No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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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.

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.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioner, which was Plaintiff below, is First Resort, Inc. First Resort is not a publicly held corporation, does not issue stock, and does not have a parent corporation.

Respondents, who were Defendants below, are Dennis J. Herrera, in his official capacity as City Attorney of the City of San Francisco, the Board of Supervisors of the City and County of San Francisco, and the City and County of San Francisco.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This Court has already decided that the category of dispute presented by this petition is worth resolving. Over a decade ago, this Court granted certiorari in *Nike* v. *Kasky* to resolve lower-court confusion regarding the definition of "commercial speech," but had to dismiss that case as improvidently granted. And by granting certiorari in *National Institute of Family & Life Advocates* v. *Becerra*, the Court concluded that it must address state and municipal laws targeting the speech of pregnancy centers. But as Petitioner First Resort pointed out as an amicus in *NIFLA*, within the genus of laws targeting pregnancy-center speech there are many species. The California law at issue in *NIFLA* targets pro-life speech by compelling speech. That case thus concerns particular aspects of the speech-neutrality and professional speech doctrines.

By contrast, laws like the ordinance enacted by San Francisco seek the same speech-suppressive end by different means: a prohibition on "false" advertising. This case therefore more directly implicates preexisting circuit splits over viewpoint discrimination, as well as the same lower-court confusion regarding the boundaries of commercial speech that was presented, but not resolved, in *Nike*.

The Court must therefore determine whether it should resolve the questions presented by this petition in the course of deciding *NIFLA*, or whether it should instead grant this petition and set this case for plenary review. Either way, there is an urgent and compelling need to resolve the First Amendment issues presented in this petition.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 860 F.3d 1263 (9th Cir. 2017) and reproduced at App.1a-43a. The District Court's opinion denying Petitioner's motion for summary judgment and granting Respondents' motion for summary judgment is reported at 80 F. Supp. 3d 1043 (N.D. Cal. 2015) and reproduced at App.44a-71a.

JURISDICTION

The Ninth Circuit entered its judgment on June 27, 2017. It denied a timely petition for rehearing en banc on September 19, 2017. App.72a. Justice Kennedy extended the deadline to file a petition for a writ of certiorari to February 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech * * *."

The text of San Francisco's Pregnancy Information Disclosure and Protection Ordinance, S.F. Admin. Code, ch. 93 §§ 93.1-93.5, is reproduced at App.73a-82a.

STATEMENT OF THE CASE

1. First Resort is a public benefit, non-profit corporation that operates a licensed pregnancy services counseling clinic in San Francisco. App.94a, 98a. Every First Resort client meets with a counselor. In support of its counseling, First Resort provides women

with basic medical services, including early ultrasounds that are conducted by licensed medical personnel, to ensure that its counseling is properly informed by the facts regarding a woman's pregnancy and the viability and gestational age of the unborn child. App.95a.

First Resort believes 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. In support of that vision, First Resort does not provide or refer for abortions or emergency contraception, but instead empowers women through its counseling to make fully informed decisions in line with their own beliefs and values, on the belief that, when given appropriate support, unbiased counseling, and accurate medical information, many women will choose non-abortion options. *Ibid.* First Resort's religion-based beliefs about abortion and the sanctity of life also motivate it to provide women who do choose to have abortions with compassionate post-abortion counseling and emotional support. First Resort provides all its services free of charge. App.95a-96a.

2. On August 2, 2011, San Francisco Supervisor Malia Cohen introduced a proposed Pregnancy Information Disclosure and Protection Ordinance. App.73a-82a, 96a. That same day, Respondents City Attorney Herrera and the Board of Supervisors issued a press release announcing the proposed Ordinance, explaining that it was part of a "joint legal and legislative" effort to target "so-called 'crisis pregnancy centers' in San Francisco"—such as, specifically, "First Resort, Inc." App.83a-86a, 96a. The press release ex-

plained that "deceptive marketing" by pregnancy centers engaged in "pro-life advocacy" had to be "halt[ed]," because these centers offer "anti-abortion-rhetoric" and "push an anti-abortion agenda on those seeking constitutionally protected medical services." "[I]n tandem with" the City's "legislation," the press release noted, the City Attorney had taken "a first step toward a possible legal action under California law against * * * First Resort, Inc." App.83-85a, 96a.[1]

That first step was a letter from Respondent Herrera to First Resort, "express[ing] serious concerns about" First Resort's advertising. App.87a-89a, 96a. Pointing to the fact that First Resort "has a paid Google search link" causing its website to appear in "search results for 'abortion in San Francisco,'" Herrera asserted that this was "misleading," because "[n]owhere on its website" or in other advertisements did First Resort "expressly" "state that it does not perform or refer clients for abortion services." Herrera did not deny that First Resort counsels women in San Francisco who are considering abortion or who have had abortions. To the contrary, the letter acknowledged that First Resort is "entitled to offer pro-life counseling," but concluded that First Resort needed to "correct" its advertising to "clarify the clinic does not offer or make referrals for abortion services." App.87a-89a.

Shortly thereafter, the Board convened hearings on the Ordinance. The hearings featured "[n]o testimony,

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[1] The press kit on the City Attorney's website included a press release from NARAL Pro-Choice California, which indicated its support of the Ordinance aimed at "anti-choice" organizations. App.90a-92a, 96a-97a.

documentation, [or] affidavits of any woman" seeking abortion or contraceptive services that "ha[d] been misled" by a San Francisco pro-life pregnancy center's advertising—leading the one dissenting Supervisor to characterize the Ordinance as "a solution in search of a problem." App.121a-123a. Other Supervisors agreed that there had been no evidence "of an actual injury" and that "the legal record" was "not totally satisf[actory]," and still another warned that finding false advertising in "Google search results and algorithms" is "a very slippery slope." But these Supervisors agreed to vote for the Ordinance anyway, viewing the "overriding concern" as showing "support [for] legislation that is fully in favor of a woman's right to choose." App.125a-128a.

The Ordinance was enacted in October 2011. By its terms, it regulates only speech related to pregnancy, and only the speech of pro-life pregnancy centers like First Resort, not abortion providers or pregnancy centers who are willing to refer for abortions or emergency contraception. App.78a-80a.

Specifically, the Ordinance prohibits "limited services pregnancy centers" ("LSPCs") from making "statement[s]" "concerning th[eir] services" that are "untrue or misleading, whether by statement or omission." The term "limited services pregnancy center" is, in turn, defined as a pregnancy center that does not provide or refer for abortions or emergency contraception. App.78a.

The Ordinance gives the City Attorney extensive enforcement powers, including broad discretion to determine which practices are "misleading." If an LSPC's "false, misleading, or deceptive" statements

are not cured within ten days from the City Attorney's notice, the City Attorney may file a civil action seeking a range of penalties, including an injunction requiring the LSPC to post a disclaimer on its premises, monetary penalties ranging between $50 and $500 per violation, and the City Attorney's "reasonable attorney's fees and costs." App.79a-81a. There are no countervailing fee- or cost-shifting protections for an LSPC wrongfully targeted and sued.

The Ordinance includes legislative "Findings" echoing the City's press release. The Findings state that the Ordinance is a response to the advertising of pregnancy clinics "that seek to counsel clients against abortion." The Findings state that false advertising by pregnancy centers may result in "a client * * * los[ing] the option to choose a particular [abortion] procedure, or to terminate the pregnancy at all." App.73a-76a. The Findings offer no example of this ever having occurred. First Resort is one of two pregnancy centers identified as targets of the Ordinance. App.97a-98a.

3. First Resort filed this action in November 2011, alleging, *inter alia*, that the Ordinance was a content- and viewpoint-based speech regulation that violated the First Amendment, both on its face and as applied. In February 2015, the District Court entered summary judgment for Respondents. First Resort appealed. In June 2017, the Ninth Circuit affirmed, concluding that the Ordinance was valid both facially and as applied.

The Ninth Circuit held that "the central issue" in the case was "whether the regulated speech should be characterized as commercial." If so, then the Ordinance would constitute a regulation "only [of] false or

misleading commercial speech," a category to which "the Constitution affords no protection." App.13a-14a.

The Ninth Circuit then concluded that the Ordinance regulated only "commercial" speech. It recognized that commercial speech ordinarily is "defined as speech that does no more than propose a commercial transaction," but held that the fact that First Resort proposes no commercial transactions is not dispositive. Instead, the Ninth Circuit held that First Resort's advertisements could still be considered "commercial" if they satisfied the "*Bolger* test," App.14a-15a (citing *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)), under which, the Ninth Circuit believed, advertisements for free counseling and other services may nonetheless constitute "commercial" speech if the speaker has "an economic motivation."

The Ninth Circuit then found this economic-motivation factor met, because "the regulated LSPCs have at least one * * * economic motive for engaging in false advertising: to solicit a patient base." Although an LSPC's patient base does not actually "pay for services," the Ninth Circuit admitted, it nonetheless "directly relates to an LSPC's ability to fundraise," because LSPCs like First Resort use "client stories * * * in fundraising." App.15a-17a.

Next, the Ninth Circuit held that even if LSPCs lacked an economic motive for advertising their free services, "their regulated speech can *still* be classified as commercial" if the free services are "commercially valuable." App. 17a-19a. Thus, because "the medical services offered by" pregnancy centers, "such as preg-

nancy testing, ultrasounds, and nursing consultations[,] have monetary value," advertising for those services is "commercial speech." *Ibid.*

The Ninth Circuit also rejected First Resort's viewpoint discrimination argument. It recognized that the advertising restrictions apply only to centers that do not refer for abortions, but held that there was no viewpoint discrimination, because pregnancy centers "may choose not to offer * * * abortion referrals for reasons that have nothing to do with their views on abortion, such as financial or logistical reasons." App.26a-27a.

Finally, the court also rejected First Resort's argument that numerous markers of legislative intent—including the findings in the Ordinance and the City's press release announcing the Ordinance—showed that the Ordinance's purpose was to target "pro-life advocacy." "To the extent First Resort argues that the Ordinance is a viewpoint-based regulation of speech on the grounds that the City had an illicit motive," the court concluded, "that argument also fails," because "an alleged illicit legislative motive" is insufficient to render a speech regulation subject to heightened scrutiny. App.27a-28a (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision merits this Court's intervention for at least two independent reasons.

First, the Ninth Circuit's viewpoint-neutrality test conflicts with the decisions of other circuits and of this Court, and would dramatically weaken this Court's speech-protective neutrality principles. Despite this Court's decision in *Reed* v. *Town of Gilbert*, 135 S. Ct.

2218 (2015), the Eighth and Ninth Circuits both treat a government's illicit motive to discriminate against a speaker's viewpoint as irrelevant, and insufficient to trigger strict scrutiny. App.26a-28a; *Phelps-Roper* v. *Ricketts*, 867 F.3d 883 (8th Cir. 2017). By contrast, the First, Second, Third, Fourth, D.C., and Federal Circuits, and several state supreme courts, recognize that strict scrutiny is required when government acts with an improper motive to discriminate based on content or viewpoint.

This split has far-reaching implications, as demonstrated by the circumstances of this case. In holding the Ordinance viewpoint-neutral, the Ninth Circuit ignored the substantial evidence—all of it undisputed, and some of it appearing on the face of the statute itself—that the City's purpose in enacting the Ordinance was to uniquely burden "clinics that seek to counsel clients against abortion." App.74a. Left uncorrected, the Eighth and Ninth Circuits' viewpoint-neutrality tests will enable governments within those jurisdictions to freely target the speech of those with disfavored views, provided they are careful enough to do so in facially viewpoint-neutral terms. Certiorari is warranted to ensure that the First Amendment's prohibition on viewpoint discrimination remains a powerful bulwark against government interference in vital societal debates like the one that has long surrounded abortion.

Second, this Court's intervention is independently warranted to resolve the deep conflict among lower courts regarding the definition of commercial speech. Because this Court has not always spoken with perfect clarity in defining commercial speech, the Nation is governed by a patchwork of different commercial

speech tests fashioned by the lower courts. The result is doctrinal chaos, with four different—and, when applied in isolation from one another, mutually exclusive—commercial speech tests commanding the allegiance of at least one circuit or state court of last resort.

This situation is not just doctrinally untidy—it has real, case-determinative consequences. In this case, the Ninth Circuit, directly applying *Bolger* without first determining that the speech at issue proposed a commercial transaction, felt free to conclude that religiously and ideologically motivated advertisements for free services constituted "commercial speech" because the services offered were "commercially valuable" and because the advertisements may ultimately contribute to fundraising. App.16a-19a. This approach poses serious dangers to the First Amendment, as many speakers whose speech is ordinarily thought to be at the core of First Amendment protection—from legal aid organizations to medical research charities to churches—routinely advertise free but "commercially valuable" services and tell donors about their successes.

Both the viewpoint discrimination and commercial speech questions are more clearly presented in this case than in *NIFLA* and should therefore be set for plenary review. However, in the alternative, this petition should at least be held pending resolution of *NIFLA*.

I. Review is needed to resolve conflict in the lower courts concerning proper application of this Court's viewpoint-neutrality test.

The Ninth Circuit's decision partakes of two errors in applying this Court's viewpoint-neutrality test that have split the lower courts. First, in ignoring evidence that the Ordinance was enacted for the purpose of imposing special burdens on pro-life speech, the Ninth Circuit overlooked that even a facially viewpoint-neutral speech regulation may be subject to strict scrutiny if it was enacted for a viewpoint-discriminatory purpose. Second, in holding that a law does not discriminate on the basis of viewpoint unless all who adopt the allegedly targeted viewpoint do so for the same reasons, the court conflated a speaker's *motive* with her *viewpoint*, giving governments latitude to distort public debate on important issues so long as different speakers could have different reasons for adopting the burdened viewpoint. Both errors implicate important splits among the lower courts, and both warrant this Court's attention.

A. The Ninth Circuit's decision directly conflicts with decisions of other circuits and this Court concerning the test for viewpoint neutrality.

In discounting the overwhelming evidence that the City's purpose in enacting the Ordinance was to impose unique burdens on pro-life speech, the Ninth Circuit disregarded this Court's decisions and deepened an existing circuit split on the relevance of a discriminatory government motive to speech-discrimination analysis.

1. The circuit split over discriminatory motive originally arose in response to *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). *Ward* held that if the government enacted a speech regulation to discriminate on the basis of content, strict scrutiny applied. *Id.* at 791. Importantly, *Ward* involved a law that was "facially content-*neutral*," so the case "had nothing to say about facially" discriminatory restrictions. *Reed*, 135 S. Ct. at 2228 (emphasis original). Thus, *Ward* stands for the proposition that a government purpose to discriminate on the basis of content or viewpoint is sufficient to trigger strict scrutiny, even when a law does not facially discriminate on the basis of content or viewpoint. *Id.* at 2227-29.

After *Ward*, however, some lower courts interpreted the decision to mean that a discriminatory government purpose was not just *sufficient*, but *necessary*, to trigger strict scrutiny. For these courts, "it did not matter if a law regulated speakers based on what they said"; "so long as the regulation of speech was not imposed *because of* government disagreement with the message," the law would be treated as content- and viewpoint-neutral. *Norton* v. *City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015) (Manion, J., concurring) (emphasis added); see also *McCullen* v. *Coakley*, 571 F.3d 167, 176 (1st Cir. 2009), *rev'd*, 134 S. Ct. 2518, ("Our principal inquiry * * * 'is whether the government has adopted a regulation of speech because of disagreement with the message.'") (quoting *Ward*, 491 U.S. at 791). For example, in *Reed* v. *Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), *rev'd*, 135 S. Ct. 2218, the Ninth Circuit held that a town sign code that facially imposed different treatment for different signs based on their content was content-neutral, because it

was not adopted because of governmental disagreement with any sign's message. *Id.* at 1071-72.

This Court reversed, explaining that "regardless of the government's benign motive," "[a] law that is content [or viewpoint] based on its face is subject to strict scrutiny." 135 S. Ct. at 2228. At the same time, the Court held that this inquiry into facial neutrality *supplements*, but does not *replace*, the inquiry into whether a law has a content- or viewpoint-discriminatory purpose. A facially content- and viewpoint-neutral law is still subject to strict scrutiny if motivated by an "[i]llicit legislative intent"—for example, "to suppress disfavored speech" or express "disagreement with the message the [regulated] speech convey[s]." *Id.* at 2227-29 (internal quotation marks omitted) (citing *Ward*, 491 U.S. at 791).

Despite *Reed*'s seeming clarity, some lower courts—apparently convinced that there should be only one path to strict scrutiny—have held, post-*Reed*, that *only* facial discrimination, and not a discriminatory purpose, can trigger strict scrutiny. These courts fail to recognize that *Reed* "operate[s] 'to protect speech,' not 'to restrict it.'" *Id.* at 2229 (quoting *Hill* v. *Colorado*, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting)). The Court should grant certiorari to resolve the lower courts' misinterpretation of *Reed*.

2. Several circuit and state supreme courts have

gotten *Reed* right. In particular, the First,[2] Second,[3] Third,[4] Fourth,[5] D.C.,[6] and Federal[7] Circuits, as well

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[2] *March* v. *Mills*, 867 F.3d 46, 54-55 (1st Cir. 2017) (under *Reed*, "[t]here are two distinct ways in which a regulation may be deemed to be content based," facial content discrimination, and content-discriminatory purpose).

[3] *Time Warner Cable Inc.* v. *F.C.C.*, 729 F.3d 137, 155-56 (2d Cir. 2013) ("[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." (internal quotation marks omitted)).

[4] *Free Speech Coal., Inc.* v. *Att'y Gen. U.S.*, 825 F.3d 149, 160 (3d Cir. 2016) (applying the *Reed* two-step analysis, concluding "[o]nly if a law is content neutral on its face may we then look to any benign purpose").

[5] *Cahaly* v. *Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (under *Reed*'s "second step, a facially content-neutral law will still be categorized as content based if it cannot be justified without reference to the content of the regulated speech" or if it was adopted because of disagreement with its message) (internal quotation marks omitted).

[6] *Pursuing Am.'s Greatness* v. *Fed. Election Comm'n*, 831 F.3d 500, 509 (D.C. Cir. 2016) (Under *Reed*, "we should look to purpose only if the text of the law is not content based.").

[7] *In re Tam*, 808 F.3d 1321, 1335 (Fed. Cir. 2015), *aff'd sub nom. Matal* v. *Tam*, 137 S. Ct. 1744 (2017) (law at issue "target[ed] 'viewpoints in the marketplace' * * * as a matter of avowed and undeniable purpose").

as the supreme courts of Kentucky[8] and North Carolina,[9] have each recognized that a governmental purpose to discriminate on the basis of content or viewpoint still suffices to trigger strict scrutiny.

Other courts have held post-*Reed* that governmental purpose to discriminate on the basis of content or viewpoint does not suffice. In this case, for instance, the panel expressly refused to consider abundant evidence that the City enacted the Ordinance specifically to target pro-life speech. App.27a-28a. The panel held that "[t]o the extent First Resort argues that the Ordinance is a viewpoint-based regulation of speech on the grounds that the City had an illicit motive, that argument * * * fails," because courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Ibid.* (internal quotation marks omitted). The Ninth Circuit reached the same conclusion in *NIFLA*, holding that even if "a stat-

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[8] *Champion* v. *Commonwealth*, 520 S.W.3d 331, 337 (Ky. 2017) ("[P]urpose is only relevant to this analysis after concluding that the regulation is facially content-neutral," "[s]trict scrutiny applies * * * when the purpose and justification for the law are content based," and "a court must evaluate each question [of *Reed*'s two-part inquiry] before it concludes that the law is content neutral and thus subject to a lower level of review" (internal quotation marks omitted)).

[9] *State* v. *Bishop*, 787 S.E.2d 814, 819 (N.C. 2016) (*Reed* "clarified that several paths can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny," including "the animating impulse behind" the law).

ute's stated purpose may also be considered," a viewpoint-discriminatory "legislative intent" is insufficient to trigger strict scrutiny. *NIFLA* v. *Harris*, 839 F.3d 823, 836 (9th Cir. 2016).

The Eighth Circuit has reached the same conclusion. In *Phelps-Roper* v. *Ricketts*, 867 F.3d 883 (8th Cir. 2017), the plaintiffs argued that a law prohibiting funeral picketing was viewpoint-based because the legislative history indicated that it was passed specifically to prohibit *their* picketing. *Ibid.* But the court said this was irrelevant: "[r]egardless of any evidence of the Nebraska legislature's motivation for passing the [law], the plain meaning of the text controls, and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face." *Id.* at 892 (internal quotation marks omitted).

Thus, although this Court has held that there are two paths to strict scrutiny, the Eighth and Ninth Circuits—disagreeing with six other circuits and two state supreme courts—hold that only facial discrimination counts. This Court should grant review to resolve this split.

3. A separate but related split concerns some courts' conclusion that the private speaker's motive for speaking *is* relevant to viewpoint-discrimination analysis. In these cases, courts have held that a law targeting one category of speech within a broader subject matter is viewpoint-neutral if different speakers could (hypothetically) have different reasons for engaging in the targeted speech.

Justice Kennedy's four-Justice concurring opinion in *Matal* v. *Tam*, 137 S. Ct. 1744 (2017), suggests that

this interpretation is wrong. In *Matal*, this Court held unconstitutional a federal statute prohibiting the registration of "disparag[ing]" trademarks. 137 S. Ct. at 1751. The government argued that the law was viewpoint-neutral because "the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark." *Id.* at 1766. But the Court found the law viewpoint-based. *Id.* at 1763 (opinion of Alito, J.); 1765-67 (opinion of Kennedy, J.). As Justice Kennedy explained, "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate." *Id.* at 1767 (Kennedy, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring). This danger is realized whenever the government "single[s] out * * * for disfavor" a "subset of messages" from some larger "subject category"—regardless of *why* the speaker chooses to deliver the message. *Id.* at 1766.

The Ninth Circuit's decision here directly conflicts with this clear guidance. The Ninth Circuit reasoned that although the Ordinance applies only to pregnancy centers who do not provide or refer for abortions, it is not viewpoint-based, because speakers could have different *reasons* for not providing or referring for abortions, which might "have nothing to do with their views on abortion." App.26a. This confusion of a

speaker's *motive* with her *viewpoint* is precisely what Justice Kennedy's concurrence rejected in *Matal*.[10]

The Fourth Circuit has adopted the same approach as the Ninth Circuit. In *Greater Baltimore*, the en banc Fourth Circuit reversed the district court's conclusion that a law applying only to pregnancy centers that do not provide or refer for abortions was viewpoint-based, relying on the court's own speculation about speaker purposes. *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 721 F.3d 264, 288 (4th Cir. 2013) (en banc). In language later adopted by the Ninth Circuit, the *Greater Baltimore* court thought that because there *might* be pregnancy centers that do not refer for abortion but have "no moral or religious qualms" about abortion, the law was not viewpoint based. 721 F.3d at 288 (internal quotation marks omitted). Only after years of litigation and discovery revealed none did the Fourth Circuit finally find the law viewpoint-based at least as applied to the plaintiff pregnancy center. *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 879 F.3d 101, 111-12 (4th Cir. 2018).

In contrast to the Fourth and Ninth Circuits, the Seventh and Federal Circuits have recognized that there is a distinction between a speaker's purpose and

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[10] The Ninth Circuit's conclusion is settled. In *Nurre* v. *Whitehead*, the Ninth Circuit found no viewpoint discrimination against religious speech when the school prohibited the playing of *Ave Maria*, reasoning that the speaker (a piano player) "was not attempting to express any specific religious viewpoint, but * * * sought only 'to play a pretty piece.'" 580 F.3d 1087, 1095 n.6. (9th Cir. 2009).

her viewpoint, and that only the latter is relevant to the viewpoint discrimination inquiry.

In *Air Line Pilots Association, International* v. *Department of Aviation of City of Chicago*, the Seventh Circuit reversed the district court's determination that an airport had not committed viewpoint discrimination in denying a union's request to display a diorama criticizing airline management. 45 F.3d 1144, 1159-60 (7th Cir. 1995). The airport argued that it had excluded all "political" displays, and thus that it had not discriminated on the basis of any speaker's viewpoint. *Id.* at 1159. But the Seventh Circuit explained that "the same viewpoint can be endorsed by different speakers, for different purposes." *Id.* at 1160. Thus, the viewpoint discrimination inquiry must turn not on *why* the union submitted the display—whether for "political" reasons or otherwise—but simply on "whether or not the forum has included speech on the same general subject matter" as the proposed display; if so, then "suppression of a proposed but distinct view because of some content element included in it is impermissible" viewpoint discrimination. *Ibid.*

Similarly, in *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), the Federal Circuit adopted the viewpoint-discrimination reasoning that Justice Kennedy would later articulate in his *Matal* concurrence, rejecting the government's argument that its ban on disparaging trademarks was viewpoint-neutral because different speakers could have "diametrically opposed" reasons for adopting a disparaging trademark. *Id.* at 1337.

Had this case arisen in the Seventh or Federal Circuits, rather than the Fourth or Ninth, the viewpoint-

discrimination inquiry would have come out differently. Rather than asking whether different speakers could have different motives for engaging in the regulated speech, the court would simply have asked whether "speech on the same general subject matter" has been left unregulated, while the government has regulated "a proposed but distinct view because of some content element included in it." *Air Line Pilots Ass'n*, 45 F.3d at 1160.

4. This case may also present an opportunity to resolve confusion in the lower courts regarding the standard applicable to content- and speaker-based restrictions following *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552 (2011), which held that "heightened judicial scrutiny is warranted" for any law that imposes content-based and speaker-based restrictions on speech, even if "commercial." *Id.* at 565.[11]

The Second Circuit correctly reads *Sorrell* to require more scrutiny than *Central Hudson*-level review of commercial speech restrictions. See *United States* v. *Caronia*, 703 F.3d 149, 163-64 (2d Cir. 2012) (if a commercial speech regulation is content-and speaker-based it is "presumptively invalid").

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[11] Several courts have recognized the confusion in the wake of *Sorrell*, but have not yet answered the question of what level of scrutiny applies. See *Ocheesee Creamery LLC* v. *Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) (recognizing "troubled waters"); *Educ. Media Co. at Va. Tech, Inc.* v. *Insley*, 731 F.3d 291, 298 n.4 (4th Cir. 2013) ("To be sure, the question of whether *Sorrell*'s 'heightened scrutiny' is, in fact, strict scrutiny remains unanswered.")

By contrast, the Eighth and Ninth Circuits hold that content-based, speaker-based restrictions of commercial speech are entitled to review under only the same, intermediate, *Central Hudson* test applicable to benign commercial speech regulations. See *1-800-411-Pain Referral Service LLC* v. *Otto*, 744 F.3d 1045, 1054-55 (8th Cir. 2014); *Retail Digital Network, LLC* v. *Prieto*, 861 F.3d 839, 849 (9th Cir. 2017) (en banc).

The Ordinance is unquestionably content-based and speaker-based. Thus, because the Ninth Circuit has treated this case as a "commercial speech" case (over Petitioner's objections), this case may present an opportunity to resolve the conflict in authorities regarding *Sorrell*, too.

B. This conflict concerning the test for viewpoint neutrality raises an issue of national importance that merits review now.

1. Unless this Court fully resolves these issues in *NIFLA*, review is necessary here. The core function of the Speech Clause's prohibition on viewpoint discrimination is to prevent the government from picking winners and losers in societal debates about important issues—from "giv[ing] one side of a debatable public question an advantage in expressing its views." *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 785 (1978). To achieve this goal, however, the doctrine has to work in practice—courts must know what is relevant to determining whether viewpoint discrimination has occurred. The government's motive *is* relevant—indeed, "flush[ing] out illicit motives" has been described as a "primary * * * object" of "First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The*

Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996). But the speaker's motive is not, because no matter *why* a speaker adopts a viewpoint, censoring that viewpoint will artificially disadvantage it in the marketplace of ideas.[12]

2. This case also provides an opportunity to show that the viewpoint-discrimination standard applies across all categories of speech, including "commercial speech." The lower court—in a conclusion that is itself certworthy, see *infra* Part II—held that the Ordinance regulates only "commercial speech." But that conclusion, even if correct, would not exempt the Ordinance from the prohibition on viewpoint discrimination.

This Court has long indicated that the prohibition against viewpoint discrimination applies to commercial speech. In *R.A.V.* v. *City of St. Paul*, for example, the Court held that even within categories of speech considered "outside" the scope of traditional First Amendment protections, the government has no authority to selectively regulate speech. 505 U.S. 377, 391-92, 402-03 (1992). It illustrated this principle with a commercial speech example: "a State may choose to regulate price advertising in one industry but not in

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[12] A law prohibiting yard signs endorsing Libertarian, and only Libertarian, candidates is in most courts the epitome of viewpoint discrimination. Yet in the Ninth Circuit the law is viewpoint-neutral. After all, a court could hypothesize speakers with reasons for wanting to post a Libertarian yard sign that "have nothing to do with their" preference for Libertarian candidates, App.26a—for example, as a joke, or just to be contrarian. That cannot be the law.

others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a state may not prohibit only that commercial advertising that depicts men in a demeaning fashion." *Id.* at 388-89 (citations omitted).

The plurality in *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), likewise indicated that commercial speech is no exception from the general prohibition on viewpoint discrimination. The *44 Liquormart* plurality said "it is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance." *Id.* at 510, 513.

Finally, in *Matal*, five Justices, in two different concurrences, recognized that viewpoint discrimination triggers strict scrutiny even in the commercial speech context. Justice Kennedy's concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, stated that "viewpoint based discrimination * * * necessarily invokes heightened scrutiny," and "remains of serious concern in the commercial context." 137 S. Ct. at 1767. And Justice Thomas's concurrence reiterated his longstanding view that even content-based regulations of commercial speech should be subject to strict scrutiny. *Id.* at 1769.

Following these opinions, several lower courts have correctly recognized that "merely wrapping a law in the cloak of 'commercial speech' does not immunize it from the highest form of scrutiny due government attempts to discriminate on the basis of viewpoint." *Dana's R.R. Supply* v. *Att'y Gen., Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015); see also *Wandering Dago, Inc.*

v. *Destito*, 879 F.3d 20, 39 (2d Cir. 2018) ("*Matal* instructs that viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context.").

The Court could use this case to affirm these lower courts' readings of its opinions, and confirm that viewpoint discrimination triggers strict scrutiny even if the regulated speech is "commercial."

II. Review is also warranted to correct the Ninth Circuit's dangerously overbroad definition of "commercial speech."

Since its earliest commercial speech cases, this Court has held that for speech to be "commercial," it must involve a proposal to engage in a commercial transaction. *Virginia Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). By dispensing with this requirement, the Ninth Circuit disregarded this Court's precedents and disagreed with numerous other courts.

If unmoored from any connection to a commercial transaction, the commercial speech doctrine will swallow vast swaths of speech at the core of First Amendment protection. This Court's review is therefore needed not only to restore uniformity to the commercial speech doctrine, but also to prevent lower courts from upholding ideologically motivated speech regulations like the Ordinance under the lower-tier commercial speech scrutiny.

A. The Ninth Circuit's decision directly conflicts with decisions of other circuits and this Court concerning the test for "commercial speech."

1. The Court has maintained from the commercial speech doctrine's beginnings that speech is "commercial" if it proposes a commercial transaction. Nevertheless, a four-way split over the definition of "commercial" has developed in the lower courts.

In *Virginia Board of Pharmacy*, the Court explained that "speech which does no more than propose a commercial transaction" is "commercial speech." 425 U.S. at 762. The Court later revisited the commercial speech doctrine in *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). There, the Court reiterated that commercial speech is "speech proposing a commercial transaction." *Id.* at 562. But the Court also said that the law at issue "restrict[ed] only commercial speech, *that is, expression related solely to the economic interests of the speaker and its audience*." *Id.* at 561 (emphasis added). In *Central Hudson*, the parties agreed that the speech at issue was commercial, *id.* at 560-61, so the Court likely did not intend for its economic-interests aside to replace *Virginia Board of Pharmacy's* propose-a-commercial-transaction test. Nonetheless, in his concurrence, Justice Stevens accused the majority of expanding the definition of speech past *Virginia Board of Pharmacy* in a way that would impermissibly "encompass[ ] speech that is entitled to the maximum protection afforded by the First Amendment." *Id.* at 579-80 (Stevens, J., concurring in the judgment).

This Court again addressed commercial speech in *Bolger*, in considering whether informational pamphlets mailed by a contraceptive manufacturer constituted commercial speech. 463 U.S. at 65-68. There, the Court reiterated that under *Virginia Board of Pharmacy*, the "core notion of commercial speech" is "'speech which does no more than propose a commercial transaction.'" *Id.* at 66 (quoting *Va. Bd. of Pharm.*, 425 U.S. at 762). But the Court explained that speech that does not "*merely* * * * propos[e] to engage in commercial transactions," but also "contain[s] discussion[] of important public issues," may also be characterized as commercial. *Id.* at 66-68 (emphasis added). In evaluating speech like this—that is, speech that occurs "in the context of commercial transactions" but includes elements other than just transaction proposals—the *Bolger* Court held that courts should consider three factors to determine whether the speech as a whole should be treated as commercial: whether it constitutes an "advertisement[]"; whether it "reference[s] a specific product"; and whether the speaker "has an economic motivation for" speaking. *Ibid.*

Finally, post-*Bolger*, this Court has repeatedly reiterated that "*the test*" for commercial speech is whether it is a "proposal of a commercial transaction." *City of Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410, 423 (1993) (quoting *Bd. of Trustees of State Univ. of New York* v. *Fox*, 492 U.S. 469, 473-74 (1989)) (emphasis in *Discovery Network*). Indeed, in *Harris* v. *Quinn*, this Court went out of its way to reaffirm that its "precedents define commercial speech as speech that does no more than propose a commercial transaction." 134 S. Ct. 2618, 2639 (2014) (quotation omitted)

(speech at issue not commercial because it "does much more than that").

2. Despite the varying formulations employed over the decades, this Court has not departed from the bedrock requirement that commercial speech is speech that—whatever else it also might do—at least proposes a commercial transaction. And, following the two-step *Bolger* framework, this Court's commercial-speech definitions are reconcilable. Under that framework, if speech "*merely*" proposes a commercial transaction, it is commercial speech, and the inquiry ends. See *Bolger*, 463 U.S. at 66. But if speech, in addition to proposing a commercial transaction, also includes "comments on public issues" or other noncommercial elements, the *Bolger* factors determine whether the speech as a whole should be classified "commercial." *Id.* at 66-68. This two-step 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.* at 68.

If, however, *Bolger* is viewed as a *substitute* for the propose-a-commercial-transaction test, rather than a tool for categorizing speech that both proposes a commercial transaction and speaks to other matters, then these definitions plainly conflict with one another. A prime example is philanthropically or religiously motivated advertisements for free services—for example, a church's advertisements for its worship services, or a food bank's ads. This speech does not propose any commercial transaction; the church asks only for attendance, and the food bank asks only that the needy

come and be fed. But under the *Bolger* factors, such speech: (1) is an advertisement; (2) mentions specific services (worship services for the church; food distribution for the food bank); and (3) may be motivated by at least "*an* economic motivation" (the church will presumably pass the plate; the food bank's ads may spur those with resources to contribute food or money). *Id.* at 67 (emphasis added).

Thus, this speech could be deemed "commercial" if *Bolger* were applied directly, without first imposing the threshold requirement of a transaction proposal. But that would lead to the absurd result of core speech being subject to lower levels of protection as "commercial" speech. See *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943) (rejecting as absurd the notion that "the passing of the collection plate in church would make the church service a commercial project"); *Reed*, 135 S. Ct. at 2225, 2227 (church's "advertise[ments of] the time and location of [its] Sunday church services" were fully protected speech). Cf. *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech * * *.").

3. Lower courts and commentators have seen this Court's commercial speech definitions as conflicting. They have described this Court's cases on the definition of commercial speech as leaving "doctrinal uncertainties" in their "wake," *Bad Frog Brewery, Inc.* v. *N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998); as "veer[ing] wildly between divergent and inconsistent approaches," Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 3 (2000); as being "unpredictable and confusing," J.

Wesley Earnhardt, Nike, Inc. *v.* Kasky*: A Golden Opportunity to Define Commercial Speech—Why Wouldn't the Supreme Court Finally "Just Do It™"?*, 82 N.C. L. Rev. 797, 797-98 (2004); as "offer[ing] a number of different—and not always consistent—definitions of commercial speech," Martin H. Redish, *Commercial Speech, First Amendment Intuitionism, and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 74 (2007); and as, simply, "a mess." Kathryn E. Gilbert, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 Mich. L. Rev. 591, 595 (2013). Reflecting this view, the lower courts have fractured into a four-way split over the definition of commercial speech.

First, eleven state supreme courts appear to recognize only this Court's propose-a-commercial-transaction test.[13] These courts do not apply the *Bolger* factors at any step in the analysis.

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[13] *City of Skagway* v. *Robertson*, 143 P.3d 965, 968 (Alaska 2006); *Joe Dickerson & Assocs., LLC* v. *Dittmar*, 34 P.3d 995, 1004 (Colo. 2001); *Cent. Maine Power Co.* v. *Pub. Utilities Comm'n*, 734 A.2d 1120, 1125-26 (Me. 1999); *Nefedro* v. *Montgomery Cty.*, 996 A.2d 850, 860-61 (Md. 2010); *Bulldog Inv'rs Gen. P'ship* v. *Sec'y of Commonwealth*, 953 N.E.2d 691, 702 (Mass. 2011); *PHE, Inc.* v. *State*, 877 So. 2d 1244, 1250 (Miss. 2004); *J.Q. Office Equip. of Omaha, Inc.* v. *Sullivan*, 432 N.W.2d 211, 213-14 (Neb. 1988); *Erwin* v. *State*, 908 P.2d 1367, 1371 (Nev. 1995); *New Mexico Life Ins. Guar. Ass'n* v. *Quinn & Co.*, 809 P.2d 1278, 1288

Meanwhile, the First Circuit and the highest courts of twelve states apply an alternative definition of commercial speech they derive from *Central Hudson*.[14] In these jurisdictions, "commercial speech * * *

(N.M. 1991); *State ex rel. McGraw* v. *Imperial Mktg.*, 472 S.E.2d 792, 805 nn.44-45 (W.Va. 1996); *In re Disciplinary Proceedings Against Hupy*, 799 N.W.2d 732, 752 (Wis. 2011).

A Ninth Circuit panel briefly joined these courts, holding that this Court's post-*Bolger* cases had "pared down the definition of commercial speech" to just transaction proposals, *Thomas* v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999), but the case was dismissed en banc on ripeness grounds. *Thomas* v. *Anchorage Equal Rights Com'n*, 192 F.3d 1208 (Mem.) (9th Cir. 1999) (en banc).

[14] *El Dia, Inc.* v. *P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 115 (1st Cir. 2005); *Ex parte Walter*, 829 So. 2d 186, 190 (Ala. 2002); *Culpepper* v. *Arkansas Bd. of Chiropractic Examiners*, 36 S.W.3d 335, 338 (Ark. 2001); *Grievance Comm. for Hartford-New Britain Judicial Dist.* v. *Trantolo*, 470 A.2d 235, 238 (Conn. 1984); *Florida Bar* v. *Fetterman*, 439 So. 2d 835, 839 (Fla. 1983); *State* v. *Musser*, 721 N.W.2d 734, 743 (Iowa 2006); *Gregory* v. *La. Bd. of Chiropractic Examiners*, 608 So. 2d 987, 989 (La. 1992); *Mont. Cannabis Indus. Ass'n* v. *State*, 368 P.3d 1131, 1149 (Mont. 2016); *Carlson's Chrysler* v. *City of Concord*, 938 A.2d 69, 72 (N.H. 2007); *E & J Equities, LLC* v. *Bd. of Adjustment of the Twp. of Franklin*, 146 A.3d 623, 634 (N.J. 2016); *Matter of Von Wiegen*, 470 N.E.2d 838, 841-42 (N.Y. 1984); *S & S Liquor*

is defined as expression related solely to the economic interests of the speaker and its audience." *El Dia*, 413 F.3d at 115.

Seven circuits, by contrast, follow *Bolger* in recognizing two categories of commercial speech.[15] In these circuits, speech that "does no more than propose a commercial transaction" is considered "core" commercial speech, while the *Bolger* factors are applied to determine "whether a communication *combining*" "commercial and noncommercial elements" should be treated as commercial speech. *Bad Frog Brewery*, 134 F.3d at 97 (emphasis original).

Finally, five circuits—including the Ninth Circuit here—and two state high courts, while sometimes acknowledging other tests, apply the *Bolger* factors to all speech, not just to speech that combines a transaction

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Mart, Inc. v. *Pastore*, 497 A.2d 729, 732-33 (R.I. 1985); *Bell-South Advert. & Publ'g Corp.* v. *Tenn. Regulatory Auth.*, 79 S.W.3d 506, 518-19 (Tenn. 2002).

[15] *Bad Frog Brewery*, 134 F.3d at 97; *Semco, Inc.* v. *Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995); *Jordan* v. *Jewel Food Stores, Inc.*, 743 F.3d 509, 516-17 & n.6 (7th Cir. 2014); *Proctor & Gamble Co.* v. *Haugen*, 222 F.3d 1262, 1274-75 (10th Cir. 2000); *Edward Lewis Tobinick, MD* v. *Novella*, 848 F.3d 935, 950 (11th Cir. 2017); *Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

proposal with noncommercial elements.[16] In these jurisdictions, whether or not speech proposes a commercial transaction, it generally will be deemed "commercial" if (1) it is an advertisement; (2) it references a specific service or product; and (3) the speaker has at least "an economic motivation" for engaging in it.

4. This kaleidoscope of approaches to defining commercial speech undermines the rule of law, creates speech-chilling uncertainty about the line between commercial and fully protected speech, and generates inconsistent results—a consequence on full display in the specific context of cases challenging pregnancy-center speech regulations.

For example, several courts have correctly held that pregnancy centers that provide all their services for free cannot be regulated under the commercial speech doctrine—but on different rationales. In *Centro Tepeyac* v. *Montgomery County*, 779 F. Supp. 2d 456 (D. Md. 2011), for instance, the court applied only the propose-a-commercial-transaction test, concluding that because the pregnancy center did "not engage in any commercial transactions with its patrons at all," its speech by definition was not "commercial." *Id.* at 463-65. Meanwhile, in *Evergreen Ass'n, Inc.* v. *City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011), *aff'd in part, vacated in part on other grounds*, 740 F.3d 233

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[16] App.14a-15a; see also *Facenda* v. *N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008); *Greater Balt.*, 721 F.3d at 284-85; *Proctor & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001); *Dryer* v. *Nat'l Football League*, 814 F.3d 938, 943 (8th Cir. 2016); *Kasky* v. *Nike, Inc.*, 45 P.3d 243, 253-55 (Cal. 2002); *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W.2d 176, 180-81 (N.D. 1986).

(2d Cir. 2014), the court read this Court's precedents as articulating "*two* * * * definitions of commercial speech"—the propose-a-commercial-transaction test, and *Central Hudson*. *Id.* at 204 (emphasis added). The court then held that the pregnancy centers' speech met neither definition, because, first, "the offer of free services such as pregnancy tests * * * does not propose a commercial transaction"; and second, the plaintiffs' counseling and advertising were "grounded in their opposition to abortion and emergency contraception," not "solely" in their economic interests. *Id.* at 205-06.

But three courts—including the Ninth Circuit below—have taken yet another approach to defining commercial speech in pregnancy-center cases. App.13a-19a; *Greater Balt.*, 721 F.3d at 284-88; *Larson*, 381 N.W.2d at 180-81. Rather than applying the propose-a-commercial-transaction test (either alone or as a threshold inquiry) or *Central Hudson*, these courts apply *Bolger* directly. Further, seizing on the *Bolger* Court's statement that none of its factors need "necessarily be present in order for speech to be commercial," 463 U.S. at 67 n.14, these courts have suggested that not even "an economic motivation" is necessary. *Greater Balt.*, 721 F.3d at 285-86; see also App.17a. These courts have thus held that the speech of a pregnancy center that provides all its services for free may nonetheless be "commercial" if it is offered "in a commercial context," *Larson*, 381 N.W.2d at 181; see also App.17a-19a (finding *Larson* "persuasive"); *Greater Balt.*, 721 F.3d at 286 (approving *Larson*); which the court below took to mean if the speech could

prove useful in fundraising and if the center's free services are "commercially valuable." App.18a.[17]

B. This conflict concerning the test for commercial speech merits review now.

1. This conflict merits this Court's attention because the commercial speech definition *matters*. In many contexts, whether speech is "commercial" or not often determines whether it is protected or not. For example, with commercial speech, the government can compel disclosures of "purely factual and uncontroversial information" subject to low-level scrutiny, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); not so elsewhere. *False* commercial speech is sometimes characterized as categorically "unprotected," like fighting words or defamation, see *Cent. Hudson*, 447 U.S. at 563; while false speech generally is *not* a "category that is presumptively unprotected." *United States* v. *Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion). And the First Amendment "overbreadth doctrine does not apply to commercial speech." *Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

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[17] In *Greater Baltimore*, discovery ultimately revealed that the "clearest motivation" of the pregnancy center there was "not economic," and that the relationship "between clinic patronage and fundraising [was] too attenuated" for the commercial speech doctrine to apply. *Greater Balt.*, 879 F.3d at 109. But the court noted that the result could have been different had a clearer link to fundraising been established. *Ibid.*

This Court recognized the certworthiness of the definition of commercial speech in *Nike* v. *Kasky*, 539 U.S. 654 (2003). There, the California Supreme Court, although invoking *Bolger*, articulated three factors distinct from the *Bolger* factors that it said defined commercial speech in the context of "laws aimed at preventing * * * commercial deception." *Kasky* v. *Nike, Inc.*, 45 P.3d 243, 256-58 (Cal. 2002). This Court granted certiorari to decide whether the California Supreme Court had correctly defined commercial speech, 539 U.S. at 674-78 (Breyer, J., dissenting); but ultimately dismissed the case as improvidently granted because of jurisdictional defects. *Id.* at 655 (per curiam), 657-58 (Stevens, J., concurring). This case provides another opportunity for this Court to standardize the commercial speech doctrine. See generally Jennifer L. Pomeranz, *Are We Ready for the Next* Nike *v.* Kasky*?*, 83 U. Cin. L. Rev. 203 (2014); Earnhardt, 82 N.C. L. Rev. 797 (2004).

2. But this case is not just *a* vehicle for fixing the commercial-speech doctrine—it is the best one, because the particular approach taken by the Ninth Circuit here is so radical. Thus, if the Court does not reach the commercial speech issue in *NIFLA* (where the Ninth Circuit devoted a footnote to the issue), it should grant review here.

The Ninth Circuit's holding that advertisements for free services, even if religiously and ideologically motivated, can constitute commercial speech if they could ultimately be "useful in fundraising" and advertise services that are "commercially valuable" "in a competitive marketplace," App.16a-18a, would "represent a breathtaking expansion of the commercial speech doctrine." *Evergreen*, 801 F. Supp. 2d at 205-06

(rejecting precisely this theory). Virtually all mission-oriented organizations engage in fundraising, virtually everything those organizations do has commercial value in a marketplace somewhere, and virtually all those organizations tout their accomplishments to potential donors. See, *e.g.*, Supreme Court Historical Society, *Make a Donation*, https://goo.gl/8NvaZY; Harvard Law School, *Campaign for the Third Century*, https://goo.gl/1kdKtA.

Apart from this far-reaching impact, however, the Ninth Circuit's decision will play an even more immediate role: as the lead authority invoked to support other one-sided pregnancy-center advertising restrictions like the Ordinance. In the time since the District Court first upheld the Ordinance, two jurisdictions—Oakland, California, and Hartford, Connecticut—have enacted copycats of the Ordinance. See Br. for First Resort at 15a-25a, 62a-76a, *NIFLA*, No. 16-1140 (reproducing Oakland and Hartford laws). And more are sure to follow: soon after the Ninth Circuit's decision, the Ordinance was hailed by pro-choice advocates as "a roadmap for adopting similar ordinances" in other jurisdictions, "[b]ecause it was" already "upheld by the Ninth Circuit." Courthouse News Service, *Ninth Circuit Upholds Law Against Misleading Anti-Abortion Ads*, June 28, 2017, https://goo.gl/JnFQQN.

In short, without this Court's intervention, the question whether religiously motivated advertisements for free services are "commercial speech" is sure to recur—first, perhaps, in other pregnancy center cases involving "false advertising" laws, then elsewhere.

III. In the alternative, this petition should be held for *NIFLA*.

For the reasons above, this case should be set for plenary review. In the alternative, the petition should be held pending resolution of *NIFLA*.

Both *NIFLA* and this case concern viewpoint discrimination and the outer bounds of commercial speech. But this case is a better vehicle for resolving the split over the definition of commercial speech. In this case, commercial speech was the "central issue," while in *NIFLA* the panel summarily rejected the government's commercial speech argument in a footnote. See *NIFLA*, 839 F.3d at 834 n.5. And because the Ordinance regulates only *advertising* by pro-life pregnancy centers, rather than intra-clinic speech, this case more cleanly implicates the differences in the lower courts' various tests for commercial speech. See *Greater Balt.*, 879 F.3d at 108-09 (distinguishing intra-clinic speech cases from advertising cases for purposes of commercial speech doctrine).

Nonetheless, this Court could resolve *NIFLA* in a way that creates a "reasonable probability that the Court of Appeals" in this case "would reject a legal premise on which it" originally "relied" in light of *NIFLA*. *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001). Therefore, the Court should at least hold this petition pending *NIFLA*.

CONCLUSION

The Court should grant the petition and set it for plenary review, or in the alternative hold the petition pending resolution of *NIFLA*.

Respectfully submitted.

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FEBRUARY 2018

APPENDIX

APPENDIX TABLE OF CONTENTS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FIRST RESORT, INC., *Plaintiff-Appellant,* v. DENNIS J. HERRERA, in his official capacity as City attorney of the City of San Francisco; BOARD OF SUPERVISORS OF THE CITY & COUNTY OF SAN FRANCISCO; CITY AND COUNTY OF SAN FRANCISCO, *Defendants-Appellees.*	No. 15-15434 D.C. No. 4:11-cv-5534-SBA OPINION

Appeal from the United States District Court for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding
Argued and Submitted November 15, 2016

San Francisco, California

Filed June 27, 2017

Before: Dorothy W. Nelson, A. Wallace Tashima, and John B. Owens, Circuit Judges.

Opinion by Judge D.W. Nelson; Concurrence by Judge Tashima

SUMMARY*

Constitutional Law

The panel affirmed the district court, and held that San Francisco's Pregnancy Information Disclosure and Protection Ordinance (the "Ordinance") was constitutional and not preempted by state law.

The Ordinance is a law designed to protect indigent women facing unexpected pregnancies from the harms posed by false or misleading advertising by limited services pregnancy centers ("LSPC"). First Resort, Inc., an LSPC, challenged the constitutionality of the Ordinance.

The panel held that the Ordinance is facially valid because it regulates only unprotected false or misleading commercial speech – a category of speech afforded no constitutional protection; and the Ordinance is not unconstitutionally vague.

The panel held that the Ordinance was valid as applied to First Resort. Specifically, the panel held that: the Ordinance does not regulate First Resort's protected speech; First Resort's commercial speech is not inextricably intertwined with its protected speech; and the Ordinance does not discriminate based on the particular opinion, viewpoint, or ideology of First Resort or other LSPCs.

The panel held that the Ordinance does not violate the Equal Protection Clause of the Fourteenth Amendment. The panel held that the Ordinance regulates only unprotected commercial speech, and

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

because the Ordinance does not unconstitutionally burden the fundamental right to free speech, the Ordinance is subject only to rational basis review. The panel concluded that the Ordinance was rationally related to legitimate government interests.

The panel held that the Ordinance was not preempted by California's false advertising law, Cal. Bus. & Prof. Code § 17500. The panel declined to apply duplication preemption to invalidate the Ordinance because its enforcement did not raise double-jeopardy concerns, and First Resort had not demonstrated that it duplicated state law.

Judge Tashima concurred in all of the panel's opinion, except for Part 4, as to which he remained *dubitante* (doubtful about the legal proposition but hesitant to declare it wrong). Judge Tashima was unpersuaded that the Ordinance was not preempted by California's false advertising law, and he would certify that question to the California Supreme Court.

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OPINION

NELSON, Senior Circuit Judge:

First Resort, Inc. ("First Resort") challenges the constitutionality of San Francisco's Pregnancy Information Disclosure and Protection Ordinance ("the Ordinance"), a law designed to protect indigent women facing unexpected pregnancies from the harms posed by false or misleading advertising by limited services pregnancy centers ("LSPCs"). S.F. Admin Code, ch. 93 § § 93.1–93.5. The district court granted in part Appellees' (collectively, "the City") motion to dismiss, denied First Resort's motion for summary judgment, and granted Appellees' cross-motion for summary judgment. First Resort now appeals those decisions. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court and hold the Ordinance is constitutional and not preempted by state law.

BACKGROUND

1. First Resort

Until 2014, First Resort, an LSPC, operated a state-licensed community medical clinic and advertised its services in San Francisco under the name "First Resort." Since 2014, First Resort has operated its clinic under the names "Third Box" and "Support Circle." As a non-profit corporation, First Resort provides free pregnancy-related services, including pregnancy testing, ultrasounds, and counseling. First Resort's goal is "to build an abortion-free world," and therefore it does not provide abortions or emergency contraception to its patients, nor does it refer its patients to other facilities for such services.

First Resort's target clients are women who are unsure how to proceed with unplanned pregnancies, including women considering abortion. While operating its website under the name "First Resort," the clinic utilized paid-for online advertising services, such as Google Adwords, to reach its intended audience. Upon searching for certain keywords such as "San Francisco," "abortion," and "emergency contraception," internet users were directed to First Resort's website. First Resort uses its online advertising to compete with abortion providers for viewers' attention.

Although First Resort has a clear anti-abortion agenda, the clinic advertised itself online as an unbiased and neutral organization that provided "abortion information, resources, and compassionate support for women" with "unintended pregnancies" who are "considering abortion." The website further stated that First Resort "equip[s] [women] with the re-

sources [they] need to make a well-informed decision about [their] options," and offered information about abortion procedures and costs. Notably, the website and advertising materials did not mention First Resort's anti-abortion stance or that it did not provide referrals for abortions.

2. False and Misleading Advertising by Clinics

False and misleading advertising by clinics that do not provide abortions, emergency contraception, or referrals to providers of such services has become a problem of national importance. This issue has been the subject of a congressional report and proposed federal legislation. *See* Minority Staff of H. Comm. on Gov't Reform, Special Investigations Div., *False & Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* (July 2006) (the "*Waxman Report*"); Stop Deceptive Advertising for Women's Services Act of 2013, S. 981, 113th Cong. (2013) ("A Bill [t]o direct the Federal Trade Commission to prescribe rules prohibiting deceptive advertising of abortion services. . . ."). The congressional report found that certain pregnancy resource centers "frequently fail to provide medically accurate information" and that "the vast majority of pregnancy centers" contacted during the investigation misrepresented the medical consequences of abortion. *Waxman Report* at 14. The report further concluded that while "[t]his tactic may be effective in frightening pregnant teenagers and women and discouraging abortion[,]" it "denies [them] vital health information, prevents them from making an informed decision, and is not an accepted public health practice." *Id.*

Local governments around the country, including in San Francisco, have also sought to curtail the deceptive practices of pregnancy service centers. On August 2, 2011, Supervisor Malia Cohen, a member of the Board of Supervisors of the City and County of San Francisco ("the Board"), introduced legislation aimed at preventing such deceptive practices. That same day, the City Attorney sent First Resort a letter expressing his "serious concerns" about First Resort's misleading advertisements and asking First Resort to "correct" its advertising "to clarify that the clinic does not offer or make referrals for abortion services." This is the only such letter the City Attorney sent First Resort.

At an October 18, 2011 Board meeting, various supervisors commented on the proposed legislation. Supervisor Cohen stated, "I want to remind you the purpose and intent of this Ordinance is to protect consumers of pregnancy-related services by prohibiting [LSPCs] from knowingly disseminating false or misleading advertising information about the services they provide." Supervisor Weiner said, "we are obviously balancing . . . constitutional rights here," noting that "we're all very conscious of the First Amendment," and that "this has been a narrowly drafted ordinance." Disagreeing with his colleagues, Supervisor Elsbernd argued that "the proponents of this legislation [have] made clear that their target is . . . First Resort," and that "there has been no testimony, documentation, no affidavits of any woman, any service, someone seeking service who has been misled."

On October 25, 2011, the Board passed the Ordinance in a ten-to-one vote. The Ordinance was

signed into law on November 3, 2011, and took effect on December 4, 2011.

3. The Ordinance

The Ordinance amended the San Francisco Administrative Code, adding Chapter 93, Sections 93.1 through 93.5, "to prohibit [LSPCs] from making false or misleading statements to the public about pregnancy-related services the centers offer or perform." The Ordinance is divided into five sections: (1) "Title," (2) "Findings," (3) "Definitions," (4) "Violati on," and (5) "Enforcement." *See generally* S.F. Admin. Code, ch. 93 § § 93.1–93.5.

The "Findings" section explains the impetus for the Ordinance, stating that "[i]n recent years, clinics that seek to counsel clients against abortion"—often referred to as crisis pregnancy centers ("CPCs")—"have become common throughout California." *Id.* § 93.2(5). Although some CPCs "openly acknowledge, in their advertising and their facilities, that they do not provide abortions or emergency contraception or refer clients to other providers of such service[,]" others "seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling." *Id.* § 93.2(6). "Because of the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or emergency contraception is of special concern to the City." *Id.* § 93.2(9). This is because "[w]hen a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy," and "may also lose the option to choose a

particular procedure, or to terminate a pregnancy at all." *Id.* The "Findings" section also emphasizes that the "City respects the right of [LSPCs] to counsel against abortions . . . and the City does not intend by this Chapter to regulate, limit or curtail such advocacy." *Id.* § 93.2(10).

In addition, the "Findings" section notes the City's relevant financial concerns. In particular, the Ordinance explains that if women "who have chosen to terminate a pregnancy are misled and delayed by the false advertising of CPCs, the cost of providing more invasive and expensive options may fall upon the City health facilities, which provide the medical services of last resort for the City's indigent population." *Id.* § 93.2(11).

In the "Definitions" section, the Ordinance distinguishes between a "[p]regnancy services center" and an LSPC. *Id.* § 93.3(f)–(g). A "[p]regnancy services center" is defined as "a facility, licenced or otherwise . . . the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility." *Id.* § 93.3(g). An LSPC, on the other hand, is "a pregnancy services center, as defined in subsection (g), that does not directly provide or provide referrals to clients for the following services: (1) abortions; or emergency contraception." *Id.* § 93.3(f). As explained below, the prohibition on false advertising set forth in the Ordinance only applies to LSPCs. *Id.* § 93.4.

The "Violation" section of the Ordinance provides:

> (a) *It is unlawful for any [LSPC], with intent directly or indirectly to perform pregnancy-related services* (professional or otherwise), *to make or disseminate* or cause to be made or disseminated before the public in the City, or to make or disseminate or cause to be made or disseminated from the City before the public anywhere, *in any newspaper or other publication, or any advertising device* or in any other manner or means whatever, including over the Internet, *any statement, concerning those services*, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, *which is untrue or misleading, whether by statement or omission*, that the [LSPC] knows or which by the exercise of reasonable care should know to be untrue or misleading.
>
> (b) It is unlawful for any [LSPC], with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

Id. (emphasis added).

Finally, as set forth in the "Enforcement" section, "[t]he City Attorney may enforce" the Ordinance through a civil action. *Id.* § 93.5(a). Before filing an action, however, the City Attorney must provide the LSPC with written notice of the violation and indicate that the LSPC has ten days "in which to cure

the false, misleading, or deceptive advertising." *Id.* "If the [LSPC] has not responded to the written notice within ten (10) days, or refuses to cure the false, misleading, or deceptive advertising within that period," the City Attorney may file suit against the LSPC for injunctive relief. *Id.* § 93.5(a)–(b). Further, the Ordinance provides that, "[u]pon a finding by a court . . . that [an LSPC] has violated Section 93.4 . . ., the City shall be entitled to recover civil penalties from each and every party responsible for the violation of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation." *Id.* § 93.5(c).

4. Procedural History

On November 16, 2011, First Resort brought suit against the City in the United States District Court for the Northern District of California, alleging freedom of expression, equal protection, void for vagueness, and state law preemption claims. The City moved to dismiss all claims except the freedom of expression claim. The district court denied the motion as to the equal protection claim and granted the motion with leave to amend as to the void for vagueness and preemption claims.

First Resort then filed its First Amended Complaint ("FAC") on October 11, 2012, re-alleging all claims from the original complaint except the void for vagueness claim. On March 11, 2013, the district court denied the City's new motion to dismiss the preemption claim. After the close of discovery, First Resort and the City filed cross-motions for summary judgment.

Granting summary judgment in favor of the City, the district court construed First Resort's freedom of speech claim as a facial challenge and held that the Ordinance only regulates unprotected false and misleading commercial speech and does not violate the First Amendment "in every conceivable application." *First Resort, Inc.* v. *Herrera*, 80 F. Supp. 3d 1043, 1049 (N.D. Cal. 2015) (citation omitted). The district court further held that its "determination that the Ordinance does not violate the First Amendment forecloses First Resort's claim under the Equal Protection Clause," and that because enforcement of the Ordinance "does not interfere or conflict with an enforcement action" under Section 17500 of the California Business and Professions Code, the Ordinance is not preempted by state law. *Id.* at 1054, 1057.

First Resort timely appealed, arguing that the Ordinance is an invalid content-based regulation of protected speech, is void for vagueness, impermissibly engages in viewpoint discrimination, violates the Equal Protection Clause of the Fourteenth Amendment, and is preempted by state law.

STANDARD OF REVIEW

We review de novo the district court's granting of a motion to dismiss. *Coal. to Defend Affirmative Action* v. *Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012). We also review de novo the district court's grant or denial of summary judgment, and "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law."

Wallis v. *Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002).

DISCUSSION

1. The Ordinance Is Facially Valid.

"An ordinance may be facially unconstitutional in one of two ways: 'either [ ] it is unconstitutional in every conceivable application, or [ ] it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.'" *Foti* v. *City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (quoting *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)). First Resort appears to challenge the Ordinance on both grounds. We conclude the Ordinance is facially valid because it regulates only unprotected false or misleading commercial speech and is not unconstitutionally vague.

a. The Ordinance Only Regulates Unprotected Commercial Speech.

Because the type of speech subject to regulation by the Ordinance is a threshold issue, we must first determine whether the Ordinance only regulates false or misleading commercial speech. This question lies at the heart of the dispute, because while commercial speech is generally subject to intermediate scrutiny, the Constitution affords no protection to false or misleading commercial speech. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to de-

ceive the public than to inform it. . . .") (internal citations omitted). First Resort argues that the Ordinance regulates all advertising, not only false or misleading advertising, and that the Ordinance is subject to heightened scrutiny because it regulates only non-commercial speech. We disagree.

First, the argument that the Ordinance regulates *all* advertising is unavailing. The Ordinance clearly makes "unlawful . . . any statement . . . which is untrue or misleading" concerning services provided by LSPCs. S.F. Admin. Code § 93.4(a). Because the Ordinance plainly regulates only false or misleading speech, the central issue therefore is whether the regulated speech should be characterized as commercial.

As we have previously explained, "[c]ommercial speech is 'defined as speech that does no more than propose a commercial transaction.'" *Hunt* v. *City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011) (quoting *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001)); *see also Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 473–74 (1989) (stating the commercial transaction test is "the test for identifying commercial speech"). Our commercial speech "analysis is fact-driven, due to the inherent 'difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.'" *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 721 F.3d 264, 284 (4th Cir. 2013) (quoting *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 419 (1993)). Under *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), "[w]here the facts present a close question, 'strong support' that the speech should be characterized as commercial speech

is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation." *Hunt*, 638 F.3d at 715 (quoting *Bolger*, 463 U.S. at 66–67 and describing the *Bolger* test). However, while "[t]he combination of *all* these characteristics . . . provides strong support for the . . . conclusion that [regulated speech is] properly characterized as commercial speech," *Bolger*, 463 U.S. at 67, each characteristic need not "necessarily be present in order for speech to be commercial," *id.* at 67 n.14.

This case is not the first time we have addressed the commercial speech doctrine in the context of medical service providers. In *American Academy of Pain Management* v. *Joseph*, 353 F.3d 1099 (9th Cir. 2004), we held that advertisements for paid medical services constituted commercial speech under the *Bolger* test. *Id.* at 1106. There, a non-profit organization and two of its member doctors challenged a provision of a California state law prohibiting doctors from advertising they were "board certified" unless the certifying board satisfied certain requirements. *Id.* at 1103–05. Holding that the state law regulated only commercial speech under *Bolger*, we explained: "The statute . . . identifies that the object of its regulation is 'advertising.' The advertising regulated relates to a specific product, medical services. Finally, the advertiser has an economic motive for engaging in this kind of speech, which is to solicit a patient base." *Id.* at 1106.

As in that case, the Ordinance states that its purpose is to regulate advertising related to a similar product: limited medical services offered by LSPCs. *See* S.F. Admin. Code § 93.2(12) ("[T]he City has de-

termined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services."); *id.* § § 93.3(f)–(g), 93.4(a). Further, the regulated LSPCs have at least one similar economic motive for engaging in false advertising: to solicit a patient base.

First Resort attempts to distinguish *American Academy* on the grounds that the patients in that case were paying clients who provided a monetary—and therefore economic—motivation for doctors to advertise. Thus, according to First Resort, LSPCs do not have a similar economic motive to solicit patients because they do not necessarily receive payments from patients for services rendered.

We decline to limit *American Academy*'s holding to circumstances where clients pay for services. Here, the solicitation of a non-paying client base directly relates to an LSPC's ability to fundraise and, in turn, to buy more advertisements. Indeed, as explained in the Joint Statement of Undisputed Facts submitted in support of the parties' cross-motions for summary judgment, "First Resort's employees are encouraged to share client stories because they are useful in fundraising," and "[a] majority of First Resort's fundraising communications reference the benefit of its services to clients and often include client stories." Furthermore, at least in the case of First Resort, successful advertising directly affects 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." Because LSPCs utilize advertising to maintain a patient base, which in turn can generate income, we con-

clude that LSPCs have an economic motivation for advertising their services.

"In any event, the potential commercial nature of speech does not hinge solely on whether the [LSPCs have] an economic motive, as even *Bolger* does not preclude classification of speech as commercial in the absence of the speaker's economic motivation." *Greater Baltimore*, 721 F.3d at 285–86. Thus, regardless of whether LSPCs have an economic motivation in advertising, their regulated speech can still be classified as commercial.

We find the reasoning in *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W.2d 176 (N.D.), *cert. denied*, 476 U.S. 1108 (1986), persuasive. In that case, the Supreme Court of North Dakota, addressing a factually similar case, upheld a preliminary injunction preventing a "pro-life" pregnancy clinic from engaging in "false and deceptive advertising and related activity [that] misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda." *Id.* at 177, 179. As in this case, the pro-life clinic argued that its communications constituted non-commercial speech "because no financial charges [were] assessed against persons receiving services." *Id.* at 180. However, the court did not find that the lack of payment for services was dispositive to the commercial speech inquiry. Instead, the court explained that, "[m]ore importantly, the Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Id.* at 181. The court thus concluded that, "[i]n effect, the Help Clin-

ic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech." *Id.*

Here, as in *Larson*, the Ordinance is directed at advertisements related to the provision of certain medical services, not the exchange of ideas; the City did not attempt to ban advertisements related to constitutionally protected pro-life advocacy. *See* S.F. Admin. Code § 93.2(10) ("The City respects the rights of [LSPCs] to counsel against abortions . . . and the City does not intend . . . to regulate, limit or curtail such advocacy."); *id.* § 93.2(12). Instead, the Ordinance only regulates the dissemination of false or misleading statements regarding the pregnancy-related services an LSPC offers in a marketplace for those services. *Id.* § 93.4(a). Furthermore, we note that the evidence in the record suggests First Resort views itself as advertising and participating in a competitive marketplace for commercially valuable services. In the Joint Statement of Undisputed Facts, First Resort admits that it "views its online advertising as competing with that of abortion providers for the attention of online viewers," and that "[t]he medical services offered by First Resort, such as pregnancy testing, ultrasounds, and nursing consultations have monetary value."

Because the Ordinance regulates advertising designed to attract a patient base in a competitive marketplace for commercially valuable services, we hold that the Ordinance regulates "classic examples of commercial speech." *Larson*, 381 N.W.2d at 181. Accordingly, as the Ordinance only regulates false or misleading commercial speech—a category of speech

afforded no constitutional protection—First Resort's first facial challenge fails.

b. The Ordinance Is Not Void for Vagueness.

First Resort also argues the Ordinance is facially invalid because it is unconstitutionally vague. However, we conclude First Resort has waived this void for vagueness challenge. In its original complaint, First Resort's second claim for relief was that the Ordinance was unconstitutionally vague. The district court dismissed this claim with leave to amend. In its FAC, First Resort did not replead the claim, effectively abandoning it. *See Lacey* v. *Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will consider those claims to be waived if not repled."); *see also Chubb Custom Ins. Co.* v. *Space Sys./Loral, Inc.*, 710 F.3d 946, 973 n.14 (9th Cir. 2013).[1] Moreover, even if we were to conclude First Resort had not waived its void for vagueness challenge, the challenge nonetheless fails on the merits.

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[1] We find unpersuasive First Resort's argument that it "reserved its claim by continuing to allege [in its FAC] the Ordinance was vague and therefore unconstitutional, but without asserting it as a claim separate from its free speech claim." Contrary to First Resort's suggestion, it does not appear First Resort continued to assert a void for vagueness claim. Although First Resort moved for summary judgment on all of the other claims pleaded in the FAC, it did not even reference its void for vagueness claim in that motion.

A law is unconstitutionally vague if it does not "provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Human Life of Wash. Inc.* v. *Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010) (citation and internal quotation marks omitted); *see also Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 629 (1984). First Resort has not satisfied either of these grounds.

First, we may reject a vagueness challenge when it is "clear what the ordinance as a whole prohibits." *Human Life of Wash.*, 624 F.3d at 1021 (citation and internal quotation marks omitted). Further, "otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Id.* (citation and internal quotation marks omitted). In arguing that a person of ordinary intelligence cannot possibly know what speech is regulated or who might be punished by the Ordinance's penalty provisions, First Resort fails to view the specific language it challenges in the context of the Ordinance as a whole.

As the district court noted, the Ordinance states in the "Findings" section "that its purpose is to prevent [LSPCs] from engaging in 'false and misleading advertising' regarding the nature of the counseling and services it provides or does not provide." *First Resort, Inc.* v. *Herrera*, No. 11-5534, 2012 WL 4497799, at *5 (N.D. Cal. Sept. 28, 2012) (quoting S.F. Admin. Code § 93.2(6)–(9), (11)–(12) (emphasis omitted)). Additionally, the Ordinance makes clear what is not regulated. In particular, the Ordinance explains that the City does not intend to "regulate, limit, or curtail" advocacy, that it "respects the

right of [LSPCs] to counsel against abortions," S.F. Admin. Code § 93.2(10), and that it "respects the right of individuals to express and promote" their beliefs about abortion, *id.* § 93.2(3). Further, the Ordinance specifies that, before bringing an action, "the City Attorney shall give written notice of the violation" and indicate that the LSPC "has ten (10) days in which to cure the false, misleading, or deceptive advertising." *Id.* § 93.5(a). Given this context, it is clear what the Ordinance as a whole prohibits; First Resorts's argument that a person of ordinary intelligence cannot possibly know what speech the Ordinance regulates is unpersuasive.

Furthermore, First Resort's hypothetical examples concerning what the Ordinance covers and who might be punished under its provisions do not render the Ordinance unconstitutionally vague. As the Supreme Court has explained, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.'" *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000) (citation and internal quotation marks omitted). Thus, even if First Resort had not waived its void for vagueness challenge, its challenge would still fail on the merits.

2. The Ordinance Is Valid As Applied to First Resort.

The parties disagree over whether First Resort properly alleged as-applied challenges as well as a facial challenge to the Ordinance, such that First Resort waived its as-applied challenges on appeal. Without providing much explanation, the district court concluded that First Resort's challenges below

were only facial. We disagree, but conclude that First Resort's as-applied challenges fail.

"An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti*, 146 F.3d at 635. For example, "a litigant may separately argue that discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment." *Id.* First Resort appears to have alleged at least three as-applied challenges below: (1) that First Resort's speech regarding the nature of its organization and services is fully protected; (2) that any commercial speech contained within First Resort's advertisements is "inextricably intertwined" with its protected speech; and (3) that the Ordinance was passed because the Board disagreed with First Resort's anti-abortion views. While we think that First Resort's as-applied arguments were properly made below such that they should be addressed on appeal, each argument fails on the merits.

a. The Ordinance Does Not Regulate First Resort's Protected Speech.

First Resort's first as-applied argument relies on the same reasoning as its facial challenge. Specifically, First Resort asserts that because its advertisements constitute non-commercial speech, the Ordinance as applied to First Resort amounts to a content-based regulation subject to strict scrutiny. As explained above, because the Ordinance only targets false or misleading commercial speech, First Resort must demonstrate that the Ordinance regulates First

Resort's own non-commercial speech to prevail on its as-applied challenge. It cannot.

As stated in the Joint Statement of Undisputed Facts, "First Resort provides counseling and basic medical services such as pregnancy tests, ultrasounds and early prenatal care to pregnant women as needed, free of charge." These services "have monetary value," and First Resort uses its online and print advertisements to compete in a competitive marketplace for those services. Indeed, First Resort uses "services like Google's Adwords" and employs "hundreds of keywords for San Francisco," such that "when an internet search is run for 'abortion San Francisco,' a link to First Resort's website can appear as a paid advertisement above the search results." "First Resort views [this] online advertising as competing with that of abortion providers for the attention of online viewers." Accordingly, as explained above, First Resort's advertisements subject to the Ordinance constitute commercial speech because they "are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Larson*, 381 N.W.2d at 181.

First Resort also has a clear economic motivation to produce successful advertisements. To provide its services for free, First Resort engages in fundraising efforts which are furthered, at least in part, by First Resort's ability to attract new clients. Indeed, "First Resort's employees are encouraged to share client stories because they are useful in fundraising." Not surprisingly, then, "[a] majority of First Resort's fundraising communications reference the benefit of its services to clients and often include

client stories." Furthermore, 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."

As such, "[First Resort's] advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech." *Larson*, 381 N.W.2d at 181. Because the Ordinance only regulates the false or misleading aspects of those advertisements, the Ordinance only regulates unprotected speech. This as-applied challenge therefore fails.

b. First Resort's Commercial Speech Is Not Inextricably Intertwined with Its Protected Speech.

First Resort also argues that, even if its advertising constitutes commercial speech, that speech is inextricably intertwined with core protected speech such that the Ordinance is subject to strict scrutiny. While it is true that "[c]ommercial speech does not retain its commercial character when it is inextricably intertwined with otherwise fully protected speech . . . [,] where the two components of speech can be easily separated, they are not inextricably intertwined." *Hunt*, 638 F.3d at 715 (internal citation and quotation marks omitted). Here, First Resort's commercial speech (speech concerning the limited medical services it provides) would have been easily separated from its fully protected speech (speech concerning truthful information about pregnancy) on its website.

As the City explained in its August 2, 2011 letter to First Resort, the clinic's website included "detailed information about abortion procedures offered at outpatient medical clinics" and "implie[d] on its 'Abortion Procedures' page that First Resort perform[ed] pregnancy tests and ultrasounds as a prelude to offering abortion as an outpatient procedure, or referring clients to a provider who performs abortions." As applied to First Resort, the Ordinance only would regulate the misleading aspects of this information, which conceals from the public the fact that First Resort neither performed abortions nor referred clients to abortion providers.

This misleading commercial speech is easily separated from other protected, non-misleading portions of First Resort's website, such as information regarding certain pregnancy-related issues. The website stated, for example: "If you have missed at least one period, you may be pregnant. . . . The only sure way to know is by having a pregnancy test or pelvic exam."; "Ultrasound is a technique that uses sound waves to project a picture of an embryo or fetus in the womb." Accordingly, because the commercial and fully protected portions of First Resort's speech are separable, the Ordinance is not subject to heightened scrutiny.

c. The Ordinance Does Not Discriminate Based on Viewpoint.

Finally, First Resort contends that the Ordinance engages in impermissible viewpoint discrimination by regulating LSPCs and exempting abortion providers because the City disapproves of the LSPCs' anti-abortion views. While First Resort does not make clear whether this viewpoint discrimination

challenge is as-applied or facial, its argument fails regardless of how the challenge is categorized.

A regulation engages in viewpoint discrimination when it regulates speech "based on 'the specific motivating ideology or perspective of the speaker.'" *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)); *see also Moss* v. *U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) ("[V]iewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject.") (citation and internal quotation marks omitted). Viewpoint discrimination is a "'more blatant' and 'egregious form of content discrimination,'" *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger*, 515 U.S. at 829), and regulations that discriminate on this basis are subject to strict scrutiny, *Turner Broad. Sys. Inc.* v. *FCC*, 512 U.S. 622, 658 (1994).

We conclude the Ordinance does not discriminate based on the particular opinion, viewpoint, or ideology of First Resort or other LSPCs. As the district court explained, whether the Ordinance applies depends on the services offered, not on the particular views espoused or held by a clinic. Indeed, the Ordinance applies regardless of what, if any, objections the LSPCs may have to certain family-planning services. Contrary to First Resort's assertion, an LSPC may choose not to offer abortions or abortion referrals for reasons that have nothing to do with their views on abortion, such as financial or logistical reasons. *See Greater Balt.*, 721 F.3d at 288 (holding that an ordinance regulating LSPCs did not engage in viewpoint discrimination and explaining that

"there may be [LSPCs] with *no* 'moral or religious qualms regarding abortion and birth-control,' . . . who refrain from providing or referring abortion or birth control for other reasons").

Moreover, contrary to First Resort's suggestion, the Ordinance regulates LSPCs because they engage in false or misleading speech, irrespective of their viewpoints. The Ordinance is aimed at protecting women from the false or misleading advertisements of certain pregnancy centers that appear to but do not actually offer abortion-related services. Thus, although the Ordinance only applies to the specific service providers that present this grave threat to women's health, we do not conclude that the Ordinance discriminates based on the LSPCs' views on abortion. Indeed, the Ordinance merely seeks to prevent LSPCs from harming women through false or misleading speech about their services and in no way restricts those entities from expressing their views about abortion to the public or their clients.

Put differently, it may be true that LSPCs engage in false or misleading advertising concerning their services because they hold anti-abortion views. However, the Ordinance does not regulate LSPCs based on any such anti-abortion views. Instead, the Ordinance regulates these entities because of the threat to women's health posed by their false or misleading advertising.

To the extent First Resort argues that the Ordinance is a viewpoint-based regulation of speech on the grounds that the City had an illicit motive, that argument also fails. "Even if [First Resort] could establish that the City had an illicit motive in adopting [the Ordinance], that would not be disposi-

tive" because "[t]he Supreme Court has held unequivocally that it 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *Menotti* v. *City of Seattle*, 409 F.3d 1113, 1130 n.29 (9th Cir. 2005) (quoting *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968)).

For the foregoing reasons, we hold that the Ordinance does not discriminate based on viewpoint.

3. The Ordinance Does Not Violate the Equal Protection Clause.

Next, First Resort contends the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment because it burdens speech and impermissibly creates a classification based on the identity of the speaker. We disagree.

As set forth above, the Ordinance regulates only unprotected commercial speech. Thus, because the Ordinance does not unconstitutionally burden the fundamental right to free speech, the Ordinance is subject only to rational basis review. *See Rubin* v. *City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002) ("[R]ational basis review is appropriate unless the restriction unconstitutionally burdens a fundamental right, here, the right to free speech. Because we conclude that the restrictions do not unconstitutionally burden Rubin's right of free speech, we find that neither do they violate his Equal Protection right."); *ACLU of Nev.* v. *City of Las Vegas*, 466 F.3d 784, 798 (9th Cir. 2006) ("If . . . there is no First Amendment right at issue, the City need only proffer a rational basis for the regulation."). A law survives rational basis review "so long as it bears a ra-

tional relation to some legitimate end." *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 543 (9th Cir. 2004) (citation and internal quotation marks omitted).

By regulating false or misleading advertising concerning LSPCs' services, the Ordinance directly furthers various legitimate government ends, including preventing consumer deception, protecting women's reproductive health, and advancing the City's fiscal goals. *See* S.F. Admin Code § 93.2(8)–(9), (11)–(12). Further, the Ordinance sets out valid reasons for distinguishing between LSPCs and full-service providers. In particular, the Ordinance states that "false and misleading advertising by clinics that do not offer or refer clients for abortion or emergency contraception is of special concern to the City" because "[w]hen a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy" and "may also lose the option to choose a particular procedure, or to terminate the pregnancy at all." *Id.* § 93.2(9). As the City asserts in its brief, "[w]here a clinic offers a full range of services, the consumer harms of false and misleading advertising may remain, but the threat to a woman's ability to access time-sensitive and constitutionally protected medical care does not."

Moreover, the Supreme Court has made clear that a legislative body may choose to implement different regulatory schemes for different entities without offending the Equal Protection Clause. *See Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions requiring different remedies. . . . Or the reform may take one step

at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.") (internal citations omitted); *Nat'l Ass'n for Advancement of Psychoanalysis* v. *Cal. Bd. of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000) ("The question is . . . whether it was rational for the California Legislature to implement different licensing schemes for psychologists, and for social workers and family counselors. It is not irrational for the Legislature to progress one step, or one profession, at a time.").

First Resort's equal protection challenge also fails to the extent First Resort separately argues that the Ordinance burdens a suspect class. Because LSPCs are not a suspect class, only rational basis review—not strict scrutiny—applies. *Cf. Tucson Woman's Clinic*, 379 F.3d at 547 (holding abortion providers are not a suspect class).

Because the Ordinance is rationally related to legitimate government interests, it survives rational basis review. Accordingly, we reject First Resort's equal protection challenge.

4. The Ordinance is Not Preempted by California Business and Professions Code § 17500.

Finally, First Resort argues that the Ordinance is duplicative of California's false advertising law, Cal. Bus. & Prof. Code § 17500 ("§ 17500" or "the FAL"), and therefore preempted by state law. Although, as a general matter, the Ordinance and § 17500 both regulate false and misleading advertising, First Resort has failed to show that duplication preemption should apply here to invalidate the Or-

dinance. *See Big Creek Lumber Co.* v. *Cty. of Santa Cruz*, 136 P.3d 821, 827 (Cal. 2006) ("The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption.").

Whether a California state law preempts a local law is governed by Article XI, section 7 of the California Constitution, which states that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict* with general laws." Cal. Const., art. XI, § 7 (emphasis added). "[A]bsent a clear indication of preemptive intent from the Legislature," California courts presume that a local law in an area of traditional local concern "is *not* preempted by state statute." *Big Creek Lumber Co.*, 136 P.3d at 827 (emphasis in original).

As this Court has recognized, "[t]he California Supreme Court has held that State Law is 'in conflict with' or preempts local law if the local law 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" *Fireman's Fund Ins. Co.* v. *City of Lodi*, 302 F.3d 928, 941 (9th Cir. 2002) (quoting *Sherwin-Williams Co.* v. *City of L.A.*, 844 P.2d 534, 536 (Cal. 1993)). "Local legislation is 'duplicative' of general law when it is coextensive therewith." *Sherwin-Williams*, 844 P.2d at 537.

As we have previously noted, "California courts have largely confined the duplication prong of the state preemption test to penal ordinances." *Fireman's Fund*, 302 F.3d at 956. This is because when a local ordinance and a state criminal law are duplicative, "a conviction under the [local] ordinance will operate to

bar prosecution under state law for the same offense." *Id.* (quoting *Cohen* v. *Bd. of Supervisors of the City & Cty. of S.F.*, 707 P.2d 840, 848 n.12 (Cal. 1985)) (internal quotation marks omitted); *accord In re Portnoy*, 131 P.2d 1, 2 (Cal. 1942) ("Insofar as the [ordinance purports] to prohibit acts which are already made criminal by the Penal Code, it is clear that they exceed the proper limits of supplementary regulation and must be invalid because in conflict with the statutes which they duplicate.").

Here, because the Ordinance is civil and contains no criminal provisions or penalties, there is no double-jeopardy bar to a state criminal prosecution for the same false advertising that the Ordinance prohibits, and First Resort has failed to show that enforcing the Ordinance would interfere with enforcing state law. Still, First Resort argues that California courts have applied duplication preemption to both civil and penal ordinances. However, as the district court recognized, the cases First Resort cites in support of this argument are distinguishable as they do not indicate a civil ordinance should be invalidated on the basis of duplication preemption alone. *See, e.g.*, *Sequoia Park Assocs.* v. *Cty. of Sonoma*, 176 Cal. App. 4th 1270, 1292–1301 (Ct. App. 2009) (holding a local civil ordinance was preempted but not relying solely on the fact that the ordinance was duplicative of the state statute); *Korean Am. Legal Advocacy Found.* v. *City of L.A.*, 23 Cal. App. 4th 376, 390–93 (Ct. App. 1994) (concluding that a civil ordinance was not preempted on duplication or other grounds); *cf. S.D. Myers* v. *City & Cty. of S.F.*, 336 F.3d 1174, 1177–78 (9th Cir. 2003) (same). While we need not decide that duplication preemption may

never apply to a civil ordinance, the fact that the Ordinance here is civil rather than penal weighs against invalidating it based on duplication preemption.

Moreover, we are not convinced that the Ordinance duplicates the FAL, as the laws are not coextensive and do not proscribe "precisely the same acts." *Great W. Shows, Inc.* v. *Cty. of L.A.*, 44 P.3d 120, 127–28 (Cal. 2002) (citation and internal quotation marks omitted). First, the Ordinance, which only applies to LSPCs, S.F. Admin. Code § 93.4, is narrower in scope than the FAL, which applies to "any person, firm, corporation or association, or any employee thereof," Cal. Bus. & Prof. Code § 17500. The FAL also applies to false statements concerning the disposal and sale of real and personal property, as well as the performance and sale of professional and nonprofessional services, while the Ordinance only applies to the performance of pregnancy-related services. *Id.*

Second, First Resort has failed to meet its burden to show that the FAL covers all acts proscribed by the Ordinance. For instance, the Ordinance prohibits disseminating untrue or misleading statements by LSPCs "whether by statement or omission," S.F. Admin. Code § 93.4(a), while the text of the FAL does not mention omissions, Cal. Bus. & Prof. Code § 17500. Similarly, the Ordinance regulates services "expressly or impliedly offered," S.F. Admin. Code § 93.4(b), while the FAL does not mention implied offers, Cal. Bus. & Prof. Code § 17500. Further, under the Ordinance, LSPCs are prohibited both (a) from making untrue or misleading statements concerning their pregnancy-related services, and (b) from making such statements with the "intent not

to perform" those services "as advertised." S.F. Admin. Code § 93.4. The FAL, on the other hand, prohibits all persons (a) from making untrue or misleading statements concerning property or services, and (b) from making such statements with "the intent not to sell" property or services as advertised. Cal. Bus. & Prof. Code § 17500. Thus, the Ordinance differs from the FAL as it narrowly proscribes false advertising concerning the performance of services, irrespective of whether those services are offered for sale.

We also note that the Ordinance and the FAL contain entirely different enforcement schemes. A violation of the FAL is a misdemeanor offense punishable by imprisonment of up to six months, or by a fine of up to $2,500, or both, as well as a civil offense punishable by the same fine. *Id.* § § 17500, 17536. A violation of the Ordinance cannot result in a criminal penalty, and is only punishable by a fine of up to $500. The Ordinance also authorizes the City Attorney to apply for injunctive relief tailored to the harmful effects of LSPCs' false advertising, including (a) paying for and disseminating corrective advertising in the same form as the false advertising, and (b) posting notice on the LSPCs' premises stating, among other things, whether abortions or abortion referrals are available at the LSPC. S.F. Admin. Code § 93.5.

In sum, we decline to apply duplication preemption to invalidate the Ordinance because its enforcement does not raise double-jeopardy concerns and First Resort has not demonstrated that it duplicates state law.

CONCLUSION

For the forgoing reasons, we affirm the district court's decisions in favor of the City.

AFFIRMED.

TASHIMA, Circuit Judge, concurring in part and *dubitante* in part:

I concur in all of Judge Nelson's fine opinion, except for Part 4, as to which I remain *dubitante*. Part 4 of the majority opinion holds that San Francisco's Pregnancy Information Disclosure and Protection Ordinance (the "Ordinance") is not preempted by California Business and Professions Code § 17500, California's false advertising law ("FAL"). Yet, the analysis the opinion engages in to reach this conclusion is, at best, sketchy. Because I do not believe that this analysis can bear the weight it is asked to shoulder, I am unpersuaded that the Ordinance is not preempted by the FAL. The question of whether the Ordinance is preempted by the FAL is an open and important one. Because the California case law gives no clear answer to this question, I would certify the question to the California Supreme Court, *see* Cal. R. Ct. 8.548, rather than make an educated guess at the answer, as the majority does here.

The majority gives two reasons why the Ordinance is not preempted. But, as I demonstrate below, it is far from clear that the majority's answer is the one the California Supreme Court would reach.

Does Duplication Preemption Apply to Non-Penal Ordinances?

The majority "decline[s] to apply duplication preemption to invalidate the Ordinance because its enforcement does not raise double-jeopardy concerns." Maj. Op. at 33. Ostensibly, the majority does not hold that duplication preemption "may never apply to a civil ordinance." Maj. Op. at 31–32. Nevertheless, the majority reasons that "the fact that the Ordi-

nance here is civil rather than penal weighs against invalidating it based on duplication preemption." *Id.* The majority's conclusion relies heavily on *Fireman's Fund Ins. Co.* v. *City of Lodi*, 302 F.3d 928, 941 (9th Cir. 2002). But the most that the majority can tease out of *Fireman's Fund* is that "California courts have *largely* confined the duplication prong of the state preemption test to penal ordinances." Maj. Op. at 30 (citing *Fireman's Fund*, 302 F.3d at 956) (emphasis added).[1] Nothing in *Fireman's Fund* bars us from applying duplication preemption to the facts of the instant case. The majority also cannot convincingly explain why *S.D. Myers* v. *City & County of San Francisco*, 336 F.3d 1174, 1177–78 (9th Cir. 2003), which was decided one year after *Fireman's Fund*, should not control. There, we undertook the duplication preemption analysis to determine if a California non-penal statute preempted a San Francisco non-penal ordinance. Although we ultimately concluded that the two laws were not coextensive and therefore not preempted, our detailed analysis of the issue casts doubt on the majority's position that duplication preemption does not apply to a non-penal ordinance.

This doubt is magnified by the California Supreme Court's long-standing recognition that duplication preemption applies to civil, non-penal ordinances. *See Chavez* v. *Sargent*, 339 P.2d 801, 810 n.3 (Cal. 1959) ("We recognize that in *Pipoly* v. *Benson* [125 P.2d 482 (Cal. 1942)] the Chief Justice was dealing with a penal ordinance and that the ordinance with which we are concerned declares no penal sanction,

[1] In addition, of course, *Fireman's Fund* is not an expression of the California Supreme Court itself.

but we nevertheless view the quoted language as applicable here."). There is thus no firm basis in California law to support the majority's "declin[ing] to apply duplication preemption," simply because a non-penal ordinance is involved.

Thus, while the majority "decline[s] to apply duplication preemption," Maj. Op. at 33, I respectfully suggest that, in doing so, the majority puts the shoe on the wrong foot. The question we should be asking is whether there is "clear authority" that duplication preemption does *not apply* (not that it does not "largely" apply) to a civil ordinance. There is not.

Does the FAL Apply to the Advertising of the Services Offered by LSPCs?

The majority opinion goes on at great length to demonstrate that the speech engaged in by First Resort, and regulated by the Ordinance, is commercial speech. But in Part 4, the opinion implies that First Resort's speech is not commercial at all because the Ordinance "narrowly proscribes false advertising concerning the performance of [an LSPC's] services, irrespective of whether those services are offered for sale." Maj. Op. at 33. The majority implies that the FAL does not apply to services that are not "offered for sale." But this implication is unsupported by a close analysis of the text of the FAL. In fact, the FAL makes it unlawful for any person who intends "to perform services," to make any untrue or misleading statement "connected with the proposed performance" of that service. Cal. Bus. & Prof. Code §17500. The FAL contains no explicit requirement that those

services be "offered for sale."[2] *Id.* Thus, the majority does not tell us the source of its implication that the FAL requires a sales transaction.

Confusing the issue even further is the majority's reliance earlier in the opinion on *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W. 2d 176 (N.D. 1986) ("*Larson*"), which "upheld a preliminary injunction preventing a 'pro-life' pregnancy clinic from engaging in 'false and deceptive advertising . . . [that] misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda.'" Maj. Op. at 16–17 (quoting *Larson*, 381 N.W.2d at 177, 179). The majority further observes that the North Dakota Supreme Court "did not find that the lack of payment for services was dispositive to the commercial speech inquiry." *Id.* at 17. It goes on to observe that "the Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Id.* at 17 (quoting *Larson*, 381 N.W.2d at 181). Thus, the majority approvingly quotes *Larson* that, "[i]n effect, the Help Clinic's advertisements constitute promotional advertising of services through which patronage of the clinic is solicited, and in that respect constitute classic examples of commercial speech." *Id.* at 17 (quoting *Larson*, 381 N.W.2d at 181).

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[2] There is a separate and independent clause at the end of the FAL which makes it unlawful to make any misleading statement "as part of a plan or scheme with the intent not to sell property or services" at the price advertised. *Id.* This is the only mention of the word "sale" or any of its variants in the FAL.

What the majority does not tell us is that the law at issue in *Larson* was "North Dakota's false advertising statute, Chapter 51-12 N.D.C.C." 381 N.W.2d at 182. That statute is substantially similar to California's FAL and the preliminary injunction issued in that case was issued under the North Dakota false advertising statute. Thus, by necessary implication, the North Dakota Supreme Court held that the false advertising statute applied to the Help Clinic's advertising, even though no *sale* was involved.[3] It thus seems entirely plausible that the California FAL, which is similarly-worded to the North Dakota statute, could also be construed to cover the type of advertising in which First Resort and other LSPCs engage. Certainly, there is no authority holding the contrary.

Further, without citing any supporting authority, the majority implies that the regulation of false advertising is a matter of "local concern." Maj. Op. at 30 ("California courts presume that a local law in an area of traditional local concern 'is *not* preempted by state statute.'" (quoting *Big Creek Lumber Co.* v. *Cty. of Santa Cruz*, 136 P.3d 821, 827 (Cal. 2006))). First, *Big Creek Lumber* involved a local zoning regulation and thus does not speak to preemption under the FAL. In the area of false advertising, albeit in the context of federal preemption, the California Supreme Court has stated that "consumer protection

[3] It is true that the North Dakota Supreme Court said that it was not deciding whether the false advertising statute applied to the case and that any opinion on the merits would be advisory. *Id.* at 182–83. It cannot be gainsaid, however, that a preliminary injunction was issued under the North Dakota false advertising statute and that injunction was affirmed on appeal by the North Dakota Supreme Court.

laws such as the . . . false advertising law . . . are within the *states' historic police powers. . . .*" *Farm Raised Salmon Cases*, 175 P.3d 1170, 1176 (Cal. 2008) (emphasis added). We have likewise stated that "consumer protection laws have traditionally been in *state* law enforcement hands." *Chae* v. *SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010) (emphasis added) (citations omitted).

Moreover, the statewide FAL was enacted over 75 years ago, in 1941. It has been in effect ever since, with only minor amendments, and with few, if any, challenges from local ordinances. The recently-enacted Ordinance, of course, has no such lineage.

Finally, the majority also asserts that

> First Resort has failed to meet its burden to show that the FAL covers all acts proscribed by the Ordinance. For instance, the Ordinance prohibits disseminating untrue or misleading statememts by LSPCs "whether by statement or omission," while the text of the FAL does not mention omissions.

Maj. Op. at 32 (internal citations omitted). But this simplistic view overlooks the substantial body of case law under the FAL. California courts have made clear that: "Under the False Advertising Law . . . '[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, *such as by failure to disclose other relevant information* is actionable.'" *Consumer Advocatets* v. *Echostar Satellite Corp.*, 8 Cal. Rptr. 3d 22, 30 (Ct. App. 2003) (emphasis added); *see also Day* v. *AT&T Corp.*, 74 Cal. Rptr. 2d 55 (Ct. App.

1998) ("A perfectly true statement couched in a manner that is likely to mislead or deceive the consumer, *such as by failure to disclose other relevant information*, is actionable under the [FAL]." (emphasis added)); *Paduano* v. *Am. Honda Motor Co.*, 88 Cal. Rptr. 3d 90, 127 (Ct. App. 2009) (same) (quoting *Day*). As can plainly be seen, the majority's assertion that the FAL does not prohibit the making of misleading omissions ignores California case law and is patently untrue.

We Should Certify This Question to the California Supreme Court.

> Certification is warranted if there is no controlling precedent and the California Supreme Court's decision could determine the outcome of a matter pending in our court. This appeal not only meets both criteria, but also presents an issue of significant public importance.

Flo & Eddie, Inc. v. *Pandora Media, Inc.*, 851 F.3d 950, 954 (9th Cir. 2017) (citing Cal. R. Ct. 8.548(a)).

Whether preemption applies to the Ordinance is outcome determinative—if it does, the Ordinance must be struck down. And, as I have shown above, the answer is far from certain—there is no directly controlling precedent. Moreover, the question is an important one in a broader sense. Whether the FAL covers advertising of the kind at issue here will dictate not only the outcome of this case, but also whether other cities and counties throughout California can copycat the Ordinance. Or whether the FAL itself governs such commercial speech. This broad

public interest makes this question one particularly suitable for certification.

True, certification is unnecessary when the state's law "is rather well-defined." *Sygenta Seeds, Inc.* v. *Cty. of Kauai*, 842 F.3d 669, 681 (9th Cir. 2016). On the other hand, we certify issues "because they require interpretation of the state [law at issue] beyond that found in state or federal cases." *Barnes-Wallace* v. *City of San Diego*, 607 F.3d 1167, 1175 (9th Cir. 2010). I submit that it cannot seriously be contended that the answer to the question here is "well-defined." On the contrary, whether preemption applies to and ousts the Ordinance requires an interpretation of the FAL "beyond that found in state or federal cases." We do the California public, as well as the litigants, a disservice by refusing to certify this controlling question to the one body that can provide a definitive answer: the California Supreme Court.

* * *

Because I remain *dubitante* on the state law preemption issue, I respectfully suggest that we should certify the question of whether the Ordinance is preempted by the FAL to the California Supreme Court.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

FIRST RESORT, INC., *Plaintiff,* 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; and the City and County of San Francisco, *Defendants.*	Case No: C 11–5534 SBA ORDER RE CROSS–MOTIONS FOR SUMMARY JUDGMENT Dkt. 84, 86

Plaintiff First Resort, Inc. ("First Resort"), a pregnancy services clinic, brings a facial challenge to the constitutionality of San Francisco's Pregnancy Information Disclosure and Protection Ordinance ("Ordinance"), S.F. Admin. Code, ch. 93 §§ 93.1-93.5. The Ordinance is aimed at ensuring that indigent women facing unexpected pregnancies are not harmed by false or misleading advertising by certain providers of pregnancy-related services that do not offer abortions or referrals for abortions. *Id.* §§ 93.3(f), 93.4. As Defendants, First Resort has named the City and County of San Francisco, the San Francisco Board of Supervisors ("Board") and the San Francisco City Attorney (collectively "the City").

The parties are presently before the Court on the parties' respective motions for summary judgment, pursuant to Federal Rule of Civil Procedure 56. Having read and considered the papers filed in connection with these matters and being fully informed, the Court hereby DENIES First Resort's motion for summary judgment and GRANTS the City's cross-motion for summary judgment, for reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. *See* Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7–1(b).

I. BACKGROUND

A. FACTUAL SUMMARY

1. First Resort

First Resort is a non-profit corporation which operates a state-licensed community medical clinic in San Francisco. Jt. Stmt. of Undisputed Facts in Supp. of the Cross-Mots. for Summ. J. Filed by Pls. and Defs. ("UF") 1, 32, Dkt. 88. The clinic offers, without charge, services such as pregnancy testing, ultrasounds and counseling. UF 2. First Resort does not provide abortions or emergency contraception, and refuses to refer clients to other facilities for those services. UF 9. First Resort believes that "abortion harms the mother and father, their families, and the unborn child." UF 8. This belief is recited in First Resort's Articles of Incorporation, which state that its goal is to "build an abortion-free world." UF 33.

In its online and print advertising, First Resort characterizes itself as a provider of medical care and counseling services for pregnant woman. UF 50 & Ex. H, sub-exs. A–N. Although First Resort opposes abortions and does not provide abortions or abortion

referrals, the subject of abortions and related resources are featured prominently in its promotional materials. For example, under the heading "Abortion Counseling," First Resort's website (http://firstresort.org) represents that "we offer abortion information, resources, and compassionate support for women facing the crucial decisions that surround unintended pregnancies and are considering abortion." UF, Ex. H, sub-ex. A. Another page discusses "Pregnancy Services and Abortion Services." *Id.*, sub-ex. G. On the services page of that section, First Resort claims that it provides "pregnancy options counseling and many other services." *Id.*, sub-ex. I. First Resort makes no mention in its website or advertising of its anti-abortion views or the fact that abortions and abortion referrals are not offered at its clinic.

First Resort's "target clients" are women who have an unplanned pregnancy, "are unsure about what they are going to do," and are considering an abortion. UF 34(a). To reach its target client, First Resort uses Google's Adwords, a fee-based "keyword" service. The service ensures that when certain combinations of keywords such as "San Francisco" and "abortion" or "emergency contraception" are used in an internet search query, a link to First Resort's website appears as a paid advertisement above the search results. UF 35, 36, 37. First Resort considers its online advertising as a means of competing with abortion providers for the attention of online viewers. UF 51.

To fund its operation, including the provision of free client services, First Resort relies on donations generated through its fundraising activities. UF 4. For fiscal year 2012, First Resort received donations

exceeding $1,000,000, $300,000 of which was allocated to the clinic operations. UF 39. To generate donations, First Resort employees are encouraged to share client "stories" and experiences. UF 46–47. Members of First Resort's senior management receive enhanced compensation based on the number of new clients brought in. UF 48.

2. The Ordinance

On April 2, 2011, San Francisco Supervisor Malia Cohen introduced legislation, cosponsored by Supervisor Scott Weiner, that eventually became the Ordinance. UF 11. October 25, 2011, the Ordinance was presented to the Board for a vote. Ten supervisors voted in favor of the Ordinance, while one voted against it. UF 18 & Ex. F. The new Ordinance was signed into law by Mayor Edwin Lee on November 3, 2011, and took effect on December 4, 2011. UF 19.

The Ordinance amended the San Francisco Administrative Code by adding Chapter 93, which consists of sections 93.1 through 93.5, and is divided into five separate sections: (1) "Title," *Id.* § 93.1; (2) "Findings," *Id.* § 93.2; (3) "Definitions," *Id.* § 93.3; (4) "Violation," *Id.* § 93.4; and (5) "Enforcement," *Id.* § 93.5. According to the Findings, the impetus for the Ordinance is the concern that pregnancy clinics that oppose abortion—referred to as "crisis pregnancy centers"—have become common throughout California. *Id.* § 93.2(5). Though some centers readily acknowledge that they do not provide abortions or emergency contraception or referrals for the same, others do not—and intentionally seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling. *Id.* § 93.2(6). From the City's perspective,

such deception is harmful, especially to indigent women facing unexpected pregnancies. For these particular women, time is of the essence, and even a few days delay in accessing emergency contraception or abortion services can render less invasive options unavailable. *Id.* § 93.2(9); *see also* UF 28, 29.

To address the potential false or deceptive advertising by crisis pregnancy centers, the Ordinance prohibits the use of false or misleading advertising regarding the services offered by certain of those centers. This prohibition states as follows:

> SEC. 93.4. VIOLATION
>
> (a) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated before the public in the City, or to make or disseminate or cause to be made or disseminated from the City before the public anywhere, in any newspaper or other publication, or any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning those services, professional or otherwise, or concerning *any circumstance or matter of fact connected with the proposed performance or disposition thereof which is untrue or misleading, whether by statement or omission, that the limited services pregnancy center knows or which by the*

> *exercise of reasonable care should know to be untrue or misleading.*
>
> (b) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

S.F. Admin. Code § 93.4 (emphasis added).

The Ordinance distinguishes between a "pregnancy services center" and a "limited services pregnancy center." *Id.* § 93.3(f), (g). A "pregnancy services center" is defined as any facility, licensed or otherwise, whose primary purpose is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility (as determined by additional criteria). *Id.* § 93.3(g).

A "limited services pregnancy center" is defined as a pregnancy services center (within the meaning of section 93.3(g)) "that does not directly provide or provide referrals to clients for the following services: (1) abortions; or (2) emergency contraception." *Id.* § 93.3(f) (emphasis added). The prohibition against false advertising set forth in the Ordinance applies only to a "limited services pregnancy center." *Id.* § 93.5(a). The Ordinance expressly states, however,

that it is not intended to "regulate, limit or curtail" abortion-related advocacy. *Id.* § 93.2(10).

The Ordinance may be enforced by the San Francisco City Attorney through a civil action. *Id.* § 93.5. Before filing an action, the City Attorney must provide the limited services pregnancy center with written notice of the violation that must be cured within ten days. *Id.* § 93.5(a). If the center does not timely respond to or correct the violation, the City Attorney may file suit against the limited services pregnancy center for injunctive relief. *Id.* § 93.5(a). A court may order the violator, inter alia, to pay for and disseminate appropriate corrective advertising; and to post a notice indicating whether a licensed doctor, nurse or nurse practitioner is present and whether abortions, emergency contraception or abortion referrals are available. *Id.* § 93.5(b). The City Attorney may also seek the imposition of civil penalties "of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation." *Id.* § 93.5(c).[1]

B. PROCEDURAL HISTORY

First Resort filed the instant action against the City under 42 U.S.C. § 1983. Compl. ¶ 1, Dkt. 1–1. The initial Complaint presented four claims, styled as follows: (1) First and Fourteenth Amendments—Freedom of Expression; (2) First and Fourteenth Amendments—Vagueness; (3) Fourteenth Amendment—Equal Protection; and (4) Preemption. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the City moved to dismiss all claims, except the first claim for denial of freedom of expression. Dkt. 12. The

[1] The City has not sought or threatened to enforce the Ordinance against First Resort.

Court granted the motion as to the second claim for vagueness and fourth claim for preemption. As to the preemption claim, the Court granted leave to amend to allege a claim that the Ordinance is preempted by California's False Advertising Law, California Business and Professions Code Section 17500 ("FAL" or "Section 17500"). Dkt. 24. The Court denied the City's motion as to First Resort's third claim for denial of equal protection. *Id.*

On October 11, 2012, First Resort filed its First Amended Complaint ("FAC"), now the operative pleading before the Court, which re-alleges all claims from the original Complaint, except for the vagueness claim which was previously dismissed without leave to amend. Dkt. 25. First Resort also re-alleges a claim for preemption based on Section 17500. As relief, the FAC seeks injunctive and declaratory relief that the Ordinance is void and cannot be enforced. In response to the FAC, the City moved to dismiss First Resort's third claim for preemption on the ground that the doctrine only applies to penal ordinances. Dkt. 30. On March 11, 2013, the Court issued its order denying the City's motion, finding that the issue had not been adequately briefed. Dkt. 40.

Pursuant to the Court's scheduling order, the parties have now filed their respective motions for summary judgment. Dkt. 84, 86. The motions are fully briefed and are ripe for adjudication.[2]

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[2] In support of its motion, the City filed a Request for Judicial Notice ("RJN") and submitted exhibits in connection with the parties' Joint Statement of Undisputed Facts in Support of the Cross–Motions for Summary Judgment ("Joint Statement"). Dkt. 87, 88. First Resort has objected to certain of the exhibits attached to the RJN and Joint Statement. Dkt. 92. However, none

II. LEGAL STANDARD

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986). The party moving for summary judgment must demonstrate that there are no genuine issues of material fact. *See Horphag v. Research Ltd.* v. *Garcia,* 475 F.3d 1029, 1035 (9th Cir.2007). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Rivera* v. *Philip Morris, Inc.,* 395 F.3d 1142, 1146 (9th Cir.2005). An issue is "material" if its resolution could affect the outcome of the action. *Anderson,* 477 U.S. at 248; *Rivera,* 395 F.3d at 1146. When parties submit cross-motions for summary judgment, "[e]ach motion must be considered on its own merits." *Fair Hous. Council Riverside Cnty., Inc.* v. *Riverside Two,* 249 F.3d 1132, 1136 (9th Cir.2001).

III. DISCUSSION

A. FIRST AMENDMENT

The First Amendment's free speech clause provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. Amend. I; *see 44 Liquormart, Inc.* v. *Rhode Island,* 517 U.S. 484, 489 n. 1 (1996) (noting that the First Amendment "applies to the States under the Due Process Clause of the Fourteenth Amendment."). "As a general matter, the First Amendment means that

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of the challenged exhibits has been relied upon by the Court in adjudicating the instant motions. Therefore, those objections are overruled as moot.

the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Bolger* v. *Youngs Drug Prods. Corp.,* 463 U.S. 60, 65 (1983) (citation omitted). Regulations that discriminate on the basis of content—including viewpoint—are subject to strict scrutiny, *Nat'l Ass'n for Advancement of Psychoanalysis* v. *Cal. Bd. of Psychology,* 228 F.3d 1043, 1055 (9th Cir. 2000), meaning that the regulation "must be narrowly tailored to promote a compelling Government interest," *United States* v. *Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813 (2000).

First Resort brings a facial challenge to the Ordinance, and contends that the Ordinance is subject to strict scrutiny on the grounds that it regulates speech on the basis of viewpoint and content, and impermissibly compels speech. FAC ¶¶ 37–40; Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") at 7–10, Dkt. 84. Because First Resort is bringing a facial, as opposed to an as-applied challenge, it must show that the Ordinance is "unconstitutional in every conceivable application." *Foti* v. *City of Menlo Park,* 146 F.3d 629, 635 (9th Cir. 1998). The City's position is that the Ordinance only regulates false and misleading commercial speech, which is not protected by the First Amendment. Alternatively, to the extent that the Ordinance is subject to First Amendment scrutiny, the City asserts that the Ordinance passes constitutional muster. Because the type of speech subject to regulation is a threshold issue, the Court first addresses the City's contention that the Ordinance only addresses commercial speech that is false or misleading.

"[C]ommercial speech is 'speech which does no more than propose a commercial transaction.'" *Rice* v. *Fox Broad. Co.,* 330 F.3d 1170, 1181 (9th Cir. 2003) (quoting *City of Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410, 422 (1993)). Limitations on commercial speech are subject to intermediate scrutiny. *Coyote Publ'g, Inc.* v. *Miller,* 598 F.3d 592, 598 (9th Cir. 2010). However, there is no First Amendment protection for commercial speech that is false or misleading. *In re R.M.J.,* 455 U.S. 191, 203 (1982); *Hoffman* v. *Capital Cities/ABC, Inc.,* 255 F.3d 1180, 1185 (9th Cir. 2001). Because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of New York,* 447 U.S. 557, 563 (1980). As a result, it is permissible to "ban forms of communication more likely to deceive the public than to inform it." *Id.*; *see Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"); *United States* v. *Schiff,* 379 F.3d 621, 630 (9th Cir. 2004) ("Fraudulent commercial speech may be enjoined" without violating the First Amendment).

The City's argument entails two salient inquiries: (1) whether the Ordinance targets commercial speech; and (2) if so, whether the speech is being targeted for being false or misleading. Starting with the latter inquiry first, there is no dispute between the parties that only false or misleading speech is regulated under

the Ordinance. By its express terms, the Ordinance only proscribes "untrue or misleading" advertisements or statements made by a limited services pregnancy center regarding the services that it purports to offer. S.F. Admin Code, §§ 93.4, 93.5. However, the first inquiry, i.e., whether the speech is commercial, requires a more nuanced analysis. More specifically, the Supreme Court has held that speech may be "characterized as commercial when (1) the speech is admittedly advertising, (2) the speech references a specific product, and (3) the speaker has an economic motive for engaging in the speech." *Am. Acad. of Pain Mgmt.* v. *Joseph,* 353 F.3d 1099, 1106 (9th Cir. 2004) (citing *Bolger,* 463 U.S. at 66–67). While "[t]he combination of all of these characteristics ... provides strong support for the . . . conclusion that [the communication is] properly characterized as commercial speech," *Bolger,* 463 U.S. at 67, it is not necessary that each of the characteristics "be present in order for speech to be commercial," *Id.* at 67 n. 14.

Here, the first two *Bolger* factors—whether the speech constitutes advertising and references a specific product—are not in dispute. Under the express terms of the Ordinance, only untrue or misleading advertisements or statements made by a limited services pregnancy center regarding the services that it purports to offer are prohibited. S.F. Admin Code, §§ 93.4, 93.5; *see also First Resort, Inc.* v. *Herrera,* No. C 11–5534 SBA, 2012 WL 4497799, *5 (N.D. Cal. Sept. 28, 2012) (finding that "the advertising targeted by the Ordinance specifically pertains to advertising that 'mislead[s] women contemplating abortion into believing that their facilities offer abortion services and unbiased

counseling.'") (citing S.F. Admin. Code § 93.2(6)), Dkt. 24. For its part, First Resort concedes that "[t]he *advertising* targeted by the Ordinance is speech offering free counseling and related prenatal care." *Id.*[3] (emphasis added). The Court therefore finds that the first two *Bolger* factors militate in favor of finding that the Ordinance only applies to commercial speech.

The parties' disagreement centers on the third *Bolger* factor: Whether the speaker has an economic motivation for engaging in the speech. First Resort argues that "its advertising is not commercial speech because it does not engage in economic transactions with its clients and has no economic motive for its communications with clients." Pl.'s Opp'n at 8, Dkt. 91. As an initial matter, First Resort's argument is germane to an as-applied challenge, as opposed to a facial challenge. "An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti,* 146 F.3d at 635. In contrast, in a facial challenge, which is the only challenge raised in this action, the plaintiff must show that the challenged law or regulation is unconstitutional in all of its applications, not just those affecting it individually. *See Lopez–Valenzuela* v. *Arpaio,* 770 F.3d 772, 780 (9th Cir. 2014). Accordingly, even if the Ordinance targets non-commercial speech when applied to First Resort, that would not ipso facto demonstrate that it does so in all

[3] Similarly, First Resort acknowledges in its opposition that "licensed facilities such as First Resort are already subject to numerous generally applicable regulations," including California Business & Professions Code § 651, which regulates "false advertising by licensed medical facilities." Pl.'s Opp'n at 13.

circumstances—as required in a facial challenge. *See Desert Outdoor Advertising, Inc.* v. *City of Oakland,* 506 F.3d 798, 805 (9th Cir. 2007) ("a 'successful as-applied challenge does not render the law itself invalid but only the particular application of the law.'") (citation omitted).[4]

The above notwithstanding, the fact that First Resort does not charge a fee for its services is not dispositive of whether its advertising is economically-motivated. Rather, an assessment of economic motivation requires that the communication be viewed in context. *Greater Baltimore Cntr. for Pregnancy Concerns, Inc.* v. *Mayor and City Council of Baltimore,* 721 F.3d 264, 285–86 (4th Cir. 2013) (en banc). In *Greater Baltimore Center for Pregnancy Concerns*, the Fourth Circuit reversed a district court decision that permanently enjoined the enforcement of a City of Baltimore ordinance requiring limited-service pregnancy centers to post disclaimers that they do not provide or make referrals for abortions or certain birth-control services. In particular, the court criticized the district court's conclusory determination that the speech regulated by the ordinance was political and religious, as opposed to commercial, in nature. *Id.* at 285. The court explained that the question of whether the speech subject to regulation is commercial in nature must take into account the context of such speech. *Id.* at 286. In reaching its decision, the court found instructive the Supreme Court of North Dakota's decision in *Fargo Women's*

[4] First Resort has not alleged, nor may it bring, an as applied challenge because the Ordinance has never been applied to First Resort.

Health Organization, Inc. v. *Larson,* 381 N.W.2d 176 (1986) ("*Larson*").

In *Larson*, an abortion clinic filed an action against a "pro-life" pregnancy clinic (i.e., the "Help Clinic"), accusing it of engaging in "false and deceptive advertising and related activity [that] misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda." 381 N.W.2d at 177. Upon motion of the plaintiff, the trial court preliminarily enjoined the Help Clinic from engaging in such practices. *Id.* On appeal, the Help Clinic argued that the injunction amounted to a prior restraint in violation of the First Amendment. The state supreme court disagreed, and concluded that the injunction only purported to regulate false and misleading commercial speech, which does not implicate the First Amendment. In reaching this conclusion, the court rejected the Help Clinic's claim that because it did not receive payment for the services rendered, its advertising could not be considered commercial speech. *Id.* at 180. The court noted that while there was evidence to the contrary, it was "not clear" to what extent the Help Clinic received compensation for its services. *Id.* Nonetheless, the court explained that whether or not monies were received by the Help Clinic services was not dispositive of whether the communication involved was commercial. Rather, the court concluded that "the Help Clinic's advertisements constitute promotional advertising of services *through which patronage of the clinic is solicited*, and in that respect constitute classic examples of commercial speech." *Id.* at 180 (emphasis added).

Here, as in *Larson*, the record strongly supports the conclusion that First Resort's advertisements, when considered in context, are economically-motivated. First Resort uses targeted advertising to attract "abortion-minded" women facing unplanned pregnancies to its clinic. UF 34–37. To reach that audience, First Resort pays to use Google's Adwords service, which ensures that First Resort's website appears in response to abortion-related search queries. *Id.* First Resort considers its advertising as a means of competing with abortion providers for the attention of online viewers. UF 51. Notably, First Resort's ability to attract clients to its clinic is critical to its fundraising efforts—which, in turn, are necessary to First Resort's operations, including the provision of free services. UF 39, 40, 47, 48, 49; *see also* Ex. H, sub-exs. O, Q, R. In view of these undisputed facts, the Court is persuaded that, irrespective of whether First Resort receives payment for its services, its advertising is indeed economically-motivated. As such, all *Bolger* factors militate in favor of finding that the Ordinance targets commercial speech.

For its part, First Resort does not dispute that it relies on advertising to draw clients to the clinic or that the ability to attract clinics bears directly on its fundraising efforts. Rather, First Resort argues that *Larson* is distinguishable because it involved appellate review of a preliminary injunction, as opposed to a summary judgment order. Pl.'s Opp'n at 10. First Resort does not explain the legal significance of that distinction, nor is one readily apparent given that, like a summary judgment motion, a motion for preliminary injunction requires the court to assess the merits of the action. *E.g.*, *Winter* v. *Natural Res. Def.*

Council, Inc., 555 U.S. 7, 20 (2008) (articulating standard for preliminary injunctions). First Resort also claims that, unlike this case, the Help Clinic in *Larson* charged fees and accepted credit cards for its services. That argument mischaracterizes *Larson*, which found that it was "not clear to what extent, if any, monies are exchanged," and that, in any event, whether or not the Help Clinic charged for its services was not "dispositive of [its] determination that the communication involved is commercial speech." 381 N.W.2d at 180. Finally, First Resort attempts to make much of the court's disagreement with one aspect of the preliminary injunction which required that "if [the Help Clinic] uses the term abortion in its advertisements, [it must] . . . state that it does not perform abortions." *Id.* at 179. The court held that in light of other provisions of the preliminary injunction, "the additional requirement in the court's order that the Help Clinic affirmatively state that it does not perform abortions is merely redundant and unnecessary to accomplish the objective of preventing false and deceptive activity." *Id.* First Resort does not allege nor is there any evidence that the Ordinance is overbroad or internally redundant.

Next, First Resort asserts, in an entirely conclusory manner, that it "is not a commercial speaker merely because it fundraises. . . ." Dkt. 91, 7. As a general matter, First Resort is correct that fundraising per se is not considered commercial speech. *See Schaumburg* v. *Citizens for Better Environment,* 444 U.S. 620, 632 (1980) (holding that charitable solicitation is not commercial speech because it "does more than inform private economic decisions and is not primarily concerned with

providing information about the characteristics and costs of goods and services"). That principle, however, is inapposite to this case. It is First Resort's advertising—not its fundraising activity—that is at issue. First Resort's fundraising is germane only to the extent that it provides context to whether First Resort has an economic motivation for relying on its advertising to attract patients to the clinic.

Equally without merit is First Resort's ancillary contention that the Ordinance is subject to strict scrutiny on the ground that any commercial speech contained within First Resort's advertisements are "inextricably intertwined" with protected speech. Dkt. 91, 9. Where commercial speech is inextricably intertwined with "fully protected speech," the former "sheds its commercial character and becomes fully protected speech." *Dex Media,* 696 F.3d at 958. "[T]he inextricably intertwined test operates as a narrow exception to the general principle that speech meeting the *Bolger* factors will be treated as commercial speech." *Id.*

First Resort contends that its advertising "has a substantial non-commercial component, which is a request that a recipient of the advertising consider receiving counseling at First Resort regarding pregnancy, free of charge." *Id.* Perhaps so, but the Ordinance does not regulate First Resort or any other limited services pregnancy center's ability to solicit clients to use services, including pregnancy counseling. Rather, the Ordinance only restricts the ability of such clinics to lure prospective clients into patronizing them through the use of false or misleading advertising—which is not protected under the First Amendment. Accordingly, the Court rejects

First Resorts' contention that the commercial speech targeted by the Ordinance is subject to heightened scrutiny under the First Amendment. *See United States* v. *Schiff,* 379 F.3d 621, 630 (9th Cir. 2004) ("Because the protected and unprotected parts of the book are not inextricably intertwined, Schiff cannot use the protected portions of The Federal Mafia to piggy-back his fraudulent commercial speech into full First Amendment protection.").[5]

At bottom, the Court concludes that the Ordinance only restricts false and misleading commercial speech, which is not protected by the First Amendment. That aside, First Resort has otherwise failed to show that the Ordinance violates the First Amendment in "every conceivable application." *Foti,* 146 F.3d at 635. Summary judgment is therefore granted in First Resort's first claim in favor of the City.

B. EQUAL PROTECTION

"The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living*

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[5] Because false or misleading speech is not protected by the First Amendment, First Resort's contentions that the Ordinance constitutes content and viewpoint discrimination and compels speech are moot. Nonetheless, even if the First Amendment were germane, there is no merit to these claims. The applicability of the Ordinance is dependent upon the services offered by a clinic, not the particular views espoused or held by the clinic. Indeed, as the City persuasively points out, there are potentially a number of reasons that a pregnancy services that a clinic may choose not to offer abortions that are completely unrelated to its views on abortion—such as financial or logistical reasons. Nor does the Ordinance compel speech by First Resort or any other limited services pregnancy clinic—both remain free to express any views it may have to the public or its clients.

Cntr., Inc., 473 U.S. 432, 439 (1985). First Resort's equal protection claim is based on the same theory as its First Amendment claim; to wit, the Ordinance infringes on its fundamental right to freedom of expression because it regulates speech depending on whether a clinic provides abortions. *See* FAC ¶¶ 44, 3(a); Pl.'s Mot. at 20. However, the Court's determination that the Ordinance does not violate the First Amendment forecloses First Resort's claim under the Equal Protection Clause. *City of Renton* v. *Playtime Theatres, Inc.,* 475 U.S. 41, 50 (1986) ("respondents can fare no better under the Equal Protection Clause than under the First Amendment itself"); *see also Dariano* v. *Morgan Hill Unified School Dist.,* 767 F.3d 764, 780 (9th Cir. 2014) ("Where plaintiffs allege violations of the Equal Protection Clause relating to expressive conduct, we employ 'essentially the same' analysis as we would in a case alleging only content or viewpoint discrimination under the First Amendment.").

First Resort does not directly address the preclusive effect of the Court's ruling on its First Amendment claim with respect to its equal protection claim. Instead, First Resort argues that the Ordinance "discriminates and burdens the exercise of [its] right of conscience," which provides "an independent basis to apply strict scrutiny." Pl.'s Opp'n at 19. This claim is not alleged in the FAC, which unequivocally identifies the fundamental right at issue as First Resort's freedom of speech, not its right of conscience. *See* FAC ¶¶ 3, 4, 21, 22, 24, 26, 30, 38–40. Since the FAC does not allege an equal protection claim premised on the denial of First Resort's right of conscience, said claim is not properly before the court

and need not be considered on a motion for summary judgment. See *Coleman* v. *Quaker Oats Co.,* 232 F.3d 1271, 1292 (9th Cir. 2000) ("[A]dding a new theory of liability at the summary judgment stage would prejudice the defendant who faces different burdens and defenses under this second theory of liability.") (internal citations and quotations omitted).[6]

Even if the FAC had alleged an equal protection violation based on the right of conscience, First Resort has failed to demonstrate the merits of such a claim. In general, the right of conscience is premised on the notion that the government may not compel persons to profess a belief or disbelief in any particular religion, or support a practice with which they do not agree. See *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). Despite First Resort's bald assertions to the contrary, the Ordinance does not compel or coerce First Resort to adopt or support any particular practice or belief relating to abortion. Under the Ordinance, First Resort remains free to advocate any religious or other views it desires. S.F. Admin. Code § 93.2(10). The only restriction facing First Resort and other limited services pregnancy centers is that they cannot mislead or defraud the public regarding the types of services they purport to offer. That restriction—which First Resort concedes is permissible—in no way impinges on its professed right of conscience. The Court therefore finds that the City is entitled to summary judgment on

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[6] The deadline to amend the pleadings expired on April 25, 2013, Dkt. 44 at 1, and First Resort has not shown good cause to amend the pleadings at this juncture, *see* Fed. R. Civ. P. 16(b)(4), *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 609–10 (9th Cir.1992).

First Resort's second claim for denial of equal protection.

C. PREEMPTION

First Resort alleges that the Ordinance is preempted by Section 17500 on the grounds that they are "nearly identical and seek to regulate the exact same conduct—false and misleading advertising." Pl.'s Mot. at 23; Pl.'s Reply at 14, Dkt. 101. Under California law, a city or county may enact and enforce its own ordinances and regulations, provided that they do not "conflict" with state law. Cal. Const., art. XI, § 7. However, "[i]nsofar as a local regulation conflicts with state law, it is preempted and invalid." *Save the Plastic Bag Coalition* v. *City and Cnty. of San Francisco,* 222 Cal.App.4th 863, 883 (2013) (internal quotations and citations omitted). "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." *Big Creek Lumber Co.* v. *Cnty of Santa Cruz,* 38 Cal.4th 1139, 1149 (2006). Absent a clear indication of legislative intent to preempt, courts presume that local regulation in areas of traditional local concern is not preempted by state law. *Id.* Whether a local ordinance is preempted by a state statute presents a question of law. *Id.*

"A conflict causing preemption by state law can occur in three different ways: the local ordinance (1) duplicates state law; (2) contradicts state law; or (3) enters an area or field fully occupied by state law." *Conejo Wellness Cntr., Inc.* v. *City of Agoura Hills,* 214 Cal.App.4th 1534, 1552 (2013). Under California law, "[l]ocal legislation is 'duplicative' of general law when it is coextensive herewith." *Sherwin-Williams Co.* v. *City of Los Angeles,* 4 Cal.4th 893, 898 (1993) (citing

In re Portnoy, 21 Cal.2d 237, 240 (1942)). A local ordinance is coextensive with a state law when it criminalizes "precisely the same acts." *Great W. Shows, Inc.* v. *Cnty. of Los Angeles,* 27 Cal.4th 853, 865 (2002) (holding that a local gun ordinance making the sale of firearms on county property a misdemeanor was not preempted by a state law prohibiting the sale of assault weapons and unsafe handguns, finding that "the Ordinance does not criminalize precisely the same acts which are prohibited by statute") (internal quotations, ellipses and citation omitted).

As a general matter, it is true that both the Ordinance and Section 17500 regulate false and misleading advertising. Despite that overlap, First Resort has failed to establish, in the first instance, that the rationale underlying duplication preemption justifies its application to this case. In *Fireman's Fund Ins. Co.* v. *City of Lodi, California*, 302 F.3d 928 (9th Cir. 2002) ("*Fireman's Fund*"), the Ninth Circuit held that the doctrine was inapplicable to a local civil ordinance known as the Comprehensive Municipal Environmental Response and Liability Ordinance ("MERLO"). In finding the doctrine inapplicable, the court explained as follows:

> California courts have largely confined the duplication prong of the state preemption test to penal ordinances. *Baldwin* v. *County of Tehama,* 31 Cal.App.4th 166, 36 Cal.Rptr.2d 886, 894 (1994). The "reason that a conflict with the general laws under article XI, section 7 of the state Constitution is said to exist where an ordinance duplicates state law *is that a conviction under the ordinance*

> will operate to bar prosecution under state law for the same offense." *Cohen* v. *Bd. of Supervisors,* 40 Cal.3d 277, 219 Cal.Rptr. 467, 475 n. 12, 707 P.2d 840 (1985). *No such situation exists here.* Furthermore, California courts find preemption by duplication only where the ordinance is "coextensive with state law." *Suter* v. *City of Lafayette,* 57 Cal.App.4th 1109, 67 Cal.Rptr.2d 420, 428 (1997). MERLO treats the same subject as covered by state hazardous waste laws. It is however hardly co-extensive with HSAA. We find no preemption by duplication.

Id. at 956 (emphasis added).

In the instant case, the Ordinance is civil as opposed to penal in nature, and therefore, obviously does not "criminalize" the same conduct as the FAL. *Id.* Nor has First Resort shown that enforcement of the Ordinance would conflict with or preclude an action under state law. *See Eller Media Co.* v. *City of Oakland,* No. C 98–2237 FMS, 1998 WL 827426, *4 (N.D. Cal. Nov. 25, 1998) ("The Ordinance and [California Business & Professions Code] § 25664 are plainly not duplicative. . . . Simultaneous enforcement of the state and local provisions will not generate inescapable jurisdictional conflicts."). Instead, First Resort counters that duplication preemption has, in fact, been applied to civil statutes and that an overlap between the local ordinance and state statute, standing alone, is sufficient for purposes of preemption. Although it is true that a few published state decisions have applied duplication preemption to

civil ordinances, none of the cases cited by First Resort is controlling and the Court finds them to be otherwise inapplicable to the instant action.

In *Sequoia Park Associates* v. *County of Sonoma,* 176 Cal.App.4th 1270 (2009) ("*Sequoia*"), the California Court of Appeal held that a county ordinance governing mobilehome conversions was expressly and impliedly preempted by an analogous state statute. *Id.* at 1292–93. As part of its implied preemption analysis, the court stated that the ordinance was "plainly duplicative" of the state statute at issue with respect to the requirements for a mobilehome conversion, which was problematic because the local provision "mandates what the state law forbids." *Id.* at 1299.[7] Here, First Resort does not argue that the Ordinance imposes requirements on limited services pregnancy centers that are contrary to those imposed by Section 17500. Pl.'s Mot. at 23. Instead, First Resort worries that "[o]ther cities will likely follow suit creating a dizzying array of ordinances using the text of Section 17500, but with varying enforcement procedures, relating to alleged false advertising." *Id.* Setting aside the speculative nature of its argument, the possibility that other cities may enact conflicting ordinances has no bearing on whether the Ordinance in dispute conflicts with Section 17500.

First Resort's citation to *Mobilepark West Homeowners Association* v. *Escondido Mobilepark*

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[7] *Sequoia* did not address the rationale underlying duplication preemption, which, as explained by both the California Supreme Court and the Ninth Circuit, derives from double jeopardy concerns. *See Fireman's Fund Ins. Co.,* 302 F.3d at 956 (citing *Cohen,* 40 Cal.3d at 292 n. 12).

West, 35 Cal.App.4th 32 (1995) ("*Mobilepark West*") fares no better. In that case, the California Court of Appeal, as an alternative basis for invalidating a local mobile home rent control ordinance, applied the doctrine of field preemption—not duplication preemption. *Id.* at 45. In the course of its analysis, the court noted that "[i]t is necessary to compare the terms of Civil Code section 798.17 to the terms of ordinance No. 91–19 to determine whether the ordinance invades a field fully occupied by state law." *Id.* It was in that context that the court noted that some of the provisions of the local ordinance duplicated and imposed requirements beyond those specified by state law. *Id.* at 47. The court did not—as First Resort wrongly suggests—predicate its analysis on duplication preemption, and no subsequent published decision has cited *Mobilepark West* on that basis.

Finally, in *Korean-American Legal Advocacy Foundation* v. *City of Los Angeles,* 23 Cal.App.4th 376 (1994), the court considered whether ordinances governing the sale of alcoholic beverages were duplicative of and preempted by California's Alcoholic Beverage Control Act. *Id.* at 390–91. In finding that they were not, the court acknowledged the local and state provisions overlapped, but ultimately highlighted the fact that the procedures under each statute were sufficiently different such that "the specific interests and the jurisdiction of each do not conflict." *Id.* at 391. Thus, *Korean–American Legal Advocacy Foundation* teaches that even in rare case where duplication preemption has been applied to civil ordinances, the salient question is not limited to solely whether the local and state provisions overlap, but whether the enforcement of the ordinance would

interfere with enforcement of the state statute. First Resort has made no such showing in this case.

Even if the doctrine of duplication preemption were applicable, the Court is unpersuaded that the Ordinance is preempted by Section 17500. Though the Ordinance is no doubt similar to Section 17500, First Resort has not shown its enforcement would interfere or conflict with state law. Nor has First Resort demonstrated that the Ordinance proscribes "precisely the same acts" as Section 17500. "A claim for false advertising [under Section 17500] requires proof that the defendant, in connection with the sale of a product or service, made an untrue or misleading statement regarding the product or service." *Nagel* v. *Twin Labs., Inc.,* 109 Cal.App.4th 39, 51 (2003) (emphasis added). In contrast, the Ordinance regulates advertising related to the proposed "*performance*" of services by a limited services pregnancy center. S.F. Admin. Code § 93.4(a), (b). Thus, the Ordinance is broader than Section 17500 in that it reaches false advertising offered in connection with the performance of a limited services pregnancy provider's services, irrespective of whether those services are offered for sale. Tellingly, First Resort fails to address this critical, textual distinction in any of its papers.

In sum, the Court finds that Section 17500 does not preempt the Ordinance. The Ordinance does not criminalize false advertising and its enforcement does not interfere or conflict with an enforcement action under the FAL. The Court therefore GRANTS summary judgment in favor of the City on First Resort's third claim for preemption.

IV. CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT:

1. First Resort's Motion for Summary Judgment is DENIED and the City's Cross-Motion for Summary Judgment is GRANTED.

2. Judgment shall be entered in favor of the City. The Clerk shall close the file and terminate all pending matters.

IT IS SO ORDERED.

Date: 2/20/15 /s/SAUNDRA BROWN ARMSTRONG
United States District Judge

Filed
Sep 19 2017
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FIRST RESORT, INC.,
Plaintiff-Appellant,

v.

DENNIS J. HERRERA, in his official capacity as City Attorney of the City of San Francisco; et al.
Defendants-Appellees.

No. 15-15434
D.C. No. 4:11-cv-05534-SBA
Northern District of California, Oakland

ORDER

Before: D.W. NELSON, TASHIMA, and OWENS, Circuit Judges.

Judge Owens voted to deny the petition for rehearing en banc. Judge Nelson and Judge Tashima recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing en banc is denied.

PREGNANCY INFORMATION DISCLOSURE AND PROTECTION ORDINANCE

FILE NO ORDINANCE NO

[Administrative Code – False Advertising by Limited Services Pregnancy Centers]

Ordinance amending the San Francisco Administrative Code by adding Chapter 93, Sections 93.1 through 93.5, to prohibit limited services pregnancy centers from making false or misleading statements to the public about pregnancy-related services the centers offer or perform.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The San Francisco Administrative Code is hereby amended by adding Chapter 93, Sections 93.1 through 93.5, to read as follows:

SEC. 93.1. TITLE. The Chapter shall be known as the Pregnancy Information Disclosure and Protection Ordinance.

SEC. 93.2. FINDINGS.

1. San Francisco serves as the medical provider of last resort for indigent individuals who need medical care. These individuals include women facing unexpected pregnancies.

2. A woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government.

3. Many people have deeply held religious and moral beliefs both supporting and opposing abortion, and

the City respects the right of individuals to express and promote such beliefs.

4. When a woman considers termination of a pregnancy, time is a critical factor. Delays in deciding to terminate a pregnancy may mean that a less invasive option is no longer available or that the option to terminate a pregnancy is no longer available.

5. In recent years, clinics that seek to counsel clients against abortion have become common throughout California. These clinics are often referred to as crisis pregnancy centers ("CPCs"). Although some CPCs are licensed to provide various medical services to pregnant women, most CPCs are not licensed medical clinics.

6. Some CPCs openly acknowledge in their advertising and their facilities, that they do not provide abortions or emergency contraception or refer clients to other providers of such services. Some of these same CPCs also openly acknowledge that they believe abortion is morally wrong. Many CPCs, however, seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling.

7. CPCs often purchase "pay per click" ads on online search services such as Google for terms such as "abortion", so that persons searching for abortion services will see a link and advertisement for the CPC at the top of the results page. In addition, many CPCs advertise on billboards, mass-transit facilities, and through websites.

8. Most clients do not come to CPCs as a result of a referral from a medical professional. Clients seeking information regarding options to terminate a preg-

nancy commonly are experiencing emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by CPCs. These circumstances raise the need for regulation that is more protective of potential consumers of pregnancy center services.

9. Because of the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or emergency contraception is of special concern to the City, When a woman is misled into believing that a clinic offers services that it does not in fact offer. she loses time crucial to the decision whether to terminate a pregnancy. Under these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all.

10. The City respects the right of limited services pregnancy centers to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit or curtail such advocacy.

11. However, if women who have chosen to terminate a pregnancy are misled and delayed by the false advertising of CPCs, the cost of providing more invasive and expensive options may fall upon City health facilities, which provide the medical services of last resort for the City's indigent population.

12. After carefully balancing the constitutionally protected right of a woman to choose to terminate her pregnancy, the right of individuals to express their religious and ethical beliefs about abortion. the harm to women worked by even slight delays that can be

caused by false advertising for pregnancy and/or abortion services, and the cost to the City that can accrue from such delay, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

SEC. 93.3. DEFINITIONS.

For the purposes of this Chapter, the following terms shall have the following meanings:

(a) "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live birth. "Abortion" includes, but is not limited to, a termination using pharmacological agents.

(b) "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

(c) "Emergency contraception" shall mean one or more prescription drugs (1) used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient, within a medically-recommended amount of time after sexual intercourse, (2) dispensed for that purpose in accordance with professional standards of practice, and (3) determined by the United States Food and Drug Administration to be safe for that purpose.

(d) "Health information" shall mean any oral or written information in any form or medium that relates to health insurance and/or the past, present or future physical or mental health or condition of a client.

(e) "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provi-

sions of federal, state, or local law to provide medical services.

(f) "Limited services pregnancy center" shall mean a pregnancy services center, as defined in subsection (g), that does not directly provide or provide referrals to clients for the following services: (1) abortions; or (2) emergency contraception.

(g) "Pregnancy services center" shall mean a facility, licensed or otherwise, and including mobile facilities, the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility. A pregnancy service center has the appearance of a medical facility if two or more of the following factors are present:

(A) The facility offers pregnancy testing and/or pregnancy diagnosis;

(B) The facility has staff or volunteers who wear medical attire or uniforms;

(C) The facility contains one or more examination tables;

(D) The facility contains a private or semi-private room or area containing medical supplies and/or medical instruments;

(E) The facility has staff or volunteers who collect health information from clients; or

(F) The facility is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

It shall be prima facie evidence that a facility has the appearance of a medical facility if it has two or more of the characteristics listed above.

(h) "Premises" shall mean land and improvements or appurtenances or any part thereof.

(i) "Prenatal care" shall mean services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy. Clinical laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition.

SEC. 93.4. VIOLATION.

(a) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated before the public in the City, or to make or disseminate or cause to be made or disseminated from the City before the public anywhere, in any newspaper or other publication, or any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, whether by statement or omission, that the limited services pregnancy center knows or which by the exercise of reasonable care should know to be untrue or misleading.

(b) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

SEC. 93.5. ENFORCEMENT.

(a) The City Attorney may enforce the provisions of this Chapter through a civil action in any court of competent jurisdiction. Before filing an action under this Chapter, the City Attorney shall give written notice of the violation to the limited services pregnancy center. The written notice shall indicate that the limited services pregnancy center has ten (10) days in which to cure the false, misleading, or deceptive advertising. If the limited services pregnancy center has not responded to the written notice within ten (10) days, or refuses to cure the false, misleading, or deceptive advertising within that period, the City Attorney may file a civil action.

(b) The City Attorney may apply to any court of competent jurisdiction for injunctive relief compelling compliance with any provision of this Chapter and correcting the effects of the false, misleading, or deceptive advertising. Such an injunction may require a limited services pregnancy center to:

(1) Pay for and disseminate appropriate corrective advertising in the same for [*sic*] as the false, misleading, or deceptive advertising.

(2) Post a notice on its premises, in a location clearly noticeable from the waiting area, examination area, or both, stating:

(A) Whether there is a licensed medical doctor, registered nurse, or other licensed medical practitioner on staff at the center; and

(B) Whether abortion, emergency contraception, or referrals for abortion or emergency contraception are available at the center.

(3) Such other narrowly tailored relief as the court deems necessary to remedy the adverse effects of the false, misleading, or deceptive advertising on women seeking pregnancy-related-services.

(c) Upon a finding by a court of competent jurisdiction that a limited services pregnancy center has violated Section 93.4 of this Chapter. the City shall be entitled to recover civil penalties from each and every party responsible for the violation of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation. In addition, if the City prevails it shall be entitled to reasonable attorney's fees and costs pursuant to order of the court.

[(d) omitted in original]

(e) Nothing in this Chapter shall be interpreted as restricting or otherwise limiting the enforcement authority that state law or the Charter or Municipal Code vest in the City, its agencies, officers or employees or any state agency.

(f) Nothing in this Chapter shall be interpreted as creating a right of action for any party other than the City.

(g) Nothing in this Chapter shall be interpreted as restricting, precluding or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any court action to enforce the provisions of this Chapter.

Section 2. **General Provisions.**

(a) **Severability.** If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid or unconstitutional.

(b) **No Conflict with State or Federal Law.** Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(c) **Undertaking for the General Welfare.** In adopting and implementing this ordinance, the City and County of San Francisco is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

Section 3. **Effective Date.** This ordinance shall become effective 30 days from the date of passage.

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

By: /s/Erin Bernstein
Deputy City Attorney

BOARD OF SUPERVISORS
7/29/2011

CITY & COUNTY OF SAN FRANCISCO

NEWS RELEASE

For Immediate Release: Tuesday, August 2, 2011

Contacts:

• **Matt Dorsey** for City Attorney Herrera..... (415) 554-4662

• **Megan Hamilton** for Supervisor Cohen..... (415) 554-7670

Cohen, Herrera take on S.F. 'crisis pregnancy centers' for deceptive marketing tactics

Proposed ordinance, City Attorney demand letter target misleading advertising by centers that push hidden agenda for 'abortion free world'

SAN FRANCISCO (Aug. 2, 2011) - Supervisor Malia Cohen and City Attorney Dennis Herrera today announced joint legal and legislative steps to halt deceptive marketing by so-called "crisis pregnancy centers" in San Francisco, which purport to offer non-judgmental abortion services and counseling to women with unwanted pregnancies, but that instead push an anti-abortion agenda on those seeking constitutionally protected medical services. Cohen and Herrera announced their initiatives at a City Hall press conference this morning.

Cohen's legislation, which she will introduce at today's Board of Supervisors meeting, is entitled the "Pregnancy Information Disclosure and Protection Ordinance." If enacted, Cohen's measure would

explicitly prohibit limited services pregnancy centers in San Francisco from making false or misleading statements to the public about pregnancy-related services that the centers offer. While some crisis pregnancy centers openly acknowledge their pro-life advocacy, many misleadingly target women in search of abortion services though false advertising-and then employ manipulative and fear mongering tactics on their visitors to dissuade them from obtaining abortions. Crisis pregnancy centers commonly offer few services other than anti-abortion rhetoric, but the proliferation of Internet search engines has given anti-abortion centers an effective way to misrepresent themselves as bona fide clinics, offering prominent paid links in response to search queries for "abortion" and related terms within their region.

"One of the most serious threats to reproductive rights today comes from so-called 'crisis pregnancy centers,' which misrepresent themselves as non-political medical providers, but that push anti-abortion propaganda and mistruths on unsuspecting women," said Cohen. "The legislation that will be introduced today would prohibit these limited services pregnancy centers in San Francisco from misleading the public about the services they perform. It's a measured, thoughtful approach that balances the free speech rights of anti-abortion activists with constitutionally protected reproductive rights for women. I appreciate City Attorney Dennis Herrera's office working with me to craft a policy to protect women in San Francisco, while minimizing possible legal risks."

In tandem with Cohen's legislation, Herrera took a first step today toward a possible legal action under California law against San Francisco's most egregiously misleading crisis pregnancy center, First Resort, Inc. Herrera's demand letter to the anti-abortion crisis pregnancy center in the medical building at 450 Sutter Street expressed serious concerns about the veracity of the center's print advertising and Internet marketing, which imply to prospective clients that First Resort offers abortion services or referrals to abortion providers-when it in fact does neither.

Herrera's letter notes that First Resort has purchased paid Google advertisements to secure top placement in search results for abortion providers in San Francisco. Moreover, the letter details several of First Resort's public representations to prospective clients that are false and misleading, and which contrast starkly with the organization's stated purpose—as revealed in its state licensing documents—to achieve "an abortion-free world."

"First Resort is certainly entitled to advocate for 'an abortion-free world' to anyone who wants to hear it, but the center is breaking the law by misrepresenting itself as an abortion provider for the purpose of luring women with unwanted pregnancies to its office," Herrera said. 'This is an insidious practice that victimizes women who are, in some instances, already victims. It's especially problematic because the delays these centers can cause interfere with women's time-sensitive, constitutionally protected right to reproductive choice. I've taken this step to demand that First Resort clarify its purpose in accordance with state law. Moreover, I applaud Supervisor Malia

Cohen for her leadership to further tighten restrictions on this unethical practice here in San Francisco."

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CITY & COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
CITY ATTORNEY

DIRECT DIAL: (415) 554-4748
EMAIL: TARA.COLLINS@SFGOV.ORG

August 2, 2011

Ms. Shari Plunkett
Chief Executive Officer
First Resort, Inc.
450 Sutter Street, Suite 1740
San Francisco, CA 94108

Re: **Misleading Advertising By First Resort, Inc.**

Dear Ms. Plunkett:

I am writing to express my serious concerns about First Resort, Inc.'s advertising of its "Pregnancy Counseling Women's Health Clinics." First Resort's print advertising, as well as its website, appear to be designed to confuse or mislead consumers into thinking that First Resort offers abortion services or referrals thereto, when in fact it does not perform abortions or refer clients to abortion providers.

First Resort has taken steps to ensure that its website will be seen by anyone searching for an abortion provider in San Francisco. First Resort has a paid Google search link, that causes its website to appear at or near the top of the search results for "abortion in San Francisco" and similar queries. On First Resort's website, the clinic:

- advertises "counseling and medical care to women who are making decisions about unplanned pregnancies"

- includes a testimonial from a "Client who chose to terminate her pregnancy"
- offers detailed information about abortion procedures offered at outpatient medical clinics
- implies on its "Abortion Procedures" page that First Resort performs pregnancy tests and ultrasounds as a prelude to offering abortion as an outpatient procedure, or referring clients to a provider who performs abortions

The First Resort website also links to a video advertisement on YouTube which states that First Resort offers "non-political services" in a time of need, and that its satisfied customers are "the face of choice." These representations are misleading, and stand in stark contrast to the organization's goal of building "an abortion-free world," as stated in First Resort's state licensing documents.

Nowhere on its website, print advertisements, or in the paid Google advertisement, does First Resort state that it does not perform or refer clients for abortion services. In contrast, on its "Adoption Options" page, First Resort's website does expressly note that First Resort "do[es] not handle adoptions or endorse any one in particular."

First Resort's advertising may mislead and deceive women facing unplanned pregnancies. Every year, thousands of women in the San Francisco Bay Area find themselves facing an unplanned pregnancy. Although many women seek counseling on their options, including abortion, many others come to a decision on their own, and choose to terminate their pregnancies. It is crucial that these women who have chosen to have an abortion are not delayed from ac-

cessing medical services in a timely fashion. At a juncture when even small delays can make a large difference in the type of procedure required—or even the availability of the option to terminate the pregnancy—it is vitally important that women receive honest information about the kind of services available at the clinic of their choice.

While First Resort is certainly entitled to offer pro-life counseling to women who desire such services, it may not lawfully attract its customers by advertising in a misleading fashion. This is particularly true where the delays caused by such misleading advertising interfere with a woman's time-sensitive and constitutionally protected right to terminate her pregnancy. I therefore ask that you correct your advertising, including First Resort's website, to clarify that the clinic does not offer or make referrals for abortion services. The City requests a response to this letter by August 31, 2011, and looks forward to your response. Should you have any questions, please contact Deputy City Attorney Erin Bernstein at 415-554-3975.

Very truly yours,

/s/ DENNIS J. HERRERA
City Attorney

Fox Plaza 1390 Market Street, San Francisco, California 94102

Reception: (415) 55-3800 facsimile: (415) 554-3985

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NARAL
Pro-Choice California

FOR IMMEIDATE RELEASE August 2, 2011

NARAL Pro-Choice California Supports San Francisco Ordinance to Help Protect Bay Area Women from Deceptive Tactics of Crisis Pregnancy Centers

New legislation would protect San Francisco women from deceptive advertising of anti-choice fake clinics and prevent anti-choice organizations from posing as comprehensive medical clinics

San Francisco, CA (August 2, 2011) – NARAL Pro-Choice California is proud to support an ordinance introduced today in San Francisco that would protect women who are facing an unplanned pregnancy.

The ordinance, introduced by San Francisco Supervisor Malia Cohen, is an important step in the fight to require honest advertising by so-called "crisis pregnancy centers" (CPCs) that use deceitful marketing practices to target pregnant women seeking comprehensive medical advice.

"Crisis pregnancy centers are a serious threat to women's health," said Amy Everitt, NARAL Pro-Choice California state director. "By posing as legitimate medical clinics that offer a full range of reproductive-health services, these fake clinics often lie and manipulate women who are facing unplanned pregnancies. I applaud Supervisor Cohen for her work on this important issue, and urge the

San Francisco Board of Supervisors to support Cohen's ordinance."

NARAL Pro-Choice California has conducted extensive research on CPCs in the state, and published an extensive report entitled "Unmasking Fake Clinics: the Truth about Crisis Pregnancy Centers in California,"[i] which can be viewed at the NARAL Pro- Choice California website. NARAL Pro-Choice America has been supportive of similar local legislation designed to hold CPCs accountable in New York, Texas, and Maryland cities.[ii]

By requiring CPCs to be truthful in their advertising, this ordinance would ensure that pregnant women who are seeking medical services are able to make informed decisions about where they seek information, counseling, and care. This is the first ordinance of its kind to be introduced in California.

About NARAL Pro-Choice California

NARAL Pro-Choice California is a statewide organization that works through the political and legislative systems to fulfill our mission:

To develop and sustain a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion.

California's nationwide influence is unquestioned; maintaining the state's strong pro-choice orientation is a national priority. NARAL Pro-

Choice California works on both the state and national levels to protect and defend a woman's right to choose.

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Contact: Sarah LaDue at 415-890-1020, SLaDue@ProChoiceAmerica.org or Michelle Andersen, 415-292-3677 at mixmoo@yahoo.com

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[i] NARAL Pro-Choice California has conducted For more information about crisis pregnancy centers in California, the NARAL Pro-Choice California report entitled "Unmasking Fake Clinics: the Truth about Crisis Pregnancy Centers in California" can be found at the following address: http://www.prochoicecalifornia.org/assets/files/cpcreport2010-revisednov2010.pdf

[ii] To learn more about the threat that CPCs pose nationwide, the NARAL Pro-Choice America fact sheet entitled "The Truth About Crisis Pregnancy Centers" can be found at the following address:
http://www.prochoiceamerica.org/media/fact-sheets/abortion-cpcs.pdf

JOINT STATEMENT OF UNDISPUTED FACTS
(REDACTED VERSION)

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Attorneys for Defendants, CITY AND COUNTY OF SAN FRANCISCO, et al.

UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT
OF CALIFORNIA

FIRST RESORT, INC., *Plaintiff,* 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; and THE CITY AND COUNTY OF SAN FRANCISCO, *Defendants.*	Case No: 4:11-cv-05534-SBA (KAW) JOINT STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT FILED BY PLAINTIFF AND DEFENDANTS Date: May 13, 2014 Time: 1:00 PM Courtroom 1

Plaintiffs FIRST RESORT, INC. ("First Resort") and defendants DENNIS HERRERA, in his official capacity as City Attorney of the City of San Francisco ("City Attorney"); BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO ("Board") and THE CITY AND COUNTY OF SAN FRANCISCO (collectively "Defendants" or "City" and with First Resort the "Parties") herby agree to the following Undisputed Facts ("UF")[1] in support of their cross-motions for summary judgment:

[1] The Parties have not stipulated to the relevance of each UF.

1. First Resort is a California 501(c)(3) public benefit, non-profit corporation that operates a State-licensed pregnancy services clinic in the City of San Francisco.

2. First Resort provides counseling and basic medical services such as pregnancy tests, ultrasounds and early prenatal care to pregnant women as needed, free of charge to its clients. Every First Resort client meets with a counselor.

3. First Resort has never received payment or reimbursement for its services from insurance companies, government entities or Medi-Cal.

4. First Resort conducts fundraising and receives charitable donations so that it may provide clients with services free of charge.

5. First Resort's stated vision is to build a Bay Area where abortion is neither desired nor needed.

6. First Resort's stated mission is to empower women in unplanned pregnancies to make fully-informed decisions in line with their own beliefs and values, and to provide support for women after their choice.

7. First Resort is run on the belief that a woman deserves time, space, and support to make an appropriately processed and informed decision about her pregnancy that aligns with her own beliefs and values.

8. It is First Resort's view that abortion harms the mother and father, their families, and the unborn child and that some women will choose options other than abortion when given appropriate support, unbiased counseling, and accurate medical information. This statement is not on First Resort's website.

9. First Resort does not provide or refer for abortions or emergency contraception. First Resort does provide pre- and post-abortion counseling.

10. Upon intake, First Resort provides all clients with a "Consent for Services" form that states "First Resort does not perform or refer for abortions". This form must be signed by the client before any services are provided.

11. On August 2, 2011, Supervisor Malia Cohen, a member of the Board, introduced legislation which ultimately became known as the Pregnancy Information Disclosure and Protection Ordinance, San Francisco Code ch. 93, §§ 93.1-93.5 ("Ordinance"). Attached as Exhibit A is a true and correct copy of the Ordinance.

12. On August 2, 2011, the City Attorney and the Board issued a joint press release announcing the proposed Ordinance ("Press Release"). Attached as Exhibit B is a true and correct copy of the Press Release. Defendants admit that the Press Release is authentic.

13. On August 2, 2011, the City Attorney issued correspondence to First Resort related to purportedly misleading advertising ("City Attorney Letter"). This is the only such letter issued by the City Attorney. Attached as Exhibit C is a true and correct copy of the City Attorney Letter. Defendants admit that the City Attorney Letter is authentic.

14. Defendants contend that the mention of "California Law" in the Press Release relates to California Business and Professions Code, § 17500.

15. The press kit for the Press Release made available on the City Attorney's website included a press

release issued by the National Abortion and Reproductive Rights Action League ("NARAL"). Attached as Exhibit D is a true and correct copy of the NARAL press release.

16. On September 26, 2011, the Ordinance came for hearing before the City Operations and Neighborhood Services Committee of the Board. Attached as Exhibit E is a true and correct copy of the portions of the September 26, 2011 hearing transcript related to the Ordinance.[2]

17. On October 18, 2011, the Ordinance came for hearing before the full Board. Attached as Exhibit F is a true and correct copy of the portions of the October 18, 2011 hearing transcript related to the Ordinance.

18. On October 25, 2011, the Board passed the Ordinance. Attached as Exhibit G is a true and correct copy of the portions of the October 25, 2011 hearing transcript regarding the Ordinance.

19. The Ordinance became effective on December 4, 2011.

20. The Legislative Record[3] only identified two "limited services pregnancy centers" in the City of San

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[2] The Parties are submitting the relevant portions of the closed-captioning transcripts from the hearings in question (the only transcript available).

[3] Defendants admitted that the documents produced by the City at CCSF 00001-00771 are the official written legislative file kept by the Clerk of the Board of Supervisors, per SF Charter, Art. II, Sections 2.108 and 2.117, for the enactment of San Francisco Administrative Code, sections 93.1 through 93.5. The only other records that are part of the Clerk's legislative file for this Ordinance are the transcripts and video of the Board of Supervisors hearings that occurred on September 26, 2011, October 4, 2011, October 18, 2011, and October 25, 2011, during which the Ordinance was

Francisco – First Resort and Alpha Pregnancy Center ("Alpha") – and Defendants have not identified any others by name in connection with discovery. Defendants have not undertaken a comprehensive effort to identify all "limited services pregnancy centers" in the City of San Francisco.

21. Alpha is registered with the California Attorney General as a public benefit, non-profit, charity.

22. Neither the Legislative Record nor Defendants' responses to discovery identify any woman who was unable to obtain an abortion or emergency contraception, or was required to undergo a more invasive procedure, as a result of the false advertising of services provided by a "limited services pregnancy center" in San Francisco.

23. Neither the Legislative Record nor Defendants' responses to discovery identify any specific examples of delay in obtaining an abortion or emergency contraception as a result of purported false advertising by a "limited services pregnancy center" in San Francisco.

24. The Legislative Record includes a document at CCSF000036 ("Dr. Drey Story").[4] The Dr. Drey Story does not mention advertising.

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addressed (collectively, "Legislative Record"). First Resort objects to the Legislative Record based on hearsay and admissibility. Defendants believe that First Resort's hearsay and general admissibility objection is inapplicable because the legislative record is: 1) subject to the public records exception to the hearsay rule; and 2) subject to judicial notice. Further, the history is not being offered for the truth of all matters asserted therein, but as evidence of the testimony and documents considered by the Board in passing the Ordinance.

[4] Copies of the Dr. Drey Story appear several times in the Legislative Record with different Bates numbers.

25. Neither the Legislative Record nor defendants' responses to discovery identify data supporting that the City has incurred increased costs as a result of a delay in obtaining abortions caused by purported misleading advertising by "limited services pregnancy centers".

26. Other than the Ordinance, the only less speech-restrictive means considered by the Board was not passing the Ordinance.

27. First Resort produced to Defendants a September 2012 PowerPoint presentation that was used and compiled by First Resort. A true and correct copy of the PowerPoint presentation is attached to Defendants' Administrative Motion to File Under Seal as Exhibit 11.

28. The type of abortion procedure available to a woman, and whether abortion is available at all, depend on how far advanced her pregnancy is.

29. Abortion procedures performed at a later stage of pregnancy may lead to increased complications and greater expense for the patient.

30. Some "limited services pregnancy centers" purchase "pay per click" ads on online search services such as Google.

31. Some "limited services pregnancy centers" seek to attract women who are considering an abortion.

32. First Resort is community clinic licensed by the California Department of Public Health, operating in San Francisco.

33. The 1994 amendment to First Resort's Articles of Incorporation states, in part, "Reaching people one by one, together we will build an abortion-free world."

34. SEE SUBSECTIONS BELOW:

a. First Resort's "target clients" are women who are in an unplanned pregnancy and are unsure about what they are going to do.

b. First Resort's "target client" includes women described as "abortion-minded". The term "abortion-minded" refers to women who are considering an abortion.

35. In its online use of services like Google's Adwords, First Resort used hundreds of keywords for San Francisco including, but not limited to, "abortion" and "emergency contraception" and the terms "medical," "San Francisco," and "Bay Area" as modifiers.

36. The terms referenced in UF #35 are used so that, for example, when an internet search is run for "abortion San Francisco," a link to First Resort's website can appear as a paid advertisement above the search result.

37. First Resort pays to use Google Adwords.

38. First Resort advertises that it provides State-licensed medical care.

39. In fiscal year 2012, First Resort's annual corporate expenditures were over $1 million; it received over $1 million in donations. This budget included, but was not limited to, $300,000 in funds for First Resort's San Francisco clinic.

40. First Resort purchases medical equipment and medical supplies.

41. The medical services offered by First Resort, such as pregnancy testing, ultrasounds, and nursing consultations have monetary value.

42. First Resort has considered accepting reimbursement for medical services from government and private insurance sources.

REDACTED

REDACTED

REDACTED

46. First Resort's employees are encouraged to share client stories because they are useful in fundraising.

47. A majority of First Resort's fundraising communications reference the benefit of its services to clients and often include client stories.

48. Members of First Resort's senior management team are eligible to receive bonuses based on criteria which may include, but are not limited to, the number of new clients, amount of revenue, number of new and converted supporters, numbers of people who mention abortion on the phone and still make appointments, and marketing leads/costs. Each individual is evaluated based on his or her responsibilities and completion of fiscal year goals and, as a result, all of the aforementioned criteria may not apply to any one particular individual.

49. First Resort has a fundraising program whereby a donor can give $35/month to sponsor one woman and her "pre-born baby." Sponsorships at higher increments are available as follows:

2 women and their pre-born babies $70

3 women and their pre-born babies $105

5 women and their pre-born babies $175

10 women and their pre-born babies $350

15 women and their pre-born babies $525

20 women and their pre-born babies $700

50. First Resort advertises its medical services to the public via print and online methods.

51. First Resort views its online advertising as competing with that of abortion providers for the attention of online viewers.

52. Attached as Exhibit H is a true and correct copy of the Parties' Join Discovery Stipulation, including Exhibits A-W.

Dated: March 11, 2014

Respectfully submitted,

LOCKE LORD LLP

By: /s/ *Michelle C. Ferrara*
Stephen A. Tuggy
Patricia A. Musitano
Michelle C. Ferrara
Kelly S. Biggins
Attorneys for Plaintiff
FIRST RESORT, INC.

Dated: March 11, 2014

DENNIS J. HERRERA
City Attorney

RONALD P. FLYNN
Chief of Complex and
Affirmative Litigation

By: /s/
ERIN BERNSTEIN

DEPUTY CITY ATTORNEY
ATTORNEYS FOR DEFENDANTS
CITY AND COUNTY OF SAN FRANCISCO, ET AL

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, SEPTEMBER 26, 2011

SFGTV – CITY OPERATIONS & NEIGHBORHOOD SERVICES COMMITTEE

1300-1600 EST 9/26/2011

* * *

>> AMY EVERETT.

>> GOOD MORNING, THANK YOU.

I AM THE STATE DIRECTOR OF CHOICE FOR CALIFORNIA, AND WE REPRESENT THOUSANDS OF WOMEN.

I AM HERE TO EXPRESS STRONG SUPPORT OF THE MEMBERS AND ORGANIZATION FOR THE PREGNANCY INFORMATION AND PROTECTION ORDINANCE.

THIS MORNING WE DELIVER MORE THAN 300 LETTERS FROM SAN FRANCISCO RESIDENTS TO EACH SUPERVISOR.

IN ADDITION TO THE MORE THAN 1500 THAT WERE DELIVERED LAST THURSDAY.

FOR SEVERAL YEARS NOW MY OFFICE HAS CONDUCTED RESEARCH ON THE CRISIS PREGNANCY CENTERS AND THE HARM THEY DO TO WOMEN WHO ARE FACING UNPLANNED PREGNANCIES.

OUR REPORT FOUND THAT MANY INTENTIONALLY MISLEAD AND COERCED WOMEN WHO GO

TO THEM SEEKING COMPREHENSNE PREGNANCY-RELATED SERVICES.

SOME OF THEM HAVE BEEN REPORTED TO YOU SHAME OR CONVINCE FROM MOBILE WOMEN THAT CARRYING THE PREGNANCIES TO TERM WILL HELP THEM TO ATONE FOR LIVING A LOOSE OR A RESPONSIBLE LIFE STYLE.

THIS ORDINANCE ONLY APPLIES TO A PREGNANCY CENTER THAT ENGAGES IN DECEPTIVE AND MISLEADING ADVERTISING.

IF THEY'RE NOT MISLEADING WOMEN, THEY HAVE NOTHING TO WORRY ABOUT.

IF THEY REALLY BELIEVE WOMEN DESERVE THE FULL AND TRUTHFUL INFORMATION ABOUT THE MEDICAL OPTIONS, THAN THEY SHOULD HAVE NO OBJECTION TO THIS ORDINANCE.

TODAY YOU WILL LIKELY YOUR CLAIMS THAT THEY HAVE HELPED UNDERSERVED WOMEN WHO NEED SUPPORT DURING THEIR PREGNANCY.

WE SUPPORT IMPROVING SERVICES FOR WOMEN WHO CHOOSE TO CONTINUE THEIR PREGNANCIES, AND WE THINK AMERICANS ARE FREE ON THIS POINT.

MANY MISINFORM WOMEN ABOUT THE HEALTH CARE OPTIONS. WE BELIEVE WE CAN HELP EXPECTANT MOTHERS MOST WHEN WE DO NOT MISLEAD THEM AND GIVE THEM FULL COMPREHENSIVE MEDICAL ADVICE.

SUPERVISORS, I STRONGLY URGE YOU TO VOTE YES. THANK YOU.

* * *

> > MY NAME IS KATIE HOVEL.

I AM 24-WEEKS PREGNANT TODAY.

I WAS A CONFUSED AND HONORABLE WOMAN AT THE POINT OF FINDING OUT I WAS PREGNANT.

I DID CALL MY NORMAL HEALTH CARE PROVIDER I HAD BEEN SEEING FOR THE PAST EIGHT YEARS AND BEEN TOLD THAT IF I – I HAD NO IDEA WHAT I WANTED TO DO AT ALL.

I WAS TOLD IF I WANTED TO KEEP MY BABY, THAT IT WOULD NOT HELP, THEY WOULD NOT GIVE ME A PREGNANCY TEST. THEREFORE I WENT ONLINE AND PUT IN I AM PREGNANT IN SAN FRANCISCO, WHAT DO I DO?

I CALLED AND MADE AN APPOINTMENT BECAUSE I KNOW TIME IS OF THE ESSENCE.

WHEN I WENT IN AND TOOK MY TEST, I WAS PREGNANT. THEY SAT DOWN WITH ME AND OFFERED ME MY OPTIONS.

AND I SAT THERE WITH MY PARTNER AND DECIDED THAT I WAS GOING TO KEEP MY PREGNANCY AND GO THROUGH WITH IT, BUT IT WAS NOT AN EASY DECISION BECAUSE IT WAS UNEXPECTED.

JUST BECAUSE IT WAS UNEXPECTED DID NOT MEAN IT WAS ON WANTED PERSONALLY.

THEY WALKED ME THROUGH OPTIONS OF BOTH SIDES OF THE STORY.

AND THEY TOID ME WHAT WOULD HAPPEN IF I WANTED TO TERMINATE.

I DID NOT KNOW WHAT WOULD HAPPEN IF I DECIDED TO GO THROUGH WITH IT.

IF YOU DO NOT HAVE INSURANCE, YOU CANNOT SEE A DOCTOR. IT TOOK ME TWO MONTHS TO GET INSURANCE.

I WOULD LIKE TO SPEAK FOR THE OTHER SIDE OF THINGS THAT THIS IS SCARY WHEN YOU DECIDE TO KEEP IT.

THANK YOU.

SUPERVISOR AVALOS: DID YOU SAY WHAT CPC YOU WENT TO?

>> I WENT TO FIRST RESORT.

>> TANYA SMITH.

>> GOOD MORNING, SUPERVISORS.

I HAVE THE PLEASURE OF MEETING WOMEN WHO COME TO A FIRST RESORT FOR COUNSELING AND MEDICAL CARE.

IT IS MY IMPERATIVE TO MAKE SURE THEY FEEL RESPECTED, MET WITH COMPASSION, AND ARE GIVEN INFORMATION TO HELP THEM MAKE A FULLY-INFORMED DECISION REGARDING THEIR PREGNANCY.

OUR CLIENTS ARE ASKED WHAT THEIR OBJECTIONS ARE AND CONCERNS ARE.

AND IT IS OUR EVERY EFFORT TO MAKE SURE WE PROVIDE THE RESOURCES AND REFERRALS THAT WILL SUPPORT THEM IN THEIR DECISION-MAKING PROCESS.

THAT MIGHT INCLUDE MAKING DECISIONS REGARDING HOUSING, DECISIONS FOR DOMESTIC VIOLENCE, EVEN TAKING PEOPLE WHO HAVE EXPERIENCED SEXUAL TRAUMA TO THE TRAUMA CENTER.

IT ALSO INCLUDES OTHER REFERRALS, INCLUDING THOSE TO MENTAL HEALTH, AND MOST IMPORTANTLY, TO HELP THEM RECEIVE THAT MEDICAL INSURANCE.

IN DOING SO, WE ARE ALSO INCLINED TO INVITE A CLIENT'S PARTNER, A BOYFRIEND, OR HUSBAND INTO THE COUNSELING SESSION IF WE THINK THAT WILL HELP FACILITATE COMMUNICATIONS BETWEEN THE CLIENT AND PARTNER.

WE BELIEVE WE DEVELOP A RAPPORT WITH THEM.

WE FIND WE MAKE NO ATTEMPT TO DELAY OR PERSUADE A CLIENT IN ANY WAY IN THEIR DECISION.

IT IS THEIR DECISION.

TO DO THAT WOULD BE OPPOSED OF WHAT OUR GOAL IS, TO HELP THEM MAKE A FULLY INFORMED DECISION.

97 PERCENT OF THE WOMEN WHO WERE SURVEYED COMING IN YOUR CLINIC STATED THEY NEVER FELT PRESSURED.

WE BELIEVE THAT PERCENTAGE SPEAKS TO THE FACT THAT WE DO USE AN UNBIASED APPROACH.

WE WORK HARD TO MAKE SURE EVERY WOMAN GREASY RECEIVES THE SUPPORT SHE NEEDS AND WE USED RESEARCH- BASED MATERIAL IN THE COUNSELING ROOM THAT IS PRODUCED AND DISTRIBUTED BY REPUTABLE HEALTH AGENCIES SUCH AS THE CENTER FOR DISEASE CONTROL, MARCH OF DIMES, AND A NONPROFIT SECULAR HEALTH EDUCATION RESOURCES.

>> THANK YOU.

JUST AS A REMINDER, YOU HEAR A SOFT BEEP THAT REMINDS YOU I HAVE 30 SECONDS.

THAT WILL GO OFF AT ONE MINUTE 30 SECONDS.

A LOUDER CHIME WILL GO OFF WHEN YOUR TIME IS UP. DANIELLE ISTRIA:

>> I AM DANIELLE ISTRIA WITH THE FIRST RESORT.

I WENT TO FIRST RESTORED AFTER GOING TO ANOTHER CLINIC, AND THEY TOLD ME THAT MY ONLY OPTIONS REALLY WERE TO ABORT.

I LOOKED UP ONLINE AND IT WAS THE FIRST PLACE THAT CAME IN.

WHEN I CALLED THEM, THE WERE VERY NICE. THEY GAVE ME BOTH OPTIONS.

THEY GAVE ME WHAT I WAS LOOKING FOR AS FAR AS COUNSELING.

NEVER ONCE DID I FEEL PRESSURED.

THEY NEVER TOLD ME WHAT CHOICES I HAVE TO MAKE. OPTIONS WERE ALWAYS UP TO ME.

THERE WERE ALWAYS AVAILABLE FOR QUESTIONS I FEEL LIKE I GOT MORE SUPPORT FROM THEM AND ANSWERS THAN I GOT FROM ANY OF THEIR CLINIC THAT I WENT TO THAT ONLY GAVE ME REALLY NEGATIVE OPTIONS AND TO NOT OFFER ME ANY KIND OF SUPPORT WHATSOEVER.

I LEFT THE CLINIC FEELING DISAPPOINTED.

WHEN I WENT TO FIRST RESORT I FELT SUPPORTED IN ANY OPTION I DECIDED TO MAKE.

THAT IS ALL I HAVE TO SAY.

* * *

>> MY NAME IS SHERRY PLUNKETT, CEO OF FIRST RESORT.

OUR THREE STATE-LICENSED CLINICS EXIST TO HELP WOMEN MAKE A FULLY INFORMED DECISION ABOUT THEIR UNINTENDED PREGNANCIES, DECISIONS THAT ALIGNED WITH THEIR OWN BELIEFS AND VALUES.

WE TREAT EACH WOMAN WITH DIGNITY AND RESPECT, AND REGARDLESS OF A WOMAN'S CHOICE, HER RIGHT TO CHOOSE IS RESPECTED BY ARE STOPPED.

WE ARE NOT AFFILIATED OR FUNDED BY ANY PRO-LIKE GROUPS. UNLIKE PLANNED PARENTHOOD, WE RECEIVE NO GOVERNMENT DOLLARS, NOR DO WE HAVE A FINANCIAL INTEREST IN A WOMAN'S DECISION.

WE DO NOT PURSUE POLITICAL ACTION TO UNDERMINE WOMEN'S LEGAL ABORTION RIGHTS.

OUR CLINICS ARE SUPERVISED UNDER THE DIRECTION OF TWO BOARD CERTIFIED IS, LIKE CALIFORNIA LICENSED OB/GYNS.

ALL COUNSELING IS SUPERVISED OR DONE BY A WOMAN WITH A MASTER'S DEGREE OR A LICENSED CLINICAL SOCIAL WORKER. MOST IMPORTANTLY, ARE NO-COST CARE IS TIMELY.

EVERY WOMAN WHO CALLS IT OFFERED A SAME-DAY APPOINTMENT.

OUR CARE IS HIGH QUALITY AND SUPPORTIVE.

PLEASE NOTE WE DO NOT USE THE YEAR, ISOLATION OR MANIPULATION WITH OUR CLIENTS, AND WE INFORMED EVERY PERSON WHO CALLS AND MENTIONS ABORTIONS ON THE PHONE THAT WE DO NOT PERFORM OR REFER FOR ABORTION.

EVERY CLIENT IS INFORMED AGAIN IN WRITING IN A ONE-PAGE DOCUMENT BEFORE SHE MEETS WITH A COUNSELOR.

OUR COMMUNICATION IS CLEAR, HONEST, AND APPROPRIATE.

I WOULD NOT PARTICIPATE, NOR WHAT MY BOARD, IN ANY TYPE OF DECEPTION OR MISLEADING WOMEN IN ANY WAY.

CAN I SAY ONE LAST THING?

SUPERVISOR AVALOS: YOUR TIME IS UP.

WE GIVE THE SAME AMOUNT OF TIME FOR EVERYONE.

> > THANK YOU VERY MUCH. PLEASE VOTE NO.

>> GOOD MORNING, SUPERVISORS.

I AM PUBLIC AFFAIRS DIRECTOR FOR THE PLANNED PARENTHOOD IN SAN FRANCISCO.

IT IS A NON-PROFIT HEALTH-CARE PROVIDER, WHICH HAS A WIDE RANGE OF COMMUNITY HEALTH CARE SERVICES AND SEXUAL HEALH EDUCATION PROVIDING SERVICES TOWARDS 100,000 MEN, WOMEN, AND TEENAGERS ANNUALLY IN 17 COUNTIES.

90 PERCENT OF THE MEDICAL SERVICES PROVIDE OUR LIFE-SAVING CANCER SCREENINGS, PRENATAL CARING, PRESS HELP SCREENINGS, SEXUAL HEALH INFORMATION, EDUCATION, AND HEALH COUNSELING.

WE OPERATE 30 HELP CENTERS, INCLUDING TWO IN THE CITY AND COUNTY OF SAN FRANCISCO THAT PROVIDE COMPREHENSIVE, MEDICALLY-ACCURATE AND UNBIASED REPRODUCTIVE AND SEXUAL HEALH INFORMATION TO ALL WHO WALK THROUGH OUR DOORS, REGARDLESS OF THEIR ABILITY TO PAY.

PLANNED PARENTHOOD HIGHLY TRAINED DOCTORS, NURSES, AND HEALTH CARE PROFESSIONALS PROVIDE AFFORDABLE, ACCESSIBLE, AND QUALITY CARE TO EVERYONE SEEKING OUR SERVICES.

PLANNED PARENTHOOD PROVIDES ACCURATE INFORMATION AND NON-JUDGMENTAL COUNSELING FOR ALL PEOPLE SO THEY CAN MAKE INFORMED DECISIONS FOR THEMSELVES AND

THEIR FAMILIES AND LIVE HEALTHY AND PRODUCTIVE LIVES.

OUR DOORS ARE OPEN TO EVERY WOMAN, EVERY FAMILY, AND EVERY COMMUNITY.

PLANNED PARENTHOOD BELIEVES ALL PEOPLE DESERVE COMPREHENSIVE, MEDICALLY ACCURATE AND UNBIASED INFORMATION FOR ANY AND ALL HELP FOR SERVICES THEY ARE SEEKING.

IT WAS STRONGLY URGE ANY AND ALL ORGANIZATIONS PROVIDING SERVICES AND INFORMATION BE HELD TO THE LEVEL OF QUALITY CARE AND PROFESSIONALISM THAT WE PROUDLY GIVE CLIENTS EVERY DAY.

THANK YOU VERY MUCH.

* * *

>> GOOD MORNING.

MY NAME IS TIANA ANDREWS.

I WAS REFERRED TO FIRST RESORT BY A FRIEND.

AFTER A CONVERSATION THAT WE HAD, SHE SUGGESTED THAT I CHECK OUT FIRST RESORT FOR SOME OF THE COUNSELING OPTIONS THAT ARE OUT THERE.

I CALLED AND WAS ABLE TO MEET WITH A LICENSED CLINICIAN. SHE WAS VERY HELPFUL IN HELPING ME TO COME TO TERMS WITH THE DECISION I HAD MADE TO TERMINATE A PREGNANCY.

SHE WAS A GREAT LISTENER.

I JUST FELT VERY SUPPORTED BY HER.

I DID NOT FEEL LIKE SHE JUDGED ME IN ANY WAY FOR THE DECISION I HAD MADE, WAS THERE TO HELP ME FOR POST-ABORTION COUNSELING.

AFTER THAT EXPERIENCE, I WISHED THAT THAT OPTION WAS READILY AVAILABLE FOR WOMEN MAKING THAT POSITION. WHEN I MADE MY DECISION, THERE WERE NO ALTERNATIVES. TO KNOW THAT THERE ARE PEOPLE SUPPORTING EITHER WAY, I DO NOT SEE A PROBLEM WITH IT.

I AM GRATEFUL TO HAVE THEM NOW TO OFFER POST-ABORTION COUNSELING.

I WOULD DEFINITELY REFER THEM TO ANYBODY.

SUPERVISOR COHEN: THANK YOU.

* * *

> > GOOD MORNING, SUPERVISORS. MY NAME IS JUANITA PRICE.

I AM ONE OF THOSE PEOPLE THAT POSTED A POSITIVE REVIEW OF FIRST RESORT ON YELP.

I FIND IT INTERESTING, LOOKING AT THE ORDINANCE, THINGS HAPPENING TO DO WITH YELP, LOOKING AT THE REVIEWS THAT PEOPLE DID WERE NEGATIVE, AND HOW THOSE WERE ACTUALLY FALSE ADVERTISING.

A LOT OF THE PEOPLE THAT POSTED THERE POSTED UNBELIEVABLE THINGS THAT HAPPENED.

MY EXPERIENCE AT FIRST RESORT WAS VERY POSITIVE.

I WAS PART OF A POST-ABORTION COUNSELING SESSION.

I DID NOT FEEL JUDGED, PUT UPON IN ANY KIND OF WAY. I WOULD URGE YOU TO VOTE NO ON THIS LEGISLATION.

SUPERVISOR COHEN: THANK YOU.

* * *

>> ELLEN SCHAFFER, CO-DIRECTOR OF THE TRUST WOMEN'S CAMPAIGN.

WE APPRECIATE YOUR LEADERSHIP AND ATIENTION TO THIS IMPORTANT ISSUE.

WE SALUTE OUR COLLEAGUES WHO ARE HERE TO MOBILIZE PUBLIC OPPOSITION TO THE PRACTICE OF CRISIS PREGNANCY CENTERS.

SUPERVISORS, FIRST RESORT IS AN ORGANIZATION DEDICATED TO AN ABORTION-FREE WORLD THAT INTENTIONALLY ADVERTISES ITSELF AS PROVIDING ABORTION SERVICES.

THEY TAKE OUT PAID ADS ON GOOGLE THAT SHOW UP WHEN YOU SEARCH FOR ABORTION AND SAN FRANCISCO.

QUOTES ON THEIR WEBSITE, REFER TO PEOPLE TO HAVE CHOSEN TO TERMINATE THE PREGNANCY.

THEY ARE NOT ALONE IN THESE EFFORTS.

AS A "NEW YORK TIMES" EDITORIAL, 30 YEARS AFTER ROE V WADE IDENTIFIED A WOMAN'S

RIGHTS TO MAKE HER OWN DECISION AND LEGALIZED ABORTION NATIONWIDE, A NEW DRIVE FROM ANTI-ABORTION FORTRESS WHO REFUSED TO EXCEPT THE LAW OF THE LAND HAVE A PAIR OF WOMEN'S ABILITY TO EXERCISE THAT RIGHT, INCLUDING FINDING WAYS TO DELAY ACCESS TO ABORTION.

WE ARE CONCERNED THESE DECEPTIVE PRACTICES ARE TO MISLEAD THE MOST OF THE HONORABLE.

POOR WOMEN HAD AN UNINTENDED PREGNANCY RATE FIVE TIMES THAT OF HIGHER INCOME WOMEN AND AN UNINTENDED BIRTHRATE SIX TIMES HIGHER IN 2008.

OUR CAMPAIGN IS CONFIDENT THAT – CONFIDENCE AND WOMEN WILL MAKE THE RICH WISES FOR THEMSELVES IF THEY CAN FIND ACCURATE INFORMATION.

SAN FRANCISCO'S GROUNDBREAKING LEGISLATION WILL HELP TO SEE THAT THEY GET IT.

SUPERVISOR COHEN: THANK YOU. NEXT SPEAKER PLEASE.

>> GOOD MORNING, SUPERVISORS. MY NAME IS MONA LISA WALLACE.

I AM ON THE BOARD FOR THE NATIONAL ORGANIZATION OF WOMEN, NATIONAL, CALIFORNIA CHAPTERS.

ON BEHALF OF MY ORGANIZATION, I WANT TO THANK MALIA COHEN FOR THIS ORDINANCE.

THIS IS FUNDAMENTALLY A FALSE ADVERTISING CONSUMER PROTECTION ISSUE.

AN IMPACT ON CONSUMERS IS TANGIBLE.

IT IS THE DIFFERENCE BETWEEN TAKING A PILL OR HAVING AN INVASIVE PROCEDURE.

THERE IS NO TIME TO DELAY. THE RESOURCES ALREADY EXIST.

THERE IS THE BAY AREA PROJECT. THERE IS PLANNED PARENTHOOD.

WE HAVE THE RESOURCES TO ADVISE WOMEN THROUGH THE FULL NATURAL SPECTRUM OF CHILDBIRTH, AND THAT INCLUDES BIRTH, MEDICALLY-INDICATED MISCARRIAGES, ABORTION.

THE NEED TO PROTECT WOMEN FROM FALSE ADVERTISING IS VERY IMPORTANT, ESPECIALLY CONSIDERING THAT IN THE UNITED STATES, WE HAVE OVER 10,000 PRE-TEENS WHO ARE IMPREGNATED EVERY YEAR IN THE COUNTRY.

THE DIFFERENCE BETWEEN GETTING HER A PILL OR AN INVASIVE PROCEDURE IS ABSOLUTELY URGENT AND IMPORTANT. I URGE YOU TO VOTE YES ON THIS ORDINANCE.

SUPERVISOR COHEN: THANK YOU. NEXT SPEAKER PLEASE.

* * *

SUPERVISOR ELSBERND: OK.

COLLEAGUES, I WILL BE DISSENTING ON THIS.

AFTER READING THE MEMO FROM THE CITY ATTORNEY, IT WAS CLEAR THAT WE NEEDED TO HAVE ESTABLISHED FOR US TODAY SOME

SORT OF LEGISLATIVE RECORD DEMONSTRATING FALSE AND MISLEADING ADVERTISING, DEMONSTRATING THE EVIDENCE.

AND NOT SO MUCH NATIONALLY.

WE ARE THE SAN FRANCISCO BOARD OF SUPERVISORS.

WE NEEDED TO SEE A PRESENTATION OF THAT WITHIN SAN FRANCISCO.

WE HAVE TWO FACILITIES WITHIN SAN FRANCISCO.

ONE OF THE FACILITIES, THERE WAS NOT AN OUNCE OF EVIDENCE.

NOTHING HAS BEEN SUBMITTED ABOUT THEM.

FRANKLY, I CAME IN HERE THINKING THAT THERE WOULD BE AN ABUNDANCE OF THINGS ON THEM BECAUSE THEY WERE THE UNLICENSED ONE.

REGARDING THE LICENSED ONE, 90 PERCENT OF THE COMMENTS WERE BASED ON YELP REVIEWS.

GOOGLE SEARCHING – I DID THAT MYSELF, AND IT COMES UP.

BUT I DO NOT THINK THAT WARRANTS THE CITY ASKING FOR AN ORDINANCE.

I RECOGNIZE THERE ARE SOME KEY DIFFERENCES – AND THERE ARE DIFFERENCES.

I VERY MUCH RECOGNIZE THAT.

BUT THE LEGISLATIVE RECORD HERE, TO ME, IS EMPTY, AND WE WOULD NOT BE ABLE TO

SUCCESSFULLY DEFEND THIS IN COURT. I DO NOT WANT TO SEE US PURSUE THIS AND HAVE THUS LOSE. SO I WILL NEED A ROLL CALL ON THE MOTION.

SUPERVISOR AVALOS: THANK YOU, SUPERVISOR ELSBERND.

I AM WHOLEHEARTEDLY IN SUPPORT OF A WOMAN'S RIGHT TO CHOOSE.

I LOOKED AT THE MEMO THAT WE GOT FROM THE CITY ATTORNEY.

I WAS EXPECTING THAT WE WOULD HAVE MORE INFORMATION ABOUT WHAT KIND OF ADVERTISING WE SEE IN SAN FRANCISCO BEFORE US, BUT DID NOT SEE THAT.

I THINK IT PUTS AT RISK OUR ABILITY – SINCE WE DO NOT HAVE A RECORD – TO PREVAIL IN COURT, IF THERE IS AN APPEAL ON THIS LEGISLATION.

BUT I DO BELIEVE – I NEED TO SEE EVIDENCE FOR MYSELF WHETHER THERE IS VALUE.

I WAS WONDERING WHY WE WERE GETTING YELP PRODUCE MORE THAN ANYTHING.

JUST LIKE WHEN I PICK A RESTAURANT, I DO NOT ALWAYS TAKE THOSE REVIEWS TO BE GOSPEL.

WONDERING THAT I WOULD LIKE TO DO, AND I HATE TO DELAY, BUT CAN WE HAVE ANOTHER HEARING WHERE WE CAN GET MORE INFORMATION TO DO THAT?

I WOULD LOVE TO BE ABLE TO SUPPORT LEGISLATION SUPPORTING A WOMAN'S RIGHT TO

CHOOSE, BUT I CANNOT TELL ACTUALLY WHAT THE EXPERIENCE HERE IN SAN FRANCISCO IS OF PEOPLE RECEIVING FALSE INFORMATION.

HAD EXPECTED IT WOULD BE CLEAR, FROM THE MEMO THAT WE GOT, THAT WE NEEDED TO PROVIDE THAT TO STRENGTHEN IT.

IF WE PROVIDE THAT RECORD, – AND I AM LIKELY TO SUPPORT ANYWAYS.

BUT IF WE CAN PROVIDE THAT RECORD, I CAN SUPPORT THAT. A RECORD OF FALSE ADVERTISING.

SO IN A NEW MOTION IS TO SEND A SUPPORT WITHOUT RECOMMENDATION AND PROVIDE THAT EVIDENCE OF FALSE ADVERTISING TO THE FULL BOARD NEXT WEEK.

CAN WE TAKE THAT WITHOUT OBJECTION? THANK YOU VERY MUCH.

* * *

EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, OCTOBER 18, 2011

SFGTV – FULL BOARD OF SUPERVISORS

1700-

> > GOOD AFTERNOON.

WELCOME TO THE BOARD OF SUPERVISORS MEETING FOR

OCTOBER 18, 2011.

>> SUPERVISOR AVALOS?

SUPERVISOR CHU? SUPERVISOR CHIU? SUPERVISOR ELSBERND. SUPERVISOR FARRELL? SUPERVISOR KIM?

SUPERVISOR MIRKARIMI? SUPERVISIR WEINER?

ALL MEMBERS ARE HERE.

* * *

PRESIDENT CHIU: ANY ADDITIONAL DISCUSSION?

SUPERVISOR ELSBERND: I RISE TO EXPLAIN WHY I WILL BE OPPOSING THIS ORDINANCE.

IN COMMITTEE, WE SENT AFFORD WITHOUT RECOMMENDATION. I THINK WE DID THAT UNANIMOUSLY BECAUSE WE FELT THE COMMITTEE HEARING, THERE HAD NOT BEEN A PRESENTATION OF THE EVIDENCE TO A PROBLEM IN SAN FRANCISCO.

THERE WAS A GREAT DEAL OF EVIDENCE FOR A PROBLEM NATIONALLY, BUT WE ONLY HAVE TWO OF THESE CENTERS IN SAN FRANCISCO.

THERE WERE ONLY FIVE OR SIX DOCUMENTATIONS OF PEOPLE COMMENTING ON THE WEB.

CORRECT ME IF I'M WRONG, IN COMMITTEE, I BELIEVE THAT WAS ALL WE HAD FOR SAN FRANCISCO.

SUBSEQUENT TO THAT, WE RECEIVED ANY MAIL FROM THE SPONSOR OF THE LEGISLATION THAT ADDED TWO ADDITIONAL PIECES OF INFORMATION ON THIS ITEM.

FIRST WAS AN E-MAIL FROM A DOCTOR AT SAN FRANCISCO GENERAL HOSPITAL WHO REPORTED A SITUATION THIAT SHE HEARD FROM A COLLEAGUE THAT SHE REMEMBERED FROM THREE YEARS AGO.

RESPECTFULLY, PROBABLY NOT THE BEST PIECE OF EVIDENCE. PROBABLY THE KIND OF HERE SAY THAT WOULD NOT BE ALLOWED IN COURT.

BUT THIS IS NOT A COURT, LET'S USE WHAT WE HAVE.

WHAT WE HEARD WAS THE SITUATION INVOLVES A CENTER THAT WASN'T EVEN LIKE THIS.

I MET WITH THE PROPONENTS OF THIS LEGISLATION HAS MADE CLEAR THEIR TARGET IS A FIRST RESORT. FIRST RESORT IS LICENSED.

THIS IS EVIDENCE OF A SITUATION THAT HAD NOTHING TO DO WITH FIRST RESORT.

THE SECOND PIECE OF EVIDENCE OFFERED INTO THE RECORD YESTERDAY IN THAT E-MAIL IN OUR PUBLIC RECORD IS THE TESTIMONY FROM ONE WOMAN WHO CAME ACROSS FIRST RESORT ON A WEBSITE.

SHE CALLED THE NUMBER, DID NOT LIKE WHAT SHE HEARD AND WITHIN FIVE MINUTES HAD HUNG UP THE PHONE AND MOVED ON.

THERE HAS BEEN NO TESTIMONY, DOCUMENTATION, NO AFFIDAVITS OF ANY WOMAN, ANY SERVICE, SOMEONE SEEKING SERVICE WHO HAS BEEN MISLED.

THERE IS NOTHING IN THE RECORD DOCUMENTING THAT. WHAT I FEAR WE ARE DOING TODAY IS PASSING A SOLUTION IN SEARCH OF A PROBLEM.

I FULLY RECOGNIZE, ESPECIALLY WITH THE REPORT WE RECEIVED THAT DOCUMENTED THE ISSUES IN OTHER CPC'S ARE ON THE COUNTRY THAT THERE MAY BE FALSE ADVERTISING AROUND THE COUNTRY.

WE ONLY HAVE TO OF THE CENTERS IN SAN FRANCISCO.

I CONTINUE TO BELIEVE AFTER THE HEARING TO WEEKS AGO UP TO TODAY THAT THE LEGISLATIVE RECORD REMAINS EMPTY.

THE DOCUMENTATION I BELIEVE IS NECESSARY TO STAND UP TO A CAUTIONARY MEMO SITTING ON EVERY ONE OF OUR DESKS THAT TELLS US WE HAVE A HIGH BURDEN TO CROSS TO GET THIS PASSED.

FOUR CITIES HAVE PASSED ORDINANCES LIKE THIS.

THREE OF THOSE CITIES HAVE SEEN THOSE TOSSED OUT.

THE FOURTH IS IN THE MIDDLE OF LITIGATION RIGHT NOW.

I DO NOT BELIEVE THE RECORD IS SUFFICIENT TO BEAT THAT THRESHOLD.

I THINK WE ARE STRIVING AGAIN – THE BEST WAY TO DESCRIBE MY FEELING IS WE'RE PUTTING FORWARD A SOLUTION TO A PROBLEM THAT IN SAN FRANCISCO HAS NOT BEEN DOCUMENTED.

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SUPERVISOR CAMPOS: THANK YOU, MR. PRESIDENT.

I WANT TO THANK SUPERVISOR COHEN FOR BRINGING THIS FORWARD.

THE NECESSARY EVIDENCE WHEN PASSING SOMETHING LIKE THIS, I UNDERSTAND THE POINT, BUT I BELIEVE THE AUTHOR OF THIS ORDINANCE HAS WORKED VERY CLOSELY WITH OUR LEGAL COUNSEL TO MAKE SURE THIS IS A PIECE OF LEGISLATION THAT PASSES LEGAL MUSTER AND I WILL DEFER TO THE JUDGMENT OF THE CITY ATTORNEY'S OFFICE WHO WAS REALLY INVOLVED IN THE CRAFTING OF THIS LEGISLATION.

WITH RESPECT TO HOW MUCH EVIDENCE OF AN INJURY OR HARM IS NEEDED, I THINK WE DO HAVE A RESPONSIBILITY TO CONSUMERS

AS A WHOLE THAT WHEN WE SEE LANGUAGE THAT IS MISLEADING, THAT WE TAKE A POSITION AND MAKE SURE THAT INFORMATION IS CORRECT.

IN FACT, ACCURATE INFORMATION IS PROVIDED TO CONSUMERS. I DON'T KNOW THAT WE HAVE TO WAIT UNTIL THERE IS AN ACTUAL INJURY TO MAKE THAT HAPPEN.

IN TERMS OF THE INJURIES THAT COULD COME BECAUSE OF THIS INFORMATION, I THINK IT IS SOMETHING WE HAVE TO BE MINDFUL OF.

I CAN TELL YOU EVEN IN PROGRESS OF SAN FRANCISCO, WE STILL SEE EFFORTS TO INTIMIDATE WOMEN WHO ARE TRYING TO EXERCISE THEIR LEGAL RIGHT TO CHOOSE WHETHER OR NOT TO TERMINATE A PREGNANCY.

I KNOW THAT IN MY DISTRICT, IN DISTRICT 9, ONE OF THE MOST PROGRESSIVE DISTRICTS IN THE CITY, THERE HAVE BEEN A NUMBER OF EXAMPLES IN THE PLANNED PARENTHOOD CLINIC THAT OPEN THEIR WHERE INDIVIDUALS HAVE TAKEN UPON THEMSELVES TO INTIMIDATE WOMEN.

THE REALITY IS EVEN IN SAN FRANCISCO, THESE PROBLEMS ARE RISE.

WE HAVE A RESPONSIBILITY TO MAKE SURE ACCURATE INFORMATION IS PROVIDED AND I'M PROUD TO SPONSOR THIS LEGISLATION.

SUPERVISOR AVALOS: THANK YOU.

I WILL BE VOTING IN FAVOR OF THIS LEGISLATION. I DID HAVE A MOVE OUT OF COMMITTEE WITHOUT RECOMMENDATION HOPING TO GET MORE INFORMATION THAT WOULD BACK THE LEGAL RECORD FOR IT.

I AM NOT TOTALLY SATISFIED WITH THAT BUT I DO WANT TO BELIEVE, I DO WANT TO SUPPORT LEGISLATION THAT IS FULLY IN FAVOR OF A WOMAN'S RIGHT TO CHOOSE AND AS THE OVERRIDING CONCERN FOR ME TODAY WHY I WILL BE SUPPORTING THIS LEGISLATION AND I WANT TO THANK THE SPONSOR FOR BRINGING IT FORWARD AND THANK ALL OF YOU COLLEAGUES WHO ARE SUPPORTING IT AS WELL.

SUPERVISOR KIM: I ALSO WANT TO THANK SUPERVISOR COHEN AND I AM A CO-SPONSOR AS WELL.

EVEN IF WE DO NOT HAVE DOCUMENTATION OF WOMEN WHO ARE MISLED BY POTENTIAL FALSE ADVERTISING, IT'S AN IMPORTANT MEASURE OF PREVENTION.

I CERTAINLY APPRECIATE CONCERN FROM COLLEAGUES ABOUT UNNECESSARY LEGISLATION.

I, MYSELF, DO NOT WANT TO SPEND OUR LEGISLATIVE PROCESS THESE ON PROBLEMS THAT DO NOT EXIST.

I THINK THIS IS AN IMPORTANT ENOUGH ISSUE FOR MANY OF OUR WOMEN IN SAN FRANCISCO, AND IF WE ARE ABLE TO PREVENT WOMEN.FROM BEING MISLED INTO COMING

INTO PREGNANCY CENTERS THAT DO NOT OFFER ALL OF THE CHOICES AVAILABLE TO WOMEN IN THEIR FIRST TRIMESTER, WE SHOULD SET SOME REGULATIONS AROUND THAT.

I APPRECIATE THIS LEGISLATION IS DIFFERENT FROM OTHER ORDINANCES PASSED IN OTHER CITIES AND COUNTIES WHICH REGULATED THE CLINIC ITSELF.

THIS REGULATES THE ADVERTISING OF THE CLINIC. THAT DIFFERENCE IS IMPORTANT.

ALSO, AS WE KNOW, SAN FRANCISCO CAN BE A MODEL FOR OTHER CITIES AND COUNTIES FOR LEGISLATION THAT WORKS

AND IS EFFECTIVE IN PROTECTING THE RIGHTS OF OUR CITIZENS.

I AM HOPEFUL THAT OTHER CITIES AND COUNTIES WILL LOOK TOWARD SUPERVISOR COHEN'S LEGISLATION.

SUPERVISOR FARRELL: THIS HAS BEEN A TOUGH ONE FOR ME AND I WILL BE SUPPORTING THE LEGISLATION.

FIRST, THIS IS NOT ABOUT FIRST RESORT.

I KNOW LOT OF PEOPLE HAVE INSINUATED THAT.

I HAVE A LOT OF FRIENDS INVOLVED WITH THE ORGANIZATION AND I HAVE GREAT THINGS TO SAY ABOUT IT.

SECOND, THIS IS A CAUTIONARY WARNING.

AT THE END OF THE DAY, I DON'T HAVE A PROBLEM OR REGULATING ADVERTISING.AND SAYING FALSE OR MISLEADING ADVERTISING IS WRONG.

I HAVE NO PROBLEM DOING THAT AND WHY I WILL BE SUPPORTING THIS TODAY.

I HAVE SEEN A LOT OF EVIDENCE IN E-MAIL CHANGE GOING AROUND LOOKING AT GOOGLE SEARCH RESULTS AND ALGORITHMS.

ALL LOT OF THAT STUFF IS NOT CONTROLLED BY PEOPLE TO ADVERTISE.

A CLEAR WARNING – I THINK YOU COULD GO DOWN A VERY SLIPPERY SLOPE.

GOOGLE HAS A PROVISION AGAINST FALSE OR MISLEADING ADVERTISING.

TO SAY THAT BY BUYING CERTAIN KEY WORDS YOU ARE DOING FALSE OR MISLEADING ADVERTISING, YOU'RE GOING AFTER GOOGLE ITSELF, AND WE NEED TO TAKE A HARD LOOK AT THE WAYS WE'RE GOING TO ENFORCE THIS LAW GOING FORWARD, BUT I WILL BE SUPPORTING IT TODAY.

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PRESIDENT CHIU: COLLEAGUES, ANY ADDITIONAL DISCUSSION? WILL CALL VOTE.

>> [ROLL-CALL]

THERE ARE A A 10YES AND 1NO.

PRESIDENT CHIU: THIS ITEM IS PASSED ON THE FIRST READING.

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EXCERPTS FROM TRANSCRIPT OF HEARING BEFORE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, OCTOBER 25, 2011

SFGTV – FULL BOARD OF SUPERVISORS PROGRAM 1700

SUPERVISOR CHIU: GOOD AFTERNOON.

WELCOME TO THE SAN FRANCISCO BOARD OF SUPERVISORS MEETING OF TUESDAY, OCTOBER 25, 2011.

MADAM CLERK, PLEASE CALL THE ROLL.

>> [ROLL CALL]

MR. PRESIDENT, ALL MEMBERS ARE PRESENT.

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ITEM 6 ORDINANCE AMENDING THE ADMINISTRATIVE CODE

TO FOR HIM AT LIMITED SERVICES PREGNANCY CENTERS FROM MAKING FALSE OR MISLEADING STATEMENTS TO THE PUBLIC ABOUT PREGNANCY RELATED SERVICES THE CENTER OFFICES OR PERFORMS.

ON ITEM 6 – MAR AYE.
MIRKARIMI AYE.
WIENER AYE.
AVALOS AYE.
CAMPOS AYE.
CHIU AYE.
CHU AYE.
COHEN AYE.
ELSBERND NO.
FARRELL AYE.

KIM AYE.
THERE ARE 10 AYES, ONE NO.

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