No. 13-1462

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

REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petition for Writ of Certiorari (hereafter Petition) explains that the Second Circuit's decision conflicts with relevant decisions of this Court and courts of appeals by allowing the government to require non-profit, non-commercial actors to make verbal and written statements about what they do not do, without sufficient justification. The City makes two basic arguments in its Brief in Opposition:

> 1. There is no conflict that warrants this Court's review because the decisions that Petitioners rely upon to demonstrate a conflict dealt with factually dissimilar circumstances.
>
> 2. There are prudential and evidentiary reasons to deny the Petition.

Both of these arguments are without merit.

I. The City Has Failed to Refute the Existence of Multiple Legal Conflicts Between the Decision of the Second Circuit and Decisions of this Court and Courts of Appeals.

A. The presence of conflicts over the same legal questions is the relevant consideration, not whether the facts of all cited cases are nearly identical.

The Petition explains that the Second Circuit made several errors *of law* in its strict scrutiny analysis of Local Law 17's verbal and written status disclosure mandate, bringing the decision in conflict

with decisions of this Court and courts of appeals that have addressed the same important questions of law. Reminiscent of the adage "if the law is against you, argue the facts," *United States v. Griffin*, 84 F.3d 912, 927 (7th Cir. 1996), the City pays little attention to reconciling the holdings of the lower court with the decisions relied upon in the Petition, instead suggesting that, for a cert-worthy conflict to exist, two cases that reach different outcomes must share nearly identical facts or deal with nearly identical laws. *See*, *e.g.*, Br. in Opp. at 19, 23, 30.

The question is not whether conflicting decisions share *near identical facts* but whether they give conflicting answers to *the same important federal question*. *See* Sup. Ct. R. 10(a), (c). For example, while ignoring cases like *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), the City attempts to draw a *factual* distinction between decisions involving government-compelled ideological statements and those involving government-compelled "factual" statements. *See* Br. in Opp. at 21. This Court has repeatedly held that a speaker's right to tailor his or her own speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. GLB*, 515 U.S. 557, 573 (1995); Pet. at 12-14. The City's attempt to sidestep compelled speech decisions that are in conflict with the lower court's decision is unavailing.

Similarly, the City dismisses the relevance of several of this Court's free speech decisions by relying on immaterial factual differences between laws that restrict what one can say and laws that require one to speak. Br. in Opp. at 25 n.6, 35. The City's attempted *factual* distinction is *legally* insignificant because "the right to speak freely and the right to refrain from speaking at all . . . are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 633-34, 637); Pet. at 13-14. Given the legally analogous nature of the two types of cases, it is unsurprising that this Court often cites to them interchangeably. *See*, *e.g.*, *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012).

Additionally, the City's few attempts to squarely address specific cases relied upon in the Petition are primarily premised on irrelevant factual distinctions. For instance, the Petition notes that the Second Circuit failed to require the City to prove "with the degree of certitude that strict scrutiny requires" that there is "an 'actual problem' in need of solving," and that compelling facilities to give disclaimers is "actually necessary to the solution." *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738-39 & n.8 (2011); Pet. at 31-32, 36. In response, the City does *not* attempt to show that the Second Circuit did, in fact, apply the high standard of proof discussed in *Brown* but rather argues that 1) *Brown* is factually dissimilar, and 2) the City's evidence is sufficient to meet the

lower standards applicable to commercial speech regulations. Br. in Opp. at 19-20.

Furthermore, the City seeks to distinguish *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), by relying on asserted factual differences and cases applying the lower standards for commercial speech regulations, Br. in Opp. at 21-23, but the lower court's strict scrutiny analysis is inconsistent with *Riley*. In its attempt to distinguish *Riley*, the City erroneously asserts that "not even petitioners dispute the City's compelling interest," *id.* at 22-23, whereas the Petition expressly argues that "[t]he City has not shown a compelling justification for broadly imposing speech mandates upon all PSCs," Pet. at 31-36.

B. The Second Circuit failed to require the City to meet its burden of proof concerning the alleged non-viability of various less restrictive means.

The City tries to defend the Second Circuit's rejection of various less restrictive alternatives proposed by Petitioners – several of which the District Court found to be viable alternatives, App. 68-70 – by erroneously suggesting that the City bears no burden to demonstrate that these alternatives would be unworkable at the preliminary injunction stage. Br. in Opp. at 27. However, this Court has required *the government* to show, even at the preliminary injunction stage, that less restrictive alternatives would not

be viable for purposes of strict scrutiny. *See*, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779-83 (2014); *Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004); *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006).

The City argues that prosecuting deceptive facilities under more narrowly tailored laws – such as a state law that prohibits pretending to be a doctor or medical office, N.Y. Educ. Law § 6512 – is inadequate because such prosecutions occur only after the fact, whereas Local Law 17 is intended to be a preventative measure. Br. in Opp. at 5, 23-25. The City's argument eviscerates the First Amendment's protection against broad speech mandates that are loosely related to interests that are compelling in the abstract because such mandates will often be more efficient than waiting to prosecute those who actually pose a threat. *See* Pet. at 16-17, 21-22, 25-26; *McCullen v. Coakley*, 134 S. Ct. 2518, 2538-41 (2014); *Ashcroft*, 542 U.S. at 666; *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 814 (2000).

Similarly, although the City asserts that Local Law 17 combats deceptive advertising, Br. in Opp. at 20, 35 – while ironically claiming to have inadequate information about Petitioners' advertising, *id.* at 9, 16-17 – the City fails to explain why utilizing existing laws that prohibit deceptive advertising is not a less restrictive alternative to Local Law 17. *See* N.Y. Gen. Bus. Law § 349(a); Pet. at 17. Local Law 17 bears little relationship to an interest in combating

deceptive advertising, as it applies to regulated facilities *regardless of whether they advertise at all*. App. 67.

In addition, the City argues that the various means by which it can inform the public about pregnancy centers (public ad campaigns, signs, etc.) are inadequate because there is no way to guarantee that all members of the public will actually receive all of the information that the City wants them to have *without any effort on their part*. Br. in Opp. at 25-27. Under this reasoning, however, government dissemination of information (relying on the public's ability to inform itself) could never be a less restrictive means, contrary to this Court's holdings. *See*, *e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012); *Brown*, 131 S. Ct. at 2740-41 & n.9; *Playboy Entm't Grp.*, 529 U.S. at 815-25.

Furthermore, there is no need for women seeking assistance to "visit multiple pregnancy-assistance facilities" in order to learn what services they do or do not provide, Br. in Opp. at 26, as a quick phone call should be sufficient. The record indicates that *all* facilities were honest when asked (by undercover supporters of Local Law 17) whether they were a medical office or whether they provided abortion or contraception. Pet. at 33.

C. The Second Circuit's decision is in conflict with this Court's overbreadth and vagueness decisions.

Petitioners argue that Local Law 17 is overbroad because it applies to a host of facilities regardless of whether they are actually deceptive. Pet. at 28-30 (citing *Watchtower Bible Tract Soc'y v. Vill. of Strauss*, 536 U.S. 150 (2002); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); and *Talley v. California*, 362 U.S. 60 (1960)). The City responds that the Second Circuit's decision is not in conflict with those decisions because they deal only with limitations on political speech. Br. in Opp. at 35. This is another purported *factual* distinction based upon the jurisprudentially insignificant difference between speech mandates and speech restrictions. *See Knox*, 132 S. Ct. at 2288. The Second Circuit's decision conflicts with the *First Amendment principle*, set forth in those decisions, that the government cannot address a perceived problem by burdening the speech of a vast array of individuals or groups, many of whom do not implicate the government's asserted interests at all.

Here, Petitioners do not need to rely upon hypotheticals to show that Local Law 17 encompasses facilities that do not engage in any wrongdoing: *the City itself admits as much*. While the City highlights allegations of improper pregnancy center conduct that were presented to the City Council, under the City's own characterization of Local Law 17's legislative record, "*some*" crisis pregnancy centers "engage in practices that, intentionally or not, mislead women,"

"*some*" "have actively misled pregnant women," and "*some*" "engage in deceptive practices." Brief in Opp. at 3-5 (emphases added).

Certainly, the First Amendment does not leave the government powerless to address real, tangible harms to the public; in particular circumstances (if any) where a facility actually engages in deception, less restrictive means are available to address such conduct. Pet. at 16-19. However, as the District Court held:

> Local Law 17's over-expansiveness is evident from its very language. While Section 1 states that only "*some* pregnancy service centers in New York City engage in deceptive practices," the Ordinance applies to *all* such facilities.

App. 67.[1]

Furthermore, the City dismisses the Petition's argument that the Second Circuit's decision is inconsistent with this Court's vagueness decisions by characterizing the argument as relying on a "hypertechnical[ ]" reading of Local Law 17. Br. in Opp. at

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[1] For the first time in this litigation, the City asserts that Petitioners failed to assert an overbreadth challenge in their complaint. Br. in Opp. at 35. Local Law 17's overbreadth is one of several *reasons* why Petitioners are likely to succeed on their *claims* that the law violates their freedom of speech and right to due process, both on its face and as applied. *See* App. 96-120; Fed. R. Civ. P. 8(a)(2) (a complaint must include "a short and plain statement of the claim").

34. Of course, what is "hypertechnical" is in the eye of the beholder; the problem with a law that restricts or mandates speech while providing unduly broad enforcement discretion is that those who may be encompassed within the law's scope must either comply out of fear of potential penalties or not comply in the hope that they can later convince a court that various readings of the law that encompass them are "hypertechnical." Local Law 17 imposes such a chilling effect upon Petitioners' freedom of speech. *See FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); App. 38-44, 70-74; Pet. at 37-42.

D. The Second Circuit's decision is in conflict with the court of appeals decisions cited in the Petition.

The sole argument the City offers to suggest that the Second Circuit's decision is not in conflict with decisions of the Sixth and Eighth Circuits discussed in the Petition is the factual circumstance that the compelled speech laws struck down in those decisions did not target pregnancy centers. Br. in Opp. at 30 (citing *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), and *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999)); Pet. at 25-27. The City makes no attempt to reconcile the *legal* holdings of those decisions – contrary to the Second Circuit's decision – that enforcing existing laws against wrongdoers and government informational campaigns are viable less restrictive alternatives for purposes of strict scrutiny.

In addition, the Petition argues that the D.C. Circuit's invalidation of coerced disclosures by business corporations is, *a fortiori*, incompatible with the Second Circuit's ruling upholding more burdensome compelled disclosures by *non-commercial* actors under the strict scrutiny test. Pet. at 22-25 (citing *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014); and *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013)). The City responds by noting that a subsequent decision, *American Meat Institute v. U.S. Dep't of Agriculture*, 2014 U.S. App. LEXIS 14398 (D.C. Cir. 2014), overruled them to the extent that they suggested that a less stringent commercial speech test may only be applied where the government relies upon an interest in correcting deception. *Id.* at *10. The D.C. Circuit's most recent decision does not undercut the persuasive weight of the earlier decisions for purposes of Petitioners' *a fortiori* argument; the situation would be much different if *American Meat Institute* suggested that the regulations in the two earlier decisions *would withstand strict scrutiny*.

Finally, the City cites five decisions that it claims are "more analogous" to the present case as evidence that there is no decisional conflict among the lower courts, Br. in Opp. at 30-31, but all of those decisions applied commercial speech tests to commercial regulations; *none of the cases applied strict scrutiny*. The decisions outlined in the Petition are far more relevant than cases that applied legal tests that the Second Circuit (appropriately) did not apply.

In sum, the City fails to undercut the Petition's explanation of how the Second Circuit's legal analysis conflicts with decisions of this Court, and courts of appeals, that have addressed the same legal issues.

II. There Are No Prudential or Evidentiary Reasons to Deny the Petition.

The City raises a few additional grounds for rejecting the Petition, none of which are valid.

Petitioners request that this Court review the Second Circuit's holding that the district court abused its discretion by preliminarily enjoining Local Law 17's verbal and written status disclosure mandate. *See* App. 18. It is not unusual for this Court to review the grant or denial of motions for preliminary injunction, particularly where First Amendment or other civil liberties claims are at issue. *See*, *e.g.*, *Burwell*, 134 S. Ct. at 2765-66; *O Centro*, 546 U.S. at 428; *Ashcroft*, 542 U.S. at 660, 665-66; *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976). Petitioners do *not* ask the Court to decide the ultimate merits of this litigation (as if the motion at issue was a motion for summary judgment). *See* Br. in Opp. at 12-14.

The City erroneously claims that the preliminary injunction record is inadequate to support a finding that Petitioners' expression is sufficiently burdened by Local Law 17's verbal and written status disclosure mandate. *Id.* at i, 8-9, 11-12, 17. The very purpose of Local Law 17 is to require facilities to modify their phone and in-person conversations and

their written expression. As both lower courts recognized, this fact alone is sufficient to establish a cognizable burden upon expression because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795; App. 26, 54-55.

Contrary to the City's apparent belief, Br. in Opp. at 8-12, this Court's cases do *not* require those subject to a speech mandate to prove that speaking in the manner the government wants them to would be financially ruinous, impractical, or onerous.[2] If the City's suggestion were the case, the government's inclusion of "Live Free or Die" on license plates would not have burdened the Maynards' freedom of speech. *See Wooley*, 430 U.S. at 705.

Additionally, the City argues that certiorari is not appropriate here because the Second Circuit declined to decide whether strict scrutiny is the applicable standard since the court concluded that Local Law 17's status disclosure mandate is likely constitutional under strict scrutiny. Br. in Opp. at 14-18. It is perfectly appropriate for a court to decline to decide what the appropriate level of scrutiny is where it believes that deciding that issue is unnecessary to decide the case, *see*, *e.g.*, *McCullen*, 134 S. Ct. at 2530 (citing *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014)), but

[2] As such, the City's failure to specify a particular format in which the written disclaimers mandated by Local Law 17 must appear is inconsequential. *See* Br. in Opp. at 17.

under the City's argument, all such decisions would be categorically immune from this Court's review. In such cases, the Court may choose to grant certiorari, address the lower court's holdings, and decline to decide any issues that the lower court declined to decide.

On a related point, the City argues that there was insufficient evidence for the Second Circuit to decide whether strict scrutiny should be applied, but that court did not suggest that any evidentiary shortcomings existed. App. 24-25. Tellingly, the District Court expressly rejected the City's argument that Local Law 17 should be treated as if it were a regulation of commercial speech, App. 55-63, holding that "[a]doption of Defendants' argument would represent a breathtaking expansion of the commercial speech doctrine," App. 60-61.

In sum, there are no evidentiary or prudential reasons to deny the Petition.

CONCLUSION

For the foregoing reasons, and those stated in the Petition for Writ of Certiorari, this Court should grant certiorari.

Respectfully submitted,

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