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PROTECTING PREGNANT PENNSYLVANIANS: PUBLIC FUNDING OF CRISIS PREGNANCY CENTERS*

Meagan McElroy**

I. INTRODUCTION

Although crisis pregnancy centers (CPCs) have existed since before the United States Supreme Court recognized the constitutional right to choose abortion in *Roe v. Wade*, these pseudo-medical, quasi-religious organizations have expanded prolifically in the past decade.¹ CPCs pose as medical clinics to lure women with unwanted pregnancies who are considering abortion, known within the anti-abortion movement as “abortion-prone”² or “abortion minded” women,³ into visiting their centers. CPC staffers then attempt to convince these women to carry their pregnancies to term, often using inaccurate information regarding fetal development and medical risks of abortion.⁴ Such tactics emotionally harm the women CPC organizers claim they wish to protect and may cause physical harm to women whose abortions are delayed by the inaccurate information CPCs promulgate.

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¹ See Alice X. Chen, Note, *Crisis Pregnancy Centers: Impeding the Right to Informed Decision Making*, 19 CARDOZO J.L. & GENDER 933, 934 (2013).

² See Gregg Cunningham, *Pro-Aborts Meaner Than Gators at the University of Florida*, IN PERSPECTIVE (Fall 2000), <http://www.abortionno.org/wp-content/uploads/2012/06/proabortsmeaner.pdf>.

³ See *Should Crisis Pregnancy Centers Use Graphic Visual Aids?*, PRIESTS FOR LIFE 1, <http://www.priestsforlife.org/resources/abortionimages/graphcpc.pdf> (last visited Oct. 21, 2014).

⁴ See *Exposing Anti-Choice Crisis Pregnancy Centers*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/get-involved/issue-campaigns/crisis-pregnancy-center-campaign.html> (last visited Oct. 21, 2014).

In Pennsylvania, CPCs receive substantial state government funding for the express purpose of promoting “alternatives to abortion services.”⁵ Although numerous states indirectly fund CPCs through fundraising programs such as “Choose Life” license plates,⁶ Pennsylvania is one of a small number of states pioneering a relatively new model of a state “abortion alternative” program run and directly funded by the Department of Welfare (DPW). These state-funded CPCs employ the same notorious tactics that have garnered increasing scrutiny from abortion-rights advocacy organizations.⁷ Abortion-rights advocates must continue to bring further attention to the deceptive practices of CPCs, which very rarely prevent a woman from actually procuring an abortion, and succeed only in inflicting emotional, psychological, physical, and financial harm upon her. Legal advocates on behalf of women’s rights must explore avenues to protect pregnant Pennsylvanians from this harmful deception.

Following a brief overview of the history of CPCs in the United States and the “abortion alternatives” program in Pennsylvania, this Note examines possible legal claims in terms of legal standards and likelihood of success. The results of a Right to Know (RTK) request directed toward the Pennsylvania DPW, including both what the DPW offered to produce and what it refused to produce, will supplement this evaluation of possible legal claims. This Note also proposes public policy recommendations aimed at eliminating the DPW’s liability for these claims in the interest of preventing abusive tactics by CPCs and conserving public funds. Finally, the relative benefits and disadvantages of legislative and regulatory reform will be compared to those of litigation. Either litigative or legislative action is necessary to prevent publically funded CPCs from inflicting further harm on pregnant Pennsylvanians.

⁵ See *Alternatives to Abortion Services Program*, PA. DEPT. PUB. WELFARE, <http://www.dpw.state.pa.us/foradults/alternativestoabortionsservicesprogram/index.htm> (last updated Feb. 21, 2012) [hereinafter *DPW Program Website*].

⁶ Eleanor J. Bader, *License to Lie*, RH REALITY CHECK (Apr. 15, 2008, 8:48 AM), <http://rhrealitycheck.org/article/2008/04/15/license-to-lie/>.

⁷ See *Exposing Anti-Choice Crisis Pregnancy Centers*, *supra* note 4.

II. HISTORY AND CURRENT OPERATIONS OF CPCs IN THE UNITED STATES

Robert Pearson, an anti-abortion activist, founded the first CPC in Hawaii following that state's consideration of abortion reform in 1967.⁸ Following *Roe*, he founded the Pearson Foundation to proselytize and foster the spread of his CPC model of providing pro-life "counseling" in a clinical setting similar to that of abortion clinics.⁹ Pearson referred to women seeking abortion as "killers," characterized stopping abortion as "fighting Satan," and justified the deceptive practices he advocated by arguing, "A killer, who in this case is the girl who wants to kill her baby, has no right to information that will help her [do that]."¹⁰ In the 1980s, CPCs were also utilized and promoted by anti-abortion activists such as Randall Terry and Operation Rescue,¹¹ an organization that advocated direct physical intervention to block access to abortion clinics.¹²

True to Robert Pearson's blueprint, which included his opinion that "there is nothing wrong or dishonest if you don't want to answer a question that may reveal your pro-life position by changing the caller's train of thought by asking a question in return," CPCs do not hesitate to deceive women regarding their true agendas.¹³ These centers purposely locate themselves in close proximity to abortion clinics in order to confuse and deceive women seeking abortions.¹⁴ The rationale for sowing this intentional confusion, according to one anti-abortion activist: "The best client you ever get is one that thin[ks] they're walking into an abortion clinic. Those are the best clients that could ever walk in your door or call your center, the ones that

⁸ *Hawaii: Did You Know?*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/did-you-know/hawaii.html> (last visited Oct. 21, 2014) [hereinafter *Hawaii*]; DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 319 (1998).

⁹ *Hawaii*, *supra* note 8.

¹⁰ *Id.*

¹¹ JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 248 (1998).

¹² *Id.*

¹³ Judith Davidoff, *Pregnant? Scared? Abortion Risks Are Exaggerated at Wisconsin's Crisis Pregnancy Centers*, ISTHMUS (Jan. 31, 2013, 9:00 AM), <http://www.isthmus.com/isthmus/article.php?article=38954>.

¹⁴ Dan Harris, *Clinics Try to Steer Women From Abortions*, ABC NEWS (Nov. 16, 2006), <http://abcnews.go.com/WNT/story?id=2659682>.

think you provide abortions.”¹⁵ CPCs’ deception thus extends even to the kind of facility they hold themselves out as.¹⁶

CPCs justify their acceptance of federal and state funding on the premise that they give full and complete information on all possible choices to women with unplanned pregnancies. However, CPC workers and volunteers will go to great lengths to distort medical facts regarding abortion, emergency contraception, birth control pills, and condoms in furtherance of their religious convictions against abortion.¹⁷ Although a comprehensive accounting of all medically inaccurate information disseminated at CPCs is unattainable without cost-prohibitive surveying of each of the thousands of CPCs in the United States, documented inaccuracies abound at different centers, and have included claims that:

- all abortions carry a risk of future infertility;¹⁸
- many women, after procuring an abortion, suffer from a fictitious mental health disorder called “Post-Abortion Syndrome,” with symptoms including drug addiction and eating disorders;¹⁹
- abortion increases a woman’s risk of breast cancer;²⁰

¹⁵ See Charlotte Cassel, “Have an Abortion and Ruin Your Life” and Other Dangerous Lies Recorded at a Cleveland Crisis Pregnancy Center, NAT’L WOMEN’S L. CTR. (June 26, 2013), <http://www.nwlc.org/our-blog/have-abortion-and-ruin-your-life-and-other-dangerous-lies-recorded-cleveland-crisis-pregnan>.

¹⁶ See Harris, *supra* note 14 (quoting a staffer who works for a CPC located in the same building as two abortion clinics as saying, “We want to beat the abortionists to reaching these mothers. There’s no doubt about it.”).

¹⁷ See *Common Lies Told By Crisis Pregnancy Centers*, NARAL PRO-CHOICE VA., <http://www.naralva.org/what-is-choice/cpc/common-lies.shtml> (last visited Oct. 21, 2014) [hereinafter *Common Lies*]; Jill, *Inside a “Crisis Pregnancy Center,”* FEMINISTE (Apr. 30, 2009), <http://www.feministe.us/blog/archives/2009/04/30/inside-a-crisis-pregnancy-center/> [hereinafter *Inside*]; Susan Brinkmann, *Pro-Abortion Undercover Sting Backfires!*, WOMEN OF GRACE (Aug. 9, 2013), <http://www.womenofgrace.com/blog/?p=23373>; Harris, *supra* note 14.

¹⁸ See *Common Lies*, *supra* note 17; *Inside*, *supra* note 17; Brinkmann, *supra* note 17; Harris, *supra* note 14.

¹⁹ See *Common Lies*, *supra* note 17; *Inside*, *supra* note 17; Brinkmann, *supra* note 17; Harris, *supra* note 14.

²⁰ See *Common Lies*, *supra* note 17; *Inside*, *supra* note 17; Brinkmann, *supra* note 17; Harris, *supra* note 14.

- condoms fail to protect against pregnancy or infection with sexually transmitted infections (STIs) because there are holes in condoms big enough for sperm, viruses, and bacteria to “leak” through;²¹
- oral contraceptives, including birth control pills and emergency contraception, cause abortions;²²
- the Food and Drug Administration (FDA) is under investigation for approving RU-486, the “abortion pill”;²³ and
- abortion can cause a woman’s body to produce antibodies that would attack a fetus if she ever got pregnant again.²⁴

Many CPCs advertise free pregnancy tests that are not actually free because the CPCs require “clients” to complete a session in which they must listen to a counselor (who is not required to be licensed) impart this false information before being told of the results of the drugstore-quality pregnancy test that CPC staffers have administered.²⁵ CPCs also attempt to convince women not to seek abortions by exaggerating rates of miscarriage, implying that since pregnancies tend to spontaneously abort, there is no need to seek out induced abortion.²⁶ More recently, CPCs have taken advantage of this particular mode of deception to justify medically unnecessary ultrasounds conducted by unqualified technicians, ostensibly to “see if the fetus is viable,” but with the real purpose of using the fetal ultrasound as yet another method of persuasion to deceive women into carrying their pregnancies to term.²⁷

These fallacies manipulate proven medical facts in order to dishonestly portray abortion, birth control, and sexual activity in general as much more

²¹ See *Common Lies*, *supra* note 17; *Inside*, *supra* note 17; Brinkmann, *supra* note 17; Harris, *supra* note 14.

²² See *Common Lies*, *supra* note 17; *Inside*, *supra* note 17; Brinkmann, *supra* note 17; Harris, *supra* note 14.

²³ See *Common Lies*, *supra* note 17; *Inside*, *supra* note 17; Brinkmann, *supra* note 17; Harris, *supra* note 14.

²⁴ See *Common Lies*, *supra* note 17; *Inside*, *supra* note 17; Brinkmann, *supra* note 17; Harris, *supra* note 14.

²⁵ Cassel, *supra* note 15.

²⁶ *Common Lies*, *supra* note 17.

²⁷ *Inside*, *supra* note 17.

dangerous than they actually are.²⁸ For example, CPCs continue to exploit the fictional link between abortion and breast cancer because women who have children are statistically less likely to develop breast cancer.²⁹ CPCs brush over the fact that this finding predicts the same chances of developing breast cancer for women who have never gotten pregnant and for women who have become pregnant and terminated those pregnancies. The American Cancer Society, the American Medical Association, and the National Cancer Institute have found no scientific link between abortion or miscarriage and breast cancer.³⁰

In 2006, United States Representative Henry A. Waxman commissioned a report concerning CPCs that began receiving exponentially increased federal funding under President George W. Bush's faith-based initiatives.³¹ The report found that 87 percent of federally funded centers at which a counselor was able to be reached provided false or misleading information to the callers, particularly relating to fictitious links between abortion and breast cancer, abortion and infertility, and abortion and mental illness.³²

III. PENNSYLVANIA'S "ABORTION ALTERNATIVES" PROGRAM

A. *History of Pennsylvania's Program*

The Pennsylvania state government's complicity in this deception began in 1999, when Governor Bob Casey struck a gentleman's agreement with abortion-rights activists. The agreement entailed state government matching cent-for-cent its funding of family planning programs like those operated by Planned Parenthood with equal funding for CPCs in Pennsylvania.³³ In order to ensure the existence of enough CPCs to receive the millions of dollars such a deal would entail, the state entered into a "grant agreement" with Real Alternatives (RA), a nonprofit

²⁸ *Common Lies*, *supra* note 17.

²⁹ *Id.*

³⁰ *Id.*

³¹ U.S. HOUSE OF REPRESENTATIVES, COMM. ON GOV'T REFORM-MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., PREPARED FOR REP. HENRY A. WAXMAN, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS (July 2006), available at <http://www.chsourcebook.com/articles/waxman2.pdf> [hereinafter HOUSE REPORT]; Chen, *supra* note 1, at 938.

³² HOUSE REPORT, *supra* note 31, at 7.

³³ Holly Otterbein, Op-Ed., *Cash and Carry*, PHILA. CITY PAPER, Aug. 18, 2011, available at <http://citypaper.net/Cash-and-Carry/>.

organization designed to funnel Pennsylvania taxpayer funds to CPCs throughout the state.³⁴ Although Pennsylvania ceased matching family planning and CPC funding in 2008, RA has grown and expanded through state budget appropriations marked as “Expanded Medical Services.”³⁵ Pennsylvania’s DPW nominally administers the state’s “abortion alternatives” program and is responsible for monitoring RA’s day-to-day management of this public funding.³⁶

The website for RA replicates many of the tactics of CPCs themselves, including describing abortions as invasive, gruesome ordeals,³⁷ portraying the choice to have an abortion as invariably the result of pressure from parents and boyfriends (the possibility of married women considering abortion is not even fathomed),³⁸ and persuading women to delay seeking abortion even if they know they do not want to be pregnant with “advice” such as, “Rushing into important decisions is usually not a smart idea.”³⁹ Such advice is particularly disingenuous considering the long wait times pregnant women must endure between attempting to schedule an abortion and actually undergoing the procedure. Wait times may even be so long that women are forced to undergo surgical abortions when they could have received far less invasive medical abortions if they had been able to schedule a procedure promptly. Pennsylvania Governor Tom Corbett has personally endorsed RA and boasted, “We’ve had over 189,000 women go through the program.”⁴⁰ RA claims that 87 percent of women who have been to a CPC say they will not seek an abortion,⁴¹ despite evidence that the effect of CPCs on women’s decisions to abort is “negligible.”⁴²

³⁴ *Pennsylvania Department of Welfare Grant Agreement*, PA. TREASURY, 1 (Aug. 15, 2012), http://contracts.patreasury.gov/Admin/Upload/203444_4100060934.pdf [hereinafter *Grant Agreement*].

³⁵ *Id.* at 1.

³⁶ *DPW Program Site*, *supra* note 5.

³⁷ *See Abortion Procedures*, REAL ALTERNATIVES, <http://www.realalternatives.org/pregnant/alternatives/abortion/procedures.htm> (last visited Oct. 21, 2014).

³⁸ *See Forced Abortions*, REAL ALTERNATIVES, <http://www.realalternatives.org/pregnant/alternatives/abortion/forcedabortion.htm> (last visited Oct. 21, 2014) [hereinafter *Forced Abortions*].

³⁹ *See Think You’re Pregnant?*, REAL ALTERNATIVES, <http://www.realalternatives.org/pregnant/> (last visited Oct. 21, 2014).

⁴⁰ Paul Strand, *State’s Funds Offer ‘Real Alternatives’ to Abortion*, CBN NEWS (June 25, 2013), <http://www.cbn.com/cbnnews/us/2013/June/Pa-Tax-Dollars-Offer-Real-Alternatives-to-Abortion/>.

⁴¹ *Id.*

⁴² RISEN & THOMAS, *supra* note 11, at 251.

B. DPW's Response to Right to Know Request

On December 11, 2013, a request was submitted to the DPW regarding its Alternatives to Abortion Program pursuant to Pennsylvania's RTK Law.⁴³ This submission requested access to public records, including:

- The "contract file" outlining the bidding and award process for DPW's contract with RA to administer Pennsylvania's Alternatives to Abortion Services Program, including but not limited to: copies of DPW's two (2) most recent contracts with RA and the total amount of funds granted to RA by the DPW for the calendar years 2013 and 2014;
- Documents related to fees from service providers reimbursed by RA for the calendar years 2012 and 2013, including but not limited to: fee totals and how those fees, including those for "counseling services," were calculated;
- The two (2) most recent annual monitoring or compliance reports concerning RA (whether submitted by RA or tabulated by the DPW), including but not limited to: background checks, child abuse clearances, and annual mandatory Program training completion;
- Documents related to the standards referred to on DPW's Alternatives to Abortion Services website, which speaks of crisis pregnancy centers being "monitored annually to ensure compliance with the Department of Public Welfare standards";
- Any client complaint or grievance reports filed with the DPW, RA, or any of its service providers for the calendar years 2012 and 2013;
- Any noncompliance reports or citations issued by the DPW concerning RA or its sub-grantees for the calendar years 2011 and 2012;
- The DPW's current or most recent list of RA service providers or sub-grantees;
- The governing documents and two most recent annual financial reports of RA for fiscal years 2012 and 2013;

⁴³ 65 PA. CONS. STAT. §§ 67.101–67.3104 (2014).

- Documents related to RA's out-of-state consulting expenditures, including but not limited to: travel vouchers and costs of transportation and lodging;
- Documents concerning meetings held, including official or unofficial minutes, or written actions undertaken during the years 2012 and 2013 by RA's governing body or board of directors;
- Documents detailing the job descriptions and salaries of RA's corporate office staff in Harrisburg;
- Any "scripts," educational, or publicity materials provided to RA's hotline (1-888-LIFE AID) operators and/or counselors;
- Documents related to program outreach efforts used in the calendar years 2012 and 2013, including but not limited to: letters, brochures, and advertising items (whether directed to other organizations or the public at large);
- Documents related to any educational materials used by RA or its sub-grantees in the calendar years 2012 and 2013, including but not limited to: pamphlets, miniatures of posters, and listings of books;
- Program materials used by Real Alternatives to train service providers used in the calendar years 2012 and 2013, including but not limited to any materials related to the Real Alternatives Program and Instructional Design (RAPID) system;
- Training materials used in the calendar years 2012 and 2013 by service providers to train employees and/or counselors;
- Any documents relating to RA's written document retention and destruction policy; and
- Documents related to the process for determining compensation for RA's CEO, Executive Director, and other officers or key employees (including PA Program Director), including but not limited to: review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision.

The DPW granted many of these requests, albeit subject to payment of \$424.50 in duplication fees without the option to access and duplicate the records

free of charge.⁴⁴ After a requestor's appeal and agency petition for reconsideration, quarterly and yearly status reports were eventually delivered, and DPW provided electronic access to DPW's publically available contract with RA to administer the "abortion alternatives" program.⁴⁵ Significant features of the contract include a section devoted to delineating the acceptable manners in which CPC counselors are permitted to pray for "clients."⁴⁶

After a requestor appeal of the \$424.50 fee as well as several denials of requests, RA intervened in the appeal as a Direct Interest Party.⁴⁷ The Office of Open Records (OOR) issued a Final Determination that DPW could charge only \$7 for a rewritable CD on which to respond to the RTK request since the documents requested were already available electronically, rather than using a per-page calculation that resulted in the \$424.50 fee.⁴⁸ The OOR's Final Determination also found that the request for training materials used in the calendar years 2012 and 2013 by service providers to train employees and/or counselors was improperly denied.⁴⁹ RA filed a petition for reconsideration of the OOR's decision that DPW improperly denied requests for training materials used in calendar years 2012 and 2013 by service providers to train employees and/or counselors.⁵⁰ The OOR granted this petition, and reversed its previous determination concerning the training material request, on June 9, 2014.⁵¹ On or around July 11 and August 15, 2014, the DPW finally responded in full to the granted portions of the RTK request.

⁴⁴ This fee assessment was appealed and ultimately reduced to a fee of \$7. *See* Final Determination, McElroy v. Pa. Dept. of Public Welfare, Docket No. AP 2014-0194 (Apr. 9, 2014), <http://dced.state.pa.us/open-records/final-determinations/FileHandler.ashx?FileID=13209> [hereinafter Final Determination].

⁴⁵ *See Grant Agreement, supra* note 34.

⁴⁶ *Id.* at Rider 2, Alternative to Abortion Services Program Fiscal Year 2012/2013 to 2016/2017, Work Plan, 11.

⁴⁷ *See* Final Determination, *supra* note 44, at 3.

⁴⁸ *Id.* at 17.

⁴⁹ *Id.* at 15–16.

⁵⁰ Final Determination Upon Reconsideration, McElroy v. Pa. Dept. of Public Welfare, Docket No. AP 2014-0194 (June 9, 2014), <http://dced.state.pa.us/open-records/final-determinations/FileHandler.ashx?FileID=15606>.

⁵¹ *Id.*

IV. CLAIMS AGAINST CPCs

A. Federal Constitutional Claim

The most prominent federal claim against Pennsylvania's publically funded CPCs would be a 42 U.S.C. § 1983⁵² discrimination claim alleging violations of the Establishment Clause.⁵³ In order for Pennsylvania's direct sponsorship of CPCs through RA to be upheld under the Establishment Clause, it must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and it must not foster excessive government entanglement with religion.⁵⁴ In *Lemon v. Kurtzman*, the United States Supreme Court struck down two statutes supporting nonpublic, religious schools in Pennsylvania and Rhode Island because they failed to fulfill the requirement of not fostering excessive government entanglement with religion.⁵⁵ The Court cited the "divisive political potential"⁵⁶ of the programs and the possibility of progression leading toward the establishment of state churches and state religion as bases of entanglement.⁵⁷

As with the private school funding, advocates could argue that CPCs fail the *Lemon* test, particularly with regard to CPCs operated through overtly religious organizations such as the Catholic Church. Although the CPCs proclaim an ostensible purpose of neutrally informing pregnant Pennsylvanians of all possible options regarding how to face an unwanted pregnancy,⁵⁸ the evidence implies that their actual purpose is to dissuade women from seeking abortion by any means necessary because of religious conviction that abortion is a sin.⁵⁹ The duplicitous nature of this proclaimed purpose and the methods used to accomplish their actual purpose aside, a court could nonetheless find that Pennsylvania's interest in fetal

⁵² 42 U.S.C. § 1983 (2012).

⁵³ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

⁵⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

⁵⁵ *Id.* at 615.

⁵⁶ *Id.* at 622.

⁵⁷ *Id.* at 624.

⁵⁸ *DPW Program Website*, *supra* note 5.

⁵⁹ *See* Brinkman, *supra* note 17 (quoting a Bible verse in the website banner).

life under *Planned Parenthood v. Casey* satisfies the secular purpose prong of the *Lemon* test.⁶⁰

Similarly, a court could find that Pennsylvania's funding of CPCs, while having the incidental effect of promoting Christian belief in the sinfulness of abortion, satisfies the second prong of the *Lemon* test: that the funding has a principal or primary effect that neither advances nor inhibits religion. Such a conclusion would strain credulity in the face of the obvious religious motivations of many CPCs. However, *Casey*'s approval of protection of fetal life as a permissible state purpose,⁶¹ and the Pennsylvania legislature's ostensible intent that the "abortion alternatives" program have the principal or primary effect of CPCs providing "alternative-to-abortion" services on par with family planning services,⁶² could convince a court that Pennsylvania's CPC funding satisfies the second prong of the *Lemon* test.

The strongest argument to be made against Pennsylvania's CPCs under the *Lemon* test lies in its third prong: that the state action does not foster excessive government entanglement with religion. As with the private school funding statutes at issue in *Lemon*, Pennsylvania's "abortion alternatives" program involves direct funding and sponsorship of overtly religious organizations. RA funnels state and federal funds to smaller, religiously oriented CPCs, and the ostensibly non-religious non-profit organization itself shows its actual religious motivations through its virulent opposition to abortion and well-hidden, passing references to religion woven throughout its materials.⁶³

As articulated in *Lemon*, "a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of

⁶⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").

⁶¹ *Id.*

⁶² See *DPW Program Website*, *supra* note 5.

⁶³ *Public Affairs Kit—History*, REAL ALTERNATIVES, <http://www.realalternatives.org/presskit/History.htm> (last visited Oct. 21, 2014) (Remarks of Dr. William K. Thierfelder at Real Alternatives Seventh Annual Service Providers Conference and Banquet conclude with "God Bless You."; Remarks of Pennsylvania State Representative Jerald M. Birmelin at Real Alternatives Eleventh Annual Service Providers Conference and Banquet include, "Do what you can, where you are, with what you have, and God will bless you for it . . .") [hereinafter *Public Affairs Kit*].

statutory or administrative standards.”⁶⁴ In the case of Pennsylvania CPCs, administrative standards include the DPW’s assurance that CPCs are “monitored annually to ensure compliance with the DPW standards, and staffed with caring professionals and trained counselors,”⁶⁵ a seemingly innocuous statement that entails annual monitoring, the articulation of standards to enforce (presumably including a guarantee as to the accuracy of medical information dispensed at the centers), and the qualification of those staffing CPCs as “professionals” and “trained.”

Most persuasively concerning excessive entanglement, the Grant Agreement details the circumstances under which CPC counselors may or may not pray under Program restrictions as a condition of public funding.⁶⁶ These restrictions include the distinctions and restrictions that:

[C]ounselors are expected to only assess clients’ spiritual needs but not meet them. Counselors can ask questions about how the client’s faith background impacts her decisions, support system, and ability to cope with her current crisis [a.k.a. unwanted pregnancy], but they are not permitted to encourage clients to attend a certain church, or believe in a certain faith. Counselors may provide clients a referral to a minister of a client’s faith such as a rabbi, priest or pastor for further discussion [sic] her spiritual needs Even if a client expresses a desire for prayer during the counseling sessions, counselors must explain that as a government-funded service, praying with clients is beyond the scope of what can be discussed while services are provided. **A counselor may of course pray for the client any time so long as the prayer is not verbalized or done in a silent manner so as not to interrupt the counseling session or suggest that prayer is occurring.**⁶⁷

These seemingly arbitrary distinctions concerning when religious belief can factor into CPC staffer-client interactions encourage the conflation of “spiritual counseling” and ostensibly secular counseling. In particular, legal restrictions on the manner in which CPC counselors may pray within the parameters of the

⁶⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971).

⁶⁵ *DPW Program Website*, *supra* note 5.

⁶⁶ *See Grant Agreement*, *supra* note 34, at Rider 2, Alternative to Abortion Services Program Fiscal Year 2012/2013 to 2016/2017, Work Plan, 11.

⁶⁷ *Id.* (emphasis added).

contract suggest excessive entanglement between this publically funded program and the sub-grantees' religious activities.

Although a persuasive case can be made to analogize Pennsylvania's funding of CPCs to state funding of private religious schools in *Lemon*, the Supreme Court has shown reluctance in recent cases to find violations of the First Amendment's Religious Clauses.⁶⁸ Certain Supreme Court Justices have also expressed criticism of and a desire to move away from application of the *Lemon* test.⁶⁹ Regardless, *Lemon* remains good law, and its factual similarities to Pennsylvania's publically funded CPCs warrant a vigorous prosecution of this claim. Additionally, basing a litigation attack on CPCs around a constitutional claim would allow advocates to bring such a claim in federal rather than state court, where state political considerations may result in a less favorable environment for considering the constitutionality or liability of a program that currently enjoys majority political support in the legislature.

B. State Law Claims

Numerous other state claims could also be brought in federal court, in addition to an Establishment Clause claim, using supplemental jurisdiction.⁷⁰ These claims could also be prosecuted in state court, particularly given the possibility that the federal court could dismiss the federal claim and then relinquish jurisdiction over the remaining state claims. The Pennsylvania state law claims would relate to the DPW's possible violation of bidding procedures required under Pennsylvania state law before any state contract can be awarded, as well as false advertising.

Litigation could illuminate deficiencies in the contract bidding process required for all state-awarded contracts in Pennsylvania.⁷¹ Pennsylvania law requires that all contracts granted by the state receive competitive, sealed public bids, unless the contracting officer determines in writing that one of a series of specific conditions exists, including when only a single contractor is capable of

⁶⁸ See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005).

⁶⁹ *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("I think the pessimistic evaluation that THE CHIEF JUSTICE made of the totality of *Lemon* is particularly applicable to the 'purpose' prong: it is a 'constitutional theory that has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting)).

⁷⁰ 28 U.S.C. § 1367 (2012).

⁷¹ 62 PA. CONS. STAT. § 511, 515 (2014) (concerning required competitive sealed bidding barring special circumstances and sole source procurement).

providing the supply, service, or construction.⁷² Although RA likely fulfills this condition, the DPW must keep a written record of such a finding.

In its response to the December 11, 2013, RTK request, DPW reiterated multiple times that it could not provide access to its “contract file” with RA because no “contract” as such exists between DPW and RA, although DPW’s agreement with RA can be found on the Pennsylvania Department of Treasury’s “E-Contracts Library,” using a “Contract Search,” which in turn utilizes “contract keyword(s),” “contracting party(s),” “amount of contract,” and “contract number,” the last of which DPW referred to as a “Grant Number” in its response.⁷³ The response also states that “the grant agreement is not a contract,” even though the Grant Agreement refers to itself as a contract in numerous provisions.⁷⁴ Clearly, DPW’s insistence on referring to its contract with RA as a grant in order to avoid compliance with contract bidding regulations, coupled with its robust opposition to a public records request for this contract file, should alert litigators that this issue is ripe for further investigation.

Finally, state claims of false advertising may be brought against the DPW, RA, and Pennsylvania CPCs. Pennsylvania’s Unfair Trade Practices and Consumer Protection Law prohibits, *inter alia*, “passing off goods or services as those of another” and “knowingly misrepresenting that services . . . are needed if they are not needed.”⁷⁵ These claims could be pursued against centers that attempt to pass off their services as medical in nature or that represent the necessity of an ultrasound to see if a fetus is viable when its employees have no medical qualifications to perform ultrasounds. In addition, a private cause of action can be brought by someone who suffers “an ascertainable loss . . . as a result of the use or employment by any person of a method, act or practice declared unlawful.”⁷⁶

However, Pennsylvania’s Unfair Trade Practices and Consumer Protection Law applies to sales of goods or services, and the “ascertainable loss” required for a private cause of action must be a loss of “money or property, real or

⁷² 62 PA. CONS. STAT. § 515 (2014).

⁷³ *E-Contracts Library*, PENNSYLVANIA TREASURY, <http://contracts.patreasury.gov/search.aspx> (last visited Oct. 21, 2014).

⁷⁴ See, e.g., *Grant Agreement*, *supra* note 34, at Rider 4, Standard Grant Terms and Conditions for Services.

⁷⁵ 73 PA. CONS. STAT. § 201-2 (2014).

⁷⁶ 73 PA. CONS. STAT. § 201-9.2(a) (2014).

personal”⁷⁷ Therefore, more difficult arguments would need to be made concerning the provision of CPC services as “sales” and the opportunity losses of income from time wasted at a CPC (not likely to be high considering CPCs’ disproportionately lower-income client base⁷⁸) or the increased cost of a later term abortion resulting from a delay in seeking abortion based on CPCs’ deceptive practices, as “ascertainable losses.” The “services” offered by CPCs arguably are the “free” pregnancy test so many of them offer, when in reality “clients” must pay with their time and by listening to required “counseling” from judgmental CPC workers.⁷⁹ Finding a client-plaintiff who fits this criteria would be difficult because money damages would likely be small and require nuanced and novel legal arguments. This indicates that, at least in Pennsylvania, advocates may not wish to utilize false advertising claims against CPCs without filing them in conjunction with other claims where plaintiffs’ standing requirements are also met.

V. LITIGATION VS. LEGISLATIVE REFORM

A. *Public Policy Recommendations*

To shield DPW from liability on the above claims, the Pennsylvania legislature should cease funding the Alternatives to Abortion Program, or at least reclassify it so as to avoid characterizing it as supplemental medical services or reproductive health counseling. This may prevent DPW being found liable for the inaccurate medical information dispensed by CPCs and the biased information they dispense regarding abortion. In addition, DPW should attempt to reduce religious entanglement by prohibiting the operation of publically funded CPCs through religious organizations. Finally, DPW should follow the sole bid contract procedure required by Pennsylvania regulations. Voluntarily adopting these reforms would go a long way toward preventing a lawsuit against DPW that would cost public taxpayer funds to defend, as well as increasing transparency for Pennsylvania taxpayers concerned about the harm inflicted by CPCs on pregnant Pennsylvanians.

⁷⁷ *Id.*

⁷⁸ *Abortion Facts*, NATIONAL ABORTION FEDERATION, <http://prochoice.org/education-and-advocacy/about-abortion/abortion-facts/> (last visited Oct. 21, 2014) (“CPCs often direct outreach towards young and low-income women Low-income women are particularly vulnerable because nationwide there is a shortage of clinics that offer full options counseling and abortion care.”).

⁷⁹ Cassel, *supra* note 15.

B. Prospects for Legislation

Although no litigative option available to legal advocates against CPCs appears perfect, such a course of action is still more likely to change CPCs' practices than statutory or regulatory reform in Pennsylvania. The state legislature is dominated by conservative Republicans who have proven extremely combative toward women's reproductive rights, keeping in step with the trend of state legislative assault on abortion rights that began in 2011.⁸⁰ In addition, even if reform legislation had passed the extremely conservative state legislature in the aftermath of that trend, it would likely have been vetoed by Governor Corbett, who, in response to criticisms of a Pennsylvania bill that would require doctors to perform medically unnecessary ultrasounds on all women seeking abortion and show patients the ultrasound image, claimed that women "just have to close [their] eyes" if they do not wish to look at the image.⁸¹ In addition, Governor Corbett had specifically touted the success of RA and Pennsylvania's Alternatives to Abortion Program.⁸² Thus, the prospects for statutory reform of the state's public funding of CPCs seem bleak while the state legislature remains controlled by Republicans.

In addition, repeated rebuffs by the state legislature of a bill intended to curtail or increase regulation on Pennsylvania's public funding of CPCs could have the opposite of its intended effect: the seemingly repeated endorsement of CPCs could lend legitimacy to their practices.⁸³ The example of early twentieth century Connecticut activists' crusade to legalize birth control, including yearly attempts to introduce reform statutes as well as several court challenges, shows the perils of such an outcome.⁸⁴ The Connecticut birth control league's repeated introduction of reform legislation failed to accomplish the league's goal until the Supreme Court decision of *Griswold v. Connecticut*, because the seemingly never-ending cycle of introduction of repeal legislation and its subsequent rejection by the Connecticut

⁸⁰ *PA Legislature Passes Disastrous "TRAP" Law*, WOMEN'S LAW PROJECT (Dec. 15, 2011, 5:34 PM), <http://womenslawproject.wordpress.com/2011/12/15/pa-legislature-passes-disastrous-trap-law>; Laura Bassett, *Tom Corbett, Pennsylvania Governor, On Ultrasound Machine: Just 'Close Your Eyes'*, HUFFINGTON POST (Mar. 15, 2012, 4:33 PM), http://www.huffingtonpost.com/2012/03/15/tom-corbett-ultrasound-bill-pennsylvania_n_1348801.html; Marc Levy, *Corbett signs anti-abortion coverage bill in Pennsylvania*, PITTSBURGH POST-GAZETTE (June 17, 2013, 7:45 PM), <http://www.post-gazette.com/stories/local/state/corbett-signs-anti-abortion-coverage-bill-in-pa-692024>.

⁸¹ Bassett, *supra* note 80.

⁸² See Strand, *supra* note 40 and accompanying text.

⁸³ See GARROW, *supra* note 8, at 319.

⁸⁴ *Id.*

legislature provided an unmistakable signal to the courts regarding the legislature's intent to prohibit the use of birth control.⁸⁵

Ironically, by continually introducing repeal legislation that invariably failed to pass, no matter what the political makeup of the state legislature, birth control advocates in Connecticut actually reinforced the state's declared public policy regarding the rejection of birth control.⁸⁶ Although continual introduction of repeal legislation ostensibly served to publicize the issue among Connecticut voters, public opinion favoring use and dissemination of information regarding birth control did not translate into legislative action.⁸⁷ Similarly, although majority support for public funding of CPCs is far from certain, the Republican political majority's support of the program may be inadvertently given increased legal importance if it repeatedly rebuffs attempts to reform.

C. *Benefits of Litigation*

DPW is obviously concerned about the public finding out the administrative details of the "abortion alternatives" program and the negative publicity that could ensue from their release. It specifically planned in its contract with RA what to do in the event of a RTK request, and forcefully contested portions of the request that could be interpreted as violating RA's trade secrets. The prospect of a lawsuit could encourage reform and tighter regulation of CPCs, if not the rescinding of funding altogether. In addition to the publicity benefits of a lawsuit, the pressure it would create for the DPW to reform or eliminate its "abortion alternatives" program, either voluntarily as part of a settlement agreement or under court order based on the various claims that could be brought against it, would be more likely to succeed than legislative or regulatory reform within Pennsylvania's Republican-dominated state government.

VI. CONCLUSION

CPCs are gaining more national attention, as is their common use of misleading practices designed to deceive pregnant women seeking abortions into delaying the procedures.⁸⁸ Staffers at CPCs may have good intentions because they believe abortion is wrong. However, in their zeal to prevent women from

⁸⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965); see generally GARROW, *supra* note 8.

⁸⁶ GARROW, *supra* note 8, at 319.

⁸⁷ *Id.*

⁸⁸ See *Exposing Anti-Choice Crisis Pregnancy Centers*, *supra* note 4.

exercising their constitutional right to choose abortion, they justify propagating misinformation concerning abortion's alleged negative health effects, including depression, increased risk of breast cancer, and infertility, none of which have been recognized by medical professionals.⁸⁹ In addition to misleading women about the medical effects of abortion, CPCs deceive their "clients" by portraying their offices as medical facilities or abortion clinics, most conspicuously by locating their facilities in close proximity to abortion clinics and advertising "free" pregnancy tests that imply the provision of medical services.⁹⁰ Whatever the personal or religious beliefs of CPC staffers and advocates, their deceptive actions targeted at pregnant women seeking abortions are unacceptable.

Even more unacceptable is Pennsylvania's use of taxpayer-funded appropriations to subsidize CPCs' practices. Under the guise of providing "alternative to abortion services" in the form of objective counseling on all of pregnant women's choices when facing an unplanned pregnancy,⁹¹ CPCs funded by RA's sub-grants in fact mislead women about the effects of abortion and the extent of the services they provide.⁹² Some of these CPCs are overtly religious, and all are transparently motivated by their opposition to abortion rather than any dedication to the welfare of women.⁹³ In fact, CPCs harm women seeking abortions by causing them to delay the procedure, resulting in more health risks, greater expense, and greater difficulty in finding an abortion provider.⁹⁴ Their judgmental and guilt-inducing counseling also causes trauma, stress, and psychological damage.⁹⁵

Although RA presents itself as an objective non-profit dedicated to providing a standard public service,⁹⁶ it was in fact created wholly in response to an artificial

⁸⁹ See *Common Lies*, *supra* note 17.

⁹⁰ See *Inside*, *supra* note 17.

⁹¹ *DPW Program Website*, *supra* note 5.

⁹² See, e.g., *Grant Agreement*, *supra* note 34, at Rider 2, Alternative to Abortion Services Program Fiscal Year 2012/2013 to 2016/2017, Work Plan, 16 n.3.

⁹³ See *Forced Abortions*, *supra* note 38.

⁹⁴ See *Abortion Facts*, *supra* note 78.

⁹⁵ See Cassel, *supra* note 15.

⁹⁶ *Our Mission*, REAL ALTERNATIVES, <http://www.realalternatives.org/aboutus/> (last visited Oct. 21, 2014).

need for an organization through which to funnel public funds to CPCs.⁹⁷ Its website reveals its biased portrayal of abortion as well as its religious motivations.⁹⁸ The RTK request discussed in this Note reveals serious deficiencies in the bidding process required for all state contractors, as well as compliance requirements for ensuring that RA's "providers" are not actively deceiving their "clients" and enforcement efforts against those found not to be in compliance with these standards.

The damage caused by CPCs is objectionable enough without Pennsylvania taxpayers' unwitting complicity and support of their practices. Although some Pennsylvania citizens may support public funding of CPCs, the structure of Pennsylvania's "alternatives to abortion" program and the fact that taxpayer money is funding facilities whose objectionable practices are only recently becoming recognized as propagating widespread harm to pregnant women seeking abortions, has not been widely publicized in Pennsylvania. Most people do not know what CPCs are, let alone that the Pennsylvania state government is funding them. In addition, unlike in states where public funding of CPCs is generated by purchases of "Choose Life" license plates, Pennsylvania taxpayers have no choice in whether to subsidize these harmful centers. Pennsylvania, particularly in its urban centers, has significant political forces in theoretical opposition to CPC tactics;⁹⁹ litigation targeting the organizations' constitutional violations, quality compliance violations (e.g. propagation of inaccurate medical information), and possible bidding procedure violations could fulfill dual purposes of remedying CPCs' injurious practices as well as mobilizing popular opposition to public CPC funding in Pennsylvania.

Even if popular opposition to CPCs did develop, litigation would still likely be a more productive avenue for combating the centers' practices than legislative reform, since popular opposition to a public policy, particularly in the area of reproductive rights, does not necessarily translate into legislative change.¹⁰⁰ The example and failure of repeated attempts to reverse birth control criminalization in Connecticut through legislative reform, even weakened reform legalizing birth control only for married women, until the statute was struck down by the Supreme

⁹⁷ See Otterbein, *supra* note 33.

⁹⁸ See *Public Affairs Kit*, *supra* note 63.

⁹⁹ See, e.g., Keegan Gibson, *Updated: PAGOP Nets 12 New County Courthouse Majorities*, POLITICSPA (Nov. 14, 2011), <http://www.politicspa.com/pagop-nets-11-new-county-courthouse-majorities/29437/>.

¹⁰⁰ See GARROW, *supra* note 8, at 319.

Court, shows that popular opposition need not translate into legislative action.¹⁰¹ Thus, the will and resources of legal activists would be better spent on pursuing a federal claim in pursuit of injunctions or damages, as well as publicity.¹⁰²

Through a lawsuit, legal advocates of abortion rights could bring the force of the judicial system to bear on the harmful practices employed by crisis pregnancy centers in the tradition of *Roe v. Wade*.¹⁰³ While this tradition has been criticized by some as judicial legislating,¹⁰⁴ the fact is that majoritarian representative democracy does not always represent the needs or rights of the minority. Of the subset of women who become pregnant, half of those pregnancies are unplanned, and half of those unplanned pregnancies will end in abortion.¹⁰⁵ This subset of the American population is already encountering great emotional, physical, and financial hardship while seeking to end their pregnancies without the additional injury inflicted upon them by deceitful, judgmental CPC staffers.¹⁰⁶ Thorough fact investigation and a legal assault on Pennsylvania's practice of funding CPCs with general taxpayer appropriations, most likely through litigation rather than legislative reform because of its greater chances of success, is one strategy for combating this harm.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰⁴ See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality In Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (Jan. 1985).

¹⁰⁵ *Induced Abortion in the United States*, GUTTMACHER INSTITUTE (July 2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html.

¹⁰⁶ See Cassel, *supra* note 15.