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 "prochoice" 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 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.

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 nonthreatening 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

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[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.

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[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.

Respectfully submitted,

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June 5, 2014

Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

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

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

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

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

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

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

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

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

Kimberly A. Parker, Zaid A. Zaid, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, *for amici curiae Planned Parenthood of New York City, NARAL Pro-Choice New York, NARAL Pro-Choice America, Community Healthcare Network, Law Students for Reproductive Justice, New York Abortion*

Access Fund, New York City Chapter of the National Organization for Women, New York County Chapter of the New York State Academy of Family Physicians, New York State Association of Licensed Midwives, National Abortion Federation, National Advocates for Pregnant Women, National Latina Institute for Reproductive Health, Physicians for Reproductive Choice and Health, Public Health Association of New York, Religious Coalition for Reproductive Choice, Reproductive Health Access Project, Sistersong Women of Color Reproductive Justice Collective, the Honorable (Congresswoman) Carolyn Maloney, in support of Defendants-Appellants.

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

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

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

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

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

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

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

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

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

Pooler, *Circuit Judge*:

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

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

BACKGROUND

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

I. Local Law 17

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

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

14, 2011, and intended to be codified in the New York City Administrative Code ("Administrative Code").[2] The law imposes on pregnancy services centers certain confidentiality requirements and mandatory disclosures. Only the disclosures are at issue in this case. Under the law, pregnancy services centers must disclose

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

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

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

[3] Specifically, the statute provides that pregnancy services centers must provide the disclosures

(Continued on following page)

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

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

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> (1) in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the commissioner on (i) at least one sign conspicuously posted in the entrance of the pregnancy services center; (ii) at least one additional sign posted in any area where clients wait to receive services; and (iii) in any advertisement promoting the services of such pregnancy services center in clear and prominent letter type and in a size and style to be determined in accordance with rules promulgated by the commissioner; and
>
> (2) orally, whether by in person or telephone communication, upon a client or prospective client request for any of the following services:
>
> (i) abortion; (ii) emergency contraception; or (iii) prenatal care.

Administrative Code § 20-816(f).

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

II. New York City Council Proceedings

On October 13, 2010 New York City Council Member Jessica S. Lappin introduced the bill that would become Local Law 17, Council Int. No. 371-2010 ("Int. No. 371"), in order to regulate the practices of "crisis pregnancy centers" ("CPCs"), organizations that provide non-medical pregnancy services and are opposed to abortion. The Council's Committee on Women's Issues held a hearing on the bill on November 16,

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[4] Local Law 17 states that

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

Administrative Code § 20-815(g).

2010. At the beginning of the hearing, Council Member Julissa Ferreras, as chair of the Committee, testified that the proposed disclosures were required because "[i]f such disclosures are not made, women seeking reproductive health care may be confused and/or misle[ ]d by unclear advertising or may unnecessarily delay prenatal care or abortion." Council Member Lappin stated that Int. No. 371 was "about truth in advertising and women's health." The Committee then considered testimony and written submissions both in favor of and against the bill.

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

Dr. Susan Blank, an Assistant Commissioner at the New York City Department of Health and Mental Hygiene, testified that delay in prenatal care decreases "the likelihood of a healthy pregnancy, delivery, healthy newborn and mother. That's why starting prenatal care in the first trimester is standard care in

obstetric practice." She also noted the dangers of delays in access to abortion services and emergency contraception.

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

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

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

medical need, the CPC told the patient that she would need repeated ultrasounds before the procedure could be done:

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

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

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

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

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

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

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

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

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

III. The Plaintiffs

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

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

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

DISCUSSION

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

Disclosure"). Administrative Code § 20-816(a)-(e). The district court found that these disclosure requirements violated Plaintiffs' First Amendment rights, granted Plaintiffs' motion for a preliminary injunction, and enjoined the law in its entirety.

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

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

I. Severance and Vagueness

Local Law 17 imposes confidentiality requirements that Plaintiffs have not challenged, along with several disclosure requirements and definitional

provisions that Plaintiffs have challenged but that might be severable in the event they are unconstitutional. We must, therefore, decide whether to sever any offending provisions or enjoin the law in its entirety. We hold that any offending provisions of the statute that infringe on Plaintiffs' First Amendment rights should be severed from the rest of the statute.

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

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

Local Law 17 § 3. "Although the presence of a severability clause is not dispositive, the preference for

severance is particularly strong when the law contains a severability clause." *Gary D. Peake,* 93 F.3d at 72 (internal quotation marks and brackets omitted). Here, we consider the severability clause along with the City Council's interest in providing consumer access to information and the prevention of deception, *see* Local Law 17 § 1, as well as the statute's confidentiality provisions, enacted to protect consumers' personal and health information, which function independent of the disclosure requirements, *see* Administrative Code § 20-817. We think it clear that the City Council would wish for severance.

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

Local Law 17 has two definitions for "pregnancy services centers." The first definition includes facilities that, like Plaintiffs Evergreen and Life Center, provide ultrasounds, sonograms, or prenatal care.

Administrative Code § 20-815(g).[5] The second definition includes other facilities, that, like Plaintiffs PCCNY, Boro, and Good Counsel, do not provide such services, but that have "the appearance of a licensed medical facility." *Id.* With regard to this second definition, the law provides that

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

Id. (emphasis added). The law adds that it is "prima facie evidence that a facility has the appearance of a

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[5] The parties do not seriously argue that this first definition is vague as applied to entities like Evergreen and Life Center, which indisputably provide at least some of the services specified in the statute. For this reason, even if the dissent were right that the second definition is impermissibly vague as applied to the PCCNY Plaintiffs, *see* Dissent at **[3 n. 1]**, this would not necessarily require striking the entire statute as opposed to merely that second definition.

licensed medical facility if it has two or more of the factors." *Id.* Plaintiffs argue that, because this list of factors is nonexclusive, Local Law 17 both fails to give fair notice to regulated facilities and authorizes discriminatory enforcement. The district court, accepting this second argument, found the statute to be vague and enjoined it in its entirety.

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

The use of nonexclusive factors is admittedly imprecise, but the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose v. Locke,* 423 U.S. 48, 49 (1975). "Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties." *Id.* at 49-50 (internal quotation marks and alterations omitted).

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

II. Appropriate Level of Scrutiny

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

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

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

information," rational basis review, *Zauderer,* 471 U.S. at 651.

The district court considered and rejected all of these arguments. We find, however, that we need not decide the issue, because our conclusions are the same under either intermediate scrutiny (which looks to whether a law is no more extensive than necessary to serve a substantial governmental interest) or strict scrutiny (which looks to whether a law is narrowly drawn to serve a compelling governmental interest).[6] As discussed below, under either level of review, the Government Message and Services Disclosure fail review while the Status Disclosure survives.

III. Preliminary Injunction

A party seeking "to stay government action taken in the public interest pursuant to a statutory or regulatory scheme . . . must establish (1) a likelihood

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

of success on the merits, and (2) irreparable harm in the absence of an injunction." *Alliance,* 651 F.3d at 230 (internal quotation marks and alterations omitted). In considering the likelihood of success on the merits, we evaluate Plaintiffs' First Amendment claims, considering both the importance of the City's interest and the burden imposed by the regulation in question. *See United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813 (2000); *Cent. Hudson,* 447 U.S. at 566.

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

With respect to the merits, we hold that the City's interest in passing Local Law 17 is compelling. The City has stated that it enacted the statute to inform consumers about the services they will receive from pregnancy services centers in order to prevent delays in access to reproductive health services. *See* Local Law 17 § 1. The City considered a wide variety of testimony related to these interests, including

testimony and reports from medical professionals, social workers, clergy, and reproductive health workers about misleading practices, patient experiences, and the dangers of delay in access to reproductive care. "[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 767 (1994); *see also Am. Life League, Inc. v. Reno,* 47 F.3d 642, 656 (4th Cir. 1995) ("[P]rotect[ing] public health by promoting unobstructed access to reproductive health facilities" "serves sufficiently compelling governmental interests.").

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

A. Status Disclosure

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

Under strict scrutiny, the challenged regulation "must be narrowly tailored to promote a compelling Government interest." *Playboy Entm't,* 529 U.S. at

813. The statute must use the least restrictive means to achieve its ends. *Id.* While this is a heavy burden, it is not true "that strict scrutiny is strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 237 (1995) (internal quotation marks omitted). In First Amendment challenges, regulations have survived strict scrutiny. In *Burson v. Freeman*, for example, the Supreme Court employed strict scrutiny in evaluating a statute carving out a "campaign-free zone" outside polling places. 504 U.S. 191, 193-94 (1992). Balancing the "minor" limitation prescribed by the statute against the historical concerns with voter intimidation and election fraud, the Court held that the statute was narrowly tailored to the state's interest in protecting the right of citizens to vote and conducting reliable elections. *Id.* at 198-210. In *Riley,* the Supreme Court suggested that a requirement that solicitors disclose their professional status would be narrowly tailored to the state's interest in "informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity." 487 U.S. at 798; *see also id.* at 799 n.11. The First Amendment test is concerned with a *balancing* of interests. Here, striking down the Status Disclosure would deprive the City of its ability to protect the health of its citizens and combat consumer deception in even the most minimal way.

The Status Disclosure is the least restrictive means to ensure that a woman is aware of whether or

not a *particular* pregnancy services center has a licensed medical provider at the time that she first interacts with it. Such a law is required to ensure that women have prompt access to the type of care they seek. Plaintiffs have suggested, and the district court held, that alternative means exist: the City could sponsor advertisements or post signs outside of pregnancy services centers; it could prosecute fraud, false advertising, and the unauthorized practice of medicine under current law; and it could impose licensing requirements on ultrasound professionals.[7] *See Evergreen,* 801 F. Supp. 2d at 208-09. But these alternate means will not accomplish the City's compelling interest. City-sponsored advertisements and signs cannot alert consumers as to whether a *particular* pregnancy services center employs a licensed medical provider, because, among other things, this is discrete factual information known only to the particular center. Enforcement of fraud or other laws occurs only after the fact, at which point the reproductive service sought may be ineffectual or unobtainable. Finally, the licensing and regulation of ultrasound professionals will not alert consumers to the status of the place in which such professionals are employed unless the licensing and regulation scheme itself requires disclosures comparable to Local Law

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

17's Status and Service Disclosures. Moreover, not all regulated centers provide ultrasounds, so a licensing and regulation effort aimed only at those centers that *do* provide ultrasounds would not help patients seeking medical assistance at other centers. The Status Disclosure is the least restrictive means of providing ready information about pregnancy services centers to consumers.

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

We conclude that the requirement that pregnancy services centers disclose whether or not they employ medical professionals is narrowly tailored. Our holding finds support in the Supreme Court's decision in

Riley, where, as mentioned above, the Court suggested that a requirement that solicitors disclose their professional status is "a narrowly tailored requirement [that] would withstand First Amendment scrutiny." 487 U.S. at 799 n.11.[8] The Supreme Court has subsequently favorably cited to *Riley. See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 623 (2003); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 706-07 (1992) (Kennedy, *J.,* concurring). Other Circuits have relied on *Riley* to uphold disclosure laws requiring solicitors to disclose their professional status or the name, identity and tax-exempt status of their organization. *See, e.g., Nat'l Fed'n of the Blind v. FTC,* 420 F.3d 331, 343 (4th Cir. 2005); *Dayton Area Visually Impaired Persons, Inc. v. Fisher,* 70 F.3d 1474, 1485 (6th Cir. 1995); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1539 (11th Cir. 1993); *Telco Commc'ns, Inc. v. Carbaugh,* 885 F.2d 1225, 1232 (4th Cir. 1989). We acknowledge that the case at hand is different, because the required disclosure does not arise in the context of charitable solicitation. However, in both contexts the laws in question support the state interest in informing consumers

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[8] We note that the plaintiffs in *Riley* did not challenge the status disclosure requirement, making the Supreme Court's discussion of the requirement dicta. 487 U.S. at 799. Additionally, the Court was divided over this issue. *See id.* at 803 (Scalia, *J.,* concurring in part and concurring in judgment) ("I do not see how requiring the professional solicitor to disclose his professional status is narrowly tailored to prevent fraud.").

and combating misinformation. A requirement that pregnancy services centers "unambiguously" disclose the "professional status" of their employees, *Riley,* 487 U.S. at 799 n.11, is narrowly tailored to the City's interests.

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

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

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

> [I]n exercising its broad police power to regulate for the health and safety of its citizens, the state must also enjoy some leeway to require the disclosure of the modicum of accurate information that individuals need in order to make especially important medical . . . decisions. . . . [The Status Disclosure] relies on the common-sense notion that pregnant women should at least be aware of the qualifications of those who wish to counsel them regarding what is, among other things, a medical condition.

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

B. Services Disclosure

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

Evaluating under strict scrutiny, we apply the same tailoring analysis to the Services Disclosure as

we did with respect to the Status Disclosure. As we explained above, requirements that the City sponsor advertisements or post signs, prosecute fraud and false advertising, or impose ultrasound licensing requirements are insufficient to ensure that women are readily aware of whether or not a particular pregnancy services center provides the services sought. However, on this record, the Status Disclosure, by itself, might narrowly satisfy the City's interest, as it alerts consumers to a small bit of accurate information about the *type* of services each center provides – medical or non-medical – even though it does not discuss specific services. *Cf. Centro Tepeyac,* 722 F.3d at 190 (considering whether, in light of ordinance's status disclosure, the city's message that pregnant women should consult with a licensed health care provider was "unneeded speech").

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

487 U.S. at 795. A requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins.

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

Finally, we consider whether a different answer would obtain under intermediate scrutiny, which looks to whether the regulation at issue is not more extensive than necessary to serve a substantial governmental interest. While it is a closer question,

we conclude that it would not, considering both the political nature of the speech and the fact that the Status Disclosure provides a more limited alternative regulation.

C. The Government Message

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

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

We are also concerned that this disclosure requires pregnancy services centers to advertise on behalf of the City. It may be the case that most, if not all, pregnancy services centers would agree that

pregnant women should see a doctor. That decision, however, as this litigation demonstrates, is a public issue subject to dispute. The Government Message, "mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue," deprives Plaintiffs of their right to communicate freely on matters of public concern. *Alliance,* 651 F.3d at 236 (affirming grant of preliminary injunction enjoining government agencies from requiring non-governmental organizations to explicitly adopt statements opposing prostitution as a condition of receiving government funds). The circumstances here differ from *Alliance* in two key respects: (1) the regulation here does not require the speaker to claim the message as its own, *see id.* at 237, but instead qualifies that it comes from the government; and (2) the regulation here was not enacted as a condition to the receipt of funding. The first distinction is of little concern here, because a law that requires a speaker to advertise on behalf of the government offends the Constitution even if it is clear that the government is the speaker. *See Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (invalidating statute that turned speaker's "private property [into] a 'mobile billboard' for the State's ideological message"). The second distinction further underscores the First Amendment violation. While the government may incidentally encourage certain speech through its power to "[choose] to fund one activity to the exclusion of the other," *Rust v. Sullivan,* 500 U.S. 173, 193 (1991), it may not directly "mandat[e] that Plaintiffs affirmatively espouse the government's position on a contested public issue"

through regulations, like Local Law 17, that threaten not only to fine or de-fund but also to forcibly shut down non-compliant entities, *Alliance,* 651 F.3d at 236; *see also Turner,* 512 U.S. at 642 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content.").

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

CONCLUSION

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

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

Local Law 17 is a bureaucrat's dream. It contains a deliberately ambiguous set of standards guiding its application, thereby providing a blank check to New York City officials to harass or threaten legitimate activity. Although I concur with the majority that the Government Message and the Services Disclosure fail under either strict or intermediate scrutiny, I agree with the district court that the entire statute is

irredeemably vague with respect to the definition of a pregnancy services center (PSC). I therefore dissent from the Court's conclusion that the Status Disclosure survives our review.

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

Where, as here, a statute "is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Farrell v. Burke,* 449 F.3d 470, 485 (2d Cir. 2006). As the majority rightly points out, courts may conclude that a law is vague for either of two independent reasons: if the law fails to provide fair notice to potentially regulated entities, or if the law "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado,* 530 U.S. 703, 732 (2000). The second of these reasons, which the Supreme Court recognizes as "the more important aspect of the vagueness doctrine," *Kolender v. Lawson,* 461 U.S. 352, 358 (1983), mandates that statutes "provide explicit standards for those who apply them" to avoid "resolution on an ad hoc and subjective basis, with the

attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972).

No one disputes that Local Law 17 burdens First Amendment expression, and in my view the law utterly fails to provide adequate guidance for its enforcement. The law gives the Commissioner unbridled discretion to determine that a facility has the "appearance of a licensed medical facility." This is an inherently slippery definition – all the more because, as the district court recognized, the law carries the "fundamental flaw" of enumerating factors that are only "among" those to be considered, meaning that the City can find a facility covered absent any *or all* of the listed qualities. *See Evergreen,* 801 F. Supp. 2d at 210. A facility that meets three of the factors might not be a PSC, whereas a facility meeting only one – or none! – of those factors might still be subjected to the restrictions of the law.[1]

This framework authorizes and encourages arbitrary enforcement. The law expressly allows the City to decide, without additional direction, what to do with centers that meet only one listed factor. And even worse, the law explicitly authorizes the City to rely on other, unlisted factors, not known to anyone,

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

which may themselves be vague or discriminate on the basis of viewpoint. Although counsel for the City sought during oral argument to assure us that *ad hoc* investigative decisions would not occur, such a "trust me" approach to enforcement in serious regulatory matters is small comfort for those being investigated.

The City does not dispute that the Commissioner has broad discretion to determine whether a facility qualifies as a PSC – indeed, they admit that this is *by design*. According to the City, Local Law 17 "grants the Commissioner appropriate discretion to identify [a PSC] *should there exist circumstances* consistent with, but not strictly limited to, the guidelines enumerated." Appellants' Br. at 84 (emphasis added). As counsel for the City explained during oral argument before the district court, the definition of a PSC "is meant to cover anything that comes along in the future. I don't know in particular what falls within the definition now." Joint App'x 1007. In other words, because the City cannot anticipate all the facilities that it may want the law to cover, the City needs the maximum of flexibility to be able to decide whether a facility is a PSC. But "[i]f the [City] cannot anticipate what will be considered [a PSC under the statute], then it can hardly expect [anyone else] to do so." *See Fox Television Stations, Inc. v. FCC,* 613 F.3d 317, 331

(2d Cir. 2010), *vacated on other grounds,* 132 S. Ct. 2307 (2012).[2]

The majority's reliance on *United States v. Schneiderman,* 968 F.2d 1564 (2d Cir. 1992), is misplaced. In that case, we rejected a vagueness challenge to a statute that prohibited the sale of drug paraphernalia in certain instances. The statute contained a list of 15 different items that exemplified drug paraphernalia but also noted that the statute covered any item "primarily intended or designed for use in ingesting, inhaling, or otherwise introducing" certain controlled substances into the body. *Id.* at 1569. *Schneiderman* recognized that with regard to criminal statutes, a vagueness challenge was on unsteady ground if the statute had a *mens rea* element. Because the statute at issue criminalized conduct when the device in question was "primarily intended or designed" to aid in drug use, the court was confident that defendants selling or transporting implements intended to be used with drugs would have adequate notice that their conduct was prohibited. Moreover, the list of examples of prohibited devices, along with additional factors that could be used to evaluate a particular device, adequately

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

circumscribed the statute. *See id. Schneiderman* was not a case in which the standards were ill defined, or in which the statute allowed an enforcing official to determine on an *ad hoc* basis what a device "appeared" to be. Instead, the choices were limited by the *mens rea* element regarding the intended use of the device. That is not the case here.

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

It may well be that some PSCs lull pregnant women into making uninformed decisions about their health. The City has an interest in preventing impostors from posing as healthcare workers and in making sure that misinformation is not directed at a vulnerable class of poor or uninformed women. However, the City does not have a right to sweep all those who, for faith-based reasons, think that abortion is not the right choice in with those who would defraud

or intentionally mislead women making this important and personal decision. Local Law 17 is unconstitutional to the extent that plaintiffs challenge it in this Court.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

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

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

Plaintiffs-Appellees,

v.

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

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

Defendants-Appellants.

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

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

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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<tr><td>THE EVERGREEN ASSOCIATION, INC., d/b/a EXPECTANT MOTHER CARE PREGNANCY CENTERS-EMC FRONTLINE PREGNANCY CENTERS, et ano.,

Plaintiffs,

-against-

The CITY OF NEW YORK,

Defendant.</td><td>: 11 Civ. 2055 (WHP)
: <u>MEMORANDUM & ORDER</u>
: (Filed Jul. 13, 2011)
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<tr><td>PREGNANCY CARE CENTER OF NEW YORK, et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.</td><td>11 Civ. 2342 (WHP)
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WILLIAM H. PAULEY III, District Judge.

Plaintiffs Evergreen Life Association, Inc. ("Evergreen"), Life Center of New York, Inc. ("Life Center"),

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

BACKGROUND

I. Local Law 17

Local Law 17 requires facilities defined as "pregnancy services centers" to make certain mandatory disclosures concerning their services. (Declaration of Nicholas Ciappetta dated May 18, 2011 ("Ciappetta Decl.") Ex. F: New York City Local Law No. 17.) A "pregnancy services center" is defined as any facility whose "primary purpose . . . is to provide services to women who are or may be pregnant" and "that either[ ] (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care[,] or (2) has the appearance of a licensed medical facility." (Local Law 17

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

§ 20-815(g).) The following factors are "among the factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility":

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

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

The Ordinance exempts facilities that (1) are licensed by New York State or the United States to "provide medical or pharmaceutical services," or (2) have a "licensed medical provider . . . present to directly provide or directly supervise the provision of" any of the services listed above. (Local Law 17 § 20-815(g).)

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

(1) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider";

(2) whether it has "a licensed medical provider on staff who provides or directly supervises the provision of all of the services" at the facility; and

(3) whether it provides referrals for abortion, emergency contraception, and prenatal care.

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

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

(2) orally, whether by in person or telephone communication, upon a client or prospective client request for any of the following

> services: (i) abortion; (ii) emergency contraception; or (iii) prenatal care.

(Local Law 17 § 20-816(f).)

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

The New York City Council (the "City Council") enacted Local Law 17 after finding that "some pregnancy services centers in New York City engage in deceptive practices, which include misleading consumers about [(i)] the types of goods and services they provide on-site," (ii) "the types of goods and services for which they will provide referrals to third parties," and (iii) "the availability of licensed medical providers that provide or oversee services on-site." (Local Law 17 § 1.) The City Council found that these deceptive practices "can impede and/or delay consumers' access to reproductive health services" and "wrongly lead [consumers] to believe that they have received reproductive health care and counseling from a licensed medical provider." (Local Law 17 § 1.) The City Council further found that "delayed access to abortion and emergency contraception . . . increase[s] health risks and financial burdens[ ] and may eliminate a

wom[a]n's ability to obtain these services altogether, severely limiting her reproductive health options." (Local Law 17 § 1.) In addition, the City Council determined that "[e]xisting laws do not adequately protect consumers from the deceptive practices targeted by [Local Law 17] . . . and anti-fraud statutes have proven ineffective in prosecuting deceptive centers" because pregnant women are reluctant to report abuses due to privacy concerns. (Local Law 17 § 1.)

II. The Plaintiffs

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

Pregnancy Care, Boro, and Good Counsel also operate facilities in New York City that offer various pregnancy-related services but do not perform ultrasounds or physical examinations. (Complaint ¶ 70, *Pregnancy Care Ctr. v. City of N.Y.,* 11 Civ. 2342 (Apr. 5, 2011) ("Pregnancy Care Compl."), ECF No. 1.) Their services include counseling, parenting and maternity education, and referrals to adoption and domestic violence agencies and to licensed medical facilities. (Pregnancy Care Compl. ¶¶ 30, 48, 63-64.) Pregnancy Care and Boro also offer free, self-administered and self-interpreted pregnancy tests

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

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

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

DISCUSSION

I. Preliminary Injunction Standard

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

II. Analysis

a. Irreparable Harm

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

will prevent the feared deprivation of free speech rights." *Bronx Household,* 331 F.3d at 350; *accord Bray v. City of N.Y.,* 346 F. Supp. 2d 480, 487 (S.D.N.Y. 2004).

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

b. Likelihood of Success on the Merits

i. Appropriate Level of Scrutiny

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

commercial speech and requires purely factual disclosures as opposed to protected expression.

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

values, and is entitled to special protection.") (quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983)).

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

The First Amendment accords less protection, however, to commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447

U.S. 557, 563 (1980). Commercial speech is "subject[ed] to 'modes of regulation that might be impermissible in the realm of noncommercial expression'" due to "'its subordinate position in the scale of First Amendment values.'" *Fla. Bar v. Went For It, Inc.,* 515 U.S. 618, 623 (1995) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 477 (1989)). As the Supreme Court observed,

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

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

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

'expression related solely to the economic interests of the speaker and its audience.'" *Conn. Bar Ass'n,* 620 F.3d at 94 (quoting *Central Hudson,* 447 U.S. at 561).

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

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

> "Commercial" means "[o]f or relating to commerce." *The American Heritage Dictionary of the English Language* 371 (4th ed. 2000). Dictionary definitions of "commerce,"

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

> in turn, speak in terms of "[t]he buying and selling of goods," *id.*; the "[e]xchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise," *The Oxford English Dictionary,* 552 (1989); and "the exchange or buying and selling of commodities on a large scale involving transportation from place to place," *Merriam-Webster's Collegiate Dictionary,* 230 (10th ed. 2000) (second definition).

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

of Defendants' argument would represent a breath-taking expansion of the commercial speech doctrine.[4]

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

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

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

U.S. at 795-96 (applying strict scrutiny to speech aimed at soliciting charitable donations).[6]

Defendants' second argument – that Plaintiffs engage in commercial speech because they are provided an audience to whom they can espouse their beliefs – is particularly offensive to free speech principles. While Defendants apparently regard an assembly of people as an economic commodity, this Court does not. *See Snyder,* 131 S. Ct. at 1217-18 (discussing the intersection between public assembly and principles of free speech). Under such a view, flyers for political rallies, religious literature promoting church attendance, or similar forms of expression would constitute commercial speech merely because they assemble listeners for the speaker. Accepting that proposition would permit the Government to inject its own message into virtually all speech designed to advocate a message to more than a single individual and thereby eviscerate the First Amendment's protections. *See Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984) ("An individual's freedom to

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[6] Given the New York Civil Liberties Union's ("NYCLU") usual concern for First Amendment rights, its amicus brief supporting Defendants' expansive view of the commercial speech doctrine is puzzling. (*See* Br. of Amicus Curiae NYCLU at 13-14 ("[Plaintiffs] are promoting and providing free but valuable health care services to pregnant consumers choosing among health care providers in a commercial marketplace. They have entered that marketplace, and, in doing so, can be required by [Local Law 17's] disclosure obligations to make clear to consumers who they are and what they do.").)

speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). This Court will not upend established free speech protections in service of Defendants' overly broad definition of commercial speech.

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

Finally, cases permitting the regulation of professional speech do not validate Local Law 17's disclosure provisions. Relying primarily on *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 884 (1992), Plaintiffs argue that a state's power to require a doctor to provide certain information concerning the decision to have an abortion also

permits the state to regulate speech by unlicensed facilities offering reproductive-related services. But that argument fails for two reasons. First, as Defendants admit, Plaintiffs do not engage in the practice of medicine. (*See* Defs. Br. at 1 (agreeing that a medical license is not required to perform an obstetric ultrasound).) If they did, they would be subject to penalties for practicing medicine without a license. *See* N.Y. Educ. Law § 6512. While not directly bearing on the issue of whether Plaintiffs' speech is commercial, Defendants' concession reveals an astonishing lacuna in the oversight of ultrasound examinations: no license or accreditation of ultrasound technicians is required by the City or New York State.

Second, as a corollary, Plaintiffs do not engage in professional speech. A professional has been characterized as "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Lowe v. Sec. & Exch. Comm'n,* 472 U.S. 181, 232 (1985) (White, J., concurring); *see also Tepeyac,* 2011 WL 915348, at *8 ("[S]peech may be labeled 'professional speech' when it is given in the context of a quasi-fiduciary – or actual fiduciary – relationship, wherein the speech is tailored to the listener and made on a person-to-person basis."). While Plaintiffs meet with clients individually, there is no indication that they employ any specialized expertise or professional judgment in service of their clients' individual needs and circumstances. *See, e.g., Fla. Bar v. Went For It, Inc.,* 515

U.S. 618, 625-26 (1995) (upholding regulations on the legal profession); *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1054 (9th Cir. 2000) (upholding regulations on mental health professionals). Ironically, Defendants' argument that Plaintiffs engage in professional speech might be more persuasive if the City licensed ultrasound technicians. But because no such license is required, this Court cannot evaluate Local Law 17 through the lens of lowered scrutiny accorded to professional speech. Accordingly, this Court will apply strict scrutiny in evaluating Local Law 17.

ii. Compelling Interest

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

Rather than disputing whether the City has a compelling interest in preventing deceptive practices

generally, Plaintiffs challenge the sufficiency of the evidence, contending that it consists almost exclusively of second-hand accounts from pro-choice organizations and individuals. In substance, Plaintiffs intimate that the evidence presented to the City Council was contrived. At this stage, this Court need not address the adequacy of the record before the City Council, for, as discussed below, Local Law 17 is not narrowly tailored. However, this Court recognizes that the prevention of deception related to reproductive health care is of paramount importance. Lack of transparency and delay in prenatal care can gravely impact a woman's health. (*See* Ciappetta Decl. Ex. G: Tr. of Minutes of the Comm. on Women's Issues dated Nov. 16, 2010 at 15-18.) Unlicensed ultrasound technicians operating in pseudo-medical settings can spawn significant harms to pregnant, at-risk women who believe they are receiving medical care. Plaintiffs' categorical denial of the existence of any such deception – and refusal to acknowledge the potential misleading nature of certain conduct – feigns ignorance of the obvious.

iii. Narrowly Tailored

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

The manner in which Local Law 17's disclosures must be made provide a logical starting point. Among

other things, they require Plaintiffs to include in any advertising English and Spanish versions of the City's recommendation that pregnant women consult a licensed medical provider. To be clear, there is nothing objectionable about this message. However, the requirement is over-inclusive because Plaintiffs' advertising need not be deceptive for the Local Law 17 to apply; any advertisement offering a facility's services falls within Local Law 17's scope. *See Green Party of Conn. v. Garfield,* 616 F.3d 189, 209 (2d Cir. 2010) ("In order to narrowly tailor a law to address a problem, . . . the government must avoid infringing on speech that does not pose the danger that has prompted regulation," (quotations omitted)). In fact, Local Law 17's over-expansiveness is evident from its very language. While Section 1 states that only "*some* pregnancy service centers in New York City engage in deceptive practices," the Ordinance applies to *all* such facilities. (Local Law 17 § 1.) By reaching innocent speech, Local Law 17 runs afoul of the principle that a law regulating speech must "target[ ] and eliminate[ ] . . . [only] the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz,* 487 U.S. 474, 485 (1988).

Local Law 17's advertising provisions will burden Plaintiffs in at least two ways. First, they will increase Plaintiffs' advertising costs by forcing them to purchase more print space or airtime, which in New York's expensive media market could foreclose certain forms of advertising altogether. Second, they will alter the tenor of Plaintiffs' advertising by drowning

their intended message in the City's preferred admonitions. *See Wooley v. Maynard,* 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."). Likewise, the requirement that certain disclosures be made orally on any request for an abortion, emergency contraception, or prenatal care will significantly alter the manner in which Plaintiffs approach these topics with their audience. *See Alliance,* 2011 WL 2623447, at *14 ("[The law] offends [the right to communicate freely on matters of public concern], mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue where the differences are both real and substantive.").

Defendants concede that a sign in English and Spanish outside each facility stating that there are no medical personnel on-site would notify women that medical care was unavailable at the facility. (*See* Hr'g Tr. dated June 15, 2011 ("Tr.") at 32.) Moreover, the City controls the right-of-way and could erect a sign on public property outside each pregnancy service center encouraging pregnant women to consult with a licensed medical provider. Such alternatives would convey the City's message and be less burdensome on Plaintiffs' speech.[7] *See Tepeyac,* 2011 WL 915348, at *13 ("[S]everal options less restrictive than compelled

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

speech could be used to encourage pregnant women to see a licensed medical professional. For example, Defendants could post notices encouraging women to see a doctor in [government] facilities or launch a public awareness campaign."); *see also Riley,* 487 U.S. at 793 (finding that the state law impermissibly placed the burden on private entities to "rebut the presumption" that their conduct was unreasonable).

Further, while the City Council maintains that anti-fraud statutes have been ineffective in prosecuting deceptive facilities, Defendants could not confirm that a single prosecution had ever been initiated. (*See* Hr'g Tr. dated June 15, 2011 at 31 ("THE COURT: Has the city ever attempted to prosecute any of these facilities under the anti-fraud laws? MS. BINDER: I don't believe at the district attorney level there was ever an attempt to prosecute this. There may have been something at a state level but I don't know if it resulted in a prosecution. There might have been an investigation by the state Attorney General, But there has not been anything at the city level.").) Such prosecutions offer a less restrictive alternative to imposing speech obligations on private speakers. *See Riley,* 487 U.S. at 800-01 ("[T]he State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."); *O'Brien,* 2011 WL

572324, at *10 ("In lieu of the disclaimer mandate of the Ordinance, Defendants could use or modify existing regulations governing fraudulent advertising to combat deceptive advertising practices by limited-service pregnancy centers.").

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

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

c. Vagueness

Having made this finding, this Court must now determine whether to enjoin Local Law 17 in its

entirety or sever its confidentiality provisions and allow them to take effect.[8] There is a presumption against invalidating an entire statute where only a portion of the statute is challenged on constitutional grounds. *See Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock,* 93 F.3d 68, 72 (2d Cir. 1996) ("[A] court should refrain from invalidating an entire statute when only portions of it are objectionable." (quotations and citations omitted)). However, while Plaintiffs do not challenge the confidentiality provisions, those provisions apply only to facilities meeting the definition of a "pregnancy services center." Plaintiffs challenge that definition as unconstitutionally vague.

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

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

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

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

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

Plaintiffs have demonstrated a likelihood of success on their second argument.

Local Law 17's fundamental flaw is that its enumerated factors are only "among" those to be considered by the Commissioner in determining whether a facility has the appearance of a licensed medical center. This formulation permits the Commissioner to classify a facility as a "pregnancy services center" based solely on unspecified criteria. *Cf. Amidon,* 508 F.3d at 104 ("[B]ecause the criteria are nonexclusive, there is a disconcerting risk that the [decision maker] could camouflage its discriminatory use of the [provision] through post-hoc reliance on unspecified criteria."). "[W]hile perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Fox,* 613 F.3d at 328 (quotations omitted), Local Law 17 fails to impose sufficient restraints on the Commissioner's discretion. The Ordinance could make the enumerated factors exclusive, require that a facility meet at least one, or include additional factors or guidance for determining whether a facility has the appearance of a medical facility. Any of these options could ameliorate discriminatory enforcement concerns.

This conclusion is not contrary to the Court of Appeals' decision in *United States v. Schneiderman,* 968 F.2d 1564 (2d Cir. 1992), on which Defendants rely. There, in rejecting the defendant's argument that a criminal statute prohibiting the sale of drug paraphernalia was unconstitutionally vague, the Court of Appeals found that the statute "strive[d] to

channel enforcement activities" by offering "15 examples of targeted paraphernalia" and listing an additional "eight factors to consider among 'all other logically relevant factors' in determining whether a defendant had the requisite scienter to violate the statute." *Schneiderman,* 968 F.2d at 1568. The Court of Appeals found that those "guidelines tend[ed] to minimize the likelihood of arbitrary enforcement by providing objective criteria against which to measure possible violations of the law." In contrast, Local Law 17 offers far fewer enumerated factors and permits the Commissioner to classify a facility as a pregnancy services center without reference to any one of them. In view of the fact that Local Law 17 relates to the provision of emergency contraception and abortion – among the most controversial issues in our public discourse – the risk of discriminatory enforcement is high. Accordingly, Plaintiffs have demonstrated a likelihood of success on the merits, and Local Law 17 is preliminarily enjoined in its entirety until this action is resolved.

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

CONCLUSION

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

Dated: July 13, 2011
New York, New York

SO ORDERED.

/s/ William H. Pauley
WILLIAM H. PAULEY III
U.S.D.J.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

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

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

Plaintiffs-Appellees,

ORDER
Docket No. 11-2735(L)
11-2929(con)

v.

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

Defendants-Appellants.

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

IT IS HEREBY ORDERED that the motion is GRANTED.

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

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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

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

Plaintiffs-Appellees,

v.

City of New York, a municipal corporation, Michael Bloomberg, Mayor of New York City,

ORDER

Docket Nos:
11-2735 (Lead)
11-2929 (Con)

in his official capacity, Jonathan Mintz, the commissioner of the New York City Department of Consumer Affairs, in his official capacity,

Defendants-Appellants.

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Relevant Constitutional Provisions

First Amendment

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

U.S. Const. amend. I.

Fourteenth Amendment, Section I

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

U.S. Const. amend. XIV, § 1.

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

No. 17

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

A LOCAL LAW

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

Be it enacted by the Council as follows:

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

Based on the evidence before it, the Council finds that some pregnancy services centers in New York

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

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

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

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

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

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

SUBCHAPTER 17
PREGNANCY SERVICES CENTERS

§ 20-815 Definitions.

§ 20-816 Required disclosures.

§ 20-817 Confidentiality of health and personal information.

§ 20-818 Penalties.

§ 20-819 Hearing authority.

§ 20-820 Civil cause of action.

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

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

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

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

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

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

such data, notwithstanding the method by which such information is maintained.

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

A pregnancy services center shall not include a facility that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly

supervise the provision of all services described in this subdivision that are provided at the facility.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) identify the client;

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

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

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

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

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

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

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

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

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

(4) A closing directed by the department pursuant to paragraph one of this subdivision shall not constitute an act of possession, ownership or control by the city of the closed premises.

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

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

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

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

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

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

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

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

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

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

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

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE §27

Pursuant to the provisions of Municipal Home Rule Law §27, I hereby certify that the enclosed Local Law (Local Law 17 of 2011, Council Int. No. 371A) contains the correct text and was passed by the New

York City Council on March 2, 2011, approved by the Mayor on March 16, 2011 and returned to the City Clerk on March 16, 2011.

JEFFREY D. FRIEDLANDER,
Acting Corporation Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE EVERGREEN ASSOCIATION, INC., d/b/a EXPECTANT MOTHER CARE PREGNANCY CENTERS-EMC FRONTLINE PREGNANCY CENTERS and LIFE CENTER OF NEW YORK, INC., d/b/a AAA PREGNANCY PROBLEMS CENTER, **Plaintiffs,** **v.** **THE CITY OF NEW YORK, a municipal corporation,** **Defendant.**	**11 CIV 2055** **Case No.** **DEMAND FOR JURY TRIAL ON ALL ISSUES SO TRIABLE**

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, The Evergreen Association, Inc., d/b/a Expectant Mother Care Pregnancy Centers-EMC Frontline Pregnancy Centers ("EMC") and Life Center of New York, Inc., d/b/a AAA Pregnancy Problems Center ("Life Center"), by and through their undersigned counsel, bring this complaint against the above-named defendant, its employees, agents, servants, officers, and successors in office and all those persons in active concert or participation with it, and

in support thereof allege the following on information and belief:

INTRODUCTION

1. This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Introduction No. 0371-A ("the Ordinance"), which added Sections 20-815 *et seq.* to Title 20, Chapter 5 of the New York City Administrative Code.

2. By this Complaint, Plaintiffs seek injunctive relief, in the form of preliminary and permanent injunctions, barring Defendant, and all those in active concert with it, from abridging Plaintiffs' constitutionally protected rights to freedom of speech, freedom of assembly and association, freedom of the press, and due process of law, guaranteed to Plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as well as the New York Constitution, through enforcement of the Ordinance.

3. Plaintiffs also ask this Court to declare that the Ordinance is unconstitutional on its face and as applied to Plaintiffs.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, as it arises under the Constitution and laws of the United States and presents a federal question, and pursuant to 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable,

monetary, and other relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights. This Court has jurisdiction over Plaintiffs' claims under the New York Constitution pursuant to 28 U.S.C. § 1367, as they form part of the same case or controversy as Plaintiffs' claims under the United States Constitution.

5. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-2202, Federal Rules of Civil Procedure 57 and 65, and the general legal and equitable powers of this Court, which empower this Court to grant the requested relief.

6. This Court has the authority to award Plaintiffs' attorneys' fees and costs associated with this action pursuant to 42 U.S.C. § 1988 and other applicable laws.

7. Venue is proper within this judicial district and division, pursuant to 28 U.S.C. § 1391(b), because the relevant events have occurred and are threatened to occur in this judicial district and division.

PARTIES

8. Plaintiff EMC is a New York nonprofit corporation with tax exemption under section 501(c)(3) of the Internal Revenue Code that owns and operates twelve facilities in the city of New York at which it offers services to pregnant women free of charge.

Plaintiff EMC's corporate office is located at 61 Lewis Parkway, Yonkers, Westchester County, New York 10705.

9. Founded in 1985, EMC provides pregnancy-related services, free of charge, to over 7,500 women a year.

10. Plaintiff Life Center is a New York nonprofit corporation with tax exemption under section 501(c)(3) of the Internal Revenue Code that owns and operates one facility in the city of New York at which it offers services to pregnant women free of charge. Plaintiff Life Center's corporate office is located at 6802 Fifth Avenue, Brooklyn, New York 11220.

11. Founded in 1984, Life Center provides pregnancy-related services, free of charge, to approximately 1,000 women a year.

12. In furtherance of their charitable missions, Plaintiffs offer free services, including pregnancy testing, ultrasounds, sonograms, and pregnancy counseling to women who are or may be pregnant.

13. Based on moral and religious beliefs, Plaintiffs do not offer or refer for abortions or emergency contraception.

14. Defendant City of New York is a municipal corporation duly incorporated and existing pursuant to the laws of the State of New York. The City of New York has established and maintains the New York Police Department and the Department of Consumer

Affairs as constituent departments or agencies of the City.

ALLEGATIONS OF FACT

The Challenged Ordinance

15. On or about March 2, 2011, the New York City Council passed Introduction No. 0371-A, which imposes burdensome speech and confidentiality requirements on "pregnancy services centers."

16. On or about March 16, 2011, Mayor Michael Bloomberg signed the bill into law.

17. According to Section 4 of Introduction 0371-A, which provides that "[t]his local law shall take effect one hundred twenty days after its enactment into law," the Ordinance will take effect on or about July 14, 2011.

18. The Ordinance defines a "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."

19. The Ordinance lists the following as "factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility": 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."

20. The Ordinance specifies that the above-enumerated factors do not comprise an exhaustive list but are only "[a]mong the factors" to be considered.

21. The Ordinance further provides 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 in subparagraphs (a) through (f)."

22. Specifically excluded from the definition of a "pregnancy services center" is any "facility that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly supervise the provision of all services described in [§ 20-815(g)] that are provided at the facility."

23. The Ordinance provides no definition or clarification as to the scope of the following terms and phrases: "services"; "medical attire or uniforms"; "private or semi-private room or area"; "medical

supplies; "medical instruments"; "shares facility space"; "directly supervise"; and "all services."

24. The Ordinance's definition of a "pregnancy services center," particularly its failure to define and/or clarify the scope of several operative terms, its provision that the enumerated "factors" are only "*[a]mong* the factors" that could give rise to coverage and liability under the Ordinance, and its reliance on the premises usage of parties other than those entities covered by the Ordinance, renders it extremely burdensome, if not impossible, for Plaintiffs and others to know whether their facilities are covered by the Ordinance.

25. The Ordinance defines "prenatal care" as "services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy," and further provides that "[c]linical laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition."

26. The Ordinance defines "premises" as "land and improvements or appurtenances or any part thereof."

27. The Ordinance requires that any facility meeting the definition of a "pregnancy services center" must make five specified "disclosures": (a) "that the New York City Department of Health and Mental

Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider"; (b) whether "it does or does not have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center"; (c) whether "it does or does not provide or provide referrals for abortion"; (d) whether "it does or does not provide or provide referrals for emergency contraception"; and (e) whether "it does or does not provide or provide referrals for prenatal care."

28. The "disclosures" required by the Ordinance 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."

29. The Ordinance fails to define or clarify the scope of the term "advertisement."

30. Additionally, such "disclosures" must be provided orally to any client or prospective client requesting an abortion, emergency contraception, or prenatal care, whether in person or by telephone. Thus, the

Ordinance requires ten separate compulsory disclosures – five written and five oral.

31. The Ordinance further requires that pregnancy services centers must treat as confidential "[a]ll health information and personal information provided by a client in the course of inquiring about or seeking services."

32. The confidentiality provision of the Ordinance expressly provides that all health information and personal information provided by a client shall not be "disclosed to any other individual, company or organization unless such client, in writing, requests or consents to the release of such information, or disclosure is required by operation of law or court order."

33. The originally introduced version of the Ordinance imposed "disclosure" requirements upon "limited service pregnancy centers," which were limited solely to those facilities providing pregnancy-related services that did not provide or refer for abortions or FDA-approved contraceptive drugs and devices.

34. The originally introduced version of the Ordinance would have required such "limited service pregnancy centers" to inform clients that the facility does not provide or refer for abortions or FDA-approved contraceptive drugs and devices.

35. The specifications as to the locations and appearance of the "disclosures" required under the originally introduced version and those required

under the enacted version of the Ordinance are almost identical.

36. The originally introduced version of the Ordinance would not have applied to facilities offering pregnancy-related services so long as they provided or referred for abortions or FDA-approved contraceptive drugs and devices.

37. Upon information and belief, the enacted version of the Ordinance is intended to apply, and in effect does apply, only to facilities that do not provide or refer for abortions or emergency contraception.

Plaintiffs' Facilities

38. Each of Plaintiffs' facilities may satisfy the Ordinance's definition of a "pregnancy services center."

39. Five of Plaintiff EMC's facilities offer obstetric sonograms and/or obstetric ultrasounds and/or prenatal care.

40. EMC's other seven facilities all offer pregnancy testing.

41. In addition to offering pregnancy testing, six of the seven EMC facilities referenced in paragraph 39 above store pregnancy tests in a closet, cabinet, or room. Five of these facilities utilize facility space that is also used by a licensed medical provider. Four of these facilities also contain one or more examination table [sic].

42. In addition to offering pregnancy testing, the seventh EMC facility referenced in paragraph 39 above is located on the twelfth (12th) story of a twelve-story office building, on which premises there may be a licensed medical facility.

43. Plaintiff Life Center's facility offers pregnancy testing and stores pregnancy tests in a private room.

44. Plaintiffs' facilities include ones located in multi-story office buildings.

45. Plaintiffs are not aware of the nature, including medical licensure status, of all other facilities located on the same premises as their own facilities.

46. Some of Plaintiffs' activities are conducted within facilities licensed by the State of New York or the United States government to provide medical or pharmaceutical services.

47. None of Plaintiffs' staff or volunteers are licensed to provide medical or pharmaceutical services.

48. None of Plaintiffs' staff or volunteers offer medical or pharmaceutical services or claim to do so.

49. Any medical or pharmaceutical services offered at Plaintiffs' facilities are provided by licensed medical providers.

50. A licensed medical provider is not present, however, to directly provide or directly supervise the provision of all services described in § 20-815(g) of the Ordinance that are provided at Plaintiffs' facilities.

51. With the exception of the provision of ultrasounds and sonograms, none of the services provided by Plaintiffs' staff and addressed by the Ordinance requires any type of government licensure or certification.

52. Every ultrasound and sonogram provided at Plaintiffs' facilities is conducted by a certified technician and in accordance with New York State laws and regulations.

53. Plaintiffs are unable to determine, based on the language of the Ordinance, which of their facilities, if any, are subject to the requirements of the Ordinance and which of their facilities, if any, are exempt from such requirements.

54. All of Plaintiffs' facilities collect personal information from clients, including the client's name, address, and contact information.

55. All of Plaintiffs' facilities collect information regarding clients' pregnancy and abortion history.

56. None of Plaintiffs' facilities collect information regarding clients' health insurance.

57. Throughout the city of New York, Plaintiffs advertise, both generally and specifically, the services offered at their facilities.

58. Plaintiffs do not charge clients any fee for the services provided at Plaintiffs' facilities.

59. Plaintiffs strongly object to being compelled to speak the messages required by the Ordinance's

"disclosure" provisions, and absent the requirements of the Ordinance would not make such "disclosures" in the manner required by the Ordinance.

Penalties Under the Ordinance

60. Failure of a "pregnancy services center" to speak the compelled messages mandated by the "disclosure" requirements of the Ordinance is punishable by a civil penalty of between $200 and $1,000 for the first violation and between $500 and $2,500 for each subsequent violation.

61. Failure of a "pregnancy services center" to comply with the confidentiality requirements of the Ordinance is punishable by a civil penalty of between $200 and $1,000 for the first violation and between $500 and $2,500 for each subsequent violation.

62. If a facility is found to have violated the "disclosure" requirements by its failure to speak compelled messages on three or more separate occasions in a two-year period (which could include a three day period before the first fine is issued), the Ordinance authorizes the Consumer Affairs Commissioner to issue an order, after notice and a hearing, sealing such facility for a period of up to five consecutive days.

63. The Ordinance further authorizes officers and employees of the New York City Consumer Affairs and Police Departments, upon written directive from the Consumer Affairs Commissioner, to act upon and

enforce an order of the Commissioner to seal a pregnancy services center ten days after such order has been posted at the subject premises.

64. The Ordinance specifically provides that the civil penalties and sealing of a pregnancy services center "shall be in addition to any other remedies or penalties provided for the enforcement of such provisions under any other law including, but not limited to, civil or criminal actions or proceedings."

65. The Ordinance creates a private cause of action on behalf of "any person claiming to be injured by the failure of a pregnancy services center to comply with [the confidentiality provisions of the Ordinance]" and authorizes any such claimant to seek "compensatory and punitive damages; injunctive and declaratory relief; attorney's fees and costs; and such other relief as a court deems appropriate."

66. Plaintiffs will continue offering and providing services, free of charge, to pregnant women in New York City into the foreseeable future.

ALLEGATIONS OF LAW

67. Defendant is a "person" for purposes of the claims set forth in this complaint, as that term is used in 42 U.S.C. § 1983.

68. The challenged Ordinance is the policy of the City of New York, officially adopted and promulgated for the City of New York by its legislative body, the

City Council of New York, and signed into law by its chief executive, the Mayor of New York.

69. All of the conduct of Defendant as set forth in this complaint, whether taken or threatened to be taken, constitutes conduct "under color of state law" as that phrase is used in 42 U.S.C. § 1983.

70. The First Amendment to the United States Constitution protects the freedoms of speech, assembly, association, and the press.

71. The First Amendment is applicable to state and local governments through the Fourteenth Amendment to the United States Constitution.

72. The Fourteenth Amendment, applicable to state and local governments, protects the right to due process of law.

73. Defendant knew or should have known that its conduct and its threatened conduct, as described in the foregoing Allegations of Fact, would violate the federal and state constitutional rights of Plaintiffs.

74. Both the Ordinance and the threat of civil and/or criminal penalties for violations thereof injure rights protected by the United States Constitution and the New York State Constitution.

75. Plaintiffs have no adequate remedy at law, as the violation of their constitutional rights imposes irreparable harm.

CAUSES OF ACTION

COUNT ONE
(Violation of the Federal Right of Free Speech)

76. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

77. The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

78. The Ordinance unconstitutionally burdens, restricts and infringes Plaintiffs' right of free speech guaranteed by the First Amendment, as applied to the States and their political subdivisions through the Fourteenth Amendment, as protected by 42 U.S.C. § 1983.

79. At a minimum, the Ordinance unconstitutionally compels Plaintiffs to speak messages that they have not chosen for themselves, with which they do not agree, and that distract from and detract from the messages they have chosen to speak.

80. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT TWO
(Violation of the Federal Rights of Free Assembly and Association)

81. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

82. The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . ."

83. The Ordinance is an unconstitutional burden on free association and assembly, as it would prohibit Plaintiffs' staff from meeting with pregnant women unless and until Plaintiffs comply with the Ordinance.

84. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT THREE
(Violation of the Federal Right of Free Press)

85. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

86. The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom . . . of the press. . . ."

87. The Ordinance provisions requiring specified "disclosures" to be contained in "any advertisement promoting the services" of a "pregnancy services

center" unconstitutionally infringes Plaintiffs' right to freedom of the press.

88. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT FOUR
(Violation of the Federal Right to Due Process)

89. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

90. The Ordinance fails to give constitutionally adequate notice of prohibited conduct and is thus impermissibly vague in violation of the right to due process guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983 for at least the following reasons:

a. The Ordinance defines a "pregnancy services center" in part based on whether a facility has a primary purpose of providing "services" to women who are or may be pregnant but fails to define the term "services";

b. The Ordinance exempts a facility from the definition of a "pregnancy services center" if "a licensed medical provider is present to directly provide or directly supervise the provision of all services described in [§ 20-815(g) of the Ordinance] that are provided at the facility" but fails [to] clarify the scope of the terms "directly supervise" and "all services";

c. The Ordinance defines a "pregnancy services center" in part based on the premises use of entities other than the pregnancy services center itself;

d. The Ordinance defines a "pregnancy services center" in part based on whether its staff or volunteers wear "medical attire or uniforms" but fails to define these terms;

e. The Ordinance defines a "pregnancy services center" in part based on the storage of "medical supplies and/or medical instruments" in a "private or semi-private room or area" but fails to define these terms;

f. The Ordinance defines a "pregnancy services center" in part based on whether such facility "shares facility space with a licensed medical provider" but fails to clarify the scope of such phrase;

g. The Ordinance defines a "pregnancy services center" in part based on whether it "has the appearance of a licensed medical facility" but grants the Commissioner the apparent unfettered discretion to consider factors in addition to those expressly enumerated in the Ordinance by expressly providing that the six factors enumerated are only "among" those to be considered in making such determination; and

h. The Ordinance requires disclosures to be made in "any advertisement promoting the services of [a] pregnancy services center" but fails to define or clarify the scope of the term "advertisement."

91. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT FIVE
(Violation of Liberty of Speech Under the New York Constitution)

92. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

93. Article I, § 8 of the Constitution of the State of New York provides in relevant part: "no law shall be passed to restrain or abridge the liberty of speech."

94. The Ordinance unconstitutionally burdens and abridges Plaintiffs' liberty of speech as protected by Article I, § 8 of the New York Constitution.

95. At a minimum, the Ordinance unconstitutionally compels Plaintiffs to speak messages that they have not chosen for themselves, with which they do not agree, and that distract from and detract from the messages they have chosen to speak.

96. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT SIX
(Violation of Liberty of the Press Under the New York Constitution)

97. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

98. Article I, § 8 of the Constitution of the State of New York provides in relevant part: "no law shall be passed to restrain or abridge the liberty of . . . the press."

99. The Ordinance provisions requiring specified "disclosures" to be contained in "any advertisement promoting the services" of a "pregnancy services center" unconstitutionally abridges Plaintiffs' liberty of the press as protected by Article I, § 8 of the New York Constitution.

100. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT SEVEN
(Violation of Right of Assembly Under the New York Constitution)

101. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

102. Article I, § 9 of the Constitution of the State of New York provides in relevant part: "No law shall be passed abridging the right[ ] of the people peaceably to assemble."

103. The Ordinance is an unconstitutional burden on free association and assembly, as it would prohibit Plaintiffs' staff from meeting with pregnant women unless and until Plaintiffs comply with the Ordinance.

104. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

PRAYER FOR RELIEF

On their foregoing causes of action, Plaintiffs respectfully pray that the Court grant them relief as set forth below:

A. Plaintiffs respectfully pray the entry of a preliminary injunction barring Defendant and all persons in active concert with it from enforcing the Ordinance against Plaintiffs;

B. Plaintiffs respectfully pray the entry of a permanent injunction barring Defendant and all persons in active concert with it from enforcing the Ordinance against Plaintiffs;

C. Plaintiffs respectfully pray the entry of a declaratory judgment that the Ordinance violates the First and Fourteenth Amendments to the United States Constitution;

D. Plaintiffs respectfully pray the entry of an order granting them their costs, including a reasonable award of attorneys' fees, pursuant to Title 42 U.S.C. § 1988;

E. Plaintiffs respectfully pray that the Court grant such other and further relief as it deems just in the circumstances.

Respectfully submitted March 24, 2011.

/s/ [Signature]
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* *Pro hac vice* motions filed herewith

VERIFICATION OF COMPLAINT

I, Christopher Slattery, hereby declare under penalty of perjury that the factual statements contained in the foregoing Complaint are known by me to be true and correct.

Executed in Yonkers, New York, on March 24, 2011.

/s/ Christopher Slattery
Christopher Slattery, President
The Evergreen Association, Inc.,
d/b/a Expectant Mother Care
Pregnancy Centers-EMC
Frontline Pregnancy Centers

VERIFICATION OF COMPLAINT

I, Fred Trabulsi, hereby declare under penalty of perjury that the factual statements contained in the foregoing Complaint are known by me to be true and correct.

Executed in Brooklyn, New York, on March 22, 2011.

/s/ Fred Trabulsi
Fred Trabulsi,
Executive Director
Life Center of New York, Inc.,
d/b/a AAA Pregnancy
Problems Center

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE EVERGREEN ASSOCIATION, INC., d/b/a EXPECTANT MOTHER CARE PREGNANCY CENTERS-EMC FRONTLINE PREGNANCY CENTERS and LIFE CENTER OF NEW YORK, INC., d/b/a AAA PREGNANCY PROBLEMS CENTER, **Plaintiffs,** **v.** **THE CITY OF NEW YORK, a municipal corporation,** **Defendant.**	**Case No. 11-CIV-2055 (WHP)** **DECLARATION OF CHRIS SLATTERY, EXECUTIVE DIRECTOR OF THE EVERGREEN ASSOCIATION, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

DECLARATION OF CHRIS SLATTERY, EXECUTIVE DIRECTOR OF THE EVERGREEN ASSOCIATION, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Chris Slattery, declare and state:

1. I am the Executive Director of The Evergreen Association, Inc., d/b/a Expectant Mother Care Pregnancy Centers-EMC Frontline Pregnancy Centers ("EMC"), located at 61 Lewis Parkway, Yonkers, Westchester County, New York 10705. EMC operates 12 facilities in Manhattan and the surrounding boroughs.

2. EMC is a New York nonprofit corporation with tax exemption under section 501(c)(3) of the Internal Revenue Code that owns.

3. EMC provides services to women in need who are or may be pregnant.

4. EMC provides all of its services free of charge.

5. EMC exists and offers services because it sincerely believes that by assisting women in need and providing services that allow them to carry their babies to term EMC is doing the work of God.

6. Based on moral and religious beliefs, EMC does not offer or refer for abortions or emergency contraception at any of its facilities.

7. EMC 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. The mandated disclaimers in Introduction 371-A (the "Ordinance") are inconsistent with EMC's mission and its moral and religious beliefs. These disclaimers will significantly interfere with the clear message EMC chooses to speak.

8. EMC provides women in need material support so that they can carry their babies to full term. All of EMC's facilities offer free over-the-counter pregnancy testing, confidential counseling, and referrals for prenatal care. EMC also makes referrals to licensed medical clinics for non-abortion services (*e.g.,*

free STD testing, prenatal care, etc.), referrals to domestic violence agencies, referrals to entities that can meet housing needs, and referrals to adoption agencies. In its counseling capacity, EMC provides information about parenting skills, alternatives to continuing educational goals, the benefits of breastfeeding, and the complications and dangers of abortion. EMC also counsels women who have undergone an abortion, as well as friends and/or family members of those women. When the resources are available, EMC provides women in need baby clothes, furniture, bedding, baby carriages, car seats, baby formula, and diapers.

9. In an effort to provide women with easy access to quality prenatal care, EMC has partnered with licensed medical clinics and private physicians. Six of EMC's facilities are either located in a licensed medical clinic or a private physician's office. At two of EMC's facilities, EMC partners with licensed medical providers to provide quality prenatal care at the EMC facility. These licensed medical providers do not, however, supervise all nonmedical services EMC offers.

10. All EMC ultrasounds and sonograms technicians have completed the certified Diagnostic Medical Sonography and Diagnostic Medical Ultrasound Programs course at the Sanford-Brown Institute in New York. This program is accredited by the Commission on Accreditation of Allied Health Education Programs (www.caahep.org) upon the recommendation

of the Joint Review Committee on Education in Diagnostic Medical Sonography (JRCDMS). Each technician has completed the required hours for certification and provide the ultrasounds and sonograms in compliance with their certification requirement. Should the certified technician have any concerns or questions about an ultrasound or sonogram performed, the technician can turn to their supervising licensed medical provider. The supervising licensed medical provider is not always physically present, however, during the ultrasound or sonogram, as physical presence is not required by the technicians' certification.

11. None of EMC's staff or volunteers provide medical or pharmaceutical services; any medical or pharmaceutical service offered at an EMC facility is offered by a partnering licensed medical provider.

12. In those facilities where EMC operates out of a partnering licensed medical clinic or a private physician's office, EMC does not have the authority to post written disclaimers, as required by the Ordinance. Moreover, posting or verbally making a disclaimer that EMC does not have on staff a licensed medical provider who provides or directly supervises the provision of all services offered would actually create confusion for women at these facilities. Likewise, posting or verbally making the disclaimer that EMC does not provide or refer for emergency contraceptives could also lead to confusion because all of the

licensed medical clinics or providers with which EMC partners do offer or refer for contraceptives and EMC frequently refers women to these licensed medical providers. If required to make these disclaimers, EMC will likely have to close the doors of the six facilities in which it operates out of a partnering licensed medical clinic or private physician's office. The end result would be that women in need, particularly those who are poverty stricken, will have less access to quality, affordable prenatal care and material support during and after their pregnancies.

13. EMC collects personal information from clients, including the client's name, address, and contact information.

14. EMC collects information regarding clients' pregnancy and abortion history.

15. None of EMC's staff of volunteers collect insurance information from its clients.

16. The Ordinance's requirement that EMC make disclaimers in English and Spanish in its advertisements places a significant financial burden on EMC and would make continued advertisement in many currently used media outlets financially unfeasible.

17. EMC advertises through the radio, typically in thirty second increments. EMC would have to purchase additional time to include all of the disclaimers required by the Ordinance. This additional advertisement time would place a significant financial burden on

EMC, likely doubling the cost of each radio advertisement. Additionally, EMC has advertised through companion banners on the online streaming radio. Because all of the disclaimers cannot be included in a companion banner, this disclaimer requirement would completely bar EMC from using the companion banner as a means of advertising.

18. EMC runs advertisements in exclusively Spanish printed news sources. Each advertisement is priced according to size. To continue advertising in these sources, EMC would have to purchase additional space to accommodate the onerous disclaimers, including an English duplicate of all required disclaimers. The disclaimer requirement creates a significant financial burden on EMC and would likely preclude future advertisements in the exclusively Spanish print news sources.

19. EMC is currently listed in the Yellow Pages under the category "Abortion Alternatives." Under the category heading "Abortion Alternatives" reads "For organizations that provide counseling and/or information on abortion alternatives. They do not provide information and/or counseling on attaining abortion services nor do they provide abortion services." The disclaimer requirement of the Ordinance forces EMC to purchase extra ad space large enough to hold the required disclaimers in both English and Spanish, despite the fact that such "Abortion Alternatives" advertisements already expressly clarify the meaning of that phrase.

Such a requirement places a significant financial burden on EMC.

20. EMC advertises on the New York Subway and each advertisement is confined to a specific size. Because of the inability to increase the size of these advertisements, EMC's own message would be significantly diluted, if not entirely overshadowed, by the City's preferred message through the onerous disclaimers. The required disclaimers would likely foreclose this medium of advertising because speaking EMC's preferred message would no longer be effective or cost-efficient.

21. EMC has considered advertising through web-based search engines, but application of the Ordinance would preclude it from doing so because it could not physically include all of the required disclaimers, in both English and Spanish, on the priority search advertisements used by web-based search engines.

22. EMC has considered advertising through television, but application of the Ordinance would likely price EMC out of this medium because of the onerous disclaimer requirements.

23. It would also be unfeasible for EMC to include all of the required disclaimers on every business card it provides as a means of advertising its facilities.

24. EMC takes issue with the New York City Council's finding that the laws of New York are inadequate to protect against deceptive

advertising. In 2006, EMC filed a complaint against Dr. Emily's, an abortion clinic masquerading as a pro-life pregnancy center, for deceptive practices in violation of New York General Business Law Article 22-A, which states that it is "unlawful for any person to make false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in New York." Article 22-A creates a right of action for the Attorney General of New York to enjoin the alleged deception and for *any person* to recover his/her actual damages from any unlawful act or practices enumerated in the provisions of this Article 22-A. Dr. Emily's settled this case out of court, but the legal process created by the New York Legislature proved to be a sufficient means of stopping deceptive advertising.

25. EMC has never been told by a client that EMC's advertising or the nature of its facilities had deceived the client.

I, Chris Slattery, hereby declare under penalty of perjury under the law of the United States that the foregoing is true and correct, and that I executed this declaration on April 27, 2011, in Washington, D.C.

By: /s/ Christopher Slattery
Christopher Slattery, President
The Evergreen Association, Inc.,
d/b/a Expectant Mother Care
Pregnancy Centers-EMC Frontline Pregnancy Centers

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, a true and correct copy of the foregoing DECLARATION OF CHRIS SLATTERY was filed electronically with this Court through the CM/ECF filing system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's CM/ECF system. Parties may access this filing through the Court's CM/ECF system. The following counsel for Defendant will receive notice of this filing through the Court's CM/ECF system:

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/s/ Christopher A. Ferrara

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

THE CITY OF NEW YORK, a municipal corporation,

Defendant.

Case No. 11-CIV-2055 (WHP)

DECLARATION OF FRED TRABULSI, EXECUTIVE DIRECTOR OF LIFE CENTER OF NEW YORK, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF FRED TRABULSI, EXECUTIVE DIRECTOR OF LIFE CENTER OF NEW YORK, IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Fred Trabulsi, declare and state:

1. I am the Executive Director of Life Center of New York, d/b/a AAA Pregnancy Problems Center ("AAA"), located at 6802 Fifth Avenue, Brooklyn, New York 11220.

2. AAA is a New York nonprofit corporation with tax exemption under section 501(c)(3) of the Internal Revenue Code that owns and operates one facility in the city of New York.

3. AAA provides services to women in need who are or may be pregnant.

4. AAA provides all of its services free of charge.

5. AAA exists and offers services because it sincerely believes that by assisting women in need and providing services that allow them to carry their babies to term AAA is doing the work of God.

6. Based on moral and religious beliefs, AAA does not offer or refer for abortions or emergency contraception at any of its facilities.

7. AAA makes a promise to its clients to help them in every way conceivable. AAA provides women in need with material nonmedical services, which include free over-the-counter pregnancy tests, confidential counseling, referrals to licensed medical clinics for non-abortion services, referrals to domestic violence agencies, referrals to entities that can meet housing needs, and referrals to adoption agencies. In its counseling capacity, AAA provides information about parenting skills, alternatives to continuing educational goals, breastfeeding, and the potential dangers of having an abortion. AAA also counsels women who have undergone an abortion, as well as friends and/or family members of those women. When the resources are available, AAA provides baby clothes, furniture, bedding, baby carriages, car seats, baby formula, and diapers. In the past, AAA has also assisted women in paying monthly bills and repaired a woman's living space to make it safe for the mother, her family, and the baby growing in her womb.

8. AAA stores over-the-counter pregnancy tests in a private room.

9. AAA collects personal information from clients, including the client's name, address, and contact information.

10. AAA collects information regarding clients' pregnancy and abortion history.

11. AAA does not collect insurance information from its clients.

12. AAA operates a modest facility in Brooklyn, New York, and relies on private donations to provide women these invaluable services during their time of need.

13. AAA does not offer any medical services, nor do any of its staff members, volunteers, or advertisements make any claim that it does.

14. AAA does not depict itself as a medical clinic. On its client intake form, which each client fills out, clients are expressly notified that AAA is a non-medical facility.

15. AAA 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. The mandated disclaimers in Introduction 371-A (the "Ordinance") are inconsistent with AAA's mission and its moral and religious beliefs. These disclaimers will significantly interfere with the clear message AAA chooses to speak.

16. AAA advertises in the Verizon phone directory in Brooklyn, New York. AAA pays to advertise in

both the English and Spanish versions of the phone directory. The disclaimer requirement of the Ordinance would force AAA to purchase extra ad space large enough to hold the required disclaimers in both English and Spanish. Such a requirement would place a significant financial burden on AAA and may make continued advertisement in the Verizon phone directory financially unfeasible.

17. It would also be unfeasible for AAA to include all of the required disclaimers on every business card it provides as a means of advertising its facilities.

18. AAA has never been told by a client that AAA's advertising or the nature of its facility had deceived the client.

I, Fred Trabulsi, hereby declare under penalty of perjury under the law of the United States that the foregoing is true and correct, and that I executed this declaration on 26 of April, 2011, in Brooklyn, New York.

By: /s/ Fred Trabulsi
Fred Trabulsi, Executive Director
Life Center of New York, Inc.,
d/b/a AAA Pregnancy Problems
Center

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, a true and correct copy of the foregoing DECLARATION OF FRED TRABULSI was filed electronically with this Court through the CM/ECF filing system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's CM/ECF system. Parties may access this filing through the Court's CM/ECF system. The following counsel for Defendant will receive notice of this filing through the Court's CM/ECF system:

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