No.13-4533(L)

No. 13-4537(CON)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, DAVID ROSS,
Plaintiffs-Appellees

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County, CHARLES J. HYNES, in his official capacity as District Attorney of Kings County,
Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of New York (Hon. Jed S. Rakoff)

Brief of *Amicus Curiae* Public Good Law Center on Petition for Rehearing en Banc, In Support of Neither Party

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CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

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INTEREST OF *AMICUS CURIAE*

The Public Good Law Center is a public interest law firm that represents *amici curiae* – and participates as *amicus curiae* – in cases of particular significance for consumer protection, public health, and civil liberties. Public Good has submitted *amicus* briefs in First Amendment commercial speech cases in the United States Supreme Court, the Courts of Appeals, and the Supreme Court of California. In particular, Public Good participated as counsel to *amici curiae* in *National Association of Tobacco Outlets v. Providence*, 731 F.3d 71 (1st Cir. 2013), upon which the panel's decision extensively draws. *See, e.g.*, Slip Op. at 31, 34.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel decision includes a discussion of "the First Amendment overbreadth doctrine," Slip Op. at 39, in the context of commercial speech – a context in which the Supreme Court has explicitly held the doctrine does not apply. Application of the doctrine in this case is unnecessary to the outcome, and has the potential to confuse future litigants and district courts.

[2] No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or any other person – other than *amicus* – contributed any money to fund the preparation or submission of this brief.

Amicus seeks no changes to the outcome of the case nor to the reasoning at its heart. *Amicus* writes only to request modification of this aspect of the panel's opinion.

ARGUMENT

The Supreme Court has made clear that the overbreadth doctrine does not apply to restrictions on commercial speech. *See Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 496-497 (1982) ("the overbreadth doctrine does not apply to commercial speech"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463 n. 20 (1978) ("Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381 (1977) ("the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context"). There is no doubt that the speech at issue in the present case is commercial speech. Consequently, there is no role for the overbreadth doctrine.

The Supreme Court's decision in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), which the panel decision cites extensively, *e.g.* Slip Op. at 23, 48 n.14, affirms this rule. In *Fox*, the Court held that overbreadth analysis is pertinent to a measure that restricts both commercial and noncommercial

speech only if the allegedly overbroad applications of the measure restrict *non-commercial* speech:

> [I]t is true that overbreadth analysis does not normally apply to commercial speech. [T]hat means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground – our reasoning being that commercial speech is more hardy, less likely to be "chilled," and not in need of surrogate litigators. Here, however, although the principal attack upon the resolution concerned its application to commercial speech, *the alleged overbreadth … consists of its application to non-commercial speech, and that is what counts*.

Id. at 481 (emphasis added) (citations omitted).

Therefore, although the panel's treatment of the doctrine surrounding facial versus as-applied challenges is instructive, that discussion is unnecessary – and potentially confusing – in this case. To the extent that the present case concerns speech at all, it concerns only purely commercial speech. The overbreadth doctrine has no application here.

CONCLUSION

To avoid confusion to future litigants in this Circuit and elsewhere, *amicus curiae* respectfully requests that the panel opinion be amended to remove discussion of the First Amendment overbreadth doctrine in the context of commercial speech.

DATED: November 24, 2015

Respectfully submitted,

/s/ *Seth E. Mermin*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief contains 613 words, according to Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).
The brief has been prepared in a proportionally spaced 14-point typeface including serifs. The typeface is Times New Roman.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: November 24, 2015

/s/ *Seth E. Mermin*
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