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' SUR-REPLY
(I) IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION, AND (II) IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
(703) 894-6800

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PRELIMINARY STATEMENT

The New York State Legislature's recent amendment to the Lobbying Law[1] does not render the Joint Commission on Public Ethics' Advisory Opinion 16-01 constitutional. The amendment exempts from lobbying regulation communications with "professional journalist[s]"—those who are "professionally affiliated for gain or livelihood" with established news organizations, N.Y. Leg. Law § 1-c(B)(ii); N.Y. Civ. Rights Law § 79-h(a)(6). As the Commission admits, the amendment has no effect on its attempt to regulate other, vast swaths of First-Amendment protected activity, including plaintiffs' efforts to stimulate coverage of the issues and promote adoption of the positions that their clients care about by "non-professional journalists or media adjuncts" or in "publications less than one year old, [on] irregular blogs, and [on] social media platforms." Def.'s Reply Br. at 1, 8.[2] Put another way, in the wake of the new amendment, AO 16-01 will continue to require registration of pure public relations activity that share none of the qualities of traditional lobbying. Advisory Opinion 16-01 remains unconstitutional.

Plaintiffs, who all work to promote their clients and their clients' views in public discourse to the greatest extent possible, do so through nearly every kind of media outlet imaginable. Ex. 8 (RHC Decl.) ¶ 4. In today's world, informal and decentralized channels for ideas, opinions, and information have become as influential as, if not more influential than, the traditional, professional media in shaping public opinion. Second Decl. of the Nov. Team, LLC

[1] Governor's Program Bill 39, Chapter 286, Laws of 2016, at Part I § 1, available at http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S08160&term=2015&Actions=Y&Text=Y.

[2] Citations to "Def.'s Reply Br." are to the Reply Memorandum of Law in Support of Defendant's Motion to Dismiss, dated September 15, 2016, Dkt. No. 51. Citations to "Pls.' Opp. Br." are to Plaintiffs' Combined Memorandum of Law, dated June 15, 2016, ECF No. 40. For all other abbreviations not explained in the text below, see Pls.' Opp. Br. at 2 n.1.

("Second Nov. Team Decl."), dated September 29, 2016 ¶ 4. Therefore, while they disseminate ideas and foster support for their clients' positions among the staff members of established media like newspapers and magazines, plaintiffs also sow policy ideas and positions among *non-professional* contributors to the public conversation, such as op-ed writers, experts, and "talking heads," and in less formal, more decentralized forums like blogs and social media. *Id*. ¶ 2. Plaintiffs' concerns about having to register as lobbyists based on these activities are not resolved by the Lobbying Law's amendment. Part I, *infra*.

The First Amendment protections that animated plaintiffs' challenge to registering their media activities under AO 16-01 prior to the Lobbying Law's amendment apply equally to their communications with the informal media and other members of the public now. For purposes of the First Amendment, it does not matter whether plaintiffs work to sway public opinion through the "institutional press"—traditional, paid journalists working for traditional for-profit news outlets—as opposed to "others" who do not work for traditional outlets, but "who disseminate information and opinion to the public through media of mass communication." Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 Yale L.J. 412, 449 (Nov. 2013), *available at* http://www.yalelawjournal.org/pdf/1217_sc9a393x.pdf. Indeed, "[t]here is no coherent way to distinguish" those two categories of political participants, and "no reason to believe that . . . writers who earn their living from writing have a monopoly" on First Amendment protections. *Id.* at 438-439. The Commission must therefore limit and justify AO 16-01's surviving registration requirements—i.e., the requirement of registration for contacts with non-professional journalists—by the same stringent First Amendment standards that have always applied. Part II, *infra*.

Under these standards, AO 16-01 continues to violate the First Amendment because it requires plaintiffs to register *any* effort to have the informal media or the public endorse their clients' messages, whether such effort encourages direct communications with government officials or not. In the Commission's own words, the Opinion regulates *any* "attempt" by PR consultants (like plaintiffs) "to influence public opinion," requiring them to register with the government any time they "encourag[e]" others—"whether the public or the press"—"to support a position on a specific government action favorable to a client." Frequently Asked Questions ("FAQs") at 1, 2, Ex. 3 to Decl. of Thomas Patrick Lane, dated May 13, 2016, ECF No. 37-3; Ex. 1 (AO 16-01) at 9. Absent a definitive statement by the Commission that the "magic words" of a traditional call to action—expressly urging listeners to *directly contact* government officials—are still required before efforts to "influence public opinion" are deemed lobbying, the obligation to register remains constitutionally impermissible. *See United States v. Harriss*, 347 U.S. 612 (1954); *United States v. Rumely*, 345 U.S. 41 (1953); *see also* Pls.' Br. at 21-24; Pls.' Opp. Br. at 8-10. Part III, *infra*.

Plaintiffs would welcome an unequivocal statement that registration is not required absent a consultant's use of "magic words," but the Commission has not offered one. Therefore, and despite the Legislature's recent, incomplete measure to curb the Commission's overreach, a preliminary injunction is required to lift an unconstitutional burden on activities that the plaintiffs engage in *every day*, which will require plaintiffs to sacrifice all anonymity and incur the expenses of complying with the Lobbying Law's registration requirements, and that will censor their activities, or threaten censure and prosecution.

ARGUMENT

I. Plaintiffs' Claims Are Not Moot Because They Enlist Individuals Other than Professional Journalists to Advance Their Clients' Messages

Defendant acknowledges that the Lobbying Law amendment leaves "unaddressed" AO 16-01's application to members of the informal media and the public who do not qualify as "professional journalist[s]," a subset of opinion leaders who are *paid* for their work with newspapers, magazines, and other "professional medium[s] or agenc[ies] which ha[ve] as one of [their] regular functions the processing and researching of news intended for dissemination to the public." Defs.' Reply Br. at 2; N.Y. Leg. Law § 1-c(B)(ii); N.Y. Civ. Rights Law § 79-h(a)(6). Advisory Opinion 16-01 is not so narrow. It requires registration by anyone expending or earning more than $5,000 who "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 (AO 16-01) at 9 (emphasis added). The referenced third-party might be a newspaper or an editorial board, but, to use the Commission's own examples, it might also be a trade group or a television audience, FAQs at 1, 2, or any "target audience," or "the public in general," Ex. 1 (AO 16-01) at 9. Defendant can pretend that the Lobbying Law amendment moots plaintiffs' claims only if it ignores this vast unaddressed population.

Defendant dismisses this population as a leftover "motley and undefined group of potential messengers." Defs.' Reply Br. at 8. But that "motley and undefined group" encompasses a potentially limitless class of unpaid op-ed contributors, unpaid bloggers, opinion leaders, social media posters, subject-matter experts who comment in the public square, and unpaid radio and television contributors with whom plaintiffs communicate on a daily basis in their efforts to facilitate clients' participation in and shaping of political discourse. Second Nov. Team Decl. ¶ 2. For some of the plaintiffs, communications with this "motley and undefined

group" are equally important as—if not more important than—communications with professional journalists, as newsrooms have cut back on personnel and more traditional reporters rely on the writings of unpaid opinion leaders and social media posters to stay abreast of happenings in government, politics, and industry. *Id*. ¶ 5.

At plaintiffs' press availabilities and in their calls to the "press," members of the paid media participate alongside bloggers, and, in order to help their clients earn mainstream attention for their ideas and interests, plaintiffs develop and disseminate messages on public policy matters not just among members of the established media, but through the voices of unpaid contributors that populate the internet, television, and radio. Second Decl. of BerlinRosen ("Second BerlinRosen Decl."), dated September 30, 2016 ¶¶ 2, 3. For example, plaintiff Anat Gerstein, Inc. ("AGI") has solicited a medical school researcher to write an op-ed opposing cuts in research funding as part of its advocacy on behalf of a client who wanted the state to dedicate more money toward research. Second Decl. of Anat Gerstein, Inc., dated September 30, 2016 ¶ 3. AGI has similarly solicited professors to write opinion pieces or columns about matters within their expertise, small business owners to write letters to the editor and online comments about the anticipated effect of legislation on their businesses, and a student to participate in a television segment to promote increased funding for diversity programs. *Id*. ¶¶ 3-4. None of these individuals was a "professional journalist." Each volunteered to promote AGI's client's message because he or she *agreed* with the policy objective, much as a professional newspaper's editorial board publishes editorials on topics suggested by plaintiffs because they comport with the boards' views. *Id*. ¶ 2.

In these and many other ways not addressed by the Lobbying Law amendment, plaintiffs work aggressively to bring issues that matter to their clients to the attention not just of editorial

boards but of writers, scholars, and commentators of all types who care about and can most effectively promote the same issues. Second BerlinRosen Decl. ¶¶ 4-5. Accordingly plaintiffs' concerns over having to register any time they "discuss an issue of interest to [a] client" with someone who then "disseminates a news story" or whenever they "direct[someone] covering policy proposals in a given area . . . to a research report that bears on the subject" cannot be dismissed as readily as defendant wishes simply by citing the Lobbying Law's amendment. Defs.' Reply Br. at 7 (internal quotation marks omitted). Sometimes the "someone" with whom plaintiffs engage is a professional journalist covered by the amendment, but often it is not. *See* Second BerlinRosen Decl. ¶¶ 2-3.

II. Plaintiffs' Communications with *All* Citizens, Not Just Professional Journalists, Are Protected by the First Amendment

The First Amendment protects plaintiffs' communications with *all* citizens on matters of public concern equally, regardless of whether they are members of the formal press. To suggest that it can regulate plaintiffs' engagement with the so-called "motley and undefined group" of non-professional journalists and members of the public without concern for AO 16-01's vagueness and overbreadth, the Commission must embrace a proposition that the Supreme Court has "consistently rejected": "that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 352 (2010) (internal quotation marks omitted).[3] To the contrary, "the press" as an institution "does not have

[3] *See also, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 525 n.8 (2001) (finding "no distinction" between media and non-media entities); *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) ("[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it.").

a monopoly on either the First Amendment or the ability to enlighten." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 (1978).

The "press" is denied a monopoly for good reason. Whether plaintiffs promote their clients' preferred policies among professional reporters and editors on the one hand, or among other fellow citizens including "non-professional" writers and opinion-makers on the other, they have the same interest in preserving their ability to associate, to speak for money, to speak anonymously, and to speak without having to satisfy burdensome, expensive—and in the case of the smaller plaintiffs, potentially fatal—administrative requirements, *see* Pls.' Br. at 28-34; Pls. Opp. Br. at 14-16. In some circumstances in today's world, plaintiffs have a greater interest in communicating freely with bloggers and social media celebrities than with newspapermen. In many ways, informal and decentralized idea, opinion, and information channels have become as influential as, if not more influential than, the traditional, professional media in shaping public opinion. Second Nov. Team Decl. ¶¶ 3, 4. Often, contributors from outside the paid media arena—those disseminating information and ideas on their blogs or in opinion pieces or tweets—are the only ones willing to take a stand on sensitive issues important to plaintiffs' sometimes anonymous clients. *Id*. ¶ 3. Sometimes, only after these outsiders first introduce a topic or advance a policy position, will paid journalists visit an issue. *Id*.

Depending on the circumstances, the client, and the issue, plaintiffs therefore work to ensure that *both* professional journalists and unpaid but influential members of the public write about the matters and consider the perspectives that their clients care about. *Id*. ¶ 2. The Commission can burden these activities with registration requirements only within the stringent limitations of the First Amendment. Advisory Opinion 16-01 fails that test.

III. The Advisory Opinion Unconstitutionally Burdens Plaintiffs' Efforts to Promote Ideas About Public Policy Even When They Make No Call to Action

What remains of AO 16-01 continues to violate the First Amendment because it burdens plaintiffs' participation in public discussions about government policy whether or not plaintiffs make or call for direct communications with government officials. The Commission continues to insist that the Advisory Opinion "*clearly requires a call to action*," Def.'s Reply Br. at 4, but it has not confirmed that a "call to action" is limited to an *explicit*, magic-words exhortation by a speaker that his listeners directly contact a government official. *See* Ex. 17 (Op. No. 49 (02-4)). Nor has it disavowed its consistent, clear statements throughout this litigation that define a "call to action" far more broadly than the term has ever been defined, and more broadly than the Constitution allows. *See, e.g.*, *Comm'n on Indep. Colleges & Univs. v. N.Y. Temporary State Comm'n on Reg. of Lobbying*, 534 F. Supp. 489 (N.D.N.Y. 1982); Pls.' Opp. Br. at 11-13.

Advisory Opinion 16-01, *as explicated by the Commission*, adopts an impossibly vague—and much more capacious—understanding of the "call to action requirement." Far from reiterating the Commission's prior, clear-cut requirement that the lobbyist "request or suggest that the receiver of the message contact their legislative representative or Executive Branch in response to the message," Ex. 17 (Op. No. 49 (02-4)), AO 16-01's plain language suggests that a grassroots lobbyist is anyone who attempts to "get" a third party "to advance the client's message" in an opinion piece. Ex. 1 (AO 16-01) at 7.

The Commission's own explanation of AO 16-01 makes clear that that encouraging *direct* contact with a government official has become, in the Commission's view, an optional element of grassroots lobbying. In a Frequently Asked Questions flier, for example, the Commission explained: "[a] consultant engages in reportable grassroots lobbying under [AO 16-01] when: (1) the consultant helps develop the client's position on a specific government action;

and (2) then 'controls the delivery' of the client's position." FAQs at 1. The consultant "controls the delivery," in turn, when it encourages a trade group "to contact a public official about a specific government action" ***or*** "appear[s] on television to support the client's position with respect to a government action, ***or*** [c]ontacts a newspaper to encourage . . . . support [of] the client's position." *Id.* at 1, 2 (emphasis added). This is a long way from a magic-words-style "call to action" that has long constrained the definition of grassroots lobbying.

Indeed, throughout this litigation, the Commission has continued to disregard the constitutional requirement of *direct* contact with a government official. It has identified its concern not with consultants who urge members of the public to call or write their representatives, but who "make writing the news easier" by providing "talking points" or "source[s] conveniently made available." Defs.' Op. Br. at 16-17. According to defendant, AO 16-01 is concerned with consultants who "lobby the press" and "solicit[] . . . journalist[s]" and other "members of the public with access to a large audience" to "support a position on a specific government action favorable to a client." Defs.' Op. at 26. None of this necessarily involves a magic-words "call to action"—and the Commission flatly refuses to say that one is required in order to activate its authority to require registration. It is that refusal, in part, that violates the First Amendment, and that motivates this litigation.

Under the First Amendment, an effort to convince fellow citizens to tout the merits of any given policy is not lobbying. Direct contact, or an explicit call for direct contact, is required. *See* Pl.'s Opp. Br. at 8-14.

CONCLUSION

Plaintiffs do not want to "exempt" any of their communications "from long-standing grassroots lobbying regulations," as Defendant contends. Defs.' Reply Br. at 1. They want only confirmation that they will not be required to register as lobbyists, or punished for

failing to register as lobbyists, unless they either contact government officials *directly* or *expressly* exhort their fellow citizens to contact government officials directly about potential or pending government policy, as both New York law and the Constitution have always required.

Without an express acknowledgment by the Commission that the "call to action" element of grassroots lobbying means an explicit suggestion that fellow citizens *directly* contact officials about government policy, plaintiffs cannot engage in their daily business of soliciting fellow citizens to make general public statements for or against government policy without either registering or fear of prosecution.

Because the Commission has not embraced, but has resisted, the requirement of an explicit call for direct contact, plaintiffs' motion for a preliminary injunction should be granted, and defendant's motion to dismiss should be denied.

Dated: September 30 2016
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

/s/

Andrew G. Celli, Jr.
Ilann M. Maazel
Hayley Horowitz

600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Of counsel: Allen Dickerson, Esq.
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800