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 Not-for-Profit Corporation,

Plaintiffs-Appellees,

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (Pauley, J.)

PETITIONS FOR PANEL REHEARING AND REHEARING EN BANC BY 11-2929-cv APPELLEES PCCNY, BPCC AND GOOD COUNSEL

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FED. R. APP. P. 35(b) STATEMENT

The panel decision conflicts with decisions of this Court and the U.S. Supreme Court (as listed and set forth herein), and consideration by the full Court is therefore necessary to secure and maintain uniformity of this Court's decisions.

Alliance for Open Soc'y Int'l, Inc. v. U.S.A.I.D., 651 F.3d 218 (2d Cir. 2011);
Amidon v. Student Ass'n, 508 F.3d 94 (2d Cir. 2007);
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Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011);
Cal. Democratic Party v. Jones, 530 U.S. 567 (2000);
City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988);
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Thomas v. Collins, 323 U.S. 516 (1945);
Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002);
Turner Broad. Sys. v. F.C.C., 512 U.S 622 (1994);
United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000)
Wooley v. Maynard, 430 U.S. 705 (1977).

The proceeding also involves questions of exceptional importance, namely whether the government may compel speech upon noncommercial speakers with whom it disagrees, and whether the government, after targeting unpopular speakers, can give itself unfettered discretion to decide which speakers are burdened. On each of these issues the panel decision conflicts with the decisions of this Court, the Supreme Court, and other Courts of Appeals, which routinely protect noncommercial speech and prohibit discretionary speech burdens.

INTRODUCTION

For the first time, under the panel majority's decision in this case (attached), the government may compel speech upon noncommercial speakers who have committed no wrongdoing, merely because those speakers want to discuss a controversial public issue—in this case, abortion. Consequently, the panel decision disrupts the uniformity of this Court's decisions, which until now have stood vigilant against compelled speech and have imposed high standards against government discretion to burden politically disfavored speech.

The panel majority's authorization of compelled speech on ideological speakers raises questions of the utmost importance. Under the panel's rationale, if a Wall Street protestor wants to criticize fiscal policy she could be required to first declare that she lacks a graduate degree in economics. Before a healthy eating advocate erects a website against McDonalds, she could be forced to post a headline declaring she is not a certified nutritionist. Prior to promoting marijuana legalization, a drug reform advocate could be forced to disclose that he is not licensed to provide drug abuse treatment.

Equally troubling, the panel majority authorizes the government to pick and choose who is subject to its coerced speech regime based on their "appearance." The City is not constrained by a specific definition or necessary criteria. This not only risks viewpoint discrimination—the City openly targets pro-life views.

These issues are pending within three federal circuits and have already been considered en banc by the Fourth Circuit. Panel rehearing and rehearing en banc are therefore necessary in this case. *See* Fed. R. App. P. 35(b).

ARGUMENT

I. The panel disrupted Second Circuit and Supreme Court precedent in holding that the government can compel speech upon a noncommercial speaker who has committed no wrongdoing.

This case challenges the City of New York's 2011 law, Local Law 17, New York City Administrative Code §§ 20-815 through 20-820 ("LL17"). LL17 imposes government crafted speech on ideological noncommercial speakers. As described by the panel, LL17 targets speakers expressing a particular viewpoint on abortion: "organizations that provide non-medical pregnancy services and are opposed to abortion." *Evergreen Ass'n, Inc. v. City of New York*, 2014 WL 184993, at *2 (2d Cir. Jan. 17, 2014); *see also* Slip op. attached. LL17 makes these pregnancy services centers ("PSCs") engage in government compelled speech containing a certain content, and is triggered by the content of the PSC's speech: if the PSC reaches out "to women who are or may be pregnant." LL17 § 20-815(g); City App. Brief at 45 ("services" includes speech, *e.g.*, counseling and classes).

LL17 applies to speech and speakers like Plaintiffs-Appellees that are noncommercial, that do not practice medicine, and that engage in no wrongdoing. Instead, the trigger for LL17's coercion is that a PSC speaks to women who may be pregnant, and that the center satisfies one of three definitions: (a) it offers ultrasounds or medical exams; (b) it meets two of six listed factors supposedly showing it has a medical "appearance" (such as being in a building where a doctor's office is elsewhere present), or (c) it meets only one, or none, of those six factors, but the City uses its discretion to deem the facility as having a medical "appearance" anyway, based on unknown criteria. *Id.* § 20-815(g).

PSCs must recite LL17's compelled speech on signs inside and outside the centers, on their websites and all advertisements, and on the telephone. LL17 § 20-816(f). LL17 lets the City decide what the disclosures will say, what kinds of ads and websites they must be placed in, and how large they must appear despite the cost and the effect of crowding out the PSC's message. *Id.* § 20-816(f). Failure to recite the compelled speech triggers increasing levels of fines, closure, civil actions, and imprisonment for violating closure orders. *Id.* §§ 20-818, 20-820.

LL17 requires these 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 abortions, contraception, or referrals for the same. *Id.* § 20-816(a)–(f). The panel majority, without deciding whether LL17 is subject to strict or intermediate scrutiny, held that disclosures (2) and (3) fail First Amendment scrutiny, but that disclosure (1) (the "Status disclosure") satisfies strict scrutiny. *Evergreen*, 2014 WL 184993 at *8.

This latter pronouncement necessitates rehearing in this case. Allowing government compelled disclosures aimed at the content of noncommercial speech upends First Amendment jurisprudence from this circuit and the Supreme Court. The Second Circuit has always rejected compelled speech on noncommercial speakers, especially on controversial issues, and certainly where speech is targeted for its content or viewpoint. Government coerced speech against ideological speakers is an issue of unparalleled importance under the First Amendment.

A. The panel disrupted Second Circuit precedent, which has uniformly rejected compelled speech upon ideological noncommercial speakers.

Until now the Second Circuit has rejected government coerced speech on noncommercial speakers, even as a mere condition on government funds (which here it is not). *See Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2d Cir. 2011). In *Alliance* this Court reiterated its vigilance against government coerced speech, especially where (as here) the issue involves "a subject of international debate. The right to communicate freely on such matters of public concern lies at the heart of the First Amendment." *Id.* at 236.

The panel majority cited no Supreme Court or Second Circuit decision allowing compelled speech upon noncommercial speakers. Instead this Court insists on "the right to refrain from speaking," and that no government official can "force citizens to confess by word" the government's message. *Amidon v. Student Ass'n*, 508 F.3d 94, 98–99 (2d Cir. 2007) (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), and quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). For the first time, this Court has authorized governments to target noncommercial speakers touching the most controversial of topics, and force them to recite government crafted messages in extensive channels of their expression.

The panel majority also undermined this Court's precedent that severely disfavors viewpoint-targeted speech burdens. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Alliance*, 651 F.3d at 235 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)). The panel acknowledged that LL17

was created to target speakers who "are opposed to abortion," *Evergreen*, 2014 WL 184993 at *2, but upheld its coerced Status disclosure anyway.

The Supreme Court has authoritatively rejected compelled speech requirements for noncommercial speakers. *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 798–800 (1988) (invalidating disclosure provisions imposed on solicitors for charitable donations). The panel attempts to rely on *Riley* by claiming that the Status disclosure "unambiguously disclose[s] the 'professional status' of [the PSC's] employees" and is therefore justified. *Evergreen*, 2014 WL 184993 at *10 (citing *Riley*, 487 U.S. at 799 n.11). But this applies *Riley* wholly out of context.

Riley itself struck down all the coerced speech it considered, which required paid solicitors to disclose certain things in their solicitation messages. 487 U.S. at 799–800. The passage that the panel cites from *Riley*, which the panel acknowledges is "dicta," *Evergreen*, 2014 WL 184993 at *10 n.8, states that a paid solicitor might theoretically be required to disclose the mere fact that he is paid. *See* 487 U.S. at 799 n. 11. In such a capacity, however, the solicitor is both a commercial actor (by soliciting for a fee) and his disclosure is tailored to that commerce. But LL17 applies to wholly noncommercial speech, and therefore is not tailored to a speaker's commerce. The Status disclosure requires PSCs to disclose that they are *not* professionals, which is the opposite of the "professional status" disclosure hypothesized in *Riley*'s dicta. PSCs are *mere free speakers*, giving them more speech protection than "professionals," not less. Moreover, *Riley* addressed rules applying to all solicitors, whereas LL17 is targeted only at pregnancy speech and abortion opponents. The panel majority acknowledged that "the case at hand is

different" from the *Riley* dicta, "because the required disclosure does not arise in the context of charitable solicitation." *Evergreen*, 2014 WL 184993 at *10. This negated even that dicta, but the panel upheld the compelled speech anyway.

Sister circuits that apply this dicta from *Riley* have never extended it beyond commercial disclosures for solicitors. *See, e.g., Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 333 (4th Cir. 2005) (involving regulation of telemarketing practices as applied to charitable fundraising); *Dayton Area Visually Impaired Persons, Inc. v Fisher*, 70 F.3d 1474, 1478 (6th Cir. 1995) (involving a challenge to charitable solicitations statutes which required detailed reporting); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1520 (11th Cir. 1993) (challenge to a city ordinance regulating charitable solicitations containing "substantial recordkeeping and disclosure requirements.").

The panel majority's opinion is also not redeemed by *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456 (D. Md. 2011). That case preliminarily upheld a Status disclosure and rejected a different disclosure, but it is distinct in three ways. First, as a district court decision from another circuit it cannot counterbalance this Court's uniform precedent protecting noncommercial speakers. Second, LL17 is far more burdensome than the disclosure in *Centro Tepeyac*, since the latter only required one sign in a waiting room, *id*. at 459, whereas here the disclosure must be posted on at least two facility signs, it must clutter each and every advertisement and website, and it must be recited during telephone conversations. LL17 § 20-816(f). The panel here failed to even discuss whether LL17's multiplicity of locations for compelled speech negates its narrow tailoring.

Third, the panel's decision here conflicts with the *en banc* Fourth Circuit's review of *Centro Tepeyac*. There the circuit applied abuse of discretion review to defer to the district court's full application of strict scrutiny. *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 191–92 (4th Cir. 2013) (affirming because the lower court "applied a correct preliminary injunction standard, made no clearly erroneous findings of material fact, and demonstrated a firm grasp of the legal principles"). Here, the lower court applied those same legal principles and made no erroneous fact findings, yet the panel reversed the district court's injunction of the Status disclosure instead of giving it deference. This creates a circuit conflict on how and whether to defer to an injunction order on two similar laws.

The Fourth Circuit's review of this issue en banc, and its pending status in other courts, also shows the issue's exceptional importance in favor of rehearing. *See also Austin Lifecare, Inc. v. City of Austin*, No. 11-cv-875 (W.D. Tex.).

B. The panel violated Second Circuit and Supreme Court standards by deciding that the Status disclosure satisfies strict scrutiny.

The panel disrupted Second Circuit precedent and violated Supreme Court jurisprudence by upholding the Status disclosure under strict scrutiny. LL17 is subject to strict scrutiny because it compels speech on noncommercial speakers and is content based (and, distinctly, viewpoint based due to targeting abortion opponents). *See Turner Broad. Sys. v. F.C.C. (Turner I)*, 512 U.S 622, 642 (1994); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *see also Alliance*, 651 F.3d at 235 (strict scrutiny triggered in controversial contexts and for viewpoint discrimination).

1. LL17 is not narrowly tailored.

The panel majority acknowledges that LL17 is not narrowly tailored to the alleged interest of preventing deception. LL17 applies to pro-life centers without any requirement that they engage in deception. "[N]ot all pregnancy services centers engage in deception. We acknowledge that this is so." *Evergreen*, 2014 WL 184993 at *10. Yet the panel still deemed the Status disclosure narrowly tailored to prevent women from "mistakenly concluding that pregnancy services centers, which look like medical facilities, are medical facilities." *Id*.

This rationale is contradicted by the text of LL17, which does not require PSCs to actually "look like medical facilities." *Id.* LL17's definition of having a medical "appearance" *does not require any appearance in particular* beyond what City officials view through their own eyes. A center can satisfy LL17's "appearance" test either by meeting *two* of the six criteria listed in the law (such as residing in a building that has a doctor's office), or even when it satisfies only one *or none* of those six factors, if the City merely *deems* it as having a medical "appearance," based on additional unknown criteria. LL17 § 20-815(g).

LL17 is therefore not narrowly tailored to the panel's stated criteria of only applying to centers "which look like medical facilities." A center that satisfies merely one, or none, of the six "appearance" factors, like the Plaintiffs in 11-2929, *is still a PSC if the City simply deems it to be one*, without any specific tailoring towards how the PSC "looks" or appears. LL17 therefore applies far more broadly than the alleged problem that some PSCs "look like medical facilities." By definition, such a law is not "narrowly tailored" to that interest.

Several Plaintiffs-Appellees illustrate LL17's lack of tailoring to the panel's cited interest. Of LL17's six "appearance" factors, Pregnancy Care Center of New York (PCCNY) and Boro Pregnancy Counseling Center (BPPC) merely offer self-administered pregnancy test kits. JA1046–49. Yet LL17 sweeps them into the PSC definition simply when the City deems them to be PSCs, and ultimately because they are "crisis pregnancy centers" that "oppose abortion." *See Evergreen*, 2014 WL 184993 at *2. The panel acknowledges that LL17 ought not apply even to crisis pregnancy centers unless they also "look" medical, but LL17 plainly targets PCCNY and BPCC without requiring any such criteria.

More flagrantly, Good Counsel Homes ("GCH") is not even a crisis pregnancy center offering counseling; it is a set of homes where needy women live *after* they have already chosen not to have abortions. JA1050–51. But LL17 sweeps GCH into its range because when GCH helps make sure its residents go to the doctor, it receives their health insurance information (one of LL17's six factors). *Id.* Thus LL17 encompasses GCH despite no requirement that it "look" medical. *See also* JA1051 (the City told GCH that LL17 may apply).

Even LL17's six listed factors do not objectively make PSCs "look like medical facilities." While PCCNY, BPCC and GCH staff do not wear medical attire (JA1066), a center "may be subject to the disclosure requirements simply because it is located in a building that houses a medical clinic, no matter how far it is from that clinic." *Id.* at *15 (Wesley, J., concurring in part and dissenting in part). GCH's use of health insurance information in no way makes their homes "look" medical. PCCNY and BPCC's distribution of self-administered pregnancy

test kits is not a medical activity (nor does it make convenience stores "look" medical), but LL17 applies even if the kits are in a drawer and therefore have no effect on the centers' "appearance."

As discussed below, the panel majority incorrectly upheld the "appearance" definition as not being vague. But it failed to acknowledge that the City's discretion also undermines its narrow tailoring. *See Evergreen*, 2014 WL 184993 at *10. The Free Speech and Due Process Clauses provide independent protections for speakers. The panel disturbed this Court's precedent by considering LL17's "appearance" test only under the Due Process claim, while assuming (not demonstrating) under the First Amendment that LL17 is *tailored* to centers that "look like medical facilities." As Judge Wesley pointed out in his partial dissent, the City's attorney admitted 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.'" *Evergreen*, 2014 WL 184993 at *14 (quoting JA1007). This renders LL17 not narrowly tailored to the interest the panel said it relied on.

2. There are less restrictive alternatives available to the City.

LL17 fails the least restrictive means component of its strict scrutiny burden. "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). The City has never bothered to deliver LL17's disclosures using the City's own voice, forums, or advertisements. The City has only ever attempted to deliver its message through Plaintiffs' mouths.

The panel decision contradicts the Supreme Court's insistence in *Riley* that to combat misperception connected to speech, the government must express its own message or enforce antifraud laws instead of burdening speech. *Riley*, 487 U.S. at 800. *Riley* invalidated a "prophylactic, imprecise, and unduly burdensome rule" compelling front-end disclosures because those alternative options are "more narrowly tailored rules [that] are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id.*

The panel here dismissed such enforcement because it occurs "only after the fact," *Evergreen*, 2014 WL 184993 at *9, but this is a *non sequitur*. The Supreme Court gave its imprimatur to after-the-fact alternatives in *Riley* because such prosecution disincentivizes behavior. Governments will always *define speech as harm* rather than target actual harm if the court allows it, but such an attack on speech is impermissible. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

C. The panel violated Second Circuit and Supreme Court precedent in finding a compelling interest in the absence of actual evidence.

The panel opened a Pandora's Box when it declared the government has a compelling interest in coercing politically unpopular noncommercial speakers. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The City is required to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664.

The City vaguely alleges that pro-life PSCs confuse women about whether they are medical, and therefore cause adverse health consequences. *Evergreen*, 2014 WL 184993 at *2–*4. But the City's evidence is anecdotal, unscientific, and overwhelmingly provided by sources hostile to anti-abortion speech. *Id.; see also* JA327–28 (admitting the NARAL Report is unscientific); City App. Brief at 22–26 (City official testimony lacking any proof of harm to women visiting PSCs, or any data, investigations, complaints, or scientific evidence). And even though the City must demonstrate its interest "in the circumstances of [the] case" and the need to solve an "actual problem," the City offered no evidence that PCCNY, BPCC, and GCH confuse or harm women. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 823–23 (2000).

When the panel accepted such unsubstantiated concerns as constituting a compelling government interest, it distorted settled precedent of this circuit and the Supreme Court. Mere "'experience, knowledge and common sense' in the absence of any empirical proof" is insufficient. *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997). In *Playboy* "a handful of complaints" were insufficient. 529 U.S. at 821–22. In *Brown*, even scientific studies were insufficient where they showed no causal harm. 131 S. Ct. at 2738–39. Here, no study shows that PSCs cause women harm, and the City received no complaints from bona fide clients.

II. The panel violated Second Circuit and Supreme Court precedent in holding that LL17 is not impermissibly vague.

The panel also violated this Court's longstanding precedent against vague laws that restrict free speech, and created uncertainty in this Court's precedent by

applying non-speech vagueness review in the free speech context.

As described above, LL17 confers unfettered discretion on City officials to decide which centers have a medical "appearance." Several Plaintiffs suffer under this discretion, since they do not offer ultrasounds and possess only one or none of the six factors in LL17's "appearance" test, yet LL17 still gives the City a "blank check" to burden them under LL17. *Evergreen*, 2014 WL 184993 at *13 (Wesley, J., concurring in part and dissenting in part). LL17 "is a bureaucrat's dream," "deliberately ambiguous," and "an inherently slippery definition. . . . [A] facility meeting only one—or none!—of those factors might still be" regulated. *Id.*

"It is a basic principle that a law or regulation 'is void for vagueness if its prohibitions are not clearly defined.'" *Piscottano v. Murphy*, 511 F.3d 247, 280 (2d Cir. 2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). "[T]his danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988). Review is even "more stringent" in the free speech context. *Fox Television Stations v. F.C.C.*, 613 F.3d 317, 328 (2d Cir. 2010) (quoting *Perez v. Hoblock*, 368 F.3d 166, 175 n.5 (2d Cir. 2004)); *see also Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 2719 (2010).

The panel majority unsettled this Court's precedent by justifying LL17 under the non-speech standard of *United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d. Cir. 1992). *Evergreen*, 2014 WL 184993 at *7. The panel failed to impose the more stringent vagueness review this Court requires for speech claims.

The panel also misapplied *Schneiderman*. As Judge Wesley observed, the law in *Schneiderman* was rendered not vague by a scienter element in the offense, which constrained enforcement of that law, but is wholly lacking in LL17. *Id.* at *14. Moreover, *Schneiderman*'s category of offense, possession of "drug paraphernalia," is much more inherently descriptive—and therefore provides sharper enforcement guidance—than the category that the City may use to target speech under LL17, possession of a medical "appearance." By its nature, "appearance" lies in the eye of the beholder. *Schneiderman* does not let the government make it illegal to "appear" to be a drug user. This Court has declared it unconstitutionally vague for the government to judge how regulated speech "appears." *Fox Television*, 613 F.3d at 330. The panel majority also diverged from this Court's decision in *Amidon*, where the Court struck down a rule, like LL17, that allowed officials to use unlisted factors to burden speech. 508 F.3d at 104.

In violation of circuit precedent, Plaintiffs have no advance knowledge how they "appear" to the City under LL17. *Cunney v. Bd. of Trs. of Vill. of Grand View*, 660 F.3d 612, 621–23 (2d Cir. 2011). And the record shows the City *intends* to unconstitutionally gauge their "appearance" by their viewpoint. *See id.*; *Evergreen*, 2014 WL 184993 at *2 (targeting centers "opposed to abortion"); JA1055 ("anti-choice"); City App. Brief at 17 (disfavoring negative speech about abortion).

CONCLUSION

The panel majority's errors strike at the heart of this Court's precedent protecting politically unpopular views. Plaintiffs-Appellees therefore respectfully ask this Court to grant their petitions for panel rehearing and rehearing en banc.

Dated: Washington, D.C.
January 31, 2014

Respectfully submitted,

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