NO. _____

IN THE

Supreme Court of the United States

PREGNANCY CARE CENTER OF NEW YORK; BORO PREGNANCY COUNSELING CENTER; GOOD COUNSEL, INC.,

Petitioners,

v.

CITY OF NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of New York compels speech upon noncommercial facilities that offer free non-medical information and counseling to persuade pregnant women not to abort. Local Law 17, N.Y.C. Admin. Code § 20-815 *et seq*. (hereinafter "LL17"). LL17 forces these centers to add unwanted messages to their communications and ads saying they do not do abortions or have medical licenses. *Id.* § 20-816. It regulates any center the City determines, based on uncertain criteria, has the "appearance of a licensed medical facility." *Id*. § 20-815.

The decision below upheld part of an injunction, so a center need not declare it does not provide abortions. Pet. App. at 36a. But in conflict with other circuits, it applied *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), to force centers to recite on their walls and ads that they lack medical licenses. Pet. App. at 31a–32a. It also authorized the City to use an unknown number and quality of factors to determine which centers must comply. *Id.* at 21a–24a.

The two questions presented are:

(1) Whether compelling a noncommercial pro-life speaker to declare it lacks a medical license passes strict scrutiny.

(2) Whether a compelled speech law is unconstitutionally vague if the City can deem speakers as needing to comply, because of their "appearance," without any ability for the speaker to know whether it must comply.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellees below, are Pregnancy Care Center of New York, incorporated as Crisis Pregnancy Center of New York; Boro Pregnancy Counseling Center; and Good Counsel, Inc. Plaintiffs-appellees in the consolidated proceeding are The Evergreen Association, Inc., d/b/a Expectant Mother Care Pregnancy Centers; EMC Frontline Pregnancy Center; and Life Center of New York, Inc., d/b/a AAA Pregnancy Problems Center;

Respondents, who were defendants-appellants below, are the City of New York, and both Mayor of New York City Bill de Blasio, and Commissioner of the New York City Department of Consumer Affairs Jonathan Mintz, sued in their official capacities. During the litigation below, Mayor Michael Bloomberg was replaced by Mr. de Blasio.

CORPORATE DISCLOSURE STATEMENT

Petitioner Pregnancy Care Center of New York is incorporated as Crisis Pregnancy Center of New York, and is a New York not-for-profit corporation. It does not have parent companies and is not publicly held.

Petitioner Boro Pregnancy Counseling Center is a New York not-for-profit corporation. It does not have parent companies and is not publicly held.

Petitioner Good Counsel is a New Jersey not-for-profit corporation. It does not have parent companies and is not publicly held.

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INTRODUCTION

This petition presents a circuit conflict over whether *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), authorizes compelled speech on noncommercial speakers. In *Riley*, this Court held compelled speech unconstitutional for noncommercial speakers, even while fundraising. *Id.* at 803. In passing, however, the Court suggested that a charity's paid solicitor could be required to declare his professional status. *Id.* at 799 n.11.

Most courts of appeals faithfully apply *Riley*'s holding against compelling speech, while properly limiting footnote 11 to allow required disclosures only for paid solicitors in the scope of their hired status. *See Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1101 (10th Cir. 1997).

But in the decision below, the Second Circuit created a novel interpretation of *Riley* that conflicts with the other courts of appeals. It used *Riley*'s footnote 11 to allow the government to force a noncommercial speaker itself—which has hired no paid solicitor and is not even fundraising—to declare that it is *not* a professional. This speech is imposed in the midst of the noncommercial speaker's delivery of its core message in opposition to abortion, on its own walls, all its ads, and an unknown number of its phone calls. This conflicts not only with *Riley*'s own holdings but with the Tenth Circuit's application thereof, and it creates similar tension with opinions of the Fourth, Sixth, and Eleventh Circuits.

Petitioners Pregnancy Care Center of New York,

Boro Pregnancy Counseling Center, and Good Counsel, Inc., are noncommercial centers that operate in New York City to offer free non-medical information and help, such as personal advice, baby items, and housing, so that women may choose birth instead of abortion. The City of New York passed Local Law 17, N.Y.C. Admin. Code § 20-815 *et seq*. ("LL17"), which imposes serious penalties unless pregnancy services centers ("PSCs") recite a variety of disclosures about whether the PSCs offer abortion and whether the PSCs have staff with medical licenses, of a content and size deemed by the City, in the PSCs' phone calls, signs at their centers, and all advertisements. LL17 § 20-816.

The Second Circuit misapplied *Riley* to uphold the City's requirement that Petitioners proclaim they have no medical license. Because this decision flies in the face of *Riley* and its interpretation by other courts of appeals, Petitioners ask the Court to grant this petition.

Petitioners also ask the Court to review the Second Circuit's approval of LL17's irredeemably vague definition of whether a pregnancy center has a medical "appearance" so as to be subject to coerced speech. LL17 § 20-815(g). The law's "appearance" test sets forth several factors to consider, but it imparts discretion to the City to compel a center's speech even if only one factor—or even none—is present. The decision below violates this Court's vigorous precedent shielding speech from unfettered governmental discretion, whose danger is at its zenith when a law targets controversial speakers with whom the government disagrees.

DECISIONS BELOW

The panel opinion of the court of appeals is reported at 740 F.3d 233 (2d Cir. 2014) and reprinted in Pet. App. at 1a. The Second Circuit's order denying rehearing en banc is unreported but reprinted in Pet. App. at 1c. The district court's opinion is reported at 801 F. Supp. 2d 197 (S.D.N.Y. 2011) and reprinted in Pet. App. at 1b.

STATEMENT OF JURISDICTION

The court of appeals issued an opinion on January 17, 2014 and denied a timely petition for rehearing *en banc* on March 18, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech[.]

U.S. CONST. amend. I.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are two pro-life pregnancy help centers, and one organization of maternity homes for mothers who have decided not to have abortions. Pet. App. at 2g–3g. The organizations are noncommercial and non-medical. *Id*. at 3g–16g. They offer free information and material assistance to encourage women in their choice of alternatives to abortion. *Id*. at 2g–4g. Petitioners offer this help based on their beliefs in favor of human life and against abortion and emergency contraception. *Id*. at 14g–15g.

On October 13, 2010, New York City Council Member Jessica Lappin introduced a bill that was intended to regulate the practice of "crisis pregnancy centers," organizations that provide non-medical pregnancy services and are opposed to abortion. Pet. App. at 11a. In March 2011, the New York City Council passed and former Mayor Michael Bloomberg signed into law Local Law 17. The law imposes on "pregnancy services centers" a requirement to disclose information in every ad, an unknown number of phone conversations, and on the center's own walls. LL17 § 20-816(f). LL17 requires three messages: (1) whether the PSC has a licensed medical provider on staff or who supervises the provision of services (even non-medical services); (2) that the City recommends pregnant women consult with a licensed provider; and (3) whether the PSC provides or refers for abortions, emergency contraception, or prenatal care. *Id*. § 20-816(a)–(e).

LL17 defines a PSC as a "facility, . . . with the primary purpose [] to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) has the appearance of a licensed medical facility." *Id.* § 20-815(g). The "services" offered to potentially pregnant women under the "primary purpose" test include counseling, information, and classes. Pet. App. at 4h-5h.

To determine if a facility has a medical "appearance," the law provides a nonexclusive list of factors for consideration. A facility is presumed to be a PSC if it possesses two of those factors, but if it possesses one or none of those factors, the City is given unlimited discretion to deem the facility as having a medical appearance. LL17 § 20-815(g). The law exempts from its provisions facilities which are "licensed . . . to provide medical or pharmaceutical services" or have a licensed medical provider on staff. *Id.*

Petitioners have primary purposes of offering information, counseling, classes, housing, and/or free non-medical material assistance to potentially pregnant women. They do not have licensed medical professionals on staff as specified in LL17's exemption. They do not offer ultrasounds or prenatal care automatically rendering them PSCs under LL17 § 20-815(g). Therefore, they are subject to LL17's medical "appearance" test, but they meet at most one of the listed factors. Pet. App. at 18g–22g. Pregnancy Care Center of New York and Boro Pregnancy Counseling Center apparently meet one "appearance" factor because they offer women free

pregnancy test kits that the women self-administer. *Id*. at 18g–20g. Good Counsel is not a pregnancy counseling center at all, but because it collects the health insurance information of its pregnant residents to help them go to the women's own doctors, it apparently meets a factor of the "appearance" test. *Id*. at 20g–22g.

Thus, LL17 gives the City unfettered discretion to deem Petitioners as PSCs and subject them to the City's coerced speech, not because they have any objective or discernible medical "appearance," but because the City disagrees with their pro-life viewpoint. Only at the peril of massive fines, closure, and possible jail time could Petitioners act as if they are not subject to LL17. *See* LL17 § 20-818.

II. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Southern District of New York, challenging LL17 under the First Amendment's Free Speech Clause and the Fourteenth Amendment's Due Process Clause. Pet. App. at 21g–24g. Petitioners alleged that the disclosure provisions violated their right to be free from governmentally compelled speech. *Id*. at 21g–23g. Petitioners further challenged as impermissibly vague the City's uncabined discretion to deem a center as having the "appearance of a licensed medical facility." *Id*. at 23g–24g.

The district court granted Petitioners' request for a preliminary injunction. It enjoined all of LL17's disclosure requirements as violating the freedom of speech, and enjoined the law in its entirety as being

unconstitutionally vague regarding which centers the City may deem to be a PSC. Pet. App. at 24b, 26b–29b. It presumed a threat of irreparable harm to Plaintiffs' First Amendment rights, *id*. at 8b–9b, and held that Petitioners had demonstrated a likelihood of success on the merits. *Id*. at 24b, 28b.

Respondents appealed. A divided panel of the court of appeals affirmed in part and reversed in part. The panel majority below held that the First Amendment does not allow the City to require Petitioners to disclose whether they offer abortion and related items, or the fact that the City believes women should consult doctors. Pet. App. at 36a, 39a. Petitioners do not appeal this holding.

But the panel majority also held that the "Status Disclosure"—declaring that Petitioners do not have licensed medical staff—satisfies strict scrutiny even though Petitioners are noncommercial, non-medical speakers in the midst of an ideological and factual communication, and even though that disclosure will be required on each and every advertisement, an unknown number of phone calls, and multiple times on their own walls. The Second Circuit vacated the district court injunction as to that disclosure. *Id*. at 31a–34a, 40a. The court of appeals also vacated the district court's holding that LL17 was void for vagueness, even though it empowers the City to deem a center to have the disfavored "appearance" "not solely by reference to" the factors in LL17. *Id*. at 22a–24a, 40a.

Judge Wesley dissented. Describing LL17 as a "bureaucrat's dream," he found the law to be

impermissibly vague because "the law utterly fails to provide adequate guidance for its enforcement. The law gives the Commissioner unbridled discretion to determine that a facility has the 'appearance of a licensed medical facility.'" Pet. App. at 40a–41a. LL17's appearance test "contains a deliberately ambiguous set of standards guiding its application, thereby providing a blank check to New York City officials to harass or threaten legitimate activity." *Id.* at 40a.

The "fundamental flaw" in LL17, Judge Wesley explained, was that the "enumerating factors" in the "appearance of a licensed medical facility" test are only "'among' those to be considered, meaning that the City can find a facility covered absent any *or all of* the listed qualities." Pet. App. at 41a (emphasis in original). "This framework authorizes and encourages arbitrary enforcement. The law expressly allows the City to decide, without additional direction, what to do with centers that meet only one listed factor." *Id.* at 42a. The law goes even further, "explicitly authoriz[ing] the City to rely on other, unlisted factors, not known to anyone, which may themselves be vague or discriminate on the basis of viewpoint." *Id.*

Judge Wesley further noted that, at oral argument, counsel for the City explained that the definition of PSC "is meant to cover anything that comes along in the future." Pet. App. at 43a (internal citations omitted). "In other words, because the City cannot anticipate all the facilities that it may want the law to cover, the City needs the maximum of flexibility to be able to decide whether a facility is a

PSC. But "[i]f the [City] cannot anticipate what will be considered [a PSC under the statute], then it can hardly expect [anyone else] to do so." *Id.* at 43a. Importantly, in the First Amendment context, "the [vagueness] doctrine demands a greater degree of specificity than in other contexts," but the panel majority violated this principle. *Id.* at 41a (internal citations omitted). Judge Wesley found that LL17 could not withstand a vagueness challenge, especially in light of its infringement of First Amendment freedoms.

The Second Circuit denied a timely petition for rehearing en banc on March 18, 2014. Pet. App. at 1c. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

The Second Circuit created a circuit conflict of vital national importance and contravened this Court's precedent when it ignored the holding in *Riley* and instead used footnote 11 to force a noncommercial speaker to speak a message within its ideological speech. The decision below also departed from longstanding precedent of this Court prohibiting unfettered government discretion in deciding who must comply with a speech regulation.

I. The Decision Below Creates a Conflict among the Courts of Appeals over Whether Noncommercial Speakers and Speech Can Be Coerced.

The decision below tried to force a square peg into a hole that other circuits insist is round. *Riley*'s holding prohibits coerced speech. It includes a

narrow exception in footnote 11 which says a paid solicitor can be required to say that he is a professional. 487 U.S. at 799 n.11. The Second Circuit imposed that notion on the opposite situation, letting New York City force a noncommercial speaker, engaging in non-paid, non-fundraising speech, to say it is *not* a professional.

The Tenth Circuit has rejected the idea that *Riley* footnote 11 could be flipped on its head in such a manner. *Meyer*, 120 F.3d 1092. Rulings of the Fourth, Sixth, and Eleventh Circuits are consistent with *Meyer* and similarly incompatible with the decision below. The severity of the Second Circuit's misinterpretation of *Riley* shows why other circuits have reached the opposite conclusion.

A. The Second Circuit Misconstrued *Riley*.

The central thrust of *Riley* was to invalidate coerced speech even in the context of professional solicitors engaging in solicitations for a charitable organization. 487 U.S. at 803. In dicta, this Court suggested that the paid solicitor might, however, legitimately be required to disclose the fact that he is being paid: "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." *Id*. at 799 n.11.

By its own terms, and in the context of *Riley's* actual holdings, that footnote cannot mean that the noncommercial, non-paid charity *itself* could be

coerced to recite disclosures within its own ideological (non-solicitation) messages, disclosures saying not that they are professional but that they are not professional.

But that reversal of logic is what occurred below. The panel majority declared that because this "Court suggested that a requirement that solicitors disclose their professional status is 'a narrowly tailored requirement [that] would withstand First Amendment scrutiny,'" somehow LL17 can coerce the non-profit non-soliciting Petitioners to tell women they have no medical licenses. Pet. App. at 31a (citing *Riley*, 487 U.S. at 799 n.11).

This contradicts *Riley* and turns First Amendment doctrine on its head. The rationale for *Riley*'s footnote 11 is apparently the common precedent saying that commercial or professional speech (like a paid solicitor saying he is paid) sometimes receives less First Amendment protection. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–71 (1976). But the panel majority used that context to justify coercing pure non-commercial free speech. LL17 is not a regulation of solicitation or fundraising, but imposes directly on Petitioners' ideological, factual, and freely given promotion of alternatives to abortion. LL17's disclosures do not make Petitioners say they *are* commercial or professional because by definition they are not. Requiring them to say so drags noncommercial and nonprofessional speech down into the lower levels of protection afforded commercial and professional speech. The Second Circuit therefore pits *Riley*'s

footnote 11 against *Riley*'s actual holdings—which *prohibited* coerced disclosures on noncommercial speakers even though their speech was intertwined with solicitation (which is not present here). *See* 487 U.S. at 795–801.

The holding below would let the government force a charity itself while it is actually offering its charitable information to express the disclaimer that "I am *not* being paid, and am *not* a professional provider," even though it is not a hired solicitor and is not trying to fundraise. The absurdity of this holding creates a stark contrast with its proper application by other circuits.

B. The Decision Below Conflicts with the Tenth Circuit, Which Says *Riley* Footnote 11 Extends to Paid Solicitors but not to the Pure Speech of Noncommercial Speakers.

The Tenth Circuit rejected the interpretation of *Riley* footnote 11, and its imposition on noncommercial speakers, that the Second Circuit imposed on Petitioners in this case. *Meyer*, 120 F.3d 1092, concerned a Colorado law that, among other things, required citizens to wear identification badges if they wished to circulate a petition to put an issue on the Colorado ballot. *Id.* at 1096–97. Several petition circulators challenged the requirement as a coercion of speech, and the government insisted that "the badge requirement has been upheld by" this Court in *Riley* footnote 11. *Id.* at 1101. The Tenth Circuit rejected this interpretation and struck down the badge requirement, stating that *Riley* did not let

a state "condition political expression on the wearing of an identification badge." *Id.* at 1101, 1104.

The decision below directly conflicts with *Meyer* on this point and compels noncommercial speakers to insert government dictated information into the heart of their expressive activities.

C. The Decision Below Creates Similar Tension with the Fourth, Sixth and Eleventh Circuit's Interpretation of *Riley* Footnote 11.

As does the Tenth Circuit, all other circuits to apply *Riley* footnote 11—the Fourth, Sixth, and Eleventh—apply it not to ideological speech of noncommercial speakers, but only to the commercial status of paid solicitors.

The Fourth Circuit in *National Federation of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005), rejected a constitutional challenge to a compelled disclosure law regulating charitable solicitors. The law required that paid solicitors "promptly explain that they are seeking donations on behalf of a specific charity." *Id.* at 343. Relying on the dicta in *Riley* footnote 11, the court upheld the disclosure requirement. *Id.* But in doing so it recognized a distinction between the charity itself and its solicitors. "'[S]oliciting financial support is undoubtedly subject to reasonable regulation' so long as the regulation is 'undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech.'" *Id.* at 338 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

In this regard the Fourth Circuit maintained full First Amendment protection for the pure speech of noncommercial speakers themselves, while justifying certain disclosures pertaining to their paid solicitors. *See id*. The Fourth Circuit further emphasized the full First Amendment protection afforded to noncommercial speech itself when it struck down solicitation disclosures in *Telco Communications v. Varbaugh*, 885 F.2d 1225, 1235 (4th Cir. 1989). Relying on the actual holdings in *Riley*, the court reasoned that while the law may be the most effective means of monitoring professional solicitors, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Id*. at 1233 (citing *Riley*, 487 U.S. at 795; *Schaumburg*, 444 U.S. at 639; *Schneider v. State*, 308 U.S. 147, 164 (1939)).

The Fourth Circuit's holdings cannot be reconciled with the decision below in the present case.[1] The Second Circuit took the lesser level of protection that the Fourth Circuit recognized is

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[1] The Second Circuit made note of a Fourth Circuit decision that upheld a district court ruling that refused to enjoin a "status disclosure." *See Centro Tepeyac v. Montgomery Cnty*., 722 F.3d 184, 190–92 (4th Cir. 2013). However, the Fourth Circuit affirmed based solely on deferential review and did not issue a holding on how to apply *Riley*. *Id.* at 193. Here, in contrast, the Second Circuit's reversal imposed a novel interpretation of *Riley*. On remand in *Centro Tepeyac*, the district court was free to apply *Riley* appropriately and it did so, striking down the entire ordinance including its status disclosure. *See Centro Tepeyac v. Montgomery Cnty*., __ F. Supp. 2d __, No. 10-1259, 2014 WL 923230 (D. Md. Mar. 7 2014) . Thus, the decision below is inconsistent with the final disposition in *Centro Tepeyac*.

afforded to solicitation as a unique category, and imposed it upward on the freely offered speech of speakers who are not soliciting and by definition are not professional or commercial.

The Sixth Circuit, likewise relying on *Riley* footnote 11, affirmed a district court decision upholding regulations of charitable solicitors. *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995). Those disclosures required paid charitable solicitors to disclose certain information about the solicitor, as well as the charity the solicitor represented, the charitable purposes to be advanced by the funds raised, and the percentages of revenue handed over between the solicitor and the charitable organization. *Id*. at 1485. The court's rulings only apply in the context of a paid solicitor and its solicitation of funds.

Finally, the Eleventh Circuit invalidated an ordinance requiring compelled disclosures by professional solicitors under the Free Exercise Clause. *Church of Scientology Service Org. v. Clearwater*, 2 F.3d 1514 (11th Cir. 1993). But it allowed that, on remand, "limited" kinds of disclosure rules could be preserved in reference to *Riley* footnote 11, but only with respect to the context of solicitation of funds. *Id*. at 1539.

Until the decision below, the courts of appeals uniformly interpreted *Riley* according to its plain meaning and context. Under that rule, paid solicitation can be subject to narrow disclosure requirements pertaining to the issue of paid solicitation itself. 487 U.S. at 799 n.11. Otherwise, it

is impermissible to compel speech upon ideological or charitable groups in their noncommercial communications. *Id.* at 797–801. The Second Circuit's radical reinterpretation of *Riley* creates a circuit conflict and imposes a rule that threatens to swallow *Riley*'s actual holdings.

II. The Decision Below Decided an Important Federal Question in a Way that Conflicts with This Court's Precedent against Compelled Speech.

As discussed above, *supra* I.A., the decision below severely misapplies *Riley*, reinterpreting its footnote dicta in a way that contradicts *Riley*'s own holdings. *Riley*'s footnote suggested that a paid solicitor engaging in fundraising could be required to disclose information central to his commercial status and activity, namely, that he is a professional solicitor. 487 U.S. at 799 n. 11.

The Second Circuit used footnote 11 in *Riley* to force speech upon ideological speakers instead of on the facts set forth in that passage. The panel justified compelled speech outside the context of any paid solicitor since Petitioners use none in this matter. The compulsion is imposed in the midst of the delivery of Petitioners' core message about abortion alternatives, rather than in fundraising. And it requires Petitioners to speak a message not related to their being paid or being professional, but explicitly due to the fact that they are neither.

The hypothesized situation in *Riley*'s footnote 11 applies, at most, in a context wholly inapplicable

here. This Court has repeatedly held that commercial speech garners less protection than noncommercial speech. *See, e.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. Thus the *Riley* dictum cannot be extrapolated to justify coerced speech in a purely noncommercial context and communication. Notably, Justice Scalia wrote a separate concurrence in *Riley* to clarify that, in his opinion, "[t]he dictum in footnote 11 represents a departure from our traditional understanding" of the First Amendment. 487 U.S. at 804 (Scalia, J., concurring).

The decision below further violates the fundamental tenet that the government cannot force a speaker to recite the government's message. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). This Court has made clear that, under the First Amendment, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)).

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Therefore, laws which mandate speech are considered "content-based regulations" subject to strict scrutiny. *Id*. This Court recently reiterated the principle that "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas it approves." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2288 (2012) (internal citations omitted).

Such principles are especially acute where, as here, they deal with controversial topics such as abortion. *See, e.g.*, *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2671 (2011) (Where the government and citizens holds "divergent views" about the value of their speech content, "[u]nder the Constitution, resolution of that debate must result from free and uninhibited speech."); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974) (holding that a Florida statute requiring that newspapers allow for editorial replies when a "candidate for nomination or election is assailed regarding his personal character or official record by any newspaper" was unconstitutional compelled speech).

These principles apply whether the compelled disclosure is characterized as one of "opinion" or of "fact." *See Riley*, 487 U.S. at 797–98 (between "compelled statements of opinion" and "compelled statements of 'fact': either form of compulsion burdens protected speech"). "Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . ." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573–74 (1995) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995); *Riley*, 487 U.S. at 797–98).

The decision below violates this Court's recent and rigorous requirement that speech restrictions provide compelling evidence to satisfy strict scrutiny. In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2732 (2011), the Court considered

whether a California law that imposed labeling on violent video games violated the freedom of speech. Treating the law as a content-based restriction on protected speech, the Court applied strict scrutiny. *Id*. at 2738. It explained, as to the alleged compelling interest, that "[t]he 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." *Id*. The government "bears the risk of uncertainty" in a speech restriction, such that "*ambiguous proof will not suffice*." *Id.* at 2739 (emphasis added).

The Court found that even scientific studies were insufficient, where they merely showed a correlative "connection" between violent video games and harm to children, because under strict scrutiny the state must "prove that violent video games *cause* minors to *act* aggressively . . ." *Id*. Otherwise the "evidence is not compelling." *Id*.

The evidence presented to the courts below woefully fails this standard. The City's theory is that if all PSC ads, their phone communications, and signs on their walls do not tell women that their staff members do not have medical licenses, women will be physically harmed by not seeking doctors while believing they are receiving medical care. But the City offered no data showing that even one woman actually suffered such harm because of the lack of those messages. It offered not one scientific study purporting to show even a correlation, much less a cause, between pregnancy centers seeing women and those women suffering poorer health.

For all the City and the Second Circuit knew, women going to PSCs have *better* health outcomes than otherwise. This paucity of evidence fails the *Brown* standard abysmally. Likewise, in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 821–22 (2000), this Court held that a "handful of complaints" were insufficient, yet the City did not even have one complaint from an actual PSC client.

Finally, the Second Circuit's use of *Riley*'s footnote negates *Riley*'s holding imposing the least restrictive means test. *Riley* rejected the state's attempt to force charitable solicitors to engage in disclosures. It insisted that the least restrictive means test limits the government to the option of punishing actual fraud and misleading statements, and to reciting its messages itself, instead of using compelled speech to correct a perceived harm from noncommercial speakers. 487 U.S. at 795–800. "If the First Amendment means anything, it means that regulating speech *must* be a last—not first—resort. *Yet here it seems to have been the first strategy the Government thought to try.*" *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (emphasis added).[2]

The Second Circuit's decision upholding compelled speech on every PSC advertisement, its own walls, and an unknown number of its phone

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[2] Even under the inapplicable lesser standard for commercial speech, less restrictive alternatives including educational campaigns or counter-speech render a compelled-speech law unconstitutional. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996) (plurality opinion); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006).

calls, disregards this Court's compelled speech precedent at every level of the analysis.

III. The Decision Below Decided an Important Federal Question in a Way that Conflicts with This Court's Void-for-Vagueness Jurisprudence.

The Second Circuit held that LL17's "appearance of a licensed medical facility" standard for application of the law was not impermissibly vague. Such a decision sharply conflicts with precedent of this Court and long-recognized principles of due process.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." *Winters v. New York*, 333 U.S. 507, 509 (1948). "[A] law or regulation that 'threatens to inhibit the exercise of constitutionally protected rights,' such as the right of free speech, will generally be subject to a more stringent vagueness test." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The Court below departed from long-held precedent of this Court in holding that LL17's expandable "appearance of a licensed medical facility" test was not impermissibly vague. The

"appearance test" in LL17 is formulated as follows:

> *Among* the factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility are the following: the pregnancy services center (a) offers pregnancy testing and/or pregnancy diagnosis; (b) has staff or volunteers who wear medical attire or uniforms; (c) contains one or more examination tables; (d) contains a private or semi-private room or area containing medical supplies and/or medical instruments; (e) has staff or volunteers who collect health insurance information from clients; and (f) is located on the same premises as a licensed medical facility or provider or shares facility space with a licensed medical provider. It shall be prima facie evidence that a facility has the appearance of a licensed medical facility if it has two or more of the factors listed in subparagraphs (a) through (f) of paragraph (2) of this subdivision.

LL17 § 20-815(g) (emphasis added). The Second Circuit held that the "appearance test" was not impermissibly vague because it was "bound by the requirement of an 'appearance' of a 'licensed medical facility," and that the listed factors were "'objective criteria' that cabin the definition of 'appearance.'" Pet. App. at 23a (citing *United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir. 1992)).

This holding disregards the text of the law and therefore this Court's precedent. LL17 in no way requires the City to deem a facility a PSC based on

the listed criteria because by definition in the law the City may deem such an appearance to exist even if one or none of those factors are present. LL17 grants unbridled discretion to City officials in providing a nonexclusive list, no factor of which must be cited in subjecting a facility to the prophylactic legislation. The subjective "appearance" requirement itself provides no guidance either.

LL17 "contains more than the possibility of censorship through uncontrolled discretion." *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992). As this Court has continually recognized, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant natures of arbitrary and discriminatory application." *Grayned*, 408 U.S. 108–09. "Uncertain meanings inevitably lead citizens to 'steer far wide of the unlawful zone'. . . than if the boundaries of the forbidden areas are clearly marked." *Id*. at 109.

In *City of Lakewood v. Plain Dealer Publishing, Co.*, 486 U.S. 750, 772 (1988), this Court held that a licensure scheme for placement of news racks was impermissibly vague because it vested unbridled discretion in the licensor. The unclear criteria in *Lakewood* made it "apparent that the face of the ordinance contains no explicit limits on the [government official's] discretion. *Id*. at 769. As the same is true here, it is impossible to distinguish the holding below from *Lakewood*'s ruling to the contrary.

In dissent below, Judge Wesley recognized the inherent flaws in the panel majority's reasoning. Stating that LL17 is a "bureaucrat's dream," Judge Wesley vigorously dissented from the majority's holding that LL17 was not impermissibly vague. Pet. App. 40a. LL17 "contains a deliberately ambiguous set of standards guiding its application, thereby providing a blank check to New York City officials to harass or threaten legitimate activity." Id. LL17, Judge Wesley explained, "gives the Commissioner unbridled discretion to determine that a facility has the 'appearance of a licensed medical facility.' This is an inherently slippery definition—all the more because, as the district court recognized, the law carries the 'fundamental flaw' of enumerating factors that are only "among" those to be considered, *meaning that the City can find a facility covered absent any or all of the listed qualities*." *Id.* at 41a (emphasis added).

> This framework authorizes and encourages arbitrary enforcement. The law expressly allows the City to decide, without additional direction, what to do with centers that meet only one listed factor. And even worse, the law explicitly authorizes the City to rely on other, unlisted factors, not known to anyone, which may themselves be vague or discriminate on the basis of viewpoint.

Id. at 42a.

Judge Wesley noted that Respondents all but conceded that the purpose of the amorphous "appearance test" is to cover future formulations of

pregnancy service centers, noting that counsel at oral argument stated that "the definition of a PSC 'is meant to cover anything that comes along in the future. I don't know in particular what falls within the definition now.'" *Id.* at 42a–43a (internal citations omitted). "In other words, because the City cannot anticipate all the facilities that it may want the law to cover, the City needs the maximum of flexibility to be able to decide whether a facility is a PSC. But "[i]f the [City] cannot anticipate what will be considered [a PSC under the statute], then it can hardly expect [anyone else] to do so." *Id.* at 43a (internal citations omitted).

IV. The Question Presented Is Recurring and Nationally Important.

Intervention of this Court is necessary to correct the inconsistency among the Courts of Appeals of compelled speech restrictions on noncommercial speakers, as well as the proper application of the vagueness doctrine. The decision below created a conflict among the courts of appeals that, absent this Court's intervention, will remain unresolved.

Absent this Court's intervention, the constitutional issues presented by LL17 will recur throughout the country. Many jurisdictions throughout the United States have enacted similar laws restricting pregnancy service centers as a result of a public campaign promulgated by NARAL Pro-Choice America, a pro-abortion group which is opposed to pregnancy service centers. *See* NARAL, "Crisis Pregnancy Centers," *available at* http://www.prochoiceamerica.org/what-is-choice/

abortion/abortion-crisis-pregnancy-centers.html (last visited June 10, 2014).

Indeed, there are several other cases already decided or currently pending in both the Fourth and Fifth Circuits challenging similar laws regulating pregnancy service centers. *See Centro Tepeyac*, 2014 WL 923230; *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804 (D. Md. 2011), *aff'd in part and vacated in part*, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264 (4th Cir. 2013) (en banc); *Austin Lifecare, Inc. v. City of Austin*, No. 11-cv-875 (W.D. Tex.).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 16, 2014

APPENDIX

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UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

August Term, 2012

(Argued: September 14, 2012
Decided: January 17, 2014)

Docket Nos. 11-2735-cv, 11-2929-cv

THE EVERGREEN ASSOCIATION, INC., DBA EXPECTANT MOTHER CARE PREGNANCY CENTERS EMC FRONTLINE PREGNANCY CENTER, LIFE CENTER OF NEW YORK, INC., DBA AAA PREGNANCY PROBLEMS CENTER, PREGNANCY CARE CENTER OF NEW YORK, INCORPORATED as CRISIS PREGNANCY CENTER OF NEW YORK, a NEW YORK NOT–FOR–PROFIT CORPORATION, BORO PREGNANCY COUNSELING CENTER, a NEW YORK NOT–FOR–PROFIT CORPORATION, GOOD COUNSEL, INC., a NEW JERSEY NOT–FOR–PROFIT CORPORATION,

Plaintiffs–Appellees,

v.

CITY OF NEW YORK, a municipal corporation, MICHAEL BLOOMBERG, MAYOR OF NEW YORK CITY, in his official capacity, JONATHAN MINTZ, the COMMISSIONER of the NEW YORK

CITY DEPARTMENT OF CONSUMER AFFAIRS,
in his official capacity,

Defendants–Appellants.

Before: POOLER, WESLEY, and LOHIER, *Circuit Judges*.

Appeal from the July 13, 2011 memorandum and order of the United States District Court for the Southern District of New York (William H. Pauley III, *J.*) granting Plaintiffs-Appellees' motion for a preliminary injunction enjoining Local Law No. 17, which requires pregnancy services centers, a term defined in the law, to make disclosures regarding the services that they provide. Because the district court found that Plaintiffs had demonstrated, with respect to their First Amendment claims, both (1) a likelihood of success on the merits and (2) irreparable harm, and it also concluded that the law is unconstitutionally vague, the court enjoined the statute in its entirety. On appeal, we conclude that the law is not impermissibly vague. We also conclude that Plaintiffs failed to demonstrate a likelihood of success on the merits with respect to one challenged disclosure provision, which requires pregnancy services centers to disclose if they have a licensed medical provider on staff, but that plaintiffs have demonstrated a likelihood of success on the merits with respect to other provisions challenged by plaintiffs that require other forms of disclosure and impermissibly compel speech. Because the provisions are severable, however, we sever the enjoined provisions from the rest of Local Law No. 17. Accordingly, the memorandum and order of the district court is AFFIRMED in part and VACATED in part, and this case is REMANDED for further proceedings.

Judge Wesley concurs in part and dissents in part in a separate opinion.

MORDECAI NEWMAN, Assistant Corporation Counsel (Michael A. Cardozo, Corporation Counsel, Larry A. Sonnenshein, Nicholas Ciappetta, Robin Binder, of Counsel, *on the brief*), City of New York, New York, NY, *for Defendants-Appellants*.

JAMES MATTHEW HENDERSON, American Center for Law & Justice, Washington, DC (Cecilia, N. Heil, Erik M. Zimmerman, Carly F. Gammil, *on the brief*), *for Plaintiffs-Appellees the Evergreen Association Inc. and Life Center of New York, Inc.*

MATTHEW BOWMAN, Alliance Defense Fund, Washington, DC (M. Todd Parker, Moskowitz & Book, New York, NY, *on the brief*), *for Plaintiffs-Appellees Pregnancy Care Center of New York, Boro Pregnancy Counseling Center*, *and Good Counsel, Inc.*

Kimberly A. Parker, Zaid A. Zaid, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, *for amici curiae Planned Parenthood of New York City, NARAL Pro-Choice New York, NARAL Pro-Choice America, Community Healthcare Network, Law Students for Reproductive Justice, New York Abortion Access Fund, New York City Chapter of the National Organization for Women, New York County Chapter of the New York State Academy of Family Physicians, New York State Association of Licensed Midwives, National Abortion Federation, National Advocates for Pregnant Women, National Latina*

Institute for Reproductive Health, Physicians for Reproductive Choice and Health, Public Health Association of New York, Religious Coalition for Reproductive Choice, Reproductive Health Access Project, Sistersong Women of Color Reproductive Justice Collective, the Honorable (Congresswoman) Carolyn Maloney, in support of Defendants-Appellants.

Brian J. Kreiswirth, Chair, Committee on Civil Rights, The Association of the Bar of the City of New York, New York, NY, *for amicus curiae The Association of the Bar of the City of New York, in support of Defendants-Appellants.*

Priscilla J. Smith, Jennifer Keighley, The Information Society Project at Yale Law School, Brooklyn, NY, *amicus curiae, in support of Defendants-Appellants.*

Melissa Goodman, Alexis Karteron, Arthur N. Eisenberg, New York Civil Liberties Union, New York, NY, *amicus curiae, in support of Defendants-Appellants.*

Dennis J. Herrera, City Attorney, Danny Chou, Chief of Complex & Special Litigation, Erin Bernstein, Deputy City Attorney, San Francisco, CA, *for amici curiae City and County of San Francisco, in support of Defendants-Appellants.*

Deborah J. Dewart, Justice and Freedom Fund, Swansboro, NC, *amicus curiae, in support of Plaintiffs-Appellees.*

Mailee R. Smith, Americans United for Life, Washington, DC, *for amici curiae Pregnancy Care Organizations Care Net, Heartbeat International, Inc., and National Institute of Family and Life Advocates, in support of Plaintiffs-Appellees*.

Noel J. Francisco, Jones Day, Washington, DC, *for amicus curiae Law Professors In Support of Appellees, in support of Plaintiffs-Appellees.*

Samuel B. Casey, David B. Waxman, Jubilee Campaign- Law of Life Project, Washington, DC, *for amici curiae, American Association of Pro-Life Obstetricians and Gynecologists, The Catholic Medical Association, and The Christian Medical and Dental Associations, in support of Plaintiffs-Appellees.*

John P. Margand, Scarsdale NY, *for amicus curiae Dr. Michael J. New, in support of Plaintiffs-Appellees.*

Pooler, *Circuit Judge*:

Defendants-Appellants (collectively, "the City") appeal from the July 13, 2011 memorandum and order of the United States District Court for the Southern District of New York (William H. Pauley III, *J.*) granting Plaintiffs-Appellees' ("Plaintiffs"") motion for a preliminary injunction enjoining Local Law No. 17 of the City of New York ("Local Law 17"). Local Law 17, *inter alia*, requires pregnancy services centers, a term defined in the statute, to make certain disclosures regarding the services that the centers provide. *See Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 200-01 (S.D.N.Y. 2011). The district court found that Plaintiffs, providers of various pregnancy-related services, demonstrated, with respect to their First Amendment claims, both (1) a likelihood of success on the merits and (2) irreparable harm. *See id.* at 202-09; *see also Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 230 (2d Cir. 2011) (discussing standard for preliminary injunction), *aff'd* 133 S. Ct. 2321 (2013). The district court also concluded that Local Law 17 is unconstitutionally vague. It therefore enjoined the statute in its entirety. On appeal, we conclude that the law is not impermissibly vague. We also conclude that Plaintiffs failed to demonstrate a likelihood of success on the merits with respect to one of the challenged disclosures, which requires pregnancy services centers to disclose if they have a licensed medical provider on staff, but that Plaintiffs have demonstrated a likelihood of success on the merits with respect to other provisions challenged by

Plaintiffs that require other forms of disclosure and impermissibly compel speech. Because the provisions are severable, we sever the enjoined provisions from the rest of Local Law 17. Accordingly, the memorandum and order of the district court is AFFIRMED in part and VACATED in part, and this case is REMANDED for further proceedings.

BACKGROUND

This case asks us to decide whether the New York City Council and Mayor of New York City can impose requirements on pregnancy services centers aimed at informing potential clients about the centers and the services that they provide, or do not provide, without running afoul of the First Amendment.[1]

I. Local Law 17

In March 2011, the New York City Council passed and Mayor Michael Bloomberg signed into law Local Law 17, which was scheduled to go into effect on July 14, 2011, and intended to be codified in the New York City Administrative Code

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[1] We pause to note that Fourth Circuit has recently resolved appeals on a similar issue. *See Centro Tepeyac v. Montgomery Cnty.,* 722 F.3d 184 (4th Cir. 2013) (after rehearing *en banc,* affirming the district court decision preliminarily enjoining only one of the two challenged disclosures); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.,* 721 F.3d 264 (4th Cir. 2013) (after rehearing *en banc,* vacating the district court's grant of plaintiffs' motion for summary judgment on their First Amendment challenge).

("Administrative Code").[2] The law imposes on pregnancy services centers certain confidentiality requirements and mandatory disclosures. Only the disclosures are at issue in this case. Under the law, pregnancy services centers must disclose

> (1) whether or not they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center" (the "Status Disclosure");
>
> (2) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider" (the "Government Message"); and
>
> (3) whether or not they "provide or provide referrals for abortion," "emergency contraception," or "prenatal care" (the "Services Disclosure").

Administrative Code § 20-816(a)-(e). They must provide the required disclosures at their entrances and waiting rooms, on advertisements, and during telephone conversations.[3] *Id.* § 20-816(f). The law

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[2] Citations to the Administrative Code are to Local Law 17's additions to Chapter 5 of Title 20 of the Code, listed in Local Law 17 § 2.

[3] Specifically, the statute provides that pregnancy services centers must provide the disclosures (1) in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the commissioner on (i) at least one

imposes civil fines on facilities that violate its provisions, and it gives the Commissioner of Consumer Affairs the authority to enforce the disclosure requirements by sealing for up to five days any facility that has three or more violations within two years. *Id.* § 20-818(a)-(b).

Local Law 17 defines a "pregnancy services center" as a "facility, . . . the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) has the appearance of a licensed medical facility." *Id.* § 20-815(g). The law provides a nonexclusive list of factors for consideration in determining whether a facility "has the appearance of licensed medical

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sign conspicuously posted in the entrance of the pregnancy services center; (ii) at least one additional sign posted in any area where clients wait to receive services; and (iii) in any advertisement promoting the services of such pregnancy services center in clear and prominent letter type and in a size and style to be determined in accordance with rules promulgated by the commissioner; and (2) orally, whether by in person or telephone communication, upon a client or prospective client request for any of the following services:(i) abortion; (ii) emergency contraception; or (iii) prenatal care. Administrative Code § 20-816(f).

facility."[4] *Id.* It is "prima facie evidence that a facility has the appearance of a licensed medical facility if it has two or more of the factors." *Id.* Finally, the law exempts from its provisions facilities that are "licensed . . . to provide medical or pharmaceutical services" or have a licensed medical provider on staff. *Id.*

II. New York City Council Proceedings

On October 13, 2010 New York City Council Member Jessica S. Lappin introduced the bill that would become Local Law 17, Council Int. No. 371-2010("Int. No. 371"), in order to regulate the practices of "crisis pregnancy centers" ("CPCs"), organizations that provide non-medical pregnancy services and are opposed to abortion. The Council's Committee on Women's Issues held a hearing on the bill on November 16, 2010. At the beginning of the hearing, Council Member Julissa Ferreras, as chair of the Committee, testified that the proposed disclosures were required because "[i]f such

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[4] Local Law 17 states that [a]mong the factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility are the following: the pregnancy services center (a) offers pregnancy testing and/or pregnancy diagnosis; (b) has staff or volunteers who wear medical attire or uniforms; (c) contains one or more examination tables; (d) contains a private or semi-private room or area containing medical supplies and/or medical instruments; (e) has staff or volunteers who collect health insurance information from clients; and (f) is located on the same premises as a licensed medical facility or provider or shares facility space with a licensed medical provider. Administrative Code § 20-815(g).

disclosures are not made, women seeking reproductive health care may be confused and/or misle[]d by unclear advertising or may unnecessarily delay prenatal care or abortion." Council Member Lappin stated that Int. No. 371 was "about truth in advertising and women's health." The Committee then considered testimony and written submissions both in favor of and against the bill.

The Committee considered a wide array of testimony in favor of Int. No. 371's proposed disclosure requirements. Several people testified as to misleading practices by CPCs. Joan Malin, President and CEO of Planned Parenthood, testified that CPCs are often intentionally located in proximity to Planned Parenthood facilities and that they often use misleading names and signage. Mariana Banzil, the Executive Director at Dr. Emily Women's Health Center, testified about a particular CPC that would park a bus in front of her clinic, from which the CPC's counselors, often wearing scrubs, would offer ultrasounds, harass Center patients, tell patients that the Center was closed, or identify themselves as Center workers.

Dr. Susan Blank, an Assistant Commissioner at the New York City Department of Health and Mental Hygiene, testified that delay in prenatal care decreases "the likelihood of a healthy pregnancy, delivery, healthy newborn and mother. That's why starting prenatal care in the first trimester is standard care in obstetric practice." She also noted the dangers of delays in access to abortion services and emergency contraception.

Other witnesses testified to patient experiences with both misleading CPC practices and delays in access to services. Balin Anderson, a social worker at Planned Parenthood, described several of her patients who mistook a CPC for a Planned Parenthood site; one patient was intercepted by a CPC member who posed as a Planned Parenthood staff member. Reverend Matthew Westfox, an ordained minister at the United Church of Christ, described the experience of several parishioners. One woman scheduled an appointment for an abortion at an organization that, as she learned upon arrival, was a CPC. Another

> works at a grocery store and had to negotiate with both her boss and one of her co-workers to get the day off so she could go to the clinic and have the abortion that she and her husband had together decided was best.
>
> When she realized she had gone to a place that wasn't going to provide the service she needed, that she had wasted her day off, lost the income she could have had that day working, and that it would be without purpose, and that it might be three weeks before she could get another day off to try this again, she was outraged.

Dr. Anne R. Davis described how one of her patients, Susan, went to a CPC during her second trimester in order to get an abortion. Despite there being no medical need, the CPC told the patient that

she would need repeated ultrasounds before the procedure could be done:

> The staff told Susan that she needed an ultrasound before the procedure. Then another ultrasound. They attributed the multiple tests to uncertainty about how advanced her pregnancy was. Because of these delays, Susan's pregnancy progressed into the third trimester.
>
> Susan was 32 weeks pregnant and still seeking an abortion when she consulted me at our hospital-based clinic. I had to tell her it was no longer possible: she was beyond the legal limit for abortion in New York. . . . [W]hen I examined Susan, I found her case straightforward – one simple abdominal ultrasound would have dated her pregnancy easily. The CPC had no medical reasons for keeping her waiting.

Jennifer Carnig, Director of Communications for the New York Civil Liberties Union, discussed her personal experience mistakenly entering a CPC: she filled out medical history paperwork, gave contact information, and received a pregnancy test and sonogram from a woman wearing medical scrubs. Kristan Toth, an abortion counselor, offered written testimony that "some [of her clients] are set up for procedures with appointments, only to have these appointments canceled and rescheduled time and time again, in an attempt to prolong the process past a point when a woman can have access to a real and

safe abortion. . . .” Reverend Dr. Earl Kooperkamp offered written testimony that he had counseled women who had sought advice from CPCs that were unable to discuss with them the full range of pregnancy options. Kellin Conlin, President of NARAL Pro-Choice New York, testified and offered into the record a copy of a NARAL Report. The report, entitled “She Said Abortion Causes Breast Cancer: A Report on the Lies, Manipulations and Privacy Violations at Crisis Pregnancy Centers,” summarizes the findings of NARAL’s investigation into CPCs through website analysis, phone survey, in-person visits, and review of literature distributed by CPCs. The report describes how many CPCs use medical sounding names, are located near medical clinics and hospitals, provide pregnancy testing and ultrasounds, and require patients to fill out detailed forms soliciting personal information, all of which creates the impression that the CPCs are medical facilities. Several counselors NARAL spoke with gave incorrect information as to how long a woman can legally wait before getting an abortion.

Finally, the Committee also heard testimony as to how many CPCs solicited confidential medical history information from clients.

Testimony was also offered against Int. No. 317. Chris Slattery, the founder of Expectant Mother Care (“EMC”), an anti-abortion pregnancy clinic, testified to the work done by EMC in counseling and providing care to women. He conceded that, at times, women confused EMC with a Planned Parenthood site located in the same building, but noted that

EMC did not mislead prospective clients about the fact that EMC was a different organization. Kathleen Dooley-Polcha, director of the Catholic Guardian Society and Home Bureaus Maternity Services Program, testified that her organization informed prospective clients that they did not provide medical care or access to abortion, but believed that centers should not be required to post disclosure signs. Persons affiliated with other CPCs testified about the work they did counseling and helping women; several noted that their organizations clearly informed women that they do not provide abortion or medical care. Dr. Anne Mielnik, a physician, testified that CPCs play a vital role in helping women. She noted that she consulted with several centers to answer medical questions and provide urgent medical care. Others testified to First Amendment concerns. Finally, many people testified in favor of the services provided by many CPCs, offered concerns about the potential health risks of abortion, and were worried that the bill would promote a pro-abortion agenda.

On March 1, 2011, the Committee on Women's Issues approved Int. No. 371, and on March 2, 2011, the full New York City Council passed the bill. On March 16, 2011, Mayor Michael Bloomberg signed the bill into law.

Local Law 17 includes a statement of "[l]egislative findings and intent." Local Law 17 § 1. The New York City Council found that some pregnancy services centers engaged in deceptive practices about their services; that these deceptive

practices could impede or delay consumer access to reproductive health services and wrongly lead consumers to believe they had received care from a licensed medical provider; and that existing laws did not adequately protect consumers from these deceptive practices. *Id.* It further found that "[d]elay in accessing abortion or emergency contraception creates increased health risks and financial burdens, and may eliminate a women's [sic] ability to obtain [reproductive health services], severely limiting her reproductive health options." *Id.* The Council stated that it enacted the law to ensure that "consumers in New York City have access to comprehensive information about and timely access to all types of reproductive health services including, but not limited to, accurate pregnancy diagnosis, prenatal care, emergency contraception and abortion." *Id.*

III. The Plaintiffs

Plaintiffs The Evergreen Association, Inc. ("Evergreen"), Life Center of New York ("Life Center"), Pregnancy Care Center of New York ("PCCNY"), Boro Pregnancy Counseling Center ("Boro"), and Good Counsel, Inc. ("Good Counsel") are pregnancy services centers under Local Law 17. Evergreen and Life Center provide a variety of pregnancy-related services including pregnancy testing, pregnancy counseling, ultrasounds, and sonograms. PCCNY, Boro, and Good Counsel also provide pregnancy services, but do not provide ultrasounds, sonograms, or physical examinations. Plaintiffs, with the exception of Good Counsel, provide their services free of charge. Good Counsel,

which offers services to pregnant women housed at its residential facilities, asks residents to pass on their rent subsidy (if on public assistance) or 10% of their income (if employed). None of the Plaintiffs offer or provide referrals for abortion or emergency contraception.

Plaintiffs moved for a preliminary injunction to prevent Local Law 17 from taking effect. They argued that the law infringed on their free speech rights under the First Amendment. In a June 13, 2011 memorandum and order, the district court granted the motion. *Evergreen Ass'n, Inc.,* 801 F. Supp. 2d at 197. Defendants the City of New York; Michael Bloomberg, Mayor of New York City, in his official capacity; and Jonathan Mintz, the Commissioner of the New York City Department of Consumer Affairs, in his official capacity, now appeal.

DISCUSSION

Local Law 17 requires pregnancy services centers to disclose (1) whether or not they have a licensed medical provider on staff (the "Status Disclosure"); (2) that "the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider" (the "Government Message"); and (3) whether or not they provide or provide referrals for abortion, emergency contraception, or prenatal care (the "Services Disclosure"). Administrative Code § 20-816(a)-(e). The district court found that these disclosure

requirements violated Plaintiffs' First Amendment rights, granted Plaintiffs' motion for a preliminary injunction, and enjoined the law in its entirety.

"We review the grant of a preliminary injunction for abuse of discretion." *Alliance,* 651 F.3d at 230. "A district court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *Id.* (internal quotation marks and ellipsis omitted).

Our review of the district court's decision requires us to consider the appropriate level of scrutiny to apply to the law, whether Plaintiffs have met their burden for a preliminary injunction, and whether we must enjoin the statute in its entirety due to vagueness. As discussed below, we find that Local Law 17 is not impermissibly vague, and thus sever the enjoined provisions from the rest of the law. We also find that Plaintiffs failed to demonstrate a likelihood of success on the merits with respect to one of the challenged disclosures.

I. Severance and Vagueness

Local Law 17 imposes confidentiality requirements that Plaintiffs have not challenged, along with several disclosure requirements and definitional provisions that Plaintiffs have challenged but that might be severable in the event they are unconstitutional. We must, therefore,

decide whether to sever any offending provisions or enjoin the law in its entirety. We hold that any offending provisions of the statute that infringe on Plaintiffs' First Amendment rights should be severed from the rest of the statute.

Severance of a local law is a question of state law. *See Gary D. Peake Excavating Inc. v. Town Bd. Of Hancock,* 93 F.3d 68, 72 (2d Cir. 1996). "Under New York Law, a court should refrain from invalidating an entire statute when only portions of it are objectionable." *Id.* (internal quotations omitted). "The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *Id.* at 73. Here, Local Law 17 provides that

> [i]f any section, subsection, sentence, clause, phrase or other portion of this local law is, for any reason, declared unconstitutional or invalid, in whole or in part, by any court of competent jurisdiction, such portion shall be deemed severable, and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this local law, which remaining portions shall continue in full force and effect.

Local Law 17 § 3. "Although the presence of a severability clause is not dispositive, the preference for severance is particularly strong when the law contains a severability clause." *Gary D. Peake,* 93 F.3d at 72 (internal quotation marks and brackets

omitted). Here, we consider the severability clause along with the City Council's interest in providing consumer access to information and the prevention of deception, *see* Local Law 17 § 1, as well as the statute's confidentiality provisions, enacted to protect consumers' personal and health information, which function independent of the disclosure requirements, *see* Administrative Code § 20-817. We think it clear that the City Council would wish for severance.

This does not end our analysis because Plaintiffs argue, and the district court held, that Local Law 17's definition of the term "pregnancy services centers" is impermissibly vague and that, for this reason, the entire statute should be enjoined. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado,* 530 U.S. 703, 732 (2000).

Local Law 17 has two definitions for "pregnancy services centers." The first definition includes facilities that, like Plaintiffs Evergreen and Life Center, provide ultrasounds, sonograms, or prenatal care. Administrative Code § 20-815(g).[5] The second

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[5] The parties do not seriously argue that this first definition is vague as applied to entities like Evergreen and Life Center, which indisputably provide at least some of the services specified in the statute. For this reason, even if the dissent

definition includes other facilities, that, like Plaintiffs PCCNY, Boro, and Good Counsel, do not provide such services, but that have "the appearance of a licensed medical facility." *Id.* With regard to this second definition, the law provides that

> [*a*]*mong* the factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility are the following: the pregnancy services center (a) offers pregnancy testing and/or pregnancy diagnosis; (b) has staff or volunteers who wear medical attire or uniforms; (c) contains one or more examination tables; (d) contains a private or semi-private room or area containing medical supplies and/or medical instruments; (e) has staff or volunteers who collect health insurance information from clients; and (f) is located on the same premises as a licensed medical facility or provider or shares facility space with a licensed medical provider.

Id. (emphasis added). The law adds that it is "prima facie evidence that a facility has the appearance of a licensed medical facility if it has two or more of the factors." *Id.* Plaintiffs argue that, because this list of factors is nonexclusive, Local Law 17 both fails to give fair notice to regulated facilities and authorizes

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were right that the second definition is impermissibly vague as applied to the PCCNY Plaintiffs, *see* Dissent at [3 n. 1], this would not necessarily require striking the entire statute as opposed to merely that second definition.

discriminatory enforcement. The district court, accepting this second argument, found the statute to be vague and enjoined it in its entirety.

We disagree. It is significant that the determination of Local Law 17's applicability is not solely by reference to the aforementioned factors. Instead, the determination is bound by the requirement of an "appearance" of a "licensed medical facility." The listed factors, while nonexclusive, are "objective criteria" that cabin the definition of "appearance." *See United States v. Schneiderman,* 968 F.2d 1564, 1568 (2d Cir. 1992) ("These guidelines tend to minimize the likelihood of arbitrary enforcement by providing objective criteria against which to measure possible violations of the law."), *abrogated on other grounds by Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513, 518-19, 524 n.13 (1994). In this way, the statute differs from the nonexclusive factors at issue in *Amidon v. Student Association of State University of New York*, which were the *sole* criteria guiding application of the referenda at issue and which included individual factors that were themselves "vague and pliable." 508 F.3d 94, 104 (2d Cir. 2007). The requirement of an "appearance of a licensed medical facility," combined with the listed factors, is enough to give notice to regulated facilities and curtail arbitrary enforcement.

The use of nonexclusive factors is admittedly imprecise, but the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted

with greater precision." *Rose v. Locke,* 423 U.S. 48, 49 (1975). "Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties." *Id.* at 49-50 (internal quotation marks and alterations omitted).

Because the New York City Council "would have wished the statute to be enforced with the invalid part exscinded," *Gary D. Peake,* 93 F.3d at 73, and because we find that Local Law 17 is not unconstitutionally vague, we enjoin only the portions of the law that infringe on Plaintiffs' First Amendment rights.

II. Appropriate Level of Scrutiny

The parties disagree about the appropriate level of scrutiny to apply to Local Law 17. Both agree that the law compels speech. Plaintiffs urge us to apply strict scrutiny. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.,* 487 U.S. 781, 795 (1988). "We therefore consider [laws mandating speech]" to be "content-based regulations" subject to strict or exacting scrutiny. *Id.*; *see also Turner Broad. Sys. v. FCC,* 512 U.S. 622, 642 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content.").

There are exceptions to this general rule, and the City and its amici put forth a number of arguments as to why we should subject Local Law 17's compelled disclosures to a lesser level of scrutiny. First, they point out that a lesser degree of scrutiny applies to compelled disclosures in the context of campaign finance regulation, *Citizens United v. FEC,* 558 U.S. 310, 366-67 (2010), the regulation of licensed physicians, *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 884 (1992), and commercial speech, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 650-51 (1985). From this, they argue that the distinction between prohibitions on speech and disclosure requirements should be "pertinent to our analysis," and that we should review Local Law 17 under intermediate exacting scrutiny. *Doe v. Reed,* 561 U.S. 186, 130 S. Ct. 2811, 2818 (2010). Second, they argue that the state's authority to compel physicians to provide information about abortion, *see Gonzales v. Carhart,* 550 U.S. 124, 157 (2007); *Casey,* 505 U.S. at 884, also applies to the regulation of non-licensed individuals who provide pregnancy-related services. Finally, the City argues that Local Law 17 regulates commercial speech, subject to either intermediate scrutiny, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y.,* 447 U.S. 560, 563-66 (1980), or, if the law compels disclosure of "purely factual and uncontroversial information," rational basis review, *Zauderer,* 471 U.S. at 651.

The district court considered and rejected all of these arguments. We find, however, that we need not decide the issue, because our conclusions are the

same under either intermediate scrutiny (which looks to whether a law is no more extensive than necessary to serve a substantial governmental interest) or strict scrutiny (which looks to whether a law is narrowly drawn to serve a compelling governmental interest).[6] As discussed below, under either level of review, the Government Message and Services Disclosure fail review while the Status Disclosure survives.

III. Preliminary Injunction

A party seeking "to stay government action taken in the public interest pursuant to a statutory or regulatory scheme . . . must establish (1) a likelihood of success on the merits, and (2) irreparable harm in the absence of an injunction." *Alliance,* 651 F.3d at 230 (internal quotation marks and alterations omitted). In considering the likelihood of success on the merits, we evaluate Plaintiffs' First Amendment claims, considering both

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[6] Assuming *arguendo* that Local Law 17's required disclosures regulate commercial speech, we do not believe that the law regulates "purely factual and uncontroversial information," such that rational basis review would apply. *Zauderer,* 471 U.S. at 651. Neither the Government Message nor the Services Disclosure require disclosure of "uncontroversial" information. The Government Message requires pregnancy services centers to state the City's preferred message, while the Services Disclosure requires centers to mention controversial services that some pregnancy services centers, such as Plaintiffs in this case, oppose. With respect to the Status Disclosure, the level of review does not matter, because, as discussed below, it survives under even strict scrutiny.

the importance of the City's interest and the burden imposed by the regulation in question. *See United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813 (2000); *Cent. Hudson,* 447 U.S. at 566.

Turning to the case at hand, we hold that the district court correctly determined that Plaintiffs have established irreparable harm. "Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.,* 331 F.3d 342, 349 (2d Cir. 2003). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley,* 487 U.S. at 795. Local Law 17, as it compels Plaintiffs to make disclosures or face penalties, is clearly a direct limitation on speech that creates a presumption of irreparable harm.

With respect to the merits, we hold that the City's interest in passing Local Law 17 is compelling. The City has stated that it enacted the statute to inform consumers about the services they will receive from pregnancy services centers in order to prevent delays in access to reproductive health services. *See* Local Law 17 § 1. The City considered a wide variety of testimony related to these interests, including testimony and reports from medical professionals, social workers, clergy, and reproductive health workers about misleading practices, patient experiences, and the dangers of delay in access to reproductive care. "[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in

connection with her pregnancy." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 767 (1994); *see also Am. Life League, Inc. v. Reno,* 47 F.3d 642, 656 (4th Cir. 1995) ("[P]rotect[ing] public health by promoting unobstructed access to reproductive health facilities" "serves sufficiently compelling governmental interests.").

At issue in this case is whether the required disclosures are sufficiently tailored to the City's interests. We evaluate the required disclosures individually, beginning with the Status Disclosure.

A. Status Disclosure

The Status Disclosure requires pregnancy services centers to disclose whether or not they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center." Administrative Code § 20-816(b). We disagree with the district court and hold that the Status Disclosure survives review under strict scrutiny.

Under strict scrutiny, the challenged regulation "must be narrowly tailored to promote a compelling Government interest." *Playboy Entm't,* 529 U.S. at 813. The statute must use the least restrictive means to achieve its ends. *Id.* While this is a heavy burden, it is not true "that strict scrutiny is strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 237 (1995) (internal quotation marks omitted). In First Amendment challenges, regulations have survived strict scrutiny. In *Burson*

v. Freeman, for example, the Supreme Court employed strict scrutiny in evaluating a statute carving out a "campaign-free zone" outside polling places. 504 U.S. 191, 193-94 (1992). Balancing the "minor" limitation prescribed by the statute against the historical concerns with voter intimidation and election fraud, the Court held that the statute was narrowly tailored to the state's interest in protecting the right of citizens to vote and conducting reliable elections. *Id.* at 198-210. In *Riley,* the Supreme Court suggested that a requirement that solicitors disclose their professional status would be narrowly tailored to the state's interest in "informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity." 487 U.S. at 798; *see also id.* at 799 n.11. The First Amendment test is concerned with a *balancing* of interests. Here, striking down the Status Disclosure would deprive the City of its ability to protect the health of its citizens and combat consumer deception in even the most minimal way.

The Status Disclosure is the least restrictive means to ensure that a woman is aware of whether or not a *particular* pregnancy services center has a licensed medical provider at the time that she first interacts with it. Such a law is required to ensure that women have prompt access to the type of care they seek. Plaintiffs have suggested, and the district court held, that alternative means exist: the City could sponsor advertisements or post signs outside of pregnancy services centers; it could prosecute fraud,

false advertising, and the unauthorized practice of medicine under current law; and it could impose licensing requirements on ultrasound professionals.[7] *See Evergreen,* 801 F. Supp. 2d at 208-09. But these alternate means will not accomplish the City's compelling interest. City-sponsored advertisements and signs cannot alert consumers as to whether a *particular* pregnancy services center employs a licensed medical provider, because, among other things, this is discrete factual information known only to the particular center. Enforcement of fraud or other laws occurs only after the fact, at which point the reproductive service sought may be ineffectual or unobtainable. Finally, the licensing and regulation of ultrasound professionals will not alert consumers to the status of the place in which such professionals are employed unless the licensing and regulation scheme itself requires disclosures comparable to Local Law 17's Status and Service Disclosures. Moreover, not all regulated centers provide ultrasounds, so a licensing and regulation effort aimed only at those centers that *do* provide ultrasounds would not help patients seeking medical assistance at other centers. The Status Disclosure is the least restrictive means of providing ready information about pregnancy services centers to consumers.

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[7] As the district court noted, New York state does not impose licensing requirements on ultrasound technicians. *Evergreen,* 801 F. Supp. 2d at 209. The district court suggested that the City could impose licensing requirements or lobby the state to do so. *Id.*

Similarly, Local Law 17 is not overly broad. "In order to narrowly tailor a law to address a problem, the government must curtail speech only to the degree necessary to meet the particular problem at hand, and the government must avoid infringing on speech that does not pose the danger that has prompted regulation." *Green Party of Conn. v. Garfield,* 616 F.3d 189, 209 (2d Cir. 2010). The district court held that the statute was overinclusive because not all pregnancy services centers engage in deception. We acknowledge that this is so. However, while the City considered deception by certain CPCs in its hearing, the problem it sought to solve is a different one. Local Law 17 seeks to prevent woman from mistakenly concluding that pregnancy services centers, which look like medical facilities, are medical facilities, whether or not the centers engage in deception. The law thus applies to facilities that "have the appearance of a licensed medical facility."

We conclude that the requirement that pregnancy services centers disclose whether or not they employ medical professionals is narrowly tailored. Our holding finds support in the Supreme Court's decision in *Riley,* where, as mentioned above, the Court suggested that a requirement that solicitors disclose their professional status is "a narrowly tailored requirement [that] would withstand First Amendment scrutiny." 487 U.S. at 799 n.11.[8] The Supreme Court has subsequently

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[8] We note that the plaintiffs in *Riley* did not challenge the status disclosure requirement, making the Supreme Court's discussion of the requirement dicta. 487 U.S. at 799.

favorably cited to *Riley*. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 623 (2003); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 706-07 (1992) (Kennedy, *J.,* concurring). Other Circuits have relied on *Riley* to uphold disclosure laws requiring solicitors to disclose their professional status or the name, identity and tax-exempt status of their organization. *See, e.g., Nat'l Fed'n of the Blind v. FTC,* 420 F.3d 331, 343 (4th Cir. 2005); *Dayton Area Visually Impaired Persons, Inc. v. Fisher,* 70 F.3d 1474, 1485 (6th Cir. 1995); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1539 (11th Cir. 1993); *Telco Commc'ns, Inc. v. Carbaugh,* 885 F.2d 1225, 1232 (4th Cir. 1989). We acknowledge that the case at hand is different, because the required disclosure does not arise in the context of charitable solicitation. However, in both contexts the laws in question support the state interest in informing consumers and combating misinformation. A requirement that pregnancy services centers "unambiguously" disclose the "professional status" of their employees, *Riley,* 487 U.S. at 799 n.11, is narrowly tailored to the City's interests.

Finally, we note that the United States District Court for the District of Maryland and the Fourth Circuit recently reached a similar conclusion in

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Additionally, the Court was divided over this issue. *See id.* at 803 (Scalia, *J.,* concurring in part and concurring in judgment) ("I do not see how requiring the professional solicitor to disclose his professional status is narrowly tailored to prevent fraud.").

Centro Tepeyac v. Montgomery County, 779 F. Supp. 2d 456 (D. Md. 2011), *rev'd in part,* 683 F.3d 591 (4th Cir. 2012), *rev'd en banc,* 722 F.3d 184 (4th Cir. 2013). At issue in *Centro Tepeyac* was a statute requiring certain non-medical pregnancy centers to post a sign stating: (1) "the Center does not have a licensed medical professional on staff;" and (2) "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider." 779 F. Supp. 2d at 459 (internal quotation marks omitted). The plaintiffs challenged the ordinance on First Amendment grounds and sought a preliminary injunction. Evaluating under strict scrutiny, the district court refused to enjoin the first required disclosure, noting that

> the record is at least colorable at this stage to suggest that the disclaimer is narrowly tailored to meet the interest: only requiring those [pregnancy clinics] to post a notice that a licensed medical professional is not on staff. It does not require any other specific message and in neutral language states the truth.

Id. at 471. After rehearing the appeal *en banc,* the Fourth Circuit affirmed the district court. 722 F.3d at 188-92. As Judge Wilkinson stated in his concurrence in *Centro Tepeyac*:

> [I]n exercising its broad police power to regulate for the health and safety of its citizens, the state must also enjoy some

> leeway to require the disclosure of the modicum of accurate information that individuals need in order to make especially important medical . . . decisions. . . . [The Status Disclosure] relies on the common-sense notion that pregnant women should at least be aware of the qualifications of those who wish to counsel them regarding what is, among other things, a medical condition.

Id. at 193. We similarly conclude that the neutral message required by the Status Disclosure survives strict scrutiny.

B. Services Disclosure

The Services Disclosure requires pregnancy services centers to disclose whether or not they provide or provide referrals for abortion, emergency contraception, or prenatal care. Administrative Code § 20-816(c)-(e). We hold that the Services Disclosure is not sufficiently tailored to the City's interests under either strict scrutiny or intermediate scrutiny.

Evaluating under strict scrutiny, we apply the same tailoring analysis to the Services Disclosure as we did with respect to the Status Disclosure. As we explained above, requirements that the City sponsor advertisements or post signs, prosecute fraud and false advertising, or impose ultrasound licensing requirements are insufficient to ensure that women are readily aware of whether or not a particular pregnancy services center provides the services sought. However, on this record, the Status

Disclosure, by itself, might narrowly satisfy the City's interest, as it alerts consumers to a small bit of accurate information about the *type* of services each center provides – medical or non-medical – even though it does not discuss specific services. *Cf. Centro Tepeyac,* 722 F.3d at 190 (considering whether, in light of ordinance's status disclosure, the city's message that pregnant women should consult with a licensed health care provider was "unneeded speech").

Regardless of whether less restrictive means exist, the Services Disclosure overly burdens Plaintiffs' speech. When evaluating compelled speech, we consider the context in which the speech is made. *Riley,* 487 U.S. at 796-97. Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives. "[E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982) (internal quotation marks omitted). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley,* 487 U.S. at 795. A requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins.

Riley is again instructive. In that case, the Supreme Court struck down a state law that required solicitors to disclose to potential donors the percentage of charitable contributions that were turned over to charity. *Id.* In striking down the mandatory disclosure, the Court noted that "if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id.* at 800. We face similar concerns here. The Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues of prenatal care, emergency contraception, and abortion. The centers must be free to formulate their own address. Because it mandates discussion of controversial political topics, the Services Disclosure differs from the "brief, bland, and non-pejorative disclosure" required by the Status Disclosure. *See Telco,* 885 F.2d at 1232.

Finally, we consider whether a different answer would obtain under intermediate scrutiny, which looks to whether the regulation at issue is not more extensive than necessary to serve a substantial governmental interest. While it is a closer question, we conclude that it would not, considering both the political nature of the speech and the fact that the Status Disclosure provides a more limited alternative regulation.

C. The Government Message

Finally, the Government Message requires pregnancy services centers to disclose that "the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider." Administrative Code § 20-816(a). We also hold that it is insufficiently tailored.

First, less restrictive alternatives exist. As the district court in *Centro Tepeyac* noted, the government interest in ensuring that women do not forego medical treatment "might be satisfied once women were aware that [pregnancy services centers] do not staff a medical professional." 779 F. Supp. 2d at 468; *see also Centro Tepeyac,* 722 F.3d at 190. Second, the Government Message differs from both the Status Disclosure and the Services Disclosure in that the City can communicate this message through an advertising campaign. The City's broad message does not require knowledge of discrete information available only to individual pregnancy services centers.

We are also concerned that this disclosure requires pregnancy services centers to advertise on behalf of the City. It may be the case that most, if not all, pregnancy services centers would agree that pregnant women should see a doctor. That decision, however, as this litigation demonstrates, is a public issue subject to dispute. The Government Message, "mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue," deprives Plaintiffs of their right to communicate freely on matters of public concern. *Alliance,* 651

F.3d at 236 (affirming grant of preliminary injunction enjoining government agencies from requiring nongovernmental organizations to explicitly adopt statements opposing prostitution as a condition of receiving government funds). The circumstances here differ from *Alliance* in two key respects: (1) the regulation here does not require the speaker to claim the message as its own, *see id.* at 237, but instead qualifies that it comes from the government; and (2) the regulation here was not enacted as a condition to the receipt of funding. The first distinction is of little concern here, because a law that requires a speaker to advertise on behalf of the government offends the Constitution even if it is clear that the government is the speaker. *See Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (invalidating statute that turned speaker's "private property [into] a 'mobile billboard' for the State's ideological message"). The second distinction further underscores the First Amendment violation. While the government may incidentally encourage certain speech through its power to "[choose] to fund one activity to the exclusion of the other," *Rust v. Sullivan,* 500 U.S. 173, 193 (1991), it may not directly "mandat[e] that Plaintiffs affirmatively espouse the government's position on a contested public issue" through regulations, like Local Law 17, that threaten not only to fine or de-fund but also to forcibly shut down non-compliant entities, *Alliance,* 651 F.3d at 236; *see also Turner,* 512 U.S. at 642 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws that

"suppress, disadvantage, or impose differential burdens upon speech because of its content.").

Based on the above, we hold that the Government Message is insufficiently tailored to withstand scrutiny.

CONCLUSION

For the foregoing reasons, the memorandum and order of the district court is AFFIRMED in part and VACATED in part. We REMAND for further proceedings consistent with this opinion.

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Wesley, *J.*, concurring in part and dissenting in part:

Local Law 17 is a bureaucrat's dream. It contains a deliberately ambiguous set of standards guiding its application, thereby providing a blank check to New York City officials to harass or threaten legitimate activity. Although I concur with the majority that the Government Message and the Services Disclosure fail under either strict or intermediate scrutiny, I agree with the district court that the entire statute is irredeemably vague with respect to the definition of a pregnancy services center (PSC). I therefore dissent from the Court's conclusion that the Status Disclosure survives our review.

Plaintiffs' briefs, the City's arguments, and the record indicate that plaintiffs have mounted an as-applied, rather than a facial, challenge, and the district court treated it as such. *See Evergreen Ass'n, Inc. v. City of New York,* 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011). Neither party contends that this is a facial challenge, suggests that Local Law 17 is inapplicable to the plaintiffs, or indicates that additional discovery is required before engaging in an as-applied analysis.

Where, as here, a statute "is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Farrell v. Burke,* 449 F.3d 470, 485 (2d Cir. 2006). As the majority rightly points out, courts may conclude that a law is vague for either of two independent reasons: if the law fails to provide fair notice to potentially regulated entities, or if the law "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado,* 530 U.S. 703, 732 (2000). The second of these reasons, which the Supreme Court recognizes as "the more important aspect of the vagueness doctrine," *Kolender v. Lawson,* 461 U.S. 352, 358 (1983), mandates that statutes "provide explicit standards for those who apply them" to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). No one disputes that Local Law 17 burdens First Amendment expression, and in my view the law utterly fails to provide adequate guidance for its enforcement. The law gives the Commissioner unbridled discretion to determine that a facility has the "appearance of a licensed medical facility." This is an inherently slippery definition – all the more because, as the district court recognized, the law carries the "fundamental flaw" of enumerating factors that are only "among" those to be considered, meaning that the City can find a facility covered absent any *or all* of the listed qualities. *See Evergreen,* 801 F. Supp. 2d at 210. A facility that

meets three of the factors might not be a PSC, whereas a facility meeting only one – or none! – of those factors might still be subjected to the restrictions of the law.[1]

This framework authorizes and encourages arbitrary enforcement. The law expressly allows the City to decide, without additional direction, what to do with centers that meet only one listed factor. And even worse, the law explicitly authorizes the City to rely on other, unlisted factors, not known to anyone, which may themselves be vague or discriminate on the basis of viewpoint. Although counsel for the City sought during oral argument to assure us that *ad hoc* investigative decisions would not occur, such a "trust me" approach to enforcement in serious regulatory matters is small comfort for those being investigated.

The City does not dispute that the Commissioner has broad discretion to determine whether a facility qualifies as a PSC – indeed, they admit that this is *by design*. According to the City, Local Law 17 "grants the Commissioner appropriate discretion to identify [a PSC] *should there exist circumstances* consistent with, but not strictly limited to, the guidelines enumerated." Appellants' Br. at 84 (emphasis added). As counsel for the City explained during oral argument before the district court, the

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[1] None of the PCCNY Plaintiffs engage in activities that trigger the "ultrasound/prenatal care" provision of Local Law 17. *See* Joint App'x 1051. Thus, they can only be subject to the law if they meet the "appearance of a medical facility" test.

definition of a PSC "is meant to cover anything that comes along in the future. I don't know in particular what falls within the definition now." Joint App'x 1007. In other words, because the City cannot anticipate all the facilities that it may want the law to cover, the City needs the maximum of flexibility to be able to decide whether a facility is a PSC. But "[i]f the [City] cannot anticipate what will be considered [a PSC under the statute], then it can hardly expect [anyone else] to do so." *See Fox Television Stations, Inc. v. FCC,* 613 F.3d 317, 331 (2d Cir. 2010), *vacated on other grounds,* 132 S. Ct. 2307 (2012).[2]

The majority's reliance on *United States v. Schneiderman,* 968 F.2d 1564 (2d Cir. 1992), is misplaced. In that case, we rejected a vagueness challenge to a statute that prohibited the sale of drug paraphernalia in certain instances. The statute contained a list of 15 different items that exemplified drug paraphernalia but also noted that the statute covered any item "primarily intended or designed for use in ingesting, inhaling, or otherwise introducing" certain controlled substances into the body. *Id.* at 1569. *Schneiderman* recognized that with regard to criminal statutes, a vagueness challenge was on unsteady ground if the statute had a *mens rea* element. Because the statute at issue criminalized

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[2] The Supreme Court's vacatur of this decision had no impact on the propositions cited above. The Court determined that the FCC's standards for determining obscene content were vague as applied to the broadcasts in question. It therefore did not address this Court's determination that the statute was unconstitutionally vague on its face. *See Fox Television Stations,* 132 S. Ct. at 2320.

conduct when the device in question was "primarily intended or designed" to aid in drug use, the court was confident that defendants selling or transporting implements intended to be used with drugs would have adequate notice that their conduct was prohibited. Moreover, the list of examples of prohibited devices, along with additional factors that could be used to evaluate a particular device, adequately circumscribed the statute. *See id.* *Schneiderman* was not a case in which the standards were ill defined, or in which the statute allowed an enforcing official to determine on an *ad hoc* basis what a device "appeared" to be. Instead, the choices were limited by the *mens rea* element regarding the intended use of the device. That is not the case here.

Local Law 17 also regulates expression, which requires a particularly high degree of specificity. Under the law as written, a facility – whether or not it is anti-abortion – may be subject to the disclosure requirements simply because it is located in a building that houses a medical clinic, no matter how far it is from that clinic. The operators of such a center have no way of knowing whether the Commissioner will penalize them for failing to comply with the law's requirements even if the center exhibits no other characteristics similar to a medical facility; the context of the law raises the troubling possibility of arbitrarily harsh enforcement against such centers that choose not to tell women about the option of abortion.

It may well be that some PSCs lull pregnant women into making uninformed decisions about

their health. The City has an interest in preventing impostors from posing as healthcare workers and in making sure that misinformation is not directed at a vulnerable class of poor or uninformed women. However, the City does not have a right to sweep all those who, for faith-based reasons, think that abortion is not the right choice in with those who would defraud or intentionally mislead women making this important and personal decision. Local Law 17 is unconstitutional to the extent that plaintiffs challenge it in this Court.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of January, two thousand and fourteen.

Before: Rosemary S. Pooler,
Richard C. Wesley,
Raymond J. Lohier, Jr.,
Circuit Judges.

The Evergreen Association, Inc., DBA Expectant Mother Care Pregnancy Centers EMC Frontline Pregnancy Center, Life Center Of New York, Inc., DBA AAA Pregnancy Problems Center, Pregnancy Care Center of New York, Incorporated as Crisis Pregnancy Center of New York, a New York Not-for-Profit Corporation, Boro Pregnancy Counseling Center, a New York Not-for-Profit Corporation, Good Counsel, Inc., a New Jersey Not-for-Profit Corporation,

Plaintiffs-Appellees,

v.

JUDGMENT
Docket Nos.
11-2735(L)
11-2929(con)

City of New York, a municipal corporation, Michael Bloomberg, Mayor of New York City, in his official capacity, Jonathan Mintz, the commissioner of the New York City Department of Consumer Affairs, in his official capacity,

Defendants-Appellants.

The appeal in the above captioned case from a memorandum and order of the United States District Court for the Southern District of New York was argued on the district court record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the memorandum and order of the district court is AFFIRMED in part, VACATED in part, and REMANDED for further proceedings in accordance with the opinion of this court.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE EVERGREEN ASSOCIATION, INC., d/b/a EXPECTANT MOTHER CARE PREGNANCY CENTERS-EMC FRONTLINE PREGNANCY CENTERS, et ano.,	11 Civ. 2055 (WHP)
Plaintiffs,	MEMORANDUM & ORDER
-against-	(Filed Jul. 13, 2011)
THE CITY OF NEW YORK,	
Defendant.	
PREGNANCY CARE CENTER OF NEW YORK, et al.,	11 Civ. 2342 (WHP)
Plaintiffs,	
-against-	
THE CITY OF NEW YORK, et al.,	
Defendants.	

WILLIAM H. PAULEY III, District Judge:

Plaintiffs Evergreen Life Association, Inc. ("Evergreen"), Life Center of New York, Inc. ("Life Center"), Pregnancy Care Center ofNew York ("Pregnancy Care"), Boro Pregnancy Counseling Center ("Boro"), and Good Counsel Homes ("Good Counsel") bring these actions against Defendants The City of New York (the "City"), Mayor Michael Bloomberg, and New York City Department of Consumer Affairs Commissioner Jonathan Mintz (the "Commissioner"), alleging that New York City Local Law No. 17[1] ("Local Law 17" or the "Ordinance") infringes their free speech rights under the United States and New York constitutions. Plaintiffs move for a preliminary injunction enjoining Local Law 17 from taking effect on July 14, 2011 until this action is resolved. For the following reasons, Plaintiffs' motion is granted.

BACKGROUND

I. Local Law 17

Local Law 17 requires facilities defined as "pregnancy services centers" to make certain mandatory disclosures concerning their services. (Declaration of Nicholas Ciappetta dated May 18, 2011 ("Ciappetta Decl.") Ex. F: New York City Local Law No. 17.) A "pregnancy services center" is defined as any facility whose "primary purpose . . . is to provide services to women who are or may be

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[1] New York, N.Y., Administrative Code, ch. 5, title 20 (2011).

pregnant" and "that either[] (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care[,] or (2) has the appearance of a licensed medical facility." (Local Law 17 § 20-815(g).) The following factors are "among the factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility":

> [whether the facility] (a) offers pregnancy testing and/or pregnancy diagnosis; (b) has staff or volunteers who wear medical attire or uniforms; (c) contains one or more examination tables; (d) contains a private or semi-private room or area containing medical supplies and/or medical instruments; (e) has staff or volunteers who collect health insurance information from clients; and (f) is located on the same premises as a licensed medical facility or provider or shares space with a licensed medical provider.

(Local Law 17 § 20-815(g).) Local Law 17 states that "it shall be prima facie evidence that a facility has the appearance of a licensed medical facility if it has two or more of the[se] factors. . . . " (Local Law 17 § 20-815(g).)

The Ordinance exempts facilities that (1) are licensed by New York State or the United States to "provide medical or pharmaceutical services," or (2) have a "licensed medical provider . . . present to directly provide or directly supervise the provision of

any of the services listed above. (Local Law 17 § 20-815(g).)

Any facility qualifying as a pregnancy services center must make the following disclosures:

> (1) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider";
>
> (2) whether it has "a licensed medical provider on staff who provides or directly supervises the provision of all of the services" at the facility; and
>
> (3) whether it provides referrals for abortion, emergency contraception, and prenatal care.

(Local Law 17 § 20-816(a)-(e).) The disclosures must be made in the following manner:

> (1) in writing, in English and Spanish in a size and style determined in accordance with rules promulgated by the [C]ommissioner on (i) at least one sign conspicuously posted in the entrance of the pregnancy services center; (ii) at least one additional sign posted in any area where clients wait to receive services; and (iii) in any advertisement promoting the services of [the] pregnancy services center in clear and prominent letter type and in a size and style to be determined

> in accordance with rules promulgated by the commissioner; and
>
> (2) orally, whether by in person or telephone communication, upon a client or prospective client request for any of the following services: (i) abortion; (ii) emergency contraception; or (iii) prenatal care.

(Local Law 17 § 20-816(f).)

Local Law 17 imposes fines of between $200 and $1000 for the first violation, and between $500 and $2000 for each additional violation. (Local Law 17 § 20-818(a).) It also authorizes the Commissioner to "seal" any facility for five days that has been found (after notice and a hearing) to have violated the Ordinance's provisions on three or more separate occasions within two years. (Local Law 17 § 20-818(b).)

The New York City Council (the "City Council") enacted Local Law 17 after finding that "some pregnancy services centers in New York City engage in deceptive practices, which include misleading consumers about [(i)] the types of goods and services they provide onsite," (ii) "the types of goods and services for which they will provide referrals to third parties," and (iii) "the availability of licensed medical providers that provide or oversee services on-site." (Local Law 17 § 1.) The City Council found that these deceptive practices "can impede and/or delay consumers' access to reproductive health services" and "wrongly lead [consumers] to believe that they

have received reproductive health care and counseling from a licensed medical provider." (Local Law 17 § 1.) The City Council further found that "delayed access to abortion and emergency contraception . . . increase[s] health risks and financial burdens[] and may eliminate a wom[a]n's ability to obtain these services altogether, severely limiting her reproductive health options." (Local Law 17 § 1.) In addition, the City Council determined that "[e]xisting laws do not adequately protect consumers from the deceptive practices targeted by [Local Law 17] . . . and anti-fraud statutes have proven ineffective in prosecuting deceptive centers" because pregnant women are reluctant to report abuses due to privacy concerns. (Local Law 17 § 1.)

II. The Plaintiffs

Evergreen and Life Center operate facilities in New York City that offer various pregnancy-related services, including pregnancy testing, ultrasounds, and counseling. (Complaint ¶¶ 8-12, The Evergreen Ass'n, Inc. v. City of N.Y., 11 Civ. 2055 (Mar. 24, 2011) ("Evergreen Compl."), ECF. No. 1.)

Pregnancy Care, Boro, and Good Counsel also operate facilities in New York City that offer various pregnancy-related services but do not perform ultrasounds or physical examinations. (Complaint ¶ 70, Pregnancy Care Ctr. v. City of N.Y., 11 Civ. 2342 (Apr. 5, 2011) ("Pregnancy Care Compl."), ECF No. 1.) Their services include counseling, parenting and maternity education, and referrals to adoption and domestic violence agencies and to licensed medical

facilities. (Pregnancy Care Compl. ¶¶ 30, 48, 63-64.) Pregnancy Care and Boro also offer free, self-administered and self-interpreted pregnancy tests and provide non-financial assistance in the form of diapers, formula, clothing, and toys. (Pregnancy Care Compl. ¶¶ 31-36, 51-55.) Good Counsel runs residential facilities for homeless and abused pregnant women and provides counseling and education services on-site. (Pregnancy Care Compl. ¶¶ 59-63.) To facilitate appointments with outside medical providers, Good Counsel collects health insurance information from its clients. (Pregnancy Care Compl. ¶ 215.)

The services provided by Plaintiffs are free, with the exception of Good Counsel, which requires certain contributions from women living in its facilities.[2] (Evergreen Compl. ¶¶ 9-11; Pregnancy Care Compl. ¶¶ 20-21.) For moral and religious reasons, none of the Plaintiffs offer or provide referrals for abortions or emergency contraception. (Evergreen Compl. ¶ 13; Pregnancy Care Compl. ¶¶ 72-73, 75.) Plaintiffs provide pregnancy-related services based on the express belief that such assistance will prevent abortions by allowing women to carry their pregnancies to full term. (See, e.g., Declaration of Christopher Slattery dated Apr. 27, 2011 ¶¶ 5-8; Pregnancy Care Compl. ¶¶ 269-70.)

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[2] Good Counsel asks women on public assistance to pass on their rent subsidy to Good Counsel, and women who are employed to contribute 10% of their income to the agency. (Pregnancy Care Compl. ¶ 21.)

DISCUSSION

I. Preliminary Injunction Standard

A party seeking to "stay government action taken in the public interest pursuant to a statutory or regulatory scheme" must establish "(1) a likelihood of success on the merits and (2) irreparable harm in the absence of an injunction." Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., --- F.3d ----, 2011 WL 2623447, at *8 (2d Cir. July 6, 2011) (quoting Alleyne v. N.Y. State Educ. Dep't, 516 F.3d 96, 101 (2d Cir. 2008)); accord Lynch v. City of N.Y., 589 F.3d 94, 98 (2d Cir. 2009).

II. Analysis

a. Irreparable Harm

While the Supreme Court has stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Elrod v. Burns, 427 U.S. 347, 374 (1976), the Court of Appeals has "not consistently presumed irreparable harm in cases involving allegations of the abridgement of First Amendment rights." Bronx Household of Faith v. Bd. of Educ. of City of N.Y., 331 F.3d 342, 349 (2d Cir. 2003). Rather, irreparable harm may be presumed only" [w]here a plaintiff alleges injury from a rule or regulation that directly limits speech. . . . " Bronx Household, 331 F.3d at 350. In contrast, "where a plaintiff alleges injury from a rule or regulation that

may only potentially affect speech, . . . the plaintiff must demonstrate that the injunction will prevent the feared deprivation of free speech rights." Bronx Household, 331 F.3d at 350; accord Bray v. City of N.Y., 346 F. Supp. 2d 480, 487 (S.D.N.Y. 2004).

Here, Plaintiffs have demonstrated that Local Law 17 will compel them to speak certain messages or face significant fines and/or closure of their facilities. See Bronx Household, 331 F.3d at 350 ("[A] party must articulate a 'specific present objective harm or a threat of specific future harm.'" (quoting Laird v. Tatum, 408 U.S. 1, 14 (1972)). This is unquestionably a direct limitation on speech. See O'Brien v. Mayor and City Council of Balt., --- F. Supp. 2d ---, 2011 WL 572324, at *5 (D. Md. Jan. 28, 2011) ("[R]equiring the placement of a 'disclaimer' sign in [a facility's] waiting room is, on its face, a form of compelled speech."). Accordingly, this Court presumes a threat of irreparable harm to Plaintiffs' First Amendment rights.

b. Likelihood of Success on the Merits

i. Appropriate Level of Scrutiny

The parties disagree over the level of scrutiny to be applied to Local Law 17. According to Plaintiffs, Local Law 17 should be subject to strict scrutiny because it compels them to speak government-crafted messages and is both content- and viewpoint-based. In contrast, Defendants argue that a lower standard of scrutiny applies because Local Law 17 governs commercial speech and requires purely

factual disclosures as opposed to protected expression.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [principle]." Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994). "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." Turner Broad., 512 U.S. at 641; see also Simon & Schuster, Inc. v. Members of N.Y.S. Crime Victims Bd., 502 U.S. 105, 116 (1991) ("The constitutional right of free expression is intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us[,] in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." (quotations omitted)). This is particularly true where, as here, Plaintiffs' speech on reproductive rights concerns an issue prevalent in the public discourse. See Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled

to special protection." (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

In recognition of these principles, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to [strict] scrutiny." Turner Broad., 512 U.S. at 642; see also Alliance, 2011 WL 2623447, at *12 ("Where . . . the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns."); Amidon v. Student Ass'n of State Univ. of N.Y. at Albany, 508 F.3d 94, 99 (2d Cir. 2007) ("The First Amendment's guarantee of freedom of speech includes both the right to speak freely and the right to refrain from speaking at all."). To satisfy strict scrutiny, a law must be "narrowly tailored to serve a compelling governmental interest." Amidon, 508 F.3d at 106; accord Turner Broad., 512 U.S. at 653. A statute is not narrowly tailored if"a less restrictive alternative would serve the Government's purpose." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000). Moreover, while the mere intonation of the strict scrutiny standard will not render a law invalid, see Grutter v. Bollinger, 539 U.S. 306, 326 (2003), strict scrutiny is "the most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

The First Amendment accords less protection, however, to commercial speech. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980). Commercial speech is "subject[ed] to 'modes of regulation that might be

impermissible in the realm of noncommercial expression'" due to "'its subordinate position in the scale of First Amendment values.'" Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (quoting Bd. Of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)). As the Supreme Court observed,

> [t]wo features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. Bates v. State Bar of Ariz., 433 U.S. 350, 381 . . . (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not" particularly susceptible to being crushed by overbroad regulation." [Bates, 433 U.S. at 381.]

Central Hudson, 447 U.S. at 564 n.6 (1980). As a result, laws governing commercial speech are generally subject to only intermediate scrutiny.

The Supreme Court has articulated two basic definitions of commercial speech. First, speech is commercial when it "'does no more than propose a commercial transaction.'" Conn. Bar Ass'n v. United States, 620 F.3d 81, 93 (2d Cir. 2010) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983)). Second, "commercial speech [has been defined] as 'expression related solely to the economic interests of the speaker and its audience.'" Conn. Bar

Ass'n, 620 F.2d at 94 (quoting Central Hudson, 447 U.S. at 561).

Defendants advance two basic arguments why Plaintiffs engage in commercial speech: (1) they advertise goods and services-e.g., diapers, clothing, counseling, pregnancy testing, and ultrasounds-that have commercial value; and (2) Plaintiffs receive something of value in return for those goods and services, namely, "the opportunity to advocate against abortion and either delay or prevent the decision to terminate a pregnancy." (Defs. Opp'n at 7.)[3] Neither argument is persuasive.

First, an organization does not propose a "commercial transaction" simply by offering a good or service that has economic value. See Bolger, 463 U.S. at 67 ("[T]he reference to a specific product does not by itself render the pamphlets [circulated by Plaintiff] commercial speech."). Rather, a commercial transaction is an exchange undertaken for some commercial purpose:

> "Commercial" means "[o]f or relating to commerce." The American Heritage Dictionary of the English Language 3 71 (4th ed. 2000). Dictionary definitions of "commerce," in turn, speak in terms of "[t]he buying and selling of goods," id.; the

[3] Defendants also incorrectly rely on the "government speech" doctrine. That doctrine applies only to speech by the Government, not a private entity. See Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557-61 (2005).

> "[e]xchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise," The Oxford English Dictionary, 552 (1989); and "the exchange or buying and selling of commodities on a large scale involving transportation from place to place," Merriam-Webster's Collegiate Dictionary, 230 (l0th ed. 2000) (second definition).

Goldberg v. Cablevision Sys. Corp., 261 F.3d 318, 327 (2d Cir. 2001). If speech becomes commercial speech merely through the offer of a valuable good or service, then "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." O'Brien, 2011 WL 572324, at *6. Likewise, a domestic violence organization advertising shelter to an abuse victim would find its First Amendment rights curtailed, since the provision of housing confers an economic benefit on the recipient. But plainly speech by a church or domestic violence organization is not undertaken for a commercial purpose. For the same reasons, the offer of free services such as pregnancy tests in furtherance of a religious belief does not propose a commercial transaction. See O'Brien, 2011 WL 572324, at *6; Tepeyac v. Montgomery Cty., --- F. Supp. 2d ----, 2011 WL 915348, at *4-5 (D. Md. Mar. 15, 2011). Adoption of Defendants' argument

would represent a breathtaking expansion of the commercial speech doctrine.[4]

Nor do Plaintiffs offer pregnancy-related services in furtherance of their economic interests. Plaintiffs' missions–and by extension their charitable work–are grounded in their opposition to abortion and emergency contraception. See Tepeyac, 2011 WL 915348, at *5 (finding that similar facilities offering pregnancy-related services were motivated by "social concerns" rather than economic interest). While it may be true that Plaintiffs increase their "fundraising prowess" by attracting clients, (Defs. Opp'n at 6 n.3), they do not advertise "solely" for that purpose. Even if they did, strict scrutiny would still apply, since the Supreme Court has never viewed "charitable solicitation ... as a variety of purely commercial speech."[5] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980); see also Riley, 487 U.S. at 795-96 (applying strict scrutiny to speech aimed at soliciting charitable donations).[6]

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[4] Even if Plaintiffs' advertising could somehow be characterized as having a commercial quality, speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." Riley v. Nat'l Federation of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988). In this case, Plaintiffs' advertising is integrally intertwined with their beliefs on abortion and contraception.

[5] Of course, if Plaintiffs are referring women to pro-life doctors in exchange for "charitable" contributions, the analysis could change. But no such evidence has been presented on these motions.

[6] Given the New York Civil Liberties Union's ("NYCLU") usual concern for First Amendment rights, its amicus brief supporting Defendants' expansive view of the commercial

Defendants' second argument-that Plaintiffs engage in commercial speech because they are provided an audience to whom they can espouse their beliefs-is particularly offensive to free speech principles. While Defendants apparently regard an assembly of people as an economic commodity, this Court does not. See Snyder, 131 S. Ct. at 1217-18 (discussing the intersection between public assembly and principles of free speech). Under such a view, flyers for political rallies, religious literature promoting church attendance, or similar forms of expression would constitute commercial speech merely because they assemble listeners for the speaker. Accepting that proposition would permit the Government to inject its own message into virtually all speech designed to advocate a message to more than a single individual and thereby eviscerate the First Amendment's protections. See Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). This Court will not upend established free speech protections in service

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speech doctrine is puzzling. (See Br. of Amicus Curiae NYCLU at 13-14 ("[Plaintiffs] are promoting and providing free but valuable health care services to pregnant consumers choosing among health care providers in a commercial marketplace. They have entered that marketplace, and, in doing so, can be required by [Local Law 17's] disclosure obligations to make clear to consumers who they are and what they do.").)

of Defendants' overly broad definition of commercial speech.

The fact that Local Law 17 mandates only factual disclosures does not save it from strict scrutiny. The lower scrutiny accorded factual disclosures applies only to commercial speech. See Hurley v. Irish American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 573-74 (1995) ("[O]utside th[e] context [of commercial speech, the State] may not compel affirmance of a belief with which the speaker disagrees .... This general rule ... applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid .... "); see also Tepeyac, 2011 WL 915348, at *5 ("[T]he Supreme Court has said that the deferential approach to factual disclosure and disclaimer requirements . . . is largely limited to the realm of commercial speech.").

Finally, cases permitting the regulation of professional speech do not validate Local Law 17's disclosure provisions. Relying primarily on Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884 (1992), Plaintiffs argue that a state's power to require a doctor to provide certain information concerning the decision to have an abortion also permits the state to regulate speech by unlicensed facilities offering reproductive-related services. But that argument fails for two reasons. First, as Defendants admit, Plaintiffs do not engage in the practice of medicine. (See Defs. Br. at 1 (agreeing that a medical license is not required to perform an obstetric ultrasound).) If they did, they would be

subject to penalties for practicing medicine without a license. See N.Y. Educ. Law § 6512. While not directly bearing on the issue of whether Plaintiffs' speech is commercial, Defendants' concession reveals an astonishing lacuna in the oversight of ultrasound examinations: no license or accreditation of ultrasound technicians is required by the City or New York State.

Second, as a corollary, Plaintiffs do not engage in professional speech. A professional has been characterized as "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 232 (1985) (White, J., concurring); see also Tepeyac, 2011 WL 915348, at *8 ("[S]peech may be labeled 'professional speech' when it is given in the context of a quasi-fiduciary-or actual fiduciary-relationship, wherein the speech is tailored to the listener and made on a person-to-person basis."). While Plaintiffs meet with clients individually, there is no indication that they employ any specialized expertise or professional judgment in service of their clients' individual needs and circumstances. See, e.g., Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625-26 (1995) (upholding regulations on the legal profession); Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (upholding regulations on mental health professionals). Ironically, Defendants' argument that Plaintiffs engage in professional speech might be more persuasive if the City licensed ultrasound

technicians. But because no such license is required, this Court cannot evaluate Local Law 17 through the lens of lowered scrutiny accorded to professional speech. Accordingly, this Court will apply strict scrutiny in evaluating Local Law 17.

ii. Compelling Interest

Local Law 17 was enacted to combat deceptive practices that impede access to reproductive health services or mislead women into believing they have received care from a licensed medical provider. Specifically, the record before the City Council included, inter alia, anecdotes about pregnancy service centers that (i) falsely told a woman she needed multiple ultrasounds before an abortion could be performed (Ciappetta Decl. ¶37); (ii) misrepresented that abortions are available through the nine month of pregnancy (Ciappetta Decl. ¶ 35); and (iii) redirected a woman to its facility using an employee posing as a Planned Parenthood staff member (Ciappetta Decl. ¶ 24).

Rather than disputing whether the City has a compelling interest in preventing deceptive practices generally, Plaintiffs challenge the sufficiency of the evidence, contending that it consists almost exclusively of second-hand accounts from pro-choice organizations and individuals. In substance, Plaintiffs intimate that the evidence presented to the City Council was contrived. At this stage, this Court need not address the adequacy of the record before the City Council, for, as discussed below, Local Law 17 is not narrowly tailored. However, this Court

recognizes that the prevention of deception related to reproductive health care is of paramount importance. Lack of transparency and delay in prenatal care can gravely impact a woman's health. (See Ciappetta Decl. Ex. G: Tr. of Minutes of the Comm. on Women's Issues dated Nov. 16, 2010 at 15-18.) Unlicensed ultrasound technicians operating in pseudo-medical settings can spawn significant harms to pregnant, at-risk women who believe they are receiving medical care. Plaintiffs' categorical denial of the existence of any such deception-and refusal to acknowledge the potential misleading nature of certain conduct–feigns ignorance of the obvious.

iii. Narrowly Tailored

Plaintiffs argue that Local Law 17 is not narrowly tailored because there are less restrictive alternatives for preventing deceptive practices that impede access to reproductive care. This Court agrees.

The manner in which Local Law 17's disclosures must be made provide a logical starting point. Among other things, they require Plaintiffs to include in any advertising English and Spanish versions of the City's recommendation that pregnant women consult a licensed medical provider. To be clear, there is nothing objectionable about this message. However, the requirement is over-inclusive because Plaintiffs' advertising need not be deceptive for the Local Law 17 to apply; any advertisement offering a facility's services falls within Local Law

17's scope. See Green Party of Conn. v. Garfield, 616 F.3d 189, 209 (2d Cir. 2010) ("In order to narrowly tailor a law to address a problem, . . . the government must avoid infringing on speech that does not pose the danger that has prompted regulation." (quotations omitted)). In fact, Local Law 17's over-expansiveness is evident from its very language. While Section 1 states that only "some pregnancy service centers in New York City engage in deceptive practices," the Ordinance applies to all such facilities. (Local Law 17 § 1.) By reaching innocent speech, Local Law 17 runs afoul of the principle that a law regulating speech must "target[] and eliminate[] ...[only] the exact source of the 'evil' it seeks to remedy." Frisby v. Schultz, 487 U.S. 474, 485 (1988).

Local Law 17's advertising provisions will burden Plaintiffs in at least two ways. First, they will increase Plaintiffs' advertising costs by forcing them to purchase more print space or airtime, which in New York's expensive media market could foreclose certain forms of advertising altogether. Second, they will alter the tenor of Plaintiffs' advertising by drowning their intended message in the City's preferred admonitions. See Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."). Likewise, the requirement that certain disclosures be made orally on any request for an abortion, emergency contraception, or prenatal care will significantly alter the manner in which

Plaintiffs approach these topics with their audience. See Alliance, 2011 WL 2623447, at *14 ("[The law] offends [the right to communicate freely on matters of public concern], mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue where the differences are both real and substantive.").

Defendants concede that a sign in English and Spanish outside each facility stating that there are no medical personnel on-site would notify women that medical care was unavailable at the facility. (See Hr'g Tr. dated June 15, 2011 ("Tr.") at 32.) Moreover, the City controls the right-of-way and could erect a sign on public property outside each pregnancy service center encouraging pregnant women to consult with a licensed medical provider. Such alternatives would convey the City's message and be less burdensome on Plaintiffs' speech.[7] See Tepeyac, 2011 WL 915348, at* 13 ("[S]everal options less restrictive than compelled speech could be used to encourage pregnant women to see a licensed medical professional. For example, Defendants could post notices encouraging women to see a doctor in [government] facilities or launch a public awareness campaign."); see also Riley, 487 U.S. at 793 (finding that the state law impermissibly placed the burden on private entities to "rebut the presumption" that their conduct was unreasonable).

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[7] The City is also perfectly capable of conveying its message through a public service advertising campaign.

Further, while the City Council maintains that anti-fraud statutes have been ineffective in prosecuting deceptive facilities, Defendants could not confirm that a single prosecution had ever been initiated. (See Hr'g Tr. dated June 15, 2011 at 31 ("THE COURT: Has the city ever attempted to prosecute any of these facilities under the anti-fraud laws? MS. BINDER: I don't believe at the district attorney level there was ever an attempt to prosecute this. There may have been something at a state level but I don't know if it resulted in a prosecution. There might have been an investigation by the state Attorney General. But there has not been anything at the city level.").) Such prosecutions offer a less restrictive alternative to imposing speech obligations on private speakers. See Riley, 487 U.S. at 800-01 ("[T]he State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. 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."); O'Brien, 2011 WL 572324, at *10 ("In lieu of the disclaimer mandate of the Ordinance, Defendants could use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers.").

As a final matter, this Court notes that the City could impose licensing requirements on ultrasound technicians (or lobby the New York State legislature

to impose state licensing requirements). Of all of the services provided by Plaintiffs, ultrasounds are the most potentially deceptive: a woman visiting a facility that performs and/or interprets ultrasounds could reasonably form the impression that she has received medical treatment. However, by permitting ultrasound examinations to be performed only by licensed professionals, the City could regulate the manner in which those examinations are conducted and curb any manipulative use. Such licensing schemes are not unprecedented; two states already require ultrasounds to be performed by a licensed professional. See N.M. Stat. Anno.§§ 61-14E-1 to 14E-12; Or. Rev. Stat. §§ 688.405, 688.415.

Accordingly, this Court finds that Plaintiffs have demonstrated a likelihood of success of establishing that Local Law 17's disclosure requirements fail strict scrutiny.

c. Vagueness

Having made this finding, this Court must now determine whether to enjoin Local Law 17 in its entirety or sever its confidentiality provisions and allow them to take effect.[8] There is a presumption against invalidating an entire statute where only a portion of the statute is challenged on constitutional grounds. See Gary D. Peake Excavating Inc. v. Town

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[8] Those provisions prohibit pregnancy service centers from disclosing any health or personal information provided by a client to a third party without the client's consent. (Local Law 17 § 20-817(a).).

Bd. of Town of Hancock, 93 F.3d 68, 72 (2d Cir. 1996) ("[A] court should refrain from invalidating an entire statute when only portions of it are objectionable." (quotations and citations omitted)). However, while Plaintiffs do not challenge the confidentiality provisions, those provisions apply only to facilities meeting the definition of a "pregnancy services center." Plaintiffs challenge that definition as unconstitutionally vague.

> "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000). Thus, all vagueness challenges–whether facial or as applied–require us to answer two separate questions: whether the statute gives adequate notice, and whether it creates a threat of arbitrary enforcement.

Farrell v. Burke, 449 F.3d 470, 485 (2d Cir. 2006). As to arbitrary enforcement, the vagueness doctrine is intended to prevent the risk that enforcement decisions are made on an "'ad hoc' basis... reflect[ing] [an] official['s] subjective biases." Fox Television Stations, Inc. v. Fed. Commc'n Comm'n, 613 F.3d 317,328 (2d Cir. 2010); see also City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763 (1988) ("[A] law or policy permitting communication in a certain manner for some but not for others raises the

specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.").

Local Law 17 defines a "pregnancy services center" as any facility whose primary purpose is to provide services to pregnant women and, inter alia, has the "appearance of a licensed medical facility." The Ordinance then lists specific nonexclusive factors for determining whether a facility has such an "appearance." Plaintiffs argue that this definition is impermissibly vague because (1) an ordinary person of reasonable intelligence cannot comprehend Local Law 17's enumerated factors, and (2) it vests unbridled discretion in the Commissioner to determine if a facility meets that definition.[9] This Court finds that Plaintiffs have demonstrated a likelihood of success on their second argument.

Local Law 17's fundamental flaw is that its enumerated factors are only "among" those to be considered by the Commissioner in determining whether a facility has the appearance of a licensed medical center. This formulation permits the Commissioner to classify a facility as a "pregnancy services center" based solely on unspecified criteria. Cf. Amidon, 508 F.3d at 104 ("[B]ecause the criteria are nonexclusive, there is a disconcerting risk that the [decision maker] could camouflage its

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[9] This Court construes Plaintiffs' arbitrary enforcement argument as a facial challenge to Local Law 17. See Kolender v. Lawson, 461 U.S. 352, 358 (1983).

discriminatory use of the [provision] through post-hoc reliance on unspecified criteria."). "[W]hile perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," Fox, 613 F.3d at 328 (quotations omitted), Local Law 17 fails to impose sufficient restraints on the Commissioner's discretion. The Ordinance could make the enumerated factors exclusive, require that a facility meet at least one, or include additional factors or guidance for determining whether a facility has the appearance of a medical facility. Any of these options could ameliorate discriminatory enforcement concerns.

This conclusion is not contrary to the Court of Appeals' decision in United States v. Schneiderman, 968 F.2d 1564 (2d Cir. 1992), on which Defendants rely. There, in rejecting the defendant's argument that a criminal statute prohibiting the sale of drug paraphernalia was unconstitutionally vague, the Court of Appeals found that the statute "strive[d] to channel enforcement activities" by offering "15 examples of targeted paraphernalia" and listing an additional "eight factors to consider among 'all other logically relevant factors' in determining whether a defendant had the requisite scienter to violate the statute." Schneiderman, 968 F.2d at 1568. The Court of Appeals found that those "guidelines tend[ed] to minimize the likelihood of arbitrary enforcement by providing objective criteria against which to measure possible violations of the law." In contrast, Local Law 17 offers far fewer enumerated factors and permits the Commissioner to classify a facility as a pregnancy services center without reference to any

one of them. In view of the fact that Local Law 17 relates to the provision of emergency contraception and abortion–among the most controversial issues in our public discourse–the risk of discriminatory enforcement is high. Accordingly, Plaintiffs have demonstrated a likelihood of success on the merits, and Local Law 17 is preliminarily enjoined in its entirety until this action is resolved.

Because Plaintiffs have demonstrated irreparable harm and a likelihood of success on the questions of whether Local Law 17 is narrowly tailored to prevent deceptive practices and is unconstitutionally vague, this Court need not address their remaining arguments regarding the New York State Constitution and New York Municipal Home Rule Law§ 20(4).

CONCLUSION

For the foregoing reasons, the motion by Plaintiffs Evergreen Life Association, Inc., Life Center of New York, Inc., Pregnancy Care Center of New York, Boro Pregnancy Counseling Center, and Good Counsel Homes to preliminarily enjoin Local Law 17 from taking effect on July 14, 2011 is granted. The Clerk of the Court is directed to terminate the motions pending at Docket No. 22 in 11 Civ. 2055, and Docket No. 12 in 11 Civ. 2342.

Dated: July 13, 2011
New York, New York

SO ORDERED:

William H. Pauley III
U.S.D.J.

All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of March, two thousand fourteen,

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The Evergreen Association, Inc., DBA Expectant Mother Care Pregnancy Centers EMC Frontline Pregnancy Center, Life Center Of New York, Inc., DBA AAA Pregnancy Problems Center, Pregnancy Care Center of New York, Incorporated as Crisis Pregnancy Center of New York, a New York Not-for-Profit Corporation, Boro Pregnancy Counseling Center, a New York Not-for-Profit Corporation, Good Counsel, Inc., a New Jersey Not-for- Profit Corporation,

Plaintiffs - Appellees,

v.

City of New York, a

ORDER

Docket Nos: 11-2735 (Lead)

11-2929 (Con)

municipal corporation, Michael Bloomberg, Mayor of New York City, in his official capacity, Jonathan Mintz, the commissioner of the New York City Department of Consumer Affairs, in his official capacity,

Defendants - Appellants.

Appellees Life Center of New York, Inc., and The Evergreen Association, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of April, two thousand and fourteen.

Before: Rosemary S. Pooler,
Richard C. Wesley,
Raymond J. Lohier, Jr.,
Circuit Judges.

The Evergreen Association, Inc., DBA Expectant Mother Care Pregnancy Centers EMC Frontline Pregnancy Center, Life Center Of New York, Inc., DBA AAA Pregnancy Problems Center, Pregnancy Care Center of New York, Incorporated as Crisis Pregnancy Center of New York, a New York Notfor- Profit Corporation, Boro Pregnancy Counseling Center, a New York Not-for-Profit Corporation, Good Counsel, Inc., a New Jersey Not-for-Profit Corporation,

Plaintiffs - Appellees,

ORDER

Docket No. 11-2735(L)

11-2929(con)

v.

City of New York, a municipal corporation, Michael Bloomberg, Mayor of New York City, in his official capacity, Jonathan Mintz, the commissioner of the New York City Department of Consumer Affairs, in his official capacity,

Defendants -Appellants.

Appellees, through counsel, move to stay the mandate pending petitions for a writ of certiorari to the United States Supreme Court and until final disposition of the case by the Supreme Court.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe

Relevant Constitutional Provisions

First Amendment

Congress shall make no law respecting an establishmentof religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

LOCAL LAWS
OF
THE CITY OF NEW YORK
FOR THE YEAR 2011

No. 17

By Council Members Lappin, the Speaker (Council Member Quinn), Arroyo, Ferreras, Mendez, Garodnick, Reyna, Foster, Brewer, Fidler, James, Koppell, Koslowitz, Lander, Palma, Rose, Van Bramer, Rodriguez, Chin, Dickens, Dromm, Mark-Viverito, Jackson and Barron

A LOCAL LAW
To amend the administrative code of the city of New York, in relation to pregnancy services centers.

Be it enacted by the Council as follows:

Section 1. Legislative findings and intent. It is the Council's intention that consumers in New York City have access to comprehensive information about and timely access to all types of reproductive health services including, but not limited to, accurate pregnancy diagnosis, prenatal care, emergency contraception and abortion.

Based on the evidence before it, the Council finds that some pregnancy services centers in New York City engage in deceptive practices, which include

misleading consumers about the types of goods and services they provide on-site, misleading consumers about the types of goods and services for which they will provide referrals to third parties, and misleading consumers about the availability of licensed medical providers that provide or oversee services on-site. Such deceptive practices are used in advertisements for pregnancy services centers, which are misleading as to the services the centers do or do not provide.

The Council further finds that such deceptive practices can impede and/or delay consumers' access to reproductive health services. Some pregnancy services centers have engaged in conduct that wrongly leads clients to believe that they have received reproductive health care and counseling from a licensed medical provider. Prenatal care, abortion and emergency contraception are all time sensitive services. Increasing the proportion of women receiving adequate and early prenatal care is a pronounced objective of the United States Department of Health and Human Services. The federal Centers for Disease Control and Prevention urges that comprehensive prenatal care begin as soon as a woman decides to become pregnant. Similar to prenatal care, delayed access to abortion and emergency contraception poses a threat to public health. Delay in accessing abortion or emergency contraception creates increased health risks and financial burdens, and may eliminate a women's ability to obtain these services altogether, severely limiting her reproductive health options.

The Council seeks both to stop pregnancy services centers that are currently engaging in deceptive practices in New York City from continuing to do so and to prevent pregnancy services centers from engaging in deceptive practices in New York City in the future. The Council fully embraces the right of pregnancy services centers to express their views about reproductive health services and seeks only to prevent and/or mitigate the effects of deceptive practices. Existing laws do not adequately protect consumers from the deceptive practices targeted by this legislation. Specifically, anti-fraud statutes have proven ineffective in prosecuting deceptive centers because the vulnerable population served by these centers faces potential threats or injury to their wellbeing by bringing forward complaints which often contain highly sensitive personal information, such as the circumstances surrounding a client's unplanned pregnancy. Clients have demonstrated a reluctance to come forward and disclose the events that occurred when they attempted to obtain such services.

The Council also finds that pregnancy services centers may collect sensitive personal and health information from consumers inquiring about or seeking services at such centers. However, most pregnancy services centers are not subject to the federal and state laws that limit the disclosure of such information by providers of medical care. If such information were to be improperly released, it could be significantly damaging to the consumers who utilize such centers. The release of such private

information is particularly troublesome where the client is a victim of intimate partner violence and/or domestic abuse. As a result, the Council finds it necessary to create protections for the personal and health information provided by consumers inquiring about or seeking services at pregnancy services centers.

§ 2. Chapter 5 of Title 20 of the administrative code of the city of New York is amended by adding a new subchapter 17 to read as follows:

SUBCHAPTER 17
PREGNANCY SERVICES CENTERS

§20-815 Definitions. For the purposes of this subchapter, the following terms shall have the following meanings: a. "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live birth, which includes but is not limited to a termination using pharmacological agents.

b. "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

c. "Emergency contraception" shall mean one or more prescription drugs used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient, within a medically recommended amount of time after sexual intercourse, and dispensed for that purpose in accordance with professional standards of practice and determined by the United States food and drug administration to be safe.

d. "Health information" shall mean any oral or written information in any form or medium that relates to health insurance and/or the past, present or future physical or mental health or condition of a client.

e. "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provisions of articles one hundred thirty-one, one hundred thirty-one-a, one hundred thirty-one-b, one hundred thirty-nine or one hundred forty of the education law of New York, to provide medical services.

f. "Personal information" shall mean any or all of the following: the name, address, phone number, email address, date of birth, social security number, driver's license number or non-driver photo identification card number of a client, a relative of a client or a sexual partner of a client. This term shall apply to all such data, notwithstanding the method by which such information is maintained.

g. "Pregnancy services center" shall mean a facility, including a mobile facility, the primary purpose of

which is to provide services to women who are or may be pregnant, that either: (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) has the appearance of a licensed medical facility. Among the factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility are the following: the pregnancy services center (a) offers pregnancy testing and/or pregnancy diagnosis; (b) has staff or volunteers who wear medical attire or uniforms; (c) contains one or more examination tables; (d) contains a private or semi private room or area containing medical supplies and/or medical instruments; (e) has staff or volunteers who collect health insurance information from clients; and (f) is located on the same premises as a licensed medical facility or provider or shares facility space with a licensed medical provider. It shall be prima facie evidence that a facility has the appearance of a licensed medical facility if it has two or more of the factors listed in subparagraphs (a) through (f) of paragraph (2) of this subdivision.

A pregnancy services center shall not include a facility that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly supervise the provision of all services described in this subdivision that are provided at the facility.

h. "Premises" shall mean land and improvements or appurtenances or any part thereof.

i. "Prenatal care" shall mean services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy. Clinical laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition.

§ 20-816 Required disclosures. a. A pregnancy services center shall disclose to a client that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider.

b. A pregnancy services center shall disclose if it does or does not have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center.

c. A pregnancy services center shall disclose if it does or does not provide or provide referrals for abortion.

d. A pregnancy services center shall disclose if it does or does not provide or provide referrals for emergency contraception.

e. A pregnancy services center shall disclose if it does or does not provide or provide referrals for prenatal care.

f. The disclosures required by this section must be provided:

(1) in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the commissioner on (i) at least one sign conspicuously posted in the entrance of the pregnancy services center; (ii) at least one additional sign posted in any area where clients wait to receive services; and (iii) in any advertisement promoting the services of such pregnancy services center in clear and prominent letter type and in a size and style to be determined in accordance with rules promulgated by the commissioner; and

(2) orally, whether by in person or telephone communication, upon a client or prospective client request for any of the following services: (i) abortion; (ii) emergency contraception; or (iii) prenatal care.

§ 20-817 Confidentiality of health and personal information. a. All health information and personal information provided by a client in the course of inquiring about or seeking services at a pregnancy services center shall be treated as confidential and not disclosed to any other individual, company or organization unless such client, in writing, requests or consents to the release of such information, or disclosure is required by operation of law or court order.

b. Any consent for the release of health or personal information required pursuant to subdivision a of this section must:

(1) be in writing, dated and signed by the client;

(2) identify the nature of the information to be disclosed;

(3) identify the name and institutional affiliation of the person or class of persons to whom the information is to be disclosed;

(4) identify the organization or individual who is to make the disclosure;

(5) identify the client;

(6) contain an expiration date or an expiration event that relates to the client or the purpose of the use or disclosure.

c. Any client that consents to the release of health or personal information pursuant to subdivision b of this section must have a clear and complete understanding of the nature of such release and the content of such information.

d. Notwithstanding subdivisions a and b of this section, if any pregnancy services center employee or volunteer has reasonable cause to suspect that a client receiving services at a pregnancy services center is an abused or maltreated child, such employee or volunteer may report such abuse to the statewide central register of child abuse and maltreatment in accordance with section four-hundred thirteen or four-hundred fourteen of the social services law of

New York, and to the administration for children's services, and/or the police department, and cooperate in the investigation related thereto to the extent permitted by applicable state and federal law. For the purposes of this subdivision, "abused child" and "maltreated child" shall be defined in accordance with section four-hundred twelve of the social services law of New York, or as a person under the age of eighteen whose parent or guardian legally responsible for such person's care inflicts serious physical injury upon such person, creates a substantial risk of serious physical injury, or commits an act of sexual abuse against such person. Reporting child abuse and maltreatment as defined in this subdivision to an individual or entity other than the statewide central registrar of child abuse and maltreatment, the administration for children's services or the police department shall be a violation of this section.

§ 20-818 Penalties. a. Any pregnancy services center that violates the provisions of sections 20-816 or 20-817 of this subchapter or any rules or regulations promulgated thereunder shall be liable for a civil penalty of not less than two hundred dollars nor more than one thousand dollars for the first violation and a civil penalty of not less than five hundred dollars nor more than two thousand-five hundred dollars for each succeeding violation.

b. (1) If any pregnancy services center is found to have violated the provisions of section 20-816 on three or more separate occasions within two years, then, in addition to imposing the penalties set forth

in subdivision a of this section, the commissioner, after notice and a hearing, shall be authorized to order that the pregnancy services center be sealed for a period not to exceed five consecutive days, except that such premises may be entered with the permission of the commissioner solely for actions necessary to remedy past violations of section 20-816 or prevent future violations or to make the premises safe. For the purposes of this subdivision, any violations at a pregnancy services center shall not be included in determining the number of violations of any subsequently established pregnancy services center at that location unless the commissioner establishes that the subsequent operator of such pregnancy services center acquired the premises or pregnancy services center, in whole or in part, for the purpose of permitting the previous operator of the pregnancy services center who had been found guilty of violating section 20-816 of this subchapter to avoid the effect of such violations.

(2) Orders of the commissioner issued pursuant to paragraph one of this subdivision shall be posted at the premises that are the subject of the order(s).

(3) Ten days after the posting of an order issued pursuant to paragraph one of this subdivision, and upon the written directive of the commissioner, officers and employees of the department and officers of the New York city police department are authorized to act upon and enforce such orders.

(4) A closing directed by the department pursuant to paragraph one of this subdivision shall not constitute

an act of possession, ownership or control by the city of the closed premises.

(5) Mutilation or removal of a posted order of the commissioner or his designee shall be punishable by a fine of not more than two hundred fifty dollars or by imprisonment not exceeding fifteen days, or both, provided such order contains therein a notice of such penalty. Any other intentional disobedience or resistance to any provision of the orders issued pursuant to paragraph one of this subdivision, including using or occupying or permitting any other person to use or occupy any premises ordered closed without the permission of the department as described in subdivision b shall, in addition to any other punishment prescribed by law, be punishable by a fine of not more than one thousand dollars, or by imprisonment not exceeding six months, or both.

c. For the purposes of this section, all violations committed on any one day by any one pregnancy services center shall constitute a single violation.

§ 20-819 Hearing authority. a. Notwithstanding any other provision of law, the department shall be authorized, upon due notice and hearing, to impose civil penalties for the violation of the provisions of this subchapter and any rules promulgated thereunder. The department shall have the power to render decisions and orders and to impose civil penalties not to exceed the amounts specified in section 20-818 of this subchapter for each such violation. All proceedings authorized pursuant to this section shall be conducted in accordance with rules

promulgated by the commissioner. The penalties provided for in section 20-818 of this subchapter shall be in addition to any other remedies or penalties provided for the enforcement of such provisions under any other law including, but not limited to, civil or criminal actions or proceedings.

b. All proceedings under this subchapter shall be commenced by the service of a notice of violation returnable to the administrative tribunal of the department. Notice of any third violation for engaging in a violation of section 20-816 shall state that premises may be ordered sealed after a finding of a third violation. The commissioner shall prescribe the form and wording of notices of violation. The notice of violation or copy thereof when filled in and served shall constitute notice of the violation charged, and, if sworn to or affirmed, shall be prima facie evidence of the facts contained therein.

§ 20-820 Civil cause of action. Any person claiming to be injured by the failure of a pregnancy services center to comply with section 20-817 shall have a cause of action against such pregnancy services center in any court of competent jurisdiction for any or all of the following remedies: compensatory and punitive damages; injunctive and declaratory relief; attorney's fees and costs; and such other relief as a court deems appropriate.

§ 3. Effect of invalidity; severability. If any section, subsection, sentence, clause, phrase or other portion of this local law is, for any reason, declared unconstitutional or invalid, in whole or in part, by

any court of competent jurisdiction, such portion shall be deemed severable, and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this local law, which remaining portions shall continue in full force and effect.

§ 4. This local law shall take effect one hundred twenty days after its enactment into law, provided that the commissioner may promulgate any rules necessary for implementing and carrying out the provisions of this local law prior to its effective date.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, s.s:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on .....March 2, 2011 ..... and approved by the Mayor on.....March 16, 2011.....

MICHAEL M. McSWEENEY, City Clerk,
Clerk of the Council.

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE §27

Pursuant to the provisions of Municipal Home Rule Law §27, I hereby certify that the enclosed Local Law (Local Law 17 of 2011, Council Int. No. 371A) contains the correct text and was passed by the New York City Council on March 2, 2011, approved by the Mayor on March 16, 2011 and returned to the City Clerk on March 16, 2011.

JEFFREY D. FRIEDLANDER,
Acting Corporation Counsel.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PREGNANCY CARE CENTER OF NEW YORK (Incorporated as Crisis Pregnancy Center of New York), a New York Not-for-Profit Corporation; BORO PREGNANCY COUNSELING CENTER, a New York Not-for-Profit Corporation; and GOOD COUNSEL, INC., a New Jersey Not-for-Profit Corporation; Plaintiffs, v. THE CITY OF NEW YORK; MICHAEL BLOOMBERG, Mayor of New York City, in His Official Capacity; and JONATHAN MINTZ, the Commissioner of the New York City Department of Consumer Affairs, in His Official Capacity; Defendants.	Civil Case No: **VERIFIED COMPLAINT** **Jury Trial Demanded**

* * *

PARTIES

10. Plaintiff Pregnancy Care Center of New York (PCCNY) (incorporated as Crisis Pregnancy Center of New York) is a New York not-for-profit corporation that is dedicated to providing free nonmedical information, assistance and support to women as they experience an unplanned pregnancy, from a viewpoint that includes not offering abortions or emergency contraception or referrals for them. PCCNY is located at 38 Tenth Street, Staten Island, NY, 10306. Its Executive Director is Joanne Reilly.

11. Plaintiff Boro Pregnancy Counseling Center (BPCC) is a New York not-for-profit corporation that is dedicated to providing free nonmedical information, assistance and support to women as they experience an unplanned pregnancy, from a viewpoint that includes not offering abortions or emergency contraception or referrals for them. BPCC is located at 20306 Rocky Hill Road, Bayside, NY, 11361. Its Executive Director is Nicole Baker Bernacet.

12. Plaintiff Good Counsel is a New Jersey not-for-profit corporation. Good Counsel's mission is to help homeless, abused or abandoned pregnant and parenting women and their children by providing a loving family environment in safe and secure homes before and after birth. Good Counsel offers all its services from a viewpoint that includes not offering abortions or contraception or referrals for them. Good Counsel runs five such homes in the New York

greater metropolitan area, including a home in Staten Island, and one in the South Bronx. Good Counsel's headquarters is located at 411 Clinton Street, Hoboken, NJ, 07030. Its Executive Director is Christopher Bell.

* * *

ALLEGATIONS

17. Plaintiffs offer loving, practical, nonmedical information and support for women who faced unplanned pregnancies.

18. PCCNY and BPCC offer information and viewpoint-motivated support to women, including women who may be considering pregnancy options and preparing for abortion alternatives, while Good Counsel focuses its efforts on housing pregnant women who need a place to stay before and after they choose to give birth, and providing them with life skills.

19. Plaintiffs are not-for-profit organizations that are supported by community (non-governmental) donations including volunteer time, items that pregnant women need, and financial assistance.

20. PCCNY and BPCC offer all their services for free.

21. Good Counsel offers its services for free, and a mother's indigence or inability to contribute is not an obstacle to her receiving Good Counsel's full

array of services. However, mothers living in Good Counsel homes who are on public assistance with a rent subsidy are expected to pass the rent subsidy to Good Counsel while they are residing there, and if a mother residing at Good Counsel homes is employed, 10% of her income is expected to be contributed to Good Counsel.

22. Many women that Plaintiffs help are or may have been considering abortion only because their material and social needs made them feel pressure to do so, but when PCCNY and BPCC are able to inform them of assistance that is available, including from sources such as Good Counsel homes, and to offer them caring support, the women are empowered to fulfill their desires and give birth.

Pregnancy Care Center of New York

23. PCCNY has been serving women from Staten Island and surrounding areas for over 25 years.

24. PCCNY is highly respected in the Staten Island community. A large local medical clinic regularly refers women to PCCNY for nonmedical material assistance and information.

25. PCCNY is an affiliate of CareNet, a national umbrella of over 1,100 pregnancy centers that offer hope to women facing unplanned pregnancies by providing practical help and emotional support.

26. PCCNY offers no medical services.

27. PCCNY does not depict or suggest that any of its services are medical, including all those discussed herein.

28. PCCNY specifically tells clients that all its services are nonmedical.

29. PCCNY provides women with peer counseling by four or five non-licensed counselors.

30. PCCNY's counseling discusses the woman's material nonmedical needs; how PCCNY can assist in meeting the woman's material nonmedical needs; parenting skills; information about alternatives to continue her education; information about breastfeeding; counseling women and other clients after having been involved in abortion; abortion alternatives; the characteristics of abortion from the counselor's nonmedical perspective; referrals of women to licensed medical clinics for non-abortion services; referrals of women to domestic violence agencies; referrals of women to entities that can meet housing needs; and referrals of women to adoption agencies.

31. PCCNY offers women a variety of non-financial, nonmedical material assistance to meet their needs during and after pregnancy. This material assistance includes such things as diapers, formula, baby clothes, maternity clothes, bassinettes, layettes, baby furnishings, car seats, and a variety of related items.

32. PCCNY hosts an annual Christmas party for the underprivileged women and families it has served, to provide toys and presents for their children, material items for their family use, and an opportunity for them to celebrate the season.

33. PCCNY hosts community events to obtain donations of material goods that it can in turn provide to women, such as "baby showers" where churches and other people supply PCCNY with a variety of items that are helpful to women and clients.

34. PCCNY offers free, self(client)-administered and self(client)-interpreted pregnancy tests.

35. The pregnancy test that PCCNY offers is a self-administered urine pregnancy test, the "Mainline Confirm hCG," produced by Mainline Technologies. The test is a small individually wrapped plastic device. The test is administered by the woman by obtaining a urine sample from herself, applying the urine to a chemically treated portion of the device, and waiting for the requisite period of time for the device to indicate the presence of hCG that indicates whether the woman is pregnant.

36. PCCNY strictly ensures that the pregnancy tests are wholly self-administered and self-interpreted by the woman. The PCCNY staff member or volunteer does not gather the sample, does not apply the test to the sample, and does not interpret the sample or diagnose the results. Instead the woman is given the sealed pregnancy test kit and the manufacturer's instructions, follows

the instructions herself, signs a form indicating that the kit is purely self-manufacturer's instructions, follows the instructions herself, signs a form indicating that the kit is purely self-manufacturer's instructions, follows the instructions herself, signs a form indicating that the kit is purely self-administered, and signs the form after the test indicating that the test was purely self-interpreted. The PCCNY counselor does not sign off or comment on any interpretation, and indicates clearly throughout the process that the test is purely self-administered and self-interpreted.

37. PCCNY's offering of self-administered and self-interpreted pregnancy tests is not a medical service.

Boro Pregnancy Counseling Center

38. BPCC has been serving women from Queens and surrounding areas for over 10 years.

39. BPCC is highly respected in the Queens community. Several local hospitals and clinics regularly refer women to BPCC for nonmedical material assistance, information and classes, as described herein.

40. BPCC is an affiliate of CareNet.

41. BPCC offers no medical services.

42. BPCC does not depict or suggest that any of its services are medical, including all those discussed herein.

43. BPCC specifically tells clients that all its services are nonmedical.

44. BPCC provides women with counseling by one counselor, Nicole Baker Bernacet.

45. Mrs. Bernacet is a Licensed Mental Health Counselor in New York State and a National Certified Counselor under the National Board of Certified Counselors.

46. BPCC's counseling through Mrs. Bernacet is not a medical service.

47. BPCC clearly describes its counseling through Mrs. Bernacet as not being a medical service, and her licensure as not being medical.

48. BPCC's counseling discusses the woman's material nonmedical needs; how BPCC can assist in meeting the woman's material nonmedical needs; information about alternatives to continue the woman's education; counseling of women and other clients after having been involved in abortion; abortion alternatives; the characteristics of abortion from the counselor's nonmedical perspective; information about social services available including New York's PCAP (Pregnancy Care Assistance Program), which in turn connects women with services such as WIC; referrals of women to hospitals or clinics for non-abortion services; referrals of women to domestic violence agencies; referrals of women to entities that can meet housing needs; and referrals of women to adoption agencies.

49. BPCC offers regular classes teaching men fatherhood skills.

50. BPCC offers regular parenting classes onsite for women who are pregnant or recently gave birth, calling these classes the "Parent Empowerment Program." BPCC offers clients onsite childcare during these classes.

51. Through the Parent Empowerment Program, BPCC offers women a variety of non-financial, nonmedical material assistance to meet their needs during and after pregnancy. This material assistance includes such things as diapers and toiletries, maternity clothes, baby/children's clothing and shoes, infant tubs, baby carriers, baby chairs or bouncers, strollers, cribs, bassinettes pack & plays, and other similar items when available.

52. BPCC hosts an annual Christmas party for the underprivileged women and families they have served, to provide toys and presents for their children, material items for their family use, and an opportunity for them to celebrate the season.

53. BPCC hosts community events to obtain donations of material goods that they can in turn provide to women, such as "diaper drives" where churches and other people supply BPCC with a variety of items that are helpful to women and clients.

54. BPCC offers free, self(client)-administered and self(client)-interpreted pregnancy tests.

55. The pregnancy test that BPCC offers is the same test that PCCNY offers: a self-administered urine pregnancy test, the "Mainline Confirm hCG," produced by Mainline Technologies. The test is a small individually wrapped plastic device. The test is administered by the woman by obtaining a urine sample from herself, applying the urine to a chemically treated portion of the device, and waiting for the requisite period of time for the device to indicate the presence of hCG that indicates whether the woman is pregnant.

56. BPCC strictly ensures that the pregnancy tests are purely self-administered and self-interpreted. The BPCC counselor does not gather the sample, does not apply the test to the sample, and does not interpret the sample or diagnose the results. Instead the woman is given the sealed pregnancy test kit and the manufacturer's instructions, follows the instructions herself, signs a form indicating that the kit is purely self-administered, and signs the form after the test indicating that the test was purely self-interpreted. The BPCC counselor does not sign off or comment on any interpretation, and indicates clearly throughout the process that the test is purely self-administered and self-interpreted.

57. BPCC's offering of self-administered and self-interpreted pregnancy tests is not a medical service.

<u>Good Counsel Homes</u>

58. Good Counsel has been serving women and families in the greater New York City metro area for 26 years.

59. Good Counsel's mission is to help homeless, abused or abandoned pregnant women by providing them a loving family environment in a safe and secure home.

60. Good Counsel runs five homes in the region where women and, as applicable, their children can come and live during their pregnancy and for up to a year afterwards.

61. Among these five homes is a Good Counsel home in Staten Island that has been open since 1987, and one in the South Bronx that Good Counsel acquired in 1991.

62. Good Counsel's home in the South Bronx can house up to fourteen women at a time, plus their children, and about thirty-five women, plus their children, during the course of a year. Good Counsel's home in Staten Island can house up to nine women at a time, plus their children, and about thirty women, plus their children, in the course of a year. Good Counsel mothers have individual rooms in their homes.

63. At these homes, Good Counsel's staff provides residents housing, food, clothing, non-licensed nonmedical counseling, post-abortion reconciliation, parenting classes, life skill programs,

vocational assistance, computer skills, assistance to transition to life after leaving the home, referrals to outside psychological assistance, referrals for both prenatal and general health medical care, and practical support for meeting the residents' needs during their stay.

64. Practical support to the pregnant women residents sometimes means that Good Counsel homes' staff help the women contact outside medical clinics and insurance agencies so that the women can arrange care for themselves with those clinics and agencies. Good Counsel homes' staff also assists the women in obtaining transportation to receive such outside medical care.

65. Once or twice a year, a woman considering abortion may come to a Good Counsel Home by referral, and at that time Good Counsel homes' staff will give her information about abortion, abortion alternatives, and available assistance from a nonmedical, non-judgmental abortion-opposing viewpoint.

66. Good Counsel offers no medical services.

67. Good Counsel does not depict or suggest that any of its services are medical, including all those discussed herein.

68. On or around October 2010 staff of the City of New York emailed the director of Good Counsel, Christopher Bell, to ask if he wished to testify in the process that led to the passage of Bill 371-A.

69. The services of PCCNY, BPCC, and Good Counsel all come in the form of either: various kinds of information, including but not limited to education and counseling, all of which is nonmedical; nonmedical material assistance of various forms; and, in the case of PCCNY and BPCC, the nonmedical distribution of self-administered, self-interpreted pregnancy tests.

70. PCCNY, BPCC, and Good Counsel engage in no ultrasounds, sonograms, physical examinations, pelvic examinations, or clinical laboratory services.

71. The information that PCCNY, BPCC, and Good Counsel offer constitutes a substantial and significant proportion of the services that they offer.

72. The information that PCCNY, BPCC, and Good Counsel offer is speech from their viewpoint of non-judgmental support for abortion-alternatives and opposition to abortion.

73. PCCNY, BPCC, and Good Counsel do not perform or refer for abortion or emergency contraception.

74. None of the services, information and material assistance that PCCNY, BPCC, and Good Counsel offer are offered in support of abortion.

75. All services, information and material assistance that PCCNY, BPCC, and Good Counsel offer are inextricably intertwined with and offered in

furtherance of their viewpoint of non-judgmental support for abortion-alternatives and opposition to abortion.

76. The material assistance that PCCNY, BPCC, and Good Counsel offer is offered at no cost to the women and other clients who receive that assistance (except sometimes at Good Counsel homes regarding rent subsidies and 10% income contribution as described above).

77. The information that PCCNY, BPCC, and Good Counsel offer is noncommercial speech.

78. The viewpoint-motivated offering and providing of free material assistance by PCCNY, BPCC, and Good Counsel are not commercial.

79. PCCNY and BPCC offer or propose no commercial transactions to their clients.

80. Good Counsel offers and proposes no commercial transactions regarding any activity that Bill 371-A is designed to regulate.

81. Good Counsel's expectation for some of their resident mothers to provide rent subsidy payments, and minimal income contributions if they are working, that are not applied to exclude women from receiving services if they cannot afford to do so, is not a commercial transaction, and if the Commissioner considers it to be a pregnancy service subjecting Good Counsel to regulation under Bill

371-A his doing so would be arbitrary and viewpoint discriminatory.

* * *

Purely Subjective Element: "Appearance" of Medical Facility

140. The third element of a "pregnancy services center" in Bill 371-A is that it "either: (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) has the appearance of a licensed medical facility." Bill 371-A § 20-815(g).

141. Although Bill 371-A goes on to list "factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility," Bill 371-A fails to define "the appearance of a licensed medical facility."

142. Licensed medical facilities in New York City "appear[]" in a wide variety of colors, shapes and sizes.

143. Bill 371-A gives the Commissioner the discretion to decide what "the appearance of a licensed medical facility" means, as long as he merely "consider[s]" the list of factors.

144. Bill 371-A does not bind the Commissioner to find that any of the factors regarding "the appearance of a licensed medical facility" in § 20-815(g) are present when he determines that a facility has "the appearance of a licensed medical facility."

145. A facility can meet none of the factors regarding "the appearance of a licensed medical facility" in § 20-815(g) and still be deemed by the Commissioner as having "the appearance of a licensed medical facility."

146. Bill 371-A's list of factors regarding "the appearance of a licensed medical facility" is not an exhaustive list.

147. Bill 371-A gives the Commissioner the discretion to decide that a facility "has the appearance of a licensed medical facility" based on factors wholly absent from the list of factors in § 20-815(g).

148. Bill 371-A gives the Commissioner the discretion to determine that abortion-opposing facilities have "the appearance of a licensed medical facility" due to government bias disfavoring abortion-opposing facilities and favoring abortion-supporting facilities.

149. Bill 371-A gives the Commissioner the discretion to arbitrarily determine that a facility has "the appearance of a licensed medical facility."

150. The 371-A Report emphasizes that abortion-opposing pregnancy centers are "deceptive" because of their supposed appearance as a license medical facility, but Bill 371-A's terms are so amorphous that it allows a finding of such "appearance" absent the presence of any deceptive,

intentional, or even objective "appearance of a license medical facility."

151. The factors in § 20-815(g)'s non-exhaustive list are as vague, or more so, as the underlying concept of having the "appearance" of a licensed medical facility, further giving unfettered discretion to the Commissioner to penalize pregnancy centers arbitrarily or because they oppose abortion.

152. Plaintiffs cannot reasonably determine from Bill 371-A whether they "ha[ve] the appearance of a licensed medical facility."

<u>"Pregnancy Test" Factor Requires Medical Licensing For a Nonmedical Activity</u>

153. The first factor is that the facility "offers pregnancy testing and/or pregnancy diagnosis." § 20-815(g).

154. Bill 371-A does not define "offers," "pregnancy testing," or "pregnancy diagnosis."

155. It is unclear under Bill 371-A whether "offers pregnancy testing" suggests that the offerer is doing the testing, or instead includes situations where the testing is wholly self-administered.

156. Offering a self-administered pregnancy test as PCCNY and BPCC offer, to be wholly self-administered and self-interpreted by the woman, is not a medical activity, is not the practice of

medicine, and does not require a medical license either for the facility or for the participating staff.

157. It is unclear under Bill 371-A whether offering a self-administered pregnancy test as PCCNY and BPCC offer, to be wholly self-administered and self-interpreted by the woman, contributes to a facility's "appearance [as] a licensed medical facility."

158. It is unclear under this factor whether the nonmedical offering of a self-administered pregnancy test as PCCNY and BPCC offer might be considered as satisfying this factor that the center "offers pregnancy testing and/or pregnancy diagnosis."

159. Bill 371-A gives the Commissioner the discretion to determine that the nonmedical offering of a self-administered pregnancy test as PCCNY and BPCC offer qualifies as "offer[ing] pregnancy testing and/or pregnancy diagnosis."

160. Bill 371-A gives the Commissioner the discretion to determine that the nonmedical offering of a self-administered pregnancy test as PCCNY and BPCC offer qualifies as "offer[ing] pregnancy testing and/or pregnancy diagnosis" even though such offering does not require a medical license.

161. Bill 371-A gives the Commissioner the discretion to arbitrarily determine that the nonmedical offering of a self-administered pregnancy test as PCCNY and BPCC offer qualifies as "offering

pregnancy testing and/or pregnancy diagnosis," or to determine it so qualifies based on to government bias disfavoring abortion-opposing facilities and favoring abortion-supporting facilities.

* * *

"Health Insurance" Factor Unrelated to "Appearance" Threatens Maternity Homes

208. The fifth factor in § 20-815(g)'s non-exhaustive list factors relating to having the "appearance" of a medical facility is that the facility "has staff or volunteers who collect health insurance information from clients." § 20-815(g).

209. Bill 371-A does not define "collect" or "health insurance information."

210. Bill 371-A gives the Commissioner the discretion to determine that if staff or volunteers of a pregnancy center merely ask a client the question "Do you have health insurance?" so as to refer them to PCAP, this constitutes "collect[ing] health insurance information from clients."

211. Bill 371-A gives the Commissioner the discretion to determine that particular information shall constitute "health insurance information" due to government bias disfavoring abortion-opposing facilities and favoring abortion-supporting facilities.

212. Bill 371-A gives the Commissioner the discretion to arbitrarily determine that particular

information shall constitute "health insurance information."

213. PCCNY and BPCC do not solicit information from clients in writing about their health insurance, and do not solicit information from clients orally about their health insurance with the exception of occasionally asking whether women have health insurance or not in the course of helping refer women who need medical referrals. If clients do not have health insurance, and seek assistance in that regard, PCCNY and BPCC do nothing in relation to their health insurance status except refer them to PCAP or to a local medical clinic or hospital that can connect them with PCAP.

214. Bill 371-A gives the Commissioner the discretion to unfairly decide that PCCNY or BPCC "have staff or volunteers who collect health insurance information from clients," in support of a determination that PCCNY or BPCC have the "appearance of a licensed medical facility."

215. Good Counsel homes, as mentioned, are actual homes where pregnant and recently delivered women live full-time. Good Counsel homes' staff, as a result of nonmedically serving all the needs of the women in their homes, help those women schedule and secure the medical assistance they need for themselves and their children from outside medical providers. Therefore, Good Counsel homes' staff do collect, and protect, actual health insurance information from the women in their homes, with

those women's full consent, to help arrange their appointments.

216. Bill 371-A gives the Commissioner the discretion to unfairly decide that Good Counsel homes "have staff or volunteers who collect health insurance information from clients," in support of a determination that Good Counsel homes have the "appearance of a licensed medical facility."

* * *

FIRST CAUSE OF ACTION: COMPELLED SPEECH IN VIOLATION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, § 8 OF THE NEW YORK CONSTITUTION

312. The allegations of the paragraphs above are reasserted here.

313. The First Amendment to the United States Constitution protects the freedom of speech and the press, including protecting private noncommercial entities from being compelled to engage in speech by the government.

314. Article I, § 8 of the New York Constitution protects the freedoms of expression and the press to an even greater degree than does the First Amendment of the U.S. Constitution.

315. PCCNY, BPCC and Good Counsel engage in the kinds of pregnancy-related speech and viewpoint-motivated activities that the

Commissioner is likely to use his discretion under Bill 371-A to regulate.

316. By compelling pregnancy services centers to engage in disclosures of information, including orally, in writing, on signs and advertisements, and in the form and content written by the Commissioner, Bill 371-A unconstitutionally compels speech.

317. Being forced to engage in Bill 371-A's compelled disclosures would force PCCNY, BPCC and Good Counsel to speak a message in a mandated form, content and context with which they disagree and which is inconsistent with the manner in which they desire to provide information and viewpoint-motivated assistance.

318. Bill 371-A imposes an unconstitutional prior restraint on speech by requiring that before PCCNY, BPCC and Good Counsel offer their informational assistance regarding pregnancy and their viewpoint-motivated assistance on the issue of pregnancy, they must comply with various disclosures, and by providing for closure of their centers by order of Defendants until such disclosures are posted.

319. PCCNY, BPCC and Good Counsel are unconstitutionally chilled in their exercise of speech and viewpoint-motivated activity regarding pregnancy because of the compelled disclosures or, in the alternative, penalties that Bill 371-A gives the Commissioner the discretion to impose on them, and

without declaratory and injunctive relief they will continue to be so chilled.

320. Defendants have no compelling interest in furtherance of Bill 371-A's compelled speech.

321. Bill 371-A's compelled speech is not narrowly tailored to serve such an interest.

322. Bill 371-A's existence and enforcement by the Commissioner will irreparably harm PCCNY, BPCC, and Good Counsel by infringing upon their right to free speech, expression and the press.

323. PCCNY, BPCC and Good Counsel have no adequate remedy at law.

* * *

FOURTH CAUSE OF ACTION: VAGUENESS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, § 6 OF THE NEW YORK CONSTITUTION

350. The allegations of the paragraphs above are reasserted here.

351. The Fourteenth Amendment to the United States Constitution right to due process protects against the government's imposition of penalties such as fines based on vague terms that do not give regulated entities adequate notice of whether or how the law applies and what entities can do to comply.

352. Article I, § 6 of the New York Constitution protects against government deprivation of life, liberty or property without due process of law.

353. Bill 371-A imposes its regulation based on a myriad of vague terms that prevent PCCNY, BPCC and Good Counsel from knowing whether or how the law applies and what they can do to comply, and allows the imposition of penalties on them without warning.

354. The vagueness of Bill 371-A gives the City and the Commissioner unconstitutional discretion to apply the law in an unconstitutionally discriminatory and arbitrary fashion against PCCNY, BPCC and Good Counsel.

355. PCCNY, BPCC and Good Counsel are unconstitutionally chilled in their exercise of speech and viewpoint-motivated activity regarding pregnancy because of the vagueness of Bill 371-A, and without declaratory and injunctive relief they will continue to be so chilled.

356. Bill 371-A's existence and enforcement by the Commissioner will irreparably harm PCCNY, BPCC, and Good Counsel by infringing upon their right to due process.

357. PCCNY, BPCC and Good Counsel have no adequate remedy at law.

* * *

11-2929-cv

United States Court of Appeals For the Second Circuit

THE EVERGREEN ASSOCIATION, INC., DBA EXPECTANT MOTHER CARE PREGNANCY CENTERS EMC FRONTLINE PREGNANCY CENTER,

Plaintiff-Appellee,

LIFE CENTER OF NEW York, INC., DBA AAA PREGNANCY PROBLEMS CENTER,

Plaintiff-Appellee,

PREGNANCY CARE CENTER OF NEW YORK, INCORPORATED AS CRISIS PREGNANCY CENTER OF NEW YORK, A NEW YORK NOT-FOR-PROFIT CORPORATION;

Plaintiff-Appellee,

BORO PREGNANCY COUNSELING CENTER, a New York Not-for-Profit Corporation;

Plaintiff-Appellee,

GOOD COUNSEL, INC., a New Jersey Not-for-Profit Corporation,

Plaintiff-Appellee,

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLANTS BRIEF

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OCTOBER 31, 2011

-against-

CITY OF NEW YORK, a Municipal Corporation,
Defendant-Appellant,

MICHAEL BLOOMBERG, Mayor of New York City, in his official capacity,

Defendant-Appellant.

JONATHAN MINTZ, the Commissioner of the New York City Department of Consumer Affairs, in his official capacity,
Defendant-Appellant,

LIFE CENTER OF NEW York, INC., DBA AAA PREGNANCY PROBLEMS CENTER, PREGNANCY CARE CENTER OF NEW York, INCORPORATED AS CRISIS PREGNANCY CENTER OF NEW York, a New York Not-for-Profit Corporation, BORO PREGNANCY COUNSELING CENTER, a New York Not for-Profit Corporation, GOOD COUNSEL, INC., a New Jersey Not-for-Profit Corporation,
Plaintiff-Appellees,

-against-

CITY OF NEW York, A MUNICIPAL CORPORATION, MICHAEL BLOOMBERG, Mayor of New York City, in his official capacity,

JONATHAN MINTZ, The Commissioner of the New York City Department of Consumer Affairs, in his official capacity,

Defendants-Appellants,

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* * *

any plausible rationale. Since consumers can be just as easily deceived by non-profit corporations as they can by for-profit entities, there is no reason to distinguish between them for purposes of determining whether their speech is commercial or noncommercial.

Nor, contrary to the court's decision below, is the exchange of currency a sine qua non of a commercial transaction. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me*, *supra,* 520 US at 573 (non profit summer camp unquestionably engaged in commerce as "a provider of goods and services"). Plaintiffs offer a variety of purportedly valuable pregnancy related services free of charge, including quasi-medical services such as pregnancy testing, ultrasounds, and sonograms, pregnancy counseling, material assistance (items necessary for child rearing such as diapers, clothing, bassinettes, etc.), and parenting classes (A37, A43). Offers to provide pregnancy-related goods and services to consumers are routinely classified as commercial speech by the Supreme Court. *See*, *e.g., Bolger v. Youngs Drug Products Corp.*, 463 US 60, 62 (1983) (condoms); *Carey v. Population Services International*, 431 US 678, 700 (1977) (contraceptive drugs and devices):

Bigelow v. Virginia, 421 US 809, 819 (1975) (abortion services).

The fact that PSCs might not charge pregnant women for such services does not diminish their commercial nature or their unquestionable commercial value. They are services that garner payments and fees in the marketplace. *See Aitken v. Communication Workers of America*, 496 F Supp 2d 653, 659 (ED Va 2007) (emails that provide information about and promote specific services are commercial speech even though the speaker was a non-profit entity); *see also World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F Supp 2d 514 (SDNY 2001) (speech by defendant, a non-profit corporation, attacking plaintiff for the purpose of self-promotion, is commercial). The commercial value of such services is particularly apparent when offered

* * *