



May 29, 2013

Honorable Fred Upton and Members  
Committee on Energy and Commerce  
United States House of Representatives  
2183 Rayburn House Office Building  
Washington, DC 20515

**Re: Legal Analysis of HR 2030, “Stop Deceptive Advertising for Women’s Service Act”**

Dear Chairman Upton and Distinguished Members of the Committee:

Alliance Defending Freedom is a not-for-profit legal organization that defends religious liberty, freedom of speech, and the sanctity of human life. We are aware that HR 2030, the “Stop Deceptive Advertising for Women’s Services Act,” has recently been introduced in the House of Representatives and assigned to the Committee on Energy and Commerce. We write to express our opinion that this bill, like similar laws enjoined by other courts in recent years, is an unconstitutional abridgment of the First Amendment. Pregnancy resource centers serve women free of charge without burdening the taxpayers, a model deserving Congress’s praise, not its condemnation. We urge members to reject this unconstitutional and unwarranted attack on these charities.

**Background:**

HR 2030 is another in a recent trend of flawed legislative attempts to regulate the speech of pro-life pregnancy resource centers. These centers share the facts and their opinions with women about abortion and other options out of an exercise of their sincerely held religious and moral beliefs. The centers do not charge women for the information or their assistance. Nevertheless, they save taxpayers significant funds by providing important free services to pregnant women and to the community, including personal support, opinions about pregnancy options, self-administered pregnancy tests, and practical resources like baby clothes, diapers, and other necessities for women who have chosen to carry their pregnancies to term. They also provide emotional and spiritual assistance to post-abortive women.

Virtually every pregnancy resource center in the country is a member of one or more of three membership organizations: CareNet, Heartbeat International, and the National Institute for Family and Life Advocates (NIFLA). These membership organizations establish best practices for these member charities. NARAL Pro-Choice America (formerly the National Abortion Rights Action League) is the primary actor seeking to regulate the speech of these not-for-profit pregnancy resource centers. In furtherance of this effort they have repeatedly sent fake clients and made phone calls to pregnancy resource centers under false pretenses, hoping to show that these charities mislead women in some way. But despite its efforts, NARAL has been unable to

document that any woman actually has been harmed by the free services offered by any pregnancy center.

As a result, NARAL's local efforts to regulate the speech of pregnancy resource centers have repeatedly failed as states and localities rejected NARAL's unsupported claims that these not-for-profit charities harm women with their free services or courts have enjoined the laws as unconstitutional. *See, e.g., Centro Tepeyac v. Montgomery County*, 779 F.Supp.2d 456 (D. Md. 2010), on appeal, 683 F.3d 591, *vacated, reh'g en banc pending*; *Evergreen Ass'n, Inc. v. City of New York*, 801 F.Supp.2d 197 (S.D.N.Y. 2011), *O'Brien v. Mayor and City Council of Baltimore*, 768 F.Supp.2d 804 (D.Md. 2011), *vacated, reh'g en banc pending*; *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539 (4th Cir. 2012), *vacated, reh'g en banc pending*.

## HR 2030

HR 2030 follows these failed local laws in attempting to regulate the speech of these not-for-profit pregnancy resource centers. HR 2030 purports to authorize the Federal Trade Commission to promulgate rules to

prohibit, as an unfair and deceptive act or practice, any person from advertising with the intent to deceptively create the impression that --

- (1) such person is a provider of abortion services if such person does not provide abortion services; and
- (2) such person is not a provider of abortion services if such person does provide abortion services.

Section 2(b) provides for enforcement of rules promulgated under this section by the FTC as an "unfair or deceptive act or practice." Section 3(2) defines "abortion services" to include "providing surgical and non-surgical procedures to terminate a pregnancy, or providing referrals for such procedures."<sup>1</sup> "Advertise" is defined in § 3(1) as "offering goods or services to the public, regardless of whether such goods or services are offered for payment or result in a profit."

Current FTC authority extends only to prohibiting "unfair or deceptive acts or practices" by corporations "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. As pregnancy resource centers act charitably, not for their own or anyone else's

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<sup>1</sup> This definition of "abortion services" appears to be underinclusive, since it would permit an entity to advertise that it provides or performs abortions when it actually only provides referrals for abortions to another facility. It is difficult to take seriously HR 2030's supposed interest in protecting women from deceptive advertising that might delay their access to abortion when it expressly permits a facility to lure a woman to its clinic, where, for example, she may have an office visit or other Medicaid-reimbursable expenses on the expectation that she may actually receive an abortion at that site only to be informed later that they will merely refer her somewhere else for the abortion.

profit, the FTC lacks jurisdiction over them. Section 2(c) of HR 2030 purports to extend the FTC's authority nonetheless, providing:

Not-for-profit Organizations – The Federal Trade Commission shall enforce this Act with respect to an organization that is not organized to carry on business for its own profit or that of its members as if such organization were a person over which the Commission has authority pursuant to section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)).

Thus, HR 2030 would provide the FTC unique authority over not-for-profits in the abortion context, causing the federal government to take an active role in regulating and investigating the speech of such entities as they advertise their free services. The FTC would be empowered to penalize any speech it deemed noncompliant with any regulation it might create to the same extent it may penalize false advertising by for profit companies selling products across state lines. Presently, those penalties, for a first violation, could include fines of up to \$5,000 and/or 6 months imprisonment. 15 U.S.C. § 54(a).

### Legal Analysis

HR 2030 suffers from at least two significant constitutional flaws: it exceeds Congress's enumerated powers and it violates the First Amendment.

“The Constitution grants Congress the power to ‘*regulate* commerce’” among the states. *Nat'l Fed. Of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2586, quoting Art. I, § 8, cl. 3 (emphasis in *NFIB*). “The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.” *Id.* While not-for-profits may engage in interstate commerce and their transactions thus may be regulated by Congress, we are aware of no example in which a court has permitted Congress to regulate the noncommercial speech activity of a not-for-profit under the guise of the commerce clause.

Congress can authorize an administrative agency to exercise only those powers that are Congress's to delegate. Hence, Congress, aware of its constitutional limitations, has previously authorized the FTC to regulate “unfair or deceptive acts or practices *in or affecting commerce.*” 15 U.S.C. § 45(a)(1) (italics supplied). Congress defined the term “commerce” as “commerce among the several states.” 15 U.S.C. § 44. Likewise, while authorizing the FTC to regulate the practices of “corporations,” Congress defined “corporation” as “any company ... which is organized to carry on business *for its own profit or that of its members....*” *Id.* (italics supplied). Thus, Congress did not provide the FTC authority to regulate noncommercial activity not affecting commerce and not carried on by a not-for-profit corporation.

HR 2030 recognizes that Congress does not authorize the FTC to regulate the speech activity of a not-for-profit corporation. Thus, it seeks to provide unique authorization to the FTC to regulate certain abortion-related speech by not-for-profits. Section 2(c). Pregnancy resource centers provide their counseling services to women free of charge. Thus, they simply do not engage in or affect interstate commerce when they provide a woman with these free services. When a pregnancy resource center provides a woman with free advice about her options and provides her with diapers and baby clothes free of charge, there simply is no “commercial

activity to be regulated.” *NFIB*, at 2586. Thus, the Constitution does not authorize the Congress to regulate this noncommercial speech activity and Congress cannot delegate to the FTC authority it does not have. HR 2030’s purported delegation of Congress’s commerce clause authority is invalid and any exercise of that supposed authority by the FTC would thus be unconstitutional.

HR 2030 would also violate the First Amendment. It singles out speech about abortion for FTC regulation and investigation. HR 2030 would permit the FTC to regulate and investigate speech only insofar as it caused, in the view of the FTC, an incorrect impression about the not-for-profit’s abortion services offerings. Only abortion-related content would earn a not-for-profit the oversight of the FTC. Thus, for example, an entity whose public claims created the false impression that it provided mammograms, adoption counseling and referrals, practical assistance for new mothers, or generally assisted families in planning for parenthood would not be subject to FTC investigation and penalties. Only where there is speech about abortion would the FTC be empowered to investigate a not-for-profit pregnancy center’s communications with a woman about her options to determine whether the not-for-profit’s public speech violated the act.

The Supreme Court has held that laws regulating speech on the basis of its content are subject to strict scrutiny. *Turner Broad. Sys., Inc. v. FCC* (“*Turner P*”), 512 U.S. 624, 643 (1994). (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based”). “Content-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). HR 2030 is expressly targeted at abortion-related speech and purports to extend the FTC’s authority over non-profits only with respect to communications about abortion. Thus, it must satisfy strict scrutiny.

Every court that has reviewed the similar city and county laws targeting pregnancy resource centers has likewise concluded that strict scrutiny applies. *Compare Centro Tepeyac*, 779 F.Supp.2d 456 (“Because the Resolution does not pertain to commercial, professional, or any other form of speech calling for a lower level of scrutiny, strict scrutiny applies.”) *with Evergreen Ass’n*, 801 F. Supp. 2d at 206 (“The fact that Local Law 17 mandates only factual disclosures does not save it from strict scrutiny.”); *and O’Brien*, 768 F.Supp.2d at 814, *vacated, reh’g en banc pending* (“Accordingly, the Court concludes that the Ordinance regulates the Plaintiffs’ fully protected non-commercial speech so that strict scrutiny is triggered.”); *and Greater Baltimore Center for Pregnancy Concerns*, 683 F.3d 539, 555 *vacated, reh’g en banc pending* (“[W]e affirm the district court’s conclusion that Ordinance 09-252 regulates the Pregnancy Center’s fully protected, non-commercial speech and therefore is subject to strict scrutiny.”)

HR 2030 would fail this demanding test. The federal government would bear the burden of demonstrating a compelling interest in regulating the speech of not-for-profit pregnancy resource centers, something that no other locality adopting a law like HR 2030 has been able to do. *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”)

In fact, despite the efforts of NARAL and others who oppose pregnancy resource centers and their provision of free counseling and services to pregnant women in need, there is no credible example of a single woman who has been harmed by a pregnancy resource center. The best that abortion advocates opposing pregnancy resource centers have been able to show is that some – not all - of their *own volunteers* believe women might be confused by pregnancy centers. *See Greater Baltimore Center for Pregnancy Concerns*, 683 F.3d at 556-57 (“[T]he record contains no evidence that any woman has been misled into believing that any pregnancy center subject to [the Ordinance] was a medical clinic or that a woman in Baltimore delayed seeking medical services because of such a misconception. ... The City's failure to provide more than speculative evidence of problems at Baltimore's pregnancy centers strongly suggests that the need for regulation of those centers is not as pressing as the City asserts.”) Despite NARAL's promotion of these anti-pregnancy resource center laws around the country they have not identified a single woman who has testified that she in fact was harmed in any way by the free services of a pregnancy center. Abortion facilities profit from women who feel pressured into abortion because they do not know about the full range of options available to them or lack the practical resources they need to care for their child. Those abortion facilities may be harmed by the free services pregnancy centers offer. But not the women they serve.

Even if the government could show such an imminent harm to women from the speech of pregnancy centers, it would still be required to also demonstrate that the regulations, investigations and potentially crippling fines and imprisonment imposed by HR 2030 are the “least restrictive means” of serving its interests. A speech regulation is only narrowly tailored if it “targets and eliminates no more than the exact source of the evil it seeks to remedy.” *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 157 n.2 (4th Cir. 1998) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). “If a less restrictive alternative would serve the Government's purpose, the legislature *must use* that alternative.” *Playboy Entm't Grp., Inc.*, 529 U.S. at 813 (2000) (emphasis supplied). Any supposed government interest could be addressed by the government's own speech rather than by extending the FTC's regulatory and investigative authority to a discrete category of not-for-profit speech concerning abortion.

Thus, like the similarly crafted and motivated laws before it, HR 2030 is likely to fail strict scrutiny and be enjoined as unconstitutional. We would encourage the House to carefully consider the constitutionality of this proposed law and the experience of localities in adopting similar laws.

Pregnancy resource centers serve as a model of citizen action to address a social problem. These are grassroots not-for-profits created by people who care about their communities and the women facing unplanned pregnancies. But they address this problem in a faith-based and practical manner, providing women with the information and resources they need to make their own decision and providing spiritual and emotional support for post-abortive women. Their services alleviate the burden on taxpayers for government services that these women would have otherwise required and yet they do not seek taxpayer funding themselves. Pregnancy resource centers deserve the House's appreciation, not regulation.


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We urge the Committee to reject this unconstitutional bill.

Sincerely,



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