Nos. 13-1462 and 13-1504

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.

THE EVERGREEN ASSOCIATION, INC., ET AL.,

PETITIONERS,

V.

CITY OF NEW YORK, ET AL.,

RESPONDENTS.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

The New York City Council conducted legislative hearings regarding the practices of "crisis pregnancy centers"—facilities that provide counseling and other services to pregnant women, ordinarily without employing licensed medical providers. Based on evidence that such pregnancy centers use misleading tactics to solicit the patronage of pregnant women, the Council passed a local law requiring "pregnancy services centers" (a term encompassing many New York City crisis pregnancy centers) to disclose that they do not employ licensed medical providers to oversee the services they provide (the "Status Disclosure" rule).

The question presented is whether petitioners, at this interlocutory stage, have failed to demonstrate a likelihood of success of the merits on their claim that the Status Disclosure rule violates the First and Fourteenth Amendments, where (1) the preliminary injunction record shows that crisis pregnancy centers have misled or confused pregnant women as to whether they employ medical professionals; (2) petitioners failed to submit evidence addressing the extent to which the Status Disclosure rule, by itself, burdened their expressive activities; and (3) petitioners failed to show that the challenged local law is unconstitutionally vague?

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STATEMENT

The City of New York submits this brief in opposition to two petitions for certiorari seeking review of the same order of the United States Court of Appeals for the Second Circuit: one petition is filed by the Evergreen Association, Inc., and Life Center of New York, Inc., and the other petition is filed by Pregnancy Care Center of New York, Boro Pregnancy Counseling Center, and Good Counsel. Petitioners seek review of the court of appeals' ruling vacating a preliminary injunction to the extent that it barred interim enforcement of a local law requiring "pregnancy services centers" to disclose whether they have a licensed medical provider on staff.

Petitioners operate crisis pregnancy centers in New York City. Such centers provide pregnancy-related services to women who are or may be pregnant and encourage those women to complete their pregnancies (A312; A469; A612; A637-38; A660). [1] Based upon evidence that crisis pregnancy centers use misleading tactics to solicit patronage, the City of New York passed a local law requiring

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[1] Unless otherwise indicated, (1) parenthetical references preceded by the letter "A" refer to pages in the Joint Appendix in the court of appeals; (2) parenthetical references containing a number followed by a lower case letter refer to pages in the Appendix to the Pregnancy Care petition for a writ of certiorari; and (3) parenthetical references containing the word "App." followed by a number refer to pages in the Appendix to the Evergreen petition for a writ of certiorari.

"pregnancy services centers" to make certain disclosures. Petitioners sued and sought preliminary injunctive relief. The District Court preliminarily enjoined the local law in full. The Second Circuit Court of Appeals partially vacated the preliminary injunction. At issue in these petitions is solely the local law's requirement that "pregnancy services centers" disclose whether they employ licensed medical providers.

A. Crisis Pregnancy Centers.

Crisis pregnancy centers (or "pregnancy centers") generally provide pregnancy tests, as well as ultrasounds or sonograms (A361-62; A442; A660; A956; 6g [¶34]; 10g [¶57]; App. 99 [¶12]; App. 105 [¶¶39-40]).[2] They do not, however, provide a full range of reproductive services, such as abortions, emergency contraception, or testing for sexually transmitted diseases (A462; A496-97; A514-15; A956; 2g-3g [¶¶10-12]; 13g [¶73]; App. 99 [¶13]). Organized as non-profits, many pregnancy centers provide their "commercially valuable pregnancy-related services" for free (A460; A569; A605; A622; 3g [¶¶19-20]; App. 98-99 [¶¶8-11]; App. 107 [¶58]). Pregnancy centers often operate without licensed medical providers on staff, and without regulatory oversight (A278-79; A318; A360-61; A369; A393; A439; A496; A514; A956; App. 106 [¶¶47, 50]).

New York City's five boroughs contain approximately twenty-six pregnancy centers (A326; A328). In 2010 and 2011, the New York City

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[2] The Pregnancy Care petitioners provide neither ultrasounds nor sonograms (13g [¶ 70]).

Council conducted extensive hearings regarding their practices (A250-953). The hearing testimony included evidence that some New York City pregnancy centers engage in practices that, intentionally or not, mislead women.

For example, several pregnancy centers in New York City operate under names—such as "Expectant Mother Care" and "Pregnancy Resource Services"—that may lead pregnant women to believe that the facility provides services under the guidance of licensed medical practitioners, and further believe that the facility provides a full range of reproductive services (A958-59). Similarly, advertisements for New York City pregnancy centers often utilize language—for example, touting "free abortion alternatives," "free pregnancy test[s]," "free ultrasounds," and "free confidential options counseling"—that leave ambiguous both the facility's limited range of reproductive services and the qualifications of the service providers (A321-22; A343; A370-71; A961-63).

Adding to the potential for consumer confusion, many pregnancy centers physically resemble medical offices (A312; A322; A399; A573; A957-58). Like visitors to medical offices, visitors to pregnancy centers receive medical history forms to complete (A399; A417; A422; App. 107 [¶¶54-55]). The staff members of at least one New York City pregnancy center wear medical scrubs and utilize examination tables located within examination rooms (A400; A417). In addition, pregnancy centers frequently choose to operate near hospitals, Planned Parenthood clinics, or reproductive healthcare clinics (A311-12; A381-82; A573; A950; A951; A958).

Beyond creating the potential for confusion, such artful methods of attracting patrons have misled pregnant women. The Council received evidence regarding several incidents in which pregnant women visited pregnancy centers under the mistaken impression that the facility offered a full range of reproductive services, including abortions (A311; A315; A321-22; A337-38; A471; A613; A649; A941; A950; A951).

The Council also heard evidence that some New York City pregnancy centers have actively misled pregnant women. After conducting a five-minute ultrasound test, a Brooklyn pregnancy center informed a pregnant woman that, based upon a full examination, her baby was "healthy and perfect" (A400; A416; A602-03). In an apparent effort to prevent a woman from obtaining an abortion, a Manhattan pregnancy center subjected her to multiple and unnecessary ultrasounds, while providing false assurances that she would be able to obtain an abortion during her third trimester (A941-42). A pregnancy center in the Bronx falsely informed a pregnant 15-year-old that she could not obtain an abortion after her 21st week of pregnancy (A284; A660).

B. The New York City Council Passes a Local Law Requiring Pregnancy Services Centers to Make Factual Disclosures.

In March 2011, the Council passed, and Mayor Michael Bloomberg signed into law, Local Law 17, codified as New York City Administrative Code (the "Code") sections 20-815 *et seq.* (1f-15f). The Council passed Local Law 17 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" (1f).

The Council found that some New York City pregnancy services centers ("PSCs") engage in deceptive practices, including misleading consumers "about the availability of licensed medical providers that provide or oversee services on-site. Such deceptive practices are used in advertisements for [PSCs], which are misleading as to the services the centers do or do not provide" (1f-2f). Indeed, the Council found, "[s]ome [PSCs] have engaged in conduct that wrongly leads clients to believe that they have received reproductive health care and counseling from a licensed medical provider" (2f).

"[S]uch deceptive practices[,]" the Council continued, "can impede and/or delay consumers' access to reproductive health services[,]" including time-sensitive services such as comprehensive prenatal care, emergency contraception, and abortion (2f). The Council further found that "[d]elay in accessing abortion or emergency contraception creates increased 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" (2f).

While "fully embrac[ing] the right of [PSCs] to express their views about reproductive health services[,]" the Council sought to stop, "prevent and/or mitigate the effects of [PSCs'] deceptive practices" (3f). The Council viewed existing laws—

such as anti-fraud statutes—inadequate to protect consumers from such deceptive practices, in part because vulnerable women "have demonstrated a reluctance to come forward and disclose the events that occurred when they attempted to obtain" services from PSCs (3f).

Local Law 17 defines a "[p]regnancy services center" as a facility whose "primary purpose . . . 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." Code § 20-815(g).

Local Law 17 directs that, in determining whether a facility has "the appearance of a licensed medical facility," the City's Department of Consumer Affairs shall consider, among other factors, 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 facility space with a licensed medical provider.

Code § 20-815(g). The law provides that the presence of two or more of the listed factors constitutes prima facie evidence "that a facility has the appearance of a licensed medical facility." *Id.*

The law excludes from its coverage facilities that (1) are licensed to provide medical or pharmaceutical services; or (2) have "a licensed medical provider . . present to directly provide or directly supervise the provision" of services. Code § 20-815(g).

Local Law 17 requires covered entities to make certain disclosures. Code § 20-816. The sole provision at issue in these petitions, the "Status Disclosure" provision, requires a PSC to disclose, both in writing and orally, whether it has "a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such [PSC]." Code § 20-816(b), (f).[3] The disclosure must appear in English and in Spanish on two posted signs at the PSC, and in PSC advertisements, in a type, size and style to be determined in accordance with rules (not yet) promulgated by the Department of Consumer

[3] Local Law 17 also requires PSCs to disclose: (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[;]" and (2) whether the PSC provides referrals for abortion, emergency contraception, and prenatal care. Code § 20-816(a), (c-e). The court of appeals affirmed the preliminary injunction as to those disclosure provisions, which are not at issue in the petitions before the Court.

Affairs. Code § 20-816(f)(1). PSCs must make the disclosure orally whenever a client or prospective client requests (in person or on the telephone) an abortion, emergency contraception, or prenatal care. Code § 20-816(f)(2).

Local Law 17 was scheduled to take effect on July 14, 2011 (14f).

C. Petitioners Commence these Actions and Seek Preliminary Injunctive Relief.

In March 2011, the Evergreen petitioners commenced an action in the United States Court for the Southern District of New York, alleging (as relevant here) that Local Law 17 violates the First and Fourteenth Amendments, both facially and as applied (App. 96-118). Early the following month, the Pregnancy Care petitioners commenced an action in the same District Court, challenging Local Law 17 on similar grounds (A1039-1108).

Petitioners subsequently moved for a preliminary injunction preventing Local Law 17 from taking effect. In support of their motions, petitioners filed two short overlapping declarations describing the operations of two Evergreen pregnancy centers (A36-49). The declarations assert that compliance with all three of Local Law 17's disclosure requirements would interfere with the pregnancy centers' "message" and create financial and logistical burdens (A36-49). The declarations do not purport to address the burden that would result from complying with the Status Disclosure rule alone. Opposing the motions, the City submitted a lawyer's declaration (A55-77) and the bulk of the legislative record (A79-980).

Petitioners did not submit any examples of pregnancy center advertisements. In his declaration, the City's trial counsel quoted the text of an Evergreen advertisement provided during discovery, which read: "Free abortion alternatives; Free Confidential Options Counseling[;] Free Pregnancy Test; Free Ultrasounds" (A76 [¶58]).

D. The District Court's Memorandum and Order.

The District Court, finding that petitioners had demonstrated a likelihood of success on the merits, entered a preliminary injunction restraining enforcement of Local Law 17 in its entirety (1b-29b). The District Court rejected the City's arguments that because PSCs engage in commercial speech, Local Law 17's disclosure provisions should receive rational basis review or intermediate scrutiny (9b-19b). Instead applying strict scrutiny, the District Court concluded that although "the prevention of deception related to reproductive health care is of paramount importance," Local Law 17 "is not narrowly tailored because there are less restrictive alternatives for preventing deceptive practices that impede access to reproductive care" (19b-24b). In addition, the District Court found that petitioners had shown a likelihood of success on their claim that Local Law 17 defines "pregnancy services center" in an unconstitutionally vague manner (24b-28b).

E. The Decision of the Second Circuit Court of Appeals.

The Second Circuit vacated in part, holding that petitioners had failed to demonstrate a likelihood of success on the merits of their claim

that Local Law 17's Status Disclosure provision violates the First Amendment (27a-34a). Holding that the Status Disclosure rule would pass even the strict scrutiny test, while Local Law 17's two other disclosure provisions would fail even intermediate scrutiny, the Second Circuit found it unnecessary to determine the extent to which Local Law 17 regulates commercial speech (25a-26a & n.6). The Second Circuit affirmed so much of the District Court's order as preliminarily enjoined enforcement of Local Law 17's two additional disclosure provisions (34a-39a).

Applying strict scrutiny, the Second Circuit held that Local Law 17 serves the City's compelling interest in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy" (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 [1994]) (27a-28a). The Second Circuit further held that the Status Disclosure provision is narrowly tailored to promote that interest (28a-34a). Rejecting the District Court's conclusion that Local Law 17 is overly broad because not all PSCs engage in deceptive practices, the Second Circuit explained that the law "seeks to prevent wom[e]n from mistakenly concluding that [PSCs], which look like medical facilities, are medical facilities" (31a).

The Second Circuit also rejected the District Court's conclusion that Local Law 17's definition of "pregnancy services center" is impermissibly vague (19a-24a). "The requirement of an 'appearance of a licensed medical facility,'" the Second Circuit reasoned, combined with the factors listed in Code section 20-815(g), "give[s] notice to regulated facilities and curtails arbitrary enforcement" (23a).

Having vacated the District Court's preliminary injunction order in part and affirmed it in part, the Second Circuit remanded the case to the District Court for further proceedings consistent with the Second Circuit's decision (40a).

Concurring in part and dissenting in part, Judge Wesley acknowledged the City's "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" (45a). Judge Wesley nevertheless would have affirmed the preliminary injunction as to the entire local law on the ground that its definition of "pregnancy services center" is unconstitutionally vague (40a-45a).

In March 2014, the Second Circuit denied petitioners' motions for rehearing *en banc* (1c-2c; App. 78-79).

REASONS FOR DENYING THE PETITIONS

This Court should deny the petitions, first, because petitioners have failed to offer any good reason why this Court's review is required at this interlocutory stage. Indeed, this case is a particularly poor vehicle for certiorari in its current interlocutory posture, because (1) the Second Circuit, in reviewing the District Court's order granting a preliminary injunction, did not resolve the threshold question of what level of First Amendment scrutiny the Status Disclosure rule should receive; (2) the preliminary injunction record is inadequate to permit the resolution of that threshold legal question; and (3) the preliminary injunction record contains no evidence

from petitioners addressing the extent to which the Status Disclosure rule, by itself, might burden their expressive activities.

Second, even apart from the interlocutory stage of the case, none of the legal questions that petitioners seek to pose warrant this Court's review. Petitioners fail to identify any conflict between the Second Circuit's decision here and any decision of this Court or another circuit court of appeals. Moreover, there is other litigation pending in the lower federal courts addressing the constitutionality of similar ordinances. This Court should deny the interlocutory petitions here, allow further percolation of the issues, and determine whether to grant review of such issues if and when a circuit split emerges.

A. This Court Should Deny the Petitions at this Interlocutory Stage.

The Second Circuit vacated the District Court's preliminary injunction order in part, affirmed the order in part, and remanded the case to the District Court for further proceedings (3a). Rather than seek review of the Second Circuit's preliminary injunction ruling, petitioners ask this Court to address issues that neither the Second Circuit nor the District Court had the opportunity to reach: the ultimate merits of their constitutional challenges to Local Law 17. Because the Second Circuit rendered its decision on petitioners' request for a preliminary injunction without the benefit of a full record, and without fully addressing all of the relevant constitutional issues, this Court should deny the petitions at this interlocutory stage.

"[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); *see also Virginia Military Inst. v. United States,* 508 U.S. 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring). This Court's certiorari jurisdiction is "perhaps the [Court's] most effective implement" for effectuating the "policy of strict necessity in disposing of constitutional issues." *Rescue Army v. Municipal Court of Los Angeles,* 331 U.S. 549, 568 (1947).

Petitioners have failed to identify any special circumstances warranting this Court's review of the merits at this interlocutory stage. For example, petitioners do not ask this Court to review the Second Circuit's resolution of a critical threshold legal issue, such as a question of jurisdiction or preemption. *Cf. Gillespie v. U.S. Steel Corp.,* 379 U.S. 148, 153-54 (1964) (reviewing non-final judgment to resolve preemption issue fundamental to further conduct of case); *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 685 n.3 (1949) (reviewing non-final judgment to resolve jurisdictional issue fundamental to further conduct of case). Nor do they seek review of an issue "fundamental to the further conduct of the case[,]" such as the measure of damages that should be used in a case remanded for trial. *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1945).

To the contrary, there are especially strong reasons not to grant review here at this interlocutory stage. Petitioners have not asserted—let alone demonstrated—that the preliminary

injunction record created in the District Court is sufficiently complete for a review of all of the legal issues presented as to the ultimate constitutionality of Local Law 17. The record is far from sufficient for this Court to resolve an important threshold legal question relevant to the proper level of First Amendment scrutiny—namely, the extent to which Local Law 17 regulates PSCs' commercial speech, as opposed to non-commercial First Amendment expression. *See Fargo Women's Health Org., Inc., v. Larson*, 381 N.W.2d 176 (N.D.) (treating pregnancy center advertisements promoting "services through which patronage of the clinic is solicited" as commercial speech, regardless of whether clinic charges for services), *cert. denied*, 476 U.S. 1108 (1986); *cf. Bigelow v. Virginia*, 421 U.S. 809, 819 (1975) (treating advertisements for abortion services as commercial speech).[4]

Restrictions on commercial speech receive less rigorous First Amendment scrutiny than other speech restrictions. In general, restrictions on nonmisleading commercial speech must withstand intermediate scrutiny—they must "directly advanc[e]" a substantial governmental interest and be "n[o] more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

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[4] In this pre-enforcement preliminary injunction challenge, petitioners leave unclear whether they seek a ruling on the facial validity of the Status Disclosure rule, or the constitutionality of that rule as applied to them (Evergreen Pet. at i, 1, 5; Pregnancy Care Pet. at i, 11-12, 16).

Where advertising for professional services "is inherently likely to deceive" or "has in fact been deceptive," however, the government may impose appropriate disclosure obligations. *Matter of R.M.J.*, 455 U.S. 191, 202-03 (1982); *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (States may deal effectively with "deceptive or misleading" commercial speech). Such disclosure requirements "may be no broader than reasonably necessary to prevent the deception." *R.M.J.*, 455 U.S. at 203; *see also Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) (disclosure obligations imposed upon advertisers must be "reasonably related" to State's interest in preventing consumer deception).[5]

Outside of the commercial speech context, courts apply "strict" or "exacting" scrutiny to compelled-speech regulations. *Riley v. National*

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[5] After petitioners filed their petitions, the D.C. Circuit Court of Appeals held in *American Meat Inst. v. USDA*, __ F.3d __, 2014 U.S. App. LEXIS 14398, *3 (D.C. Cir. July 29, 2014) (*en banc*), that *Zauderer* "reach[es] beyond problems of deception." Accordingly, the D.C. Circuit overruled so much of its earlier decisions in *National Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), and *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), as purported to limit *Zauderer* to disclosure requirements reasonably related to the prevention of consumer deception. 2014 U.S. App. LEXIS 14398, at *10. The Evergreen petitioners misplace reliance on both of the partially-overruled cases (Evergreen Pet. at 2, 22-24).

Fed'n of the Blind, 487 U.S. 781, 795, 798 (1988). To satisfy strict scrutiny, regulations must be narrowly tailored to serve a compelling governmental interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

The Second Circuit did not decide—and the preliminary injunction record is insufficient to permit this Court to determine—the extent to which Local Law 17 regulates commercial speech. Only one circuit-level decision has discussed whether a similar disclosure law regulates commercial speech, and that decision makes clear that the inquiry requires a "fact-driven" analysis, given "the inherent 'difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category'." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 [1993]). To resolve the question of whether Local Law 17 regulates commercial speech, this Court would need to consider, among other facts: (1) the extent to which PSCs "possess[] economic interests apart from [their] ideological motivations[;]" (2) whether PSCs refer women to pro-life doctors in exchange for "charitable" contributions; (3) "the scope and content of [PSCs'] advertisements[;]" and (4) the extent to which PSCs' commercial speech is inextricably intertwined with their noncommercial speech. *Greater Baltimore*, 721 F.3d at 284-88; 15b nn.4-5.

The evidentiary material in the preliminary injunction record does not provide a sufficient basis for this Court to determine whether Local Law 17

regulates commercial speech. As noted above (on page 8), the record contains short declarations regarding the operations of two petitioner pregnancy centers, a lawyer's declaration, and portions of the legislative history. Petitioners' declarations omit any discussion of the extent to which petitioners, or PSCs generally, have economic motives for soliciting pregnant women to visit their facilities.

The preliminary injunction record is also deficient in a second key respect: it contains no evidence of the extent to which the Status Disclosure rule burdens PSC speech. While the declarations the petitioners submitted discuss the difficulties they would face if required to comply with all three of Local Law 17's disclosure obligations (App. 121-33), the declarations do not address the purported burden of complying with the Status Disclosure provision alone. Nor could the record address the feasibility of complying with the Status Disclosure provision alone, because the Department of Consumer Affairs has not yet promulgated regulations specifying the type, size, and style of the required written Status Disclosure. *See* Code § 20-816(f)(1). Moreover, as noted above (at page 9), the preliminary injunction record does not contain examples of advertisements disseminated by petitioners or any other pregnancy center.

Thus, whether petitioners seek a merits ruling on a facial challenge to the Status Disclosure rule, or on an as-applied challenge, the record is insufficient to resolve definitively critical questions of law bearing directly on the questions that petitioners seek to present.

The unsuitability of the threshold question—the proper level of First Amendment scrutiny—for this Court's review at this interlocutory stage presents the most glaring example of the petitions' fundamental defect. This Court should not grant certiorari to review the questions sought to be raised by petitioners without the benefit of a full record, as well as the District Court's and the Second Circuit's full consideration of the legal issues relevant to the questions that petitioners seek to present.

For this reason alone, this Court should deny the petitions. *See Hamilton-Brown*, 240 U.S. at 258 (by itself, the non-final nature of the order "sought to be reviewed by certiorari . . . furnished sufficient ground for the denial of the application").

B. Petitioners Have Failed to Demonstrate a Conflict between the Second Circuit's Application of Strict Scrutiny and this Court's Precedents.

With respect to Local Law 17's Status Disclosure requirement, the Second Circuit held that petitioners had failed to demonstrate a likelihood of success on the merits, even assuming that strict scrutiny applied (26a-34a). The Second Circuit held that the Status Disclosure requirement serves a compelling governmental interest in protecting the health of citizens, combating consumer deception, and ensuring that women "have prompt access to the kind of care they seek" (27a-29a). The Second Circuit further held that the Status Disclosure provision satisfies the "narrow tailoring" test (28a-34a). In the Second Circuit's words, "[t]he Status Disclosure is the least

restrictive means to ensure that a woman is aware of whether or not a *particular* [PSC] has a licensed medical provider at the time that she first interacts with it" (29a).

Petitioners have failed to show any conflicts between the Second Circuit's application of the strict scrutiny test and this Court's precedent. (Evergreen Pet. at 12-22; Pregnancy Care Pet. at 10-12, 16-21).

1. The Legislative Record Contains Sufficient Evidence that Pregnancy Centers' Use of Misleading Solicitation Tactics Harms Women.

In attempting to demonstrate a conflict, petitioners rely on decisions addressing laws that are far different from Local Law 17. For example, petitioners first argue that the Second Circuit's decision conflicts with *Brown v. Entertainment Merchants Association*, __ U.S. __, 131 S. Ct. 2729 (2011), because the court of appeals did not require additional evidence that PSC practices actually harm women (Evergreen Pet. at 31-36; Pregnancy Care Pet. at 18-20). But *Brown* is dramatically different from this case: there, this Court invalidated a California law banning sales and rentals of violent video games to minors. This Court held that the ban did not satisfy strict scrutiny because the government had failed to identify "'an actual problem' in need of solving[,]" that is, "a direct causal link between violent video games and harm to minors." 131 S. Ct. at 2738 (quoting *Playboy*, 529 U.S. at 822-23).

This case is nothing like *Brown*. This case involves misleading advertising and solicitations directed at pregnant women—a clear and critical public-health issue. Petitioners have no basis for analogizing this law to one based on speculative concerns that exposure to violent video games harms minors. Here, the legislative record shows that PSCs have used misleading advertisements, and donned the appearance of medical facilities, to solicit the patronage of pregnant women seeking time-sensitive health and counseling services. As the legislative record demonstrates (see page 4 above), these tactics have deceived pregnant women to their detriment. *See Centro Tepeyac v. Montgomery County*, 2014 U.S. Dist. LEXIS 29949, *63 & n.9 (D. Md. Mar. 7, 2014) (acknowledging that the record here contains evidence that pregnancy centers' failure to state clearly that "no doctors are on premises has led to . . . negative health outcomes").

In any event, "[w]hen the possibility of deception is as self-evident as it is in this case," this Court does not require the government to 'conduct a survey of the . . . public before it [may] determine'" that the relevant practices have a "'tendency to mislead.'" *Milavetz v. United States*, 559 U.S. 229, 251 (2010) (quoting *Zauderer*, 471 U.S. at 52-53). Here, as in *Milavetz*, evidence in the legislative record "demonstrating a pattern of advertisements" that hold out the promise of free pregnancy services, without alerting customers to the absence of licensed medical personnel on staff, adequately "establish[es] that the likelihood of deception in this case 'is hardly a speculative one.'" *Milavetz*, 559 U.S. at 251 (quoting *Zauderer*, 471 U.S. at 652); *see also Mother & Unborn Baby Care,*

Inc. v. State, 749 S.W.2d 533, 539 (Tex. App. 1988, writ denied) (upholding jury finding that pregnancy center engaged in "fraud and false, misleading, or deceptive acts or practices"), *cert. denied*, 490 U.S. 1090 (1989).

2. This Court's Precedents Permit the City to Combat Deceptive Tactics by Imposing Reasonable Disclosure Obligations.

Next, the Pregnancy Care petitioners liken the Status Disclosure rule to certain "compelled speech" laws that this Court struck down in other contexts (Pregnancy Care Pet. at 16-18). But the Status Disclosure rule does not compel petitioners to endorse government-approved messages, express opposing viewpoints, or affirm beliefs with which they disagree. Rather, the rule combats misleading PSC practices by requiring a factual, non-intrusive disclosure that the PSC does not have a licensed medical provider on staff. Petitioners' "constitutionally protected interest in not providing any particular factual information in [their] advertising is minimal." *Zauderer*, 471 U.S. at 561.

Governmental entities "retain authority" to use disclosure requirements "to regulate inherently misleading advertisements," including professional service advertisements, which "pose a special risk of deception." *Milavetz*, 559 U.S. at 250-51; *see also Zauderer*, 471 U.S. at 651 ("[B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, warnings or disclaimers might be appropriately required to dissipate the possibility of consumer confusion or deception."). Petitioners cannot avoid such disclosure obligations merely

because they provide their services to pregnant women without charging them, or because they provide their services for ideological reasons (Pregnancy Care Pet. at 10-12, 15-17).

The Pregnancy Care petitioners further argue that the Second Circuit's decision conflicts with this Court's holding in *Riley*, 487 U.S. 781 (Pregnancy Care Pet. at 10-12, 16-18). Applying strict scrutiny in *Riley*, this Court struck down a charitable solicitation law requiring professional fundraisers to disclose to potential donors the gross percentage of revenues that the fundraiser had retained from previous charitable solicitations. 487 U.S. at 795-801. In *dicta*, this Court added that a narrowly-tailored law requiring "a fundraiser to disclose unambiguously his or her professional status . . . would withstand First Amendment scrutiny." *Id.* at 799 n.11.

The Second Circuit appropriately analogized Local Law 17's Status Disclosure provision to the "professional status" disclosure that this Court approved in *Riley* (31a-32a & n.8). The Pregnancy Care petitioners misguidedly attempt instead to analogize the Status Disclosure provision to the disclosure rule regarding fundraisers' retention of past contributions that this Court struck down in *Riley*, 487 U.S. 781 (Pregnancy Care Pet. at 10-12, 16-17). That disclosure rule failed strict scrutiny in part because North Carolina lacked a sufficiently strong interest in dispelling alleged donor misconceptions about the division of charitable contributions between professional fundraisers and charities. 487 U.S. at 798-800. Here, by contrast, not even petitioners dispute the City's compelling interest in combating misleading practices that

impede pregnant women's prompt access to the medical and counseling services they seek.

3. The Second Circuit Properly Rejected Petitioners' Proposed Alternatives to the Status Disclosure Rule.

Petitioners also argue that the Second Circuit's application of the narrow tailoring test here conflicts with this Court's narrow tailoring analysis in *Riley*, 487 U.S. 781 (Evergreen Pet. at 16-20; Pregnancy Care Pet. at 20). Petitioners fail to explain how such a "conflict" could exist, when this Court and the Second Circuit addressed different disclosure requirements, imposed upon different categories of speakers, in order to achieve different governmental interests.

In any event, this Court should reject petitioners' arguments that the Second Circuit departed from *Riley* by rejecting their proposed alternatives to the Status Disclosure provision. This Court suggested in *Riley* that instead of mandating revenue-retention disclosures, North Carolina could reduce "alleged donor misperception" by "enforc[ing] its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." 487 U.S. at 800. While noting that enforcing antifraud laws may not be "the most efficient means of preventing fraud," this Court observed that "the First Amendment does not permit the State to sacrifice speech for efficiency." *Id.* at 795.

Here, the Second Circuit rejected petitioners' proposed "fraud prosecution" alternative to the Status Disclosure provision as unable to "accomplish the City's compelling interest" (29a-30a). Unlike fraud prosecutions, the Status Disclosure rule helps women make informed choices about the pregnancy services available to them, during the crucial and limited period when pregnant women are free to make a full range of choices. In this way, the Status Disclosure provision serves the City's compelling interest in protecting women's freedom to seek lawful pregnancy-related medical or counseling services.

While the Evergreen petitioners accuse the Second Circuit of "sacrific[ing] speech for efficiency" by rejecting their "fraud prosecution" proposal (Evergreen Pet. at 17), they miss a key distinction between *Riley* and this case. In *Riley*, the alleged deception was solely about money: therefore, fraud prosecutions constituted a plausible narrower alternative to revenue-retention disclosures because such prosecutions would give defrauded charitable donors an opportunity to obtain full monetary compensation. Here, by contrast, even assuming a woman deceived by a PSC were willing to initiate a fraud prosecution after the fact (see 3f), the prosecution would do nothing to provide meaningful access to the reproductive services the woman originally sought during the term of her pregnancy (30a). As the Second Circuit stressed, "[e]nforcement of fraud or other laws occurs only after the fact, at which point the reproductive

service sought may be ineffectual or unobtainable" (29a-30a).[6]

In addition to antifraud prosecutions, the *Riley* Court suggested another alternative to the revenue-retention disclosure obligation that was at issue in that case: State publication of the financial disclosure forms professional fundraisers must file. 487 U.S. at 800. Addressing a loosely analogous proposal here, the Second Circuit determined that "City-sponsored advertisements and signs" posted outside pregnancy centers would not achieve the City's compelling interest (29a-30a). As the Second Circuit reasoned, such advertisements and signs "cannot alert consumers as to whether a particular [PSC] employs a licensed medical provider, because . . . this is discrete factual information known only to the particular center" (30a).

Unable to dispute the soundness of the Second Circuit's reasoning on this point, the Evergreen petitioners propose a public education

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[6] The Evergreen petitioners cite several cases in which this Court expressed a preference for antifraud prosecutions over outright bans on a category of protected speech (Evergreen Pet. at 21-22). *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (ban on distribution of anonymous campaign literature); *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620 (1980) (ban on certain charitable solicitations); *Schneider v. State*, 308 U.S. 147 (1939) (ban on public distribution of hand-bills). Because the Status Disclosure rule does not ban speech, the cited cases lack relevance here.

campaign regarding the duty of licensed medical professionals to display their licenses on site (Evergreen Pet. at 18). Even armed with that knowledge, however, time-pressured pregnant women do not have the luxury of visiting multiple pregnancy-assistance facilities, checking each one for a posted license. This Court does not require governmental entities to utilize impractical, ineffectual means to achieve compelling governmental interests. *Cf. 44 Liquormart v. Rhode Island*, 517 U.S. 484, 507 (1996) ("educational campaigns focused on the problems of . . . drinking might prove to be more effective" than the State's ban on advertising the retail prices of alcoholic beverages) (plurality opinion); *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977) (to distinguish passenger vehicle license plates from other license plates, police may use less drastic method than requiring passenger vehicle license plates to display state motto).

Again citing *Riley*, 487 U.S. at 799, the Evergreen petitioners suggest that the City could simply leave it up to pregnant women to discover whether a pregnancy center has a licensed medical provider on staff (Evergreen Pet. at 18-19). In *Riley*, this Court noted that charitable donors were "free to inquire [of professional fundraisers] how much of the contribution will be turned over to the charity." 487 U.S. at 799. This Court neither held nor suggested, however, that governments must adopt the policy of "*caveat emptor*," rather than impose disclosure obligations, to combat deceptive advertising, let alone to address deceptive tactics

for soliciting the patronage of vulnerable pregnant women.[7]

The Evergreen petitioners further argue that under *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), the Second Circuit should have insisted upon "proof" that plausible, less restrictive alternatives to the Status Disclosure rule would fail to achieve the City's compelling interest (Evergreen Pet. at 20-21). As the Second Circuit's decision reflects, however, petitioners failed to propose any plausible alternatives (26a-34a). In any event, the Second Circuit rendered its decision on a preliminary injunction record, not—as in *Playboy*—after a trial on the merits. 529 U.S. at 807. During a trial, the City would have a full opportunity to demonstrate the unworkability of petitioners' proposed alternatives. *See Greater Baltimore*, 721 F.3d at 288 ("Even if strict scrutiny proves to be the applicable standard, the City must be accorded the opportunity to develop . . . evidence disproving the effectiveness of purported less restrictive alternatives to the Ordinance's disclaimer").

Petitioners have thus failed to demonstrate the existence of any certworthy conflict between the Second Circuit's decision and this Court's cases

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[7] Undermining their own "*caveat emptor*" proposal, the Evergreen petitioners attack even the portion of the Status Disclosure rule requiring them to tell potential clients, if asked for abortion or emergency contraception services, that they do not have a licensed medical provider on staff (Evergreen Pet. at 20).

applying the strict scrutiny test in the First Amendment context.

C. Petitioners Have Failed to Identify a Relevant Circuit Split.

Contrary to petitioners' argument, there is no conflict among the circuit courts of appeal as to whether the government may combat misleading PSC solicitation practices by requiring PSCs to disclose whether they have a licensed medical provider on staff.

Only one other circuit court has entertained challenges to pregnancy center disclosure ordinances, and that court's decisions do not conflict in any way with the Second Circuit's ruling here. In *Greater Baltimore*, 721 F.3d 264, the Fourth Circuit, sitting *en banc*, vacated a district court summary judgment award permanently enjoining the enforcement of Baltimore's disclosure ordinance. The Fourth Circuit held that it could not "properly analyze the speech regulated by" the ordinance "[w]ithout all the pertinent evidence — including evidence concerning the [plaintiff pregnancy c]enter's economic motivation (or lack thereof) and the scope and content of its advertisements." *Id.* at 286.

Together with its decision in *Greater Baltimore*, the Fourth Circuit issued its decision in another pregnancy center disclosure case, *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (*en banc*). Again sitting *en banc*, the Fourth Circuit affirmed a district court order granting a preliminary injunction as to one Montgomery County disclosure provision, but

denying a preliminary injunction as to a separate disclosure provision. The enjoined provision requires pregnancy centers to post signs disclosing that the county health agency "encourages women who are or may be pregnant to consult with a licensed health care provider." 722 F.3d at 186. The non-enjoined provision requires pregnancy centers to post signs disclosing that the facility does not have a licensed medical professional on staff. *Id.* Narrowly construing its scope of review, and noting the "undeveloped" state of the preliminary injunction record, the Fourth Circuit held that the district court had not abused its discretion. *Id.* at 189, 192.

Petitioners do not assert, let alone attempt to demonstrate, any conflict between the Second Circuit's decision here and the Fourth Circuit's decisions in *Greater Baltimore* and *Centro Tepeyac*. Nor could they: no such conflict exists.

While largely ignoring the Fourth Circuit's decisions (see Evergreen Pet. at 18; Pregnancy Care Pet. at 14 n.1, 26), petitioners do discuss the decision of the District Court for the District of Maryland after remand from the Fourth Circuit. The district court granted the plaintiff's motion for summary judgment and permanently enjoined both Montgomery County disclosure provisions. *Centro Tepeyac v. Montgomery County*, 2014 U.S. Dist. LEXIS 29949 (D. Md. Mar. 7, 2014). Petitioners describe the Second Circuit's decision here as "inconsistent" with the District Court of Maryland's decision following remand (Evergreen Pet. at 35-36; Pregnancy Care Pet. at 14 n.1). But they disregard the fact that the District Court of Maryland expressly disclaimed any conflict between its

decision and the Second Circuit's decision here, observing that the record supporting the law here is stronger than the record that was compiled in the Maryland case. *Centro Tepeyac*, 2014 U.S. Dist. LEXIS 29949, at *63 & n.9.

Unable to identify a conflict between the Second Circuit's decision and the decision of any other circuit court regarding pregnancy center disclosure requirements, petitioners discuss circuit court decisions concerning the validity of other kinds of compelled speech laws, strikingly different from Local Law 17 (Evergreen Pet. at 22-28; Pregnancy Care Pet. at 12-16). *See*, *e.g.*, *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999) (State law requiring printing of ballot label next to names of federal candidates who make insufficient efforts to promote term limits), *aff'd on other grounds*, 531 U.S. 510 (2001); *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307 (6th Cir. 1998) (State law requiring employers and unions to make disclaimer that employees' campaign contribution decisions will not trigger benefits or retaliation); *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997) (State law requiring ballot petition circulators to wear identification badges), *aff'd sub nom. Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999).

That other circuit courts have struck down other kinds of compelled speech laws, under circumstances unrelated to the provision or promotion of pregnancy- or health-related services, hardly creates a circuit court conflict warranting this Court's review. In more analogous cases, many of the circuit courts supposedly in conflict with the Second Circuit have rejected First Amendment

challenges to laws requiring the disclosure of factual information that would help consumers make informed decisions or prevent consumer deception. *See American Meat Inst. v. USDA*, __ F.3d __, 2014 U.S. App. LEXIS 14398 (D.C. Cir. July 29, 2014) (*en banc*) (federal rule mandating country-of-origin labels on meat products is reasonably related to government's substantial interest in enabling consumers to make informed food-purchase decisions); *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1062 (8th Cir. 2014) (state law requiring advertisements for medical treatment referrals to disclose the types of health care providers in the referral network is reasonably related to state's "interest in preventing the dissemination of misleading information to car accident victims"); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 530 (6th Cir. 2012) (federal statute mandating textual warnings on tobacco packaging is "reasonably tailored to overcoming the informational deficit regarding tobacco harms"), *cert. denied sub nom. American Snuff Company, LLC v. United States*, __ U.S. __, 133 S. Ct. 1996 (2013); *United States v. Wenger*, 427 F.3d 840, 850-51 (10th Cir. 2005) (federal law requiring stock publicists to disclose the consideration they receive from the companies they promote is reasonably related to government's interest in preventing fraud), *cert. denied*, 548 U.S. 913 (2006); *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir.) (upholding Florida law requiring dentists who advertise specialty areas not recognized by the State, or credentials from credentialing organizations not recognized by the State, to disclose lack of State recognition), *cert. denied*, 537 U.S. 1080 (2002). Petitioners cite none of these cases.

This Court should thus reject petitioners' argument that the Second Circuit's decision creates a conflict among circuit courts.

D. Petitioners Have Failed to Demonstrate a Conflict between the Second Circuit's Decision and this Court's Application of Vagueness and Overbreadth Principles.

Nor have petitioners shown that the Second Circuit disregarded or misapplied this Court's precedent when it held that petitioners had failed to establish a likelihood of success on the merits of their vagueness and overbreadth challenges to Local Law 17 (Evergreen Pet. at 28-30, 37-42; Pregnancy Care Pet. at 21-25).

1. Vagueness

Local Law 17 defines a "pregnancy services center" as a facility whose "primary purpose . . . 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." Code § 20-815(g). To determine whether a facility "has the appearance of a licensed medical facility," the Department of Consumer Affairs must consider six non-exclusive factors, such as whether the facility "has staff or volunteers who wear medical attire or uniforms." Code § 20-815(g)(2)(b). Local Law 17 excludes from the definition of "pregnancy services center" both (1) licensed medical facilities; and (2) facilities "where a licensed medical provider is present to directly provide or directly supervise the provision" of the services the facility provides. Code § 20-815(g).

The Second Circuit held that Local Law 17's definition of "pregnancy services center" is not impermissibly vague (23a-24a). "The requirement of an 'appearance of a licensed medical facility,'" the Second Circuit reasoned, combined with the six factors providing "'objective criteria' that cabin the definition of "appearance[] . . . . is enough to give notice to regulated facilities and curtail arbitrary enforcement" (23a).

The Second Circuit's vagueness holding is fully consistent with this Court's precedent. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). In *Ward*, this Court upheld a City sound amplification ordinance containing "flexible" standards—"best sound" and "appropriate sound quality balanced with respect for nearby residen[ces]" and a "mayorally-decreed quiet zone"—and affording "considerable discretion" to implementing officials. *Id.* at 787 n.2, 794-95. *See also Grayned v. City of Rockford*, 408 U.S. 104, 108-12 (1972) (rejecting vagueness challenge to anti-noise ordinance containing "'flexibility and reasonable breadth, rather than meticulous specificity,'" that "clearly 'delineate[d] its reach in words of common understanding'") (internal citations omitted).

Petitioners assert that a conflict exists between the Second Circuit's vagueness holding and one decision of this Court: *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (Pregnancy Care Pet. at 23). In *Plain Dealer*, this Court struck down a municipal licensing ordinance granting the mayor unfettered discretion to grant

or deny permits to place newsracks on public property. *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (striking down assembly and parade licensing ordinance vesting unbridled discretion in county administrator to determine how much licensees must pay to cover county's policing costs). By contrast here, Local Law 17 is not a licensing ordinance. Moreover, Local Law 17 provides objective criteria for determining whether a facility that primarily provides pregnancy services, and which has the appearance of a licensed medical facility but neither a license nor a licensed medical provider on staff, is properly subject to Local Law 17. *See Ward*, 491 U.S. at 793-94 (distinguishing *Plain Dealer* ordinance from ordinance upheld in *Ward*).

Unable to establish a conflict, the Evergreen petitioners speculate that if construed hypertechnically, Local Law 17's definition of "pregnancy services center" could someday be misapplied to some facility whose existence petitioners merely hypothesize (Evergreen Pet. at 29). But "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications'." *Hill v. Colorado*, 530 U.S. 703, 733 (2000), quoting *United States v. Raines*, 362 U.S. 17, 23 (1960).

Petitioners have thus failed to demonstrate that the Second Circuit's vagueness holding conflicts with this Court's precedent.

2. Overbreadth

Despite having failed to assert an overbreadth challenge to Local Law 17 in their complaint, the Evergreen petitioners argue that this Court's precedent required the Second Circuit to strike down the Status Disclosure rule as overbroad (Evergreen Pet. at 28-30). The Evergreen petitioners deem the Status Disclosure rule overboard because of its hypothetical application to unidentified (1) "facilities *that do not actually appear to be medical offices*[;]" and (2) PSCs that do not engage in misleading advertising (*id.*).

As support for their overbreadth argument, the Evergreen petitioners cite three cases in which this Court held that the government cannot seek to prevent the misuse of political speech by banning an entire category of anonymous political speech. *See Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150 (2002) (door-to-door political advocacy); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (distribution of campaign literature); *Talley v. California*, 362 U.S. 60 (1960) (dissemination of handbills). The law at issue here, however, does not ban any category of speech. To the contrary, Local Law 17 applies a far more targeted solution to the problem of misleading PSC practices: Local Law 17 simply requires PSCs to disclose that they do not have a licensed medical provider on staff. Petitioners' ability to imagine a possible future application of the Status Disclosure rule to a hypothetical PSC that neither resembles a medical office nor disseminates misleading ads "is not sufficient to render [Local Law 17] susceptible to an overbreadth challenge." *Members of City*

Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).[8]

This Court should thus reject the Evergreen petitioners' attempt to portray the Second Circuit's decision as inconsistent with this Court's overbreadth precedent.

E. Even if the Questions Presented Otherwise Warranted Certiorari, this Court's Review Should Nevertheless Await Further Percolation and the Possible Emergence of a Circuit Split.

We have shown that the questions presented in the petitions are not worthy of this Court's review. But even if the legal questions presented

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[8] Attempting to salvage their overbreadth argument, the Evergreen petitioners quote one sentence from the opinion of a three-Justice plurality in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007): "A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech" (Evergreen Pet. at 30). Without addressing the overbreadth doctrine, the relevant portion of the plurality opinion rejects the notion that if a compelling interest justifies restrictions on express advocacy (promoting a candidate's election or defeat), a compelling interest also justifies restrictions on issue advocacy (regarding public issues generally). *FEC*, 551 U.S. at 477-78. The plurality's rejection of "greater-includes-the-lesser" reasoning has no bearing here.

might warrant this Court's resolution someday, the petitions here would not provide the right vehicles for such review, not only because they arise in an interlocutory posture, but also because the issues presented should be allowed to percolate further in the lower federal courts.

Several other municipalities require pregnancy centers to make various disclosures about the services they provide. Section 3-502 of the Baltimore City Health Code requires pregnancy centers to post a sign in the waiting room stating that they "do[] not provide or make referral for abortion or birth-control services." In Montgomery County, Maryland, Board of Health Resolution No. 16-1252 requires pregnancy centers to post a sign in the facility indicating whether they "have a licensed medical professional on staff[,]" among other information. Chapter 10-10-2(A) of the Austin, Texas City Code requires pregnancy centers to post entrance signs stating whether they provide medical services and, if so, whether they provide those services "under direction and supervision of a licensed health care provider" and with a state or federal license. San Francisco imposes civil penalties on pregnancy centers whose advertisements, either by statement or omission, describe the center's services in untrue or misleading ways. *See First Resort, Inc. v. Herrera*, 2012 U.S. Dist. LEXIS 140925 (N.D. Cal. Sept. 26, 2012).

Although several of those ordinances have triggered federal litigation (see Pregnancy Care Pet. at 26), no circuit court has yet addressed, on a full record, the merits of challenges to their constitutionality. Once circuit courts have an

opportunity to address the merits on a full record, they may or may not reach conflicting holdings as to (1) which First Amendment test applies to laws requiring pregnancy centers to disclose factual information about their services; and (2) whether such laws satisfy the relevant test. A split in the circuits may arise, or if it does not, at a minimum a fuller factual record, as well as a fuller body of circuit-level precedent, will have been developed.

Thus, while the present case would furnish a poor vehicle for addressing the issues that petitioners propose for review, a much better opportunity for exploring those issues, if deemed appropriate for this Court's review, will likely arise in the future.

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

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