No. 16-2325

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,

Plaintiff-Appellee,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; CATHERINE E. PUGH, in her official capacity as Mayor of Baltimore; LEANA S. WEN, M.D., in her official capacity as Baltimore City Health Commissioner,

Defendants-Appellants.

On Appeal from the United States District Court
For the District of Maryland

BRIEF OF *AMICUS CURIAE* THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF APPELLEE, *urging affirmance*

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-2325 Caption: Greater Balto. Center for Pregnancy Concerns v. Mayor & City Council

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all such owners:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Steven W. Fitschen Date: April 3, 2017

Counsel for: The National Legal Foundation

CERTIFICATE OF SERVICE

****

I certify that on April 3, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

N/A N/A

s/ Steven W. Fitschen April 3, 2017
(signature) (date)

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Maryland, are vitally concerned with the outcome of this case because of the impact a case such as this one will have on the interactions that religious institutions and other charitable organizations have with local governments when these institutions and organizations speak and assemble.

Pursuant to Fed. R. App. P. 29(a), *Amicus Curiae* submits this Brief pursuant to consent of all parties. The NLF also submitted an amicus brief in the prior proceedings in this case before this Court, Nos. 11-1111(L) and 11-1185.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(a) (4) (E)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amicus Curiae*, The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The challenged ordinance not only compels speech. It also targets specific content and favors a particular viewpoint. (JA34–37.) Under the standards recently reaffirmed and clarified by the Supreme Court in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the ordinance violates the First Amendment for these reasons, too.

In addition, the ordinance violates the freedom of assembly of the Appellee ("Pregnancy Center" or "Center"). This freedom complements the Center's freedom of speech, and this particular violation is closely analogous to violations that gave rise to the freedom of assembly being incorporated in the First Amendment as one of our nation's "first freedoms."[1]

ARGUMENT

Pregnancy centers and abortion providers, most visibly Planned Parenthood, think very differently about "birth control" and caring for women with unplanned pregnancies. Planned Parenthood began its existence as the American Birth Control League and advocated for birth control as a means to "plan" one's parenthood and *to reduce the number of abortions*. *See* Planned Parenthood Federation of America, Inc., *Margaret Sanger—20th Century Hero* (Aug. 2009), https://www.planned

[1] *See* Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 38-39 (1986).

parenthood.org/files/7513/9611/6635/Margaret_Sanger_Hero_1009.pdf (last visited Mar. 30, 2017), at 1-2, 6. Now, however, it advocates for abortion *as* birth control (or as a supplement to birth control). *See* https://www.plannedparenthood.org/learn/abortion ("Abortion is a safe and legal way to end pregnancy.") (last visited Mar. 30, 2017). In contrast, pregnancy centers believe planning for parenthood rightly ought to include planning for a healthy pregnancy through planned prenatal care. Yet, at many of its locations, Planned Parenthood provides only limited prenatal services, if any at all, and its abortion services that terminate parenthood are a main funding source for it. *See* Planned Parenthood Fed'n of Am., *Annual Report 2014–2015*, at 29–30, 32, *available at* https://issuu.com/actionfund/docs/2014-2015_annual_report_final_20mb. (last visited Mar. 29, 2017). The pregnancy centers involved here, on the other hand, provide exactly what their names suggest—help to pregnant mothers to care for both themselves and their growing babies in the womb—at no cost. (JA 353, 360–63, 491–92.)

Yet, Baltimore decided it would require pregnancy centers to disclaim that they provide abortion services, while at the same time not requiring abortion providers like Planned Parenthood to broadcast what adoption or prenatal services they do or do not provide at a particular location. This, despite uncontested evidence in the trial record that the Center is forthright about not providing abortion services

or referring clients to organizations that do whenever the client or prospective client asks. (JA 355.)

Your *Amicus* does not here repeat arguments made by the Center concerning compelled speech. Rather, it brings to this Court's attention that, even if the challenged ordinance did not compel speech, the ordinance is unconstitutional because it is content-based and viewpoint-discriminatory. Moreover, it improperly regulates the Center's freedom of assembly. For these additional reasons, it must be subjected to strict scrutiny review, which, for the reasons stated by the trial court and the Center, it cannot withstand.

I. The Ordinance Is Both Content-Based and Viewpoint-Discriminatory.

Under the standards recently clarified by the Supreme Court in *Reed*, the Baltimore ordinance is content-based because it targets a specific message. Moreover, it is viewpoint-discriminatory because it regulates only one side of a current policy debate, a motivation clearly demonstrated during its enactment.

In *Reed*, the town had constructed its sign ordinances to discriminate between the types of signage based on its content, allowing different sizes, placement, and hours of display depending on whether a sign dealt with political advertisement, ideological message, or directions to a religious or other event. A church complained of the disfavored status accorded to its signs announcing meeting times

and giving directions to those interested in attending. The Supreme Court struck down the ordinance as an impermissible, content-based regulation. 135 S.Ct. at 2224-26.

The Supreme Court set out the controlling law regarding content-based restrictions as follows:

> [A] municipal government . . . "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).
>
> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g., Sorrell v. IMS Health, Inc.*, 564 U.S. ___, ___–___, 131 S. Ct. 2653, 2663–2664 (2011); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Mosley, supra*, at 95. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell, supra*, at ___, 131 S. Ct., at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Id. at 2226–27 (alteration original).

The analysis here could hardly be simpler. The Baltimore ordinance, like that in *Reed*, on its face deals with the content of the speech it regulates. The ordinance recognizes that pregnancy centers will be discussing a woman's pregnant condition, and it compels the centers to communicate a certain message. Thus, it must be justified, if at all, based on a compelling government interest and must be the least restrictive alternative. *Id.*

The Baltimore ordinance is actually a more extreme case than that struck down in *Reed*. The town in *Reed* attempted to justify its sign ordinance on the lack of content-based motivation. The Supreme Court rebuffed the attempt:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon &*

> *Schuster*, *supra*, at 117. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Id. at 2228.

Baltimore has not tried to defend its ordinance by arguing that those who enacted it had a benign purpose unrelated to content.[2] On the contrary, the purpose of the ordinance has always and openly been content-based, with the City Council seeking to weigh in on one side of the national debate about the propriety and merit of abortion and expressly rejecting an effort to regulate abortion centers. (JA 144–66, 1002–03.) In other words, the City Council had a "content-based purpose," *Turner Broadcasting*, 512 U.S. at 622, which, by itself, is sufficient to invalidate a regulation. Thus, even if the ordinance were neutral on its face, it would be subject to strict scrutiny.

This same conclusion applies because, in addition to being content-based, the Baltimore ordinance is viewpoint-discriminatory. The Supreme Court has defined viewpoint-based regulation as "a 'more blatant' and 'egregious form of content

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[2] This Court has recognized that the Supreme Court in *Reed* abrogated its prior precedent that justified content-based regulation on the basis of the benign intent of the enactors. *See Cahaly v. LaRosa*, 796 F.3d 399, 405 (4th Cir. 2015).

discrimination'" that is "based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Reed*, 135 S.Ct. at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Obviously, the City Council in adopting the ordinance was taking sides in the abortion controversy. It singled out those organizations that believe that abortion is morally wrong and that attempt to provide support and encouragement to pregnant women to keep their babies. The City forced those organizations, and only them, to communicate a pro-abortion message. (JA 1002–05.)

This viewpoint discrimination is also obvious from what the ordinance does *not* do: it does not regulate organizations that provide abortions. If the Council were concerned about pregnant women being confused or deceived about what type of services were being offered, one would have thought that the prime candidate for regulation would be Planned Parenthood, one of the primary abortion providers in America. That organization's very name is deceptive. A naïve young woman would logically believe that an organization trumpeting "parenthood" would be advising on how she could be a good parent to the child she was carrying or would at least be advising on adoption services if she did not believe herself able to care for her child after birth. Instead, she would learn that "planned parenthood" meant "eliminate parenthood" as soon as she entered the door, if a similar sign had been required, perhaps one similar to the following based on Planned Parenthood's annual report:

"You are 16 times more likely to receive an abortion here than prenatal services." Planned Parenthood Fed'n of Am., *Annual Report 2014–2015*, at 30 (identifying prenatal services as 0.18% and abortions as 3% of the total services from 2010-2015).[3] But the City Council did not mandate a sign by abortion providers to explain what "termination of pregnancy" services they provided, to disclose their financial interest in getting women to choose abortion, and to advise those who entered their doors what "continuation of pregnancy" services they do not offer.

This is not a case in which the challenged regulation requires *all* pregnancy counselors to put potential clients on notice of what services they do and do not provide on a neutral, evenhanded basis. It singles out only counselors with a certain viewpoint and regulates them with a jaundiced eye. For that reason, the Baltimore ordinance is viewpoint-discriminatory and subject to strict scrutiny: the Supreme Court has "insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Id.* at 2231 (quoting *Turner*, 512 U.S. at 658). Additionally, the

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[3] The "3%" figure advertised by Planned Parenthood as its percentage of abortion services has been labeled as significantly misleading by independent fact checkers, as the number is derived by giving equal weight to, for example, handing someone a free condom and doing an abortion surgery for which Planned Parenthood charges up to $1,500. *See* https://www.washingtonpost.com/news/fact-checker/wp/2015/08/12/for-planned-parenthood-abortion-stats-3-percent-and-94-percent-are-both-misleading/?utm_term=.47326b5f801d (last visited Mar. 30, 2017).

unevenhanded nature of the ordinance also means it cannot possibly pass strict scrutiny, as any government interest in "fair disclosure" or "elimination of confusion among potential clients" is treated in a one-sided, underinclusive manner. *See id.* at 2231–32.

The Baltimore ordinance is both content-based and viewpoint-discriminatory. Under longstanding free speech principles recently reaffirmed by the Supreme Court in *Reed*, the ordinance cannot stand, and the district court's judgment should be affirmed on this additional basis.

II. The Ordinance Also Infringes the Center's Freedom of Assembly

The freedom of assembly, while a freestanding right, is a close cousin of the freedom of speech. On many occasions, individuals exercise their freedom of speech by gathering in groups. Conversely, by restricting the access of individuals to each other, their rights to free speech can be restricted or eliminated altogether. The two rights, then, often work in tandem. *See NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("this Court has more than once recognized . . . the close nexus between the freedoms of speech and assembly"); *Thomas v. Collins*, 323 U.S. 516 (1945) (noting that rights of the speaker and audience are "necessarily correlative"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); *Whitney v. Cal.*, 274 U.S.357, 375 (1927) (Brandeis, J., concurring in the result)

("without free speech and assembly discussion would be futile"), *majority opinion overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The Baltimore ordinance when it strikes at speech also strikes at the freedom of assembly. The Pregnancy Center exercises its free speech rights most typically in the context of its facility, to which it has invited those interested in pregnancy care to come for its services and to discuss the benefits and concerns of childbearing. (JA 354–55, 362–63, 368.) The Center's mission is to protect "the physical, emotional and spiritual lives of our clients and their unborn children" (JA 384), and it does so by providing women facing an unplanned pregnancy with a place to explore their options in a non-threatening, comfortable environment. (JA 354-55.) "The dialogue between visitors and the Center's employees and volunteers begins when a visitor enters the Center's waiting room." (JA 365.) The Center does not charge any fee to those who come. (JA 361.) *See In re Primus*, 436 U.S. 412, 437-39 & n.32 (1978) (recognizing that, when an attorney solicited pro bono clients relating to a particular cause, he was exercising fully protected associational rights).

The ordinance, though, requires an opening notice designed to dissuade the Center and pregnant women from assembling to discuss life-changing matters by chasing away those inclined to aborting their children before they even speak with the Pregnancy Center counselors. (JA 1002–03.) This obviously chills the assembling of the Center's staff with the pregnant women. (JA 830–31.) The City

admits that the notice's design is to restrain or eliminate the "social interaction that brings with it a certain level of commitment and engagement" that the Center fosters. (JA 1002–03.) Just as such an effect dooms legislation on freedom of speech grounds, *see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799–800 (1988), it also dooms this ordinance on freedom of assembly grounds.

This case has substantial parallels to the historical development of the freedom of assembly and its inclusion as one of the "first freedoms" in our Constitution. The need for the Constitution to enshrine such a right was most clearly illustrated to the drafters by what had happened to William Penn in 1670 in London. Barred from using a meeting house for a Quaker service under the 1664 Conventicle Act that prohibited "any Nonconformists attending a religious meeting, or assembling themselves together to the number of more than five persons in addition to members of the family, for any religious purpose not according to the rules of the Church of England," Penn took his meeting to the street and began preaching, gathering a crowd of onlookers. Penn was arrested for violating the act, but acquitted by a jury. *See generally* John Inazu, *Liberty's Refuge* 24–25 (2012); William Dixon, *William Penn: An Historical Biography* 75–76 (1851). During the debates on what became the First Amendment, supporters of the freedom of assembly made direct mention of Penn's trial. *See generally* Irving Brant, *The Bill of Rights: Its Origin and Meaning* 56–57, 61 (1965).

Penn was assembling not just with his family, but with other Quakers and with those he could interest in his message. Similarly, the Pregnancy Center here both meets with "the faithful" and invites others to join their assemblies to hear the message. (JA 360–61.) Penn was motivated by a religious purpose. So are those who counsel at the Pregnancy Center. (JA353.) Penn assembled with others to speak, and it was the ability to assemble that allowed him to speak effectively and in a manner deemed most appropriate for the particular message. Similarly here, the Pregnancy Center requires the freedom of assembly to communicate its message in the way it deems most appropriate and effective. (JA 830–31.)

Another historical parallel is applicable here. During the debates on the clause that became in its final form the "freedom to peaceably assemble," several offered limiting language that the right would only protect assembly "for the common good," implying that the state might be able to determine what was "the" common good and otherwise restrict assembly. However, the version James Madison first presented to the House on June 8, 1789, changed "the" to "their" common good, leaving it in the hands of those who assembled to decide what was for "their" common good. Attempts to change the draft to "the" common good were rejected, and then the restrictive phrase was deleted entirely in conference, broadening the "right to peaceably assemble" even more. *See* Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 129, 140 (1997); Willi Paul

Adams, *The First American Constitutions* 221 (2001); *see generally* Inazu, *supra*, at 22–23, 25.

The Baltimore ordinance is an attempt to regulate the assembly of individuals at the pregnancy centers to achieve purposes consistent with what the City Council believes is the common good. The City Council's views and those of the Pregnancy Center do not coincide. The Pregnancy Center believes that the common good is undermined, both individually and corporately, by abortion. The freedom of assembly in our Constitution was deliberately drafted to keep out of the hands of legislators and other governmental actors the power to regulate the assembly of citizens, even if the government believes those assembling to be advocating views contrary to the common good and accepted policy.

The Supreme Court has repeatedly struck down statutes that have tried to restrict the assembly of individuals because legislators have disapproved of the content of their speech. The criminal convictions of those advocating a Communist form of government was overturned in *De Jonge* and in *Herndon v. Lowry*, 301 U.S. 242 (1937), and of those encouraging union organizing was struck down in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), and *Thomas v. Collins*. When Alabama regulated the assembly of individuals in the NAACP by requiring the organization to register as a business and to disclose its membership, the Supreme Court prevented that. 357 U.S. 449 (1958). And in *Boy Scouts of*

America v. Dale, 530 U.S. 640 (2000), the Supreme Court recognized a non-profit organization's right to express its own message and to infuse that message into others who came to the organization. It upheld the organization's right to refuse to assemble with those who espoused a different view. The Court ruled that even what an outsider might regard as a minimal intrusion could not be constitutionally tolerated, as courts are required to defer to the organization's views of what would affect its mission:

> [I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. See *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); see also *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical consistent, or comprehensible to others in order to merit First Amendment protection").

Id. at 651. Similarly here, the Pregnancy Center is a non-profit organization to whom the right of assembly is foundational to its message and the carrying out of its mission. The ordinance, by forcing the Center to publish a message that dissuades the Center's clientele from meeting with it, violates freedom of assembly.

The constitutional protection of the "freedom to peaceably assemble" stands in the way of attempts of those in control of the organs of government to restrict or regulate those assembling for purposes those in power oppose or want to discourage.

It rightly prevents enforcement of the Baltimore ordinance, and for this additional reason the district court should be affirmed.

CONCLUSION

The Baltimore ordinance is content-based and viewpoint-discriminatory, improperly restricting speech and showing favoritism to one side of an ongoing debate about abortion. The ordinance also restricts the freedom of assembly of the pregnancy center and those it serves. Thus, it is subject to strict scrutiny analysis, which it cannot meet. The district court properly enjoined its operation.

Respectfully submitted,
this 3rd day of April 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(B)(i), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 3,713 words as calculated by Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, I served the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *Greater Baltimore Center for Pregnancy concerns, Inc, v. Mayor and City Council of Baltimore, et al*., No. 16-2325, on all parties or their counsel of record through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service on those participants will be accomplished by the CM/ECF system.

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