NO. 15-15434

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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.*

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*Appeal from a Decision of the U.S. District Court for the Northern District of California, No. 4:11-cv-05534-SBA, Hon. Saundra Brown Armstrong*

# APPELLANT'S MOTION FOR LEAVE TO FILE REPLY TO THE RESPONSE OF APPELLEES TO APPELLANT'S PETITION FOR REHEARING *EN BANC*

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*Attorneys for Appellant First Resort, Inc.*

Appellant First Resort, Inc. ("Appellant") respectfully requests leave to file a Reply to the Response of Appellees to Appellant's Petition for Rehearing *En Banc* for the following reasons:

1. Appellees acknowledge that the issues involved in this case are of "national importance." (Resp. at 1). Appellant is challenging the constitutionality of a San Francisco ordinance that regulates the speech of certain organizations that support an "anti-abortion agenda." The San Francisco ordinance has already become a model for other cities. Oakland has adopted a similar ordinance. Planned Parenthood is also advocating for the adoption of similar ordinances nationwide. Accordingly, this is a case of exceptional importance. Appellant believes that its proposed reply would be beneficial to the Court when analyzing this matter.

2. In its Response, Appellees have cited several new authorities that were not addressed in prior briefing. Appellant is also seeking an opportunity to file a reply to address those new authorities and the reasons why they do not support Appellees' position.

3. Appellant's counsel has conferred with counsel for Appellees. Appellees advised they "will likely oppose" this motion.

4. A copy of the Reply to the Response of Appellees to Appellant's Petition for Rehearing *En Banc* is attached hereto as Exhibit A.

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Dated: August 10, 2017

Respectfully submitted,

By */s/ Kelly S. Biggins*

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# CERTIFICATE OF COMPLIANCE

**[Pursuant to Circuit Rule 27-1]**

I certify that pursuant to Circuit Rule 27-1, the attached motion complies with the length limits permitted by Fed. R. App. P. 27 and Ninth Circuit Rule 27-1. The motion contains 204 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

Dated: August 10, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Kelly S. Biggins, an attorney, do hereby certify that on August 10, 2017, I caused a copy of the foregoing "APPELLANT'S MOTION FOR LEAVE TO FILE REPLY TO THE RESPONSE OF APPELLEES TO APPELLANT'S PETITION FOR REHEARING *EN BANC*" 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: August 10, 2017 By: */s/ Kelly S. Biggins*

# EXHIBIT A

NO. 15-15434

UNITED STATES COURT OF APPEALS
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*Appeal from a Decision of the U.S. District Court for the Northern District of California, No. 4:11-cv-05534-SBA, Hon. Saundra Brown Armstrong*

# REPLY TO THE RESPONSE OF APPELLEES TO APPELLANT'S PETITION FOR REHEARING *EN BANC*

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## REPLY

The City's Response recognizes that this case presents issues of "national importance," but pretends the Panel's opinion is "narrow," "unremarkable," and "wholly consistent" with precedent. (Resp. at 1-2). But the City cannot hide the three core First Amendment principles violated by the decision: (a) viewpoint based discrimination is prohibited for all categories of speech (creating conflict with *R.A.V. v. City of St. Paul*, *Sorrell v. IMS Health Inc.*, and *Matal v. Tam*); (b) the "commercial speech" doctrine focuses on commercial transactions not charitable ministries (creating conflict with *Central Hudson*); and (c) the content neutrality doctrine turns on the words the government regulates rather than speaker motivation, (creating conflict with *Reed v. Town of Gilbert* and *McCullen v. Coakley*). These stark conflicts should be corrected. Moreover, the City's "anti-abortion"-specific Ordinance is preempted by California's generally applicable false advertising laws.

### I. The Ordinance Is Viewpoint-Based Discrimination and the City's Defense of the Panel's Decision is Foreclosed by *R.A.V. v. City of St. Paul*

The City admits the "well-known principle … that viewpoint discrimination is presumptively invalid." (Resp. at 10). This principle applies to all speech, including allegedly commercial speech. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 556, 571 (2011); *Matal v. Tam*, 137 S. Ct. 1744, 1765-66 (2017) (Kennedy, J., concurring). Indeed, "the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or

recruiting others to communicate a message on its behalf." *Matal*, 137 S. Ct. at 1768.[1] That exception does not apply here.

But the City defends the Panel's decision by asking the Court to instead create a new exception to allow viewpoint-based regulation of "false or misleading commercial speech" by those who refuse to refer for abortion, claiming this is "a category of speech afforded no constitutional protection." (Resp. at 1). Even assuming First Resort's speech were false or misleading (it is not) and commercial (it is not), the City's argument is squarely foreclosed by the Supreme Court's decision in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

In *R.A.V.*, the Supreme Court made clear 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. at 391-392, 402-403. In *R.A.V.*, St. Paul (like the City here) argued that selective speech restrictions were permissible by claiming the targeted speech (in that case "fighting words") was not protected by the First Amendment. *Id.* at 381, 391. The Court rejected that approach. Even though "fighting words" were often referred to as "not within the area of constitutionally protected speech," *id.* at 383, the Court held that St. Paul could not selectively regulate "fighting words" based on the viewpoints expressed. *Id.* at 383-390. Similarly, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. (Emphasis in original).

[1] Justices Ginsburg, Sotomayor, and Kagan joined Justice Kennedy's opinion in *Matal*; no Justices voiced disagreement on this point.

Here, there is no dispute that the Ordinance applies only because of the subject matter and viewpoint of First Resort's speech. The Ordinance regulates the allegedly "false and misleading commercial speech" only because they wish to help women who are or may be pregnant but refuse to "provide referrals" for abortion. S.F. Admin. Code § 93.3(f) and (g). If First Resort would talk to women about any other issue—marriage, cancer, smoking, or vaccines—the law would not apply. *Id.* And if First Resort would just provide the referral for abortions the City desires, the law would not apply. *Id.*

The City does not dispute that the Ordinance applies to only two entities, both of whom the City believes "push an anti-abortion agenda," and was targeted specifically against First Resort. (ER Vol. II, p. 63 [UF 12], p. 64 [UF 20], pp. 79-80, and p. 130). The City practically admits viewpoint discrimination in its Response when it says its Ordinance responds to a claimed "ethical obligation" to refer for abortion. (Resp. at 3).

The Supreme Court has made clear, however, that the government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392. As Justice Kagan observed more than two decades ago, *R.A.V.* means that the Court's neutrality principles apply even "to a case of non-facial discrimination in an unprotected sphere." Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. Chi. L. Rev. 873, 877 (1993). Thus, the City can defend neither the Panel decision nor the City's highly selective false advertising law by claiming it is only regulating speech "afforded no constitutional protection." (Resp. at 1).

This Court's recent decisions in *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017), and *Lone Star Sec. & Video, Inc. v.*

*City of Los Angeles*, 827 F.3d 1192 (9th Cir. 2016), do not alter the analysis. Those cases do not address viewpoint-based discrimination and were issued before Justice Kennedy reaffirmed the far-reaching scope of the prohibition against viewpoint based discrimination. The City's reliance upon *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) is also misplaced because that case focused on the regulation of medical treatments. It did not discriminate against speakers because of their views. *Id.* at 1229-31.

## II. Panel's Decision Vastly Expands The "Commercial Speech" Doctrine In Conflict With *Central Hudson*

The undisputed evidence is that First Resort provides its clients with free counseling and ancillary medical care. (ER Vol. II, p. 62 [UF2].) First Resort intends, through its free counseling assistance, "to empower women in unplanned pregnancies to make fully-informed decisions in line with their own beliefs and values." (ER Vol. II, p. 62 [UF 6].) It is First Resort's view that if women are given accurate information—as well as time, space, and support to make a processed and informed decision that aligns with their own beliefs and values—many will conclude abortion is neither desired nor needed. (ER Vol. II, p. 62 [UF 5-7].) That is core protected speech, from which many women benefit.

In its Response, the City maintains that its Ordinance "regulates classic commercial speech" because it "regulates advertising designed to attract a patient base in a competitive marketplace for commercially valuable services." (Resp. at 12.) But that approach—echoed by the Panel—ignores the Supreme Court's test for commercial speech, which focuses on whether First Resort's speech proposes a commercial transaction. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980). First Resort's efforts to attract listeners for its speech, its fundraising

to conduct its ministry, and its willingness to provide women with information about their pregnancy and gestational development do not propose commercial transactions. The Supreme Court has explained that what "defines" commercial speech is that it does no more than "*propose[]* a commercial transaction," or that it "relate[s] solely to the economic interests of the speaker and its audience." *Bd. of Trs. of the State Univ. of New York v. Fox*, 492 U.S. 469, 482 (1989) (emphasis in original); *Central Hudson*, 447 U.S. at 561-62 (internal citations omitted). As Justices Brennan and Stevens aptly concurred in *Central Hudson*, "it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." 447 U.S. at 579.

If, as the City suggests, the commercial speech doctrine should be changed so that First Resort's speech is "classic commercial speech," then there will be profound implications for the speech of non-profit organizations which rely on fundraising and donations. Under this novel and expansive definition, a pastor's homily intended to attract worshippers and encourage donations would be commercial speech. A political party's website, by competing with other organizations promoting contrary ideas, would be commercial speech. And so on. The commercial speech test, as argued by the City and construed by the Panel, loses sight of the "common-sense" principles that gave rise to it, and strays far from the Supreme Court's conception of it. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 (1978) (recognizing "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."); *see also Central Hudson*, 447 U.S. at 562.

The abandonment of longstanding precedent about what constitutes

"commercial" speech and adoption of a novel analysis that vastly expands the commercial speech doctrine in conflict with *Central Hudson* warrants *en banc* review.

## III. The Panel's Neutrality Analysis Cannot Be Squared with *Reed* and *McCullen*

The Panel's decision invents a new standard for viewpoint- and content-neutrality analysis. Faced with a law that, on its face, regulates only speakers with a particular viewpoint about abortion referrals (namely, those who refuse to make them), the Panel still deemed the law "neutral." Why? Because it was theoretically possible that some speakers who refuse to make abortion referrals do so for a reason other than opposition to abortion. (Op. at 26 ("[A]n 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.")).

This additional test strays from the Supreme Court's controlling cases of *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015),[2] which make clear that content-neutrality analysis depends not on the subjective motivations of the speaker but on whether application of the law depends on the words spoken. *McCullen*, 134 S. Ct. at 2531 ("The Act would be content based if it required enforcement

[2] The only citation for this novel approach is the Fourth Circuit's 2013 decision in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013) (Op. at 16). However, the analysis in that case cites no authority and predates *McCullen* and *Reed*. The Fourth Circuit has since recognized that *Reed* "conflicts with, and therefore abrogates, our previous descriptions of content neutrality" which had focused on governmental purpose. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015).

authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.") (internal quotation marks and citation omitted); *Reed*, 135 S. Ct. at 2227 ("The restrictions … thus depend entirely on the communicative content"). Neither included the additional requirement that a law singling out a particular content might still be deemed neutral if some people who speak that content might have other reasons for doing so. No such requirement exists, and the Panel's decision creates a significant conflict warranting *en banc* review.

## IV. The Ordinance is Preempted by State Law

The City admits the key text of its targeted Ordinance duplicates generally applicable state law: "The terms of the Ordinance are almost identical to those of the California's false advising statue, Business and Professions Code section 17500." (ER Vol. II, p. 292, lines 11-13).[3] Since substantially the entire text of the Ordinance's liability provision is found in state law, the Ordinance is plainly duplicative, by the City's own admission. Indeed, its only plausible value is adding additional restrictions for one targeted set of speakers: "anti-abortion" advocates.

The City attempts to spin this targeting as a virtue, saying this targeted enforcement scheme makes the Ordinance "narrower" than the FAL. (Resp. at 13). But these assertions highlight the clear jurisdictional conflict between the municipal and state law. Indeed, a jurisdictional conflict is inevitable where dual regulations (by the State and the City) cover the same ground. *Pipoly v. Benson*, 20 Cal.2d 366, 371 (1942). "The invalidity arises,

[3] Indeed, the City Attorney has already attempted to use Section 17500 as a vehicle to attack First Resort. (ER Vol. II, p. 63 [UF 12-14] and pp. 79-80, 82-83.)

not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground." *Id.* This is further compounded by the fact other municipalities *have already* enacted copycat versions of the Ordinance. *See, e.g.*, Oakland, Cal., Mun. Code ch. 5.06, § 5.06.110; *contra* Resp. at 14 (dismissing prospect of copycats as "speculative").

Lastly, because the Panel relied in whole or in part on the fact that the Ordinance is civil and not criminal in determining the preemption issue, certification of this issue to the California Supreme Court is appropriate.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Dated: August 10, 2017

Respectfully submitted,

By */s/ Kelly S. Biggins*

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## 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 2,091 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: August 10, 2017

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