

**City Council Bill 09-0406**  
**Statement on Bill: “Limited Service Pregnancy Centers -- Disclaimers”**

Presented to the City of Baltimore

Tuesday, October 26, 2009

By

Jeanneane Maxon, Esquire

General Counsel, Care Net

Biography and credentials available at: <http://www.care-net.org/aboutus/bio.php?id=11>.

This statement is **in opposition to City Council Bill 09-0406**.

Today, you will hear testimony about the thousands of Baltimore citizens—women, men, and children—that have been assisted by pregnancy resource centers during their greatest time of need. You will hear about how pregnancy resource centers provide pregnancy support and have promoted healthy sexual choices in adolescents, parenting classes, and support groups for post-abortive women. Pregnancy centers offer these services at no cost to their clients. These centers also do not take any funding from the City of Baltimore. After today, I am confident you will understand the great work done by pregnancy resource centers in Baltimore and that City Council Bill 406 needlessly and unfairly attacks the integrity of these worthy institutions, which exist merely to help out needy citizens in Baltimore at no cost to the city. I also am confident that you will see the numerous constitutional and legal concerns which could subject the Bill to legal challenge.

**A. Constitutional Violations**

**1. First Amendment Viewpoint Discrimination**

City Council Bill 406 raises clear Constitutional concerns. If successfully challenged in a court of law, the ordinance would result in the unnecessary waste of public resources and funds. The bill would mandate heightened regulation of only those pregnancy centers that do not provide abortions, compelling such centers to deliver a government-crafted message regarding the nature of their services.

Such compelled speech triggers the First Amendment’s strict scrutiny test, under which courts will find a law unconstitutional unless it is narrowly tailored to serve a compelling state interest. The right not to speak includes not only “compelled statements of opinion” but also “compelled statements of ‘fact’”, such that “either form of compulsion burdens free speech.” *Riley v. National Federation of the Blind*, 487 U.S. 781, 798 (1988); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (statute compelling speech held unconstitutional). While licensed organizations can be the subject of regulation, “the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.” *Riley*, 487 U.S. at 791, 799 (1988). In this context, government action restricting speech must meet the highest standard of scrutiny: it must be narrowly tailored to serve a

compelling state interest. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Shelton v. Tucker*, 364 U.S. 479 (1960).

While the City Solicitor has argued that “consumer confusion” satisfies the requirement of a compelling state interest, the City Solicitor failed to address the fact that the bill is not viewpoint neutral. Specifically, the bill regulates only those pregnancy centers and physicians that do “not provide or refer for (A) abortions; or (B) nondirective and comprehensive contraceptive services.” In other words, it would not matter how professional, honest, forthright, and/or legally compliant the pregnancy center or physician is; the bill would still apply only because they hold a pro-life viewpoint. Courts have found that “viewpoint discrimination” is an egregious form of content discrimination and that the government must, accordingly, abstain from regulating speech when a specific motivating ideology or opinion of the speaker is the rationale for the restriction. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995). Because this bill regulates only pregnancy centers that oppose abortion, City Council Bill 406 constitutes unconstitutional viewpoint discrimination.

## **2. Equal Protection Violations**

Along the same vein, the bill violates the Equal Protection rights of pro-life physicians and pregnancy centers by failing to regulate similar organizations with differing ideologies, such as abortion clinics or family planning organizations. Such organizations are not required to post similar signage concerning services they do not provide, such their failure to provide adoption referrals, to make referrals to pregnancy centers, that they don't provide ultrasound services or prenatal care, or the fact that such organizations financially gain from a client's decision for abortion. Such regulatory underinclusiveness is a strong indication that that the bill's purpose is merely to subject pregnancy centers that oppose abortion to heightened regulation. *See Carey v. Brown*, 447 U.S. 455, 465 (1980) (underinclusiveness of a picketing statute undermined state's claim of interest); *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and in the judgment) (content-discriminatory law unconstitutional because it was underinclusive). The fact that the bill regulates only those pregnancy centers that oppose abortion also “suggests that the government itself doesn't see the interest as compelling enough to justify a broader statute.” Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pennsylvania L. Rev. 2417 (1997); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (law's underinclusiveness indicated that its true purpose was something else).

## **3. Due Process Violations**

The bill also presents due process concerns. The language of the bill is vague and ambiguous, yet it would subject pro-life pregnancy centers and physicians to criminal convictions for violations. In order to be constitutional, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply the statute in order to avoid arbitrary and discriminatory enforcement. *See Upton vs. S.E.C.*, 75 F.3d 92, Fed. Sec. L. Rep. (CCH) ¶99011 (2d Cir. 1996);

*U.S. v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996); *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996). Important language is undefined, such as “nondirective and comprehensive birth-control services,” “easily readable,” and “conspicuously” posted. The bill also fails to specify exactly who would be subject to criminal convictions for failure to post the signage—would it be the organization’s board, administrator, the landlord, the receptionist, client peer counselors, or volunteers? The potential for mass criminal prosecution due to vagueness appears limitless.

## **B. The Bill Improperly Infringes on Maryland Rights of Conscience Protections**

City Council Bill 406 improperly infringes upon rights of conscience protections provided by Maryland law by subjecting physicians and pregnancy centers who oppose abortion to regulation involving criminal discipline. Maryland Code 20-214(a)(1) &(2) provides:

A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy. **The refusal of a person to perform or participate in, or refer to a source for, these medical procedures may not be a basis for: (i) Civil liability to another person; or (ii) Disciplinary or other recriminatory action against the person.** MD Code §20-214(a)(1)-(2) (2009).

City Council Bill 406, however, specifically regulates:

Any Person: (1) Whose Primary Purpose Is To Provide Pregnancy-Related Services; And (2) Who: (i) For A Fee Or As A Free Service, Provides Information About Pregnancy-Related Services; But (ii) Does Not Provide Or Refer For: (A) Abortions; Or (B) Nondirective And Comprehensive Birth-Control Services.

The Bill subjects both pro-life physicians and pregnancy centers to regulation and the potential for criminal sanctions merely because they hold religious and moral conscience beliefs about abortion. A physician who does not provide abortion referrals would be required to post signage that his/her other colleagues do not have to post merely because he/she is pro-life. Additionally, he/she would be subject to criminal penalties for failure to abide by the requirement. Such a requirement is clearly outside the spirit of Maryland protections and may be grounds for a challenge under Maryland law.

## **C. The Bill Is Ideologically Driven By Politically Charged Individuals’ Misuse Of A Government Actor**

Pro-abortion advocates, such as NARAL Maryland and Planned Parenthood of Maryland have been the primary proponents of this legislation. The abortion debate is better suited for the public square without abortion advocates enlisting a government actor to needlessly harass pro-life charities. This is a misuse of the City Council and is outside its jurisdiction and proper functions. Neither pro-abortion proponents nor the City of Baltimore of demonstrated a need for this bill. Rather, the bill is designed to emphasize an ideological complaint that pro-abortion advocates have with regard to pregnancy centers.

Planned Parenthood of Maryland has stated, “Nobody should have medical information withheld from them. The last thing pregnant women need is misinformation about their birth control options and comprehensive information withheld from them.” *See* [http://www.ppaction.org/campaign/LSPC\\_Bill?rk=vdSHjIMqPPRAE](http://www.ppaction.org/campaign/LSPC_Bill?rk=vdSHjIMqPPRAE) (accessed on October 22, 2009). If there truly is a legitimate concern for full disclosure and full information provided to women facing pregnancy-related decisions, the following amendments should be added to the bill to require abortion providers to disclose and subject them to similar criminal sanctions in the event they fail to disclose: (a) the various risks associated with abortions, (b) that abortion providers gain financially from a woman’s decision to abort and do not gain from a woman’s decision to parent or adopt; (c) the risks and failure rates of any contraception distributed by family planning agencies; (d) that abortion providers do not have hospital privileges at local hospitals in the event of a medical emergency; (e) that abortion providers and family planning centers do to refer to pregnancy centers; (f) that the abortion provider does not show ultrasound images to its clients or let them listen to the fetus’ heartbeat during pre-abortion examinations, (g) the lack of the full array of options and services available to pregnancy women by abortion providers, including the failure to provide adoption referrals.

#### **D. The Bill Unnecessarily and Unfairly Targets Centers For Regulation**

City Council Bill 0406 unnecessarily regulates pregnancy centers which already voluntarily operate under high standards of professionalism. The Baltimore-based pregnancy centers subject to regulation under this Bill already disclose to clients that they do not refer for abortions or contraception. For example, the Greater Baltimore Center for Pregnancy Concerns states, “We do not offer, recommend, or refer for abortions or abortifacients (birth control), but we are committed to offering accurate information about abortion procedures and risks,” in both signage and client in-take forms. *See Attachment A, Greater Baltimore Center for Pregnancy Concerns Commitment of Care and Client In-Take Form.*

Two (2) of the Baltimore pregnancy centers are also members of Care Net. Care Net centers are provided with a legal updates, legal manuals, policy and procedure manuals, medical services manuals, and other materials reviewed and approved by legal and medical professionals. Overall, the legal department at Care Net devotes about eighty percent (80%) of its time and resources to conducting legal audits, and to educating centers on legal issues and best practice standards.

Care Net is not alone in these efforts. Other affiliation organizations such as the National Institute for Family and Life Advocates (NIFLA) and Heartbeat International also maintain legal departments and provide centers with legal education and other services. The legal education and other services offered by these groups are designed to ensure that centers are operating in compliance with state and federal laws and providing only truthful and accurate information.

Pregnancy resource centers are credible institutions held to high standards set by professionals in the industry. Centers comply with laws and offer a tremendous service to their communities—services that often cannot be found in any other institution. City Council Bill 0406 seeks only to unfairly discredit these worthy organizations.

For these reasons, **I urge the City Council to vote against City Council Bill 09-0406.**