No. 17-1087

In The
Supreme Court of the United States

FIRST RESORT, INC.,

Petitioner,

v.

DENNIS J. HERRERA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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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.

QUESTIONS PRESENTED – Continued

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.

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF advocates for the protection of our First Amendment rights. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of their First Amendment freedoms. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111, 2017 U.S. LEXIS 4226 (Jun. 26, 2017); *Bennie v. Munn*, 137 S. Ct. 812 (2017); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Minority TV Project, Inc. v. FCC*, 134 S. Ct. 2874 (2014); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

SLF has an abiding interest in the protection of the freedoms set forth in the First Amendment – specifically the freedom of speech and the freedom to exercise one's religion. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions, and when the law suppresses one from

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[1] All parties have consented to the filing of this brief by blanket consent on file with the Clerk of Court or by notice to *amicus curiae*, and the parties were notified of *amicus curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

expressing his or her religious beliefs. SLF is profoundly committed to the protection of American legal heritage, which includes all of those protections provided for by our Founders in the First Amendment.

SUMMARY OF ARGUMENT

San Francisco enacted the challenged ordinance to silence First Resort, a nonprofit organization which exists solely to serve the public interest. It did so knowing that any judicial challenge would likely fail because the Ninth Circuit refuses to apply this Court's precedent with respect to both commercial speech and content-based, speaker-based restrictions.

Amicus writes separately to highlight two additional reasons why this case warrants review. First, the Ninth Circuit's overbroad definition of commercial speech chills speech that is neither durable nor objective, effectively silencing nonprofit organizations like *amicus* who will shut their doors before disclosing constitutionally protected information such as donor and member lists. Second, on several recent occasions this Court has held that content-based and speaker-based restrictions on speech warrant strict scrutiny, regardless of the nature of the speech. While the Court's statements remain unequivocal, several lower courts including the Ninth Circuit insist on finding vagueness in them and refuse to apply strict scrutiny to commercial speech restrictions. Such a complete disregard for this Court's precedent warrants review to ensure

that one's level of First Amendment protection is not dependent on where you live.

ARGUMENT

I. The Ninth Circuit's economic motivation test undermines the durability of commercial speech leaving it susceptible to regulations that chill speech.

A. The Court affords speech that proposes a transaction less protection than other types of speech because it is objective, durable, and less likely to be chilled by regulation.

In 1942, "the Supreme Court plucked the commercial speech doctrine out of thin air." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 627 (1990). It all began with *Valentine v. Chrestensen*, 316 U.S. 52 (1942), when a man wanted to pass out handbills on the New York streets advertising tours of his submarine. *Id*. at 53. The City told him the handbills violated the New York Sanitary Code, which forbade "distribution in the streets of commercial and business advertising matter" but allowed distribution of "handbills solely devoted to 'information or a public protest.'" *Id*. In response, he printed and distributed new handbills with the original ad on one side and a statement protesting the city ordinance on the other side. *Id*.

After the police "restrained" him, the submarine owner challenged the constitutionality of the restraint on speech. *Id*. at 53-54. Without citing a single source or providing any legal basis whatsoever,[2] the Court proclaimed, "We are . . . clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id*. at 54. Despite the lower court's concern about drawing a line between speech made for pecuniary gain and speech for the public interest, the Court declined to provide any guidance as to what constitutes commercial and noncommercial speech. *Id*. at 55 (explaining that the case before it was not based on "subtle distinctions" and that it need not "assume possible cases not now presented"). And with that "casual, almost offhand" ruling, *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring), any speech that could be deemed "commercial" was categorically excluded from First Amendment protection.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court gave its first indication – subtle as it may have been at the time – that the categorical exclusion of commercial speech from First Amendment protection would not survive the test of time. It did so by distinguishing the advertisement at issue from that in

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[2] The most logical explanation of the Court's holding lies in its concern that the submarine owner attached the protest to his advertisement to evade the New York Sanitary Code. The Court explained that "[i]f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Chrestensen*, 316 U.S. at 55.

Chrestensen, explaining that the latter was "purely commercial advertising" and thus concluding that when speech goes beyond "purely commercial advertising" it is worthy of being protected. *Id*. at 266. More specifically, the Court found that a newspaper ad placed by civil rights advocates was "not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*" because it "communicated information, expressed opinion . . . on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id*. The Court explained that if it allowed the *Chrestensen* "purely commercial" restraints in cases like *Sullivan*, "[t]he effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id*. (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

Further indications that the Court would soon reject or further limit *Chrestensen* appeared in the dissents of Justices Blackmun and Stewart in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973),[3] and Justices Brennan, Marshall,

[3] *See Pittsburgh Press*, 413 U.S. at 401 (Stewart, J., dissenting) ("Whatever validity the *Chrestensen* case may still retain when limited to its own facts, it certainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments. Any possibility on that score was surely laid to rest in *New York Times Co. v. Sullivan*."); *Id*. at 397-98 (Douglas, J., dissenting) ("Commercial matter, as distinguished from news, was held in *Valentine v. Chrestensen*, not to be subject to First Amendment protection. My views on that issue have changed since 1942,

and Powell in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).[4] In the various dissents, the Justices questioned the continued validity of *Chrestensen*, suggesting agreement with Justice Douglas' 1959 observation that the categorical exclusion of commercial speech from First Amendment protection "has not survived reflection." *Cammarano*, 358 U.S. at 514.

In 1976, the Court finally dispensed with *Chrestensen* and recognized commercial speech – speech that does "no more than propose a commercial transaction" – as protected by the First Amendment. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press*, 413 U.S. at 385). In doing so, the Court wrote in depth about the public interest element of commercial speech stating that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id*. at 763. The Court found that the free flow of commercial products, and the communication of where, how, and why they were made, was "indispensable." *Id*. at 765. "[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in democracy, we could not say that the

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the year *Valentine* was decided. As I have stated on earlier occasions, I believe that commercial materials also have First Amendment protection.").

[4] *See Lehman*, 418 U.S. at 314 n.6 (Brennan, J., dissenting) ("It is sufficient . . . to recognize that commercial speech enjoys at least *some* degree of protection under the First Amendment.").

free flow of information does not serve that goal." *Id*. The Court found that there are few commercial messages that lack a public interest element, and that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id*.

Yet with that admission, the Court explained that its holding did not dispense with defining speech as commercial or noncommercial, or with the potential application of different levels of scrutiny for the two categories. *Id*. at 771 n.24. Rather, the Court justified its proposed "different degree of protection" for commercial speech – which it later defined in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) – on the conclusion that speech that proposes a commercial transaction is more objective, verifiable, and durable, and thus, less likely to be chilled. *Id*.

> Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than

> anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Id.

To date, the Court has declined to revisit the distinction between commercial and noncommercial speech.[5] In the years following *Virginia State Board of Pharmacy*, the Court reiterated that because commercial speech proposes a commercial transaction, it is both durable and objective and thus, not "particularly susceptible to being crushed by overbroad regulation." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977); *see also Friedman v. Rogers*, 440 U.S. 1, 10 (1979) ("Because it relates to a particular product or service, commercial speech is more objective, hence more verifiable, than other varieties of speech."); *Central Hudson*, 447 U.S. at 564 n.6 ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression. . . .").

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[5] This is not to say that no one has questioned the distinction. *See, e.g.*, *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting) ("[N]o differences between commercial and other kinds of speech justify protecting commercial speech less extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities.").

B. The Ninth Circuit's overbroad definition of commercial speech chills speech that is neither durable nor objective.

Commercial speech is not only durable and objective, it is also valuable. As this Court has explained, "some of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989). When a court applies anything other than this Court's proposed transaction test to determine if speech is "commercial," it risks chilling speech protected by the First Amendment. This Court's proposed transaction test is intentionally narrow and limited in its reach to prevent courts from finding speech is commercial just because it has *some* connection to profit. *See, e.g.*, *id.* (finding that just because speech results in a profit does not necessarily mean that such speech "*proposes* a commercial transaction, which is what defines commercial speech").

Rather than follow this Court's precedent, the Ninth Circuit created its own test,[6] which focuses

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[6] The Ninth Circuit points to *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), to support its theory that economic motivation alone can justify classifying speech as commercial. Its reliance on *Bolger* is misplaced. Rather than expand the definition of commercial speech, the Court in *Bolger* explained that "the fact that Youngs has an economic motivation for mailing the pamphlets *would clearly be insufficient by itself* to turn the materials into commercial speech." *Id*. at 67 (emphasis added). The Ninth Circuit incorrectly relies on footnote 14 of the *Bolger* opinion to find that some characteristics, by themselves, are enough to classify speech as commercial. *First Resort v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017). That reading of *Bolger* is too simplistic. In

primarily on the economic motivation behind the speech. It classifies far more speech as commercial than would be captured under this Court's proposed transaction test, including speech that is neither durable nor objective.

This results because this Court's test requires that a "seller" make an offer to a "consumer," whereas, the economic motivation requires nothing more than the mere thought of money. "Proposal" is defined in Black's Law Dictionary as "[s]omething offered for consideration or acceptance; a suggestion." *Proposal*, *Black's Law Dictionary* (10th ed. 2014). But, under the Ninth Circuit's economic motivation test, no offering or suggestion is required. Applying its test, the Ninth Circuit found that First Resort's use of a service which directs internet searchers using Google to search keywords like "San Francisco," "abortion," and "emergency contraception," to First Resort's website, constituted commercial speech. *First Resort*, 860 F.3d at 1276. According to the Ninth Circuit, paying Google

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City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1983), the Court explained that while *Bolger* relied on the speaker's economic motivation, "[i]t is noteworthy that in reaching that conclusion we did not simply apply the broader definition of commercial speech advanced in *Central Hudson* . . . but rather 'examined them carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.' " *Id*. at 423 (quoting *Bolger*, 463 U.S. at 66). Further, the Court noted that in *Fox*, a case decided six years after *Bolger*, it "described the category even more narrowly, by characterizing the proposal of a commercial transaction as '*the test* for identifying commercial speech.' " *Discovery Network*, 507 U.S. at 422-23 (quoting *Fox*, 492 U.S. at 473-74).

Ads so that your nonprofit's website shows up higher in a Google search list is commercial speech even though the Google search involves no transaction. Whether the use of this kind of service constitutes speech at all is questionable. But even accepting that conclusion, it is no more commercial than strategically naming your company so that it shows up first in the phone book.

Under its economic motivation test, the Ninth Circuit also found that encouraging clients to discuss their experiences at First Resort with others, constituted commercial speech because shared client stories are "useful in fundraising." *Id*. Classifying actions that remotely, or even inadvertently contribute to fundraising success as commercial speech extends the proposed transaction test too far and frustrates the purpose of the commercial speech doctrine. It is unclear how many degrees of separation from the actual transaction between consumer and service provider are encompassed under the economic motivation test. But, according to the Ninth Circuit, word of mouth about an organization's services is also a commercial transaction, even though the organization is not speaking, and the conversation is happening between two consumers. Simply because these conversations could lead to new clients, which could lead to bonuses for the clinic's management, the court found a commercial transaction had taken place. Not only is this speech neither durable nor objective, but it is not even made by First Resort.

C. Overbroad definitions of commercial speech silence nonprofit and public interest organizations.

This case is but one example of how the government stifles the voices of disfavored (and vulnerable) speakers by simply labeling speech as commercial. "If affixing the commercial label permits the suppression of any speech that may lead to political or social 'volatility,' free speech would be endangered." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017). The Ninth Circuit's economic motivation test silences nonprofit and public interest organizations in several ways.

First, most nonprofits and public interest organizations are forced into silence because they cannot afford to challenge unconstitutional speech restrictions. For example, in *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 879 F.3d 101 (4th Cir. 2018), litigation began in 2011, and did not conclude until January 2018 after appealing up to the Fourth Circuit twice on the very issue of whether the pregnancy center's speech was commercial or noncommercial. Litigating a case for seven years could financially cripple any business, especially a nonprofit organization serving a public interest. It also results in using funds raised on litigation, rather than program costs – something many nonprofits cannot do without risking violations of their charters.

Second, an expansive definition of commercial speech opens the door to compelling nonprofits to publicly disclose donor lists and financial information that

would otherwise be protected by the First Amendment. *See NAACP v. State of Alabama*, 357 U.S. 449, 462-63 (1958) (finding that compelled disclosure of petitioner's membership list "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure . . . and of the consequences of [that] exposure"). The City tried this very tactic here when it sought all "communications with donors that place a monetary value on services" and "communications with donors that represent the number or type of services that will be covered by a particular donation." Joint Letter Brief Re: Motion to Compel Documents and Further Deposition Testimony at 6, *First Resort v. Herrera*, 80 F. Supp. 3d 1043 (N.D. Cal. 2015) (No. 11-5534-SBA), ECF No. 52. The City argued it needed the information because those documents "place a monetary value on First Resort's services, which relates to both the 'economic motive' and the 'services offered' factors of the commercial speech test." *Id*. However, as First Resort pointed out, it did not have to produce donor information because the requested records "have absolutely no impact on the 'commercial speech' analysis as they are not the speech that is at issue." *Id*.

The prospect of courts allowing governments to compel nonprofit donor lists alone is enough to silence those serving the public interest. Many nonprofits would rather shut their doors than breach the confidentiality that their donors expect. The Ninth Circuit's test not only opens the door, but almost encourages government abuse and forced silence.

II. This case provides an opportunity for this Court to reaffirm that all content-based and speaker-based restrictions warrant strict scrutiny.

The Ninth Circuit's overbroad definition of commercial speech cannot be reconciled with this Court's First Amendment jurisprudence. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).[7] "Content-based restrictions are the essence of censorial power." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Kennedy, J., dissenting). This Court has concluded time and time again that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citing *Carey v. Brown*, 447 U.S. 455, 463 (1980); *Mosley*, 408 U.S. at 95-96). Traditional First Amendment principles mandate that "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540

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[7] *See also Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

(1980) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). "A less stringent analysis would permit a government to slight the First Amendment's role 'in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Id*. at 541 (quoting *Bellotti*, 435 U.S. at 783).

This Court has, on more than one occasion, held that *all* content-based and speaker-based restrictions on speech are "presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2266 (2015); *Sorrell v. IMS Health, Inc.*, 564 U.S. 566 (2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) ("The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"). This is true regardless of whether a court finds the speech is commercial or noncommercial. *Sorrell*, 564 U.S. at 566 (finding that even if a law appears neutral on its face, "its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. *Commercial speech is no exception*.") (emphasis added).

In *Sorrell*, this Court made the unequivocal statement that "commercial speech is no exception" to strict scrutiny analysis of a content-based regulation. *Id.* at 566. Notably, the government argued that "heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation." *Id*. This Court

rejected that argument and found that even though commercial speech "results from an economic motive, so too does a great deal of vital expression." *Id*. at 567. Further, the Court made clear that governments may not avoid strict scrutiny of their content-based restrictions, simply by categorizing the regulated speech as commercial. *Id*. at 580 ("The State has burdened a form of protected expression that it found too persuasive. At the same time, the State left unburdened those speakers whose messages are in accord with its own views. This the State cannot do."); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)) ("The Court has stated that 'a State cannot foreclose the exercise of constitutional rights by mere labels.' "). Thus, "[r]egardless of the particular label asserted by the State – whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' – a court may not escape the task of assessing the First Amendment interest at stake. . . ." *Bigelow*, 421 U.S. at 826.

Several years later, the Court reiterated that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (quoting *Discovery Network*, 507 U.S. at 429). The Court explained that it has "insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.' " *Id*. at 2230 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658

(1994)). And, just in case any question remained, the Court further stated, "Not 'all distinctions' are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny." *Id*. at 2232.

Content-based and speaker-based restrictions on speech are no less harmful in the commercial arena. The danger that "future government officials may one day wield such statutes to suppress disfavored speech" still exists. *Id*. at 2229. The consequences of regulating the speech of commercial actors based on content not only chills speech, but can also run those speakers out of the market place. The Court made clear in both *Sorrell* and in *Reed*, that content-based restrictions receive strict scrutiny. Even so, the Ninth Circuit approached this issue as if uncertainty remains and refused to apply the standard necessary to protect speech from ordinances enacted to silence disfavored speakers. It is vital that this Court review this case to prevent any further chilling of protected speech.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amicus curiae* brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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