NO. 15-15434

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,

Defendant – Appellee,

and

BOARD OF SUPERVISORS OF THE CITY & COUNTY OF SAN FRANCISCO,

Defendant – Appellee,

and

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant – Appellee.

APPELLANT'S PETITION FOR REHEARING *EN BANC*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 4:11-cv-05534-SBA, HONORABLE SAUNDRA BROWN ARMSTRONG

Kelly S. Biggins
kbiggins@lockelord.com
Locke Lord LLP
300 S. Grand Avenue, Suite 2600
Los Angeles, California 90071
(213) 485-1500

W. Scott Hastings
shastings@lockelord.com
Carl Scherz
cscherz@lockelord.com
Locke Lord LLP
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(214) 740-8000

Attorneys for Appellant First Resort, Inc.

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RULE 35 STATEMENT REGARDING *EN BANC* REVIEW

En banc review is needed to preserve uniformity in this Court's decisions, to reconcile this Court's authority with Supreme Court precedent, and to address issues of constitutional law that are exceptionally important.

First, the Panel's decision restricting First Amendment rights as it pertains to an abortion-related ordinance targeted at those viewed as "anti-abortion" is exceptionally important. The Panel decision conflicts with *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which prohibit content-based and viewpoint based discrimination against speech of all types, even commercial speech. The Panel decision also conflicts with this Court's decision in *National Institute of Family & Life Advocates (NIFLA) v. Harris*, 839 F.3d 823 (9th Cir. 2016) where, in sharp contrast to the decision here, the Panel applied the *Sorrell* test as the first step in its analysis.[1]

Second, the Panel's determination that Petitioner First Resort, Inc. ("First Resort") was engaged in commercial speech is an unprecedented extension of the U.S. Supreme Court's commercial speech test. The Panel holds that the speech of a non-profit organization such as First Resort is commercial because the speaker has an "economic motive" to solicit patrons which may relate to its "ability to fundraise" or may lead to more donations. (Op. pp. 15-16). This expansion of the definition of commercial speech has serious and broad implications on the speech of all non-profits.

Third, as Judge Tashima explains, there is much confusion regarding whether duplication preemption applies to civil statutes under California law. That issue should be certified to the California Supreme Court.

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[1] *NIFLA* was decided by the same Panel that heard this case.

BACKGROUND

I. First Resort Is a "Limited Services Pregnancy Center" that Provides Counseling Free of Charge to Women in Unintended Pregnancies.

First Resort is a public benefit, non-profit corporation that operates a pregnancy services counseling clinic in San Francisco. (ER Vol. II, p. 62 [UF 1].)

First Resort seeks to empower women in unintended pregnancies to make fully-informed decisions and to provide support for women after their choice. (ER Vol. II, p. 62 [UF 6-7].) First Resort views abortion as harming the mother and father, their families, and the unborn child. (ER Vol. II, pp. 62-63 [UF 8].) Some women will choose options other than abortion when given appropriate support, unbiased counseling, and accurate medical information. (ER Vol. II, pp. 62-63 [UF 8].) Nevertheless, First Resort believes a woman's free will is God-given and respects her right to make her own choices. (ER Vol. II, p. 62-63[UF 6-8].) First Resort does not provide or refer for abortions and, as a result, it is a "limited services pregnancy center" under the Ordinance. (ER Vol. II, p. 63 [UF 9].) No matter the decision, First Resort provides post-abortion counseling to those women who choose to have one performed. (ER Vol. II, p. 62 [UF 6].)

Every client of First Resort meets with a counselor free of charge. First Resort provides certain medical services (such as pregnancy tests and early ultrasounds) as needed and also free of charge to allow it to provide counseling that is properly informed by the facts regarding pregnancy. (ER Vol. II, pp. 62, 65 [UF 2, 32].)

First Resort has never received payment or reimbursement for its services from clients, insurance, government, or Medi-Cal. Instead, First

Resort utilizes charitable donations to enable it to provide its services for free. (ER Vol. II, p. 62 [UF 3-4].)

II. San Francisco Adopted an Ordinance Regulating the Speech of Limited Service Pregnancy Centers (of Which First Resort Is One of Only Two in the Area) That Neither Provide Nor Refer for Abortions or Emergency Contraception.

First Resort initiated the underlying action against Respondents Dennis 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 (collectively, the "City") challenging San Francisco's "Pregnancy Information Disclosure and Protection Ordinance" (the "Ordinance"), S.F. Admin. Code, ch. 93, §§ 93.1-93.5 on the grounds it was unconstitutional and preempted by state law. (A copy of the Ordinance is at ER Vol. II, pp. 69-77).

The Ordinance regulates "statements" by certain pregnancy centers concerning pregnancy-related services, "professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof." (ER Vol. II, p. 74, S.F. Admin. Code § 93.4(a).) It prohibits "statements" that are "untrue or misleading, whether by statement or omission," that the center "knows or which by the exercise of reasonable care should know to be untrue or misleading." (ER Vol. II, p. 74, S.F. Admin. Code § 93.4(a).) In addition, the Ordinance prohibits regulated centers from making misleading or untrue statements "as part of a plan or scheme with the intent not to perform the services expressly or implied offered, as advertised." (ER Vol. II, p. 74, S.F. Admin. Code § 93.4(b).).

The Ordinance does not apply to all pregnancy services centers, but rather ***only*** to "limited services pregnancy centers" which do not provide or refer for abortions or emergency contraception. (ER Vol. II, p. 73, S.F. Admin Code § 93.3(f), (g).) Proponents of the legislation targeted First Resort. (ER Vol. II, p. 130.) The Ordinance pertains to only two organizations in San Francisco – First Resort and one other – both of whom are, in the City's view, "anti-abortion" organizations. (ER Vol. II, p. 64 [UF 20].) The City could identify no others that were subject to the Ordinance.[2]

The Ordinance authorizes discretionary enforcement by the City Attorney based on what the City Attorney believes is "false, misleading, or deceptive." (ER Vol. II, pp. 74-75, S.F. Admin. Code § 93.5(a).) If the "false, misleading, or deceptive" statements are not cured, the City Attorney may file a civil action seeking (i) to require a limited services pregnancy center to pay for corrective advertising; post a notice on its premises stating whether abortion, emergency contraception, or referrals for abortion or emergency contraception are available at the center; or such other "narrowly tailored relief as the court deems necessary;" (ii) civil penalties "from each and every responsible party for the violation of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation;" and (iii)

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[2] The Panel decision does not acknowledge the undisputed fact that only two entities are subject to the Ordinance, both because of their "anti-abortion" views. Instead, the Panel suggests that "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." (Op. p. 26). This is speculation unsupported by the record. The only two entities in San Francisco that qualify as LSPC's were targeted because of their views. And even if there were other entities that refused to provide disfavored services because of "financial or logistical reasons," the Ordinance would still be targeted to speech of those who did not favor or want to promote abortions.

the City Attorney's "reasonable attorney's fees and costs." (ER Vol. II, p. 75, S.F. Admin. Code § 93.5(b), (c).)

There are no protections in the Ordinance for a limited services pregnancy center that was wrongfully targeted and sued. Even if the targeted defendant prevails against the City Attorney's challenge, the defendant will still suffer a severe litigation burden just for exercising its right to speak.

The Panel decision upheld the Ordinance against First Resort's constitutional challenges. The Panel also held that the Ordinance was not preempted by California's generally-applicable false advertising laws. Judge Tashima recommends certification of the preemption issue to the California Supreme Court.

ARGUMENT

I. The Panel Decision Conflicts with Precedent Holding Content-Based and Viewpoint Based Regulations Presumptively Invalid.

The Panel's opinion conflicts with U.S. Supreme Court precedent and with its own recent opinion in *NIFLA, supra*.

1. In *Sorrell v. IMS Health Inc.*, the Supreme Court held that "heightened judicial scrutiny" must be applied to all content-based speech regulations. 564 U.S. 552, 565-66 (2011). "Commercial speech is no exception." *Id.* at 566. When a regulation is found to be content and viewpoint based, the regulation is presumptively invalid. *Id.* at 571-72. The *Sorrell* Court did not articulate the exact standard of scrutiny to apply because, in a case involving commercial speech, the regulation must "at least" pass the *Central Hudson* test, which the challenged regulation did

not.[3] *Id.* at 571-80. For non-commercial speech, the standard is clearly-established in *Reed v. Town of Gilbert*: facially content-based laws—"those that target speech based on its communicative content"—must undergo strict scrutiny. 135 S. Ct. 2218, 2226 (2015).

Last term, Justice Kennedy (writing for a 4 justice plurality in a 4-4 decision), elaborated on the standard in a commercial speech case involving a prohibition against "offensive" trademarks: "A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)). Justice Kennedy's opinion declared the challenged law unconstitutional without the need to conduct a *Central Hudson* analysis. Similar to the situation in *Sorrell*, the other four justices did not reach the viewpoint discrimination issue in *Matal* because the challenged regulation failed even under the *Central Hudson* test. *Id.* at 1763-65.

Following *Sorrell*, *Reed*, and *Matal*, when analyzing the constitutionality of the Ordinance, the Panel first should have focused on whether the Ordinance was a content and/or viewpoint-based regulation of speech and next determined the appropriate level of scrutiny (i.e., *Central Hudson* or greater). This is the approach followed by this Court in *NIFLA*, when it discussed *Sorrell* and held the FACT Act was a content-based restriction but not viewpoint discrimination because "[i]t does not discriminate based on the particular opinion, point of view, or ideology of a

[3] *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

certain speaker. Instead, the Act applies to *all licensed and unlicensed facilities*, regardless of what, if any objections they may have to certain family-planning services." 839 F.3d at 835 (emphasis added).

Here, in contrast to *NIFLA*, the Panel did not discuss *Sorrell* let alone apply it. Rather, the Court first considered whether First Resort's speech was commercial, and based on that determination dismissed the content and viewpoint-based arguments, thereby misapplying the test set forth by the U.S. Supreme Court.[4] (*See* Op. pp. 22-23, 25-27).

2. The Panel's decision was reached notwithstanding the fact the Ordinance applies only to a subset of licensed and unlicensed facilities that are targeted precisely because of the objections they have to "certain family-planning services" (i.e., abortion and referrals for abortion). (ER Vol II, p. 73, S.F. Admin Code § 93.3(f), (g).) Enforcement of the Ordinance requires the City Attorney to determine the viewpoint of the speaker– i.e., whether the speaker provides or refers for abortions or emergency contraception. Because the Ordinance pertains to only some pregnancy services centers and not others based on whether or not they provide or refer for abortions or emergency contraception, the Ordinance is an impermissible content-based regulation of speech.

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[4] In its commercial speech analysis, the Panel relied heavily on *American Academy of Pain Management v. Joseph*, 353 F.3d 1099 (9th Cir. 2004), and *Fargo Women's Health Org., Inc. v. Larsen*, 381 N.W.2d 176 (N.D. 1986). Those decisions addressed commercial speech issues in the context of generally-applicable laws. (*See* Op. p. 38) (Tashima, J.) (recognizing that *Larson* was a case addressing North Dakota's generally-applicable false advertising laws). Neither case involved a law targeted at a specific speaker or viewpoint.

The Ordinance also engages in viewpoint discrimination by regulating only the speech of organizations whose viewpoints regarding abortion are not favored by the City. (ER Vol. II, p. 79.) The undisputed facts indicate the City's stated purpose of the Ordinance is pretextual and that the Ordinance applies to only two entities, both regarded by the City as "anti-abortion" organizations. (ER Vol. II, p. 64 [UF 20 and 21].) There is no question that the only organizations that would refuse to ***refer*** for abortions or emergency contraception would be organizations with the viewpoints the City considers "anti-abortion."

The undisputed evidence is overwhelming that the City adopted the Ordinance specifically to target First Resort and other similar organizations the City believes have an "anti-abortion" counseling perspective. For example, before the Ordinance was passed into law, the City issued a press release announcing the proposed Ordinance and asserting its displeasure with First Resort's purported efforts "to push an anti-abortion agenda" on women seeking pregnancy-related services in San Francisco. (ER Vol. II, p. 63 [UF 12] and pp. 79-80.) The press release indicates the City Attorney, who proposed and would enforce the Ordinance, has taken action against First Resort "to demand that First Resort clarify its purpose in accordance with state law." (ER Vol. II, p. 80.)

The related press kit made available on the City Attorney's website included a press release issued by the National Abortion and Reproductive Rights Action League ("NARAL"), which maintains a "pro-choice" viewpoint. (ER Vol. II, p. 63 [UF 15] and pp. 85-86.)

Further, neither the legislative record nor the City in litigation has identified a single woman who was unable to obtain an abortion or emergency contraction, or was required to undergo a more invasive

procedure, or was delayed in seeking an abortion or emergency contraception, as a result of the allegedly false advertising of services provided by a limited services pregnancy center in San Francisco. (ER Vol. II, p. 65 [UF 22 and 23].) Indeed, the lack of evidence was highlighted by Supervisor Elsbernd: "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." (ER Vol. II, p 130.)

As Supervisor Sean Elsbernd said at the hearing on the Ordinance, "I met with the proponents of this legislation has [sic] made clear their target is First Resort." (ER Vol. II, p. 130.)

3. The Ordinance creates a chilling effect on First Resort's speech and that of similar organizations which the City views as having an "anti-abortion agenda." (ER Vol. II, p. 79.) That the Ordinance vests a remarkable degree of discretion for enforcement in the City Attorney highlights the chilling effect. (ER Vol. II, p. 75, S.F. Admin. Code § 93.5(b), (c).) *See also Evergreen Assn, Inc. v. City of New York*, 740 F.3d 233, 251-52 (2d Cir. 2014) (the law provides "a blank check to New York City officials to harass or threaten legitimate activity.") As enacted, the City Attorney has discretion to decide what he believes is "false" or "misleading," and then he can subject the speaker to enormous burdens through litigation regardless of whether the City Attorney prevails in the litigation. This is a viewpoint based recipe for suppression.

4. Of further importance, the constitutionality of the Ordinance is a national issue as "pro-choice" organizations view this as a roadmap for all municipalities:

> "But Planned Parenthood's Parker was optimistic, saying that other cities may now consider enacting similar laws. 'Because it was upheld by the Ninth Circuit, it gives a roadmap for adopting similar ordinances,' she said in an interview. 'At least within the Ninth [Circuit], there's a good expectation those ordinances will be upheld against a challenge. Indeed, other cities and states could use it.'"

Helen Christophi, Ninth Circuit Upholds Law Against Misleading Anti-Abortion Ads, Courthouse News Service (June 28, 2017), http://www.courthousenews.com/ninth-circuit-upholds-law-misleading-anti-abortion-ads/. Indeed, the City of Oakland passed a similar ordinance last year. *See* Oakland, Cal., Mun. Code ch. 5.06, § 5.06.110. Further review of this case is warranted now before the unconstitutional suppression of speech based on an "anti-abortion" viewpoint spreads nationwide.

II. The Panel Adopted a Sweeping Definition of Commercial Speech that Enables Suppression of Non-Commercial Messages.

As shown above, the Ordinance is unconstitutional regardless whether it is viewed as a regulation of commercial or non-commercial speech. Nevertheless, the Panel's designation of First Resort's speech as commercial is based on an erroneous test for commercial speech. While the Panel correctly identifies the standard – "[c]ommercial speech is 'defined as speech that does no more than propose a commercial transaction'" (Op. p. 14 (internal cites omitted)) – it does not accurately apply it.

That the speech of a non-profit organization which does not charge for any services is deemed "commercial" because the speaker has an "economic motive" to solicit patrons which may relate to its "ability to fundraise" or may lead to more donations extends the definition of commercial speech

such that the speech of all non-profit organizations who seek patrons and fundraising are deemed commercial. (Op. pp. 15-16). Such an extension has serious, broad implications. This is especially true where the allegedly "commercial" aspects of First Resort's speech would be inextricably intertwined with protected speech. *See S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1140 (9th Cir. 1998), *amended*, 160 F.3d 541 (9th Cir. 1998) (ordinance was overbroad "because it is likely to restrict not only purely commercial speech, but also fully protected noncommercial speech inextricably intertwined with commercial speech.").

Tellingly, the Ordinance allows the City Attorney to target any "statements," and not just commercial advertising. It also allows the City Attorney to target alleged "omissions," which is nothing short of a way for the City Attorney to try to compel additional speech supporting the City's views. Because the Ordinance allows the City Attorney to target non-commercial speech, it should have been subjected to strict scrutiny.

III. As Reflected by Judge Tashima's *Dubitante* Opinion, the Panel's Preemption Analysis Also Presents an Important Issue of Law that Warrants Further Review.

Judge Tashima's separate opinion highlights that *en banc* review is needed to (1) correct the Panel's erroneous conclusion that California's existing false advertising law ("FAL")[5] does not preempt the duplicative Ordinance which also purports to regulate false advertising by "anti-abortion" pregnancy centers, or in the alternative (2) certify this issue to the California Supreme Court for clarification.

[5] *See* California Business and Professions Code sections 17500 *et seq*.

1. The Panel's decision finding no preemption hinged on an "educated guess" about California law. (Op. p. 34) (Tashima, J.). Although the Panel stopped short of deciding that duplication preemption can never apply in the context of a California civil statute, the Panel applied this Court's decision in *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002), to conclude that "the fact that the Ordinance here is civil rather than penal weighs against invalidating it based on duplication preemption." (Op. pp. 31-32). As Judge Tashima notes, "[n]othing in *Fireman's Fund* bars us from applying duplication preemption to the facts of the instant case." (Op. p. 35) (Tashima, J.).

Contrary to the Majority's presumption against preemption of civil statutes, *Fireman's Fund* notes, if not expressly then implicitly, that preemption applies to both civil as well as penal ordinances. *Fireman's Fund Ins. Co.*, 302 F.3d at 956 ("California courts have *largely* confined the duplication prong of the state preemption test to penal ordinances.") (emphasis added).

More importantly, the Majority's opinion ignores a more recent Ninth Circuit decision that applied a duplication preemption analysis to a civil ordinance. *See S.D. Myers v. City & County of San Francisco*, 336 F.3d 1174, 1177-78 (9th Cir. 2003). Although the Court ultimately determined that the California Family Code did not preempt the San Francisco Ordinance, the Court employed a duplication preemption analysis. *Id.* at 1178 (holding that "the two measures regulate distinct subject matters and therefore are not duplicative.").

Even if the Panel is correct that no California court has struck down a civil ordinance solely on duplication preemption grounds, it does not logically follow that duplication preemption could never be the sole grounds

for a decision. Instead, California case law leaves open this possibility. *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 536 (Cal. 1993) ("A conflict exists [only] if the local legislation [1] duplicates, [2] contradicts, or [3] enters an area fully occupied by general law, either expressly or by legislative implication.") (internal quotation marks omitted).

Moreover, the Panel's substantive analysis misapplied preemption law. Despite the fact that the language of the Ordinance is almost identical to the FAL, the Panel suggests that the Ordinance "clarifies" and "adds" to the FAL. Close scrutiny of the Panel's examples reveals that these "clarifications" are really "duplications." The Panel attempts to carve out an area unoccupied by the FAL, but it is only able to do so by misconstruing the plain text. The panel notes: "the Ordinance … only applies to LSPCs," and "only applies to the performance of pregnancy-related services." (Op. p. 32) (Tashima, J.). Additionally, the Panel notes that the FAL text does not mention "omissions" or apply to services not offered for sale. (Op. pp. 32-33) (Tashima, J.).

As Judge Tashima again noted, the Panel's analysis is overly simplistic, and "overlooks the substantial body of case law under the FAL." (Op. p. 39) (Tashima, J.). California case law makes it clear that the FAL covers omissions. Indeed, this Circuit has used the FAL to regulate misleading omissions. *Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc.*, 421 F.3d 981, 985 (9th Cir. 2005) (wholesaler association brought action under Section 17500 claiming that Lexmark engaged in false advertising by omitting information on cartridge packages). A close reading of the two laws' text and the FAL's substantial body of case law demonstrates that the Ordinance is duplicative.

"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." (Op. p. 40) (Tashima, J.). Accordingly, further review is warranted to ensure that this Court's preemption authority is correct. The Ordinance is preempted.

2. Alternatively, this issue should be certified 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." *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950, 954 (9th Cir. 2017) (citing Cal. R. Ct. 8.548(a)). Furthermore, certification is warranted if an appeal "presents an issue of significant public importance." *Id.* In the matter at hand, there is no directly controlling precedent regarding (1) whether duplication preemption applies to civil ordinances or (2) whether the Ordinance at issue duplicates the FAL. Moreover, this issue is of significant public importance because it threatens the sovereignty of the California legislature and the balance of state and local power.

It is true that "certification is unnecessary when the state's law 'is rather well-defined.'" (Op. p. 41) (Tashima, J.) (quoting *Syngenta Seeds, Inc. v. Cty. of Kauai*, 842 F.3d 669, 681 (9th Cir. 2016)). However, the Panel's decision illustrates courts' confusion in applying California duplication preemption law. As it stands, the Panel decision creates ambiguity and confusion that need a definitive answer. The Ninth Circuit should certify this issue "because [it] require[s] interpretation of the state [law at issue] beyond that found in state or federal cases." (Op. p. 41) (Tashima, J.) (quoting *Barnes-Wallace v. City of San Diego*, 607 F.3d 1167,

1175 (9th Cir. 2010)). The preemption issue should be certified to the only body who can definitively rule on it: the California Supreme Court.

3. The Ordinance disturbs an area of law the FAL has occupied, virtually unchanged, for over 75 years. Although the Panel frames the regulation of false advertising as a matter of local concern, (Op. p. 38) (Tashima, J.), California case law says exactly the opposite. According to the California Supreme Court, false advertising law is "within the *states' historic police powers*…." *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (Cal. 2008) (emphasis added). And as Judge Tashima notes, the Ninth Circuit has 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).

If the Ordinance is not preempted, San Francisco and other cities are granted permission to dodge the state's enforcement requirements. Cities can copy and paste pre-existing state law but ignore that law's enforcement history, substantial body of case law, and local procedures. There is little doubt that similar ordinances will arise throughout the state if the Ordinance stands. (Op. p. 40) (Tashima, J.).[6] If this Circuit remains divided on duplication preemption, state laws will be hollow, robbed of their ability to bring uniformity and stability to the cities of California. This Court should certify this issue to the California Supreme Court in order to preserve California's sovereignty and balance of state and local power.

CONCLUSION

This Court should grant the petition for rehearing *en banc*.

[6] *See, e.g.*, Oakland, Cal., Mun. Code ch. 5.06, § 5.06.110.

Dated: July 11, 2017

Respectfully submitted,

By *__/s/ Kelly S. Biggins__*

Kelly Biggins
W. Scott Hastings
Carl Scherz
Locke Lord LLP
Attorneys for Appellant
First Resort, Inc.

CERTIFICATE OF COMPLIANCE

[Pursuant to Circuit Rules 35-4 and 40-1]

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

X Contains 4,158 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

__ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Dated: July 11, 2017

Respectfully submitted,

By */s/ Kelly S. Biggins*

Kelly Biggins
W. Scott Hastings
Carl Scherz
Locke Lord LLP
Attorneys for Appellant
First Resort, Inc.

CERTIFICATE OF SERVICE

I, Kelly S. Biggins, an attorney, do hereby certify that on July 11, 2017, I caused a copy of the foregoing PETITION FOR REHEARING *EN BANC* OF APPELLANT to be served through the Court's Case Management/Electronic Case Files (CM/ECF) system upon all persons and entities registered and authorized to receive such service.

Dated: July 11, 2017 By: */s/ Kelly S. Biggins*