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

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

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. P. 65 and Local Court Rule 65, Plaintiff Austin LifeCare ("LifeCare"), in addition to its pending Amended Motion for a Preliminary injunction (Document 31), hereby respectfully applies for a temporary restraining order enjoining the above-named defendants from enforcing Chapter 10-10 of Title 10 of the Austin City Code (Ordinance No. 20120126-45, enacted January 25, 2012: hereafter the "Ordinance") from the Ordinance's effective date, February 6, 2012, until such time as the Court can hear and duly rule on LifeCare's Amended Motion for Preliminary Injunction (Document 31). Since Defendant's legal counsel has informed LifeCare that it intends to enforce the Ordinance on it effective date, in the absence of a temporary restraining order, Plaintiffs will be forced to comply with the Ordinance and thereby suffer irreparable harm, namely the loss of rights and freedoms

guaranteed, *inter alia*, by the First and Fourteenth Amendments to the United States Constitution.

In support of this Motion, Plaintiff relies on the following:

1. LifeCare's accompanying MEMORANDUM OF LAW in support of this Application, filed a contemporaneously herewith, including the supporting Declaration of Samuel B. Casey and the exhibits thereto showing the notice of this application has been given to Defendants' legal counsel;

2. A [PROPOSED] ORDER filed contemporaneously with this Application.

3. LifeCare's MEMORANDUM OF LAW IN SUPPORT OF ITS PENDING AMENDED MOTION FOR PRELIMINARY INJUNCTION (Document 31)

4. Lifecare's AMENDED VERIFIED COMPLAINT (Document 30), as filed on January 31, 2012.

5. Plaintiffs request that the Court waive the security requirement for bond pursuant to Rule 65(c).

The requested temporary restraining order pending final judicial disposition of LifeCare's pending amended motion for preliminary injunction is justified and supported by the facts and authorities set forth in the above-listed documents showing that LifeCare meets all of the elements required for temporary or preliminary injunctive relief: (1) Plaintiff is likely to prevail on the merits of the First Amendment and Due Process claims as set forth in their Amended Verified Complaint; (2) Plaintiff will suffer irreparable injury without the requested temporary restraining order; (3) the injury to Plaintiff outweighs any injury the injunction will cause Defendants; and (4) such an injunction will not disserve the public interest. *Bluefield Water Ass'n., Inc. v. City of Starkville, Miss.*, 577 F.3rd 250, 252-53 (5th Cir. 2009).

REQUEST FOR HEARING

Given the urgency of the matter, Plaintiff requests a hearing for presentation of oral argument on this application for temporary restraining order no later than Friday, February 3, 2012 at 9:00 a.m. when a status conference is currently scheduled before the Court.

NOMINAL SECURITY

Insofar as Defendants costs and damages will be at most nominal in the unlikely event that Defendants are ever found to have been "wrongfully enjoined or restrained" by the requested temporary restraining order during the limited period of its duration, the Court is requested to exercise its discretion under Fed. R. Civ. P. 65 (c) to properly set the security to be given by Plaintiff in support of the requested temporary restraining order at zero. See *Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411,421 n.3 (4th Cir. 1999) ["The amount of the bond, then ordinarily depends on the gravity of the potential harm to the enjoined party…Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the mount of the bond accordingly. In some circumstances, a nominal bond may suffice. See e.g. *International Controls Corp. v. Vesco*, 490 F. 2d 1334 (2nd Cir. 1974) (approving district court's fixing bond amount at zero in the absence of evidence regarding likelihood of harm)."]

///

///

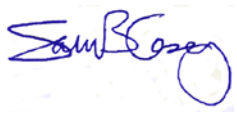
///

///

///

Dated: February 1, 2012

Respectfully submitted,



Samuel B. Casey, Cal. Bar. No, 76022
David B. Waxman, Texas Bar No. 24070817
JUBILEE CAMPAIGN-LAWOF LIFE PROJECT
801 G. Street, N.W., Suite 521
Washington, D.C. 20001
Telephone: (202) 586-5652
Fax: (703) 349-7323
sbcasey@lawoflifeproject.org

Gregory R. Terra, TX Bar No. 24042017
Stephen D. Casey, TX Bar No. 24065015
TEXAS CENTER FOR DEFENSE OF LIFE
501 South Austin Avenue, Suite 1130
Georgetown, Texas 78626
Telephone: (512) 763-9068
Fax: (512) 692-2878
gterra@yahoo.com
stephen.casey.law@gmail.com

ATTORNEYS FOR PLAINTIFF

Matthew S. Bowman*
D.C. Bar No. 993261
ALLIANCE DEFENSE FUND
801 G. Street, N.W., Suite 509
Washington, D.C. 20001
Telephone: (202) 393-8690
Fax: 202-347-3622
mbowman@telladf.org

OF COUNSEL:

Professor Mark L. Rienzi
D.C. Bar No. 494336
COLUMBUS SCHOOL OF LAW
THE CATHOLIC UNIV. OF AMERICA
620 Michigan Avenue, N.E.
Washington, D.C. 20064
Telephone: (202) 319-4979
Rienzi@law.edu

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2012, using the CM/ECF system I electronically filed the foregoing PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER, PROPOSED ORDER, and the accompanying MEMORANDUM OF LAW AND DECLARATION OF SAMUEL B. CASEY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER with the Clerk of the Court and duly served a copy of these documents on following legal counsel representing all the defendants in this matter:

COUNSEL FOR PLAINTIFF
(Consolidated Case No.:
CIVIL NO. A-II-CA-876-LY)
DAVID S. LILL
Texas Bar No. 12352500
BOWMAN AND BROOKE, LLP
600 Congress Avenue, Suite 1400
Austin, TX 78701
Telephone: (512) 874-3822
Fax: (512) 874-3801
Email: david.lill@bowmanandbrooke.com

Raul A. Gonzalez
Texas Bar No. 00000032
LAW OFFICE OF RAUL A. GONZALEZ
10511 River Plantation Drive
Austin, Texas 78747
Telephone: (512) 280-1002
Fax: (512) 292-4513
Email: rgonzalezlaw@aol.com

Jeffrey C. Mateer, TX Bar No. 13185320
Hiram S. Sasser III, TX Bar No. 24039157
Erin E. Leu, TX No. 24070138
LIBERTY INSTITUTE
2001 Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
Fax: (972) 941-4457
Email: jmateer@libertyinstitute.org

COUNSEL FOR DEFENDANTS:
Sara W. Clark, *TX Bar No. 00794847*
Casey L. Dobson, *TX Bar No. 05927600*
SCOTT, DOUGLASS & McCONNICO, L.L.P.
600 Congress Avenue, Suite 1500
Austin, Texas 78701-2589
Telephone: (512) 495-6300
Fax: (512) 474-0731
SClark@ScottDoug.com
CDobson@ScottDoug.com

Samuel B. Casey, Cal. Bar. No, 76022
JUBILEE CAMPAIGN-LAWOF LIFE PROJECT

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

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

[PROPOSED] ORDER GRANTING PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER

This matter having come before the Court pursuant to Fed. R. Civ. Proc. 65(b) on the application of Plaintiff Austin LifeCare for a temporary restraining order pending the parties' briefing and the Court's final disposition on Plaintiff's pending amended motion for preliminary injunction (Document 31), at least two (2) days notice having been given to Defendants' legal counsel by Plaintiffs' legal counsel, and upon consideration of the briefs, arguments, and evidence submitted in this matter, including Plaintiff's Verified Amended Complaint (Document 30) and pending Amended Motion for Preliminary Injunction (Document 31), this Court hereby finds:

1) Plaintiff's application satisfies the equitable purpose for a temporary restraining order to

"preserve the *status quo* and prevent irreparable injury just so long as necessary for the Court to hold a hearing" on Plaintiff's' pending amended motion for preliminary injunction. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp,,* 174 F.3d 411,422 (4th Cir. 1999) citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters etc*., 415 U.S. 433, 439, 94 St. Ct. 1113 (1974).

2) Plaintiff has also satisfied the "cumulative burden of proving each of the four elements enumerated before a temporary restraining order or preliminary injunction can be granted." *Mississippi Power and Light Co. v. United Gas Pipe Line,* 760 F.2d 618, 621 (5th Cir.1985).

3) In particular, it appears from Plaintiff's Verified Amended Complaint and Motion for Preliminary Injunction that there is a substantial likelihood that Plaintiff will prevail on the merits of its claims because Chapter 10-10 of Title 10 of the Austin City Code (Ordinance No. 20120126-45, hereafter the "Ordinance") which would otherwise become effective on February 6, 2012 is a content-based and viewpoint-based regulation of speech that requires Plaintiff to post at the entrance of its premises a government-dictated message which fails to advance a compelling government interest using the least restrictive means. Plaintiff's loss of "First Amendment Freedoms …constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). This threatened irreparable injury if the temporary injunction "is denied outweighs any harm that will result" to the City of Austin if the enforcement of the Ordinance is delayed pending further proceeding before this Court "because the deprivation of First Amendment liberties constitutes irreparable harm. The grant of such an injunction will not disserve the public interest." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

4) It is therefore ordered that a temporary restraining order staying the implementation and

enjoining the enforcement of the Ordinance pending the Court's final determination on Plaintiff's pending Amended Motion for Preliminary Injunction is GRANTED.

5) Accordingly, Defendants City of Austin; Lee Leffingwell, in his official capacity as Mayor of Austin; Chris Riley, Mike Martinez, Kathie Tovo, Laura Morrison, Bill Spelman, and Sheryl Cole, in their official capacities as members of the Austin City Council; and Marc Ott, in his official capacity as City Manager of the City of Austin, and all those acting in concert with the Defendants, are hereby enjoined from implementing or otherwise enforcing the Ordinance until further Order of this Court.

6) Because the "circumstances warrant it" and it appears that the "likelihood of harm" to Defendants is "remote" as a consequence of this injunction between now and when the Court can enter its final disposition of Plaintiff's pending amended motion for preliminary injunction, the security amount for this temporary injunction is set at zero pursuant to Fed. R. Civ. Proc. Rule 65(c). *See Hoachst Diafoil. Co. v. Nan Ya Plastics*, supra, 174 F.3d at 421 n.3 ["The amount of the bond, then ordinarily depends on the gravity of the potential harm to the enjoined party…Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the mount of the bond accordingly. In some circumstances, a nominal bond may suffice. *See e.g. International Controls Corp. v. Vesco*, 490 F. 2d 1334 (2nd Cir. 1974) (approving district court's fixing bond amount at zero in the absence of evidence regarding likelihood of harm)."]

SO ORDERED.

Dated: _____ _____

THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

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

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

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S APPLICATION
FOR TEMPORARY RESTRAINING ORDER

This case arises out of an extensive attempt by the Defendants (the "City') to require certain disfavored speakers to convey a government-mandated message. The City's Ordinance 20120126-45, ("the Ordinance"), on its face violates the protection of free speech in the United States and Texas Constitutions. The extensive facts and detailed legal analysis can be found in LifeCare's Amended Verified Complaint (Document 30, hereafter the "AVC") and in the Memo Supporting LifeCare's Amended Motion for Preliminary Injunction (Document 31, hereafter "API Memo").

The City's legal counsel has advised LifeCare's legal counsel that the City intends to enforce the Ordinance against LifeCare on its effective date. *See* accompanying Declaration of

Samuel B. Casey (Casey Decl.) ¶ ¶ 5-6. LifeCare's legal counsel has notified the City's legal counsel of LifeCare's intention to apply for a temporary restraining order no later than February 3, 2012. Casey Decl. ¶ 5. Without the temporary injunctive relief requested, LifeCare will be compelled to comply with the unconstitutional Ordinance and post containing the government's unlawful, unnecessary, unjustified and nonsensical message.

ARGUMENT

I. LEGAL STANDARD

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

LifeCare satisfies the "cumulative burden of proving each of the[se] four elements enumerated before a temporary restraining order or preliminary injunction can be granted." *Mississippi Power and Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir.1985) and as such satisfies the equitable purpose for a temporary restraining order to "preserve the *status quo* and prevent irreparable injury just so long as necessary for the Court to hold a hearing" on Plaintiff's' pending amended motion for preliminary injunction. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp*,, 174 F.3d 411,422 (4th Cir. 1999) citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters etc*., 415 U.S. 433, 439, 94 St. Ct. 1113 (1974).

Three similar ordinances have already been the objects of preliminary injunctions in

federal courts. *O'Brien v. Mayor and City Council of Baltimore*, 768 F. Supp. 2d 804 (D. Md. 2011); *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456 (D. Md. 2011); *Evergreen Ass'n v. City of New York*, 801 F.Supp.2d 197 (S.D.N.Y. 2011).

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

A. THE ORDINANCE IS SUBJECT TO STRICT SCRUTINY BECAUSE IT COMPELS SPEECH[1]

The Ordinance forces LifeCare and other pregnancy resource centers ("PRCs") to post a sign communicating a message that they would otherwise not speak and that significantly burdens the conversation and relationship between PRCs and their clients. See AVC at 29-31. It is well established that forcing speech is just as unconstitutional as prohibiting speech. *See Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner I*"), 512 U.S. 624, 642 (1994); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The "right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Wooley*, 430 U.S. at 714 (citing *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Any alleged "difference between compelled speech and compelled silence . . . is without constitutional significance." *Id.* at 796.

B. THE ORDINANCE IS SUBJECT TO STRICT SCRUTINY BECAUSE IT DISCRIMINATES ON THE BASES OF VIEWOINT AND CONTENT[2]

The Ordinance is also unconstitutional as a plain example of unconstitutional viewpoint and content based discrimination. On its face, the Ordinance determines *which* speakers will be regulated based on the topic of their conversation, namely pregnancy. AVC at 14, 31-33. "Content based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382. Entities that

[1] A more detailed analysis can be found at API Memo at 3-5.
[2] A more detailed analysis can be found at API Memo at 5-6.

discuss any health issue besides pregnancy are exempt from the Ordinance, by explicit definition. AVC at 14.

In addition to discriminating on content of speech, the Ordinance discriminates against pro-life speakers because of their viewpoint. The Ordinance is written in such a way that it has the purpose and practical effect of only covering PRCs that do not provide or refer for abortion. AVC at 31-33. Its history (AVC at 12-23) shows unequivocally that it was passed for the constitutionally invalid reason "of disagreement with the message" pro-life pregnancy centers convey. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Ordinance language is gerrymandered not to apply to abortion centers because they have full-time doctors, while necessarily requiring pro-life centers that can't afford full-time doctors to post *explicitly negative* signs, saying they either don't have doctors, or don't have imaginary facility-licenses for ultrasounds, and to erect those signs so they dissuade anyone from entering the facility due to its self-deprecation. AVC at 31-33. Viewpoint discrimination is "an egregious form of content discrimination" and a "blatant" First Amendment violation. *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

C. THE ORDINANCE UTTERLY FAILS STRICT SCRUTINY[3]

Strict scrutiny review under the First Amendment requires that the Ordinance "be narrowly tailored to promote a compelling Government interest" and "if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *see also Riley*, 487 U.S. at 800-01; *Wooley*, 430 U.S. at 715-16. This requirement is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534, (1997). "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. 'It is rare that a

[3] A more detailed analysis can be found at API Memo at 6-10.

regulation restricting speech because of its content will ever be permissible.'" *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted) (quoting *Playboy*, and *R.A.V.*). The City has no compelling interest if its supporting "evidence is not compelling" to substantiate that interest. *Id.* at 2739. The City "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664*; Consol. Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

1. THE ORDINANCE ADVANCES NO COMPELLING INTEREST

The City can cite no compelling interest specific to this Ordinance. AVC at 14-18. It has no evidence at all of a problem, much less one showing the Ordinance to be "actually necessary." The City literally has no evidence of any bad activities of pregnancy centers. The only evidence from the record that the City has are reports about centers elsewhere. But even those reports are not probative, much less compelling, because they are from openly pro-abortion sources, unabashedly targeting pro-life ("anti-choice") centers, and doing so by nothing more than equating "deception" with *saying negative things about abortion*, which is of course an impermissible viewpoint-discriminatory reason to pass a law against speech. In contrast, the Supreme Court in *Brown* rejected the state of California's *scientific studies*, which demonstrated a correlation between violent video games and child-violence, because it was *still* insufficient to prove "causation" of the problem—"ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2738-39. "Deception" in this case is merely a code word for the City's fundamental disagreement with pro-life speech.

The Ordinance's exceptions for abortion-centers with full-time doctors, even when they engage in pregnancy options counseling by persons who aren't doctors and aren't under their supervision, further undermines any alleged compelling interest, because the lack of such an interest is betrayed when a government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546-47.

The City cannot rest on a generic interest in "public health." The determination of whether an asserted interest is compelling "is not to be made in the abstract" but rather "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (rejecting assertion that protecting public health was compelling interest "in the context of these ordinances"). The City has no evidence to justify regulation of *speech about pregnancy by Austin centers without full-time doctors*.

2. THE ORDINANCE IS NOT NARROWLY TAILORED TO ADVANCE ANY INTEREST

The Ordinance is not narrowly tailored to serve any alleged interest. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Ordinance advances no interest against "deception" because it does not actually regulate deceptive practices. Entities are subject to the Ordinance even if they engage in no deception at all, and provide completely truthful "counseling." Likewise, the Ordinance does not regulate false advertising, because it does not target advertising at all. The Ordinance is not tailored to deception.

Defendants must "show that it has adopted the least restrictive means of achieving that interest" *City of Boerne*, 521 U.S. at 534; *Playboy*, 529 U.S. at 813. "In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged

donor misperception, more benign and narrowly tailored options are available." *Riley*, 487 U.S. at 800. *Riley* notes that "the State may vigorously enforce its antifraud laws." *Id.* *Riley* also notes what is completely true here: that the government can serve its interest of promulgating its disclaimers *by doing so itself* instead of forcing private entities to do so. "These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id.*

Nothing prevents the City from using its own, public means to publish information discussed in the disclosures, and the City simply ignores this easy, inexpensive, and less speech-restrictive alternative. There is not a scintilla of evidence of any such speech or advertising by the City. Nothing in the legislative record shows that the City ever considered less restrictive alternatives. AVC at 12-23. Even after repealing one ordinance due to its unconstitutionality, the City chose not to replace it with a less restrictive alternative but instead passed an equally if not more restrictive Ordinance. If the City's interest in this message has not been compelling enough for it to inform women with its own words, it surely is not compelling enough to require Plaintiffs to speak it.[4]

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

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

[4] Even under a lesser standard, the Ordinance would fail judicial scrutiny due to being content-based. In *Sorrell* the Supreme Court scathingly rejected a law whose effect was to disfavor speech to patients by pharmaceutical manufacturers, who while not strictly the only targets of the law were "essentially the only" speakers affected, therefore making the law one that was "designed to impose a specific, content-based burden on protected expression." 131 S. Ct. at 2663-64.

as well as other rights under the First Amendment have been infringed upon from the moment the Ordinance was passed. As such LifeCare and other centers currently suffer irreparable injury and will continue to do so in the absence of preliminary relief. AVC at 40-41.

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

The injury to LifeCare far outweighs any injury to the City of Austin against which the Ordinance is supposed to protect. The Ordinance's impact on LifeCare's speech is extremely significant. Disclaimers are inherently warnings to all readers not to trust the information provided by such speakers. The required disclaimers impose speech that impairs Plaintiff's ability to start and control a sensitive conversation and effectively serve the Austin community. AVC at 24. Disclosures that have the potential for substantially burdening protected speech with an adverse impact on the listener have been directly foreclosed by the Supreme Court. *Riley*, 487 U.S. at 798. On the other hand, Austin suffers little to no harm under a temporary restraining order. The City had and still has zero evidence of the supposed harm that motivated the Ordinance. The City has other means available to deliver its message and combat supposed deceptive practices. The City has never enforced this type of Ordinance, and recently repealed a similar on to "avoid further litigation expense." Casey Decl.¶, Exh. B-5.

V. A TEMPORARY RESTRAINING ORDER WILL SERVE THE PUBLIC'S INTEREST

Enjoining the Ordinance will serve the public's interest. "The public interest is best served by enjoining the effect of any ordinance which limits potentially constitutionally protected expression until it can be conclusively determined that the ordinance withstands constitutional scrutiny." *Wexler v. City of New Orleans*, 267 F. Supp. 2d, 559, 568-69 (E.D. La. 2003). Allowing Pregnancy Centers to serve the public to the best of their abilities, caring for

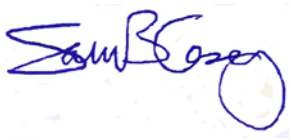
pregnant women in need of assistance and guidance, further serves the public. Where a policy threatens constitutional rights, a temporary restraining order does not disserve the public interest.

CONCLUSION

For the foregoing reasons, on the terms stated in the accompanying proposed Order, Plaintiff respectfully requests that the Court enter a temporary restraining order against enforcement of the Ordinance, with no or nominal security bond required for the reasons set forth in the accompanying APPLICATION FOR TEMPORARY RESTRAINING ORDER, at least until the Court can render its final judgment on Plaintiff's pending amended motion for a preliminary injunction (Document 31).

Dated: February 1, 2012

Respectfully submitted,



Gregory R. Terra, TX Bar No 24042017
Stephen D. Casey, TX Bar No. 24065015
TEXAS CENTER FOR DEFENSE OF LIFE
501 South Austin Avenue, Suite 1130
Georgetown, Texas 78626
Telephone: (512) 763-9068
Fax: (512) 692-2878
greg@tcdl.org
stephen@tcdl.org

Samuel B. Casey, Cal. Bar. No, 76022
David B. Waxman, TX Bar No. 24070817
JUBILEE CAMPAIGN-LAWOF LIFE PROJECT
801 G. Street, N.W., Suite 521
Washington, D.C. 20001
Telephone: (202) 586-5652
Fax: (703) 349-7323
sbcasey@lawoflifeproject.org
dbwaxman@lawoflifeproject.org
ATTORNEYS FOR PLAINTIFF

Matthew S. Bowman
D.C. Bar No. 993261
ALLIANCE DEFENSE FUND
801 G. Street, N.W., Suite 509
Washington, D.C. 20001
Telephone: (202) 393-8690
Fax: 202-347-3622
mbowman@telladf.org

OF COUNSEL:

Professor Mark L. Rienzi
D.C. Bar No. 494336
COLUMBUS SCHOOL OF LAW
THE CATHOLIC UNIV. OF AMERICA
620 Michigan Avenue, N.E.
Washington, D.C. 20064
Telephone: (202) 319-4979
Rienzi@law.edu