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Legal Analysis of the Effects of the Leventhal-Trachtenberg Amendment on the Proposed Regulation to Impose Disclaimer Requirements on Pregnancy Resource Centers in Montgomery County

Councilmembers Leventhal and Trachtenberg have proposed an amendment to a resolution that would impose disclaimer requirements on certain pregnancy resource centers in Montgomery County. Although the amendment's apparent intent is to address the original resolution's legal deficiencies, the regulation of "limited service pregnancy resource centers" ("LSPRCs") would still be subject to challenge in court on several bases even if the proposed amendment is adopted. The amendment fails to correct the original resolution's infringements of the U.S. Constitution's First Amendment and Due Process Clause. Additionally, the resolution would still violate the boundaries of the Board's own limited authority, particularly in light of evidence on the record of any problem with LSPRCs in Montgomery County that requires legislative remediation.

I. The First Amendment's Right to Free Speech

The proposed regulation would violate the First Amendment's protection of free speech. To compel speech burdens free speech. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This principle applies to compelled statements of fact as well as opinion. *Riley v. National Federation of the Blind*, 487 U.S. 781, 798 (1988).

Although the amendment corrects a fatal defect in the original resolution by eliminating its most explicitly viewpoint-based provisions, this regulation is still viewpoint-based and therefore unconstitutional. A viewpoint-based speech restriction occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). The First Amendment prohibits viewpoint-based speech restrictions. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132; see *Carey v. Brown*, 447 U.S. 455, 463 (1980). The rationale need not be spelled out on the face of the regulation; disparate impact may serve as evidence of legislative intent. *Arlington Heights v. Metropolitan Housing Corp.* 429 U.S. 252, 266 (1977).

At first glance the amendment appears to promote a fair and even application of the regulation by expanding the definition of LSPRCs to potentially cover centers that refer clients for abortions. Instead of pro-life versus pro-choice, the key distinction in the new definition is the exclusion of centers that have a licensed medical professional on staff and the inclusion of those that do not. Although this provision is facially neutral regarding a center's viewpoint on abortion, in its application the regulation will still only govern pro-life centers: there are simply no pro-choice pregnancy resource centers that do not employ medical personnel in Montgomery County. By applying to *all* pro-life LSPRCs in the County and *no* LSPRCs that provide or refer for abortions—because they do not exist—the regulation's disparate impact is so "stark" that it may be considered determinative of discriminatory intent. *Id.*

Laws imposing time, place, and manner restrictions on speech that are explicitly motivated by the (alleged) conduct of partisans on a particular side of a debate are typically held to be constitutionally viewpoint- and content-neutral because they apply equally to all speakers regardless of viewpoint and make no reference to the content of the speech, respectively. In contrast, the proposed regulation applies only to pregnancy centers that hold a pro-life viewpoint and proscribes specific speech. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *Hill v. Colorado*, 530 U.S. 703, 719 (2000), *Frisby v. Schultz*, 487 U.S. 474 (1998). Because this regulation does not fall into the few narrow exceptions for permissible viewpoint-based speech restrictions, it is unconstitutional.¹²

Even if this regulation is not held to be viewpoint-based, it imposes compelled speech, which is inherently content-based. Content-based speech restrictions must pass strict scrutiny. *Riley*, 487 U.S. at 782.³ The strict scrutiny standard of review, as applied in its current form to speech restrictions, requires that the regulation burdening free speech must be (i) *narrowly tailored* to serve a (ii) *compelling state interest*. See *Hersh v. United States*, 553 F.3d. 743, 765 (5th Cir.) (2008).

The first prong to apply is the “compelling state interest” test. The preamble to the proposed amendment purports to explain the alleged state interest: it is to prevent clients at LSPRCs from the health risks of failing to seek medical attention for their pregnancies because the centers misled them.

However, the language of the amendment is telling: it states that “[c]lients *could* neglect to take action (such as consulting a doctor)....” (emphasis added). It does not claim that clients *do* neglect to take action, or suffer any of the resulting harms, because there is no reliable evidence that this happens to clients at the LSPRCs to be regulated. Not a single relevant complaint against the pro-life LSPRCs has ever been filed. The record contains no reliable evidence whatsoever to show that there is any need for increased regulation of Montgomery County’s pro-life LSPRCs.

With no evidence to demonstrate any actual or imminent harm, the state interest to be advanced by this regulation cannot be considered compelling. Nor is there any *a priori* reason to equate the pro-life mission with misleading practices. Furthermore, all four centers *already* provide disclaimers stating they are not medical facilities, further diminishing whatever conceivable state interest remains.

The second prong of the test is whether the regulation is narrowly tailored to the state interest. Even if the state interest were somehow compelling, the regulation would burden the free speech

¹ See, e.g. *Chaplinsky v. N.H.*, 315 U.S. 568, 571-572 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”).

² One need not even engage in statutory analysis to see that the proposed resolution is viewpoint-based—simply look at the pattern of similar proposals introduced before legislatures across the country and consider the politically motivated, self-interested lobbying groups behind them.

³ Although *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) might be read to apply a lesser standard of review to speech restrictions imposed in the regulation of the practice of medicine, note that the regulation here explicitly applies only to entities that do *not* practice medicine.

of parties it is not intended to govern – principally, organizations and individuals that have no religious or moral objections to abortion but do not provide or refer for them because their activities do not relate directly to the decision to carry a child to term. If the state interest is to regulate LSPRCs shown to mislead clients, the unintended parties would include all LSPRCs for whom such evidence does not exist (namely, all of them). A regulation that burdens more free speech than is necessary for the achievement of the state interest is not narrowly tailored. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 772 (1994).

Furthermore, the addition of “individuals” to the definition of LSPRCs opens a constitutional can of worms for this resolution. The scope of the original regulation needed to be narrowed to apply only to parties the Board has at least attempted to demonstrate an interest in regulating. Instead, this addition expands the regulation to cover “individual[s]...[that have] a primary purpose to provide pregnancy-related services...[and] do not have a licensed medical professional on staff,” which could conceivably include a pregnant woman’s husband.

II. The Due Process Clause’s Void-for-Vagueness Doctrine

A law violates the Due Process Clause if it is too vague for the average person to understand what conduct is prohibited or if it does not provide explicit standards for who the law applies to. See *Upton v. S.E.C.*, 75 F.3d 92 (2d Cir. 1996), *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

As implied further above, organizations whose services are non-medical and pregnancy-related, yet do not implicate the question of abortion or contraception, would not know whether to observe the letter of law or the common-sense interpretation that they are not meant to be the target of this regulation. In a similar result, centers may in good faith believe themselves to be exempt from the law yet be found liable under it.

Moreover, the concept of an “individual” as a LSPRC is so nebulous that a pregnancy-related business’ non-medical employees, such as receptionists or sales clerks, might be individually subject to this regulation. Nor would any individual who considered him- or herself to be subject to the regulation have any idea how to comply—does he or she *personally* have to post a sign in the waiting room? If the individual’s pregnancy-related services are not performed in a place where a sign could be posted, must he or she carry a sign stating the contents of the disclaimer?

III. Violation of the Board’s Authority

The Montgomery County Charter, Section 101, vests the County Council with the “power to legislate for the peace, good government, health, safety or welfare of the County.” The Maryland Code’s Health-General Article, Section 3-202(d) states that “each county board of health may adopt and enforce rules and regulations on any nuisance or cause of disease in the county.” No doubt conscious of this grant of authority, the proposed amendment aims to “prevent adverse consequences, including disease....”

However, the Board has offered no public testimony or evidence on the record that the health, safety, or welfare of County residents needs protection or that there is any actual or imminent nuisance or disease that this regulation seeks to prevent or correct. As such, the factual findings of the Board are grossly insufficient to bring the LSPRCs within the scope of its regulatory authority.

There are many legal problems with this resolution, but the biggest is that there was never any need for it in the first place: there is *no* legitimate evidence supporting any of the alleged concerns with Montgomery County's pro-life LSPRCs. For these reasons, we believe the proposed regulation should be rejected outright.