11-2735-cv

& 11-2929-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

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 NOTFOR-PROFIT CORPORATION,

Plaintiffs-Appellees,

(CAPTION CONTINUED ON INSIDE COVER)

On Appeal From the United States District Court
For The Southern District Of New York
No. 11-CIV-02055 Before the Honroable William H. Pauley, III

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF DEFENDANTS-APPELLANTS

Brian J. Kreiswirth
Chair, Committee on Civil Rights,
THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK
42 West 44th Street
New York, NY 10036
(212) 382-6600

Attorney for Amicus Curiae The Association of the Bar of the City of New York

November 7, 2011

v.

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.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

CONSENT OF THE PARTIES

All parties have consented to the filing of this amicus curiae brief by the Association of the Bar of the City of New York.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York[1] (the "Association") was founded in 1870 and has been dedicated ever since to maintaining the highest ethical standards of the profession, promoting reform of the law and providing service to the profession and the public. With over 23,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving and promoting civil liberties and civil rights. Through its standing committees, including the Committee on Civil Rights, the Committee on Sex and the Law, and the Health Law Committee, the Association is interested in ensuring that women have access to timely, vital and constitutionally-protected reproductive health information and care, particularly where such interests can be promoted without imposing an unconstitutional burden on First Amendment rights.

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[1] No counsel for any party helped author the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the amicus curiae, its members or its counsel, contributed money that was intended to fund preparing or submitting the brief.

PRELIMINARY STATEMENT

Appellant, the City of New York, enacted New York City Local Law No. 17 ("Local Law 17") with the intent of ensuring "that consumers in New York City have access to comprehensive information about and timely access to all types of reproductive health services." Local Law 17, § 1, *Legislative Findings and Intent* (2011). The law requires that certain organizations providing services to pregnant women disclose the extent of the services they provide and make other related disclosures.

Appellees are entities that provide services to pregnant women and that may be subject to Local Law 17's requirements. Appellees brought suit claiming that Local Law 17 violates their constitutional free speech rights under both the United States and New York constitutions and moved for a preliminary injunction enjoining Local Law 17 from coming into effect until their suits are resolved.

The question addressed here is whether Appellees have demonstrated a likelihood of success in proving that Local Law 17 violates their constitutional free speech rights. The District Court found that they had. After reviewing the case law, we urge this Court to conclude that they have not.

STATEMENT OF FACTS AND DECISION BELOW

Local Law 17 imposes certain disclosure requirements on pregnancy services centers, defined under the law as "facilit[ies] . . . the primary purpose of which is to provide services to women who are or may be pregnant, that either: (1) offer[] obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) ha[ve] the appearance of a licensed medical facility". N.Y.C. Admin. Code § 20-815(g) (2011). The law expressly excludes from the definition of pregnancy services center "a facility that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly supervise the provision of all services." *Id.*

Local Law 17 requires that pregnancy services centers disclose:

- that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider;
- whether or not the center has a licensed medical provider on staff who provides or supervises the provision of all services provided by the center; and
- whether or not the center provides, or provides referrals for, abortions, emergency contraception and prenatal care.

Id. at § 20-816(a-e). The law also prescribes the format for such disclosures. *Id.* at § 20-816(f).[2]

In enacting Local Law 17, the New York City Council made several important findings, including:

- that "[s]ome pregnancy services centers have engaged in conduct that wrongly leads clients to believe that they have received reproductive health care and counseling from a licensed medical provider";
- "that some pregnancy services centers in New York City engage in deceptive practices, which include misleading [women] about the types of goods and services they provide on-site, misleading [women] about . . . referrals to third parties, and misleading [women] about the availability of licensed medical providers that provide or oversee services on-site";
- "that such deceptive practices can impede and/or delay . . . access to reproductive health services"; and
- that "[p]renatal care, abortion and emergency contraception are all time sensitive services".

Local Law 17, §1, *Legislative Findings and Intent*.

The deceptive practices engaged in by some pregnancy services centers were detailed in testimony to the New York City Council. For example, one witness testified about visiting a pregnancy services center

[2] Local Law 17 also sets forth certain requirements with regard to preserving the confidentiality of health information provided by clients of pregnancy services centers. *Id.* at §20-817.

when she was 23 weeks pregnant. (Hearing on Intro. 311 before New York City Council Comm. on Women's Issues, Nov. 1, 2010[3]: 150.) She was given an over-the-counter pregnancy test and, upon being told that the results were inconclusive, was taken to an examination room where a woman dressed in scrubs "pulled a wand over [her] belly", "played the sound of the heartbeat for [her]", and after only "a few more quick swipes" declared that she had given the baby a "full examination," and pronounced the baby "healthy and perfect." (*Id.* at 151.) The witness testified that, had she not known better, she would have been led to believe that she had been given "a full checkup". (*Id.* at 151-52.) Information was presented about numerous other women who experienced deception and delays in obtaining medical care as a result of the practices of pregnancy services centers. (*E.g.*, *Id.* at 64-67.)

In granting a preliminary injunction enjoining the enforcement of Local Law 17, the District Court first found that the law was subject to strict scrutiny because (1) it did not regulate commercial speech (Order at 9-12); (2) "the lower scrutiny accorded factual disclosures applies only to

[3] *Available at*: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=777861&GUID=F7F0B7D7-2FE7-456D-A7A7-1633C9880D92&Options=ID|Text|&Search=pregnancy (last visited Nov. 4, 2011).

commercial speech" (*Id.* at 12); and (3) the lower scrutiny accorded regulation of professional speech, including informed consent requirements, did not apply because Plaintiffs are not engaged in the practice of medicine or in professional speech (because they are not licensed under any professional standard) (*Id.* at 13-14).

The District Court then held that Local Law 17 is not sufficiently narrowly tailored to survive strict scrutiny "because there are less restrictive alternatives for preventing deceptive practices that impede access to reproductive care". (*Id.* at 15.) Specifically, the court found that Local Law 17 was not narrowly tailored because, *inter alia*, it reached innocent speech (*Id.* at 15-16); other approaches to disclosure would "convey the City's message and be less burdensome on Plaintiffs' speech" (*Id.* at 16); prosecutions under anti-fraud statutes "offer a less restrictive alternative to imposing speech obligations on private speakers" (*Id.* at 17); and licensing of ultrasound technicians was possible (thereby bringing the technicians under the auspices of the professional speech regime) (*Id.* at 17-18).

In the Association's view, the circumstances of this case do not warrant strict scrutiny.[4] However, even if they did, the District Court

[4] The Association agrees with the positions asserted by Defendants and fellow amici that a lesser standard of review is appropriate in this case for a

misapplied strict scrutiny here by identifying and relying on these largely untested alternative approaches to serving the City of New York's compelling interest—and also by rejecting the City's express finding that certain of these alternatives were ineffective at meeting that interest.

ARGUMENT

"The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Commc'ns. of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Satisfying this test "does not require exhaustion of every conceivable . . . alternative." *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003). The City of New York has a compelling interest in ensuring that women have adequate information about their reproductive health, are able to access the medical care that they need (including abortion services), and can do so in a timely fashion. Local Law 17 is aimed at serving those interests and is narrowly tailored so as to satisfy the least restrictive means standard. Accordingly, Local Law 17 survives

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variety of reasons. Nevertheless, the Association writes separately to assert that, even under the most stringent level of scrutiny, Local Law 17 is a constitutional exercise of government authority and does not impermissibly burden the First Amendment or other constitutional rights of Appellees.

even the strictest scrutiny applied to government actions that affect First Amendment rights.

I. LOCAL LAW 17 SERVES A COMPELLING GOVERNMENT INTEREST

The importance of the interest served by Local Law 17 cannot be overstated. Although declining to decide whether the record supported a finding that Local Law 17 serves a compelling government interest, the court below did recognize that "the prevention of deception related to reproductive health care is of paramount importance" and that "[l]ack of transparency and delay in prenatal care can gravely impact a woman's health". (Order at 14-15.)

A. ACCESS TO ACCURATE INFORMATION AND TIMELY REPRODUCTIVE CARE IS VITAL TO WOMEN'S HEALTH

Women face many obstacles to receiving comprehensive, affordable, quality health care. One significant barrier arises when health care providers, insurers, employers, and facilities do not provide comprehensive access to care and/or information on health care alternatives, whether intentionally or otherwise. When women are not informed about all of their health care options or about restrictions on information or services, harmful consequences to their health can and do result.

Although disclosure is important for *any* individual seeking health care services or information, it is particularly critical for women seeking reproductive health services because of the time sensitivity of many such services. Delay in access caused by a lack of information or awareness of restrictions can result in serious harm to women and, in some cases, can result in negative health outcomes for children after birth. For example:

- **Access to emergency contraception.** Timely access to emergency contraception is important for all women, but particularly for victims of sexual assault. Each year, 25,000 pregnancies occur as a result of sexual assault, and experts predict that timely access to emergency contraception could prevent up to approximately 90% of these pregnancies.[5] Two brands of emergency contraception are effective for only up to 72 hours following birth control failure, unprotected sex, or sexual assault;[6] a third

[5] Felicia Stewart & James Trussell, *Prevention of Pregnancy Resulting from Rape: A Neglected Preventative Health Measure*, 19 Am. J. Preventive Med. 228–29 (2000).

[6] Highlights of Prescribing Information, Plan B One-Step (Levonorgestrel) Tablet, 1.5 mg, for Oral Use ("Take Plan B One-Step orally as soon as possible within 72 hours after unprotected intercourse or a known or suspected contraceptive failure. Efficacy is better if the tablet is taken as soon as possible after unprotected intercourse."), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (last visited Nov. 4, 2011); Highlights of Prescribing Information, Next Choice (Levonorgestrel) Tablets, .75mg, for Oral Use ("The first tablet is taken orally as soon as possible within 72 hours after unprotected intercourse. The second tablet should be taken 12 hours after the first dose. Efficacy is better if Next Choice™ is taken as soon as possible after unprotected intercourse."), *available at* http://pi.watson.com/prescribing_info.asp?type=pi&product_group=1648 (last visited Nov. 4, 2011).

brand is effective for up to 120 hours (about five days).[7] Emergency contraception is more effective the earlier it is taken.[8]

- **Access to prenatal care.** Early prenatal care helps a woman and her health care provider monitor her pregnancy and identify any potential health problems before they become serious. Health care providers may give preventive advice to encourage a healthy lifestyle, treat conditions such as diabetes and high blood pressure, and refer women to services such as nutrition and smoking cessation programs.[9] Prenatal care may also "contribute to improved infant survival by linking women with high-risk pregnancies to better obstetrical and neonatal care".[10] Women who receive care late in their pregnancy, or who do not receive any prenatal

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[7] Highlights of Prescribing Information, ella (Ulipristal Acetate) Tablet ("Instruct patients to take one tablet orally as soon as possible within 120 hours (5 days) after unprotected intercourse or a known or suspected contraceptive failure."), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf (last visited Nov. 4, 2011); Ctr. for Disease Control and Prevention, U.S. Dep't. of Health and Human Servs., *Unintended Pregnancy*, http://www.cdc.gov/reproductivehealth/UnintendedPregnancy/index.htm (last modified Apr. 30, 2010).

[8] Highlights of Prescribing Information, ella (Ulipristal Acetate) Tablet ("Instruct patients to take one tablet orally as soon as possible within 120 hours (5 days) after unprotected intercourse or a known or suspected contraceptive failure."), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf (last visited Nov. 4, 2011).

[9] Commonwealth Fund, *Prenatal Care in the First Trimester* (citations omitted), http://www.commonwealthfund.org/Performance-Snapshots/Preventive-Health-and-Dental-Care-Visits/Prenatal-Care-in-the-First-Trimester.aspx (last visited Nov. 4, 2011).

[10] *Id*. (citations omitted).

care, have an increased risk of bearing stillborn infants, infants who die within the first year of life, or low birth weight infants.[11]

- **Access to abortion.** Although abortion is an extremely safe procedure, delay in accessing abortion services can increase the risk of the procedure to the patient. The greater the delay in obtaining an abortion, the less safe the procedure becomes: the risk of patient death increases as pregnancy continues, from one death for every one million abortions at or before eight weeks of pregnancy to one per 29,000 at 16-20 weeks, and one per 11,000 at 21 or more weeks of pregnancy.[12]

- **Access to treatment for ectopic pregnancy.** Ectopic pregnancy occurs when a fertilized egg implants outside the uterus. It can result in a life-threatening emergency that requires immediate medical attention. Ectopic pregnancy is the leading cause of maternal death in the first trimester of pregnancy.[13]

Given the critical importance of timely information and care in the reproductive health context, it is essential that those providing information or services related to reproductive health disclose any gaps in information or limitations in care to potential patients. Disclosure allows individuals to

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[11] U.S. Dep't. of Health and Human Servs., *Trends in the Well-Being of America's Children and Youth 2003*, § 3. Health Conditions and Health Care, HC 1.2 Prenatal Care (2003) (citation omitted), *available at* http://aspe.hhs.gov/hsp/03trends/.

[12] Guttmacher Inst., *Facts on Induced Abortion in the United States* (Jan. 2011) (citing Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729 (2004)), http://www.guttmacher.org/pubs/fb_induced_abortion.html#13a.

[13] Anne-Marie Lozeau & Beth Potter, *Diagnosis and Management of Ectopic Pregnancy*, 72 Am. Fam. Physician 1707, 1707 (2005).

learn in advance of any restrictions or obstructions to full and complete information and care. Disclosure allows individuals to make informed decisions about which providers, facilities, or plans best meet their needs or fit their own values. Disclosure is particularly important at locations, such as pregnancy services centers, where any member of the public can seek a service without a prior referral from someone who is aware of the kinds of restrictions that could exist.[14]

In light of the above, it is critical that women seeking reproductive health services have information about the services available to them so that they are able to access necessary health care in a timely manner.

B. THE PRACTICES AND TACTICS OF PREGNANCY SERVICES CENTERS DENY WOMEN ACCESS TO VITAL INFORMATION AND CARE

As described above, the record is rife with evidence that pregnancy services centers engage in practices and tactics that both purposely and inadvertently deny women adequate information about their reproductive health; undermine timely access to necessary medical care (including the types of care listed above); and, as a result, interfere with the ability and

[14] Adam Sonfield, *Delineating the Obligations That Come with Conscientious Refusal: A Question of Balance*, Guttmacher Policy Rev., Vol. 12 No. 3, at 6, 9.

right of women to make informed decisions about their reproductive and overall health. The City's interest in addressing this situation—to ensure that women have the opportunity to exercise their right to make decisions about their reproductive health and can access the information and care necessary to effectuate that right—is compelling and on par with interests that courts have found to be compelling under strict scrutiny analysis. In *Dickerson v. Stuart*, 877 F. Supp. 1556 (M.D. Fla. 1995), for example, the court upheld Florida's Midwifery Practice Act which requires licensing of individuals who provide specified services to expectant parents, including during labor and delivery. In upholding the law, the court held that the state "has a compelling interest in the health of expectant mothers and the safe delivery of newborn babies". 877 F. Supp at 1559.

II. LOCAL LAW 17 IS NARROWLY TAILORED

Local Law 17 also is narrowly tailored and satisfies the least restrictive means standard as a method of ensuring that women have adequate information about their reproductive health, are able to access the medical care that they need and to do so in a timely fashion, and are not misled into believing that they have received complete medical care when they have not.

A. LOCAL LAW 17 IMPOSES A NARROW OBLIGATION

It is noteworthy that Local Law 17 does not require pregnancy services centers to offer abortion or contraception services or prenatal care, to provide referrals for such services, or even to refrain from stating an opinion or making a recommendation about such services. Instead, Local Law 17 merely requires that pregnancy services centers disclose (1) whether the center has a licensed medical provider on staff who supervises the provision of all services; (2) whether the center itself provides, or provides referrals for, prenatal care, emergency contraceptives, and abortion; and (3) the fact that the New York City Department of Health and Mental Hygiene encourages women who are or may be pregnant to consult a licensed medical provider. N.Y.C. Admin. Code § 20-816(a)-(e). These disclosure requirements are directly and specifically addressed at ensuring that women seeking reproductive services are aware that medical care is recommended, and will know whether or not medical care is available—or, even more critically, *has been provided*—at the facilities that they visit or consider visiting.

B. LOCAL LAW 17'S DISCLOSURE REQUIREMENTS ARE NARROWLY APPLICABLE

Also key to the narrow tailoring analysis is the fact that Local Law 17's disclosure requirements (themselves a narrow obligation) are imposed

only on a very narrow subset of organizations and individuals. Specifically, the law applies only to facilities that either offer certain medical services (obstetric ultrasounds, obstetric sonograms, or prenatal care) or have the appearance of a medical facility, *and* that neither are licensed by New York State or the United States to provide medical or pharmaceutical services nor have a licensed medical provider present to directly provide or supervise the provision of such services. N.Y.C. Admin. Code § 20-815. Stated more simply, Local Law 17 imposes disclosure requirements *only* on entities that have the look and feel of a medical or doctor's office and/or that provide basic health care services to women, but that are not in fact licensed to provide medical services.

This limitation on the applicability of Local Law 17 is key because it means that, in contrast to the lower court's finding in enjoining the law, the disclosure requirements do not burden innocent speech. In finding that the law applies to *all* pregnancy services centers whereas only *some* engage in deceptive practices, the lower court failed to acknowledge the very limited applicability of the law's disclosure requirement. An entity will only be "burdened" by the requirement if it seeks to conceal that it is not a licensed medical facility; that it does not have a licensed medical professional providing or supervising the provision of health services; or whether or not it

provides the specified pregnancy-related health services. It is *precisely* this type of deception that Local Law 17 aims to address.[15]

[15] For the same reasons, Local Law 17 should be upheld without reference to whether it survives strict scrutiny because the required disclosures constitute a valid informed consent requirement similar to those upheld in *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992), and its progeny. In *Casey*, the U.S. Supreme Court found no violation of a physician's right not to speak, without need for further analysis of whether the requirements were narrowly tailored to serve a compelling state interest, where physicians merely were required to give "truthful and not misleading information" relevant to the patient's decision to have an abortion. 505 U.S. at 882. In doing so, the *Casey* court also cited the State's interest in the "reasonable licensing and regulation". *Id.* at 884. Following *Casey*, courts have upheld legislation that required disclosures that provided information reasonably related to informed consent. *See, e.g.*, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) ("[A State may] use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion . . . ."); *Karlin v. Foust*, 188 F.3d 446, 495 (7th Cir. 1999) ("[L]egislation is based on a permissible purpose if it is reasonably related to promoting childbirth over abortion or protecting maternal health"); *Eubanks v. Schmidt*, 126 F. Supp.2d 451, 458 (W.D. Ky. 2000) (noting that "a statute requiring every physician to advise women of their right to have an abortion…might be equally justified as the one here" (citation omitted)).

The Court below held that because the Plaintiffs are not required to obtain a license to perform an ultrasound, the cases permitting the regulation of professional speech do not validate Local Law 17's disclosure provisions. (Order at 13.) Such a statement misses the point. The Plaintiffs are doing more than providing unlicensed ultrasounds; they are posing as doctors, and at-risk patients may not be able to tell the difference. Without the minimal disclosures proscribed by Local Law 17, patients may believe — understandably, though mistakenly — that the advice they are receiving about their child and their own health is that of medical personnel, backed by medical training. It is absurd that someone dangerously misleading a patient into thinking he has a medical license should be exempt from the

C. LOCAL LAW 17'S ALLEGED IMPACT ON INNOCENT SPEECH IS NOT FATAL UNDER STRICT SCRUTINY ANALYSIS

While Local Law 17 does not burden innocent speech, it would still pass muster even if it did. A law need not address only impermissible speech or behavior in order to survive strict scrutiny review. In *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), for example, the court upheld a nighttime curfew for teenagers on the grounds that the government had a compelling interest "to reduce juvenile crime and victimization, while promoting juvenile safety and well-being", and that the curfew was narrowly tailored to such interest. *Id.* at 492-95. The defendant in *Qutb* was not required (and, of course, would not have been able) to demonstrate that the curfew restriction did not place restrictions on innocent behavior, *id.* at 493; certainly, there were teenagers affected by the curfew who did not pose a threat to public safety or to their own well being. Instead, the court applied a balancing test that weighed the government's interests against the burden on plaintiffs' rights. *Id.* at 495 ("It is true, of course, that the curfew ordinance would restrict some late-night activities of juveniles . . . . But when

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very speech regulation that would apply if he actually had one. The informed consent requirement plays a significant constitutional role in the reproductive rights context, and it should apply equally to the Plaintiffs as to the medical experts they purport to be.

balanced with the compelling interest sought to be addressed—protecting juveniles and preventing juvenile crime—the impositions are minor."); *New York State Ass'n of Career Schools v. State Educ. Dept. of State of N.Y.*, 823 F.Supp. 1096, 1105-06 (S.D.N.Y. 1993) (where schools challenged statute creating regulatory scheme for curricula, least restrictive test was met because "the scheme created by the Statute is both reasonable and the least restrictive in light of the specific concerns that the State of New York has identified and seeks to address" and included a number of procedural safeguards). Likewise, any burden to pregnancy services centers imposed by a requirement that they make certain basic factual disclosures pales in comparison to the government's interest in ensuring that women have timely access to vital reproductive health services.

D. THE EXISTENCE OF OTHER POTENTIAL METHODS OF PROMOTING THE GOVERNMENT'S INTEREST IS NOT FATAL UNDER STRICT SCRUTINY ANALYSIS

The District Court's finding that the City could serve the same interests in a less restrictive —by, for example, engaging in a public interest campaign or prosecuting offenders under the City's anti-fraud statutes—also is inapposite. "Narrow tailoring does not require exhaustion of every conceivable . . . alternative." *Grutter*, 539 U.S. at 339-40.

First, it is not clear that the court's proposed alternatives would effectively serve the City's compelling interest in ensuring that women have timely access to vital reproductive health services. (*See* Order at 15-17.) Certainly, a *post hoc* punitive measure such as prosecution under existing anti-fraud statutes will provide little consolation to a woman who has been denied necessary medical care due to deceptive practices by a pregnancy services center.[16] (*See id.* at 17.) A more proactive measure, such as the disclosure requirements of Local Law 17, is needed in order actually to prevent the harm to women that results from lack of access to timely reproductive medical care.[17]

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[16] In a case addressing legislation similar to Local Law 17, a court in Maryland found that the government's interest was in "protecting and informing women seeking abortion and comprehensive birth-control services from misleading advertisements" (*i.e.*, "combating false advertising"). *O'Brien v. Baltimore*, 768 F. Supp. 2d 804, 816 (D. Md. 2011). The *O'Brien* court found that the legislation at issue was not narrowly tailored to serve this interest since there were less restrictive means of combating false advertising, including enforcing or strengthening existing anti-fraud rules. *Id.* at 817. As noted above, the compelling interest sought to be served by Local Law 17 is broader than that found to be at stake in *O'Brien*. Because the Bill seeks to ensure women's timely access to medical care (including abortion), mere enforcement or strengthening of anti-fraud laws would not be a sufficient means of serving the government's compelling interest.

[17] Similarly, there is a substantive difference between a public information campaign and other such measures and a message delivered *at* the point of service or in center-specific advertising advising potential clients of the services that are and are not provided.

In addition, the "narrowly tailored" and "least restrictive means" analysis does not focus on all conceivable means of addressing the government's interest and instead focuses on whether the means chosen (for example, *Qutb*'s curfew requirement, 11 F.3d at 493-94) are sufficiently tailored so as not to place too large a burden on the rights of those affected. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 200-210 (1992) (considering history and "simple common sense" in holding that statute requiring 100-foot restricted zone around polling places survived strict scrutiny; dismissing less restrictive means that were arguably not as effective or only different in degree of restrictiveness); *Qutb*, 11 F.3d at 493-94 (comparing the curfew requirement at issue to previous requirements that had been struck down as overly broad and noting that "[b]y including the defenses to a violation of the ordinance, the city has enacted a narrowly drawn ordinance that allows the city to meet its stated goals while respecting the rights of the affected minors" (citation omitted)). The same arguments accepted by the District Court here could have been made in *Qutb*. For example, the government's interests in public safety and the well-being of juveniles might have been addressed by prosecuting juvenile offenders for criminal acts or by engaging in a public information campaign warning the public to be careful when

going out at night or admonishing parents not to allow their minor children out at night, but this was not fatal to the curfew requirement.

Here, the court should focus on the means chosen by the New York City Council (a disclosure requirement for pregnancy services centers) and should assess whether those means are narrowly tailored and satisfy the least restrictive means standard. It should not consider all possible methods of addressing the city's compelling interest in ensuring that women have timely access to vital reproductive health services. *See, e.g.*, *Grutter*, 539 U.S. at 339-40 (holding that law school's race-conscious admissions policy did not violate equal protection clause where school "sufficiently considered workable race-neutral alternatives" as "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative"); *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (in applying strict scrutiny pursuant to the Religious Freedom Restoration Act, requiring government to "refute alternate schemes offered by the challenger . . . through the evidence presented in the record," but not requiring government to "do the impossible—refute each and every conceivable alternative regulation scheme").

Because the disclosure requirements are limited only to entities with specified characteristics that, in and of themselves, create a likelihood of

deception, and because only entities seeking to hide vital information from women seeking reproductive health services will be burdened by the requirements, Local Law 17 is sufficiently narrowly tailored to survive strict scrutiny.

CONCLUSION

In light of the foregoing, the Association respectfully asks that the decision of the District Court be reversed and that the preliminary injunction preventing enforcement of Local Law 17 be lifted.

Dated New York, New York
November 7, 2011

Respectfully Submitted,

by s/ Brian J. Kreiswirth

BRIAN J. KREISWIRTH
Chair, Committee on Civil Rights
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, NY 10036
(212) 382-6600

Attorney for Amicus Curiae The Association of the Bar of the City of New York

CERTIFICATE OF COMPLIANCE

BRIAN J. KREISWIRTH certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: November 7, 2011

s/ Brian J. Kreiswirth
Brian J. Kreiswirth