Testimony of the American Center for Law and Justice in Opposition to the Proposed Anti-Crisis Pregnancy Center Bill (Int. No. 371)

November 16, 2010

SUMMARY

On October 12, 2010, the New York City Council introduced a bill (Introduction Number 371-2010) targeting pro-life organizations that offer information and assistance to women who are pregnant or believe that they may be pregnant, often called "crisis pregnancy centers" (CPCs). This bill is unnecessary and clearly violates federal and New York law.

The American Center for Law and Justice (ACLJ) strongly opposes this bill on both constitutional and policy grounds. The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law and the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States and participated as *amicus curiae* in a number of significant cases involving abortion and the freedoms of speech and religion.[1] The ACLJ represents Expectant Mother Care (which operates a dozen CPC locations throughout New York City), Life Center of New York-Brooklyn, and Heartbeat International concerning Introduction 371's impact on their legal rights.

Int. 371 targets pro-life "limited service pregnancy centers," defined as

> a facility where the primary purpose is to provide commercially valuable pregnancy-related services, regardless of whether they are offered for a fee but:
> (1) does not provide or refer for abortions or FDA-approved contraceptive drugs and devices;

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[1] *See, e.g.*, *Pleasant Grove v. Summum*, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (participated as *amicus curiae*; Court held that the Partial Birth Abortion Ban Act of 2003 was facially constitutional); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (holding that the creation of floating buffer zones around persons seeking to use abortion clinics violated the First Amendment rights of pro-life speakers); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (holding that a federal law did not provide a cause of action against pro-life speakers who obstructed access to abortion clinics).

(2) is not licensed by the state of New York or the United States government to provide medical or pharmaceutical services; and

(3) is not a facility where the primary purpose is for one or more practitioners, licensed under [New York law] to provide medical services.[2]

This definition encompasses pro-life organizations but does not cover pro-abortion facilities that provide or refer for abortions or contraceptives. Int. 371 is just the latest attack in a nationwide campaign by pro-abortion groups to burden, marginalize, and vilify pro-life crisis pregnancy organizations.[3] The sole "evidence" cited in support of Int. 371 is a faulty, self-serving "report" of a pro-abortion group that falls far short of documenting any public health crisis calling for intrusive government regulation of non-profit organizations.

One hundred and twenty days after Int. 371 is enacted,[4] it will require limited service pregnancy centers to display written notices in English and Spanish—by their entrances, in their waiting rooms, on their websites, and in any advertisements—stating that the organization does not provide abortions or contraceptives or referrals for them.[5] In addition, if a licensed medical professional is not on site, the organizations must post a sign stating so by their entrance and in their waiting room.[6]

Any limited service pregnancy center that fails to comply with these notice requirements will be subject to financial penalties.[7] If three violations occur within two years, the Health Commissioner can issue an order to be posted at the center giving the NYPD the authority to shut the center down for up to five days in order to correct or prevent violations.[8] A person who removes or destroys a posted order will be subject to up to fifteen days of jail time or a $250 fine.[9] A person who intentionally disobeys a posted order or uses any premises closed by an order will be subject to up to six months imprisonment or a fine of up to $1,000.[10]

In addition, Int. 371 requires limited service pregnancy centers to keep all "health information and personal information" confidential, requiring a signed, written consent form with an expiration date for the release of any such information.[11] The bill creates a civil cause of action for a person claiming to be injured by a violation of this requirement. Potential remedies include injunctive relief, compensatory and punitive damages, attorney's fees, and costs.[12]

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[2] Int. 371 § 20-815(e).

[3] *See, e.g.*, *Council Sets Abortion Fight; New Bill Would Set Strict Disclosure Requirements for Crisis-Pregnancy Centers*, Wall Street Journal, Oct. 12, 2010, http://online.wsj.com/article/SB10001424052748703794104575546620908818644.html; *Virginia Legislators Drop Bill Restricting Pregnancy Centers, Praise Them Instead*, Catholic News Agency, Mar. 12, 2010, http://www.catholicnewsagency.com/news/virginia_legislators_drop_bill_restricting_pregnancy_centers_praise_them_instead/.

[4] Int. 371 § 3.

[5] *Id.* § 20-816(a).

[6] *Id.* § 20-816(b).

[7] *Id.* § 20-818(a).

[8] *Id.* § 20-818(b)(1) to (4).

[9] *Id.* § 20-818(b)(5).

[10] *Id.*

[11] *Id.* § 20-817.

[12] *Id.* § 20-820.

The Council's authority is limited to enacting laws that are consistent with the enumerated powers of the New York City Charter, and the constitutions and laws of the United States and the State of New York.[13] Int. 371 exceeds the Council's authority because, if enacted, it would violate the United States and New York Constitutions in numerous ways. Int. 371 would violate the freedom of speech protected by the First Amendment to the United States Constitution for four distinct reasons because it

1) compels pro-life limited service pregnancy centers to speak;
2) regulates speech on the basis of content;
3) regulates speech on the basis of viewpoint; and
4) regulates speech on the basis of speaker identity,

without being the least restrictive means of achieving a compelling governmental interest.

In addition, Int. 371 would violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment by singling out pro-life centers for discriminatory treatment and by subjecting them to vague speech requirements under the threat of criminal and financial penalties. Int. 371 would also violate the Free Exercise Clause of the First Amendment by targeting a class of speakers who tend to be religiously-motivated and/or affiliated with a religious denomination while expressly excluding speakers with an opposing, secular viewpoint. Int. 371 would also violate multiple provisions of the New York Constitution that provide similar protections for the freedom of speech,[14] equal protection of the law,[15] due process,[16] and the free exercise of religion.[17] As such, Int. 371 should not be enacted.

ANALYSIS

I. THERE IS NO NEED OR JUSTIFICATION FOR INT. 371.

Int. 371 is a solution in search of a problem. The only "evidence" offered in support of Int. 371 is a document compiled by the New York affiliate of a pro-abortion organization (NARAL) that is engaged in a national campaign to discredit CPCs and use the federal, state, and local governments to saddle CPCs with burdensome regulations. In fact, the Council Members who introduced Int. 371 relied solely upon this NARAL document to justify the "need" to regulate CPCs.[18] Therefore, in depth consideration of the claims made in the NARAL document

[13] *N.Y. City Health & Hosps. Corp. v. Council of N.Y.*, 752 N.Y.S.2d 665, 669 (App. Div. 2003); *see also* N.Y. Const. art. IX, § 2(c) ("[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . ."); New York City Charter, ch. 2, § 28 (the Council "shall have the power to adopt local laws which it deems appropriate . . . for the good rule and government of the city; for the order [and] protection . . . of persons . . . ; for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants . . .").
[14] N.Y. Const. art. I, § 8.
[15] N.Y. Const. art. I, § 11.
[16] N.Y. Const. art. I, § 6.
[17] N.Y. Const. art. I, § 3.
[18] *See, e.g.*, New York City Council, Office of Communications, *Release #098-2010*, Oct. 12, 2010, http://council.nyc.gov/html/releases/10_12_10_crisis.shtml; *NYC Council Member Lappin Touts Her Kill CPC Bill*, http://www.youtube.com/watch?v=9jh5rDyvM9k (Council Member Jessica Lappin leading a press conference

is warranted, and upon such consideration, it is evident that there is in fact no justification for Int. 371.

Specifically, the NARAL document, entitled "She Said Abortion Could Cause Breast Cancer,"[19] claims that unnamed pro-abortion "volunteers" conducted a covert investigation of CPCs through phone calls and in-person visits in order to "educate women and the public at large about the full range of deceptive and manipulative practices used by CPCs in New York City." Although the document itself admits that these volunteers were specifically trained in order to gather information helpful to NARAL's cause, the absence of any substantiated information in the document demonstrates that they wholly failed in their endeavor. Further, "because none of the volunteer investigators was pregnant, th[e] report contains no insight into how CPCs would respond to a proven pregnancy."

Such faulty, unverifiable claims by an organization with a strong bias against CPCs falls far short of the rigorous evidentiary standard necessary to justify compelling a private, non-profit organization to convey a government-mandated message. NARAL Pro-Choice New York recently showed its true agenda—destroying CPCs, not protecting women from any real harm—by fishing for hypothetical testimony from CPC clients who support NARAL's claims and saying, "*Your testimony can help bring them down*."[20] NARAL Pro-Choice New York President Kelli Conlin referred to Int. 371 as "a great first step,"[21] signaling an intent to further target CPCs with more legislation in the future.

A. CPCs Provide Material Assistance to Expectant Mothers.

Even putting aside the obvious, numerous research flaws in the NARAL document, and the fact that the "research" was conducted by an organization with a biased agenda to "bring [CPCs] down," the statements intended to support an alleged need for Int. 371 range from irrelevant to absurd. Int. 371 is based on nothing more than a desire to vilify and ridicule CPCs. The City Council should react to the NARAL report in the same way that the Virginia legislature reacted to a similar report issued by NARAL's Virginia chapter earlier this year.

NARAL Pro-Choice Virginia supported legislation to regulate CPCs in connection with funding for Choose Life license plates, making the same arguments concerning an alleged need to regulate CPCs that have been offered in favor of Int. 371.[22] After squarely rejecting NARAL's proposed legislation, both houses of the Virginia legislature adopted a resolution in support of the work of CPCs, stating,

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announcing Int. 371's introduction next to NARAL leaders and a sign with the title of the NARAL document); Speaker Quinn and Council Members Lappin, Ferreras, and Arroyo, *Email to Constituents*, Oct. 22, 2010 (citing NARAL document as sole "evidence" supporting Int. 371).

[19] NARAL Pro-Choice New York Foundation, *She Said Abortion Could Cause Breast Cancer*, http://www.prochoiceny.org/assets/files/cpcreport2010.pdf. The document is similar to one produced in 2006 for U.S. Representative Henry Waxman attempting to discredit CPCs.

[20] NARAL Pro-Choice New York Foundation, http://www.prochoiceny.org/ (last visited Nov. 12, 2010).

[21] *Kelli Conlin of NARAL-NY Calls Kill CPC Bill just "The First Step"*, http://www.youtube.com/watch?v=7YvtzRQYS7w.

[22] *See* NARAL Pro-Choice Virginia, *Crisis Pregnancy Centers Revealed*, Jan. 20, 2010, http://www.naralva.org/assets/files/cpcsrevealed.pdf.

WHEREAS, the life-affirming impact of pregnancy care centers on the women, men, children, and communities they serve is considerable and growing; and

WHEREAS, pregnancy care centers serve women in Virginia and across the United States with integrity and compassion; and

WHEREAS, more than 30 pregnancy care centers across Virginia provide comprehensive care to women and men facing unplanned pregnancies, including resources to meet their physical, psychological, emotional, and spiritual needs; and

WHEREAS, last year alone, pregnancy care centers provided free, confidential help and services to over 19,000 women in Virginia, including 9,200 free pregnancy tests, 9,600 free packs of diapers, 8,000 free bags of baby clothes, 3,800 free classes on topics ranging from infant care and parenting to job search skills, and 2,800 limited ultrasounds; and

WHEREAS, these and other services amounted to approximately $ 1.1 million in services and goods to women and families; and

WHEREAS, pregnancy care centers offer women free, confidential, and compassionate services, including pregnancy tests, peer counseling, 24-hour telephone hotlines, childbirth and parenting classes, and referrals to community, health care, and other support services; and

WHEREAS, many medical pregnancy care centers offer ultrasounds and other medical services; and

WHEREAS, many pregnancy care centers provide information on adoption and adoption referrals to pregnant women; and

WHEREAS, pregnancy care centers encourage women to make positive life choices by equipping them with complete and accurate information regarding their pregnancy options and the development of their unborn children; and

WHEREAS, pregnancy care centers provide women with compassionate and confidential peer counseling in a nonjudgmental manner regardless of their pregnancy outcomes; and

WHEREAS, pregnancy care centers provide important support and resources for women who choose childbirth over abortion; and

WHEREAS, pregnancy care centers ensure that women are receiving prenatal information and services that lead to the birth of healthy infants; and

> WHEREAS, many pregnancy care centers provide grief assistance for women and men who regret the loss of their child from past choices they have made; and
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> WHEREAS, many pregnancy care centers work to prevent unplanned pregnancies by teaching effective abstinence education in public schools; and
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> WHEREAS, pregnancy care centers operate primarily through reliance on the voluntary donations and time of caring individuals who are committed to caring for the needs of women and promoting and protecting life; now, therefore, be it
>
> RESOLVED by the House of Delegates, the Senate concurring, That the General Assembly hereby commend pregnancy care centers for their outstanding service to women in Virginia; and, be it
>
> RESOLVED FURTHER, That the Clerk of the House of Delegates prepare a copy of this resolution for presentation to the pregnancy care centers as an expression of the General Assembly's admiration and gratitude for the work of the centers.[23]

B. CPCs Do Not Engage in False Advertising or Mislead Women.

Int. 371 should be rejected because there is no justification for regulating the speech of CPCs. CPC advertisements are neither false nor misleading. The NARAL document cites CPC subway advertisements stating, "Scared? Confused? We Can Help" and "Abortion Alternatives" as examples of deceptive advertising. No reasonable person, however, would read an advertisement for "Abortion Alternatives" and assume that the organization must be an abortion provider or a group that refers for abortion. The word "alternatives" clearly denotes options that are *alternatives to abortion* (*i.e.*, options *other than* abortion). Those options all involve, by definition, a live birth rather than an abortion.

There is not a shred of evidence that New York City women have been duped into believing that they were walking into an abortion provider's office by such advertisements, let alone that such a misunderstanding threatened their health. The mere suggestion by NARAL or a Council member that a hypothetical person could read an advertisement and conclude that the organization must be one that provides or refers for abortion is not "evidence" of a need for government regulation of CPCs.

In addition, the NARAL document declares that CPCs are "misleading"—justifying intrusive government regulation of their speech—because some CPCs use "neutral sounding names like Pregnancy Help, Inc., Pregnancy Resources Services, and Center for Pregnant Women," use the word "choice" in discussing alternatives to abortion, or locate near abortion

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[23] *Commending pregnancy care centers*, 2010 Va. H.J.R. 435 (passed Senate March 12, 2010). The Virginia Senate passed an identical resolution except that the final two paragraphs have slightly different language to indicate that the House concurred and to instruct the Clerk of the Senate to prepare a copy of the resolution. 2010 Va. S.J.R. 265 (passed House Mar. 11, 2010).

clinics. Although pro-abortion groups may like to think that they have a monopoly on the terminology they prefer to use, or a right to prevent pro-life organizations from speaking anywhere near abortion clinics, the First Amendment says otherwise.

NARAL also accuses CPCs of "us[ing] emotionally manipulative counseling to shame women out of choosing abortion" by stating that abortion is the "killing" of an "unborn child" or "baby" (rather than calling it the termination of a "fetus"), showing images or videos of fetal development, and sharing true personal stories of women who regret having an abortion. NARAL also criticizes CPCs for offering ultrasounds "on the theory that a woman is less likely to choose to terminate her pregnancy if she is able to view her fetus or listen to the fetal heartbeat." Although NARAL may choose to de-humanize the unborn and to keep factual information about the development of a baby or about abortion procedures from women, there is no justification for publicly chastising CPCs for referring to the unborn as human beings at the earliest stages of their development or for providing factual information to pregnant women. More importantly, there is no justification for making these the bases for intrusive governmental regulation. Just because NARAL would operate a pregnancy center differently does not make the CPCs guilty of "coercive tactics" or "emotional manipulation." NARAL is not the self-appointed police of all things pregnancy-related.

In sum, NARAL is trying to make a mountain out of a non-existent molehill. A woman who is unsure of whether a CPC will provide or refer for abortion or contraceptives, or whether a CPC volunteer is a licensed doctor or nurse, *may simply ask a question.* Not even NARAL alleges that CPC volunteers claim that CPCs provide or refer for abortion or contraceptives, refuse to state the CPC's position on abortion and contraceptives, or falsely claim that they are doctors or nurses. Multiple times every day, Americans are presented with advertisements, statements, and other information about organizations, products, services, and events about which they are not fully knowledgeable. It takes virtually no effort to Google a name, make a phone call, or send an email asking a question in response to seeing an advertisement. NARAL has provided absolutely no evidence justifying intrusive government regulation of CPCs.

Another faulty claim made by NARAL is that CPCs deprive women of "information they need to prevent unintended pregnancies in the future" by emphasizing abstinence until marriage as the only fully effective means of preventing pregnancy. NARAL faults CPCs for highlighting that contraceptives are not foolproof means of preventing undesired pregnancies and by promoting abstinence until marriage as the only "risk-free" and "effective way to prevent sexually transmitted diseases (STDs) and unintended pregnancies." This premise is yet another example of NARAL seeking to employ the government to impose its own policy preferences and ideology upon CPCs, and it is ironic in two respects.

First, CPCs' emphasis on abstinence until marriage as the only fully effective means of preventing pregnancy and STD transmission *is factually accurate*, as countless thousands of American women become pregnant each year, or contract STDs, despite their use of contraceptives, while abstinence does not result in pregnancy or the transmission of an STD. Second, many of the women who visit CPCs for assistance *know firsthand* that what CPC volunteers tell them is true based on their own experience with becoming pregnant or contracting an STD despite their use of contraceptives. Many would argue that it is a perception of the

infallibility of contraceptives in preventing pregnancy, with the "backup plan" of the availability of abortion, including the morning-after pill—rather than an emphasis on abstinence until marriage—that has contributed to continued high rates of unplanned pregnancy in the United States. Regardless of one's personal perspective on this issue, however, the government may not use its regulatory power to target private organizations with a disfavored viewpoint on contraceptives and abstinence.

C. Information Provided by CPCs is Overwhelmingly Supported by Scientific Research.

The NARAL document maligns CPCs for providing women with materials discussing the physical, mental, and emotional risks associated with abortion. NARAL refutes any negative outcomes associated with abortion, holding the view that "after an abortion, most women report feeling 'relief and happiness.'" Organizations that assist numerous women who are plagued with regret and physical and emotional problems due to their abortions, such as the Silent No More Awareness campaign,[24] would strongly disagree with NARAL's assessment. It is significant that, in 2007, the Supreme Court noted that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."[25]

The title of the NARAL document, "She Said Abortion Could Cause Breast Cancer," illustrates the absurdity of the alleged need for Int. 371. Although pro-abortion organizations continuously deny any conceivable link between abortion and breast cancer (or any other negative outcome for that matter), and cite studies or other sources supporting their argument, *there are numerous studies and articles that suggest a correlation or link between abortion and breast cancer and numerous other negative health effects*.

For example, Elizabeth Cohen, CNN Senior Medical Correspondent, noted in an October 7, 2010 article that "it's medically important to tell your doctor if you've had abortions" because, among other things, "infertility might be caused by infection or scar tissue that resulted from the abortion," and "multiple abortions could put you at a higher risk for miscarriage or premature birth."[26] In addition, one article opposing Int. 371 explains,

> there are significant negative health effects associated with induced abortion. By 2008, for instance, 59 studies had shown a statistically significant increase in the risk of pre-term birth and low birth weight in future pregnancies for women who have had induced abortions. Increased risk of placenta previa in future pregnancies is also well established. And much to the chagrin of the abortion-is-no-big-deal crowd, there is a substantial body of medical literature indicating that induced abortion leads to increased risk of negative mental-health outcomes,

[24] Silent No More Awareness, http://www.silentnomoreawareness.org/.
[25] *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (citation omitted).
[26] Elizabeth Cohen, CNN Senior Medical Correspondent, *5 secrets you shouldn't keep from your GYN*, Oct. 7, 2010, http://www.cnn.com/2010/HEALTH/10/07/secrets.from.gynecologist/index.html?ir
ef=allsearch.

including suicide ideation, alcohol dependence, illegal-drug dependence, major depression, and anxiety disorder.[27]

The American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) "continue[s] to explore data from around the world regarding abortion associated complications (such as depression, substance abuse, suicide, other pregnancy associated mortality, subsequent preterm birth, placenta previa, and breast cancer) in order to provide a realistic appreciation of abortion-related health risks."[28] AAPLOG's website provides numerous articles and studies dealing with "abortion complications" such as breast cancer, pre-term birth, maternal mortality, mental health, and placentia previa.[29] Although AAPLOG acknowledges that some medical groups have denied any association between abortion and breast cancer, AAPLOG believes that those groups "have taken certain liberties with their interpretation of the scientific literature. AAPLOG feels that these liberties lack basic fairness and balance in reaching their 'no association' conclusion."[30]

The following is a brief list of some of the articles or reports documenting the link between abortion and a variety of negative health consequences:

- Natalie P. Mota, et al., *Associations Between Abortion, Mental Disorders and Suicidal Behavior in a Nationally Representative Sample*, 55(4) Can. J. Psychiatry 239-46 (Apr. 2010).

- Angela Lanfranchi, *Normal Breast Physiology; The Reason Hormonal Contraceptives and Induced Abortion Increase Breast-Cancer Risk*, 76(3) Linacre Q. 236-49 (Aug. 2009).

- Jessica M. Dolle, et al., *Risk Factors for Triple-Negative Breast Cancer in Women Under the Age of 45 Years*, 18(4) Cancer Epidemiology, Biomarkers & Prevention 1157-66 (Apr. 2009).

- Vahit Ozmen, et al., *Breast Cancer Risk Factors in Turkish Women: a University Hospital Based Nested Case Control Study*, 7 W. J. Surgical Oncology 37 (Apr. 2009).

- Priscilla K. Coleman, et al., *Predictors and Correlates of Abortion in the Fragile Families and Well-Being Study: Paternal Behavior, Substance Use, and Partner Violence*, 7(3) Int. J. Ment. Health Addiction 405-22 (2009).

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[27] Greg Pfundstein, *Crisis Pregnancy Centers in New York City: What Misinformation?*, Oct. 15, 2010, http://www.nationalreview.com/corner/249931/crisis-pregnancy-centers-new-york-city-what-misinformation-greg-pfundstein?sms_ss=facebook&at_xt=4cb8a0e3a1150b31%2C0.

[28] American Association of Pro-Life Obstetricians and Gynecologists, *About Us*, http://www.aaplog.org/about-2/.

[29] American Association of Pro-Life Obstetricians and Gynecologists, *Abortion Complications*, http://www.aaplog.org/.

[30] American Association of Pro-Life Obstetricians and Gynecologists, *Induced Abortion and Subsequent Breast Cancer Risk*, 2008, http://www.aaplog.org/complications-of-induced-abortion/induced-abortion-and-breast-cancer/induced-abortion-and-subsequent-breast-cancer-risk-an-overview/.

- Priscilla K. Coleman, et al., *Induced Abortion and Anxiety, Mood, and Substance Abuse Disorders: Isolating the Effects of Abortion in the National Comorbidity Survey*, 43(8) J. Psychiatr. Res. 770-76 (2009).

- David M. Fergusson, et al., *Abortion and Mental Health Disorders: Evidence From a 30-year Longitudinal Study*, 193 British J. Psychiatry 444-451 (2008).

- David M. Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health*, 47(1) J. Child Psychol. & Psychiatry 16-24 (2006).

- Joel Brind, *The Abortion-Breast Cancer Connection*, Nat. Cath. Bioethics Q. 303-29 (Summer 2005).

- Priscilla K. Coleman, *Induced Abortion and Increased Risk of Substance Abuse: A Review of the Evidence*, 1 Current Women's Health Review 21-34 (2005).

- Caroline Moreau, et al., *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, 112(4) BJOG: Int'l J. Obstetrics & Gynecology 430-37 (Apr. 2005).

- Joel Brind, *Induced Abortion as an Independent Risk Factor for Breast Cancer: A Critical Review of Recent Studies Based on Prospective Data*, 10(4) J. Am. Physicians & Surgeons 105-10 (Winter 2005).

- David C. Reardon, et al., *Deaths Associated with Abortion Compared to Childbirth - A Review of New and Old Data and the Medical and Legal Implications*, 20 J. Contemp. Health L. & Pol'y 279-327 (2004).

- Vincent M. Rue, et al., *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women*, 10 Med. Sci. Monit. 5-16 (2004).

- Brent Rooney & Byron Calhoun, *Induced Abortion and Risk of Later Premature Births*, 8 J. Am. Physicians & Surgeons 46-49 (Summer 2003).

- Jesse R. Cougle, et al., *Depression Associated With Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9(4) Med. Sci. Monit. 105-12 (2003).

- John M. Thorp, et al., *Long Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58(1) Obstetrical & Gynecological Surv. 67-79 (2002).

- Priscilla K. Coleman, et al., *A History of Induced Abortion in Relation to Substance Use During Subsequent Pregnancies Carried to Term*, 187(6) Am. J. of Obstetrics & Gynecology 1673-78 (2002).

- Mika Gissler, et al., *Suicides after Pregnancy in Finland, 1987-94: Register Linkage Study*, 313 British Med. J. 1431-34 (Dec. 1996).

- Janet R. Daling, et al., *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86 J. Nat'l Cancer Inst. 1584-92 (1994).

The well-documented nature of the risks associated with abortion has prompted state legislatures to require doctors to include a warning about the link between abortion and breast cancer or other specific harms, including psychological distress and the fact that the abortion will end the life of an actual human being (as more fully discussed *infra*, Part II, at pages 15-16). Such information is provided to women considering abortion pursuant to the informed consent laws of these states. For example, a Texas law requires doctors to provide a woman considering abortion with information concerning

> the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate:
> (i) the risks of infection and hemorrhage;
> (ii) the potential danger to a subsequent pregnancy and of infertility; and
> (iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer.[31]

Similarly, a Nebraska law requires doctors to inform women considering abortion of

> (a) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, perforated uterus, danger to subsequent pregnancies, and infertility;
> (b) The probable gestational age of the unborn child at the time the abortion is to be performed;
> (c) The medical risks associated with carrying her child to term; and
> (d) That she cannot be forced or required by anyone to have an abortion and is free to withhold or withdraw her consent for an abortion.[32]

Many other state laws require doctors to inform women of the health risks associated with abortion and provide them with information concerning the gestational age and physical characteristics of the unborn child at the time the abortion is to be performed.[33] While NARAL and other pro-abortion organizations are free to disagree with these legislatures and to debate the soundness of the numerous articles highlighting the negative health consequences of abortion, they may not utilize the machinery of the government to impose burdensome disclosure requirements upon those with an opposing viewpoint.

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[31] Tex. Health & Safety Code § 171.012(a)(1)(B). Other statutes that expressly mention a link between breast cancer and abortion are: Minn. Stat. § 145.4242; Miss. Code Ann. § 41-41-33; Mont. Code Ann. § 50-20-104.

[32] Neb. Rev. Stat. § 28-327(1).

[33] *See, e.g.,* Code of Ala. § 26-23A-4; Ari. Rev. Stat. § 36-2153; Ark. Code Ann. § 20-16-903; Fla. Stat. § 390.0111; Kan. Stat. Ann. § 65-6709; Mich. Comp. L. § 333.17015; S.D. Codified Laws § 34-23A-10.1; Utah Code Ann. § 76-7-305; W. Va. Code § 16-2I-2.

In addition, NARAL falsely claims that CPCs manipulate women into "delaying" their decision because some women who consider information received at CPCs may take days, or even weeks, to consider a variety of options before ultimately deciding to have an abortion. This argument is quite frankly absurd, as any family member, friend, co-worker, or other person who suggests to a pregnant woman that she should keep the baby or put it up for adoption would also have to be labeled as "manipulative" if the woman initially contemplates their perspective but later decides to have an abortion. CPCs simply provide assistance and information to pregnant women; the ultimate decision is theirs and theirs alone, and any "delay" between a CPC visit and a decision to have an abortion is attributable to the woman's own deliberative process.

Furthermore, the NARAL document provides no justification for the Council to impose confidentiality requirements upon CPCs. While Int. 371's supporters have speculated about *hypothetical* scenarios involving the misuse of client information, they have *no factual basis* for stating that New York CPCs have misused or will misuse such information. The CPCs targeted by Int. 371 have operated continuously—some for decades—without any claims of misuse of client information. As with Int. 371's other provisions, the confidentiality provisions are clearly designed to burden and intimidate CPCs without any demonstrated need for the legislation.

In sum, the alleged need for Int. 371 is non-existent. The NARAL document is a mix of unfounded accusations, opinions, and pejorative statements intended to malign the work of CPCs. It falls woefully short of providing any *actual evidence* justifying intrusive regulation of CPCs. To the contrary, the document is conveniently tailored to meet NARAL's goal of making Int. 371 the "first step"[34] to "bring [CPCs] down."[35] The Council should squarely reject Int. 371.

II. INT. 371 VIOLATES THE RIGHTS OF CPCS PROTECTED BY FEDERAL AND STATE LAW.

A. Introduction 371 Violates CPCs' Freedom of Speech.

The Free Speech Clause of the First Amendment, applicable to state and local governments through the Fourteenth Amendment, states that the government "shall make no law . . . abridging the freedom of speech."[36] Int. 371 violates CPCs' freedom of speech because the government lacks a compelling reason to force them to speak against their will or to regulate their expression based on content, viewpoint, and speaker identity.

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[34] *Kelli Conlin*, *supra* note 21.
[35] NARAL Pro-Choice, *supra* note 20.
[36] U.S. Const. amend. I.

1. Introduction 371 is Subject to Strict Scrutiny Because it Compels Expression and is Not Analogous to Cases Dealing With Commercial Speech or the Regulation of Professions.

a. Strict Scrutiny Standard.

The Supreme Court of the United States has observed that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[37] In other words, "freedom of speech prohibits the government from telling people what they must say."[38] A CPC, like other organizations, has "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."[39] The Court has explained that

> [t]he essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.[40]

The Court has also observed that

> [a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[41]

Laws requiring groups or individuals to convey a message are "subject to exacting First Amendment scrutiny"; the government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."[42] Numerous cases demonstrate that Int. 371 clearly fails this standard, as it does not further any compelling interest, let alone the least

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[37] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

[38] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. [FAIR]*, 547 U.S. 47, 61 (2006); *see also Lewis v. Cowen*, 165 F.3d 154, 161 (2d Cir. 1999) ("The First Amendment protects the right to refrain from speaking just as surely as it protects the right to speak.").

[39] *Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986) (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 & n.55 (1976)).

[40] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (citation omitted).

[41] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (citations omitted).

[42] *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 798, 800 (1988).

restrictive means available.[43] In *West Virginia State Board of Education v. Barnette*,[44] the Court held that a public school could not compel students to recite the Pledge of Allegiance over their religious objections. While acknowledging that "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government,'" the Court noted, "[h]ere, however, we are dealing with a compulsion of students to declare a belief."[45]

Similarly, in *Wooley v. Maynard*,[46] the Court held that the State of New Hampshire could not penalize citizens who covered the motto "Live Free or Die" on their license plates because the motto conflicted with their religious and moral beliefs. The Court based its decision on the fact that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[47] The state lacked a compelling reason for forcing drivers to display that message.[48]

In addition, in *Riley v. National Federation of the Blind of North Carolina*,[49] the Supreme Court held that a state law requiring professional fundraisers for charitable organizations to tell solicited persons what percentage of contributions actually went to such organizations violated the First Amendment. The Court explained,

> [t]he First Amendment mandates that we presume that *speakers, not the government, know best both what they want to say and how to say it*. . . . "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." To this end, the government, even with the purest of motives, *may not substitute its judgment as to how best to speak for that of speakers and listeners*; free and robust debate cannot thrive if directed by the government.[50]

The Court noted that the First Amendment's protection of the freedom of speech "necessarily compris[es] the decision of both what to say and what not to say."[51] This is true regardless of whether the compelled speech consists of "fact" or opinion. Although the disclosure requirement applied to all professional fundraisers, the Court noted the discriminatory effect it would have upon "small or unpopular charities, which must usually rely on professional fundraisers."[52] The

[43] *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding that requiring mushroom handlers to pay an assessment used to fund advertisements promoting mushroom sales violated the First Amendment); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring parade organizers to include a group with an unwanted message in their parade violated their First Amendment right to choose the content of their message); *Pac. Gas*, 475 U.S. 1 (declaring unconstitutional a requirement that a company place a consumer group's letter in its bills to customers); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a requirement that newspapers print a politician's reply to editorials).
[44] 319 U.S. 624 (1943).
[45] *Id.* at 631 (citations omitted).
[46] 430 U.S. 705 (1977).
[47] *Id.* at 714 (citing *Barnette*, 319 U.S. at 633-34).
[48] *Id.* at 715-16.
[49] 487 U.S. 781 (1988).
[50] *Id.* at 790-91 (citation omitted) (emphasis added).
[51] *Id.* at 797.
[52] *Id.* at 799.

disclosure requirement was not the least restrictive means of achieving a compelling governmental interest and, as such, violated the First Amendment.[53]

Like the statute struck down in *Riley*, Int. 371 violates the First Amendment. Even if the Introduction were offered "with the purest of motives," the Council may not "substitute its judgment as to how best to speak for that of speakers and listeners."[54] That Int. 371 directs pro-life limited service pregnancy centers to post statements of fact, rather than claims of opinion, does not change the outcome. It must be remembered that "[t]he First Amendment protects expression, be it of the popular variety or not."[55]

b. Cases Not Applying Strict Scrutiny Are Distinguishable.

Supporters of Int. 371 will likely claim that imposing disclosure requirements upon CPCs is no different than imposing disclosure requirements upon doctors, lawyers, or businesses, which are constitutionally permissible in some instances. For example, last year a court upheld a New York City Code provision requiring restaurants to post calorie content information on their menus,[56] and the Code imposes numerous other disclosure requirements upon businesses.[57] This argument is flawed, however, because a lesser standard of First Amendment scrutiny is applied in cases involving "commercial" speech or the regulation of a profession, neither of which are the case when non-profit CPCs make their services known to the public.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[58] the Supreme Court upheld a state requirement that doctors provide women with certain information at least 24 hours before performing an abortion, including information about the nature and risks of abortion and childbirth as well as the availability of state-published materials describing fetal development.[59] The Court rejected an "asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State," noting that "the physician's First Amendment rights not to speak are implicated, *but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State*."[60]

Similarly, in *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*,[61] the court rejected a First Amendment challenge to a state law requiring doctors to provide certain disclosures and information to women prior to obtaining their consent before

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[53] *Id.* at 800-01.
[54] *See id.* at 790-91.
[55] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000).
[56] *N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132-34 (2d Cir. 2009) (upholding a New York City Code provision requiring restaurants to post calorie content information on their menus as a reasonable regulation of commercial speech, subject to rational basis review under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985)).
[57] *See, e.g.*, NYC Admin. Code § 20-801 (requiring child care providers to post a sign near their entrance stating that the most recent state inspection report for the provider may be accessed through a state government website); NYC Admin. Code § 17-173 (requiring venders of alcoholic beverages to post a sign stating "Warning: Drinking alcoholic beverages during pregnancy can cause birth defects").
[58] 505 U.S. 833 (1992) (plurality opinion).
[59] *Id.* at 881.
[60] *Id.* at 884 (citing *Wooley*, 430 U.S. 705) (emphasis added).
[61] 530 F.3d 724 (8th Cir. 2008) (en banc).

performing an abortion. Among other things, the law required doctors to provide a written statement that "the abortion will terminate the life of a whole, separate, unique, living human being" along with a "description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . [d]epression and related psychological distress [and] [i]ncreased risk of suicide ideation and suicide."[62] The court observed that, although laws requiring individuals to speak are typically subject to strict scrutiny,[63] the state 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, even if that information might also encourage the patient to choose childbirth over abortion."[64]

Casey and *Rounds* provide no support for Int. 371, which targets select non-profit organizations rather than doctors or other professionals. Both cases emphasized the government's authority to regulate *the medical profession.*[65] New York state law defines the practice of the profession of medicine as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition."[66] CPCs clearly are *not* engaged in the practice of medicine. CPC volunteers provide material support and information to women in need. They do not diagnose, treat, operate, or prescribe for any medical condition, nor do they claim to do so in their advertisements.[67] Given the nature of the assistance that CPCs provide, it is unsurprising that state and local law has not, until Int. 371, attempted to directly regulate CPCs. As such, cases dealing with the regulation of the medical profession have no bearing on Int. 371.

In addition, CPC advertisements are not "commercial speech" that can be broadly regulated by the Council. In *Zauderer v. Office of Disciplinary Counsel*,[68] the Supreme Court upheld a requirement that attorneys include certain disclosures in any advertisements that mention contingent fee rates. The Court distinguished the case at hand from *Wooley*, *Tornillo*, and *Barnette* because it involved commercial advertising, which receives a lower level of protection than non-commercial speech.[69]

The United States Court of Appeals for the Second Circuit, which covers New York, recently reaffirmed these principles. In *Connecticut Bar Association v. United States*,[70] the court

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[62] *Id.* at 726.
[63] *Id.* at 733.
[64] *Id.* at 735.
[65] It is significant to note that, even under *Casey*, courts have invalidated overreaching government disclosure requirements and speech restrictions. *See, e.g., Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (upholding an injunction preventing the federal government from revoking a doctor's license to prescribe certain drugs or investigating him based solely on his "recommendation" of the use of medical marijuana, when his recommendation falls short of an actual conspiracy to violate federal law and he does not actually prescribe or dispense marijuana); *Planned Parenthood of the Heartland v. Heineman*, Case No. 4:10-cv-3122, 2010 U.S. Dist. LEXIS 70484, at *55 (D. Neb. July 14, 2010) (granting motion for preliminary injunction preventing the enforcement of statutory provisions requiring doctors to provide disclosures to women before performing an abortion that were, in the court's view, "untruthful, misleading and irrelevant").
[66] N.Y. C.L.S. Educ. § 6521.
[67] *See id.*
[68] 471 U.S. 626 (1985).
[69] *Id.* at 651.
[70] Case No. 09-0015, 2010 U.S. App. LEXIS 18894 (2d Cir. Sept. 7, 2010).

rejected a First Amendment challenge to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that require debt relief agencies and other professionals who provide bankruptcy assistance for a fee to provide an assisted person with certain notices and to include certain language in their advertisements. The court held that the disclosure requirements were subject to only rational basis review, not strict scrutiny, because the speech at issue was commercial speech.[71] Importantly, the court noted that commercial speech is expression that "does 'no more than propose a commercial transaction,'"[72] or is "'related solely to the economic interests of the speaker and its audience.'"[73] The court also noted that the government has much broader leeway to impose reasonable disclosure requirements upon professionals in the course of their business (lawyers, doctors, etc.) than upon non-professionals.[74]

The CPC advertisements targeted by Int. 371 are clearly not commercial speech. Such advertisements do not "propose a commercial transaction,'"[75] nor do they "'relate[] solely to the economic interests of the speaker and its audience.'"[76] A non-profit organization offering assistance and information free of charge is not a business, and its advertisements are not proposals to enter a commercial transaction. *Zauderer* and other cases involving commercial speech are irrelevant to the analysis of Int. 371 and, as such, Int. 371 is subject to strict scrutiny.[77]

2. Introduction 371 is Subject to Strict Scrutiny Because it Regulates on the Basis of Content.

Int. 371 regulates speech on the basis of its content; groups that discuss pregnancy are covered, while groups that discuss politics, sports, or other subjects are not covered. "Content-based regulations are presumptively invalid"[78] because, "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[79] Content-based speech regulations are subject to strict scrutiny, and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[80] As explained herein, Int. 371 cannot survive strict scrutiny and, therefore, violates the First Amendment.

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[71] *Id.* at *25-26 (citing *Zauderer*, 471 U.S. 626); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010) (rejecting an as-applied challenge to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).
[72] 2010 U.S. App. LEXIS 18894 at *29 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).
[73] *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980)).
[74] *Id.* at *51 (citing *Casey*, 505 U.S. at 884 (plurality opinion)); *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) (upholding a labeling requirement applied to manufacturers of mercury-containing light bulbs; the court distinguished between commercial speech and non-commercial speech, noting that lesser protection applied to commercial speech under cases such as *Zauderer*).
[75] *See Conn. Bar Ass'n*, 2010 U.S. App. LEXIS 18894, at *29 (citation omitted).
[76] *Id.* (quoting *Cent. Hudson*, 447 U.S. at 561).
[77] In addition, the intermediate level of "exacting scrutiny" that the Court has applied to disclosure requirements related to election-related political advertisements is not applicable to Int. 371. *See Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010); *Buckley*, 424 U.S. at 64, 66 (per curiam).
[78] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).
[79] *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).
[80] *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817-18 (2000).

3. Introduction 371 is Subject to Strict Scrutiny Because it Discriminates on the Basis of Viewpoint.

Int. 371 is a more flagrant violation of the First Amendment than other laws that target a particular subject matter because it is viewpoint discriminatory on its face. Int. 371 by its terms only targets organizations who oppose abortion and/or contraceptives but does not cover pro-choice organizations that provide or refer for abortions or contraceptives. Such organizations are free to meet with women who are pregnant or may become pregnant and to discuss various options without having to post disclaimers about the services that they provide or do not provide. This biased imbalance is a perfect example of viewpoint discrimination that the First Amendment prohibits.[81] As explained herein, Int. 371 cannot survive strict scrutiny and, therefore, violates the First Amendment.

4. Introduction 371 is Subject to Strict Scrutiny Because it Discriminates on the Basis of Speaker Identity.

In addition, Int. 371 impermissibly targets one group of speakers (pro-life CPCs) for regulation.

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.
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> . . . [T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. . . . The First Amendment protects speech and speaker, and the ideas that flow from each.[82]

Int. 371 is subject to strict scrutiny because it targets one group of speakers for regulation. As explained herein, Int. 371 cannot survive strict scrutiny and, therefore, violates the First Amendment.

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[81] *See Pleasant Grove*, 129 S. Ct. at 1132; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *R.A.V.*, 505 U.S. 377; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

[82] *Citizens United*, 130 S. Ct. at 898-99 (citations omitted); *see also Mosley*, 408 U.S. at 96.

5. Introduction 371 Violates CPCs' Freedom of Speech Because it is Not the Least Restrictive Means of Achieving Any Compelling Government Interest.

As noted previously, laws that require individuals to speak are subject to strict scrutiny where, as here, they are not limited to commercial speech or the regulation of a profession. The Supreme Court "appl[ies] the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny."[83] The Court has observed that "[r]equiring [the government] to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."[84] The Council cannot identify any compelling government interest requiring mandatory disclosures by CPCs, nor is Int. 371 the least restrictive means of achieving such an interest.

It is clear that "[m]ere speculation of harm does not constitute a compelling state interest."[85] In *Turner Broadcasting System, Inc. v. FCC*,[86] the Supreme Court stated that

> [w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[87]

Similarly, in *Ibanez v. Florida Dep't of Business and Prof'l Regulation*,[88] the Court stated that, to justify the regulation of allegedly misleading commercial advertisements, the government cannot rely on "mere speculation or conjecture" or the fear of "potentially misleading" advertisements, but must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree," such as by evidence that members of the public have actually been misled.[89] This principle applies with much greater force when the target of regulation is non-commercial speech such as a CPC expression. As explained in Section I, Int. 371 is based solely upon the NARAL document designed to "bring [CPCs] down."[90] The document is faulty and unreliable, and fails to provide any support for Int. 371. A court reviewing Int. 371 would make short work of the government's position in light of the lack of any compelling need for Int. 371.

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[83] *Turner Broad. Sys.*, 512 U.S. at 642 (citations omitted); *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved").

[84] *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

[85] *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980).

[86] 512 U.S. 622 (1994).

[87] *Id.* at 664 (citation omitted).

[88] 512 U.S. 136 (1994).

[89] *Id.* at 143, 145 n.10, 146 (citations omitted).

[90] NARAL Pro-Choice, *supra* note 20.

Another reason why Int. 371 cannot survive strict scrutiny is that it is woefully underinclusive. Int. 371 only applies to pro-life organizations that do not provide or refer for abortions or contraceptives, but does not apply to pro-abortion organizations. When a particular viewpoint or speaker is "singled out for special treatment," it "undermines the likelihood of a genuine state interest" and "suggests instead that the legislature may have been concerned with silencing" the targeted speaker.[91] Underinclusiveness often indicates a "governmental attempt to give one side of a debatable public question an advantage in expressing its views."[92] That is especially true where, as here, the impetus for the proposed law comes from staunch opponents of the targeted group.

In sum, Int. 371 cannot withstand strict scrutiny. There is no evidence that Int. 371 furthers any compelling government interest, let alone through the least restrictive means. Int. 371 also violates the Free Speech Clause of the New York Constitution, which states that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."[93] The New York Court of Appeals has interpreted the Free Speech Clause of the New York Constitution to provide more protection for free expression than the safeguards afforded by the First Amendment to the federal Constitution.[94] For the same reasons Int. 371 violates CPCs' freedom of speech under the First Amendment, it also violates the broader protection of free speech guaranteed by the state Constitution.

B. Introduction 371 Violates CPCs' Right to Equal Protection of the Law.

Int. 371 violates the Crisis Pregnancy Centers' right to equal protection under the law because it targets CPCs for their pro-life message and does not require similar disclosures from pro-abortion organizations. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike."[95] Strict scrutiny applies "when the classification impermissibly interferes with the exercise of a fundamental right," such as "rights guaranteed by the First Amendment."[96] "[E]ven the most legitimate goal may not be advanced in a constitutionally impermissible manner," and underinclusiveness often undermines the government's argument that differential treatment is justified.[97] "[A] bare . . .

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[91] *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978).
[92] *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994).
[93] *See* N.Y. Const. art. I, § 8.
[94] *See, e.g.*, *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 112-13 (2d Cir. 2010); *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277, 281 n.3 (N.Y. 1988) ("The protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment."); *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991); *People v. Ferber*, 441 N.E.2d 1100 (N.Y. 1982) (per curiam). For example, in discussing "[f]reedom of expression in books, movies and the arts," the New York Court of Appeals held that "the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of [New York's] constitutional guarantee of freedom of expression." *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 494-95 (N.Y. 1986).
[95] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).
[96] *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 n.3 (1976) (citing *Williams v. Rhodes*, 393 U.S. 23 (1968)).
[97] *Carey v. Brown*, 447 U.S. 455, 464-65 (1980).

desire to harm a politically unpopular group" is not a legitimate state interest, let alone a compelling one.[98]

Under the Equal Protection Clause, Int. 371 would not withstand strict scrutiny for the reasons previously discussed. There is no compelling reason for singling out pro-life organizations for burdensome regulation while deliberately leaving pro-abortion groups—the supporters of the legislation—without such disclosure requirements. As such, Int. 371 violates the Equal Protection Clause.

Similarly, the New York Constitution provides that "[n]o person shall be denied the equal protection of the laws" and "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."[99] This provision is comparable to the federal Equal Protection Clause[100] and, as such, Int. 371 violates the New York Constitution for the same reasons.

C. Introduction 371 is Vague and Violates CPCs' Right to Due Process.

Int. 371 subjects the public to civil and criminal penalties, and imposes upon their freedom of speech, without clearly defining key terms. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[101] A statute is unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[102]

The Supreme Court applies a more stringent test for vagueness when a law "threatens to inhibit the exercise of constitutionally protected rights,"[103] such as the freedom of speech, because, "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'"[104] In addition, the Court applies a more stringent test for vagueness when criminal penalties may be enforced,[105] as "'[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'"[106]

Int. 371 falls short of the constitutional standard for vagueness. Its vague terms will likely be manipulated in practice to target disfavored groups (*i.e.*, pro-life CPCs) and exclude all other groups. As such, Int. 371 violates the Due Process Clause of the Fourteenth Amendment as well

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[98] *City of Cleburne*, 473 U.S. at 447.
[99] N.Y. Const. art. I, § 11.
[100] *Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306, 1317 (2d Cir. 1991) ("The breadth of coverage under the equal protection clauses of the federal and states constitutions is equal."); *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 592 (2d Cir. 1989) ("We observe, as the Appellate Division did, that analysis under the federal and New York State constitutions is the same for purposes of equal protection.").
[101] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[102] *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)).
[103] *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).
[104] *Grayned*, 408 U.S. at 109 (citations omitted).
[105] *Hoffman Estates*, 455 U.S. at 498-99.
[106] *Morales*, 527 U.S. at 58 (citation omitted).

as the Due Process Clause of the New York Constitution, which provides that "[n]o person shall be deprived of life, liberty or property without due process of law." [107]

D. Introduction 371 Violates CPCs' Free Exercise of Religion.

Int. 371 violates the free exercise rights of CPCs—most of whom are overtly Christian and base their opposition to abortion and/or contraceptives on Christian teachings—by targeting them for discriminatory disclosure requirements while excluding secular organizations that provide or refer for abortions or contraceptives. The Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[108] However, a law that is not neutral or generally applicable "must undergo the most rigorous of scrutiny" and "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[109]

Although the text of a statute is relevant when considering whether it is neutral and generally applicable,

> [f]acial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."[110]

"Apart from the text, the effect of a law in its real operation is strong evidence of its object,"[111] and "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"[112] Int. 371 is neither neutral nor generally applicable, as it expressly targets pro-life organizations who do not provide or refer for abortions or contraceptives—often due to their sincerely held religious beliefs—while exempting organizations that have no religious or moral objection to providing or referring for abortion or contraceptives. Int. 371 is, in essence, a "religious gerrymander" as it was intentionally designed to cover pro-life/faith-

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[107] N.Y. Const. art. I, § 6. This guarantee of due process under the law protects against arbitrary enforcement and requires laws to be crafted with sufficient clarity to provide notice of the conduct they proscribe just like the Due Process Clause of the Fourteenth Amendment. *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 628 (S.D.N.Y. 1999) ("[T]he New York State Constitution's guarantees of . . . due process are virtually coextensive with those of the U.S. Constitution."); *see also People v. N. St. Book Shoppe, Inc.*, 139 A.D.2d 118, 120 (N.Y. App. Div. 1988) (treating, for purposes of the void-for-vagueness doctrine, the Due Process Clause of the New York State Constitution, Article I § 6, as equivalent to the Due Process Clause of the federal Constitution).
[108] *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).
[109] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32, 546 (1993).
[110] *Id.* at 534 (citations omitted).
[111] *Id.* at 535.
[112] *Id.* at 542 (citations omitted).

based organizations while excluding pro-abortion/secular organizations. When the government targets one side of a contentious religious, moral, and social issue for unique disabilities, it is not acting in a neutral or generally applicable manner. As such, Int. 371 is subject to strict scrutiny and, for the reasons previously discussed, violates CPCs' freedom of religion.

Additionally, Int. 371 violates the Free Exercise Clause of the New York Constitution because it targets a class of speakers who tend to be religiously-motivated and/or affiliated, and expressly excludes speakers with an opposing, secular viewpoint. The New York Constitution guarantees "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference."[113] Although this provision permits regulation of conduct that endangers the "peace or safety of [the] state,"[114] the law must be neutral and generally applicable.[115] Int. 371 does not meet this standard.

CONCLUSION

Simply put, there is no need or justification for Int. 371. While the First Amendment ensures that pro-abortion organizations are free to express their opinions about CPCs and their work, it also dictates that the government is not free to use its power to impose regulatory burdens upon organizations because they have a disfavored viewpoint. There is simply no factual or legal basis for Int. 371, and it violates a host of federal and state constitutional protections. As such, the Council should squarely reject Int. 371.

[113] N.Y. Const. art. I, § 3.
[114] *Id.*
[115] *See Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).