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, 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 Commssioner appropriate discretion to identify [a PSC] *should there exist circumstances*

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[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.

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

[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.

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 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.