

02 - 7876

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAKE THE ROAD BY WALKING, INC.,

Plaintiff-Appellant,

IRANIA SANCHEZ and EMILIO VEGA, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

JASON A. TURNER, as Administrator of the Human Resources
Administration of the City of New York,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT
MAKE THE ROAD BY WALKING

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CORPORATE DISCLOSURE STATEMENT

Make the Road by Walking has no parent corporations, and it does not issue stock so there are no publicly held companies holding 10% or more of its stock.

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Make the Road by Walking ("MRBW") respectfully requests oral argument regarding this appeal.

PRELIMINARY STATEMENT

This is an appeal from an Opinion and Order of the United States District Court for the Southern District of New York (Allen G. Schwartz, J.), issued on June 19, 2002 and entered on June 26, 2002, and from the Judgment entered on June 28, 2002.

JURISDICTIONAL STATEMENT

MRBW challenges the refusal of the New York City Human Resources Administration ("HRA") to permit welfare advocates to enter the waiting rooms of HRA's welfare offices¹ to provide information, assistance and representation regarding welfare benefits to the people in need who are waiting there, unless the advocates are accompanied by individual welfare applicants or recipients ("claimants"). The complaint raises claims under the First and Fourteenth Amendments to the United States Constitution, and Article I, sections 6, 8 and 11 of the New York State Constitution. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), providing for jurisdiction over civil actions arising under the

¹ Today, HRA calls these offices "Job Centers." At various times during the past few decades, it has called them "Income Support Centers" and "Income Maintenance Centers." This brief will simply use the term "welfare offices."

Constitution and laws of the United States, and 28 U.S.C. § 1367, providing for supplemental jurisdiction over state claims.

On June 26, 2002, the district court entered an Opinion and Order finally disposing of all of the parties' claims by granting summary judgment to the plaintiffs on one claim and granting summary judgment to the defendant on all other claims. Judgment was entered on June 28, 2002. This appeal was timely filed on July 26, 2002. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Does HRA's exclusion of advocates from welfare offices unless the advocates are accompanied by claimants violate the speech, press, petition and associational rights of claimants and advocates under the First and Fourteenth Amendments to the United States Constitution and under the New York State Constitution?

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings

This appeal challenges HRA's exclusion from its welfare offices of advocates seeking to engage in the First Amendment-protected activities of discussing with welfare claimants the claimants' rights within the welfare system, assisting the claimants in enforcing those rights, and representing the claimants during interactions with welfare agency personnel.

HRA prohibits advocates from entering welfare offices unless they are accompanied by individual claimants.

Plaintiffs MRBW, a not-for-profit welfare advocacy group; Irania Sanchez; and Emilio Vega² (collectively "plaintiffs") filed their Complaint on March 6, 2000, raising the following challenges to HRA's policy and practice: 1) HRA Executive Order 651,³ on which the City bases its exclusion of advocates unaccompanied by individual claimants, is unconstitutionally vague (the "vagueness claim"); 2) HRA's exclusion of advocates is viewpoint discriminatory (the "viewpoint discrimination claim"); 3) HRA's exclusion of advocates from a species of public forum violates the speech, press, petition and associational rights of claimants and advocates without adequate justification (the "forum claim"); and 4) HRA's exclusion of advocates violates claimants' rights to due process and equal protection (the "due process" and "equal protection" claims).

On July 30, 2001, plaintiffs MRBW and Sanchez moved for summary judgment on all of plaintiffs' claims. On November 1, 2001, HRA responded to plaintiffs' motion, cross-moved for summary judgment, and moved to strike portions of plaintiffs' evidence, to strike the class claims, and to amend the Answer.

² Pursuant to a stipulation between the parties, Mr. Vega's individual claims were dismissed by an Order dated May 21, 2001, and he is no longer a plaintiff.

³ Included in its entirety at SPA-118 to 128.

II. Decision Below

On June 19, 2001, the district court granted plaintiffs' motion for summary judgment as to part of the vagueness claim. The court agreed with plaintiffs that the portions of HRA Executive Order No. 651 permitting HRA to make its premises available for "such activities as may be specifically authorized" by the HRA Commissioner, and permitting HRA to allow the distribution of "releases issued or sponsored by the Agency," are unconstitutionally vague. SPA-8, 13-14.

The court denied plaintiffs' motion for summary judgment, and granted HRA's motion for summary judgment, as to plaintiffs' remaining claims: the claim that the remaining portions of HRA's access policy are unconstitutionally vague,⁴ the viewpoint discrimination claim, the forum claim, the due process claim, and the equal protection claim.

In ruling on the forum claim, the district court stated that it was following *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718 (2d Cir. 1984) ("*Brezenoff II*"), in

⁴ The remaining portion provides:
The Use of Agency Premises shall be limited to the transaction of official business. . . .
Distribution of written material on Agency premises is limited to releases of recognized staff organizations or clubs approved for distribution by [HRA] . . . and releases of certified labor organizations pursuant to collective bargaining agreements.
See SPA-125 to 126, ¶¶ V.C, V.D; see also SPA-3 to 4.

which this Court held that welfare offices "are public fora for the purposes of speech pertaining to welfare issues." SPA-16. Because "the 'public' character of welfare offices is limited to the discussion of welfare issues," the district court ruled, welfare offices are "limited public fora." *Id.*

Although in *Brezenoff* this Court held that heightened scrutiny governs review of HRA's exclusions of advocates' speech from welfare offices, the district court did not follow this holding. Instead, the district court ruled that HRA's exclusion of advocates' speech from welfare offices is subject to only rational basis scrutiny. *Id.*; compare *Brezenoff II*, 742 F.2d at 720-21; *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319, 1323 (2d Cir. 1974). The district court did not explain why it applied lesser scrutiny. SPA-16.

The district court then held that HRA's interests in preventing "disruption" at welfare offices, and in not endorsing MRBW's speech, were sufficient to justify HRA's exclusion of MRBW's speech. SPA-16 to 19.

Rejecting the viewpoint discrimination claim, the district court characterized HRA's exclusion of MRBW as "content discrimination" which "preserve[s] the purposes of the forum." SPA-20. Notwithstanding the undisputed record evidence that HRA's mission includes both ensuring that qualified individuals receive benefits they are due under the law, and providing them

with the information and assistance necessary to enable them to obtain those benefits, see discussion *infra* at 11, the court concluded that "the purpose of the forum is the efficient distribution of public assistance benefits." SPA-20. The court also held that even if, as plaintiffs had argued, "HRA's goal is to discourage claimants from receiving the benefits to which they are entitled," HRA's speech exclusion would be constitutional because the government was merely "express[ing] its own viewpoint while excluding all others." *Id.*

In addition to disposing of the parties' summary judgment motions, the court granted HRA's motion to strike the class claims, denied as moot HRA's motions to strike evidence and to amend the Answer, and *sua sponte* dismissed all individual claims asserted by plaintiff Irania Sanchez.

III. This Appeal

MRBW appeals the district court's denial of its motion for summary judgment and granting of HRA's motion for summary judgment as to plaintiffs' forum claim. Insofar as plaintiffs' vagueness and viewpoint discrimination claims are relevant to plaintiffs' forum claim, MRBW also appeals the district court's

denial of its motion for summary judgment and granting of HRA's motion for summary judgment as to those claims.⁵

STATEMENT OF FACTS

I. MRBW and Its Advocacy

The material facts are not in dispute. MRBW, a community organization based in Bushwick, Brooklyn, seeks to provide free assistance and advocacy in welfare office waiting rooms to ensure that essential, subsistence-level benefits are available to individuals qualified to receive them. In carrying out this mission, MRBW is responding to a fundamental void in the welfare system. For many people, there are no more important interactions with city government than those relating to welfare benefits, which are often essential to their very survival. Yet welfare claimants, all of whom lack the resources to hire attorneys, and many of whom have only a limited education, find it difficult to navigate the indisputably complicated system. As a result, claimants frequently misunderstand their rights and obligations, and even well-intentioned welfare employees sometimes erroneously deny benefits to qualified people.

Since 1998, MRBW has sought permission from HRA to go into welfare office waiting rooms in order to talk with the people waiting there about their rights in the welfare system. MRBW

⁵ MRBW does not appeal the district court's dismissal of: 1) plaintiffs' due process and equal protection claims, 2) Ms. Sanchez's individual claims, or 3) plaintiffs' class claims.

also wants to provide the claimants with educational leaflets about welfare benefits. See A-12 to 35, 41. For example, MRBW seeks to inform claimants who do not speak English that HRA is obligated by law to provide them with bilingual caseworkers, written materials in the claimants' languages, and, where necessary, interpreters. MRBW also seeks to inform claimants that if HRA makes a mistake regarding their benefits (such as by repeatedly failing to correct a wrong mailing address in HRA's computers) they have the right to file a written complaint with HRA and to seek an administrative fair hearing with the State of New York. In addition to providing these and other types of information, MRBW seeks to provide claimants with practical assistance in filling out forms and obtaining necessary documents, and to represent them in dealings with caseworkers and other HRA personnel. A-71 to 81, ¶¶ 4, 5, 9 to 34.

When MRBW has been able to provide claimants with these types of assistance, it has helped HRA correct errors that were causing qualified people to go without essential benefits. For example, on at least twenty-two occasions between February 1999 and April 2000, HRA corrected a mistake regarding a claimant's welfare case after MRBW helped the claimant file a written complaint with HRA. See A-117 to 163 (complaints by MRBW's clients and HRA's responses). The direct result of MRBW's assistance was that vulnerable individuals and families received

benefits for which they were qualified and that they could use for food, clothing, shelter and other basic needs. To cite just a few examples, MRBW assisted claimants in obtaining: an emergency grant so that Con Edison would not shut off a claimant's utilities, an emergency grant to replace clothing lost in a disaster, grants to cover additional expenses during pregnancy and to buy a crib once the child was born, cash benefits and food stamps for children that caseworkers had refused to add to a family's budget, a grant to pay for beds for a mother and her son, and over \$4,000 in retroactive food stamps and cash benefits for a particular claimant. A-121, 122, 138, 141, 145, 151, 155 to 159.

Several individuals whose welfare cases had been closed in error, resulting in their receiving no benefits whatsoever, also were able to reopen their cases with MRBW's assistance. See, e.g., A-152 to 153, 161. In addition, on at least sixteen occasions between February 1999 and April 2000, HRA assigned claimants new caseworkers after the claimants, with MRBW's assistance, filed complaints about HRA's failure to adhere to federal law⁶ requiring a caseworker who spoke the claimant's language, about HRA's failure to assign a caseworker, or about a previous caseworker's unresponsiveness. A-164 to 190.

⁶ See 7 C.F.R. § 272.4(b)(3).

MRBW engages in this work because it knows that HRA often provides claimants with misinformation and frequently makes errors regarding claimants' benefits cases.⁷ This knowledge has been confirmed by several federal and state investigations in the past few years which have found that, in violation of federal and state law, HRA has not provided claimants with information they need to follow HRA procedures, to meet their obligations to HRA, and ultimately to obtain the subsistence benefits for which they are qualified. For example, HRA has failed to tell claimants that: 1) they have a right to apply for Food Stamps the same day they contact a welfare office, 2) they have a right to apply for food stamps benefits independent of other benefits, 3) they may be excused from normally required work activities if they are unable to find child care that is appropriate, 4) if they withdraw an application for temporary cash assistance HRA will also disregard their applications for participation in the food stamps program, and 5) HRA will provide them with either a caseworker who speaks their language or with a translator. A-96 to 100, 202 to 220, 247 (reports of investigations by the U.S. Department of Agriculture, U.S. Department of Health and Human Services, and the New York State

⁷ As *amicus curiae* Community Service Society explains, the misinformation and mistakes are the unsurprising result of the difficult task with which HRA has been entrusted: administering a large, complicated welfare benefits system, and having to rely on over-burdened, under-trained personnel to do so.

Comptroller). The investigations have found that because of these failures to provide information, and because of improper HRA procedures, many qualified individuals have been unable to access benefits due them under the law. A-96 to 100, 236.

If HRA were to allow MRBW to provide claimants with information in welfare offices, HRA would be acting in accordance with its mandate in operating the offices. HRA agrees that its mandate includes "provid[ing] public assistance benefits to eligible individuals and families," and that it is "committed to enhancing the quality of life for all New Yorkers through the effective administration of programs that . . . [p]rovide a safety net, where necessary." A-109, 338.

Moreover, federal and state law explicitly impose on HRA a mandate to provide welfare claimants with the information and assistance they need to obtain benefits. *See, e.g.*, SPA-35, 92, 94 to 96 (7 C.F.R. § 272.5(b)(3) & (c); 18 N.Y. Comp. R. & Reg. §§ 351.1(b)(1), 387.2(b), 387.2(e), 387.2(h), 387.2(i), 387.2(p), 387.2(s), 387.2(t), 387.2(u), 387.2(y)); *Aronowitz v. Bernstein*, 430 N.Y.S.2d 323, 325 (App. Div. 1980) (discussing HRA's obligation to "affirmatively assist applicants to understand and comply with the requirements of the law and regulations") (citing 45 C.F.R. § 206.10 (SPA-36-39)).

II. HRA's Access Policy, Past and Present

Another way that federal and state law ensures that qualified claimants are able to obtain the benefits they are due is by requiring HRA to permit claimants to bring advocates to welfare offices with them. See SPA-36, 93 (45 C.F.R. § 206.10(a)(1)(iii); 18 N.Y. Comp. R. & Reg. § 351.1(d)). Accordingly, HRA permits advocates to enter welfare offices whenever they are accompanied by claimants, and it does not require the advocates to obtain specific permission prior to entering, to have particular training, or to meet any other criteria. SPA-93 (18 N.Y. Comp. R. & Reg. § 351.1(d)) (HRA must admit advocates accompanied by claimants); A-56 (advocates accompanied by claimants may enter welfare offices "without the need to apply for prior permission"); A-109 (advocates accompanied by claimants need not have particular training or meet other requirements). While in the welfare offices, the advocates are permitted to provide claimants with information, assistance and representation with regard to welfare benefits. Additionally, if other claimants ask for assistance, the advocates may help them too. A-626 to 627.

From at least 1974 through approximately 1991, HRA also allowed advocates to enter welfare offices to provide information, assistance and representation to claimants even when the advocates were not accompanied by individual claimants.

A-691, 693-697, 701-705, 707-708; *New York City Unemployed & Welfare Council v. Brezenoff* ("Brezenoff I"), 677 F.2d 232, 235 (2d Cir. 1982). In 1977, HRA issued regulations, which codified prior practice and remained in effect until at least 1983, permitting "[o]rganizations desiring to converse with clients and distribute literature" to sit behind tables at welfare offices. *Brezenoff I*, 677 F.2d at 235; A-192 (HRA's former Office Procedures Manual). In the early 1980's, pursuant to a court order that directed HRA to modify its regulations, HRA also started allowing at least one advocate from any given organization to walk around the waiting rooms. *Brezenoff I*, 677 F.2d at 235 n.4.⁸ Pursuant to the HRA regulations, in the 1970's HRA admitted the Food Law Project, in the 1980's HRA admitted the New York City Unemployed and Welfare Council and at least four other welfare advocacy organizations, and in the late 1980's and early 1990's HRA admitted other advocates. A-691, 693, 694-697, 701-705, 707-708; *Brezenoff I*, 677 F.2d at 234; *id.* at 241 (Murphy, J., concurring in part and dissenting in part). In undisputed testimony, Barry Ensminger, HRA's General Counsel during the last few years in which HRA admitted advocates unaccompanied by claimants, explained that the

⁸ On information and belief, this order has never been modified and remains in effect. See *id.*

advocates did not cause any disruptions during his tenure. A-705, 706.

Since the early years of the Giuliani administration, however, HRA has barred advocates, including MRBW, from welfare offices unless they are accompanied by individual claimants, and it has also prohibited advocates from distributing written materials in those offices. A-110, 306, 308. Although HRA did not start excluding advocates unaccompanied by claimants until the mid-1990's, it claims that the current policy is based upon the following portions of an HRA Executive Order establishing a "Code of Conduct for HRA Employees," versions of which have been continuously in place since 1974:

The use of [HRA] premises shall be limited to the transaction of official business and such other activities as may be specifically authorized by the HRA/[Department of Social Services] Commissioner. . . .

Distribution of written material on Agency premises is limited to releases issued or sponsored by the Agency, releases of recognized staff organizations or clubs approved for distribution by [HRA] . . . and releases of certified labor organizations pursuant to collective bargaining agreements.

A-110. See also SPA-118 to 137 (HRA Executive Orders 651, 639, 618, 510).

SUMMARY OF ARGUMENT

Under well-established First Amendment forum jurisprudence, the government creates a species of public forum when it opens its property to a genre of speech without requiring speakers to obtain permission on a case-by-case basis before speaking, and when the purpose of the forum is compatible with speech. When the government excludes speech that falls within the genre generally admitted to the forum, the government's action is subject to heightened scrutiny. The government's action is subject to particular scrutiny when it excludes speech furthering the purpose of the forum. See section I.A, *infra*.

Here, welfare office waiting rooms should be treated as a species of public forum because HRA has opened them to speech between welfare claimants, the advocates representing them, and welfare officials concerning public benefits issues, and because that speech is compatible with the purpose of the forum. The City allows this genre of speech to occur in the waiting rooms without requiring the speakers to first obtain permission. Since MRBW seeks to engage in precisely this genre of speech, HRA's exclusion of MRBW's speech is subject to heightened scrutiny.

Moreover, by providing claimants with essential information about welfare benefits, and by facilitating conversations between claimants and officials, the advocates further an

important purpose of welfare offices: ensuring that qualified individuals receive benefits they are due under the law. HRA's exclusion of MRBW is subject to particular scrutiny for this reason. In suggesting that a lesser level of scrutiny applies, the district court erred. See section I.B, *infra*.

Heightened scrutiny is also applicable to HRA's exclusion of advocates' speech because HRA is taking aim at speech critical of the government. See section I.C, *infra*.

Finally, HRA's blanket ban on speech by any advocate who is not accompanied by an individual claimant must be unconstitutional. Such a ban is not narrowly tailored to serve the only two interests claimed by the government and cited by the district court: avoiding disruption and avoiding endorsing the advocates' speech. Moreover, several of the interests that the district court found the government to possess are not, in fact, legitimate governmental interests. See section II, *infra*.

ARGUMENT

I. HRA'S EXCLUSION OF MRBW'S SPEECH IS SUBJECT TO HEIGHTENED SCRUTINY.

The constitutional rights at stake in this appeal are among our most highly valued. "Freedom of expression, safeguarded by the First and Fourteenth Amendments to the Constitution, is a fundamental right, essential to our democratic society and accorded great weight by our courts." *Brezenoff I*, 677 F.2d at

236. In particular, the First Amendment protects the right of lawyers and non-lawyers to "acquaint persons with what they believe to be their legal rights and advise them to assert their rights" *NAACP v. Button*, 371 U.S. 415, 434, 437 (1963); see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (legal services lawyers engage in constitutionally protected activity); *In re Primus*, 436 U.S. 412 (1978).

Likewise, distributing leaflets and pamphlets "is a form of communication protected by the First Amendment." *Brezenoff I*, 677 F.2d at 235 n.4 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). In fact, publications of the type MRBW seeks to distribute "have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." *Albany Welfare Rights Org., 493 F.2d at 1322-23; see also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2087 (2002) (discussing the importance of leafleting, particularly "to the poorly financed causes of little people") (quoting *Martin v. City of Struthers*, 319 U.S. 141, 144-46 (1943)).

In two prior cases, this Circuit has held that because HRA has chosen to open up its welfare office waiting rooms to some First Amendment-protected speech regarding welfare benefits, those waiting rooms are public forums for the discussion of

welfare benefits, and exclusions of advocates' speech from the waiting rooms are subject to heightened scrutiny. See *Brezenoff I*, 677 F.2d at 238-39; *Brezenoff II*, 742 F.2d at 720-21; *Albany Welfare Rights Org.*, 493 F.2d at 1323-24.

In *Albany Welfare Rights Organization v. Wyman*, this Court ruled unconstitutional Albany's policy - similar to the policy at issue in this appeal - imposing a blanket ban on welfare advocates talking to claimants and handing out informational leaflets within welfare office waiting rooms. *Albany Welfare Rights Org.*, 493 F.2d at 1324.

In *New York City Unemployed & Welfare Council v. Brezenoff*, the district court ruled unconstitutional HRA regulations far less restrictive than those at issue in this case. Those regulations actually allowed advocates not accompanied by individual clients to enter welfare offices, and required only that they stand behind tables. See *Brezenoff I*, 677 F.2d at 235 & n.4. The court held that HRA could not constitutionally prohibit the advocates from walking around and directed HRA to modify its regulations accordingly. *Id.* HRA did not appeal the ruling.

In affirming other aspects of the district court's opinion, this Court held that "a welfare office is to be treated as a public forum for the purposes of speech pertaining to welfare issues." *Brezenoff II*, 742 F.2d at 720. As such, this Court

held, content-neutral time, place or manner restrictions on speech in welfare offices must be "narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication."⁹ *Id.* at 720 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); see also *Brezenoff I*, 677 F.2d at 238.

In the instant case, the district court adhered to this Court's rulings in *Brezenoff* and *Albany Welfare Rights Organization* that welfare office waiting rooms are public forums for the discussion of welfare benefits. At the same time, the district court departed from those rulings in applying only rational basis scrutiny to HRA's refusal to allow advocates unaccompanied by individual claimants to enter the waiting rooms. The district court did not explain why it applied lesser scrutiny. See discussion *supra* at 5.

As MRBW demonstrates below, the district court erred in failing to apply heightened scrutiny, because MRBW's speech is indistinguishable from the speech generally admitted to those offices. Application of heightened scrutiny is particularly

⁹ Based on this holding, this Court ruled that the district court had improperly rejected the plaintiffs' challenge to a separate ban on soliciting funds. See *id.* at 240-41. On remand, the district court again upheld the solicitation ban, and this Court affirmed. See *Brezenoff II*, 742 F.2d 718. Unlike the *Brezenoff* plaintiffs, the advocates here do not seek to solicit membership fees or any other funds inside welfare offices.

appropriate here, because MRBW's speech furthers the purpose of the forum, and because in excluding MRBW HRA is trying to suppress speech critical of the government.

This Court must review the district court's judgment "de novo, giving the nonmoving party . . . the benefit of all reasonable inferences that the evidence permits." *Wilkinson v. Russell*, 182 F.3d 89, 96 (2d Cir. 1999). This is particularly important in First Amendment cases, for which the Supreme Court has warned that appellate review must include "'an independent examination of the whole record,' so as to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)); see also *Thomas v. Board of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 n.12 (2d Cir. 1979) (conducting "an independent and careful examination of the record" in a First Amendment case and concluding that a district judge erred in ruling that students were suspended for insubordination rather than for publishing particular material in an off-campus newspaper).

If this Court determines that the district court erred in granting summary judgment for HRA, and if there are no genuine issues of material fact, this Court may direct the entry of summary judgment for MRBW. See *Wright, Miller & Kane*, 10A Fed.

Practice & Proc. § 2716, at 292 (1998). See, e.g., *Coregis Ins. Co. v. American Health Found., Inc.*, 241 F.3d 123, 131 (2d Cir. 2001).

A. The Government Creates a Limited Public Forum When It Admits a Genre of Speech Onto Its Property Without Requiring Permission on a Case-by-Case Basis, and When the Purpose of the Forum Is Compatible With Speech.

Forum doctrine is an attempt to determine whether "the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other [speech] purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985); see also *Hotel Employees & Rest. Employees Union (HERE), Local 100 v. City of N.Y. Dep't of Parks & Recreation*, -- F.3d --, 2002 WL 31545301, *7 (2d Cir. Nov. 18, 2002) (forum doctrine is "a useful means of analyzing the parties' competing interests"). The key question is whether the government's use of the property is "compatible with various kinds of expressive activity." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 681 (1992). "If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum." *Id.* at 698 (Kennedy, J., concurring).

Applying this principle, the Supreme Court has divided government property into four categories: traditional public forums, nonpublic forums, designated public forums, and limited public forums. In "traditional public forums" - government property, such as streets and parks, traditionally available to the public for expressive activity - "a principal purpose . . . is the free exchange of ideas." *Cornelius*, 473 U.S. at 800. Accordingly, "'open access . . . is compatible with the intended purpose of the property.'" *HERE*, 2002 WL 31545301, *7 (quoting *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998)). Because the property is compatible with speech, the content-based regulation of First Amendment activity is subject to strict scrutiny, and it will survive only if the government can show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991). While the government may impose time, place and manner restrictions on speech in a public forum, those restrictions are still subject to heightened scrutiny and will survive only if they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of information.

See Perry Educ. Ass'n, 460 U.S. at 45; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (defining standard).

In a nonpublic forum - defined as property that the government has not opened for speech - it is presumed that speech is incompatible with the primary uses of the property, and speech regulations will be upheld so long as they are "reasonable in light of the purpose of the property." *Arkansas Educ. Television Comm'n*, 523 U.S. at 682; *see also Cornelius*, 473 U.S. at 809.

However, when the government intentionally opens a nontraditional forum to all speech (creating a "designated public forum"), or to some genres of speech (creating a "limited public forum"), without requiring people engaging in the permitted speech to first obtain permission,¹⁰ and when the purpose of the forum is compatible with speech, the forum is a public forum for the admitted genres of speech. *Perry Educ. Ass'n*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 802. Restrictions on those genres of speech are subject to the same heightened

¹⁰ If the government opens the forum to some speakers on a permission-only basis, no presumption arises that similar speech would be compatible with the purpose of the forum. Only if the government grants general access to all speech or to a category of speech without requiring permission does the government create a public forum. *See Perry Educ. Ass'n*, 460 U.S. at 47 (school district's refusal to grant access to teacher mailboxes was subject to rational basis scrutiny because district required speakers to obtain permission before using the mailboxes); *Cornelius*, 473 U.S. at 802-06.

scrutiny applied to speech restrictions in a traditional public forum.¹¹ See *Arkansas Educ. Television Comm'n*, 523 U.S. at 677-78; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *HERE*, 2002 WL 31545301, *6. All other genres of speech are presumed to be incompatible with the purpose of the forum, however, and restrictions on those genres are subject to only reasonableness scrutiny. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001); *Rosenberger*, 515 U.S. at

¹¹ Although the district court relied on this Court's rulings in *General Media Communications v. Cohen*, 131 F.3d 273 (2d Cir. 1997), and *Perry v. McDonald*, 280 F.3d 159, 166 n.4 (2d Cir. 2001), in applying rational basis scrutiny to HRA's exclusion of MRBW's speech, SPA-15 to 16, neither ruling purports to overturn this Court's prior rulings that exclusions of speech falling within the category generally admitted to government property and furthering the purpose of the property are subject to heightened scrutiny. See, e.g., *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 129-30 (2d Cir. 1998); *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996); *Travis*, 927 F.2d at 692; *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991). Rather, in the portion of *General Media Communications* cited by the district court, this Court explicitly adhered to its ruling in *Travis v. Owego-Apalachin School District* that in a public forum "whose use is limited to particular purposes or speakers, . . . once government 'allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre.'" See 131 F.3d at 278, n.6 (quoting *Travis*, 927 F.2d at 692). The portion of *Perry* cited by the district court merely relies on that same *General Media Communications* footnote without further analyzing the public forum point. 280 F.3d at 166 n.4.

In *HERE*, this Court has again adhered to its *Travis* ruling, stating: "in limited public fora, strict scrutiny is accorded . . . to restrictions on speech that falls within the designated category for which the forum has been opened." 2002 WL 31545301, *6.

829; *Perry Educ. Ass'n*, 460 U.S. at 48; *HERE*, 2002 WL 31545301, *6.

The government's exclusion of speech that not only falls within the genre generally admitted into the forum, but that also furthers the purpose of the forum, should be subjected to particular scrutiny, given the Supreme Court's warning that the purpose of the forum doctrine is to determine whether the interests of those wishing to use government property for speech outweigh the government's interests. See discussion *supra* at 21. When the proposed speech will actually further the government's interests, there is simply no justification for excluding that speech. Compare *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 353-54 (6th Cir. 1998) (holding that speech exclusion was unconstitutional where the speech was "[]compatible with the forum's principal function").

B. Heightened Scrutiny Applies in This Case Because MRBW Seeks to Engage in the Genre of Speech Allowed in Welfare Offices, and Because MRBW's Speech Furthers the Purpose of the Forum.

The district court was correct in holding that the waiting rooms of HRA's welfare offices are limited public forums for discussions between welfare advocates and claimants regarding welfare benefits. It is undisputed that HRA allows advocates who are accompanied by welfare claimants to discuss welfare

benefits with those claimants in welfare office waiting rooms, and to represent the claimants at meetings with agency personnel, without requiring the advocates to first obtain permission. See discussion *supra* at 12. This speech is clearly compatible with the purpose of the forum: by helping claimants get benefits for which they are qualified, and by providing claimants with the necessary information and assistance so that they are able to obtain those benefits, the advocates' speech furthers important purposes of welfare offices. See discussion *supra* at 8-9, 11. In fact, it is precisely in order to further these goals that HRA admits advocates accompanied by claimants into its welfare offices. See discussion *supra* at 12. Welfare offices are, thus, as the district court found, limited public forums for this genre of speech.

HRA's exclusion of MRBW's speech from this forum is subject to heightened scrutiny. MRBW seeks to engage in precisely the genre of speech in which HRA allows advocates accompanied by claimants to engage: discussing welfare benefits with claimants, and representing claimants at meetings with agency personnel. See discussion *supra* at 7-8, 12. Moreover, MRBW's speech not only furthers, but is essential to, the important purposes of welfare offices. See *United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 350 (noting that forum analysis requires examination of a forum's "multiple purposes").

Without the assistance of advocates, many claimants are deprived of benefits essential to their very survival. When MRBW provides claimants with information and assistance enabling them to obtain benefits due them under the law, however, it has been remarkably successful at helping HRA meet its goals. See discussion *supra* at 8-9. HRA's exclusion of MRBW is consequently subject to heightened scrutiny.

C. Heightened Scrutiny Also Applies in This Case Because HRA's Exclusion of MRBW's Speech Is Motivated by a Desire to Suppress Speech Critical of the Government.

Application of heightened scrutiny is also appropriate for an additional reason - because HRA's exclusion of MRBW is at least partly motivated by a desire to suppress criticism of the government. It is well established that, regardless of the type of forum, the government may not engage in viewpoint discrimination. *HERE*, 2002 WL 31545301, *6-*7.

In deposition after deposition, welfare office personnel declared that they did not want MRBW admitted to the welfare offices because when advocates tell clients about their rights, the clients try to enforce those rights. See A-580, 619, 638, 666, 880.

For example, Brenda Brown, Assistant Deputy Commissioner in HRA's Office of Procedures and Policy Development, testified that one reason HRA did not want the advocates in the welfare

offices is that when advocates used to be allowed in without clients to sit at tables:

There would be times when, let's say, a client would come and he or she would be very upset and then the person at the table would start, "Well, they're not right, that's not the way it's supposed to work," da da da da da, and it would stir up the rest of the clients who were waiting.

A-638. Likewise, Seth Diamond, HRA's Deputy Commissioner for Job Center Operations, testified that one reason he wanted MRBW excluded was that when advocates have conducted inspections of the welfare offices pursuant to the court order in *Reynolds v. Giuliani*:

They walk around freely in the waiting room talking to people, encouraging them, if they have problems to file complaints of various kinds. They frequently demand to speak to supervisors and others in the center, people come over to them. It creates a difficult atmosphere to conduct business in the center.

A-666.

As this Court recently warned in the course of invalidating a governmental policy that suppressed legal advocacy efforts on behalf of, and by, welfare claimants, "The strongest protection of the First Amendment's free speech guarantee goes to the right to criticize government or advocate change in governmental policy." *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001); *see also Harman v. City*

of N.Y., 140 F.3d 111, 118 (2d Cir. 1998). Because this is precisely the sort of speech that HRA's exclusion of MRBW suppresses, HRA's exclusion must be scrutinized particularly carefully.

The district court was wrong to reject plaintiffs' viewpoint discrimination claim on the ground that HRA is not excluding particular messages but is merely excluding all speakers who do not have "official business" to conduct. SPA-20. The essential role of MRBW in helping HRA make accurate decisions is well established in the record. See discussion *supra* at 8-9. Likewise, the state and local laws that the district court contended "clearly define" HRA's "official business," SPA-10 to 12, actually require HRA to provide precisely the sort of services in welfare offices that MRBW seeks to help it provide. See discussion *supra* at 11. Consequently, the only basis for concluding that advocates are not engaged in "official business" is that HRA says they are not.¹²

HRA is able to reach this conclusion because it has not promulgated any standards to guide its discretion over what constitutes "official business." The "official business"-only

¹² In contrast, during the decades that HRA admitted advocates unaccompanied by individual clients, HRA presumably viewed the advocates as engaging in "official business," because HRA's "official business"-only policy was in effect that entire time. See discussion *supra* at 12-14.

policy is thus strikingly similar to another HRA speech restriction that this Court has recently invalidated: a ban on all employee speech not "consistent with the efficient and effective operation of the agency." *Harman*, 140 F.3d at 119. In *Harman*, this Court ruled that the ban was not only "[in]sufficiently definite to limit the possibility for content or viewpoint censorship," but that it "inherently disfavor[ed] speech that is critical of agency operations, because such comments will necessarily seem more potentially disruptive than comments that 'toe[] the agency line.'"¹³ *Id.* at 120, 121 (quoting *Sanjour v. EPA*, 56 F.3d 85, 96-97 (D.C. Cir. 1995) (en banc)). It is clear from the deposition testimony quoted above that this is precisely how HRA's "official business" policy operates in this case - to exclude speech in which claimants, through their advocates, urge HRA to follow its own procedures, speech that HRA employees are predisposed to view as "disruptive."

For this reason, and also because welfare office waiting rooms are public forums for the discussion of welfare benefits by advocates and claimants, because MRBW wants to engage in that

¹³ This ruling echoes the Supreme Court's warning in *City of Lakewood v. Plain Dealer Publishing Co.* that "a law or policy permitting communication in a certain manner for some but not for others raises the specter of . . . viewpoint discrimination. This danger is at its zenith when the determination of who may speak . . . is left to the unbridled discretion of a government official . . ." 486 U.S. 750, 763 (1988).

genre of speech, and because MRBW's speech furthers the purpose of the forum, HRA's exclusion of MRBW's speech is subject to heightened scrutiny.

II. THE GOVERNMENT'S INTERESTS ARE INSUFFICIENT TO JUSTIFY A BLANKET BAN ON MRBW'S SPEECH IN WELFARE OFFICE WAITING ROOMS.

The particular level of heightened scrutiny that applies to HRA's exclusion of MRBW's speech depends on whether HRA's regulation is content-based or is instead a time, place or manner regulation. As discussed above, if it is content-based, HRA's speech exclusion is subject to strict scrutiny and will survive only if HRA demonstrates that it is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. See discussion *supra* at 22. This rigorous standard applies here, because the City's absolute ban on advocates unaccompanied by claimants entering welfare office waiting rooms cannot be considered a time, place and manner restriction. See *Loper v. New York City Police Dep't*, 999 F.2d 699, 705 (2d Cir. 1993).

However, even if the ban were considered a time, place and manner restriction, it would still be subject to heightened scrutiny, so that it must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of information. See discussion *supra* at 22-23.

Under either level of scrutiny, the government bears the burden of showing that its regulation can meet the test. *Perry Educ. Ass'n*, 460 U.S. at 45. There are several components to this showing. First, the government must demonstrate that its interests are legitimate. See *Lerman v. Board of Elections*, 232 F.3d 135, 151, 152 (2d Cir. 2000) (rejecting several asserted governmental interests as illegitimate), *cert. denied*, 533 U.S. 915 (2001). Then, the government must demonstrate that the regulation will actually further those interests. As the Supreme Court has warned:

When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)); see also *Lerman*, 232 F.3d at 150-51. Finally, the government must demonstrate that the regulation is adequately tailored to those interests.

As discussed below, HRA's exclusion of MRBW fails on all three counts. In fact, the blanket nature of the ban makes it virtually impossible for HRA to satisfy the last criterion. See *Loper*, 999 F.2d at 704 ("[A] statute that totally prohibits

begging in all public places cannot be considered 'narrowly tailored' to achieve that end."); see also *Brezenoff I*, 677 F.2d at 239 ("'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.'") (quoting *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980)) (other quotations omitted).

A. HRA's Asserted Interest in Avoiding Disruption Does Not Justify Excluding MRBW's Speech.

The district court's ruling that HRA's interest in avoiding disruption justifies the exclusion of MRBW's speech relied on three distinct types of disruption: 1) that advocates cause clients to get into disagreements with their HRA personnel, 2) that MRBW advocates enter welfare offices when they are not representing specific claimants, and 3) that clients stand in front of elevator doors and the front doors of welfare offices while talking to MRBW. Based on the evidence properly in the record, none of these types of disruption is sufficient to justify the exclusion of MRBW's speech.

The district court's finding regarding the first type of disruption - that in the 1970's "several disruptive incidents occurred after welfare advocates incorrectly told claimants they were entitled to certain benefits" - is unsupported by the evidence. See SPA-17. It is based solely on speculation by a

single HRA employee who did not hear the advocates speaking to the claimants, and who simply assumed that because the claimants disagreed with HRA personnel the claimants must have received misinformation from the advocates.¹⁴ SPA-598. This speculation is inadmissible because it was not based on personal knowledge. See Fed. R. Civ. P. 56(e); *United States v. Alessi*, 599 F.2d 513, 515 (2d Cir. 1979) (affidavits supporting or opposing summary judgment "that do not appear to be made on personal knowledge" are inadmissible).

Moreover, since clients who have not had any contact with advocates often get into disagreements with HRA personnel, there is no basis for Ms. Brown's speculation that the disagreements she observed stemmed from the advocates' statements. A-669, 834-835. Accordingly, the district court should not have relied on her testimony. *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 451-52 (2d Cir. 1999) (summary judgment affidavits must be "based upon concrete particulars, not conclusory allegations"), *cert. denied*, 530 U.S. 1242 (2000); *Applegate v. Top Assocs., Inc.*, 425 F.2d 92, 97 (2d Cir. 1970) ("affidavit grounded in suspicion" should be excluded on motion for summary judgment);

¹⁴ Although the district court's opinion implies that either Helen Benson or Sheryl Logan gave similar testimony regarding MRBW's activities in "recent years," SPA-17, neither did. Rather, Ms. Benson testified that after MRBW informed claimants about their rights, the claimants tried to enforce those rights. A-579 to 582. Ms. Logan's testimony did not concern misinformation at all. A-832 to 833.

see also Fed. R. Evid. 403, 701. It simply cannot be that an agency's spurious claims of "disruption" occurring thirty years ago can suffice to suppress essential First Amendment expressive activity today.

Even if the record did support a finding that advocates had given misinformation to claimants thirty years ago, this would not justify a total ban on First Amendment-protected activity by advocates who are not accompanied by claimants. Significantly, HRA's ban does not apply to advocates accompanied by claimants, despite the fact that HRA does not screen these advocates to determine whether they are competent to provide assistance. See discussion *supra* at 12. The ban's underinclusiveness prevents it from being narrowly tailored to HRA's claimed interest in preventing claimants from receiving misinformation. See *Bery v. City of N.Y.*, 97 F.3d 689, 698 (2d Cir. 1996) ("[T]he City's licensing exceptions for veterans and vendors of written material call into question the City's argument that the regulation is narrowly tailored."); *Loper*, 999 F.2d at 705 (restriction on begging without license did not further government interests where it did not apply to "certain religious, educational and fraternal organizations"). At the same time, the ban is overinclusive in that it applies even to MRBW staff who are lawyers, who are presumably competent to

provide accurate information, and it applies even though all MRBW staff work under the supervision of lawyers. A-563 to 564.

That the ban is both overinclusive and underinclusive suggests that HRA's asserted desire to protect claimants from misinformation is merely pretextual. An additional indication that this interest is pretextual - and thus cannot survive heightened scrutiny - is the fact that at the time advocates were purportedly giving out misinformation causing claimants to disagree with HRA personnel, and for at least a decade thereafter, HRA allowed advocates unaccompanied by claimants into welfare office waiting rooms. See discussion *supra* at 12-14. Compare *Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993) (rejecting asserted governmental interests in speech restriction as "post hoc, pretextual creations"); *Time Warner Cable v. City of N.Y.*, 943 F. Supp. 1357, 1397 n.35, 1401 (S.D.N.Y. 1996) (rejecting as pretextual, and inadequate to survive heightened scrutiny, City's claim that anticompetitive behavior by cable operators was the basis for the City's attempt to compel operators to carry Fox News, since City did not act to stop the behavior when it allegedly occurred), *aff'd on other grounds*, 118 F.3d 917 (2d Cir. 1997).

In the absence of evidence that advocates provide misinformation to clients or are otherwise disruptive, HRA's

concern boils down to a desire to prevent claimants from engaging in the First Amendment-protected activities of learning of their rights and then using that knowledge to enforce their rights. See discussion *supra* at 17. Both the First Amendment and HRA's legal obligation to ensure that claimants receive accurate information about their eligibility for welfare benefits, see discussion *supra* at 11, deprive HRA of a legitimate interest in discouraging this activity. See *Lerman*, 232 F.3d at 151 (rejecting as illegitimate the government's asserted interest in "fenc[ing] out non-residents' political speech," because such interest "simply cannot be reconciled with the First Amendment's purpose of ensuring 'the widest possible dissemination of information from diverse and antagonistic sources'" (citation omitted); *Cullen v. Fliegner*, 18 F.3d 96, 104 (2d Cir. 1994) ("[A] state cannot have a legitimate interest in discouraging the exercise of constitutional rights."); *Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 1999) (county commission lacked significant government interest in discouraging First Amendment-protected speech). As the Supreme Court has warned, "No system worth preserving should have to fear that if an [individual] is permitted to consult with a lawyer, he will become aware of, and exercise, [his] rights." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

This same problem infects the second type of alleged disruption on which the district court relied: advocates entering welfare office waiting rooms without HRA's authorization.¹⁵ MRBW's claim that it is constitutionally entitled to enter the waiting rooms is the central issue in this appeal. Because HRA is constitutionally required to permit MRBW to enter, and because MRBW furthers HRA's legal mandate to ensure that claimants get information about their rights, see discussion *supra* at 11, HRA has no legitimate interest in discouraging MRBW from engaging in that behavior. In fact, in *Albany Welfare Rights Organization* this Court found that advocates had a constitutional right to enter welfare offices to engage in precisely the speech in which MRBW seeks to engage, even though the plaintiffs had leafleted in welfare offices contrary to the county's policy. See 493 F.2d at 1321.

The third type of "disruption" on which the district court relied is the suggested risk that clients would stand in front of elevator doors and the front doors of welfare offices while talking to MRBW. SPA-17. HRA certainly has a strong interest in ensuring free access to both types of doors. However, a regulation requiring advocates and claimants to stand a certain

¹⁵ The district court stated that "MRBW advocates have . . . entered Job Centers when *not* representing specific claimants (in violation of HRA's access policy), and, after leaving the Centers at the request of HRA staff, have re-entered those same Centers." SPA-17.

distance away from doors would satisfy HRA's concern without suppressing more speech than necessary. Consequently, a total ban on advocates entering welfare office waiting rooms is not narrowly tailored to HRA's asserted interest.¹⁶ See *Bery*, 97 F.3d at 697 ("The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, but it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice.").

Finally, without citation to supporting caselaw, the district court held that even in the absence of record evidence demonstrating that advocates have caused disruption at welfare offices, "HRA's access policy would not necessarily be unreasonable because the potential for congestion and disruption would still exist."¹⁷ SPA-18. Even if only reasonableness

¹⁶ In fact, the total ban on advocates entering Centers does nothing to further HRA's interest in ensuring access to its front doors.

¹⁷ The district court also stated that if HRA admitted MRBW HRA would have to choose between one of three "untenable" options: 1) admit all advocates who wanted to enter; 2) choose among the groups; or 3) regulate the groups' access and activities. SPA-18. The court apparently believed that all options were so burdensome that HRA should not have to try them instead of instituting a complete ban. This ignores the fact that for several decades HRA successfully admitted any advocacy group that wanted to enter welfare offices, simply requiring the groups to pre-register to ensure that there was room for them. See *Brezenoff I*, 677 F.2d at 235. HRA has not presented any

scrutiny applied to HRA's exclusion of MRBW's speech, speculation regarding future harms would be insufficient to support the exclusion. See *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). Since HRA's speech exclusion must satisfy the more rigorous heightened scrutiny standard, the court's speculation is certainly inadequate. See discussion *supra* at 32. The district court's conjecture regarding future harms is particularly insupportable because of the undisputed evidence that no disruptions occurred during the last years that HRA admitted advocates. A-705 to 706. Given HRA's decades-long, successful admission of advocates, the district court's speculation that harm would occur if advocates were admitted now is unwarranted.

B. HRA's Asserted Interest in Not Endorsing MRBW's Speech Does Not Justify Excluding That Speech.

The district court was also wrong as a matter of law that HRA's asserted interest in ensuring that claimants do not believe that HRA endorses MRBW's speech justifies completely excluding that speech from welfare offices. SPA-18 to 19. Given that the risk of people perceiving MRBW as acting on behalf of HRA is low, and that there are numerous steps HRA

evidence that there was undue congestion during this period or that HRA found administering this first-come, first-served procedure burdensome in any way.

could take to completely eliminate that risk, HRA's total ban cannot survive heightened scrutiny.

There are several reasons why it is unlikely that anyone will perceive MRBW's speech as being endorsed by HRA. First, the nature of MRBW's message - that claimants have particular rights that HRA must respect - makes it unlikely that anyone will perceive MRBW as speaking for HRA. Second, because claimants are not likely to trust MRBW to advocate vigorously for them within the welfare system if they perceive MRBW as working for that system, MRBW has a strong incentive to make sure that claimants know that MRBW is not endorsed by HRA. Third, HRA has opened its welfare offices for speech by a wide variety of advocates and claimants, not for speech by MRBW in particular. The Supreme Court has found that when private actors speak in a forum open either to the public in general or to certain categories of speech, it is apparent that the forum's owner is not endorsing the speech. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (where shopping center is open to the public, "[t]he views expressed by members of the public passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner"); see also *Travis*, 927 F.2d at 694 ("having an open-door policy that happens to allow religious speech does not 'endorse' or 'establish' a religion"). Consequently, the risk that anyone

will perceive MRBW's speech as being endorsed by HRA is so small that it cannot support the City's total exclusion of that speech.¹⁸ See *Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) ("Private . . . speech cannot be subject to veto by those who see favoritism where there is none.").

Moreover, as this Court observed in *Albany Welfare Rights Organization*, and as the district court observed, HRA could eliminate even that small risk by posting disclaimers or requiring MRBW advocates to "clearly designate themselves in an appropriate manner as not being employees" of the welfare department. See 493 F.2d at 1325 n.3; SPA-19. See also *PruneYard Shopping Ctr.*, 447 U.S. at 87 (private mall owner could "expressly disavow any connection with [pamphleteers'] message by simply posting signs [which] . . . could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law").

For these reasons, when heightened scrutiny applies to a speech exclusion, the government's desire not to endorse speech cannot justify a total ban. See *Capitol Sq. Rev. & Advisory Bd.*, 515 U.S. at 769 (plurality op.) (refusal to permit group to

¹⁸ For this reason, the district court's speculation that there might be a "problem of potential confusion" were MRBW admitted to welfare offices is unwarranted and insufficient to support summary judgment. SPA-19. Mere speculation cannot suffice as a basis for curtailing the exercise of speech, particularly where all indications are that the harm will *not* occur. See discussion *supra* at 32.

erect cross on property government had opened for private speech failed strict scrutiny where government could "requir[e] all private displays . . . to be identified as such"); *id.* at 784, 793-94 (Souter, J., concurring) (same). This is even true when the government is constitutionally bound by the Establishment Clause not to endorse the speech, *see id.*, so it is certainly true here, where there is no similar constitutional mandate against endorsement. HRA's total ban is, consequently, unconstitutional.

CONCLUSION

For the foregoing reasons, MRBW respectfully requests this Court to reverse the opinion of the district court and grant summary judgment for MRBW.

Dated: New York, New York
December 6, 2002

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

This brief contains 9,632 words, exclusive of the corporate disclosure statement, table of contents, table of authorities, statement with respect to oral argument, and this certificate.

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