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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The City does not dispute that the Ninth Circuit's decision deepens a circuit split regarding whether a showing of purposeful viewpoint discrimination suffices to trigger strict scrutiny under *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015). Pet. 11-16. Nor does it dispute that the Ninth Circuit's decision adds to a separate four-way split among the lower courts regarding the definition of commercial speech. Pet. 24-34. Most importantly, it does not dispute that these splits *matter*. As we have shown, the Ninth Circuit's refusal to consider evidence of viewpoint discrimination incentivizes government gamesmanship in drafting speech regulations and would result in dramatic underprotection of speech. Pet. 9, 21-22. And if advertisements for free services are "commercial speech" because they could be "useful in fundraising," as the Ninth Circuit holds, that would subject vast swaths of speech by religious and other nonprofits to lower-tier constitutional scrutiny. Pet. 35-36.

1. Instead of addressing these splits—and despite asking for a 45-day extension—the City offers a scant two paragraphs of argument in opposition. The City says the petition should be held pending *NIFLA*. But while this Court could craft its *NIFLA* opinion broadly enough to cover the issues presented here, Pet. 37, the City's brief ignores the important ways in which the Ordinance is an even more flagrant First Amendment violation than the FACT Act, making this a particularly good vehicle for review.

First, in this case, the Ninth Circuit correctly observed that the definition of commercial speech was

"at the heart of the dispute," Pet. App. 13a; by contrast, *NIFLA* addressed commercial speech in a footnote. *NIFLA* v. *Harris*, 839 F.3d 823, 834 n.5 (9th Cir. 2016). Moreover, because the Ninth Circuit upheld the speech regulation in *NIFLA* on other grounds, the definition of commercial speech wasn't part of the basis for that decision.

Second, as we have shown elsewhere, there are currently two main categories of laws targeting pregnancy centers. See Br. for First Resort, Inc. as *Amicus Curiae*, *NIFLA*, at 4-8 (summarizing different jurisdictions' pregnancy-center speech regulations). One category concerns direct government regulation of intra-center speech—for example, a law requiring pregnancy centers to post government messages about abortion in their waiting rooms. *NIFLA* largely falls into this category. See *NIFLA*, 839 F.3d at 834 n.5 (FACT Act "primarily regulates the speech that occurs within the clinic").

The other main category concerns speech made outside the pregnancy center that offers free services to needy women. This case falls into this latter category, because it involves the City's attempt to regulate the content of First Resort's website, as well as its use of Google AdWords associations to reach its target audience. Pet. App. 5a-6a. The City claims that the targeted speech is just advertising, entitled to the lesser protections usually afforded to commercial speech.

The difference between the two categories of cases involving regulations of the speech of pregnancy centers explains why the Ninth Circuit in *NIFLA* rejected California's commercial-speech argument in a footnote, while here the very same Ninth Circuit panel

made San Francisco's commercial-speech argument the centerpiece of its decision. Since this case concerns regulation of pregnancy-center speech outside of the clinic, it is a particularly good vehicle for addressing the definition of commercial speech.

2. Aside from its request for a hold, the City also offers some reasons why it believes it is right on the merits.

First, the City argues that the Ordinance regulates only "false and misleading commercial speech," which receives "no First Amendment protection." Br. in Opp. 4. This of course begs the commercial-speech question. The lower courts have adopted widely divergent views as to what qualifies as commercial speech. First Resort does not believe its speech qualifies as commercial under the proper test. Nor is First Resort's speech false or misleading. But even assuming the Ordinance did regulate only false and misleading commercial speech, the City's position is wrong under *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992).

In *R.A.V.*, the Court recognized that while it has sometimes described certain categories of speech as being "unprotected" by the First Amendment, that description is not "literally true." 505 U.S. at 382-86. Instead, the Court made clear that strict scrutiny still applies where the government impermissibly targets "particular instances of such proscribable expression" on the basis of content or viewpoint. *Id.* at 384. Thus, in *R.A.V.*, the Court held that while St. Paul could constitutionally proscribe all fighting words, its attempt to proscribe only those fighting words that were "addressed to * * * specified disfavored topics" was "facially unconstitutional." *Id.* at 391-92.

The City's argument directly conflicts with *R.A.V.* The Ordinance isn't a general prohibition on false advertising (California already has one of those, which it has not bothered to use, Pet. App. 30a-34a, 99a); instead it is a restriction only on advertising about a certain subject ("concerning" "pregnancy-related services"), and by certain speakers, *viz.*, those that do not provide or refer for abortions. Pet. App. 77a-78a. Under *R.A.V.*, these content- and viewpoint-based distinctions—even if within the "unprotected" category of "false commercial speech"—receive the ordinary treatment accorded to content- or viewpoint-based speech regulations: strict scrutiny. 505 U.S. at 382-385, 395. Yet the Ninth Circuit applied no scrutiny at all.

Second, the City notes that in *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014), the Court held that an abortion-clinic buffer-zone law was viewpoint-neutral "notwithstanding its impacts on abortion protesters." Br. in Opp. 4. But the Court found that the law at issue in *McCullen* drew neither viewpoint nor "content-based distinctions on its face"; it prohibited anyone from standing within the buffer zone, even if the person did not "utter[ ] a word." 134 S. Ct. at 2531. Here, by contrast, the Ordinance is triggered *only* by speech, and it applies not to everyone but only to pregnancy centers that do not refer for abortions. In *McCullen*, the Court recognized that "[i]t would be a very different question if" pro-abortion speakers were allowed to speak within the buffer zone while everyone else was not. *Id.* at 2534. Here, because the Ordinance restricts the advertising of only those pregnancy centers that do not refer for abortions, while allowing centers that do refer for abortions to advertise without restriction, it "facilitate[s] speech on only one side of the abortion

debate[.]" *Ibid.* This case therefore is not governed by *McCullen*. Moreover, the Ordinance's express targeting is more direct and egregious than the suspected "gerrymander" at issue in *NIFLA*. Oral Arg. Tr., *NIFLA*, at 13:25-15:1; see also *id.* at 37:22-38:7 (Kagan, J.) ("[I]f [the law] has been gerrymandered, that's a serious issue.").

* * *

Simply put, the Ninth Circuit has upheld a regulation of speech about a single topic, from a single viewpoint, as permissible under the First Amendment. And to do so, it has treated offers of free help as "commercial speech," subject to reduced scrutiny. These errors create and exacerbate problems of First Amendment doctrine that the City cannot deny and this Court should not ignore.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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MAY 2018