UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NOVEMBER TEAM, INC., *et al.*, Plaintiffs, -against- NEW YORK STATE JOINT COMMISSION ON PUBLIC ETHICS, *et al.*, Defendants.	ECF Case No. 1:16-cv-1739 (LGS)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs suffer no constitutional injury from a reporting regime that has been in place for decades. Their disingenuous reading of the Advisory Opinion, untethered from the Opinion's text and unsupported by even a warning letter, against them or anyone else, does not create Article III standing or a claim ripe for adjudication.

The absence of an injury in fact and the imprudence of racing into this New York regulatory matter have only grown more conspicuous in recent weeks. New legislation hollows the core of Plaintiffs' Complaint by excluding communications with journalists from the definition of lobbying. In effect, the legislation reduces Plaintiffs' imagined injuries to a smaller universe of fringe hypotheticals involving unsettled regulatory questions.

What remains of the Plaintiffs' grievance is a vaguely-stated concern relating to communications with an undefined set of non-professional journalists or media adjuncts. It is not clear why Plaintiffs believe their communications with these actors should be exempt from long-standing grassroots lobbying regulations, but their novelty and diversity only amplify the concerns JCOPE set out in its initial brief: the harm Plaintiffs fear is, at this point, purely and completely speculative. The legal issues would be better decided later, if ever JCOPE issues a letter threatening an enforcement action related to contact with a non-traditional media member that does not meet the long standing and well-accepted definition of grassroots lobbying. The claims would also be better decided in state court in the first instance. State legislation has already mooted the core of the Plaintiffs' misguided Complaint. Deference to our federalist system of government, and simple judicial economy, suggest the state courts ought to have a chance to moot the rest, should they deem it appropriate to do so.

STATEMENT OF FACTS

The history of New York state lobbying regulations and the Advisory Opinion are set out in JCOPE's opening brief. There has, however, been a new development. On August 24, 2016, Governor Andrew Cuomo signed a bill amending the Lobbying Act to exclude from the definition of lobbying "Communications with a professional journalist or newscaster, including an editorial board or editorial writer of a newspaper, magazine, news agency, press association or wire service, relating to news, as these terms are defined in section seventy-nine-h of the civil rights law. . . ."[1]

Under Civil Rights Law section 79-h, *newspapers* and *magazines* are defined, in part, as having regular, paid circulation for more than one year. CVR §§ 79-h(a)(1)-(2). A *professional journalist* is defined in part by functioning "either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with [a newspaper, magazine, news agency, press association, or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public]." *Id.* at § 79-h(a)(6).

Section 79-h defines as news "written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." *Id.* at § 79-h(a)(8).

The legislation does not directly address non-professional bloggers, social media personalities, and other media channels that do not meet the statutory definitions of "professional journalist," "newspaper," "magazine," *etc.* JCOPE has announced that its Commissioners will be considering regulations this fall to provide further guidance on reportable lobbying activities,

[1] Governor's Program Bill 39, Chapter 286, Laws of 2016, at Part I § 1, available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GPB39ethicspackage-bill.pdf.

which will necessarily include topics covered by the Advisory Opinion and the new legislation.[2] The regulatory process will provide an opportunity for members of the public, including Plaintiffs, to comment on any proposed regulation as required under the State Administrative Procedure Act.

ARGUMENT

I. THE PLAINTIFFS' UNFOUNDED READING OF THE ADVISORY OPINION DOES NOT CONFER ARTICLE III STANDING OR CREATE A CLAIM RIPE FOR REVIEW

As Defendant explained in its opening brief, Plaintiffs lack Article III standing because they have articulated no concrete plan to violate the Lobbying Act.[3] In their Opposition, Plaintiffs come no closer to producing an honest reading of the Advisory Opinion or identifying a credible threat of prosecution.

Plaintiffs argue that the Advisory Opinion "strips 'lobbying' of both the 'direct contact' and the 'call to action' requirements" and thereby threatens to regulate 'any statement . . . that could possibly be viewed, read, or heard by, or might otherwise influence, a public official." Pls.

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[2] Minutes of the Public Session of the Feb. 17, 2016 Commission Meeting of the Joint Commission on Public Ethics, available at: http://jcope.ny.gov/public/minutes/Approved%20Public%20Minutes%202.17.16.pdf.

[3] Indeed, Plaintiffs still have not even identified a state policy they would like to influence. The affidavit paragraphs that Plaintiffs cite in rebuttal are general descriptions of Plaintiffs' business—*not* concrete articulations of plans for the future. For example:

> Mercury has hundreds of clients at any one time. These clients include everything from small, local not-for-profit organizations to large 'Fortune 500' companies. In addition, we represent individuals who are seeking public office or, in some cases, who already hold public office. Many of our clients, and perhaps most of them, come to us because they are interested, for various ideological, business or other reasons, in being part of 'the public conversation' about matters of government and politics. For instance, Mercury was retained by a coalition of businesses to wage a public information campaign against a move to allow wine sales in grocery stores; some smaller members of the coalition preferred that their customers not know that they were part of that effort."

Celli Decl. Exh. 9 ¶ 4.

Joint Opp.-Reply 19. But the Advisory Opinion's definition of grassroots lobbying *clearly requires a call to action*. On the second page it states, "A grassroots communication constitutes lobbying if it: (1) References, suggests, or otherwise implicates an activity covered by Lobbying Act Section 1-c(c); (2) Takes a clear position on the issue in question; and (3) [i]s an attempt to influence a public official *through a call to action*, i.e., solicits or exhorts the public, or a segment of the public, to contact (a) public official(s) . . . ." Declaration of Thomas Patrick Lane dated May 13, 2016 ("Lane Decl.") Exh. 1 (ECF No. 31-1), at 2 (emphasis added).

Plaintiffs' Complaint and Opposition completely misread the unambiguous Advisory Opinion. Plaintiffs interpret sentences explaining that "a public relations consultant who contacts a media outlet in an attempt to get it to advance the client's message in an editorial would . . . be delivering a message[]," *id.* at 8, and "[a]ny attempt by a consultant to induce a third-party—whether the public or the press—to deliver the client's lobbying message to a public official would constitute lobbying under these rules," *id.* at 9, to threaten limitless regulation of contacts between PR consultants and journalists, *see* Pls. Joint Opp.-Reply 9, 19. But the first sentence speaks only to the "control" element of the grassroots lobbying definition. Delivering a message is not lobbying unless several other elements are present, including a call to action and input into the content. Lane Decl. Exh. 1, at 8. The second sentence emphasizes this point by referring to a *lobbying* message as distinct from other kinds of messages a consultant might deliver—even about matters of public interest—to media contacts.

When read in context, the Advisory Opinion is both clear and consistent with past regulations. It sets out a general definition of a grassroots lobbying message—one that is nearly

identical to past definitions.[4] It then describes with reasonable precision the control and input that, when combined with a grassroots lobbying message, would trigger reporting requirements.[5] The fact that Plaintiffs have confused these portions of the Advisory Opinion does not render the portions overbroad.

Article III standing to bring a pre-enforcement suit requires a reasonable interpretation of the statute—one that could justify a well-founded fear of prosecution. *See, e.g.*, *Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 162 (D.D.C. 2014) (finding plaintiff lacked standing where the Government had never enforced the statute as plaintiff feared, had never threatened to enforce it, and had stated its belief that the statute did not proscribe the plaintiff's conduct).

Ripeness requires an injury that is not contingent upon future events. *See New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130-31 (2d Cir. 2008) (Sotomayor, J.) (dismissing plaintiff's claim as unripe where it "would certainly benefit from additional factual development and [was] in many ways contingent on future events, such as an inquiry by the Commission into activity that the [plaintiff] deem[ed] non-lobbying advocacy."). In the recent *Citizens United v. Schneiderman* opinion, a federal district court for the Southern District of New York found that the plaintiffs' due process challenge to charitable contribution reporting requirements was not ripe for adjudication because the plaintiffs "ha[d] not alleged that the attorney general . . .

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[4] The Advisory Opinion relies on the longstanding definition of grassroots lobbying but clarifies that a communication need not specifically identify pending legislation; it need only relate to a Section 1-c(c) activity. In other words, a message may be lobbying if the generation, passage, or defeat of a bill is its intended byproduct, even if the message does not mention a bill number. Lane Decl. Exh. 1, at 8.

[5] Because the Advisory Opinion does retain the call-to-action element in its definition of grassroots lobbying, it is consistent with Lobbying Commission Op. No. 44 (00-3) (2000) (finding radio ads with a call to action are lobbying notwithstanding the lack of direct contact with legislators) and Lobbying Commission Op. No. 49 (02-4) (2002) (explaining that a person or entity who merely "contact[s] newspaper publishers and editorial writers to solicit their support for a bill . . . would not be required to register as a lobbyist."). The first scenario calls on *someone* to make direct contact with a legislator. The second does not.

stripped them of any rights or imposed any penalty as a consequence of their failure to provide [required documents]." No. 14-cv-3703 (SHS), 2016 WL 4521627, at *9 (S.D.N.Y. Aug. 29, 2016) (citing *Thomas v. City of New York*, 143 F.3d 31, 35 & 35 n.6 (2d Cir. 1998); *Valentine Props. Assocs., L.P. v. U.S. Dep't of Hous. & Urban Dev.,* No. 05-cv-2033 (SCR), 2007 WL 3146698, at *10-11 (S.D.N.Y. Oct. 12, 2007)). Rather, the plaintiffs alleged "only [sic] that they '*face[d]* the loss of their registration . . . as well as civil penalties.'" *Id.* (quotation marks and citation omitted). "[C]ontingencies abound. Will plaintiffs continue to violate the attorney general's policy after this Court upholds its constitutionality? Will the attorney general impose fines on plaintiffs stemming from their now two-year refusal to comply? Only pure speculation can supply the answers to these questions." *Id.*

Here, Plaintiffs' argument rests on a reading of the Advisory Opinion that JCOPE has never embraced, let alone acted upon. Their unreasonable statutory construction cannot supply a well-founded fear of prosecution, which in a pre-enforcement action is a prerequisite to Article III standing. *Johnson v. District of Columbia*, 71 F. Supp. 3d at 162. Moreover, their claims are unripe because they have not been sharpened by even the faintest threat of an enforcement action. As in *Citizens United*, Plaintiffs can only speculate about threats they might face on various contingencies—including the highly unlikely one that JCOPE chooses to interpret its Advisory Opinion contrary to its text and decades of precedent. For these reasons, Plaintiffs cannot point to an injury-in-fact or a ripe controversy.

II. NEWLY-ENACTED LEGISLATION MOOTS THE CORE OF PLAINTIFFS' COMPLAINT AND UNDERSCORES THE ABSENCE OF STANDING AND RIPENESS

Defendant's standing and ripeness arguments are even stronger now than they were four months ago. The core of Plaintiffs' Complaint is that "[t]he Opinion unduly restricts and chills protected speech and freedom of the press, by giving the Commission virtually unfettered

discretion to determine which interactions between PR consultants and the press are and are not lobbying." Compl. ¶ 75.[6] Not only is this assertion untrue, for the reasons stated above, but the new legislation clarifies that communications with the press about news is *not* lobbying.

The recent amendments to the Lobbying Act exclude communications about the news with professional journalists or newscasters, including editorial boards or writers at newspapers, magazines, news agencies, *et al.*[7] "News" is defined in terms broad enough to cover the communications that Plaintiffs raise in their Complaint.[8]

The exclusion plainly moots Plaintiffs' claim that protected communications with the press will be curtailed by direct enforcement or chilled through unconstitutionally vague regulation. Plaintiffs' scenario where a consultant contacts a reporter "to discuss an issue of interest to [a] client, and the newspaper . . . disseminates a news story," Pls. Joint Opp.-Reply 8-9, would clearly fall under the exclusion. On pages 20-21 of their Opposition, Plaintiffs set out a number of hypotheticals. For example, "if 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?" Pls. Joint Opp.-Reply 20 (quoting Celli Decl. Exh. 7, at ¶ 7). The answer to this question and to each of the other hypotheticals is clearly "no."

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[6] *See also* Compl. ¶ 2 (objecting that the Advisory Opinion subjects PR firms to a disclosure and punishment regime designed for "true lobbyists" when all they are doing is speaking to the press about public issues); Compl. ¶ 51 ("The Opinion equates lobbyists who contact legislators to PR consultants who pitch stories to newspapers.").

[7] *See supra* note 1.

[8] "News" is "written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." CVR § 79-h(a)(8). Plaintiffs' attempts to "speak[] to an editorial board about . . . issue[s] being considered in a municipal legislature," Compl. ¶ 49, or to urge a newspaper to correct a statement about a pending bill, Pls. Joint Opp.-Reply 20 (quoting Celli Decl. Ex. 9, at ¶ 9), would fit comfortably within the "matters of public concern or public interest or affecting the public welfare" definition of "news."

There is no vagueness problem with the Advisory Opinion because *no* relevant communications with the press will be subject to regulation. For the same reason, the Plaintiffs protected activities will not be chilled, and no reporters identities will be disclosed.[9]

What is left unaddressed by the legislation are publications less than one year old, irregular blogs, and social media platforms. This is a motley and undefined group of potential messengers.

These circumstances make JCOPE's standing and ripeness arguments all the more compelling. The Plaintiffs have not identified a client, a messenger, or a platform they plan to use and fear will be implicated by the Advisory Opinion. There is no pending action, letter threatening action, or even a substantial body of precedent to suggest enforcement is forthcoming. In fact, JCOPE has not yet addressed when use of such media is reportable lobbying. Advisory Opinion 16-01 addresses only when the conduct of certain consultants constitutes lobbying based on their role in connection with a lobbying communication. Plaintiffs have focused on the *medium* of communication, whereas JCOPE is addressing the *message* itself. Unlike professional journalism, which is protected by the State Shield Law, social media frequently is a vehicle for lobbying activities. For this reason, in February 2016, in anticipation of developing guidance later this year, JCOPE solicited public comments on which

[9] Plaintiffs apparently concede that the Advisory Opinion does not require the disclosure of press contacts and retreat to the position that such contacts may nevertheless be exposed in a regulatory investigation. *Id.* at 15-16. This is a smokescreen. It has always been the case that JCOPE's investigation of lobbying activities could give it limited access to information the target did not initially have to disclose. The Supreme Court has described "recordkeeping, reporting, and disclosure requirements" as "an essential means of gathering the data necessary to detect violations" of relevant laws. *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976) (per curiam); *see also Citizens United v. Schneiderman*, 2014 WL 4521627, at *5 (noting disclosure regimes have long been considered a less-restrictive alternative to comprehensive speech regulations).

communications delivered via social media are reportable lobbying activities.[10] At this time, litigation as to any future guidance JCOPE may issue is, at best, completely premature. Thus, what remains of the Plaintiffs' Complaint is precisely the "abstract disagreement[] over administrative policies" that the ripeness doctrine seeks to avoid. *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130-31 (2d Cir. 2008) (Sotomayor, J.) (citation omitted).

Because legislation has mooted the core of Plaintiffs' Complaint and left only an eclectic array of media platforms that (a) may present different legal issues from one another and (b) are in any case under no threat of an invalid enforcement action,[11] the Complaint should be dismissed for lack of standing or ripeness.

III. IN THE ALTERNATIVE, THE COURT SHOULD ABSTAIN UNTIL A NEW YORK STATE COURT HAS HAD AN OPPORTUNITY TO SETTLE THE UNDERLYING NEW YORK REGULATORY ISSUES

The federal questions in this case turn on the construction of an Advisory Opinion issued by a state agency. No New York court has interpreted the Advisory Opinion, but it is plainly susceptible to an interpretation that would moot the federal constitutional issue. This is a paradigmatic case for *Pullman* abstention.[12]

The argument for *Pullman* abstention is even stronger with new state legislation amending the definition of lobbying. Resolving Plaintiffs' free speech claims now requires examination of how the Advisory Opinion and new legislation interact. Neither the state agency Opinion nor the state legislation has been interpreted by a state court. Further, the topics not

[10] "The Joint Commission on Public Ethics is Soliciting Informal Comments on Potential Guidance Regarding the Applicability of the Lobbying Act (Legislative Law Article 1-A) to Social Media Activities," Revised Feb. 21, 2016, available at http://jcope.ny.gov/advice/proposed%20regs/Revised%202.1.16%20-%20Webpage%20for%20Social%20Media%20Activities.pdf.

[11] This is true in the specific sense that there is no letter threatening an enforcement action and in the general sense, explained in Part I, that Plaintiffs' interpretation of the Advisory Opinion is plainly wrong.

[12] *See Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-502 (1941).

addressed on the face of the new legislation—social media, among others—would draw the Court into complicated domestic regulatory issues before the state itself has had a chance to declare its view. If the Court is in any doubt over the Advisory Opinion's scope, and JCOPE maintains that a fair reading of the Advisory Opinion and the new legislation should dispel such doubts, the best course set out by binding precedent, respect for our federal system of government, and simple judicial economy, is to let a New York state court address these New York laws in the first instance.

CONCLUSION

For the foregoing reasons, the Court should grant JCOPE's Motion to Dismiss the Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1). In the alternative, JCOPE respectfully requests that the Court abstain from exercising its jurisdiction until a New York court has had a chance to consider this New York regulatory issue.

New York, New York
Dated: September 15, 2016

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