No. _____

In The
Supreme Court of the United States

THE EVERGREEN ASSOCIATION, INC., d/b/a EXPECTANT MOTHER CARE PREGNANCY CENTERS EMC FRONTLINE PREGNANCY CENTER; LIFE CENTER OF NEW YORK, INC., d/b/a AAA PREGNANCY PROBLEMS CENTER,

Petitioners,

v.

CITY OF NEW YORK, a municipal corporation; BILL DE BLASIO, Mayor of the City of New York, in his official capacity; JONATHAN MINTZ, Commissioner of the New York City Department of Consumer Affairs, in his official capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A New York City law requires facilities that are defined as "pregnancy services centers" to include several disclaimers in their phone and in-person conversations with individuals seeking assistance, in all of their ads, and on multiple on-site signs.

Petitioners, nonprofit entities that, for moral and religious reasons, provide free non-medical aid to women who are or may be pregnant, brought suit asserting that the law violates their freedom of speech and is unconstitutionally vague. The district court granted Petitioners' motion for a preliminary injunction. A divided Second Circuit panel upheld the injunction except with respect to one of the disclaimer mandates. The questions presented are:

1. Did the Second Circuit err in holding that requiring nonprofit facilities to provide written and verbal disclaimers is the least restrictive way to protect the government's interests, a holding in conflict with this Court's First Amendment decisions, as well as decisions of the D.C., Sixth, and Eighth Circuits?

2. Did the Second Circuit err by upholding, in conflict with this Court's First Amendment decisions, a law that coerces speech by facilities engaged in no improper conduct, where the City failed to prove that the law is a necessary solution to an actual problem?

3. Did the Second Circuit err by upholding, in conflict with this Court's vagueness decisions, a law with ambiguous standards that give city employees arbitrary discretion to burden the freedom of speech?

PARTIES TO THE PROCEEDINGS

Petitioners are The Evergreen Association, Inc., d/b/a Expectant Mother Care Pregnancy Centers EMC Frontline Pregnancy Center, and Life Center of New York, Inc., d/b/a AAA Pregnancy Problems Center.

Respondents are the City of New York, Mayor of the City of New York Bill de Blasio, and Commissioner of the New York City Department of Consumer Affairs Jonathan Mintz. The individual Respondents are sued in their official capacities.

CORPORATE DISCLOSURE STATEMENT

Petitioners, The Evergreen Association, Inc., d/b/a Expectant Mother Care Pregnancy Centers EMC Frontline Pregnancy Center, and Life Center of New York, Inc., d/b/a AAA Pregnancy Problems Center, are New York nonprofit corporations. Neither corporation has a parent corporation or is publicly held.

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INTRODUCTION

Although the particular speech mandate that the Second Circuit allowed to take effect may, at first glance, appear modest, that appearance would be misleading for two important reasons. That mandate compels regulated facilities to give written and verbal disclaimers stating that they do not have a medical provider on staff who provides or directly supervises all of the center's services. The first important problem is practical: Petitioners must inject this disclaimer into every single one of their ads and in numerous phone and in-person conversations, which represents a huge logistical burden upon such communications. *See* App. 67-68.

The second, and more important, problem is a matter of constitutional principle: the notion, embraced by the Second Circuit, that government can compel speech by a nonprofit entity, engaged in noncommercial speech, opens a jurisprudential Pandora's Box. Once it is established – contrary to *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *Wooley v. Maynard*, 430 U.S. 705 (1977), *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), *Hurley v. Irish-Am. GLB*, 515 U.S. 557 (1995), and *AID v. AOSI, Inc.*, 133 S. Ct. 2321 (2013) – that the government, rather than private noncommercial speakers, can decide what the speakers must say, the First Amendment war is over, and the remaining battle is only over what particular speech mandates will satisfy a reviewing judge.

The Second Circuit's ruling gives government actors a green light to use speech mandates far more frequently than the First Amendment, and relevant decisions of this Court, allow. The Second Circuit's decision also conflicts with decisions of the D.C., Sixth, and Eighth Circuits, as discussed below, that correctly invalidated government-imposed speech mandates. *See Nat'l Ass'n of Mfrs. v. SEC*, 2014 U.S. App. LEXIS 6840 (D.C. Cir. Apr. 14, 2014); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998); *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999).

This Court should grant certiorari to correct the Second Circuit's legal errors that have jeopardized the freedom of speech of individuals and groups within the Second Circuit and in other Circuits that may follow the Second Circuit's lead.

DECISIONS BELOW

The district court's decision granting Petitioners' motion for a preliminary injunction (App. 47) is reported at *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011). The Second Circuit's decision affirming in part and vacating in part (App. 1) is available at *Evergreen Ass'n v. City of New York*, 740 F.3d 233 (2d Cir. 2014). The Second Circuit's denial of Petitioners' petition for rehearing en banc on March 18, 2014 (App. 78) and grant of Petitioners'

motion to stay the issuance of the mandate on April 7, 2014 (App. 76) are unpublished.

JURISDICTION

The Second Circuit issued its decision on January 17, 2014, and denied Petitioners' motion for rehearing en banc on March 18, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are set forth in the Appendix to this Petition at App. 80, 81.

STATEMENT OF THE CASE

I. Petitioners' Activities

Petitioners, Expectant Mother Care ("EMC") and AAA Pregnancy Problems Center ("AAA"), are New York nonprofit corporations. App. 122, 130. They provide non-medical assistance, free of charge, to women who are or may be pregnant. App. 122-23, 131-32. Based on their moral and religious beliefs, Petitioners do not refer for abortions or emergency contraception. App. 122, 131. Petitioners offer free over-the-counter pregnancy test kits, informal counseling, and referrals

to doctors for prenatal care. App. 122-23, 131-32. They do not advertise themselves as medical clinics, and their staff and volunteers do not offer any medical services. App. 124, 132.

In an effort to improve women's access to prenatal care, Petitioner EMC has partnered with licensed medical clinics and physicians and, as such, some of EMC's facilities are located in or near a licensed medical clinic or a physician's office. App. 123-25. At some locations, EMC also offers ultrasounds provided by certified technicians. App. 123-24. None of EMC's staff or volunteers provide medical or pharmaceutical services; any such services are offered, if at all, by a partnering licensed medical provider. App. 124. EMC also provides pregnancy test kits *for self-administration* that are readily available to the public in drugstores. New York City Council, Hearing of Comm. on Women's Issues, Nov. 16, 2010, at 59, 112-14.[1] Staff at Petitioners' facilities collect certain personal information from women seeking assistance in order to better facilitate discussion and assistance. App. 125, 132.[2]

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[1] The complete legislative record of Local Law 17 is available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID|Text|&Search=2011%2f017.

[2] Furthermore, EMC requests, at times, a modicum of information relating to possible pregnancy-related symptoms and whether birth control was used, which facilitates EMC's *non-medical* discussions about sexual morality and the moral, social, and economic aspects of giving birth and having an abortion.

Throughout the City and by various means, Petitioners have advertised the assistance offered at their facilities. App. 125-27, 132-33. To comply with LL17, Petitioners would need to buy additional advertising space to continue using certain advertising media, and they would likely be foreclosed from advertising through some media sources. App. 67-68, 125-27, 132-33.

II. Enactment of Local Law 17

LL17 was enacted at the prompting of Petitioners' ideological opponents, self-proclaimed "pro-choice" advocates who asserted a need (and desire) to regulate the speech of "anti-abortion" facilities. *Infra* at 40-41. LL17 imposes disclaimer and confidentiality requirements on facilities defined to be "pregnancy services centers" ("PSCs"). A PSC is "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." App. 86. The following is a non-exhaustive list of "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.

Id.

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. *Id.* The six listed factors are only "[a]mong the factors" to be considered by the Commissioner, *id.*, who may 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. 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" the definition of PSC, are excluded from the definition. App. 86-87.

LL17 requires every facility deemed to be a PSC to state (1) whether it has "a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy

services center";[3] (2) whether it provides, or refers for, abortion, emergency contraception, and prenatal care; and (3) "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." App. 87-88. These disclaimers must be made in English and Spanish,

> 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.

App. 88. All of these disclaimers must also be provided verbally, whether in-person or by phone, to any person requesting an abortion, emergency contraception, or prenatal care. *Id.*[4]

PSCs that do not fully comply with LL17 face $200 to $1,000 in penalties for the first violation and $500 to $2,500 for each subsequent violation. App. 90. If a PSC fails to provide the required disclaimers on

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[3] This disclaimer would always state that there is no such licensed medical provider because facilities that have one are excluded from the definition of PSC.

[4] LL17 also requires PSCs to keep confidential all health and personal information provided by an individual in the course of inquiring about or seeking services, subject to a few exceptions. App. 88-90. Petitioners challenged LL17 in its entirety in their Complaint, but did not focus on the law's confidentiality provisions in their preliminary injunction briefing.

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. App. 90-91. Removing or disobeying a posted order to seal the premises is punishable by fines and jail time. App. 92.

III. Lower Court Proceedings

Petitioners brought this action in federal district court, asserting that LL17 violates their First and Fourteenth Amendment rights as well as the New York Constitution, both on its face and as applied to Petitioners. App. 97.[5] The complaint cited 28 U.S.C. §§ 1331, 1343(a)(4), and 1367 as the bases for the district court's jurisdiction. App. 97-98. Petitioners filed a motion requesting a preliminary injunction before LL17 would take effect. The district court granted Petitioners' motion, stating that

> Plaintiffs have demonstrated that Local Law 17 will compel them to speak certain messages or face significant fines and/or closure of their facilities. . . . Accordingly, this Court presumes a threat of irreparable harm to Plaintiffs' First Amendment rights.

App. 55.

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[5] Another lawsuit challenging LL17 was filed by several other nonprofit organizations. *Pregnancy Care Ctr. of N.Y. v. City of New York*, No. 1:11-cv-02342-WHP (S.D.N.Y. filed Apr. 6, 2011), and No. 11-2929-cv (2d Cir.). The cases have remained separate for most purposes, such as briefing.

The court concluded that LL17 is subject to strict scrutiny and held that

> [LL17]'s over-expansiveness is evident from its very language. While Section 1 states that only "*some* pregnancy service centers in New York City engage in deceptive practices," the Ordinance applies to *all* such facilities. . . . By reaching innocent speech, [LL17] 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."

App. 67 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

Furthermore, the district court noted the availability of other less restrictive means of protecting the City's interests, such as the enforcement of laws that prohibit deceptive advertising and falsely holding oneself out as a licensed medical office or doctor. App. 68-70. The court also held that LL17's definition of "pregnancy services center" is unconstitutionally vague because it vests unbridled enforcement discretion in the Commissioner of the Department of Consumer Affairs. App. 72-74. The court stated, "[i]n view of the fact that [LL17] 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." App. 74.

A divided panel of the Second Circuit affirmed in part and reversed in part. The court held that the definition of "pregnancy services center" is not

unconstitutionally vague. App. 18-23. The court also concluded that Petitioners had established irreparable harm and stated that "the City's interest in passing Local Law 17 is compelling." App. 26.

Additionally, the court held that the requirement that centers give written and verbal disclaimers stating that they do not have a medical provider on staff who provides or directly supervises all of the center's services survives review under strict scrutiny (without deciding whether strict scrutiny was required). App. 25, 27-33. The court held that there were no viable less restrictive alternatives, App. 28-30, and while the court expressly acknowledged that "not all pregnancy services centers engage in deception," App. 30, it concluded that LL17 only applies to facilities that appear to be medical facilities, *id.*

Furthermore, the court held, unanimously, that LL17's other two disclaimer requirements likely violate Petitioners' First Amendment rights. App. 33-38. The court explained that

> [a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins.

App. 35.

In a separate opinion, Judge Wesley stated:

> Local Law 17 is a bureaucrat's dream. It contains a deliberately ambiguous set of standards guiding its application, thereby providing a blank check to New York City officials to harass or threaten legitimate activity. . . . [T]he entire statute is irredeemably vague with respect to the definition of a pregnancy services center (PSC).

App. 38-39 (Wesley, J.). Judge Wesley concluded by noting that

> the context of the law raises the troubling possibility of arbitrarily harsh enforcement against such centers that choose not to tell women about the option of abortion. . . .
>
> [T]he City does not have a right to sweep all those who, for faith-based reasons, think that abortion is not the right choice in with those who would defraud or intentionally mislead women making this important and personal decision.

App. 43-44.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Upholding Compelled Speech Requirements Conflicts With This Court's First Amendment Jurisprudence and Decisions of the D.C., Sixth, and Eighth Circuits.

> [O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say." Although the State may at times "prescribe what shall be orthodox in *commercial* advertising" by requiring the dissemination of "purely factual and uncontroversial information," outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to *statements of fact the speaker would rather avoid*.

Hurley, 515 U.S. at 573 (citations omitted) (emphasis added). The Second Circuit failed to follow this First Amendment norm.

Strict scrutiny is a "searching examination," *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013), that is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This Court has repeatedly emphasized that government attempts to dictate what private individuals or groups must say are highly suspect. *See, e.g.*, *AID*, 133 S. Ct. at 2327 ("It is . . . a basic First

Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" (citation omitted)); *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("The government may not . . . compel the endorsement of ideas that it approves."); *Hurley*, 515 U.S. at 573 ("[A] speaker has the autonomy to choose the content of his own message."); *Pac. Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) (plurality op.) (holding unconstitutional a requirement that a utility company include speech from an opposing group in its newsletters); *Miami 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 government-mandated content); *Barnette*, 319 U.S. 624 (holding that a public school could not compel students to recite the Pledge of Allegiance).

For example, in *Wooley*, this Court held that New Hampshire could not penalize citizens who covered the motto "Live Free or Die" on their license plates, stating:

> the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . [which] are complementary components of the broader concept of "individual freedom of mind."

430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 633-34, 637). More recently, the Court explained,

> [a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . .
>
> [T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.

TBS v. FCC, 512 U.S. 622, 641-42 (1994).

A. The Second Circuit's decision conflicts with this Court's decisions.

In *Riley*, this Court applied strict scrutiny in holding that three challenged portions of a law regulating the solicitation of charitable donations by professional fundraisers violated the First Amendment. 487 U.S. at 784. One of the challenged requirements provided that, before asking for funds, a professional fundraiser must disclose to potential donors the average percentage of gross receipts that the fundraiser turned over to charities in the state within the previous twelve months. *Id.* at 786. The government asserted a need to inform potential donors how the money they donate is spent in order to clear up possible misperceptions. *Id.* at 798.

The Court held that the "content-based regulation is subject to exacting First Amendment scrutiny," *id.*, stating, "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," *id.* at 790-91. To illustrate this point, the Court stated:

> 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. Although the foregoing factual information might be relevant to the listener . . . a law compelling its disclosure would clearly and substantially burden the protected speech.

Id. at 798. The Court observed that the law

> will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent. . . . [I]n the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone.

Id. at 799-800.

Additionally, the Court held that, "[i]n contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available." *Id.* at 800. As the Court explained,

> the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. . . . "'Broad prophylactic rules in the area of free expression are suspect.'"

Id. at 800-01 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Here, the Second Circuit's holding that "striking down the Status Disclosure would deprive the City of its ability to protect the health of its citizens and combat consumer deception in even the most minimal way," App. 28, conflicts with *Riley*, as the City's asserted interests can plainly be furthered through less restrictive means. According to the City, the impetus for LL17's enactment was the alleged existence of anti-abortion facilities that have falsely donned the appearance of medical offices in order to trick women who are seeking pregnancy-related medical services. However, falsely holding oneself out as being a doctor

or medical office *has been prohibited by New York law for over a century*. N.Y. Educ. Law § 6512; *New York v. Sher*, 149 Misc. 2d 194, 195-96 (N.Y. Sup. Ct. 1990). This law has offered ample protection of public health, as there has been no shortage of successful prosecutions against those who have violated it. *See New York v. Amber*, 76 Misc. 2d 267, 269 (N.Y. Sup. Ct. 1973). Also, New York General Business Law § 349(a) prohibits "[d]eceptive acts or practices . . . in the furnishing of any service." These laws can be enforced in the unlikely event that a facility actually falsely dons the appearance of a medical office.

As the District Court correctly held, *Riley* dictates that these laws provide a less restrictive way to address harmful behavior:

> [W]hile the City Council maintains that antifraud 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.

App. 69 (citation omitted). Although the Second Circuit discounted these laws on the basis that enforcement "occurs only after the fact," App. 29, this conflicts with *Riley*'s holding that, even if enforcement of an antifraud law "is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency," 487 U.S. at 795.

The *Riley* Court also noted that the government could publish information concerning professional fundraisers to help educate the public. *Id.* at 800. Similarly, the City could sponsor public service ads encouraging women who are or may be pregnant to visit a doctor, and also noting that licensed medical professionals are required to openly display their medical license and current registration on site.[6] As the District Court noted, the City could also post signs on public property near PSC facilities encouraging pregnant women to consult a doctor. App. 68. "Such alternatives would convey the City's message and be less burdensome on Plaintiffs' speech." *Id.*; *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 198-99 (4th Cir. 2013) (en banc) (Niemeyer, J., dissenting) (discussing less restrictive alternatives such as the government's own advocacy and prosecutions under narrowly tailored laws prohibiting improper conduct); *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (holding that educational campaigns would be a less restrictive way to further the government's interests).

Furthermore, the *Riley* Court observed that "a donor is free to inquire how much of the contribution will be turned over to the charity. . . . [I]f the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate." 487 U.S. at 799. Similarly, individuals can

[6] *See* N.Y. State Educ. Dep't, *Consumer Information*, http://www.op.nysed.gov/prof/med/medbroch.htm.

inform themselves about PSCs and their services by asking questions and utilizing publicly available information. Indeed, testimony before the City Council indicated that individuals at *every* PSC stated, upon being asked, that they were not a medical facility. *See* Nov. 16, 2010 Hearing, at 87-88.

The Second Circuit relied heavily upon a footnote in *Riley* in which the Court suggested, in dicta, that the government may "require a fundraiser to disclose unambiguously his or her professional status." App. 30-32 (quoting 487 U.S. at 799, n.11). In *Riley*, of course, the government had an interest in supervising those *seeking money*; here, by contrast, the pregnancy centers *provide assistance for free*. Hence, any concern about the corrupting influence of money is absent. Moreover, as Justice Scalia noted in *Riley*,

> [it is difficult to] see how requiring the professional solicitor to disclose his professional status is narrowly tailored to prevent fraud. . . . [The government] cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made.

487 U.S. at 803-04 (Scalia, J., concurring).[7]

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[7] The Second Circuit's reliance upon cases in which other Circuits "have relied on *Riley* to uphold disclosure laws requiring solicitors to disclose their professional status or the name, identity and tax-exempt status of their organization," App. 31, is, therefore, misplaced.

Additionally, whereas the *Riley* Court noted the stifling effect of a requirement to inject verbal disclaimers into a phone conversation, *id.* at 799-800, LL17 requires the inclusion of disclaimers in phone and in-person conversations, in any ads, and on multiple signs on the facility's premises.[8] As the district court explained,

> [LL17's disclaimer requirements] . . . 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. . . . [They will also] 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 . . . will significantly alter the manner in which Plaintiffs approach these topics with their audience.

App. 67-68.

Furthermore, in *United States v. Playboy Entm't Grp.*, 529 U.S. 803 (2000), the Court explained that, in applying strict scrutiny, "[a] court should not assume a plausible, less restrictive alternative would be

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[8] Similarly, the law regulating crisis pregnancy centers that a district court struck down in *Tepeyac v. Montgomery Cnty.*, 2014 U.S. Dist. LEXIS 29949 (D. Md. Mar. 7, 2014), was far less burdensome than LL17 because it only required signs to be posted *in waiting rooms*.

ineffective," *id.* at 824, and stated that "[w]hen a plausible, less restrictive alternative is offered . . . it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals," *id.* at 816. Here, the City has not proven, or even *attempted* to prove, that the various less restrictive alternatives mentioned above would be ineffective. The City's own *ipse dixit* that such means would be inadequate is not evidence, let alone evidence sufficient to meet the City's high burden. *See Reno v. ACLU*, 521 U.S. 844, 879 (1997).

The Second Circuit's decision also conflicts with *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). There, the Court invalidated a law prohibiting the distribution of anonymous campaign literature because, *inter alia*, the state's interests in combating libelous and fraudulent statements and providing voters with additional information could be served by less restrictive means, such as the enforcement of laws prohibiting the dissemination of false statements during political campaigns. *Id.* at 348-53. The Court explained that,

> in general, *our society accords greater weight to the value of free speech than to the dangers of its misuse*. . . . The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech . . . with no

> necessary relationship to the danger sought to be prevented.

Id. at 357 (emphasis added); *see also Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) ("The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."); *Schneider v. State*, 308 U.S. 147, 162, 164 (1939) ("There are obvious methods of preventing littering. . . . Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden.").

B. The Second Circuit's decision conflicts with decisions of the D.C., Sixth, and Eighth Circuits.

The Second Circuit's decision conflicts with the decisions of several other circuits.

1. D.C. Circuit

In *Nat'l Ass'n of Mfrs. v. SEC*, 2014 U.S. App. LEXIS 6840 (D.C. Cir. Apr. 14, 2014), the D.C. Circuit invalidated a requirement that businesses that are deemed to have utilized "conflict minerals" in their products – those derived from the Democratic Republic of the Congo (DRC) in a manner that may indirectly help to fund the conflict there – must state on a report filed with the government, and posted on their website, that their products are not "DRC conflict free." *Id.* at *33-34.

The court observed, "[t]hat a disclosure is factual, standing alone, does not immunize it from scrutiny" because the First Amendment's protection of the right to craft one's own message applies regardless of whether the compelled speech is ideological. *Id.* at *28. The court also rejected the notion that purported "factual" disclaimers are inherently non-ideological, noting that the speech mandate effectively required businesses to confess moral responsibility for the Congo war. *Id.* at *28-29. Additionally, the court noted that a hypothetical requirement that companies annually disclose the political ideologies of their board members, or the labor conditions of their foreign factories, would be "obviously repugnant to the First Amendment." *Id.* at *30-31.

Furthermore, the D.C. Circuit held that the government failed to prove that less restrictive alternatives, such as the government itself compiling and publishing a list of products that it considers to be DRC conflict-affiliated, would be less effective. *Id.* at *32-33. The court also rejected the government's contention that a company's ability to explain the meaning of the disclaimer prevented any First Amendment violation, explaining that "the right to explain compelled speech is present in almost every such case and is inadequate to cure a First Amendment violation." *Id.* at *33. The D.C. Circuit's invalidation of a coerced factual disclosure by a *business* corporation *a fortiori* is incompatible with the Second Circuit's ruling upholding compelled disclosures by *noncommercial* speakers.

In similar fashion, in *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), the D.C. Circuit invalidated an NLRB rule compelling employers to post an NLRB notice concerning employee unionization rights. The court ruled that employer non-threatening speech, or failure to speak, cannot be treated as evidence of an unfair labor practice. *Id.* at 959-60. While the decision technically rests upon the interpretation of a labor statute, the court's discussion of the statutory protection and the First Amendment was intertwined because the pertinent statute was designed to protect employers' First Amendment rights. The court noted that compelled speech need not be ideological to violate the freedom of speech and also observed that objecting employers viewed the notice as one-sided. *Id.* at 957-58.

In both cases discussed above, the D.C. Circuit correctly applied this Court's decisions in invalidating speech mandates imposed upon businesses, whereas the Second Circuit upheld more onerous speech mandates imposed upon charitable organizations. The mandate invalidated in *Nat'l Ass'n of Mfrs. v. SEC* required a statement to be made on a website and in a report sent to the government, whereas the requirement upheld by the Second Circuit requires the inclusion of a written disclaimer, in English and Spanish, in all advertisements (including websites) and on two signs at an entity's premises, and also the inclusion of a verbal disclaimer in phone and in-person conversations. Furthermore, contrary to the Second Circuit's holding, the D.C. Circuit recognized

that government educational campaigns are a viable less restrictive means of increasing the public's knowledge about issues that the government deems to be important.

2. Sixth Circuit

In *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), the Sixth Circuit invalidated a law stating that, when corporations and unions request donations for political causes from employees and members, they must provide a disclaimer stating that no reprisal or benefit will result from their response. *Id.* at 316. The court stated that, although the law furthered a compelling government interest, "[w]e cannot allow this interest to be vindicated . . . at the expense of the fundamental First Amendment right of other individuals to engage in core political speech often associated with solicitation." *Id.* at 315.

Additionally, the Sixth Circuit noted that less restrictive means of protecting the state's interests were available, such as enforcement of an existing state law making it illegal to coerce, intimidate, or harm someone, or to threaten to do so, for failing to contribute to a political cause. *Id.*[9] By contrast, the Second Circuit held that existing laws prohibiting

[9] The court also speculated that less burdensome hypothetical disclaimer requirements that applied less frequently may be permissible, but concluded that the existing speech mandate was unconstitutional. *Id.* at 315-16.

holding oneself out as a medical office or using deceptive advertisements were not a viable less restrictive means of pursuing the government's interests. *See also Speet v. Schuette*, 726 F.3d 867, 879-80 (6th Cir. 2013) (holding unconstitutional a law prohibiting begging and noting that "Michigan's interest in preventing fraud can be better served by a statute that . . . is more narrowly tailored to the specific conduct, such as fraud, that Michigan seeks to prohibit."); *Comite de Jornaleros v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (en banc) (invalidating a ban on the solicitation of business or employment by, or from, occupants of a vehicle in light of the possibility of enforcing laws prohibiting jaywalking and obstructing traffic).

3. Eighth Circuit

In *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999), the Eighth Circuit held that a Missouri constitutional provision that authorized the inclusion of disclaimers on ballots next to the names of candidates who failed to pledge their support for term limits violated candidates' First Amendment rights. *Id.* at 917-21. The court held that there were less restrictive ways to increase voter awareness, noting that "Missouri could institute voluntary programs, such as debates or voter information guides, to provide information about candidates' views on term limits and other important issues." *Id.* at 921. By contrast, the Second Circuit held that the City's ability to educate the public through various means was not a viable less

restrictive alternative to compelling speech under LL17.

4. Other Circuits

Other Circuit decisions further illustrate the Second Circuit's errors. For instance, the Seventh Circuit recently invalidated, as applied to radio ads that are thirty seconds or shorter in duration, a rule requiring entities acting independent of any political campaign to include a lengthy disclaimer in their ads, noting the "significant amount of paid advertising time" that the disclaimer would "consume." *Wisc. Right to Life, Inc. v. Barland*, 2014 U.S. App. LEXIS 9015, at *75-76 (7th Cir. May 14, 2014). And in *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), the First Circuit invalidated regulations requiring entities that were not affiliated with political campaigns to provide equal space and prominence for all candidates in their voter guides. The court explained that,

> where public issues are involved, government agencies are not normally empowered to impose and police requirements as to what private citizens may say or write. Commercial labeling aside, the Supreme Court has long treated compelled speech as abhorrent to the First Amendment. . . .
>
> [The government's interests] cannot normally be secured by compelling a private entity to express particular views. . . .

Id. at 1313-14.

In sum, the Second Circuit upheld a law compelling speech by noncommercial private speakers, supposedly to prevent various *potential* harms from *possibly* materializing in the future, even though there are "less drastic means for achieving the same basic purpose." *See Wooley*, 430 U.S. at 716-17 (citation omitted). The cases addressed above show that this misguided ruling conflicts with decisions of other Circuits and warrants review by this Court.

II. The Second Circuit's Decision Conflicts With This Court's Decisions Invalidating Overbroad Restrictions on Speech.

A. LL17 substantially alters the written and verbal speech of facilities that do not harm the government's stated interests.

The First Amendment prohibits the government from using broad, overinclusive speech proscriptions or prescriptions. For instance, in *McIntyre*, the Court concluded that the law was only loosely related to the government's interests because it "encompasse[d] documents that are not even arguably false or misleading." 514 U.S. at 344, 349-51; *see also Watchtower Bible Tract Soc'y of N.Y., Inc. v. Vill. of Strauss*, 536 U.S. 150, 168-69 (2002) (holding that an ordinance requiring individuals to obtain a permit before engaging in door-to-door advocacy of a cause was not narrowly tailored to combat crime); *Talley v. California*, 362 U.S. 60 (1960) (holding unconstitutional an ordinance that prohibited the distribution of handbills

that did not identify their authors and distributors because it applied to speakers who were not engaged in fraud, false advertising, or libel).

LL17's broad definition of "pregnancy services center" ensures that numerous facilities *that do not actually appear to be medical offices* will be forced to significantly alter their written and verbal speech by giving LL17's lengthy disclaimers. For example, one factor used to characterize an entity as a facility having the false appearance of a 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." App. 86. 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.* Another factor is whether the facility contains a private or semi-private room or area containing medical supplies or instruments, but this apparently includes a bathroom that contains a stocked medicine cabinet or first aid kit.[10] These factors bear no connection to the governmental interests purportedly underlying LL17, and yet they serve presumptively to sweep facilities that do not bear any resemblance to a medical facility within LL17's scope.

[10] Also, the mere provision of ultrasounds, without giving a medical diagnosis, does not constitute the practice of medicine.

Similarly, LL17 was repeatedly described by Council members who supported it as a "truth-in-advertising" law, Nov. 16, 2010 Hearing, at 14; App. 11, but its application is not triggered by the making of an allegedly misleading advertisement, or any advertisement at all. The district court explained that

> [LL17] is over-inclusive because Plaintiffs' advertising need not be deceptive for [LL17] to apply. . . . [LL17]'s over-expansiveness is evident from its very language. While Section 1 states that only "*some* pregnancy service centers in New York City engage in deceptive practices," the Ordinance applies to *all* such facilities.

App. 67.

As Judge Wesley correctly observed, "the City does not have a right to sweep all those who, for faith-based reasons, think that abortion is not the right choice in with those who would defraud or intentionally mislead women making this important and personal decision." App. 43-44 (Wesley, J.). While "[a] court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech," *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 477-78 (2007) (plurality op.) (emphasis added), that is certainly not the case here. The Second Circuit clearly erred in concluding that LL17 is narrowly tailored.

B. The City has not shown a compelling justification for broadly imposing speech mandates upon all PSCs.

The Second Circuit also erred by not applying the high evidentiary burden of proof that the government must satisfy to justify a law that is subject to strict scrutiny; a collection of vague secondhand anecdotes based upon hearsay is insufficient. This Court has described a compelling state interest as a "high degree of necessity," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011), 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).

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), which applied strict scrutiny in the context of a Religious Freedom Restoration Act 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; *see also Gilardi v. U.S. H.H.S.*, 733 F.3d 1208, 1220 (D.C. Cir. 2013) ("'[S]afeguarding the public health' is such a capacious formula that it requires close scrutiny of the asserted harm." (citing *O Centro*, 546 U.S. at 431)). In *Brown*, the Court held that the government's evidence was "not compelling," even though the record included scholarly articles by psychologists addressing the key issues, because "[t]he studies in

question . . . [lacked] the degree of certitude that strict scrutiny requires," and "ambiguous proof will not suffice." 131 S. Ct. at 2738-39 & n.8, 2741.

Here, the City's scattershot collection of anecdotes and vague hearsay-upon-hearsay recollections falls far short of providing compelling evidence that *all* PSCs, or even a substantial number of them, engage in false or misleading advertising or falsely hold themselves out to the public as medical facilities. Dr. Susan Blank, Assistant Commissioner of the City's Department of Health and Mental Hygiene, admitted that the City lacked *any* direct evidence or city-generated data indicating that *any* crisis pregnancy center had *ever* falsely held itself out as a medical facility, or practiced medicine without a license. Nov. 16, 2010 Hearing, at 49, 56-57. Similarly, Council Member Cabrera observed that "there is not one recorded incident from a City agency, State agency or scientific data that supports the notion that women are being misguided." New York City Council Session, Mar. 2, 2011, at 71. Council Member Halloran noted:

> [T]he Commissioner of the Department of Health indicated they received . . . no formal complaints, conducted no investigations, [and] found no wrongdoing by the crisis pregnancy centers. The Department of Consumer Affairs conceded they found no frauds, had no open investigations, and had issued no violations with regards to this issue.

New York City Council, Hearing of Comm. on Women's Issues, Mar. 1, 2011, at 6.

Additionally, a representative of NARAL, an organization that is opposed to crisis pregnancy centers and that claimed to have "investigated" all of the City's centers, was asked whether any center stated that it was a licensed medical office. Nov. 16, 2010 Hearing, at 87-88. She responded:

> *No one lied about it*. There were actually those who did say they had and did have medical providers on staff. I don't know how frequently those medical providers were in their offices, but *they were not deceitful*.

Id. (emphasis added). Supporters of LL17 also admitted that the City's crisis pregnancy centers were honest about whether they provided abortion or contraception. *Id.* at 74, 77, 83.

During this litigation, the City admitted that it has not attempted to prosecute any crisis pregnancy center under existing antifraud laws, Hearing Transcript, *Evergreen Ass'n v. City of New York* (S.D.N.Y. June 15, 2011), at 31, and also admitted that Petitioners do not engage in the practice of medicine, App. 64. At most, the City has baldly asserted that "certain" PSCs appear to be medical facilities, echoing the City Council's claim that "some" PSCs engage in deceptive practices. App. 15, 81-82.

Furthermore, the record demonstrates that PSCs *further*, rather than jeopardize, the City's stated interest in increasing the availability of prenatal care to women early in their pregnancies. Several PSCs testified that they help women obtain appointments

for prenatal care with licensed doctors. Nov. 16, 2010 Hearing, at 134, 278, 282, 285. Petitioner EMC's President testified that EMC partners with medical providers (who are not EMC employees) who provide prenatal care and STD testing, which their licenses authorize them to do. *Id.* at 111-26, 144. Also, Dr. Anne Mielnik testified, "I am trained to provide prenatal care, STD testing and primary care gynecology. I'm available to provide same-day care to clients of any New York City crisis pregnancy center." *Id.* at 234-35.

Moreover, although the City has claimed that Jennifer Carnig of the NYCLU, who provided rare *first-hand* testimony, *mistakenly* entered a PSC, and the Second Circuit repeated this claim, App. 13, Carnig *intentionally* visited the center hoping to collect evidence that would support LL17's passage, Nov. 16, 2010 Written Testimony, at 90. Carnig admitted that it was clear that the center would not help her to obtain an abortion. Nov. 16, 2010 Hearing, at 152, 166-67.

Furthermore, although some secondhand testimony suggested that some women have contacted or entered a PSC with a mistaken belief about what assistance the PSC may provide, it is undisputed that all PSCs stated that they were not a medical facility when asked. *Id.* at 87-88.[11] The sparse record

[11] A few troubling secondhand anecdotes alleged that some individuals falsely identified themselves as abortion clinic staff.

(Continued on following page)

concerning occasional confusion or ambiguity lacks the high degree of certainty required for the government to demonstrate that *indefinitely* regulating the speech of *all* PSCs is a necessary means of addressing a compelling problem.

A district court's recent decision in *Tepeyac v. Montgomery County*, in which the court permanently enjoined the enforcement of a resolution that was similar to LL17 in key respects, further illustrates the Second Circuit's failure to adhere to this Court's strict scrutiny precedents. The sparse record that the government offered in that case to support the imposition of disclaimer requirements upon crisis pregnancy centers – primarily consisting of an "undercover" NARAL report and a collection of anecdotes about encounters with centers – was similar in key respects to the City Council record here. *See* 2014 U.S. Dist. LEXIS 29949, at *48-65. The court noted that

> [t]he County Council phrased the public health concerns in terms of possibilities: pregnant women *may* mistake [a center] for a medical clinic or its staff members as licensed medical professionals and, because of that erroneous belief, *could* fail to consult an

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Such claims, even if true, do not establish a pattern of wrongdoing by all or most PSCs and can be addressed under less restrictive existing laws.

> actual medical professional, leading to negative health outcomes.

Id. at *50. The court concluded that "the alleged harm caused by [centers] is based on the County's conjecture." *Id.* at *63-65.

Similarly, the City has asserted that "*some*" centers "engage in deceptive practices," which "*can*" delay a decision to seek an abortion. App. 81-82 (emphasis added). (Petitioners contend that *no* centers engage in any improper conduct.) As in *Tepeyac*, there is a dearth of evidence in the record that women have actually suffered negative health consequences as a result of visiting crisis pregnancy centers; rather, the City's health department admitted that it lacked any direct evidence that any center had engaged in wrongdoing. Nov. 16, 2010 Hearing, at 49, 56-57; Mar. 1, 2011 Hearing, at 6.

The City's "ambiguous proof" falls far short of "the degree of certitude that strict scrutiny requires" to justify LL17's indefinite regulation of PSC's speech. *See Brown*, 131 S. Ct. at 2738-39 & n.8. The Second Circuit's holdings conflict with this Court's precedents and warrant review.

III. The Second Circuit's Holding That LL17's Definition of "Pregnancy Services Center" Is Not Unconstitutionally Vague Conflicts With This Court's Vagueness Decisions.

LL17's definition of "pregnancy services center" is unconstitutionally vague. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court explained that

> [a] vague law impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . . [W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms."

Id. at 108-09; *see also Chicago v. Morales*, 527 U.S. 41, 56-57 (1999); *Vill. of Hoffman Estates v. The Flipside*, 455 U.S. 489, 499 (1982).

Here, LL17 defines "pregnancy services center" 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." App. 86. LL17's six stated factors for determining whether a facility has the appearance of a licensed medical facility are only "[a]mong the factors" to be considered. *Id.*

It is impossible for Petitioners to determine with any degree of certainty whether a City bureaucrat

will conclude that one, some, or all of their facilities have "the appearance of a licensed medical facility" under LL17.[12] The vague definition of PSC leaves Petitioners and other entities to guess, among other things:

- whether a facility "offers pregnancy testing and/or pregnancy diagnosis" by making available, for self-administration, a pregnancy test kit 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
- whether a primary purpose of providing "*services* to women who are or may be pregnant" includes solely providing *goods or information*.

Facilities that may potentially meet one of LL17's vague factors are forced either to subject themselves to LL17's burdensome requirements or to risk the imposition of substantial penalties for failing to do so. Additionally, facilities are left to blindly guess what kind of unwritten additional factors the City may decide to implement in the enforcement of LL17. For

[12] Many of Petitioners' facilities do not offer ultrasounds, sonograms, or prenatal care, so they are subject to the vague "appearance" test because LL17 applies to *facilities*, not *organizations*.

example, the City has suggested that "Pregnancy Help, Inc." is a medical-sounding name, Appellants' Brief, *Evergreen Ass'n v. City of New York*, at 20 (2d Cir. Oct. 31, 2011), but the City has also stated that "there is nothing about [an ad stating, "Pregnant? Need help? Call _____"] that suggests that the place they are going to call is a medical facility," June 15, 2011 Hearing Transcript, at 29. Two individuals even suggested to the Council that "Sisters of Life" could be misleading or confusing. Nov. 16, 2010 Hearing, at 50, 84-85. LL17 allows the Commissioner to make determinations on such a subjective, unwritten basis, forcing facilities to risk the imposition of substantial penalties if they do not significantly alter their written and verbal speech to comply with LL17's requirements.

Both the district court and Judge Wesley detailed LL17's unconstitutional vagueness. In granting the preliminary injunction, the district court explained:

> 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.

App. 73. Similarly, Judge Wesley stated that

> [a] facility that meets three of the factors might not be a PSC, whereas a facility meeting only one – or none! – of those factors might still be subjected to [LL17].

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

App. 40-41 (Wesley, J.).

The City has made key admissions illustrating that LL17's vagueness is not only apparent but *intentional*. Judge Wesley noted that,

> [a]s counsel for the City explained . . . the definition . . . "is meant to cover anything that comes along in the future. I don't know in particular what falls within the definition now." . . . But "[i]f the [City] cannot anticipate what will be considered [a PSC], then it can hardly expect [anyone else] to do so."

App. 41 (citations omitted).

The risk of arbitrary enforcement under LL17 is palpable considering that it targets facilities that oppose abortion. The City Council's official press release concerning the bill that became LL17 described the targeted entities as "anti-choice" and "anti-abortion" groups. New York City Council, Press Release #098-2010, Oct. 12, 2010; *see also* App. 10. The November 16, 2010 hearing evinced a desire to regulate "anti-choice" centers, at 11, 58-59, 63, 199-200, with one LL17 supporter criticizing PSCs' purported "commitment to

proselytizing conservative, anti-choice Christianity," Nov. 16, 2010 Written Testimony, at 186. Council Member Lander characterized PSCs as part of a larger effort by "[o]pponents of abortion" to lower the number of abortions through various means. Mar. 2, 2011 Hearing, at 76. Council Members Oddo and Vallone criticized LL17 for targeting the speech of pro-life groups. *Id.* at 79, 102-03. Mayor Bloomberg stated, "I've always been pro-choice" when explaining his decision to sign LL17 into law.[13]

In light of this record, the district court concluded that "the risk of discriminatory enforcement is high." App. 74. In evaluating LL17's vagueness, this Court should not turn a blind eye to the fact that LL17 was motivated by a viewpoint-discriminatory intent. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("The question is . . . whether the Rule is so imprecise that discriminatory enforcement is a real possibility.").

In sum, contrary to this Court's precedents, LL17 utterly fails to give the public fair warning of what is required *beforehand* so that facilities may adjust their conduct accordingly. The law subjects the public to significant penalties, and burdens the freedom of

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[13] Michael Howard Saul, *Mayor Signs Pregnancy Center Law, Setting Stage for Abortion Battle*, Wall Street Journal Blog, Mar. 16, 2011, http://blogs.wsj.com/metropolis/2011/03/16/mayor-signs-pregnancy-center-law-setting-stage-for-abortion-battle/.

speech, without adequately limiting enforcement discretion. This Court should grant certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

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