

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**THE EVERGREEN ASSOCIATION, INC.,
d/b/a EXPECTANT MOTHER CARE
PREGNANCY CENTERS-EMC
FRONTLINE PREGNANCY CENTERS
and LIFE CENTER OF NEW YORK, INC.,
d/b/a AAA PREGNANCY PROBLEMS
CENTER,**

Case No.

**DEMAND FOR JURY TRIAL
ON ALL ISSUES SO TRIABLE**

Plaintiffs,

v.

**THE CITY OF NEW YORK, a municipal
corporation,**

Defendant.

**VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, The Evergreen Association, Inc., d/b/a Expectant Mother Care Pregnancy Centers-EMC Frontline Pregnancy Centers (“EMC”) and Life Center of New York, Inc., d/b/a AAA Pregnancy Problems Center (“Life Center”), by and through their undersigned counsel, bring this complaint against the above-named defendant, its employees, agents, servants, officers, and successors in office and all those persons in active concert or participation with it, and in support thereof allege the following on information and belief:

INTRODUCTION

1. This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Introduction No. 0371-A (“the Ordinance”), which added Sections 20-815 *et seq.* to Title 20, Chapter 5 of the New York City Administrative Code.

2. By this Complaint, Plaintiffs seek injunctive relief, in the form of preliminary and permanent injunctions, barring Defendant, and all those in active concert with it, from abridging Plaintiffs’ constitutionally protected rights to freedom of speech, freedom of assembly and association, freedom of the press, and due process of law, guaranteed to Plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as well as the New York Constitution, through enforcement of the Ordinance.

3. Plaintiffs also ask this Court to declare that the Ordinance is unconstitutional on its face and as applied to Plaintiffs.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, as it arises under the Constitution and laws of the United States and presents a federal question, and pursuant to 28 U.S.C. § 1343(a)(4), in that it seeks to secure equitable, monetary, and other relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights. This Court has jurisdiction over Plaintiffs’ claims under the New York Constitution pursuant to 28 U.S.C. § 1367, as they form part of the same case or controversy as Plaintiffs’ claims under the United States Constitution.

5. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-2202, Federal Rules of Civil Procedure 57 and 65, and the general legal and equitable powers of this Court, which empower this Court to grant the requested relief.

6. This Court has the authority to award Plaintiffs' attorneys' fees and costs associated with this action pursuant to 42 U.S.C. § 1988 and other applicable laws.

7. Venue is proper within this judicial district and division, pursuant to 28 U.S.C. § 1391(b), because the relevant events have occurred and are threatened to occur in this judicial district and division.

PARTIES

8. Plaintiff EMC is a New York nonprofit corporation with tax exemption under section 501(c)(3) of the Internal Revenue Code that owns and operates twelve facilities in the city of New York at which it offers services to pregnant women free of charge. Plaintiff EMC's corporate office is located at 61 Lewis Parkway, Yonkers, Westchester County, New York 10705.

9. Founded in 1985, EMC provides pregnancy-related services, free of charge, to over 7,500 women a year.

10. Plaintiff Life Center is a New York nonprofit corporation with tax exemption under section 501(c)(3) of the Internal Revenue Code that owns and operates one facility in the city of New York at which it offers services to pregnant women free of charge. Plaintiff Life Center's corporate office is located at 6802 Fifth Avenue, Brooklyn, New York 11220.

11. Founded in 1984, Life Center provides pregnancy-related services, free of charge, to approximately 1,000 women a year.

12. In furtherance of their charitable missions, Plaintiffs offer free services, including pregnancy testing, ultrasounds, sonograms, and pregnancy counseling to women who are or may be pregnant.

13. Based on moral and religious beliefs, Plaintiffs do not offer or refer for abortions or emergency contraception.

14. Defendant City of New York is a municipal corporation duly incorporated and existing pursuant to the laws of the State of New York. The City of New York has established and maintains the New York Police Department and the Department of Consumer Affairs as constituent departments or agencies of the City.

ALLEGATIONS OF FACT

The Challenged Ordinance

15. On or about March 2, 2011, the New York City Council passed Introduction No. 0371-A, which imposes burdensome speech and confidentiality requirements on “pregnancy services centers.”

16. On or about March 16, 2011, Mayor Michael Bloomberg signed the bill into law.

17. According to Section 4 of Introduction 0371-A, which provides that “[t]his local law shall take effect one hundred twenty days after its enactment into law,” the Ordinance will take effect on or about July 14, 2011.

18. The Ordinance defines a “pregnancy services center” as “a facility, including a mobile facility, the primary purpose of which is 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.”

19. The Ordinance lists the following as “factors that shall be considered in determining whether a facility has the appearance of a licensed medical facility”: the facility “(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.”

20. The Ordinance specifies that the above-enumerated factors do not comprise an exhaustive list but are only “[a]mong the factors” to be considered.

21. The Ordinance further provides that “[i]t 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).”

22. Specifically excluded from the definition of a “pregnancy services center” is any “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 described in [§ 20-815(g)] that are provided at the facility.”

23. The Ordinance provides no definition or clarification as to the scope of the following terms and phrases: “services”; “medical attire or uniforms”; “private or semi-private room or area”; “medical supplies”; “medical instruments”; “shares facility space”; “directly supervise”; and “all services.”

24. The Ordinance’s definition of a “pregnancy services center,” particularly its failure to define and/or clarify the scope of several operative terms, its provision that the enumerated “factors” are only “[a]mong the factors” that could give rise to coverage and liability under the Ordinance, and its reliance on the premises usage of parties other than those entities covered by the Ordinance, renders it extremely burdensome, if not impossible, for Plaintiffs and others to know whether their facilities are covered by the Ordinance.

25. The Ordinance defines “prenatal care” as “services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy,” and further provides that “[c]linical laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition.”

26. The Ordinance defines “premises” as “land and improvements or appurtenances or any part thereof.”

27. The Ordinance requires that any facility meeting the definition of a “pregnancy services center” must make five specified “disclosures”: (a) “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”; (b) whether “it does or does not have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center”; (c) whether “it does or does not provide or provide referrals for abortion”; (d) whether “it does or does not provide or provide referrals for emergency contraception”; and (e) whether “it does or does not provide or provide referrals for prenatal care.”

28. The “disclosures” required by the Ordinance must be “in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the commissioner on (i) at least one sign conspicuously posted in the entrance of the pregnancy services center; (ii) at least one additional sign posted in any area where clients wait to receive services; and (iii) in any advertisement promoting the services of such pregnancy services center in clear and prominent letter type and in a size and style to be determined in accordance with rules promulgated by the commissioner.”

29. The Ordinance fails to define or clarify the scope of the term “advertisement.”

30. Additionally, such “disclosures” must be provided orally to any client or prospective client requesting an abortion, emergency contraception, or prenatal care, whether in person or by telephone. Thus, the Ordinance requires ten separate compulsory disclosures—five written and five oral.

31. The Ordinance further requires that pregnancy services centers must treat as confidential “[a]ll health information and personal information provided by a client in the course of inquiring about or seeking services.”

32. The confidentiality provision of the Ordinance expressly provides that all health information and personal information provided by a client shall not be “disclosed to any other individual, company or organization unless such client, in writing, requests or consents to the release of such information, or disclosure is required by operation of law or court order.”

33. The originally introduced version of the Ordinance imposed “disclosure” requirements upon “limited service pregnancy centers,” which were limited solely to those facilities providing pregnancy-related services that did not provide or refer for abortions or FDA-approved contraceptive drugs and devices.

34. The originally introduced version of the Ordinance would have required such “limited service pregnancy centers” to inform clients that the facility does not provide or refer for abortions or FDA-approved contraceptive drugs and devices.

35. The specifications as to the locations and appearance of the “disclosures” required under the originally introduced version and those required under the enacted version of the Ordinance are almost identical.

36. The originally introduced version of the Ordinance would not have applied to facilities offering pregnancy-related services so long as they provided or referred for abortions or FDA-approved contraceptive drugs and devices.

37. Upon information and belief, the enacted version of the Ordinance is intended to apply, and in effect does apply, only to facilities that do not provide or refer for abortions or emergency contraception.

Plaintiffs’ Facilities

38. Each of Plaintiffs’ facilities may satisfy the Ordinance’s definition of a “pregnancy services center.”

39. Five of Plaintiff EMC’s facilities offer obstetric sonograms and/or obstetric ultrasounds and/or prenatal care.

40. EMC’s other seven facilities all offer pregnancy testing.

41. In addition to offering pregnancy testing, six of the seven EMC facilities referenced in paragraph 39 above store pregnancy tests in a closet, cabinet, or room. Five of these facilities utilize facility space that is also used by a licensed medical provider. Four of these facilities also contain one or more examination table.

42. In addition to offering pregnancy testing, the seventh EMC facility referenced in paragraph 39 above is located on the twelfth (12th) story of a twelve-story office building, on which premises there may be a licensed medical facility.

43. Plaintiff Life Center's facility offers pregnancy testing and stores pregnancy tests in a private room.

44. Plaintiffs' facilities include ones located in multi-story office buildings.

45. Plaintiffs are not aware of the nature, including medical licensure status, of all other facilities located on the same premises as their own facilities.

46. Some of Plaintiffs' activities are conducted within facilities licensed by the State of New York or the United States government to provide medical or pharmaceutical services.

47. None of Plaintiffs' staff or volunteers are licensed to provide medical or pharmaceutical services.

48. None of Plaintiffs' staff or volunteers offer medical or pharmaceutical services or claim to do so.

49. Any medical or pharmaceutical services offered at Plaintiffs' facilities are provided by licensed medical providers.

50. A licensed medical provider is not present, however, to directly provide or directly supervise the provision of all services described in § 20-815(g) of the Ordinance that are provided at Plaintiffs' facilities.

51. With the exception of the provision of ultrasounds and sonograms, none of the services provided by Plaintiffs' staff and addressed by the Ordinance requires any type of government licensure or certification.

52. Every ultrasound and sonogram provided at Plaintiffs' facilities is conducted by a certified technician and in accordance with New York State laws and regulations.

53. Plaintiffs are unable to determine, based on the language of the Ordinance, which of their facilities, if any, are subject to the requirements of the Ordinance and which of their facilities, if any, are exempt from such requirements.

54. All of Plaintiffs' facilities collect personal information from clients, including the client's name, address, and contact information.

55. All of Plaintiffs' facilities collect information regarding clients' pregnancy and abortion history.

56. None of Plaintiffs' facilities collect information regarding clients' health insurance.

57. Throughout the city of New York, Plaintiffs advertise, both generally and specifically, the services offered at their facilities.

58. Plaintiffs do not charge clients any fee for the services provided at Plaintiffs' facilities.

59. Plaintiffs strongly object to being compelled to speak the messages required by the Ordinance's "disclosure" provisions, and absent the requirements of the Ordinance would not make such "disclosures" in the manner required by the Ordinance.

Penalties Under the Ordinance

60. Failure of a "pregnancy services center" to speak the compelled messages mandated by the "disclosure" requirements of the Ordinance is punishable by a civil penalty of between \$200 and \$1,000 for the first violation and between \$500 and \$2,500 for each subsequent violation.

61. Failure of a “pregnancy services center” to comply with the confidentiality requirements of the Ordinance is punishable by a civil penalty of between \$200 and \$1,000 for the first violation and between \$500 and \$2,500 for each subsequent violation.

62. If a facility is found to have violated the “disclosure” requirements by its failure to speak compelled messages on three or more separate occasions in a two-year period (which could include a three day period before the first fine is issued), the Ordinance authorizes the Consumer Affairs Commissioner to issue an order, after notice and a hearing, sealing such facility for a period of up to five consecutive days.

63. The Ordinance further authorizes officers and employees of the New York City Consumer Affairs and Police Departments, upon written directive from the Consumer Affairs Commissioner, to act upon and enforce an order of the Commissioner to seal a pregnancy services center ten days after such order has been posted at the subject premises.

64. The Ordinance specifically provides that the civil penalties and sealing of a pregnancy services center “shall be in addition to any other remedies or penalties provided for the enforcement of such provisions under any other law including, but not limited to, civil or criminal actions or proceedings.”

65. The Ordinance creates a private cause of action on behalf of “any person claiming to be injured by the failure of a pregnancy services center to comply with [the confidentiality provisions of the Ordinance]” and authorizes any such claimant to seek “compensatory and punitive damages; injunctive and declaratory relief; attorney's fees and costs; and such other relief as a court deems appropriate.”

66. Plaintiffs will continue offering and providing services, free of charge, to pregnant women in New York City into the foreseeable future.

ALLEGATIONS OF LAW

67. Defendant is a “person” for purposes of the claims set forth in this complaint, as that term is used in 42 U.S.C. § 1983.

68. The challenged Ordinance is the policy of the City of New York, officially adopted and promulgated for the City of New York by its legislative body, the City Council of New York, and signed into law by its chief executive, the Mayor of New York.

69. All of the conduct of Defendant as set forth in this complaint, whether taken or threatened to be taken, constitutes conduct “under color of state law” as that phrase is used in 42 U.S.C. § 1983.

70. The First Amendment to the United States Constitution protects the freedoms of speech, assembly, association, and the press.

71. The First Amendment is applicable to state and local governments through the Fourteenth Amendment to the United States Constitution.

72. The Fourteenth Amendment, applicable to state and local governments, protects the right to due process of law.

73. Defendant knew or should have known that its conduct and its threatened conduct, as described in the foregoing Allegations of Fact, would violate the federal and state constitutional rights of Plaintiffs.

74. Both the Ordinance and the threat of civil and/or criminal penalties for violations thereof injure rights protected by the United States Constitution and the New York State Constitution.

75. Plaintiffs have no adequate remedy at law, as the violation of their constitutional rights imposes irreparable harm.

CAUSES OF ACTION

COUNT ONE

(Violation of the Federal Right of Free Speech)

76. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

77. The First Amendment to the United States Constitution provides, in relevant part: “Congress shall make no law . . . abridging the freedom of speech”

78. The Ordinance unconstitutionally burdens, restricts and infringes Plaintiffs’ right of free speech guaranteed by the First Amendment, as applied to the States and their political subdivisions through the Fourteenth Amendment, as protected by 42 U.S.C. § 1983.

79. At a minimum, the Ordinance unconstitutionally compels Plaintiffs to speak messages that they have not chosen for themselves, with which they do not agree, and that distract from and detract from the messages they have chosen to speak.

80. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT TWO

(Violation of the Federal Rights of Free Assembly and Association)

81. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

82. The First Amendment provides, in relevant part: “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble”

83. The Ordinance is an unconstitutional burden on free association and assembly, as it would prohibit Plaintiffs' staff from meeting with pregnant women unless and until Plaintiffs comply with the Ordinance.

84. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT THREE
(Violation of the Federal Right of Free Press)

85. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

86. The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom . . . of the press"

87. The Ordinance provisions requiring specified "disclosures" to be contained in "any advertisement promoting the services" of a "pregnancy services center" unconstitutionally infringes Plaintiffs' right to freedom of the press.

88. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT FOUR
(Violation of the Federal Right to Due Process)

89. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

90. The Ordinance fails to give constitutionally adequate notice of prohibited conduct and is thus impermissibly vague in violation of the right to due process guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983 for at least the following reasons:

a. The Ordinance defines a “pregnancy services center” in part based on whether a facility has a primary purpose of providing “services” to women who are or may be pregnant but fails to define the term “services”;

b. The Ordinance exempts a facility from the definition of a “pregnancy services center” if “a licensed medical provider is present to directly provide or directly supervise the provision of all services described in [§ 20-815(g) of the Ordinance] that are provided at the facility” but fails clarify the scope of the terms “directly supervise” and “all services”;

c. The Ordinance defines a “pregnancy services center” in part based on the premises use of entities other than the pregnancy services center itself;

d. The Ordinance defines a “pregnancy services center” in part based on whether its staff or volunteers wear “medical attire or uniforms” but fails to define these terms;

e. The Ordinance defines a “pregnancy services center” in part based on the storage of “medical supplies and/or medical instruments” in a “private or semi-private room or area” but fails to define these terms;

f. The Ordinance defines a “pregnancy services center” in part based on whether such facility “shares facility space with a licensed medical provider” but fails to clarify the scope of such phrase;

g. The Ordinance defines a “pregnancy services center” in part based on whether it “has the appearance of a licensed medical facility” but grants the Commissioner the apparent unfettered discretion to consider factors in addition to those expressly enumerated in the Ordinance by expressly providing that the six factors enumerated are only “among” those to be considered in making such determination; and

h. The Ordinance requires disclosures to be made in “any advertisement promoting the services of [a] pregnancy services center” but fails to define or clarify the scope of the term “advertisement.”

91. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT FIVE
(Violation of Liberty of Speech Under the New York Constitution)

92. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

93. Article I, § 8 of the Constitution of the State of New York provides in relevant part: “no law shall be passed to restrain or abridge the liberty of speech.”

94. The Ordinance unconstitutionally burdens and abridges Plaintiffs’ liberty of speech as protected by Article I, § 8 of the New York Constitution.

95. At a minimum, the Ordinance unconstitutionally compels Plaintiffs to speak messages that they have not chosen for themselves, with which they do not agree, and that distract from and detract from the messages they have chosen to speak.

96. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT SIX
(Violation of Liberty of the Press Under the New York Constitution)

97. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

98. Article I, § 8 of the Constitution of the State of New York provides in relevant part: “no law shall be passed to restrain or abridge the liberty of . . . the press.”

99. The Ordinance provisions requiring specified “disclosures” to be contained in “any advertisement promoting the services” of a “pregnancy services center” unconstitutionally abridges Plaintiffs’ liberty of the press as protected by Article I, § 8 of the New York Constitution.

100. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

COUNT SEVEN
(Violation of Right of Assembly Under the New York Constitution)

101. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 75 above and incorporate those allegations herein by reference.

102. Article I, § 9 of the Constitution of the State of New York provides in relevant part: “No law shall be passed abridging the right[] of the people peaceably to assemble.”

103. The Ordinance is an unconstitutional burden on free association and assembly, as it would prohibit Plaintiffs’ staff from meeting with pregnant women unless and until Plaintiffs comply with the Ordinance.

104. Wherefore, Plaintiffs request the relief set forth below in the prayer for relief.

PRAYER FOR RELIEF

On their foregoing causes of action, Plaintiffs respectfully pray that the Court grant them relief as set forth below:

A. Plaintiffs respectfully pray the entry of a preliminary injunction barring Defendant and all persons in active concert with it from enforcing the Ordinance against Plaintiffs;

B. Plaintiffs respectfully pray the entry of a permanent injunction barring Defendant and all persons in active concert with it from enforcing the Ordinance against Plaintiffs;

C. Plaintiffs respectfully pray the entry of a declaratory judgment that the Ordinance violates the First and Fourteenth Amendments to the United States Constitution;

D. Plaintiffs respectfully pray the entry of an order granting them their costs, including a reasonable award of attorneys' fees, pursuant to Title 42 U.S.C. § 1988;

E. Plaintiffs respectfully pray that the Court grant such other and further relief as it deems just in the circumstances.

Respectfully submitted March 23, 2011.

/s/ Christopher A. Ferrara CAF-7123
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* *Pro hac vice* motions filed herewith