

**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;
BOARD OF SUPERVISORS OF THE
CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

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

—◆—
BRIEF FOR RESPONDENTS IN OPPOSITION

—◆—
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
YVONNE R. MERÉ
Chief of Complex and Affirmative Litigation
MOLLIE M. LEE
Deputy City Attorney
Counsel of Record
CITY ATTORNEY'S OFFICE
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
Telephone: (415) 554-4290
mollie.lee@sfcityatty.org

Attorneys for the City and County of San Francisco

QUESTIONS PRESENTED

1. Whether a law prohibiting limited services pregnancy centers from advertising services they do not provide is viewpoint neutral.
2. Whether such a law regulates false and misleading commercial speech not protected under the First Amendment.

OPINIONS BELOW

The opinion of the court of appeals is reported at 860 F.3d 1263 (9th Cir. 2017). The opinion of the district court is reported at 80 F. Supp. 3d 1043 (N.D. Cal. 2015).



JURISDICTION

The Ninth Circuit entered judgment on June 27, 2017. It denied a petition for rehearing en banc on September 19, 2017. A petition for a writ of certiorari was filed on February 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



STATEMENT OF THE CASE

1. On October 25, 2011, San Francisco passed the Pregnancy Information Disclosure and Protection Ordinance (“Ordinance”) to protect women contemplating abortion, including indigent women for whom San Francisco serves as the medical provider of last resort. S.F., Cal., Admin. Code, ch. 93 §§ 93.1-93.5. The Ordinance forbids limited services pregnancy centers from advertising services they do not offer or making other false or misleading statements about their services. “Limited services pregnancy center” is defined as a facility that provides pregnancy-related services – such as pregnancy tests, ultrasounds or sonograms – but does not offer or refer for emergency contraception or abortions. The San Francisco Board of Supervisors

enacted the Ordinance after identifying a critical need to regulate false and misleading advertising by these facilities. *Id.* § 93.2(12); *see also id.* §§ 93.3(f), 93.4.

First Resort, Inc. (“First Resort”) operates a clinic in San Francisco that offers a limited set of pregnancy services, including ultrasounds and counseling. Pet. 2-3. First Resort does not provide or refer for emergency contraception or abortion. *Id.* at 3. First Resort advertises to women considering abortion and targets its online advertising to compete with abortion providers. Pet. App. 5a. First Resort’s website and advertisements do not disclose its anti-abortion agenda and that it does not refer for abortion. *Id.* at 5a-6a.

2. On November 16, 2011, First Resort sued the City and County of San Francisco, the Board of Supervisors of the City and County of San Francisco, and Dennis J. Herrera, in his official capacity as City Attorney of the City of San Francisco (collectively, “the City”). Pet. App. 11a. First Resort challenged the Ordinance as unconstitutional under the First and Fourteenth Amendments, and as preempted by state law. In February 2015, the district court granted summary judgment in favor of the City on First Resort’s free speech, equal protection, and preemption claims. Pet. App. 62a, 64a-65a, 70a.

3. The court of appeals affirmed. Pet. App. 4a. The court held the Ordinance is valid both on its face and as applied. *Id.* at 13a, 22a. The court rejected First Resort’s arguments that the Ordinance is void for

vagueness, violates equal protection, and is preempted by state law. *Id.* at 19a-21a, 28a-34a.

The court also rejected First Resort’s First Amendment arguments. The court found that the Ordinance regulates only false or misleading speech in advertising aimed at competing with other medical providers to solicit patients for commercially valuable services. Pet. App. 18a. Accordingly, the court concluded, “the Ordinance only regulates false or misleading commercial speech – a category of speech afforded no constitutional protection. . . .” *Id.* at 18a-19a. The court additionally found that First Resort’s misleading commercial speech is “easily separated from other protected, non-misleading” speech, including certain portions of its website, such that the Ordinance is not subject to heightened scrutiny. *Id.* at 25a.

Finally, the court held that the Ordinance is viewpoint neutral. *Id.* at 25a-28a. The court explained that the Ordinance does not apply based on the ideology or viewpoint of First Resort or other limited services pregnancy centers but rather applies based on the range of services that a pregnancy center provides. *Id.* at 26a. Although “it may be true that [limited services pregnancy centers] engage in false or misleading advertising concerning their services because they hold anti-abortion views . . . the Ordinance regulates these entities because of the threat to women’s health posed by their false or misleading advertising,” not their views on abortion. *Id.* at 27a.



ARGUMENT

False and misleading commercial speech receives no First Amendment protection. The court of appeals held that San Francisco’s Pregnancy Information Disclosure and Protection Ordinance targets only false and misleading commercial advertising. It also held that the Ordinance is viewpoint neutral because it applies equally to all limited services pregnancy centers, regardless of the reason these centers choose to limit their services. The decision of the court of appeals is correct and consistent with both this Court’s precedents and the decisions of other lower courts. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518, 2527, 2532-34 (2014) (holding that a law regulating expressive conduct outside abortion clinics was viewpoint neutral notwithstanding its impacts on abortion protesters); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563 (1980) (“there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”).

On November 13, 2017, this Court granted a petition for writ of certiorari in *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140 (“*NIFLA*”). That case, argued on March 20, 2018, also presents questions about the applicability of the First Amendment to the speech of pregnancy service providers. As Petitioners underscore, both cases concern the doctrines of viewpoint discrimination and commercial speech. *See* Pet. 37. Because this Court’s decision in *NIFLA* may have relevance to Petitioner’s First

Amendment claims, the Court should hold the petition for a writ of certiorari pending the resolution of *NIFLA*.



CONCLUSION

This Court should hold Petitioner's petition for a writ of certiorari pending its decision in *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140, and, in light of that decision, dispose of the petition as appropriate.

Respectfully submitted,

DENNIS J. HERRERA

City Attorney

CHRISTINE VAN AKEN

Chief of Appellate Litigation

YVONNE R. MERÉ

Chief of Complex and Affirmative Litigation

MOLLIE M. LEE

Deputy City Attorney

Counsel of Record

CITY ATTORNEY'S OFFICE

City Hall, Room 234

One Dr. Carlton B. Goodlett Place

San Francisco, CA 94102

Telephone: (415) 554-4290

mollie.lee@sfcityatty.org

Attorneys for the City and County of San Francisco