NO. _____

IN THE

Supreme Court of the United States

PREGNANCY CARE CENTER OF NEW YORK; BORO PREGNANCY COUNSELING CENTER; GOOD COUNSEL, INC.,

Petitioners,

v.

CITY OF NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of New York compels speech upon noncommercial facilities that offer free non-medical information and counseling to persuade pregnant women not to abort. Local Law 17, N.Y.C. Admin. Code § 20-815 *et seq*. (hereinafter "LL17"). LL17 forces these centers to add unwanted messages to their communications and ads saying they do not do abortions or have medical licenses. *Id.* § 20-816. It regulates any center the City determines, based on uncertain criteria, has the "appearance of a licensed medical facility." *Id*. § 20-815.

The decision below upheld part of an injunction, so a center need not declare it does not provide abortions. Pet. App. at 36a. But in conflict with other circuits, it applied *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), to force centers to recite on their walls and ads that they lack medical licenses. Pet. App. at 31a–32a. It also authorized the City to use an unknown number and quality of factors to determine which centers must comply. *Id.* at 21a–24a.

The two questions presented are:

(1) Whether compelling a noncommercial pro-life speaker to declare it lacks a medical license passes strict scrutiny.

(2) Whether a compelled speech law is unconstitutionally vague if the City can deem speakers as needing to comply, because of their "appearance," without any ability for the speaker to know whether it must comply.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellees below, are Pregnancy Care Center of New York, incorporated as Crisis Pregnancy Center of New York; Boro Pregnancy Counseling Center; and Good Counsel, Inc. Plaintiffs-appellees in the consolidated proceeding 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, who were defendants-appellants below, are the City of New York, and both Mayor of New York City Bill de Blasio, and Commissioner of the New York City Department of Consumer Affairs Jonathan Mintz, sued in their official capacities. During the litigation below, Mayor Michael Bloomberg was replaced by Mr. de Blasio.

CORPORATE DISCLOSURE STATEMENT

Petitioner Pregnancy Care Center of New York is incorporated as Crisis Pregnancy Center of New York, and is a New York not-for-profit corporation. It does not have parent companies and is not publicly held.

Petitioner Boro Pregnancy Counseling Center is a New York not-for-profit corporation. It does not have parent companies and is not publicly held.

Petitioner Good Counsel is a New Jersey not-for-profit corporation. It does not have parent companies and is not publicly held.

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INTRODUCTION

This petition presents a circuit conflict over whether *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), authorizes compelled speech on noncommercial speakers. In *Riley*, this Court held compelled speech unconstitutional for noncommercial speakers, even while fundraising. *Id.* at 803. In passing, however, the Court suggested that a charity's paid solicitor could be required to declare his professional status. *Id.* at 799 n.11.

Most courts of appeals faithfully apply *Riley*'s holding against compelling speech, while properly limiting footnote 11 to allow required disclosures only for paid solicitors in the scope of their hired status. *See Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1101 (10th Cir. 1997).

But in the decision below, the Second Circuit created a novel interpretation of *Riley* that conflicts with the other courts of appeals. It used *Riley*'s footnote 11 to allow the government to force a noncommercial speaker itself—which has hired no paid solicitor and is not even fundraising—to declare that it is *not* a professional. This speech is imposed in the midst of the noncommercial speaker's delivery of its core message in opposition to abortion, on its own walls, all its ads, and an unknown number of its phone calls. This conflicts not only with *Riley*'s own holdings but with the Tenth Circuit's application thereof, and it creates similar tension with opinions of the Fourth, Sixth, and Eleventh Circuits.

Petitioners Pregnancy Care Center of New York,

Boro Pregnancy Counseling Center, and Good Counsel, Inc., are noncommercial centers that operate in New York City to offer free non-medical information and help, such as personal advice, baby items, and housing, so that women may choose birth instead of abortion. The City of New York passed Local Law 17, N.Y.C. Admin. Code § 20-815 *et seq*. ("LL17"), which imposes serious penalties unless pregnancy services centers ("PSCs") recite a variety of disclosures about whether the PSCs offer abortion and whether the PSCs have staff with medical licenses, of a content and size deemed by the City, in the PSCs' phone calls, signs at their centers, and all advertisements. LL17 § 20-816.

The Second Circuit misapplied *Riley* to uphold the City's requirement that Petitioners proclaim they have no medical license. Because this decision flies in the face of *Riley* and its interpretation by other courts of appeals, Petitioners ask the Court to grant this petition.

Petitioners also ask the Court to review the Second Circuit's approval of LL17's irredeemably vague definition of whether a pregnancy center has a medical "appearance" so as to be subject to coerced speech. LL17 § 20-815(g). The law's "appearance" test sets forth several factors to consider, but it imparts discretion to the City to compel a center's speech even if only one factor—or even none—is present. The decision below violates this Court's vigorous precedent shielding speech from unfettered governmental discretion, whose danger is at its zenith when a law targets controversial speakers with whom the government disagrees.

DECISIONS BELOW

The panel opinion of the court of appeals is reported at 740 F.3d 233 (2d Cir. 2014) and reprinted in Pet. App. at 1a. The Second Circuit's order denying rehearing en banc is unreported but reprinted in Pet. App. at 1c. The district court's opinion is reported at 801 F. Supp. 2d 197 (S.D.N.Y. 2011) and reprinted in Pet. App. at 1b.

STATEMENT OF JURISDICTION

The court of appeals issued an opinion on January 17, 2014 and denied a timely petition for rehearing *en banc* on March 18, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech[.]

U.S. CONST. amend. I.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are two pro-life pregnancy help centers, and one organization of maternity homes for mothers who have decided not to have abortions. Pet. App. at 2g–3g. The organizations are noncommercial and non-medical. *Id*. at 3g–16g. They offer free information and material assistance to encourage women in their choice of alternatives to abortion. *Id*. at 2g–4g. Petitioners offer this help based on their beliefs in favor of human life and against abortion and emergency contraception. *Id*. at 14g–15g.

On October 13, 2010, New York City Council Member Jessica Lappin introduced a bill that was intended to regulate the practice of "crisis pregnancy centers," organizations that provide non-medical pregnancy services and are opposed to abortion. Pet. App. at 11a. In March 2011, the New York City Council passed and former Mayor Michael Bloomberg signed into law Local Law 17. The law imposes on "pregnancy services centers" a requirement to disclose information in every ad, an unknown number of phone conversations, and on the center's own walls. LL17 § 20-816(f). LL17 requires three messages: (1) whether the PSC has a licensed medical provider on staff or who supervises the provision of services (even non-medical services); (2) that the City recommends pregnant women consult with a licensed provider; and (3) whether the PSC provides or refers for abortions, emergency contraception, or prenatal care. *Id*. § 20-816(a)–(e).

LL17 defines a PSC as a "facility, . . . with the primary purpose [] 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 "services" offered to potentially pregnant women under the "primary purpose" test include counseling, information, and classes. Pet. App. at 4h-5h.

To determine if a facility has a medical "appearance," the law provides a nonexclusive list of factors for consideration. A facility is presumed to be a PSC if it possesses two of those factors, but if it possesses one or none of those factors, the City is given unlimited discretion to deem the facility as having a medical appearance. LL17 § 20-815(g). The law exempts from its provisions facilities which are "licensed . . . to provide medical or pharmaceutical services" or have a licensed medical provider on staff. *Id.*

Petitioners have primary purposes of offering information, counseling, classes, housing, and/or free non-medical material assistance to potentially pregnant women. They do not have licensed medical professionals on staff as specified in LL17's exemption. They do not offer ultrasounds or prenatal care automatically rendering them PSCs under LL17 § 20-815(g). Therefore, they are subject to LL17's medical "appearance" test, but they meet at most one of the listed factors. Pet. App. at 18g–22g. Pregnancy Care Center of New York and Boro Pregnancy Counseling Center apparently meet one "appearance" factor because they offer women free

pregnancy test kits that the women self-administer. *Id*. at 18g–20g. Good Counsel is not a pregnancy counseling center at all, but because it collects the health insurance information of its pregnant residents to help them go to the women's own doctors, it apparently meets a factor of the "appearance" test. *Id*. at 20g–22g.

Thus, LL17 gives the City unfettered discretion to deem Petitioners as PSCs and subject them to the City's coerced speech, not because they have any objective or discernible medical "appearance," but because the City disagrees with their pro-life viewpoint. Only at the peril of massive fines, closure, and possible jail time could Petitioners act as if they are not subject to LL17. *See* LL17 § 20-818.

II. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Southern District of New York, challenging LL17 under the First Amendment's Free Speech Clause and the Fourteenth Amendment's Due Process Clause. Pet. App. at 21g–24g. Petitioners alleged that the disclosure provisions violated their right to be free from governmentally compelled speech. *Id*. at 21g–23g. Petitioners further challenged as impermissibly vague the City's uncabined discretion to deem a center as having the "appearance of a licensed medical facility." *Id*. at 23g–24g.

The district court granted Petitioners' request for a preliminary injunction. It enjoined all of LL17's disclosure requirements as violating the freedom of speech, and enjoined the law in its entirety as being

unconstitutionally vague regarding which centers the City may deem to be a PSC. Pet. App. at 24b, 26b–29b. It presumed a threat of irreparable harm to Plaintiffs' First Amendment rights, *id*. at 8b–9b, and held that Petitioners had demonstrated a likelihood of success on the merits. *Id*. at 24b, 28b.

Respondents appealed. A divided panel of the court of appeals affirmed in part and reversed in part. The panel majority below held that the First Amendment does not allow the City to require Petitioners to disclose whether they offer abortion and related items, or the fact that the City believes women should consult doctors. Pet. App. at 36a, 39a. Petitioners do not appeal this holding.

But the panel majority also held that the "Status Disclosure"—declaring that Petitioners do not have licensed medical staff—satisfies strict scrutiny even though Petitioners are noncommercial, non-medical speakers in the midst of an ideological and factual communication, and even though that disclosure will be required on each and every advertisement, an unknown number of phone calls, and multiple times on their own walls. The Second Circuit vacated the district court injunction as to that disclosure. *Id*. at 31a–34a, 40a. The court of appeals also vacated the district court's holding that LL17 was void for vagueness, even though it empowers the City to deem a center to have the disfavored "appearance" "not solely by reference to" the factors in LL17. *Id*. at 22a–24a, 40a.

Judge Wesley dissented. Describing LL17 as a "bureaucrat's dream," he found the law to be

impermissibly vague because "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.'" Pet. App. at 40a–41a. LL17's appearance test "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." *Id.* at 40a.

The "fundamental flaw" in LL17, Judge Wesley explained, was that the "enumerating factors" in the "appearance of a licensed medical facility" test are only "'among' those to be considered, meaning that the City can find a facility covered absent any *or all of* the listed qualities." Pet. App. at 41a (emphasis in original). "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." *Id.* at 42a. The law goes even further, "explicitly authoriz[ing] the City to rely on other, unlisted factors, not known to anyone, which may themselves be vague or discriminate on the basis of viewpoint." *Id.*

Judge Wesley further noted that, at oral argument, counsel for the City explained that the definition of PSC "is meant to cover anything that comes along in the future." Pet. App. at 43a (internal citations omitted). "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." *Id.* at 43a. Importantly, in the First Amendment context, "the [vagueness] doctrine demands a greater degree of specificity than in other contexts," but the panel majority violated this principle. *Id.* at 41a (internal citations omitted). Judge Wesley found that LL17 could not withstand a vagueness challenge, especially in light of its infringement of First Amendment freedoms.

The Second Circuit denied a timely petition for rehearing en banc on March 18, 2014. Pet. App. at 1c. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

The Second Circuit created a circuit conflict of vital national importance and contravened this Court's precedent when it ignored the holding in *Riley* and instead used footnote 11 to force a noncommercial speaker to speak a message within its ideological speech. The decision below also departed from longstanding precedent of this Court prohibiting unfettered government discretion in deciding who must comply with a speech regulation.

I. The Decision Below Creates a Conflict among the Courts of Appeals over Whether Noncommercial Speakers and Speech Can Be Coerced.

The decision below tried to force a square peg into a hole that other circuits insist is round. *Riley*'s holding prohibits coerced speech. It includes a

narrow exception in footnote 11 which says a paid solicitor can be required to say that he is a professional. 487 U.S. at 799 n.11. The Second Circuit imposed that notion on the opposite situation, letting New York City force a noncommercial speaker, engaging in non-paid, non-fundraising speech, to say it is *not* a professional.

The Tenth Circuit has rejected the idea that *Riley* footnote 11 could be flipped on its head in such a manner. *Meyer*, 120 F.3d 1092. Rulings of the Fourth, Sixth, and Eleventh Circuits are consistent with *Meyer* and similarly incompatible with the decision below. The severity of the Second Circuit's misinterpretation of *Riley* shows why other circuits have reached the opposite conclusion.

A. The Second Circuit Misconstrued *Riley*.

The central thrust of *Riley* was to invalidate coerced speech even in the context of professional solicitors engaging in solicitations for a charitable organization. 487 U.S. at 803. In dicta, this Court suggested that the paid solicitor might, however, legitimately be required to disclose the fact that he is being paid: "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." *Id*. at 799 n.11.

By its own terms, and in the context of *Riley's* actual holdings, that footnote cannot mean that the noncommercial, non-paid charity *itself* could be

coerced to recite disclosures within its own ideological (non-solicitation) messages, disclosures saying not that they are professional but that they are not professional.

But that reversal of logic is what occurred below. The panel majority declared that because this "Court suggested that a requirement that solicitors disclose their professional status is 'a narrowly tailored requirement [that] would withstand First Amendment scrutiny,'" somehow LL17 can coerce the non-profit non-soliciting Petitioners to tell women they have no medical licenses. Pet. App. at 31a (citing *Riley*, 487 U.S. at 799 n.11).

This contradicts *Riley* and turns First Amendment doctrine on its head. The rationale for *Riley*'s footnote 11 is apparently the common precedent saying that commercial or professional speech (like a paid solicitor saying he is paid) sometimes receives less First Amendment protection. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–71 (1976). But the panel majority used that context to justify coercing pure non-commercial free speech. LL17 is not a regulation of solicitation or fundraising, but imposes directly on Petitioners' ideological, factual, and freely given promotion of alternatives to abortion. LL17's disclosures do not make Petitioners say they *are* commercial or professional because by definition they are not. Requiring them to say so drags noncommercial and nonprofessional speech down into the lower levels of protection afforded commercial and professional speech. The Second Circuit therefore pits *Riley*'s

footnote 11 against *Riley*'s actual holdings—which *prohibited* coerced disclosures on noncommercial speakers even though their speech was intertwined with solicitation (which is not present here). *See* 487 U.S. at 795–801.

The holding below would let the government force a charity itself while it is actually offering its charitable information to express the disclaimer that "I am *not* being paid, and am *not* a professional provider," even though it is not a hired solicitor and is not trying to fundraise. The absurdity of this holding creates a stark contrast with its proper application by other circuits.

B. The Decision Below Conflicts with the Tenth Circuit, Which Says *Riley* Footnote 11 Extends to Paid Solicitors but not to the Pure Speech of Noncommercial Speakers.

The Tenth Circuit rejected the interpretation of *Riley* footnote 11, and its imposition on noncommercial speakers, that the Second Circuit imposed on Petitioners in this case. *Meyer*, 120 F.3d 1092, concerned a Colorado law that, among other things, required citizens to wear identification badges if they wished to circulate a petition to put an issue on the Colorado ballot. *Id.* at 1096–97. Several petition circulators challenged the requirement as a coercion of speech, and the government insisted that "the badge requirement has been upheld by" this Court in *Riley* footnote 11. *Id.* at 1101. The Tenth Circuit rejected this interpretation and struck down the badge requirement, stating that *Riley* did not let

a state "condition political expression on the wearing of an identification badge." *Id.* at 1101, 1104.

The decision below directly conflicts with *Meyer* on this point and compels noncommercial speakers to insert government dictated information into the heart of their expressive activities.

C. The Decision Below Creates Similar Tension with the Fourth, Sixth and Eleventh Circuit's Interpretation of *Riley* Footnote 11.

As does the Tenth Circuit, all other circuits to apply *Riley* footnote 11—the Fourth, Sixth, and Eleventh—apply it not to ideological speech of noncommercial speakers, but only to the commercial status of paid solicitors.

The Fourth Circuit in *National Federation of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005), rejected a constitutional challenge to a compelled disclosure law regulating charitable solicitors. The law required that paid solicitors "promptly explain that they are seeking donations on behalf of a specific charity." *Id.* at 343. Relying on the dicta in *Riley* footnote 11, the court upheld the disclosure requirement. *Id.* But in doing so it recognized a distinction between the charity itself and its solicitors. "'[S]oliciting financial support is undoubtedly subject to reasonable regulation' so long as the regulation is 'undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech.'" *Id.* at 338 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

In this regard the Fourth Circuit maintained full First Amendment protection for the pure speech of noncommercial speakers themselves, while justifying certain disclosures pertaining to their paid solicitors. *See id*. The Fourth Circuit further emphasized the full First Amendment protection afforded to noncommercial speech itself when it struck down solicitation disclosures in *Telco Communications v. Varbaugh*, 885 F.2d 1225, 1235 (4th Cir. 1989). Relying on the actual holdings in *Riley*, the court reasoned that while the law may be the most effective means of monitoring professional solicitors, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Id*. at 1233 (citing *Riley*, 487 U.S. at 795; *Schaumburg*, 444 U.S. at 639; *Schneider v. State*, 308 U.S. 147, 164 (1939)).

The Fourth Circuit's holdings cannot be reconciled with the decision below in the present case.[1] The Second Circuit took the lesser level of protection that the Fourth Circuit recognized is

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[1] The Second Circuit made note of a Fourth Circuit decision that upheld a district court ruling that refused to enjoin a "status disclosure." *See Centro Tepeyac v. Montgomery Cnty*., 722 F.3d 184, 190–92 (4th Cir. 2013). However, the Fourth Circuit affirmed based solely on deferential review and did not issue a holding on how to apply *Riley*. *Id.* at 193. Here, in contrast, the Second Circuit's reversal imposed a novel interpretation of *Riley*. On remand in *Centro Tepeyac*, the district court was free to apply *Riley* appropriately and it did so, striking down the entire ordinance including its status disclosure. *See Centro Tepeyac v. Montgomery Cnty*., __ F. Supp. 2d __, No. 10-1259, 2014 WL 923230 (D. Md. Mar. 7 2014) . Thus, the decision below is inconsistent with the final disposition in *Centro Tepeyac*.

afforded to solicitation as a unique category, and imposed it upward on the freely offered speech of speakers who are not soliciting and by definition are not professional or commercial.

The Sixth Circuit, likewise relying on *Riley* footnote 11, affirmed a district court decision upholding regulations of charitable solicitors. *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995). Those disclosures required paid charitable solicitors to disclose certain information about the solicitor, as well as the charity the solicitor represented, the charitable purposes to be advanced by the funds raised, and the percentages of revenue handed over between the solicitor and the charitable organization. *Id*. at 1485. The court's rulings only apply in the context of a paid solicitor and its solicitation of funds.

Finally, the Eleventh Circuit invalidated an ordinance requiring compelled disclosures by professional solicitors under the Free Exercise Clause. *Church of Scientology Service Org. v. Clearwater*, 2 F.3d 1514 (11th Cir. 1993). But it allowed that, on remand, "limited" kinds of disclosure rules could be preserved in reference to *Riley* footnote 11, but only with respect to the context of solicitation of funds. *Id*. at 1539.

Until the decision below, the courts of appeals uniformly interpreted *Riley* according to its plain meaning and context. Under that rule, paid solicitation can be subject to narrow disclosure requirements pertaining to the issue of paid solicitation itself. 487 U.S. at 799 n.11. Otherwise, it

is impermissible to compel speech upon ideological or charitable groups in their noncommercial communications. *Id.* at 797–801. The Second Circuit's radical reinterpretation of *Riley* creates a circuit conflict and imposes a rule that threatens to swallow *Riley*'s actual holdings.

II. The Decision Below Decided an Important Federal Question in a Way that Conflicts with This Court's Precedent against Compelled Speech.

As discussed above, *supra* I.A., the decision below severely misapplies *Riley*, reinterpreting its footnote dicta in a way that contradicts *Riley*'s own holdings. *Riley*'s footnote suggested that a paid solicitor engaging in fundraising could be required to disclose information central to his commercial status and activity, namely, that he is a professional solicitor. 487 U.S. at 799 n. 11.

The Second Circuit used footnote 11 in *Riley* to force speech upon ideological speakers instead of on the facts set forth in that passage. The panel justified compelled speech outside the context of any paid solicitor since Petitioners use none in this matter. The compulsion is imposed in the midst of the delivery of Petitioners' core message about abortion alternatives, rather than in fundraising. And it requires Petitioners to speak a message not related to their being paid or being professional, but explicitly due to the fact that they are neither.

The hypothesized situation in *Riley*'s footnote 11 applies, at most, in a context wholly inapplicable

here. This Court has repeatedly held that commercial speech garners less protection than noncommercial speech. *See, e.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. Thus the *Riley* dictum cannot be extrapolated to justify coerced speech in a purely noncommercial context and communication. Notably, Justice Scalia wrote a separate concurrence in *Riley* to clarify that, in his opinion, "[t]he dictum in footnote 11 represents a departure from our traditional understanding" of the First Amendment. 487 U.S. at 804 (Scalia, J., concurring).

The decision below further violates the fundamental tenet that the government cannot force a speaker to recite the government's message. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). This Court has made clear that, under the First Amendment, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)).

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Therefore, laws which mandate speech are considered "content-based regulations" subject to strict scrutiny. *Id*. This Court recently reiterated the principle that "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas it approves." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2288 (2012) (internal citations omitted).

Such principles are especially acute where, as here, they deal with controversial topics such as abortion. *See, e.g.*, *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2671 (2011) (Where the government and citizens holds "divergent views" about the value of their speech content, "[u]nder the Constitution, resolution of that debate must result from free and uninhibited speech."); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974) (holding that a Florida statute requiring that newspapers allow for editorial replies when a "candidate for nomination or election is assailed regarding his personal character or official record by any newspaper" was unconstitutional compelled speech).

These principles apply whether the compelled disclosure is characterized as one of "opinion" or of "fact." *See Riley*, 487 U.S. at 797–98 (between "compelled statements of opinion" and "compelled statements of 'fact': either form of compulsion burdens protected speech"). "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 v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573–74 (1995) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995); *Riley*, 487 U.S. at 797–98).

The decision below violates this Court's recent and rigorous requirement that speech restrictions provide compelling evidence to satisfy strict scrutiny. In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2732 (2011), the Court considered

whether a California law that imposed labeling on violent video games violated the freedom of speech. Treating the law as a content-based restriction on protected speech, the Court applied strict scrutiny. *Id*. at 2738. It explained, as to the alleged compelling interest, 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. . . . That is a demanding standard." *Id*. The government "bears the risk of uncertainty" in a speech restriction, such that "*ambiguous proof will not suffice*." *Id.* at 2739 (emphasis added).

The Court found that even scientific studies were insufficient, where they merely showed a correlative "connection" between violent video games and harm to children, because under strict scrutiny the state must "prove that violent video games *cause* minors to *act* aggressively . . ." *Id*. Otherwise the "evidence is not compelling." *Id*.

The evidence presented to the courts below woefully fails this standard. The City's theory is that if all PSC ads, their phone communications, and signs on their walls do not tell women that their staff members do not have medical licenses, women will be physically harmed by not seeking doctors while believing they are receiving medical care. But the City offered no data showing that even one woman actually suffered such harm because of the lack of those messages. It offered not one scientific study purporting to show even a correlation, much less a cause, between pregnancy centers seeing women and those women suffering poorer health.

For all the City and the Second Circuit knew, women going to PSCs have *better* health outcomes than otherwise. This paucity of evidence fails the *Brown* standard abysmally. Likewise, in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 821–22 (2000), this Court held that a "handful of complaints" were insufficient, yet the City did not even have one complaint from an actual PSC client.

Finally, the Second Circuit's use of *Riley*'s footnote negates *Riley*'s holding imposing the least restrictive means test. *Riley* rejected the state's attempt to force charitable solicitors to engage in disclosures. It insisted that the least restrictive means test limits the government to the option of punishing actual fraud and misleading statements, and to reciting its messages itself, instead of using compelled speech to correct a perceived harm from noncommercial speakers. 487 U.S. at 795–800. "If the First Amendment means anything, it means that regulating speech *must* be a last—not first—resort. *Yet here it seems to have been the first strategy the Government thought to try.*" *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (emphasis added).[2]

The Second Circuit's decision upholding compelled speech on every PSC advertisement, its own walls, and an unknown number of its phone

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[2] Even under the inapplicable lesser standard for commercial speech, less restrictive alternatives including educational campaigns or counter-speech render a compelled-speech law unconstitutional. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996) (plurality opinion); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006).

calls, disregards this Court's compelled speech precedent at every level of the analysis.

III. The Decision Below Decided an Important Federal Question in a Way that Conflicts with This Court's Void-for-Vagueness Jurisprudence.

The Second Circuit held that LL17's "appearance of a licensed medical facility" standard for application of the law was not impermissibly vague. Such a decision sharply conflicts with precedent of this Court and long-recognized principles of due process.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." *Winters v. New York*, 333 U.S. 507, 509 (1948). "[A] law or regulation that 'threatens to inhibit the exercise of constitutionally protected rights,' such as the right of free speech, will generally be subject to a more stringent vagueness test." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The Court below departed from long-held precedent of this Court in holding that LL17's expandable "appearance of a licensed medical facility" test was not impermissibly vague. The

"appearance test" in LL17 is formulated as follows:

> *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.

LL17 § 20-815(g) (emphasis added). The Second Circuit held that the "appearance test" was not impermissibly vague because it was "bound by the requirement of an 'appearance' of a 'licensed medical facility," and that the listed factors were "'objective criteria' that cabin the definition of 'appearance.'" Pet. App. at 23a (citing *United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir. 1992)).

This holding disregards the text of the law and therefore this Court's precedent. LL17 in no way requires the City to deem a facility a PSC based on

the listed criteria because by definition in the law the City may deem such an appearance to exist even if one or none of those factors are present. LL17 grants unbridled discretion to City officials in providing a nonexclusive list, no factor of which must be cited in subjecting a facility to the prophylactic legislation. The subjective "appearance" requirement itself provides no guidance either.

LL17 "contains more than the possibility of censorship through uncontrolled discretion." *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992). As this Court has continually recognized, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant natures of arbitrary and discriminatory application." *Grayned*, 408 U.S. 108–09. "Uncertain meanings inevitably lead citizens to 'steer far wide of the unlawful zone'. . . than if the boundaries of the forbidden areas are clearly marked." *Id*. at 109.

In *City of Lakewood v. Plain Dealer Publishing, Co.*, 486 U.S. 750, 772 (1988), this Court held that a licensure scheme for placement of news racks was impermissibly vague because it vested unbridled discretion in the licensor. The unclear criteria in *Lakewood* made it "apparent that the face of the ordinance contains no explicit limits on the [government official's] discretion. *Id*. at 769. As the same is true here, it is impossible to distinguish the holding below from *Lakewood*'s ruling to the contrary.

In dissent below, Judge Wesley recognized the inherent flaws in the panel majority's reasoning. Stating that LL17 is a "bureaucrat's dream," Judge Wesley vigorously dissented from the majority's holding that LL17 was not impermissibly vague. Pet. App. 40a. LL17 "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." Id. LL17, Judge Wesley explained, "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*." *Id.* at 41a (emphasis added).

> 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.

Id. at 42a.

Judge Wesley noted that Respondents all but conceded that the purpose of the amorphous "appearance test" is to cover future formulations of

pregnancy service centers, noting that counsel at oral argument stated that "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.'" *Id.* at 42a–43a (internal citations omitted). "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." *Id.* at 43a (internal citations omitted).

IV. The Question Presented Is Recurring and Nationally Important.

Intervention of this Court is necessary to correct the inconsistency among the Courts of Appeals of compelled speech restrictions on noncommercial speakers, as well as the proper application of the vagueness doctrine. The decision below created a conflict among the courts of appeals that, absent this Court's intervention, will remain unresolved.

Absent this Court's intervention, the constitutional issues presented by LL17 will recur throughout the country. Many jurisdictions throughout the United States have enacted similar laws restricting pregnancy service centers as a result of a public campaign promulgated by NARAL Pro-Choice America, a pro-abortion group which is opposed to pregnancy service centers. *See* NARAL, "Crisis Pregnancy Centers," *available at* http://www.prochoiceamerica.org/what-is-choice/

abortion/abortion-crisis-pregnancy-centers.html (last visited June 10, 2014).

Indeed, there are several other cases already decided or currently pending in both the Fourth and Fifth Circuits challenging similar laws regulating pregnancy service centers. *See Centro Tepeyac*, 2014 WL 923230; *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804 (D. Md. 2011), *aff'd in part and vacated in part*, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264 (4th Cir. 2013) (en banc); *Austin Lifecare, Inc. v. City of Austin*, No. 11-cv-875 (W.D. Tex.).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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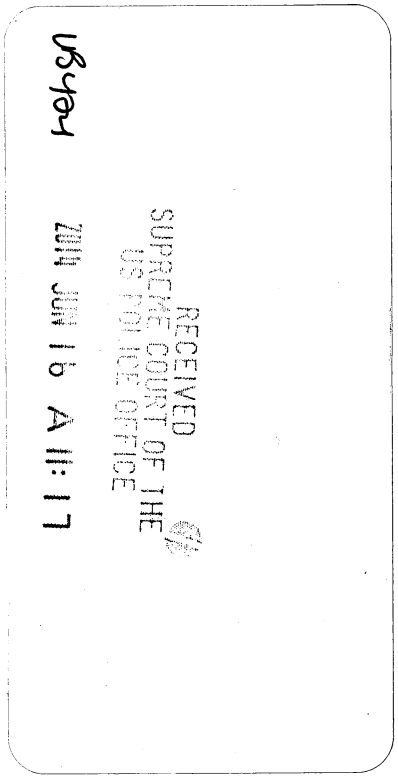

No. _____

IN THE
Supreme Court of the United States

PREGNANCY CARE CENTER OF NEW YORK; BORO PREGNANCY COUNSELING CENTER; GOOD COUNSEL, INC.,

Petitioners,

v.

CITY OF NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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