APP NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

FIRST RESORT, INC.

Petitioner,

v.

DENNIS J. HERRERA, in his official capacity
as City Attorney of the City of San Francisco, *et al.*,

Respondents.

On Application for an Extension of Time
to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Anthony M. Kennedy, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

First Resort, Inc., respectfully requests that its deadline for filing its petition for writ of certiorari in this matter be extended by sixty days to and including February 16, 2018. The Court of Appeals issued its opinion on June 27, 2017. See App. A. On September 19, 2017, the Court of Appeals denied First Resort's petition for rehearing en banc. See App. B. Without an extension, First Resort's petition for certiorari would therefore be due on December 18, 2017. First Resort is filing this application at least ten days before that date. See S. Ct. R. 13.5. This Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1).

BACKGROUND

First Resort is a California public benefit, nonprofit corporation that operates a pregnancy services counseling center in San Francisco. First Resort provides counseling to women, and also provides pregnancy tests and ultrasounds as needed to allow it to provide counseling that is properly informed by the facts regarding pregnancy. Because it views abortion as harmful, First Resort does not refer or provide for abortions, but instead counsels women to make fully informed decisions on the matter in line with their own values and beliefs. First Resort also provides counseling to women who have already had an abortion. It provides all its services free of charge.

First Resort filed this lawsuit to challenge the constitutionality of an ordinance enacted by the City of San Francisco (the "City") in 2011. *See* S.F. Admin. Code, Ch. 93 §§ 93.1–93.5. The ordinance prohibits "limited services pregnancy centers" from

making "any statement concerning th[eir] services . . . which is untrue or misleading." *Id.* § 93.4(a). A "limited services pregnancy center" is defined, in relevant part, as "a facility . . . the primary purpose of which is to provide services to women who are or may be pregnant," but that "does not directly provide or provide referrals to clients for the following services: (1) abortions; or (2) emergency contraception." *Id.* §93.3(f), (g).

Only two organizations in San Francisco meet the definition of a "limited services pregnancy center" subject to the ordinance. Both are characterized by the City as having "anti-abortion" views. Petitioner First Resort was specifically identified as a target of the ordinance when the City adopted it.

The district court granted summary judgment against First Resort in March 2014, and the Ninth Circuit affirmed. The Court of Appeals acknowledged that content-based regulations of speech ordinarily trigger heightened First Amendment scrutiny, but it declined to apply heightened scrutiny to the ordinance on the ground that the ordinance regulated only "false commercial speech." App. A at 13–18, 22–24. The court further held that even if the City had enacted the ordinance with the "illicit motive" of targeting pregnancy centers with "anti-abortion" views, the ordinance's purpose could not be considered in determining whether it discriminated on the basis of viewpoint. *Id.* at 25–27. Finally, the Court held that the ordinance did not discriminate based on viewpoint because the ordinance allegedly focused "on the services offered," and a pregnancy center might have "financial or logistical," rather than moral and religious, reasons for refusing to offer abortions or abortion referrals. *Id.*

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended by sixty days for these reasons:

1. This case presents important and complex First Amendment issues warranting a carefully prepared certiorari petition. As the Court of Appeals noted, in enacting the ordinance, San Francisco joined other "governments around the country" that have passed laws imposing special burdens on the speech of pregnancy centers that do not refer or provide for abortions. App. A at 6–7. One such government is the State of California, which has enacted a different law burdening the speech of "anti-abortion" pregnancy centers—the "Reproductive FACT Act"—that is the subject of the certiorari petition this Court recently granted in *National Institute of Family & Life Advocates* v. *Becerra*, No. 16-1140, 2017 WL 5240894 (Mem.) (Nov. 13, 2017) (*NIFLA*). This case was decided by the same Ninth Circuit panel and authoring judge that decided *NIFLA*, yet that panel used a remarkably different approach here, concluding that San Francisco's ordinance regulated only "false commercial speech" that receives no First Amendment protection at all. App. A at 13-18. The panel did not even cite its prior *NIFLA* decision when deciding this case.

2. On the merits, this case has many similarities with *NIFLA*: for instance, in both cases the challenged regulations targeted the speech of pregnancy centers who do not provide or refer for abortions, and in both cases the Ninth Circuit held that this targeting was not viewpoint discrimination because it is possible to conceive of reasons why a pregnancy center might refuse to provide or refer for abortions besides

opposition to abortion. But see *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (rejecting the government's argument that a law was viewpoint neutral because it applied "regardless of the [speaker]'s personal views or reasons for" engaging in the regulated speech). But there are important differences between the cases as well, including the *First Resort* panel's extensive commercial speech analysis. Petitioner anticipates challenging whether the panel was correct to conclude that a speaker's advertisements for services it provides free of charge are transformed into "commercial speech" merely because the speaker also engages in fundraising activities to support its mission and operations. App. A at 16. Thus, this case raises important additional questions about the proper interpretation of this Court's First Amendment precedents that may not be resolved in *NIFLA*; these issues certainly merit this Court's close consideration of a well-prepared petition.

3. First Resort's counsel need additional time to prepare its petition in this case. After the Court of Appeals issued its opinion, First Resort retained additional counsel with Supreme Court expertise to assist with this case who need a chance to become more familiar with the record, complex legal issues, and governing precedent. Moreover, First Resort's appellate counsel from its long-time firm, Locke Lord LLP, have been tied up with significant trials in Denver and Houston and appellate arguments in New Orleans during First Resort's briefing period. An extension of time will enable First Resort's counsel to coordinate and prepare a full, well-prepared petition in this case.

4. No meaningful prejudice would arise from the extension. For one thing, *NIFLA*, like this case, involves a law imposing special burdens on the speech of pregnancy centers that do not provide or refer for abortions, and the cases present many similar legal issues, including whether these centers are subject to heightened levels of speech regulation on the ground that they engage in allegedly "professional" speech (*NIFLA*) or "commercial" speech (*First Resort* and *NIFLA*), see Pet. for Writ of Certiorari, *NIFLA*, No. 16-1140 (Mar. 20, 2017), at 21–23; Br. for the State Respondents in Opposition, *NIFLA*, No. 16-1140 (May 24, 2017), at 20, 23; and whether regulations applying only to pregnancy centers who do not provide or refer for abortions discriminate on the basis of viewpoint (*First Resort* and *NIFLA*). Pet. for Writ of Certiorari, *NIFLA*, No. 16-1140, at 17–19. An extension would not slow this Court's consideration of any such issues that may overlap. Moreover, this Court would hear oral argument and issue its opinion in this case in the October 2018 Term, at the earliest, regardless of whether an extension is granted.

CONCLUSION

For these reasons, First Resort, Inc. respectfully requests an extension of time to file its certiorari petition, up to and including February 16, 2018.

Respectfully submitted,

/s/ Mark Rienzi

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CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioner First Resort, Inc., states that it is not a publicly-held corporation, does not issue stock, and does not have a parent corporation.

/s/ Mark Rienzi
Mark L. Rienzi
Counsel for Petitioner