COMMENTS

CRISIS PREGNANCY CENTERS SHOULD BE REGULATED BY CONSUMER PROTECTION STATUTE IN WISCONSIN

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INTRODUCTION

A Crisis Pregnancy Center (CPC) is a nonprofit organization established to counsel women facing unintended pregnancies.[1] CPCs are sometimes also called "limited service pregnancy centers" or "pregnancy resource centers."[2] The majority of CPCs are not medical facilities.[3] Most CPCs provide counselors who talk with women about the downfalls of abortion, promote abortion alternatives, give free pregnancy tests and ultrasounds, and give out information about adoptions.[4] Recent studies of CPCs conducted by Senator Waxman and the Committee on Government Reform, the National Abortion Federation (NAF), and the National Abortion and Reproductive Rights Action League (NARAL), demonstrate that CPCs commonly give out misleading information, attempt to delay abortions, and use emotionally manipulative strategies in an effort to dissuade women from getting abortions.[5] However, supporters maintain that CPCs help women in a confusing and pivotal time and leave these women feeling very satisfied with the services they received.[6]

In response to these studies, several cities passed CPC Truth-in-Advertising ordinances (CPC ordinances).[7] Truth-in-Advertising principles are not uncommon and underlie laws such as the Federal Trade Commission Act, state deceptive trade practices acts, and state consumer protection laws.[8] Such laws generally limit or compel speech in order to protect the public from misleading advertisements or unethical business practices that take advantage of consumers.[9] However, any time speech is limited or compelled, First

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1. *See* NARAL PRO-CHOICE MARYLAND FUND, THE TRUTH REVEALED: MARYLAND CRISIS PREGNANCY CENTER INVESTIGATIONS 1-2 (2008), *available at* http://www.prochoicemd.org/assets/bin/pdfs/cpcreportfinal.pdf [hereinafter NARAL, TRUTH REVEALED].

2. *See False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers: Hearing Before the Special Investigations Div. of the Minority Staff of the H. Comm. On Gov't Reform*, 109th Cong. 1-5 (2006), *available at* http://www.chsourcebook.com/articles/waxman2.pdf [hereinafter Waxman Report]; Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. CONTEMP. HEALTH L. & POL'Y 223, 224 (2010).

3. Rienzi, *supra* note 2 at 224.

4. *Id.*

5. *See* NARAL, TRUTH REVEALED, *supra* note 1, at 6. Emotionally manipulative strategies included "offering congratulations for a positive pregnancy test, referring to the pregnancy as a baby, and giving the investigator hand-knitted baby booties." *Id.* "Another CPC provided a woman with a model of a 12-week-old fetus (even though they had estimated her gestation to be six weeks), and was told to 'show this to your boyfriend when discussing options.'" *Id.*

6. *See* Rienzi, *supra* note 2, at 224, 224 n.10.

7. *See id.* at 223.

8. Stacey A. Tovino, *Imaging Body Structure and Mapping Brain Function: A Historical Approach*, 33 AM. J.L. & MED. 193, 225-26 (2007).

9. *See, e.g.*, 15 U.S.C. § 45 (2006).

Amendment rights are implicated and lawmakers must be sure not to unconstitutionally infringe on these rights.[10]

Baltimore, Maryland was the first city to pass a CPC ordinance.[11] The Baltimore ordinance required CPCs to clearly post signs in their waiting rooms stating that the CPC does not provide abortions or birth control and does not refer patients to facilities that will provide those services, if that was the case.[12] Pro-Choice organizations such as NARAL and Planned Parenthood are planning campaigns to encourage passage of similar laws across the United States.[13] Such campaigns are necessary because 49 percent of pregnancies in America are unplanned.[14]

States must regulate CPCs in order to protect the well-established right of women to access an abortion. Vulnerable women are being delayed when seeking abortions, and sometimes these women are entirely coerced out of their constitutional right to obtain an abortion.[15] Delaying a woman from obtaining an abortion is egregious for a number of reasons: there is a time limit for obtaining abortions; abortions become more risky, expensive, and difficult to obtain later in a pregnancy; and personal moral considerations may become more troublesome for the woman as the fetus develops.[16] This article will

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10. Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he 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.").

11. Rienzi, *supra* note 2, at 223.

12. *See* O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 808, 810 (D. Md. 2011). Ordinance 09-252, which was enacted by the City of Baltimore on December 4, 2009, provides, in pertinent part, that "[a] limited-service pregnancy center must 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." *Id.* (internal quotations omitted).

13. Rienzi, *supra* note 2, at 223-24.

14. Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 90, 90 (2006), *available at* http://www.guttmacher.org/pubs/psrh/full/3809006.pdf.

15. *See* NARAL, TRUTH REVEALED, *supra* note 1, at 4-7.

16. *See* Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 339 (3d Cir. 1987) ("[A] plethora of cases have reiterated with little variation the risks involved when delays are imposed on the abortion decision. . . . [I]t is uncontested that delays of a week or more do indeed increase the risk of abortion to a statistically significant degree. . . . Furthermore, a delay of even twenty-four hours may push a woman into the second trimester, thus requiring that the operation be performed in a hospital, and significantly increasing the procedure's cost, inconvenience, and, of course[,] risk." (second ellipsis in original) (internal citations and quotations omitted).); Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C.L. REV. 1323, 1452-53 (1995) ("[D]elay in obtaining an abortion substantially increases the risk of complications and mortality[.] Beyond eight weeks gestation, the risk of complications (by approximately 30%) and mortality (by approximately 50%) increase with each additional week of gestation. For some women, the delay will push a first-trimester abortion over to a second-trimester one, substantially increasing both cost and risk. . . . [I]n addition to the increased medical risk and expense, the waiting period would also adversely affect women's

demonstrate that an amendment to a Wisconsin consumer protection statute will be a narrowly tailored and constitutional way to ensure that Wisconsin CPCs do not take advantage of vulnerable women by misrepresenting their missions.[17]

This article will examine the background of CPCs and the ability of the government to regulate them given the limitations of the First Amendment. Part I will discuss the operation and funding of CPCs while also highlighting problematic and unethical CPC actions that have been uncovered through investigations.[18] Because of the vulnerability of the population affected by CPC behavior, immediate and effective regulation is especially necessary.

Because CPC ordinances have been effectively challenged on First Amendment grounds, Part II will analyze whether CPC advertisements can be regulated. The ease of regulation of CPC advertising begins by determining whether CPC advertisements can be considered commercial speech or whether they must be considered fully-protected personal or political speech.[19] This section will discuss the foundations of the First Amendment, including how the First Amendment balances regulation of false information with the right of free speech.

Part III examines state and federal law to demonstrate that there is authority for writing a Truth-in-Advertising statute. Antitrust and consumer protection laws are well-established means of protecting citizens from unethical "business" methods and advertising strategies.[20] Both federal and state laws lay a strong foundation for regulating CPCs through consumer protection laws.

Finally, Part IV will argue that an amendment to Wis. Stat. § 100.20,[21] which governs methods of competition and trade practices, is a practical and narrowly tailored method for regulating any CPCs that attempt to delay or prevent women from exercising their constitutional right to choose. This proposed statute is not only constitutional, but it also protects the constitutional rights of Wisconsin women.

I. A BACKGROUND ON CRISIS PREGNANCY CENTERS

As of 2007, there were 116 Crisis Pregnancy Centers in Wisconsin.[22] CPCs are generally not medical facilities, are staffed mostly by volunteers, and

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psychological health." (internal quotations omitted.)); *see also* Janessa L. Bernstein, Note, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463, 1501 (2008) ("[L]ate-term abortions can cost anywhere from $400 to $7000.").

17. *See infra* Part IV.C.

18. *See infra* Part I.

19. *See infra* Part II.A.

20. *See infra* Part III.

21. WIS. STAT. § 100.20 (2009-10).

22. List of CPCs in Wisconsin, NARAL PRO-CHOICE WISCONSIN, http://www.prochoicewisconsin.org/issues/factsheets/200711271.shtml (last modified Dec. 6, 2007) [hereinafter NARAL, List of CPCs].

are funded through donors, churches, and even through government grants.[23] Some CPCs receive a portion of their funds through Title X funding from the U.S. Department of Health and Human Services Office of Population Affairs.[24] Title X of the Public Health Service Act is a source of funding that imposes minimum requirements (such as providing medically accurate information) on any CPC that accepts money.[25]

Title X of the Public Health Service Act has provided the majority of federal funding to family planning clinics since 1970.[26] It was enacted to "make comprehensive voluntary family planning services readily available to all persons desiring such services" and also to ensure that information on family planning is readily available.[27] As such, Title X-funded programs are required to provide counseling that informs patients of their options—*e.g.*, continuing the pregnancy, placing the child up for adoption, or terminating the pregnancy.[28] Furthermore, these programs must meet professional standards of care and counseling, such as protecting patient privacy.[29] Despite the fact that some CPCs are receiving Title X funding, CPCs almost never counsel clients on contraception and most do not make abortion referrals.[30]

An especially problematic aspect of CPC noncompliance with Title X funding requirements is that many CPCs provide misleading information.[31] In one study conducted by NARAL Pro-Choice Maryland, every CPC that the researchers visited provided misleading information on abortion risks.[32] NARAL's analysis showed that 54 percent of the CPCs visited for the study provided misinformation verbally, 63 percent had false or misleading risk factors on their websites, and 81 percent distributed pamphlets that contained inaccurate information about abortion risks.[33] In addition, the study found that CPCs provided misleading information about birth control and utilized emotionally manipulative counseling to deter women from getting an abortion.[34]

One of the most deceptive practices CPCs engage in is assuming the aura of medical authority by providing services traditionally performed by health care professionals.[35] For instance, while 45 percent of CPCs offered on-site

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23. NARAL, TRUTH REVEALED, *supra* note 1, at 1-2.
24. *Id.* at 2.
25. *Id.*
26. Stephanie Bornstein, *The Undue Burden: Parental Notification Requirements for Publicly Funded Contraception*, 15 BERKELEY WOMEN'S L.J. 40, 40 (2000).
27. *Id.* at 46 (internal quotations omitted).
28. NARAL, TRUTH REVEALED, *supra* note 1, at 2.
29. *Id.*
30. *Id.*
31. *Id.* at 3.
32. *Id.*
33. *Id.*
34. NARAL, TRUTH REVEALED, *supra* note 1, at 3-4.
35. *Id.* at 4.

sonograms, only 18 percent actually employed medical staff.[36] CPC volunteers rely on this aura of medical authority to improperly lend credence to their discussion of such medical facts as abortion risks and fetal development.[37] In addition, NARAL's study showed that problems with CPC volunteers ranged from ignorance of basic reproductive health information to overt manipulation through scare tactics and emotional exploitation.[38]

Another study, prepared for Senator Waxman (D-CA), found that CPCs created an intentional barrier to abortion when they misled and manipulated women who were facing unplanned pregnancies.[39] The Waxman Report revealed that 87 percent of the CPCs contacted provided false or misleading information about the health effects of abortion.[40] For example, CPCs gave misleading information about a link between abortion and breast cancer, despite the well-accepted medical consensus that induced abortion does not cause an increased risk of breast cancer.[41] Many CPCs also falsely and misleadingly told women that abortion has negative impacts on future fertility and mental health.[42] Thus, the Waxman Report determined that CPCs' frequent failure to provide medically accurate information and their gross misstatements about the risks of abortion prevented women from making an informed decision about how to manage an unwanted pregnancy.[43]

According to the National Abortion Federation report (NAF Report), "Crisis Pregnancy Centers: An Affront to Choice," CPCs also often engage in deceptive advertising.[44] The NAF Report found that CPCs take advantage of young, low-income women and women of color through their advertising techniques, placement of ads, and the services they advertise, exacerbating the existing barriers such women face when seeking abortion.[45]

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36. *Id.* at 5.
37. *Id.*
38. *Id.* at 5-6.
39. Waxman Report, *supra* note 2, at i-ii.
40. *Id.* at 7.
41. *Id.*
42. *Id.*
43. *Id.* at 14.
44. NATIONAL ABORTION FEDERATION, CRISIS PREGNANCY CENTERS: AN AFFRONT TO CHOICE 3 (2006), *available at* http://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf [hereinafter NAF REPORT].
45. *Id.* at 3-5; s*ee* Julie F. Kowitz, Note, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth Are Unconstitutional Under the Purpose Prong of* Planned Parenthood v. Casey, 61 BROOK. L. REV. 235, 243 n.50 (1995) ("The [American Medical Association]'s Council on Scientific Affairs concluded . . . that the negative impact of increasingly restrictive abortion laws would disproportionately affect young, poor, and minority women and noted that because poor and low-income women are most likely to have difficulty with financial arrangements . . . they are more likely to delay . . . and are therefore at greater risk for abortion-related complications or death." (first ellipsis added) (internal quotations omitted).).

Some CPCs choose names to intentionally mislead women into believing that they offer a wide range of services, including family planning and abortion care.[46] The Family Research Council, a Christian organization opposed to the practice of abortion, conducted a report investigating how to rename CPCs such that they would be more likely to appeal to women, particularly Pro-Choice women.[47] Some CPCs were thereafter called "Women's Resource Centers," a name that gives the impression of a clinic with a full range of services. This was a strategic decision to reach women "at risk for abortion."[48]

CPC misrepresentations target women in sophisticated ways. The Family Research Council "report also showed that women faced with an unplanned pregnancy were most likely to look in the Yellow Pages under the words 'Pregnancy,' 'Medical,' 'Women's Centers,' and 'Clinics.' Accordingly, CPCs often are advertised under these categories, as well as 'Abortion Alternatives,' and 'Women's Organizations.'"[49]

II. A BACKGROUND ON THE FIRST AMENDMENT

A. Free Speech and False Information

One way to stop the deceptive and misleading practices engaged in by CPCs is to draft legislation regulating the CPCs' advertising such that they must engage in clear and truthful advertising. A basic understanding of the First Amendment in this context is important when contemplating how to draft legislation that regulates or compels any type of speech. Statutes that regulate nonprofit advertising and solicitation have been struck down in the past for violating First Amendment rights on the grounds that they were unconstitutionally broad.[50]

The First Amendment's right to free speech is based in part on the theory that the free flow of ideas is conducive to revealing truth.[51] Although freedom

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46. NAF REPORT, *supra* note 44, at 4.

47. *Id.* at 3-4; *see generally* FAMILY RESEARCH COUNCIL, http://www.frc.org/ (last visited Mar. 30, 2012) (providing general background information).

48. NAF REPORT, *supra* note 44, at 3 (internal quotations omitted).

49. *Id.*

50. Secretary of State v. Joseph H. Munson Co., Inc., 467 U.S. 947, 967-68 (1984); *see, e.g.*, O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 808 (D. Md. 2011).

51. *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("[Those who won our independence knew] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."); Abrams v. United States, 250 U.S. 616, 630 (1919) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) ("[The First Amendment] presupposes that

of speech is a fundamental part of the American fabric, not all speech is protected equally.[52] For instance, some speech that advocates for the use of force or violation of the law is unprotected under the First Amendment, and speech that is used for expressive purposes may be regulated only if a threshold inquiry is met.[53]

Commercial advertising is a form of speech that has been assigned its own category of protection. Commercial advertising is less protected than other kinds of speech and can be restricted if it is found to be inherently misleading.[54] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court recognized that "deceptive or misleading" commercial speech, even when it is "not provably false, or even wholly false," may be regulated by the state.[55] Accordingly, false or misleading advertising may be banned entirely.[56] This conclusion, which sharply contrasts with the Court's treatment of false statements in the noncommercial context, has been justified on the ground that a "listener has little interest in receiving false, misleading, or deceptive commercial information."[57] However, while actually or inherently misleading advertising is prohibited, the government "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive."[58]

B. Extensions and Limitations of the First Amendment

Knowledge of the boundaries of commercial advertising is necessary for determining the ability of Wisconsin to regulate CPC tactics without infringing on the constitutional protection to which they are entitled. One of the many limitations of the First Amendment is on the government's ability to mandate speech.[59] However, the government may be allowed to compel speech in the

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right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."); Patricia R. Stembridge, Note, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907, 937 (2000).

52. *See* Caren S. Sweetland, Note, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471, 472 (1997).

53. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (stating government may ban speech advocating use of force); Stromberg v. California, 283 U.S. 359, 368-69 (1931) ("There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means.").

54. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110 (1990).

55. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72 (1976).

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

57. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 432 (1993) (Blackmun, J., concurring).

58. *In re* R.M.J., 455 U.S. 191, 203 (1982).

59. Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

commercial advertising setting, especially when the compulsion is to prevent false or misleading speech.[60] Exploring the extensions and limitations of the First Amendment can inform the discussion of the legality of Truth-in-Advertising ordinances, which compel CPCs to disclose what services they do not provide.

i. The Captive Audience Doctrine and the Right against Compelled Listening

"[C]itizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[61] However, this right is not absolute. While there is no formally recognized right to be free from compelled listening, there is an accepted rule that in *some* situations, a listener's right not to listen trumps a speaker's right to speak. [62]

This limitation on speech is the captive audience exception.[63] In order for the captive audience doctrine to apply, two requirements must be met. First, the audience must be unable to readily avoid the message.[64] This means the unwanted message must invade the listener's privacy "in an essentially intolerable manner."[65] "Certain places come with an expectation of privacy such that listeners are not expected to leave in order to avoid unwanted speech."[66] These locations include the home[67] and possibly public transportation, welfare offices, and medical facilities.[68] Second, the audience

60. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (holding that protection of commercial speech "is justified principally by the value to consumers of the information such speech provides"); Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) ("Congress could reasonably conclude that full disclosure during an election campaign tends 'to prevent the corrupt use of money to affect elections.'").

61. Boos v. Barry, 485 U.S. 312, 322 (1988) (internal quotations omitted).

62. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943 (2009); *see, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring) ("Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away . . . a different order of values obtains in the home.").

63. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970).

64. Consol. Edison Co. of N.Y., Inc. v. Public Serv. Comm'n, 447 U.S. 530, 541-42 (1980).

65. Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

66. Corbin, *supra* note 62, at 946.

67. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring).

68. *See e.g.*, Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) ("The streetcar audience is a captive audience.").

should not have to leave the space in which they are entitled to privacy in order to avoid the unwanted message.[69]

Health care centers have been identified as places in which the captive audience doctrine can apply because "[j]ust as one expects peace and quiet rather than heckling and bombardment at home, one should expect the same at a health care facility."[70] Furthermore, the substantive due process right to medical privacy includes the right to make one's own decisions regarding personal health.[71] It is difficult to make a decision to avoid an anti-abortion message when one is lured to hear it under false pretenses. Because abortion involves both a right to medical privacy and also a right to be free from unwanted messages in a medical facility, there are multiple layers of privacy rights that entitle women to be free from unwanted anti-abortion messages. The right to choose abortion includes the ability to do so without having to submit to an obstacle course.[72] In the obstacle course analogy, CPCs are dead ends that require women to turn around and recommence their attempt to find an abortion provider.

ii. Compelled Speech and Abortion; Compelled Listening and Abortion

In some states, doctors *must* tell patients who elect to have an abortion about certain state-decreed information.[73] These are considered abortion

69. Corbin, *supra* note 62, at 946.

70. *Id*. at 948; *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994).

71. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); Cruzan v. Director of Mo. Dep't of Health, 497 U.S. 261, 281 (1990) ("It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."); Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977).

72. Hill v. Colorado, 530 U.S. 703, 716 (2000).

73. *See* GUTTMACHER INSTITUTE, COUNSELING AND WAITING PERIODS FOR ABORTION 1-3 (2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. Seven state statutes require physicians to assert only negative emotional responses resulting from an abortion, while eleven state statutes require physicians to report a range of emotional responses. Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, GUTTMACHER POL'Y REV., Fall 2006, at 8, *available at* http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.html. Such biased information is unsupported by the broader scientific community. For example, one study has concluded that "the claim that observed associations between abortion history and a mental health problem are *caused by* the abortion per se, as opposed to other factors, is not supported by the existing evidence." Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 AM. PSYCHOLOGIST 863, 885, *available at* http://www.apa.org/pubs/journals/features/amp-64-9-863.pdf. The same study also found that "[a] history of mental health problems prior to pregnancy emerged as the strongest predictor of postabortion mental health. It is important to note that many of these same factors also are predictive of negative psychological reactions to other types of stressful life events, including childbirth, and hence are not uniquely predictive of psychological responses following abortion." *Id.*

informed consent laws.[74] Twenty-six states direct their health agencies to develop written materials that contain information about fetal development, abortion procedures, and the ability of a fetus to feel pain: nine states require the materials to be given to the patient; seventeen require that they be offered to her.[75]

In some states, doctors must "convey specific information to their patients in a way that the patient cannot avoid."[76] For instance, in South Dakota, doctors must tell women that the abortion will "terminate the life of a whole, separate, unique, living human being" and that "the pregnant woman has an existing relationship with that unborn human being."[77] In Oklahoma, a woman "must have an ultrasound at least an hour before her abortion," and her doctor "must show her the image and provide a simultaneous description of the ultrasound."[78] Her doctor "must describe the size, heartbeat, and organs of the embryo or fetus."[79] In this situation, the woman is allowed to avert her eyes but must certify that she has received this information.[80]

While Wisconsin's abortion informed consent law requires that doctors tell patients certain information,[81] the Seventh Circuit has interpreted it flexibly.[82] Wisconsin Stat. § 253.10(3)(c)1.f. requires doctors to address "risks of infection, psychological trauma, hemorrhage, endometriosis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility."[83] However, the Seventh Circuit construed Wisconsin's law to allow each physician to determine the content of the information that needs to be disclosed.[84] Additionally, when upholding state-mandated printed material requirements, courts have emphasized that clinicians may dissociate themselves from the materials and can comment on the materials as they see fit.[85]

Many doctors do not agree with the information they are required to disclose in this situation.[86] Some doctors feel the requirements go further than "informed consent" and enter moral territory.[87] Furthermore, some medical

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74. *See, e.g.*, Planned Parenthood of Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 726 (8th Cir. 2008).

75. GUTTMACHER INSTITUTE, *supra* note 73, at 1.

76. Corbin, *supra* note 62, at 1001.

77. *Id*.

78. *Id*.

79. *Id*. at 1002.

80. *Id*.

81. WIS. STAT. § 253.10 (2009-10).

82. Karlin v. Foust, 188 F.3d 446, 472-73 (7th Cir. 1999).

83. WIS. STAT. § 253.10(3)(c)1.f. (2009-10); s*ee also* WIS. STAT. §253.10(3)(d)2. (2009-10).

84. *Karlin*, 188 F.3d at 472-73.

85. *See, e.g.*, *id.* at 473.

86. *See, e.g.*, Eubanks v. Schmidt, 126 F. Supp. 2d 451, 457 (W.D. Ky. 2000); *see generally* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (2007).

87. *See, e.g.*, *Eubanks*, 126 F. Supp. 2d at 458.

centers are required to pay for the information that they are forced by the government to distribute.[88] Nonetheless, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court found that such compelled speech was no different from any other form of mandated informed consent.[89] The Court was undeterred by the finding that some of the provisions did not concern the patient's health but instead served to express the government's preference for childbirth as opposed to abortion.[90] *Casey* essentially determined that morally charged informed consent laws are not a form of compelled speech or compelled listening, but a reasonable state regulation of medicine.

However, there are limitations on the government's right to mandate these informed consent laws. In *Frieman v. Ashcroft*, the Eighth Circuit invalidated mandated disclosures relating to adoption and early childhood care as applied to women with ectopic pregnancies or lethal fetal anomalies.[91] The court held that the Missouri law was irrational as applied to such women because the information served no purpose other than to distress.[92] Furthermore, "[i]naccurate or misleading information may be challenged under . . . *Casey*'s undue burden standard, which states that an undue burden exists where a state regulation has the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[93] *Casey* establishes that while there is a "substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth, the provision of *false or misleading* information" does not relate to such an interest.[94]

C. Regulating Misleading Commercial Speech

In addition to informed consent, states may also regulate false, deceptive, or misleading advertisements or sales techniques.[95] This is because most advertisements and sales techniques are considered commercial speech.[96] Unlike other forms of speech, commercial speech must comply with antitrust law and consumer protection laws.[97]

Courts often describe commercial speech as "speech which does no more than propose a commercial transaction."[98] However, in *Gordon & Breach*

88. *See, e.g.*, *id.* at 461. *But see* Summit Med. Ctr. of Ala. v. Riley, 274 F. Supp. 2d 1262, 1277 (M.D. Ala. 2003) (finding this practice invalid).

89. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

90. Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 115 (2008).

91. Frieman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978).

92. Tobin, *supra* note 90, at 120.

93. *Id*. at 125-26 (internal quotations omitted) (emphasis in original).

94. *Id*. at 127 (internal quotations omitted) (emphasis in original).

95. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

96. Gordon & Breach Science Publrs. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1537 (S.D.N.Y. 1994).

97. *See infra* Part III; *see also Pittsburgh Press Co.*, 413 U.S. at 382-83.

98. *See, e.g.*, *Pittsburgh Press Co.*, 413 U.S. at 385.

Science Publishers v. American Institute of Physics, the U.S. District Court for the Southern District of New York noted that "a more nuanced inquiry" of what type of speech is involved in a communication is sometimes required.[99] *Gordon & Breach Science Publishers* addressed whether a nonprofit publisher may be sued for false advertising for publishing articles with comparative surveys of scientific journals that, through the employment of a misleading rating system, rated its own publications as superior to plaintiff's publications.[100] The court held that in order for representation to constitute commercial advertising or promotion, it must be (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.[101] Under *Gordon & Breach Science Publishers*, courts must carefully examine restrictions on speech "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed" or speech not deserving of constitutional protection is not mistakenly protected.[102]

States can regulate speech as commercial speech even in the case of a nonprofit organization. In *Birthright v. Birthright, Inc.*, one office affiliated with a larger nonprofit sent out letters that the larger entity felt were misleading.[103] The U.S. District Court for the District of New Jersey determined that although Birthright, Inc.'s fundraising letters were not, strictly speaking, commercial advertisements, the definition of commercial speech is broad enough to reach false or misleading statements made in the context of nonprofit fundraising.[104] Therefore, the smaller office's misleading letters were determined to be similar enough to commercial speech to be covered by federal regulations that govern commercial speech.[105] *Gordon & Breach Science Publishers* and *Birthright* apply to CPC advertising because, although their advertisements are for a nonprofit and do not "propose a commercial transaction"[106] in the typical sense, they promote services of a nonprofit organization in a misleading manner.

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99. *Gordon & Breach Science Publrs*., 859 F. Supp. at 1537.

100. *Id.* at 1523.

101. *Id.* at 1535-36.

102. *Id.* at 1537.

103. Birthright v. Birthright, Inc., 827 F. Supp. 1114, 1129 (D.N.J. 1993). Amongst other issues, the umbrella Birthright organization felt that the materials sent out by the smaller office did not clearly explain that the funds raised would only go towards a hotline and that none of the funds would go to the direct services provided by the local Birthright center. *Id.*

104. *Id*. at 1138.

105. *Id*.

106. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

D. Regulating Commercial Speech that Is not Misleading

Non-misleading commercial speech may also be regulated under certain circumstances. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the U.S. Supreme Court found that the link between an advertising prohibition and the state's interest in ensuring fair and efficient energy rates was too tenuous and speculative to justify an advertising ban, and thus the prohibition was too broad.[107] In coming to its conclusion that this regulation was unconstitutional, the Court applied a four-part test: (1) truthful speech that is not misleading may be regulated when (2) the regulation serves a substantial government interest, (3) the regulation directly advances that government interest, and (4) the regulation is not more extensive than necessary.[108]

If the advertisement fails the first element, the government may regulate the speech because the speech is either "provably false," "wholly false," or deceptively misleading.[109] If the advertisement does not fail the first element, the government bears the burden of proof to demonstrate that the substantial interest that the government is supposedly acting to advance is real and that the government restriction will advance that interest to a material degree, without being overly broad.[110] If all four requirements of the test are fulfilled, then the government may regulate the commercial speech, even when it is not misleading.[111]

E. Regulating Noncommercial Speech

The government's power to limit other types of speech in a public forum is more constrained.[112] "The government may not restrict expression based on the subject matter . . . or viewpoint of a speaker's message unless the restrictions meet the familiar requirements of strict scrutiny: necessary to serve a compelling state interest and narrowly drawn to achieve that end."[113] For instance, courts have determined that speech may be regulated around abortion clinics if the speech prevents a woman from readily entering.[114] The Supreme

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107. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569-71 (1980).

108. *Id*. at 566.

109. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976).

110. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

111. *Id.* at 567.

112. *See* Corbin, *supra* note 62, at 981.

113. Alana C. Hake, Note, *The States, A Plate, and the First Amendment: The "Choose Life" Specialty License Plate as Government Speech*, 85 WASH. U. L. REV. 409, 418 (2007); *see also* Carey v. Brown, 447 U.S. 455, 461-62 (1980).

114. Corbin, *supra* note 62, at 954-55; *see, e.g.*, Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 365 (1997) (describing how protesters' "constructive blockades" included "yelling at, grabbing, pushing, and shoving people entering and leaving the clinics").

Court has held that a woman "entering a clinic should not be required to run a gauntlet."[115] This is a situation in which the government has been determined to have a compelling state interest and the restrictions have been found to be appropriately tailored to address that interest.

III. AUTHORITY FOR IMPLEMENTING A TRUTH-IN-ADVERTISING STATUTE

As this section shows, existing law lays a clear foundation for Wisconsin to enact a statute that further protects the right of women to access an abortion by regulating CPCs that have been shown to mislead women. As a state with over 115 CPCs and only four abortion providers[116] with mandatory 24 hour waiting periods,[117] Wisconsin must pass legislation to ensure that CPCs truthfully advertise so that women seeking abortions are not improperly delayed or deceived when they attempt to exercise their constitutional right to choose.[118]

A. Relevant Laws

Consumer protection law, which prevents organizations and businesses from taking advantage of the public,[119] is the optimal prototype for regulating CPCs. Consumer protection law originated in antitrust law,[120] which is intended to "promote vigorous competition and protect consumers from anticompetitive

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115. Corbin, *supra* note 62, at 955. "'[T]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.'" *Id.* (quoting Hill v. Colorado, 530 U.S. 703, 716 (2000)).

116. *See* NARAL, List of CPCs, *supra* note 22.

117. *See* WIS. STAT. § 253.10(3)(c) (2009-10).

118. *See* Judges, *supra* note 16, at 1452-53 (stating that delays impose serious economic, physical, and psychological harm on women seeking abortion). Even a 24 hour waiting period would have a very real negative impact on many women seeking abortion, and inflict even worse harm on a vulnerable class of women—the poor, the young, the battered, and those living in remote areas. *Id.* at 1452.

119. *See, e.g.*, WIS. STAT. Ch. 100 (2009-10).

120. Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 132 (2006). The Sherman Act, 15 U.S.C. §§ 1-7 (2006), and the Clayton Act, 15 U.S.C. §§ 12-27 and 29 U.S.C. §§ 52-53 (2006), both prohibit business practices that will harm competition in certain circumstances. In addition to the Federal Trade Commission Act, advertising may be controlled by the Lanham Act, 15 U.S.C. § 1051 (2006), which is the federal statute controlling the law of trademarks and unfair competition. The term "advertising" can have a very broad meaning under the Lanham Act. For instance, in *National Artist Management Co., Inc. v. Weaving*, the court held that although the defendants' conduct was not "commercial advertising and promotion" in the traditional sense, the defendant had engaged in advertising because in the context of the industry, services were largely promoted by word-of-mouth and information was spread through a network of telephone contracts. *Nat'l Artists Mgmt. Co., Inc. v. Weaving*, 769 F. Supp. 1224, 1235 (S.D.N.Y. 1991). *National Artists* and others like it may set precedent for regulating nonprofits through unfair competition laws.

mergers and business practices."[121] The Federal Trade Commission Act (FTC Act) is part of federal antitrust law and is the basis of many state consumer protection laws.[122]

i. The Federal Trade Commission Act

On its face, the FTC Act, which protects consumers from deceptive practices that are unrelated to competition between businesses,[123] appears to exempt nonprofit and charitable organizations from the Federal Trade Commission's (FTC) jurisdiction because the statute applies only to "persons, partnerships or corporations."[124] However, the FTC may assert jurisdiction over charitable organizations if the activities of the organization resemble the activities of a business.[125]

Courts generally determine if a nonprofit is covered by the FTC Act by evaluating the effect of the nonprofit's allegedly deceptive practices on the consumer.[126] This method of determination was used in *FTC v. Saja*.[127] In this case, the FTC brought charges against a fundraising organization that had deliberately deceived its customers through a fraudulent fundraising scheme.[128] The U.S. District Court for the District of Arizona held that the defendant's status as a fundraiser for a nonprofit organization did not exempt it from the jurisdiction of the FTC.[129] Defendants claimed that the FTC should not have jurisdiction over the activities of the organization because charitable fundraising does not affect commerce.[130] The court rejected this argument.[131] It held that because the organization solicited donations using interstate telephone

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121. *See FTC Guide to the Antitrust Laws*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/bc/antitrust/ (last modified Jan. 6, 2010); *see also* Bauer, *supra* note 120, at 132.

122. Bauer, *supra* note 120, at 131-32. The FTC Act created the Federal Trade Commission (FTC) by supplementing the Sherman Act. FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922). The FTC is charged with preventing unfair and deceptive acts and practices. *See* 15 U.S.C. § 45 (2006).

123. Bauer, *supra* note 120, at 131.

124. Nicholas Barborak, *Saving the World, One Cadillac at a Time; What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 AKRON L. REV. 577, 589 (2000).

125. *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984) (finding nonprofit defendant subject to Sherman Act).

126. *See, e.g.*, FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (1994) ("The Commission announced a three-part test for determining whether an advertisement is misleading and deceptive in violation of section 12. Under this test, 'the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.'").

127. FTC v. Saja, 1997 U.S. Dist. LEXIS 17225 (D. Ariz. Oct. 6, 1997).

128. *Id.* at *2.

129. *Id.* at *4.

130. *Id.*

131. *Id.* at *5.

lines and collected money by mail or though United Parcel Service deliveries, defendants' activities affected interstate commerce.[132] The court concluded that "the First Amendment does not shield a person committing a fraud on the public even where the purpose is protected by the First Amendment."[133]

ii. State Level Consumer Protection Laws

In the 1960s, states began enacting their own consumer protection statutes.[134] Practitioners often refer to state consumer protection statutes as "'Little FTC Acts' because they contain identical language to the FTC Act, typically forbidding unfair competition and unfair deceptive acts and practices."[135] The language in these "Little FTC Acts" demonstrates that most of the state legislatures enacting consumer protection acts "sought to keep their Acts consistent with the FTC Act and the Acts of other states, united in a single body of precedent."[136] Thus, federal FTC Act precedent is arguably applicable in any of the states, and if CPC Truth-in-Advertising laws are deemed constitutional in one state, they will likely be found so in other states as well.

Consumer protection precedent provides insight for how courts will receive a CPC statute in Wisconsin. *Mother & Unborn Baby Care of North Texas, Inc. v. State* speaks directly to this issue.[137] The case involved an analysis of whether the misrepresentations made by CPCs violated Texas consumer protection laws.[138] Defendants argued that marketing themselves under "Abortion" in Yellow Pages did not constitute trade or commerce

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132. *Id.* at *6-7.

133. FTC v. Saja, 1997 U.S. Dist. LEXIS 17225, at *9. In a similar case, the FTC brought suit against the American Medical Association (AMA) for violating the FTC Act. Am. Med. Ass'n v. FTC, 638 F.2d 443, 445-46 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (per curiam). "The AMA argued that, as a nonprofit corporation with the objective of safeguarding the medical profession, its activities were not subject to the jurisdiction of the FTC Act." Bauer, *supra* note 120, at 165 (citing Am. Med. Ass'n v. FTC, 638 F.2d at 447-448). The Second Circuit "held that the AMA's activities were within the scope of the FTC Act." *Id.* at 165-66 (citing 638 F.2d at 448). These cases establish precedent for regulating nonprofits through consumer protection laws.

134. Bauer, *supra* note 120, at 144 (noting that "[b]y the early 1980s, all fifty states and the District of Columbia had enacted one or more consumer protection laws"); Barborak, *supra* note 124, at 606 (stating that a reason to enact these statutes was to create a private cause of action).

135. Bauer, *supra* note 120, at 144 (internal quotations omitted).

136. *Id.* at 171.

137. *See* Mother & Unborn Baby Care of N. Tex., Inc. v. Texas, 749 S.W.2d 533 (Tex. App. 1988).

138. *Id.* at 536. A large number of Texan women found defendants' CPC advertisement within the Yellow Pages. *Id.* Believing it to be an abortion clinic, the women contacted the CPC. *Id.* The women were then further lead to believe that the CPC was an abortion clinic and made appointments. *Id.* The women only started to suspect they were not at an abortion clinic while they waited for the results of their pregnancy tests and were shown slides or videos with graphic pictures pertaining to abortions. *Id.*

because they did not actually sell abortions or medical services.[139] However, the court found that defendants distributed goods such as pamphlets and distributed services such as pregnancy testing, counseling, and arrangements for financial assistance.[140] The Texas Court of Appeals held that "[i]t is immaterial whether appellants provided a service in exchange for money; the statute as a whole supports the conclusion that the transfer of valuable consideration is not necessary."[141] "If in the context of a transaction in goods or services, any person engages in an unconscionable course of action which adversely affects a consumer, that person is subject to liability."[142] The court also found that "there is no doubt that the women concerned are 'consumers' within the definition of [the statute]. Each woman, an individual, testified that she was seeking to purchase a service upon which the complaint is based."[143] Wisconsin has consumer protection laws similar to those in Texas.[144] These cases set precedent for regulating CPCs through currently existing consumer protection laws.

B. Precedent and the "Riley Trilogy"

It is important, when drafting Truth-in-Advertising legislation, to ensure that the legislation cannot be construed as unconstitutionally broad. Cases with statutes and ordinances that have been struck down set precedent that is useful in considering how to draft a Truth-in-Advertising statute. In each of the following cases (known as the "Riley Trilogy"), the U.S. Supreme Court determined that states had the power to regulate charitable organizations, but that the statute or ordinance in question was unconstitutionally broad.

In the first case, *Village of Schaumburg v. Citizens for a Better Environment*, Schaumburg passed an ordinance that required nonprofits to demonstrate that 75 percent of the proceeds of their charitable solicitation went to the charitable purpose of the organization in order to be given a solicitation permit.[145] The Court determined that charitable solicitation was "subject to

139. *Mother & Unborn Baby Care of N. Tex., Inc.*, 749 S.W.2d at 537.

140. *Id.* at 538.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* WIS. STAT. § 100.18(1) (2009-10) ("No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any . . . service, or anything offered by such person, firm, corporation or association . . . directly or indirectly to the public for sale, hire, use or other distribution . . . shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement which . . . contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.").

145. Vill. of Schaumburg v. Citizens for Better Env't, 444 U.S. 620, 624 (1980).

reasonable regulation" and found that the village had a substantial interest in protecting the public from "fraud, crime and undue annoyance."[146] Nonetheless, the Court found that the blanket statistics-based ordinance intruded upon free speech rights by using inflexible statistical models that applied across-the-board.[147]

Secretary of State v. Joseph H. Munson Co., Inc. challenged a similar Maryland statute that included the possibility of an administrative waiver if the organization could demonstrate financial necessity.[148] However, the Court once again found the blanket percentage limitation to be too imprecise a tool and that such statistics were not an accurate measure of fraud because high employee costs are justifiable if the employees accomplish the charity's other goals in their work.[149] Furthermore, the Court found that the waiver was too narrow to remedy the broad statistic measure.[150] As a result, the Court held that the ordinance was unconstitutionally broad.[151]

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Court evaluated a statute that had been implemented by North Carolina that prohibited a charitable organization from retaining an "unreasonable" or "excessive" fee.[152] The fee was determined to be "unreasonable" or "excessive" based on a three-tiered statistical model.[153] Once again, the Court found the statute to be unconstitutionally broad.[154] The Court held that even though statistics might be used as a *factor* in indicating if fraud was occurring, the connection between fraud and statistics was tenuous at best.[155] The Court suggested the use of antifraud laws and disclosure of financial information to accomplish the state's interest.[156] Conceding that this may not be the most efficient way to protect against fraud, the Court defended its method by stating that "'the First Amendment does not permit the State to sacrifice speech for efficiency.'"[157]

The act considered in *Riley* also required professional solicitors to disclose certain information to donors.[158] The Court found that a state's "interest in

146. *Id.* at 636 (internal quotation marks omitted).

147. Kent D. Wittrock, Note, *The End of Fraudulent Solicitation—Really?: The Supreme Court in* Madigan v. Telemarketing Associates *Provides That Fraudulent Statements in Charitable Solicitation Are Not Protected Speec*h, 72 UMKC L. REV. 275, 278 (2003) (citing *Vill. of Schaumburg*, 444 U.S. at 632-33).

148. Secretary of State v. Joseph H. Munson Co., Inc., 467 U.S. 947, 962 (1984).

149. *Id.* at 966-67.

150. *Id*. at 964-65.

151. Wittrock, *supra* note 147, at 278-79.

152. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 784 (1988).

153. *Id.* at 784-86.

154. *Id.* at 790-01.

155. *Id.* at 793.

156. *Id.* at 795.

157. Wittrock, *supra* note 147, at 282 (quoting *Riley*, 487 U.S. at 795).

158. *Riley*, 487 U.S. at 786. The act "provides that, prior to any appeal for funds, a professional fundraiser must disclose to potential donors: (1) his or or name; (2) the name of

protecting charities (and the public) from fraud [was] . . . a sufficiently substantial interest to justify a narrowly tailored regulation."[159] However, the Court once again held that the requirements, as written, were "unduly burdensome and not narrowly tailored."[160] The Court offered several suggestions for more narrowly tailored alternatives to compelled disclosures.[161] One option the Court suggested was for the State to "vigorously enforce its antifraud laws to prohibit professional fundraisers from" defrauding donators or making false statements.[162]

These cases establish clear precedent for regulating charitable organizations through state antifraud or consumer protection laws. Furthermore, *Riley* establishes that mandated disclosures or disclaimers may be enforced as long as they are narrowly tailored.[163]

C. The Baltimore CPC Truth-in-Advertising Ordinance

The Baltimore Truth-in-Advertising CPC ordinance was determined to be too restrictive and overly broad by the U.S. District Court for the District of Maryland.[164] As was discussed above,[165] Baltimore enacted the first ordinance that attempted to protect the public from misrepresentations by CPCs.[166] The ordinance was challenged in court and declared unconstitutionally broad at the summary judgment stage.[167] In striking down the Baltimore ordinance on January 28, 2011, the court stated that the ordinance was far from the least restrictive means of combating false advertising.[168] One of the reasons for this determination was that the ordinance did not provide a "carve-out" provision for those centers that do not engage in deceptive practices.[169] The court suggested that a better means of regulating CPC would be to "use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers."[170] This was also one of the alternatives suggested in *Riley*.[171] CPCs may claim to be excluded

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the professional solicitor or professional fundraising counsel by whom he or she is employed and the name and address of his or her employer; and (3) the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months." *Id.*

159. *Id.* at 792.

160. *Id.* at 798.

161. *Id.* at 800.

162. *Id.*

163. *Riley*, 487 U.S. at 792.

164. O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 808 (D. Md. 2011).

165. *See supra* Introduction.

166. Rienzi, *supra* note 2, at 223.

167. *O'Brien*, 768 F. Supp. 2d at 817.

168. *Id.*

169. *Id.*

170. *Id.*

171. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (1988).

from anti-fraud laws because they are not clearly a "person, firm or corporation that offers for sale merchandise, commodities, or service."[172] However, the U.S. District Court for the District of Maryland determined that "subjecting pregnancy centers to existing anti-fraud provisions would require only minor modifications."[173]

IV. REGULATING CRISIS PREGNANCY CENTERS IN WISCONSIN: A PROPOSED STATUTE

The need for CPC regulation is demonstrated by the accounts of misleading advertisements, incorrect information, and emotionally manipulative strategies that the organizations employ.[174] Wisconsin has a legitimate interest in protecting the public from fraud and misrepresentation and therefore has the power to regulate such charitable organizations.[175] The difficulty in writing such a statute lies in ensuring that it is not unconstitutionally broad.[176]

A. Regulation of CPC Advertising is Permissible Because the Advertising Contains Less-Protected Consumer Speech

CPC advertisements do not clearly fit within commercial speech but require a "more nuanced inquiry" to determine that they are commercial speech.[177] For instance, CPCs may not sell products.[178] However, courts have determined that the laws governing unfair and deceptive acts and practices apply when plaintiffs "seek . . . goods or services" from an organization regardless of whether the plaintiffs ultimately purchase or lease any product.[179] Therefore, women who approach CPCs seeking abortions may be considered consumers under consumer protection statutes.[180]

Furthermore, abortion providers have a financial interest in the number of women obtaining abortions.[181] Thus, abortion clinics lose funds when women

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172. *O'Brien*, 768 F. Supp. 2d at 817 (citing BALTIMORE CITY CODE, art. II, § 4-1 (2003)).

173. *Id*. However, the court did not explain what modifications would be required.

174. *See* Waxman Report, *supra* note 2, at i; NARAL, TRUTH REVEALED, *supra* note 1, at 1.

175. *See Riley*, 487 U.S. at 792; *see also* WIS. STAT. § 100.18(1) (2009-10).

176. *See* Wittrock, *supra* note 147, at 278.

177. *See* Gordon & Breach Science Publrs. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1537 (S.D.N.Y. 1994).

178. *See, e.g.*, Mother & Unborn Baby Care of N. Tex., Inc. v. State, 749 S.W.2d 533, 538 (1989).

179. James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 61 (1994) (internal quotations omitted); *see, e.g.*, *Mother & Unborn Baby Care of N. Tex., Inc.*, 749 S.W.2d at 538.

180. *See Mother & Unborn Baby Care of N. Tex., Inc.*, 749 S.W.2d at 538.

181. *See* Brief for Eagle Forum Education & Legal Defense Fund as Amici Curiae Supporting Petitioner at 154, Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) (No. 04-1144); Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion*

do not get abortions due to CPCs' deceptive practices. When this occurs, misleading advertisements by CPCs constitute knowing unfair diversion of trade from a competitor.[182] Unfair competition exists wherever unfair means are used in trade rivalry.[183] CPCs use misleading information to attract women to the centers, where counselors give women false information in hopes of preventing them from purchasing an abortion. This constitutes unfair diversion of trade from a competitor. Under either rationale, CPCs advertisements may be considered commercial speech, which need not undergo a strict scrutiny review to be regulated.[184]

B. A CPC Ordinance Would Survive Strict Scrutiny Review if it is Determined to be Noncommercial Speech

Even if CPC advertising is found to contain non-consumer speech, it is a type of speech that is permissible for the government to regulate, and a well-written statute would be upheld under strict scrutiny review. The strict scrutiny standard applies if the CPC advertisements are considered protected speech.[185] A statute that regulates protected speech satisfies the strict scrutiny standard if the statute is "narrowly tailored to promote a compelling Government interest."[186] A statute is not narrowly tailored if a "less restrictive alternative would serve the Government's purpose."[187] Thus, in assessing whether a statute

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Deserves a Closer Look, 84 NOTRE DAME L. REV. 1369, 1408 (2009) ("[T]he abortion provider has a financial interest in resisting changes to their practices that will reduce the gross numbers of patients they serve."). Because the pro-life movement often calls attention to this fact, it is unlikely CPCs would disagree. *See* Jennie Stone, *The numbers Planned Parenthood doesn't want you to know*, LIFESITENEWS.COM, Mar. 16, 2012, http://www.lifesitenews.com/news/the-numbers-planned-parenthood-doesnt-want-you-to-know ("Those abortion services garner Planned Parenthood millions upon of millions of dollars every single year."); Abortion for Profit, ABORT73.COM, http://www.abort73.com/abortion/abortion_for_profit/ (last modified Sept. 3, 2010) ("Abortion, to put it plainly, is a very lucrative business, and this has been true from the beginning."); Abortion Facts: Are Abortionists Motivated By Money?, WHY PRO-LIFE?, http://www.whyprolife.com/are-abortionists-motivated-by-money/ ("The abortion industry is a billion dollar industry.") (last visited Apr. 2, 2012).

182. *See* FTC v. Winsted Hosiery Co., 258 U.S. 483, 492-494 (1922) (holding that underwear producer's practice of implying that products were all-wool when instead products were combined with cotton constituted unfair method of competition).

183. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 538 (2001); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 349-50 (1986) (Brennan, J., dissenting); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

184. *See* Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110 (1990).

185. *See Posadas de Puerto Rico Assocs.*, 478 U.S. at 350-51 (Brennan, J., dissenting).

186. United v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (citation omitted).

187. *Id.*

is narrowly tailored, a court must determine whether the regulation is the least restrictive means that will accomplish the goal.[188]

One compelling government interest of a Truth-in-Advertising statute is to prevent women from being delayed from obtaining an abortion. In order to effectively do so, the targeted women must be notified of the anti-abortion nature of the CPC *before* they make arrangements to visit it. If a woman takes off work or travels to the CPC before discovering that the clinic does not provide the services she needs, this constitutes significant delay.[189] Delay is generally harmful to women seeking abortions because there is a time limit for obtaining abortions, because abortions become more expensive and harder to obtain later in a pregnancy, and because a woman's personal moral considerations may become more complicated as the fetus develops.[190] Moreover, delay can be more harmful to young women and economically disadvantaged women, who may not have the time, money, or necessary knowledge to overcome these barriers.[191]

In addition, a statute that penalizes CPCs only after determining that they have violated consumer protection laws satisfies the strict scrutiny standard because it is narrowly tailored and is the least restrictive means of preventing delay for women seeking to obtain an abortion. A statute that requires disclaimers on CPC advertisements only after previous advertisements are found to be misleading, like the statute proposed in this article, is much more narrowly tailored than the Baltimore ordinance was because it provides a "'carve-out' provision" for law-abiding CPCs.[192]

C. A Proposed Statute

In Wisconsin, the most effective and simplest way to begin regulating the advertising practices of CPCs is to pass legislation altering the language in one of the already existing consumer protection statutes. Such a proposal is supported by the Supreme Court in *Riley* and by the U.S. District Court for the

188. Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).

189. BALLENTINE'S LAW DICTIONARY (3d ed. 1969) ("[D]elay. . . . Noun: An interference with performance; a detainment."); s*ee also* Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97, 122 (2008).

190. D'Andra Millsap, *Sex, Lies, and Health Insurance: Employer-Provided Health Insurance Coverage of Abortion and Infertility Services and the ADA*, 22 AM. J.L. & MED. 51, 55-56 (1996); s*ee also* Smith *supra* note 189, at 121.

191. *See* Judges, *supra* note 16, at 1452-53 (stating that delays impose serious economic, physical, and psychological harm on women seeking abortion, especially on a vulnerable class of women—the poor, the young, the battered, and those living in remote areas).

192. O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 817 (D. Md. 2011).

District of Maryland in *O'Brien*, both of which recommended altering an existing consumer statute.[193]

Wisconsin has a number of consumer protection statutes, most notably in Chapter 100 of the Wisconsin Statutes, which governs marketing and trade practices.[194] Wisconsin Stat. § 100.20, "Methods of competition and trade practices,"[195] is the ideal statute to alter to explicitly include regulation of nonprofit trade practices. An amendment that incorporates into this statute nonprofit organizations conducting charitable enterprises would constitute only a minor change in existing law, and would serve to regulate the advertising practices of CPCs. The following proposed amendment incorporates the considerations listed above:

Proposed Amendment to Wis. Stat. § 100.20(2010) (changes in bold)

Section 100.20. Methods of competition and trade practices.

(1) Methods of competition in business and trade practices in business shall be fair. **Methods of competition between nonprofits and charitable organizations and trade practices of nonprofits and charitable organizations shall be fair. Unfair methods of competition in business, between nonprofits, and between charitable organizations are hereby prohibited. Unfair trade practices in business, in fundraising and in charitable work are hereby prohibited.**

. . . .

(1t) It is an unfair trade practice for a person to provide any service which the person has the ability to withhold that facilitates or promotes an unfair method of competition in business **or charitable enterprise**, an unfair trade practice in business **or charitable enterprise**, or any other activity which is a violation of this chapter.

(1v) It is an unfair trade practice for a nonprofit or charity organization to inaccurately represent their practices, activities, pursuits, or commitments in order to garner support, raise funds, or attract the public.

(2) (a) The department [of Agriculture, Trade and Consumer Protection], after public hearing, may issue general orders forbidding methods of competition in business **or charitable enterprise** or trade practices in business **or charitable enterprise** which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or **charitable enterprise** or trade practices in business **or charitable enterprise** which are determined by the department to be fair.

. . . .

(3) **(a)** The department, after public hearing, may issue a special order against any person **or organization**, enjoining such person **or organization** from

193. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988); *O'Brien*, 768 F. Supp. 2d at 817.

194. WIS. STAT. ch. 100 (2009-10).

195. WIS. STAT. § 100.20 (2009-10).

employing any method of competition in business **or charitable enterprise** or trade practice in business or **charitable enterprise** which is determined by the department to be unfair or from providing service in violation of sub. (1t). The department, after public hearing, may issue a special order against any person or organization, requiring such person or organization to employ the method of competition in business **or charitable enterprise** or trade practice in business **or charitable enterprise** which is determined by the department to be fair.

(3) (b) Special orders may include the following:

(i) Requiring disclaimers on all advertisements issued by the person or organization;

(ii) Requiring the posting of signage on the premises of the business, organization, or charity; and/or

(iii) Other methods determined to be necessary by the department.

(4) The department of justice may file a written complaint with the department alleging that the person **or organization** named is employing unfair methods of competition in business **or charitable enterprise** or unfair trade practices in business **or charitable enterprise** or both. Whenever such a complaint is filed it shall be the duty of the department to proceed, after proper notice and in accordance with its rules, to the hearing and adjudication of the matters alleged, and a representative of the department of justice designated by the attorney general may appear before the department in such proceedings. The department of justice shall be entitled to judicial review of the decisions and orders of the department under ch. 227.
(5) Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefore in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorneys fee.
(6) The department may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction the violation of any order issued under this section. The court may in its discretion, prior to entry of final judgment make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action, provided proof thereof is submitted to the satisfaction of the court. The department may use its authority in ss. 93.14 and 93.15 to investigate violations of any order issued under this section.

D. The Proposed Statute is the Most Effective and Least Restrictive Means of Preventing Delay for Women Seeking Abortions

Although this proposed statute might not be the most expedient form of regulating CPCs, the Court stated in *Riley* that the government may not sacrifice First Amendment rights for efficiency.[196] Therefore, this model is necessary in order to make the statute as narrowly tailored as possible.

196. *Riley*, 487 U.S. at 795.

This statute succeeds where its predecessors failed for several reasons. First, the proposed statute is not viewpoint specific. The *O'Brien* court found the CPC ordinance in Baltimore to be viewpoint specific because it focused only on CPCs.[197] Pre-amended Wis. Stat. § 100.20 addressed businesses, whereas the proposed statute amends § 100.20 to include nonprofits as well.[198] Although this means the statute will apply more broadly, it will not contain a viewpoint-based discrimination.[199] Furthermore, the proposed statute provides authority to prevent misleading advertising or fraud perpetrated by other organizations that were not previously regulated.[200] Although this seems to be a significant change, there is a clear benefit to preventing misleading advertising by organizations, and there is also strong precedent establishing that the government has the right to regulate charitable organizations through such amendments, as long as they are not unconstitutionally broad.[201]

Second, the proposed statute creates a carve-out provision for law-abiding CPCs so that it will not be seen as unconstitutionally broad. One of the problems the U.S. District Court for the District of Maryland had with the Baltimore CPC ordinance was that it applied "primarily (if not exclusively) to those with strict moral or religious qualms regarding abortion and birth-control."[202] The proposed statute applies only to organizations that have been determined to violate the statute by the Department of Agriculture, Trade and Consumer Protection (DATCP). Third, the proposed statute is a mere amendment to an already well-established consumer protection law. As was suggested in *Riley*, a statute can be considered more narrowly tailored if it is incorporated into an already existing statute.[203]

Fourth, cases brought under the proposed statute must be addressed on a case-by-case basis by DATCP, an already-existing regulatory body, so as to avoid disfavored "blanket provisions."[204] The Riley Trilogy cases were struck down largely because their statistical evaluation of charitable expenditure did not address the needs of specific organizations.[205] Under the proposed statute, because DATCP evaluates complaints on a case-by-case basis and involves a hearing and public debate, it is clearly tailored to each case and satisfies due process requirements.

Finally, the proposed statute uses a safeguard against misrepresentation so as to prevent confusion and delay more effectively than the Baltimore ordinance. Under the proposed statute, a disclaimer may be required on each

197. *O'Brien*, 768 F. Supp. 2d at 811-12.

198. *See supra* Part IV.C.

199. *See O'Brien*, 768 F. Supp. 2d at 815.

200. *See supra* Part IV.C.

201. *See supra* Part III.B-C.

202. *O'Brien*, 768 F. Supp. 2d at 815.

203. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (1988); s*ee also O'Brien*, 768 F. Supp. 2d at 817.

204. NAACP v. Button, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

205. *See supra* Part III.B.

advertisement made by CPCs in violation of the statute, which will prevent women from traveling to the clinic before realizing that it does not provide abortion or contraception.[206] This is a marked improvement over the Baltimore ordinance, which required a sign in the waiting room that would only notify women who were already present at the clinic.[207] However, if DATCP deems it necessary, the proposed statute allows it to require a sign in the waiting room as well.[208] The CPC's punishment can be tailored to the egregiousness of the offense or to how many people it affects.

CONCLUSION

Truth-in-Advertising laws do not violate the constitutional rights of CPCs; rather, they protect the constitutional rights of the vulnerable women at risk of deception by CPCs. In Wisconsin, it would be most beneficial for a CPC Truth-in-Advertising law to be enacted statewide to monitor nonprofit trade practices. The proposed statute herein would be deemed constitutional even when evaluated under the strict scrutiny standard because it is narrowly tailored so as not to restrict the speech of clinics that do not mislead the public. The proposed amended consumer protection statute is constitutional, necessary, beneficial, and will prevent women seeking abortions from being manipulated, mislead, and delayed when attempting to exercise their constitutional right to access an abortion.

206. *See supra* Part IV.C.
207. *See O'Brien*, 768 F. Supp. 2d at 808.
208. *See supra* Part IV.C.