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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since this Court's decision in *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), lower courts have divided over the question whether the government's illicit motive in enacting a speech regulation suffices to trigger strict scrutiny. Most Circuits apply strict scrutiny when a law discriminates against content or viewpoint either on its face or in its purpose. The Eighth and Ninth Circuits, however, hold that the government's purpose is irrelevant to the analysis. This case involves a First Amendment challenge to a San Francisco law that penalizes "false" advertising by pro-life, but not pro-choice, pregnancy centers. Although legislative findings plainly announce the law's target—"clinics that seek to counsel clients against abortion"—the Ninth Circuit found the law viewpoint-neutral, deeming irrelevant all evidence of governmental intent to target pro-life speech. The court further found that advertising by pregnancy centers that charge no fees and engage in no commercial transactions with women was nevertheless "commercial speech" subject to reduced scrutiny, implicating a longstanding four-way split in the lower courts over the definition of commercial speech. The questions presented are:

1. Whether a speech regulation applying only to speech concerning pregnancy services by pregnancy centers that do not refer for abortion, and enacted to target speakers with pro-life views, is subject to strict scrutiny.

2. Whether this Court's "commercial speech" doctrine can be applied to the speech of non-profit pregnancy centers who provide free and often religiously motivated assistance to pregnant women.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioner, which was Plaintiff below, is First Resort, Inc. First Resort is not a publicly held corporation, does not issue stock, and does not have a parent corporation.

Respondents, who were Defendants below, are Dennis J. Herrera, in his official capacity as City Attorney of the City of San Francisco, the Board of Supervisors of the City and County of San Francisco, and the City and County of San Francisco.

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INTRODUCTION

This Court has already decided that the category of dispute presented by this petition is worth resolving. Over a decade ago, this Court granted certiorari in *Nike* v. *Kasky* to resolve lower-court confusion regarding the definition of "commercial speech," but had to dismiss that case as improvidently granted. And by granting certiorari in *National Institute of Family & Life Advocates* v. *Becerra*, the Court concluded that it must address state and municipal laws targeting the speech of pregnancy centers. But as Petitioner First Resort pointed out as an amicus in *NIFLA*, within the genus of laws targeting pregnancy-center speech there are many species. The California law at issue in *NIFLA* targets pro-life speech by compelling speech. That case thus concerns particular aspects of the speech-neutrality and professional speech doctrines.

By contrast, laws like the ordinance enacted by San Francisco seek the same speech-suppressive end by different means: a prohibition on "false" advertising. This case therefore more directly implicates preexisting circuit splits over viewpoint discrimination, as well as the same lower-court confusion regarding the boundaries of commercial speech that was presented, but not resolved, in *Nike*.

The Court must therefore determine whether it should resolve the questions presented by this petition in the course of deciding *NIFLA*, or whether it should instead grant this petition and set this case for plenary review. Either way, there is an urgent and compelling need to resolve the First Amendment issues presented in this petition.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 860 F.3d 1263 (9th Cir. 2017) and reproduced at App.1a-43a. The District Court's opinion denying Petitioner's motion for summary judgment and granting Respondents' motion for summary judgment is reported at 80 F. Supp. 3d 1043 (N.D. Cal. 2015) and reproduced at App.44a-71a.

JURISDICTION

The Ninth Circuit entered its judgment on June 27, 2017. It denied a timely petition for rehearing en banc on September 19, 2017. App.72a. Justice Kennedy extended the deadline to file a petition for a writ of certiorari to February 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech * * *."

The text of San Francisco's Pregnancy Information Disclosure and Protection Ordinance, S.F. Admin. Code, ch. 93 §§ 93.1-93.5, is reproduced at App.73a-82a.

STATEMENT OF THE CASE

1. First Resort is a public benefit, non-profit corporation that operates a licensed pregnancy services counseling clinic in San Francisco. App.94a, 98a. Every First Resort client meets with a counselor. In support of its counseling, First Resort provides women

with basic medical services, including early ultrasounds that are conducted by licensed medical personnel, to ensure that its counseling is properly informed by the facts regarding a woman's pregnancy and the viability and gestational age of the unborn child. App.95a.

First Resort believes that abortion is harmful both to women and their unborn children, and its vision is to build a Bay Area in which abortion is neither desired nor seen as needed. In support of that vision, First Resort does not provide or refer for abortions or emergency contraception, but instead empowers women through its counseling to make fully informed decisions in line with their own beliefs and values, on the belief that, when given appropriate support, unbiased counseling, and accurate medical information, many women will choose non-abortion options. *Ibid.* First Resort's religion-based beliefs about abortion and the sanctity of life also motivate it to provide women who do choose to have abortions with compassionate post-abortion counseling and emotional support. First Resort provides all its services free of charge. App.95a-96a.

2. On August 2, 2011, San Francisco Supervisor Malia Cohen introduced a proposed Pregnancy Information Disclosure and Protection Ordinance. App.73a-82a, 96a. That same day, Respondents City Attorney Herrera and the Board of Supervisors issued a press release announcing the proposed Ordinance, explaining that it was part of a "joint legal and legislative" effort to target "so-called 'crisis pregnancy centers' in San Francisco"—such as, specifically, "First Resort, Inc." App.83a-86a, 96a. The press release ex-

plained that "deceptive marketing" by pregnancy centers engaged in "pro-life advocacy" had to be "halt[ed]," because these centers offer "anti-abortion-rhetoric" and "push an anti-abortion agenda on those seeking constitutionally protected medical services." "[I]n tandem with" the City's "legislation," the press release noted, the City Attorney had taken "a first step toward a possible legal action under California law against * * * First Resort, Inc." App.83-85a, 96a.[1]

That first step was a letter from Respondent Herrera to First Resort, "express[ing] serious concerns about" First Resort's advertising. App.87a-89a, 96a. Pointing to the fact that First Resort "has a paid Google search link" causing its website to appear in "search results for 'abortion in San Francisco,'" Herrera asserted that this was "misleading," because "[n]owhere on its website" or in other advertisements did First Resort "expressly" "state that it does not perform or refer clients for abortion services." Herrera did not deny that First Resort counsels women in San Francisco who are considering abortion or who have had abortions. To the contrary, the letter acknowledged that First Resort is "entitled to offer pro-life counseling," but concluded that First Resort needed to "correct" its advertising to "clarify the clinic does not offer or make referrals for abortion services." App.87a-89a.

Shortly thereafter, the Board convened hearings on the Ordinance. The hearings featured "[n]o testimony,

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[1] The press kit on the City Attorney's website included a press release from NARAL Pro-Choice California, which indicated its support of the Ordinance aimed at "anti-choice" organizations. App.90a-92a, 96a-97a.

documentation, [or] affidavits of any woman" seeking abortion or contraceptive services that "ha[d] been misled" by a San Francisco pro-life pregnancy center's advertising—leading the one dissenting Supervisor to characterize the Ordinance as "a solution in search of a problem." App.121a-123a. Other Supervisors agreed that there had been no evidence "of an actual injury" and that "the legal record" was "not totally satisf[actory]," and still another warned that finding false advertising in "Google search results and algorithms" is "a very slippery slope." But these Supervisors agreed to vote for the Ordinance anyway, viewing the "overriding concern" as showing "support [for] legislation that is fully in favor of a woman's right to choose." App.125a-128a.

The Ordinance was enacted in October 2011. By its terms, it regulates only speech related to pregnancy, and only the speech of pro-life pregnancy centers like First Resort, not abortion providers or pregnancy centers who are willing to refer for abortions or emergency contraception. App.78a-80a.

Specifically, the Ordinance prohibits "limited services pregnancy centers" ("LSPCs") from making "statement[s]" "concerning th[eir] services" that are "untrue or misleading, whether by statement or omission." The term "limited services pregnancy center" is, in turn, defined as a pregnancy center that does not provide or refer for abortions or emergency contraception. App.78a.

The Ordinance gives the City Attorney extensive enforcement powers, including broad discretion to determine which practices are "misleading." If an LSPC's "false, misleading, or deceptive" statements

are not cured within ten days from the City Attorney's notice, the City Attorney may file a civil action seeking a range of penalties, including an injunction requiring the LSPC to post a disclaimer on its premises, monetary penalties ranging between $50 and $500 per violation, and the City Attorney's "reasonable attorney's fees and costs." App.79a-81a. There are no countervailing fee- or cost-shifting protections for an LSPC wrongfully targeted and sued.

The Ordinance includes legislative "Findings" echoing the City's press release. The Findings state that the Ordinance is a response to the advertising of pregnancy clinics "that seek to counsel clients against abortion." The Findings state that false advertising by pregnancy centers may result in "a client * * * los[ing] the option to choose a particular [abortion] procedure, or to terminate the pregnancy at all." App.73a-76a. The Findings offer no example of this ever having occurred. First Resort is one of two pregnancy centers identified as targets of the Ordinance. App.97a-98a.

3. First Resort filed this action in November 2011, alleging, *inter alia*, that the Ordinance was a content- and viewpoint-based speech regulation that violated the First Amendment, both on its face and as applied. In February 2015, the District Court entered summary judgment for Respondents. First Resort appealed. In June 2017, the Ninth Circuit affirmed, concluding that the Ordinance was valid both facially and as applied.

The Ninth Circuit held that "the central issue" in the case was "whether the regulated speech should be characterized as commercial." If so, then the Ordinance would constitute a regulation "only [of] false or

misleading commercial speech," a category to which "the Constitution affords no protection." App.13a-14a.

The Ninth Circuit then concluded that the Ordinance regulated only "commercial" speech. It recognized that commercial speech ordinarily is "defined as speech that does no more than propose a commercial transaction," but held that the fact that First Resort proposes no commercial transactions is not dispositive. Instead, the Ninth Circuit held that First Resort's advertisements could still be considered "commercial" if they satisfied the "*Bolger* test," App.14a-15a (citing *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)), under which, the Ninth Circuit believed, advertisements for free counseling and other services may nonetheless constitute "commercial" speech if the speaker has "an economic motivation."

The Ninth Circuit then found this economic-motivation factor met, because "the regulated LSPCs have at least one * * * economic motive for engaging in false advertising: to solicit a patient base." Although an LSPC's patient base does not actually "pay for services," the Ninth Circuit admitted, it nonetheless "directly relates to an LSPC's ability to fundraise," because LSPCs like First Resort use "client stories * * * in fundraising." App.15a-17a.

Next, the Ninth Circuit held that even if LSPCs lacked an economic motive for advertising their free services, "their regulated speech can *still* be classified as commercial" if the free services are "commercially valuable." App. 17a-19a. Thus, because "the medical services offered by" pregnancy centers, "such as preg-

nancy testing, ultrasounds, and nursing consultations[,] have monetary value," advertising for those services is "commercial speech." *Ibid.*

The Ninth Circuit also rejected First Resort's viewpoint discrimination argument. It recognized that the advertising restrictions apply only to centers that do not refer for abortions, but held that there was no viewpoint discrimination, because pregnancy centers "may choose not to offer * * * abortion referrals for reasons that have nothing to do with their views on abortion, such as financial or logistical reasons." App.26a-27a.

Finally, the court also rejected First Resort's argument that numerous markers of legislative intent—including the findings in the Ordinance and the City's press release announcing the Ordinance—showed that the Ordinance's purpose was to target "pro-life advocacy." "To the extent First Resort argues that the Ordinance is a viewpoint-based regulation of speech on the grounds that the City had an illicit motive," the court concluded, "that argument also fails," because "an alleged illicit legislative motive" is insufficient to render a speech regulation subject to heightened scrutiny. App.27a-28a (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision merits this Court's intervention for at least two independent reasons.

First, the Ninth Circuit's viewpoint-neutrality test conflicts with the decisions of other circuits and of this Court, and would dramatically weaken this Court's speech-protective neutrality principles. Despite this Court's decision in *Reed* v. *Town of Gilbert*, 135 S. Ct.

2218 (2015), the Eighth and Ninth Circuits both treat a government's illicit motive to discriminate against a speaker's viewpoint as irrelevant, and insufficient to trigger strict scrutiny. App.26a-28a; *Phelps-Roper* v. *Ricketts*, 867 F.3d 883 (8th Cir. 2017). By contrast, the First, Second, Third, Fourth, D.C., and Federal Circuits, and several state supreme courts, recognize that strict scrutiny is required when government acts with an improper motive to discriminate based on content or viewpoint.

This split has far-reaching implications, as demonstrated by the circumstances of this case. In holding the Ordinance viewpoint-neutral, the Ninth Circuit ignored the substantial evidence—all of it undisputed, and some of it appearing on the face of the statute itself—that the City's purpose in enacting the Ordinance was to uniquely burden "clinics that seek to counsel clients against abortion." App.74a. Left uncorrected, the Eighth and Ninth Circuits' viewpoint-neutrality tests will enable governments within those jurisdictions to freely target the speech of those with disfavored views, provided they are careful enough to do so in facially viewpoint-neutral terms. Certiorari is warranted to ensure that the First Amendment's prohibition on viewpoint discrimination remains a powerful bulwark against government interference in vital societal debates like the one that has long surrounded abortion.

Second, this Court's intervention is independently warranted to resolve the deep conflict among lower courts regarding the definition of commercial speech. Because this Court has not always spoken with perfect clarity in defining commercial speech, the Nation is governed by a patchwork of different commercial

speech tests fashioned by the lower courts. The result is doctrinal chaos, with four different—and, when applied in isolation from one another, mutually exclusive—commercial speech tests commanding the allegiance of at least one circuit or state court of last resort.

This situation is not just doctrinally untidy—it has real, case-determinative consequences. In this case, the Ninth Circuit, directly applying *Bolger* without first determining that the speech at issue proposed a commercial transaction, felt free to conclude that religiously and ideologically motivated advertisements for free services constituted "commercial speech" because the services offered were "commercially valuable" and because the advertisements may ultimately contribute to fundraising. App.16a-19a. This approach poses serious dangers to the First Amendment, as many speakers whose speech is ordinarily thought to be at the core of First Amendment protection—from legal aid organizations to medical research charities to churches—routinely advertise free but "commercially valuable" services and tell donors about their successes.

Both the viewpoint discrimination and commercial speech questions are more clearly presented in this case than in *NIFLA* and should therefore be set for plenary review. However, in the alternative, this petition should at least be held pending resolution of *NIFLA*.

I. Review is needed to resolve conflict in the lower courts concerning proper application of this Court's viewpoint-neutrality test.

The Ninth Circuit's decision partakes of two errors in applying this Court's viewpoint-neutrality test that have split the lower courts. First, in ignoring evidence that the Ordinance was enacted for the purpose of imposing special burdens on pro-life speech, the Ninth Circuit overlooked that even a facially viewpoint-neutral speech regulation may be subject to strict scrutiny if it was enacted for a viewpoint-discriminatory purpose. Second, in holding that a law does not discriminate on the basis of viewpoint unless all who adopt the allegedly targeted viewpoint do so for the same reasons, the court conflated a speaker's *motive* with her *viewpoint*, giving governments latitude to distort public debate on important issues so long as different speakers could have different reasons for adopting the burdened viewpoint. Both errors implicate important splits among the lower courts, and both warrant this Court's attention.

A. The Ninth Circuit's decision directly conflicts with decisions of other circuits and this Court concerning the test for viewpoint neutrality.

In discounting the overwhelming evidence that the City's purpose in enacting the Ordinance was to impose unique burdens on pro-life speech, the Ninth Circuit disregarded this Court's decisions and deepened an existing circuit split on the relevance of a discriminatory government motive to speech-discrimination analysis.

1. The circuit split over discriminatory motive originally arose in response to *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). *Ward* held that if the government enacted a speech regulation to discriminate on the basis of content, strict scrutiny applied. *Id.* at 791. Importantly, *Ward* involved a law that was "facially content-*neutral*," so the case "had nothing to say about facially" discriminatory restrictions. *Reed*, 135 S. Ct. at 2228 (emphasis original). Thus, *Ward* stands for the proposition that a government purpose to discriminate on the basis of content or viewpoint is sufficient to trigger strict scrutiny, even when a law does not facially discriminate on the basis of content or viewpoint. *Id.* at 2227-29.

After *Ward*, however, some lower courts interpreted the decision to mean that a discriminatory government purpose was not just *sufficient*, but *necessary*, to trigger strict scrutiny. For these courts, "it did not matter if a law regulated speakers based on what they said"; "so long as the regulation of speech was not imposed *because of* government disagreement with the message," the law would be treated as content- and viewpoint-neutral. *Norton* v. *City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015) (Manion, J., concurring) (emphasis added); see also *McCullen* v. *Coakley*, 571 F.3d 167, 176 (1st Cir. 2009), *rev'd*, 134 S. Ct. 2518, ("Our principal inquiry * * * 'is whether the government has adopted a regulation of speech because of disagreement with the message.'") (quoting *Ward*, 491 U.S. at 791). For example, in *Reed* v. *Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), *rev'd*, 135 S. Ct. 2218, the Ninth Circuit held that a town sign code that facially imposed different treatment for different signs based on their content was content-neutral, because it

was not adopted because of governmental disagreement with any sign's message. *Id.* at 1071-72.

This Court reversed, explaining that "regardless of the government's benign motive," "[a] law that is content [or viewpoint] based on its face is subject to strict scrutiny." 135 S. Ct. at 2228. At the same time, the Court held that this inquiry into facial neutrality *supplements*, but does not *replace*, the inquiry into whether a law has a content- or viewpoint-discriminatory purpose. A facially content- and viewpoint-neutral law is still subject to strict scrutiny if motivated by an "[i]llicit legislative intent"—for example, "to suppress disfavored speech" or express "disagreement with the message the [regulated] speech convey[s]." *Id.* at 2227-29 (internal quotation marks omitted) (citing *Ward*, 491 U.S. at 791).

Despite *Reed*'s seeming clarity, some lower courts—apparently convinced that there should be only one path to strict scrutiny—have held, post-*Reed*, that *only* facial discrimination, and not a discriminatory purpose, can trigger strict scrutiny. These courts fail to recognize that *Reed* "operate[s] 'to protect speech,' not 'to restrict it.'" *Id.* at 2229 (quoting *Hill* v. *Colorado*, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting)). The Court should grant certiorari to resolve the lower courts' misinterpretation of *Reed*.

2. Several circuit and state supreme courts have

gotten *Reed* right. In particular, the First,[2] Second,[3] Third,[4] Fourth,[5] D.C.,[6] and Federal[7] Circuits, as well

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[2] *March* v. *Mills*, 867 F.3d 46, 54-55 (1st Cir. 2017) (under *Reed*, "[t]here are two distinct ways in which a regulation may be deemed to be content based," facial content discrimination, and content-discriminatory purpose).

[3] *Time Warner Cable Inc.* v. *F.C.C.*, 729 F.3d 137, 155-56 (2d Cir. 2013) ("[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." (internal quotation marks omitted)).

[4] *Free Speech Coal., Inc.* v. *Att'y Gen. U.S.*, 825 F.3d 149, 160 (3d Cir. 2016) (applying the *Reed* two-step analysis, concluding "[o]nly if a law is content neutral on its face may we then look to any benign purpose").

[5] *Cahaly* v. *Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (under *Reed*'s "second step, a facially content-neutral law will still be categorized as content based if it cannot be justified without reference to the content of the regulated speech" or if it was adopted because of disagreement with its message) (internal quotation marks omitted).

[6] *Pursuing Am.'s Greatness* v. *Fed. Election Comm'n*, 831 F.3d 500, 509 (D.C. Cir. 2016) (Under *Reed*, "we should look to purpose only if the text of the law is not content based.").

[7] *In re Tam*, 808 F.3d 1321, 1335 (Fed. Cir. 2015), *aff'd sub nom. Matal* v. *Tam*, 137 S. Ct. 1744 (2017) (law at issue "target[ed] 'viewpoints in the marketplace' * * * as a matter of avowed and undeniable purpose").

as the supreme courts of Kentucky[8] and North Carolina,[9] have each recognized that a governmental purpose to discriminate on the basis of content or viewpoint still suffices to trigger strict scrutiny.

Other courts have held post-*Reed* that governmental purpose to discriminate on the basis of content or viewpoint does not suffice. In this case, for instance, the panel expressly refused to consider abundant evidence that the City enacted the Ordinance specifically to target pro-life speech. App.27a-28a. The panel held that "[t]o the extent First Resort argues that the Ordinance is a viewpoint-based regulation of speech on the grounds that the City had an illicit motive, that argument * * * fails," because courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Ibid.* (internal quotation marks omitted). The Ninth Circuit reached the same conclusion in *NIFLA*, holding that even if "a stat-

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[8] *Champion* v. *Commonwealth*, 520 S.W.3d 331, 337 (Ky. 2017) ("[P]urpose is only relevant to this analysis after concluding that the regulation is facially content-neutral," "[s]trict scrutiny applies * * * when the purpose and justification for the law are content based," and "a court must evaluate each question [of *Reed*'s two-part inquiry] before it concludes that the law is content neutral and thus subject to a lower level of review" (internal quotation marks omitted)).

[9] *State* v. *Bishop*, 787 S.E.2d 814, 819 (N.C. 2016) (*Reed* "clarified that several paths can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny," including "the animating impulse behind" the law).

ute's stated purpose may also be considered," a viewpoint-discriminatory "legislative intent" is insufficient to trigger strict scrutiny. *NIFLA* v. *Harris*, 839 F.3d 823, 836 (9th Cir. 2016).

The Eighth Circuit has reached the same conclusion. In *Phelps-Roper* v. *Ricketts*, 867 F.3d 883 (8th Cir. 2017), the plaintiffs argued that a law prohibiting funeral picketing was viewpoint-based because the legislative history indicated that it was passed specifically to prohibit *their* picketing. *Ibid.* But the court said this was irrelevant: "[r]egardless of any evidence of the Nebraska legislature's motivation for passing the [law], the plain meaning of the text controls, and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face." *Id.* at 892 (internal quotation marks omitted).

Thus, although this Court has held that there are two paths to strict scrutiny, the Eighth and Ninth Circuits—disagreeing with six other circuits and two state supreme courts—hold that only facial discrimination counts. This Court should grant review to resolve this split.

3. A separate but related split concerns some courts' conclusion that the private speaker's motive for speaking *is* relevant to viewpoint-discrimination analysis. In these cases, courts have held that a law targeting one category of speech within a broader subject matter is viewpoint-neutral if different speakers could (hypothetically) have different reasons for engaging in the targeted speech.

Justice Kennedy's four-Justice concurring opinion in *Matal* v. *Tam*, 137 S. Ct. 1744 (2017), suggests that

this interpretation is wrong. In *Matal*, this Court held unconstitutional a federal statute prohibiting the registration of "disparag[ing]" trademarks. 137 S. Ct. at 1751. The government argued that the law was viewpoint-neutral because "the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark." *Id.* at 1766. But the Court found the law viewpoint-based. *Id.* at 1763 (opinion of Alito, J.); 1765-67 (opinion of Kennedy, J.). As Justice Kennedy explained, "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate." *Id.* at 1767 (Kennedy, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring). This danger is realized whenever the government "single[s] out * * * for disfavor" a "subset of messages" from some larger "subject category"—regardless of *why* the speaker chooses to deliver the message. *Id.* at 1766.

The Ninth Circuit's decision here directly conflicts with this clear guidance. The Ninth Circuit reasoned that although the Ordinance applies only to pregnancy centers who do not provide or refer for abortions, it is not viewpoint-based, because speakers could have different *reasons* for not providing or referring for abortions, which might "have nothing to do with their views on abortion." App.26a. This confusion of a

speaker's *motive* with her *viewpoint* is precisely what Justice Kennedy's concurrence rejected in *Matal*.[10]

The Fourth Circuit has adopted the same approach as the Ninth Circuit. In *Greater Baltimore*, the en banc Fourth Circuit reversed the district court's conclusion that a law applying only to pregnancy centers that do not provide or refer for abortions was viewpoint-based, relying on the court's own speculation about speaker purposes. *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 721 F.3d 264, 288 (4th Cir. 2013) (en banc). In language later adopted by the Ninth Circuit, the *Greater Baltimore* court thought that because there *might* be pregnancy centers that do not refer for abortion but have "no moral or religious qualms" about abortion, the law was not viewpoint based. 721 F.3d at 288 (internal quotation marks omitted). Only after years of litigation and discovery revealed none did the Fourth Circuit finally find the law viewpoint-based at least as applied to the plaintiff pregnancy center. *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 879 F.3d 101, 111-12 (4th Cir. 2018).

In contrast to the Fourth and Ninth Circuits, the Seventh and Federal Circuits have recognized that there is a distinction between a speaker's purpose and

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[10] The Ninth Circuit's conclusion is settled. In *Nurre* v. *Whitehead*, the Ninth Circuit found no viewpoint discrimination against religious speech when the school prohibited the playing of *Ave Maria*, reasoning that the speaker (a piano player) "was not attempting to express any specific religious viewpoint, but * * * sought only 'to play a pretty piece.'" 580 F.3d 1087, 1095 n.6. (9th Cir. 2009).

her viewpoint, and that only the latter is relevant to the viewpoint discrimination inquiry.

In *Air Line Pilots Association, International* v. *Department of Aviation of City of Chicago*, the Seventh Circuit reversed the district court's determination that an airport had not committed viewpoint discrimination in denying a union's request to display a diorama criticizing airline management. 45 F.3d 1144, 1159-60 (7th Cir. 1995). The airport argued that it had excluded all "political" displays, and thus that it had not discriminated on the basis of any speaker's viewpoint. *Id.* at 1159. But the Seventh Circuit explained that "the same viewpoint can be endorsed by different speakers, for different purposes." *Id.* at 1160. Thus, the viewpoint discrimination inquiry must turn not on *why* the union submitted the display—whether for "political" reasons or otherwise—but simply on "whether or not the forum has included speech on the same general subject matter" as the proposed display; if so, then "suppression of a proposed but distinct view because of some content element included in it is impermissible" viewpoint discrimination. *Ibid.*

Similarly, in *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), the Federal Circuit adopted the viewpoint-discrimination reasoning that Justice Kennedy would later articulate in his *Matal* concurrence, rejecting the government's argument that its ban on disparaging trademarks was viewpoint-neutral because different speakers could have "diametrically opposed" reasons for adopting a disparaging trademark. *Id.* at 1337.

Had this case arisen in the Seventh or Federal Circuits, rather than the Fourth or Ninth, the viewpoint-

discrimination inquiry would have come out differently. Rather than asking whether different speakers could have different motives for engaging in the regulated speech, the court would simply have asked whether "speech on the same general subject matter" has been left unregulated, while the government has regulated "a proposed but distinct view because of some content element included in it." *Air Line Pilots Ass'n*, 45 F.3d at 1160.

4. This case may also present an opportunity to resolve confusion in the lower courts regarding the standard applicable to content- and speaker-based restrictions following *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552 (2011), which held that "heightened judicial scrutiny is warranted" for any law that imposes content-based and speaker-based restrictions on speech, even if "commercial." *Id.* at 565.[11]

The Second Circuit correctly reads *Sorrell* to require more scrutiny than *Central Hudson*-level review of commercial speech restrictions. See *United States* v. *Caronia*, 703 F.3d 149, 163-64 (2d Cir. 2012) (if a commercial speech regulation is content-and speaker-based it is "presumptively invalid").

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[11] Several courts have recognized the confusion in the wake of *Sorrell*, but have not yet answered the question of what level of scrutiny applies. See *Ocheesee Creamery LLC* v. *Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) (recognizing "troubled waters"); *Educ. Media Co. at Va. Tech, Inc.* v. *Insley*, 731 F.3d 291, 298 n.4 (4th Cir. 2013) ("To be sure, the question of whether *Sorrell*'s 'heightened scrutiny' is, in fact, strict scrutiny remains unanswered.")

By contrast, the Eighth and Ninth Circuits hold that content-based, speaker-based restrictions of commercial speech are entitled to review under only the same, intermediate, *Central Hudson* test applicable to benign commercial speech regulations. See *1-800-411-Pain Referral Service LLC* v. *Otto*, 744 F.3d 1045, 1054-55 (8th Cir. 2014); *Retail Digital Network, LLC* v. *Prieto*, 861 F.3d 839, 849 (9th Cir. 2017) (en banc).

The Ordinance is unquestionably content-based and speaker-based. Thus, because the Ninth Circuit has treated this case as a "commercial speech" case (over Petitioner's objections), this case may present an opportunity to resolve the conflict in authorities regarding *Sorrell*, too.

B. This conflict concerning the test for viewpoint neutrality raises an issue of national importance that merits review now.

1. Unless this Court fully resolves these issues in *NIFLA*, review is necessary here. The core function of the Speech Clause's prohibition on viewpoint discrimination is to prevent the government from picking winners and losers in societal debates about important issues—from "giv[ing] one side of a debatable public question an advantage in expressing its views." *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 785 (1978). To achieve this goal, however, the doctrine has to work in practice—courts must know what is relevant to determining whether viewpoint discrimination has occurred. The government's motive *is* relevant—indeed, "flush[ing] out illicit motives" has been described as a "primary * * * object" of "First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The*

Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996). But the speaker's motive is not, because no matter *why* a speaker adopts a viewpoint, censoring that viewpoint will artificially disadvantage it in the marketplace of ideas.[12]

2. This case also provides an opportunity to show that the viewpoint-discrimination standard applies across all categories of speech, including "commercial speech." The lower court—in a conclusion that is itself certworthy, see *infra* Part II—held that the Ordinance regulates only "commercial speech." But that conclusion, even if correct, would not exempt the Ordinance from the prohibition on viewpoint discrimination.

This Court has long indicated that the prohibition against viewpoint discrimination applies to commercial speech. In *R.A.V.* v. *City of St. Paul*, for example, the Court held that even within categories of speech considered "outside" the scope of traditional First Amendment protections, the government has no authority to selectively regulate speech. 505 U.S. 377, 391-92, 402-03 (1992). It illustrated this principle with a commercial speech example: "a State may choose to regulate price advertising in one industry but not in

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[12] A law prohibiting yard signs endorsing Libertarian, and only Libertarian, candidates is in most courts the epitome of viewpoint discrimination. Yet in the Ninth Circuit the law is viewpoint-neutral. After all, a court could hypothesize speakers with reasons for wanting to post a Libertarian yard sign that "have nothing to do with their" preference for Libertarian candidates, App.26a—for example, as a joke, or just to be contrarian. That cannot be the law.

others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a state may not prohibit only that commercial advertising that depicts men in a demeaning fashion." *Id.* at 388-89 (citations omitted).

The plurality in *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), likewise indicated that commercial speech is no exception from the general prohibition on viewpoint discrimination. The *44 Liquormart* plurality said "it is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance." *Id.* at 510, 513.

Finally, in *Matal*, five Justices, in two different concurrences, recognized that viewpoint discrimination triggers strict scrutiny even in the commercial speech context. Justice Kennedy's concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, stated that "viewpoint based discrimination * * * necessarily invokes heightened scrutiny," and "remains of serious concern in the commercial context." 137 S. Ct. at 1767. And Justice Thomas's concurrence reiterated his longstanding view that even content-based regulations of commercial speech should be subject to strict scrutiny. *Id.* at 1769.

Following these opinions, several lower courts have correctly recognized that "merely wrapping a law in the cloak of 'commercial speech' does not immunize it from the highest form of scrutiny due government attempts to discriminate on the basis of viewpoint." *Dana's R.R. Supply* v. *Att'y Gen., Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015); see also *Wandering Dago, Inc.*

v. *Destito*, 879 F.3d 20, 39 (2d Cir. 2018) ("*Matal* instructs that viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context.").

The Court could use this case to affirm these lower courts' readings of its opinions, and confirm that viewpoint discrimination triggers strict scrutiny even if the regulated speech is "commercial."

II. Review is also warranted to correct the Ninth Circuit's dangerously overbroad definition of "commercial speech."

Since its earliest commercial speech cases, this Court has held that for speech to be "commercial," it must involve a proposal to engage in a commercial transaction. *Virginia Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). By dispensing with this requirement, the Ninth Circuit disregarded this Court's precedents and disagreed with numerous other courts.

If unmoored from any connection to a commercial transaction, the commercial speech doctrine will swallow vast swaths of speech at the core of First Amendment protection. This Court's review is therefore needed not only to restore uniformity to the commercial speech doctrine, but also to prevent lower courts from upholding ideologically motivated speech regulations like the Ordinance under the lower-tier commercial speech scrutiny.

A. The Ninth Circuit's decision directly conflicts with decisions of other circuits and this Court concerning the test for "commercial speech."

1. The Court has maintained from the commercial speech doctrine's beginnings that speech is "commercial" if it proposes a commercial transaction. Nevertheless, a four-way split over the definition of "commercial" has developed in the lower courts.

In *Virginia Board of Pharmacy*, the Court explained that "speech which does no more than propose a commercial transaction" is "commercial speech." 425 U.S. at 762. The Court later revisited the commercial speech doctrine in *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). There, the Court reiterated that commercial speech is "speech proposing a commercial transaction." *Id.* at 562. But the Court also said that the law at issue "restrict[ed] only commercial speech, *that is, expression related solely to the economic interests of the speaker and its audience*." *Id.* at 561 (emphasis added). In *Central Hudson*, the parties agreed that the speech at issue was commercial, *id.* at 560-61, so the Court likely did not intend for its economic-interests aside to replace *Virginia Board of Pharmacy's* propose-a-commercial-transaction test. Nonetheless, in his concurrence, Justice Stevens accused the majority of expanding the definition of speech past *Virginia Board of Pharmacy* in a way that would impermissibly "encompass[ ] speech that is entitled to the maximum protection afforded by the First Amendment." *Id.* at 579-80 (Stevens, J., concurring in the judgment).

This Court again addressed commercial speech in *Bolger*, in considering whether informational pamphlets mailed by a contraceptive manufacturer constituted commercial speech. 463 U.S. at 65-68. There, the Court reiterated that under *Virginia Board of Pharmacy*, the "core notion of commercial speech" is "'speech which does no more than propose a commercial transaction.'" *Id.* at 66 (quoting *Va. Bd. of Pharm.*, 425 U.S. at 762). But the Court explained that speech that does not "*merely* * * * propos[e] to engage in commercial transactions," but also "contain[s] discussion[] of important public issues," may also be characterized as commercial. *Id.* at 66-68 (emphasis added). In evaluating speech like this—that is, speech that occurs "in the context of commercial transactions" but includes elements other than just transaction proposals—the *Bolger* Court held that courts should consider three factors to determine whether the speech as a whole should be treated as commercial: whether it constitutes an "advertisement[]"; whether it "reference[s] a specific product"; and whether the speaker "has an economic motivation for" speaking. *Ibid.*

Finally, post-*Bolger*, this Court has repeatedly reiterated that "*the test*" for commercial speech is whether it is a "proposal of a commercial transaction." *City of Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410, 423 (1993) (quoting *Bd. of Trustees of State Univ. of New York* v. *Fox*, 492 U.S. 469, 473-74 (1989)) (emphasis in *Discovery Network*). Indeed, in *Harris* v. *Quinn*, this Court went out of its way to reaffirm that its "precedents define commercial speech as speech that does no more than propose a commercial transaction." 134 S. Ct. 2618, 2639 (2014) (quotation omitted)

(speech at issue not commercial because it "does much more than that").

2. Despite the varying formulations employed over the decades, this Court has not departed from the bedrock requirement that commercial speech is speech that—whatever else it also might do—at least proposes a commercial transaction. And, following the two-step *Bolger* framework, this Court's commercial-speech definitions are reconcilable. Under that framework, if speech "*merely*" proposes a commercial transaction, it is commercial speech, and the inquiry ends. See *Bolger*, 463 U.S. at 66. But if speech, in addition to proposing a commercial transaction, also includes "comments on public issues" or other noncommercial elements, the *Bolger* factors determine whether the speech as a whole should be classified "commercial." *Id.* at 66-68. This two-step approach prevents the commercial speech doctrine from expanding to cover speech unrelated to any commercial transaction, but at the same time ensures that commercial speakers cannot "immunize" otherwise commercial speech "simply by including references to public issues." *Id.* at 68.

If, however, *Bolger* is viewed as a *substitute* for the propose-a-commercial-transaction test, rather than a tool for categorizing speech that both proposes a commercial transaction and speaks to other matters, then these definitions plainly conflict with one another. A prime example is philanthropically or religiously motivated advertisements for free services—for example, a church's advertisements for its worship services, or a food bank's ads. This speech does not propose any commercial transaction; the church asks only for attendance, and the food bank asks only that the needy

come and be fed. But under the *Bolger* factors, such speech: (1) is an advertisement; (2) mentions specific services (worship services for the church; food distribution for the food bank); and (3) may be motivated by at least "*an* economic motivation" (the church will presumably pass the plate; the food bank's ads may spur those with resources to contribute food or money). *Id.* at 67 (emphasis added).

Thus, this speech could be deemed "commercial" if *Bolger* were applied directly, without first imposing the threshold requirement of a transaction proposal. But that would lead to the absurd result of core speech being subject to lower levels of protection as "commercial" speech. See *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943) (rejecting as absurd the notion that "the passing of the collection plate in church would make the church service a commercial project"); *Reed*, 135 S. Ct. at 2225, 2227 (church's "advertise[ments of] the time and location of [its] Sunday church services" were fully protected speech). Cf. *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech * * *.").

3. Lower courts and commentators have seen this Court's commercial speech definitions as conflicting. They have described this Court's cases on the definition of commercial speech as leaving "doctrinal uncertainties" in their "wake," *Bad Frog Brewery, Inc.* v. *N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998); as "veer[ing] wildly between divergent and inconsistent approaches," Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 3 (2000); as being "unpredictable and confusing," J.

Wesley Earnhardt, Nike, Inc. *v.* Kasky*: A Golden Opportunity to Define Commercial Speech—Why Wouldn't the Supreme Court Finally "Just Do It™"?*, 82 N.C. L. Rev. 797, 797-98 (2004); as "offer[ing] a number of different—and not always consistent—definitions of commercial speech," Martin H. Redish, *Commercial Speech, First Amendment Intuitionism, and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 74 (2007); and as, simply, "a mess." Kathryn E. Gilbert, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 Mich. L. Rev. 591, 595 (2013). Reflecting this view, the lower courts have fractured into a four-way split over the definition of commercial speech.

First, eleven state supreme courts appear to recognize only this Court's propose-a-commercial-transaction test.[13] These courts do not apply the *Bolger* factors at any step in the analysis.

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[13] *City of Skagway* v. *Robertson*, 143 P.3d 965, 968 (Alaska 2006); *Joe Dickerson & Assocs., LLC* v. *Dittmar*, 34 P.3d 995, 1004 (Colo. 2001); *Cent. Maine Power Co.* v. *Pub. Utilities Comm'n*, 734 A.2d 1120, 1125-26 (Me. 1999); *Nefedro* v. *Montgomery Cty.*, 996 A.2d 850, 860-61 (Md. 2010); *Bulldog Inv'rs Gen. P'ship* v. *Sec'y of Commonwealth*, 953 N.E.2d 691, 702 (Mass. 2011); *PHE, Inc.* v. *State*, 877 So. 2d 1244, 1250 (Miss. 2004); *J.Q. Office Equip. of Omaha, Inc.* v. *Sullivan*, 432 N.W.2d 211, 213-14 (Neb. 1988); *Erwin* v. *State*, 908 P.2d 1367, 1371 (Nev. 1995); *New Mexico Life Ins. Guar. Ass'n* v. *Quinn & Co.*, 809 P.2d 1278, 1288

Meanwhile, the First Circuit and the highest courts of twelve states apply an alternative definition of commercial speech they derive from *Central Hudson*.[14] In these jurisdictions, "commercial speech * * *

(N.M. 1991); *State ex rel. McGraw* v. *Imperial Mktg.*, 472 S.E.2d 792, 805 nn.44-45 (W.Va. 1996); *In re Disciplinary Proceedings Against Hupy*, 799 N.W.2d 732, 752 (Wis. 2011).

A Ninth Circuit panel briefly joined these courts, holding that this Court's post-*Bolger* cases had "pared down the definition of commercial speech" to just transaction proposals, *Thomas* v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999), but the case was dismissed en banc on ripeness grounds. *Thomas* v. *Anchorage Equal Rights Com'n*, 192 F.3d 1208 (Mem.) (9th Cir. 1999) (en banc).

[14] *El Dia, Inc.* v. *P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 115 (1st Cir. 2005); *Ex parte Walter*, 829 So. 2d 186, 190 (Ala. 2002); *Culpepper* v. *Arkansas Bd. of Chiropractic Examiners*, 36 S.W.3d 335, 338 (Ark. 2001); *Grievance Comm. for Hartford-New Britain Judicial Dist.* v. *Trantolo*, 470 A.2d 235, 238 (Conn. 1984); *Florida Bar* v. *Fetterman*, 439 So. 2d 835, 839 (Fla. 1983); *State* v. *Musser*, 721 N.W.2d 734, 743 (Iowa 2006); *Gregory* v. *La. Bd. of Chiropractic Examiners*, 608 So. 2d 987, 989 (La. 1992); *Mont. Cannabis Indus. Ass'n* v. *State*, 368 P.3d 1131, 1149 (Mont. 2016); *Carlson's Chrysler* v. *City of Concord*, 938 A.2d 69, 72 (N.H. 2007); *E & J Equities, LLC* v. *Bd. of Adjustment of the Twp. of Franklin*, 146 A.3d 623, 634 (N.J. 2016); *Matter of Von Wiegen*, 470 N.E.2d 838, 841-42 (N.Y. 1984); *S & S Liquor*

is defined as expression related solely to the economic interests of the speaker and its audience." *El Dia*, 413 F.3d at 115.

Seven circuits, by contrast, follow *Bolger* in recognizing two categories of commercial speech.[15] In these circuits, speech that "does no more than propose a commercial transaction" is considered "core" commercial speech, while the *Bolger* factors are applied to determine "whether a communication *combining*" "commercial and noncommercial elements" should be treated as commercial speech. *Bad Frog Brewery*, 134 F.3d at 97 (emphasis original).

Finally, five circuits—including the Ninth Circuit here—and two state high courts, while sometimes acknowledging other tests, apply the *Bolger* factors to all speech, not just to speech that combines a transaction

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Mart, Inc. v. *Pastore*, 497 A.2d 729, 732-33 (R.I. 1985); *Bell-South Advert. & Publ'g Corp.* v. *Tenn. Regulatory Auth.*, 79 S.W.3d 506, 518-19 (Tenn. 2002).

[15] *Bad Frog Brewery*, 134 F.3d at 97; *Semco, Inc.* v. *Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995); *Jordan* v. *Jewel Food Stores, Inc.*, 743 F.3d 509, 516-17 & n.6 (7th Cir. 2014); *Proctor & Gamble Co.* v. *Haugen*, 222 F.3d 1262, 1274-75 (10th Cir. 2000); *Edward Lewis Tobinick, MD* v. *Novella*, 848 F.3d 935, 950 (11th Cir. 2017); *Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

proposal with noncommercial elements.[16] In these jurisdictions, whether or not speech proposes a commercial transaction, it generally will be deemed "commercial" if (1) it is an advertisement; (2) it references a specific service or product; and (3) the speaker has at least "an economic motivation" for engaging in it.

4. This kaleidoscope of approaches to defining commercial speech undermines the rule of law, creates speech-chilling uncertainty about the line between commercial and fully protected speech, and generates inconsistent results—a consequence on full display in the specific context of cases challenging pregnancy-center speech regulations.

For example, several courts have correctly held that pregnancy centers that provide all their services for free cannot be regulated under the commercial speech doctrine—but on different rationales. In *Centro Tepeyac* v. *Montgomery County*, 779 F. Supp. 2d 456 (D. Md. 2011), for instance, the court applied only the propose-a-commercial-transaction test, concluding that because the pregnancy center did "not engage in any commercial transactions with its patrons at all," its speech by definition was not "commercial." *Id.* at 463-65. Meanwhile, in *Evergreen Ass'n, Inc.* v. *City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011), *aff'd in part, vacated in part on other grounds*, 740 F.3d 233

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[16] App.14a-15a; see also *Facenda* v. *N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008); *Greater Balt.*, 721 F.3d at 284-85; *Proctor & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001); *Dryer* v. *Nat'l Football League*, 814 F.3d 938, 943 (8th Cir. 2016); *Kasky* v. *Nike, Inc.*, 45 P.3d 243, 253-55 (Cal. 2002); *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W.2d 176, 180-81 (N.D. 1986).

(2d Cir. 2014), the court read this Court's precedents as articulating "*two* * * * definitions of commercial speech"—the propose-a-commercial-transaction test, and *Central Hudson*. *Id.* at 204 (emphasis added). The court then held that the pregnancy centers' speech met neither definition, because, first, "the offer of free services such as pregnancy tests * * * does not propose a commercial transaction"; and second, the plaintiffs' counseling and advertising were "grounded in their opposition to abortion and emergency contraception," not "solely" in their economic interests. *Id.* at 205-06.

But three courts—including the Ninth Circuit below—have taken yet another approach to defining commercial speech in pregnancy-center cases. App.13a-19a; *Greater Balt.*, 721 F.3d at 284-88; *Larson*, 381 N.W.2d at 180-81. Rather than applying the propose-a-commercial-transaction test (either alone or as a threshold inquiry) or *Central Hudson*, these courts apply *Bolger* directly. Further, seizing on the *Bolger* Court's statement that none of its factors need "necessarily be present in order for speech to be commercial," 463 U.S. at 67 n.14, these courts have suggested that not even "an economic motivation" is necessary. *Greater Balt.*, 721 F.3d at 285-86; see also App.17a. These courts have thus held that the speech of a pregnancy center that provides all its services for free may nonetheless be "commercial" if it is offered "in a commercial context," *Larson*, 381 N.W.2d at 181; see also App.17a-19a (finding *Larson* "persuasive"); *Greater Balt.*, 721 F.3d at 286 (approving *Larson*); which the court below took to mean if the speech could

prove useful in fundraising and if the center's free services are "commercially valuable." App.18a.[17]

B. This conflict concerning the test for commercial speech merits review now.

1. This conflict merits this Court's attention because the commercial speech definition *matters*. In many contexts, whether speech is "commercial" or not often determines whether it is protected or not. For example, with commercial speech, the government can compel disclosures of "purely factual and uncontroversial information" subject to low-level scrutiny, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); not so elsewhere. *False* commercial speech is sometimes characterized as categorically "unprotected," like fighting words or defamation, see *Cent. Hudson*, 447 U.S. at 563; while false speech generally is *not* a "category that is presumptively unprotected." *United States* v. *Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion). And the First Amendment "overbreadth doctrine does not apply to commercial speech." *Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

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[17] In *Greater Baltimore*, discovery ultimately revealed that the "clearest motivation" of the pregnancy center there was "not economic," and that the relationship "between clinic patronage and fundraising [was] too attenuated" for the commercial speech doctrine to apply. *Greater Balt.*, 879 F.3d at 109. But the court noted that the result could have been different had a clearer link to fundraising been established. *Ibid.*

This Court recognized the certworthiness of the definition of commercial speech in *Nike* v. *Kasky*, 539 U.S. 654 (2003). There, the California Supreme Court, although invoking *Bolger*, articulated three factors distinct from the *Bolger* factors that it said defined commercial speech in the context of "laws aimed at preventing * * * commercial deception." *Kasky* v. *Nike, Inc.*, 45 P.3d 243, 256-58 (Cal. 2002). This Court granted certiorari to decide whether the California Supreme Court had correctly defined commercial speech, 539 U.S. at 674-78 (Breyer, J., dissenting); but ultimately dismissed the case as improvidently granted because of jurisdictional defects. *Id.* at 655 (per curiam), 657-58 (Stevens, J., concurring). This case provides another opportunity for this Court to standardize the commercial speech doctrine. See generally Jennifer L. Pomeranz, *Are We Ready for the Next* Nike *v.* Kasky*?*, 83 U. Cin. L. Rev. 203 (2014); Earnhardt, 82 N.C. L. Rev. 797 (2004).

2. But this case is not just *a* vehicle for fixing the commercial-speech doctrine—it is the best one, because the particular approach taken by the Ninth Circuit here is so radical. Thus, if the Court does not reach the commercial speech issue in *NIFLA* (where the Ninth Circuit devoted a footnote to the issue), it should grant review here.

The Ninth Circuit's holding that advertisements for free services, even if religiously and ideologically motivated, can constitute commercial speech if they could ultimately be "useful in fundraising" and advertise services that are "commercially valuable" "in a competitive marketplace," App.16a-18a, would "represent a breathtaking expansion of the commercial speech doctrine." *Evergreen*, 801 F. Supp. 2d at 205-06

(rejecting precisely this theory). Virtually all mission-oriented organizations engage in fundraising, virtually everything those organizations do has commercial value in a marketplace somewhere, and virtually all those organizations tout their accomplishments to potential donors. See, *e.g.*, Supreme Court Historical Society, *Make a Donation*, https://goo.gl/8NvaZY; Harvard Law School, *Campaign for the Third Century*, https://goo.gl/1kdKtA.

Apart from this far-reaching impact, however, the Ninth Circuit's decision will play an even more immediate role: as the lead authority invoked to support other one-sided pregnancy-center advertising restrictions like the Ordinance. In the time since the District Court first upheld the Ordinance, two jurisdictions—Oakland, California, and Hartford, Connecticut—have enacted copycats of the Ordinance. See Br. for First Resort at 15a-25a, 62a-76a, *NIFLA*, No. 16-1140 (reproducing Oakland and Hartford laws). And more are sure to follow: soon after the Ninth Circuit's decision, the Ordinance was hailed by pro-choice advocates as "a roadmap for adopting similar ordinances" in other jurisdictions, "[b]ecause it was" already "upheld by the Ninth Circuit." Courthouse News Service, *Ninth Circuit Upholds Law Against Misleading Anti-Abortion Ads*, June 28, 2017, https://goo.gl/JnFQQN.

In short, without this Court's intervention, the question whether religiously motivated advertisements for free services are "commercial speech" is sure to recur—first, perhaps, in other pregnancy center cases involving "false advertising" laws, then elsewhere.

III. In the alternative, this petition should be held for *NIFLA*.

For the reasons above, this case should be set for plenary review. In the alternative, the petition should be held pending resolution of *NIFLA*.

Both *NIFLA* and this case concern viewpoint discrimination and the outer bounds of commercial speech. But this case is a better vehicle for resolving the split over the definition of commercial speech. In this case, commercial speech was the "central issue," while in *NIFLA* the panel summarily rejected the government's commercial speech argument in a footnote. See *NIFLA*, 839 F.3d at 834 n.5. And because the Ordinance regulates only *advertising* by pro-life pregnancy centers, rather than intra-clinic speech, this case more cleanly implicates the differences in the lower courts' various tests for commercial speech. See *Greater Balt.*, 879 F.3d at 108-09 (distinguishing intra-clinic speech cases from advertising cases for purposes of commercial speech doctrine).

Nonetheless, this Court could resolve *NIFLA* in a way that creates a "reasonable probability that the Court of Appeals" in this case "would reject a legal premise on which it" originally "relied" in light of *NIFLA*. *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001). Therefore, the Court should at least hold this petition pending *NIFLA*.

CONCLUSION

The Court should grant the petition and set it for plenary review, or in the alternative hold the petition pending resolution of *NIFLA*.

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