

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT
MAKE THE ROAD BY WALKING

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ARGUMENT

I. HRA HAS FAILED TO JUSTIFY APPLICATION OF ANYTHING LESS THAN HEIGHTENED SCRUTINY TO ITS EXCLUSION OF MRBW'S SPEECH.

A. HRA's Attack on This Court's Most Recent Forum Analysis as "Erroneous" Misreads Second Circuit and Supreme Court Precedent.

Characterizing as "erroneous" this Court's most recent analysis of the forum doctrine in *Hotel Employees and Restaurant Employees Union, Local 100 ("HERE") v. City of New York*, defendant Human Resources Administration ("HRA") argues that all exclusions of speech from a limited public forum are valid so long as they are reasonable and viewpoint neutral, even if the excluded speech is of a genre the government generally allows in the forum, and even if the speech furthers the purpose of the forum. Def.'s Br. at 41-44 & n.5. In *HERE*, this Circuit held that "[i]n limited public fora, strict scrutiny is accorded . . . to restrictions on speech that falls within the designated category for which the forum has been opened." 311 F.3d 534, 545 (2d Cir. 2002). That ruling is rooted in sound Supreme Court and Second Circuit precedent and is not erroneous.

In *Perry Education Association v. Perry Local Educators' Association*, for example, the Supreme Court held that "[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects,"

and that when the government creates such a forum "it is bound by the same standards as apply in a traditional public forum." 460 U.S. 37, 45-46 & n.7 (1983). The Court reaffirmed this holding most recently in *Arkansas Educational Television Commission v. Forbes*, stating, "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." 523 U.S. 666, 677 (1998).

In objecting to *HERE*, HRA does not point to any Supreme Court opinions purporting to overturn *Perry* and *Forbes*. Instead, it relies on out-of-context citations from *Good News Club v. Milford School District*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Lamb's Chapel v. Central Moriches School District*, 508 U.S. 384 (1993). HRA contends that those opinions applied reasonableness scrutiny to exclusions of speech that fell within a genre generally allowed in a limited public forum. Def.'s Br. at 41-44. However, in none of those cases did the Court determine that the speech fell within a genre generally allowed in the forum.¹ Rather, in each the Court held that the

¹ On the contrary, all involved the exclusion of religious speech from forums with explicit rules barring such speech. See *Good News Club*, 533 U.S. at 103 (policy barred the use of school premises "for religious purposes"); *Rosenberger*, 515 U.S. at 825 ("The student activities that are excluded are religious activities"); *Lamb's Chapel*, 508 U.S. at 388 (policy

speech exclusion was viewpoint discriminatory, which is unconstitutional regardless of whether or not the speech falls within the genre generally permitted in a limited public forum. *See Good News Club*, 533 U.S. at 107; *Rosenberger*, 515 U.S. at 837; *Lamb's Chapel*, 508 U.S. at 391-93.

Accordingly, in none of the cases did the Court have occasion to determine what level of scrutiny would have applied had the speech fallen within the genre generally allowed in the forum. The language in *Good News Club* and *Rosenberger* upon which HRA relies concerns the parameters of a limited public forum (which must be reasonable in light of the purposes served by the forum, but are not subject to heightened scrutiny), and has nothing to do with the exclusion of speech that falls within those parameters. *See Good News Club*, 533 U.S. at 106-07, cited in Def.'s Br. at 42; *Rosenberger*, 515 U.S. at 829, cited in Def.'s Br. at 44 n.5. The only language in *Lamb's Chapel* regarding reasonableness concerns nonpublic forums, and is wholly irrelevant here. 508 U.S. at 392-93.

In addition to wrongly asserting that Supreme Court precedent renders *HERE's* limited public forum analysis

barred the use of school premises "for religious purposes"). In *Lamb's Chapel*, the Court noted that the district had allowed some groups to use school premises for what were arguably religious uses, but assumed for the sake of argument that the school district had not opened its premises for such uses. 508 U.S. at 391-92 & n.5.

erroneous, HRA implies that *HERE*'s analysis is of recent vintage. Def.'s Br. at 44 n.5. On the contrary, *HERE* cites to and is rooted in many identical Second Circuit holdings. 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 v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991); *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991). See also Br. of Amicus Curiae New York Civil Liberties Union at 6 n.2.

This Court's interpretation of the limited public forum doctrine in *HERE* and in other cases accords with the interpretation of the following circuits that have examined the issue:²

- Third Circuit: *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1260-62, 1264 (3d Cir. 1992) ("a designated public forum need not be open to the public at large, but may be opened to a specific class of people or for the discussion of certain subject matter;" in such a forum "time, place or

² The various circuits use different terms for what this Circuit calls a "limited public forum." See, e.g., *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001) (deeming a "limited public forum" a nonpublic forum in which the government maintains tight control over speech, while a "designated public forum" is a public forum in which the government admits all speech, or certain types of speech). In summarizing these cases, plaintiffs focus on how the circuits treat exclusions of speech falling within a genre generally admitted to a forum, where the admitted speech furthers the purpose of the forum, rather than on specific terminology.

manner regulations that limit permitted First Amendment activities . . . are constitutional only if they are 'narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of information'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989));

- Fourth Circuit: *Warren v. Fairfax County*, 196 F.3d 186, 193-194 (4th Cir. 1999) (en banc) ("[A]s regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum.");
- Fifth Circuit: *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) ("[O]nce the government has designated a particular forum as appropriate for certain types of speech or for speech on particular topics, 'speech for which the forum is designated is afforded protection identical to the protection provided to speakers in a traditional public forum.'" (quoting *Hays County Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992)));
- Sixth Circuit: *Kincaid v. Gibson*, 236 F.3d 342, 348-49, 352-54 (6th Cir. 2001) (en banc) (when the government provides a genre of speech with general access to a forum, restrictions on speech falling within that genre are subject to the level of scrutiny applicable in traditional public forums);

- Ninth Circuit: *Hopper v. City of Pasco*, 241 F.3d 1067, 1075-78 (9th Cir.), *cert. denied*, 534 U.S. 951 (2001) (in a "designated public forum," where the government has intentionally "'ma[d]e its property generally available to a certain class of speakers,'" where the government does not first require speakers to seek permission, and where the purpose of the forum is compatible with speech, exclusions of speech falling within the genre generally allowed in are subject to strict scrutiny) (quoting *Forbes*, 523 U.S. at 679);
- Tenth Circuit: *Summum v. Callaghan*, 130 F.3d 906, 914 (10th Cir. 1997) (when the government creates a designated public forum "for use 'by certain speakers, or for the discussion of certain subjects,'" it is "'bound by the same standards as apply in a traditional public forum'") (quoting *Perry Educ. Ass'n*, 460 U.S. at 45-56 & n.7);
- Eleventh Circuit: *Crowder v. Housing Auth.*, 990 F.2d 586, 591 (11th Cir. 1993) (in a limited public forum opened for certain types of speech, content-neutral time, place and manner restrictions must be "narrowly tailored to serve a significant government interest");
- Federal Circuit: *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1321 (Fed. Cir.), *cert. denied*, 123 S. Ct. 410 (2002) ("the government's exclusion of a speaker

who falls within the class to which the forum is made generally available will be subjected to strict scrutiny").

Ignoring these cases, which adhere to essentially the same forum analysis as this Circuit does, HRA places great weight on Eighth Circuit jurisprudence, which differs in several important respects from that of this Circuit (and, respectfully, from that of the Supreme Court). Specifically, throughout its brief, HRA relies on the 8-4 decision in *Families Achieving Independence and Respect ("FAIR") v. Nebraska Department of Social Services*, 111 F.3d 1408 (8th Cir. 1997) (en banc). See Def.'s Br. at 16, 29, 34, 39, 47, 52, 53, 55, 57. Unlike this Circuit, the Eighth Circuit fails to recognize that the government can create a species of public forum - a "limited public forum" - by granting access to a particular genre of speech, even if it does not grant general access to all members of the public. See 111 F.3d at 1418; compare *HERE*, 311 F.3d at 545.

Moreover, the facts in *FAIR* were significantly different than the instant case. For example, while *Make the Road by Walking ("MRBW")* furthers an important purpose of welfare offices by providing welfare applicants and recipients ("claimants") with on-the-spot information, assistance and representation regarding their welfare cases, Pls.' Br. at 8-9, 11, 29, *FAIR* sought solely to enlist claimants in ongoing political advocacy work, including attending a rally and

lobbying the legislature, and did not provide a "direct benefit" to claimants or meet claimants' "basic needs." *FAIR*, 111 F.3d at 1413-14, 1416-17, 1420 & n.11. Additionally, while there was no evidence in *FAIR* that other groups were allowed to engage in the activities in which *FAIR* sought to engage, *id.* at 1423, it is undisputed here that other groups are allowed to engage in the activities in which MRBW seeks to engage. See Pls.' Br. at 7-8, 12, 26. HRA's reliance on *FAIR* is wholly misplaced.

In addition to misinterpreting binding precedent, HRA's insistence that reasonableness scrutiny applies to all exclusions of speech from a limited public forum ignores fundamental principles underlying the forum doctrine. First, the purpose of the doctrine is to determine 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). The government's admission of a genre of speech into a forum establishes that the forum is compatible with that genre of speech. The government's subsequent attempt to exclude speech falling within that genre accordingly should be subject to heightened scrutiny. See *id.* at 698 (Kennedy, J., concurring). HRA's insistence to the contrary is indefensible.

Moreover, HRA's reasonableness scrutiny argument violates the First Amendment principle that the government cannot

exercise unbounded discretion over protected speech. See *Lakewood v. Plain Dealer Publ'g*, 486 U.S. 750, 763 (1988) (the danger of viewpoint discrimination "is at its zenith when the determination of who may speak . . . is left to the unbridled discretion of a government official"). It is this principle that requires that, as HRA admits, when the government opens its property to all kinds of speech, its exclusion of some speech from that property must be narrowly tailored to serve a significant government interest. Def.'s Br. at 36. The same principle mandates that, when the government opens its forum to a genre of speech, its exclusion of speech falling within that genre must likewise be subject to heightened scrutiny.

Finally, if HRA were correct that reasonableness scrutiny applied to all exclusions of speech from a limited public forum, there would be no reason to so carefully distinguish between a limited public forum and a nonpublic forum: the same level of scrutiny would apply in either. It cannot be that this Court and the other courts that have defined the limited public forum category have been involved in a meaningless exercise.

B. HRA Cannot Avoid Creating a Limited Public Forum and Application of Heightened Scrutiny by Deeming All Speech That It Admits "Official Business," or by Admitting Only Speech Required by Law.

HRA is wrong that the government can avoid creating a limited public forum by admitting only uses that the government

deems to be within its "official business." Def.'s Br. at 45, 47-48.³ Courts have consistently held that the government cannot suppress speech through the use of standardless labels like "official business," because the possibility of viewpoint discrimination is too great. See, e.g., *New York Magazine*, 136 F.3d at 131 ("the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as the MTA"); *Harman v. City of N.Y.*, 140 F.3d 111, 119-21 (2d Cir. 1998) (discussing a ban on speech not "consistent with the efficient and effective operation of the agency"). For example, the Ninth Circuit has held that a city that retained standardless discretion to determine what constituted

³ None of the cases HRA cites for this proposition are on point, because in none did the court find that the government had allowed general access to a genre of speech, that the excluded speech fell within that genre, and that the excluded speech furthered the forum's purpose. See Def.'s Br. at 47-48.

In *General Media Communications v. Cohen*, the government did not allow general access to any genre of speech. Rather, "the government ha[d] simply chosen to purchase certain magazines, newspapers, and videos from third parties." 131 F.3d 273, 280 (2d Cir. 1997).

Although HRA argues that MRBW resembles the plaintiff in *Perry Education Association*, a union that was not the official bargaining unit of the teachers in the defendant school district, that is incorrect. MRBW furthers an important purpose of welfare offices, see Pls.' Br. at 29, while there was no contention in *Perry* that the plaintiff union furthered the school district's purposes in operating the intra-school mail system that was the forum at issue. 460 U.S. at 47-48.

In *Knolls Action Project v. Knolls Atomic Power Laboratory*, there was no contention that the excluded political protests were similar to speech already allowed in the nuclear power laboratory, or that the protests would further the purpose of the laboratory. 771 F.2d 46 (2d Cir. 1985).

"controversial" art had not exercised the sort of clear and consistent control over speech necessary to maintain the nonpublic nature of its forum. *Hopper*, 241 F.3d at 1079-80.

HRA's "official business" label is fluid and standardless. See Pls.' Br. at 8-9, 11, 29. In fact, for over a decade HRA allowed advocates unaccompanied by claimants to engage in the identical speech at issue in this case, even though HRA's "official business"-only policy was in effect the entire time. *Id.* at 29 n.12. Thus, if HRA's "official business" theory of nonpublic forums were correct, HRA could evade its First Amendment obligations by simply placing the "official business" label on all private speech that it wanted to allow in the forum.

HRA also argues - without support - that the admission of a particular type of speech cannot create a limited public forum when the admission is statutorily required. Def.'s Br. at 46-47. This argument is belied by *Madison Joint School District No. 9 v. Wisconsin Employment Relations Commission*, where the Supreme Court held that because a state statute provided for open school board meetings, the meetings were a public forum for citizen involvement. 429 U.S. 167, 174-75 (1976). See also *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 803 (1985) (interpreting *Madison Joint Sch. Dist. No. 9*). In fact, "a higher governmental body made me do it" is never a defense to

a First Amendment violation. *See, e.g., Good News Club*, 533 U.S. at 107 n.2.

C. Heightened Scrutiny Applies Here 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.

HRA's exclusion of MRBW's speech is subject to heightened scrutiny because it falls within the genre of speech HRA generally allows into welfare offices, and because it furthers an important purpose of the offices. HRA does not contest that at least some of the speech in which MRBW seeks to engage is identical to the speech in which HRA permits advocates accompanied by claimants to engage. That is, HRA does not contest either that MRBW seeks to provide welfare claimants with information, assistance and representation relating to welfare benefits,⁴ or that advocates accompanied by claimants routinely engage in such speech. Def.'s Br. at 4, 13.

HRA argues that its admission of advocates accompanied by claimants would not create a limited public forum if it required each advocate to individually obtain permission in advance. *See* Def.'s Br. at 45. This is irrelevant, because HRA admits that it does not require advocates to obtain permission in advance and that it is statutorily barred from doing so: "Legal

⁴ Rather, HRA attempts to mischaracterize the access that MRBW seeks as being much broader. *Compare* A-34, ¶ (a), with Def.'s Br. at 1, 7, 34.

representatives and advocates are entitled to have access to . . . Job Centers for the purpose of representing specific clients, without the need to apply for prior permission." *Id.* at 6. *See also* Pls.' Br. at 12; SPA-93.

HRA has not refuted MRBW's evidence that the speech in which MRBW seeks to engage furthers an important purpose of welfare offices. Although HRA contends that an important purpose of welfare offices is encouraging employment, it does not and cannot retract its prior admission that helping eligible clients obtain benefits is also an important purpose. Def.'s Br. at 51. And HRA does not dispute MRBW's evidence that the presence of MRBW and other advocates is essential to helping claimants obtain both employment and benefits. *See* Pls.' Br. at 8-9, 11, 29. *See generally* Brief of Amicus Curiae Community Service Society.

Because MRBW seeks to engage in a genre of speech that HRA admits into welfare offices without requiring individuals to obtain prior permission, and because that speech furthers the purpose of the forum, under the standards this Court has set forth in *HERE* and in other cases, HRA's exclusion of MRBW's speech is subject to heightened scrutiny. *See* Pls.' Br. at 23-25.

**D. HRA Fails to Appreciate the Viewpoint
Discriminatory Nature of Its Exclusion of**

**MRBW's Speech, Which Further Supports
Application of Heightened Scrutiny.**

As plaintiffs have noted, HRA's exclusion of MRBW is rooted in a policy discouraging speech that would enable claimants to learn about and assert their rights. See Pls.' Br. at 27-28. HRA's brief only confirms that this is so. See discussion *infra* at 19-21.

HRA argues that its exclusion of MRBW cannot be viewpoint discrimination, because HRA started banning advocates unaccompanied by claimants before MRBW existed. Def.'s Br. at 49 n.8, 56. However, suppression of speech constitutes viewpoint discrimination even if it is aimed generally at a speaker's message and not at the speaker itself. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (restriction on speech challenging welfare reform laws was impermissible viewpoint discrimination). This is the case here, where HRA suppresses the dissemination of information about claimants' rights. HRA's exclusion of other advocates, in addition to MRBW, confirms, rather than undermines, this point.

HRA also contends that its policy is content-neutral and not viewpoint discriminatory because it serves purposes unrelated to the content of the prohibited speech, such as

avoiding "disruptions,"⁵ and preserving the property for "official business." See Def.'s Br. at 49 n.8, 56. Although HRA is correct that a policy is content-neutral when the government justifies it without reference to the content of the prohibited speech, that is hardly the case here, where the "disruptions" HRA seeks to avoid consist of advocates informing claimants about rights, enabling claimants to assert those rights, and helping claimants file written complaints, and where HRA has unbounded discretion over what constitutes "official business." Pls.' Br. at 8-9, 11, 27-29. The cases the City cites are all distinguishable, because in each the government's goals were truly content-neutral. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002) (goals were to coordinate use of space, preserve park, prevent dangerous uses, and assure financial accountability); *Hill v. Colorado*, 530 U.S. 703, 719-20 (2000) (goals were protecting access and privacy, and providing police with clear guidelines); *Ward*, 491 U.S. at 791-92 (goal was to control noise levels).

Finally, HRA's attempt to distinguish *Harman*, 140 F.3d 111, arguing that it involved a "blanket prior restraint," Def.'s Br. at 58, is unsuccessful. HRA's ban on MRBW speaking in welfare

⁵ The goal of avoiding "disruptions" lends itself to viewpoint discrimination because, as HRA acknowledges, "disruption is a subjective word that means different things to different people." A-111.

office waiting rooms is a classic prior restraint because it gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). That MRBW remains free to exercise its speech elsewhere might be relevant if the law permitted the government to exercise unbounded discretion over speech so long as it did not entirely foreclose a speaker's ability to speak anywhere. That is simply not the case. See, e.g., *Plain Dealer Publ'g*, 486 U.S. at 762, 772 (striking down as exercise of unbridled discretion ordinance governing placement of newsracks on public property, although ordinance was not "a total prohibition"). HRA also attempts to distinguish *Harman* by arguing that the policy at issue there did not use the precise words "official business." Def.'s Br. at 58. That is a distinction without a difference: this Court's point was that the government's speech regulations must "possess 'narrow, objective, and definite standards'" to avoid the specter of viewpoint discrimination.⁶ 140 F.3d at 120 (quoting

⁶ HRA is equally unsuccessful in its attempt to distinguish *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 771 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001), which plaintiffs rely on solely for the point that speech advocating a change in government policy receives the highest First Amendment protection. Pls.' Br. at 28. HRA wisely does not attempt to refute this point, focusing instead on the irrelevant point that the *Velazquez* facts differ from the facts here.

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969)).

HRA's "official business" policy does not.

II. HRA'S BLANKET BAN ON MRBW'S SPEECH IN WELFARE OFFICE WAITING ROOMS IS NOT NARROWLY TAILORED TO SERVE ANY SIGNIFICANT GOVERNMENT INTEREST.

Content-based speech exclusions from limited public forums must satisfy strict scrutiny, while content-neutral time, place and manner restrictions must satisfy heightened scrutiny by being narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of information. Pls.' Br. at 22, 31. Strict scrutiny applies here, because HRA is wrong that its exclusion of MRBW's speech is content-neutral. See discussion *supra* at 15. However, as set forth below, even if heightened scrutiny is applied, none of HRA's explanations for its exclusion of MRBW justifies that exclusion, because HRA's total ban on MRBW's speech is not narrowly tailored to serve a significant governmental interest.

A. Avoiding "Disruptions"

HRA points to several types of "disruption," none of which are sufficient to justify the total exclusion of advocates unaccompanied by claimants. The first type is HRA's contention that many years ago - "in the late 1970's and early 1980's" -

advocates⁷ gave out misinformation, which caused "disruptions" when claimants allegedly relying on that information got into disputes with their caseworkers. See Def.'s Br. at 52 (citing Brenda Brown Deposition at A-587). However, HRA fails to address any of the following arguments MRBW has made as to why this purported concern cannot justify the total ban on MRBW's speech. First, the deposition testimony of Brenda Brown (the sole evidence on which HRA relies) is inadmissible speculation. See Pls.' Br. at 33-35. Second, there are two reasons that HRA's ban is not narrowly tailored to its concern that advocates may provide misinformation: 1) the ban does not apply to advocates accompanied by claimants, despite the fact that HRA does not screen those advocates in any way, and 2) the ban applies to MRBW, even though all MRBW advocates work under the supervision of lawyers who are presumably competent.⁸ *Id.* at 35-

⁷ HRA's implication that MRBW was in the welfare offices "in the late 1970's and early 1980's," Def.'s Br. at 52, is false. As HRA admits, MRBW was not created until the 1990's. A-562, ¶ 68.

⁸ Although HRA contends that no MRBW advocates other than Mr. Friedman have been trained to provide assistance to claimants, and that MRBW believes no training is necessary, it cites only to its Rule 56.1 Statement of Undisputed Facts, which is not supported by the evidence. See Def.'s Br. at 4-5, *citing* A-318 to 319; *compare* A-563 to 568. In fact, the undisputed evidence shows that all MRBW advocates who visit welfare offices receive training to do the specific task they are going to perform. See Supplemental Appendix 38 to 39 (Andrew Friedman Deposition, dated Feb. 5, 2001, pp. 23-24 (Exhibit G to Declaration of Laura K. Abel, dated December 19, 2001)); A-722 to 723; A-563, Resp. to ¶ 72 (listing types of training MRBW

36. Third, the fact that HRA waited at least a decade before banning advocates unaccompanied by claimants indicates that HRA's purported concern about misinformation is pretextual. *Id.* at 36. For all of these reasons, HRA's total ban is not narrowly tailored to its purported concern about advocates providing "misinformation."

HRA fails to demonstrate any legitimate interest in discouraging the second type of "disruption" to which it points: advocates engaging in the First Amendment-protected activities of informing claimants of their rights and assisting them in enforcing their rights. See Def.'s Br. at 51 (citing A-666); *id.* at 52 (citing A-320, 580, 821-826, 881-883); see also Pls.' Br. at 27-28, 36-37. For example, one of the "disruptions" HRA considers objectionable consisted of advocates, who were conducting welfare office inspections pursuant to a federal court order in *Reynolds v. Giuliani*, "walk[ing] around . . . in the waiting room talking to people, encouraging them, if they

advocates have received). Although HRA contends that MRBW advocates Isabelle Gonzalez and Yorelis Vidal "have had little or no training in the eligibility requirements for public assistance benefits," Def.'s Br. at 5, 53-54, it provides no evidence that either intends to provide information about eligibility. Rather, it is undisputed that Ms. Gonzalez intends to inform people that they have right to a translator and that she would refer them to Mr. Friedman if they had other questions. A-566, ¶ 80; A-803 to 804. Ms. Vidal has received training about several other benefits-related topics. A-567, ¶¶ 82-83. Like Ms. Gonzalez, if she could not assist claimants she would refer them to Mr. Friedman.

have problems to file complaints of various kinds." A-666, *cited in* Def.'s Br. at 51; *see also* Pls.' Br. at 28.

HRA similarly characterizes as "disruptions" MRBW's constitutionally protected advocacy on behalf of clients seeking welfare benefits. For example, it calls "disruptive" MRBW's informing claimants about their rights in the public assistance system, because claimants who had talked to MRBW subsequently complained to HRA personnel about their lack of benefits. A-320, ¶ 88, *cited in* Def.'s Br. at 52; A-580, *cited in* Def.'s Br. at 52. HRA also objects to attempts by MRBW to persuade HRA to quickly provide emergency benefits to clients in dire need, A-823 to 826, *cited in* Def.'s Br. at 52, although HRA apparently does not dispute that it is legally obligated to provide such benefits. *See* 18 N.Y.C.R.R. § 372.2 ("Emergency assistance must be provided *immediately* by a social services district") (emphasis added). Similarly, HRA objects to attempts by MRBW to follow up on written complaints that its clients had filed with HRA, Def.'s Br. at 52 (citing A-320, ¶ 89 & A-881 to 883), although many such complaints are meritorious and cause HRA to correct mistakes that had deprived claimants of benefits for which they are eligible. *See* Pls.' Br. at 8-9. HRA likewise objects to a telephone call Andrew Friedman, a lawyer who is a MRBW advocate, made on behalf of a client in which he "repeat[ed] the law, what the law states." A-821 to 822, *cited*

in Def.'s Br. at 52. Throughout, HRA fails to address or refute plaintiffs' point that HRA lacks a legitimate interest in discouraging the exercise of any of these constitutionally protected activities. Pls.' Br. at 36-37.

Even if HRA possessed a legitimate interest in discouraging constitutionally protected advocacy due to its disruptive effect, HRA's claim that this activity actually causes disruptions is insufficient to support a grant of summary judgment, because it is based largely on inadmissible evidence, allegations unsupported by the evidence, and contested allegations. For example, HRA relies on testimony by Brenda Brown regarding a meeting she did not attend. See Def.'s Br. at 52 (citing A-587); Supp. A-34⁹ (Brenda Brown Deposition, p. 30 (Exhibit B to Declaration of Laura K. Abel, dated December 19, 2001) ("Abel Decl.)) ("I was not in attendance, no."). This is inadmissible hearsay. Fed. R. Evid. 802; A-570, ¶ 87.

Likewise, HRA erroneously relies on Helen Benson's testimony that advocates "caused" confrontations between claimants and their workers. See Def.'s Br. at 52 (citing A-320, ¶ 88 & A-583 to 585). However, particularly because claimants frequently get into fights with their workers without

⁹ "Supp. A-" denotes the Supplemental Appendix, which plaintiff has moved for leave to file. Whenever plaintiff cites to a document contained in the Supplemental Appendix it will also indicate where the document is in the Record.

any prior contact with advocates, see A-571, 669, 834-835, Ms. Benson is not competent to testify that whatever confrontations occurred between claimants and workers were "caused" by advocates. See Fed. R. Evid. 701; A-571.

Although HRA claims that MRBW caused "confrontations" between claimants and workers in July and August 2000, HRA has produced no evidence that MRBW was involved. Compare Def.'s Br. at 52 (citing A-320, ¶ 88; A-583 to 585), with A-570 to 571, ¶ 88; Supp. A-26 to 33 (Helen Benson Deposition, pp. 69-74 & Benson Dep. Ex. 2 (Exhibit A to Abel Decl.)).

Finally, although HRA contends that MRBW advocates refuse to give important information to HRA personnel, Def.'s Br. at 52 (citing A-320, A-822 to 826), this is contradicted by Andrew Friedman's sworn statement that MRBW advocates do not refuse to provide pertinent, non-privileged information to HRA staff while advocating for their clients. Supp. A-6 (Declaration of Andrew Friedman, dated December 19, 2001, ¶ 8 ("Friedman Decl.)); see also A-570, ¶ 87. HRA's assertion is neither relevant or material, because a refusal by MRBW to provide information to HRA would not justify totally banning them from providing information, assistance or representation in welfare offices. However, if the Court finds HRA's assertion to be relevant it must deny summary judgment to HRA because this is a disputed fact.

The third type of "disruption" HRA cites - advocates entering welfare office waiting rooms without HRA's authorization, see Def.'s Br. at 51; see also A-884 to 887, cited in Def.'s Br. at 52 - is unsupported by any constitutionally cognizable interest. See Pls.' Br. at 38. HRA does not even attempt to argue to the contrary.

The fourth type of "disruption" to which HRA points is the suggested risk that clients would stand in front of elevator doors and welfare office entrances while talking to MRBW. Def.'s Br. at 52 (citing A-320, ¶ 88). However, the total ban on advocates unaccompanied by claimants is not tailored to the goal of ensuring access to doors; a regulation requiring advocates and claimants to stay clear of all doors would take care of that concern. See Pls.' Br. at 38-39. HRA does not suggest otherwise.

Fifth, although HRA contends that its recent experience with Medicaid managed care organization contractors ("MCO's") demonstrates that it cannot admit advocates without suffering some disruptions, Def.'s Br. at 51-52, this experience actually demonstrates the opposite. As HRA notes, it accommodates as many as three MCO's, each with two staff people, in its waiting rooms without suffering disruptions. *Id.* The MCO staff conduct many of the activities with respect to Medicaid that MRBW seeks to conduct with respect to public assistance benefits: talking

to claimants and handing them literature while standing behind tables and while walking around waiting rooms. A-261, ¶ 41; A-283, ¶ 41. Consequently, the MCO experience demonstrates that HRA can accommodate at least some advocates in its waiting rooms without suffering disruptions.

Finally, HRA's contention that advocates would disrupt its goal of helping claimants participate in employment, Def.'s Br. at 50-51, ignores the substantial evidence put forward by plaintiffs that HRA can best achieve this goal when claimants are able to obtain assistance from advocates. See discussion *supra* at 13. The undisputed evidence shows that allowing advocates into welfare office waiting rooms would further, rather than hamper, the purpose of those offices.

B. Avoiding Endorsement of MRBW's Speech

Making no attempt to distinguish the cases stating that when the government opens a forum to certain genres of speech by private individuals, the government does not thereby endorse the individuals' speech, see Pls.' Br. at 41-42, HRA asserts that if it admitted MRBW, claimants would believe that HRA was endorsing MRBW's speech. Def.'s Br. at 52-53. Given these cases, and the cases finding that disclaimers eliminate any risk of endorsement, see Pls.' Br. at 42, HRA's unsupported claim that disclaimers would be ineffective holds no water. Def.'s Br. at 52-53.

Cornelius and *FAIR*, which HRA cites, *see id.* at 53, are not on point. In *Cornelius*, finding that the forum at issue was nonpublic, the Court applied only reasonableness scrutiny to the government's asserted interest, not the heightened scrutiny that applies here. *See* 473 U.S. at 808-09. Also, the plaintiffs there were seeking to be included in charitable fundraising conducted on federal property by federal employees. This carefully controlled forum in no way resembled the crowded welfare office waiting rooms at issue here, which are full of both members of the general public applying for welfare and the advocates accompanying them, and where no one believes that HRA endorses the speech of the claimants or their unscreened advocates.

In *FAIR*, discussed *supra* at 7-8, the Eighth Circuit likewise applied reasonableness scrutiny, not heightened scrutiny, to the government's asserted interest. 111 F.3d at 1420-21. Moreover, unlike the *FAIR* plaintiffs, MRBW seeks not to propound political views but to provide factual information. *See id.* at 1422. Rather, MRBW's speech is the same as the speech at issue in *Albany Welfare Rights Organization v. Wyman*, where this Court concluded that disclaimers would satisfy any government interest in distancing itself from advocates' speech. 493 F.2d 1319, 1325 (2d Cir. 1974).

HRA similarly provides no evidence for its hypothesis that even if claimants do not believe that MRBW speaks for HRA, claimants nevertheless will believe that HRA has screened MRBW. Def.'s Br. at 53. This makes the hypothesis an insufficient basis on which to curtail MRBW's First Amendment rights. See Pls.' Br. at 32 (citing cases requiring governmental bodies defending speech restrictions to demonstrate that recited harms are real and that the regulation will directly alleviate those harms).

Finally, HRA attacks the credentials of MRBW's advocates. However, as discussed earlier, all MRBW advocates are competent to perform the tasks they seek to perform.¹⁰ See discussion *supra* at 18 & n.8.

**C. Avoiding Discrimination Lawsuits and
Protecting an Allegedly "Captive" Audience**

HRA's claimed interest in avoiding liability for possible discrimination by MRBW, Def.'s Br. at 54-55, is groundless. As a matter of law, HRA would not be found liable for discriminatory actions by volunteer advocates admitted into welfare offices to counsel and represent claimants regarding

¹⁰ Although MRBW disputes the relevance of HRA's contention that MRBW's malpractice insurance policy would not cover the services it seeks to provide inside welfare offices, see Def.'s Br. at 54, the policy would in fact cover such services. See Supp. A-37 (Andrew Friedman Deposition, dated January 26, 2001, p. 183 (Exhibit F to Abel Decl.)); Supp. A-3, A-14 to 15 (Friedman Decl., ¶ 11 & Attachment A, Definition ¶ 9 & Coverage ¶ a)A(1)).

their rights against HRA, because HRA would not exercise sufficient control over the advocates. See *Garcia v. Herald Trib. Fresh Air Fund*, 380 N.Y.S.2d 676, 678 (N.Y. App. Div. 1976) (under New York law, "a principal-agency relationship exists where one retains a degree of direction and control over another"); *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender paid by the state is not a state actor for purposes of 42 U.S.C. § 1983 because he acts in a role independent of and in opposition to the State and thus "is not acting on behalf of the State; he is the State's adversary"). Moreover, HRA has not provided competent evidence to support its speculation that MRBW would discriminate, and in fact MRBW can generally provide some assistance to everyone in a waiting room. A-552 to 554 (Pls.' Resp. to Def.'s SF, ¶ 50(b)).

HRA similarly hypothesizes, without offering any evidence, that claimants are a captive audience that may feel obligated either to join MRBW in exchange for free assistance or to fill out complaint forms with its assistance. See Def.'s Br. at 55. On the contrary, MRBW makes clear that it is willing to help people whether or not they want to join MRBW and whether or not they fill out complaint forms. A-552 to 554 (Pls.' Resp. to Def.'s SF, ¶ 50(c)); A-726 to 727, 737 to 738. Moreover, although HRA has evidently had a similar "captive audience" concern about MCO's - who have a profit motive that advocates

lack - it has apparently managed to ensure that MCO's do not pressure claimants into signing up with them. See Supp. A-4 (Declaration of Kevin Flanagan, dated October 25, 2001, ¶ 10 (filed with HRA's summary judgment motion)); SPA-76 to 77 (N.Y. Soc. Servs. L. § 364-j(4)(e)(i), (v), (viii)) (welfare agencies must prevent aggressive marketing). For these reasons, HRA cannot meet its burden of "demonstrat[ing] that the recited harms are real, not merely conjectural." See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). Moreover, if HRA is truly concerned about claimants feeling pressured, it could use disclaimers to let claimants know that HRA will not treat them adversely if they refuse the advocates' offers of assistance. See, e.g., A-408 to 409 (MCO's must state on all fliers distributed in welfare offices "that participation in the Medicaid managed care program is voluntary"). Thus, HRA's policy is not narrowly tailored to HRA's interest.

In any event, even if HRA's speech ban were narrowly tailored to its alleged interests in avoiding liability for discrimination and protecting a "captive" audience, HRA would be barred from asserting those interests, because HRA failed to identify them in response to plaintiffs' contention interrogatory requesting HRA to specifically identify "difficulties or disruptions" that would be caused by the admission of advocates unaccompanied by claimants, see A-513 to

516, or at any other time prior to defendant's summary judgment motion. Pursuant to Federal Rule of Civil Procedure 37(c)(1), HRA is consequently barred from relying on these interests. See Advisory Comm. Notes to Fed. R. Civ. P. 37(c)(1), 146 F.R.D. at 691 (noting that the rule "provides a self-executing sanction . . . without need for a motion").

III. THERE IS NO ADEQUATE ALTERNATIVE LOCATION WHERE MRBW CAN EFFECTIVELY CONDUCT THE SPEECH IT SEEKS TO CONDUCT IN WELFARE OFFICE WAITING ROOMS, AND EVEN IF THERE WERE THAT WOULD NOT JUSTIFY EXCLUDING MRBW.

HRA is wrong that MRBW can effectively conduct its speech on the sidewalks outside welfare offices. See Def.'s Br. at 55. When MRBW leaflets outside, it is not able to assist people inside who at that moment are having difficulty filling out a particular form or are being denied a particular service HRA is obligated to provide them. Supp. A-35 to 36 (Andrew Friedman Deposition, dated January 26, 2001, pp. 167 to 168 (Exhibit F to Abel Decl.)). Additionally, because of bad weather and time pressure, people are routinely unable to talk to MRBW on the sidewalk, even though they would want to talk with them inside a waiting room. *Id.*; Supp. A-40 to 41 (Isabelle Gonzalez Deposition, pp. 67-68 (Exhibit H to Abel Decl.)).

Even assuming, however, that MRBW could effectively conduct its speech elsewhere, that would not justify totally excluding MRBW from welfare office waiting rooms. See *Schneider v. New*

Jersey, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *Crowder*, 990 F.2d at 593 (fact that tenant could hold Bible study classes in his apartment did not justify housing authority excluding the classes from limited public forum at all times except Friday nights). *HERE*, which HRA cites, Def.'s Br. at 55, is not on point, because it applied rational basis scrutiny, not the heightened scrutiny that applies here. See 311 F.3d at 556.

CONCLUSION

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

Dated: New York, New York
January 30, 2003

Laura K. Abel

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

This brief contains 6,967 words, exclusive of the table of contents, table of authorities, and this certificate.

Dated: New York, New York
January 30, 2003

Laura K. Abel