

THE DISCLAIMER DICHOTOMY: A FIRST
AMENDMENT ANALYSIS OF COMPELLED SPEECH IN
DISCLOSURE ORDINANCES GOVERNING CRISIS
PREGNANCY CENTERS AND LAWS MANDATING
BIASED PHYSICIAN COUNSELING

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INTRODUCTION

When one types “pregnant,” “abortion,” “clinic,” and other similar keywords into an internet search engine, the initial page of results will inevitably include the websites of several Crisis Pregnancy Centers (CPCs).¹ The homepages of these websites often display headings such as “Pregnant? Confused? We Can Help!” and promise to provide free and confidential services to women who think they might be pregnant.² The motivation behind these centers and the actual medical services they provide are opaque, and, despite their prevalence, most women have never heard of CPCs and do not realize that a visit to one might involve both more and less than they bargained for.

While CPCs provide limited services and information to women facing unintended pregnancies, they are not traditional medical clinics and do not provide abortions or abortion referrals.³ Further, there is mounting evidence that CPCs disseminate inaccurate information about

¹ GOOGLE, <http://www.google.com> (search “Pregnant Abortion Clinic”) (last visited Aug. 25, 2013).

² See, e.g., HOWARD COUNTY PREGNANCY CENTER, <http://www.howardcountypregnancycenter.org> (last visited Aug. 25, 2013); PREGNANCY CENTER NORTH, <http://www.pcn4you.org> (last visited Aug. 25, 2013).

³ See NARAL PRO-CHOICE AM. FOUND., THE TRUTH ABOUT CRISIS PREGNANCY CENTERS 1, 3 (Jan. 1, 2013) [hereinafter NARAL CPC Report], available at <http://www.prochoiceamerica.org/media/fact-sheets/abortion-cpcs.pdf>.

abortion and reproductive health that leads women to delay or misunderstand important pregnancy choices.⁴ Several localities throughout the United States have attempted to require CPCs to post signs in their waiting rooms disclosing that they do not provide abortions or abortion referrals and/or do not have licensed medical professionals on staff.⁵ The courts thus far have ruled that such ordinances regulate non-commercial free speech and are unconstitutional because the ordinances are neither sufficiently specific nor tailored to important government interests.⁶

This Note argues that CPC disclosure ordinances regulate commercial speech, are reasonably related to the state's interest in protecting the public from CPCs' harms, and are thus constitutional.⁷ This Note argues that CPCs should be considered commercial for the purposes of the First Amendment, but even if they are considered non-commercial, the compelled speech mandated by CPCs should be found constitutional. This Note further argues that the courts have artificially drawn a distinction between compelled speech targeted at CPCs and compelled speech for physicians who provide abortions, such that CPCs receive preferential legal treatment due to their ties to religious beliefs.

This Note will proceed in four parts. Part I will provide a history of the emergence of CPCs in the United States and their practices, the disclosure ordinances localities have passed to govern CPC practices, and the litigation surrounding such laws. Part II will discuss the prevalence of state laws mandating physician counseling for abortion and illuminate the similarities between such laws and CPC disclosure ordinances. Part III will provide an analysis of the constitutional issues involved in the compelled speech mandated by CPC disclosure ordinances by comparing them to cases involving pre-abortion state mandated physician counseling and other similar areas of the law. Finally, Part IV will propose a new framework for analyzing CPC

⁴ See *infra* Part I.B.

⁵ See Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 PERSP. ON SEXUAL AND REPROD. HEALTH 201, 203 (2012).

⁶ See *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539 (4th Cir. 2012) (holding that the Baltimore Ordinance was not narrowly tailored and the government had not demonstrated a compelling interest in regulating CPCs). However, the Fourth Circuit sitting en banc recently agreed to rehear the case. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, Nos. 11-1111, 11-1185, 2013 WL 3336884 (4th Cir. July 3, 2013) (en banc).

⁷ This argument has been suggested by legal and public health professionals. See generally Brief for Public Health Advocates as Amici Curiae Supporting Defendants-Appellants and Reversal, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539 (4th Cir. 2012) (Nos. 11-1111, 11-1185), 2011 WL 1855980 [hereinafter Public Health Advocates Amicus Brief]; Kirsten Gallacher, *Protecting Women from Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 WOMEN'S RTS. L. REP. 113, 115 (2011). But see generally Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. CONTEMP. HEALTH L. & POL'Y 223, 251-52 (2010).

disclosure ordinances and CPC practices in general. Such a shift would be the first step in changing the courts' attitude towards CPCs and recognizing the government's substantial interest in protecting the public against the potential harms that stem from the misinformation they distribute.

I. THE EMERGENCE OF CRISIS PREGNANCY CENTERS IN THE UNITED STATES

During the last several decades, CPCs have quietly become widespread and prevalent throughout the United States. In response to mounting concerns that they disseminate false reproductive health information,⁸ several localities have passed laws to prevent CPCs' arguably deceptive activities. The courts' analyses, however, have thus far reflected a poor understanding of both CPC behavior and how the First Amendment should be applied to laws mandating certain CPC disclosures.

A. *What Are Crisis Pregnancy Centers?*

Crisis Pregnancy Centers—also known as Limited Service Pregnancy Centers or Pregnancy Resource Centers—are organizations that provide limited support and information to women facing unintended pregnancies.⁹ CPCs are generally staffed by volunteers committed to Christian beliefs but who lack medical training.¹⁰ While most CPCs are unlicensed and do not have trained medical professionals on staff, they often portray themselves as medical facilities offering the full range of reproductive health services.¹¹ For example, CPC websites sometimes include statements that their facility is “a non-profit medical clinic that provides free services to those facing an unexpected pregnancy.”¹² CPCs advertise to women who are pregnant or think they might be pregnant, and provide pregnancy tests, information about adoption, financial assistance for baby clothes and supplies, and counseling services for women who have had or are

⁸ See generally Waxman Report, *infra* note 23; Bryant & Levi, *infra* note 62; NARAL CPC Report, *supra* note 3.

⁹ NARAL CPC Report, *supra* note 3, at 1.

¹⁰ NAT'L ABORTION FED'N, CRISIS PREGNANCY CENTERS: AN AFFRONT TO CHOICE 2 (2006) [hereinafter NAF CPC Report], available at http://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf.

¹¹ NARAL CPC Report, *supra* note 3, at 1–2.

¹² *About Us*, PREGNANCY CENTER W. MED. CLINIC, <http://www.pregnancycenterwest.org/about.html> (last visited June 18, 2013).

considering having an abortion.¹³ Some CPCs also provide ultrasounds (often only to confirm fetal viability) and testing for sexually transmitted infections (STIs).¹⁴ Most CPCs receive state and federal funding and provide their services for no cost.¹⁵

While the number of abortion clinics has declined since the 1990s, the number of CPCs in the United States and Canada has grown.¹⁶ Estimates indicate that there are 2,500 to 4,000 CPCs in the United States, and CPCs vastly outnumber abortion clinics in rural areas.¹⁷ Many CPCs are supported by a parent organization that provides technical assistance, education materials, training, legal advice, organizational development, and financial assistance.¹⁸ NARAL Pro-Choice America has identified three such umbrella organizations: the National Institute of Family and Life Advocates (NIFLA), Care Net, and Heartbeat International.¹⁹ Birthright International is also a well-known organization that operates hundreds of CPCs throughout the United States and Canada.²⁰ Finally, Option Line, a joint venture between Care Net and Heartbeat International, operates a 24-hour call center that they claim receives 16,000 calls per month, maintains a web tool to refer women to the nearest CPC, and delivers boilerplate educational information to CPCs for use on their websites.²¹ Thus, CPCs have many resources at their disposal, and the movement's leadership has allowed CPC information materials to become remarkably streamlined.²²

B. *Deceptive Practices and False Information Disseminated by Crisis Pregnancy Centers*

There is mounting evidence that CPCs deliberately cloud the distinction between their facilities and traditional health clinics.²³ While

¹³ Gallacher, *supra* note 7, at 118.

¹⁴ *Id.* at 118.

¹⁵ *Id.* at 120, 123. Government funding to CPCs comes through direct allocations or tax credits in state budgets, sales of "choose life" license plates (as the revenues are used to fund CPCs), the donation of equipment to CPCs, and federal "abstinence only" programs. NARAL CPC Report, *supra* note 3, at 8.

¹⁶ Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 6 (2003).

¹⁷ Rosen, *supra* note 5, at 201; NARAL CPC Report, *supra* note 3, at 2.

¹⁸ NARAL CPC Report, *supra* note 3, at 1.

¹⁹ *Id.*

²⁰ *Discover Birthright*, BIRTHRIGHT INT'L, <http://www.birthright.org/en/discover-birthright> (last visited Aug. 25, 2013).

²¹ NARAL CPC Report, *supra* note 3, at 2.

²² *See id.*

²³ MINORITY STAFF OF H.R. COMM. ON GOV'T REFORM SPECIAL INVESTIGATIONS DIV., 109TH CONG., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS i-ii (2006) (prepared for Rep. Waxman) [hereinafter

systematic documentation of CPC practices is scarce, CPCs are known to use deceptive advertising, disseminate false facts about the risks of abortion, persuade pregnant women to choose adoption or motherhood, and employ tactics intended to delay women considering abortion from obtaining the procedure.²⁴ A widely cited 2006 report prepared for United States Representative Henry Waxman of California to evaluate the medical accuracy of information provided by CPCs—often referred to as the Waxman Report—documented these deceptive practices.²⁵

1. Deceptive Advertising Practices

The Waxman Report discussed many deceptive advertising practices by CPCs, including advertising in the yellow pages under “abortion services,” purchasing internet advertisements under keywords like “abortion” or “abortion clinic,” obscuring that they do not provide abortions or abortion referrals, describing themselves as “medical facilities,” and implying that they help women understand *all* their options in facing an unintended pregnancy.²⁶ Additionally, CPCs often open near Planned Parenthood locations and abortion clinics and deliberately attempt to cloud the distinction between their facilities.²⁷ For example, a Planned Parenthood location in Massachusetts brought a lawsuit against a CPC²⁸ alleging that the CPC had opened on the same floor of the office building where they were located and was using the acronym “PP” in violation of trademark law.²⁹ The Supreme Judicial Court of Massachusetts noted that “[t]he danger here is the fact that the two organizations, located on the same floor of the same building, operate for diametrically opposing purposes and that [the CPC] confused the public into believing that its services were endorsed by [Planned Parenthood].”³⁰ Thus, as CPCs have spread throughout the country, their deceptive advertising has been recognized as a public health concern demanding legal and/or legislative action.

Waxman Report], available at <http://www.chsourcebook.com/articles/waxman2.pdf>; NARAL CPC Report, *supra* note 3, at 1–2.

²⁴ See generally Waxman Report, *supra* note 23. The Waxman Report found, among other deceptive practices, that CPCs erroneously draw a link between abortion and breast cancer, abortion and future fertility problems, and abortion and long-term mental health problems. *Id.* at i–ii. See also Bryant & Levi, *infra* note 62.

²⁵ Waxman Report, *supra* note 23, at i.

²⁶ *Id.* at 1–2.

²⁷ See 12TH & DELAWARE (Home Box Office 2010); Gallacher, *supra* note 7, at 125.

²⁸ Planned Parenthood Fed’n of Am., Inc. v. Problem Pregnancy of Worcester, Inc., 498 N.E.2d 1044, 1045 (Mass. 1986).

²⁹ *Id.*

³⁰ *Id.* at 1049.

2. False Information About Abortion's Risks and Reproductive Health

The Waxman Report also found that CPCs provide false information about the risks of abortion, most notably drawing erroneous links between abortion and breast cancer, decreased future fertility, and negative mental health effects.³¹ While CPCs argue that they are seeking to inform women about all the physical and spiritual implications of having an abortion, many of which may not be readily apparent,³² the scientific inaccuracies they perpetuate coupled with their misleading context, is troubling.

Despite medical consensus that there are no causal links between abortion and future health risks, CPCs continue to perpetuate these myths.³³ Indeed, the National Cancer Institute held a workshop in 2003 where more than one hundred experts concluded that an induced abortion cannot be scientifically linked to an increased risk of breast cancer.³⁴ Statements about “never having children again” and the danger of “Post-Abortion Syndrome”³⁵ are also ubiquitous in CPC literature.³⁶ Yet a study commonly cited by CPCs linking abortion and long-term mental health³⁷ was recently debunked as “misleading and erroneous.”³⁸

³¹ See Waxman Report, *supra* note 23, at 7–14; see, e.g., *Abortion Risks*, WOMEN'S RESOURCE CENTER, <http://www.pregnancynorthplatte.com/abortion-risks.html> (last visited Aug. 25, 2013).

³² See *Abortion Procedures & Abortion Risks*, CARE NET PREGNANCY CENTER OF THE HUDSON VALLEY, <http://www.carenetpregnancycenter.com/abortionproceduresandrisk.htm> (last visited Aug. 25, 2013).

³³ NAF CPC Report, *supra* note 10, at 10–11.

³⁴ *Id.*

³⁵ CPCs define “Post-Abortion Syndrome” as a form of depression involving a variety of symptoms including guilt, anxiety, avoidance of children and pregnant women, psychological numbing, re-experiencing events related to the abortion, preoccupation with becoming pregnant again, anxiety over fertility and childbearing issues, disruption of the bonding with children, self-abuse and self-destructive behaviors, anniversary reactions, and psychotic breaks. See, e.g., *Post-Abortion Syndrome*, PREGNANCY HELP CENTER, http://www.pregnancyhelpcenter.org/post_abortion_syndrome.php (last visited Aug. 25, 2013). The American Psychological Association has concluded that the best research indicates that no such syndrome is scientifically or medically recognized. See *Post-Abortion Syndrome*, NAT'L ABORTION FED'N, http://www.prochoice.org/about_abortion/myths/post_abortion_syndrome.html (last visited Aug. 25, 2013).

³⁶ Waxman Report, *supra* note 23, at 7–14; NARAL CPC Report, *supra* note 3, at 3.

³⁷ Priscilla K. Coleman, Catherine T. Coyle, Martha Shuping & Vincent M. Rue, *Induced Abortion and Anxiety, Mood, and Substance Abuse Disorders: Isolating the Effects of Abortion in the National Comorbidity Survey*, 43 J. OF PSYCHIATRIC RES. 770 (2009).

³⁸ Julia R. Steinberg & Lawrence B. Finer, Letters to the Editor, *Coleman, Coyle, Shuping, and Rue Make False Statements and Draw Erroneous Conclusions in Analyses of Abortion and Mental Health Using the National Comorbidity Survey*, 46 J. OF PSYCHIATRIC RES. 407, 407 (2012). In their retraction, the Journal of Psychiatric Research emphasized that it is extremely difficult to draw causal relationships in such studies due to the number of biases and confounding variables involved. *Id.*

CPCs also provide inaccurate facts about other areas of reproductive health.³⁹ Incorrect statements about fetal development are common on CPC websites; for example, “[a] few days after your missed period[,] [t]he baby’s heart begins to beat.”⁴⁰ While the timing for each fetus varies, the American College of Obstetricians and Gynecologists states that most fetal hearts begin to beat near the end of the first month of pregnancy.⁴¹ CPCs also make unfounded claims about fetal pain: “22 week preborn baby . . . The baby can now feel pain, possibly as early as 18 weeks. In fact, from now until about 32 weeks, pain is felt more intensely than any other time in development.”⁴² While conclusive evidence of fetal pain is all but impossible to show,⁴³ researchers estimate that pain perception does not exist before the third trimester (i.e. week twenty-eight).⁴⁴

CPCs also disseminate incorrect information about contraception. Misstatements of the effectiveness of condoms are common: “Slippage and breakage of condoms is 26 percent.”⁴⁵ While slippage and breakage rates will vary depending on condom type, user errors, and other factors, clinical trials estimate that they range from 0.5% to 8.4% and are lower for latex condoms (the most popular variety in the United States) than polyurethane condoms.⁴⁶ CPCs also distribute false and dangerous instructions regarding the use of the morning after pill/Plan B: “You must take a pregnancy test and receive a negative result before taking the pills.”⁴⁷ This assertion is incorrect and may lead women to overlook

³⁹ See NAF CPC Report, *supra* note 10, at 9; see also Rosen, *supra* note 5, at 202.

⁴⁰ *What’s Happening to My Body?*, LAUREL PREGNANCY CENTER, <http://www.laurelpregnancycenter.org/whathappening.html> (last visited Aug. 25, 2013); see also *Fetal Development*, THE TWIN FALLS PREGNANCY CRISIS CENTER, <http://pregnancytf.org/girls/fetal-development> (last visited Aug. 25, 2013).

⁴¹ AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, FREQUENTLY ASKED QUESTIONS: HOW YOUR BABY GROWS DURING PREGNANCY (2011), available at www.acog.org/~media/for%20patients/faq156.ashx.

⁴² *Get the Facts About Pregnancy*, BEACON OF HOPE PREGNANCY CARE CENTER, <http://beacon1.intuitwebsites.com/products.html> (last visited Aug. 25, 2013).

⁴³ Scientifically, pain is defined as an emotional and psychological response that requires recognition of an unpleasant stimulus; thus, perception of pain to a fetus with a partially developed nervous system is equivocal. Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 952 (2005).

⁴⁴ Studies have attempted to use withdrawal reflexes, hormonal stress responses, and measurements of neurological development to assess fetal pain. *Id.* at 947.

⁴⁵ *Sexually Transmitted Diseases (STDs) and Your Sexual Health*, LAUREL PREGNANCY CENTER, <http://www.laurelpregnancycenter.org/STD.html> (last visited Aug. 25, 2013).

⁴⁶ See Michael J. Rosenberg & Michael S. Waugh, *Latex Condom Breakage and Slippage in a Controlled Clinical Trial*, 56 CONTRACEPTION 17, 17 (1997); Markus J. Steiner et al., *Contraceptive Effectiveness of a Polyurethane Condom and a Latex Condom: A Randomized Controlled Trial*, 101 OBSTETRICS & GYNECOLOGY 539, 539 (2003).

⁴⁷ *Morning After Pill*, LAUREL PREGNANCY CENTER, <http://www.laurelpregnancycenter.org/MAP.html> (last visited Aug. 25, 2013); see also *Morning After Pill*, PREGNANCY RESOURCE CENTER OF CLEVELAND COUNTY, <http://www.prccc.org/map.html> (last visited Aug. 25, 2013).

emergency contraception that could prevent the need for an abortion if taken within seventy-two hours after unprotected sex.⁴⁸

Finally, CPCs disseminate misleading and emotionally laden information about the abortion procedure itself. While these descriptions do distinguish between the different abortion procedures for each pregnancy stage, they often lump together gestational age periods and use charged and graphic language to deter women from seeking an abortion at any stage. Narratives of late stage abortions using dilation and extraction/evacuation can be particularly inflammatory:

[T]he woman receives medication to start labor. After labor begins, the abortion doctor uses ultrasound to locate the baby's legs. Grasping a leg with forceps, the doctor delivers the baby up to the baby's head. Next, scissors are inserted into the base of the skull to create an opening. A suction catheter is placed into the opening to remove the skull contents. The skull collapses and the baby is removed.⁴⁹

This language can be contrasted with medical descriptions of the procedures. For example, the American College of Gynecologists describes dilation and evacuation as follows: "The contents of the uterus are removed by a suction device that is inserted into the uterus."⁵⁰

3. Emphasis on Delaying a Potential Abortion

A subtler but equally troubling CPC practice involves encouraging women to wait to confirm pregnancy or receive abortion services. Because later abortions are more difficult to procure and carry higher risks, delaying abortions may effectively prevent them from occurring. Teenage, poorly educated, and low income women generally take longer to confirm suspected pregnancies, and these are the women who most often seek care at CPCs.⁵¹ The longer women wait to seek abortion, the

⁴⁸ Emergency contraception is more effective the sooner it is taken, so erroneous advice that delays women from obtaining the treatment could interfere with its effectiveness. See *Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> (last updated Aug. 27, 2013).

⁴⁹ *Abortion Procedures*, LIFE CHOICE CARE CENTER, <http://lifechoicecarecenter.org/abortion-procedures> (last visited Aug. 25, 2013).

⁵⁰ AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, FREQUENTLY ASKED QUESTIONS: INDUCED ABORTION (2011), available at <http://www.acog.org/~media/For%20Patients/faq043.pdf?dmc=1&ts=20120319T2201341670>.

⁵¹ Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 *CONTRACEPTION* 334, 338 (2006); Rosen, *supra* note 5, at 202. This may be due, at least in part, to CPCs' provision of free services and their numerous and widespread locations.

more expensive and risky the procedure becomes.⁵² Additionally, some women may postpone abortion so long that by the time they make an appointment, their pregnancy has progressed to a stage where abortion in their state is prohibited.⁵³ CPCs vary in how explicitly they convey the message. Some cite a 30% rate of spontaneous miscarriage,⁵⁴ which given the context and vulnerable state of recipients, may make the potential need for an abortion seem less urgent.⁵⁵ Other CPCs use phrases about pregnancy tests being more effective the longer you wait.⁵⁶ Still others will explicitly call for more time: “*Take some time.* Decisions that people most often regret are those that are made too quickly in the midst of a crisis.”⁵⁷ While these statements may not be inherently inaccurate, when delivered in the context of discouraging women from seeking abortion, they can have damaging effects on a woman’s ability to successfully obtain the procedure, particularly in states that ban the procedure as early as six or twelve weeks after conception.⁵⁸

⁵² Second trimester abortions (compared to first trimester) are associated with higher mortality rates, and the relative risk of death increases exponentially with gestational age. See Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 *OBSTETRICS & GYNECOLOGY* 729, 729 (2004).

⁵³ Twenty-two states ban abortions as early as twelve weeks. *Abortion Bans After 12 Weeks*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/what-is-choice/maps-and-charts/map.jsp?mapID=16> (last visited Aug. 25, 2013); see, e.g., OKLA. STAT. tit. 21, § 684 (2013); S.C. CODE ANN. § 44-41-85 (2013).

⁵⁴ See, e.g., *Abortion*, ROCKVILLE PREGNANCY CLINIC, <http://www.rockvilleclinic.org/abortion> (last visited Aug. 25, 2013). This rate is also of dubious accuracy; the National Institutes of Health estimate that up to half of all fertilized eggs spontaneously abort, generally before a woman knows she is pregnant. *Miscarriage*, MEDLINEPLUS: A SERVICE OF THE U.S. NAT’L LIBR. OF MED., NAT’L INSTS. OF HEALTH, <http://www.nlm.nih.gov/medlineplus/ency/article/001488.htm> (last visited Aug. 25, 2013). However, the rate among women who know they are pregnant is estimated to be closer to 15–20%. *Id.* Because it is extremely likely that a woman visiting a CPC is already pregnant or suspects she might be, a quoted rate of 30% may be misleading in the CPC context.

⁵⁵ Cf. *infra* note 115 and accompanying text (discussing the state-mandated physician disclosure to women seeking abortion that the father may be liable for child support, which may be misleading given the context and the state’s established preference for childbirth over abortion).

⁵⁶ See, e.g., *Pregnancy*, CRISIS PREGNANCY CENTER OF NORTHFIELD, <http://cpcnorthfield.org/pregnancy.html> (last visited Aug. 25, 2013); *Pregnancy*, SHIRLEY GRACE PREGNANCY CENTER, <http://www.sgpregnancycenter.com/pregnancy.html> (last visited Aug. 25, 2013).

⁵⁷ *An Expectant Mother’s Choices*, BIRTHRIGHT PREGNANCY AID CENTER OF HARFORD COUNTY, <http://birthrightharfordcounty.org/expectant-mother-choices> (last visited Aug. 25, 2013) (emphasis in original).

⁵⁸ See, e.g., H.B. 1456, 63d Leg. Assemb. (N.D. 2013), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-0304-02000.pdf?20130315161558> (banning abortion where the fetus has a detectible heartbeat, effectively banning abortion as early as six weeks after conception).

4. Lack of Literature Documenting Crisis Pregnancy Centers' Deceptive Practices

While lawmakers like Representative Waxman and pro-choice advocacy groups have begun investigating their deceptive practices, CPCs have received little attention in the public health literature.⁵⁹ The lack of research may be partially explained by the difficulty of quantifying data on the misinformation strategies above. Anecdotal evidence, for example, the 2010 HBO documentary “12th & Delaware,” documents the deceptive tactics used at some CPCs, including purposely misleading women about the services they offer and providing incorrect facts about pregnancy.⁶⁰ The Waxman Report’s evidence of misinformation was based on the results of female investigators’ phone calls to twenty-five CPCs requesting information and advice about unintended pregnancy.⁶¹ A recent study examining phone calls, visits, and websites of CPCs in North Carolina revealed widespread provision of inaccurate medical information about the risks of abortion.⁶² It is impossible, however, to systematically measure the deceptive practices that occur behind 4,000 separate closed doors. These methodological challenges account for the absence of large-scale scientific studies documenting the misinformation distributed by CPCs, which, as will be shown, may explain the courts’ refusal to recognize CPCs’ widespread deceptive practices in their decisions involving CPC conduct.⁶³

C. *Adoption of Disclosure Ordinances Governing Crisis Pregnancy Centers and Litigation Surrounding Their Constitutionality*

The misinformation distributed by CPCs recently came to the attention of lawmakers, and several localities concerned with CPCs’ deceptive practices passed or introduced disclosure ordinances in response.⁶⁴ The ordinances differ slightly in content but generally

⁵⁹ See Rosen, *supra* note 5, at 201.

⁶⁰ See 12TH & DELAWARE, *supra* note 27; NARAL CPC Report, *supra* note 3, at 3–7.

⁶¹ Waxman Report, *supra* note 23, at i.

⁶² Amy G. Bryant & Erika E. Levi, *Abortion Misinformation from Crisis Pregnancy Centers in North Carolina*, 86 CONTRACEPTION 752 (2012).

⁶³ See *infra* Part I.C.

⁶⁴ See, e.g., N.Y.C., N.Y., LOCAL LAW 17 (Mar. 16, 2011), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID>; BALT. CITY, MD., HEALTH CODE §§ 3-501 to -506 (2010), available at <http://legistar.baltimorecitycouncil.com/detailreport/?key=4550>; CITY OF AUSTIN, TX., ORDINANCE 20100408-027 (Apr. 8, 2010), available at <http://www.austintexas.gov/edims/document.cfm?id=163551>; MONTGOMERY COUNTY, MD., BOARD OF HEALTH RESOLUTION 16-1252 (Feb. 2, 2010), available at

require CPCs (as defined in the ordinances) to post signs in their waiting rooms stating that they do not provide abortions or abortion referrals and/or have no licensed medical professionals on staff. The ordinances do not address the medical misinformation disseminated by CPCs, but rather only address the preliminary threshold deception that women who accidentally visit CPCs believe they are medical clinics. Three ordinances, passed in the City of Baltimore, Montgomery County, Maryland, and New York City, have been challenged as unconstitutional compelled speech under the First Amendment.

The Baltimore City Ordinance,⁶⁵ passed in December 2009, was the first such law to be enacted in the United States. The ordinance requires organizations that provide information about pregnancy-related services but do not provide abortions or abortion referrals—what it calls “limited service pregnancy centers”—to post conspicuous signs in their waiting rooms stating that each center “does not provide or make referral for abortion or birth-control services.”⁶⁶ The Greater Baltimore Center for Pregnancy Concerns (a CPC) sued the city claiming that the ordinance violated the freedom of speech clause of the First Amendment.⁶⁷

Primarily, the district court determined that a disclaimer introducing the subject of abortion regulates non-commercial speech, as CPCs provide services for free and based on strongly-held religious beliefs, not for economic gain.⁶⁸ Because the court found that the ordinance regulated speech that was not commercial, it applied the exacting standard of strict scrutiny in its analysis.⁶⁹

In applying strict scrutiny,⁷⁰ the district court then found that the ordinance was not the least restrictive means of preventing misleading CPC advertising and thus was an unconstitutional form of compelled speech.⁷¹ Because the ordinance was only applicable to CPCs, the court found that this “qualification limits the application of the Ordinance

http://www.montgomerycountymd.gov/content/council/pdf/res/2010/20100202_16-1252.pdf; *News Release: Cohen, Herrera Take on S.F. ‘Crisis Pregnancy Centers’ For Deceptive Marketing Tactics*, CITY AND COUNTY OF S.F., CAL. (Aug. 2, 2011), <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=865> (last visited Aug. 25, 2013); *see also* Rosen, *supra* note 5, at 203.

⁶⁵ BALT. CITY, MD., HEALTH CODE §§ 3-501 to -506 (2010).

⁶⁶ O’Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 808 (D. Md. 2011).

⁶⁷ *Id.*

⁶⁸ *Id.* at 813.

⁶⁹ *Id.* at 817.

⁷⁰ Under strict scrutiny, a law must be “narrowly tailored to promote a compelling Government interest” to be constitutional. *Id.* at 812 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000)). This contrasts with the legal standard for regulations compelling pure commercial speech, which need only be “reasonably related to the State’s interest in preventing deception of consumers” to be constitutional. *Id.* at 813 (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339–40 (2010)).

⁷¹ *Id.* at 817.

primarily (if not exclusively) to those with strict moral or religious qualms regarding abortion and birth-control.”⁷² Thus, the court found that the ordinance unconstitutionally discriminated against a particular religious viewpoint.⁷³ The court further ruled that the ordinance inappropriately regulated CPCs in mandating the timing and content of their introductory discussion of abortion and birth control.⁷⁴

The Montgomery County ordinance⁷⁵ was passed in February 2010 (before the district court struck down the Baltimore ordinance), and it is slightly different in scope.⁷⁶ It defines a “Limited Service Pregnancy Resource Center” as an organization or individual whose primary purpose is to provide pregnancy-related services for a fee or for free but does not have licensed medical professionals on staff.⁷⁷ The ordinance then requires that such organizations post signs in their waiting rooms stating: “(1) [T]he Center does not have a licensed medical professional on staff; and (2) the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.”⁷⁸ Centro Tepeyac (a CPC) challenged the ordinance, and again the district court found that it involved compelled non-commercial speech, and thus applied strict scrutiny.⁷⁹ Yet, here the court found that part (1) of the ordinance was constitutional, but that part (2) was not sufficiently narrowly defined to be constitutional.⁸⁰

After the Maryland district court struck down the Baltimore ordinance, New York City passed a disclosure ordinance.⁸¹ Learning from the failures in Maryland, New York City framed its ordinance differently in an attempt to avoid similar First Amendment objections. This ordinance required CPCs to post signage stating whether or not the CPC had licensed medical providers on staff and offered certain medical services.⁸² However, a New York district court overturned the

⁷² *Id.* at 815.

⁷³ *Id.*

⁷⁴ *Id.* at 812.

⁷⁵ MONTGOMERY COUNTY, MD., BOARD OF HEALTH RESOLUTION 16-1252 (Feb. 2, 2010), available at http://www.montgomerycountymd.gov/content/council/pdf/res/2010/20100202_16-1252.pdf.

⁷⁶ *Centro Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 458 (D. Md. 2011).

⁷⁷ *Id.* at 459.

⁷⁸ *Id.* (internal quotation marks omitted).

⁷⁹ *Id.* at 460–64.

⁸⁰ *Id.* at 471.

⁸¹ N.Y.C., N.Y., LOCAL LAW 17 (Mar. 16, 2011), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID>.

⁸² The text of the New York City ordinance was as follows: (1) “[T]hat the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider”; (2) whether or not the CPC has “a licensed medical provider on staff who provides or directly supervises the provision of all of the services”; and (3) whether the CPC provides referrals for abortion, emergency contraception,

ordinance, finding again that the ordinance regulated non-commercial speech and applying strict scrutiny.⁸³ The City of New York appealed the case to the Second Circuit Court of Appeals, which has heard the case but has yet to release an opinion.⁸⁴

Both Maryland district court decisions were also appealed, and the Fourth Circuit heard them together in March 2012.⁸⁵ In affirming the district court's decision on the Baltimore City ordinance and overturning the portion of the Montgomery County ordinance upheld by the district court, the Fourth Circuit held that the speech at issue was non-commercial, that the ordinances were subject to strict scrutiny, that the government had not demonstrated a compelling interest, and that the ordinances were not narrowly tailored.⁸⁶ The Fourth Circuit also significantly downplayed the harm posed by CPCs:

[T]he record establishes, at most, only isolated instances of misconduct by pregnancy centers generally Indeed, the record contains no evidence that any woman has been misled into believing that any pregnancy center subject to Ordinance 09-252 was a medical clinic or that a woman in Baltimore delayed seeking medical services because of such a misconception. . . . The City's failure to provide more than speculative evidence of problems at Baltimore's pregnancy centers strongly suggests that the need for regulation of those centers is not as pressing as the City asserts.⁸⁷

This statement reflects both the Court's downplaying of CPC harms and Baltimore City's failure to prove the widespread deceptive practices of CPCs, partly due to the public health community's absence of documentation. The Fourth Circuit granted a rehearing of the case en banc,⁸⁸ and vacated the district court's decision, remanding the case for further proceedings.⁸⁹ While the Fourth Circuit remanded the case on procedural not substantive grounds, its opinion emphasized the lower court's failure to allow the City to fully develop the evidentiary record

and prenatal care. *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197, 201 (S.D.N.Y. 2011).

⁸³ *Id.* at 209.

⁸⁴ *Id.* at 201, *appeal docketed*, No. 11-2735 (2d Cir. argued Sept. 14, 2012).

⁸⁵ See Sarah Forden, *Pregnancy Center Case to Go Before Full Appeals Court*, BLOOMBERG.COM (Aug. 14, 2012, 5:55 PM), <http://www.bloomberg.com/news/2012-08-15/pregnancy-center-case-to-go-before-full-appeals-court.html>.

⁸⁶ See *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539 (4th Cir. 2012); see also *Centro Tepeyac v. Montgomery Cnty.*, 683 F.3d 591 (4th Cir. 2012), *aff'd*, Nos. 11-1314, 11-1336, 2013 WL 3336825 (4th Cir. July 3, 2013) (en banc).

⁸⁷ *Greater Balt.*, 683 F.3d at 556-57.

⁸⁸ *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, No. 11-1111 L, 2012 WL 7855859 (4th Cir. Aug. 15, 2012) (granting rehearing en banc).

⁸⁹ *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, Nos. 11-1111, 11-1185, 2013 WL 3336884 (4th Cir. July 3, 2013) (en banc).

documenting the harms from CPCs.⁹⁰ As this Note discusses, these failures have led to a wild misunderstanding of the widespread standardized deceptive practices of CPCs in the legal community and a flawed conception of how CPCs compare to other similar organizations for the purposes of compelled speech analysis under the First Amendment.

II. THE PREVALENCE OF STATE LAWS MANDATING BIASED PHYSICIAN COUNSELING

An interesting legal analogy can be drawn between the compelled speech mandated by CPC disclosure ordinances and the similar compelled speech targeting abortion providers in many states. One of the legislative effects to flow out of the Supreme Court's landmark decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹¹ and *Gonzales v. Carhart*⁹² was a flood of state legislation designed to regulate abortion through informed consent statutes.⁹³ While advocates on both sides use different terminology, these laws—often titled “Woman’s Right to Know” acts—have come to be known in the public health community as “biased physician counseling laws,” and now exist in some form in thirty-five states⁹⁴ across the country.⁹⁵ I will refer to

⁹⁰ “We refrain today from evaluating the ultimate merits of the Center’s claims, however, focusing instead on the preliminary errors made by the district court as it rushed to summary judgment. Those errors include the court’s denial to the City of essential discovery, its refusal to view in the City’s favor what evidence there is, and its verboten factual findings, many premised on nothing more than its own supposition.” *Id.* at *9.

⁹¹ 505 U.S. 833 (1992) (upholding the constitutional right to abortion established in *Roe v. Wade*, 410 U.S. 113 (1973)).

⁹² 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).

⁹³ See Kaitlin Moredock, Note, “Ensuring So Grave a Choice is Well Informed”: *The Use of Abortion Informed Consent Laws to Promote State Interests in Unborn Life*, 85 NOTRE DAME L. REV. 1973, 1973 (2010).

⁹⁴ ALA. CODE § 26-23A-4 (2013); ALASKA STAT. §§ 18.05.032, 18.16.010, 18.16.060 (2013); ARIZ. REV. STAT. ANN. § 36-2153 (2013); ARK. CODE ANN. §§ 20-16-901 to -904 (2013); CONN. GEN. STAT. § 19a-116 (2013); DEL. CODE ANN. tit. 24, § 1794 (2013); FLA. STAT. § 390.0111(3) (2013); GA. CODE ANN. §§ 31-9A-1 to -4 (2013); IDAHO CODE ANN. §§ 18-604, 18-609 (2013); IND. CODE §§ 16-18-2-69, 16-34-2-1.1 (2013); KAN. STAT. ANN. §§ 65-6709 to -6710 (2013); KY. REV. STAT. ANN. § 311.725 (West 2013); LA. REV. STAT. ANN. § 40:1299.35.6 (2013); MASS. GEN. LAWS ch. 112, § 12S (2013); MICH. COMP. LAWS §§ 333.17014 to .17015 (2013); MINN. STAT. §§ 145.4241 to .4243 (2013); MISS. CODE ANN. §§ 41-41-33, 41-41-35 (2013); MO. REV. STAT. § 188.039 (2013); MONT. CODE ANN. §§ 50-20-104, 50-20-106 (2013); MONT. CODE ANN. §§ 50-20-301 to -304 (2013); NEB. REV. STAT. §§ 28-326 to -327.01 (2013); N.C. GEN. STAT. § 90-21.82 (2013); N.D. CENT. CODE §§ 14-02.1-02 to -03 (2013); OHIO REV. CODE ANN. § 2317.56 (LexisNexis 2013); OKLA. STAT. tit. 63, §§ 1-738.2 to .3 (2013); OKLA. STAT. tit. 63, § 1-738.8 (2013); 18 PA. CONS. STAT. §§ 3205, 3208 (2013); R.I. GEN. LAWS §§ 23-4.7-2, 23-4.7-5 (2013); S.C. CODE ANN. § 44-41-30 (2013); S.C. CODE ANN. § 44-41-340 (2013); S.D. CODIFIED LAWS § 34-23A-10.1 (2013); S.D. CODIFIED LAWS § 34-23A-10.3 (2013); TEX. HEALTH & SAFETY CODE ANN. §§ 171.011 to .016 (West 2013); UTAH CODE ANN. § 76-7-305(2)(a) (LexisNexis 2013); VA. CODE ANN. § 18.2-76 (2013); W. VA. CODE §§ 16-21-1 to -3 (2013); WIS.

these laws as biased physician counseling laws throughout this Note because, as discussed below, they are intended to deter women from seeking abortion and often include medically inaccurate information.⁹⁶

A discussion of these laws is illuminating to the legal analysis of CPC disclosures because they involve nearly identical legal rights yet have resulted in disparate outcomes in the courts. Where compelled speech by CPCs has been universally overturned, courts have given state legislatures great latitude in passing biased physician counseling laws with little concern for the First Amendment rights of the physicians whose speech they compel. Arizona, for example, requires that abortion clinics post conspicuous signs in their waiting rooms stating:

[I]t is unlawful for any person to force a woman to have an abortion and a woman who is being forced to have an abortion has the right to contact any local or state law enforcement or social service agency to receive protection from any actual or threatened physical, emotional or psychological abuse.⁹⁷

Despite this law's striking similarity to the speech mandated by CPC disclosure ordinances, it remains good law. In fact, most biased physician counseling laws go beyond requiring waiting room signage, and dictate the content of the doctor-patient conversation that occurs in the exam room. A closer look at the intent and scope of biased physician counseling laws and the legal challenges against them shows how the courts' analysis of CPC disclosure ordinances is inconsistent with established compelled speech law.

A. *What Are Biased Physician Counseling Laws?*

Biased physician counseling laws compel physicians to provide certain state-dictated information to female patients considering abortion before they can obtain the procedure.⁹⁸ These laws are grounded in the legal tradition of informed consent, which elevates the importance of patient autonomy in medical decision-making by requiring physicians to provide all the medical information needed for a

STAT. § 253.10 (2013); ALASKA ADMIN. CODE tit. 12, § 40.070 (2013); CAL. CODE REGS. tit. 22, § 75040 (2013).

⁹⁵ See *Mandatory Delays and Biased Counseling for Women Seeking Abortions*, CENTER FOR REPROD. RIGHTS (Sept. 30, 2010), <http://reproductiverights.org/en/project/mandatory-delays-and-biased-counseling-for-women-seeking-abortions#chart> (last visited Aug. 25, 2013); *State Governments*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/government-and-you/state-governments> (last visited Aug. 25, 2013).

⁹⁶ See *infra* Part III.A.

⁹⁷ ARIZ. REV. STAT. ANN. § 36-2153(G) (2013).

⁹⁸ See *Mandatory Delays and Biased Counseling for Women Seeking Abortions*, *supra* note 95.

patient to make a fully informed treatment decision that reflects her personal beliefs and priorities.⁹⁹ Proponents of these laws stress that informed decision-making is particularly important in women's choices about preserving unborn life.¹⁰⁰ However, pre-abortion physician counseling laws are referred to as "biased" by organizations like the ACLU and NARAL Pro-Choice America because they are intended to discourage women from seeking the procedure, provide information that is often unnecessary or irrelevant, and may be factually misleading or harmful to the woman's health.¹⁰¹

Biased physician counseling laws generally require abortion providers to inform women about the nature of the procedure and its risks, facts about pregnancy and childbirth as well as their risks, and the probable gestational age of the fetus.¹⁰² The structure and content of these laws varies by state, but there are several themes. Twenty-six states require the state health agency to develop written materials that in ten states must be *given* to women seeking abortion, and in sixteen states must be *offered* to women.¹⁰³ While some states allow remote communication (over the phone or via mail, email, or fax), eleven states require oral, in-person communication between the physician and patient.¹⁰⁴ Nine states have abortion-specific requirements that follow the general principles of informed consent while twenty-six states detail the specific information a woman must receive.¹⁰⁵ Statutes that require specific information include information about the ability of a fetus to feel pain in eleven states, facts about fetal development throughout pregnancy in twenty-five states, and the gestational age of the woman's fetus in thirty-three states.¹⁰⁶ Twenty-four states also require specific

⁹⁹ See Amanda McMurray Roe, Note, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205, 205 (2009).

¹⁰⁰ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 840 (1992).

¹⁰¹ See *Biased Counseling Against Abortion*, AM. CIV. LIBERTIES UNION (Apr. 11, 2001), <http://www.aclu.org/reproductive-freedom/biased-counseling-against-abortion> (last visited Aug. 25, 2013); *Biased Counseling & Mandatory Delays*, NARAL PRO-CHOICE AM., http://www.prochoiceamerica.org/what-is-choice/fast-facts/biased_counseling.html (last visited Aug. 25, 2013).

¹⁰² See Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 6, 7 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.html>.

¹⁰³ See GUTTMACHER INST., COUNSELING AND WAITING PERIODS FOR ABORTION 1 (Sept. 12, 2013) [hereinafter GUTTMACHER REPORT], available at http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

¹⁰⁴ *Id.* Biased physician counseling laws often also include a mandatory waiting period (usually 24 hours) after a woman receives counseling before she can obtain the procedure. For states that require counseling to be in person, a woman is effectively required to make and (depending on insurance coverage) to pay for two trips to her health care provider to receive an abortion. Some of these laws have been struck down, but others have been upheld as not representing an "undue burden" under *Casey*. See *infra* note 124.

¹⁰⁵ GUTTMACHER REPORT, *supra* note 103.

¹⁰⁶ *Id.*

information about the risks of abortion, including the link between abortion and breast cancer,¹⁰⁷ the psychological effects of abortion,¹⁰⁸ and effects on future fertility.¹⁰⁹ Twenty-nine states also require information about the health risks of pregnancy.¹¹⁰

The content of these state-mandated disclosures covers the same categories of information that are commonly found on CPC websites.¹¹¹ This is unsurprising given that twenty states provide referrals to CPCs as part of their state-mandated resources for women seeking abortions.¹¹² Twelve states also provide referral information about ultrasound services, and several states have even begun mandating that women receive ultrasounds before obtaining an abortion.¹¹³ Some states have gone beyond compelling physicians to provide medical facts and include information about social and legal resources in their compelled speech statutes.¹¹⁴ This information may include statements: that the father is liable for child support; that state medical assistance may be available for prenatal, childbirth, and postnatal care; and that adoption alternatives are available and adoptive parents may pay for care during pregnancy.¹¹⁵ As with CPCs, the vulnerable state of women receiving the information and the context of the discussion can cause the requirements to becoming misleading, as women may be left thinking that abortion is more dangerous than it is, that state-endorsed ideology is supported by medical facts, and that state resources will prevent the hardships of childbirth.

B. *Public Health Concerns Raised by Biased Physician Counseling Laws*

Biased physician counseling laws create public health problems for women seeking reproductive care while simultaneously imposing

¹⁰⁷ Six states, five of which include inaccurate information. *Id.*

¹⁰⁸ Twenty states, eight of which only describe negative responses. *Id.*

¹⁰⁹ Eighteen states, five of which include inaccurate information. *Id.*; Richardson & Nash, *supra* note 102, at 8.

¹¹⁰ GUTTMACHER REPORT, *supra* note 103, at 1.

¹¹¹ See *supra* Part I.B.ii.

¹¹² Richardson & Nash, *supra* note 102, at 8.

¹¹³ See Moredock, *supra* note 93, at 1985–86 (“[S]tates have recently begun including laws requiring an ultrasound or providing the option of viewing the ultrasound of the fetus. Though such information can be considered biological or medical, it does not directly pertain to the health of the *woman*; rather, the physician is disseminating information pertaining to the biological and medical status of the *fetus*.”). These laws, which have come to be known as “trans-vaginal ultrasound laws” represent another burdensome state restriction on the abortion procedure but are outside the scope of this Note.

¹¹⁴ *Id.* at 1986.

¹¹⁵ See, e.g., GA. CODE ANN. §§ 31-9A-3 to -4 (2013); KAN. STAT. ANN. §§ 65-6709 to -6710 (2013); LA. REV. STAT. ANN. § 40:1299.35.6 (2013).

cumbersome compelled speech requirements on abortion providers.¹¹⁶ These laws delay women in obtaining abortions by necessitating multiple trips to their abortion provider,¹¹⁷ and also force women to receive information that is often inaccurate and incomplete and, at best, biased and misleading.¹¹⁸ Overall, these laws inundate pregnant women with information in an attempt to deter them from choosing abortion.¹¹⁹ Thus, biased physician counseling laws create the same public health problems as the inaccurate and misleading information disseminated by CPCs, with the increased concern that this information is distributed by medical professionals in a medical setting.

Additionally, although supporters of these laws justify their compelled speech under the umbrella of informed consent, biased physician counseling laws actually subvert the physician-patient relationship.¹²⁰ The American Medical Association has long opposed legislative measures that require “procedure-specific” informed consent, as such laws go beyond providing medical information and allow the state to influence individuals’ medical decisions.¹²¹ The Center for Reproductive Rights, a leading legal advocacy organization dedicated to reproductive rights, states that “[t]his insertion of the state into the communications between physician and patient intrudes on a woman’s autonomy and dignity; interferes with the physician’s professional practice; and corrupts the informed consent process.”¹²² Physicians themselves often do not agree with the information they are forced to provide and express concern that these laws inappropriately inject moral considerations into the medical setting.¹²³

¹¹⁶ See *Biased Counseling Against Abortion*, *supra* note 101.

¹¹⁷ See GUTTMACHER REPORT, *supra* note 103.

¹¹⁸ *Id.*

¹¹⁹ See *Roe*, *supra* note 99, at 210–11 (“[T]he goal is not always to provide comprehensive and objective knowledge. On the contrary, these statutes are transparently in place to deter women, if at all possible, from choosing abortion. Abortion informed consent statutes require disclosure of specific risks in a way that is unlike the risk disclosure required for any other medical procedure. Most problematically, some of these enumerated risks have little or no scientific basis. . . . some of the abortion statutes have crossed the line differentiating permissible and impermissible uses of informed consent.” (internal footnotes omitted)).

¹²⁰ See Richardson & Nash, *supra* note 102, at 7.

¹²¹ *Id.*

¹²² *Mandatory Delays and Biased Counseling for Women Seeking Abortions*, *supra* note 95.

¹²³ See Susan Lund, Comment, *Crisis Pregnancy Centers Should be Regulated by Consumer Protection Statutes in Wisconsin*, 27 WIS. J.L. GENDER & SOC’Y 37, 47 (2012); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 959 (discussing that South Dakota’s biased physician counseling law “does not regulate professional speech, but instead mandates that physicians affirm ideological truths to which they might well object”).

C. *Litigation Surrounding Biased Physician Counseling Laws*

Every abortion provider and every woman seeking an abortion in a state with a biased physician counseling law is affected by the law, so it is unsurprising that these laws have engendered a great deal of litigation. The watershed case of *Planned Parenthood v. Casey* is best known for upholding the constitutional right to have an abortion established in *Roe v. Wade*, but the statute at issue in *Casey*, upheld by the Court, was an informed consent statute requiring physicians to provide women seeking abortion with certain disclaimers.¹²⁴ *Casey* thus opened the door for increasingly expansive state informed consent statutes,¹²⁵ establishing that the government may require physicians to provide information about the abortion procedure that is “truthful” and “nonmisleading.”¹²⁶

Interestingly, the *Casey* decision only devoted two sentences to the physicians’ First Amendment free speech rights implicated by the informed consent statute:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.¹²⁷

This minimal concern for free speech rights has been mirrored in the cases since *Casey*, where the overall trend has been to uphold compelled speech requirements for physicians, generally deferring to the

¹²⁴ 505 U.S. 833, 833–34 (1992). In *Casey*, the Supreme Court did away with *Roe*’s “rigid trimester framework” in favor of an “undue burden” standard for evaluating state abortion restrictions before viability. Thus, *Casey* relaxed the standard for state abortion restrictions, making only laws that created an “undue burden” on women seeking abortion unconstitutional. The Court defined undue burden as follows: “An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 837.

¹²⁵ See Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 252 (2009) (“*Casey* marks a turning point where abortion law explicitly began treating women as decision-makers less capable than other competent adults. It permitted the State to impose biased information when women are choosing to reject the traditional role of motherhood.”). But see Mark L. Rienzi, *An Abortion Exception to the First Amendment? Evaluating Recent Efforts to Regulate Speech About Pregnancy Options*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 111, 111 (2010) (arguing that “*Casey* [did not] establish an abortion exception to the First Amendment, giving governments greater power to regulate speech about abortion than other topics”).

¹²⁶ *Casey*, 505 U.S. at 838; see also *Roe*, *supra* note 99, at 214.

¹²⁷ *Casey*, 505 U.S. at 884 (internal citations omitted).

legislature's determination of what constitutes scientific facts and thus gutting the requirement that disclaimers be non-misleading.¹²⁸ While the lower court in *Casey* treated physician counseling of patients seeking abortion as commercial speech (evidently due to a concession by the plaintiffs),¹²⁹ the commercial/non-commercial speech distinction has remained largely unexplored in the subsequent cases examining biased physician counseling laws.

In fact, litigation of these laws has most often focused on elements of the laws unrelated to compelled speech; for example, requiring disclosures in person versus over the phone,¹³⁰ mandating waiting periods,¹³¹ and compelling use of state-prepared materials versus allowing use of physician-prepared materials.¹³² State courts have come out on both sides of these issues, but they have largely upheld the state's general ability to compel physicians to communicate state-dictated information about the abortion procedure and its risks along with the gestational age of the fetus.¹³³ For example, in upholding the constitutionality of Kentucky's compelled speech provisions, the Kentucky district court emphasized that the statute requires that

¹²⁸ See *Roe*, *supra* note 99, at 218.

¹²⁹ *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 705 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992) ("This case involves commercial speech, and the clinics do not dispute this point.").

¹³⁰ See, e.g., *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 195 (Ariz. Ct. App. 2011) (holding the Arizona law's in person counseling requirement constitutional); *Clinic for Women, Inc., v. Brizzi*, 837 N.E.2d 973, 981 (Ind. 2005) (holding the Indiana law's in person requirement, which in effect requires two office visits, constitutional).

¹³¹ See, e.g., *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) (lifting a previous injunction and holding Ohio's mandatory delay provision constitutional).

¹³² See, e.g., *Karlin v. Foust*, 188 F.3d 446, 492 (7th Cir. 1999) (construing Wisconsin's law to allow each physician to determine the content of the information that needs to be disclosed); *Northland Family Planning Clinic, Inc. v. Granholm*, No. 01-CV-70549 (E.D. Mich. Apr. 12, 2001) (order approving a settlement agreement regarding Michigan law that, among other things, removes the law's requirement that all abortion literature be state-produced, allowing physicians to use other appropriate documents when state-prepared materials are not available).

¹³³ See, e.g., *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 531-34 (8th Cir. 1994) (upholding constitutionality of North Dakota's provisions requiring abortion providers to inform women seeking abortion of the medical risks of abortion, the probable gestational age of the fetus, and the medical risks of pregnancy); *Hodgson v. Lawson*, 542 F.2d 1350, 1355-56 (8th Cir. 1976) (upholding constitutionality of Minnesota's provision preventing a woman from obtaining an abortion unless a physician has provided a full explanation of "the procedure and its effect" because "the particularly stressful nature of the decision to abort distinguishes it sufficiently from other medical decisions to justify additional state regulation"); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 460 (W.D. Ky. 2000) (upholding constitutionality of Kentucky's provision that physicians provide women seeking abortion with state-published printed materials regarding the abortion procedure and its risks); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1149-50 (D.R.I. 1982) (upholding constitutionality of Rhode Island's provision requiring that a woman be informed of the nature of an abortion and the gestational age of the fetus before she obtains an abortion).

materials be “objective and nonjudgmental, and shall include only accurate scientific information.”¹³⁴

However, in-depth First Amendment analysis in these decisions has been scarce. When discussing Kentucky physicians’ First Amendment rights, the court stated that though the legislature passed the law to further the state’s preference for childbirth over abortion, the court did not consider the state materials to be compelled ideological speech, as the information does not compel women to make the choice favored by the legislature.¹³⁵ Some states, like North Dakota, have also upheld compelled speech requirements mandating that physicians inform women that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, and that the father is liable to provide child support.¹³⁶ In its decision about the North Dakota law, the Eighth Circuit did not mention the First Amendment, but noted that physicians could disassociate themselves from these statements,¹³⁷ seeming to indicate that this would alleviate concerns about compelled speech. The language in these decisions, common in state court decisions of compelled physician speech laws, appears to conflate First Amendment analysis with *Casey*’s undue burden standard at the expense of physicians’ free speech rights.¹³⁸ By focusing only on whether or not women’s compelled listening to these statements creates an undue burden under *Casey*, the courts fail to consider the equally important question of whether or not the compelled speech required by physicians violates their First Amendment rights.¹³⁹

Where courts have struck down compelled speech provisions, litigation has focused on specific information communicated that the court deemed overtly biased.¹⁴⁰ For example, litigation surrounding

¹³⁴ *Eubanks*, 126 F. Supp. at 459.

¹³⁵ *Id.* at 458 n.11.

¹³⁶ *Schafer*, 18 F.3d at 531.

¹³⁷ *Id.* at 534.

¹³⁸ Moredock, *supra* note 93, at 1990.

¹³⁹ For a discussion of the right against compelled listening, see generally Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009).

¹⁴⁰ See, e.g., *J. Scott O. Wright, Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, No. 03-4210-CV-C-SOW (Dec. 1, 2005) (order granting preliminary injunction on Missouri’s law which, among other provisions, requires the woman to receive materials that state that “the life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being”); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 21–22 (Tenn. 2000) (holding unconstitutional the provision of the Tennessee law requiring that physicians disclose (1) the number of weeks elapsed from the probable time of conception and, if more than 24 weeks have elapsed, that the “child” may be viable and the physician has “a legal obligation to take steps to preserve the life” of a viable “child”; (2) that “numerous” public and private agencies and services are available to assist a woman during her pregnancy and after the birth of the child and that her physician will provide her with a list of such agencies and services upon request; and (3) the risks and benefits associated with abortion and with childbirth); *Mandatory Delays and Biased Counseling for Women Seeking Abortion*, *supra* note 95 (noting that in *Planned Parenthood of Missoula v.*

South Dakota's law has focused on the legislature's choice to include particular words and phrases in its state-mandated lecture from physicians, which the courts have argued are biased and/or scientifically incorrect.¹⁴¹ The phrases of concern include: "abortion will terminate the *life* of a *whole, separate, unique, living human being*," "the pregnant woman has an *existing relationship* with that *unborn human being*," and "[t]he probable gestational age of the *unborn child* at the time the abortion is to be performed."¹⁴² The argument is that using phrases like "human being" and "child" to describe the fetus deliberately forces physicians to endorse the ideological beliefs of those who oppose abortion.¹⁴³ The South Dakota district court initially issued a preliminary injunction, finding that the statute violated physicians' First Amendment right to be free from compelled speech, while also expressing concerns about the use of the term "human being."¹⁴⁴ However, the Eighth Circuit sitting en banc set aside the injunction, citing to *Casey* and *Carhart* to justify the state's ability to compel physician speech.¹⁴⁵

Focusing on informed consent and the deferential standard applied to state regulation of medicine, these cases have not discussed in a significant way whether compelled physician speech is commercial or non-commercial.¹⁴⁶ Yet, the Supreme Court held in *Bigelow v. Virginia*¹⁴⁷ that advertisements for abortion providers are commercial speech.¹⁴⁸ This seems to imply that physicians are entitled to fewer First Amendment protections when their speech is state-mandated than when physicians themselves initiate speech. While the commercial speech doctrine seeks to ensure the dissemination of truthful and non-misleading information, the Eighth Circuit declined to critically evaluate the claims of the state-mandated physician disclosure for scientific

State, No. BDV-95-722 (Mont. Dist. Ct. Dec. 29, 1999), the court held, upon agreement of the parties, that the Montana law which, among other provisions, requires that the physician disclose the probable gestational age of the "unborn child," is unconstitutional under the state constitution); *Massachusetts: Biased Counseling & Mandatory Delay*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/massachusetts.html?templateName=template-161602701&issueID=1&ssumID=2642> (last visited Sept. 3, 2013) (noting that in *Planned Parenthood League of Mass., Inc. v. Bellotti*, No. 80-1166-MA (D. Mass. Nov. 4, 1987), the court held unconstitutional the provision of the Massachusetts law requiring a description of the stage of development of the "unborn child").

¹⁴¹ See Post, *supra* note 123, at 956–59.

¹⁴² S.D. CODIFIED LAWS § 34-23A-10.1 (2013) (emphasis added).

¹⁴³ See Post, *supra* note 123, at 956.

¹⁴⁴ *Planned Parenthood Minn. v. Rounds*, 375 F. Supp. 2d 881, 887–88 (D.S.D. 2005), *vacated*, 530 F.3d 724 (8th Cir. 2008) (en banc).

¹⁴⁵ *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (en banc); see generally *Roe*, *supra* note 99, at 218–19.

¹⁴⁶ See Post, *supra* note 123, at 971–76.

¹⁴⁷ 421 U.S. 809 (1975).

¹⁴⁸ *Id.* at 809.

accuracy, instead deferring to the legislature's determinations.¹⁴⁹ Thus, even where the courts have struck down compelled speech requirements in abortion informed consent statutes, the courts have not focused critically on the commercial nature of the doctor-patient relationship nor the First Amendment free speech rights of the physicians involved.

Moreover, the case law surrounding biased physician counseling laws contrasts starkly with the cases involving CPC disclosure ordinances. While biased physician counseling law cases gloss over free speech and jump right to undue burden, in the CPC cases, the courts' reasoning is mostly devoted to first designating CPCs as non-commercial and then finding that the compelled speech involved is unconstitutional under strict scrutiny.¹⁵⁰ This disparate legal treatment suggests that the constitutionality of CPC disclosure ordinances should be reexamined.

III. THE CONSTITUTIONALITY OF DISCLOSURE ORDINANCES

Challenges to the constitutionality of CPC disclosure ordinances have focused on concerns that the laws violate CPCs' First Amendment free speech rights.¹⁵¹ The First Amendment analysis of such a violation proceeds in two parts: (1) are CPCs commercial or non-commercial for the purposes of free speech analysis (dictating which legal standard applies)?; and (2) under the appropriate standard, is the compelled speech mandated by disclosure ordinances constitutional? This Note argues that CPCs should be considered commercial for the purposes of the First Amendment, but even if they are considered non-commercial, the compelled speech mandated by CPCs should be found constitutional.

A. *Crisis Pregnancy Centers Should Be Considered Commercial for the Purposes of the First Amendment*

The designation of CPCs as commercial or non-commercial for the purposes of the First Amendment has critical implications for the courts' analyses and subsequent constitutional determinations of disclosure ordinances. The legal standard for non-commercial free speech is strict scrutiny, which requires that the state demonstrate both

¹⁴⁹ See *Roe*, *supra* note 99, at 219.

¹⁵⁰ See *supra* Part II.C.

¹⁵¹ See, e.g., *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 548 (4th Cir. 2012) (affirming the district court's determination "that the disclaimer required by Ordinance 09-252 is 'a form of compelled speech' that 'alters the course of a [pregnancy] center's communication with a client or prospective client about abortion and birth-control'").

a compelling government interest in regulating the entity at issue and narrow tailoring of the regulation to that interest.¹⁵² Commercial free speech is subject to a lower, intermediate level of scrutiny, which relaxes the government's requisite interest and degree of tailoring.¹⁵³ Because the government's burden under strict scrutiny is much greater, the choice of level often decides the outcome of the case. Thus, it is primarily important to distinguish commercial speech from non-commercial speech.

The Constitution draws no distinction between protections afforded to commercial speech and those given to non-commercial speech, and thus provides no guidance for what distinguishes one kind of speech from another.¹⁵⁴ Generally, the Supreme Court understands commercial speech as providing information relevant to consumer decisions about the nature and cost of goods and services.¹⁵⁵ Many Supreme Court cases addressing commercial speech refer vaguely to "commonsense differences" but do little to clarify the distinction.¹⁵⁶ However, two differences have emerged as relevant: (1) commercial speech is more easily verifiable and fact-based and thus more objective than non-commercial speech; and (2) commercial speech is motivated by economic self-interest and so is less susceptible to harm from restrictive regulation.¹⁵⁷ While instructive, these distinctions do not always control a court's decision of which standard applies, leading to the courts' murky and often inconsistent application of the commercial speech doctrine.¹⁵⁸ Moreover, in designating CPCs as non-commercial for the purposes of free speech, courts have disregarded many valid arguments for why CPCs are commercial.¹⁵⁹

¹⁵² See *supra* note 70.

¹⁵³ See *infra* notes 165–71 and accompanying text.

¹⁵⁴ See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990).

¹⁵⁵ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340 (2010); *United States v. United Foods, Inc.*, 533 U.S. 405, 409–10 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion).

¹⁵⁶ Kozinski & Banner, *supra* note 154, at 634 & n.37 ("In our experience, the more frequently common sense is invoked to support a proposition, the less likely it is to reflect common sense.").

¹⁵⁷ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 n.6 (1980).

¹⁵⁸ See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007).

¹⁵⁹ See Brief for Law Professors as Amici Curiae Supporting Appellants and Reversal at 5–14, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539 (4th Cir. 2012) (No. 11-1111), 2012 WL 3867234 [hereinafter Law Professors Amicus Brief].

1. The Commercial Speech Doctrine

The so-called commercial speech doctrine emerged from the Supreme Court's assertion in *Bolger v. Youngs Drug Products Corporation*¹⁶⁰ that "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression."¹⁶¹ The justification for this difference lies in the informational function of advertising and the government's accompanying interest in protecting the public from misleading and unlawful communications.¹⁶² Moreover, there is a "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."¹⁶³ While the Supreme Court promotes the free flow of information to consumers when it communicates factual information about goods and services, the Court makes it clear that misleading speech is not entitled to First Amendment protection.¹⁶⁴

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,¹⁶⁵ the Supreme Court established a four-part test for determining the constitutionality of state regulations of commercial speech, designating intermediate scrutiny as the Court's level of scrutiny in commercial speech cases. A court must consider: (1) whether the communication is lawful and not misleading; (2) whether there is a substantial government interest; (3) whether the regulation directly advances the government's asserted interest; and (4) whether the regulation is the least restrictive means of advancing that interest.¹⁶⁶ Under this standard, the Court has upheld numerous disclosure laws designed to prevent deception and inform consumers.¹⁶⁷

¹⁶⁰ 463 U.S. 60 (1983).

¹⁶¹ *Id.* at 64–65. For a discussion of the *Bolger* test as applied to CPCs, see Kathryn E. Gilbert, Note, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 MICH. L. REV. 591 (2013).

¹⁶² *Central Hudson*, 447 U.S. at 563–64 ("The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." (internal citations omitted)).

¹⁶³ *Id.* at 562.

¹⁶⁴ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *id.* at 771 n.24 ("[T]he greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.").

¹⁶⁵ 447 U.S. 557 (1980).

¹⁶⁶ *Id.* at 564.

¹⁶⁷ See, e.g., *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985) (upholding a requirement that advertisements for legal services disclose if fee percentages are calculated before or after the deduction of court expenses).

The Court's use of the commercial speech doctrine has, over the years, moved beyond simple commercial advertisements into other communications flowing out of commercial activities.¹⁶⁸ The Supreme Court has treated otherwise non-commercial speech providing general educational information as commercial where it accompanies promotion of goods and services.¹⁶⁹ Additionally, communications about products or services tied to current public debates are still commercial, as the state maintains regulatory power over all statements made "in the context of commercial transactions."¹⁷⁰ The Tenth Circuit noted that while messages can contain both commercial and non-commercial components, where the non-commercial component involves religious ideas, "the bare fact that the subject message contains a 'theological' component is insufficient to transform it into noncommercial speech."¹⁷¹ Thus, the commercial speech doctrine does not only apply to *purely* commercial activities.¹⁷²

Some have argued that the expansion of the commercial speech doctrine is unwise and such speech should be treated like political and expressive speech.¹⁷³ However, this doctrine is a crucial tool in consumer protection legislation because it allows the government to regulate communications for their truth, thus preventing consumers from being misled or deceived.¹⁷⁴ The question of whether a company may lie to its consumers is still being considered by the courts,¹⁷⁵ but while the existence of such a constitutional right to lie is controversial, the government has a legally established interest in preventing

¹⁶⁸ See Law Professors Amicus Brief, *supra* note 159, at 7–8.

¹⁶⁹ See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983) (holding that advertisements for contraceptives are commercial speech because they promote products as well as provide information on preventing sexually transmitted diseases). In *Bolger*, the Court established that even speech that does not involve commercial transactions can still qualify as commercial speech. See Gilbert, *supra* note 161, at 598.

¹⁷⁰ See *Central Hudson*, 447 U.S. at 562 n.5.

¹⁷¹ *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1275 (10th Cir. 2000).

¹⁷² The Court in *Bolger* articulated several factors guiding identification of commercial speech, including, if the speech was an advertisement, if the speech referred to a specific product, if the speaker had an economic motivation, and if the speech was associated with important public issues. See Gilbert, *supra* note 161, at 604.

¹⁷³ See, e.g., Deborah J. La Fetra, *Kick It Up A Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004); Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383 (2005).

¹⁷⁴ See Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 368 (2006).

¹⁷⁵ See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 123 S. Ct. 817 (2003), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003). The California Supreme Court found that Nike's speech was commercial but remanded for a determination of whether the speech was false or misleading. *Id.* at 262.

untruthful and misleading information from unduly influencing the choices of consumers.¹⁷⁶

2. Distinguishing Commercial from Non-Commercial Speech in Similar Areas of the Law

In determining whether or not CPCs are commercial for the purposes of the First Amendment, it is instructive to consider the defining qualities they do or do not share with other commercial entities.

The regulation of speech by medical entities serves as a useful comparison to CPCs. Courts here have found that affiliation with medical services does not preclude an entity from being considered commercial.¹⁷⁷ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁷⁸ the Supreme Court applied commercial speech analysis to a statute barring pharmacists from advertising prescription drug prices, emphasizing the importance of the free flow of information in the medical setting.¹⁷⁹ Additionally, in *Bolger*, the Court analyzed condom advertisements containing information about sexual health as commercial speech.¹⁸⁰ As discussed above, the Supreme Court has held that advertisements for abortion providers are commercial speech,¹⁸¹ emphasizing that reproductive services involve commercial transactions. Similarly, the Illinois Supreme Court found that an ophthalmologist who used a telemarketing firm to telephone patients to offer them free eye examinations and free transportation to his clinic—in violation of a state statute prohibiting professional patronage—properly involved commercial speech.¹⁸² The court found that the physician's purpose was to induce persons to visit his clinic where he would persuade them to undergo expensive eye surgery and that such solicitation "is not conducive to informed and reliable decisionmaking."¹⁸³ Thus, commercial speech cases involving dissemination of medical information emphasize both consumer protection and proper, non-misleading informed consent of patients.

Organizations that share CPCs' tax designation of not-for-profit may also be comparable. While many organizations considered

¹⁷⁶ See Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for A Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 153 (2005).

¹⁷⁷ See, e.g., *Desnick v. Dep't of Prof'l Regulation*, 665 N.E.2d 1346 (Ill. 1996).

¹⁷⁸ 425 U.S. 748 (1976).

¹⁷⁹ *Id.* at 764.

¹⁸⁰ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 60 (1983).

¹⁸¹ *Bigelow v. Virginia*, 421 U.S. 809, 809 (1975).

¹⁸² *Desnick*, 665 N.E.2d at 1352.

¹⁸³ *Id.* at 1354.

commercial for the purposes of free speech are for-profits, this is not a defining quality.¹⁸⁴ Courts have repeatedly held that non-profits engaged in speech about the nature of goods and services are regulated by the commercial speech doctrine.¹⁸⁵ In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*,¹⁸⁶ the Supreme Court found that a law prohibiting a non-profit organization from promoting a benefit called the “Gay Olympic Games,” as it misleadingly used the word “Olympic,” properly regulated commercial speech.¹⁸⁷ State and district courts have reached similar results, applying the commercial speech doctrine to a range of organizations, including a non-profit providing information about different Medicare supplement insurance plans,¹⁸⁸ a non-profit trade organization for painters that was writing disparaging articles about an internship matching service,¹⁸⁹ and a non-profit egg industry trade association using a misleading public relations campaign to promote the nutritional benefits of eating eggs.¹⁹⁰ In the last case, the Seventh Circuit reasoned that the trade association’s speech was commercial because it communicated information intended to be purely factual but that misled consumers by “categorically and falsely den[ying] the existence of evidence that in fact exists and w[as] made for the purpose of persuading the people who read them to buy eggs.”¹⁹¹ Thus, even non-profits acting to further their missions can engage in commercial speech, showing that an organization does not need to be motivated by making money to be commercial.

3. The Courts’ Failure to Appropriately Apply the Commercial Speech Doctrine to Disclosure Ordinances

In light of this history of the commercial speech doctrine, it is curious that courts have not found that CPC disclosure ordinances regulate commercial speech, and that courts analyzing biased physician counseling laws have failed to address the commercial/non-commercial

¹⁸⁴ See Law Professors Amicus Brief, *supra* note 159, at 8.

¹⁸⁵ *Id.*

¹⁸⁶ 483 U.S. 522 (1987).

¹⁸⁷ See *id.* at 535.

¹⁸⁸ Nat’l Fed’n of Retired Persons v. Ins. Comm’r, 838 P.2d 680, 686 (Wash. 1992) (en banc).

¹⁸⁹ Nat’l Servs. Grp., Inc. v. Painting & Decorating Contractors of Am., Inc., No. SACV06-563CJC(ANX), 2006 WL 2035465, at *4 (C.D. Cal. July 18, 2006) (finding that the speech at issue does “not fall within what the Supreme Court has characterized as the ‘core’ of commercial speech, or ‘proposals to engage in commercial transactions,’ but rather are statements by a nonprofit trade association discussing services provided by non-member companies. However, the mere fact that a speaker is a nonprofit organization does not preclude its speech from being commercial speech” (internal footnote omitted)).

¹⁹⁰ Nat’l Comm’n on Egg Nutrition v. FTC, 570 F.2d 157, 159 (7th Cir. 1977).

¹⁹¹ *Id.* at 163.

distinction. In determining whether CPCs are commercial, the Maryland district court decisions relied heavily on CPCs' lack of economic interest and spiritual motivation.¹⁹² Similarly, the New York district court, citing extensively to the Maryland decisions, was fixated on CPCs' religious mission and non-profit status.¹⁹³ The Fourth Circuit, while admitting that the provision of free services alone is insufficient to designate an entity as non-commercial, stated that this factor "becomes dispositive" because "there is no indication that the Pregnancy Center is motivated by an economic interest or that it is proposing any commercial transaction."¹⁹⁴ The Fourth Circuit, sitting en banc, held that while the city's commercial speech theory may not ultimately prove meritorious, the district court was too quick to dismiss the city's arguments.¹⁹⁵ Thus, while the tides may be turning, the courts have yet to thoroughly analyze CPCs' commercial qualities.

CPCs may be non-profit entities that do not charge for their services, but they still provide market-based services that women can choose to obtain at a variety of different commercial locations. CPCs profess to provide many reproductive services, including pregnancy tests, ultrasounds, information about STIs, material assistance, and counseling services.¹⁹⁶ Whether or not they charge for these services is irrelevant to the fact that they are in direct competition with other organizations providing the same services, including medical clinics,

¹⁹² See *Centro Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 463–64 (D. Md. 2011) ("In providing these services, there is no indication that Plaintiff is acting out of economic interest. Rather, Plaintiff is allegedly motivated by social concerns."); *O'Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 813–14 (D. Md. 2011) ("The CENTER offers services that have value in the commercial marketplace. However, the offering of free services such as pregnancy tests and sonograms in furtherance of a religious mission fails to equate with engaging in a commercial transaction.").

¹⁹³ See *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011) ("[A]n organization does not propose a 'commercial transaction' simply by offering a good or service that has economic value. . . . Nor do Plaintiffs offer pregnancy-related services in furtherance of their economic interests.").

¹⁹⁴ *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 553 (4th Cir. 2012). The court further stated: "The Pregnancy Center seeks to provide free information about pregnancy, abortion, and birth control as informed by a religious and political belief. This kind of ideologically driven speech has routinely been afforded the highest levels of First Amendment protection, even when accompanied by offers of commercially valuable services." *Id.* at 553–54. The court failed to acknowledge that although the information provided was "informed by a religious and political belief," it was not communicated as such, but rather was presented as scientific fact. *Id.* at 554.

¹⁹⁵ *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, Nos. 11-1111, 11-1185, 2013 WL 3336884, at *13 (4th Cir. July 3, 2013) (en banc).

¹⁹⁶ See, e.g., *Pregnant?*, MIDTOWN PREGNANCY SUPPORT CENTER, <http://mpsc.org/services> (last visited Aug. 25, 2013); *Services Provided . . .*, CARE NET PREGNANCY CENTER OF CENT. NEW YORK, <http://www.carenetcares.com/services> (last visited Aug. 25, 2013).

Planned Parenthood locations,¹⁹⁷ and counseling centers.¹⁹⁸ Some reproductive service providers charge for their services and some do not, but all—including CPCs—are engaged in commercial activity by providing physical and mental health services to pregnant women. Because CPCs provide services for free in a marketplace where other providers generally charge fees, CPCs may even have a heightened ability to influence consumers' decisions.¹⁹⁹ Thus, much like the non-profit cases discussed above, CPCs are providing services in the commercial setting in furtherance of their mission. The only difference here is that their mission is religious.

Moreover, CPCs implicitly recognize their commercial involvement in medical care by targeting their advertising to pregnant women seeking assistance. Importantly, CPCs do not advertise themselves as “spiritual guidance centers” or “Christian pregnancy alternatives” but instead explicitly claim to provide confidential, accurate medical information about *all* of a woman's options when facing an unplanned pregnancy.²⁰⁰ Disclosure ordinances say nothing about the religious messages or misleading statements communicated at CPCs, nor do they take sides in the public abortion debate; rather, they only require a factual statement about the services that CPCs do *not* provide.²⁰¹ The Supreme Court of North Dakota, in finding that a CPC's advertisements were commercial speech, stated the following:

[T]he Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas. The Help Clinic [sic] advertisements offer medical and advisory services in addition to financial assistance. In effect, the Help Clinic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute *classic examples of commercial speech*.²⁰²

Thus, at minimum one court has acknowledged that CPCs, at least in their attempts to advertise their services, are engaged in commercial activities.

What can easily become lost in this analysis is the nature of the requirements mandated by disclosure ordinances. These ordinances

¹⁹⁷ Courts have previously found Planned Parenthood to be engaged in commercial speech. *See, e.g.,* Planned Parenthood Comm. of Phx., Inc. v. Maricopa Cnty., 375 P.2d 719, 727–28 (Ariz. 1962) (en banc).

¹⁹⁸ *See* NARAL CPC Report, *supra* note 3, at 3.

¹⁹⁹ *See* Law Professors Amicus Brief, *supra* note 159, at 10.

²⁰⁰ *See, e.g.,* PREGNANCY CARE CENTER, <http://www.care4mybody.com> (last visited Aug. 25, 2013).

²⁰¹ *See* Law Professors Amicus Brief, *supra* note 159, at 10.

²⁰² Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 181 (N.D. 1986) (emphasis added).

only require that CPCs be honest and upfront about the services they *do not* provide to prevent consumer deception: a factual, bias-free statement “that the center does not provide or make referral for abortion or birth-control services.”²⁰³ This statement is extremely relevant to the commercial nature of CPC activities and does not involve any non-commercial opinion about the morality of abortion.²⁰⁴ Additionally, this is not a case where commercial speech is “inextricably intertwined with otherwise fully protected speech,”²⁰⁵ as the disclosure ordinances do not prevent CPCs from engaging in ideological speech, nor do they dictate the form or content of discussions that occur inside patient rooms.

The courts analyzing CPC disclosure ordinances have put too much emphasis on the difference between ideologically-driven and economically-driven speech. The commercial speech jurisprudence does not suggest that only economically-driven speech can be considered commercial. Indeed, speech can remain commercial even when the goal of advertising is simply to spread a message and educate people.²⁰⁶ The motivations for speech, particularly by non-profit organizations, cannot be so neatly divided into economic and non-economic. As non-profits by definition cannot legally make a profit, the notion that some speech in which they engage is commercial and some is non-commercial makes little logical sense. Disclosure ordinances only dictate that where CPCs are involved in the marketplace of reproductive services, even as non-profit entities, they must provide bare-bones disclosures about their services to help pregnant women make informed choices about where to obtain medical assistance and to prevent consumer deception. For these reasons, CPC speech should be deemed commercial.

B. *Is the Compelled Speech Mandated by Disclosure Ordinances Constitutional?*

Whether or not CPC disclosure ordinances are constitutional depends primarily on if CPC speech is considered commercial or non-commercial for the purposes of the First Amendment. As discussed

²⁰³ BALT. CITY, MD., HEALTH CODE § 3-502 (2010).

²⁰⁴ See Law Professors Amicus Brief, *supra* note 159, at 11 (“There is a distinct difference between the offer to tell a fortune (‘I’ll tell your fortune for twenty dollars.’), which is commercial speech, and the actual telling of the fortune (‘I see in your future . . .’), which is not.” (internal quotation marks omitted) (citing *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998))).

²⁰⁵ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); see also *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that advertisements soliciting funds did not involve commercial speech).

²⁰⁶ See *Native Am. Arts, Inc. v. Earth Dweller, Ltd.*, No. 01-C-2370, 2001 WL 910394, at *4-5 (N.D. Ill. Aug. 10, 2001).

above, this Note argues that CPC speech is commercial. However, for the sake of argument, this Note will assess the constitutionality of CPC disclosure ordinances under both the commercial standard and the non-commercial standard for free speech. Regardless of the standard employed, these ordinances should be found constitutional.

1. The Compelled Speech Mandated by Crisis Pregnancy Center Disclosure Ordinances Is Constitutional Under the Standard for Commercial Speech

CPC disclosure ordinances easily meet the deferential standard for restrictions on commercial speech articulated by the Supreme Court. The Court affirmed that the intermediate scrutiny of *Central Hudson* applies to compelled disclosure requirements designed to prevent misleading commercial speech in *Zauderer v. Officer of Disciplinary Counsel of Supreme Court of Ohio*,²⁰⁷ and more recently in *Milavetz, Gallop & Milavetz, P.A. v. United States*.²⁰⁸ Under *Zauderer*, a state law concerning purely factual commercial disclosure need only be “reasonably related to the State’s interest in preventing deception of consumers.”²⁰⁹ These cases further emphasize that a deferential standard for disclosure laws is necessary because such laws promote more speech instead of less, enhance the value of commercial speech rather than diminish it, and avoid burdensome or overly broad requirements by only mandating disclosure of purely factual information.²¹⁰ Because disclosure ordinances represent a substantial government interest in protecting pregnant women, are reasonably related to that interest, and use minimally restrictive means to advance that interest, they are a constitutional form of compelled commercial speech.²¹¹

²⁰⁷ 471 U.S. 626 (1985). For an argument that under *Zauderer* courts should apply rational basis review to compelled factual commercial disclosures where the disclosure serves the state’s interest in an informed public and the disclosure informs the audience instead of spreading the government’s message, see Jennifer M. Keighley, *Can you Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539 (2012).

²⁰⁸ 130 S. Ct. 1324 (2010).

²⁰⁹ *Zauderer*, 471 U.S. at 651. The Fourth Circuit en banc opinion regarding the Maryland disclosure ordinances further distinguishes the review it applies to different kinds of commercial speech: the court stated that disclosure requirements aimed at misleading commercial speech need only survive rational basis review under *Zauderer*, while restrictions on non-misleading commercial speech must survive intermediate scrutiny under *Central Hudson*. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, Nos. 11-1111, 11-1185, 2013 WL 3336884, at *12 & n.8 (4th Cir. July 3, 2013) (en banc). Because an ordinance passing intermediate scrutiny will by definition also pass rational basis review, in viewing CPC speech as commercial, I only review CPC ordinances under intermediate scrutiny.

²¹⁰ See Law Professors Amicus Brief, *supra* note 159, at 15.

²¹¹ See *supra* note 166 and accompanying text.

Primarily, disclosure ordinances represent a substantial government interest in preventing deception of women seeking reproductive health services who mistakenly visit a CPC. The Supreme Court has recognized a legitimate government role in consumer protection where concern of deception is “self evident” or where there is a pattern of misleading conduct.²¹² *Milavetz* established that localities have a low evidentiary bar, and need only show that the likelihood of deception is “hardly speculative.”²¹³ This Note has demonstrated that while comprehensive data is lacking, the harm from CPCs is far from speculative; CPCs are engaged in widespread deceptive and misleading practices that may be leading to significant harm to women’s reproductive health.²¹⁴ The government’s interest in protecting vulnerable pregnant women from the health concerns associated with CPCs is thus rooted in the government’s well-established role in consumer protection. In *Zauderer* and *Milavetz*, the Court upheld similar consumer protection legislation designed to protect consumers from predatory practices by bankruptcy professionals and attorneys.²¹⁵ As discussed above, the government’s role in consumer protection to ensure the accurate provision of medical information and care is also well established.²¹⁶ Similarly, CPC disclosure ordinances do no more than mandate the disclosure of simple, factual, information for the purpose of preventing consumer confusion and deception.

CPC disclosure ordinances are also reasonably related to the government interest in preventing CPCs from deceiving women, using minimally restrictive means to advance that interest. Disclosure ordinances are in fact very narrowly drawn, requiring only waiting room disclaimers about the specific threshold issue leading to consumer deception: the misconception that CPCs are traditional health clinics that provide abortions and/or have medical professionals on staff.²¹⁷ Significantly, disclosure ordinances do not require that CPCs provide accurate medical information to their patients and do not dictate the form or content of the discussions that occur inside CPCs. Nor do disclosure ordinances regulate CPC advertising, which many believe would be a more efficient way of preventing consumer deception.²¹⁸ As Justice Thomas noted in *Milavetz*, “I acknowledge this Court’s longstanding assumption that a consumer-fraud regulation that compels the disclosure of certain factual information in advertisements

²¹² See *Zauderer*, 471 U.S. at 653–54.

²¹³ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340 (2010).

²¹⁴ See *supra* Part I.B.

²¹⁵ See *Milavetz*, 130 S. Ct. at 1330; *Zauderer*, 471 U.S. at 663.

²¹⁶ See *supra* Part III.A.2.

²¹⁷ See Law Professors Amicus Brief, *supra* note 159, at 19.

²¹⁸ See generally Daniel J. Faria, *Advertising for Life: CPC Posting Laws and the Case of Baltimore City Ordinance 09-252*, 45 COLUM. J.L. & SOC. PROBS. 379 (2012).

may intrude less significantly on First Amendment interests than an outright prohibition on all advertisements that have the potential to mislead.”²¹⁹

While *Zauderer* does not require that a locality first exhaust all alternative means of accomplishing its goal,²²⁰ disclosure ordinances can hardly be considered cumbersome in light of the state’s options for regulation. Indeed, when compared to biased physician counseling laws, which require physicians to verbally affirm state-mandated disclosures using state-prepared or endorsed visual aids, it is difficult to consider a sign posted in a waiting room unduly burdensome.²²¹ While one could argue that the government’s solution is indirect and debate the strength of the connection between the compelled disclosure and the harm to women, disclosure ordinances are minimally intrusive and should thus easily survive intermediate scrutiny. Disclosure ordinances are thus more analogous to labeling requirements on consumer products than to verbal compelled speech laws.²²² For these reasons, disclosure ordinances are surely a constitutional regulation of commercial speech.

2. The Compelled Speech Mandated by Crisis Pregnancy Center Disclosure Ordinances Is Also Constitutional Under the Standard for Non-Commercial Speech

While CPC disclosure ordinances should properly be found constitutional as commercial speech, they should still survive the heightened standard of strict scrutiny applied to non-commercial speech. To be constitutional, restrictions on non-commercial speech must be “narrowly tailored” and “promote a compelling Government interest.”²²³ The Maryland district court and Fourth Circuit opinions

²¹⁹ *Milavetz*, 130 S. Ct. at 1343 n.1 (Thomas, J., concurring).

²²⁰ See *Zauderer*, 471 U.S. at 651 n.14 (“We reject appellant’s contention that we should subject disclosure requirements to a strict ‘least restrictive means’ analysis under which they must be struck down if there are other means by which the State’s purposes may be served.”).

²²¹ Cf. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (distinguishing a compelled statement that must be uttered each time an employee speaks and thus intertwined with other protected speech from compelled speech communicated through a sign visible in a waiting room).

²²² Compare *Riley*, 487 U.S. at 799 (approving mandatory disclosure of a fundraiser’s professional status to potential donors), and *Nat’l Fed’n of the Blind v. FTC*, 420 F.3d 331, 343 (4th Cir. 2005) (upholding requirement that fundraisers for charities disclose the name of the charity and the purpose of the call), with *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 131–37 (2d Cir. 2009) (upholding mandatory posting of calorie content information on restaurant menus and menu boards), and *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (upholding requirement that pharmacy benefit managers disclose any conflict of interest in their role as middlemen between pharmacies and the pharmaceutical industry).

²²³ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

reflect an overreliance on CPCs' ties to religion and a flawed conception of compelled speech analysis, particularly when compared to cases involving biased physician counseling laws. Thus, even under strict scrutiny, disclosure ordinances should be found constitutional.

Courts' analyses of disclosure ordinances have entirely misconstrued the scope and intent of the laws. In its City of Baltimore decision, the Fourth Circuit stated that the ordinance requires CPCs "to participate in the City's effort to tell pregnant women that abortions are available elsewhere as a morally acceptable alternative, contrary to the moral and religious beliefs of the [CPC]."²²⁴ Not only does this statement indicate that disclosure ordinances somehow impede the religious rights of CPCs, but it also suggests that the ordinance itself is imbued with a moral judgment and state preference for abortion. However, a factual, value-free statement that a facility "does not provide abortions" fails to carry any of these biases. Yet, the Fourth Circuit went further to state that regulations of physician speech are inapplicable to CPCs because restrictions on physicians' right to speech are justified as they are "imposed incidental to the broader governmental regulation of a profession."²²⁵ This seems to suggest that even non-commercial speech, when in the medical context, is somehow entitled to less protection, a proposition that lacks support in First Amendment free speech jurisprudence. Finally, in failing to find a compelling government interest, the Fourth Circuit found only "speculative evidence of problems" at CPCs, reflecting a downplaying of CPCs deceptive practices, and the failure of Baltimore City to prove uniformity of these activities across CPCs.²²⁶ The Fourth Circuit en banc's remand of the case indicates that at least more discovery is necessary before the court can dismiss the harms posed by CPCs.²²⁷ Thus, while the tides may be turning, the courts must be more fastidious in their application of strict scrutiny to CPC disclosures.

Primarily, disclosure ordinances are narrowly tailored. In *Buckley v. Valeo*,²²⁸ the Supreme Court upheld regulations requiring contributors to political campaigns to disclose their names when their contributions exceeded a certain amount, stating that such disclosures "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."²²⁹ Similarly, disclosure ordinances only require that CPCs identify themselves as

²²⁴ Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539, 552 (4th Cir. 2012).

²²⁵ *Id.* at 554.

²²⁶ *Id.* at 556.

²²⁷ See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., Nos. 11-1111, 11-1185, 2013 WL 3336884 (4th Cir. July 3, 2013) (en banc).

²²⁸ 424 U.S. 1 (1976).

²²⁹ *Id.* at 68; see also Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 343 (4th Cir. 2005).

non-medical clinics, narrowly addressing the problem of consumer confusion that CPCs are traditional health clinics. Beyond posting the sign, no affirmative action by the CPC is required. Such regulation was recently supported by the Court in *Citizens United v. Federal Election Commission*:²³⁰ “The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.”²³¹ Disclosure ordinances are thus the least restrictive means of preventing women from being misled about the identity of the CPC: they do not regulate CPC advertising or prevent women from mistakenly making an appointment at a CPC. Only if a woman sees the sign in the CPC waiting room and recognizes its meaning, will the government’s interest be fulfilled. It is hard to imagine a means of advancing the government’s interest that is less restrictive.

Further, the government’s interest in protecting pregnant women against consumer fraud and the health risks that flow out of CPCs’ deceptive practices is undoubtedly compelling.²³² For all of the reasons discussed above, pregnant women visiting CPCs are particularly vulnerable to deception about their options for reproductive care. Even if a woman is able to visit a traditional health clinic after attending a CPC, much damage has already been done. Many states include a mandatory waiting period in their biased physician counseling laws, and some of these provisions have been struck down as creating an undue burden under *Casey* by necessitating two trips to the doctor,²³³ the very same harm created by a visit to a CPC. While the undue burden standard does not apply to CPCs as they are not government actors, it often creeps into justifications of biased physician counseling laws, overriding compelled speech concerns.²³⁴

The comparison to biased physician counseling laws illuminates the flaws in the courts’ assessment of CPCs. The courts allow the religious motivation behind biased physician counseling laws—intended to further the state’s preference for childbirth over abortion²³⁵—yet object to disclosure ordinances as subtly endorsing abortion.²³⁶ In

²³⁰ 558 U.S. 310 (2010).

²³¹ *Id.* at 369.

²³² See, e.g., *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 636 (1980) (stating that a government interest “in protecting the public from fraud, crime and undue annoyance” is substantial).

²³³ See *supra* note 104.

²³⁴ See *Moredock*, *supra* note 93, at 1990.

²³⁵ See *id.*

²³⁶ Additionally, while the Fourth Circuit attempts to distinguish compelled speech in biased physician counseling laws from disclosure ordinances by relying on *Casey* and the state’s power over licensure, the court fails to recognize that physicians engaged in speech about pregnancy options with their patients are not involved in the regulated practice of medicine: the government does not require a license to talk about pregnancy, nor does it require informed consent before such a discussion occurs. See *Rienzi*, *supra* note 125, at 112. Informed consent

Eubanks v. Schmidt,²³⁷ a Kentucky district court stated that “[i]t is possible to convey information about ideologically charged subjects without communicating another’s ideology” and emphasized that the state-mandated information does not “overly trumpet [the State’s] preference” but just provides “information from which a woman might naturally select the choice favored by the legislature.”²³⁸ Yet, when considering a CPC disclosure ordinance, not only have the courts refused to acknowledge the neutrality of the compelled speech involved, but they accuse the disclaimer of conveying a hidden moral message. Apparently, the state can legally express its preference for childbirth over abortion but cannot even require CPCs to state what services they do or do not provide. The analysis is religiously but not legally consistent.

Finally, in viewing CPC disclosure ordinances as comparable to labeling requirements, their neutrality appears even more pronounced. Recent litigation surrounding the new FDA requirements for warnings on cigarette labels emphasizes the distinction between simple fact-based disclosures and more emotionally laden statements, which deserve a higher level of scrutiny by the courts.²³⁹ In 2009, Congress passed a new law requiring that tobacco packaging replace the existing generic Surgeon General’s warning with more disease/symptom-specific warnings accompanied by graphic images illustrating the hazards of smoking.²⁴⁰ Both the Sixth Circuit and the D.C. Circuit applied intermediate scrutiny from *Central Hudson* in cases challenging the law, but while the Sixth Circuit found the compelled speech at issue constitutional,²⁴¹ the D.C. Circuit found the compelled speech unconstitutional and blocked the new warning labels from taking effect.²⁴² In its decision, the D.C. Circuit said that the warnings, when accompanied by graphic images, “go beyond making purely factual and accurate commercial disclosures” and “do not constitute the type of ‘purely factual and uncontroversial’ information, or ‘accurate statement[s],’ to which the *Zauderer* standard may be applied.”²⁴³ Thus, while the existing Surgeon General’s warning was purely factual, the

controls the dissemination of information, not the provision of medical care. See Post, *supra* note 123, at 972.

²³⁷ 126 F. Supp. 2d 451.

²³⁸ *Id.* at 458 n.11.

²³⁹ See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

²⁴⁰ See *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 524. According to the new law, each cigarette package must contain one of nine different warnings and an image illustrating the effect described, e.g. “Smoking during pregnancy can harm your baby” or “Tobacco smoke can harm your children.” 15 U.S.C. § 1333 (2012).

²⁴¹ *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 527.

²⁴² *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1205.

²⁴³ *Id.* at 1212, 1216 (internal citations omitted).

emotional images added something more subjective, arguably demanding more careful analysis by the court.

In this framework, CPC disclosure ordinances mandate speech much more similar to the original Surgeon's General warning, while biased physician counseling laws, which, as discussed above, often involve emotionally charged language and associated images, are more analogous to the new graphic cigarette warnings. Yet strangely, CPC disclosures have been uniformly struck down while biased physician counseling laws have been largely upheld. This discrepancy shows why, even under a heightened level of scrutiny, disclosure ordinances should be constitutional.

IV. PROPOSALS

When the compelled speech litigation surrounding CPC disclosure ordinances is compared to that involving biased physician counseling laws, the disparate treatment by the courts is apparent. Disclosure ordinances do not go beyond stating facts relevant to inform consumer choice. They do not endorse a state preference for any pregnancy choice. They do not even mandate verbal speech requirements. Yet, because they allow the state to take a step towards illuminating the true function of religiously motivated CPCs, courts refuse to afford localities legislative deference and denounce any state attempt to regulate CPCs as infringing on religious freedom. Meanwhile, states are allowed to continue imposing ever more cumbersome requirements on physician speech with minimal interruption by the courts. This Note has demonstrated that the defining qualities of CPCs—non-profits, providing medical services for no charge, and advertising to pregnant women in places where they look for reproductive services—do not justify expansive protection of CPCs' free speech, but rather support quite the opposite. The only meaningful difference between CPC and physician compelled speech is that anti-abortion views in any form, because religiously motivated, are deemed worthy of special legal protections. Free speech jurisprudence, however, does not support such a distinction.

This Note recommends that the courts, when evaluating CPC disclosure ordinances, recognize that discussions of religious freedom are inappropriate in the context of CPCs, especially where they entirely overshadow the government's substantial interest in protecting the public from the harms posed by the inaccurate health information they disseminate. Localities have a compelling interest in protecting consumers from the fraudulent and deceptive practices by CPCs, as they interfere with consumers' ability to access appropriate and timely health

services.²⁴⁴ The Waxman Report,²⁴⁵ the North Carolina study,²⁴⁶ and many anecdotal accounts demonstrate CPCs' widespread dissemination of misinformation and their use of various techniques to confuse their centers with medical clinics. While CPCs may not charge for their services and should be free to openly distribute religious and spiritual counseling about unintended pregnancy, their deceptive techniques intentionally delay and/or prevent women from accessing abortion, contraception, and sexual health services. Additionally, consumers who most often seek care at CPCs are teenage, poorly educated, and/or low income women, and the state has a particularly substantial interest in protecting such vulnerable populations.²⁴⁷ Courts should not be downplaying these widespread harms and should avoid judicial advocacy that serves to further religious ideals in place of the rule of law. The Fourth Circuit's en banc opinion suggests that courts are moving towards more fact intensive analysis of the misleading practices of CPCs, but proper discovery is only the first step in the thorough legal investigation necessary in these cases.

Similarly, courts should not allow *Casey's* undue burden analysis to enter into examinations of compelled physician speech. This Note has demonstrated that courts repeatedly minimize, if not ignore, the First Amendment rights of physicians providing abortions and allow a state interest in choosing pregnancy over abortion to override concerns about limiting physicians' free speech. Even if such a balance is appropriate, courts should more thoroughly examine the implications of compelled speech on the rights of physicians. Additionally, if the state's interest is powerful enough to justify compelled speech by physicians, it is difficult to understand why the state's interest in preventing deception and the resulting health harms from CPCs is inadequate to justify the minimal compelled speech mandated by disclosure ordinances.

Yet, local governments must also be more explicit in demonstrating and articulating the need for these disclosure ordinances. CPCs can appear non-commercial on the surface because they are religiously motivated and provide services for free. However, localities must emphasize that CPCs are engaged in coordinated activities designed to divert consumers away from abortion clinics in defending their disclosure ordinances. Because CPCs position themselves as an alternative form of service for pregnant women, providing some of the same services as medical facilities, they are engaged in commercial activity within the health care industry. Legislators should highlight the fact that CPCs advertise in yellow pages under categories related to

²⁴⁴ See Public Health Advocates Amicus Brief, *supra* note 7, at 26.

²⁴⁵ Waxman Report, *supra* note 23.

²⁴⁶ Bryant & Levi, *supra* note 62.

²⁴⁷ See Finer et al., *supra* note 51, at 338; Rosen, *supra* note 5, at 202.

medical services and pay search engines to have their advertisements appear when consumers enter certain key phrases like “abortion,” “signs of pregnancy,” and “the morning after pill.”²⁴⁸ Thus, CPCs are intentionally advertising themselves where women seeking abortion are likely to search for resources and medical providers. Disclosure ordinances only scratch the surface in battling these harms, so legislators throughout the country should continue to develop new methods to regulate CPCs.

However, a lack of research and systematic data on the deceptive practices of CPCs has prevented courts from recognizing and localities from demonstrating the substantial risks CPCs pose to public health. There is an ongoing need for continued research from the public health community and increased interest from legislators in documenting and battling their harms. Nearly every discussion of the dangers of CPCs references the 2006 Waxman Report, yet this report is now seven years old. For these reasons, the Note recommends that public health professionals and legislators continue to research and raise awareness about the harms of CPCs.

CONCLUSION

While the knowledge base concerning CPC misconduct is limited, it nonetheless establishes that CPCs pose a substantial threat to women’s reproductive health. All women seeking reproductive health services are in need of comprehensive and medically accurate information about their options that is free of religiously charged rhetoric so they can make the best decision for themselves and their families. Moreover, the state has a substantial interest in ensuring that women in vulnerable situations and facing unplanned pregnancies not be misled or manipulated in promotion of an anti-abortion political or religious agenda. While the First Amendment cannot and should not be cast aside in these cases, courts and legislators can strike a balance between protecting the free speech rights of CPCs and regulating them to protect women’s health. Localities must continue to develop innovative legislative techniques to regulate CPCs, but disclosure ordinances should be considered a modest constitutional method of preventing deception in reproductive health care.

²⁴⁸ See Public Health Advocates Amicus Brief, *supra* note 7, at 17–19.