See NIFLA*, 839 F.3d at 841-45 (factual disclosure requirement for pregnancy center survives intermediate, and even strict, scrutiny review); *Evergreen Ass'n, Inc.*, 740 F.3d at 246-47 (holding requirement that pregnancy center notify clients whether licensed provider is on staff would survive even strict scrutiny review); Brief of Appellants at 43-45, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. 16-2325 (4th Cir. Jan. 30, 2017).

II. The Services Disclosure is a Regulation of Commercial Speech that is Reasonably Related to Preventing Consumer Deception.

Although the Court need not reach the issue, the Services Disclosure could also be upheld as a regulation of commercial speech that is reasonably related to preventing consumer deception. It is textbook First Amendment doctrine that commercial speech has never been given the stringent level of scrutiny or subject to the same doctrinal rules as public discourse.[11] Before 1976, in fact, commercial speech fell outside First Amendment protections altogether. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). In *Virginia State Board*, the Supreme Court overruled prior precedent, holding that commercial speech was not "wholly outside"

[11] *See, e.g.,* Geoffrey R. Stone, et al., THE FIRST AMENDMENT 186-215 (4th ed. 2012); Robert Post, *Compelled Commercial Speech*, *supra*, at 871-72.

the protections of the First Amendment, *Virginia State Bd.,* 425 U.S. at 761, but still protected commercial speech less vigorously than core political speech in keeping with the different constitutional values served by the different types of speech. As Dean Robert Post explains, the Court granted commercial speech diminished constitutional protection, because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer and Abood,* 40 Val. U. L. Rev. 555, 559 (2005) ("[A] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'") (internal quotations omitted). *See also Va. State Bd.*, 425 U.S. at 761 (discussing society's "strong interest" in the "free flow of commercial information").[12]

Because of the different constitutional values served by commercial speech

[12] *See also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); Post, *Compelled Commercial Speech, supra*, at 872-73. The most common rationales given for protecting public discourse at the highest level include the "marketplace of ideas" rationale, the self-governance rationale and the autonomy rationale, all of which are concerned with the interests of the speaker. Stone, et al., *supra*, at 9-14. In commercial speech doctrine on the other hand, "[t]he Court has … focused its analysis on the need to receive information, rather than on the rights of speakers." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 14 (2000) (hereinafter Post, *Constitutional Status*).

protection, the doctrine has developed to allow "'modes of regulation that might be impermissible in the realm of noncommercial expression,'" to preserve the informational value of the speech, *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)), and insure that the stream of commercial information flows "cleanly as well as freely." *Va. State Bd.,* 425 U.S at 771-72. For example, the Court has held that neither overbreadth nor prior restraint doctrines apply to commercial speech[13]; chilling-effect doctrine does not apply[14]; and certain types of commercial speech can be targeted for specific restrictions.[15] Most importantly for purposes of this case, factual disclosures in the context of commercial speech are allowed as long as they are "reasonably related" to the state's interest in "preventing deception of consumers."[16]

A. To Protect the Listener's Interest in Information, the State Can Regulate Commercial Speech to Insure It Flows "Cleanly As Well As Freely."

Normally laws compelling speech are considered "content-based regulations"

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[13] Post, *Constitutional Status*, *supra*, at 28-33; Amanda Shanor & Robert Post, *Adam Smith's First Amendment,* 128 HARVARD L. REV. F. 165, 167-73 (2015); see also *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 565 n.8 (1980); *id.* at 571 n.13; *Va. State Bd.,* 425 U.S. at 771 n.24.

[14] *Va. State Bd.*, 425 U.S. at 771 n.24.

[15] *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (quoting *Va. State Bd.*, 425 U.S. at 771-72).

[16] *Milavetz, P.A. v. United States*, 559 U.S. 229, 253 (2010) (internal quotations omitted); *see also Nat'l. Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d. Cir. 2001).

subject to strict scrutiny, *Riley v. Nat'l Fed. of the Blind of N.C., Inc.,* 487 U.S. 781, 797-98 (1988)*; see also Turner Broad. Sys. v. FCC,* 512 U.S. 622, 642 (1994), because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley, supra,* at 782. However, the Court has recognized that the interests implicated by non-ideological compelled speech in the commercial context are "not of the same order" as the interests implicated in non-commercial speech cases;[17] instead, the commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[18] Factual disclosures may be required to "dissipate the possibility of consumer confusion or deception," thus serving the consumer's interest in the protection of commercial speech in the first place. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650–51 (1985) (internal quotations omitted). Rather than applying the four-part test applicable to other forms of commercial speech,[19] in *Zauderer* the Court adopted rational basis review for a compelled disclosure law imposed on commercial speech, asking only whether the law is "reasonably related to the State's interest in

[17] *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650–51 (1985). *Compare Stuart v. Camnitz,* 774 F.3d 238 (4th Cir. 2014).
[18] *Id.*
[19] *Cent. Hudson Gas & Elec. Corp.,* 447 U.S. 557 (1980).

preventing deception of consumers."[20]

B. The Services Disclosure Ordinance Regulates Commercial Speech.

The Plaintiff medical clinic argues and the district court below held that the Services Disclosure does not regulate commercial speech because the medical clinic offers its services free of charge. *Greater Balt. Ctr*, 2016 BL 339280 at *14, 23-25. But this is an overly narrow view of commercial speech. Although the Court originally characterized commercial speech as "speech which does no more than propose a commercial transaction,"[21] in *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 66-67 (1983), the Court broadened the notion of commercial speech, looking beyond this one factor to hold that some speech that did not propose a commercial transaction was commercial speech nonetheless. Id. Accordingly, this Court and others have looked beyond economic motivations in determining the nature of the speech at issue. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 285 (4th Cir. 2013) (*en banc*) (addressing the three *Bolger* factors for commercial speech, that (1) the speech is an advertisement, (2) it refers to a specific product or service,

[20] *Zauderer*, 471 U.S. at 650-51. *See also Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Sorrell*, 272 F.3d at 114 ("[M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values); *Citizens United v. FEC,* 558 U.S. 310, 366–67 (2010) (compelled disclosures in the context of campaign finance regulation subject to lesser scrutiny).

[21] *Va. State Bd. of Pharm.*, 425 U.S at 762 (internal quotation marks and citations omitted). This limited definition sufficed for the statute challenged in that case that prevented pharmacists from advertising the price of prescription drugs. Id.

and (3) the speaker has an economic motivation for the speech, and concluding that "it is not necessary that each of the characteristics 'be present in order for speech to be commercial'") (internal citations omitted).

The Supreme Court has held that other non-profit organizations with religious missions engaged in commercial speech when advertising their services. *See, e.g., Camps Newfound/Owatonna v. Town of Harrison, Me.,* 520 U.S. 564, 573 (1997) (advertisements of non-profit organization with religious mission were in interstate commerce); *Nat'l Servs. Grp. v. Painting & Decorating Contractors*, No. SACV06-563CJC(ANX), 2006 WL 2035465, at *4 (C.D. Cal. July 18, 2006) (looking to the First Amendment definition of commercial speech in a suit under the Lanham Act and concluding that "the mere fact that a speaker is a nonprofit organization does not preclude its speech from being commercial…"); *id.* ("[N]arrow focus on trade associations' nonprofit nature would thwart the purpose of the Lanham Act and ignore the reality that such associations represent commercial interests engaged in commercial competition."). *See also Cincinnati v. Discovery Network*, 507 U.S. 410, 410, 419 (1993) (the distribution of free magazines "consist[ing] primarily of advertisements for respondents' services" constitutes commercial speech). Other courts have held that similar medical facilities with licensed personnel on staff, such as Plaintiff's medical director, were engaged in commercial speech. *See also First Resort v. Herrera*, 80 F. Supp. 3d

1043, 1052 (N.D. Cal. 2015) (whether clinic charged for services not dispositive of commercial speech issue), *appeal docketed*, No. 15-15434 (9th Cir. 03/10/2015); *Fargo v. Women's Health Org., Inc. v. Larson*, 381 N.W.2d 180-81 (N.D. 1986).

A medical clinic that provides free pregnancy tests and sonograms engages in commercial speech when advertising services, regardless of whether it receives any money from clients, because the "advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Fargo Women's Health Org.*, 381 N.W.2d at 181. Insuring that patients have not been misinformed by those advertisements protects the accuracy of the flow of information to consumers. *See* Cent. *Hudson Gas & Elec. Corp.*, 447 U.S. at 561 (holding speech was commercial because it had an impact on listeners operating in the marketplace, even though it did not have an economic impact on the speaker).

In evaluating the nature of the speech at issue here, this Court should consider the informational value being served by the speech at issue. The district court and the plaintiff err by focusing on the *speaker* and ignoring the impact of the speech on the *consumer-patient*. [22] *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. MJG-10-760, 2016 BL 339280 at *23-

[22] *Bates v. State Bar of Arizona*, 433 U.S. 350, 364-65 (1977) (First Amendment protections for commercial speech exist *because of* the consumer's interest in the speech, and *despite* the economic interests of the speaker).

25 (D. Md. Oct. 4, 2016). Because the commercial speech doctrine is concerned with protecting the free flow of accurate information to consumers, the appropriate question in this case is what services the target of the speech, a pregnant woman in a waiting room of a medical clinic supervised by a physician who is its "medical director," will understand the clinic to provide, and how the Services Disclosure will impact her. *See* Post, *Constitutional Status, supra*, at 14 (2000); Keighley, *Can You Handle the Truth? supra,* at 589-95 (discussing contours of commercial speech doctrine).[23] If she has misunderstood, or been misled by, public information about the medical clinic, the notice will correct that misunderstanding. If she has not misunderstood or been misled, the notice will tell her nothing she doesn't already know. The protection of *truthful nonmisleading* commercial speech thus "serves individual and societal interests in assuring informed and reliable decisionmaking." *Bates*, 433 U.S. at 350.

For the same reasons discussed above,[24] the medical clinic's religious or ideological speech is not so intertwined with its commercial speech to shield it from commercial speech review. From the women's point of view the clinics engage in a commercial venture when they encourage women to receive

[23] The "contextual inquiry into the social meaning of a particular speech act goes beyond the factors articulated in *Bolger* and requires analyzing the speech act as a whole." Keighley, *Can You Handle the Truth? supra*, at 591 (citing Post, *Constitutional Status*, *supra*, at 18); Halberstam, *supra*, at 832 (1999) (definition of commercial speech turns on the relationship between the speaker and audience).

[24] *See supra* at 17-18.

pregnancy-related medical services and when they deliver those services in a medical facility. Taking the *Bolger* factors into account, *see Bolger*, 463 U.S. at 66-68, and examining the nature of the speech as a whole, the Services Disclosure is a regulation of commercial speech subject to rational basis review to determine whether is it "reasonably related to the state's interest in preventing deception of consumers," *Zauderer*, 471 U.S. at 650-51, a standard it easily meets. Br. of Appellants, *supra*, at 38-41.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court reverse the district court's judgment and direct the district court to enter summary judgment in favor of the Defendant Officials.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 6,327 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on Feb. 6, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system. An original copy of this brief has been mailed to the Court today.

DATED: Feb. 6, 2017

/s/ Priscilla Joyce Smith
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