No. 17-1087

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 Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to free speech and religious liberty. In the present case, the Ninth Circuit has dramatically expanded the "commercial speech" doctrine, at the expense of the right to free speech, prompting the ACLJ's concern.

SUMMARY OF ARGUMENT

Commercial speech is that which proposes a commercial transaction. Yet the court below held that the speech of a nonprofit charity, which sells nothing, was somehow commercial speech – with concomitant reduced First Amendment protection. This holding is dramatically inconsistent with Supreme Court precedent and would sweep into the realm of commercial speech the communications of charities across the board. This Court should grant review.

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party authored this brief in whole or in part. No person or entity aside from amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

The Ninth Circuit has gone quite astray with this one. The court held that communications from a nonprofit charity, which provides all its services for free, constitute "commercial speech." Worse, the rationale the court used to reach that startling conclusion would pull under the "commercial speech" rubric a broad range of speech that until now has been regarded as plainly noncommercial and subject to full First Amendment protection. This Court should grant review and, indeed, consider summary reversal.

I. FIRST RESORT'S SPEECH IS NOT COMMERCIAL SPEECH.

Labels matter. In the First Amendment context, labels are particularly important, as the standard of review for restrictions on speech depends on such labels as "government speech," *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), "harmful to minors," *Ginsberg v. New York*, 390 U.S. 629 (1968), and "commercial speech," *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Here, the Ninth Circuit got the label wrong.

The speech at issue – communications of a nonprofit pregnancy center that provides exclusively free, charitable services – is by no means commercial. As this Court has repeatedly explained, "the test" for identifying commercial speech is whether the speech "propose[s] a commercial transaction." *Board of Trustees of SUNY v. Fox*, 492 U.S. 469, 473-74 (1989) (internal quotation marks and citations omitted).

Describing well-settled precedent, this Court elaborated:

> Our decisions . . . have recognized the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . The Constitution . . . affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.

United States v. Edge Broadcasting, 509 U.S. 418, 426 (1993) (internal quotation marks and citations omitted).

The petitioner here, First Resort, Inc., is not a commercial business. Rather, it is an entirely charitable entity that sells no products or services. It proposes no commercial transactions to its clientele, but instead offers them assistance free of charge, like any other charity. The commercial speech doctrine is therefore wholly inapplicable.

II. THE NINTH CIRCUIT'S CONTRARY RATIONALE UNDERMINES FREE SPEECH RIGHTS.

The Ninth Circuit saw things differently. It concluded that the speech of First Resort fits within the commercial speech doctrine. But the lower court's rationale for that conclusion is both illogical and expansive, and hence dangerous to the integrity of free speech jurisprudence.

First, the Ninth Circuit analogized First Resort to nonprofit providers of paid medical services. *First*

Resort, Inc. v. Herrera, 860 F.3d 1263, 1272 (9th Cir. 2017). But First Resort is not a provider of paid services of any kind. To be sure, a business can be engaged in commercial sales even if it is structured as a nonprofit. Hence, it makes some sense to treat the speech of a for-profit hospital and the speech of a nonprofit hospital as falling into the same doctrinal box. But just because *some* nonprofits engage in commercial sales does not mean that *all* nonprofits are commercial enterprises.

The Ninth Circuit acknowledged the absence of paid services or sales here, but insisted that the same rule should apply if the entity *raises funds* off the services that it advertises. *Id.* at 1272-73. Let that point sink in for a bit. If an entity can raise *more* money through donations because it performs *more* charitable services as a consequence of advertising – promoting – those same services, then, says the Ninth Circuit, those advertisements are "commercial speech." One is left to wonder, is there any donor-supported charity that would *not* fit the Ninth Circuit's description? Every charity must somehow get out the word about its good works, with a view to bringing in the clientele that charity assists. The church that runs a food pantry, the public interest legal group that represents domestic abuse victims for free, the large foundation that awards grants to promising musicians – all of these, and more, are engaged in "commercial speech" under the Ninth Circuit's rationale whenever they inform potential beneficiaries of their particular charitable functions.

Worse still, the Ninth Circuit went on to declare that even a lack of *any* economic incentive (even one as indirect as fundraising) would not matter. It suffices, said that court, that First Resort's advertisement of its

work is "directed at the providing of services rather than toward an exchange of ideas." *Id.* at 1273 (internal quotation marks and citation to North Dakota supreme court decision omitted). Hence, this rationale would sweep in even the entity that made *no* effort to bring in contributions, but simply spent down its capital (say, a trust created by an estate and dedicated to training homeless children in work skills). Just *doing* something apparently makes speech about that activity commercial.

Finally, the Ninth Circuit observed that First Resort gives away "commercially valuable services," *id.* at 1274. But the same could be said of any charity that feeds the hungry, clothes the naked, instructs the ignorant, or visits the sick or imprisoned. There is a world of difference between a commercial enterprise that gives away some free services or goods to drum up business or good will, and a charity that only gives away services or goods. The Ninth Circuit's failure to notice that difference led it to disregard the boundaries of the commercial speech doctrine.

The Ninth Circuit's holding on the scope of commercial speech bears no resemblance to this Court's line of relevant precedents and spells trouble for charitable operations across the board, at the expense of First Amendment rights. This Court should grant review.

CONCLUSION

This Court should grant review and reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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