11-2735-cv

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;

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;

(*Caption continued on inside cover*)

On Appeal from the United States District Court
for the Southern District of New York (Pauley, J.)

Brief of Plaintiffs-Appellees The Evergreen Association, Inc. and Life Center of New York, Inc.

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Counsel for Plaintiffs-Appellees The Evergreen Association, Inc. and Life Center of New York, Inc. January 30, 2012.

(Caption continued from cover)

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.

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees The Evergreen Association, Inc. and Life Center of New York, Inc. are non-profit corporations that have no parent corporations and issue no stock.

Dated January 30, 2012.

/s/ James Matthew Henderson
James Matthew Henderson, Sr.
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Plaintiffs-Appellees The Evergreen Association, Inc. and Life Center of New York, Inc.

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INTRODUCTION

The District Court granted Plaintiffs-Appellees' motion for a preliminary injunction preventing City of New York Local Law 17 ("LL17") from taking effect. The court held that Plaintiffs, non-profit organizations that assist women who are or may become pregnant in furtherance of their religious and charitable missions, were likely to establish that LL17's disclaimer requirements violated the First Amendment to the United States Constitution and that LL17's definition of "pregnancy services center" ("PSC") is impermissibly vague because it vests unbridled enforcement discretion in the Commissioner of the Department of Consumer Affairs ("the Commissioner"). SPA19, SPA22. The court's rationale is amply supported by Supreme Court precedent, and its decision is in line with two recent district court decisions reviewing similar ordinances. *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804 (D. Md. 2011); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456 (D. Md. 2011). This Court should affirm the District Court's decision.

QUESTIONS PRESENTED

1. Did the District Court correctly hold that LL17 is subject to strict scrutiny where LL17 compels PSCs to make numerous written and verbal government-crafted statements and does not regulate commercial or professional speech?

2. Did the District Court correctly hold that Plaintiffs are likely to establish that LL17 violates the First Amendment where a) the City lacked compelling evidence that all PSCs engage in deceptive or misleading speech or conduct or endanger women's health; b) LL17 reaches all PSCs regardless of whether they engage in any deceptive or misleading speech or conduct or endanger women's health; and c) numerous less restrictive means already exist, or could easily be adopted, to address the City's interests?

3. Did the District Court correctly hold that Plaintiffs are likely to establish that LL17's definition of "pregnancy services center" is unconstitutionally vague because LL17 grants the Commissioner unfettered discretion to classify a facility as a PSC, thereby subjecting it to LL17's written and verbal disclaimer mandates and potential civil and criminal penalties?

SUMMARY OF FACTS

LL17 requires PSCs to give a variety of disclaimers about the assistance that they do and do not offer. A243-A244. "Pregnancy services center" is defined as "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." A242. Specifically excluded from the definition of "pregnancy services center" are licensed medical facilities and any facility "where

a licensed medical provider is present to directly provide or directly supervise the provision of all services described in [section 20-815(g)] that are provided at the facility." A243.

LL17 lists the following as "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 facility space with a licensed medical provider.

A242-A243.

LL17 states that "[i]t 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 above. A243. The six listed factors are not an exhaustive or illustrative list, but are only "[a]mong the factors" to be considered by the Commissioner, A242, who has unfettered discretion to determine that facilities that meet *one or none* of the listed factors have the appearance of a licensed medical facility. The definition of "pregnancy services center" does not require intent to deceive or a finding that a reasonable person would be deceived by a facility's statements or appearance.

LL17 requires all PSCs to make several specified statements: (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 the PSC has "a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center"; and (3) whether the PSC provides, or refers for, abortion, emergency contraception, and prenatal care. A243-A244. These disclaimers must be

> 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.

A244. These statements must also be provided verbally to any woman requesting an abortion, emergency contraception, or prenatal care. *Id.*

Additionally, LL17 requires PSCs to keep confidential "[a]ll health information and personal information provided by a client in the course of inquiring about or seeking services." *Id.* Such information may not be released, even to law enforcement authorities, unless disclosure is required by law or court order, there is reasonable cause to believe that the person being assisted is an abused or maltreated child, or the woman provides detailed written consent in the manner required by section 20-817(b). A244-A246.

The penalties for failing to provide the required disclaimers or breaching the confidentiality requirement are substantial: $200 to $1,000 for the first violation

and $500 to $2,500 for each subsequent violation. A246. If a PSC fails to provide the required disclaimers on three or more occasions within two years, the Commissioner may issue an order, after notice and a hearing, sealing the facility for up to five days. *Id.* Removing or disobeying an order to seal the premises that is posted on site is punishable by fines and jail time. A247.

Plaintiffs, Expectant Mother Care ("EMC") and AAA Pregnancy Problems Center ("AAA"), are New York non-profit corporations. A36, A42. They provide assistance, free of charge, to women who are or may become pregnant. *Id.* Based on their moral and religious beliefs, Plaintiffs do not refer for abortions or emergency contraception. A37, A43. Plaintiffs offer free over-the-counter pregnancy tests, informal counseling, and referrals for prenatal care. *Id.* Plaintiffs do not advertise themselves as medical clinics, and their staff and volunteers do not offer any medical services. A37-A38, A43-A44.

In an effort to improve access to prenatal care, EMC has partnered with licensed medical clinics and physicians and, as such, six of EMC's facilities are located in a licensed medical clinic or a physician's office. A43-A44. None of EMC's staff or volunteers provide medical or pharmaceutical services; any such services are offered by a partnering licensed medical provider. A44. Staff and volunteers at all of Plaintiffs' facilities collect certain personal information from

women seeking assistance in order to better facilitate discussion and assistance. A37, A45.

Throughout the City and by various means, EMC and AAA advertise, both generally and specifically, the assistance offered at their facilities. A38, A45-A47. To comply with LL17, Plaintiffs will need to buy additional advertising space to continue using certain advertising media, and they would likely be unable to continue advertising through some media sources. *See infra* Section I.A.

APPLICABLE STANDARD

> This Court reviews the grant of a preliminary injunction for abuse of discretion. . . . In order to justify a preliminary injunction, a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and 3) that the public's interest weighs in favor of granting an injunction.

Taxicab Bd. of Trade v. City of N.Y., 615 F.3d 152, 156 (2d Cir. 2010) (citations and quotation marks omitted). The likelihood of success on the merits is key here because a violation of First Amendment rights generally causes irreparable harm and harms the public's interest. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010); *Doninger v. Niehoff*, 527 F.3d 41, 47-48 (2d Cir. 2008); *Vincenty v. Bloomberg*, 476 F.3d 74, 89 (2d Cir. 2007).

SUMMARY OF THE ARGUMENT

The District Court's decision—that Plaintiffs are likely to demonstrate that LL17 violates their First Amendment right to the freedom of speech and also violates the Fourteenth Amendment because it is impermissibly vague—is sound. The law is subject to strict scrutiny because it significantly burdens and alters Plaintiffs' expression and does not regulate commercial speech or the speech of a regulated profession. LL17 fails strict scrutiny because it is not based upon a compelling record of harm, is not narrowly drawn to the City's stated interests, and is not the least restrictive means of achieving a compelling governmental interest. In addition, LL17 is impermissibly vague because key terms are not sufficiently defined, and the Commissioner has unbridled discretion to subject a facility to LL17's requirements.

ARGUMENT

For the reasons discussed herein, the District Court's decision granting Plaintiffs' motion for a preliminary injunction was well within its discretion and should be affirmed.

I. LL17 Violates Plaintiffs' Freedom of Speech.

As a general rule, the Free Speech Clause of the First Amendment provides robust protection against laws that require or prohibit speech by private individuals. The Supreme Court has recognized several narrow categories of

expression that the government has a freer hand to regulate—commercial speech, professional speech, certain speech relating to political campaign financing, etc.—but those categories are narrowly interpreted so that the freedom of speech is not unduly limited. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). The City's flawed attempt to fit LL17 within these narrow categories should be viewed with this principle in mind.

A. LL17 Significantly Burdens Plaintiffs' Expression.

LL17 will fundamentally alter the nature of Plaintiffs' expression by requiring them to bury their intended written and verbal messages beneath the government's preferred message and lengthy disclaimers designed to discourage women from contacting Plaintiffs. The effectiveness of Plaintiffs' communications will be substantially limited by the loss of their ability to craft and convey messages of their own choosing that align with their charitable missions. As the District Court recognized, "Plaintiffs have demonstrated that Local Law 17 will compel them to speak certain messages or face significant fines and/or closure of their facilities. This is unquestionably a direct limitation on speech." SPA7-SPA8 (citations omitted).

Before LL17's enactment, Plaintiff EMC could run a subway or billboard advertisement stating:

> Pregnant? Need Help? Call [Phone Number] for free abortion alternatives.

If LL17 were permitted to take effect, however, EMC would be compelled to drastically change the content of that advertisement to read:

> Pregnant? Need Help? Call [Phone Number] for free abortion alternatives.
>
> 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. Expectant Mother Care does not have a licensed medical provider on staff who provides or directly supervises the provision of all services offered at all of its locations. Expectant Mother Care provides referrals for prenatal care, but does not provide, or provide referrals for, abortions or emergency contraceptives.
>
> El Departamento de Salud y Higiene Mental de la Ciudad de Nueva York alienta a las mujeres que son o que pueden estar embarazadas a consultar con un médico con licencia. Madre Futura Cuidado no tiene un médico con licencia en el personal que proporciona o supervisa directamente la provisión de todos los servicios ofreció en todas sus ubicaciones. Madre Futura Cuidado proporciona remisiones para cuidado prenatal, pero no provee, o provee remisiones para, abortos o anticonceptivos de emergencia.

The same holds true for advertisements run by Plaintiff AAA.

In addition, Plaintiffs could no longer advertise through business cards because there is not enough room to add an additional 153 words in an appropriate font size as required by LL17. If Plaintiffs distribute business cards without the disclaimers for one month, they could be fined up to $76,000 ($1,000 for the first violation and $2,500 for each succeeding violation). A246. As such, Plaintiffs will be prevented from using one of their most common and least expensive means of advertising. EMC will also be precluded from advertising through web-based

search engines, A46, and would no longer be able to advertise through companion banners on online streaming radio stations, A45, because the required disclaimers could not fit in the limited space available.

Furthermore, if a woman calls Plaintiffs' centers and inquires about abortion, emergency contraception, or prenatal care, the person answering must abruptly provide the lengthy disclaimer listed above before continuing the conversation. Compliance with LL17 would require EMC to purchase additional time in all of its radio and television advertisements, likely doubling the cost of each advertisement. A45, A47. Similarly, for advertisements in Spanish-only printed news sources, EMC would be forced to buy additional space to provide an English duplicate of the disclaimers. A46. Plaintiffs also advertise through phone directories, A38, A46, and would need to purchase extra ad space large enough to hold the required disclaimers in English and Spanish. In addition, EMC's message on its New York Subway advertisements would be significantly overshadowed by the City's preferred message due to space limitations. A46.

The District Court recognized multiple ways in which LL17's requirements will burden Plaintiffs' speech:

> 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. . . . 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.

SPA17 (citations omitted); *see also O'Brien*, 768 F. Supp. 2d at 814 (reaching a similar conclusion concerning similar requirements). This conclusion is in line with the Supreme Court's holding that "[m]andating speech that a speaker would not otherwise make *necessarily alters* the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (emphasis added); *see also Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (highlighting the significant burden imposed upon First Amendment rights when a speaker is forced to alter its message and devote space and money to convey a government-mandated message).

The City's arguments concerning the burden imposed upon Plaintiffs' expression are unavailing. First, the City misreads *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), asserting that the disclaimer stating the view of the Department of Health and Mental Hygiene "does not compel any private speech" and "is exempt from judicial scrutiny altogether." City Br. at 62. *Pleasant Grove* dealt with a group's attempt to *compel the government* to speak, not a law *compelling private groups* to speak. SPA11, n.3. Numerous Supreme Court cases defeat the City's theory, which would allow the government to force any individual to state the viewpoints of any government agency or official. *See, e.g.*, *Wooley v.*

Maynard, 430 U.S. 705 (1977) (holding that New Hampshire could not penalize citizens who covered the motto "Live Free or Die" on their license plates); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a public school could not compel students to recite the Pledge of Allegiance). As this Court recently noted, "the First Amendment does not look fondly on attempts by the government to affirmatively require speech," and where "the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns." *Alliance for Open Soc'y Int'l, Inc. v. U.S. A.I.D.*, 651 F.3d 218, 234 & n.3 (2d Cir. 2011) (affirming the grant of a preliminary injunction because a statute requiring NGOs to adopt a policy explicitly opposing prostitution likely violated the First Amendment).

In addition, the City ignores binding precedent in arguing that Plaintiffs' speech is not burdened because the messages that LL17 requires PSCs to convey are not ideological or political in nature. City Br. at 50, 52, 67, 73 n.5. The Supreme Court has repeatedly rejected the City's argument, noting that compelled speech cases such as *Barnette* and *Wooley* "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': *either form of compulsion burdens protected speech*." *Riley*, 487 U.S. at 797-98 (emphasis added); *see also Rumsfeld v. FAIR, Inc.*, 547 U.S.

47, 62 (2006) (same); *Hurley v. Irish-Am. GLB Grp. of Bos.*, 515 U.S. 557, 573 (1995) (same).

Similarly, the City posits a broad government power to require private individuals to make "factual" disclosures to the public, regardless of the context, without having to withstand strict scrutiny. City Br. at 61-62, 68-69, 76-77. This is incorrect. The cases upon which the City relies for this proposition deal with specific contexts—the regulation of commercial speech, professional speech, or political campaign financing—that are not at issue here. As the District Court recognized, "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." SPA13 (citations omitted).[1]

If the City's argument were accepted, the City could mandate that all City residents post signs at their residences listing various facts about themselves, or require any individual speaking about a political or social issue to provide various facts about the issue being discussed, without being subject to strict scrutiny, so long as the required disclosures "are purely factual" and "are easily capable of being proven true or false." *See* City Br. at 61. As the Supreme Court noted in *Riley*, however,

[1] In addition, relevant cases reviewing laws that regulate campaign financing or elections have not announced a general rule, applicable in all contexts, that would overrule or sharply limit the holdings of cases such as *Barnette*, *Wooley*, and *Riley*.

> we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget.

487 U.S. at 797-98. The Court has expressly acknowledged that

> [t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Meyer v. Grant, 486 U.S. 414, 419-20 (1988) (internal citations and quotation marks omitted). In sum, the First Amendment "prohibits the government from telling people what they must say," in factual statements or otherwise. *FAIR, Inc.*, 547 U.S. at 61.

B. LL17 Is Subject to Strict Scrutiny.

Due to the First Amendment's robust protection of the freedom of speech, laws requiring private speakers to convey a message are typically "subject to exacting First Amendment scrutiny"; the government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley*, 487 U.S. at 798, 800. LL17 is subject to this rigorous standard because it

alters Plaintiffs' message (*see supra* Section I.A), compels them to speak, and regulates their speech on the bases of content and speaker identity.[2]

1. LL17 Compels Speech and Regulates on the Bases of Content and Speaker Identity.

The Supreme Court has recognized that "[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*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637). The Court has also observed that

> [a]t 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. . . . Laws [requiring the utterance of a government-favored message] 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. Sys. v. FCC, 512 U.S. 622, 641 (1994) (citations omitted).

For example, the Supreme Court has held that a law requiring professional fundraisers for charitable organizations to tell solicited persons what percentage of contributions actually went to such organizations violated the First Amendment. *Riley*, 487 U.S. at 781. The Court explained,

[2] LL17 is unconstitutional even if lesser standards of review were applied because there is no reasonable fit between the ends sought to be achieved and the overbroad means chosen, and numerous other forms of regulation already exist (or could be enacted) that achieve the City's purported goals while imposing little to no burden upon the freedom of speech.

> [t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. . . . To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.

Id. at 790-91 (citations omitted). This reasoning applies equally to compelled statements of fact and opinion. *Id.* at 797-98.

In addition, LL17 regulates expression on the basis of content; groups that discuss pregnancy are covered, while groups that discuss politics, sports, or other subjects are not covered. "Content-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), because, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). LL17 also impermissibly targets one group of speakers (PSCs) for regulation. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

2. LL17 Does Not Regulate Commercial Speech.

The First Amendment principles governing the regulation of commercial speech are not implicated in this case. LL17 imposes numerous written and verbal disclaimer requirements upon PSCs, which engage in purely non-commercial speech and do not offer goods or services for sale or exchange. The application of

LL17 is not triggered by the publication of a commercial ad; to the contrary, it applies to PSCs regardless of whether they ever advertise.

The City correctly acknowledges that *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), provides the governing test for whether the speech regulated by a law is commercial in nature. City Br. at 42. Under *Central Hudson*, expression is only "commercial speech" if it "relate[s] solely to the economic interests of the speaker and its audience" or "propos[es] a commercial transaction." 447 U.S. at 561-62; *see also Conn. Bar Ass'n v. United States*, 620 F.3d 81, 93-94 (2d Cir. 2010). *Central Hudson* referred to commercial speech as "the offspring of economic self-interest." 447 U.S. at 564 n.6. Applying *Central Hudson* inevitably leads to the conclusion that LL17 does not regulate commercial speech, but the City's brief avoids a straightforward application of *Central Hudson*, instead discussing various red herrings and positing two new tests that it would like this Court to adopt without supporting precedent. City Br. at 41-52. The City's comparison of Plaintiffs' speech to McDonald's ads promoting food for sale, City Br. at 50, illustrates the fundamental flaw in the City's reasoning: an organization offering an item *for sale* is a quintessential example of commercial speech, while an organization offering an item *for free*, in order to further its charitable and religious purposes, is a quintessential example of

non-commercial speech. As such, the City's extensive reliance upon cases that dealt with the regulation of commercial speech is misplaced.

a. LL17 Does Not Regulate Speech That Relates Solely to the Economic Interests of PSCs and Their Audience.

The City has conceded, with good reason, that LL17 does not regulate speech that relates solely to the economic interests of PSCs and their audience. During oral argument on the motion for a preliminary injunction that is the subject of this appeal, the District Court asked the City, "What is the economic interest of the Plaintiffs?" A1014. The City admitted, "There is no economic interest, your Honor." *Id.* This admission is fully consistent with the record, which includes no evidence that PSCs offer to assist women free of charge solely because of their economic interests. To the contrary, like many other PSCs, each Plaintiff "desires to offer free, non-medical, non-commercial assistance to women with a message that supports its mission and aligns with its moral and religious beliefs." A38, A43. As the District Court noted, "Plaintiffs' missions—and by extension their charitable work—are grounded in their opposition to abortion and emergency contraception." SPA12; *see also O'Brien*, 768 F. Supp. 2d at 813.

Supreme Court precedent also forecloses the argument—made by the City below—that offering free assistance to women is commercial speech because it could raise Plaintiffs' profile and *indirectly* increase the odds of third parties

donating money to them. The Court has repeatedly applied strict scrutiny to the regulation of *direct solicitation* of charitable donations. *Riley*, 487 U.S. at 795-96; *Vill. of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *N.Y. Times v. Sullivan*, 376 U.S. 254, 256 (1964). Also, in *Transportation Alternatives, Inc. v. City of New York*, 340 F.3d 72 (2d Cir. 2003), this Court held that a non-profit group's promotion of a Bike Tour was not commercial speech even though the group used the event as a fundraiser, directly solicited donations, reproduced the logos of corporate sponsors in its materials, and offered free Ben & Jerry's ice cream to participants. *Id.* at 78-79. As the District Court correctly noted, "[w]hile it may be true that Plaintiffs increase their 'fundraising prowess' by attracting clients, they do not advertise 'solely' for that purpose." SPA12 (citations omitted).

Additionally, the City's commercial speech arguments fail to recognize that, in considering whether a law regulates commercial speech, what controls are *the nature and purpose of the regulated speech*, not the characteristics of the speaker or the nature of the goods, services, or issues being discussed. In this vein, Plaintiffs acknowledge that non-profit organizations may engage in commercial speech or conduct by advertising goods or services *for sale* or acting in ways that solely further their economic interests. Such situations are entirely different from this case; a business card or billboard ad that invites women to contact Plaintiffs to learn more about the *free* assistance they offer, for moral and religious purposes,

with no request for or expectation of any money, goods, or services in return, is *not* commercial speech.

The City's reliance upon *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), which held that a non-profit summer camp engaged in commercial activity both as a purchaser and as a provider of goods and services *for which it charged money*, *id.* at 567, 573, is unavailing. City Br. at 43. The common sense conclusion that offering goods or services *for sale* (regardless of the nature of the entity selling the items) is commercial activity is a far cry from the City's suggestion that merely offering assistance *free of charge*, with no request for money, goods, or services in return, is also commercial speech. As the District Court noted, "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." SPA11. That the organization could, in some sense, be said to compete with hotels and apartment landlords *is irrelevant*; the test for commercial speech focuses not on incidental effects but on the nature and purpose of the speech at issue.

The City's discussion of the relevance of "profit motive," City Br. 43-44, similarly misses the mark. In fact, the City has the underlying principle backwards; courts have warned against giving the commercial speech doctrine *too broad of an application* by incorrectly applying it to speech that, while truly non-commercial in

nature, has been offered for a profit motive. *See, e.g.*, *Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 440-42 (4th Cir. 1999) ("In and of itself, profit motive on the speaker's part does not transform *noncommerical speech into commercial speech*." (emphasis added)). Likewise, the City's comparison of Plaintiffs' speech to "an advertisement for a free vacation so that you can hear somebody's pitch about a time-share," A1011, is deeply flawed. Although commercial speech may include an *indirect* encouragement to buy a product, such as speech promoting the benefits of a product that the speaker sells, *Bolger*, 463 U.S. at 66-68, Plaintiffs' offer of free assistance is not a segue to any later *offer to sell or exchange* goods or services. In sum, LL17 does not regulate expression that relates solely to the economic interests of PSCs and their audience.[3]

b. LL17 Does Not Regulate Speech That Proposes a Commercial Transaction.

Offering free information and assistance, with no money, goods, or services asked for or expected in exchange, does not propose a commercial transaction. The type of proposal referred to in *Central Hudson* is one involving the "exchange . . . of goods and services," *Tepeyac*, 779 F. Supp. 2d at 464; SPA11 ("Commerce" relates to "[t]he buying and selling of goods," "trading," or an "exchange of merchandise"). As the District Court observed,

[3] In addition, requiring a *commercial business* to post no-smoking signs, in furtherance of a law regulating the *conduct* of smoking, is entirely different from LL17's direct regulation of PSCs' non-commercial speech.

> an organization does not propose a "commercial transaction" simply by offering a good or service that has economic value. Rather, a commercial transaction is an exchange undertaken for some commercial purpose. . . .
>
> [T]he offer of free services such as pregnancy tests in furtherance of a religious belief does not propose a commercial transaction. Adoption of Defendants' argument would represent a breathtaking expansion of the commercial speech doctrine.

SPA11-SPA12 (citations omitted).

The City has creatively reasoned that a proposed commercial exchange occurs under LL17: "crisis pregnancy centers receive something of importance (the opportunity to express their views to pregnant women) in return for offering commercially valuable goods and services." City Br. at 49 n.4. The City's novel theory finds no support in the law and would greatly expand the commercial speech doctrine by transforming any conversation about matters of opinion into a commercial transaction because the individuals involved exchange the opportunity to express their views. As the District Court noted,

> [this argument] is particularly offensive to free speech principles. While Defendants apparently regard an assembly of people as an economic commodity, this Court does not. 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.

SPA13 (citations omitted).

While the City suggests that *money* need not necessarily change hands for an exchange to be commercial in nature, City Br. at 44, 49 n.4, the City provides no precedent to support its claim that the *free provision* of a good or service, without more, can be a commercial transaction for purposes of *Central Hudson*. Perhaps an offer to barter—*i.e.*, to evenly exchange goods or services with no money involved, such as "Will Work for Food"—could be considered commercial speech, but that issue is not relevant where, as here, there is no offered *exchange* of goods, services, or money of any kind. Key cases that concluded that the targeted expression was "commercial" undercut the City's position because the speech was directly tied to *the exchange of goods, services, and/or money*.[4] In addition, while the City states that "[o]ffers to provide pregnancy-related goods and services to consumers are routinely classified as commercial speech by the Supreme Court," City Br. at 44, the cases the City cites in support of that statement involved information about how to obtain goods or services *for which the reader would*

[4] *See, e.g.*, *Bd. of Trs. of S.U.N.Y. v. Fox*, 492 U.S. 469, 471-73 (1989) (offering products for sale and promoting the benefits of their use); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629 (1985) (attorney solicitations); *Cent. Hudson*, 447 U.S. at 558 (utilities promoting the use of electricity); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009) ("disclosure of calorie information in connection with . . . the sale of a restaurant meal"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107-08 (2d Cir. 2001) (labels on light bulb packages warning consumers).

pay.[5] The City's attempt to fit LL17 within the Supreme Court's narrow construction of the commercial speech doctrine is unavailing.

c. This Court Should Decline to Accept the City's Invitation to Expand the Commercial Speech Doctrine Well Beyond Its Existing Boundaries.

In an effort to avoid the application of strict scrutiny to LL17, the City proposes two significant expansions of existing law, ignoring the reality that "[c]ommercial speech receives limited First Amendment protection and has therefore been narrowly defined by the Supreme Court." *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1207 (D. Colo. 2001); *see also Bolger*, 463 U.S. at 68; *Karhani v. Meijer*, 270 F. Supp. 2d 926, 930 (E.D. Mich. 2003). First, the City proposes that the commercial speech doctrine should be applied to the regulation of all expression that, in the government's view, poses the same potential to be deceptive, misleading, or confusing as actual commercial expression since the prevention of deception is one reason that the commercial speech doctrine exists. *See* City Br. at 44, 46-47. If the perceived misleading or confusing nature of speech were, *by itself*, a sufficient basis for the government to directly regulate it without having to satisfy strict scrutiny, the government would

[5] *Bolger*, 463 U.S. at 62 (a contraceptive manufacturer's ads including information about products it offered for sale); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977) (ads published by a business that sold contraceptives); *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975) (ad offering to help arrange low-cost abortions).

be given an expansive licensing and censorship power over an array of social, political, religious, moral, ethical, and even "factual" claims that someone may find to be misleading or confusing.

Second, the City argues that *all* speech relating to a good or service that has some market value should be treated as commercial speech, with regulations thereof subject to lesser scrutiny. The district court in *O'Brien* aptly noted the broad-ranging impact of this kind of novel theory:

> [T]he offering of free services such as pregnancy tests and sonograms in furtherance of a religious mission fails to equate with engaging in a commercial transaction. Were that the case, 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.

768 F. Supp. 2d at 813-14. In addition, the City fails to address this Court's holding that the offering of free Ben & Jerry's ice cream to participants in a Bike Tour did not convert otherwise non-commercial speech into commercial speech. *Transp. Alts*, 340 F.3d at 78-79. Acceptance of the City's proposed expansion of the commercial speech doctrine would permit the government to regulate the speech of religious, social, civic, or other groups that oppose gambling, the use of cigarettes, pornography, sexually oriented businesses, or the construction of a business that causes environmental harm, oppose a particular company's business practices, or offer food and shelter to the homeless, because the speech relates to a product or service that has commercial value and puts the speaker in competition

with various businesses. Neither of the City's ill-advised expansions of the commercial speech doctrine is supported by precedent, and both run counter to the general rule of broad protection for private expression.

3. LL17 Does Not Regulate Professional Speech.

The City's reliance upon cases dealing with laws regulating the medical and legal professions is misplaced. City Br. at 3, 53-57. As the District Court properly concluded, the lesser standard of First Amendment scrutiny applicable to laws that regulate the professional speech of doctors, lawyers, and members of other professions is inapplicable to LL17. SPA14. LL17 targets entities outside of the medical profession and expressly exempts entities directly supervised by a physician. "[A]s Defendants admit, Plaintiffs do not engage in the practice of medicine." *Id.*

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion), the Supreme Court upheld a requirement that doctors provide women with certain information at least 24 hours before performing an abortion. *Id.* at 881-87. The Court stated that "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* at 884 (citations omitted). *Casey* provides no support for LL17 because it dealt with the government's authority to regulate *the medical profession*. *See, e.g.*, *United States v. Farhane*, 634 F.3d 127,

137 (2d Cir. 2011) (discussing *Casey* in noting the government's authority to regulate the practice of medicine); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. 11-50814, 2012 U.S. App. LEXIS 548, at *12-14 (5th Cir. 2012).

Similarly, LL17 does not, and was not intended to, regulate any profession or occupation. A "profession" is "[a] vocation requiring advanced education and training," and a "professional" is "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency." *Black's Law Dictionary* 1329 (9th ed. 2009). It takes no "advanced education and training" or "high level of training and proficiency" to offer women who are or may become pregnant free material assistance and someone to talk to in an informal, non-medical, non-professional setting. PSCs do not exercise any individualized professional judgment on behalf of the women they assist, akin to a lawyer evaluating the merits of a potential case; they uniformly express their religious and moral views in every situation. In fact, proponents of LL17 criticized PSCs for consistently promoting their religious and moral viewpoints, to the exclusion of providing referrals for abortion or emergency contraceptives, A359, A448, A604, further illustrating that PSCs do not exercise professional judgment on behalf of any individual. In addition, most individuals staffing PSCs are volunteers. A551, A570, A633.

In sum, the District Court's analysis of this issue is sound:

> 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." 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.

SPA14-SPA15 (citation omitted).

C. LL17 Fails Strict Scrutiny.

The City cannot meet its exceedingly high burden of proving that LL17 can withstand strict scrutiny, for at least three reasons: 1) there is no compelling record of evidence demonstrating that all PSCs engage in unlawful or harmful conduct that may be remedied only through speech mandates; 2) LL17 is not narrowly tailored to address the harms that the City claims it was enacted to address; and 3) numerous other less restrictive means of addressing the City's concerns already exist or are readily available.

1. The Government's Burden of Proof in Strict Scrutiny Cases Is Exceedingly High.

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). As such, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Court has explained that "[l]aws

that compel speakers to utter or distribute speech bearing a particular message are subject to the [most exacting] rigorous scrutiny," *Turner*, 512 U.S. at 642 (citations omitted). "Requiring [the government] to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

The City's claim that there is a compelling need for LL17 begins the strict scrutiny analysis; it does not end it. The government bears the difficult burden of demonstrating that the law at issue is one of the "rare" instances in which a law mandating or directly regulating speech meets the "demanding standard" of strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). Even when the government has cited very important interests, like national security and the protection of children, the Supreme Court has invalidated laws that were not narrowly tailored to eliminate a concrete threat to those interests, or that were not the least restrictive means of doing so. *See, e.g., id.* at 2741 ("Even where the protection of children is the object, the constitutional limits on governmental action apply."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119-20 (1991) ("The distinction drawn by [the statute] has nothing to do with [the asserted] interest."); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 787-88 (1978) (the government's interests "either are not implicated in this case or

are not served at all, or in other than a random manner"); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) (national security "cannot be invoked as a talismanic incantation to support any [law]").

The Supreme Court recently described a compelling state interest as a "high degree of necessity," *Brown*, 131 S. Ct. at 2741, noting 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." *Id.* at 2738 (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980). As such, the government's mere invocation of the promotion of public health as a compelling interest, without more, is insufficient to meet the demands of strict scrutiny. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), which applied strict scrutiny in the context of a RFRA claim, the Court "looked beyond broadly formulated interests," *id.* at 431, and, while recognizing "the general interest in promoting public health and safety," held that "invocation of such general interests, standing alone, is not enough." *Id.* at 438. In other words, the government has the burden of compiling a compelling evidentiary record in order to justify the regulation of speech as a means to combat a threat to public health. Similarly, while the government has a strong interest in regulating individuals who engage in fraud (*i.e.*, intentional deception leading to a financial

gain for the speaker), that interest must be *stretched beyond recognition* to justify a law, such as LL17, that applies where there is no intent to deceive, no proof that a reasonable person would actually be deceived, and no financial gain for the speaker.

The existence of a compelling interest in the abstract does not give the government *carte blanche* to promote that interest through the regulation of private speech. *See, e.g.*, *Robel*, 389 U.S. at 263-64 ("[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal."). For instance, there is a key difference between requiring an entity to warn the public about health risks that *it directly creates* (for example, potentially dangerous attributes of its products) and requiring an entity that *does not create health risks* to convey a government message promoting healthy behaviors (for example, LL17's disclaimer stating the view of the Department). The latter cannot withstand strict scrutiny, yet the City cites a generic desire to increase the availability of information concerning abortion, emergency contraceptives, and prenatal care to women who are or may become pregnant as a justification for LL17. The City's mere desire to dictate the content of private speech relating to these subjects lacks any "high degree of necessity," *Brown*, 131 S. Ct. at 2741, and is not "actually necessary to the solution" of an "actual problem," *id.* at 2738.

Similarly, the City lacks a compelling interest in micromanaging what a select group of private entities say about abortion, emergency contraceptives, and prenatal care. The City's concept of a broad government power to police private speech in order to divine what is true, false, or potentially confusing, and to eliminate or broadly regulate any expression not meeting the government's standards, is wholly foreign to the First Amendment. *See, e.g.*, *Citizens United*, 130 S. Ct. at 907 ("Factions should be checked by permitting them all to speak, . . . and by entrusting the people to judge what is true and what is false." (citing *The Federalist No. 10* (Madison)); *Bellotti*, 435 U.S. at 792 ("[I]f there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment."). As the *O'Brien* decision aptly noted, "[w]hether a provider of pregnancy-related services is 'pro-life' or 'pro-choice,' it is for the provider—not the Government—to decide when and how to discuss abortion and birth-control methods." 768 F. Supp. 2d at 808.

The City further seeks to justify LL17 as a prophylactic measure designed to prevent various potential harms from possibly happening in the future,[6] but "[b]road prophylactic rules in the area of free expression are suspect. Precision of

[6] *See, e.g.*, City Br. at 72, 74 (desire to *prevent* potential confusion about the services that PSCs offer); City Br. at 70 (desire to *safeguard* against conceivable delays in obtaining medical care).

regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 U.S. at 438 (citations omitted); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (plurality opinion) ("[A] prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."). When the government imposes burdensome disclaimer requirements to address a perceived problem, the First Amendment requires a scalpel, not a sledge hammer. *See Wis. Right to Life*, 551 U.S. at 477-78 ("A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech.").

The significant level of evidence necessary to demonstrate a *compelling need* to regulate speech in order to protect a compelling government interest from concrete harm is exacting.

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner, 512 U.S. at 664 (citation omitted). "[B]ecause [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2739 (citation omitted). "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). In addition, the City cannot paper over the lack of

compelling evidence before the City Council through creative briefing. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008) ("We cannot and will not uphold a statute that abridges an enumerated constitutional right on the basis of a factitious governmental interest found nowhere but in the defendants' litigating papers.").[7]

Furthermore, for the government to meet its high burden of proof under strict scrutiny, it "must present more than anecdote and supposition." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000). The City's reliance upon *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), City Br. at 71-72, is misplaced because that case involved commercial speech by members of a closely regulated profession, and the two cases it cited regarding the sufficiency of "studies and anecdotes" involved the regulation of sexually oriented businesses, which are subject to lesser scrutiny. 515 U.S. at 628 (citations omitted).[8] Also, the City's citation to *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001), City Br. at 67, is misplaced, as the Court applied the rule that "rational basis scrutiny applies to

[7] Cases holding that the government may justify the regulation of *commercial* speech through new, post-enactment justifications are not applicable here. *See, e.g.*, *Clear Channel Outdoor, Inc. v. City of N.Y.*, 594 F.3d 94, 103 n.10 (2d Cir. 2010); *Anderson v. Treadwell*, 294 F.3d 453, 461 n.5 (2d Cir. 2002).

[8] Nor does *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality), which *Florida Bar* cited, support the City's argument because the Court relied heavily on the fact that all fifty States had similar statutes, some of which were over a century old, *id.* at 200-06, a fact that does not exist in the present case.

immigration and naturalization regulation." *Id.* at 582. These cases do not suggest that anecdotal hearsay, the bulk of what the City Council considered here, suffices to satisfy strict scrutiny. The Supreme Court recently held in *Brown* that the evidence offered by the government was "not compelling," even though the record included various scholarly articles by research psychologists addressing the key issues, because "[t]he studies in question . . . [lacked] *the degree of certitude that strict scrutiny requires*." 131 S. Ct. at 2738-39 & n.8 (emphasis added).

2. The City Council Lacked Compelling Evidence of Concrete Harms Caused By All PSCs and a Need For Legislation Regulating All PSCs' Expression.

The City alleges six interests to justify LL17, none of which is supported by compelling evidence: 1) ensuring access to prenatal care; 2) prohibiting facilities from giving the false appearance of a medical facility; 3) eliminating false advertising; 4) increasing public awareness about PSCs and the full range of options available to women; 5) preventing delays in abortive services; and 6) protecting the confidentiality of personal information. The record lacks the compelling evidence needed to justify the indefinite regulation of the written and verbal speech of all PSCs.

First, the record demonstrates that PSCs bolster, rather than jeopardize, the City's interest in increasing the availability of prenatal care to women early in their pregnancies. Several PSCs testified that they "make immediate appointments for

prenatal care" and refer for prenatal care. A383, A527, A531, A534. There was no evidence submitted to the Council suggesting that PSCs contribute to a delay in obtaining prenatal care. The inclusion of prenatal care as a subject covered by LL17 illustrates that LL17 is not based upon a record demonstrating a compelling threat of harm.

Second, the Council also lacked compelling evidence that all PSCs have the false appearance of a medical facility.[9] In fact, the first two pages of the City's brief use equivocal terms with respect to this issue, stating that "certain" PSCs appear like medical facilities, and claiming that PSCs "often" look like medical facilities. City Br. at 1-2. Dr. Susan Blank, Assistant Commissioner of the Department of Health and Mental Hygiene, stated that "some" PSCs appear to be medical facilities. A267. The City tacitly admits the lack of evidence that any PSCs actually have the false appearance of a medical facility by arguing that existing law does not address PSCs' conduct, wholly ignoring New York Education Law section 6512 making it a felony for any person not authorized to practice medicine to practice, offer to practice, or *hold himself out* as being able to practice medicine. Tellingly, Dr. Blank admitted that she was unaware of the City bringing any actions against a PSC for the unlawful practice of medicine. A305-A306; *see also*

[9] The mere fact that LL17 uses the terminology "has the appearance of a licensed medical facility" in the definition of "pregnancy services center" bears no evidentiary weight on this issue.

A298 (Dr. Blank admitted that the City lacked any direct evidence that any PSCs had violated any laws); A1017 (counsel for the City noted that there have been no anti-fraud prosecutions of PSCs by the City).[10] If the record indicated that PSCs universally or often don the appearance of a medical facility, which it does not, then the City's failure to distinguish (or even cite) section 6512 is baffling.

The City's specific examples of what supposedly makes some PSC locations appear to be medical offices fall far short of being compelling. For example, the City faults some PSCs for locating within the vicinity of medical offices. City Br. at 15, 20, 63-64. Plaintiff EMC's founder Chris Slattery testified, however, that EMC partners with doctors at various locations for the purpose of increasing women's access to timely prenatal care and STD testing provided by medical professionals. A360, A363-A364, A369-A370, A393.[11] Also, Kelli Conlin of NARAL Pro-Choice New York testified that, while her organization had conducted an "undercover" non-scientific investigation of all PSCs in the City, A327, individuals at *every* PSC expressly stated when asked that they were not a

[10] A few isolated second-hand anecdotes cited by the City, in which an individual affiliated with a PSC allegedly claimed to work for an abortion clinic in order to deceive women, if true, could easily be dealt with under section 6512 or other narrowly tailored laws. City Br. at 16, 18. These anecdotes come nowhere close to establishing that all PSCs engage in such conduct.

[11] Similarly, the City faults PSCs for having names like "Pregnancy Help," City Br. at 20, but it is irrational to suggest that the general public will conclude that any organization that includes words like "pregnancy" or "mother" in its name must be a medical office. In any event, LL17 applies to PSCs regardless of their names.

medical facility, A336-A337, and that they did not provide or refer for abortion or emergency contraceptives, A323, A326, A332.

Additionally, in an attempt to paint Jennifer Carnig of the New York Civil Liberties Union (NYCLU)—who provided *rare first-hand testimony*—as an unsuspecting woman deceived by a PSC, the City incorrectly states that Carnig "*mistakenly* enter[ed] a PSC." City Br. at 16-17 (emphasis added). Carnig, however, *intentionally* entered a PSC hoping to collect evidence for the NYCLU that would support LL17's passage. A396, A655. Carnig also admitted that the staff at the PSC she visited told her upfront that they would not provide any help obtaining an abortion. A401, A415-A416.

Third, although LL17 is purportedly "about truth in advertising," A178, A263, the City has failed to produce compelling evidence that all, or even any, currently existing PSCs engage in false or misleading advertising. As the District Court noted, "[w]hile Section 1 [of LL17] states that only '*some* pregnancy service centers in New York City engage in deceptive practices,' the Ordinance applies to *all* such facilities." SPA16. This statutory reference to "some" PSCs reflects the sparse evidence concerning this issue, consisting primarily of two news articles from the 1980s concerning a few PSCs' ads and a 2002 state Attorney General's report indicating that an investigation of nine PSCs throughout the *State* led to an agreement being entered with *one* PSC (which was not within the City's

jurisdiction). A961-A963. At best, this information suggests that, *in decades past, some* PSCs have, at times, arguably used misleading advertising. Evidence of sporadic past use of misleading advertising by a small subset of PSCs falls far short of meeting the rigorous evidentiary standard necessary to justify LL17's indefinite regulation of the speech of all PSCs.

The City's brief essentially concedes the lack of compelling evidence that PSCs presently engage in deceptive advertising by acknowledging that PSCs' statements and conduct do not violate existing anti-deception laws. City Br. at 77-79. If PSCs were presently engaging in false or misleading advertising, as alleged, the already existing laws prohibiting such conduct could be utilized. Given the lack of evidence, the City has largely retreated from arguing that evidence of *false or misleading* advertising supports LL17, instead adopting the much weaker argument that LL17 serves to lessen potential, unintended *confusion or ambiguity* about PSCs' assistance. *See, e.g.*, City Br. at 2, 12, 66. The possibility of mere unintended confusion—which could easily be cleared up by making a phone call, doing a quick Internet search, asking a question in person, etc.—does not give rise to a compelling government interest. Multiple record cites relied upon by the City do nothing more than suggest that some women have contacted or entered a PSC with a mistaken belief about what assistance the PSC may provide, City Br. at 15, 18-19, 23-24, with little or no information provided about what specifically led to

that mistaken belief. The sparse record concerning confusion or ambiguity lacks the high degree of certainty required for the government to demonstrate that indefinitely regulating the speech of PSCs is a necessary means of addressing a compelling problem.

Fourth, the City also falsely claims that, absent LL17, women "have no way of knowing, either in advance or upon arrival," the nature of a PSC or what assistance the PSC provides. City Br. at 2. The City's brief and the record illustrate that a simple Internet search reveals a lot of information about any given PSC, often including the assistance it does or does not offer and where it is located. City Br. at 34-36; A448, A508, A609. For individuals without Internet access, a simple phone call to the PSC could clarify what assistance the organization does or does not offer. In addition, when women arrive at a PSC's location, the absence of an openly displayed medical license and current registration on site puts them on notice that they are not in the office of a medical professional.[12]

The City's argument that its interest in ensuring that women have "medically accurate, unbiased and comprehensive information about their full range of options" justifies LL17, City Br. at 14, 19; A179, A263, fails for several reasons.

[12] Medical professionals must display their licenses and current registration at the practice site. *See* N.Y. State Dep't of Health, Statements on Telemedicine, http://www.health.ny.gov/professionals/doctors/conduct/telemedicine.htm; N.Y. State Educ. Dep't, Consumer Information, http://www.op.nysed.gov/prof/med/medbroch.htm.

First, LL17 does not regulate the information that PSCs provide, and it is ironic that the City accuses PSCs of acting like medical facilities while, at the same time, the City asserts a need to require PSCs to give "medically accurate" information. Second, that the government believes that citizens should have more information about health-related or other topics (which is often the case) does not give rise to a compelling need to make private citizens become distributors of the government's preferred content. The government has a variety of means to increase public awareness about various issues short of imposing speech mandates. Finally, with respect to abortion and emergency contraceptives, the City is positing that the government may force speakers on one side of a hotly contested social, political, moral, or religious issue to make certain "unbiased" and "comprehensive" statements of the government's choosing, a troubling proposition that is unsupported by the law.

Fifth, an additional asserted justification for LL17—a need to prevent delays in women obtaining an abortion or emergency contraception—is also not implicated here. Under the City's view, *all* speech that opposes abortion would be subject to close regulation because it (indirectly) increases the odds that a woman will take time to consider the speech, ultimately delaying an abortion. *See* City Br.

at 22.[13] If true, family members, friends, or other individuals who suggest motherhood or adoption to a pregnant woman also create compelling public health risks because the woman may delay obtaining an abortion while contemplating their viewpoints. Plaintiffs provide information and assistance to pregnant women; the ultimate decision concerning a woman's pregnancy is hers. There is no compelling evidence that PSCs harm women's health.[14]

Finally, there is no evidence that PSCs disclose any personal information provided by women seeking their assistance. Dr. Susan Blank testified that the City had no direct evidence that any PSC has ever publicly disclosed any personal information provided by the women that seek their assistance, nor has the City investigated any anecdotal claims in this regard. A287-A289. The few speakers who addressed the subject spoke in terms of potential, hypothetical harms, A110, A277, A320, with only one anecdotal claim that a PSC staff member allegedly visited a woman at her workplace (but did not disclose the woman's personal

[13] The Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, bears no relevance to this case. City Br. at 71. An interest in keeping one person from *physically preventing* another person from taking lawful action is much different from a purported interest in forcing a person to provide government-crafted disclaimers to increase general awareness of the availability of various health-related services.

[14] In addition, while the record includes statements suggesting that some women were upset or offended by what a PSC's staff member told them, *see, e.g.*, A470-A471, that is not a valid basis for regulating PSCs' speech. *Brown*, 131 S. Ct. at 2738 ("[D]isgust is not a valid basis for restricting expression.").

information). A337-A338. There is simply no compelling evidentiary basis for regulating PSCs based upon a fear that they will disclose women's information.

In sum, Plaintiffs do not seek to "feign[] ignorance of the obvious," SPA16, by denying the likelihood that some of the various secondhand anecdotes presented before the Council are true, or by denying that some women who read a PSC's ad might incorrectly assume that the PSC would provide or refer for abortion or emergency contraceptives. The fact remains, however, that the record before the Council falls far short of providing compelling evidence that *all* (or even a substantial number of) PSCs engage in false or misleading advertising, falsely hold themselves out to the public as medical facilities, or publicly disclose information that women may provide them. Given LL17's over-inclusive coverage and blunt speech mandates, the burden is *not* upon Plaintiffs to prove that none of the secondhand accounts actually happened, but rather rests squarely upon the City to prove that the record considered by the Council meets the exceedingly high, rigorous standards required to satisfy strict scrutiny. The City simply cannot make that showing.

3. LL17 Is Not Narrowly Tailored to Achieve the City's Stated Interests.

Even if the Council had compiled a compelling record of harms caused by PSCs, LL17 would not be a proper means of addressing those harms. While the First Amendment does not handcuff the government from addressing real harms

through appropriately tailored regulations applicable only to the specific individuals or groups responsible for causing those harms, it prohibits the government from using blunt speech proscriptions or prescriptions, such as LL17, that are both over-inclusive with respect to which entities are covered and overly burdensome with respect to the speech mandates imposed. *See*, *e.g.*, *Watchtower Bible Tract Soc'y of N.Y., Inc. v. Vill. of Strauss*, 536 U.S. 150, 168-69 (2002). For example, one would reasonably assume that a law championed as an anti-deceptive advertising measure would be triggered by the making of allegedly misleading statements. LL17, however, casts a broad net to cover numerous facilities that do not jeopardize the government's asserted interest in combating deception, irrespective of whether the PSC has ever advertised. As the District Court explained,

> 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. . . . 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."

SPA16-SPA17 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

Similarly, LL17's definition of "pregnancy services center" broadly encompasses numerous entities that do not engage in false or misleading advertising or practices. For example, one factor used to characterize an entity as a facility having the false appearance of a licensed medical facility is whether it "is

located on the same premises as a licensed medical facility or provider or shares facility space with a licensed medical provider," A242-A243, but if a fifty-story building has one medical provider as an occupant, *any other occupant of the building* is "located on the same premises as a licensed medical facility," *see id.* Also, locating a PSC near a medical office is not inherently deceptive; as noted previously, PSCs often have relationships with medical providers to increase the availability of prenatal care and STD testing. Another factor is whether the facility contains a private or semi-private room or area containing medical supplies or instruments, but this broad, vague language includes a bathroom that contains a stocked medicine cabinet or a first aid kit. These factors bear no connection to the governmental interests purportedly underlying LL17.

4. LL17 Is Not the Least Restrictive Means of Achieving the City's Stated Interests.

As the District Court correctly noted, SPA17-SPA19, the City has several options significantly less burdensome than LL17 to address actual threats to the City's stated interests, such as narrowly tailored laws prohibiting false advertising, the unauthorized practice of medicine, or falsely holding oneself out as a doctor or medical office—all of which already exist and could be enforced against an entity that actually violates them—along with City-sponsored ad campaigns communicating the government's viewpoints. On the eve of LL17's passage, Council Member Vallone stated that the law was "unnecessary and

unconstitutional" because the State and the City already have the power to prosecute any fraud or deception under existing law. A223. The City cannot merely *assume* that all of these less restrictive means would be ineffective. *See Consol. Edison*, 447 U.S. at 543.

While the City repeatedly asserts that some PSCs present themselves to the public in the guise of medical offices, the City fails to explain why the enforcement of New York Education Law section 6512—making it a felony for any person not authorized to practice medicine to practice, offer to practice, or hold himself out as being able to practice medicine—is not a less restrictive means of addressing the issue. The non-existence of any prosecutions brought against PSCs under this statute is merely an indication of *a lack of evidence of wrongdoing*, not an indication that prosecutions are doomed to fail in the event that they would be warranted. *See* A305-A306; *People v. Amber*, 349 N.Y.S.2d 604, 607 (Sup. Ct. 1973) (noting that section 6512, coupled with statutes defining the practice of medicine, have "a long history" and have "furnished the basis for numerous prosecutions"). To the extent the City suggests that this remedy would not reach most or all PSCs, it admits that LL17 is impermissibly over-inclusive.

Similarly, although New York State does not require the provision of ultrasounds (without giving a medical diagnosis) to be administered by a physician, the suggestion that those services are inherently medical in nature can

be addressed through narrowly tailored legislation governing the operation of ultrasound machines. For example, the District Court noted that "the City could impose licensing requirements on ultra-sound technicians (or lobby the New York State legislature to impose state licensing requirements) . . . . to regulate the manner in which [ultrasound] examinations are conducted and curb any manipulative use." SPA18-SPA19.

Additionally, narrowly tailored false advertising laws are available to address hypothetical improper ads that could be made by PSCs in the future. For example, New York General Business Law section 349(a) provides that "[d]eceptive acts or practices . . . in the furnishing of any service in this state are hereby declared unlawful," and section 349(h) creates a cause of action for a person injured by a deceptive practice. The applicable standard is not rigorous: "[t]he test is not whether the average man would be deceived," as the provisions "safeguard the 'vast multitude which includes the ignorant, the unthinking and the credulous.'" *People by Lefkowitz v. Volkswagen of Am., Inc.*, 366 N.Y.S.2d 157, 158 (App. Div. 1975). These laws apply to both commercial and non-commercial ads and practices, *Marcus v. Jewish Nat'l Fund, Inc.*, 557 N.Y.S.2d 886, 889 (App. Div. 1990), and provide a less burdensome way to protect the City's interests if a PSC engages in misleading advertising, *see O'Brien*, 768 F. Supp. 2d at 817.

The City dismissively rejected the effectiveness of this less restrictive means on the assumption that some women may hesitate to report deceptive practices, A240, A963, but the government cannot merely *assume* that a less restrictive means would be ineffective. *Consol. Edison*, 447 U.S. at 543. This explanation is especially weak considering that PSCs openly advertise through a variety of means that the City can readily examine. The District Court observed that, "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. Such prosecutions offer a less restrictive alternative to imposing speech obligations on private speakers." SPA18 (citations omitted). Various cases illustrate this point. *See, e.g.*, *Mother & Unborn Baby Care of N. Tex., Inc. v. State*, 749 S.W.2d 533, 536, 540 (Tex. 1988) (holding that a consumer protection statute applied to intentionally misleading statements was narrowly tailored and did not "further encompass protected speech or conduct"); *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 182 (N.D. 1986) (upholding "a narrowly prescribed order temporarily restraining allegedly false and deceptive communication" and vacating part of the order that reached non-deceptive advertising).

The City's approach—to lump all PSCs together under one broad law, imposing speech mandates upon them now rather than waiting to prosecute any

individual that may engage in unlawful conduct in the future—runs counter to our constitutional tradition. For example, while a PSC staff person accused of wrongdoing under more narrowly tailored laws would (and should) be afforded various due process, evidentiary, and constitutional protections in a civil or criminal proceeding, LL17 dispenses with individualized justice in favor of a blanket provision based almost exclusively upon unreliable hearsay that would be inadmissible in a court proceeding. *See* Fed. R. Evid. 802. In addition, numerous areas of First Amendment jurisprudence—defamation, prior restraints, licensing, etc.—recognize the First Amendment's command that after-the-fact prosecutions or civil actions against those who actually break the law are strongly preferred over blanket before-the-fact speech regulations like LL17. *See, e.g.*, *Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 485 & n.5 (2d Cir. 2007); *United States v. Quattrone*, 402 F.3d 304, 309-10 (2d Cir. 2005).

Finally, the City has a variety of means to convey its own message without converting private entities into the City's mouthpiece. For example, the City could produce or sponsor public service advertisements advising women who are or may become pregnant of the need for early prenatal care and the health risks associated with a delay in seeing a doctor, and also encouraging them to ensure that they are being seen by a licensed doctor by asking questions or looking for the required license. The Department of Health and Mental Hygiene often runs similar

campaigns to inform citizens about health-related issues through ads displayed throughout the City and on various websites.[15] Similarly, the City could run ads in various media stating, "Pregnant? Need Help? Call [Phone Number]," with the number connecting callers to a person at the Department who can assist them, or to an automated message providing information about prenatal care, the importance of seeing a doctor early on in pregnancy, etc. This would clearly serve the City's interests without imposing any burden on the speech of PSCs. *See Tepeyac*, 779 F. Supp. 2d at 469, n.9. Moreover, as the District Court suggested, the City could post signs on public property near PSC locations encouraging pregnant women to consult a doctor. SPA17-SPA18. "Such alternatives would convey the City's message and be less burdensome on Plaintiffs' speech." SPA17.

5. LL17's Confidentiality Section Also Fails Strict Scrutiny.

Although LL17's confidentiality section (§ 20-817) purports to serve the laudable goal of protecting women's privacy, it suffers from two critical defects. First, there is no compelling evidence that PSCs disclose women's information to third parties or the general public. *See supra* Section I.C.2. This glaring lack of evidence is an example of improperly "posit[ing] the existence of the disease sought to be cured." *Turner*, 512 U.S. at 664.

[15] *See, e.g.*, YouTube-NYC Health Department, *NYC's Health Channel*, http://www.youtube.com/user/NYCHealth#p/p (roughly 250,000 total video views as of Jan. 26, 2012).

Second, section 20-817 undercuts the government's interest in encouraging the reporting of suspected criminal activities. Although state law declares who may, or must, report suspected crimes against children that involve parental abuse, neglect, or maltreatment, N.Y. Social Servs. Law §§ 413, 414, state law does not impose a general reporting mandate with respect to *other* crimes, meaning that the general public is free to report suspected criminal activities to law enforcement authorities (with certain narrow exceptions like an attorney's duty of confidentiality), but is not *required* to do so. By imposing a broad confidentiality requirement upon PSCs while only exempting reporting for parental abuse, neglect, or maltreatment, LL17 prohibits PSCs from reporting a host of potential criminal activities of which they may become aware. For example, if a PSC staff member learns or suspects that a woman seeking assistance has been raped, kidnapped, or physically abused (by someone who is not her parent or guardian), LL17 prevents him or her from reporting the crime to the police (barring detailed written consent from the woman herself) because such reporting is not *required* by state law. Meanwhile, the vast majority of the general public remains free to contact law enforcement authorities should they receive similar information. Given the high importance of assisting the police in investigating suspected criminal activities, LL17's blunt confidentiality provisions are not the least restrictive means of achieving a compelling governmental interest.

6. LL17 Was Enacted to Hamper Organizations With a Disfavored Viewpoint.

That LL17 cannot survive strict scrutiny is unsurprising; the record clearly indicates that LL17 was designed to impose burdens upon organizations that oppose abortion. In the City Council's official press release concerning the introduction of the bill that became LL17, Council Members Lappin and Ferreras referenced the targeted entities as "anti-choice" and "anti-abortion" groups. A1138-A1139. The November 16, 2010 hearing evinced a desire to regulate "anti-choice" centers that oppose abortion, A260, A307-A308, A312, A448-A449, A573, A649-A650, A757-A758, with one supporter of LL17 criticizing PSCs' purported "commitment to proselytizing conservative, anti-choice Christianity," A751.

In March 2011, after a cosmetic change was made to remove expressly discriminatory language,[16] Council Member Lander characterized PSCs as part of a larger effort by "opponents of abortion" to lower the number of abortions through threats, intimidation, and attacks, stating, "[t]his bill has been crafted to specifically address that issue." A197. Council Members Oddo and Vallone faulted LL17 for targeting the speech of pro-life groups. A200, A223-A224.

[16] Entities that oppose abortion are the principal, if not the only, existing organizations with facilities that fit the definition of a "pregnancy services center." The record does not indicate that *any* existing entity that refers for abortion would be subject to LL17.

Although political leaders often use their positions to reward supporters and punish opponents under the old adage "to the victor goes the spoils," the Supreme Court once aptly noted, "[t]o the victor belong only those spoils that may be constitutionally obtained." *Rutan v. Republican Party*, 497 U.S. 62, 64 (1990); *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting that the First Amendment protects "the expression of opinions that we loathe and believe to be fraught with death"). In applying strict scrutiny to LL17, this Court should not turn a blind eye to the fact that LL17 was motivated by a viewpoint-discriminatory intent. *See Hill v. Colorado*, 530 U.S. 703, 768-69 (2000) (Kennedy, J., dissenting).

II. LL17 Is Vague and Violates Plaintiffs' Right to Due Process.

LL17 is unconstitutionally vague. Where, as here, a law "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); *see also Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). "'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.'" *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186-87 (2d Cir. 2010) (quoting *Hill*,

530 U.S. at 732); SPA20. LL17 is impermissibly vague because it subjects the public to civil and criminal penalties, and burdens their freedom of speech, without clearly defining key terms or adequately limiting enforcement discretion.

A. LL17 Uses Impermissibly Vague Terminology.

"[I]ndividuals should receive fair notice or warning when the state has prohibited specific behavior or acts. The relevant inquiry is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *VIP of Berlin*, 593 F.3d at 187 (quotation marks and citations omitted). LL17's vague language leaves Plaintiffs and other entities to guess, among other things:

- whether a primary purpose of providing "*services* to women who are or may be pregnant" includes solely providing *goods or information*;
- what constitutes "medical attire or uniforms";
- whether one "offers pregnancy testing and/or pregnancy diagnosis" by simply making available a pregnancy test for self-administration that one could find at a drug store;
- what kinds of materials, activities, and locations constitute the storage of "medical supplies and/or medical instruments" in a "private or semi-private room or area"; and

- which statements relating to the entity constitute an "advertisement promoting the services of" the entity.

Facilities that may potentially meet one of LL17's vague factors are forced to either subject themselves to LL17's burdensome requirements or face the imposition of penalties for failing to do so. "'Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Farrell*, 449 F.3d at 494 (quoting *Grayned*, 408 U.S. at 109); *see also United States v. Reeves*, 591 F.3d 77, 81 (2d Cir. 2010) (holding that the term "significant romantic relationship" was vague).

B. LL17 Invites Arbitrary Enforcement.

"The second way in which a statute can be found unconstitutionally vague is if the statute does not provide explicit standards for those who apply [it]." *VIP of Berlin*, 593 F.3d at 191 (quotation marks omitted). "[T]he vagueness doctrine is based on the need to eliminate the impermissible risk of discriminatory enforcement. A vague law impermissibly delegates basic policy matters to [government officials] for resolution on an ad hoc and subjective basis." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 328 (2d Cir. 2010) (citations omitted); *see also* SPA20.

As the District Court observed,

> 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. . . . 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. . . .
>
> 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.

SPA21-SPA22.

The City has no answer for the fact that LL17's plain language gives the Commissioner unbridled discretion to arbitrarily impose the law's onerous requirements upon disfavored organizations. The six factors listed do *not* limit the Commissioner's discretion in any way; a facility may be deemed to be subject to LL17's requirements based on one listed factor, one or more unlisted factors, or no discernible factors at all. For example, the City's brief suggests that merely having a name like "Pregnancy Help" is itself deceptive and misleading, and two individuals even suggested in their testimony that "Sisters of Life" could be misleading or confusing, A299, A333-A334; LL17's text allows the Commissioner to make determinations on such a subjective basis. The vagueness of LL17's terms was highlighted when Counsel for the City stated during oral argument before the District Court that the definition of pregnancy services center "is meant to cover

anything that comes along in the future. I don't know in particular what falls within the definition now." A1007; *see also Fox Television Stations*, 613 F.3d at 331 (noting that a perceived need to give the government "the maximum amount of flexibility" to address future problems "does not provide a justification for implementing a vague, indiscernible standard").

United States v. Schneiderman, 968 F.2d 1564 (2d Cir. 1992), upon which the City relies, is distinguishable for at least three reasons: 1) the criminal statute at issue had a scienter element that "ensure[d] that defendants have notice that their conduct is prohibited" (LL17 includes no scienter element); 2) there were fifteen specific examples provided of items that would categorically fall within the definition of "drug paraphernalia" (LL17 only provides factors to be considered); and 3) the statute included exemptions that "help[ed] safeguard legitimate users of legal products from discriminatory enforcement" (LL17 provides no similar safeguards). *See id.* at 1568-69; *see also Transp. Alts.*, 340 F.3d at 78 (holding that a law impermissibly vested unbridled discretion in the Parks Commissioner where eleven listed factors were to be "taken into consideration"). *Thibodeau v. Portuondo*, 486 F.3d 61 (2d Cir. 2007), is also inapposite because the allegedly vague evidentiary presumption only applied if the government proved that several specific things had occurred, *id.* at 68, while LL17 imposes no similar burdens of proof to limit the Commissioner's unfettered discretion.

In addition, the City's suggestion that LL17's vagueness should be ignored now because there may be an opportunity to address vagueness in any administrative enforcement proceedings at a future date, City Br. at 86, ignores a key purpose of the vagueness doctrine: ensuring that laws give the public a "sufficiently definite" and "fair warning" of what is required *beforehand* so that the public may adjust its conduct accordingly. *Cunney v. Bd. of Trs. of Grand View*, 660 F.3d 612, 621 (2d Cir. 2011).

CONCLUSION

For the foregoing reasons, the District Court's decision and order granting Plaintiffs' motion for preliminary injunction should be affirmed.

Respectfully submitted January 30, 2012.

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