

CRISIS PREGNANCY CENTERS: IMPEDING THE RIGHT TO INFORMED DECISION MAKING

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INTRODUCTION

Amy K., a twenty-one year old woman, was approximately two weeks pregnant when she decided to seek an abortion in New York City, New York.¹ She visited the address of a Planned Parenthood that offered the procedure. Instead of walking into the Planned Parenthood office, she unknowingly entered a crisis pregnancy center (“CPC”) that was purposefully located in the same building.² The waiting room was made to look like “a children’s playhouse[,]” the office had a receptionist’s desk, and there was at least one bed that “looked very much like it was in a doctor’s office.”³

Amy requested a medical abortion. Instead, she received pamphlets full of graphic abortion images. A staff member immediately performed a sonogram on Amy and forced her to listen to the fetal heartbeat. Although Amy was less than one month into her pregnancy, the CPC’s staff member lied to her, informing her that she was three and a half months pregnant. The staff member encouraged Amy to continue the pregnancy, telling her, “I think you’re going to be a really great mother,” and asking, “Wouldn’t your mother love to take care of this baby?”⁴ As Amy became increasingly distraught about her pregnancy, another staff member took advantage of her emotional vulnerability to encourage her to have the baby. The CPC provided Amy with a sonogram image and instructed her to return with her boyfriend.

Amy never revisited the pregnancy center and ultimately obtained an abortion elsewhere. Reflecting upon her experience, she explained,

[f]or me, there was a difference between being sure what I wanted and being sure how I felt about it. I knew that I did not want to have a child

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¹ Amy K., *The Time I Tried to get an Abortion from a Crisis Pregnancy Center*, JEZEBEL.COM (Sept. 21, 2011), <http://jezebel.com/5842125/the-time-i-tried-to-get-an-abortion-from-a-crisis-pregnancy-center>.

² *Id.*

³ *Id.*

⁴ *Id.*

right then. . . . If you think you want an abortion, you probably shouldn't be having a kid anyway. And if you know you want an abortion, someone misrepresenting themselves shouldn't make it harder on you.⁵

According to several studies and investigative reports, Amy's experience at that New York City CPC is typical of women's experiences at anti-abortion centers across the country.⁶ CPCs, also referred to as pregnancy resource centers and pregnancy help centers, are anti-abortion organizations that provide pregnancy-related counseling and support to women with unintended pregnancies. The centers are made to look and feel like doctor's offices, which lead visitors to believe that CPCs are actual medical centers. CPC staff members use ultrasounds and sonograms to manipulate pregnant women's emotions. Unfortunately, there is little-to-no government regulation of CPCs and their deceptive practices.

Since the United States Supreme Court's seminal 1973 decision to legalize abortion in *Roe v. Wade*,⁷ activists on both sides of the controversial issue have worked to change women's access to the medical procedure. In addition to using educational and medical methods of outreach, pro- and anti-abortion activists have used the law to further their causes.⁸ These activists have appealed to legislators, voters, and the courts to enact legal change. CPCs began opening across the United States before *Roe* was decided, but they have only been used as a primary tool in the anti-abortion movement during the past decade.

Part I of this Note provides a general background of CPCs and a description of the domestic and international CPC networks that support local anti-abortion centers posing as medical resources for vulnerable pregnant women. CPC networks provide monetary and educational resources that allow individual CPCs to stay in business. Part II explores the different types of financial support that federal and state governments provide to CPCs. Government funds for CPCs have varied from federal community building grants to state-sponsored specialty license plate programs. Federal funds were most readily available during President George W. Bush's administrative terms. Part III addresses recent anti-CPC ordinances passed by local governments aimed at preventing deceptive practices and advertising. Federal courts have largely rejected these local ordinances as First Amendment freedom of speech violations. Finally, Part IV provides examples of CPCs' harmful agendas and argues that states are responsible for protecting vulnerable pregnant women from CPCs' deceptive practices. State governments

⁵ *Id.*

⁶ See, e.g., NAT'L ABORTION FED'N, CRISIS PREGNANCY CENTERS: AN AFFRONT TO CHOICE (2006).

⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸ With regard to educational and medical outreach, pro-abortion advocates promote sex education, reproductive health education, and the inclusion of abortion training in medical school curriculums. Anti-abortion activists promote initiatives such as abstinence-only education, the promotion of abortion alternatives such as adoption, and scientific studies about fetal health. While these educational and medical methods of outreach are important aspects of the abortion debate, this Note will focus on specific legal areas of the anti-abortion movement.

must enforce existing anti-deception statutes and enact legislation to ensure that CPC clients are fully protected from the facilities' anti-abortion purposes and lack of medical licenses.

I. CPC SERVICES IN THE UNITED STATES

Modern CPCs began to open across the United States during the 1960s when states began to pass more liberal abortion laws.⁹ Some credit the idea behind CPCs to Robert Pearson, who founded one of the first United States CPCs in Hawaii in 1967.¹⁰ Pearson's primary goal was to prevent as many abortions as possible by withholding information from women who were considering the termination of their unintended pregnancies.¹¹ Pearson's manual, *How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center*, provides instructions on how to operate an anti-abortion pregnancy center with a neutral façade.¹² For example, Pearson's manual informs CPC staff members, "there is nothing wrong or dishonest if you don't want to answer a question that may reveal your pro-life position by changing the caller's train of thought by asking a question in return[.]"¹³

Others credit the inception of CPCs to Birthright International, a CPC network organization founded in 1968, that currently has over 400 chapters on three continents.¹⁴ The majority of United States CPCs are currently affiliated with one or more network, or "umbrella," organizations such as Birthright International.¹⁵ These umbrella organizations are usually religious. The primary CPC network groups in the United States are Care Net, Heartbeat International, and the National Institute of Family and Life Advocates ("NIFLA").¹⁶ Care Net oversees a network of over 1,100 CPCs, which provide services such as "[f]ree pregnancy tests, ultrasounds, abortion information, parenting classes, and material assistance . . . [to] empower women to choose life[.] Care Net seeks to promote,

⁹ Vitoria Lin & Cynthia Dailard, *Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy*, THE GUTTMACHER REPORT ON PUB. POLICY 4 (2002), available at www.guttmacher.org/pubs/tgr/05/2/gr050204.pdf.

¹⁰ Dawn Stacey, *The Pregnancy Center Movement: History of Crisis Pregnancy Centers*, CRISIS PREGNANCY CTR. WATCH, available at www.motherjones.com/files/cpchistory2.pdf.

¹¹ *Id.* In 1994, Pearson stated, "A killer, who in this case is the girl who wants to kill her baby, has no right to information that will help her kill her baby. Therefore, when she calls and says, 'Do you do abortions?' we do not tell her, No, we don't do abortions."

¹² *Id.*

¹³ *Id.*

¹⁴ *A Passion to Serve, a Vision for Life: Pregnancy Resource Center Service Report 2009*, FAMILY RESEARCH COUNCIL 6 (2009) [hereinafter *PRC Service Report*], available at <http://downloads.frc.org/EF/EF09I51.pdf>; *About Birthright*, BIRTHRIGHT INT'L, www.birthright.org/htmpages/about.htm (last visited Oct. 30, 2011).

¹⁵ *See* COMM. ON GOV'T REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, PREPARED FOR REP. HENRY A. WAXMAN 1 (July 2006) [hereinafter *WAXMAN REPORT*].

¹⁶ Nancy Gibbs, *The Grass-Roots Abortion War*, TIME, Feb. 15, 2007, at 2, available at <http://www.time.com/time/magazine/article/0,9171,1590444,00.html>.

prepare, and plant pregnancy centers across North America.”¹⁷ Heartbeat International, a Christian organization that began as a telephone hotline and grew into a network of pregnancy centers, has “over 1,400 affiliated pregnancy help centers, maternity homes, and non-profit adoption agencies in all 50 states and in 47 countries.”¹⁸ NIFLA provides legal support to over 700 CPCs in the United States, all of which operate as licensed medical facilities that perform ultrasounds.¹⁹ NIFLA further promotes abortion prevention through education, “offer[ing] medical training for nurses in limited obstetric ultrasound in the [pregnancy resource center] setting, continuing nurses training in ultrasound online and [NIFLA’s] National Advisory Medical Board.”²⁰ Ultrasounds are often not medically necessary for early abortions, but nevertheless are promoted by anti-abortion organizations to significantly increase the cost of abortion and to manipulate pregnant women’s emotions while they are considering abortions.²¹

Although early versions of CPCs subscribed to the “crisis intervention model” of pregnancy counseling—providing anti-abortion services specifically catered towards women with unintended pregnancies—modern CPCs have added a wide variety of other pregnancy and family planning-related services such as “maternity support, classes, post-abortion support groups and Bible studies, abstinence counseling, and educational programs (to prevent the ‘need’ for abortion).”²² Many CPCs operate as clinics that provide pregnancy tests and use ultrasound technology to confirm pregnancies.²³ Ultrasound technology is a crucial tool used by CPCs to dissuade women from considering abortions.²⁴ Some clinics have licensed medical directors who, in addition to providing ultrasounds, also oversee additional medical services such as sexually transmitted infection (“STI”) testing and prenatal care.²⁵ CPC services are “generally provided at little or no cost.”²⁶ Most CPC staff members are volunteers.²⁷ Furthermore, the “vast

¹⁷ *About Care Net*, CARE NET, www.care-net.org/aboutus/ (last visited Mar. 27, 2013).

¹⁸ *Our Story*, HEARTBEAT INT’L, www.heartbeatinternational.org/hbi-about-us/our-story (last visited Mar. 27, 2013).

¹⁹ *What We Do*, NAT’L INST. OF FAM. & LIFE ADVOCES., www.nifla.org/about-us-what-we-do.asp (last visited Mar. 27, 2013).

²⁰ *Id.*

²¹ *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. 1 (Mar. 2012), www.guttmacher.org/pubs/fb_induced_abortion.pdf.

²² Margaret H. Hartshorn, *The History of Pregnancy Help Centers in the United States*, HEARTBEAT INT’L (Mar. 13, 2007), available at www.heartbeatinternational.org/pdf/PRC-History.pdf; see also *PRC Service Report*, *supra* note 14, at 14. Prior to the widespread availability of over-the-counter pregnancy tests, CPCs offered free pregnancy tests to attract women to their counseling services.

²³ Hartshorn, *supra* note 22.

²⁴ *PRC Service Report*, *supra* note 14, at 8.

²⁵ Hartshorn, *supra* note 22.

²⁶ *PRC Service Report*, *supra* note 14, at 22.

²⁷ *Id.* at 22-23.

majority [of CPCs] are faith-based [and] all are non-profit, 501(c)(3) organizations, supported almost entirely by private donations.”²⁸

An additional and important piece of the CPC system is Option Line, a free telephone hotline that provides anti-abortion counseling to women who are distressed or confused about their unplanned pregnancies. Although its name implies that the hotline encourages women to fully consider all options to unintended pregnancies, Option Line warns against the use of emergency contraception,²⁹ strongly discourages abortions,³⁰ and provides referrals to CPCs for in-person anti-abortion counseling.³¹ Heartbeat International and Care Net, two major CPC umbrella organizations, administer Option Line and refer callers to one of their 1,800 CPCs for in-person pregnancy and anti-abortion counseling.³²

There are currently 2,300 to 4,000 CPCs in the United States.³³ The exact figure is difficult to ascertain because many CPCs are affiliated with one or more national groups, while others are privately run CPCs that are not affiliated with any umbrella organizations.³⁴ It is not easy to account for these unaffiliated CPCs. It is clear, however, that the number of CPCs far outweigh the number of abortion providers in the United States. There are approximately 1,800 abortion providers in the United States, and “[e]ighty-seven percent of all U.S. counties lacked an abortion provider in 2008[.]”³⁵ Government funding is one major reason for that extreme disparity.

II. PRO-CPC GOVERNMENT FUNDING

CPCs are largely funded through private donations.³⁶ Over the past decade, however, CPCs have received millions of dollars in funds and grants from federal and state governments. These funds not only indicate the government’s endorsement of the CPCs’ anti-abortion message, but also encourage centers to continue misleading and providing often-inaccurate information to their visitors.

²⁸ Hartshorn, *supra* note 22. The 501(c)(3) designation is important because only 501(c)(3) organizations may receive tax-deductible contributions. See *Exemption Requirements – Section 501(c)(3) Organizations*, IRS.COM, www.irs.gov/charities/charitable/article/0,,id=96099,00.html (last visited Dec. 31, 2011).

²⁹ *Need to know about the morning after pill?*, OPTION LINE, www.optionline.org/questions/the-morning-after-pill/ (last visited Nov. 5, 2011).

³⁰ *Considering Abortion: Explore All Your Options*, OPTION LINE, www.optionline.org/abortion-education (last visited Mar. 27, 2013).

³¹ *Find a Pregnancy Center*, OPTION LINE, <http://www.optionline.org/get-help/> (last visited Mar. 27, 2013).

³² *About Option Line*, OPTION LINE, <http://www.optionline.org/about/> (last visited Nov. 5, 2011).

³³ See Lin & Dailard, *supra* note 9, at 4; Gibbs, *supra* note 16; Hartshorn, *supra* note 22.

³⁴ Gibbs, *supra* note 16.

³⁵ *Facts on Induced Abortion in the United States*, GUTTMACHER INST. 2 (Aug. 2011), available at www.guttmacher.org/pubs/fb_induced_abortion.pdf.

³⁶ See Hartshorn, *supra* note 22.

A. Federal Funding

The relatively recent rise in federal funding for CPCs was due largely to President George W. Bush's anti-abortion and "faith-based agenda,"³⁷ which made CPCs "a centerpiece of compassionate conservatism, a signal to members of the President's evangelical base that he shares their values."³⁸ President Bush publicly voiced his support for CPCs, stating, "my administration encourages adoption and supports abstinence education, crisis pregnancy programs, parental notification laws,³⁹ and other measures to help us continue to build a culture of life."⁴⁰ As a result of the Bush Administration's support for CPCs, federal CPC funding began rising rapidly in 2001 and "over \$30 million in federal funds went to more than 50 pregnancy resource centers between 2001 through 2005."⁴¹

Under the Bush Administration, the largest source of federal funds came from the Community-Based Abstinence Education ("CBAE") program. CBAE promoted abstinence education among adolescents between the ages of twelve and eighteen, and aimed "to educate young people and create an environment within communities that support[ed] teen decisions to postpone sexual activity until marriage."⁴² The program was discontinued in 2010 under President Barack Obama's administration.⁴³ Between 2001 and 2005, however, CBAE allocated over \$24 million to at least twenty-nine CPCs.⁴⁴ In some instances, federal abstinence-education grants "instantly doubled or tripled [CPCs'] budgets."⁴⁵ As non-profit faith-based organizations, CPCs qualified for CBAE funding because the centers discouraged the use of contraceptives and promoted abstinence-only education.

Other ongoing sources of federal funding include the Title V Abstinence-Only Program, the Compassion Capital Fund, and related federal grants. Section 510 of Title V allocates federal abstinence-education funds for states, and gave

³⁷ WAXMAN REPORT, *supra* note 15, at 2; *see also* Thomas B. Edsall, *Grants Flow to Bush Allies on Social Issues*, WASH. POST (Mar. 22, 2006), www.washingtonpost.com/wp-dyn/content/article/2006/03/21/AR2006032101723.html (providing an overview and examples of federal funds to socially conservative organizations, including CPCs).

³⁸ Gibbs, *supra* note 16.

³⁹ Parental notification laws are state laws that require physicians to contact parents or guardians before performing abortions for minors. These laws can be problematic by causing delays, leading some minors to turn to unsafe or illegal abortions, or forcing motherhood upon minors who are unable to obtain parental consent. *See Parental Involvement Laws*, CTR. FOR REPROD. RIGHTS (Jan. 14, 2009), <http://reproductiverights.org/en/project/parental-involvement-laws>.

⁴⁰ Proclamation, George W. Bush, National Sanctity of Human Life Day, 2004 (Jan. 16, 2004), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040116-2.html>.

⁴¹ WAXMAN REPORT, *supra* note 15, at 3.

⁴² *Community-Based Abstinence Education (CBAE)*, CATALOG OF FED. DOMESTIC ASSISTANCE, <https://www.cfda.gov/?s=program&mode=form&tab=step1&id=b7754b23ccdffcc63305657efa41cd4e> (last visited Mar. 27, 2013).

⁴³ *See id.*

⁴⁴ *See* WAXMAN REPORT, *supra* note 15, at 3.

⁴⁵ Gibbs, *supra* note 16.

approximately \$6 million to CPCs between 1999 and 2006.⁴⁶ The Compassion Capital Fund was created to “expand and strengthen the role of organizations in their ability to provide social services to low-income communities.”⁴⁷ A 2006 congressional investigation reported that twenty-five CPCs in fifteen states received Compassion Capital Fund grants totaling almost \$1 million.⁴⁸ Some of those CPCs received direct grants from the Compassion Capital Fund, while others received subgrants from the Institute for Youth Development (“IYD”), “an intermediary organization which focuses its subgrants on helping smaller organizations ‘build capacity to identify federal grant opportunities and to prepare highly competitive applicants for federal assistance.’”⁴⁹ The IYD supported CPCs through its “Pregnancy Resource Center Service Delivery and Medical Model” program, which redirected Compassion Capital Funds to CPCs that supported “at-risk or disadvantaged pregnant women.”⁵⁰ Today, the IYD’s CPC program no longer exists, but the organization continues to receive federal funds and promotes abstinence-only education through its Abstinence Education Initiative.⁵¹

Federal CPC funding has decreased significantly under President Obama’s administration.⁵² Nevertheless, some CPCs still receive federal dollars through programs such as the National Fatherhood Initiative (“NFI”), which works with the Office of Family Assistance in the United States Department of Health and Human Services to “aid grassroots and community-based organizations through a series of capacity-building grants . . . to provide services to local fathers and families.”⁵³ At least two CPCs received NFI grants in 2011—Care Net Pregnancy Resource Center in South Dakota and Sav-A-Life, Inc. in Alabama.⁵⁴ Despite President Obama’s commitment to women’s health,⁵⁵ anti-choice pregnancy centers continue to receive support from the federal government.

⁴⁶ WAXMAN REPORT, *supra* note 15, at 4. The figure could be higher than \$6 million “because centralized information on these grants is not available.” See also Adam Sonfield & Rachel Benson Gold, *States’ Implementation of the Section 510 Abstinence Education Program, FY 1999*, FAMILY PLANNING PERSPECTIVES, July/Aug. 2001, at 166, for background on the enactment of Section 510 of Title V.

⁴⁷ *Compassion Capital Fund Fact Sheet*, U.S. DEPT. OF HEALTH & HUMAN SERV. ADMIN. FOR CHILDREN & FAMILIES, www.acf.hhs.gov/programs/ocs/ccf/about_ccf/facts.html (last visited Nov. 12, 2011).

⁴⁸ WAXMAN REPORT, *supra* note 15, at 4-5.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.*

⁵¹ *Abstinence Education Initiative*, INST. FOR YOUTH DEV., www.youthdevelopment.org/articles/pr050702.htm (last visited Mar. 27, 2013).

⁵² See Kate Murphy, *Regulating CPCs: Consumer Protection or Affront to Free Speech?*, THE NATION (Oct. 31, 2011), www.thenation.com/article/164278/regulating-cpcs-consumer-protection-or-affront-free-speech.

⁵³ *About NRCFBI*, NAT’L RESPONSIBLE FATHERHOOD CAPACITY-BUILDING INITIATIVE, www.fatherhood.org/page.aspx?pid=423 (last visited Mar. 27, 2013).

⁵⁴ *2011 Capacity-Building Awardees*, NAT’L RESPONSIBLE FATHERHOOD CAPACITY-BUILDING INITIATIVE, www.fatherhood.org/capacity-building-initiative/2011-awardees/site-narratives (last visited Mar. 27, 2013).

⁵⁵ See *The President’s Record on Contraception*, BARACK OBAMA, <http://www.barackobama.com/>

B. State Legislation and Funding

State governments support CPCs through funding and legislation that promote the anti-abortion centers. Like the federal government, states have bolstered CPCs through abstinence-education funds. Congress subsidizes some of those funds—for example, Section 510 of Title V allocates \$250 million between 2010 and 2014 to programs that “teach abstinence to the exclusion of other topics and may in no way contradict the A-H federal definition for ‘abstinence education.’”⁵⁶ Other funds come from the states’ own budgets: Arizona, Florida, Louisiana, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Pennsylvania, and Texas are among those states that provide state-subsidized funding for CPCs.⁵⁷ Such funds are specifically earmarked for—and allocated to—abstinence education, comprehensive family planning, and welfare budgets.⁵⁸ In 2007, states spent approximately \$13 million of public funds “to dissuade women from abortion.”⁵⁹

A major campaign to increase state financial support for CPCs involves anti-abortion license plates, also known as “Choose Life” license plates. Randy Harris, an anti-abortion Florida county commissioner, began the Choose Life plate campaign in 1996 with the idea that state Departments of Motor Vehicles (“DMVs”) would sell specialty license plates at a higher price than regular license plates and direct the additional funds to support “efforts for pre-natal care for women considering adoption services and to help pro-life pregnancy centers and other life affirming agencies.”⁶⁰ Florida was the first state to pass legislation to enact the Choose Life plate program in 2000.⁶¹ By 2007, when the program had expanded to sixteen other states, Florida had already generated \$5.5 million from the plates, which went directly towards anti-abortion efforts.⁶²

record/on/contraception (last visited Mar. 27, 2013).

⁵⁶ STATE BY STATE DECISIONS: THE PERSONAL RESPONSIBILITY EDUCATION PROGRAM AND TITLE V ABSTINENCE-ONLY PROGRAM, SIECUS 1 (2010), available at www.siecus.org/_data/global/images/State%20by%20State%20Decisions%20-%20PREP%20and%20Title%20V%20Abstinence-Only%20101910.pdf. The A-H definition is a list of eight components of an abstinence-only program. See *Evaluation of Abstinence Education Programs Funded Under Title V, Section 510: Interim Report*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, <http://aspe.hhs.gov/hsp/abstinence02/ch1.htm> (last visited Nov. 12, 2011). Barbara Daveny et. al, THE EVALUATION OF ABSTINENCE EDUCATION PROGRAMS FUNDED UNDER TITLE V SECTION 510: INTERIM REPORT 3 (2002), www.mathematica-mpr.com/PDFs/evalabstinence.pdf.

⁵⁷ Stephanie Simon, *States Fund Antiabortion Advice*, L.A. TIMES, Feb. 11, 2007, at A1.

⁵⁸ *Id.*

⁵⁹ *Id.* In recent years, these funds are often diverted from dollars that have typically been reserved for family-planning groups, like Planned Parenthood, that support abortion. *Id.*

⁶⁰ CHOOSE LIFE AMERICA, INC., www.choose-life.org/ (last visited Mar. 27, 2012). See also Eleanor J. Bader, *License to Lie*, RH REALITY CHECK (April 15, 2008, 8:48 AM), www.rhrealitycheck.org/blog/2008/04/15/license-to-lie (providing additional background on the inception of Choose Life plates).

⁶¹ CHOOSE LIFE AMERICA, INC., *supra* note 60.

⁶² Bader, *supra* note 60.

Today, Choose Life plates are available from DMVs in twenty-four states.⁶³ States' anti-abortion license plate programs are created through administrative, legislative, or hybrid models.⁶⁴ Under the administrative model, state legislation permits the DMV to develop the rules and process for creating and distributing Choose Life plates.⁶⁵ The legislative model involves statutory authorization for the program. Under this model, the bill sponsor—a state senator, representative, or assembly member—drafts the details of the program.⁶⁶ The hybrid model combines the administrative and legislative models. For example, a hybrid model may allow individuals or organizations to petition and create a comprehensive plan for specialty license plate creation, which then requires legislative approval.⁶⁷

Typically the “plates cost anywhere between \$25 and \$70 on top of standard fees.”⁶⁸ Of the twenty-four states where Choose Life plates can be purchased, fourteen donate funds to CPCs or specific anti-abortion organizations and fifteen contribute funds to organizations that provide adoption support or services. The remaining nine states prohibit funds from the license plates from being contributed to organizations that provide abortion-related services or counseling.⁶⁹ The latter policy has been challenged, and reproductive rights organizations have argued “that it is unconstitutional for a state to endorse one political viewpoint over another, and that the funding of agencies affiliated with churches or religious organizations amounts to establishment of religion.”⁷⁰ There is currently an ongoing campaign to institute a pro-choice equivalent of the Choose Life license plates.⁷¹

When the Virginia legislature passed SB 817,⁷² the 2009 bill authorizing Choose Life plates, the CPC umbrella organization Heartbeat International agreed

⁶³ See CHOOSE LIFE AMERICA, INC., *supra* note 60. See also *State Policies in Brief: 'Choose Life' License Plates*, GUTTMACHER INST. (last updated Mar. 1, 2013) [hereinafter *License Plates Report*], available at www.gutmacher.org/statecenter/spibs/spib_CLLP.pdf. Choose Life plates are currently available in Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, and Virginia. *Id.*

⁶⁴ Stephanie S. Bell, *The First Amendment and Specialty License Plates: The "Choose Life" Controversy*, 73 MO. L. REV. 1279, 1281-84 (2008).

⁶⁵ *Id.* at 1281-82.

⁶⁶ *Id.* at 1282-83.

⁶⁷ *Id.* at 1283-84.

⁶⁸ *License Plates Report*, *supra* note 63, at 1.

⁶⁹ *Id.*

⁷⁰ *Id.* See, e.g., *Am. Civil Liberties Union of Tenn. v. Bredeesen*, 441 F.3d 370 (6th Cir. 2006) (reversing the District Court decision granting summary judgment to pro-choice organizations' challenge of Tennessee's anti-abortion license plates); *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005) (reversing a District Court finding that the Louisiana anti-abortion license plate program was unconstitutional); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (holding that South Carolina's Choose Life plates violated the First Amendment). See also Bell, *supra* note 64, for the various freedom of speech approaches that courts have used to evaluate the legality of government-sanctioned specialty license plates.

⁷¹ LICENSE TO CHOOSE, <http://licensetochoose.org/> (last visited Nov. 12, 2011).

⁷² See *SB 817 License Plates, Special; Issuance to Members and Supporters of Various Organizations*, VA'S LEGISLATIVE INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?091+sum+SB817> (last visited Mar. 27, 2013), for the bill's legislative history during the 2009 session.

to help facilitate the distribution of funds to Virginia CPCs.⁷³ In turn, all Virginia CPCs that receive funds through the Choose Life plates program must agree to the “Commitment of Care,” a set of standards created by Heartbeat International.⁷⁴ Four of the major standards within the “Commitment of Care” state:

- Client information is held in strict and absolute confidence. Releases and permissions are obtained appropriately. Client information is only disclosed as required by law and when necessary to protect the client or others against imminent harm.
- Clients receive accurate information about pregnancy, fetal development, lifestyle issues, and related concerns.
- We do not offer, recommend or refer for abortions or abortifacients, but are committed to offering accurate information about abortion procedures and risks.
- All of our advertising and communication are truthful and honest and accurately describe the services we offer.⁷⁵

The complete list of thirteen standards highlight the CPCs’ agreement to provide open, honest, safe, and legal care to their clients.⁷⁶ These standards are part of CPCs’ larger effort to present an aura of compassion and reliability despite their biased and deceptive practices.

In 2010, NARAL Pro-Choice Virginia Foundation (“NPCVF”) conducted a survey of thirty-six CPCs that were receiving funds from Virginia’s Choose Life plates.⁷⁷ The study concluded that twenty-six of the centers, or seventy-two percent, were acting in violation of the “Commitment of Care” standards.⁷⁸ Most of the CPCs were not licensed medical clinics that could legally be held to federal HIPAA privacy requirements.⁷⁹ Several of the Virginia CPCs provided investigators with misleading statistics regarding the likelihood of miscarriages, infertility, and the psychological effects of abortion.⁸⁰ The majority of CPCs provided incorrect information about fetal development, birth control, and abortion risks and procedures.⁸¹ It is evident that although these CPCs have agreed to Heartbeat International’s “Commitment of Care” as a contingent of receiving

⁷³ *Choose Life License Plate*, HEARTBEAT INT’L, <http://www.heartbeatinternational.org/connections/choose-life/virginia> (last visited Mar. 27, 2013).

⁷⁴ See VA. CODE ANN. § 46.2-725 (2011).

⁷⁵ *Our Commitment of Care and Competence*, HEARTBEAT INT’L, www.heartbeatinternational.org/services-about-us/commitment-of-care-and-competence (last visited Mar. 27, 2013).

⁷⁶ *Id.*

⁷⁷ NARAL PRO-CHOICE VA. FOUNDATION, *CRISIS PREGNANCY CENTERS REVEALED: VIRGINIA PREGNANCY CENTER INVESTIGATIONS AND POLICY PROPOSALS 23* (2010) [hereinafter NARAL VA. REPORT].

⁷⁸ *Id.* at 23-30.

⁷⁹ *Id.* at 24-25.

⁸⁰ *Id.* at 25-26.

⁸¹ *Id.* at 26-30.

Choose Life plate funding, neither the state of Virginia nor Heartbeat International are holding the centers accountable to the agreed-upon standards.

III. CPC ORDINANCES AND FEDERAL COURT CHALLENGES

State legislatures have largely failed to rein in CPCs' actions. As a result, local lawmakers have recently taken on the task of responding to CPCs' documented history of deceptive advertising and CPCs' practices of providing false and misleading information regarding pregnancy, abortion, and contraceptives. A handful of local governments—Austin, San Francisco, Baltimore, Montgomery County in Maryland, and New York City—introduced or passed ordinances that require CPCs to explicitly inform clients of their anti-abortion purposes by posting signs that inform clients that the centers do not provide or refer clients for birth-control services or abortions. CPCs and anti-abortion religious organizations have challenged the ordinances on First Amendment free speech grounds, and separate actions are currently pending in federal courts in California, Maryland, New York, and Texas.⁸²

A. CPC Disclosure and Signage Ordinances

In December 2009, the City Council of Baltimore, Maryland was the first local government to introduce and pass a CPC ordinance. Ordinance 09-252, "Limited Service Pregnancy Centers—Disclaimers," added certain provisions to the Baltimore City Health Code and was enacted "[for] the purpose of requiring limited-service pregnancy centers to provide a certain disclaimer to clients and potential clients; defining a certain term; imposing certain penalties; and generally relating to required disclaimers by limited-service pregnancy centers."⁸³ The ordinance defines CPCs, or "limited-service pregnancy centers," as "any person . . . whose primary purpose is to provide pregnancy-related services [and] provides information about pregnancy-related services [but] does not provide or refer for . . . abortions [or] nondirective and comprehensive birth-control services."⁸⁴ The

⁸² See Chris Roberts, "Crisis Pregnancy Center" First Resort Files First Amendment Lawsuit Against SF, SFAPPEAL.COM (Nov. 17, 2011), <http://sfappeal.com/news/2011/11/crisis-pregnancy-center-first-resort.php>. See also Press Release, *Federal Appeals Court to Hold New Hearing on Baltimore's Regulation of Deceptive Crisis Pregnancy Centers*, CENTER FOR REPRODUCTIVE RIGHTS (Aug. 15, 2012) [hereinafter Baltimore Press Release], <http://reproductiverights.org/en/press-room/federal-appeals-court-to-hold-new-hearing-on-baltimores-regulation-of-deceptive-crisis-pr>; Steven Ertelt, *New York Appeals Decision Striking Anti-Pregnancy Center Law*, LIFENEWS.COM (Aug. 2, 2011) [hereinafter Ertelt, *New York Appeals Decision*], www.lifenews.com/2011/08/02/new-york-appeals-decision-striking-anti-pregnancy-center-law; Steven Ertelt, *Austin, Texas Suspends Law Attacking Crisis Pregnancy Centers*, LIFENEWS.COM (Nov. 11, 2011) [hereinafter Ertelt, *Austin, Texas Suspends Law*], www.lifenews.com/2011/11/11/austin-texas-suspends-law-attacking-pregnancy-centers.

⁸³ BALT., MD., HEALTH CODE § 3-501 (2009) [hereinafter BALTIMORE ORDINANCE], available at <http://legistar.baltimorecitycouncil.com/attachments/5179.pdf>. See also *Legislative File ID 09-0406*, BALTIMORE CITY COUNCIL, <http://legistar.baltimorecitycouncil.com/detailreport/?key=4550> (last visited Mar. 27, 2013) for the complete legislative history of the ordinance.

⁸⁴ BALTIMORE ORDINANCE, *supra* note 83.

ordinance requires these limited-service pregnancy centers to “provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services.”⁸⁵ At least one “easily readable” sign “written in English and Spanish” must be “conspicuously posted in the center’s waiting room or other area where individuals await service.”⁸⁶ A \$500 misdemeanor penalty can be imposed for each day a Baltimore limited-service pregnancy center violates the ordinance by failing to display a sign.⁸⁷

Beginning in 2010, Maryland’s Montgomery County⁸⁸ and the cities of Austin,⁸⁹ San Francisco,⁹⁰ and New York City⁹¹ enacted similar ordinances. Like Baltimore’s law, all four ordinances require “pregnancy service centers,” “limited service pregnancy resource centers,” or “pregnancy resource centers” to display signs that inform potential clients that the centers do not provide abortion counseling or referrals. The laws are defined specifically to apply to CPCs that do not have licensed medical professionals on staff, centers that do not provide abortion services or referrals, and centers that do not provide comprehensive birth control services or referrals. Violators that do not comply with the ordinances within a timely fashion will be fined or charged with civil violations.

The purposes of these ordinances are to protect public health, to prevent false advertising, and to encourage pregnant women to consult medically licensed health professionals. The Montgomery County ordinance acknowledges that CPC clients might “neglect to take action (such as consulting a doctor) that would protect their health or prevent adverse consequences, including disease, to the client or the pregnancy.”⁹² The San Francisco ordinance arose because “[c]lients seeking information regarding options to terminate a pregnancy commonly are experiencing emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by CPCs. These circumstances raise the need for regulation that is more protective of potential consumers of pregnancy center

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ MONTGOMERY CNTY, MD. CNTY. CODE § 2-65 (2010) [*hereinafter* MONTGOMERY CNTY. ORDINANCE], available at www.montgomerycountymd.gov/content/council/pdf/res/2010/20100202_16-1252.pdf (adding MONTGOMERY CNTY., MD., RES. 16-1252 (2010)).

⁸⁹ AUSTIN CITY CODE, ORDINANCE NO. 20100408-027 (2010) [*hereinafter* AUSTIN ORDINANCE], available at <http://www.ci.austin.tx.us/edims/document.cfm?id=135350> (adding AUSTIN, TEX., CODE CH. 10-9 (2010)).

⁹⁰ SAN FRANCISCO ORDINANCE NO. 212-11 (2011) [*hereinafter* SAN FRANCISCO ORDINANCE], available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances11/o0212-11.pdf> (adding S.F. CAL. ADMIN. CODE §§ 93.1-93.5 (2011)).

⁹¹ N.Y.C., N.Y., LOCAL LAW NO. 17 INT. NO. 371-A (2011) [*hereinafter* NYC ORDINANCE], available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID|Text|&Search=>

⁹² MONTGOMERY CNTY. ORDINANCE, *supra* note 88.

services.”⁹³ State governments should also be mindful of these regulatory needs. The New York City ordinance was enacted because,

[s]pecifically, anti-fraud statutes have proven ineffective in prosecuting deceptive centers [since] the vulnerable population served by these centers faces potential threats or injury to their well-being by bringing forward complaints which often contain highly sensitive personal information, such as the circumstances surrounding a client’s unplanned pregnancy. Clients have demonstrated a reluctance to come forward and disclose the events that occurred when they attempted to obtain such services.⁹⁴

After recognizing the federal and state legislatures’ failure to regulate CPCs’ deceptive practices, each of these local governments took proactive steps to protect pregnant women’s right to accurate and fully informed decision making.

B. Recent Challenges to CPC Ordinances

All five local CPC ordinances have been challenged by CPCs and anti-abortion religious organizations.⁹⁵ At least three of those challenges have been adjudicated in federal courts. The Baltimore, Montgomery County, and New York City ordinances have been struck down as First Amendment violations.⁹⁶ Appeals to the Baltimore and New York City decisions are currently pending.⁹⁷ The San Francisco and Austin suits, filed in late 2011, are still pending, and the Austin ordinance has been temporarily suspended.⁹⁸

The first CPC disclosure requirement, introduced by the City of Baltimore, was the first to be challenged. The Archbishop of Baltimore Edwin F. O’Brien, along with the Greater Baltimore Center for Pregnancy Centers, Inc., disputed Baltimore’s CPC ordinance in March 2010.⁹⁹ *O’Brien v. Mayor and City Council of Baltimore* was decided in the U.S. District Court for the District of Maryland in January 2011.¹⁰⁰ Less than three months later, *Tepeyac v. Montgomery County*, a challenge to Montgomery County’s similar CPC ordinance, was decided in the

⁹³ SAN FRANCISCO ORDINANCE, *supra* note 90.

⁹⁴ NYC ORDINANCE, *supra* note 91.

⁹⁵ See *First Resort, Inc. v. Herrera*, No. CV-11-5534-MEJ (N.D. Ca. filed Nov. 16, 2011); *Austin LifeCare v. City of Austin*, No. A11CA875-LY (D.W. Tex. filed Oct. 5, 2011); *Evergreen Ass’n v. City of New York*, 801 F.Supp.2d 197 (S.D.N.Y. 2011); *Tepeyac v. Montgomery Cty.*, 779 F.Supp.2d 456 (D. Md. 2011) [hereinafter *Tepeyac I*], *aff’d in part, rev’d in part*, 683 F.3d 591 (4th Cir. 2012) [hereinafter *Tepeyac II*]; *O’Brien v. Mayor & City Council of Balt.*, 768 F.Supp.2d 804 (D. Md. 2011).

⁹⁶ See *Evergreen Ass’n*, 801 F.Supp.2d 197; *Tepeyac I*, 779 F.Supp.2d 456; *O’Brien*, 768 F.Supp.2d 804.

⁹⁷ The Fourth Circuit granted an en banc rehearing of *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3 539 (2012), in August 2012, and a decision is currently pending. See Baltimore Press Release, *supra* note 82. See also Ertelt, *New York Appeals Decision*, *supra* note 82.

⁹⁸ Ertelt, *Austin, Texas Suspends Law*, *supra* note 82.

⁹⁹ The Court found that the Archbishop, but not the CPC, lacked standing to be a plaintiff in the case. *O’Brien*, 768 F.Supp.2d at 811-12.

¹⁰⁰ *Id.* at 804.

same federal district court in favor of Centro Tepeyac, a Montgomery County CPC.¹⁰¹ A number of New York City CPCs, including Evergreen, Life Center, Pregnancy Care, Boro, and Good Counsel, initiated *Evergreen Association, Inc. v. City of New York* in the U.S. District Court for the Southern District of New York, which was decided in July 2011.¹⁰² The decisions in all three cases address the issue of First Amendment-protected speech, concluding that the CPC ordinances regulated and compelled speech.¹⁰³ Specifically, the *O'Brien* decision found that the Baltimore ordinance compelled speech “by mandating the timing and content of the introduction of the subjects of abortion and birth control.”¹⁰⁴ The CPC plaintiffs in all three cases were deemed by the courts to be private individuals who should be protected from being “forced to propound government-dictated messages.”¹⁰⁵

1. Strict Scrutiny Review, Not Commercial Speech

The three separate First Amendment analyses utilized the strict scrutiny standard. Strict scrutiny applies to most forms of speech because private individuals should not be “forced to propound government-dictated messages.”¹⁰⁶ Only laws that are “narrowly tailored to serve a compelling governmental interest”¹⁰⁷ can survive the First Amendment strict scrutiny test, and “[a] statute is not narrowly tailored if ‘a less restrictive alternative would serve the Government’s purpose.’”¹⁰⁸ As defendants, each of the local governments argued that strict scrutiny should not apply to the First Amendment analyses of the ordinances because CPCs are commercial enterprises and because the ordinances regulate commercial speech.¹⁰⁹ A lower standard of review applies to commercial speech, which has been defined as “expression related solely to the economic interests of the speaker and its audience.”¹¹⁰ Commercial speech regulations are valid if the “disclosure requirements are reasonably related to the State’s interest in preventing deception of customers.”¹¹¹

The City of New York argued that the CPCs engage in commercial speech because the pregnancy centers advertise goods and services, such as “diapers, clothing, counseling, pregnancy testing, and ultrasounds,” with commercial

¹⁰¹ *Tepeyac I*, 779 F.Supp.2d 456. The Fourth Circuit reviewed the challenge to Montgomery County’s ordinance in June 2012, affirming in part and reversing in part. *Tepeyac II*, 683 F.3d 591.

¹⁰² *Evergreen Ass’n*, 801 F. Supp. 2d 197.

¹⁰³ *Id.* at 202-03; *Tepeyac I*, 779 F.Supp.2d at 461; *O’Brien*, 768 F.Supp.2d at 812.

¹⁰⁴ *O’Brien*, 768 F.Supp.2d at 812.

¹⁰⁵ *Tepeyac I*, 779 F.Supp.2d at 461.

¹⁰⁶ *Id.*

¹⁰⁷ *Amidon v. Student Ass’n of State Univ. of N.Y., Albany*, 508 F.3d 94, 99 (2d Cir. 2007).

¹⁰⁸ *Evergreen Ass’n*, 801 F.Supp.2d at 204 (quoting *U.S. v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000)).

¹⁰⁹ *Id.*; *Tepeyac I*, 779 F.Supp.2d at 462; *O’Brien*, 768 F.Supp.2d at 813-14.

¹¹⁰ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980).

¹¹¹ *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 130 S. Ct. 1324, 1339 (2010).

value.¹¹² Furthermore, the City of New York asserted that the centers receive valuable return for those goods and services, “namely, ‘the opportunity to advocate against abortion and either delay or prevent the decision to terminate a pregnancy.’”¹¹³ The City of Baltimore made similar claims about the pregnancy centers’ engagement in commercial transactions, arguing that CPCs provide pregnant women with valuable goods and services.¹¹⁴ Montgomery County also argued that strict scrutiny should not apply because the county’s ordinance was “a permissible factual disclosure requirement” very similar to those that appear in commercial and professional disclosure cases, which have warranted a lower standard of scrutiny.¹¹⁵ The county argued that “truthful and purely factual disclosure laws do not merit strict scrutiny.”¹¹⁶

The district court judges in each of the three cases chose to apply strict scrutiny, rather than the more relaxed standard urged by the local governments, concluding that the ordinances do not regulate commercial speech.¹¹⁷ The *O’Brien* opinion explained:

[t]he overall purpose of the advertisements, services, and information offered by the CENTER is not to propose a commercial transaction, nor is it related to the CENTER’s economic interest. The CENTER engages in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives.¹¹⁸

Although the *O’Brien* judge recognized that CPCs’ services include inherently commercial elements, “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.”¹¹⁹ The *Evergreen* decision agreed, citing the New York City CPCs’ primarily “charitable” and “religious” purpose as the reason why the centers’ economic interests fall outside of the commercial speech doctrine.¹²⁰ The Montgomery County decision explicitly chose to follow a general rule, which allows speakers to tailor their own speech.¹²¹ That general rule, the *Tepeyac* court explained, “applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps to the

¹¹² *Evergreen Ass’n*, 801 F.Supp.2d at 204.

¹¹³ *Id.*

¹¹⁴ *O’Brien*, 768 F.Supp.2d at 813.

¹¹⁵ *Tepeyac v. Montgomery Cty.*, 779 F.Supp.2d 456, 462 (D. Md. 2011).

¹¹⁶ *Id.*

¹¹⁷ *Evergreen Ass’n*, 801 F.Supp.2d at 204-07; *Tepeyac I*, 779 F.Supp.2d at 463-64; *O’Brien*, 768 F.Supp.2d at 813-14.

¹¹⁸ *O’Brien*, 768 F.Supp.2d at 813.

¹¹⁹ *Id.* at 813-14.

¹²⁰ *Evergreen Ass’n*, 801 F.Supp.2d at 205.

¹²¹ *Tepeyac I*, 779 F.Supp.2d at 464.

permissive law of defamation.”¹²² All three courts essentially found that it was more important to protect CPCs’ religious and anti-abortion interests than to permit the local governments in Baltimore, Montgomery County, and New York City to further their interests in ensuring that CPC clients make fully and factually informed decisions about their pregnancies.

Two of these decisions also specified that CPCs cannot be held to standards of professional speech because CPC employees and volunteers are not medical professionals.¹²³ The *Evergreen* opinion explains, “[w]hile [the New York City centers] meet with clients individually, there is no indication that they employ any specialized expertise or professional judgment in service of their clients’ individual needs and circumstances.”¹²⁴ The Montgomery County decision expands upon the professional disclosure issue by addressing the difference between the permissive application of factual disclosure laws to abortion providers and the strict scrutiny of compelled speech laws that apply to non-medical pregnancy centers.¹²⁵ In *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Gonzales v. Carhart*, the United States Supreme Court upheld states’ ability to regulate abortion procedures and dictate the information that abortion providers must provide to women considering the procedure.¹²⁶ The *Tepeyac* judge explained that *Casey* and *Gonzales* demonstrate states’ ability to regulate the medical profession.¹²⁷ The Montgomery County opinion cites the United States Court of Appeals for the Eighth Circuit, which wrote in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, “while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion.”¹²⁸

In short, the government can compel licensed medical professionals to make factual disclosures, but because the courts view CPCs as individuals, the government may not require these pseudo-healthcare providers and non-licensed pregnancy centers to provide medically accurate information, despite the fact that the New York City and Montgomery County disclosures were created with the same public health interests in mind. An effective solution, as discussed in Part IV, would be for states like New York and Maryland to follow New York City and Montgomery County’s lead by enacting broader medical regulations for pseudo-

¹²² *Id.*

¹²³ *Id.* at 465-67; *Evergreen Ass’n*, 801 F.Supp.2d at 206-07.

¹²⁴ *Evergreen Ass’n*, 801 F.Supp.2d at 207.

¹²⁵ *Tepeyac I*, 779 F.Supp.2d at 465-66.

¹²⁶ *See Gonzales v. Carhart*, 550 U.S. 124, 157 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

¹²⁷ *Tepeyac I*, 779 F.Supp.2d at 465.

¹²⁸ *Id.* (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (en banc)).

healthcare providers like CPCs. Thereafter, CPCs would be held to the standards of the medical profession, and professional speech requirements would also apply.

2. Narrow Tailoring

Each of the three ordinances failed the strict scrutiny analysis because the courts found that the regulations were not tailored narrowly enough.¹²⁹ The *O'Brien* court focused on the government interest against false advertising and found that the Baltimore ordinance could have been less restrictive in its purpose of fighting false advertising.¹³⁰ The court determined that the ordinance failed to “provide a ‘carve-out’ provision for those limited-service pregnancy centers which do not engage in any deceptive practices,” and suggested that the City of Baltimore should “use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers.”¹³¹

Similarly, the *Evergreen* court determined that the New York City ordinance was not narrowly tailored enough “to combat deceptive practices that impede access to reproductive health services or mislead women into believing they have received care from a licensed medical provider.”¹³² The opinion indicates that “there is nothing objectionable about” the City’s message that pregnant women should seek the advice of licensed medical professionals.¹³³ Nonetheless, like the *O'Brien* court, the *Evergreen* court found the New York City law to be over-inclusive: “Plaintiffs’ advertising need not be deceptive for the [ordinance] to apply; any advertisement offering a facility’s services falls within [the ordinance]’s scope.”¹³⁴ The opinion suggests that the City of New York “could erect a sign on public property outside each pregnancy service center encouraging pregnant women to consult with a licensed medical provider.”¹³⁵ The opinion also recommends other alternatives, such as the prosecution of deceptive facilities through existing anti-fraud statutes and the enactment of licensing requirements for ultrasound technicians.¹³⁶ These recommended actions would be most effective if implemented from the more authoritative state government level.¹³⁷

Montgomery County’s ordinance requires CPCs to make two disclaimers by posting conspicuous and “easily readable” signs “written in English and Spanish.”¹³⁸ The sign must first state that the CPC “does not have a licensed

¹²⁹ *Evergreen Ass’n*, 801 F.Supp.2d at 208-09; *Tepeyac I*, 779 F.Supp.2d at 468-69; *O’Brien*, 768 F.Supp.2d at 816-17.

¹³⁰ *O’Brien*, 768 F.Supp.2d at 817.

¹³¹ *Id.*

¹³² *Evergreen Ass’n*, 801 F.Supp.2d at 207.

¹³³ *Id.* at 208.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 209.

¹³⁷ *See supra* Part IV.

¹³⁸ *Tepeyac v. Montgomery Cty.*, 779 F.Supp.2d 456, 459 (D. Md. 2011).

medical professional on staff” and second, that “the Montgomery County Health Officer encourages women who are and may be pregnant to consult with a licensed health care provider.”¹³⁹ The district court upheld the first part of the ordinance, using a strict scrutiny analysis that focused on the government’s “compelling interest in ensuring that its citizenry are able to obtain needed medical care.”¹⁴⁰ On appeal, the Fourth Circuit disagreed and found the first part of the ordinance to be “an impermissible government control of speech.”¹⁴¹ The appellate court explained that “even supposedly neutral and fact-based compelled disclosures can imperil free speech.”¹⁴²

Both *Tepeyac* decisions concurred that the second part of the ordinance was not narrowly tailored.¹⁴³ The district court was unconvinced that the recommendation to consult a medical professional effectively “ensure[d] that women did not forgo medical treatment [such as an abortion] that they would otherwise obtain after visiting [a limited service pregnancy resource center.]”¹⁴⁴ The district court judge believed that CPC visitors might not seek professional medical advice, even after being informed that CPCs did not have medical professionals on staff.¹⁴⁵ The first *Tepeyac* opinion dismissed a portion of the CPC law for “compel[ing] unneeded speech.”¹⁴⁶ The Fourth Circuit agreed and added that Montgomery County may encourage pregnant women to consult licensed medical professionals, but “must, at minimum, first do so using its own voice.”¹⁴⁷

Ultimately, the challenges successfully and completely limited the local governments’ CPC ordinances. The *Evergreen* court chose to grant a preliminary injunction of the New York City ordinance in its entirety.¹⁴⁸ *O’Brien* overturned the Baltimore CPC ordinance on Freedom of Speech grounds.¹⁴⁹ The *Tepeyac* law was completely enjoined on appeal.¹⁵⁰ Although the local government ordinances have initially been unsuccessful in court, it is still important for the government to protect women’s reproductive health by regulating CPCs’ harmful practices. That responsibility should fall upon state governments.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 468.

¹⁴¹ *Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 594 (4th Cir. 2012).

¹⁴² *Id.* (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988)).

¹⁴³ *Tepeyac II*, 683 F.3d at 594; *Tepeyac I*, 779 F.Supp.2d at 468-69.

¹⁴⁴ *Tepeyac I*, 779 F.Supp.2d at 468.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Tepeyac II*, 683 F.3d at 594.

¹⁴⁸ *Evergreen Ass’n v. City of New York*, 801 F.Supp.2d 197, 211 (S.D.N.Y. 2011).

¹⁴⁹ *O’Brien v. Mayor & City Council of Balt.*, 768 F.Supp.2d 804, 817-18 (D. Md. 2011).

¹⁵⁰ *Tepeyac II*, 683 F.3d at 595.

IV. PROBLEMS AND PROPOSED RESPONSES

Roe v. Wade and its progeny clearly indicate that individual states have a compelling interest in regulating abortion, especially to protect pregnant women's health.¹⁵¹ States, therefore, are responsible for enacting measures that ensure that pregnant women are provided the opportunity to consider their full range of reproductive health options.¹⁵² Among the many important issues that states should consider are CPCs' deceptive advertisements that hide the centers' anti-abortion purpose, unlicensed and untrained staff at CPCs, the protection of personal information that pregnant women provide to CPCs, the funding that CPCs receive from their home states, and the accuracy of medical information that CPCs present as truth. Unlike the attempts of local governments to enact blanket ordinances that apply to a small number of CPCs, states can easily address these concerns by enforcing existing laws in an effective way without encroaching upon pregnancy centers' First Amendment freedom of speech rights.

A. Deceptive Advertising and Anti-Deception Statutes

Many CPC offices can be found in the same building, shopping center, or vicinity as abortion providers' offices.¹⁵³ In order to reach their targeted demographic—vulnerable, often young women with unintended pregnancies—CPCs are purposefully positioned in locations where they can easily be mistaken for an abortion provider's office. CPCs often have misleading names such as Women's Health First, Inc., Unplanned Pregnancy, Family Planners, AAA Pregnancy Problem, and Options.¹⁵⁴ These names disguise the centers' anti-abortion mission to draw in unsuspecting women who seek unbiased information or full reproductive health services. Furthermore, many CPCs are often strategically located in urban areas or near college campuses to target minority, student, and low-income women.¹⁵⁵ This is particularly troubling because these are subsets of women who, after visiting a CPC, may not have the resources to properly explore their full range of reproductive health options, some of which might be less financially or geographically accessible.

¹⁵¹ See, e.g., *Roe*, 410 U.S. 113 (holding that pregnant women's health and the potentiality of human life are compelling state interests); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (holding that state laws may reflect states' interest in the potentiality of human life and that states may regulate abortion procedures to protect women's health).

¹⁵² Some states have flouted this responsibility by enacting measures designed to delay and mislead women's reproductive health choices. See, e.g., *Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 799 F.Supp.2d 1048 (D. S.D. 2011) (granting a preliminary injunction for unconstitutional provisions of South Dakota's House Bill 1217, which would have required pregnant women to wait 72 hours and visit a CPC prior to an abortion procedure).

¹⁵³ See Amy K., *supra* note 1, when New York City building directory listed one Planned Parenthood and four CPCs.

¹⁵⁴ See *id.* See also Jane Gross, *Pregnancy Centers: Anti-Abortion Role Challenged*, N.Y. TIMES, Jan. 23, 1987.

¹⁵⁵ See *Our Work*, CARE NET, www.care-net.org/ourwork/ (last visited Mar. 27, 2013).

CPCs also obscure their purpose through direct advertising. Many centers are listed in yellow pages under “abortion services.”¹⁵⁶ Their advertisements promise services such as birth control information and accurate abortion information.¹⁵⁷ However, nearly all CPCs subscribe to the abstinence-only school of birth control, CPCs never offer abortion referrals, and they have been charged with providing misleading health information, especially regarding abortion procedures and the after-effects of abortions.¹⁵⁸

Abortion counseling messages can regularly be seen on billboards and transportation advertisements; when further explored, many of these advertisements are actually referrals for anti-abortion CPCs. One example is a New York City subway advertisement campaign for abortionchangesyou.com. The website presents testimonials by individuals who have had, or who have been impacted by, abortions.¹⁵⁹ Michaelene Fredenburg, the website’s founder, claims that abortionchangesyou.com provides “a safe place [for women and their families] to experience their own range of emotions, apart from controversy and debate.”¹⁶⁰ However, abortionchangesyou.com contains a very limited and negative perspective of abortion and its after-effects.

Nowhere on the site does abortionchangesyou.com mention an anti-abortion agenda. But when I clicked the “Find Help” button and typed in a Manhattan ZIP code, the first thing that popped up was Project Rachel, an initiative of the Roman Catholic Church to “present the truth of the impact and extensive damage abortion inflicts on the mother, father, extended family and society.”¹⁶¹

The website’s bias is particularly evident when abortionchangesyou.com is contrasted with Exhale,¹⁶² a pro-choice post-abortion telephone hotline that recognizes both the positive and negative impacts of abortion, and the Doula Project,¹⁶³ a New York City organization that provides unbiased emotional support and information about options for unintended pregnancies. Websites like abortionchangesyou.com, which mask the creators’ real purpose to frighten visitors with one-sided and incomplete information, have the harmful effect of preventing women from receiving adequate and informed pregnancy counseling.

¹⁵⁶ WAXMAN REPORT, *supra* note 15, at 1. *See also* Gross, *supra* note 154.

¹⁵⁷ Gross, *supra* note 154.

¹⁵⁸ *See* Gibbs, *supra* note 16; Gross, *supra* note 154.

¹⁵⁹ ABORTION CHANGES YOU, www.abortionchangesyou.com (last visited Mar. 27, 2013).

¹⁶⁰ Susan Dominus, *In Subway Ads on Abortion, a Pretense of Neutrality*, N.Y. TIMES (Mar. 26, 2010), available at www.nytimes.com/2010/03/27/nyregion/27bigcity.html.

¹⁶¹ *Id.*

¹⁶² *See After-Abortion Support*, EXHALE, www.exhaleprovoice.org/after-abortion-support (last visited Mar. 27, 2013) (“There is no ‘right’ way to feel . . . Women often experience feelings such as sadness, happiness, empowerment, anxiety, grief, relief, and guilt.”).

¹⁶³ *See Our Mission*, THE DOULA PROJECT, www.doulaproject.org/our-mission.html (last visited Mar. 27, 2013) (“The Doula Project works to create a society in which all pregnant people have access to the care and support they need during their pregnancies and the ability to make healthy decisions for themselves, whether they face birth, miscarriage, stillbirth, fetal anomaly, or abortion.”).

CPCs have a documented history of deceptive advertising. In 2002, New York Attorney General Eliot Spitzer reached a settlement with an upstate New York CPC in order to “help clarify acceptable practices for organizations that counsel women on alternatives to abortion.”¹⁶⁴ The agreement, modeled after similar New York Attorney General consent decrees from 1987 and 1995, arose because the CPC’s advertisements deceptively suggested that the center provided medical services, abortions, or referrals to abortions.¹⁶⁵ The 2002 agreement requires the CPC to inform visitors that it does not provide abortion referrals, that it is not a licensed medical facility, and that its pregnancy tests are identical to over-the-counter tests.¹⁶⁶ The agreement was necessary because “[u]nlike Planned Parenthood facilities and other medical providers, which are monitored closely by the State Health Department, CPCs are not regulated by the state.”¹⁶⁷ The previous consent decrees addressed similar problems that arose because CPCs were reported for “misleading advertising and inappropriate medical counseling.”¹⁶⁸

States must actively enforce their anti-deception statutes, especially since CPCs are blatantly lying to the public about their services. The administration of anti-deception statutes “offer[s] a less restrictive alternative to imposing speech obligations on private speakers.”¹⁶⁹ State attorneys general must follow the lead of New York State attorneys general, who not only brought attention to a number of CPCs’ deceptive advertising and practices, but also initiated prosecution procedures against deceptive facilities. Most states already have anti-deception statutes, and several states have codified the Uniform Deceptive Trade Practices Act,¹⁷⁰ which is enforceable against CPCs.

Common CPC practices fall under the Uniform Deceptive Trade Practices Act’s definition of “deceptive trade practices.”¹⁷¹ CPCs “[cause] likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services”¹⁷² when uncertified technicians provide ultrasounds. CPCs often “[disparage] the goods, services or business of another by

¹⁶⁴ *Spitzer Reaches Agreement with Upstate Crisis Pregnancy Center*, OFF. OF THE N.Y. ST. ATT’Y GEN. (Feb. 28, 2002), www.ag.ny.gov/press-release/spitzer-reaches-agreement-upstate-crisis-pregnancy-center.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* See also NARAL PRO-CHOICE N.Y. FOUND. & NAT’L INST. FOR REPROD. HEALTH, SHE SAID ABORTION COULD CAUSE BREAST CANCER: A REPORT ON THE LIES, MANIPULATIONS, AND PRIVACY VIOLATIONS OF CRISIS PREGNANCY CTRS. IN N.Y.C. 8 (2010) [hereinafter NARAL N.Y. REPORT]. The final clarification is important because the CPC’s advertisements implied that its pregnancy tests were different from and more “medical” than over-the-counter pregnancy tests.

¹⁶⁷ *Spitzer Reaches Agreement with Upstate Crisis Pregnancy Center*, *supra* note 164.

¹⁶⁸ *Id.*

¹⁶⁹ *Evergreen Ass’n v. City of New York*, 801 F.Supp.2d 197, 209 (S.D.N.Y. 2011).

¹⁷⁰ Delaware, Georgia, Illinois, Nebraska, and Texas are among the states that have adopted the Uniform Deceptive Trade Practices Act.

¹⁷¹ See, e.g., 815 ILL. COMP. STAT. 510/2 (2011).

¹⁷² *Id.*

false or misleading representation”¹⁷³ by acting through their missions to discourage women from considering several types of reproductive health options, such as birth control and abortion. CPCs are notorious for “advertis[ing] goods or services with intent not to sell them as advertised”¹⁷⁴ because the centers pretend to provide abortions or abortion referrals. Altogether, a CPC’s purpose is to engage in conduct that “creates a likelihood of confusion or misunderstanding”¹⁷⁵ by providing misleading health information.¹⁷⁶ Without the threat of prosecution and legal enforcement at the state level, CPCs have little to no incentive to stop their deceptive practices.

B. Misleading Health Information and Stronger Regulations

CPCs have been scrutinized for various other deceptive practices in addition to false advertising, such as providing incorrect or misleading information regarding health effects associated with abortions. In 2006, the Committee on Government Reform prepared an investigative report for House Representative Henry A. Waxman titled, “False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers.”¹⁷⁷ The study, which solicited information from twenty-three federally funded CPCs, concluded that the centers often “grossly misrepresented the medical risks of abortion, telling the callers that having an abortion could increase the risk of breast cancer, result in sterility, and lead to suicide and ‘post-abortion stress disorder.’”¹⁷⁸ Four other similar investigations by pro-choice organizations including the National Abortion and Reproductive Rights Action League (“NARAL”) Pro-Choice Maryland Fund, Legal Voice, Planned Parenthood Votes! Washington, NARAL Pro-Choice Virginia Foundation, NARAL Pro-Choice New York Foundation, and the National Institute for Reproductive Health, reached similar conclusions, with additional findings that CPCs also misrepresent the effectiveness of, and risks associated with, different methods of birth control.¹⁷⁹

All of the investigative reports conclude that many CPCs provide misleading information about abortion procedures and related risks. Some CPCs purposefully overestimate pregnant women’s gestation or delay follow-up appointments in order

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* Part IV.B.

¹⁷⁷ WAXMAN REPORT, *supra* note 15.

¹⁷⁸ *Id.*

¹⁷⁹ See LEGAL VOICE & PLANNED PARENTHOOD VOTES! WASH., THE DECEPTIVE PRACT. OF LTD SERV. PREGNANCY CTRS: A REPORT (2009) [hereinafter WASH. REPORT]; NARAL PRO-CHOICE MD. FUND, THE TRUTH REVEALED: MARYLAND CRISIS PREGNANCY CTR. INVESTIGATIONS (2008) [hereinafter NARAL MD. REPORT]; NARAL N.Y. REPORT, *supra* note 166; NARAL PRO-CHOICE VA. FOUND., CRISIS PREGNANCY CENTERS REVEALED: VA. PREGNANCY CTR. INVESTIGATIONS & POL’Y PROPOSALS (2010) [hereinafter NARAL VA. REPORT].

to rule out the possibility of certain surgical abortion procedures.¹⁸⁰ Other CPCs were observed providing incorrect information regarding the legal timeframe in which the medical abortion pill, RU-486, can be taken.¹⁸¹ These centers purposefully delay women's decision making because "the further along a woman is in pregnancy the more expensive and inaccessible abortion becomes."¹⁸² Furthermore, CPCs often misrepresent the direct risks associated with abortion. The safety of abortion has been established and "[f]ewer than 0.3% of abortion patients experience a complication that requires hospitalization."¹⁸³ CPCs, however, regularly and grossly exaggerate the possibility of serious complications. Centers have been observed informing women that "many women bleed to death on the table,"¹⁸⁴ that "the 'uterine lining could be pulled out entirely,'"¹⁸⁵ and that "'abortion is a blind procedure.'"¹⁸⁶ These anecdotes were told to frighten and prevent women from considering their full range of reproductive health options.

Additionally, CPCs regularly provide incorrect information regarding abortion's physiological and psychological side effects, telling women that abortion will lead to an increased risk of breast cancer, depression, and infertility. A Maryland CPC brochure tells pregnant women, "if you have a family history of breast cancer and have an early abortion at a young age, your chances of getting breast cancer before the age 45 are increased by 800 percent!"¹⁸⁷ Although the National Cancer Institute issued a 2003 report with the "well established" conclusion that "[i]nduced abortion is not associated with an increase in breast cancer risk,"¹⁸⁸ many CPCs frequently provide exaggerated and incorrect breast cancer statistics.¹⁸⁹

Several centers also purport a significant and long-lasting possibility of "Post-Abortion Syndrome," a condition that is neither recognized by the American Psychological Association nor the American Psychiatric Association.¹⁹⁰ "Despite the scientific evidence that abortion does not cause significant long-term

¹⁸⁰ See NARAL MD. REPORT, *supra* note 179, at 5; NARAL N.Y. REPORT, *supra* note 166, at 10-11; NARAL VA. REPORT, *supra* note 179, at 17.

¹⁸¹ See NARAL VA. REPORT, *supra* note 179, at 17 (CPC told an investigator that RU-486 cannot be taken after five weeks of pregnancy, when the legal limit is actually seven weeks).

¹⁸² NARAL N.Y. REPORT, *supra* note 166, at 10.

¹⁸³ *Facts on Induced Abortion in the U.S.*, *supra* note 35, at 2.

¹⁸⁴ NARAL MD. REPORT, *supra* note 179, at 3.

¹⁸⁵ NARAL VA. REPORT, *supra* note 179, at 16.

¹⁸⁶ WASH. REPORT, *supra* note 179, at 7.

¹⁸⁷ NARAL MD. REPORT, *supra* note 179, at 4.

¹⁸⁸ NAT'L CANCER INST., SUMMARY REPORT: EARLY REPROD. EVENTS & BREAST CANCER 2003, available at www.cancer.gov/cancertopics/causes/ere/workshop-report.

¹⁸⁹ See WASH. REPORT, *supra* note 179, at 7 (explaining that the investigated CPCs provided written information that included statements such as "abortion causes cancer."); NARAL N.Y. REPORT, *supra* note 166, at 7 (showing a CPC brochure titled, "The Deadly After-Effect of Abortion: Breast Cancer"); NARAL VA. REPORT, *supra* note 179, at 21 (citing literature from sixteen CPCs that stated "abortion doubles a woman's risk of developing breast cancer"); WAXMAN REPORT, *supra* note 15, at 7-9 (explaining that an increased risk of breast cancer is a consistent theme in CPC propaganda).

¹⁹⁰ WAXMAN REPORT, *supra* note 15, at 11.

psychological harm,”¹⁹¹ all five CPC investigative reports discovered evidence that the centers falsely informed visitors that abortion leads to an increased risk of depression, suicide, or addiction to drugs or alcohol.¹⁹² The threat of future emotional and psychological harm is yet another scare tactic that CPCs utilize to deter pregnant women from seeking abortions.

Furthermore, investigations revealed that the centers frequently informed women that abortion causes an increased risk of infertility. The Waxman Report summarizes research concluding “that a single induced abortion performed by vacuum aspiration does not increase the risk of complications during future pregnancies, the risk of having a low birthweight baby, or the risk of having a pregnancy result in a miscarriage, stillbirth, infant death or congenital malformations.”¹⁹³ All of the investigative reports discovered that CPCs continue to erroneously inform women that infertility, sterility, miscarriages, and future birth defects are common side effects of abortion.¹⁹⁴

In addition to providing abortion and pregnancy counseling, many of the CPCs approached in the investigative reports also claimed to offer basic family planning services. When these services were explored, investigators found that the centers, which mostly promote abstinence, do not actually provide accurate information about contraceptives and sexually transmitted infections.¹⁹⁵ In Washington, for example, one CPC incorrectly “told an in-clinic tester ‘condoms are 85% effective when they don’t break, which they often do, and they do not protect against herpes and HPV transmission, they sort of protect against HIV transmission.’”¹⁹⁶ Another Washington CPC informed a visitor that “condoms fail

¹⁹¹ *Id.* at 12.

¹⁹² See WASH. REPORT, *supra* note 179, at 7 (quoting a CPC staff member who cautioned that abortion can cause post-traumatic stress disorder and depression); NARAL MD. REPORT, *supra* note 179, at 4 (citing a CPC counselor who warned of Post-Abortion Stress Syndrome); NARAL N.Y. REPORT, *supra* note 166, at 10 (explaining that 73% of the investigated CPCs mentioned Post-Abortion Stress Syndrome); NARAL VA. REPORT, *supra* note 179, at 15 (listing claims that abortion leads to depression, Post-Abortion Stress Syndrome, alcoholism, drug addiction, and eating disorders); WAXMAN REPORT, *supra* note 15, at 12 (providing examples of “emotional complications” purported by CPCs).

¹⁹³ WAXMAN REPORT, *supra* note 15, at 9.

¹⁹⁴ See WASH. REPORT, *supra* note 179, at 7 (quoting a CPC who told an investigator that abortion can damage the cervix, “resulting in greater potential for miscarriage in later life”); NARAL MD. REPORT, *supra* note 179, at 3-4 (providing an example where a CPC counselor listed future infertility as an abortion risk); NARAL N.Y. REPORT, *supra* note 166, at 10 (finding that 64% of CPCs “cited future infertility” during an in-person visit); NARAL VA. REPORT, *supra* note 179, at 20-21 (explaining that CPCs informed investigators “that any type of abortion would make it far more difficult to conceive and carry a healthy baby to term in the future”); WAXMAN REPORT, *supra* note 15, at 9-10 (referencing phone conversations and CPC websites that informed of infertility-related side effects).

¹⁹⁵ See, e.g., NARAL N.Y. REPORT, *supra* note 166, at 14 (“While 56% of CPCs visited provided no written literature about contraception, the remaining 44% gave inaccurate information about the efficacy and/or risks of contraception.”); NARAL VA. REPORT, *supra* note 179, at 19-20 (“A total of [nineteen] CPCs shared medically inaccurate information about contraception, and a total of fourteen told investigators unfounded statements about sexually transmitted infections . . . NPCVF’s investigation revealed that the majority of CPCs in [Virginia] promote abstinence.”).

¹⁹⁶ WASH. REPORT, *supra* note 179, at 9.

50% of the time, according to the Centers for Disease Control.”¹⁹⁷ The Maryland investigation discovered that “nine out of [eleven] CPCs visited did not discuss birth control, and not a single center provided a referral for birth control.”¹⁹⁸ Although CPCs exist to deter women from obtaining abortions, it is evident that the centers either avoid the topic of birth control or provide information to discourage women from taking necessary steps to prevent unintended pregnancies.

CPCs’ practice of providing misleading health information can be regulated under the state anti-deception statutes.¹⁹⁹ Additionally, in order to ensure that women receive safe and adequate pregnancy or reproductive health care, states should regulate CPCs as medical clinics, particularly when the centers offer ultrasounds and family planning services. States can require, without violating the First Amendment, ultrasound technicians to be licensed or registered with a professional certifying body, such as the American Registry for Diagnostic Medical Sonography.²⁰⁰ When CPCs hold themselves out to be medical professionals, the centers should be held to the standards of medical professionals, including the standards of professional speech that local governments were unable to enforce through CPC ordinances. If states require medical licensing for all ultrasound technicians, CPCs “would be subject to penalties for practicing medicine without a license.”²⁰¹ States have an interest in women’s health and safety. State legislation should not only explicitly prevent CPCs from providing misleading information that is harmful to women’s health, but should also encourage CPCs to disclose accurate and complete information to their clients.

Moreover, states that provide CPC funding should condition funding upon fair practices. Funding from the “Choose Life” license plates is often contingent upon CPCs’ agreement to follow certain guidelines, but states have not been closely monitoring centers’ compliance with the guidelines. It is critical for states to be aware that government funds are directly supporting deceptive and harmful practices, and state legislatures and states’ consumer protection agencies are responsible for curtailing CPCs’ operations that run contrary to public policy.

C. Confidentiality Concerns and HIPAA Requirements

Unlicensed CPCs are often purposefully made to look like medical clinics. One Virginia investigator reported that a particular center had the appearance of “a small doctor’s office,” because it had a waiting room, a glass check-in window, a

¹⁹⁷ *Id.*

¹⁹⁸ NARAL MD. REPORT, *supra* note 179, at 4.

¹⁹⁹ See *infra* Part IV.A.

²⁰⁰ According to the United States Bureau of Labor Statistics, “No States require licensure in diagnostic medical sonography . . . Most employers prefer to hire registered sonographers because registration provides an objective measure of an individual’s professional standing.” *Diagnostic Medical Sonographers*, U.S. BUREAU OF LABOR STATISTICS, www.bls.gov/oco/ocos273.htm#training (last visited Mar. 4, 2012).

²⁰¹ *Evergreen Ass’n v. City of New York*, 801 F.Supp.2d 197, 207 (S.D.N.Y. 2011).

bathroom with “a place to put my urine sample in the wall like at my doctor’s office,” and an ultrasound room with medical equipment and supplies.²⁰² The medical and doctor’s office-like appearances give visitors the impression that the CPCs are held to the same legal standards set forth for medical facilities and authorities. This, however, is untrue for CPCs that are not medically licensed.

The confidentiality of women’s personal and medical information provided to CPCs is another important concern, especially in the context of CPCs without medical licenses. HIPAA, the Health Insurance Portability and Accountability Act Privacy Rule, “provides federal protections for personal health information held by covered entities and gives patients an array of rights with respect to that information.”²⁰³ Some CPCs are medically licensed and must adhere to HIPAA laws. However, most CPCs are not medically licensed and, therefore, “are not bound by federal privacy laws as required of licensed medical facilities (HIPAA).”²⁰⁴ In a 2004 issue of *At the Center*, an anti-abortion magazine, Care Net president Kurt Enstimminger described recently-passed HIPAA laws and wrote,

[t]he good news for pregnancy centers is that most are not covered by these new federal requirements. If your pregnancy center is not a health care provider, the new HIPAA privacy rules should have no application to your procedures and practices. Moreover, even if your center offers limited medical services such as ultrasounds or STD testing, it may be exempt from the requirements of HIPAA so long as it does not engage in electronic transactions related to insurance claims and payments.²⁰⁵

Although Enstimminger’s article encouraged CPCs to voluntarily comply with HIPAA requirements, he acknowledged that most CPCs are not compelled to take steps that ensure protection of pregnant women’s private and medical information.²⁰⁶

It is troubling that many CPCs are able to use the façade of medical authority to solicit personal and private information from women—information such as “relationship status, work information, and even the personal information of the ‘father of the baby’”²⁰⁷—without being legally required to safeguard the information in any way. One Virginia CPC told a caller, “I assure you we’re confidential and absolutely free.”²⁰⁸ Despite those assurances, that CPC’s brochure contained fine print stating that “[there are times when confidential information may be shared without your permission, [including] giving certain

²⁰² NARAL VA. REPORT, *supra* note 179, at 12.

²⁰³ *Understanding Health Information Privacy*, U.S. DEP’T OF HEALTH & HUMAN SERV., www.hhs.gov/ocr/privacy/hipaa/understanding/index.html (last visited Mar. 27, 2013).

²⁰⁴ NARAL VA. REPORT, *supra* note 179, at 13. See also Kurt Enstimminger, *HIPAA Privacy Rules and the Pregnancy Center*, *AT THE CENTER* (2004), available at www.atcmag.com/v5n3/article11.asp.

²⁰⁵ Enstimminger, *supra* note 204.

²⁰⁶ *Id.*

²⁰⁷ NARAL N.Y. REPORT, *supra* note 166, at 8.

²⁰⁸ NARAL VA. REPORT, *supra* note 179, at 13.

information to parents or guardians of minors; [or] sharing information with companies we contract with to provide services on our behalf.”²⁰⁹ Women should be explicitly informed about existing or nonexistent protections for their private information, especially in the context of pregnancy, which could be fraught with unpredictable and personal complications.²¹⁰

Although HIPAA is a federal regulation, enforceability is determined at the state level. The state licensing requirements recommended in Section B would trigger HIPAA requirements that protect women’s confidential personal and health information. Only licensed CPCs are obligated to follow confidentiality rules, and state legislatures must take necessary steps to ensure that women’s private information is properly protected.

CONCLUSION

Along with the surge in CPC activity across the country over the past decade, there has been increased federal, state, and local government attention towards these pregnancy centers that often do not have medically licensed staff. Under the Bush administration during the early 2000s, CPCs received a significant boost in federal funding under several maternal health and abstinence education schemes. CPCs have also received state funding through the promotion of so-called “Choose Life” vehicle license plate tags.

Not all CPC treatment has been positive, though, and beginning in 2010, local governments, including Montgomery County in Maryland and the cities of Baltimore, New York, Austin, and San Francisco, enacted restrictive CPC regulations requiring pregnancy centers to make disclosures about their non-medical and anti-abortion practices. These types of ordinances promote a genuine government interest in protecting the health and interests of pregnant women from biased and overwhelmingly religious organizations, but two federal courts have either struck down or limited three of the anti-CPC ordinances for First Amendment reasons.

Without state intervention, CPCs will continue to deceive women and delay time-sensitive reproductive healthcare. States bear the burden of ensuring that pregnant women are not deceived by CPCs’ biased agenda, and states must mobilize their attorneys general to enforce existing anti-deception laws against violators. States must also use their legislative power to regulate pseudo-healthcare providers that use medical equipment, provide incorrect medical statistics, and obtain women’s personal and private health information. Women are entitled to complete and accurate health information, especially when making personal

²⁰⁹ *Id.*

²¹⁰ One example is pregnant women in abusive relationships. An abusive relative, spouse, or boyfriend might easily be able to obtain the pregnant woman’s personal and contact information from a CPC.

decisions regarding unintended pregnancies. States are responsible for removing CPC-imposed barriers between women and their right to reproductive health information.