Oregon Senate Bill 490 Legal Analysis

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Oregon Senate Bill 490 ("SB 490") is the latest in a long string of legislation, promoted by NARAL and like-minded groups, to undermine the work of pro-life pregnancy resource centers. Although SB 490 is not yet in its final form, it appears that Oregon has taken note of some of the constitutional problems that similar legislation has faced (e.g. viewpoint discrimination) and endeavored to avoid them. Ultimately, however, this remains an instance of compelled speech in a non-commercial context, which is prohibited by the First Amendment.

I. Provisions of SB 490

A. Entities to which SB 490 would apply

SB 490 "applies to an entity if the primary purpose of the entity is to provide pregnancy-related services and the entity advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests or pregnancy options counseling." SB 490 §1(2)(a). Unlike most anti-pregnancy-center legislation, SB 490 does not expressly condition its application upon the entity's refusal to perform or refer for abortion.

Entities are exempted from the provisions of SB 490 if "at all of the entity's sites that are open to the public," the entity employs a physician, naturopath, nurse practitioner, physician assistant, registered nurse, or nurse midwife who is "on-site whenever medical services or treatment is provided." SB 490 §1(2)(b). This exception is very narrow and will not exempt most pregnancy centers, *even those which are fully medically licensed*, for three reasons.

First, SB 490 §1(2)(b)(A) uses the word "employs," which suggests that the medical professional must be paid by the pregnancy center. Many pregnancy centers utilize physicians, nurses, etc. on a volunteer basis only. This allows the pregnancy center to keep costs down and provide care to low-income women and families free of charge. There is no reason to believe that the quality of care provided by a volunteer medical professional is any less than that provided by a paid employee, making this provision entirely irrational.

Second, there must be a medical professional at every site that the entity operates. If a medical pregnancy center has a satellite office or offices that exclusively provides social services (e.g. counseling, parenting classes, baby and maternity products), *all* of the pregnancy center's locations will be covered, including the medical location, as SB 490 is currently written.

Third, although it sounds reasonable to say that the medical professional must be on site "whenever medical services or treatment is provided," an earlier section defines "medical services" to include *pregnancy options counseling and pregnancy testing*. SB 490 §1(1)(a). As a practical matter, to be exempt, the center must have a medical professional on site every day. If a center designates one or two days a week as "medical days" when a volunteer physician or

nurse is available, and provides options counseling or pregnancy testing on other days, the center will *not* be exempt from the disclosure requirement.

This is an attack on the idea that pregnancy options counseling can be effectively provided by trained, compassionate, non-medical volunteers. Pregnancy centers provide options counseling based on accurate and current facts and statistics from medically reviewed studies. Such information is already widely available through various vehicles, including internet searches. As this information is educational in nature and not diagnostic, pregnancy options counseling is not a "medical service" requiring the presence of a physician or nurse.

SB 490 could, in theory, apply to a center that provides or refers for abortions. Many abortion clinics rely on traveling abortionists who are only on-site on designated days of the week. If any such clinic provides options counseling or pregnancy testing on a day when no doctor, nurse, etc. is on site, that clinic will expose itself to liability under SB 490. This may be an intended outcome, meant to bolster the state's case that SB 490 does not constitute viewpoint discrimination, or it may be an unintended outcome.[1] In any event, given Oregon's strongly pro-choice political climate, pregnancy centers are understandably concerned that the bill will be selectively enforced only against those entities with a pro-life viewpoint.

Finally, it is worth noting that SB 490 makes no distinction between entities which offer services for free and those which propose commercial transactions.

B. The disclosure requirement

Covered entities must provide a written disclosure regarding "whether or not" they provide "(a) contraceptive drugs or devices that are approved by the United States Food and Drug Administration; (b) an on-site consultation with [a physician, naturopath, nurse practitioner, physician assistant, registered nurse, or nurse midwife]; (c) adoption services or referral for adoption services; and (d) abortion services or referral for abortion services." SB 490 §1(3).

The "whether or not" language and the inclusion of some services that are commonly provided by pregnancy centers (adoption services or referrals and, for some, on-site consultations) are unique to Oregon's bill. This is likely a response to the pro-life complaint that past disclaimers have focused solely on services that pregnancy centers do *not* provide, while ignoring the positive, helpful services that they *do* provide. Notably absent from the list in SB 490 §1(3), however, are any services which pregnancy centers provide and abortion centers do not,[2] such as parenting classes and free maternity supplies. The end result is that this bill, like its predecessors in other states, promotes a false perception that abortion centers provide everything that pregnancy centers do and more.

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[1] Planned Parenthood has come out in support of the measure and evidently does not think that SB 490 would apply to it. *See* Christopher David Grey, *Planned Parenthood Wants Pregnancy Centers to Display Their Services*, THE LUND REPORT, Apr. 3, 2013, *available at* http://www.thelundreport.org/resource/planned_parenthood_wants_pregnancy_centers_to_display_their_services.

[2] Although abortion centers rarely if ever provide adoption referrals in practice, they are certainly capable of doing so upon request. Planned Parenthood's most recent annual report indicates that Planned Parenthood provides one adoption referral for every 145 abortions it performs. http://issuu.com/actionfund/docs/ppfa_ar_2012_121812_vf/5 (showing 333,964 abortion procedures and 2300 adoption referrals in the year 2011).

In addition, the disclosure regarding FDA-approved "drugs and devices" for contraception is unwarranted in that it narrowly focuses women's minds on particular forms of birth control, regardless of whether or not an FDA-approved drug or device is the best method of family planning for her situation. Pregnancy centers do in fact offer contraception services, in the form of natural family planning and abstinence education; abortion centers typically do not offer these methods, preferring to prescribe drugs and devices. A truly balanced bill would simply require all entities to disclose the methods of contraception that they offer. The narrow focus of SB 490 suggests that fully informing women is not the genuine legislative motive.

The disclosures must be "conspicuously" posted at every pregnancy center entrance, in every waiting area, on the center's website, and on all advertisements. SB 490 §1(4)(a). This will result in clients seeing the disclaimer far more times than is reasonably necessary to convey the information.

In addition, the disclosures must be "written and provided in a manner that a reasonable person is likely to read and understand before accepting the services described in subsection (2)(a) of this section"—namely, prenatal sonography, pregnancy tests, and pregnancy options counseling. SB 490 §1(4)(b). This provision is troubling for two reasons.

First, as will be discussed more fully in the "Constitutional Issues" section of this memo, SB 490 §1(4)(b) is unclear to the point of being unconstitutionally vague. What is a reasonable person likely to read? The notices at the entrance, waiting room, etc. required by SB §1(4)(a) are probably things that a reasonable person would be likely to read and understand (and if not, why require them?), but would they also satisfy the mandate of §1(4)(b)? Given the use of the word "and" between SB 490 §1(4)(a) and (b), the answer would seem to be no—Oregon wants yet another notice. But what shall this additional written notice be? Perhaps a form signed by the client? (Is a reasonable person *likely to read* the details of every form she signs?)

Second, §1(4)(b) seems to suggest that the additional notice must come immediately before a client accepts a service (although this too is unclear). That would lead to some bizarre outcomes, such as the center being required to notify a pregnant client that it does not offer FDA-approved contraceptive drugs and devices before she can obtain her sonogram.

Perhaps the committee already recognizes the potential for confusion, because SB 490 §3 does direct the Oregon Health Authority to "adopt rules to carry out the provisions of sections 1 and 2 of this 2013 Act." Unfortunately, there is no way to know in advance what these rules would be.

C. Procedure and penalties

If a pregnancy center's disclosures are not sufficiently "conspicuous" in the opinion of the Oregon Health Authority, the pregnancy center will receive a written notice and will have five days to cure the violation without a penalty. SB 490 §2(1). If the Oregon Health Authority remains unsatisfied after five days, the pregnancy center will be fined between $250 and $1000. SB 490 §2(2). A week after that, the fine increases to up to $5000, SB 490 §2(3), and a week after that, the fine increases to up to $10,000 per week, SB 490 §2(4).

Pregnancy resource centers are non-profit, low-budget, and largely volunteer-run entities. A fine of $1000, $5000, or $10,000 could wreak havoc on a center's finances, compromising the availability of services to low-income Oregon women.

D. Effective date and declaration of emergency

When it comes to the effective date of the measure, SB 490 contradicts itself. SB 490 §4(1) states that sections 1 and 2 (the substantive provisions of the bill) shall "become operative on October 1, 2013." But SB 490 §5 says differently: "This 2013 Act being necessary for the immediate preservation of the public peace, health, and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage."

Setting aside the ridiculousness of declaring an emergency over an imaginary threat to the "public peace, health, and safety" from charities that help pregnant women who choose life, the conflicting effective dates create a serious problem for pregnancy centers. Between the enactment date and October 1, 2013, it will be unclear whether or not a pregnancy center must comply with the act's disclosure requirements. A pregnancy center that guesses wrong could be subjected to crippling fines, as discussed above.

II. Constitutional Issues

A. SB 490 raises First Amendment concerns

As discussed above, the authors of SB 490 have attempted to avoid offending the First Amendment prohibition on viewpoint discrimination by making this bill equally applicable to entities that are pro-life and those that are pro-choice. However, viewpoint discrimination is only one of two First Amendment arguments that have been advanced against pregnancy center speech regulations. The other is that governments cannot compel speech where no commercial transaction is being proposed, unless the compelled speech is the least restrictive means available to achieve a compelling government interest. SB 490 cannot meet this test and is therefore unconstitutional.

The Fourth Circuit Court of Appeals recently struck down a Baltimore ordinance requiring disclosures from pro-life pregnancy centers. *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council*, 683 F.3d 539 (4th Cir. 2012) (affirming District Court judgment that law compelling speech by pregnancy centers that do not provide or refer for abortions is unconstitutional). Although that ordinance was also viewpoint-discriminatory, the Fourth Circuit primarily relied on the non-commercial speech rationale to apply strict scrutiny and find the legislation unconstitutional:

> [T]he City asserts that although many pregnancy centers operate as non profits, they effectively engage in commerce by offering pregnancy testing, sonograms, and options counseling, "all of which have commercial value, garnering payments and fees in the marketplace." The City's formulation of the commercial speech doctrine, however, is not supported by the law. …

> Rather than regulating traditional commercial advertising, Ordinance 09-252 targets speech regarding the provision of "free services." While this fact alone might not be dispositive, it becomes so in this case because there is no indication that the Pregnancy Center is motivated by any economic interest or that it is proposing any commercial transaction. The Pregnancy Center seeks to provide free information about pregnancy, abortion, and birth control as informed by a religious and political belief. This kind of ideologically driven speech has routinely been afforded the highest levels of First Amendment protection, even when accompanied by offers of commercially valuable services.
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> The City's argument does not address what commercial transaction is proposed by the Pregnancy Center's speech or what economic interest motivates the Pregnancy Center's speech. Instead, the City would define commercial speech to include any speech that offers services "which have commercial value, garnering payments and fees in the marketplace" generally. Adopting this definition of commercial speech would effect an unprecedented expansion of the commercial speech doctrine and is unsupported by citation to any applicable Supreme Court precedent. As the district court explained, the City's position would mean that "any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection." Indeed, it is difficult to imagine any charitable organization whose speech would not be considered "commercial" under the City's proposed broad definition.
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> In short, we agree with the district court that the pregnancy centers are not engaged in commercial speech and that their speech cannot be denied the full protection of strict scrutiny on that basis.

Id. at 553-54 (internal citations and parentheticals omitted).

SB 490 applies even when the entity offers all services free of charge. Accordingly, the speech that SB 490 compels will be analyzed under the strict scrutiny standard. "It is well-established that a regulation compelling noncommercial speech is subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest." *Greater Baltimore*, 683 F.3d at 552 (*citing United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), and *Riley v. National Federation of Blind, Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)). In order for a statute to be narrowly tailored, it must be the least restrictive means among available alternatives. In this case, the burden would be on the State to show that there is (1) a compelling government interest and (2) that it is narrowly tailored. In this instance, the State has neither produced nor received any evidence that the Bill is needed to serve a compelling state interest.

Furthermore, SB 490 is not the least restrictive means among available alternatives. If a problem does exist, Oregon "always retains the option of prosecuting violations of its criminal and civil

laws that proscribe deceptive advertising and deceptive statements made by pregnancy centers," rather than compelling speech. *Greater Baltimore*, 683 F.3d at 558.

Additionally, the provisions of SB 490 are themselves overly burdensome. SB 490 does not merely prohibit deceptive behavior; it requires pregnancy centers to provide affirmative disclosures, and to do so multiple times: in their advertising, on their websites, at their entrances, in their waiting rooms, and once more before a client can receive certain services. This means that every client who visits the center will receive the disclaimer at least three times, and quite likely four or five times! Given this excess, a court would likely find that SB 490 is not narrowly tailored, and is therefore unconstitutional.

B. SB 490 Raises Due Process Concerns

SB 490 presents serious due process concerns. The language of the proposed legislation is vague and ambiguous. In order to be constitutional, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply the statute in order to avoid arbitrary and discriminatory enforcement. *See Upton v. S.E.C.*, 75 F.3d 92, Fed. Sec. L. Rep. (CCH) ¶99011 (2d Cir. 1996); *U.S. v. Wunsch*, 84 F.3d 1110 (9th Cit. 1996); *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996).

SB 490 does not come close to meeting this standard. Several key terms are undefined and open to considerable interpretation, most notably: what it means for a posting to be sufficiently "conspicuous" under SB 490 §1(4)(a); the nature of the additional written notice that a reasonable person must be likely not only to understand, but also to likely to *read* (§1(4)(b)); and even, as mentioned previously, when the legislation goes into effect!

C. Misuse of a Government Actor

Pro-abortion advocacy organizations, principally NARAL, have been the primary proponents of legislation imposing regulations on pregnancy centers. The abortion debate is better suited for the public square, without abortion advocates enlisting a government actor to needlessly harass pro-life charities. This is a misuse of the Oregon Senate and is outside its jurisdiction and proper functions. Neither pro-abortion proponents nor the state of Oregon has demonstrated a need for this bill. Rather, SB 490 is designed to emphasize an ideological complaint that pro-abortion advocates have with regard to pregnancy centers.

III. Conclusion

SB 490 violates the First Amendment and is unconstitutionally vague, exposing Oregon to the likelihood of a costly legal challenge. Pursuing such legislation is a waste of Oregon's time and resources.

SB 490 unnecessarily regulates pregnancy centers which already voluntarily operate under high standards of professionalism. The overwhelming majority of pregnancy centers are part of an affiliation organization such as Care Net, National Institute for Family and Life Advocates (NIFLA), and Heartbeat International. Each of these affiliation organizations maintains a legal

department and provides centers with legal education and other services, such as legal manuals, policy and procedure manuals, legal updates, and other materials reviewed and approved by legal and medical professionals. The array of services offered by these groups is designed to ensure that centers are operating in compliance with state and federal laws and providing only truthful and accurate information.

Pregnancy centers are credible institutions held to high standards set by professionals in the industry. Centers comply with laws and offer a tremendous service to their communities—services that sometimes cannot be found in any other institution. SB 490 seeks only to unfairly discredit these worthy organizations, and it does so in a way that is demonstrably unconstitutional.

For these reasons, **we urge you to oppose Senate Bill 490.**