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 *AMICUS CURIAE* OF DEMOCRATS FOR LIFE OF AMERICA, THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, THE LUTHERAN CHURCH – MISSOURI SYNOD, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief focuses on the second question presented in the Petition for Certiorari. The specific question presented in this brief is:

> 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 *AMICI CURIAE*[1]

Democrats for Life of America ("DFLA") is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, health care, and life's other basic necessities. DFLA has been committed to supporting the free speech rights of pro-life individuals and organizations; for example, it filed an amicus brief in support of the successful plaintiffs in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

The **Ethics and Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over

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[1] Neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparation or submission. No person (other than the *amici curiae*, their members, or their counsel) contributed money that was intended to fund its preparation or submission. Petitioner and Respondents have consented to the filing of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Scripture teaches that every person is an image-bearer of God and that the womb is his domain. SBC members believe God's knowledge of unborn life even precedes the creative act of conception. Therefore, abortion is incongruent with SBC beliefs. The ERLC is committed to upholding the freedom of Christian ministries who care for women in unplanned pregnancies because we believe mothers and their unborn children are known and loved by God.

The **Institutional Religious Freedom Alliance** ("IRFA"), founded in 2008 and now a division of the Center for Public Justice, a nonpartisan Christian policy research and citizenship education organization, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based services.

The **Lutheran Church – Missouri Synod** ("the Synod") has some 6,100 member congregations with 2.1 million baptized members throughout the United States. In addition to numerous Synodwide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations

throughout the country. The Synod steadfastly adheres to orthodox Lutheran theology and practice, and its ministries include upholding the sanctity of human life, both within the church body and in the culture at large. Further, it promotes and fully supports religious liberty and the preservation of all First Amendment protections guaranteed under the United States Constitution.

Christian Legal Society ("CLS") is a nonpartisan association of attorneys, law students, and law professors, founded in 1961, with attorney chapters and law student chapters nationwide. CLS's advocacy arm, the Center for Law and Religious Freedom, defends freedom of speech, the free exercise of religion, and the sanctity of human life in the courts, legislatures, and public square. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

Based on its belief that the Bible commands Christians to plead the cause of those in need, CLS encourages and equips its members to volunteer their time and resources to help those in need in their communities. Through its legal aid ministry, CLS provides training and resources to approximately 60 local legal aid clinics nationwide. These clinics represent one category of religious ministries whose work could be adversely affected by an expansion of the "commercial speech" classification to organizations that provide services from motives that are primarily religious or ideological.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner First Resort, Inc., is a nonprofit organization that provides free services, including pregnancy testing, ultrasounds, and counseling, to women considering abortion. Pet. App. 5a. It provides these services "on the belief that, when given appropriate support, unbiased counseling, and accurate medical information, many women will choose non-abortion options." Pet. 3. It also provides "compassionate post-abortion counseling and emotional support." *Id.* First Resort's mission stems from its "religion-based beliefs about abortion and the sanctity of life." *Id.* Based on these religious and moral beliefs, First Resort does not provide or refer for abortions or emergency contraception. *Id.*

The City of San Francisco ("the City") passed an ordinance that made it unlawful for a "limited services pregnancy center," such as First Resort, to make statements about its services that were "untrue or misleading, whether by statement or omission." Pet. App. 48a. The City Attorney sent a letter to First Resort "express[ing] serious concerns about" First Resort's advertising; the City's only support for this threat was that First Resort "'has a paid Google search link'" which allowed "its website to appear in 'search results for "abortion in San Francisco."'" Pet. 4 (quoting Respondents' letter to Petitioner). The City thus suggested that First Resort and another pro-life pregnancy-counseling center violated the ordinance in making their free services known to women – even though their counseling unquestionably concerns the subject of abortion. The

City claims that the centers' statements about their services are "commercial speech" and therefore can be regulated under the relaxed First Amendment standards applicable to that category of speech.

In the lower courts and in the petition for certiorari, First Resort has objected that the City's ordinance (1) discriminates against speech that reflects a pro-life viewpoint and (2) regulates ideological speech at the core of First Amendment protection, not commercial speech receiving lesser protection. *Amici* agree with these propositions; and we agree that a deep division in the lower courts over the proper definition of "commercial speech" calls out for this Court's review.

This brief supports a specific argument in the petition. The Ninth Circuit, in holding that petitioners' statements could be regulated as a form of commercial advertising, adopted a "dangerously overbroad definition of commercial speech." Pet. 24. The court of appeals' definition would sweep in free services offered by a host of charitable organizations and ministries whose motivation is religious or ideological, not economic.

The Ninth Circuit adopted the broadest definition of commercial speech of any of the conflicting definitions in the lower courts. The court held that a charitable organization's statements of outreach offering free services nevertheless constitute commercial speech if the services have "monetary value" and the organization has an "economic motivation" to serve clients and thereby attract more donors. Pet. App. 23a-24a.

The court's standard applies even where – as here – the organization's primary motive is to pursue an ideological or religious mission and it seeks donors only to advance that mission.

The court of appeals' definition would sweep in a vast range of speech by charities that act out of moral, ideological, or religious motivations. The list ranges from religious congregations to food pantries to counseling services to immigrant and refugee services. If generating new client stories to attract donors is an "economic motivation," virtually every charity engages in commercial speech, since virtually every charity seeks donors in order to support its mission. Most charities likewise provide services of "monetary" value that could be offered for money and that are offered by other, "competing" entities.

It is entirely inadequate to answer that congregations or charitable organizations have no worries because the government is prohibiting only "false" or "misleading" speech. Hostile governments can easily target organizations with unpopular religious or ideological perspectives by calling their speech "misleading" – a danger that is evident in this very case.

Review is also appropriate because sweeping in churches and free charitable services contravenes previous decisions of this Court. The Court has given strong free speech protection to several sorts of advertisements or solicitations, distinguishing them from commercial speech. These include signs for church worship services, solicitation for potential litigants in

public-interest advocacy, and requests for charitable donations. The court of appeals' broad definition of commercial speech directly contradicts these rulings.

Today it is pro-life pregnancy counseling centers that hostile government officials aim to restrict, in San Francisco and elsewhere. Tomorrow it may be immigrant or refugee-services centers in states or localities hostile to immigration, or food pantries or homeless shelters in comfortable suburban neighborhoods. In either case, government may not use the "commercial speech" label to distort or suppress speech by organizations that provide free services from motives that are primarily ideological and only tangentially commercial.

ARGUMENT

Review is Needed to Correct the Court of Appeals' Erroneously Broad "Commercial Speech" Test, Which Would Sweep in Free Services Offered by a Host of Charitable Organizations and Ministries Whose Motivation is Religious or Ideological, Not Economic.

Amici agree with the petition for certiorari that the definition of "commercial speech" has triggered deep division in the lower courts, division that calls out for this Court's review. *See* Pet. 29-32 (describing how "lower courts have fractured into a four-way split over the definition of commercial speech").

This brief focuses on a related point. The Ninth Circuit, through the decision below, has adopted the most expansive of all the definitions of commercial speech. Its overbroad test would sweep in multiple churches, ministries, and other charitable organizations – applying the lesser protections of commercial speech to organizations that are engaged in core First Amendment activity. The result could put numerous nonprofit organizations and ministries in jeopardy, as evidenced by this case itself. Therefore, the importance of this issue of federal law, as well as the confusion among lower courts, warrants this Court's review.

It is unquestioned that First Resort offers all of its services for free – and that it offers them primarily out of its moral and religious beliefs. *See* Pet. 3 (noting that First Resort is motivated by its "religion-based beliefs about abortion and the sanctity of life"); *id.* (noting First Resort's belief 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").

Several lower courts have recognized that pro-life pregnancy counseling centers offering free services act out of moral, religious, and ideological motivation. Courts have made this recognition in the course of finding that the centers' speech is not "commercial." *See, e.g.*, *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 879 F.3d 101 (4th Cir. 2018) (center was "a non-profit organization whose clearest motivation is not economic but moral, philosophical, and religious"); *Evergreen*

Ass'n, Inc. v. City of New York, 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011), *aff'd in part, vacated in part on other grounds*, 740 F.3d 233 (2d Cir. 2014) (centers' work was "grounded in their opposition to abortion and emergency contraception"); *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 463-64 (D. Md. 2011), *aff'd in part, rev'd on other grounds*, 683 F.3d 591 (4th Cir. 2012), *aff'd en banc*, 722 F.3d 184 (4th Cir. 2013) ("[T]here is no indication that Plaintiff is acting out of economic interest. Rather, Plaintiff is allegedly motivated by social concerns.").

Despite the philosophical and religious nature of First Resort's free services, the court of appeals held that publicizing them was commercial speech. This error could have serious consequences and calls out for this Court's review.

A. The Court of Appeals Adopted The Broadest Definition of Commercial Speech of Any of the Conflicting Definitions in the Lower Courts.

As the petition for certiorari explains, there are several definitions of "commercial speech" in the lower courts. The Ninth Circuit, in the decision below, adopted the broadest of these definitions. The court did not apply this Court's ruling limiting commercial speech to "speech which does no more than propose a commercial transaction." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). Under this rule, petitioner's speech is non-commercial, because all its services are free.

Instead, the court applied the three factors set forth in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983): "'strong support' that the speech should be characterized as commercial speech is found where [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation." Pet. App. 14a-15a (quotation omitted and bracketed numbers added) (citing *Bolger*, 463 U.S. at 66-67). But the court of appeals applied *Bolger* even though this case did not arise in the same context as *Bolger* – which involved "informational pamphlets" that mixed noncommercial speech (information about "the desirability of contraceptives") with commercial speech (references to products that the contraceptive company offered for sale). 463 U.S. at 62, 66.

To top it off, the Ninth Circuit applied the *Bolger* factors in an extremely broad fashion. First, the court disregarded the fact that First Resort provides all of its "particular product[s]" and services (Pet. App. 15a) free of charge, motivated by its deeply held religious and moral beliefs. Although First Resort therefore makes no commercial offer of goods and services, the court of appeals relied on the argument that First Resort offers goods and services that *could* be provided commercially. Pet. App. 23a. The court said that the pregnancy test, ultrasounds, and counseling all "have monetary value," and that First Resort uses its outreach "to compete in a competitive marketplace for those services." *Id.*

Second, the court said that First Resort has "an economic motivation to produce successful advertisements." Pet. App. 23a. This was not because First Resort charges money for its services – but rather, the court said, because "First Resort engages in fundraising efforts which are furthered, at least in part, by First Resort's ability to attract new clients." *Id.* Moreover, the court said, "the success of First Resort's advertising directly relates to employee compensation, as '[m]embers of First Resort's senior management team are eligible to receive bonuses based on criteria which may include . . . the number of new clients.'" *Id.* at 24a (brackets and ellipsis in original).

B. The Court of Appeals' Definition Would Sweep in Speech by a Vast Range of Charitable Organizations, Including Religious Congregations.

1. We turn first to the court of appeals' claim of "economic motivation." It is true that First Resort seeks to raise funds by attracting donors. But that is because First Resort has a moral incentive to pursue its mission of counseling and supporting women, and donors help it further that mission. And the same is true of every charitable and humanitarian entity, including churches. Every charitable entity needs donors in order to support its mission. *See, e.g.*, *Gift Shop*, Supreme Court Historical Society (last visited Feb. 27, 2018), http://supremecourtgifts.org/makeadonation.aspx; *Our Donors*, Livestrong Foundation (last visited Feb. 27, 2018), https://www.livestrong.org/?utm_expid=80058216-13.7QYzlrtdRLShKdIYzM-PMQ.0; *Make a Donation to*

the Basilica of Saint Mary, The Basilica of Saint Mary (last visited Feb. 27, 2018), https://mybasilica.mary.org/netcommunity/mary.org/donations/donation-page---mobile-wallet.

Recently, on facts similar to those here, the Fourth Circuit rejected the argument that a pregnancy-care counseling center had an economic motivation merely because it sought to attract donors. *Greater Baltimore Center*, 879 F.3d at 109. The court held that the center was "a non-profit organization whose clearest motivation is not economic but moral, philosophical, and religious." *Id*. (concluding that the relationship "between clinic patronage and fundraising [was] too attenuated to amount to 'economic motivation' ").

The court of appeals here also claimed that First Resort has an "economic motivation" because its management stands to be compensated if the center gets more clients. Pet. App. 16a. Again, the same could be said of most churches and nonprofit ministries. Organizations and churches have more revenue if more people show up and contribute, and some of that revenue may compensate leaders. But the organizations' main goal is to have more worshipers or serve more clients, not to earn revenue for compensation.

2. Nor is petitioner's speech "commercial," as the court of appeals held, because petitioner offers services that have "monetary value," and for which other organizations charge money in what could be called a "competitive marketplace." *See supra* pp. 9-10, Pet. App. 23a. A wide range of nonprofit organizations and ministries

provide free goods or services that have "monetary value." Many of these organizations operate directly in or through churches; others have a religious affiliation; still others are secular.

3. We give here just a few examples of the vast range of charitable organizations that provide free services with "monetary value" and that receive donations inspired in part by the provision of those services.

- Churches advertise their worship services and other activities on their websites and marquees, in newspapers, and in other venues. They do so to draw more attendance at worship and other events. Their "clearest motivation" is "moral [and] religious" (*Greater Baltimore Center*, 879 F.3d at 109), but they may also pass the collection plate around the congregation. Under the Ninth Circuit's approach, advertisements for worship services could be considered commercial speech. The church is attracting potential donors whose contributions help compensate the church's leaders. Churches also provide free services, from counseling to food, clothing, and other supplies, that have "monetary value" and are provided by others.

- Refugee Services of Texas, a nonprofit social service agency for refugees and other displaced persons, provides free temporary housing, employment search, counseling for victims of human trafficking, and many other services. Refugee Services of Texas, *About*, https://www.rstx.org/about/ (last visited Feb. 26, 2018). The organization's website displays client stories.

Under the Ninth Circuit's approach, state or local officials could argue that Refugee Services of Texas uses client stories to attract donors and, therefore, all of its statements reaching out to refugees could be regulated under the relaxed standards of protection for commercial speech.

- Immigration and refugee ministries and organizations also provide various free services for immigrants, such as teaching the English language, providing temporary housing, and helping to find jobs. All have monetary value, could be provided for money, and are provided by others in what could be called a "competitive marketplace." Under the Ninth Circuit's approach, a city or state could treat any of these organizations' outreach to beneficiaries as commercial speech.

- Food pantries and soup kitchens for the poor or homeless offer free food, which obviously has monetary value – and other organizations "compete" in providing such assistance. These providers also advertise their goods and services to inform potential beneficiaries. Under the Ninth Circuit's approach, such outreach would be considered commercial speech.

The district court in *Evergreen Ass'n*, *supra*, summarized the consequences that we have warned of for churches and charities:

> If speech becomes commercial speech merely through the offer of a valuable good or service, then "any house of worship offering their

> congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection." Likewise, a domestic violence organization advertising shelter to an abuse victim would find its First Amendment rights curtailed, since the provision of housing confers an economic benefit on the recipient.

Evergreen Ass'n, 801 F. Supp. 2d at 205 (quotation omitted). "Adoption of [this] argument," the court aptly concluded, "would represent a breathtaking expansion of the commercial speech doctrine." *Id.*

Today it is pro-life pregnancy counseling centers that hostile government officials aim to restrict, in San Francisco and elsewhere. Tomorrow it may be immigrant or refugee-services centers in states or localities hostile to immigration, or food pantries or homeless shelters in comfortable suburban neighborhoods.[2] In all of these cases, government may not use the "commercial speech" label to distort or suppress speech by

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[2] The idea that a state would seek to restrict religious and secular charities serving immigrants is no speculation. In 2011, religious denominations and other charities in Alabama challenged the state's new law prohibiting a wide range of forms of assistance to immigrants in the country illegally. *See* Plaintiff's Second Amended Complaint at 2, *Parsley v. Bentley*, Civ. Action No. 11-cv-2736 (M.D. Ala. Aug. 11, 2011) (hereinafter "Parsley Complaint"), *available at* https://www.clearinghouse.net/chDocs/public/IM-AL-0007-0001.pdf (last visited Feb. 25, 2018) (alleging that the law prevents religious groups "from being able to freely practice their faith to minister to all of God's children without regard to immigration status").

organizations that provide free services from motives that are primarily ideological and only tangentially commercial.

4. It is entirely inadequate to answer that congregations or charitable organizations have no worries because the government is prohibiting only "false" or "misleading" speech. A bedrock proposition of the First Amendment is that with respect to "core" forms of speech – ideological, religious, and political – government may not impose prohibitions on the basis that it deems the speech false. In these core areas, this Court holds fast to the principles "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing room' that they 'need . . . to survive.'" *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (ellipsis in original) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Moreover, hostile governments can easily target organizations with unpopular religious or ideological perspectives by calling their speech "false" or "misleading." This case exemplifies the potential for such mischief. The City claims that First Resort engaged in misleading behavior by using the Google search link, or keyword, "abortion in San Francisco" for its advertisements – even though First Resort unquestionably provides counseling to women who are considering abortion or have had abortions, and even though its counseling concerns the subject of abortion by offering women alternatives pre-abortion or support post-abortion. *See* Pet. 4. In its threatening letter to First

Resort, and in its ordinance, the City asserts that San Francisco pregnancy-counseling centers must explicitly state that they do not provide or refer for abortions – even though the legislative record revealed no documentation or affidavit "'of any woman' seeking abortion or contraceptives that 'ha[d] been misled' by [such a] pregnancy center's advertising." Pet. 4-5 (quoting Pet. App. 121a-123a (first brackets in original)).

Under the City's theory, a church whose clergy provide free pastoral counseling aimed at helping couples save their marriages could face liability for "misleading" advertising if it used the term "divorce" as a keyword so that its website showed up in Google searches. The church could face liability for its advertising even though it in fact provides counseling on the subject of divorce – how to avoid it – to couples who are considering divorce. The views of many churches on the legitimacy of divorce and other sexual matters are just as controversial as views on abortion. It is not speculative to think that cities armed with a broad definition of commercial speech, like that of the Ninth Circuit, will use it to find "misleading" statements in the public outreach of churches they oppose.

The broad definition of commercial speech could also empower governments that are hostile to organizations providing free relief services to refugees and immigrants out of religious or moral motivations. For example, Alabama's 2011 law concerning illegal immigration, *see supra* p. 15 note 2, made it illegal, among other things, for anyone knowingly or recklessly to "[e]ncourage or induce an alien to come to or reside in

th[e] state." Ala. Code 1975 § 31-13-13(a)(2). Religious organizations and leaders in Alabama challenged the law as a violation of their rights to, among other things, freedom of speech. Parsley Complaint, *supra* p. 15 note 2, paras. 90-93. But if many statements of outreach by religious and other charities are "commercial speech," the state could claim broad authority to prohibit statements offering hospitality to illegal immigrants on the ground that they encourage such persons to come to Alabama. That is because commercial speech doctrine allows states to prohibit not only advertisements that are false or misleading, but also advertisements for "transactions [that] are themselves illegal." *Virginia Bd. of Pharmacy*, 425 U.S. at 771-72. By contrast, of course, in cases of core First Amendment political or ideological activity, the state may not forbid advocacy "of law violation" unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

As petitioner puts it, "the commercial speech definition *matters*." Pet. 34 (emphasis in original). If the court of appeals' decision stands, its approach will seriously affect religious and other charities in the Ninth Circuit and any other circuit that follows the approach.

C. Sweeping in Churches and Free Charitable Services Violates Previous Decisions of This Court.

By its strikingly broad definition of commercial speech, the court of appeals' decision contravenes several of this Court's decisions concerning the speech rights of churches and charitable organizations. The Ninth Circuit's standard leads to treating ideological speech, at the core of the First Amendment, as commercial speech.

1. This Court has long protected churches and religious outreach from being deemed commercial enterprises. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), a city ordinance prohibited the sale of goods of any kind by soliciting door-to-door without a license. The city prosecuted Jehovah's Witnesses who allegedly violated the ordinance by going door-to-door distributing literature and requesting a "contribution" for each item. *Id*. at 107. This Court held that the ordinance violated the group's First Amendment rights. The Court emphasized that if the Jehovah's Witnesses in this case were to be considered a commercial enterprise, "then the passing of the collection plate in church would make the church service a commercial project." *Id*. at 111.

In particular, the Court has protected the public advertisement of church worship services. In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Court invalidated an ordinance that severely restricted the size, duration of display, and location of temporary

outdoor signs advertising and directing people to upcoming events. A church and its pastor challenged the ordinance because it restricted their signs "advertis[ing] the time and location of their Sunday church services." *Id.* at 2225. This Court held that the ordinance was subject to strict scrutiny because it distinguished among signs based on their content. *Id.* at 2227-31. But as discussed above, the broad definition of "commercial speech" adopted by the court of appeals in this case could lead to advertisements for worship services being treated as commercial speech – a category in which content-based regulation receives more latitude. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) ("content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech").

2. The Court has also protected organizations that pursue political and ideological goals through litigation. Restrictions on their solicitation of potential clients must be more limited than restrictions on ordinary fee-charging lawyers; the restrictions must "withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights.'" *In re Primus*, 436 U.S. 412, 432 (1978) (ACLU) (quotation omitted); *accord Button*, *supra*, 371 U.S. 415 (NAACP). In particular, this Court refused to lower the standard of protection simply because such organizations seek attorney's fee awards when they prevail:

> Although such benefit to the organization may increase with the maintenance of successful litigation, the same situation obtains

> with voluntary contributions and foundation support, which also may rise with ACLU victories in important areas of the law. That possibility, standing alone, offers no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees.

Primus, 436 U.S. at 430-31. Similarly, the fact that attracting clients may bring a pregnancy center tangential economic benefits – like increased "voluntary contributions" from donors – provides "no basis" for calling its speech "commercial" when its "primary purpose" is not to raise money, but to pursue its moral and religious mission of countering abortion.

3. Finally, this Court has protected the speech of charities and organizations when they ask for donations. The Court has rejected the argument that "charitable solicitation is akin to a business proposition, and therefore constitutes merely commercial speech." *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 787-88 (1988) (invalidating various restrictions on charitable solicitation by professional fundraisers). "Regulation of a solicitation 'must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech'" and is thus not "'purely commercial speech.'" *Id.* at 796, 788 (quoting *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

The Ninth Circuit's ruling in this case characterizes a pregnancy center's outreach to women as "commercial speech" on the basis that the center shares its client stories to procure more charitable donations. But that argument is deeply ironic when, under *Riley* and *Schaumburg*, the solicitation of such donations is itself highly protected and is not "merely commercial speech." Petitioner's overriding motives for attracting clients are moral and religious; those core First Amendment activities do not become commercial because they also assist another highly protected activity, soliciting charitable donations.

D. Review Is Needed to Clarify the Definition of Commercial Speech and the Role of the *Bolger* Factors.

The Court should grant review of this case to resolve the confusion in the lower courts over the definition of commercial speech, and to correct the "breathtaking expansion" of the definition adopted by the Ninth Circuit and some other courts. *Evergreen Ass'n*, 801 F. Supp. 2d at 205. That expansion stems from the courts' misreading and misapplication of *Bolger*.

First, *amici* agree with petitioner that the *Bolger* factors should be limited to the case where "speech, in addition to proposing a commercial transaction, also includes 'comments on public issues' or other noncommercial elements." Pet. 27. In such cases, "the *Bolger* factors determine whether the speech as a whole should be classified 'commercial.'" *Id.* Such an

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.* (quoting *Bolger*, 463 U.S. at 68).

Second, as discussed above, even assuming the *Bolger* factors apply, lower courts have given far too broad a reading to the concept of "economic motivation." *See supra* pp. 9-18. This Court could remedy those serious errors by concluding that pro-life pregnancy counseling centers do not have a sufficient economic motivation. Even when an organization has some motive to attract donors, the organization's outreach to clients cannot be considered "commercial" when the primary motivation for the organization and its outreach is "social concerns," *Centro Tepeyac*, 779 F. Supp. 2d at 463-64, or an ideological or religious position such as "opposition to abortion and emergency contraception." *Evergreen*, 801 F. Supp. 2d at 205. When an organization provides free services, this Court should, at the very least, restrict the commercial-speech category to cases where the organization's dominant motivation is economic. The category should not apply to free services offered by organizations with significant ideological or religious motivations.

Amici note that this distinction between ideological and commercial organizations is wrongly overlooked in the brief *amicus curiae* of the United States filed in *National Institute of Family Life Advocates v. Becerra*, No. 16-1140 (filed Jan. 16, 2018) ("U.S. *NIFLA*

Br."). The U.S. argued in *NIFLA* that California's disclosure mandates imposed on pro-life pregnancy centers should not trigger strict scrutiny, even though the centers provide their services for free. U.S. *NIFLA* Br. at 20. The U.S. relied on the fact "that the government may regulate malpractice or misconduct by attorneys, tax preparers, and medical professionals without regard to whether a professional charges for a particular service or provides it pro bono." *Id.*; *see also id.* at 21 (arguing that commercial-speech rules govern speech of "[a] manufacturer that offers free samples as a promotion, or a professional that offers free consultations to attract customers"). Under standards lower than strict scrutiny, the U.S. argued, some of California's mandates were invalid but others valid. *Id.* at 25, 33.

The U.S. *NIFLA* brief has a point when it argues that individuals or entities who generally charge for services can still be regulated when, in an incidental class of cases, they "offer their services without charge" (U.S. *NIFLA* Br. at 20). That proposition covers the law firm providing pro-bono services, the doctor providing free medical services, or the "manufacturer that offers free samples as a promotion." *Id.* at 21. But the point has no application to entities that *consistently* offer their services for free – especially when, as with pro-life pregnancy centers, they do so out of ideological or religious motivation.

The U.S. *NIFLA* brief recognizes that *NAACP v. Button* and *In re Primus*, *supra* pp. 20-21, "applied strict scrutiny because the NAACP's [and ACLU's] litigation activity itself constituted 'expressive and associational

conduct at the core of the First Amendment's protective ambit.'" U.S. *NIFLA* Br. at 22 (quoting *Primus*, 436 U.S. at 424). But the U.S. overlooks that speech counseling women on abortion and abortion alternatives also lies at the First Amendment's core. For example, in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the Court protected the right of individuals opposed to abortion "to engage women approaching [abortion] clinics in . . . 'sidewalk counseling,' which involves offering information about alternatives to abortion and help pursuing those options" (*id.* at 2527) – the same information that pregnancy-care centers provide in their own facilities. Pet. 3. The Court described the activity in *McCullen* as "[l]eafletting and commenting on matters of public concern" and "advoca[ting] a politically controversial viewpoint": both of them "classic forms of speech that lie at the heart of the First Amendment." *Id.* at 2536 (quotations and citations omitted).

In short, speech that counsels women on alternatives to abortion – "a politically controversial viewpoint" on a "matter[] of public concern" (*McCullen*) – should receive full First Amendment protection, not the relaxed form governing commercial speech.

CONCLUSION

This Court should grant the petition for certiorari, or in the alternative, hold it pending the decision in *NIFLA v. Becerra*.

Respectfully submitted,

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