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,

Case No. 11-CIV-2055 (WHP)

PLAINTIFFS' JOINT RESPONSE TO AMICUS BRIEF BY NEW YORK CIVIL LIBERTIES UNION

Plaintiffs,

v.

THE CITY OF NEW YORK, a municipal corporation,

Defendant.

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;

Case No. 11-CIV- 2342 (WHP)

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.

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The New York Civil Liberties Union (NYCLU) proposes many of the same flawed arguments for considering Plaintiffs' speech commercial or "professional" as the City of New York Defendants, arguments that Plaintiffs have rebutted in their respective memoranda. To the extent that the amicus brief adds relevant points, Plaintiffs address them here.

I. The NYCLU Distorts First Amendment Law on "Factual" Disclosures.

The NYCLU (like the City) incorrectly asserts that LL17 is not subject to strict scrutiny because "[l]aws that compel disclosure of factual information are often evaluated differently" than those compelling one to speak an opinion, and that anti-compelled-speech cases involving ideological statements subject to strict scrutiny, such as *Barnette*, are "far different" and do not apply. NYCLU Br. at 6, 8. This assertion contradicts Supreme Court precedent. When a law compels disclosures regarding noncommercial speech, *Wooley*, *Barnette*, and similar cases applying strict scrutiny "*cannot be distinguished* simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797–98 (1988) (emphasis added). "[A] law compelling [a factual] disclosure would clearly and substantially burden . . . protected speech." *Id.* at 798.

The NYCLU attempts to distinguish *Riley* by claiming that it only applies to factual disclosures that are not "inextricably bound with substantive, ideological expression." NYCLU Br. at 6. But *Riley* unequivocally says the opposite: "either form . . . burdens protected speech." *Id.* Moreover, the NYCLU's suggestion itself jumbles the test. The "[i]nextricability" inquiry concerns whether the standard for commercial speech should be applied to a message comprised of both commercial and noncommercial expression, not whether speech that is noncommercial

fact and noncommercial opinion can be regulated as if it were commercial in nature. *Id.* at 796.[1] Once the speech is deemed noncommercial (as Plaintiffs' speech is), the federal standard does not treat it under a lower level of scrutiny merely because it is "factual." In any event, forcing a pro-life pregnancy center to disclose anything about abortion or pregnancy, as LL17 does, *is* inextricably intertwined with the heart of its ideological opinions.

The NYCLU turns the commercial speech test on its head by declaring that factual speech *might* be subject to higher scrutiny if there are "serious adverse consequences." NYCLU Br. at 6–7. This is wrong: compulsion of noncommercial speech is subject to strict scrutiny regardless of whether it is "fact" or opinion. Compelling "factual" disclosures does not transform the speech into commercial speech. Every single case cited by the NYCLU for its fact/opinion scrutiny distinction is either a commercial speech case or a campaign finance case. But campaign finance cases are not "illustrative" of the rule for noncommercial speech. They did not apply under *Riley*, and they are not part of the *Central Hudson* test, which would be rendered meaningless if campaign finance cases governed all noncommercial compelled speech cases. The NYCLU cites *no* federal cases applying principles from campaign finance cases to other noncommercial speech contexts.

It is deeply ironic that a civil liberties organization would propose that the government can force fully private speakers to make a host of disclosures just because the disclosures are allegedly "factual." Debate is usually *about* facts. Debate is also about the *emphasis* one places on facts. "Facts" are not neutral—they *push* the debate in one side's favor, even if they are forced on all speakers. The public proponents and opponents of a law would both be burdened

[1] Thus the NYCLU's reliance on *Abramson v. Gonzalez*, 949 F.2d 1567, 1575 (11th Cir. 1992) is misplaced, because that case involved the intertwining of concededly commercial speech by psychologists with their noncommercial speech.

greatly if the government "neutrally" forced *all* speakers to disclose "facts" about the law, but used a list of facts that emphasized the significance and strong points of only one side of the debate, and delineated the manner and timing of the disclosures. As noted in *Riley*:

> Thus, 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.

Riley, 487 U.S. at 797–98. The long-venerated understanding of the freedom of speech as protecting a "marketplace of ideas" largely free from government-imposed compulsion, whether through restrictions or compelled expression, is particularly apt in this case.

Likewise, LL17 interferes with the manner in which pro-life centers address topics central to their viewpoint and only topics favoring their opponents. LL17 does not force all pregnancy-related providers to disclose all that they do or do not do. LL17 tips the scales for abortion facilities because it forces PSCs to disclose that they do not provide or refer for abortion and emergency contraception, which abortion and abortion-promoting facilities, by definition, refer for or provide. Yet LL17 does not require abortion facilities opting not to refer for or provide prenatal care for women (see Defs.' Exh. G at 97) to disclose that fact to women who might choose motherhood, because, in practice, abortion facilities are covered by LL17's exemption provision. Abortion-favoring facilities are therefore not impacted by the burdensome speech requirements imposed on PSCs. Thus LL17 is not a neutral law that merely "incidentally" burdens people with one viewpoint as the NYCLU suggests from *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 762-63 (1994). NYCLU Br. at 16 n.7. LL17's decision about which facts to compel and which to omit, coupled with the exemption, biases the playing field. Consider the reverse situation from LL17. Would a law truly be considered "merely factual" if it required pregnancy discussing facilities, including abortion facilities, disclose: whether a financial

incentive exists to perform abortions; whether (or how many) adoptions they facilitate; whether they help women choose birth; whether they provide free car seats, diapers, baby clothes and parenting classes; and whether they refer to pro-life centers? Calling LL17's disclosures "factual" is irrelevant to their compulsion effect, and their abortion-favoring bias.

Also contrary to NYCLU's suggestion, NYCLU Br. at 8, LL17 is not justified by *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). The requirement in *Rumsfeld* was conditioned on the receipt of government funds, and it was not a compulsion of speech but of conduct: the requirement that schools "afford equal access to military recruiters" alongside other employers: "The Solomon Amendment neither limits what law schools may say nor requires them to say anything." *Id.* at 59. Any impact that the law may have had on speech was "plainly incidental to . . . regulation of conduct." *Id.* at 62. Here, LL17's speech regulations are not incidental to some broader regulation of conduct—the speech regulations are the entire imposition at issue. Section 20-816 of LL17 directly compels speech and changes Plaintiffs' factual and ideological message by dictating speech in every interaction, changing the tone, context, and timing of their discussion of selected topics, and by foreclosing mediums of expression or making them cost-prohibitive.

II. "Product" Speech Is Not Commercial Unless the Speaker Is Commercial Vis-a-Vis That Product.

The NYCLU incorrectly asserts that any information provided about a product, even if it is not related to the speaker's commercial interests, is always commercial speech. NYCLU Br. at 10 *et seq*. No case extends commercial speech to this all-encompassing magnitude. Instead, *Central Hudson* clearly states that commercial speech is "related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557, 561 (1980). Every federal case that the NYCLU cites for its false version of the commercial

speech test involved people who were *selling* that product.[2] Likewise the NYCLU's citations for the idea that the government has an interest in avoiding deception regarding consumer products also involved either commercial speech or untruthful factual statements, both of which are absent here.[3] Such an interest does not justify burdening noncommercial, truthful speech. R.J. Reynolds can be forced to give the surgeon general's warning on its cigarettes because its speech about its product is commercial: it sells its product. But the government cannot use the commercial speech doctrine to justify regulating the speech of an anti-smoking group because it talks about a "product," Mothers Against Drunk Driving for warning about an alcoholic "product," or a pastor for urging his congregation to avoid a pornography "product." Martin Luther King, Jr.'s call to boycott a segregated bus or lunch counter "product" or to sit in the white section of it could not have been regulated as commercial for mentioning a particular service, nor could a church's expression be regulated simply because it provides, or publicizes that it provides, clothing to the homeless and down-trodden. The NYCLU's argument that all speech related to "products" or "services" is commercial eviscerates freedom of speech precedent in countless contexts.

The NYCLU's citation to *Village of Schaumburg* misses the mark widely in this regard.

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[2] The regulated speech included: a contraceptive distributor's speech about contraception (*Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 62, 66 (1983)); a light bulb manufacturer's speech about mercury in the bulbs (*Nat'l Elec. Mfr. Ass'n v. Sorrell*, 272 F.3d 104, 114-16 (2d Cir. 2001)); a restaurant's speech about caloric content of its food (*N.Y. State Rest. Ass'n v. N. Y. City Bd. of Health*, 556 F.3d 114, 134-35, 137 (2d Cir. 2009)); a commercial sponsor's commercial logo on the ads for an event it *paid* to sponsor (*Transp. Alts., Inc. v. City of N.Y.*, 218 F. Supp. 2d 423 (S.D.N.Y. 2002)); an abortion-supporting "family planning" facility promoting its for-profit services by the distribution of a calendar to generate referrals (*Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 749–50 (1991)); and speech at parties to sell Tupperware (*Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–75 (1989)).

[3] The regulated speech included: an optometrist's commercial use of trade names (*Friedman v. Rogers*, 440 U.S. 1, 15 (1979)); commercial solicitations by certified public accountants (*Edenfield v. Fane*, 507 U.S. 761, 769 (1993)); commercial speech by apple advertisers (*Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977)); and commercial speech by licensed pharmacists (*Thompson v. West. States Med. Ctr.*, 535 U.S. 357, 376 (2002)).

That case establishes that *even if a group is directly asking for money* its speech is not necessarily commercial: "charitable appeals for funds . . . [are] characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views . . . . [C]haritable solicitation . . . *has not been dealt with in our cases as a variety of purely commercial speech*." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (emphasis added). *Village of Schaumburg* thus foreshadows *Riley*, which held that even a non-profit's *fundraising* by hired professional agencies was *not* commercial speech. *Riley*, 487 U.S. at 797–800.

The NYCLU further suggests that *Schaumburg* expresses a broader commercial-speech test than *Central Hudson*, one that includes speech that merely "inform[s] private economic decisions." NYCLU Br. at 10–11. But *Central Hudson* was decided after *Village of Schaumburg*. The City has conceded, as every federal court recognizes, that *Central Hudson*'s formulation is the test for commercial speech. Response at 5. Yet the NYCLU Brief does not even recite the *Central Hudson* test, and mentions the case only in passing.

In its attempt to broaden the commercial speech doctrine, the NYCLU also incorrectly asserts that *Bolger* established a factor test for commercial speech. NYCLU Br. at 10. In *Bolger* the Supreme Court held that a distributor that advertised its product and promoted more generally the use of that product in discussing important public issues was engaged in commercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 62, 67-68 (1983). Although the advertising did not directly call for a commercial transaction, the distributor sought to further its economic interests by increasing awareness and thus increasing future sales of its product. *Id.* Further confusing the issue, the NYCLU asserts that LL17 meets two of the factors present in *Bolger*, advertising and reference to a particular service. But this argument misses the

mark entirely. LL17's mandated disclosures apply regardless of whether a PSC ever advertises its services.

LL17's vast disclaimer regime cannot be reconciled with *Riley*. In the midst of the Court's strong statements against regulating noncommercial speech, the Court mentioned that it would accept a requirement that a professional fundraiser disclose solely his professional status. *Riley*, 487 U.S. at 799 n.11. Nothing of the sort is present in Plaintiffs' situation. Their speech is separated from the situation of a hired professional fundraiser by three layers: Plaintiffs' interaction with their clients does not constitute fundraising; Plaintiffs' speech with their clients is not by someone they hired; and LL17's disclosures do not focus or require disclosure of whether the messenger is hired. Although the hiring of someone to fundraise for you may involve a commercial exchange, that does not transform the underlying message into commercial speech. And although some of Plaintiffs' advertising involves hiring the third party medium, "speech is not rendered commercial by the mere fact that it relates to an advertisement." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-85 (1973) (citing multiple cases); *see also N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (payments made to run an advertisement soliciting charitable donations did not make the solicitation commercial).

III. Other "Pregnancy" Cases NYCLU Cites Counsel Against LL17.

The NYCLU's brief cites several cases involving pro-life pregnancy centers that are inapplicable to LL17 for a variety of reasons. In *Mother & Unborn Baby Care of North Texas, Inc. v. State*, decided before *Riley* on non-federal grounds, the issue was whether overtly false activities—such as advertising under abortion and medical services in the yellow pages—could be restricted; that law "proscribes activities constitutionally forbidden" because they were untrue, "but does not further encompass protected speech or conduct." 749 S.W.2d 533, 536, 540 (Tx.

1988). LL17 fails to regulate only false statements, but applies to the entirely nondeceptive practice of providing pregnancy services and either ultrasounds or self-administered pregnancy test kits. N.Y.C. Admin. Code § 20-815(g).

In addition, the case from the North Dakota Supreme Court, *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176 (N.D. 1986), if applicable at all, counsels against LL17. *Fargo* did not involve a general law but an injunction against an entity found to have actually engaged in false commercial advertising. *Id.* at 177–79. The Court was deferentially reviewing the equitable injunctive power that could be exercised against an entity found to have actually engaged in false commercial advertising; it was not reviewing a law applicable to all pregnancy centers having engaged in no false advertising.

Fargo was thoroughly a false advertising case, in which ads were placed declaring that the center provides abortions and offers financial support for abortions, including that "major credit cards are accepted." *Id.* at 177–80. The Court deferred to the factual finding that those ads falsely proposed the commercial transaction providing women abortions for money, and that the ads "offer[ed] medical . . . services." *Id.* at 178–79, 181. But such ads are wholly inapplicable to what triggers LL17 as the definition of a PSC applies both to PSCs that advertise truthfully and to PSCs that never advertise, including those PSCs that engage in no deception at all, but merely offer pregnancy services and either ultrasounds or self-administered pregnancy tests and are fully honest about that fact. N.Y. Admin. Code § 20-815(g).

Even more troubling for LL17, the North Dakota Supreme Court actually *struck down* the only part of the rule at issue that resembles LL17: requiring that the center state that it does not perform abortions. *Id.* at 179. The Court found it "redundant and unnecessary to accomplish the objective of preventing false and deceptive activity." *Id.* LL17 suffers from the same problem,

the problem the *O'Brien* court found in that case, but that the NYCLU evades: LL17 is not limited to deceptive statements, and consumer protection laws (such as laws against false advertising) would be a lesser restrictive mechanism. The basic outcome in *Fargo* is similar to the outcome that Plaintiffs request: every mandate in LL17 that does not prohibit false advertising statements (which is to say, every mandate in LL17) should be struck down because not one of those mandates prohibits false advertising or limits its application only to centers engaged in false advertising.[4]

The view of commercial speech in *Fargo*, if extended beyond false commercial advertising, is not applicable under *Riley*. *Riley*, decided two years later, held that even fundraising communications are noncommercial, and declared that the government can serve its interest by directly prohibiting false statements and false pretenses (which is what *Fargo* actually imposed). *Riley*, 487 U.S. at 800–01. To the extent that the NYCLU asserts *Fargo* supports that speech is commercial if it merely "offer[s] services" that are free, not medical, and not deceptive, in service of an ideological non-profit mission, that interpretation is impossible to reconcile with *Central Hudson*'s commercial proposal and economic interest test as applied in *Riley*. *Fargo* never states that conclusion, nor does its reasoning reach that far. *Fargo* simply does not apply to the wholly noncommercial speech at issue in this case, nor does it inform the application of *Central Hudson* and *Riley* in the absence of false advertising or commercial transaction speech.

[4] *Fargo*'s rule also only applied to advertising (the newspaper and yellow pages), whereas LL17 applies not only to third-party advertising but to signage in the PSC lobby, to the PSC's oral communications, and (by the law's lack of definition of "advertising") apparently to a PSC's own materials, website, and external building signage. None of those contexts were regulated by *Fargo*, and the fact that the speech was "advertising" was central to the *Fargo* Court's determination that the speech was commercial. But the U.S. Supreme Court has said the exact opposite: "[S]peech is not rendered commercial by the mere fact that it relates to an advertisement." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-85 (1973) (citing multiple cases).

Finally, the NYCLU asserts "there is an informational imbalance between PSCs and their client," whereas in *Riley* the fundraisers were required to disclose their professional status, putting potential contributors on notice that some of their contribution "might go to solicitation costs, and 'free to inquire' how much." NYCLU Br. 15 n.6. No such imbalance exists. New York requires medical professionals to display their licenses and current registration at the practice site.[5] The absence of such display would equally put women on notice that they are not being seen by a medical professional. If women are unaware they should look for this display, the City can conduct a public service campaign alerting women who are or may become pregnant of the need to consult with a licensed medical provider and to verify they are being seen by a medical professional, including that all medical professional must display their credentials. Moreover, as the NYCLU points out, women remain "free to inquire" as to the nature of services provided at any PSC, NYCLU Br. at 15 n.6, and New York law already sufficiently protects against any deception by a PSC.

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Respectfully submitted,

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[5] *See* N.Y. State Dep't of Health, http://www.health.ny.gov/professionals/doctors/conduct/telemedicine.htm; N.Y. State Educ. Dep't, http://www.op.nysed.gov/prof/med/medbroch.htm.

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