IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(AUSTIN DIVISION)

AUSTIN LIFECARE, INC. Plaintiff, v. CITY OF AUSTIN, *a municipal corporation;* LEE LEFFINGWELL, *in his official capacity as the Mayor of Austin*; CHRIS RILEY, MIKE MARTINEZ, KATHIE TOVO, LAURA MORRISON, BILL SPELMAN, and SHERYL COLE, *in their official capacities as members of the Austin City Counci*l; and MARC OTT, *in his official capacity as City Manager of the City of Austin,* Defendants.	§	CIVIL NO. 1:11-CA-00875-LY (Consolidated with CIVIL NO. A-II-CA-876-LY) ORAL ARGUMENT REQUESTED

AMENDED MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and Fed. R. Civ. P. 15(a)(1)(B), Plaintiff Austin LifeCare (LifeCare) hereby respectfully withdraws its pending motion for preliminary injunction (Document 13) to enjoin Chapter 10-9 of Title 10 of the Austin City Code (Ordinance No. 20100408-45, enacted on April 8, 2010, and repealed by Ordinance 10120126-17 on January 26, 2012; hereafter the "Repealed Ordinance") and substitutes this amended motion to enjoin the above-captioned Defendants from enforcing Chapter 10-10 (Ordinance No. 20120126-45, hereafter the "Ordinance) that was enacted on January 26, 2012 to replace the Repealed Ordinance. In the absence of the requested preliminary injunction order, Plaintiffs will suffer irreparable harm, namely the loss of rights and freedoms guaranteed by the First and Fourteenth Amendments to the United States Constitution.

In support of this Motion, LifeCare relies upon the facts and authorities set forth in the following :

1. LifeCare's accompanying MEMORANDUM OF LAW in support of this Amended Motion, filed contemporaneously herewith;

2. LifeCare's accompanying [PROPOSED] ORDER filed contemporaneously with this Amended Motion.

3. LifeCare's AMENDED VERIFIED COMPLAINT (Document 30), filed January 31, 2012

The requested preliminary injunction is justified and ought to be granted because the Plaintiff meets all of the elements required for temporary or preliminary injunctive relief: (1) Plaintiff is likely to prevail on the merits of the First Amendment and Due Process claims as set forth in their Amended Verified Complaint; (2) Plaintiff will suffer irreparable injury with the requested temporary restraining order; (3) the injury to Plaintiff outweighs any injury the injunction will cause Defendants; and (4) such an injunction will not disserve the public interest. *Bluefield Water Ass'n., Inc. v. City of Starkville, Miss.*, 577 F.3rd 250, 252-53 (5th Cir. 2009).

REQUEST FOR HEARING

Plaintiffs request a hearing for presentation of oral argument on this motion.

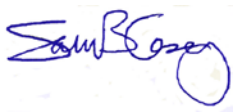
NOMINAL SECURITY

Insofar as Defendants costs and damages will be at most nominal in the unlikely event that Defendants are ever found to have been "wrongfully enjoined or restrained", the Court is requested to exercise its discretion under Fed. R. Civ. P. 65 (c) to properly set the security to be given by Plaintiff at zero or a nominal amount not exceeding $500. See *Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411,421 n.3 (4th Cir. 1999) ["The amount of the bond, then ordinarily depends on the gravity of the potential harm to the enjoined party…Where the district court

determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the mount of the bond accordingly. In some circumstances, a nominal bond may suffice. See e.g. *International Controls Corp. v. Vesco*, 490 F. 2d 1334 (2nd Cir. 1974) (approving district court's fixing bond amount at zero in the absence of evidence regarding likelihood of harm)."]

Dated: January 31, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2012, using the CM/ECF system I electronically filed the foregoing Plaintiffs' Amended Motion for Preliminary Injunction, Proposed Order, and Memorandum in Support of Plaintiffs' Amended Motion for Preliminary Injunction to the Clerk of the Court in person and duly served a copy of these documents on following legal counsel representing all the defendants in this action.

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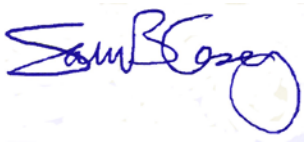

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(AUSTIN DIVISION)

AUSTIN LIFECARE, INC. Plaintiff, v. CITY OF AUSTIN, *a municipal corporation;* LEE LEFFINGWELL, *in his official capacity as the Mayor of Austin*; CHRIS RILEY, MIKE MARTINEZ, KATHIE TOVO, LAURA MORRISON, BILL SPELMAN, and SHERYL COLE, *in their official capacities as members of the Austin City Counci*l; and MARC OTT, *in his official capacity as City Manager of the City of Austin,* Defendants.	§ § § § § § § § § § § § § § §	CIVIL NO. 1:11-CA-00875-LY (Consolidated with CIVIL NO. A-II-CA-876-LY)

[PROPOSED] ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION

This matter having come before the Court on the motion of Plaintiff Austin LifeCare (Plaintiff) for an amended preliminary injunction, and upon consideration of Plaintiff's Amended Verified Complaint and the briefs, arguments, and evidence submitted by the parties, this Court hereby finds:

1) Plaintiff has satisfied the requirements for a preliminary injunction. In particular, there is a substantial likelihood that Plaintiff will prevail on the merits of its claim because Chapter 10-10 of Title 10 of the Austin City Code (Ordinance No. 20120126-45, hereafter the "Ordinance") is a content-based and viewpoint-based regulation of speech for which Defendants have not established either a compelling state interest or the least restrictive

means for protecting such an interest through this Ordinance . The threatened injury to the Plaintiff outweighs the claimed injury to the City of Austin, because the deprivation of First Amendment liberties constitutes irreparable harm. A preliminary injunction against an unconstitutional law abridging such liberties is always in the public interest.

2) It is therefore ordered that a preliminary injunction enjoining enforcement of the Ordinance pending final determination on the merits is granted.

3) Accordingly, Defendants City of Austin; Lee Leffingwell, in his official capacity as Mayor of Austin; Chris Riley, Mike Martinez, Kathie Tovo, Laura Morrison, Bill Spelman, and Sheryl Cole, in their official capacities as members of the Austin City Council; and Marc Ott, in his official capacity as City Manager of the City of Austin, and all those acting in concert with the Defendants, are hereby enjoined from enforcing the Ordinance for the duration of this case

4) Plaintiff is entitled to rely on this injunction to remove or not post whatever signage in required by the Ordinance for the duration of this case.

5) Insofar as Defendants costs and damages will be at most nominal in the unlikely event that Defendants are ever found to have been "wrongfully enjoined or restrained", the Court exercises its discretion under Fed. R. Civ. P. 65 (c) to set the security to be given by Plaintiff at zero

SO ORDERED.

Dated: _____

_____

THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
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(AUSTIN DIVISION)

AUSTIN LIFECARE, INC. Plaintiff, v. CITY OF AUSTIN, *a municipal corporation;* LEE LEFFINGWELL, *in his official capacity as the Mayor of Austin*; CHRIS RILEY, MIKE MARTINEZ, KATHIE TOVO, LAURA MORRISON, BILL SPELMAN, and SHERYL COLE, *in their official capacities as members of the Austin City Counci*l; and MARC OTT, *in his official capacity as City Manager of the City of Austin,* Defendants.	§ § § § § § § § § § § § § § §	CIVIL NO. 1:11-CA-00875-LY (Consolidated with CIVIL NO. A-II-CA-876-LY)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Austin LifeCare (LifeCare) respectfully offers this memorandum in support of its amended motion for preliminary injunction against the above named defendants, enjoining Chapter 10-10 of Title 10 of the Austin City Code's (Ordinance No. 20120126-45, hereafter the "Enacted Ordinance") for violations of the freedom of speech and due process, and the Texas Restoration of Religious Freedom Act.

INTRODUCTION

This case arises out of an attempt by the City of Austin to require certain disfavored speakers to convey a government-mandated message. The City's Ordinance 20120126-45, ("the Ordinance"), on its face violates the protection of free speech in the United States and Texas

Constitutions. The facts can be found in LifeCare's detailed Amended Verified Complaint (Document 30, hereafter the "AVC"), which serves as an appendix to this motion.

The Ordinance is subject to judicial review under the 'strict scrutiny' test because it compels private speakers to post on their property a message mandated by the City, and impermissibly targets speakers based on the content and viewpoint of their speech. AVC at 14-15, 29-33. The Ordinance does not regulate commercial speech; rather, it regulates the free speech of pregnancy centers such as in "options counseling" where they discuss their viewpoint on issues facing pregnant women. LifeCare is subject to the Ordinance because it engages in such speech in order to deliver its view in support of life and against abortion or "comprehensive birth control." Due purely to LifeCare's engaging in speech, the Ordinance forces LifeCare to post negative and nonsensical signs at the entrance of its facility designed by the City to discourage women from ever listening to LifeCare. AVC at 24. The content of the Ordinance's sign is utterly irrational, forcing LifeCare to declare that the facility has no state or federal license to provide limited ultrasound care and pregnancy diagnoses, even though there is no such thing as a federal or state license for a facility to do so. *Id.*

Meanwhile, the Ordinance intentionally discriminates against pro-life viewpoints by exempting abortion centers from posting signage, even when those centers have completely unlicensed persons offering pregnancy options counseling that the doctor in the building does not supervise. Options counseling triggers pro-life center signage but not abortion center signage. AVC at 31-33, 37.

The purported interests served by the Ordinance do not remotely approach the threshold standard requiring a compelling interest, narrow tailoring, and least restrictive alternatives mandated by the United State and Texas Constitutions. AVC at 12-23. Every single court to rule on the constitutionality of laws like the Ordinance compelling the speech of pro-life centers has

determined that they are subject to strict scrutiny and has issued injunctive relief. LifeCare has likewise demonstrated a likelihood of success on the merits and is entitled to a preliminary injunction to stop the Ordinance from violating its hallowed free speech rights.

ARGUMENT

I. LEGAL STANDARD

"In order to prevail on a motion for preliminary injunction, [the moving party] must establish that (1) there is a substantial likelihood that it will prevail on the merits, (2) there is a substantial threat that the party will suffer irreparable injury if the preliminary injunction is denied, (3) the threatened injury to the party seeking the injunction outweighs the threatened injury to the party to be enjoined, and (4) granting the preliminary injunction will not disserve the public interest." *Walgreen Co. v. Hood*, 275 F.3d 475, 477 (5th Cir. 2001). As the Ordinance goes into effect on or about February, 6 2012, showing these elements also establishes the requirements for a temporary restraining order. Rule 65.[1]

LifeCare satisfies each of these requirements. Three similar ordinances have already been the objects of preliminary injunctions in federal court. *O'Brien v. Mayor and City Council of Baltimore*, 768 F. Supp. 2d 804 (D. Md. 2011); *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456 (D. Md. 2011); *Evergreen Ass'n v. City of New York*, 801 F.Supp.2d 197 (S.D.N.Y. 2011).

II. THERE IS A SUBSTANTIAL LIKELIHOOD THAT LIFECARE WILL PREVAIL ON THE MERITS

A. The Ordinance Is Subject to Strict Scrutiny Because it Compels Speech

[1] Plaintiff intends to file a separate application for temporary restraining order. Plaintiff will defer or withdraw its request for a temporary restraining order if Defendants agree not to implement or enforce the Ordinance until this court has rendered a judgment on Plaintiff's motion for preliminary injunction. However, prior to filing this brief counsel for Defendants refused to so agree.

The Ordinance is a plain example of unconstitutional compelled speech. The Ordinance forces LifeCare and other pregnancy resource centers ("PRCs") to post a sign communicating a message that they would otherwise not speak and that significantly burdens the conversation and relationship between PRCs and their clients. See AVC at 29-31.

It is well established that forcing speech is just as unconstitutional as prohibiting speech. *See Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner I*"), 512 U.S. 624, 642 (1994); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The "right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Wooley*, 430 U.S. at 714 (citing *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Any alleged "difference between compelled speech and compelled silence . . . is without constitutional significance." *Id.* at 796.

Whether the compelled disclaimer is "opinion" or "mere" statement of "fact" likewise makes no difference to the scrutiny applied against laws that compel speech. *Id.* at 797-98. There is no factual "exception to the rule that information is speech." *Sorrell*, 131 S. Ct. at 2667. The First Amendment "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573–74 (1995) (citation omitted). "Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as content-based speech regulations. *Turner I*, 512 U.S. at 642.[2]

[2] Commercial speech scrutiny does not apply. Commercial speech is speech "proposing a commercial transaction," or is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557, 560 (1980). The Ordinance is not a regulation of commercial speech: it applies to completely free and noncommercial speech about pregnancy. LifeCare engages in and proposes no commercial transactions, and has no associated economic motive. AVC at 24. *See also Riley*, 487 U.S. at 796 (speech "inextricably intertwined" with protected speech is not commercial); *O'Brien*, 768 F. Supp. 2d at 813 (commercial speech scrutiny does not apply); *Centro Tepeyac*, 2011 WL 915348, at *6

B. The Ordinance Is Subject to Strict Scrutiny Because It Discriminates on the Basis of Viewpoint and Content

The Ordinance is also unconstitutional for additional, independent reasons that the Supreme Court has condemned: it is a plain example of unconstitutional viewpoint- and speaker-discrimination. On its face, the Ordinance determines *which* speakers will be regulated based on the topic of their conversation, namely pregnancy. AVC at 14, 31-33. "Content based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382; *see also Sorrell*, 131 S. Ct. at (invalidating a statute that "disfavors . . . speech with a particular content"); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (invalidating statute that "plainly imposes a

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(footnote 2, cont.)
("Defendants cannot rely on commercial speech cases"); *Evergreen*, 2011 WL 2748728, at *6 (the City's argument to apply commercial speech "is particularly offensive to free speech principles").

Likewise, it is not legitimate here to apply *Planned Parenthood v. Casey*, 505 U.S. 833, 882–85 (1992) and similar cases because they only allow certain disclosure requirements when it is "part of the practice of medicine, subject to reasonable licensing and regulation by the State." *See also Gonzales v. Carhart*, 550 U.S. 124, 128 (2007) (allowing disclosure only under "significant role . . . in regulating the medical profession"); *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 2012 WL 45413, at *5 (5th Cir. Jan. 10, 2012) (informed consent passes First Amendment scrutiny only as "part of the state's reasonable regulation of medical practice"). The Ordinance in this case regulates activities wholly outside the licensed practice of medicine. In fact it applies only when a full-time doctor is *not* present, and is triggered by mere ideological "counseling" speech. There is no such thing as the profession of "options counseling" about pregnancy, and no case applies *Casey* outside the context of regulating licensed practice. Nor could the government declare mere pregnancy speech a licensed profession, even if it wanted to. *Watchtower Society v. Village of Stratton*, 536 U.S. 150, 167 (2002) (prohibiting licensing conditions on speech).

The fact that LifeCare sometimes offers medical services under a doctor's supervision does not make the Ordinance a professional regulation. The Ordinance is triggered by unlicensed, pure ideological speech about pregnancy "options," not by what any doctors at a center does. Likewise, the Ordinance's requirement that LifeCare disclose the fictitious "fact" that its facility has no ultrasound or pregnancy-diagnosis license is not a professional regulation because, as mentioned, there is no such thing in the Texas or federal governments as such a license, so there is no facility-profession that the Ordinance is governing. And even in the context of regulations that do apply to the health profession, the Supreme Court recently applied strict scrutiny where the regulation by "practical operation" was geared towards to target [certain] speakers and their messages for disfavored treatment." *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2663 (2011).

financial disincentive only on speech of a particular content"). Entities that discuss any health issue besides pregnancy are exempt from the Ordinance, by explicit definition. AVC at 14.

In addition to discriminating on content of speech, the Ordinance discriminates against pro-life speakers because of their viewpoint. The Ordinance is written in such a way that it has the purpose and practical effect of only covering PRCs that do not provide or refer for abortion. AVC at 31-33. Its history (AVC at 12-23) shows unequivocally that it was passed for the constitutionally invalid reason "of disagreement with the message" pro-life pregnancy centers convey. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Ordinance language is gerrymandered not to apply to abortion centers because they have full-time doctors, while necessarily requiring pro-life centers that can't afford full-time doctors to post *explicitly negative* signs, saying they either don't have doctors, or don't have imaginary facility-licenses for ultrasounds, and to erect those signs so they dissuade anyone from entering the facility due to its self-deprecation. AVC at 31-33.

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).

As the Supreme Court explained recently in *Sorrell*, "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory." 131 S. Ct. at 2667. The Ordinance "burdens disfavored speech by disfavored speakers." *Id.* at 2663.

C. The Ordinance Utterly Fails Strict Scrutiny

Strict scrutiny review under the First Amendment requires that the Ordinance "be narrowly tailored to promote a compelling Government interest" and "if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *see also Riley*, 487 U.S. at 800-01; *Wooley*, 430 U.S. at 715-16. This requirement is "the most demanding test known to constitutional law."

City of Boerne v. Flores, 521 U.S. 507, 534, (1997). "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted) (quoting *Playboy*, and *R.A.V.*). The City has no compelling interest if its supporting "evidence is not compelling" to substantiate that interest. *Id.* at 2739. The City "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. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."). "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).

1. The Ordinance Advances No Compelling Interest

The City can cite no compelling interest specific to this Ordinance. AVC at 14-18. It has no evidence at all of a problem, much less one showing the Ordinance to be "actually necessary." The City literally has no evidence of any bad activities of pregnancy centers. The only evidence from the record that the City has are reports about centers elsewhere. But even those reports are not probative, much less compelling, because they are from openly pro-abortion sources, unabashedly targeting pro-life ("anti-choice") centers, and doing so by nothing more than equating "deception" with *saying negative things about abortion*, which is of course an impermissible viewpoint-discriminatory reason to pass a law against speech. In contrast, the Supreme Court in *Brown* rejected the state of California's *scientific studies*, which demonstrated a correlation between violent video games and child-violence, because it was *still* insufficient to prove "causation" of the

problem—"ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2738-39. "Deception" in this case is merely a code word for the City's fundamental disagreement with pro-life speech.

The Ordinance's exceptions for abortion-centers with full-time doctors, even when they engage in pregnancy options counseling by persons who aren't doctors and aren't under their supervision, further undermines any alleged compelling interest, because the lack of such an interest is betrayed when a 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; *see also Merced v. Kasson*, 577 F.3d 578, 594 (5th Cir. 2009); *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (rejecting under-inclusive law as a "governmental attempt to give one side of a debatable public question an advantage in expressing its views"); *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978) (an under-inclusive speech restriction "undermines the likelihood of a genuine state interest, and instead points to "silencing [the speaker] on a particular subject").

The City cannot rest on a generic interest in "public health." The determination of whether an asserted interest is compelling "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 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (rejecting assertion that protecting public health was compelling interest "in the context of these ordinances"). The City has no evidence to justify regulate *speech about pregnancy by Austin centers without full-time doctors*.

2. The Ordinance is Not Narrowly Tailored to Advance Any Interest

The Ordinance is not narrowly tailored to serve any alleged interest. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Ordinance advances no interest against

"deception" because it does not actually regulate deceptive practices. Entities are subject to the Ordinance even if they engage in no deception at all, and provide completely truthful "counseling." Likewise, the Ordinance does not regulate false advertising, because it does not target advertising at all. The Ordinance is not tailored to deception.

Defendants must "show that it has adopted the least restrictive means of achieving that interest" *City of Boerne*, 521 U.S. at 534; *Playboy*, 529 U.S. at 813. "In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available." *Riley*, 487 U.S. at 800. *Riley* notes that "the State may vigorously enforce its antifraud laws." *Id*. *Riley* also notes what is completely true here: that the government can serve its interest of promulgating its disclaimers *by doing so itself* instead of forcing private entities to do so. "These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id.*

Nothing prevents the City from using its own, public means to publish information discussed in the disclosures, and the City simply ignores this easy, inexpensive, and less speech-restrictive alternative. *See also 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); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009). There is not a scintilla of evidence of any such speech or advertising by the City. Nothing in the legislative record shows that the City ever considered less restrictive alternatives. AVC at 12-23. Even after repealing one ordinance due to its unconstitutionality, the City chose not to replace it with a less restrictive alternative but instead passed an equally if not more restrictive Ordinance. If

the City's interest in this message has not been compelling enough for it to inform women with its own words, it surely is not compelling enough to require Plaintiffs to speak it.[3]

D. The Ordinance also Violates Texas Law in Addition to Federal Law

For the same reasons the Ordinance violates the Texas Constitution's speech protections.

E. The Ordinance is Impermissibly Vague and Violates Due Process

As detailed in the AVC, a lack of definitions and explanation, as well as statements made by Austin's legal representation and the Ordinance's sponsor which may conflict with the text, make it difficult to know if LifeCare is covered and what is required if it is. AVC at 20-22, 38-40.

III. PLAINTIFF WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF

The "loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. Unit B Nov.1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Under the Ordinance, plaintiff must speak the government's message to the detriment of its own speech or face fines and criminal punishment. Plaintiff's right to free speech as well as other rights under the First Amendment have been infringed upon from the moment the

[3] Even under a lesser standard, the Ordinance would fail judicial scrutiny due to being content-based. In *Sorrell* the Supreme Court scathingly rejected a law whose effect was to disfavor speech to patients by pharmaceutical manufacturers, who while not strictly the only targets of the law were "essentially the only" speakers affected, therefore making the law one that was "designed to impose a specific, content-based burden on protected expression." 131 S. Ct. at 2663-64. The Ordinance and its history target pregnancy centers in an equally objectionable way. Even though the speech in question was mere facts—prescriber information—the Court did not apply the lowest scrutiny level but reviewed the law under the content-based commercial speech standard, requiring that it "directly advance[] a substantial governmental interest," and that there be a "fit between the legislature's ends and the means." *Id.* at 2667-68. But neither protecting patient confidentiality nor public health saved the law there due to available "remedies other than content-based rules," including the fact that "the State can express that view through its own speech." *Id.* at 2669-71. The state there, as the City here, simply failed to show that the speech targeted is actually "false or misleading within the meaning of this Court's First Amendment precedents," and it failed to show that "the provision challenged here will prevent false or misleading speech." *Id.* at 2762. The utter lack of actual evidence behind the Ordinance makes it fail any applicable level of scrutiny.

Ordinance was passed. As such LifeCare and other centers currently suffer irreparable injury and will continue to do so in the absence of preliminary relief. AVC at 40-41.

IV. THE CONTINUED INJURY TO PLAINTIFF OUTWEIGHS THE CLAIMED INJURY TO THE CITY OF AUSTIN

The injury to Liifcare far outweighs any injury to the City of Austin against which the Ordinance is supposed to protect. The Ordinance's impact on LifeCare's speech is extremely significant. Disclaimers are inherently warnings to all readers not to trust the information provided by such speakers. The required disclaimers impose speech that impairs Plaintiff's ability to start and control a sensitive conversation and effectively serve the Austin community. AVC at 24. Disclosures that have the potential for substantially burdening protected speech with an adverse impact on the listener have been directly foreclosed by the Supreme Court. *Riley*, 487 U.S. at 798. On the other hand, Austin suffers little to no harm under a preliminary injunction. The City had and still has zero evidence of the supposed harm that motivated the Ordinance. The City of Austin has other means available to deliver its message and combat supposed deceptive practices.

V. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC'S INTEREST

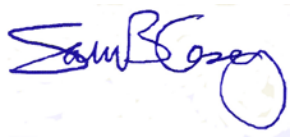
Enjoining the Ordinance will serve the public's interest. "The public interest is best served by enjoining the effect of any ordinance which limits potentially constitutionally protected expression until it can be conclusively determined that the ordinance withstands constitutional scrutiny." *Wexler v. City of New Orleans*, 267 F. Supp. 2d, 559, 568-69 (E.D. La. 2003). Allowing Pregnancy Centers to serve the public to the best of their abilities, caring for pregnancy women in need of assistance and guidance, further serves the public. Where a policy threatens constitutional rights, a preliminary injunction does not disserve the public interest.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter a preliminary injunction against enforcement of the Ordinance.

Dated: January 31, 2012

Respectfully submitted,



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