

# 11-2735-cv(L)

11-2929-cv

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IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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

*Plaintiffs-Appellees,*

—against—

CITY OF NEW YORK, A MUNICIPAL CORPORATION, MICHAEL BLOOMBERG, MAYOR OF NEW YORK CITY, in his official capacity, JONATHAN MINTZ, THE COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, in his official capacity,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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### BRIEF FOR *AMICUS CURIAE* SCHOLARS FROM THE INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL IN SUPPORT OF DEFENDANTS-APPELLANTS

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### INTEREST OF AMICUS CURIAE<sup>1</sup>

Amici are scholars<sup>2</sup> associated with the Information Society Project at Yale Law School (ISP)<sup>3</sup> and the ISP's Program for the Study of Reproductive Justice. The program focuses on a wide range of issues concerning the intersections between reproductive rights, health policy, technology policy, privacy concerns, and the regulation and dissemination of information relevant to reproductive freedoms. Amici are **Jack Balkin**, Knight Professor of Constitutional Law and the First Amendment at Yale Law School and founder and director of the ISP; **Margot Kaminski**, Research Scholar in Law and Executive Director of the ISP, and **Anjali Dalal**, Google Policy Fellow of the ISP, both of whom write on privacy, information politics and First Amendment issues; **Priscilla Smith**, Senior Fellow of the ISP, and **Jennifer Keighley**, Resident Fellow of the ISP, both of whom write on reproductive rights and privacy law, with a particular focus on information policy.

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<sup>1</sup>This brief is filed with the consent of the parties as required under F.R.A.P. 29. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amicus curiae or its counsel contributed money intended to fund preparing or submitting the brief.

<sup>2</sup>The Scholars participate in this case in their personal capacity; titles are used only for purposes of identification.

<sup>3</sup>The Information Society Project studies the implications of new information technologies for law and society, guided by the values of democracy, human development, and social justice.

### STATEMENT OF FACTS

Local Law 17 of 2011 (“the Ordinance”) regulates facilities it dubs “pregnancy service centers” (hereinafter “PSCs”), that have a primary purpose of providing services to women who are or may be pregnant, and that either (1) offer obstetric ultrasounds, sonograms, or prenatal care,<sup>4</sup> or (2) have “the appearance of a licensed medical facility.” N.Y.C. Admin. Code § 20-815(g). The Ordinance lists six factors that courts should consider in evaluating whether a PSC has “the appearance of a licensed medical facility,” the presence of any two of which constitutes prima facie evidence that it does. *Id.* The law exempts from its coverage any facility that is *actually* licensed to provide medical care, or has a licensed medical provider present to provide or supervise the provision of services. *Id.* Thus, the law only targets facilities that offer medical services or otherwise appear to the consumer to be a medical facility, but have no licensed medical provider on staff, thus creating a likelihood of consumer deception.

The Ordinance requires PSCs to make three factual disclosures: 1) that the PSC does not have a licensed medical provider on staff; 2) that the NYC Department of Health encourages women who are or may be pregnant

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<sup>4</sup> Prenatal care is defined in medical terms: “services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy.” N.Y.C. Admin. Code § 20-815(i).

to consult with a licensed medical provider; and 3) whether the PSC provides or refers for abortions, emergency contraception, and prenatal care. N.Y.C. Admin. Code § 20-816(a)-(e). These disclosures must be made 1) on any advertisements for the PSC's services; 2) on one sign at the PSC's entrance, and one sign inside the PSC's waiting area; and 3) orally, but only upon the request for prenatal care, emergency contraception, or abortion services. *Id.* at § 20-816(f). The Ordinance does not ban any speech or prevent the facilities from disassociating themselves from or commenting on the disclosures.

Given the evidence of the deceptive tactics used by the PSCs, *see* Appellants' Brief 14-24, and the resulting harm to consumers, the City Council concluded that the Ordinance's factual disclosure requirements were a necessary measure to curtail PSCs' ongoing practice of defrauding and deceiving women seeking time-sensitive medical care.

#### **SUMMARY OF ARGUMENT**

The district court erred in applying strict scrutiny to strike down the Ordinance for two reasons. First, the court erred in determining that the regulated speech was not commercial. It ignored Supreme Court precedent requiring the court to evaluate the nature of regulated speech in its entirety, taking into account the point of view of the consumer and the impact of the

speech on her economic interests. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 567 (1980). Facilities that offer medical services or hold themselves out as medical facilities to consumers in the marketplace – the only facilities to which the Ordinance applies – can not evade commercial speech doctrine and insulate themselves from reasonable fraud prevention efforts simply by offering services to consumers free of charge. Speech that solicits clients for the PSCs, advertises PSCs, and offers medical services qualifies as commercial speech, even if women do not have to pay to receive services, because it targets them as consumers by offering them free services for which they otherwise would pay. Just as religious speech is not commercialized by the mere solicitation of funds, *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (speech “in pursuit of a clearly religious activity” not commercial, even where money solicited), the free nature of the services provided by PSCs does not automatically make their speech non-commercial. If a reasonable consumer would understand the solicitation as proposing a commercial transaction, including a free substitute for a traditionally commercial transaction, then it can be regulated as consumer speech.

Reasonable regulations of commercial speech are permissible because governments have a valid interest in preventing the deception of consumers

and ensuring the dissemination of truthful, non-misleading information. The First Amendment does not prevent New York City from imposing the Ordinance's narrow factual disclosure requirements to prevent fraud and protect the health of city residents, all without burdening any constitutionally-protected speech, merely because these facilities are able to bankroll the provision of services to unsuspecting consumers. The Ordinance, which seeks solely to inform women about the non-medical and limited nature of the services provided by PSCs, is a reasonable factual disclosure law designed to prevent consumer deception. Any ruling to the contrary would undermine the purpose of the commercial speech doctrine, which is to protect consumers from inaccurate speech in the marketplace.

Second, even if the commercial speech doctrine did not apply, this Court should nonetheless uphold the Ordinance under a lower level of scrutiny<sup>5</sup> because these factual disclosure requirements target only fraudulent or illegal speech that is not protected by the First Amendment. The Ordinance does not interfere with protected speech of any kind. It applies only to facilities offering medical services to consumers or otherwise appearing to consumers to be medical facilities, and compels them to set the

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<sup>5</sup> We agree with Appellants that the Ordinance withstands strict scrutiny, *see* Appellants' Brief 70-79, but contend that a lower level of scrutiny is appropriate.



record straight by informing potential visitors they are not licensed medical facilities and do not offer a full range of reproductive medical services.