UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NOVEMBER TEAM, INC.; ANAT GERSTEIN, INC., BERLINROSEN PUBLIC AFFAIRS, LTD.; RISA HELLER COMMUNICATIONS LLC; and MERCURY LLC,

Plaintiffs,

-against-

NEW YORK STATE JOINT COMMISSION ON PUBLIC ETHICS,

Defendant.

No. 16 Civ. 1739 (LGS)

PLAINTIFFS' COMBINED MEMORANDUM OF LAW: (I) IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION, AND (II) IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

PAGE NO.

PRELIMINARY STATEMENT 1

ARGUMENT 5

I. THE PRELIMINARY INJUNCTION SHOULD BE GRANTED 5

A. Advisory Opinion 16-01 Violates the Constitution 5

1. The Opinion is an Unprecedented Expansion of the Lobbying Act 6

a. The Lobbying Act Has Never Before Applied to Press Communications 6

b. The Opinion's Definition of "Lobbying" for the First Time Abandons the Requirement of Direct Contacts 8

2. The Opinion Violates *Harriss* 11

3. The Opinion Infringes on First Amendment Rights Without Any Legitimate Justification 13

a. The Commission Acknowledges the Impact the Opinion Has on Plaintiffs' Speech Rights 14

b. No State Interest in These Infringements Satisfies Exacting Scrutiny 16

4. The Opinion Is Unconstitutionally Vague 19

B. Absent an Injunction, the Opinion Will Cause Immediate, Irreparable Harm 22

C. The Balance of Hardships Falls Squarely in Plaintiffs' Favor 25

II. THE MOTION TO DISMISS SHOULD BE DENIED 25

A. Plaintiffs Have Standing 26

B. Plaintiffs' Claims are Ripe 28

C. Abstention Is Inappropriate 29

CONCLUSION 30

TABLE OF AUTHORITIES

PAGE NO.

Cases

ACLU of N.J. v. N.J. Election Law Enforcement Comm'n,
509 F. Supp. 1123 (D.N.J 1981) ..... passim

Alliance of Am. Insurers v. Cuomo,
854 F.2d 591 (2d Cir. 1988)..... 29

Auto Sunroof of Larchmont, Inc. v. American Sunroof Corp.,
639 F. Supp. 1492 (S.D.N.Y. 1986)..... 24

Baker v. F & F Inv.,
470 F.2d 778 (2d Cir. 1972)..... 18

Blum v. Holder,
744 F.3d 790 (1st Cir. 2014)..... 27

Broadrick v. Oklahoma,
413 U.S. 601 (1973)..... 5

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985)..... 5

Bronx Household of Faith v. Bd. of Educ. of City of N.Y.,
331 F.3d 342 (2d Cir. 2003)..... 23

Buckley v. Valeo,
424 U.S. 1 (1976)..... 14

Citizens United v. Fed. Elec. Comm'n,
558 U.S. 310 (2010)..... 13, 16

Comm'n on Independent Colleges & Univs. v. N.Y. Temp. State Comm'n on Regulation of Lobbying,
534 F. Supp. 489 (N.D.N.Y. 1982)..... 11, 17, 22

Elrod v. Burns,
427 U.S. 347 (1976)..... 22, 24

FEC v. Cent. Long Island Tax Reform Immediately Comm.,
616 F.2d 45 (2d. Cir. 1980)..... 15

Florida League of Professional Lobbyists, Inc. v. Meggs,
87 F.3d 457, 459 (8th Cir. 1996) 13

Free the Nipple—Springfield Residents Promoting Equal. v. City of Springfield,
No. 15-3467-CV, 2015 WL 9595628 (W.D. Mo. Dec. 28, 2015) 27

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 26

Gooding v. Wilson,
405 U.S. 518 (1972) 5

Grayned v. City of Rockford,
408 U.S. 104 (1972) 22

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013) 27

Holt v. Cont'l Grp., Inc.,
707 F.2d 87 (2d Cir. 1983) 23

Johnson v. Dist. of Columbia,
71 F. Supp. 3d 155 (D.D.C. 2014) 27

Latino Officers Association v. Safir,
170 F.3d 167 (2d Cir. 1999) 24

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 26

Marchi v. Bd. of Coop. Educ. Servs. of Albany,
173 F.3d 469 (2d Cir. 1999) 29

Minnesota State Ethical Practices Board. v. NRA,
761 F.2d 509 (8th Cir. 1985) 12

Mullins v. City of N.Y.,
626 F.3d 47 (2d Cir. 2010) 23

N.Y. Progress & Prot. PAC v. Walsh,
733 F.3d 483 (2d Cir. 2013) 24

N.Y. v. U.S. Army Corps. of Engineers,
896 F. Supp. 2d 180 (E.D.N.Y. 2012) 28

Nat'l Ass'n of Mfrs. v. Taylor,
582 F.3d 1 (D.C. Cir. 2009) 12

NYCLU v. Grandeau,
528 F.3d 12 130 (2d Cir. 2008) 28

NYCLU. v. Acito,
459 F. Supp. 75 (S.D.N.Y. 1978)..... 12, 29

SpeechNow.org v. FEC,
599 F.3d 686 (D.C. Cir. 2010)..... 16

Susan B. Anthony List v. Driehaus,
134 S.Ct. 2334 (2014)..... 26

United States v. Harriss,
347 U.S. 612 (1954)..... passim

United States v. Rumely,
345 U.S. 41 (1953)..... passim

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988)..... 28

Virginia v. Hicks,
539 U.S. 113 (2003)..... 5

Von Bulow ex rel. Auersperg v. Von Bulow,
811 F.2d 136 (2d Cir. 1987)..... 18

Vt. Right to Life Comm., Inc. v. Sorrell,
221 F.3d 376 (2d Cir. 2000)..... 27, 29

Warth v. Seldin,
422 U.S. 490 (1975)..... 28

Zwickler v. Koota,
389 U.S. 241 (1967)..... 29

Statutes and Rules

N.Y. Leg. Law § 1-d..... 15

N.Y. Leg. Law § 1-h..... 17, 23

N.Y. Leg. Law §1-o..... 23

Other Authorities

Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing,
113 Harv. L. Rev. 1321 (2000)..... 5

Commission Opinion No. 21 (79-1) (1979)..... 8, 11

Commission Opinion No. 36 (82-2) (1982)..... 8

Commission Opinion No. 39 (97-1) (1997)..... 8

Commission Opinion No. 44 (00-3) (2000)..... 10

Commission Opinion No. 49 (02-4) (2002)..... *passim*

PRELIMINARY STATEMENT

Defendant's opposition to Plaintiffs' motion for a preliminary injunction rests on four interrelated propositions: *first*, that Plaintiffs' communications with the press constitute "lobbying;" *second*, that, because press contacts are a form of lobbying, the burdens of registration and public disclosure are justified by the state's interest in knowing who is influencing government and how; *third*, that, inasmuch as Plaintiffs are being treated like every other "lobbyist" in what the Defendant loosely refers to as "the system," they bear no burden and suffer no harm sufficient to confer Article III standing; and *fourth*, that Plaintiffs are challenging the constitutionality of New York's Lobby Act and its regulatory regime as a whole, based on the assertion that it will require public relations firms to report specific press contacts when they register as lobbyists.

None of these propositions holds water.

First, the idea that communicating with the press constitutes "lobbying" is as unprecedented as it is nonsensical. No other jurisdiction in the United States defines "lobbying" to include press contacts, and the Commission itself never so defined it prior to Advisory Opinion 16-01 (the "Opinion"). The Supreme Court, in *United States v. Harriss*, 347 U.S. 612 (1954), and *United States v. Rumely*, 345 U.S. 41 (1953), and the Commission's own prior opinions all recognize that lobbying means bringing about "direct contact" with public officials either by one-on-one "buttonholing" or through paid efforts to expressly urge others to communicate directly *with* public officials ("grassroots lobbying" via a "call to action").

Indeed, far from bringing about "direct contacts" with public officials, press communications are part and parcel of the broad public discourse about issues of the day. Public relations firms like Plaintiffs seek press coverage in order to "influence public opinion," not to stimulate a targeted message to a specific official. Accordingly, press contacts are precisely the

kind of communications that the *Rumely* Court held did *not* fall within a common-sense understanding of the term "lobbying"—however far their "radiations of influence" may span. *Rumely*, 345 U.S. at 46. Parts I.A.1, 2 *infra*.

Moreover, Defendant's assertion that "Plaintiffs have no special constitutional right to lobby the press" is straightforwardly wrong. Opp. Br. at 31.[1] In our constitutional system, *everyone* has an unfettered constitutional right to speak on public issues, *including* with the press. The Commission believes that if it expands the definition of "lobbying" to include press contacts, the protections afforded by the Constitution to those who would speak and those who would publish their remarks somehow disappear. They do not. As a matter of both constitutional jurisprudence and simple common sense, there is no such thing as "lobbying the press." There is only lobbying the *government*—and speaking to a journalist is not that. Parts I.A.1-3 *infra*.

Defendant's second proposition is equally inconsistent with Supreme Court and other precedent. Forcing public relations firms like the Plaintiffs to submit to New York's burdensome regulatory regime because they communicate with the *press* is not justified by the state's interest in disclosing who is lobbying *government* and why. New York's Lobbying Law requires disclosure of political associations (who is paying whom for what political work), political goals (which bill or issue a particular person or entity is supporting or opposing), and, in the context of an investigation, specific communications (who spoke to whom about what), and it

[1] Citations to "Opp. Br." are to the Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, dated May 16, 2016, Dkt. No. 32. Citations to the "MTD Br." are to Defendant's Memorandum of Law in Support of Its Motion to Dismiss, dated May 13, 2016, Dkt. No. 35. Citations to "Pls.' Br." are to Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, dated March 8, 2016, Dkt. No. 12. Citations to Exhibits 1 through 11 are to exhibits to the Declaration of Andrew G. Celli, Jr. in Support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction, dated March 8, 2016, Dkt. No. 13. Citations to Exhibits 12 through 16 are to exhibits to the Reply Declaration of Andrew G. Celli, Jr. in Further Support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction, dated June 15, 2016 and filed along with this Memorandum of Law.

threatens criminal sanctions for the willful failure to make these disclosures. Such intrusiveness, and the burden it places on pure political speech, is permissible—but only when it is "substantially related" to a "sufficiently important" state interest.

Courts have found such an interest, and have upheld registration and disclosure regimes like New York's, only when traditional lobbying takes place. In that context, disclosure is necessary to expose direct communications with public officials—which are otherwise hidden from public scrutiny—and to identify the powerful interests behind such contacts. A public official has a right to know who is paying the lobbyist to stand in her office doorway, and whether the passel of letters that has landed on her desk represents a spontaneous outpouring from voters, or a letter-writing campaign "artificially stimulated" by paid organizers.

But these issues are not in play, and the state's interests are not at stake, when a public official reads a newspaper article or editorial, any more than when she sees a blog post, listens to a speech delivered in the public square, or picks up a leaflet distributed to a crowd. The state interest in promoting openness in the political process and exposing pressures applied to lawmakers does not exist with respect to communications that exist as part the broad public "conversation," as distinct from a specific "lobbying message" whispered in an official's ear. And it does not exist when the communications are with, and filtered through, a robust and independent Fourth Estate. See Part I.A.3 *infra*.

Third, Defendant's effort to skirt this litigation by asserting that Plaintiffs lack Article III standing (and that the issues in this case are not ripe for adjudication) ignores the substantial and undisputed factual record now before this Court. Each Plaintiff has articulated the specific constitutional and business harms it will suffer if the Opinion becomes effective. These harms, which are detailed in lengthy declarations, run the gamut from deterred speech and fear of

political retaliation for having to disclose their advocacy of unpopular positions, to the additional expenses and logistical challenges that public relations shops face if they must register and disclose. Far from being "conclusory" or merely "self-serving," *see* Opp. Br. at 28-29, Plaintiffs' now-undisputed sworn testimony details the negative impacts on their speech if the Opinion becomes law. The consequential impacts on the press—which will be deprived of information and competing voices if Plaintiffs withdraw from the public "conversation"—are incalculable. See Part II *infra*.

Finally, Defendant's overheated rhetoric notwithstanding, Plaintiffs do not seek to invalidate the Lobbying Act and its regulatory rules, but rather to restore them to their traditional, constitutional scope. This case is not a facial challenge to the Lobbying Act itself, or to New York's regulatory scheme as a whole. Nor does it turn on an imagined obligation to report every communication with a reporter to the government. It is a challenge solely to Advisory Opinion 16-01 and its unprecedented requirement that public relations firms and others who do not lobby submit to the Act's existing burdensome requirements. PR firms do not lobby: they contact the press, *not* public officials, and they influence the public generally and public officials only indirectly. The state has no valid interest in burdening this core First Amendment activity, and the Opinion is unconstitutional even though it does not require the reporting of each specific press contact at the time of filing. See Part I.A.1,2 infra.

For these reasons and more, Plaintiffs' motion for a preliminary injunction must be granted and the Commission's motion to dismiss the complaint must be denied.

ARGUMENT

I. THE PRELIMINARY INJUNCTION SHOULD BE GRANTED

A. Advisory Opinion 16-01 Violates the Constitution

Advisory Opinion 16-01's expanded definition of "lobbying" is a new phenomenon on the constitutional stage. It is without precedent, and it goes far beyond prior definitions that have been upheld by courts. In Advisory Opinion 16-01, it is the Commission, not Plaintiffs, that "seek[s] to uproot decades of precedent and practice," Opp. Br. at 1, by abandoning the requirement of direct contact with government officials that has until now been the universal hallmark of lobbying.

Plaintiffs' facial challenge is not to the *Lobbying Act*, but only to that portion of the *Opinion* that would expand the definition of "lobbying," and extend the accompanying registration requirements, to activities beyond buttonholing and grassroots lobbying—*i.e.*, to activities that do not involve direct contact with legislators. That expansion is unconstitutionally overbroad because it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the [Opinion's] plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 2193 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). In a facial challenge, even if Plaintiffs' "own conduct is not constitutionally protected," they are "entitled to insist that the statute be relatively fully specified and that, as relatively fully specified, it not sweep too broadly." Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1346-47 (2000) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-04 (1985); *Gooding v. Wilson*, 405 U.S. 518, 502-21 (1972)).

Whether Plaintiffs' First Amendment and due process rights are considered in isolation, or alongside the rights of the countless others now swept into the lobbying regulation regime by the Commission, the Opinion is both unconstitutionally overbroad and impermissibly vague.

The Supreme Court held in *United States v. Harriss* and *United States v. Rumely* that requiring lobbying disclosure, or punishing its absence, outside the context of direct contacts with public officials creates grave constitutional concerns under the First Amendment. This case, in which the Commission offers *no* valid justification for requiring registration and disclosure by a class of persons who, heretofore, were never considered lobbyists, proves that point in spades. The Opinion simply does not survive the "exacting" level of scrutiny to which rules affecting political speech are subject. Part I.A.3(b) *infra*.

The Opinion cannot withstand due process scrutiny either. The Opinion's contours are so vague that even the commissioners who adopted it cannot agree on its meaning. For that reason as well, it is unconstitutional and must be enjoined. *See* Part I.A.4 *infra*.

1. The Opinion is an Unprecedented Expansion of the Lobbying Act

a. The Lobbying Act Has Never Before Applied to Press Communications

Advisory Opinion 16-01's rule requiring PR firms to register and disclose their activities when they communicate with the press is new and unprecedented.

The Commission forthrightly admits that the Opinion represents the first time in the history of New York's Lobbying Act that public relations firms have been required to register and disclose their clients and goals. *See* Opp. Br. at 11 ("Plaintiffs' attempts to send lobbying messages through the press may not have been subject to any reporting requirements previously"). What the Commission avoids saying, but what is undeniable, is that the Opinion's interpretation is also an about-face from prior Commission rulings.

In 2002, the last time the Commission addressed the subject, its position could not have been clearer: a person or entity who "contact[s] newspaper publishers and editorial writers to solicit their support for a bill . . . would *not* be required to register as a lobbyist." Ex. 17 (Op.

No. 49 (02-4)) (emphasis added).[2] This was true even if the consultant's "sole purpose . . . [was] to create a climate of support for the proposed legislation (thru statewide editorials) leading to voter and legislative support for the bill." *Id.*[3] In other words, until to the adoption of Advisory Opinion 16-01 in January 2016, "contact[ing] . . . editorial writers to solicit their support for a bill" was not lobbying. Ex. 17 (Op. No. 49 (02-4)). Now it is. Opp. Br. at 16-17; *id.* at 17 ("soliciting media coverage" is lobbying).

The Opinion is also unprecedented—in New York and elsewhere. In advocating for the adoption of the Opinion, Martin Levine, Esq., the Commission's Senior Counsel,[4] told the commissioners that no other jurisdiction requires PR consultants to register as lobbyists. Ex. 4 (Open Meeting) at 35:17-35 ("As far as capturing the activities of consultants, I believe we are out front. *I have not been able to find anything similar in any other jurisdiction.*" (emphasis added)). Put another way, before now, no statute, rule, or interpretive guidance has ever purported to regulate what this Commission calls "lobby[ing] the press." Opp. Br. 26.

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[2] Also available at http://www.jcope.ny.gov/advice/lob/opinio49.htm.

[3] Opinion 16-01 purports to "affirm[] while clarifying" previous opinions, but it never even mentions the 2002 Opinion or attempts to reconcile its directly contrary construction of the Lobbying Act. *See* Ex. 1 at 8-9.

In its brief to this Court, the Commission does acknowledge the 2002 Opinion, but misleadingly quotes it and thereby obscures its significance. The Commission quotes 2002 Opinion's conclusion that lobbying does not include "contact[ing] other message creators (i.e. [newspaper] editors) to make their own statements and position to their audience without any suggestion as to what the message should say or direct, *only that it speaks favorably as to a pending legislative issue*," Ex. 17 (Op. No. 49) (emphasis added), but it truncates the italicized language, *see* Opp. Br. at 6. This omission creates the misimpression that the 2002 Opinion left open, rather than foreclosing, the Commission's present position: that lobbying includes "soliciting a journalist to support a position on a specific government action." Opp. Br. at 26.

[4] Mr. Levine also holds the title of Director of Lobbying and Financial Disclosure. *See*, e.g. www.jcope.ny.gov/pubs/eblast (under June 2015, click on "JCOPE to Extend Comment Period on Proposed Guidance on Definition of Lobbyiing).

b. The Opinion's Definition of "Lobbying" for the First Time Abandons the Requirement of Direct Contacts

The Opinion is also a radical departure from the Commission's prior interpretation of the Lobbying Act because, for the first time, it construes "lobbying" to include conduct that does not entail *direct* communication with public officials—whether that direct communication is made "by lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign." Ex. 13 (Op. No. 21 (79-1)) (emphasis omitted)[5]; *id.* ("To conform with Federal case law, to constitute 'lobbying activity' under the [Lobbying Act], contacts with legislators, the Governor or regulatory agency decision makers *must be direct*" (emphasis added)). Before the Opinion was issued, a consultant was not a "lobbyist" unless he "ha[d] control over message delivery, and that control *result[ed] in a direct contact with decision makers*" in the form of "face to face meetings with legislators, written and printed communications, telephone contact, e-mail or any other electronic means of communication." Ex. 14 (Op. No. 39 (97-1)) (emphasis added).[6] "Grassroots lobbying" involves "direct contact" because it is marked by a 'call to action'—the lobbyist "request[s] or suggest[s] that the receiver of the message *contact their legislative representative or Executive Branch* in response to the message," leading to the direct communication with a public official that is the hallmark of lobbying. Ex. 17 (Op. No. 49 (02-4)) (emphasis added); *see also* Ex. 15 (Op. No. 36 (82-2))[7] (lobbyists "urge or exhort the public *to contact legislators or the governor*" (emphasis added)).

The earned-media scenario that the Opinion seeks to capture shares none of the attributes of either "buttonholing" or "grassroots lobbying." When a PR professional contacts a reporter or

[5] Also available at http://www.jcope.ny.gov/advice/lob/opinio21.htm.

[6] Also available at http://www.jcope.ny.gov/advice/lob/opinio39.htm.

[7] Also available at http://www.jcope.ny.gov/advice/lob/opinio36.htm

an editorial page writer to discuss an issue of interest to her client, and the newspaper, in its own judgment, disseminates a news story or an editorial on the subject to the whole world, no one has any "direct contact" with a public official: no phone call has been made, no office has been visited, and no letter or email has been sent. The only "contact" that a public official has with the communication is of precisely the same sort that each and every reader or viewer has, in real time. If a public official picking up a newspaper constitutes "direct contact" in the sense of the case law, then that term has lost all meaning.

Also missing from the PR consultant's earned media campaign is any recognizable requirement of a "call to action." While the Commission claims that a "call to action" is still required under the Opinion, *see* Ex. 1 at 8-9; Opp. Br. at 32, the Opinion has so watered down the requirements—of both a "call" and of "action"—as to render them meaningless. A "call to action" has always been defined as "a request or suggestion that the receiver of the message contact their legislative representative or Executive Branch in response to the message." Ex. 17 (Op. No. 49 (02-04)). In the Opinion, the Commission has redefined and broadened the term to mean any "attempt[] . . . to induce a third-party—whether the public or the press—to deliver the client's lobbying message to a public official," Ex. 1 (Opinion) at 9, where "delivering [a] message to a public official" means nothing more than making a public statement—such as in a newspaper article or editorial—that the official might encounter.[8]

At their most basic level, media outlets exist to disseminate news to the general public; they are participants in the broad public "conversation" about our politics. Media outlets are not

[8] Indeed, it is simply not possible, in any practical sense, to use the press to "get a message" to a particular public official as can be done with an artificially-stimulated letter-writing campaign. Unlike the grassroots lobbyist who provides hundreds or thousands of constituents with pre-printed post-cards, telephone scripts, or email text to sign and submit, in the earned media context, the theoretical message-sender—the PR consultant—has no control over whether or not a media outlet even publishes a story or editorial on the relevant issue, much less what the story or editorial says, what slant it takes, what nuances it adopts or rejects, and whether the particular official is or is not one of the thousands, hundreds of thousands, or millions of readers or viewers who actually see the story.

a "back-channel" to government officials, and, unlike the lobbyist lingering in the hallway or the constituents whose mail stacks up on a desk, they do not send "lobbying messages" on behalf of their sources. A PR consultant who encourages the press to "speak[] favorably as to a pending legislative issue" in its news or editorial pages can only hope to "creat[e] a climate of support for the proposed legislation"—*regardless* of whether the "message" does or does not reach a particular public official. Ex. 17 (Op. No. 49 (02-4)).

Put another way, whereas buttonholing and artificially stimulated letter-writing campaigns are designed to result in specific contacts aimed directly at public officials (a letter, a call, a tug on the shirtsleeve), earned media activities can only stimulate general, public discourse on matters of public policy; the message "reaches" a public official, if at all, only by affecting the public discussion in which *every* reader and viewer takes part. *See* Ex. 17 (Op. No. 49 (02-4)) (activity designed "to create a climate of support for [various public policies] through statewide editorials" is not lobbying). There is a world of difference between "direct contacts" with public officials, and public policy arguments made "in the air." The Commission ignores this distinction, and has lost sight of the basic principle it previously embraced: journalists cannot be "lobbied"; only public officials can be, and, even then, only when contacted directly. Ex. 17 (Op. No. 49 (02-4)).[9]

[9] Prior to the Opinion, the Commission had always advised that direct contact with an official was a necessary element of lobbying, even though the lobbyist himself need not make the direct contact. *See, e.g.*, Ex. 16 (Op. No. 44 (00-3)), also available at http://www.jcope.ny.gov/advice/lob/opinio44.htm. That type of lobbying—grassroots lobbying—was considered many times by the Commission, including in Opinion 44 in 2000. Opinion 44 considered radio advertisements that told listeners to "Tell Governor Pataki to" and "Let Governor Pataki know" concerning a pending legislative matter. *Id*. Based on these "calls to action," the ads were attempts to influence legislation through direct contacts between constituents and the governor. In this context, the Commission explained,"[d]irect contact is not required," *id*. and cited to another opinion, Opinion 21, which explained that direct contact *is* required, where that contact means "direct pressures exerted by the lobbyists themselves or through [others]." Ex. 13 (Op. No. 21 (79-1)). The notion that "direct contact is not required," speaks only to personal communication between the lobbyist and the official. But plainly, "grassroots lobbying" is designed to stimulate "direct contact" between a constituent and a public official – hence the critricality of the magic-words "call to action, " without which there is no "grassroots lobbying." In its briefing, the Commission quotes Opinion 44 to

2. The Opinion Violates *Harriss*

The rule that lobbying must entail direct communications with public officials was not created by the Commission; it is a constitutional mandate—a "clear . . . requirement" of [f]ederal case law" applying the First Amendment. Ex. 13 (Op. No. 21 (79-1)). In *United States v. Harriss*, the Supreme Court upheld a lobbying disclosure statute only after narrowly defining "lobbying" to mean "*direct communication with [public officials]*," whether "exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated latter campaign." *Harriss*, 347 U.S. at 622 (emphasis added); *Rumely*, 345 U.S. 41 (1953).[10] This narrow interpretation was necessary to avoid "a serious doubt of constitutionality." *Rumely*, 345 at 47. Relying on *Harriss*, a federal district court interpreted New York Lobbying Act identically. It held that only "activities that involve[] *direct contact* with government officials," and not merely any "attempt to influence government action," constitute lobbying. *Comm'n on Independent Colleges & Univs. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 496-97 (N.D.N.Y. 1982) (hereinafter "*CICU*"); *also id*. at 497-98. In reaching that result, the *CICU* court relied on the Commission's previous opinions that the Act would not be applied to "require[] disclosure of indirect lobbying activities that go beyond those activities enumerated in *Harriss*," *id*. at 497-98.

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suggest that no direct contact of *any* kind is required. MTD Br. at 11. The context of the opinion and its citation to Opinion 21 show that to be inaccurate.

[10] The Commission again relies on a partial quotation, which creates a fundamentally distorted impression of *Harriss*' holding. *Harriss* upheld a definition of lobbying that covered only "*direct pressures*, exerted by the lobbyists themselves or *through* their hirelings or through an artificially stimulated letter campaign." *Harriss*, 347 U.S. at 620. The Commission misleadingly paraphrases this holding as authorizing "regulation of 'direct pressures exerted by the lobbyists themselves' *and* indirect pressure via the exhortations to the public," MTD Br. at 3-4 (quoting *Harriss*, 347 U.S. at 620) (emphasis added). The partial quotation of the sentence suggests the very opposite of its meaning: that "indirect pressure via exhortations to the public" can be regulated, not in addition to direct pressures, but only if they are a mechanism for applying direct pressures.

But the Commission has now overturned its prior opinions in this area, and Advisory Opinion 16-01 reaches far outside the scope of speech held validly the subject of disclosure in *Harriss*, *Rumely*, and *CICU*. The Opinion requires registration where *no one* has direct contact with public officials, and no one is even urged to have such contacts. The standard articulated by the Commission is breathtaking in its sweep: persons and entities must register whenever they communicate with the media for "the purpose of influencing government." Opp. Br. at 2. This very "purpose" test was flatly rejected by the Supreme Court more than 60 years ago. In *Rumely*, the Supreme Court ruled that government cannot "inquire into . . . efforts . . . to influence public opinion through . . . periodicals" merely because they may exert "radiations of influence . . . upon the ultimate legislative process." *Rumely*, 345 U.S. at 46.

Later courts employed a circumscribed definition of "lobbying" to avoid precisely this constitutional infirmity. *See e.g.*, *ACLU of N.J. v. N.J. Election Law Enforcement Comm'n*, 509 F. Supp. 1123, 1130-31 (D.N.J 1981) (upholding New Jersey's lobbying law only after state courts narrowed the statute's "phraseology 'to influence legislation'" to mean "activity which consists of direct, express and intentional communications with legislators"); *NYCLU. v. Acito*, 459 F. Supp. 75, 89 (S.D.N.Y. 1978) (facially invalidating law that required registration by groups that attempted to influence public discourse on matters of public policy).

To be sure, the "unbroken line of cases" that the Commission cites, Opp. Br. at 2, does reaffirm *Harriss*. But it does not support the Opinion, and it certainly does not support the capacious "purpose" test upon which the Commission now relies. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 26 (D.C. Cir. 2009) (upholding reporting requirements for lobbyists as defined by *Harriss*). For example, while the Commission claims the Eighth Circuit in *Minnesota State Ethical Practices Board. v. NRA* upheld lobbying disclosure laws "not involving 'direct'

contact with legislators," in fact, the circuit merely reaffirmed *Harriss*' ruling that a "grassroots lobbying campaign"—which by definition involves urging people to directly contact their legislators—could be subject to disclosure. 761 F.2d 509 (8th Cir. 1985). And in *Florida League of Professional Lobbyists, Inc. v. Meggs*, the Eighth Circuit declined to invalidate Florida's lobbying law *in its entirety*, because the plaintiff could not show that it "would operate unconstitutionally in *most* cases," 87 F.3d 457, 459, 461 (8th Cir. 1996). Here, Plaintiffs do not seek to invalidate the Lobbying Act in all cases, or even in some. They merely seek an injunction against a single section of the administratively engineered Opinion that requires registration and disclosure simply because someone has been hired to communicate with the press on a matter of public policy.[11]

Harriss could not be clearer: an attempt to influence policy is "lobbying" only if it involves "direct communication" with a public official. *Harriss*, 347 U.S. at 623. Because there are no such direct contacts in Plaintiffs' communications with the press, by declaring Plaintiffs lobbyists and requiring them to register, the Opinion violates *Harriss*—and the Constitution.

3. The Opinion Infringes on First Amendment Rights Without Any Legitimate Justification

The Opinion's violation of the "direct contacts" principle of *Harriss* alone invalidates it. But there is more. The Opinion severely burdens the First Amendment activities of PR consultants and countless others without a substantially related, sufficiently important state interest. It therefore fails the "exacting scrutiny" that the Commission concedes governs this Court's review. Opp. Br. at 12; *see Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 366–67

[11] To the extent that the Eighth Circuit further suggests that conduct can be regulated as lobbying in the absence of any direct contact with legislators, it is unpersuasive. *Meggs* rejected *Harriss*'s crystal clear statement that lobbying must involve "*direct communication with Congress*," *Harriss*, 347 U.S. at 623 (emphasis added), apparently because it overlooked the fact that a grassroots lobbyist, whose only *personal* contact with legislators is indirect, nevertheless endeavors to bring about direct contact between his grassroots audience and government officials. *See Meggs*, 87 F.3d at 461.

(2010) (exacting scrutiny "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest" (internal quotation marks omitted)).

a. The Commission Acknowledges the Impact the Opinion Has on Plaintiffs' Speech Rights

In their opening brief, Plaintiffs enumerated five ways in which the Opinion burdens their speech rights. Pls.' Br. at 28-36. The Commission's "analysis" of this issue begins with the bald assertion that the Opinion is justified, and then "concludes" by saying that the Plaintiffs' First Amendment rights are not significant. Opp. Br. at 19. This is exactly backwards. The proper approach to constitutional balancing is to *first* acknowledge the nature of the burdens imposed, and *then* weigh those burdens against the governmental interests at stake. "[S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes . . . must survive exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). As a careful review of the Commission's briefing makes clear, in the end, the Commission implicitly concedes that the burdens imposed on Plaintiffs by the Opinion are significant indeed.

First, the Commission acknowledges that the recordkeeping and reporting obligations to which Plaintiffs and others would be subject under the Opinion are "are not de minimis." Opp. Br. at 19. This is correct—and a substantial understatement. If the Opinion stands, the Lobbying Act requires multiple filings and fees throughout the year, extensive recordkeeping, disclosure of political associations and goals, and the looming threat of "civil and criminal penalties." *See* Pls.' Br. at 12-15, 28-31. The Commission denies none of this.

Likewise, the Commission admits in its opposition brief that the Opinion subjects newly designated "lobbyists" to reporting requirements only because they "associat[e] and speak[] for substantial amounts of money." Opp. Br. at 2. Those who do not "expend or earn more than $5,000" are not required to file six reports each year disclosing the exact terms of their activities,

keep three-years' worth of records tracking those activities, or submit to investigations, on penalty of both civil and criminal sanctions—even though their conduct may be identical to those who are paid for their work. *See* Pls.' Br. at 28-29. This is rank discrimination against both political association and paid speech, the second and third ways in which affected parties' First Amendment rights are infringed. *See* Pls.' Br. at 31-33.

Fourth, the Opinion fatally undermines the Plaintiffs' right to speak anonymously. The opinion requires that, whenever Plaintiffs urge reporters or editorial writers to recognize the merits or demerits of a particular policy prescription, they must "identify themselves, their clients . . . and the subject of their lobbying activities" to both the Commission and to the public at large. Opp. Br. at 1. They must, in other words, "account . . . for engaging in debate of political issues." *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 54 (2d. Cir. 1980) (Kaufman, C.J., concurring). Their right to speak anonymously is destroyed. *See* Pls.' Br. at 32.

Finally, while the Commission asserts that the Opinion "in no way requires disclosure of conversations with the media," MTD Br. at 2; *see also* Opp. Br. at 1, it does not dispute that it is vested by statute with expansive audit and investigation authority through which it is empowered to subpoena records and compel testimony. N.Y. Leg. Law § 1-d(b). In the context of audits and investigations, the Commission will necessarily inquire into the *existence* and *substance* of press communications to determine: (i) whether a public relations consultant under investigation for failure to file spoke to a reporter on a client's behalf; and (ii) whether the consultant was "merely serving as a [reporter's] source" or "proactively advanc[ing its] client's interest through the media"—two scenarios that the Commission says it will treat differently. Opp. Br. at 18. While it is true, then, that PR firms need not report each press contact in their initial filings,

whenever a PR firm (or its client) is subject to an investigation, the Commission *must* inquire, in detail, into the nature, extent, and content of contacts between the PR consultant and the media. *See* Pls.' Br. at 40. It is only through such intrusive inquiry that the Commission can distinguish between "real" media coverage, whatever that is, and "artificial media coverage"—whatever *that* means. Opp. Br at 17.

b. No State Interest in These Infringements Satisfies Exacting Scrutiny

The real-life burdens that the Opinion imposes on public relations firms withstand "exacting" constitutional scrutiny only if the state's registration and disclosure requirements bear "a substantial relation" to a "sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366–67 (internal quotation marks omitted). *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) ("[T]he First Amendment cannot be encroached upon for naught"). The Commission has identified no such interests.

In an attempt to justify the Opinion's broad sweep, the Commission points to *ACLU of New Jersey v. N.J. Election Law Enforcement Commission*, 509 F. Supp. at 1129, which, relying on *Harriss* and other precedents, identifies three interests furthered by disclosure of traditional lobbying activities: (1) the "needs of elected officials," for whom disclosure informs them of the "sources" of pressures they face and the "particular constituency" that is advancing a particular legislative goal; (2) "the needs of the electorate," who, the court says, should be allowed to judge how public officials perform under lobbying pressure; and (3) "a strong interest in promoting openness in the system by which . . . laws are created." Opp. Br. at 14. None of these interests justifies lobbying disclosure requirements as applied to communications between PR consultants and the press.

As to the first two rationales, the state's and the public's interest in learning the identities and motives of those who petition public officials has no relevance in a context where no one is

contacting a public official. *See Harriss*, 347 U.S. at 625 (lobbyist registration requirements allow "individual members" of government to "properly evaluate" the "myriad pressures to which they are regularly subjected"); *CICU*, 534 F. Supp. at 489 (government interest "is in providing the public and government officials with knowledge regarding the source and amount of pressure *on government officials*") (emphasis added); *accord id*. at 494-95. The state interest in disclosure of identities is further diminished by the fact that any "pressure" created by public relations professionals is aimed at the press, not public officials, and is mediated by the press's independent editorial judgment. In any event, the disclosure requirement itself is redundant: if the *New York Times* editorializes in favor of a particular position, there is no question whose opinion that is. It's the opinion of the *New York Times*.

The disconnect between the first two justifications for traditional lobbying disclosure on the one hand, and the reporting requirements imposed on PR firms on the other, is starkly illustrated by the obligation to disclose "the name of the person, organization, or legislative body before which the lobbyist has lobbied." N.Y. Leg. Law § 1-h(b). When a lobbyist buttonholes a public official, or encourages constituents to contact specific legislators, it is obvious which target must be listed on the form. But when a PR firm urges a reporter to dedicate more airtime to a particular issue, who exactly are "the persons" or "bodies" being "lobbied"? It is, simultaneously, everyone—and no one.

Lastly, the Commission's asserted "interest in promoting openness in the system by which its laws are created" is not served by the Opinion. Opp. Br. at 14 (internal quotation marks omitted). Editorials are not secret, and neither are news items. They are written for the public. When members of the public read the news item or editorial, or see a broadcast, they readily see the source of any "pressure" a government official might feel when she or he has the

same viewing experience. *See* Opp. Br. at 17 (acknowledging that "press coverage reaches a broader audience than a constituent's letter or phone call"). The only things "hidden" in an earned media campaign covered by the Opinion are the ways in which the "*journalist* might [have been] . . . influenced," and the identities of "sources" that the *journalist* has "contact[ed]." Opp. Br. at 16-17 (emphasis added). The true objective of the Opinion is clear: to force the disclosure of pressures applied to members of the *media*, not to *government officials*, and the Commission says as much. The Commission wants to know who is "lobby[ing] a newspaper editorial board." Opp. Br. at 8. But where is the case or precedent that supports any state interest in disclosing *that* information in the "lobbying" context? The Commission cites none; there is none.

In any event, the Commission is adamant that its registration requirements would never reveal the identity of press sources and, except in the case of investigations, Plaintiffs agree. Since that is true, what state interest is advanced by registration and disclosure? As the Commission makes clear, in the ordinary course of a public filing at least, the identity of the consultant "behind" the editorial or news story would not be revealed. Opp. Br. at 25. And so, as applied to PR professionals, what possible purpose does the disclosure regime serve? Based on the Commission's own representation in this regard, the Opinion fails the "substantially related" requirement. And to the extent this is not true, to the extent the Opinion *will* lead to government scrutiny of media sources, *see supra* Part I.A.3.a, it violates the "paramount public interest" in an independent press, *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972), free from government prying into the "relationship between the journalist and his source." *Von Bulow ex rel. Auersperg v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987).

To be sure, courts have routinely upheld lobbying registration and disclosure requirements in the face of First Amendment and due process challenges—but only when applied to traditional lobbying involving direct contacts. Here, the burden of the requirements, and their impact on speech, must be balanced against *non-lobbying* activities in which no contact with public officials is made. At least one court has already undertaken just such an exercise, and, not surprisingly, it found the registration and disclosure regime traditionally associated with lobbying unconstitutional as applied to non-lobbying activities. "[A]dministrative requirements, as applied to non-lobbying activities, impose a burden on the exercise of First Amendment rights but do not substantially further any state interest." *ACLU of N.J.*, 509 F. Supp. at 1133.

The Opinion is an overreach. It imposes significant burdens on Plaintiffs without any valid state interest. It is a direct assault on core political speech. It should be struck down.

4. The Opinion Is Unconstitutionally Vague

The Opinion is also unconstitutionally vague, untethered to any precedent or limiting principle.

Under the Opinion, anyone expending or earning more than $5,000 in a year must register as a lobbyist if he "attempt[s] . . . to induce a third-party—whether the public or the press—to deliver the client's lobbying message to a public official." Ex. 1 (Opinion) at 9. The Opinion fails to define *either* "attempt to induce" or "deliver the client's message." Instead, it provides as an *example* a PR consultant, like one of the Plaintiffs, who "contacts a media outlet in an attempt to get it to advance the client's message in an editorial." *Id*. at 8. The Commission is clear that its example should not be read too narrowly to apply *only* to media contacts, but also to *any* "group" or "third-party—whether the public or the press."

As discussed above, the earned media example offered by the Commission strips "lobbying" of both the "direct contact" and the "call to action" requirements and replaces it with

no other limiting principle. *See supra* Part I.A.1.b. The result is that "lobbying" seems to apply to *any* "attempt" to induce *any* "third-party" to make *any* statement in *any* public forum on *any* matter of public policy that could possibly be viewed, read, or heard by, or might otherwise somehow influence, a public official. The "principle" that the Opinion stands on is boundless. An invitation to "like" a statement on Facebook declaring a need for ethics reform in Albany would appear to qualify; so too would initiating a call-and-response at a rally, urging fellow citizens to publicly demand "justice" "now."

Instead of analysis to help Plaintiffs and others determine which of their activities might be reportable lobbying, the Commission offers conclusory statements that lead inevitably to confusion. For instance, the Commission's brief states that "being paid to write an editorial and see that it gets published" is "clearly" lobbying, while "answering a call from a journalist is clearly not." Opp. Br. at 9. But it does not explain how or why those scenarios are distinguishable; the Commissioners themselves do not even agree that they are. *See* Ex. 4 (Open Meeting) at 29:10, 49:00, 52:55; Pls.' Br. at 17, 40.

The Commission also fails to explain what "being paid to write an editorial and see that it gets published" even means in practice, and it does not respond to the many trenchant questions posed in Plaintiffs' declarations. Plaintiffs BerlinRosen and Mercury wonder about activities they engage in on a daily basis: "[I]f we . . . direct reporters covering policy proposals in a given area . . . to a research report that bears on the subject, is that covered activity requiring registration?" Ex. 7 (BerlinRosen Decl.) at ¶ 7. "[I]f a newspaper runs an article concerning a particular bill in the State Legislature that my client supports, and misconstrues its provisions in a way likely to make it less popular, is my firm engaged in a covered activity requiring registration if it contacts the publication to urge it to run a correction?" Ex. 9 (Mercury Decl.) at

¶ 9. And "if a reporter writing an article or editorial about a proposed agency action contacts my firm to ask how the action will affect the business of one of [our] clients, and the firm responds that the action would be either helpful or harmful to the client, has the firm engaged in covered activity requiring registration?" *Id*. What if the consultant refers not only to harm to the client but the industry generally? Or to the community more broadly?

The Commission offers no hint as to whether these activities are lobbying, or why they may or may not be. Each involves a public relations consultant "proactively advanc[ing its] client's interests through the media," which is defined as lobbying in the Opinion. Ex. 1 at 9. But each also concerns a "reporter's ability to gather information or to seek comment from representatives of advocacy groups as part of reporting the news," which the Opinion insists it does not affect. *Id*. at 8-9.

Rather than offering concrete answers, the Commission falls back on bland assurances of fairness and constitutional propriety. It tells us that "JCOPE has the expertise to resolve close cases consistent with the First Amendment," Opp. Br. at 10-11, which is cold comfort indeed, coming from the very Commission that gave us the Opinion. Do we trust the Commission to define and distinguish between "artificial" and "real" media coverage? Opp. Br at 17. Between a journalist "prompted to adopt a public relations consultant's position," and one who came to a position on her own? Opp. Br. at 16.

Even if believed, the Commission's reassurance that it "knows" what metric it will apply to distinguish between lobbyists and non-lobbyists does not save the Opinion from a vagueness challenge. Due process requires that the Commission *articulate* comprehensible standards *ex ante*, not resort to "'resolution on an ad hoc and subjective basis'" *ex post*, in the context of

enforcement proceedings. *ACLU of N.J.*, 509 F. Supp. at 1128 n.12 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

The Commission relies upon the *CICU* decision upholding the Lobbying Act against a vagueness challenge. But *CICU* denied the challenge only because "the direct contact" requirement served as a limiting principle. *CICU*, 534 F. Supp. at 502 ("Since . . . [the] Commission's interpretation of the law indicates that a person . . . is obliged to comply with this law only if there is direct contact with governmental decision-makers, or a campaign to encourage the public to engage in direct contact, the vagueness argument . . . fails."). In *Harriss* as well, only the "direct contact" element saved a federal statute from a vagueness challenge. *Harriss*, 347 U.S. at 621.

Here, the Opinion contains no "direct contact" rule. Absent such a requirement, the Lobbying Act applies to the type of "remote indirect activity to influence legislation" that *CICU* held would fail a vagueness challenge. *CICU*, 534 F. Supp. 502; *see also Rumely*, 345 U.S. at 46. The Opinion is unconstitutionally vague and violates due process.

B. Absent an Injunction, the Opinion Will Cause Immediate, Irreparable Harm

Enforcement of the Opinion will chill Plaintiffs'—and countless others'—First Amendment-protected speech. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). If the Opinion is enforced, Plaintiffs either must end their media communications, report their First Amendment activities to the government, or expose themselves to financial penalty and criminal prosecution for failing to do so.

This is not only a constitutional Hobson's choice for the Plaintiffs; it poses real practical difficulties. In some cases, Plaintiffs cannot afford to register—either because of the financial costs or because of the political risks. Registration and recordkeeping are expensive; they

require administrative support, technical capabilities, and, often, legal counsel, and not all of the Plaintiffs are equipped to fulfill these requirements.[12] *See* Pls.' Br. at 30-31 (citing cases for the proposition that disclosure obligations can be prohibitive barriers to participation in public dialogue). Fearful of violating registration requirements, Plaintiffs will in some cases forego media campaigns rather than risk civil and criminal sanctions.[13] In addition, the nature of Plaintiffs' businesses—and their clients' interests—means that they will sometimes refrain from speaking if the alternative is to associate publicly with policies that would expose them to negative repercussions.[14]

Absent an injunction, Plaintiffs will be chilled from freely engaging the media and the public on matters of public importance as they do now. Because "First Amendment rights are presumed to be irreparable," Plaintiffs' showing of a "chilling effect" satisfies the irreparable injury requirement for a preliminary injunction. *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003). Even a "'risk' of deterrence is sufficient to satisfy the irreparable harm standard." *Mullins v. City of N.Y.*, 626 F.3d 47, 55 (2d Cir. 2010) (quoting *Holt v. Cont'l Grp., Inc.*, 707 F.2d 87, 91 (2d Cir. 1983)).

And Plaintiffs are not alone. The Opinion covers a vast number of people and entities, including many who cannot afford to comply with the Lobbying Act and so will avoid speaking

[12] *See, e.g.*, Ex. 5 (Nov. Team Decl.) ¶¶ 3-9 (the November Team is a "small PR shop" with two partners and one employee, no support staff, and no capacity to comply with Lobbying Act obligations); Ex. 6 (AGI Decl.) ¶¶ 3, 10 (with eight PR Professionals and no support staff, AGI would struggle to comply with the reporting requirements).

[13] *See*, e.g., Ex. 6 (AGI Decl.) ¶ 12; Ex. 8 (RHC Decl.) ¶¶ 8-10; Ex. 7 (BerlinRosen Decl.) ¶ 6; Ex. 9 (Mercury Decl.) ¶ 9.

[14] *See, e.g.*, Ex. 5 (Nov. Team Decl.) at ¶ 11 (November Team fears retribution if firm and clients are required to disclose to the government efforts to sway public opinion against governing party's agenda); Ex. 7 (BerlinRosen Decl.) at ¶ 5 (clients fear the political vulnerability of being associated with certain positions); Ex. 9 (Mercury Decl.) at ¶ 8 (clients fear exposing future business intentions by disclosing issues on which they seek to influence opinion).

with the press or members of the public.[15] "The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (internal quotation marks omitted). A preliminary injunction is required.

The Commission's suggestion that the Court simply disregard Plaintiffs' sworn statements as "self-serving" and lacking in "concrete data," Opp. Br. at 28-29, cannot carry the day. The Commission offers no evidentiary basis to dispute the truth or accuracy of Plaintiffs' declarations.[16] The abundant evidence of chill that the Commission would rather ignore distinguishes this case from *Latino Officers Association v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999), on which the Commission relies. The plaintiffs there were not subjected to burdensome and expensive obligations as a precondition of speech; they were not required to sacrifice anonymity; and they faced no threat of discipline. *Id*. at 171. A threat of sanctions much less severe than the civil fines or criminal prosecution threatened here has been held sufficient to establish chill. *Elrod*, 427 U.S. at 373-74l (threats of discharge constitute irreparable injury).

[15] "The burden of compliance with these requirements may constitute a severe barrier to the exercise of free speech," *ACLU of N.J.*, 509 F. Supp. at 1130 n.18, not only for Plaintiffs but for their less-resourced compatriots. Take, for example, a group of grieving family members who pools together $5,000 to pay a representative to travel the state, speaking to citizens, reporters, and editorial writers about the need for more state-funded research into childhood cancer. Such a group would quickly abandon their plan upon realizing that they must file expense reports every two months, and track and record every expense over $75, and that, if they forget or ignore an obligation, they face fines or maybe even jail. N.Y. Leg. Law §§ 1-h(a), (b)(5), (c)(3); 1-o(a), (b). Other groups—such as rape victims, registered sex offenders, or individuals with drug addictions—are likely to forego plans to have a representative voice their positions in public discussions for fear of broadcasting their identities in connection with sensitive or unpopular positions.

[16] The Commission unhelpfully relies on *Auto Sunroof of Larchmont, Inc. v. American Sunroof Corp.*, 639 F. Supp. 1492, 1494 (S.D.N.Y. 1986), for the proposition that "self-serving affidavits" are inadequate for showing irreparable harm, and "concrete data" is required. Opp. Br. at 29. In *Auto Sunroof*, the plaintiff alleged that a competitor's opening of a similar business near his own would cause his business's failure, a proposition that could be evaluated through "concrete data" such as facts about "how much of [plaintiff's] business is from [the relevant town] and how close it already is to business failure." *Auto Sunroof*, 639 F. Supp. at 1494. The *Auto Sunroof* court never suggested that the plaintiff could not provide the relevant information in a statement by its owner merely because he was "self-interested," or that some other *form* of evidence was required.

C. The Balance of Hardships Falls Squarely in Plaintiffs' Favor

The grant of an injunction restoring the Lobbying Act to its prior, proper dimensions would expose the Commission to no hardship. The Commission's rhetoric notwithstanding, this case is not a facial challenge to enforcement of the Lobbying Act, nor does it call into question "the fate of a critically-important 35-year-old statute," MTD Br. at 23, or seek to "prevent[a] law[] embodying the will of the people from being implemented." Opp. Br. at 9. Plaintiffs merely seek to return New York to thirty years of status quo: the Lobbying Act as it was before the Opinion. *See supra* Part I.A.1.

II. THE MOTION TO DISMISS SHOULD BE DENIED

The Commission's arguments against jurisdiction are all based on a fundamental misstatement of Plaintiffs' case. The Commission claims that Plaintiffs' case rests on an interpretation of the Opinion that would require consultants to "disclose the identities of reporters they contact or the content of their conversations with reporters" in the regular course of registration. MTD Br. at 10-11. The Commission calls this a "bizarre and baseless" interpretation—which Plaintiffs do not dispute. They never advanced such an argument. As Plaintiffs' opening brief states, the Opinion expands the class of individuals who must satisfy the Lobbying Act's reporting requirements beyond those who have "direct contacts"; it does not alter the requirements themselves. Pls.' Br. at 15. The constitutional infirmity lies in the Opinion's requirement that persons who do not have or stimulate "direct contacts" with public officials must still report their political associations and goals to the government.

Once Plaintiffs' argument is properly construed, the concreteness of the parties' dispute is clear: the Commission, which enforces the Lobbying Act, has adopted a formal interpretation that requires Plaintiffs to either: (1) undertake the expense and burdens of registering as lobbyists; or (2) forego their earned media activities; or (3) risk civil and criminal sanctions by

not registering. That novel interpretation, which is set forth in the Opinion, and its consequences for Plaintiffs are stayed only by order of this Court. If enforcement is preliminarily and then permanently enjoined, Plaintiffs may pursue their earned-media activities without worry about either registration or prosecution. Plaintiffs have standing to pursue that remedy. Because no additional factual or legal development of the issue could sharpen the dispute, the case is ripe and abstention is inappropriate.

A. Plaintiffs Have Standing

The elements of constitutional standing are, as the Commission acknowledges, "somewhat relaxed" in the First Amendment context, MTD Br. at 8 (internal quotation marks omitted), particularly where First Amendment burdens are accompanied by the threat of criminal sanctions, *see Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2346 (2014). Even if they were not, Plaintiffs have satisfied all three standing elements: they are "threatened [by an] injury [that] is certainly impending," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000), which is caused by the Opinion, and which will be avoided if the Opinion is enjoined. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As the Commission admits, the Opinion reaches "*exactly* what Plaintiffs do": "contact members of the press . . . and seek to persuade them to report or, in the case of editorial writers, to adopt . . . the positions that [Plaintiffs'] client[s] wish[] to advance." Opp. Br. at 8 (emphasis added). The Commission issued the Opinion to "make clear that the same disclosure rules that apply to other lobbyists apply to . . . *Plaintiffs*." Opp. Br. at 8-9 (emphasis added).[17] If the stay is lifted, Plaintiffs must immediately make disclosures, pay registration fees, and adopt the Act's

[17] In light of the Commission's insistence that Plaintiffs are governed by the Opinion, their suggestion that Plaintiffs have not shown a need to report because they have "not even identified specific areas of state policy they would like to influence" is meaningless. See MTD Br. at 13. It is also not true. *See, e.g.*, Ex. 9 (Mercury Decl.) ¶ 4; Ex. 7 (BerlinRosen Decl.) pp. 2-3 ¶¶ 1-2; Ex. 6 (AGI Decl.) ¶¶ 4-5.

record-keeping practices.[18] The "imminent loss of money" in the amount of the registration fee, "traceable to the [regulation] requirement," is, alone, a basis for standing. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013), *aff'd*, 134 S. Ct. 2751 (2014).

There is nothing "speculative" about the risk of enforcement here: the Commission has promised it. The Commission adopted the Opinion as a formal interpretation of the Lobbying Act following a lengthy "notice and comment" period and a public meeting at which the chair announced that anyone violating the Opinion would be deemed a criminal, Ex. 4 (Open Meeting) at 1:10:29. The Commission has defended the validity of the Opinion in this litigation, and it in no way has disavowed its intent to enforce it.[19] Indeed, the Commission insists that disclosure by PR consultants is so vital to honest politics in New York that the public will be deeply harmed if enforcement of the Opinion is at all delayed. Opp. Br. at 30. In this context, the Commission cannot just "remove [Plaintiffs'] fear that it will be subjected to [prerequisites and] penalties for its planned expressive activities" by simply declaring that fear speculative. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000).

On these facts, this Court can rightly assume the Opinion will be enforced.[20] *See*

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[18] The Commission confusingly argues that Plaintiffs cannot complain of the burdens of *complying* with the Opinion because they have not articulated a plan to *violate* it. MTD Br. at 13. Plaintiffs are injured by the Opinion whether they violate it and risk sanctions; *or* pay the fees, file the statements, and maintain the records required; *or* fundamentally alter their businesses and stop pursuing earned media to avoid reporting obligations.

[19] The cases cited by the Commission in which the government expressly *disavowed* its intent to enforce the law as interpreted and challenged by plaintiffs therefore have no bearing here. *See e.g.*, *Johnson v. Dist. of Columbia*, 71 F. Supp. 3d 155, 162 (D.D.C. 2014); *Blum v. Holder*, 744 F.3d 790, 803 (1st Cir. 2014).

[20] That the Commission has never previously enforced the Lobbying Act with respect to earned media also does nothing to alleviate Plaintiffs' reasonable fear of sanctions. *See* MTD Br. at 12. Until it adopted the Opinion, the Commission did not consider such conduct governed by the Lobbying Act; now it does. *See supra* Part I.A.1. And since it adopted the Opinion, the Commission has been enjoined from enforcing it. *See* Dkt. Nos. 15, 18. *See Free the Nipple—Springfield Residents Promoting Equal. v. City of Springfield*, No. 15-3467-CV, 2015 WL 9595628, *3 (W.D. Mo. Dec. 28, 2015) ("[T]he lack of prosecutions does not suggest an ordinance that has rarely been used; the lack of prosecutions is a function of (1) the recency of the New Ordinance's passage and (2) the fact that the New Ordinance has successfully dissuaded Plaintiffs from engaging in conduct that might violate the New Ordinance.").

Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988). Absent an injunction, Plaintiffs have "an actual and well-founded fear that the law will be enforced against it." *Id*. Their businesses—and the First Amendment activities on which they are built—will suffer. Plaintiffs' real and "personal stake" in the Opinion's enforceability gives rise to Article III standing. *Warth v. Seldin*, 422 U.S. 490, 489-99 (1975) (internal quotation marks omitted).

B. Plaintiffs' Claims are Ripe

For the same reasons, there is nothing unripe about the parties' dispute. "'[A] plaintiff that can assert an injury-in-fact,'" as can Plaintiffs here, "'will usually have a constitutionally ripe claim.'" MTD Br. at 14 (quoting *N.Y. v. U.S. Army Corps. of Engineers*, 896 F. Supp. 2d 180, 195 (E.D.N.Y. 2012)).

In its struggle to identify a "contingent or future event" as the basis for its ripeness argument, *see* MTD Br. at 15, the Commission argues incomprehensibly that it is "at best unclear to what extent [the Commission] has actually adopted [the challenged] policy or how stringently [the Commission] will enforce it." MTD Br. at 17 (quoting *NYCLU v. Grandeau*, 528 F.3d 12 130 (2d Cir. 2008). There is no question that the policy at issue has been formally adopted by the Commission, which has offered no reason to doubt that it will be fully enforced. *See supra* Part II.A. This case differs in *every* material respect from *NYCLU v. Grandeau*, on which the Commission primarily relies. MTD Br. at 16-18. There, the plaintiff challenged a possible reading of the Lobbying Act that had "*not* been adopted by the Commission." *Grandeau*, 528 F.3d at 130 (internal quotation marks omitted) (emphasis added). Here, the Commission has formally adopted Advisory Opinion 16-01. There, the Commission had formally informed the plaintiff that it was *not* required to register under the Act. *Id.* at 127. Here, the Commission insists that Plaintiffs register as lobbyists, and has never promised to refrain from enforcing the Opinion against them. Opp. Br. at 8-9.

There is no "conjecture about what JCOPE might do" the moment the stay of enforcement is lifted, as the Commission suggests. MTD Br. at 18. It will put the Opinion into effect, creating for Plaintiffs the "direct and immediate dilemma" of whether to violate the law, suffer the burdens of registration as a tax on exercising their First Amendment rights, or abandon the exercise of those rights. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 478 (2d Cir. 1999). The contours of the parties' dispute, and the alleged constitutional injury, are clear. The case is ripe for adjudication.

C. Abstention Is Inappropriate

The prerequisites for abstention are not met here. Even if they were "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law." *Vt. Right to Life*, 221 F.3d at 385. Calls for federal court abstention must be evaluated with "particular caution" where, as here, "a plaintiff has raised a facial constitutional challenge to a [government policy]." *Vt. Right to Life Comm., Inc.*, 221 F.3d at 385. Abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy before it" in any context, *id.*, and it is especially "inappropriate for cases such as the present one where "statutes are justifiably attacked on their face as abridging free expression." *Acito*, 459 F. Supp. at 83 (quoting *Zwickler v. Koota*, 389 U.S. 241, 254 (1967)).

There is no basis for the abstention because the challenged Opinion is not "ambiguous or uncertain" in requiring Plaintiffs to register their earned-media activities as lobbying. *Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 602 (2d Cir. 1988). The "ambiguity" that the Commission identifies in the Opinion has been invented by the Commission and is disavowed by all parties: that the Opinion requires Plaintiffs to detail on their registration statement the participants in, and substance of, conversations with the press. Plaintiffs' argument is that the law's disclosure requirements already applied to lobbyists—along with all other obligations and

enforcement mechanisms embodied in the Act—cannot constitutionally be imposed on Plaintiffs and others described in Advisory Opinion 16-01. A state-court ruling on the meaning of the Opinion would not lead to avoidance of the constitutional questions; they must be faced in any event.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction should be granted and Defendant's motion to dismiss should be denied.

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