UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CENTRO TEPEYAC, Plaintiff	)	
v.	)	Civil Action Number 8: 10CV01259
MONTGOMERY COUNTY, et al.,	)	
Defendants	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

Plaintiff Centro Tepeyac is a non-profit organization that provides information and assistance to pregnant women. Montgomery County Resolution 16-1252 (the "Resolution") purports to compel Plaintiff and other speakers who discuss pregnancy to post signs bearing two government-mandated messages:

> the Center does not have a licensed medical professional on staff; and
>
> the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.

Resolution 16-1252.

In March, 2011, this Court entered a partial preliminary injunction against enforcement of the Resolution. Mem. Op., Mar. 15, 2011, ECF No. 26. The Court found that the Resolution is subject to strict scrutiny under the First Amendment, and that Plaintiff had demonstrated a likelihood of success on the merits as to the second of the required messages. *Id*. at 32-33. At that time, however, the Court suggested that Defendants might be able to survive strict scrutiny on the "no licensed provider" statement, because "the interest in public health and access to medical care may be described as compelling," and the record was "at least colorable at this stage" to suggest that the disclaimer might be narrowly tailored. *Id.* at 32.

The Court explained, however, that the government would need to come forward with some actual proof of a problem in order to successfully defend the law:

> Of course, to invoke such a compelling interest, ***Defendants would need to "demonstrate that the harms are real, not merely conjectural***, and that the [Resolution] will in fact alleviate these harms in a direct and material way." *Turner Broad.*, 512 U.S. at 664.

Id. at 25 (emphasis supplied). The Court further explained that, even if a compelling interest were found, the government would have to prove that the law is narrowly tailored in that it "targets and eliminates no more than the exact source of the evil it seeks to remedy" and that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* at 25-26 (citing *Columbia Union Coll. v. Clarke*, 159 F.3d 157 n.2 (4th Cir. 1988) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) and *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)).

Plaintiff now respectfully moves for summary judgment. As the Court properly found at the preliminary injunction stage, the Resolution is subject to strict scrutiny because it compels Plaintiff to speak a government-dictated message. Indeed, every federal court to consider this type of law has reached the same conclusion: strict scrutiny applies. *See O'Brien v. Mayor and City Council of Balt.*, 768 F. Supp. 2d 804 (D. Md., 2011); *Evergreen Ass'n , Inc. v. City of N.Y.* , 2011 WL 2748728 (S.D.N.Y., July 13, 2011).

The undisputed facts of the case now show that the Resolution simply cannot survive strict scrutiny. As this Court rightly observed, strict scrutiny requires the government to "demonstrate that the harms are real, not merely conjectural." ECF No. 26 at 25. Yet the County has now admitted that it acted without any evidence of a problem at all—with no complaints from pregnant women who had been to the centers and with no indication at all that pregnant women were confused about whether pregnancy centers were medical. Discovery has now shown that the government acted ***with no evidence that even a single woman had ever delayed medical treatment because she mistakenly thought a pregnancy center was a medical facility***. Thus the claimed reason for the law—that women are being misled into believing that

pregnancy centers are medical clinics and are neglecting to seek medical care—was entirely conjectural, with no actual proof of any problem at all. In fact, the County's 30(b)(6) witness admitted that, for all the County knows, women who visit pregnancy centers may be ***more*** likely to get medical treatment than others.

Perhaps not surprisingly, since the County never had any evidence of a problem, the County has now also conceded that it has ***never done anything at all*** to spread the allegedly compelling messages it seeks to force onto Plaintiff's walls. No newspaper ads. No radio or television commercials. No electronic media. No use of any type of media of any kind. No statements from the Montgomery County Health Officer. No signs on government buildings. In fact, the County's 30(b)(6) witness admitted that the County had done absolutely nothing to spread the two allegedly compelling messages, and that the County was simply "not going to put a lot of resources into this specific topic." In fact, even when the County ***is directing pregnant women to LSPRCs***, the County has not bothered to tell those women either of the two allegedly compelling messages, either in writing or in its verbal communications to these women.

These facts dispose of the entire case. The government has no compelling interest in restricting speech to regulate a problem it now admits may not exist at all. As the Supreme Court explained last term in *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011), the government can only survive strict scrutiny if it can "identify an 'actual problem' in need of solving" and prove that the restriction on free speech is "actually necessary to the solution." *Id.* at 2738. In rejecting California's scientific evidence in *Brown*, the Court explained that strict scrutiny "is a demanding standard," and that because the government "bears the risk of uncertainty, . . . ***ambiguous proof will not suffice***." *Id.* at 2738-39 (finding California's reliance

on psychology research showing a correlation between video games and violent behavior to be "not compelling") (emphasis supplied). Defendants here do not even have "ambiguous proof" like the psychological studies rejected in *Brown*—they admit they have no proof at all.

Even if this non-evidence could be spun into a compelling interest, the government here has no plausible claim that regulating Plaintiff's speech is "actually necessary to the solution," *Id.* at 2738, or that commandeering Plaintiff's walls is the least restrictive way to disseminate its message. If the County thinks it has a compelling need to alert women that two small pregnancy centers lack licensed medical providers and that pregnant women should see doctors, the County has many ways to spread that message, including 500 public health employees and a $70 million public health budget. In fact, if the interest were actually compelling, one would expect the public health authorities to be spreading these messages to the population at large, not just the tiny fraction of pregnant women who happen through two small pro-life pregnancy centers. And one would expect that the Montgomery County Health Officer—whose advice the government wants inscribed on Plaintiff's walls—would at least be using her own voice to announce her opinion elsewhere. Yet the County now admits that it has entirely failed to use its own voice, its own funds, its own employees, and its own walls to disseminate these supposedly compelling messages. The government's interest cannot simultaneously be compelling enough to be forcibly inscribed on Plaintiff's walls, yet not quite compelling enough to ever move the County to use one penny of its own funds, one minute of its own time, or one inch of its own walls to send the messages. "If the First Amendment means anything, it means that regulating speech *must* be a last-not first-resort. *Yet here it seems to have been the first strategy the Government thought to try*." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (emphasis supplied).

Where, as here, less restrictive alternatives exist, the government "must use that alternative." *Playboy Entm't Grp., Inc.*, 529 U.S. at 813. Defendants failure to use these alternatives both confirms that even they do not regard the claimed interest as compelling, and that they have not adopted (or even tried to adopt) less restrictive ways of disseminating their messages.

In light of this undisputed evidence, the Resolution does not even come close to surviving strict scrutiny. For these reasons, and for the reasons set forth more fully below, Plaintiff respectfully requests entry of summary judgment on all claims in the First Amended Complaint.

II. STATEMENT OF UNDISPUTED FACTS

A. The Parties

Plaintiff Centro Tepeyac ("Centro") is a Maryland 501(c)(3) not for profit corporation that operates at 1315 Apple Avenue in Montgomery County. Decl. of Mariana Vera at ¶ 2 (hereafter "Vera Decl.") (attached hereto as Exhibit 2). Centro has provided services and information to women since 1990. Vera Decl. ¶ 5. Centro gives women material assistance for their pregnancies and for early parenthood, discusses pregnancy options with women, and provides information on parenting. Vera Decl. ¶ 3. Centro's mission is to meet emotional, physical and spiritual needs of women by providing services including free pregnancy tests, diapers, baby clothes and confidential conversation about pregnancy options. Vera Decl. ¶ 3. Centro provides services to over 1,900 women per year, and does not charge women for its services. Vera Decl. ¶ 6. Centro does not refer or provide for abortion. Vera Decl. ¶ 7. Centro

has complied with the Resolution and posted the required sign; but for the Resolution, Centro would not post the sign. Vera Decl. ¶¶ 9-10.[1]

Defendant Montgomery County Council (the "County Council") is the legislature of Defendant Montgomery County, Maryland (the "County"). On February 2, 2010, the County Council, purportedly acting as the County Board of Health pursuant to County Code § 2-65, enacted the Resolution. (attached hereto as Exhibit 3).

B. The Resolution

The Resolution requires certain speakers who wish to discuss pregnancy options to post signs bearing government-required messages. The Resolution applies only to speakers who meet the definition of a "limited service pregnancy resource center," defined as:

> an organization, center, or individual that:
>
> (A) has a primary purpose to provide pregnancy-related services;
> (B) does not have a licensed medical professional on staff; and
> (C) ***provides information about pregnancy-related services, for a fee or as a free service.***

Resolution 16-1252(a)(3) (emphasis supplied). Under the Resolution, a limited service pregnancy resource center ("LSPRC") "must post at least 1 sign in the Center" carrying the following two messages:

> the Center does not have a licensed medical professional on staff; and
>
> the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.

[1] The Court's preliminary injunction order of March 15, 2011 (ECF No. 26) has temporarily relieved Plaintiff of the obligation to include the statement concerning the Montgomery County Health Officer's views.

Id. The sign must be "written in English and Spanish," "easily readable," and "conspicuously posted in the Center's waiting room or other area where individuals await service." *Id.*

The Resolution specifies that a "violation of this regulation is a Class A civil violation." *Id.* Under Montgomery County law, each day of a continuing Class A civil violation is a separate offense, which can result in fines in excess of $20,000 per month. *See Maryland County Code* at §1-19 (setting maximum penalties for Class A violations as $500 for first offense, and $750 for repeat offenses); *id.* at 1-20(c) ("Each day any violation of County law continues is a separate offense.").

The Resolution is tied solely to the issue of pregnancy and, more specifically, solely to certain speakers who wish to "provide information" about pregnancy. Resolution 16-1252(a)(3). If Plaintiff or any other entity simply *provides* pregnancy-related services without a medical license, *without providing information about pregnancy*, no disclaimers are required. Rather, the Resolution applies—and *only* applies—to those who wish to "provide information about pregnancy-related services." *Id.*

When considering the final version of the Resolution, the County Council released a public memorandum, authored by its own legislative analyst, explaining that the law was *designed* to address the substance of *information* provided about pregnancy options, with which the County apparently disagreed:

> *The issue the proposed regulation is designed to address* is that some LSPRCs provide their clients with *misinformation/incomplete information* about their pregnancy options which can negatively affect a woman's decision regarding her pregnancy and health.

January 29, 2010 Memorandum from Legislative Analyst Amanda Mihill to County Council (Exhibit 4) ("Mihill Memo") at 3 (emphasis added).[2] Councilmember Leventhal also explained to Ms. Vera that the Council was made up of nine pro-choice Councilmembers who had to pass something.[3]

Upon enacting the Resolution, the County Council issued a press release announcing the Resolution and again acknowledging that the law is designed as a response to particular information about abortion and contraception being provided by some pregnancy centers, with which the County apparently disagreed. In particular, the Council's press release quotes the law's "chief sponsor" Duchy Trachtenberg:

> Councilmember Trachtenberg said that the regulation is needed because some pregnancy centers often provide false and misleading information to women. She said that CPCs often tell clients that abortions make future pregnancy impossible; that abortions and oral contraceptives cause breast cancer; and that condoms are ineffective in preventing pregnancy and STDs. Overall, she said that CPCs often discourage women from seeking contraception or abortion.

Montgomery County Council Press Release, February 2, 2010 (attached hereto as Exhibit 6) at 1-2.[4]

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[2] The memorandum also explained that the initial version of the resolution—which was jointly introduced by a majority of the members of the Council, Mihill Memo at circle-4—"could violate the First Amendment's prohibition against viewpoint discrimination *because it singles out for regulation only those LSPRCs that have a particular view of abortion*." Mihill Memo at 4 (emphasis supplied).

[3] Ms. Vera recounted Councilmember Leventhal's comment as follows: "And then of course, I had a meeting with George Leventhal after that hearing where he was addressing us on how the wording and the documents were being prepared and he, and he said at that time, I remember very well that he said we are nine liberal pro-choice Council members and we need to vote on something. We need to pass something, so I'm sorry that this has even come up at this election year but we need to vote on something. So it was very clear that he even wanted -- he didn't even want it to be, or that's the message that he send me, that he didn't want to be involved in all of this mess but he had to vote on something, he had to pass on something." Deposition of Mariana Vera (attached hereto as Exhibit 5) at 31:23–32:15.

[4] When introducing the initial version of the Resolution, Councilmember Trachtenberg likewise stated that the law was needed to address the substance of information provided by speakers who

The Council's focus on the content of information conveyed—i.e., the *substance of speech*—is reflected in the Resolution's applicability only to those providers of pregnancy-related services who *also* "provide information" about pregnancy-related services. Resolution 16-1252(a)(3). The Council apparently believed that receiving such information—i.e., *hearing such speech*—from the regulated speakers might negatively affect health, and that "[t]he proposed regulation would address this health concern *by ensuring that clients of LSPRCs understand that the information they are receiving* is not necessarily from licensed medical professionals." Mihill Memo at 3 (emphasis supplied).

In the Resolution itself, the Board of Health claimed its actual concern was that women "may" be misled into believing LSPRCs have medical personnel and "could" therefore neglect to seek medical care:

> The Board of Health's concern is that clients ***may*** be misled into believing that a Center is providing medical services when it is not. Clients ***could*** therefore 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.

Resolution 16-1252 (emphasis added).

C. The First Amended Complaint

Plaintiff filed suit on May 19, 2010 (Compl., ECF No. 1) and filed an amended complaint on May 27, 2011 (ECF No. 41**).** The First Amended Complaint asserts that the Resolution violates the First Amendment (Count I), the Fourteenth Amendment (Count II), and Article 40 of the Maryland Declaration of Rights (Count III).

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oppose abortion. Mihill Memo at circle-5. This initial version of the resolution was jointly sponsored by a majority of the Council, *id.* at circle-4, and was *expressly* targeted only at those speakers who refused to "provide or refer clients for: abortions; or nondirective and comprehensive contraceptive services." *Id.* at circle-2.

D. The Montgomery County Health Officer, Testifying as the County's 30(b)(6) Designee, Confirms The County Has No Evidence of a Problem.

On September 29, 2011, Defendant Montgomery County produced Dr. Ulder J. Tillman to testify as its 30(b)(6) witness on a range of topics, including the alleged need for the law (topic 1), complaints received by the County about LSPRCs (topic 2), County referrals to LSPRCs (topic 5), and the County's efforts and available options to disseminate its messages (topic 6). *See* Notice of Rule 30(b)(6) Deposition (attached hereto as Exhibit 7).[5]

Dr. Tillman is the Montgomery County Health Officer and the Chief of Public Health Services. Tillman Depo., 3:13-15 (attached hereto as Exhibit 8). Dr. Tillman is responsible for a wide range of public health services in the County, and has a staff of "about 500" people, and a budget of approximately $70 million, to help her work on public health issues. Tillman Depo. 4:14-6:17. She has worked in public health for more than three decades, and as the Montgomery County Health Officer since 2003. Tillman Depo. 7:2-4; 7:25-9:25.

The undisputed facts from Dr. Tillman's testimony confirm that the County has no compelling interest in regulating LSPRCs. In particular:

1. The County Has No Evidence of Complaints From Women Who Have Sought Service at LSPRCs.

At her deposition, on behalf of the County, Dr. Tillman confirmed that there are two LSPRCs in Montgomery County: Birthright and Centro Tepeyac. Tillman Depo. 14:1-9. Dr. Tillman explained that the vast array of public health agencies she oversees have received exactly **zero** complaints from women who had sought service at LSPRCs:

[5] Defendant Montgomery County Council refused to produce a 30(b)(6) witness, relying on legislative privilege and immunity.

Q: In the time you've been in Montgomery County, have any of the many departments that you run or supervise received complaints from people who have sought service at Centro or Birthright?
A: No complaints.

Tillman Depo. 14:10-14; *see also* 21:5-9 ("***We've received no complaints*** from these centers that are on the list. ***We refer them***, we refer individuals who come to us for a specific purpose ***and without any complaints, we have no objections or need to investigate anything beyond that***.") (emphasis supplied).

2. The County Has No Evidence of Even a Single Woman Who Mistakenly Believed an LSPRC was Medical and Delayed Seeking Medical Care.

Dr. Tillman also admitted, on behalf of the County, that the County is not aware of even a single woman who had mistakenly believed an LSPRC was licensed and delayed getting medical care:

Q: Do you have any evidence that any actual pregnant woman who went to one of these centers delayed seeking care?
A: Not at the time that this was occurring.[6]

* * *

Q: So to your knowledge, you're not aware of a single woman who has ever delayed getting medical care because they believed either Birthright or Centro Tepeyac was licensed?
A: No direct knowledge. That's correct.
Q: Any indirect knowledge of that?
A: You know, that – well, I, I can't answer that one. I would have to say no.

[6] Dr. Tillman's "not at the time this was occurring" qualification referred to her review of documents concerning individuals who had chosen to have home births (rather than hospital births) and were in the medical care of a doctor's office in Virginia called Tepeyac Family Center. Tillman Depo. 24:8-25:23. As to the information she had reviewed concerning that issue, Dr. Tillman confirmed that there was no indication anyone ever thought Centro Tepeyac or Birthright was licensed. Tillman Depo. 25:24-26:2 ("Q: But in that work, you have never seen anybody claiming that either Birthright or Centro Tepeyac either was or claimed to be a licensed medical provider, is that correct? A: No such documents have come across my desk.").

Tillman Depo. 24: 4-6, 26:3-9.

3. The County Has No Idea Whether Visiting an LSPRC Has Impact On The Likelihood of a Woman Obtaining Medical Care.

Dr. Tillman also admitted, on behalf of the County, that she had no knowledge at all about whether visiting an LSPRC was in any way correlated to the likelihood that a woman would receive medical care from a trained and licensed physician. Indeed, despite the fact that the Resolution itself cites this alleged concern (albeit in "may" and "could" terms), the County's designee on the topic pleaded complete ignorance on the subject:

> *Q: For all you know, is it possible that women who go to places like Birthright and Centro Tepeyac are actually more likely to go get prenatal medical care than other women?*
> *A: I'm not going to -- [Objection] speculate . . . .*
> *Q: You don't know either way whether going to Birthright or Centro makes someone more likely to get medical care, less likely to get medical care or has no impact?*
> *A: I have no –*
> *Q: You have no knowledge either way?*
> *[Objection]*
> *A: I have no direct knowledge of that.*
> *Q: Either way?*
> *A: Correct.*

Tillman Depo. 26:15-27:11.

4. The County Has No Evidence Concerning Whether Women Who Go To Centro Tepeyac Obtain Medical Care.

Dr. Tillman, on behalf of the County, confessed similar ignorance as to whether the women who go to Centro Tepeyac do or do not also go meet with a medical provider:

> *Q: And you have no information to suggest that the women who go to Centro Tepeyac don't get to a medical provider, do you?*
> *A: I have no idea. Have no idea if they do or don't.*

Tillman Depo. 62:7-10.

5. The County Health Officer Had Never Even *Heard of* LSPRCs Prior to the Board's Consideration of the Resolution, and Did Not Recommend that the Board Consider This Issue.

The County claims that there is a compelling public health need to regulate the speech of LSPRCs. However, Dr. Tillman, testifying on behalf of the County, stated that she in fact did not even *know of their existence* until late 2009. *See* Tillman Depo. 10:6-9; 11:5-25; 12:4-6 ("Q: And before that point, you weren't aware of the existence of these places, correct? A: No. Not really."). This is true despite the fact that Dr. Tillman by that point had spent more than three decades in public health, and more than six years as the County Health Officer. Tillman Depo. 7:2-4; 7:25-9:25.

Furthermore, when pressed as to the alleged importance of the issue, Dr. Tillman, testifying as the County's 30(b)(6) witness, explained that she did not know how many women went to LSPRCs and that the issue had "***not risen to my level for me or to the State to say this is a concern.***" Tillman Depo. 61:12-15 (emphasis supplied). In fact, although Dr. Tillman participated when the County Council sought her assistance, she made clear that she did not recommend this action to them. Tillman Depo. 61:20-62:4.

6. The County Has Not Assigned a Single Public Health Employee to Consider Public Health Problems Allegedly Caused by LSPRCs.

Nor, apparently, has the County deemed the problem important enough to assign even one of the 500 public health employees working for Dr. Tillman to investigate or look into LSPRCs in any way. *See* Tillman Depo. 15:4-8 ("Q: Of the 500 people on your staff, is there anybody who has a particular responsibility for investigating or looking into these types of limited service pregnancy resource centers? A: No. . . .").

7. The County Has No Idea Whether the Signs Are Working At All.

Testifying on behalf of the County, Dr. Tillman also acknowledged that the County actually has no idea whether the signs are working at all:

> *Q: Do you have any proof that the signs are working?*
>
> *A: I have no knowledge of that . . .*

Tillman Depo. 43:12-13; *see also id*. at 34:24-35:1 (acknowledging that average person might ignore signs on the wall); *id.* 33:9-34:7 (acknowledging that Centro's pregnancy test form already recommends that women see their doctors); *id.* at 35:20-36:1 (arguing only that someone "may" read the sign).

E. The Montgomery County Health Officer, Testifying as the County's 30(b)(6) Designee, Confirms The County "Never Did Anything" to Spread the Allegedly Compelling Messages Required by the Resolution.

The undisputed facts from Dr. Tillman's testimony also confirm that the County has never taken any action—other than requiring signs on the walls of Plaintiff and one other LSPRC—to spread the allegedly compelling messages required by the Resolution. In particular:

1. The County Has Not Used Newspaper Advertisements or Posted Signs, and, In Fact, "Never Did Anything" to Spread the Messages Required by the Resolution.

Although Defendants claim that the Resolution is narrowly tailored to a compelling state interest, the County's 30(b)(6) designee repeatedly admitted that the County has not spoken the allegedly compelling messages with its own voice, funds, employees, or walls. In particular, Dr. Tillman testified as follows:

> *Q: There are two messages in the resolution. One says that the speaker is not a licensed healthcare provider, and the other one says the Montgomery County Health Officer encourages women to see a licensed healthcare provider.*
> *A: Um-hum.*

* * *

Q: The County has not tried to spread that message by taking out advertisements in newspapers, has it?
A: No.
Q: It hasn't posted signs on Government buildings with that message?
A: You're talking about something that's under litigation. No, we have not.
Q: Even before it was under litigation, the County never did anything to spread that message, did it?
A: Based on the resource constraints we have, no, we would not.

Tillman Depo. 46:3-24 (emphasis supplied). In fact, when asked to "think about any way the County could get the message across," Dr. Tillman agreed that the County had never done anything to spread these messages other than requiring signs on the walls of two LSPRCs. Tillman Depo. 48:11-22.

2. The County Has Not Used Free Electronic Media To Spread Its Allegedly Compelling Messages.

Nor has the County ever used free electronic media such as Facebook and Twitter to send these messages:

Q: Montgomery County maintains Twitter and Facebook pages?
A: The County -- how can I describe this? The Executive Branch does, yes.
Q: And to your knowledge, those resources have never been used to spread the messages in its resolution?
A: In this resolution?
Q: Yes.
A: Which is not an Executive Branch – you're right, no. I'm not aware of their using or doing that.

Tillman Depo. 47:11-20.[7] Indeed, Dr. Tillman explained that the possibility of the County sending this message itself over its electronic media outlets "***hasn't even come up for discussion***." Tillman Depo. 59:25-60:14 (emphasis supplied).

[7] Dr. Tillman confirmed that the County is capable of using its Twitter account to encourage people to use licensed professionals. Tillman Depo. 57:5-23 (acknowledging that Twitter account had been used to encourage people to "be sure to use a licensed contractor" for home

3. The County Has Not Used Any Medium, of Any Kind, to Spread its Allegedly Compelling Messages.

Dr. Tillman elsewhere confirmed that the County **had not used any media, of any kind**, to spread the messages required by the Resolution:

> *Q: Last question. Whether it is through social media or older media like radio, television newspaper ads, whatever –*
> *A: Um-hum.*
> *Q: -- the bottom line is Montgomery County has not used any of those media to spread the message that limited service pregnancy centers don't have doctors or to spread the message that the Montgomery County Health Officer thinks pregnant women should see a doctor, is that correct?*
> ***A: That is correct.** . . .*

Tillman Depo. 73:4-13.

4. The Montgomery County Health Officer Has Never Spoken the County's Allegedly Compelling Messages Herself, and the County Is "Not Going to Put a Lot of Resources Into This Specific Topic."

Nor has Dr. Tillman ever decided to speak these allegedly compelling messages herself, even though she could do so:

> *Q: So the litigation is not stopping the County from, for example, using the Twitter page or the web page or any of these other mechanisms of communication to spread this message, is that true?*
> *A: Okay. Let me clarify.* ***The litigation is not stopping me, as County Health Officer, from making those statements wherever I so choose.*** *Whether it is influencing the County from considering those other vehicles, I do not know.*
> ***Q: But you have not chosen to send that message?***
> ***A: I have not made that recommendation and I've not been asked.***

Tillman Dep. 65:8-19 (emphasis added). In fact, when pressed about whether she believes it is necessary to take steps to tell the *rest* of the pregnant women in Montgomery County (i.e., those who do not come to the County's two LSPRCs) that they should see a doctor, Dr. Tillman

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repairs). *See also* Exhibit 9 (excerpt of Montgomery County's Twitter page) at 7 ("Need home repairs? Be sure to use a licensed contractor.").

deferred to state medical authorities, and stated that, as for the County, "***we*** are not going to put a lot of resources into this specific topic." Tillman Depo. 50:16-17 (emphasis supplied).

F. The County's 30(b)(6) Designee Confirms That, Even When the County Sends Women to LSPRCs, It Does Not Convey the Messages Required by the Resolution.

Dr. Tillman's testimony also confirmed that the County fails to do anything to convey the allegedly compelling messages, **even when it is sending women to LSPRCs**.

1. The County Provides Information on its "MC311" Website About Birthright, but Does Not Advise Women of the Two Allegedly Compelling Messages.

Defendant Montgomery County operates a "311" service called "MC311" that provides information over the telephone and internet. *See*, http://www3.montgomerycountymd.gov/311/ (last visited October 29, 2011).[8] The MC311 website contains information provided by Montgomery County about Birthright, which Dr. Tillman acknowledged is an LSPRC. Tillman Depo 14:1-9.

The County's MC311 page includes information about Birthright including that Birthright "will try to assist a woman in making a decision about a pregnancy," that they provide "free pregnancy testing" and "counseling for pregnant women who are confused about their options," and that they operate a 24-hour hotline "for crisis counseling concerning an unplanned pregnancy." *See* MC311 Birthright listing (attached hereto as Exhibit 10).

[8] The MC311 page is accessible from a link on the left side of the County's homepage, www.montgomerycountymd.gov (last visited October 29, 2011). Despite being the County's designee on the topic of "the County's efforts and available options to convey its messages," **(**Deposition notice, topic 6) Dr. Tillman testified that she is aware of the telephone 311 service, but she "ha[d] not seen their web service." Tillman Depo. 51:25. Nevertheless, Dr. Tillman identified the logo on the page as the County's 311 logo she knows and the document states Montgomery County owns the copyright. Tillman Depo. 53:11.

Notably, despite providing the public with these types of written information about Birthright, the County does ***not*** inform women of either of the two supposedly compelling messages at issue here. *See* MC311 Birthright listing (Exhibit 10); s*ee also* Tillman Depo. 53:12-22 ("That document doesn't indicate that Birthright does not have a licensed medical provider on staff, correct? A: That's correct. . . . Q: The document also doesn't say that the Montgomery County Health Officer recommends that pregnant women see a licensed medical provider, does it? A: That's correct.").

Thus, even when providing written information to the public about LSPRCs, the County has not chosen, on its own webpage, to speak either of the two allegedly compelling messages.

2. The County Sends Women to Centro Tepeyac for Pregnancy Tests and Gives Them Written Information About Centro Tepeyac, but Does <u>Not</u> Advise Women of the Two Allegedly Compelling Messages.

The County also directly sends some women to Centro Tepeyac for pregnancy testing. Tillman Depo. 12:11-13 (noting that the County refers some women to LSPRCs for pregnancy testing); Tillman Depo. 18:24-20:8 ("The only thing were interested in would be that, what is the result of the pregnancy test that comes back.") ; Vera Decl. ¶ 4.

Dr. Tillman identified Exhibit 11 (attached hereto) as the referral sheet distributed by the County directing women to Centro Tepeyac. The referral sheet provides information about Centro Tepeyac, including that Centro Tepeyac provides free pregnancy testing. Montgomery County Pregnancy Test Resources referral sheet (attached hereto as Exhibit 11)**.**

Notably, when sending women who are or may be pregnant to Centro Tepeyac for pregnancy testing, the County does ***not*** take steps to send either of the two allegedly compelling messages at issue here, either verbally or in writing. As Dr. Tillman explained:

Q: When the County sends women to Centro Tepeyac for pregnancy tests --
A: Um-hum.
Q: -- does the County tell women that the people at Centro Tepeyac are not licensed healthcare providers?
A: Probably not. This sign, I mean this list preexisted the Board of Health resolution, the date of the Board of Health resolution.
Q: And this list is still in existence today, correct?
A: Yes, um-hum.
Q: And even today, it doesn't indicate that Centro Tepeyac is not a licensed healthcare provider.
A: That is correct.
Q: And even today, it doesn't indicate that the Montgomery County Health Officer thinks pregnant women should see a licensed healthcare provider, is that correct?
A: Not on this form, that's correct.

Tillman Depo. 36:7-23 (emphasis supplied). Nor does the County verbally give these allegedly compelling messages to the pregnant women it refers to Centro Tepeyac. Tillman Depo 37:8-10.

III. STANDARD OF REVIEW

Summary judgment is appropriate where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(f); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). Facts should be construed in the light most favorable to the non-moving party. *See Emmett*, 532 F.3d at 297. When the nonmoving party has the burden of proof, he or she must confront the motion for summary judgment with sufficient evidence to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 254; *Celotex Corp.*, 477 U.S. at 324.

The Defendants bear the burden of proving the constitutionality of the Resolution. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

IV. ARGUMENT

I. THE RESOLUTION IS SUBJECT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT BECAUSE IT COMPELS SPEECH.

A. The First Amendment Protects Speakers From Being Compelled to Speak.

The Supreme Court has explained that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the Court has emphasized that the First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker "to decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)) (internal quotation marks omitted). In this manner, the First Amendment "presume[s] that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). Therefore, "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." *Id*. at 791.

While "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance . . . ." *Id.* at 796. Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. Inc. v. FCC* ("*Turner I*"), 512 U.S. 624, 642 (1994).

B. The Resolution Impermissibly Compels Speech and is Therefore Subject to Strict Scrutiny

As this Court correctly found at the preliminary injunction stage the Resolution compels speech and is therefore subject to strict scrutiny. ECF No. 26. at 24 . The Resolution forces certain speakers who wish to discuss pregnancy to communicate the government's desired message via a sign that must be posted on their walls. As the court recognized, Defendants do not contest that "the Resolution requires Plaintiff to say something it might not otherwise say." *Id.* at 9. Accordingly, for the reasons set forth above and recognized by the Court at the preliminary injunction stage, strict scrutiny is required. *Id.* at 9-24.

Not surprisingly, every federal court to consider similar pregnancy center sign requirements has reached the same conclusion. For example, in reviewing a similar Baltimore Ordinance, Judge Garbis explained that "requiring the placement of a 'disclaimer' sign in the center's waiting room is, on its face, a form of compelled speech." *See O'Brien* 768 F. Supp. 2d at 812 (D. Md. 2011); *id.* at 814 (applying strict scrutiny). A federal court in the Southern District of New York reached the same conclusion about a similar New York City law. *See Evergreen Ass'n , Inc.*, 2011 WL 2748728 at *4 ("Here, Plaintiffs have demonstrated that Local Law 17 will compel them to speak certain messages or face significant fines and/or closure of their facilities."); *id* at *7 (applying strict scrutiny).

In compelling this speech, the Resolution necessarily interferes with Plaintiff's freedom of speech. Here, the government-compelled disclaimers immediately suggest to women arriving at Centro Tepeyac that the government views Plaintiff as unqualified to provide pregnancy-

related information and that the government believes she should seek counsel elsewhere.[9] *See* Vera Decl. ¶10.[10]

As this court correctly observed, the mandated sign "necessarily alters the content of the speech." ECF No. 26 at 9 (quoting *Riley*, 487 U.S. at 795). The two other federal judges to consider similar laws reached the same conclusion. *See O'Brien*, 768 F. Supp. 2d at 814 (government-required sign "indeed alters the course of a center's communications"); *Evergreen Ass'n, Inc.*, 2011 WL 2748728 at *9 (noting that disclaimers will "alter the manner in which Plaintiffs approach these topics with their audience").

For these reasons, the Resolution is subject to strict scrutiny because it compels speech. *See* ECF No. 26 at 24; *see also Turner I*, 512 U.S. at 642; *Riley*, 487 U.S. at 797-98.

[9] Women, of course, come to Centro Tepeyac seeking all manner of help, much of it having absolutely nothing to do with medical issues. *See, e.g.,* Vera Decl. ¶3 (noting that Centro serves women's "emotional" and "spiritual" needs, "provides information on parenting," and "provides women with practical support in the form of diapers, baby clothes and other needed items"). In her deposition, Dr. Tillman, as the County's designee, conceded that the government's interest in requiring the disclaimer only applies where women are seeking medical care. Tillman Depo. 31:12-17 ("Q: Because your public health perspective or concern is only triggered in situations where someone could think they might be getting medical care? [Objection] A: With regards to these pregnancy resource centers, yes.").

[10] *See also* Vera Depo. at 25:3-26:1 (explaining disagreement with the sign because it suggests "that we are not qualified enough to help these women . . . [W]e think we are qualified to help these women, that we can assist them in their pregnancy, that we are here to support them . . . . [P]regnancy is a holistic thing. It involves emotional, physical like needs. I need, you know, diapers and I need maternity clothes, and also, they can be burdened with pain of being left or abandoned. They can need food and we can give them, you know, something for their pantry. So pregnancy is not medical issues. Pregnancy is a whole thing that happens to a woman and to a family so they need medical assistance, they need that support so we refer them to the proper channel, you know, to the proper agency who will take care of them. But the other things, the doctor is not going to listen to them when they're, you know, crying about he left me and, you know, I'm sad because this baby won't have a father.").

C. The Resolution Regulates Non-Commercial, Non-Professional Speech

As the Court properly found at the preliminary injunction stage, the Resolution regulates non-commercial, non-professional speech. ECF No. 26 at 24.

Although Defendants bear the burden of proof as to the constitutionality of their law, as the Court observed, "Defendants have not taken any definite position as to whether the Resolution regulates commercial speech." ECF No. 26 at 13. In any case, the Supreme Court "defines" commercial speech as that which does no more than "propose a commercial transaction," or that "relates solely to the economic interests of the speaker and its audience." *Fox*, 492 U.S. at 482; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). Controlling Fourth Circuit precedent follows this formulation to determine whether government speech restrictions regulate "commercial speech." *See CPC Intern., Inc. v. Skippy Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (stating that speech is commercial if it "does no more than propose a commercial transaction"; otherwise "there is no reason to deny full First Amendment protection"; ruling that website discussing a trademark dispute "served a primarily informational purpose, not a commercial one") (internal citations omitted).

This court properly concluded that the Resolution regulates Plaintiff's non-commercial speech. In particular, this court found that the Resolution "by its terms . . . reaches entities that 'provide[] information about pregnancy-related services, for a fee *or as a free service.*'" ECF No. 26 at 13-14 (emphasis in original). Indeed, the legislative history shows that the only two entities covered by this Resolution provide their services for free. *See* Tillman Depo. 14:1-9 (acknowledging Birthright and Centro Tepeyac as the only two LSPRCs); Mihill Memo at circle-51 and circle-53 (noting that Centro's and Birthright's services are free).

This Court further found that Plaintiff provides its services "all free of charge," and that "there is no indication that Plaintiff is acting out of economic interest" or that Plaintiff's speech proposes any commercial transaction. ECF No. 26 at 14; *see also* Vera Decl. ¶6 ("Centro Tepeyac does not charge women for these services."). Rather, "Plaintiff does not engage in any commercial transactions with its patrons at all." ECF No. 26 at 14;[11] *see also* Vera Depo. 5:4-7 ("Our mission is to serve women, men, children, to serve the poor, the immigrant, the unborn. We are a pro-life center so our mission is of service and referrals in those regards."). Such speech simply does not "propose[] a commercial transaction, which is what defines commercial speech." *Fox*, 492 U.S. at 483.

Not surprisingly, each of the federal courts to consider this question has reached the same conclusion. *See O'Brien*, 768 F. Supp. 2d at 813 ("The overall purpose of the advertising, 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."); *Evergreen Ass'n, Inc.*, 2011 WL 2748728 at *6 ("This Court will not upend established free speech protections in service of Defendants' overly broad definition of commercial speech.").

In its preliminary injunction opinion, the Court discussed the possibility that "*Casey's* rationale *might* indicate that burdens on professional speech are more susceptible to disclosure

[11] The court also correctly noted that even if Plaintiff did engage in commercial speech, that speech would necessarily be "intertwined" with its non-commercial speech. ECF No. 26 at 14, n.7 (noting that the Supreme Court's decision in *Riley* indicates that where commercial speech is intertwined with informative or persuasive speech, it is improper to "parcel out the speech" and that "the test for fully protected expression should apply."); *see also, O'Brien*, 2011 WL 572324 at *7 (same).

requirements in light of the government's interest in regulating the underlying profession," because such speech may be "incidental to the conduct of the profession." ECF No. 26 at 18-19 (citing *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring).

Even at the Fourth Circuit, the County has not taken a firm position as to whether any such professional speech doctrine even exists. *See Centro Tepeyac v. Montgomery County*, United States Court of Appeals for the Fourth Circuit, Appeal No. 11-1314, Document 18 ("The County is not aware that a professional speech doctrine has been adopted, by name, but, insofar as it exists . . ."). In any case, it is clear that such a doctrine could not possibly cover this Resolution. First and foremost, the County simply has no "interest in regulating the underlying profession" to which its speech regulation here might be deemed "incidental." Unlike an occasional speech regulation that may be incidental to the government's regulation of lawyers, doctors, or other professionals, the Resolution here is the *only* effort by the County to regulate providers of pregnancy-related services. Worse, the Resolution doesn't even reach *all* non-medical providers of pregnancy-related services—it *only* attaches to those who wish to "provide information." Indeed, at the Fourth Circuit, the Defendants made clear that the government's interest was not in regulating a profession, but in *regulating the speech of non-professionals*. *Centro Tepeyac v. Montgomery County*, (Fourth Circuit) Appeal No. 11-1314, Document 29-1 at 14 (arguing that Resolution is necessary "for the precise reason that Centro's advisors are unlicensed and are not governed by standards of care . . ."); *id.* (Centro's speakers are "unlicensed, untrained layperson(s)"); *id.* at 18 (Resolution is "narrowly target[ed]" because it

only applies to facilities "that do *not employ licensed medical professionals*.") (emphasis supplied).[12]

These positions were confirmed by the County's 30(b)(6) witness, Dr. Tillman, who was repeatedly asked to describe the reason for the law, but never mentioned a government interest in regulating the "profession" of LSPRCs. *See* Tillman Depo. 17:24-18:18 (claiming an interest in letting women know they are *not* receiving information from a professional is the "only concern" she is aware of for the Resolution); *id.* 23:10-20. Accordingly, the Resolution cannot be defended as a regulation of a profession that happens to have an incidental effect on speech.

For these reasons, it is clear that the Resolution regulates Plaintiff's non-commercial, non-professional speech. As this Court has found, and as every other court to consider the issue in similar circumstances has found, such a law is subject to strict scrutiny.

II. THE RESOLUTION IS SUBJECT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT BECAUSE IT IS CONTENT- AND VIEWPOINT-BASED.

The Resolution is subject to strict scrutiny for a second, separate reason. In addition to compelling speech, the Resolution also determines *which* speakers will be regulated based on the content of their speech. Thus, unlike the broadly applicable license-plate requirement in *Wooley* (which applied to all drivers, regardless of whether they otherwise spoke or what topics they sought to address) and the charitable solicitation regulation in *Riley* (which applied to professional solicitors regardless of which issues were embraced by the charities that employed them), the Resolution at issue here applies only selectively, and does so because of the content and viewpoint of speech.

[12] This is consistent with the County's position in the legislative history. *See* Mihill Memo at 4 (noting that LSPRCs are **not** regulated by state or federal law if they provide urine pregnancy tests, because the FDA determined such tests "have an insignificant risk of erroneous result").

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. "The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.")[13]; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (invalidating statute that "plainly imposes a financial disincentive only on speech of a particular content"); *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2664 (2011) (content-based burdens on speech are reviewed with same rigorous scrutiny as content-based bans).

Viewpoint discrimination is "an egregious form of content discrimination" and a "blatant" First Amendment violation. *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Such viewpoint-based speech restrictions, *i.e.*, those "based on hostility—or favoritism—towards the underlying message expressed," are impermissible under the First Amendment. *R.A.V.*, 505 U.S. at 386. Simply put, the "First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding that the government cannot "suppress expression merely because public officials oppose the speaker's view").

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[13] In *R.A.V.*, the Supreme Court invalidated an ordinance forbidding conduct, like cross burning, which was designed to arouse anger "on the basis of race, color, creed, religion or gender." 505 U.S. at 391. The Court found the statute unconstitutional, both because it discriminated on the basis of viewpoint, but also because it prohibited conduct "addressed to one of the specified disfavored topics," and thereby targeted speech based on its content. *Id.*

A. The Resolution is Content-Based Because Its Applicability Depends on Whether Speakers Discuss One Particular Subject: Pregnancy.

The Resolution is expressly content-based in that its entire application turns on the content and subject matter of a person's speech. The Resolution specifically dictates who must post a disclaimer by reference to the content of their speech—namely, whether the speaker "provides information about pregnancy-related services." Resolution 16-1252(a)(3). Because Centro Tepeyac chooses to discuss pregnancy, it is subject to the Resolution's speech restriction.[14] If the Plaintiff provided information concerning any other issue—drugs, heart health, obesity, marriage, divorce, parenting, nutrition, poverty, unemployment, AIDS or anything else—it would not be required to begin all of its interactions with government-required disclaimers. It is Centro Tepeyac's choice to *speak* (*i.e.*, "provide[] information"), and to do so *about the issue of pregnancy*, that qualifies it for the requirements of the Resolution. The Resolution is thus the quintessential content-based law. *See Turner I*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.").

At the preliminary injunction stage, this court properly found that this focus on speech about pregnancy renders the Resolution content-based. ECF No. 26 at 10, n.5 (rejecting the County's claim of content-neutrality because the Resolution "is activated in part by a particular message" in that it focuses on the provision of "information about pregnancy related services"). As the Court explained in March:

[14] When Dr. Tillman was asked, "The law doesn't regulate a center that wants to talk about some issue other than pregnancy, correct?" she responded: "That's my understanding of it, yes." Tillman Depo. 43:22-44:14.

> [T]he Resolution is also triggered by the 'provision of information about pregnancy-related services.' Moreover, in this case it is the government itself that is prescribing the content of the message. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (emphasizing importance of the fact that a 'specific message is dictated by the State"). As *Riley* notes, 487 U.S. at 795, the fact that particular content is compelled by the Resolution necessarily renders it content-based: 'Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the act as a content-based regulation of speech.'

ECF No. 26 at 10, n.5.

Nothing has changed. As in March, the law is still triggered by discussion of one topic and only one topic: pregnancy-related services. And the law still requires a particular, government-dictated message. As in *Riley*, and as in this Court's preliminary injunction opinion, these facts render the law content-based. Content-based laws are presumptively invalid and can only be upheld where they satisfy strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Turner I*, 512 U.S. at 642-43 ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content."). Accordingly, strict scrutiny applies here.

B. The Resolution is Content- and Viewpoint-Based Because the County Adopted it as a Result of Disagreement With Pro-Life Speech About the Health Effects of Abortion.

Strict scrutiny is required for a third, independent reason: the County adopted the law because of disagreement with certain speech about the health effects of abortion. The First Amendment also prohibits the government from enacting even facially neutral laws where the government has acted because of disagreement with certain speech. *See Mosley*, 408 U.S. at 95 ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also Ward v. Rock Against Racism*,

491 U.S. 781, 791 (1989) (stating that the "principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

This disagreement is evident from the history of the Resolution. First, the initial version of the Resolution—co-sponsored by a majority of the Council, Mihill Memo at circle-4—targeted *only* those speakers who refused to "provide or refer" for "abortions" or "nondirective and comprehensive contraceptive services." Mihill Memo at circle-2. Thus the Council began by expressly targeting a certain group of speakers because of their viewpoint about abortion and birth-control. Indeed, the County itself admits that its original law "single[d] out for regulation only those LSPRCs that have a particular view of abortion." Mihill Memo at 4.

The County, of course, would prefer that the Court ignore the Resolution's genesis as an expressly and admittedly discriminatory measure targeting speakers with a particular disfavored viewpoint about abortion. As the Supreme Court has indicated, however, a legislature cannot so easily eliminate the taint of its impermissible motives. *See, e.g., United States v. Eichman*, 496 U.S. 310, 315-318 (1990) ("Although Congress cast the Flag Protection Act of 1989 in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: It suppresses expression out of concern for its likely communicative impact"; finding law content-based "despite the Act's wider scope . . ."); *McCreary Cnty , Ky. v. Am. Civ. Liberties Union of Ky,* 545 U.S. 844, 866 (rejecting County's argument that purpose "should be inferred . . . only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. *But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence . . .*") (emphasis supplied).

Here, the subsequent history confirms that, while the County heeded advice to remove the Resolution's *express* focus on viewpoint, the final version of the Resolution was enacted "out of concern for [the] likely communicative impact" *Eichman*, 496 U.S. at 318, of pregnancy center speech. First, the Resolution continues to focus only on those who "provide information"—it has absolutely no applicability at all to persons who provide pregnancy-related services *without conveying a message*. This focus on information-givers makes sense only if, as here, the government is acting out of concern about the "likely communicative impact" of that speech. The Council has admitted that this was precisely the reason for the final version of the Resolution, and that the Resolution is "designed" to address such information:

> *The issue the proposed regulation is designed to address* is that some LSPRCs provide their clients with *misinformation/incomplete information* about their pregnancy options which can negatively affect a woman's decision regarding her pregnancy and health.

Mihill Memo at 3; *see also* Tillman Depo. at 66:1-2 ("I would want them to receive unbiased information, period"). "Misinformation" and "incomplete information" are merely code words for the Council's disagreement with the content and viewpoint of speech about the morality and health effects of abortion. *See* Mihill Memo at 2 (claiming that "NARAL volunteers indicated that County LSPRCs provided . . . misinformation" about the health effects of abortion, but acknowledging that some "isolated studies" "may" support the LSPRC's views).

Likewise, the County Council's press release upon enacting the law makes clear that the Resolution is a "needed" response to information provided by pregnancy centers:

> Councilmember Trachtenberg said that the regulation is needed because some pregnancy centers often provide false and misleading information to women. She said that CPCs often tell clients that abortions make future pregnancy impossible; that abortions and oral contraceptives cause breast cancer; and that condoms are

> ineffective in preventing pregnancy and STDs. Overall, she said that CPCs often discourage women from seeking contraception or abortion.

Exhibit 3 (County's 2/2/10 press release).

The Council apparently believed that receiving such information from LSPRCs might negatively affect health, and that "[t]he proposed regulation would address this health concern *by ensuring that clients of LSPRCs understand that the information they are receiving* is not necessarily from licensed medical professionals." Mihill Memo at 3 (emphasis supplied).

The County continued to take this position—namely, that the Resolution was enacted *because of* the County Council's view of the information provided by pro-life pregnancy counselors—as this court heard arguments on the preliminary injunction. For example, the County explained: "As is reflected in the legislative record, the Resolution was borne of the Council's ***concern about the accuracy and truthfulness of information*** being provided to pregnant women at pregnancy resource centers." ECF No. 5 at 3 (emphasis supplied). Indeed, the County goes so far as to argue that the Council need not even have been *correct* in disagreeing with the substance of this information—according to the County, the Resolution is permissible simply because the "legislative record contains sufficient information for a legislator to conclude that some of that advice is false and misleading." ECF No. 21 at 3.

All of these facts—the origin of the Resolution as an expressly viewpoint-discriminatory law; the County's admission that the law is "designed to address" pregnancy speech with which the Council apparently disagreed; the County's press release explaining that the Resolution is "needed" to respond to certain pregnancy speech; the law's focus *only* on those who provide pregnancy-related services; the law's applicability *only* to those who speak, i.e., "provide information," about pregnancy; and the County's repeated admissions in this court that the law

arises from the Council's "concern" about the substance of certain information—confirm that the Resolution was, in fact, enacted "because of disagreement" with certain pregnancy-related speech, *Ward*, 491 U.S. at 791. As the Supreme Court has explained, however, "the government *must abstain* from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis supplied). Accordingly, the law is impermissibly content- and viewpoint-based and subject to strict scrutiny.

III. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE THE COUNTY CANNOT SUCCEED IN CARRYING ITS BURDEN UNDER STRICT SCRUTINY.

The Resolution is subject to strict scrutiny because it compels speech, is content-based, and was enacted because of disagreement with the content and viewpoint of past pregnancy center speech. Applying strict scrutiny, during its decision on the preliminary injunction this Court correctly found that Plaintiff had shown a likelihood of success on the merits of Plaintiff's First Amendment claim against the portion of the Resolution requiring Plaintiff to state that the County Health Officer "encourages women who are or may be pregnant to consult with a licensed health care provider." ECF No. 26 at 33. Although the Court at that time found that Plaintiff had not shown a likelihood of success as to the "no licensed medical professional" portion of the Resolution, *id.* at 32, the evidence is now overwhelmingly clear that Defendants cannot carry their burden to justify either part of the Resolution under strict scrutiny.

For the reasons set forth below, neither of the two disclaimers is narrowly tailored to serve a compelling state interest; both are therefore invalid as a matter of law.

A. Legal Standard for Strict Scrutiny.

Strict scrutiny review under the First Amendment requires that the Resolution is "1) narrowly tailored to 2) promote a compelling government interest." J.A. 232 (quoting *PSINet, Inc. v. Chapman*, 362 F.2d 227, 233 (4th Cir, 2004)). "Action taken to remedy an 'evil' will be considered 'narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy.'" *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 157 n.2 (4th Cir. 1998) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). "If a less restrictive alternative would serve the Government's purpose, the legislature *must use* that alternative." *Playboy Entm't Grp., Inc.*, 529 U.S. at 813 (2000) (emphasis supplied).

The County's burden 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*." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (emphasis supplied). Viewpoint and content-based speech restrictions are presumed unconstitutional because it is virtually impossible for the government to justify such selective restrictions on speech. *Playboy*, 529 U.S. at 817-18. Viewpoint-based regulations of private speech "rarely, if ever, will withstand strict scrutiny review." *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 616, n.4 (4th Cir. 2002).

In describing this standard at the preliminary injunction stage, this Court was quite clear about what would be required of the government to establish a compelling interest:

> Of course, to invoke such a compelling interest, Defendants would ***need to 'demonstrate that the harms are real, not merely conjectural, and that the [Resolution] will in fact alleviate these harms in a direct and material way***. *Turner Broad.*, 512 U.S at 664.

ECF No. 26 at 25 (emphasis supplied). As set forth in more detail below, Defendants cannot possibly meet this burden where (a) there is no evidence of a problem, (b) the alleged harms are

entirely conjectural, and (c) the County actually has no idea (and apparently has never even bothered to find out) whether the law "in fact alleviates" the alleged harms "in a direct and material way." Accordingly, the entire law fails for lack of a compelling interest.

The Court spoke with similar clarity about the government's burden on the issue of narrow tailoring:

> "Action taken to remedy an 'evil' will be considered 'narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy.'" *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 157 n.2 (4th Cir. 1998) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

ECF No. 26 at 26. As set forth in more detail below, Defendants cannot possibly meet this burden where, as here, they have entirely failed to use a wide range of less restrictive alternatives that would serve the government's alleged purposes.

B. The Resolution Does Not Serve a Compelling Interest.

The compelling interest test can only be satisfied when the law at issue serves interests "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The determination of whether an asserted interest meets this test "is not to be made in the abstract" but rather "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *see also Lukumi*, 508 U.S. at 546 (rejecting assertion that protecting public health was compelling interest "in the context of these ordinances"). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Further, the County "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." *Turner I*, 512 U.S. at 664*; Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest.").

The compelling interest test cannot be satisfied where, as here, the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546–47. Rather, "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.*; *see also PSInet*, 362 F.3d at 238. And the government "must present more than anecdote and supposition" to support a speech regulation, but instead must prove the existence of the alleged concern underlying the law based on substantial evidence. *Playboy*, 529 U.S. at 822; *Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"),_520 U.S. 180, 195 (1997).

The Resolution fails these tests as a matter of law. The undisputed facts show that, in fact, the County has no evidence of actual harm, and certainly no evidence of a threat to an interest "of the highest order." Dr. Tillman admitted, on behalf of the County, that the government actually has no evidence of even a single pregnant woman mistakenly believing an LSPRC is a licensed medical facility. Tillman Depo. 24:4-6 (no evidence of any actual pregnant woman delaying seeking care after going to LSPRC); 26:3-9 (County "not aware of a single woman who has ever delayed getting medical care because they believed either Birthright or Centro Tepeyac was licensed"). Nor does the County have evidence of a single pregnant woman doing the thing the law is allegedly aimed at, namely refraining from seeking medical care because she has been to an LSPRC. Tillman Depo. 24:4-6, 26:3-9. Nor has the County received

any complaints—not even one—from any actually pregnant women who sought help from an LSPRC, even though the County itself refers women to Centro Tepeyac for pregnancy testing. Tillman Depo. 14:10-14 (no complaints); 21:5-9 (County refers women to Centro but has received no complaints). The County has absolutely no idea whether women who go to Centro Tepeyac also seek help from a medical provider. Tillman Depo. 62:7-10 (County has "no idea if they do or don't" get to a medical provider). In fact, Dr. Tillman admitted that, for all the County knows, women who go to LSPRCs might be *more likely* than other women to get medical care. Tillman Depo. 26:15-27:11 (County admitting it has no knowledge about whether women who go to LSPRCs are more likely or less likely to go to a medical provider).

The total absence of evidence of a problem is further confirmed by the County's admitted total failure to do anything, ever, to spread these allegedly compelling messages other than require their posting on the walls of two LSPRCs. Tillman Depo. 46:3-24 (agreeing County "never did anything to spread" the allegedly compelling messages). Thus Dr. Tillman testified that she has not assigned even one of her approximately 500 public health employees to look into the activities of LSPRCs, Tillman Depo. 15:4-8. One would think if the issue were "of the highest order" at least one of those employees would have looked into it.[15] Yet Dr. Tillman admitted that she had not even *heard of* LSPRCs prior to 2009, despite more than three decades in the field of public health. Tillman Depo. 10:6-9, 11:5-25, 12:4-6. And she was quite clear that she has never bothered to send this message herself—even though Dr. Tillman is the very

[15] Likewise, if the County actually had a compelling interest in ensuring that *all* pregnant women in the County were told of the Health Officer's view that they should see a doctor, the County would require *all* providers of pregnancy-related services to post that disclaimer (not just those who do so as a "primary purpose," and not just those who want to "provide[] information"). The County's failure to do so confirms that its interest is not compelling.

Montgomery County Health Officer whose opinion LSPRCs are being inscribe on their own walls. *Compare* Resolution 16-1252 (requiring LSPRCs to post County Health Officer's message) with Tillman Depo 65:8-19 (noting that she *could* send the message "wherever I so choose" but that she has "not chosen to send that message").

According to Dr. Tillman, the issue simply hasn't risen to her level yet, and the County "is not going to put a lot of resources into this specific topic." Tillman Depo. 50:16-17. Thus the County has never tried to spread these allegedly compelling messages to the public in any way at all—not in newspapers, not on the radio, not on the television, not with electronic media, not with her own voice, not with public employees. Tillman Depo. 46:3-24; 47:11-20; 48:11-22; 73:4-13. In fact, even when the County directs women to LSPRCs, the County has not—and to this day apparently still does not—even bother to convey its allegedly compelling messages on its own website, its own forms, or with its own employees who are talking to women who are going to LSPRCs. *See* Tillman Depo. 53:12-22 (acknowledging that County MC311 website information about Birthright does not include the two allegedly compelling messages); Exhibit 10 (MC311 Birthright listing)**;** Tillman Depo. 12:11-13 and 18:24-20:8 (acknowledging County's referrals to Centro Tepeyac); Tillman Depo. 36:7-23 (acknowledging that referral sheet does not include the two allegedly compelling messages); Exhibit 11 (County referral sheet listing Centro Tepeyac**)**; Tillman Depo 37:8-10 (acknowledging that the County also fails to convey the allegedly compelling messages verbally to the women it sends to Centro Tepeyac).

The Supreme Court's decision last term in *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2739 (2011) confirms that these undisputed facts require summary judgment for the Plaintiff. In *Brown*, the Court considered whether a California law that imposed restrictions on

violent video games comported with the First Amendment. *Id.* at 2732. The law prohibited the sale or rental of "violent video games" to minors, and required the packaging of these specific video games to be labeled "18." *Id.* The Court treated the law as a content-based restriction on protected speech. *Id.* at 2738. As such, the Court applied strict scrutiny, noting that "unless [the law] is justified by a compelling government interest and is narrowly drawn to serve that interest," it cannot pass constitutional muster. *Id.* As to the purported compelling interest, the Court explained "[t]he State must specifically identify an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to the solution." *Id.* "That is a demanding standard." *Id*.

Although California conceded that it could not point to a direct causal link between violent video games and harm to minors, California "claimed that it need not produce such proof because the legislature can make a *predictive* judgment that such a link exists, based on competing psychological studies." *Brown* 131 S. Ct. at 2738 (emphasis added). In rejecting this argument, the Court reasoned that because the government "bears the risk of uncertainty, . . . ***ambiguous proof will not suffice***." *Id.* at 2739 (emphasis added).

To support a compelling interest, California relied primarily on psychology research that "purport[ed] to show a connection between exposure to violent video games and harmful effects on children." *Id*. The Court, however, found that these studies "d[id] not prove that violent video games *cause* minors to *act* aggressively . . ." *Id.* Rather, they only indicated some correlation, and the Court found that this "evidence is not compelling." *Id*. Consequently, the Court held that California failed to show that the law served a compelling government interest.

Here, the evidence is far weaker than the evidence the Court rejected as "not compelling" in *Brown.* The County has not come forward with studies or anecdotal evidence even purporting to show a correlation between seeking help at an LSPRC and foregoing medical care. At most the County can offer its unsupported speculation that women "may" be confused and "could" neglect to seek medical care. Resolution 16-1252. But the County has absolutely no idea if this ever occurs or not, and offers no evidence from which this Court could conclude that it does, much less that it happens with sufficient frequency to be an interest "of the highest order," and much less that the County has proven that regulating the Plaintiff's speech is "actually necessary" to solve this alleged problem. *Brown*, at 2738; *see also Playboy*, 529 U.S. at 821–22 ("Without some sort of field survey, it is impossible to know how widespread the problem in fact is, and the only indicator in the record is a handful of complaints.").

The County's claim to a compelling interest is also undermined by its failure to pursue that interest anywhere other than on the walls of two LSPRCs. For example, the County does not require speakers discussing a range of important life-and-death health issues—such as obesity, heart health, sexually transmitted diseases, or vaccinations—to post signs about their lack of licensing before they begin speaking. Even within the topic of pregnancy, the County does nothing to regulate the vast majority of information women receive from the internet, television, books, magazines, and other sources. Nor has the County written a law that would require disclosure by, for example, an unlicensed counselor discussing pregnancy options at a Planned Parenthood facility.[16]

[16] Indeed, Dr. Tillman testified that she simply does not know anything about how counseling occurs at Planned Parenthood facilities. Tillman Depo. 39:35-40:2.

The County's failure to address its alleged public health goals in the vast majority of discussions about pregnancy and other health issues confirms that the interest is not compelling. *See PSINet*, 362 F.3d at 238 ("Where strict scrutiny applies, a statute that leaves appreciable damage to the supposedly compelling interest uncorrected is invalid.") (quotation omitted). The County has failed to "demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly" and, accordingly, the interest cannot pass strict scrutiny. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989).[17]

The County's interest simply cannot simultaneously be compelling enough to commandeer Plaintiff's walls, but not compelling enough to prompt the County to have evidence of even a single other instance in which it has taken action to spread these allegedly compelling messages (even in its own direct interactions with pregnant women it sends to LSPRCs). An interest is not compelling where, as here, the government "fails to enact feasible measures restrict other conduct producing o substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546–47. Rather, "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.*; *see also PSInet*, 362 F.3d at 238.

Moreover, the government can offer no evidence that the sign requirement is "actually necessary" to a "solution" for this problem about which it has no evidence. *Brown*, 131 S. Ct. at

[17] *See also City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (rejecting underinclusive law as a "governmental attempt to give one side of a debatable public question an advantage in expressing its views"); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 793 (1978) (holding that an underinclusive speech restriction "undermines the likelihood of a genuine state interest in protecting" against the alleged harm, and "suggests instead that the legislature may have been concerned with silencing [the speaker] on a particular subject").

2738. To the contrary, the government admits it has no idea at all whether the signs even work or not. Tillman Depo. 43:12-13.

For these reasons, the government cannot carry its burden to demonstrate that the compelled speech serves a compelling government interest. Plaintiff is therefore entitled to judgment as a matter of law that the Resolution fails strict scrutiny for this reason alone.

C. The Resolution Is Not Narrowly Tailored.

The Resolution fails strict scrutiny for a second, independent reason—even if one assumes the existence of a compelling interest, the Resolution is not narrowly tailored or the least restrictive means of achieving that interest. The County bears the burden of demonstrating that the Resolution is narrowly tailored to further a compelling interest and that there are no less restrictive alternatives that would further the interest. *Playboy*, 529 U.S. at 813. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby* 487 U.S. at 485. The government fails this test in several ways.

First, the County has completely failed to pursue a wide range of less restrictive alternatives in that it has simply never chosen to send the allegedly compelling messages with its own voice, its own funds, its own walls, or its own employees. 46:3-24; 47:11-20; 48:11-22; 73:4-13. This is true both when the County might speak broadly in a way that would alert many pregnant women about the allegedly compelling messages and also when the County is speaking directly to particular women it is directing to the County's two LSPRCs. Tillman Depo. 53:12-22; 36:7-23; 37:8-10. Speaking these allegedly compelling messages with the government's own voice would have the added benefit of reaching the vast majority of pregnant women in the

County who do not come to the County's two LSPRCs.[18]

As the Supreme Court has explained, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801 (internal quotations and citations omitted). "In contrast to the prophylactic, imprecise, and unduly burdensome" Resolution adopted by the County, "more benign and narrowly tailored options are available." *Id.* at 800. In *Riley*, the government asserted an interest in ensuring that donors are made aware of certain financial information concerning professional fundraisers. Rejecting the State's attempt to require even professional fundraisers to provide this information to donors over the telephone, the Court explained that the government can spread this message itself:

> For example, as a general rule, the State may itself publish the detailed [information it wants the public to know]. This procedure would communicate the desired information to the public without burdening the speaker with unwanted speech during the course of a solicitation.

Riley, 487 U.S. at 800. As this Court correctly observed at the preliminary injunction stage:

> [S]everal options less restrictive than compelled speech could be used to encourage pregnant women to see a licensed medical professional. For example, Defendants could post notices encouraging women to see a doctor in county facilities or launch a public awareness campaign.

ECF No. 26 at 26, n.9.

Here, nothing prevents the County from publishing the information it seeks to publicize about LSPRCs (namely that they are not medical providers and that the County Health Officer believes women should see a doctor). Yet the County simply ignores this easy, inexpensive, and

[18] Indeed, it is unclear why the County would ever want to restrict this allegedly compelling message about the County Health Officer's opinion that pregnant women should seek medical attention to the women who happen to go to two LSPRCs.

less restrictive alternative. *44 Liquormart, Inc. v. R.I.* 517 U.S. 484, 507–08 (1996) (plurality opinion) (striking down, under commercial speech standard, a government prohibition on advertising alcohol prices because of less restrictive alternatives, such as an educational campaign or counter-speech); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) (same). If the County wishes to notify people that Centro Tepeyac and any other LSPRC do not have a doctor on staff, or that the County Health Officer believes pregnant women should see a doctor, the County can speak with its own voice, its own funds, and its own walls. The government's proffered excuses—that the issue has not "risen to my level" (Tillman Depo. 61:12-15), that the idea of disseminating this message in other ways "hasn't even come up for discussion" (Tillman Depo. 59:25-60:14), or that "we are not going to put a lot of resources into this specific topic" (Tillman Depo. 50:16-17)—are wholly inadequate. Either the message is compellingly important enough for the government to send (in which case they should go ahead and send it) or not (in which case they certainly cannot compel Plaintiff's speech).

Likewise, if and when the County becomes aware of any actual person who believes she has been defrauded or mistreated in some way by an LSPRC, the County can use or amend its generally applicable laws to address the problem without targeting Plaintiff's speech. *See Riley*, 487 U.S. at 800 ("the State may vigorously enforce its antifraud laws"); *Nefedro v. Montgomery Cnty*, 996 A.2d 850, 863 (Md. 2010) ("There is at least one less restrictive, effective means for combating fraud: laws making fraud illegal without respect to protected speech."). That Defendants have apparently had exactly zero real cases in which they might pursue these alternatives simply shows the government has regulated without evidence, but it does not make these alternatives somehow less available or effective if and when the first complaint in the

history of the County's LSPRCs happens to be filed.

Even under the lower scrutiny provided in the commercial speech context, the Fourth Circuit has recognized that "the government must consider alternatives to regulating speech to achieve its ends. In this regard, any commercial speech restrictions must be 'a ***necessary as opposed to merely convenient*** means of achieving [the government's] interests.'" *W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 305 (4th Cir. 2009) (quoting *Thompson*, 535 U.S. at 373). Moreover, the Supreme Court has explained that "[i]f the First Amendment means anything, it means that regulation of speech *must* be a last-not first-resort. *Yet here it seems to have been the first strategy the Government thought to try*." *Thompson*, 535 U.S. at 373 (emphasis supplied). The County's use of compelled speech regulations as "the first strategy" it thought to try, and its failure to pursue (or apparently even consider) the other available options, ends the analysis. So long as there is another mechanism for the government to convey its message, the Resolution cannot survive strict scrutiny. *Playboy*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature *must use* that alternative.") (emphasis added).

The Resolution also fails the narrow tailoring inquiry because it does not "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485. Here, Dr. Tillman admitted that the government's interest is only triggered where a woman might mistakenly believe she is getting medical care. Tillman Depo. 31:12-17. Yet the Resolution requires the government's message to be announced on a sign to *every single woman who comes to an LSPRC*, even if she is coming for diapers, financial assistance, or any other services which no one could mistake for a visit to the obstetrician's office. Vera Decl. ¶3. The

sign applies regardless of whether an LSPRC looks anything like a medical facility at all, and regardless of whether there is any possibility that any visitor to an LSPRC could ever actually believe she'd been to a doctor's office. As such, the Resolution interferes with a broad range of speech which simply does not implicate the government's claimed interest at all.

For these reasons, even if one assumes the existence of a compelling interest, the Resolution is not narrowly tailored or the least restrictive means of achieving that interest. Accordingly, the Plaintiff is entitled to judgment as a matter of law that the Resolution fails strict scrutiny and violates the First Amendment.

IV. PLAINTIFF IS ALSO ENTITLED TO SUMMARY JUDGMENT BECAUSE THE RESOLUTION IS IMPERMISSIBLY VAGUE.

The entire Resolution should also be stuck down for a separate reason—it is impermissibly vague, in violation of the Fourteenth Amendment. The vagueness cuts to the core of the Resolution's impact on Plaintiff's speech, because it deprives Plaintiff of any clear ability to avoid the speech compulsion. "Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). The Supreme Court has been clear that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Further, if "the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.; see Grayned*, 408 U.S. at 109 n.5 ("[w]here First Amendment interests are affected, a *precise* statute 'evincing

a legislative judgment that certain specific conduct be . . . proscribed' assures us that the legislature has focused on the First Amendment interests") (citation omitted) (emphasis added).

Vague laws in the First Amendment context not only raise dangers of arbitrary and discriminatory application, they also "may trap the innocent by not providing fair warning" and force speakers to chill their own speech. *Id*. at 108–09. Most importantly here, the Court has explained that vague laws violate the principle that a person must be "free to steer between lawful and unlawful conduct" and that laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*

Here, the Resolution makes it impossible for the Center to "steer between lawful and unlawful conduct" because a variety of terms are undefined, which inhibit the Center's ability to "steer" itself out of the Resolution's compelled speech requirements. For example, the Resolution provides that "[l]icensed medical professional on staff" means, *inter alia*, individuals who "provide medical related services" by either "providing medical services" for twenty hours per week or "directly overseeing medical services." Resolution No. 16-1252 (a)(2). However, there is no definition explaining what types of services constitute either "medical-related services" or "medical services." Are "medical" or "medical-related" services only those services that require a medical license? Or are they something different?

These questions are not mere hypotheticals—they are particularly important questions for the Plaintiff as they leave it in the dark about how, exactly, it can avoid the Resolution's speech restrictions. For example, is it a "medical service" to talk to a woman about whether or not to have an abortion? There is certainly no law in Maryland requiring a license to discuss this issue. If such discussions do count as "medical" or "medical-related" services, can Centro Tepeyac

place itself outside of the law by having a nurse available for such discussions? Does the nurse have to be physically present for *all* such discussions that occur at Centro to qualify as "directly overseeing medical-related services"? If Centro currently provides no medical services (however the County defines that term under the law), or performs them for less than twenty hours per week, must it *begin* offering such services just to have something for the licensed medical professional to do? Does handing a woman a home pregnancy test constitute "medical services," even though such tests are available at any grocery or convenience store? The Resolution provides no clear answers to these questions, and thus deprives the Plaintiff of having any ability to avoid the speech restriction.

A similar uncertainty arises from the law's failure to define "a primary purpose" and "pregnancy-related services." Many of Centro's services relate to assisting women *after* childbirth—i.e., diapers, parenting classes, and material assistance. Vera Decl. ¶3. Do these services qualify as "pregnancy-related" because they are offered to women who were recently pregnant (or because they are offered in hopes of facilitating a woman's ability to choose to have a child)? The legislative history provides no clear answer, and focuses only on the information the County deemed threatening, *see generally*, Mihill Memo, and not on what services count as "pregnancy-related." If these services are pregnancy-related, then presumably the County is requiring signs at daycare centers and baby clothing stores; if not, then Centro perhaps could avoid the compelled speech by choosing to increase the scope of services to new parents.

The Resolution leaves speakers guessing at these questions, making it impossible for Plaintiff to know how to avoid the speech restrictions by having a "primary purpose" unrelated to pregnancy or by having a "licensed medical professional" on staff. Plaintiff simply cannot

"steer" its speech to avoid the Resolution and, therefore, must "steer far wider of the unlawful zone" than they would if the boundaries "were clearly marked." *Grayned*, 408 U.S. at 109.

For these reasons, the Resolution is impermissibly vague. *Vill. of Hoffman Estates*, 455 U.S. at 498-99.

V. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT UNDER ARTICLE 40 OF THE MARYLAND DECLARATION OF RIGHTS.

Plaintiff is also entitled to summary judgment on Count III, because the Resolution violates Article 40 of the Maryland Declaration of Rights. Maryland courts generally treat Article 40 as co-extensive with the First Amendment. *See, e.g., Nefedro v. Montgomery County*, 414 Md. 585, 593 n.5 (Md. 2010) ("Article 40 is read generally *in pari materia* with the First Amendment"). Therefore, for the reasons set forth above, the Resolution violates Article 40. To the extent there is any difference between the two, the decision in *Nefedro* should be taken to establish that Plaintiff's speech is not commercial under Maryland law, and that the existence of less restrictive alternatives renders the Resolution unconstitutional under Maryland law. *Nefedro*, 414 Md. at 602-604 (even fortunetelling for money is not commercial speech because "the purpose of fortunetelling is not to propose a commercial transaction, nor is it solely related to the economic interests of the speaker"); id. at 606 ("There is at least one less restrictive, effective means for combating fraud: laws making fraud illegal without respect to protected speech.").

VI. INJUNCTIVE RELIEF IS REQUIRED

Where a law unconstitutionally infringes First Amendment rights, an injunction is appropriate. *See Legend Night Club v. Miller*, 637 F.3d 291, 302 -303 (4th Cir., 2011). As set forth in *Legend Night Club*, the loss of First Amendment freedoms unquestionably constitutes

irreparable harm and cannot be compensated by money damages. Moreover, the government is not harmed by an injunction against enforcing unconstitutional restrictions, and upholding constitutional rights is in the public interest. *Id.*; *see also* ECF No. 26 at 33-34.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court enter summary judgment in Plaintiff's favor on all claims in the First Amended Complaint.

Respectfully submitted,

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Dated: November 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document on Clifford Royalty, counsel for defendants, via electronic filing.

s/ Mark L. Rienzi
Mark L. Rienzi

Dated: November 1, 2011