

Statement on Senate Bill 690
“Limited Service Pregnancy Centers -- Disclaimers”
Presented to the Senate Finance Committee
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By
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This statement is **in opposition to SB 690**.

Should SB 690 be enacted, it 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 and accuracy 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. Because this bill regulates only pregnancy centers that oppose abortion, and because it then requires such centers to themselves make false statements, SB 690 fails the strict scrutiny test. Thus, if enacted, SB 690 would violate the First Amendment of the U.S. Constitution.

A. SB 690 regulates speech protected by the First Amendment.

On its face, SB 690 raises free speech concerns. The First Amendment protects the speech of non-profit charitable organizations like the pregnancy centers covered by the bill. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (speech by charities “involve[s] a variety of speech interests . . . that are within the protection of the First Amendment”). Furthermore, the First Amendment includes both the right to speak and the right not to speak. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). 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).

B. SB 690 fails the First Amendment’s strict scrutiny test and is thus unconstitutional.

1. Because it is underinclusive, SB 690 does not meet the “compelling interest” prong of the strict scrutiny test.

Maryland undoubtedly has a strong interest in ensuring that pregnant women receive medical assistance and factually accurate information. Importantly, however, SB 690 does not attempt to ensure that all pregnancy centers inform their clients about the extent of their services and the accuracy of the information they provide. Instead, the bill regulates only those pregnancy centers that do “not provide or refer for (I) abortions; or (II) nondirective and comprehensive contraceptive services.” SB 690 (A)(3). In other words, the bill does not mandate a disclaimer for pregnancy centers that do not have a medical professional on staff. It does not mandate a disclaimer for pregnancy centers with a history of providing “factually inaccurate information.” It only mandates a disclaimer for pregnancy centers with certain views regarding the highly contested issue of abortion.

Such regulatory underinclusiveness is a strong indication that something else is at work here: that the state’s interest is not just with getting accurate medical information to women – a laudable goal -- but also with subjecting 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 SB 690 regulates only those centers that oppose abortion “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).

Thus, SB 690 fails the First Amendment’s strict scrutiny test because it is underinclusive; it regulates only those pregnancy centers that oppose abortion, allowing a large number of the state’s (abortion-providing) pregnancy centers to operate without having to offer a disclaimer. This indicates that the state is interested not only in providing pregnant women with accurate medical information, but also in placing restrictions on pregnancy centers that do not promote abortion.

2. SB 690 is not narrowly tailored to serve the state’s interest.

SB 690 also fails the second prong of the First Amendment’s strict scrutiny test: it is not narrowly tailored to serve the state’s interest in providing women with medically accurate pregnancy-related information. A law is narrowly tailored if it is the least speech-restrictive means to accomplish the government’s interest. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 74 (1990); *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

SB 690 is not the least restrictive means of accomplishing its goal. Section (B)(3) mandates that a covered pregnancy center inform each one of its clients or potential clients, on their first contact with the center, that the center “is not required to provide factually accurate information to clients.” This is a false statement. As others will testify, limited service pregnancy centers are required by their internal guidelines and ethical rules, and potentially Maryland law, to provide factually accurate medical information to their clients.

Forcing pregnancy centers to make false statements to women cannot serve the bill’s purported goal of increasing the accuracy of information given to those women. The government can have no interest in false speech; furthermore, a regulation requiring false speech cannot be the least-speech restrictive means to achieve the state’s interest, given that the regulation could, at the very least, simply require pregnancy centers to tell the truth.¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1994) (state-mandated informational requirements must be truthful and not misleading). Requiring pregnancy centers to make a false statement in every initial contact with every client or potential client is not a narrowly tailored means to accomplish the state’s ends.

Because of the serious First Amendment problems posed by SB 690, I urge an unfavorable report.

¹ SB 690’s underinclusiveness – the fact that it fails to mandate a disclaimer for pregnancy centers that favor abortion – also indicates that it isn’t narrowly tailored to serve the state’s interest. See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny* at n. 39-41; see also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 793 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)