

Advertising for Life: CPC Posting Laws and the Case of Baltimore City Ordinance 09-252

DANIEL J. FARIA*

Also known as “pregnancy resource centers,” crisis pregnancy centers (CPCs) are counseling centers that seek to dissuade women from having abortions. Although the religious organizations funding CPCs normally make their opposition to abortion clear, the loose network of counseling centers these organizations assist are often criticized for concealing their opposition to abortion and contraception in commercial advertisements and to potential visitors. Informing potential visitors that they will not receive access to such family-planning services is often seen by CPCs as an obstacle to getting women “in the door.” And recently, critics have increasingly suggested that CPCs deceive visitors in search of options counseling with promises of financial support or false medical information concerning the risks of abortion or the stage of their pregnancies.

Responding to these criticisms, several legislators have experimented with disclosure laws to counteract deceptive advertising by CPCs. These laws typically require CPCs to post signs outlining the services they offer or inform visitors that they do not offer or refer clients for abortion or birth control. One such law, Baltimore City Ordinance 09-252, was recently struck down by the District Court of Maryland, which suggested that CPC disclosure laws of this type are an unconstitutional form of compelled speech. This Note examines the Baltimore ordinance and similar laws, proposing legislative strategies to help regulators avoid similar challenges by shifting their focus away from viewpoint discrimination and towards what should be their chief concern: deception.

* Writing & Research Editor, COLUM. J.L. & SOC. PROBS., 2011–2012. J.D. Candidate 2012, Columbia Law School. The author would like to thank Professor Ariela Dubler, Jennifer Chou, and the editorial staff of the *Columbia Journal of Law & Social Problems* for their guidance and assistance in the editing process.

I. INTRODUCTION

In the ideological struggle over abortion, information can be a critical tool. Indeed, a legal landscape in which states cannot ban pre-viability abortions¹ can make persuasion the next best approach² for those ideologically opposed to them. One form of information is misinformation. And, historically, a long-standing point of contention between pro-life and pro-choice advocates has concerned just what factual or scientific assertions family planning clinics can or must make to their visitors.³

Federal and state legislators on both sides of the abortion debate have thrust themselves into this controversy, attempting to use their regulatory powers to shape and direct conversations between pregnant women and their counselors. In 2005, for example, pro-life legislators in South Dakota passed a law requiring doctors performing abortions to inform women that they had an “existing relationship” with an unborn human being, and that an abortion would “terminate the life of a whole, separate, unique, living human being.”⁴ In 2006, Congressman Henry Waxman criticized religiously-motivated “crisis pregnancy centers”⁵ (CPCs)

1. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”).

2. Another option available after *Casey* is to restrict state or federal funding for those organizations providing abortions or programs where abortion is considered a method of family planning. See *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding as protected government speech Department of Health and Human Services regulations prohibiting recipients of Title X funds from counseling, advising, or promoting abortion). The constitutionality or prudence of such funding restrictions is a topic beyond the scope of this Note.

3. For an overview of complaints launched against crisis pregnancy centers in particular, see *The Truth about Crisis Pregnancy Centers*, NARAL (Jan. 1, 2010), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-cpcs.pdf> [hereinafter NARAL].

4. See *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 665–66 (8th Cir. 2011) (upholding a requirement that physicians inform patients that an abortion would “terminate the life of a whole, separate, unique, living human being” but striking down a provision requiring doctors to describe “all known medical risks” of abortion, including increased risk of suicide and suicide ideation), *vacated in part on reh’g en banc*, 662 F.3d 1072 (8th Cir. 2011); see also Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (2007).

5. “Crisis pregnancy centers” are counseling centers seeking to dissuade potential mothers from having abortions. See, e.g., U.S. HOUSE OF REPRESENTATIVES, COMM. ON GOV’T REFORM — MINORITY STAFF, FALSE AND MISLEADING INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS i–ii (2006) [hereinafter COMM. ON GOV’T REFORM REPORT], available at <http://www.chsourcebook.com/articles/waxman2.pdf>.

in a report finding that CPCs routinely provided false and misleading medical information suggesting that obtaining an abortion will increase a woman's risk of breast cancer.⁶

In October 2009, however, legislators in Baltimore took their regulatory efforts one step further, passing a CPC "disclosure law" attempting to shape conversations between pregnant women and pro-life advocates *before* they occur.⁷ In Ordinance 09-252 (the "Ordinance"), the Baltimore City Council set forth a new set of disclosure requirements for "limited-service pregnancy centers," defined as those pregnancy resource centers that do not provide or refer for abortions or comprehensive birth-control services.⁸ Under the terms of the Ordinance, these limited-service centers would be required to post a waiting-room disclaimer "substantially to the effect that the center does not provide or make referral for abortion or birth-control services."⁹

The Ordinance was met with stern disapproval in the pro-life community.¹⁰ In the spring of 2010, the Roman Catholic Archdi-

There are a number of terms for CPCs. For instance, in Baltimore City Ordinance 09-252, CPCs are referred to as "limited-service pregnancy centers." See *infra* note 7. Supporters have also referred to them as "pregnancy resource centers" or "pregnancy centers." See, e.g., *Our Passion*, HEARTBEAT INT'L, <http://www.heartbeatinternational.org/heartbeatint-about-us> (last visited Mar. 31, 2012); *About Care Net*, CARE NET, <https://www.care-net.org/aboutus/> (last visited Mar. 31, 2012). For the purpose of uniformity, the term "crisis pregnancy center" will be used in this Note.

6. See COMM. ON GOV'T REFORM REPORT, *supra* note 5. The American Congress of Obstetricians, American Cancer Society, and National Cancer Institute have all concluded that there is no proven link between induced abortion and breast cancer, and that studies that have found such a link were flawed in their methodology. See, e.g., AMER. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION, INDUCED ABORTION AND BREAST CANCER RISK, NUMBER 434 (June 2009), available at <http://www.acog.org/-/media/Committee%20Opinions/Committee%20on%20Gynecologic%20Practice/co434.pdf>; *Is Abortion Linked to Breast Cancer?*, AM. CANCER SOC'Y, <http://www.cancer.org/Cancer/BreastCancer/MoreInformation/is-abortion-linked-to-breast-cancer> (last modified Sept. 20, 2011); *Abortion, Miscarriage, and Breast Cancer Risk*, NAT'L CANCER INST. <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage> (last modified Jan. 12, 2010). The Royal College of Obstetricians and Gynecologists in the United Kingdom also recommends that physicians inform their patients that there is no causal linkage between abortion and breast cancer. See ROYAL COLL. OF OBSTETRICIANS & GYNAECOLOGISTS, THE CARE OF WOMEN REQUESTING INDUCED ABORTION, EVIDENCE-BASED CLINICAL GUIDELINE NUMBER 7, at 42-43, available at http://www.rcog.org.uk/files/rcog-corp/Abortion%20guideline_web_1.pdf.

7. BALT., MD., HEALTH CODE §§ 3-501-506 (2009).

8. *Id.* at § 3-501.

9. *Id.* at § 3-502.

10. Julia Duin, *Pro-life Group Fights Disclosure Law at Pregnancy Crisis Centers*, WASH. TIMES, May 24, 2010, at A1; Brent Jones, *Archdiocese Sues City About Pregnancy Center Ordinance*, BALT. SUN., Mar. 29, 2010, <http://articles.baltimoresun.com/2010-03->

ocese of Baltimore filed suit against the Baltimore City Council, arguing that the Ordinance impermissibly intruded on the First Amendment rights of crisis pregnancy centers.¹¹ The petitioners in this case suggested, for example, that a forced disclosure of the type at stake in the Ordinance not only singled out counseling centers with a religiously motivated, pro-life viewpoint for disfavor, but would require CPCs to send the message that abortion is a legitimate and morally acceptable family-planning choice readily available at other family planning clinics, even though this message was antithetical to their religious views.¹² The U.S. District Court for the District of Maryland agreed with these arguments, finding the Ordinance to be an impermissible form of viewpoint discrimination.¹³ Specifically, the district court expressed concern that “whether a provider of pregnancy-related services is ‘pro-life’ or ‘pro-choice,’ it is for the provider — not the Government — to decide when and how to discuss abortion and birth-control methods.”¹⁴

As the first major constitutional challenge to CPC disclosure laws, *O'Brien v. Mayor of Baltimore* presents the novel question of whether a state or local government may require CPCs to inform visitors that they will not provide contraception or abortion-related services. The question is an important one for several state and local legislatures, who have for many years struggled to respect the speech rights of pro-life organizations and assure that these rights are not exercised through fraud or misrepresentation. Decisions made in family planning clinics are sensitive and can fundamentally shape the lives and livelihoods of visitors. And, according to many legislators, these decisions should not be warped by medical misinformation, spurred by compelled listening, or influenced by false advertising.¹⁵ Yet targeting speech for

29/news/bal-lawsuit0329_1_maternity-and-infant-supplies-pregnancy-center-counseling-centers; see also *infra* note 12.

11. See Duin, *supra* note 10; Jones, *supra* note 10.

12. Motion of Petitioner for Summary Judgment at 12–13, *O'Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804 (D. Md. 2011) (No. MJG-10-760). The Centro Tepeyac Women’s Center, a CPC in Silver Spring, Maryland, also filed suit lodging similar complaints, securing a preliminary injunction against the enforcement of Baltimore City Ordinance 09-252. See *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456 (D. Md. 2011).

13. See *O'Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 807–08 (D. Md. 2011).

14. *Id.* at 808.

15. See *supra* notes 5–6 and accompanying text.

regulation because of its potentially harmful effects on an audience is a legislative strategy of questionable constitutional legitimacy.¹⁶ And it is not clear that a government may parlay its fears of such harmful effects into a requirement that a disfavored subset of counseling centers provide visitors with *advanced* notice of the range of services that will or will not be provided.

This Note examines this issue, with a particular focus on Baltimore City Ordinance 09-252, and proposes legislative strategies to 1) tailor future CPC laws to avoid constitutional challenges, and 2) provide state and local officials with a meaningful mechanism for combating what should be the ultimate focus of their legislative efforts: deception. Specifically, this Note argues that future laws should avoid mandated speech requirements, and instead actively prohibit advertisements that refer to abortion, contraception, or pregnancy testing services when they are in fact not provided. Given the prohibitive costs of monitoring family planning clinics and the need to prevent harassment of clinics engaging in non-deceptive advertising, citizen-suit and fee-shifting provisions should be added to future laws regulating CPCs. To give these legislative efforts meaning, this Note also argues that trial courts should not be timid in reading citizen suit provisions broadly. If these suggestions are followed, future CPC laws can both respect the right of pro-life organizations to provide counseling *and* assure that such counseling does not proceed through deception or promote the spread of misinformation.

This Note proceeds in five parts. Part I provides an introduction to CPC disclosure laws. Part II analyzes CPC disclosure laws, false advertising laws, and the first wave of challenges to CPC advertising practices, highlighting three crucial problems that have faced plaintiffs challenging CPC advertising: enforcement problems, remedy problems, and the mandated disclosure problem. Part III examines the second wave of challenges to CPCs, in the form of mandatory disclosure laws, and looks in depth at the legislative infirmities of Baltimore City Ordinance 09-252 and the New York City ordinance it inspired. Part IV then details legislative strategies that can help state and local regulators both comport with the First Amendment *and* promote

16. See *infra* Part II.C (detailing the close scrutiny applied to mandated speech).

autonomous and informed decision-making. Part V offers a brief conclusion.

II. FALSE ADVERTISING CONFLICTS IN THE ABORTION CONTEXT

Also known as “pregnancy resource centers,” CPCs are non-profit organizations that seek to dissuade potential mothers from having abortions.¹⁷ A large number of CPCs are coordinated by organizations opposed to abortion as a matter of faith. For instance, approximately 2300 are supported by the National Institute of Family and Life Advocates (NIFLA), Care Net, or Heartbeat International,¹⁸ three umbrella organizations for CPCs whose objections to abortion are largely rooted in Christianity.¹⁹ Although these umbrella organizations normally make their opposition to abortion clear, the loose and unregulated network of CPCs that these organizations assist are often criticized by legislators and pro-choice advocates for concealing their opposition to abortion and contraception in commercial advertisements and to potential visitors.²⁰ For instance, NARAL Pro-Choice America (NARAL) observes that CPCs often list themselves in phonebooks under such headings as “abortion” and “abortion services,” advertise themselves under online headings referring to abortion and contraception, or direct staff members to refrain from letting callers know that they will not receive access to contraception or

17. See *supra* note 5.

18. NARAL, *supra* note 3, at 1.

19. See, e.g., *Our Commitment*, HEARTBEAT INT'L, <http://www.heartbeatinternational.org/heartbeatint-about-us> (last visited Mar. 18, 2012) (“Heartbeat International does promote God’s Plan for our sexuality: marriage between one man and one woman, sexual intimacy, children, unconditional/unselfish love, and relationship with God must go together.”); *About Care Net*, CARE NET, <https://www.care-net.org/aboutus/> (last visited Feb. 24, 2012) (“The ultimate aim of Care Net and its network of pregnancy centers is to share the love and truth of Jesus Christ in both word and deed.”); NAT’L INST. OF FAMILY & LIFE ADVOCATES, *THE LIFE SENTINEL* 1 (July 2010), available at http://www.nifla.org/pdf/The_Life_Sentinel_201007.pdf (“Slavery, like abortion, denied the image of God in certain human beings who were deemed unworthy of life.”).

20. See, e.g., Jennifer Caring, *Abortion’s Foes Resort to Deception: What I Found When I Went to a Crisis Pregnancy Center*, N.Y. DAILY NEWS, Nov. 5, 2010, <http://www.nydailynews.com/opinion/abortion-foes-resort-deception-i-found-i-a-crisis-pregnancy-center-article-1.453393>; Jan Jarvis, *Advertising Practices of Crisis Pregnancy Centers Raise Concerns*, FT. WORTH STAR-TELEGRAM, Sept. 13, 2010, <http://www.star-telegram.com/2010/09/13/2465545/advertising-practices-of-crisis.html>; Nancy H. Tilghman, *Dillon and Spitzer Clash Over Abortion*, N.Y. TIMES, Feb. 24, 2002, at 14L1.

referrals to abortion providers.²¹ CPCs have also been criticized for locating themselves near medical clinics providing abortions, or deliberately operating under names similar to those of abortion clinics.²²

NARAL argues that the purpose of such methods is to attract women to CPCs before they are aware that abortion counseling or contraception will not be provided.²³ The decision whether or not to carry a child to term is emotionally-charged. And for family-planning organizations ideologically opposed to abortion, it is often seen as crucial to reach women *before* they begin to consider one. The Option Line, for example — a twenty-four-hour family-planning call center jointly run by CareNet and Heartbeat International — suggests in its volunteer handbook that “while [women] are on the phone, [their] objective is to schedule an appointment [C]allers are looking for fast answers and may turn elsewhere if they do not get them.”²⁴ Getting potential mothers “in the door,” then, may be the most important step for CPCs. For these organizations, a turn “elsewhere” that involves a visit to an abortion provider can be a disastrous result. It is in this context that advertising becomes an important tool for CPCs.

Over the last thirty years, however, many CPCs have faced legal challenges suggesting that they had engaged in false or deceptive advertising practices. In *Fargo Women’s Health Organization, Inc. v. Larson*,²⁵ for example, the petitioner abortion pro-

21. NARAL, *supra* note 3, at 2–6; *see also* Neary v. Pa. Pub. Util. Comm’n, 468 A.2d 520 (Pa. Cmmw. Ct. 1983) (reversing a public utility commission’s order that a phone company delete its listing for a crisis pregnancy center that registered in a phonebook as an “Abortion, Birth Control and Pregnancy Testing Clinic”).

22. In 1986, for instance, the Planned Parenthood League of Massachusetts brought suit against a CPC, Problem Pregnancy of Worcester, for posting the initials “PP” on the front door of its offices. *See* Planned Parenthood Fed’n of Am., Inc. v. Problem Pregnancy of Worcester, Inc., 498 N.E.2d 1044 (Mass. 1986) (finding that the CPC’s actions constituted common-law trademark infringement, but were not actionable under state unfair and deceptive business practices statutes). And recently, the daily operations of a CPC located across the street from an abortion clinic in Fort Pierce, Florida, were chronicled in the film *12th & Delaware*. 12TH & DELAWARE (Loki Films & HBO Films 2010). *See also* NARAL, *supra* note 3, at 2 (“For example, in Minnesota, Robbinsdale Women’s Center, an anti-choice pregnancy center that counsels women against abortion is located across the street from the Robbinsdale Clinic, P.A., which offers a range of medical care from licensed medical providers, including abortion services.”).

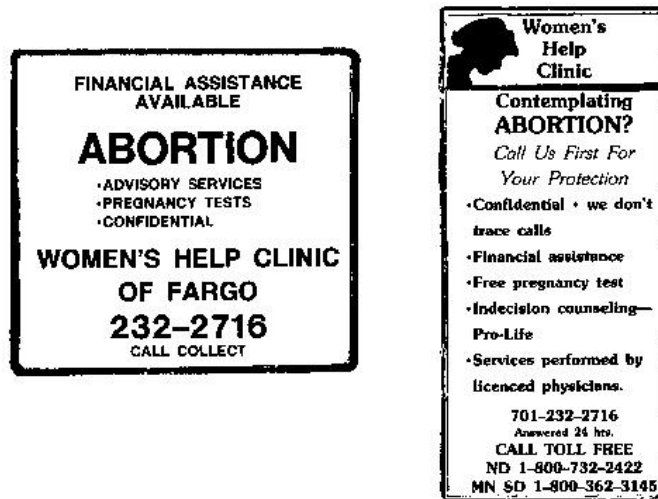
23. NARAL, *supra* note 3, at 2–5.

24. *Id.* at 2 (quoting HEARTBEAT INT’L & CARE NET, OPTION LINE HANDBOOK (2007)) (internal quotation marks omitted).

25. 381 N.W.2d 176 (N.D. 1986).

viders, the Fargo Women's Health Organization ("Women's Health") sought a preliminary injunction against Fargo Women's Help Clinic of North Dakota ("Help Clinic"), a North Dakota CPC, for Help Clinic's use of false and deceptive advertising.²⁶ In particular, Women's Health suggested that Help Clinic deliberately chose a name similar to its own and held itself out as an abortion provider in print advertisements,²⁷ and that this activity demonstrated "the intent of deceptively luring [women] to the clinic to unwittingly receive anti-abortion propaganda."²⁸ An example of advertising at issue in *Larson* is provided below²⁹:

Figure 1: *Print advertisements at issue in Larson*



In deciding *Larson*, the Supreme Court of North Dakota first held that a preliminary injunction issued by the lower court did not constitute an abuse of discretion.³⁰ Looking to affidavits filed by both parties, along with the newspaper and phonebook advertising employed by the Help Clinic, Women's Health had made a prima facie showing that Help Clinic's advertising was false and

26. In North Dakota, false advertising is defined as advertising that is "untrue, deceptive, or misleading." N.D. CENT. CODE § 51-12-01 (2011).

27. *Larson*, 381 N.W.2d at 177.

28. *Id.*

29. *Id.* at 178 n.1.

30. *Id.* at 179-80.

deceptive, and would result in a continuing injury to Women's Health.³¹ Importantly, however, the Court modified the injunction by removing a "redundant and . . . unduly broad" order suggesting that "if the defendants advertise using the term abortion then they must state that they do not perform abortions."³² As modified, the injunction simply required the Help Clinic to refrain "from falsely and deceptively advertising that they provide elective abortions and financial assistance for such services," without any specific command to notify potential visitors that abortions would not be provided.³³ The court also held that advertisements released by the Help Clinic did not amount to fully protected political speech simply due to their reference to abortion, a heavily-debated public issue.³⁴ Rather, the ads represented "commercial speech," which is protected under a more relaxed scrutiny standard.³⁵ The preliminary injunction at stake in *Larson* was therefore upheld against a First Amendment Challenge.³⁶

The *Larson* case highlights three major problems that can hinder attempts to challenge CPC advertising practices through traditional false advertising laws. This Note labels these problems enforcement, remedy, and mandated disclosure problems. All three may explain why false advertising litigation has become relatively infrequent and unsuccessful in the abortion context. They are also important considerations for legislators attempting to regulate crisis pregnancy centers; in fact, the same problems

31. *Id.*

32. *Id.* at 179.

33. *Id.* at 178 (citation omitted) (internal quotation marks omitted).

34. *Id.* at 180–82.

35. *Id.* Under the commercial speech doctrine, speech that does no more than propose a commercial transaction is entitled to lower constitutional protection than political speech, and may be regulated if it is either misleading or deceptive, or if the government can show that it has a substantial interest in regulating the speech, that the speech regulation directly advances the government interest, and that the regulation is not more expansive necessary. *See* *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980); *see also infra* Part II.C; *but see* notes 85–86 and accompanying text (outlining recent Supreme Court decisions questioning the continued validity of the commercial speech doctrine). Political speech cannot be regulated based on content or viewpoint absent narrow tailoring to serve a compelling government interest. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.") (citations omitted).

36. *Larson*, 381 N.W.2d at 180–83.

facing the petitioners in *Larson* re-appeared in the case of Baltimore City Ordinance 09-252 and contributed to its nullification.

A. ENFORCEMENT PROBLEMS IN REGULATING CPC ADVERTISING

Although state false advertising laws exist to protect visitors to those CPCs engaging in fraud or deception, several barriers may prevent these laws from being meaningfully enforced. Such obstacles are what this Note refers to as enforcement problems. First, strict standing requirements may be construed to allow relief for only those visitors to CPCs who can prove injury-in-fact from an alleged deception. Second, the subjective and often vague standards established by false advertising laws may require a highly contextual and potentially fruitless inquiry into the wording of individual CPC advertisements, only decreasing enforcement incentives and increasing litigation costs for advocates seeking to combat deceptive advertising on a large scale.³⁷ Finally, given the sheer variety and flexibility of CPC advertising practices, success in one false advertising lawsuit does not guarantee

37. See, e.g., *Kjolsrud v. MKB Mgmt. Corp.*, 669 N.W.2d 82 (N.D. 2003) (denying standing in an action against family-planning clinic on behalf of petitioner, women seeking abortions, and the general public, where clinic allegedly distributed pamphlets making false claims about the risk factors of abortion, but where petitioner had not in fact read the pamphlets before initiating suit or alleged an injury); 15 U.S.C. § 1125(a)(1) (2006) (defining false description as a “false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities”). This provision of the U.S. Code, commonly referred to as § 43(a) of the Lanham Act, also requires that a plaintiff prove that “he or she is or is likely to be damaged by such act.” 15 U.S.C. § 1125(a)(1)(B). When alleged misrepresentations are not facially false, but instead to be inferred from the circumstances surrounding their publication, the requisite injury is not presumed and must be demonstrated. See, e.g., *Coca-Cola Co., v. Tropicana Prods., Inc.*, 690 F.2d 312, 316 (2d Cir. 1982); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 189–90 (2d Cir. 1980). A number of state false advertising laws have come to trace the requirements of the Lanham Act. See, e.g., *Universal Future Int’l, Inc. v. Collezione Europa USA, Inc.*, No. 1:04CV00977, 2007 WL 2712926 (D.N.C. Sept. 14, 2007) (finding that a Lanham Act violation will also prove violation of North Carolina’s Unfair and Deceptive Trade Practices Act); *Outdoor Techs., Inc., v. Vinyl Visions, LLC*, No. 1:06-CV-044, 2006 WL 2849782 (S.D. Ohio Sept. 29, 2006) (finding that both the Ohio Deceptive Trade Practices Act and the common law follow Lanham Act analysis).

meaningful precedent for those seeking to use false advertising laws to challenge CPC advertising.

1. *Standing and Other Procedural Barriers*

Issues of standing present perhaps the most intractable enforcement problems for those seeking relief against a CPC engaging in potentially deceptive advertising. At work in *Larson*, for example, was a North Dakota statute describing false advertising only as advertising that is “untrue, deceptive, or misleading.”³⁸ In *Kjolsrud v. MKB Management Corp.*, a woman was denied standing under this statute when she claimed that the pamphlets distributed by an abortion provider injured her by denying a causal linkage between abortion and breast cancer.³⁹ Even though this statute gave “any person acting for the interests of itself, its members, or the general public” the authority to enforce state false advertising laws,⁴⁰ the court held that its standing language was redundant, finding that it only granted standing to those persons acting in the interest of the general public that already had standing to maintain the action under the common law of North Dakota.⁴¹ Because the petitioner conceded that she had not read the pamphlets — and therefore had not suffered an injury-in-fact — before bringing suit, she could not allege a requisite injury and was denied standing.⁴² Although *Kjolsrud* involved a claim against an abortion provider, not a CPC, it is exemplary of how strict standing requirements can act to exclude false advertising claims coming from the general public before these claims reach the merits.

Cases concerning the potentially unfair or deceptive business practices of CPCs have frequently been dismissed on other technical grounds, leaving litigants with little useful precedent to predict whether or not bringing suit against a CPC will be worthwhile. In *Neary v. Pennsylvania Public Utility Commission*,⁴³ for example, a public utility commission ordered that a

38. N.D. CENT. CODE § 51-12-01 (2011).

39. *Kjolsrud*, 669 N.W.2d at 84–88. There is no proven linkage between breast cancer and induced abortion. See *supra* note 6 and accompanying text.

40. *Kjolsrud*, 669 N.W.2d at 84–85 (quoting N.D. CENT. CODE § 51-12-01).

41. *Id.* at 88.

42. *Id.*

43. 468 A.2d 520 (Pa. Commw. Ct 1983).

phone company delete its listing for a crisis pregnancy center that registered in a phonebook as an “Abortion, Birth Control and Pregnancy Testing Clinic.”⁴⁴ A Pennsylvania Commonwealth Court reversed the order: as the phone company in question was neither required nor empowered to investigate the nature of the CPC’s listing, and because the “telephone directory service is provided only for the purpose of assisting the public in associating a listed party with the proper call number,” the court found that the commission’s decision was an abuse of discretion.⁴⁵

Even those who personally visit CPCs may find themselves excluded from the courtroom. In *Mother & Unborn Baby Care of North Texas, Inc. v. Doe*,⁴⁶ three female visitors to a CPC in Fort Worth, Texas brought a false advertising suit against the clinic, which advertised under such phonebook headings as “Clinics-Medical” and “Abortion Information & Services.”⁴⁷ All three testified that they visited the CPC expecting to obtain an abortion, but instead “were given a urine test and subjected to questions of a personal and intimate nature about their marital status, use of contraceptives, previous pregnancies and previous abortions [and] were then shown an anti-abortion film and were lectured on the dangers and evils of abortion.”⁴⁸ The Texas Court of Appeals reversed the lower court’s injunction against the CPC, finding the plaintiffs’ suggestion that they suffered from fear and apprehension of future contact from the CPC insufficient to establish a likelihood of irreparable harm meriting an injunction.⁴⁹ Thus, even women who were deceived by CPC advertising and subsequently subjected to protracted and uninvited counseling could not succeed in securing an injunction against future deceptive advertisements.

44. *Id.*

45. *Id.* at 521 (internal quotation marks omitted); see also *Summit Cnty. Crisis Pregnancy Ctr., Inc. v. Fisher*, 830 F. Supp. 1029, 1031–34 (N.D. Ohio 1993) (deciding only on issues pertaining to abstention in a case concerning the allegedly deceptive print advertisements of a CPC).

46. 689 S.W.2d 336, 337 (Tex. Ct. App. 1985).

47. *Id.*

48. *Id.*

49. *Id.* at 338.

2. *Substantive Barriers: Judicial Construction of False Advertising Statutes*

Those who are able to surmount procedural obstacles and proceed to the merits of their case must still operate under exacting judicial standards requiring a highly subjective and contextual inquiry into the wording of allegedly deceptive advertisements. This can potentially act as a further barrier to relief under false advertising laws, which may be so narrowly construed as to become incapable of preventing anything but clear and facial falsehoods.⁵⁰

Larson demonstrates just how unmanageable judicial standards concerning false advertising can be. From an initial look at the disputed advertisements,⁵¹ it is not entirely clear whether the advertisements at issue in *Larson* are deceptive on their face. To be sure, the advertisement on the left features the word “ABORTION” accompanied by little clarifying language, potentially leading viewers to believe that Help Clinic was an abortion provider. However, its counterpart on the right asks readers only if they are contemplating abortion, and directly states that the Help Clinic is pro-life.

This type of confusion can be exploited by CPC staff seeking to secure an initial consultation with women seeking or considering abortions.⁵² Women unsure whether or not a CPC provides abortions may become “wait-and-see” patrons, making a visit or phone call to clarify uncertainties, and then becoming vulnerable to persuasion, coercion, or exposure to medical misinformation.⁵³ This problem loomed large for the petitioners in *Larson*, who suggested that the Help Clinic “use[d] the similar name ‘Women’s Help Clinic’ to intentionally confuse women seeking abortions from Women’s Health and to cause them to mistakenly contact the Help Clinic.”⁵⁴

This type of confusion also highlights critical enforcement problems for those who take issue with the advertising practices

50. 1A LOUIS ALTMAN & MALLA POLLACK, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5:3 (2011), available at Westlaw CALLMAN.

51. *Supra* note 29.

52. *See* NARAL, *supra* note 3, at 2–5.

53. *Id.* at 3.

54. *Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 177 (N.D. 1986).

of CPCs. Over 2300 CPCs are run by NIFLA, CareNet, and Heartbeat International alone.⁵⁵ If each of these clinics published its own print or digital advertisements, it is hard to imagine any enforcement agency, public or private, mustering the resources to challenge these advertisements in a series of fact-intensive lawsuits. Past false advertising actions against CPCs have come with mixed success, and there is no indication that one trial court's definition of what is "untrue" or "deceptive" will be of much use to other litigants, who will be challenging differently worded advertisements and, in some cases, dissimilar CPC practices.

In this context, CPC advertising becomes somewhat of a hydra for litigants to tackle. In response to litigation, CPCs may either withdraw disputed advertisements or pamphlets, or tweak them, making them somewhat less deceptive but altogether still confusing. A court's tolerance for such behavior may vary with its tolerance for judicial line drawing. The ultimate result for those seeking to challenge CPC advertising is a seemingly endless need for litigation.

B. REMEDY PROBLEMS IN CPC LITIGATION

Even if plaintiffs tackle enforcement problems and succeed in acquiring an injunction against CPCs, it is not clear how vaguely worded court orders — such as those issued in *Larson*⁵⁶ — can give CPCs or their adversaries meaningful direction as to what advertising practices will or will not be accepted in the future. This problem, along with other remedy problems, helps explain why false advertising litigation has been unsuccessful in the reproductive rights field.

Plaintiffs who succeed in false advertising suits against CPCs are often granted injunctions that are vague, subjective, and open to misinterpretation. For example, in his concurring opinion to *Larson*, Judge VandeWalle expressed frustration that an injunction commanding that Women's Help "be enjoined from using the name Women's Help Clinic, or comparable words which are simi-

55. See NARAL, *supra* note 3, at 1.

56. See *supra* notes 25–36 and accompanying text.

lar, and confusing,”⁵⁷ was a “very subjective standard,” and gave Women’s Help poor guidance, especially given the fact that the petitioner Women’s Health Organization “used a variety of names in its own business, not all of which would be protected trade names.”⁵⁸ Indeed, if a North Dakota statute requires only that parties refrain from “untrue, deceptive, or misleading”⁵⁹ advertising, it is not clear what instructions a trial court can issue other than ones to the effect that allegedly defective advertisements be removed and that violators refrain from engaging in similar “untrue, deceptive, or misleading” advertising.

If injunction orders are vague and subjective, this may increase the odds that they will either be misinterpreted or ignored. Further litigation parsing the language of modified trade names or advertisements may then be necessary. To be sure, it is not entirely clear whether such injunctions would be enforceable without extended judicial oversight or protracted and potentially wasteful litigation. In this context, cases like *Larson* seem a small victory for pro-choice advocates, who can at best hope that CPCs respond to them by cautiously modifying their advertising practices. Given the above-mentioned power in numbers,⁶⁰ it is

57. *Larson*, 381 N.W.2d at 178 (internal quotation marks omitted).

58. *Id.* at 183 (VandeWalle, J., concurring). The lower court’s injunction read, in relevant part:

THEREFORE IT IS ORDERED . . . that the defendant be enjoined from using the name Women’s Help Clinic, or comparable words which are similar, and confusing . . . [T]hat the defendants individually and collectively, jointly and severally, shall be prohibited from falsely and deceptively advertising that they provide elective abortions and financial assistance for such services. . . . [T]hat the defendants do not falsely lull people that come to them for counseling into thinking that they are, in fact, the Women’s Health Organization or the Fargo Women’s Health Organization, Inc. and that the defendants take no action or inaction which would lull people into believing that they are dealing with the Fargo Women’s Health Organization, Inc. when they are in fact dealing with defendants or F-M Women’s Help and Caring Connection, Inc. . . . [T]hat if the defendants advertise using the term abortion, then they must state that they do not perform abortions.

Id. at 178 (alterations in original) (internal quotation marks omitted).

On the surface, it is not clear what direction such an instruction can give to a crisis pregnancy center looking to abide by it. At no point in *Larson* did the Supreme Court of North Dakota provide what type of language would be sufficiently “similar” or “confusing” so as to avoid future litigation alleging trade name infringement. Nor did it elaborate on how a crisis pregnancy center could avoid falsely lulling others as to the organization with which they were interacting.

59. N.D. CENT. CODE § 51-12-01 (2011).

60. See *supra* note 55 and accompanying text.

hard to see how any individual CPC could find a financial incentive to do so.

Aside from *Larson*, few trial courts have ventured to issue positive injunctions regulating the content of CPC advertisements or directing them to make a particular disclosure.⁶¹ In *Roe v. San Diego Pregnancy Services, Inc.*, a San Diego County trial court enjoined the Center for Unplanned Pregnancy (CUP) from, among other things, implying that it was a health care facility and falsely advertising under such directory headings as “clinics,” “birth control information,” “abortion service providers,” or “abortion service referral providers.”⁶² The Appellate Department also issued a positive injunction on appeal requiring “disclosure over the telephone to each caller that CUP does not perform abortions or give abortion referrals; birth control or birth control referrals; or written pregnancy verifications, and that CUP’s counseling is by volunteers and from a Biblical ‘anti-abortion’ perspective.”⁶³

However, it is not clear whether such an injunction could ever be upheld on further appeal, especially given the First Amendment implications of mandated speech highlighted in litigation surrounding Baltimore City Ordinance 09-252.⁶⁴ The San Diego trial court did qualify its ruling, stating that the injunction “shall not restrict CUP in giving counseling against abortion. CUP is not restricted from using any Biblical references or religious arguments or statements that support CUP’s efforts to stop pregnant women, or any woman harboring a belief that she may be pregnant, from getting an abortion.”⁶⁵ However, potential First Amendment obstacles may be one explanation for why cases is-

61. *But see* *Roe v. San Diego Pregnancy Servs., Inc.*, No. 657592, 1994 WL 498012 (Cal. App. Dep’t Super. Ct. June 10, 1994) (enjoining a CPC from suggesting that it provided pregnancy testing when it in fact only provided home pregnancy tests, indicating that pregnancy test kits were free when visitors were required to sign a waiver agreeing to counseling or listening to presentations, advertising in a way that would suggest that abortion counseling was available, and advertising under headings for “clinics,” “family planning information,” “abortion service providers,” “abortion referral service providers,” “birth control information,” “pregnancy options counseling,” and other deceptive headings in a local Health Care Guide).

62. *Id.*; *see also* Tamar Lewin, *Anti-Abortion Center’s Ads Ruled Misleading*, N.Y. TIMES, Apr. 22, 1994, at A15 (reporting on the outcome of *San Diego Pregnancy Services*).

63. *San Diego Pregnancy Servs.*, 1994 WL 498012, at *1.

64. *See infra* Part III.

65. *San Diego Pregnancy Servs.*, 1994 WL 498012, at *2.

suingsuch injunctions are rare and controversial. These obstacles are further explored below.

C. THE MANDATED DISCLOSURE PROBLEM

An important question underlying CPC advertising controversies concerns whether CPCs can legally mislead women into visiting their facilities, and subsequently pressure them to remain on CPC premises until they have been exposed to pro-life messages.⁶⁶ Those answering this question in the negative must also acknowledge the fact that CPC staffers have a constitutionally protected right to communicate pro-life messages. Once it is established that a CPC has engaged in misleading advertising practices, a difficulty arises when courts or legislators attempt to frame a remedy that will both rid the advertisements of their alleged defects and respect the federal and state constitutional rights of those publishing them. Thus, although courts may be sympathetic to the policies behind false advertising law, they have also appeared to reject legal attempts to censor the political speech of pro-life organizations or mandate an affirmative disclosure to the effect that a CPC will not provide abortions or abortion referrals.⁶⁷ This is the essence of the mandated disclosure problem.

In order to address the validity of restrictions on the speech of CPCs, a court must first decide the appropriate standard of review, which requires appropriately categorizing CPC advertisements as a type of speech. As a matter of first principles, the First Amendment generally prevents the government from pro-

66. See Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 1007–11 (2009) (arguing that the First Amendment should protect individuals from “compelled listening” and applying this to mandatory abortion counseling).

67. For example, a contentious issue on appeal in *Larson* was a trial court order imposing a preliminary injunction which provided, in part, “that if the defendants advertise using the term abortion then they must state that they do not perform abortions.” *Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 179 (N.D. 1986) (internal quotation marks omitted). This was one instruction that the Supreme Court of North Dakota struck from the trial court’s order as redundant and unnecessary. *Id.* Subsequent courts would express similar discomfort with mandating affirmative disclosures from CPCs, rooting their concerns in state and federal free speech rights. See, e.g., *O’Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 810 (D. Md. 2011) (nullifying a city council ordinance that would require Baltimore-area CPCs to post notices “substantially to the effect that the center does not provide or make referral for abortion or birth control services” (quoting BALT., MD., HEALTH CODE § 3-502(a) (2009))).

scribing speech based on its content or viewpoint.⁶⁸ Content-based regulations of speech or individual expression are presumptively invalid and can only be upheld under strict scrutiny.⁶⁹ However, as developed by the Supreme Court in *Valentine v. Chrestensen*, the commercial speech doctrine seeks to distinguish those forms of speech attributable to individual expression from those of a commercial nature.⁷⁰ Although commercial speech was once seen as outside the protection of the First Amendment, beginning with *Bigelow v. Virginia*, the Supreme Court re-established commercial speech as a protected form of expression.⁷¹ However, because commercial speakers are normally engaged in economic activity, presumed to have extensive knowledge of both their respective markets and the products they are advertising, and are better suited to evaluate the accuracy of their message and lawfulness of their advertising practices, potential infringements of commercial speech are examined under a lower standard of constitutional protection than the traditional standard of strict scrutiny applied to content-based restrictions on individual expression.⁷²

68. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

69. *Id.*; see also *id.* at 403 (White, J., concurring) (“Assuming, *arguendo*, that the St. Paul ordinance is a content-based regulation of protected expression, it nevertheless would pass First Amendment review under settled law upon a showing that the regulation is ‘necessary to serve a compelling state interest and is narrowly drawn to achieve that end.’”).

70. 316 U.S. 52, 54 (1942) (“This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.”).

71. 421 U.S. 809, 818 (1975) (“The existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.” (citation omitted) (internal quotation marks omitted)).

72. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–65 (1980) (establishing a four-prong test for analyzing government restrictions of lawful, non-misleading commercial speech); see also *infra* note 75 and accompanying text; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64–65 (1983) (“[O]ur decisions have recognized the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. Thus, we have held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.” (citations omitted) (internal quotation marks omitted)).

The degree of First Amendment protection owed to a commercial advertiser depends on the nature of the expression at issue and the governmental interest in regulating it.⁷³ If advertising is patently misleading or related to unlawful activity, there can be no constitutional objection to its suppression.⁷⁴ As established in *Central Hudson*, however, if commercial speech is not misleading or related to unlawful activity, the state must show a substantial interest in regulating commercial speech, the regulatory technique must directly advance that interest, and the speech regulation cannot be sustained if the government interest asserted can be served just as well by a more limited restriction.⁷⁵

For regulators seeking to restrict CPC advertising practices, or litigants bringing forth false advertising claims, the commercial speech doctrine presents a potential area of opportunity. If CPCs opposing legal challenges to their advertising practices are seen as engaging in “commercial speech,” they will no longer be guarded by a rarely surmountable strict scrutiny standard.⁷⁶ Hence, if a court determines that CPC advertising is commercial speech, it is more likely to accept content-based speech restrictions of such advertising.⁷⁷ This was the case in *Larson*, where the Supreme Court of North Dakota found Women’s Help to be engaging in commercial speech, in large part due to the fact that some of their advertisements “expressly state[d] that financial assistance is available and that major credit cards are accepted.”⁷⁸ However, the Court did not expressly require that monies be exchanged between the CPC and its patrons.⁷⁹ More important was the fact that the newspaper ads were “placed in a commercial context and are directed at the providing of services rather than

73. *Cent. Hudson*, 447 U.S. at 563.

74. *Id.*

75. *Id.* at 564. This is not a “least restrictive means” test, but instead requires only a “reasonable fit” between the legislative aims expressed and the means employed to further them. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476–80 (1989).

76. *See supra* notes 69–72 and accompanying text.

77. *See, e.g., Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 180 (1986) (“[I]n determining whether the trial court’s preliminary injunction constituted an unconstitutional prior restraint, it is necessary to determine whether the Help Clinic’s communication constituted commercial or non-commercial speech and then to determine whether the trial court afforded appropriate safeguards in imposing the preliminary injunction commensurate with the type of speech involved.”).

78. *Id.*

79. *Id.* at 180–81.

toward an exchange of ideas.”⁸⁰ The newspaper advertisements helped the clinic to solicit patrons, and thus were a classic example of commercial speech, whether or not they used the term “pro-life” and thus linked themselves to a current public debate.⁸¹

However, categorizing CPC advertising as “commercial speech” may still be of limited use to similarly situated litigants challenging CPC practices under traditional false advertising laws. The commercial speech doctrine may make it easier for a court to enjoin allegedly false advertising, but it does not necessarily require mandatory disclosures. For example, even though the advertisements at issue in *Larson* were deemed commercial speech, the Supreme Court of North Dakota still removed an “overly broad” portion of the trial court’s order requiring that “if the defendants advertise using the term abortion, then they must state that they do not perform abortions.”⁸²

Furthermore, if litigants succeed in proving that CPCs engaged in commercial speech, such speech is only outside the purview of the First Amendment if it is patently misleading.⁸³ If CPC advertising is not found to be misleading, a State must establish a substantial interest in regulating it, and narrowly tailor these regulations.⁸⁴ Even the relatively lenient *Central Hudson* test has been brought into question by the Rehnquist and Roberts Courts, which have exhibited continued impatience for regulations targeting commercial speech due to its potentially harmful effects on listeners.⁸⁵ Paternalism in commercial speech regula-

80. *Id.* at 181.

81. *Id.*

82. *Id.* at 179 (internal quotation marks omitted) (“With one exception, the trial court’s order was narrowly drawn, focusing only upon the prohibition of deceptive or misleading activity by the Help Clinic during the pendency of the action. However, we believe that the last part of the order which requires the Help Clinic, if it uses the term abortion in its advertisements, to state that it does not perform abortions is redundant and an unduly broad restriction, the imposition of which constituted an abuse of discretion by the trial court.”).

83. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

84. *Id.* at 564.

85. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (“We must consider that tobacco retailers and manufactures have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (“Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond ‘irration-

tion has irked the Supreme Court ever since the advent of the commercial speech doctrine,⁸⁶ making regulation of non-misleading CPC advertising precarious. Thus, legislative attempts to regulate CPC advertising *in general*, as opposed to only those advertisements that are false and misleading, run the risk of invalidation.

Assuming that CPC advertising is commercial speech, disclosure laws such as Baltimore City Ordinance 09-252 would belong in a category of speech known as “compelled commercial speech.” Such speech regulations are subject to relatively limited constitutional review, and will be upheld if disclosure requirements are “reasonably related” to the government’s asserted interest, provided that they are “purely factual and uncontroversial” and are not “unjustified or unduly burdensome.”⁸⁷ Otherwise, such disclosure requirements would be subject to strict scrutiny.⁸⁸ However, if *O’Brien v. Mayor of Baltimore* is any indication, it may be unlikely that federal courts will see CPCs as commercial speakers. Here, eschewing a suggestion from the City of Baltimore that the overall purpose of CPC advertising was to “propose a commercial transaction,” the District Court of Maryland found that “the [CPC] engages in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives.”⁸⁹ By introducing the topic of abortion, CPC disclosure laws compelled speech of a political nature and largely different from the “highly commercial activities” — tobacco ads, for example — at issue in other compelled commercial speech cases.⁹⁰

ally’ to the truth.” (quoting *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 96 (1977)).

86. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (“It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists . . . [b]ut it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.”).

87. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–52 (1985).

88. *See, e.g., R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, No. 11-1482(RJL), 2011 WL 5307391, at *4–5 (D.D.C. Nov. 7, 2011) (“Thus, where a statute ‘mandates speech that a speaker would not otherwise make,’ that statute ‘necessarily alters the content of the speech.’ . . . As the Supreme Court itself has noted, this type of compelled speech is ‘presumptively unconstitutional.’” (internal citations omitted)).

89. *O’Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 813–14 (D. Md. 2011).

90. *Id.*

Failing a finding that CPCs engage in commercial speech, compelled speech requirements will be subjected to strict scrutiny.⁹¹ Thus, it is at the very least doubtful that a state court could order a CPC to affirmatively disclose its decision to abstain from providing abortion or contraception referrals, especially given the fact that a simple command to refrain from advertising using the terms “abortion” or “contraception” is a narrower remedy that could suffice to cure defective advertising.⁹²

Indeed, although mandated disclosure laws have the apparently legitimate purpose of preventing fraudulent misrepresentation, opponents to these laws suggest that they require all pro-life counseling centers, regardless of the nature of their advertising, to make the implicit statement that abortion is an acceptable practice readily available at competing counseling centers.⁹³ In the litigation that would eventually nullify Baltimore City Ordinance 09-252, the District Court of Maryland would go so far as to say that “whether a provider of pregnancy-related services is ‘pro-life’ or ‘pro-choice,’ it is for the provider — not the Government — to decide when and how to discuss abortion and birth-control methods.”⁹⁴ This would suggest that a law requiring the mere mention of the fact that abortion services or contraception are provided by others amounts to requiring CPCs to adopt a state-endorsed viewpoint on abortion.

Hence, litigants opposed to CPC advertising practices appear to be doubly-damned. As established above, litigants seeking to challenge such practices face clear enforcement and remedy problems, forcing them to lodge individual challenges against a seemingly endless number of CPC advertisements. A practical solution to avoid duplicative litigation would seem to be judicial commands requiring CPCs to inform visitors that they will not

91. *Id.*; see also *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

92. *O'Brien*, 768 F. Supp. 2d at 817 (“In lieu of the disclaimer mandate of the Ordinance, Defendants could use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers. Such an alternative was suggested in *Riley* where the Supreme Court noted that instead of mandating a disclaimer requirement, ‘the state may vigorously enforce its anti-fraud laws.’” (quoting *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 800 (1988))).

93. See *infra* note 113 and accompanying text.

94. *O'Brien*, 768 F. Supp. 2d at 808.

receive abortion or contraception services. Given the mandated disclosure problem and the failure of recent legislative experiments with “disclosure laws,” however, it appears that this may be unavailable to state and local legislators.

III. LEGISLATIVE ATTEMPTS AT CPC REGULATION

Given the problems associated with challenging CPC advertising under a theory of false advertising, it is perhaps not surprising that suits like *Larson* are relatively rare. Recently, however, a number of state and federal legislators have experimented with new ways of regulating CPC advertising. Part III explains why such efforts have failed to address the enforcement, remedy, and mandated disclosure problems highlighted in Part II, first by discussing political efforts to bring attention to CPC advertising, and then focusing on so-called “disclosure laws” and the nullification of Baltimore City Ordinance 09-252.

A. FEDERAL AND LOCAL CAMPAIGNS CONCERNING CPC ADVERTISING

In 2002, then-Attorney General Eliot Spitzer of New York carried out what was perhaps the first contemporary political investigation one of the most extensive contemporary political investigations into the advertising practices of CPCs, focusing on several New York CPCs alleged to be engaging in fraud and misrepresentation.⁹⁵ The investigation was heavily contested by a number of CPC proprietors, who filed motions to quash subpoenas concerning their advertising and counseling practices.⁹⁶ Spitzer eventually came to a compromise with state CPCs, settling with one upstate center and, in doing so, developed model procedures for transparency in advertising.⁹⁷

These procedures required the CPC at issue to address false advertising concerns in four ways. First, the CPC must inform

95. Press Release, Office of the Attorney Gen., Spitzer Reaches Agreement with Upstate Crisis Pregnancy Center (Feb. 28, 2002) [hereinafter Spitzer Press Release], available at <http://www.ag.ny.gov/press-release/spitzer-reaches-agreement-upstate-crisis-pregnancy-center>; see also NARAL, *supra* note 3, at 4.

96. Alan Cooperman, *Abortion Battle: Prenatal Care or Pressure Tactics?*, WASH. POST., Feb. 21, 2002, at A1.

97. See Spitzer Press Release, *supra* note 95.

patrons that it did not provide abortion, birth control, or referrals for either of these services.⁹⁸ Second, it must disclose to women that it “is not a licensed medical provider qualified to diagnose or accurately date pregnancy.”⁹⁹ Third, it must clarify that only over-the-counter (OTC) pregnancy tests would be provided.¹⁰⁰ Lastly, the CPC must inform individuals calling or visiting the facility that “it is not a medical facility.”¹⁰¹ The agreement did not make clear whether or not these procedures would be applied to anyone but the settling CPC.

In October 2010, however, the New York City Council proposed legislation that would effectively apply similar requirements to all CPCs, requiring that the centers (1) conspicuously post signage informing visitors that abortion or FDA-approved contraceptives are not available,¹⁰² and (2) inform visitors if a licensed medical provider is not available.¹⁰³ The bill became law in March 2011, and instantly sparked threats of litigation.¹⁰⁴ The Austin City Council enacted a similar law in April 2010.¹⁰⁵

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. New York, N.Y., Local Law 17 (Mar. 16, 2011), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID|Text|&Search=pregnancy>. The New York ordinance would require CPCs to disclose to prospective clients that they will not provide or make referrals for abortion, emergency contraception, or prenatal care. *Id.* at §§ 20-816(c)–(e). Required disclosures must be provided in writing, in English and Spanish, on at least one sign “conspicuously posted” near the entrance to the CPC, in any room where patients wait for services, and on any advertisements of the CPC in “clear and prominent letter type.” *Id.* at § 20-816(f)(1). The ordinance would also require oral disclosures, whether in person or by telephone, when a client requests an abortion, emergency contraception, or prenatal care. *Id.* at § 20-816(f)(2).

103. *Id.* at § 20-816(b). This required disclosure is subject to the same “conspicuous” signage provisions as disclosures concerning the availability of abortion and contraceptives. *Id.* at § 20-816(f).

104. Elizabeth A. Harris, *City Council Favors Pregnancy Center Disclosures*, N.Y. TIMES, Mar. 3, 2011, at A22.

105. Sarah Coppola, *Crisis Pregnancy Centers That Don't Offer Abortions, Birth Control Will Have to Post Signs, Council Says*, STATESMAN (Austin), Apr. 8, 2010, <http://www.statesman.com/news/local/crisis-pregnancy-centers-that-dont-offer-abortions-birth-540483.html>; see also Jordan Smith, *Making Pregnancy Centers' Tell the Truth*, AUSTIN CHRON., Apr. 2, 2010, <http://www.austinchronicle.com/blogs/news/2010-04-02/making-pregnancy-centers-tell-the-truth/>. The Austin ordinance was largely repealed by city legislators and replaced by a version omitting any reference to abortion or birth control. Austin, Tex., Ordinance 20120126-045 (Jan. 26, 2012), available at <http://www.ci.austin.tx.us/edims/document.cfm?id=163551>; see also Sarah Coppola, *City Repeals, Replaces Sign Ordinance for Pregnancy Centers*, STATESMAN (Austin), Jan. 26,

To date, the only sustained federal effort to deal with CPC advertising has come at the behest of Congresswoman Carolyn Maloney, whose Stop Deceptive Advertising for Women's Services Act "prohibited any person to advertise with the intent to deceptively create the impression that such person is a provider of abortion services if such person does not provide abortion services."¹⁰⁶ This somewhat cryptic bill was to be enforced by the Federal Trade Commission, but never became law.¹⁰⁷

B. BALTIMORE CITY ORDINANCE 09-252

Perhaps the most controversial CPC law to date has been Baltimore City Ordinance 09-252 (the "Ordinance"). First introduced in October 2009, the Ordinance defines its regulated community as those "limited-service pregnancy centers" (1) with a primary purpose of providing information about pregnancy-related services, and (2) who do not provide or refer for abortions or non-directive and comprehensive birth control services.¹⁰⁸ Section 3-502 of the Ordinance lays out the new disclosure requirements that would apply to the centers, requiring each to "provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services."¹⁰⁹ The Ordinance requires that such a disclaimer be provided in English and Spanish, "easily

2012, <http://www.statesman.com/news/local/city-repeals-replaces-sign-ordinance-for-pregnancy-centers-2128625.html>. As amended, the ordinance only requires that CPCs post conspicuous signage indicating 1) whether they provide medical services, and 2) whether all medical services are performed by licensed health care providers. Ordinance 20120126-045 at § 10-10-2.

106. Rep. Carolyn Maloney, Press Release, Seeking a Crackdown on Deceit by Radical Anti-Choice Centers, available at <http://maloney.house.gov/press-release/seeking-crackdown-deceit-radical-anti-choice-centers>. This press release refers to an earlier iteration of this legislation, which Rep. Maloney has re-introduced in subsequent sessions of Congress. See *infra* note 107 and accompanying text.

107. H.R. 5652, 111th Cong. (2d Sess. 2010). On July 14, 2011, Senator Maloney reintroduced the legislation in the most recent Congress as the Stop Deceptive Advertising for Women's Services Act. H.R. 2543, 112th Cong. (1st Sess. 2011). As of the time of publication, the Act has not made it past committee. See *H.R. 2543: Stop Deceptive Advertising for Women's Services Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2543> (last modified July 14, 2011).

108. BALT., MD., HEALTH CODE § 3-501 (2009).

109. *Id.* § 3-502(a).

readable,” and “conspicuously posted in the center’s waiting room.”¹¹⁰

The Ordinance, and its Montgomery County counterpart, met with instant disapproval in the local religious community.¹¹¹ Both the Roman Catholic Archdiocese of Baltimore and a Montgomery County CPC brought suit against the Baltimore City Council, seeking to enjoin the enforcement of the ordinances.¹¹² The Archbishop of Baltimore, in a partial motion for summary judgment, suggested that the Ordinance violated the First Amendment in that it

forces pregnancy centers to begin their conversations with every visitor with the stark government disclaimer, implying without context, a message that abortion is available elsewhere and might be considered a good option by pregnant women, a message that the Center expressly finds morally offensive and would not otherwise provide.¹¹³

The District Court of Maryland endorsed this argument, finding the mandated disclosure requirement to be an impermissible speech restriction. Specifically, the Court noted that “whether a provider of pregnancy-related services is ‘pro-life’ or ‘pro-choice,’ it is for the provider — not the Government — to decide when and how to discuss abortion and birth-control methods.”¹¹⁴ Hence, a legislative requirement that CPCs provide visitors with advance notice of the range of services to be provided could not survive strict scrutiny, especially given that the record at issue reflected only “sporadic” instances of deceptive CPC advertising, the Ordinance had no carve-out provision for CPCs engaging in non-deceptive advertising, and isolated incidents of fraudulent advertising could conceivably be handled by existing laws governing consumer fraud.¹¹⁵

O’Brien takes the rather bold step of likening a disclaimer to the effect that a CPC does not provide abortion to a government-

110. *Id.* § 3-502(b).

111. *See supra* notes 10, 12 and accompanying text.

112. *See supra* notes 10–12 and accompanying text.

113. Petitioner Motion for Summary Judgment at 13, *O’Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804 (D.Md. 2010) (No. MJG-10-760).

114. *O’Brien*, 768 F. Supp. 2d 804, 808 (D. Md. 2011).

115. *Id.* at 817.

imposed requirement that a CPC affirmatively accept abortion as a morally-acceptable practice. It is not clear at this point whether this reasoning will find acceptance in other federal courts. However, *O'Brien* serves as a clear warning to other legislators seeking to regulate CPC advertising through mandated speech and, as yet, not taking note of the mandated disclosure problem highlighted in Section II. The New York City Council, for example, has left itself vulnerable to litigation by pushing further than the Baltimore City Ordinance and requiring that CPCs 1) disclose to a client that they do not provide or make referrals for abortion or FDA-approved contraceptive drugs, 2) make these disclosures on their websites, on conspicuous clinic signage, and *orally* to any callers or visitors requesting an abortion, emergency contraception, or prenatal care, and 3) include them in any advertisement “in clear and prominent letter type.”¹¹⁶

Such disclosure requirements, and those envisioned by Baltimore City Ordinance 09-252, are risky in light of the strict First Amendment limitations imposed on legislators experimenting with disclosure requirements or content-based speech regulations. Furthermore, the litigation surrounding the Ordinance suggests that litigants may even struggle to establish that CPC advertisements are commercial speech.¹¹⁷ In *O'Brien*, the District Court of Maryland made clear its belief that the advertisements published by the CPC in question were *non-commercial*:

The CENTER offers services that have value in the commercial marketplace. However, the offering of free services such as pregnancy tests and sonograms in furtherance of a religious mission fails to equate with engaging in a commercial transaction. Were that the case, any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial val-

116. See *supra* notes 102–03 and accompanying text.

117. See *supra* notes 89–90 and accompanying text (detailing the District Court of Maryland’s finding that the speech of a CPC did *not* represent commercial speech due to the strong religious and political motives underlying CPC advertising practices). If CPC advertising is not found to be commercial speech, regulations of its content would be subject to strict scrutiny. See *supra* text accompanying notes 68–69.

ue, would find their accompanying speech subject to diminished constitutional protection.¹¹⁸

If CPC advertisements are found to be commercial speech, and failing a finding that they are patently misleading, CPC disclosure laws will still require narrow tailoring.¹¹⁹ However, rather than addressing specific allegations of deceptive advertising, Ordinance 09-252 represents a prophylactic model of legislation, requiring all limited-service pregnancy centers to directly mention abortion on conspicuous and involuntary signage.¹²⁰ Even if the city successfully argued that CPC advertisements are commercial speech, it would be challenging for a city council to assert that such broad-sweeping litigation, targeting every member of a disfavored subset of family-planning clinics was narrowly tailored to deal with a state interest in preventing fraudulent misrepresentation.¹²¹

It is by no means certain that New York's version of Ordinance 09-252 will be nullified. And given the sheer impossibility of monitoring the advertising practices of countless family planning clinics, there are strong arguments that courts should accept the practical and prophylactic route from Ordinance 09-252 to dealing with enforcement problems. However, by adopting the mandated disclosure requirements put forward in Baltimore, future laws of this type leave themselves vulnerable to nullification at the hands of courts unsympathetic to any perceived need for CPC regulation. Thus, Ordinance 09-252 is not a model with potential nationwide traction. New York may be pushing the envelope even further by requiring CPCs to make explicit mention of abortion on their websites, on print ads, and over the telephone. It may be exceedingly difficult, therefore, to regulate CPC advertising without impinging on the constitutional rights of crisis pregnancy centers.

118. *O'Brien*, 768 F. Supp. 2d at 813–14 (citation omitted).

119. See *supra* note 75 and accompanying text (outlining the *Central Hudson* test applied to non-misleading commercial speech).

120. BALT., MD., HEALTH CODE §§ 3-503, 3-506 (2009).

121. This form of narrow tailoring would be required by Supreme Court precedent governing the regulation of commercial speech. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

C. OTHER PROBLEMS WITH BALTIMORE CITY ORDINANCE 09-252

Beyond the mandated disclosure problem, Baltimore City Ordinance 09-252 also fails to take into account the enforcement problems highlighted in Part II. To begin, the law contains no mechanism for prosecuting a violation, other than the issuance of a notice from the Health Commissioner and a potential civil citation.¹²² It is unclear whether the City of Baltimore would have the resources to periodically or faithfully monitor CPC adherence to the Ordinance. In addition, no portion of the Ordinance purports to give a citizen visitor to a CPC standing to challenge a violation of 09-252, and a portion of the text establishing a possible fine was eventually reserved from the text.¹²³ It is therefore not clear who could challenge such a violation, or what, if any, financial disincentive the law provides for CPCs engaging in deceptive advertising. Hence, not only is the Ordinance an archetypal illustration of the mandated disclosure problem, it also fails to deal with the enforcement problems that arise in regulating CPC advertising. It may tackle remedy problems to some extent by giving CPCs a clear directive as to what actions are required from them. But absent a fine or penalty for violating the Ordinance, it is not clear what, if any, consequences will arise for those CPCs engaging in fraudulent advertising, or how often the Ordinance would be enforced.

In many ways, Baltimore legislators can learn from their New York counterparts, who seek to establish a penalty structure and a cause of action for any individual injured by the fraudulent misrepresentations of CPCs.¹²⁴ As Part IV suggests, if New York's somewhat overbroad restrictions on CPC advertising can be reeled in, its enforcement structure could provide an ideal model for legislators seeking to give citizens a meaningful incentive to prevent false advertising.

122. BALT., MD., HEALTH CODE §§ 3-503, 3-506 (2009).

123. *Id.*

124. *See infra* note 131 and accompanying text.

IV. PROPOSED REMEDIES FOR CPC DISCLOSURE LAWS

As cases like *Larson* and *O'Brien* have shown, legislators have not yet crafted an effective or constitutional means to constrain CPCs engaging in false advertising. This does not mean, however, that legislators have been left without an effective means of preventing fraudulent misrepresentation. Rather, as this Part discusses, legislators may still actively prohibit advertisements that refer to abortion, contraception, or pregnancy testing services when they are in fact not provided. As *O'Brien* itself suggested, legislatures may still use or modify existing regulations governing fraudulent advertising and enforce these regulations more vigorously.¹²⁵ If such legislative injunctions are coupled with the penalty structures proposed by New York City's CPC law, citizens alleging harm from false advertising may have real and meaningful incentives to prevent such advertising.

Crafting a solution to the problems addressed by Ordinance 09-252 first requires an analysis of the ill such laws attempt to cure: deception. Thus, it is important to note that any law regulating CPC advertising should not be an attempt to impinge on the right of these organizations to provide advice that is vehemently anti-abortion. Arguments suggesting that a State has the right to quiet or actively prevent such speech would be out of step with First Amendment doctrine.¹²⁶ And a blanket requirement that CPCs disclose their viewpoint on abortion may be seen as a message that pro-life viewpoints are inherently dangerous and should only be expressed in front of those actively prepared for them.

It is for this reason that this Note is skeptical of mandated disclosure laws. If one sees the real victims of false advertising as those who expected to receive one service and were exposed to another, uninvited form of persuasion — not those who visit CPCs in general — the real perpetrators of false advertising come to be those who suggest to women that they will receive reliable pregnancy testing, ultrasounds from a medical professional, and *comprehensive* counseling, when these women will in fact only be

125. *O'Brien*, 768 F. Supp. 2d at 808.

126. See *supra* notes 68–69 and accompanying text.

presented with moral or religious reasons to carry their children to term.

Taking this group as the group of CPC visitors that false advertising laws should protect, it follows that CPC laws should take the form of a legislative injunction. Such an injunction would directly prohibit any family-planning clinic, religiously-motivated or otherwise, from advertising using such words as “abortion,” “abortion services,” “contraception,” “ultrasounds,” or “pregnancy testing” when these clinics are not willing or licensed to provide these services.

To some extent, this form of legislation would integrate some of the instructions seen before in judicial injunctions. The trial court in *Larson*, for instance, issued an instruction that Women’s Help refrain from alluding to abortion services in its advertisements.¹²⁷ The court in *Roe v. San Diego Pregnancy Services* instructed, amongst other things, that a CPC (1) not advertise using the words “pregnancy testing” when in fact only over-the-counter (OTC) pregnancy kits were offered, and (2) refrain from advertising under such headings as “abortion service providers,” “abortion service referral providers,” or “birth control providers.”¹²⁸ These types of directions give both CPCs and their adversaries clear direction as to what type of advertising will not be acceptable, without First Amendment implications. They are therefore a suitable means of addressing remedy problems, and do not leave advocates to deal with muddled, highly subjective directions. They may also be tailored to prevent the abusive use of synonyms, although this would potentially increase their length and complexity.

Admittedly, legislative injunctions of this type would not be the most efficient means of tackling the enforcement problems discussed in Part II. Given the large number of CPCs in the United States, and the corresponding volume of advertisements they produce,¹²⁹ a blanket method such as that envisioned in Ordinance 09-252 may be preferable. But even if such a method would be more effective in practice, any solution to the CPC ad-

127. *Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 178 (N.D. 1986).

128. *Roe v. San Diego Pregnancy Servs., Inc.*, No. 657592, 1994 WL 498012, at *1 (Cal. App. Dep’t Super. Ct. June 10, 1994).

129. See NARAL, *supra* note 3, at 1.

vertising problem must be both workable and capable of surviving judicial scrutiny on a national level.

Recognizing the importance of combating enforcement problems, future laws dealing with CPC advertisement must also provide citizens with a cause of action against CPCs for violating such laws and a financial incentive for bringing suit. For example, such laws should integrate fee structures and civil suit mechanisms similar to those in New York's recent legislation.¹³⁰ These mechanisms are not only capable of being simple and workable in practice, they may also provide citizens something that the Ordinance is lacking: a rational incentive to pursue false advertising litigation.

As envisioned by New York legislators, violators of a CPC law could be subjected to a graduated system of penalties.¹³¹ For example, New York's current CPC law dictates that single violations be subject to civil penalties ranging from two hundred to one thousand dollars, second violations subject to penalties ranging from five hundred to twenty-five hundred dollars, and any subsequent violations subject to CPC closure until defects are remedied.¹³² Any removal or mutilation of closure orders would be subject to additional sanctions.¹³³ On their face, such penalty provisions present family-planning organizations with a clear disincentive to repeatedly violate a false advertising law.

Coupled with these penalties, New York's CPC law envisions a civil cause of action for "any person claiming to be injured by the failure of a pregnancy services center to comply with [the law]."¹³⁴ Such individual would be able to pursue compensatory and punitive damages, injunctive and declaratory relief, and potentially attorney fees and costs.¹³⁵ The latter provision would not only allow citizens to enforce a CPC law with reduced financial risk — only increasing the chance that the law would have a meaningful impact on advertising practices — but would also act as a subsidy of socially-beneficial litigations. A number of federal laws al-

130. See *infra* note 131.

131. New York, N.Y., Local Law 17, at § 20-818 (Mar. 16, 2011), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID|Text|&Search=pregnancy>.

132. *Id.*

133. *Id.*

134. *Id.* at § 20-820.

135. *Id.*

ready allow courts to award reasonable attorney's fees to prevailing plaintiffs under a one-way fee-shifting paradigm.¹³⁶ In the instance that such fee shifts lead or are feared to lead to the harassment of family planning clinics, legislators may also consider it necessary for CPC laws to include a *two-way* fee-shift, reducing the chance of abusive litigation. A two-way fee shift — embodied, for example, by Alaska Rule of Civil Procedure 82¹³⁷ — would award attorney fees to the prevailing party in any particular fraudulent misrepresentation claim, regardless of whether that prevailing party was the plaintiff or the defendant CPC. The chance of beggaring low-income plaintiffs with the attorney's fees of a prevailing CPC could be reduced by granting courts discretion to reduce the amount of attorney fees awarded when equity so requires, or when doing so “may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts.”¹³⁸ In this scenario, citizens could have a meaningful mechanism to enforce fraudulent misrepresentation laws, without the need for a blanket requirement that *all* CPCs conform to government disclosure requirements.

In order for this enforcement mechanism to operate, courts would also have to be willing to grant potential claimants standing. As discussed in Part II.A.1, many courts have been timid if not obstinate in doing so in the past. For this reason, citizen suit provisions should be clear in instructing courts that they are an additional grant of standing, beyond those already established by state common law. If future CPC laws can be so clear, avoid mandated disclosure requirements and instead embrace the “legislative injunction” model, and lastly, provide advocates with a meaningful enforcement mechanism, legislators may have an effective and constitutionally permissible method of preventing deceptive advertising.

136. The Civil Rights Attorney's Fees Award Act of 1976, for instance, allows prevailing plaintiffs attorney's fees in cases involving the Religious Freedom Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, and title VI of the Civil Rights Act. See 42 U.S.C. § 1988(b) (2006). The Freedom of Information Act has a similar “one-way” fee shift, wherein attorney's fees are only awarded to prevailing *plaintiffs*. 5 U.S.C.A. § 552(a)(4) (West 2007).

137. ALASKA R. CIV. P. 82(a) (2011) (“Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.”).

138. ALASKA R. CIV. P. 82(b)(3)(I) (2011).

V. CONCLUSION

This Note has painted a bleaker picture of false advertising law than some advocates venturing to challenge CPC marketing practices may hope to see. A survey of legal efforts to challenge such practices has revealed that state statutes regulating advertising are vague and contextual by nature, are generally read to include strict standing requirements, and lend themselves to muddled, case-by-case resolution. Those litigants who succeed in challenging deceptive advertising practices would hope to see courts craft clear directives, requiring CPCs to either refrain from using specific language or affirmatively disclose their viewpoints on abortion. However, courts are hesitant to do so and such a directive may be seen as a constitutionally impermissible form of mandated speech.¹³⁹ Initial legislative efforts to address CPC advertising have failed to properly address these enforcement, remedy, and mandated disclosure problems, and may suffer the same fate as legal disputes that worked their way through state courtrooms in the late twentieth century.¹⁴⁰

However, the numerous problems facing those who wish to challenge CPC advertising practices do come with solutions. One of the principal conclusions of this article is that legislators can sincerely prevent confusion in CPC advertising by reviving and codifying outright prohibitions of deceptive phonebook or Internet listings.¹⁴¹ This would practically be done by prohibiting the use of such words as “abortion services” or “pregnancy testing” by those family planning clinics not providing such services or not licensed to do so. In order to make such provisions meaningfully enforceable, states could create broad and unambiguous citizen suit provisions, allowing any visitor to a CPC standing to bring suit for deceptive advertising. Although many states have already done so, they will have to be clear in their directives to prevent courts from narrowly interpreting such provisions. Fee-shifting statutes could also provide litigants with an incentive to bring suit, while also preventing harassment of CPCs who engage in good faith advertising efforts.

139. *See supra* Part II.C.

140. *See supra* Part II.

141. *See supra* Part IV.

Thus, although early attempts to regulate CPC advertising have met with mixed success, an understanding of why these attempts stumbled, coupled with proactive legislation at the state and local level, can help regulators tackle deceptive advertising in a clear and constitutionally sound manner.