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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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; and GOOD COUNSEL, INC., a New Jersey Not-for-Profit Corporation;

Plaintiffs,

v.

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;

Defendants.

Civil Case No:
11-CV-2342-WHP

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Pregnancy Care Center of New York ("PCCNY"), Boro Pregnancy Counseling Center ("BPCC"), and Good Counsel, Inc. ("Good Counsel") respectfully offer this reply memorandum in support of their motion for a preliminary injunction against Defendants.

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1. LL17 Regulates Noncommercial Speech and Is Subject to Strict Scrutiny

The lead argument of the City Defendants ("the City") is that Plaintiffs engage in commercial speech, leading to "rational basis" or "intermediate" scrutiny. But as the City candidly admits, the Supreme Court's *Central Hudson* test considers speech noncommercial unless it is either "solely related to the economic interests of the speaker" or "proposes a commercial transaction."[1] Defs' Memo in Opp. to Pls.' Mot. ("Response") at 5. This standard dooms the City's position, since Plaintiffs' speech meets neither prong of the test.

To its credit, the City does not attempt to argue that Plaintiffs' speech is solely related to Plaintiffs' economic interests—there is no dispute that Plaintiffs provide their services for free. Instead, the City attempts to warp the meaning of "proposes a commercial transaction," by defining free speech itself as commercial. The City contends that Plaintiffs' provision of free services is done in exchange for the opportunity to "espouse their views" against abortion.[2] *Id.* at 7. Under this theory, any time a listener lets a speaker "espouse his views" a commercial transaction has been proposed, because the speaker has received something of value—indeed, "something that is actually more valuable than money." *Id.* This expansion of the definition of commercial speech would turn the First Amendment on its head. The "I Have a Dream" speech would be a commercial proposal to "espouse views." But the fact that protected speech is *constitutionally* valuable does not convert that speech into a commercial commodity.

Not surprisingly, the City cannot offer a single case to support this inventive theory. *Id.* at 6–7. No court has ever adopted such a definition of commercial speech. Churches who give out communion, breast cancer advocates who distribute pink ribbons, and union organizers who hand out signs and t-shirts for rallies should not be swept into an all-consuming commercial

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1 *Zauderer* and commercial speech cases do not apply if the *Central Hudson* test fails.

2 This concedes that LL17 targets free speech; content-based laws receive strict scrutiny.

speech definition. These items all have some commercial value, like diapers and $1 pregnancy kits, but no case suggests they involve commercial speech. Both federal judges in Maryland rejected the same view the City offers here. "[T]he offering of free services such as pregnancy tests and sonograms in furtherance of a religious mission fails to equate with engaging in a commercial transaction." *O'Brien*, 2011 WL 572324, at *6. "Plaintiff does not engage in any commercial transactions." *Centro Tepeyac*, 2011 WL 915348, at *5.

Instead, the City seeks refuge in cases in which the speaker actually was trying to make money. *Aitken* involved economically motivated speech that proposed joining a union, to "perform[] economically valuable services for its members [employee benefits in the marketplace] in exchange for . . . union dues." *Aitken v. CWA*, 496 F. Supp. 2d 653, 665 (E.D. Va. 2007). Nothing of the kind is present here. *Bozell* is likewise inapposite, where the use of the plaintiff's copyrighted video was directly done in fundraising communications with "the goal[] of making money." *WWFE, Inc. v. Bozell*, 142 F. Supp. 2d 514, 526 (S.D.N.Y. 2001). Nor is it true that a non-profit organization is "commercial" just because other people donate in a wholly separate context. Under that theory, everything a non-profit does would be commercial. But *Riley* held that a non-profit's *fundraising* was not even commercial. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797–800 (1988). Plaintiffs' provision of free services and counseling simply does not "propose a commercial transaction" under any fair reading of relevant precedent.

2. Licensed Speech and Campaign Finance Cases Do Not Apply to LL17

Casey and its progeny do not apply. *Casey* allowed certain disclosure requirements *only* as part of a specific medical procedure, which requires a license, which needs informed consent because it is surgery, and which is almost always commercial. *See Planned Parenthood v. Casey*, 505 U.S. 833, 882–85 (1992). The City calls it "backwards" that both Maryland

pregnancy center cases essentially decided "that unlicensed pregnancy centers are entitled to greater First Amendment protection than licensed medical offices." Response at 13. But in America, the default is free speech. If one assumes the privilege of licensed medical practice, or proposes a commercial transaction, greater speech limitations may apply. Yet this in no way suggests the government can burden a private citizen's expression of "abortion-related" content in speech.[3] *Id.* at 12. The City believes it would make "little sense" not to apply *Casey* outside a licensed medical procedure, *id.* at 13, but the City cannot find a single case applying *Casey* beyond such context. It is impossible to imagine a legislature successfully requiring everyone who discusses abortion to provide the type of "informed consent" needed before surgery.

The City inaccurately suggests that *McComish* reduces the scrutiny level if the speaker is minimally burdened. *Id.* at 23. The Supreme Court has never suggested that the level of scrutiny depends on the size of the burden imposed on the speaker, and it rejected this type *ad hoc* approach in *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010). The City's error is in believing that campaign finance cases such as *McComish* are applicable at all. Response at 23. The City can cite no case in which campaign finance precedent has ever been applied to other speech. *Riley* was decided over a decade after *Buckley*, yet *Riley* specifically considered only two possibilities—either commercial speech, or fully protected speech; and if speech is noncommercial it is fully protected, and the test is strict scrutiny. *Riley*, 487 U.S. at 795–98.

3. LL17 Does Not Regulate Mere "Services," but Targets Speech and Viewpoint

The City inaccurately claims that LL17 regulates either (1) only services and not "counseling," Response at 8–9, or (2) only PSC speech "as to the types of pregnancy services

[3] The City misleadingly contends that Plaintiffs should not be able to offer "reproductive services" without restriction. Response at 13. Plaintiffs *do not* offer medical "reproductive services." The City admits this, Response at 1, and admits that LL17 regulates those who offer only services that require no license (counseling, pregnancy test kits, etc., Response at 7).

that they offer," and "not" speech about "the advantages or disadvantages of [abortion, etc.]." Response at 10–11. But the City cannot "parcel out" Plaintiffs' "services" speech from its "ideological" speech.[4] *O'Brien*, 2011 WL 572324, at *7; *Riley*, 487 U.S. at 796.

Furthermore, the City contradicts itself in three ways. First, the City admits that LL17 regulates a PSC if it offers "services," which includes "pregnancy counseling." Response at 7. Counseling is just another name for Plaintiffs' speech. Second, the City is wrong that LL17 applies only to advertising of services. LL17's compelled speech is not triggered by a center that "advertises," but by one that "provides" services. §20-815(g). LL17 applies whether or not the center places ads, ideological or not, and it imposes disclosures well beyond ads.

Third, the City forthrightly admits that LL17 targets the act of "portray[ing] abortion as"

> a "painful, dangerous procedure that leads to a range of physical and emotional damage: future infertility, higher risk of breast cancer, 'post abortion syndrome,' and other health complications, including sexual dysfunction, infection, cervical scarring, and death."

Response at 21. So LL17 *does* regulate "speech regarding the advantages or disadvantages of [abortion]." Response at 10–11. Such portrayals are *fully-protected speech*. See PCCNY Memo at 4–6. Citizens cannot be forced to recite disclaimers just because they disagree with NARAL. A law targeting speech because it opposes abortion is viewpoint-based. *See Rosenberger*, 515 U.S. at 829. This renders the City's other viewpoint discrimination arguments irrelevant.

4. LL17 Is Not Narrowly Tailored Because Its Interest Is Served by Advertising

The City cannot distinguish *Riley* and other cases that establish that a law is not narrowly tailored if the government can pursue its interests through means such as advertising. *Riley*

[4] The City's characterization of Plaintiffs' motivation for offering pregnancy-related services is without factual support. Offering pregnancy-related material services to pregnant mothers is part and parcel of Plaintiffs' "message" of encouragement for pregnant women with the hope that with such support women will carry their pregnancies to term. Thus, the City's claim that the material services are a "good" or "service" in *exchange* for the opportunity to then speak their "message" mischaracterizes the centrality of services within the nature of Plaintiffs' message.

rejected up-front, "factual" disclosures to advance the alleged interest of avoiding misleading omissions. 487 U.S. at 795, 798. LL17's mandates far exceed the single accounting disclosure that *Riley* struck down, requiring five separate wordy disclosures, in duplicate languages, on signs, on all "advertising" apparently including self publications, and orally. § 20-816.

The ability to conduct general government advertising was sufficient to undermine the government's narrow tailoring argument in *Riley* even though it would not occur within particular conversations. 487 U.S. at 800–01. The City claims it cannot possibly know what PSCs do in order to advertise those facts. Response at 27. But the City already credits extensive "undercover" information indentifying all pregnancy centers. *Id.* at 21. Moreover, if the City can find out the relevant facts about PSCs to give them warnings, fines, and to padlock their doors, it can discover those same facts to advertise its message to the public, even about particular facilities. Calling this impossible makes no sense. The Court in *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006), surveying multiple Supreme Court cases, likewise rejected compelled speech because the government failed its burden to show that general advertising would be insufficient. Of course, to date, the City has never delivered § 20-816's messages itself, confirming that even the City does not view its interest as compelling.

5. LL17 Is Not Narrowly Tailored to Target Deception

The City's allegation of "deceptive" practices is an attempt to cloak its discrimination. The record contains no objective, reliable evidence of specific instances of deception. Indeed, in a letter to the Court dated May 25, 2011, the City contends that *none* of the evidence relied upon in its brief is offered for the truth of the matter that pregnancy centers engage in deception. Moreover, the City cites no complaints from actual patients. All of the City's so-called evidence is a combination of disagreement with anti-abortion speech, opposition to Plaintiffs' viewpoint

by organizations performing or advocating abortions (whom the City admits compete with Plaintiffs), wholly non-deceptive facts such as locations, and/or hearsay anecdotes that do not constitute delay and medical harm.[5] The City's evidentiary burden falls under strict scrutiny *see Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997), rather than under intermediate scrutiny cases, see Response at 25, and is not met by an ideological façade of evidence.

Nevertheless, even if evidence of deception existed, the plain text of LL17 does not require deception. The City falsely asserts that LL17 "by definition" applies to a "per se" deceptive "appearance." Response at 27–28. But a center is a PSC if it non-deceptively offers nonmedical pregnancy services and ultrasounds, or nonmedical pregnancy services and self-administered pregnancy tests and possibly (see § 6 infra) other non-deceptive factors. Offering ultrasounds or pregnancy tests is *not* a per se appearance of a licensed medical facility because ultrasounds or self-administered pregnancy tests are not medical. Instead of regulating deception, LL17 simply labels pregnancy help deception by a *term-of-art*. The City misleadingly claims that "during the intake process, [] failure to disclose the lack of medical supervision . . . is misleading in and of itself." Response at 28. But the City has not shown anything misleading about helping women choose birth, and LL17's mandates apply to *all* communications even if a center already discloses that it is not medical. LL17 fails to tailor its mandates to an anti-deception interest.[6]

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[5] The City's "declaration" adds nothing of substance to the evidence from the 371-A Report. PCCNY Memo at 10–12. Additionally, the City's claim that Plaintiffs cause delay in "prenatal care" is absurd: Plaintiffs gladly refer out for such care to assist the choice of birth. Complaint ¶¶ 30, 48, 63. The City also says that Plaintiffs believe "the ends justify the means." This is libelous. Plaintiffs oppose abortion but never claim that deception is justified, nor do they claim (or is there evidence that) they prefer "delayed" abortions over earlier ones, which is nonsensical.

[6] For this reason, LL17 would be excessive even if it regulated commercial speech. Unlike the disclosure requirements upheld in *Milavetz* and *Zauderer*, LL17's requirements extend far beyond the advertisements that the Court found "pose a special risk of deception." *Milavetz*,

6. LL17 Targets PSCs Based on Vague and Unwritten Factors

The City contends that the appearance "factors" in § 20-815(g) are clear, but it ignores the point LL17 does not require the Commissioner to find that any of these factors exist. The section explicitly says the factors are merely "among" those to be considered, so that the City can find an "appearance" absent any or all of them. The City's brief repeatedly emphasizes a variety of unlisted, imprecise factors that allegedly give a false medical appearance, including: (1) merely having "a waiting room" (Response at 28); (2) having a name that is too "generic" (*id.* at 20); (3) advertising services in a way that is too generic (*id.* at 11, 20–21); (4) telling women negative things about abortion (*id.* at 20–21); (5) being located "near" an abortion facility (*id.* at 20); and (6) filling out forms providing "personal" (not "insurance") information (*id.* at 20–21).

No pregnancy center can know which unlisted factor the Commissioner will consider, what many of them mean, or how many listed plus unlisted factors need to be present. How generic is too generic? How near is too near? Why is it deceptive to say negative things about abortion, *and* to speak about pregnancy without revealing one's ideology? Are all waiting rooms inherently medical, or does it have to "appear" medical? The unlisted factors are not "guided" by the listed factors, and the category of a *licensed medical* "appearance" is based on the perception of the regulator. The City, for example, believes that unlicensed activities, like pregnancy test kits, contribute to a "licensed medical" appearance, showing that its determination of LL17's meaning is arbitrary, and untethered to reasonable linguistic standards.

Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1340 (2010). LL17 regulates not only *all* ads, regardless of deception, but every face-to-face visit to the centers. Nothing suggests that the government can simply declare all such communications with certain speakers "misleading in and of itself" and justify the law under rational basis scrutiny. Further, under *Central Hudson*'s intermediate scrutiny, LL17 would not "directly advance" a substantial government interest and be "n[o] more extensive than is necessary," by compelling speech on every single ad and in-person interaction, regardless of whether medical issues are discussed or discussed misleadingly.

Furthermore, since LL17 invites consideration of unlisted factors, the most prominent legislative characteristic of every pregnancy center considered must also be relevant: being "anti-choice." This record calls out for an "impermissible risk of discriminatory enforcement." *Fox Television Stations v. F.C.C.*, 613 F.3d 317, 328 (2d Cir. 2010). The City's attempt to distinguish *Fox Television* is unavailing since both cases involve "appear[ances]" and severely incomplete criteria, while the City completely ignores *Amidon v. Student Ass'n*, 508 F.3d 94, 104 (2d Cir. 2007), and its prohibition on "nonexclusive" and "unenumerated" factors. Response at 34–35.

Even if LL17 was limited to only listed factors (which the City does not concede), LL17 does not say how many listed factors are needed. Two or more factors cause a prima facie finding, but a center meeting only one factor cannot know from LL17 if it is a PSC. Depending on what the LL17 factors mean, PCCNY and BPCC might meet only one factor—the self-administered pregnancy test, Response at 32 n.18[7]—and yet the City either considers them to be PSCs, or does not say.[8] Response at 32–34. By refusing to say whether one factor is enough, LL17 pressures centers to not even offer self-administered pregnancy test kits *in a nonmedical environment*. This pressure is another hallmark of vague laws: they cause citizens to "steer far wider of the unlawful zone" than would be needed to serve the alleged interest. *Fox Television*

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[7] Plaintiffs' staff members do not wear medical attire or medical uniforms (¶ 170). Plaintiffs describe in great detail the health items in their centers that might, depending on LL17's meaning, be considered "medical supplies" in a "semi-private room or area" (¶¶ 194–207). Good Counsel obtains residents' insurance information to help arrange outside medical care (¶¶ 215–16), though the City does not mention this, Repsonse at 32 n.18. PCCNY and BPCC do not solicit "insurance" information except merely to orally ask if women have insurance, so as to refer them to PCAP (¶¶ 213–14). Plaintiffs engage in no physical or pelvic examinations or ultrasounds that would implicate having an examination table (¶ 70), and they in fact have no such tables or "examination rooms containing examination tables and medical equipment," Response at 28. Finally, there are no medical facilities at Plaintiffs' addresses.

[8] Similarly, according to the City's interpretation, Good Counsel might likewise meet only one factor: collecting health insurance information, which Good Counsel does to help its residents obtain needed medical care elsewhere. The City never addresses the scope of this factor.

Stations, 613 F.3d at 328. If only one factor is enough, it would arguably collapse § 20-815(g)(2)'s multi-factor test into the single-factor triggers of § 20-815(g)(1).

The City incorrectly claims that Plaintiffs cannot challenge LL17 facially because "some of the plaintiffs" are "clearly" PSCs. Response at 31. This is incorrect for three reasons. First, Plaintiffs can facially challenge "if a law reaches a substantial amount of constitutionally protected conduct even if it is not vague in all applications." *Kolender v Lawson*, 461 U.S. 352, 359 n.8 (1983). Second, the City fails to define whether *any* of the PCCNY Plaintiffs are or are not PSCs. None of the PCCNY Plaintiffs can determine whether or not it is covered by LL17 due to its vagueness. The City contends only that the *Evergreen* Plaintiffs fall under LL17. Response at 31–32. But as the Court has observed, the PCCNY Plaintiffs are not plaintiffs in the Evergreen case. Third, even in cases the City cites, not *all* joint plaintiffs are barred from bringing a facial challenge just because *one* is covered by the law. Each plaintiff is considered separately. Moreover, the City concedes that Plaintiffs can challenge LL17 under *Humanitarian Law Project* based on the facts before the Court. Response at 32. Plaintiffs' brief and Complaint raise facts thoroughly challenging all the multiple vaguenesses in LL17.[9]

Finally, the City claims that the "doctor supervision" exception to the PSC definition in § 20-815(g) is not vague because it only applies to "the sonograms, pregnancy tests, and prenatal care enumerated" in the PSC definition. Response at 33. But even this truncated list of the items described in that section is in tension with § 20-816(b), which mandates that a PSC disclose whether a medical provider "supervises the provision of **all**" services (emphasis added). Since

[9] Plaintiffs can also challenge LL17's overbroad "advertising" rule as it may apply to third-party entities who advertise Plaintiffs' services. PCCNY Memo at 20 & n.12. The City claims that LL17 clearly does not impose penalties on third-party advertisers. Response at 34 n.19. But the City fails to say whether the City can penalize *the PSC* for free third party ads, especially if a PSC *asks* for the ad. If LL17 would apply to such a request, it would constitute another distinct restriction on the PSC's speech—the speech of *asking* for the free ad, absent disclaimers.

forcing a center to hire a doctor to supervise diaper distribution is ridiculous, forcing a center to tell women that no doctor supervises their diaper distribution is equally irrational. Even if PCCNY and BPCC merely need to get a doctor to supervise self-administered pregnancy tests, LL17 is preempted by state law, which defines that activity as not being medical nor requiring a license. See PCCNY Memo at 19. And if Good Counsel is a PSC, it cannot meet LL17's exemption by getting a doctor to supervise the described services, because it does not offer them.

7. The City Incorrectly Cites or Misquotes Various Cases

The City is incorrect that LL17 somehow receives lesser scrutiny for disclosures that are "factual." Strict scrutiny applies to either "opinion" or "fact" mandates. *Riley*, 487 U.S. at 797–98; *see also* PCCNY Memo at 4–5 & n.3, 12. The City also raises several insufficient points regarding commercial speech, such as that non-profit entities can sometimes seek commercial gain, that merely referencing a public issue does not render a sale noncommercial, and that "profit motive" is a distinct inquiry. Response at 5–6. These points beg the question that the "transaction" in question is commercial, which, as discussed above, Plaintiffs' speech is not.

The City's assertion that § 20-816's first disclosure is purely government speech, *id.* at 16, is, frankly, absurd. All of LL17's disclosures are made by PSC's own mouths, walls, and publications. *Reynolds Tobacco* involved government ads in third-party media, not messages spoken by the company. *Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 912 (9th Cir. 2005). Establishment clause cases do not contend that government compelled private speech is not private. No case immunizes compelled speech just by the preface "The government believes."

Finally, the City misquotes *ACLU v. Reno*. Response at 23 n.11. That Court is not saying that a financial burden does not harm speech, but exactly the contrary: that even if plaintiffs can afford an added cost, it *still* burdens speech. 31 F. Supp. 2d 473, 494–95 (E.D. Va. 1999).

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Washington, DC.

Respectfully submitted,

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