15-15434

IN THE

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 AND COUNTY OF SAN FRANCISCO,

Defendant-Appellee,

—and—

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICUS CURIAE* ON BEHALF OF INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL AND FIRST AMENDMENT SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici are the Information Society Project at Yale Law School,[2] and individual scholars of the First Amendment, all of whom share an interest in ensuring that the constitutionality of S.F. Admin. Code. Ch. 93, §§ 93.1-93.5 (2011), is determined in accordance with settled First Amendment principles.

The **Information Society Project** (ISP) is an intellectual center addressing the implications of new information technologies for law and society and focuses on a wide range of issues concerning the intersections between health policy, technology policy, privacy concerns, and the regulation and dissemination of information. Many of the scholars associated with the ISP are especially concerned with the development of First Amendment doctrine and its impact on listeners in the marketplace.

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School, the founder and director of Yale's Information Society Project, and the director of the Knight Law and Media Program and the Abrams Institute for Free Expression at Yale. Professor Balkin is the author of numerous articles in different fields including constitutional theory, Internet law,

[1] Counsel for defendants has refused to consent to the filing of this brief. According, this brief is accompanied by a motion to file an amicus brief. No

[2] This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

freedom of speech, reproductive rights, jurisprudence, and the theory of ideology. His books include *Living Originalism; Constitutional Redemption: Political Faith in an Unjust World*; *The Constitution in 2020* (with Reva Siegel); and *Processes of Constitutional Decisionmaking* (5th ed. with Brest, Levinson, Amar, and Siegel).

Steven H. Shiffrin is the Charles Frank Reavis Sr. Professor of Law, Emeritus at Cornell Law School. He joined the Cornell Law School faculty in 1987, after beginning his law school teaching career at UCLA, and retired in 2014. Professor Shiffrin is a coauthor of *Constitutional Law, 11th ed.* (2011), and *The First Amendment, 5th ed.* (2011), both of which are widely used casebooks in the field. He is author of numerous law review articles and also of *The Religious Left and Church-State Relations* (Princeton University Press, 2009), *Dissent, Injustice, and the Meanings of America* (Princeton University Press, 1999), and *The First Amendment, Democracy, and Romance* (Harvard Press, 1990), winner of the Thomas J. Wilson Award. He is working on a new book entitled, *What's Wrong with the First Amendment?*

Michael C. Dorf is the Robert S. Stevens Professor of Law at Cornell Law School. He is the co-author (with Laurence Tribe) of On Reading the Constitution (1991), the co-author (with Trevor Morrison) of The Oxford Introductions to U.S. Law: Constitutional Law (2010), and the editor of Constitutional Law Stories (2d. ed. 2009). He served as law clerk for Judge Stephen Reinhardt of the United States

Court of Appeals for the Ninth Circuit and then for Justice Anthony M. Kennedy of the Supreme Court of the United States. Before joining the Cornell faculty, Professor Dorf taught at Rutgers-Camden and Columbia Law Schools.

Tamara Piety is the Phyllis Hurley Frey Professor of Law at the University of Tulsa College of Law and in 2015 was a Scholar in Residence and Affiliated Fellow at the Information Society Project. She is the author of *Brandishing the First Amendment* from University of Michigan Press and of numerous articles on the First Amendment, commercial speech and corporate personhood. She was recently invited to address the National Association of Attorneys General's on the topic of the regulation of commercial speech as a part of their consumer protection conference.

Amanda Shanor is a Resident Fellow at the Information Society Project and a Ph.D Candidate in Law at Yale Law School, where her research focuses on the First Amendment and constitutional and administrative law. Shanor served as a law clerk to the Honorables Cornelia T.L. Pillard and Judith W. Rogers on the United States Court of Appeals for the District of Columbia Circuit and Robert W. Sweet on the United States District Court for the Southern District of New York. She is the author of works on the First Amendment, the administrative state, national security law, and constitutional change.

STATEMENT OF THE CASE

The Ordinance at issue in this case, San Francisco Admin. Code, ch. 93, §§ 93.1-93.5 (2011) ("the Ordinance"), prohibits false advertising by facilities it refers to as "limited pregnancy services centers" ("limited PSC"). To be considered a "limited PSC," the center must be:

1) a "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;[3] S.F. Admin. Code, ch 93, § 93.3(g), that,
2) does *not* directly provide or provide referrals to clients for either abortions or emergency contraception. *Id.* § 93.3(f).

As the district court found, the Ordinance is "aimed at ensuring that indigent women facing unexpected pregnancies are not harmed by false and misleading advertising by certain providers of pregnancy-related services that do not offer abortions or referrals for abortion." *First Resort, Inc. v. Herrera*, 80 F. Supp.3d 1043, 1045 (N.D. Cal. 2015) (citing S.F. Admin. Code, ch. 93 §§ 93.3(f), 93.4 2011)). In enacting the Ordinance, the San Francisco Board of Examiners found, *inter alia*, that:

[3] Having the "appearance of a medical facility" is further defined in the Ordinance. S.F. Admin. Code, ch.93, § 93.3(g).

- so-called "crisis pregnancy centers" (or "centers") "that seek to counsel clients against abortion have become common throughout California," *id.* § 93.2(5);
- while "[s]ome [of these centers] openly acknowledge . . . that they do not provide abortions or emergency contraception or refer clients to other providers of such services," many of these centers "seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling," *id.* § 93.2 (6);
- "[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," *id.* § 93.2(9); and
- "[u]nder these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all." *Id.*

To achieve its goal of protecting women from being misled by false or misleading advertising, the Ordinance does not require any disclosures or compel any speech. Nor does it ban advocacy against abortion. Indeed, it specifically states that "[t]he City respects the right of [centers] to counsel against abortions . . . and the City does not intend by this Chapter to regulate, limit or curtail such advocacy." *Id.* § 93.2(10). All the Ordinance does is make it unlawful for limited PSCs, "with intent directly or indirectly to perform pregnancy-related services," to:

- "make . . . any statement, concerning those services . . ., or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof which is untrue or misleading . . . that the limited services pregnancy center knows or which by the exercise of reasonable care should know to be untrue or misleading," *id.* § 93.4(a); or
- "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* § 93.4(b).

The Ordinance specifically limits enforcement of these provisions to a civil action brought by the City Attorney, and states that it does not create a private right of action for any party other than the City. *Id.* § 93.5(a) and (e). It also mandates that the City provide notice of violation and an opportunity to cure to the limited PSC. *Id.* § 93.5(a).

The record in this case shows that the plaintiff First Resort's website advertising refers to specific products with the use of headings, such as the heading "Abortion Counseling" under which it represents "we offer abortion information, resources, and compassionate support for women facing the crucial decisions that surround unintended pregnancies and are considering abortion." *First Resort*, 80 F. Supp.3d at 1046. The website also includes a section entitled "Pregnancy Services

and Abortion Services" in which it claims that First Resort provides "pregnancy options counseling and many other services."[4] *Id.* As the district count found, there is no indication on the website or advertising that abortions and abortion referrals are not offered at the clinic. *Id.*

To insure that women considering abortion are directed to its website, First Resort uses Google's "Adwords," a fee-based keyword service. As the district court explains, "[t]he 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." *Id.*

First Resort does not charge for the services it does provide. Plaintiff-Appellant's Br. at 20-21. However, First Resort and members of First Resort's senior management benefit financially from successful advertising. First Resort considers this advertising a "means of competing with abortion providers for the attention of online viewers" who are seeking information about providers of abortion and contraception in San Francisco. *First Resort*, 80 F. Supp.3d at 1046. Senior management receive enhanced compensation that is tied directly to the number of new clients brought in, and the advertising is part of a fundraising

[4] These headers contradict First Resort's claims that it does not advertise "specific products." See Plaintiff-Appellant's Br. at 20-21.

apparatus that raised $1,000,000 in FY 2012, only $300,000 of which was spent on clinic operations. *Id.*

SUMMARY OF ARGUMENT

Starting in 1976, the Supreme Court adopted limited First Amendment protections for commercial speech—speech between an organization and its potential clientele—recognizing the informational value of the speech to consumers. The commercial speech doctrine has always been tailored to the constitutional value it recognizes. It protects the flow of speech to insure that consumers are not denied access to information, but also allows governments to protects the accuracy of the speech by insuring that the information is truthful and not misleading.

Accordingly, commercial speech doctrine allows limits on commercial speech that are not allowed where public discourse is concerned—public discourse has always received greater protection in recognition of the constitutional values served by open political dialogue, debate over ideas, philosophy, religion and the arts. With respect to public discourse, for example, the Court has famously said, "there is no such thing as a false idea." Where commercial speech is concerned, on the other hand, governments may ban false and misleading advertising outright to protect consumers and may target specific industries or professions for these bans,

especially where problems are known to exist as they are with respect to the limited pregnancy services centers targeted in the Ordinance.

This case concerns the constitutionality under the First Amendment of San Francisco's Ordinance to stop the use of false and misleading advertisements by limited PSCs. These advertisements cloak the ideological mission of these organizations in a veneer of medical clinic respectability, luring women seeking abortions by listing "Abortion Services" and other pregnancy-related services on their website. Dangling free pregnancy tests and counseling ensures that those who come to the facilities are among the most vulnerable, low-income women seeking abortions at the lowest cost. When women arrive at the facilities, staff attempt to delay them, lie to them about the availability of services, and about the health risks and benefits of abortion all in an attempt to stop the women from obtaining abortions. *See, e.g.,* Naral Pro-Choice America, CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM (2015), *available at* *http://www.prochoiceamerica.org/assets/download-files/cpc-report-2015.pdf*.

Giving the impression that they are a commercial entity offering commercial services is at the very heart of what these facilities intend to do. They lie and mislead women about the services they provide and hide their ideological bent because if they told the truth, women would not go to the clinics. False and

misleading advertising attracts the most clients. With regard to First Resort, it turns out that the senior management have an economic interest in the success of the advertisements; the more women they lure into the clinic with promises of "Abortion Services," the more money they make. *Supra* at 7. That the promises are false, that women are never actually offered abortion services at any price makes no difference to the nature of the advertising. That women may not be charged for pregnancy tests makes no difference to the woman except that it makes her more likely to go to that clinic for help to obtain her abortion. Nothing on the advertisements leads a woman to believe that *all* services, including the offered "Abortion Services" would be offered for free. That after all, would not be believable. Responding to concerns about these tactics, San Francisco has chosen a very modest, almost mundane way to prevent women from being harmed by this subterfuge.[5] The City has done what many other lawmakers do in response to reports of false advertising and misleading shams in other industries. It has enacted a law to prevent false advertisements about the services these facilities claim to be offering.

First Resort's only way to maintain its business model is to argue that because it offers some services for free, like pregnancy tests or what it refers to as

[5] Unlike some of the other regulations in this area, the Ordinance here does not compel speech, even limited factual disclosure. *Cf Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014) (upholding one disclosure requirement and striking another "under either level of review").

"counseling," the facility's advertisements are not "commercial speech." The question is whether these advertisements that look like commercial speech, and act like commercial speech, and most importantly appear to be commercial speech to the potential consumers reading them, somehow lose their commercial attributes because the facilities offer some advertised services for free, and fail to offer other advertised services altogether. Their claim is that their commercial speech becomes ideological speech because their intent was to deny women the abortions they were tricked into seeking. Does the hidden ideological motive behind the ads deprive the ads of their true character? If commercial speech doctrine is correctly applied, it cannot be that ads that lie about their commercial nature lose their commercial nature because of the lie. This violates the heart of the Supreme Court's demand that governments be allowed to insure that the stream of information "runs clearly." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 771-2 (1976),[6]

San Francisco's Ordinance is squarely within the reasoning of the commercial speech doctrine. It does not even approach First Amendment boundaries and should be upheld.

[6] The state's authority to police the accuracy of the information available to consumers is so great that in some circumstances the state can even compel speech and affirmatively require disclosures of factual information. *See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

ARGUMENT

I. Because Commercial Speech Doctrine Primarily Protects the Listener's Interest in Information, the State Can Regulate Commercial Speech to Insure It Flows "Cleanly As Well As Freely."

It is textbook First Amendment doctrine that commercial speech has never been given the stringent level of scrutiny or subject to the same doctrinal rules as public discourse.[7] Before 1976, in fact, commercial speech fell outside First Amendment protections altogether. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("the Constitution imposes no . . . restraint on government" regulation of "purely commercial advertising."). In *Virginia State Bd.*, the Supreme Court overruled prior precedent, holding that commercial speech was not "wholly outside" the protections of the First Amendment. *Virginia State Bd.,* 425 U.S. at 761 (striking down a law preventing licensed pharmacists from advertising the prices of prescription drugs). Still, the Court protected commercial speech less vigorously than core political speech in keeping with the different constitutional values served by the different types of speech. *See, e.g.,* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer and Abood,* 40 Val. U. L. Rev. 555, 559 (2005) (internal quotations omitted).

It has been stated repeatedly by the Court that commercial speech serves a

[7] *See, e.g.,* Stone, et al., THE FIRST AMENDMENT 186-215 (4th ed. 2012); Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 871-72 (2015).

different constitutional value than core political speech. Because citizens engage in commercial speech in order to facilitate transactions in the marketplace, the First Amendment's concern for commercial speech is based on the value of accurate and free-flowing information to the consumer. *Virginia State Bd.,* 425 U.S. at 761 (discussing "keen" consumer interest and society's "strong interest" in the "free flow of commercial information.").[8] Simply put, where public discourse doctrine is speaker centered,[9] commercial speech doctrine is audience centered.[10]

Because of the different constitutional values being served by commercial speech doctrine, that doctrine has developed to allow "'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Bd. of Trs. v.*

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[8] *See also* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods*,* Zauderer *and* Abood, 40 Val. U. L. Rev. 555, 559 (2005) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)); Post, *Compelled Commercial Speech,* 117 W. Va. L. Rev. at 872-73 (internal footnotes omitted); *Nat'l. Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d. Cir. 2001) (protecting "robust and free flow of accurate information" is principal justification for protecting commercial speech).

[9] The most common rationales given for protecting public discourse at the highest level include the "marketplace of ideas" rationale, the self-governance rationale and the autonomy rationale, all of which are concerned with the interests of the speaker. Stone, et al., THE FIRST AMENDMENT 9-14.; *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (The First Amendment is "the guardian of our democracy.").

[10] Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 14 (2000) ("*Constitutional Status*") (in commercial speech doctrine "[t]he Court has … focused its analysis on the need to receive information, rather than on the rights of speakers.").

Fox, 492 U.S. 469, 477 (1989) (quoting Ohralik v. Ohio State Bar Asson, 436 U.S. 447, 455-56 (1978)). For example, the Court has held that neither overbreadth nor prior restraint doctrines apply to commercial speech;[11] chilling-effect doctrine does not apply;[12] and certain types of commercial speech can be targeted for specific restrictions, all in order to serve the value of preserving the informational value of the speech.[13]

In *Zauderer,* the Court upheld a disciplinary rule requiring attorneys who advertise contingency fee arrangements to also state that clients in these cases would be required to cover costs whether or not they prevailed. 471 U.S. at 652. Even this type of limited factual disclosure requirement was permissible in *Zauderer* because it was *inter alia* "reasonably related to the States' interest in preventing deception of consumers." *Id.* As the Court emphasized, "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Id.*

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[11] Post, *Constitutional Status,* 48 UCLA L. Rev. at 28-33; Amanda Shanor & Robert Post, *Adam Smith's First Amendment,* 128 Harvard L. Rev. F. 165, 167-73; see also *Central Hudson*, 447 U.S. at 565 n.8; *id.* at 571 n.13; *Va. State Bd.,* 425 U.S. at 771–72 n.24.

[12] *Va. State Bd.*, 425 U.S. at 771 n.24.

[13] *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (quoting *Va. State Bd.*, 425 U.S. at 771–72).

II. The First Amendment Allows States to Target Specific Industries for Prohibitions Against False or Misleading Commercial Speech.

Most fundamentally, in establishing these limited protections for commercial speech in 1976, the Court has always been clear that false and misleading commercial speech falls outside First Amendment protection. In *Virginia State Bd.*, the Court emphasized that "[t]he First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." 425 U.S. at 771-72. Because "the public and private benefits from commercial speech derive from confidence in its accuracy and reliability," *Bates*, 433 U.S at 383, protecting false commercial speech would undermine the constitutional value that First Amendment protections are intended to serve. As the Court explained in *Central Hudson,* 447 U.S. at 563, 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."[14] As the Court noted in distinguishing false commercial

[14] *See also Central Hudson,* 447 U.S. at 563 (permissible to "ban forms of communication more likely to deceive the public than to inform it."); *see also Zauderer,* 471 U.S. at 638 ("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); *First Resort*, 80 F. Supp. 3d at 1050.

speech from falsity in other contexts, "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." *Bates,* 433 U.S. at 383. *See, e.g., Hoffman v. Capital Cities/ABC, Inc*. 255 F.3d 1180, 1184 (9th Cir. 2001) ("False or misleading commercial speech is not protected.").

It is also permissible to target certain industries for prohibitions against fraud and other forms of deception. For example, in *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993), the Court noted that a ban on in-person solicitation by certified public accountants would be constitutional if it targeted only fraud and deceptive commercial expression as 25 States and the District of Columbia did at the time. 507 U.S. at 768-69. As the Court wrote in *Edenfield*:

> our cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification, see, e.g., Central Hudson Gas & Electric Corp., supra, 447 U.S., at 563-564, 100 S.Ct., at 2350; In re R.M.J., 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982); Metromedia, Inc. v. San Diego, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981) (plurality opinion). Indeed, 25 States and the District of Columbia take various forms of this approach, forbidding solicitation by CPA's only under circumstances that would render it fraudulent, deceptive, or coercive.

Id. (but striking the Florida ban because it would also restrict truthful non deceptive information proposing lawful commercial transactions).

Thus, government is free to do what San Francisco has done here, "prevent the dissemination of commercial speech that is false, deceptive, or misleading."

Zauderer, 471 U.S. at 638. *See also Central Hudson*, 447 U.S. at 563 ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"). As this Court has put it, "*[f]raudulent* commercial speech may be enjoined . . . . An advertisement is fraudulent when it misleads customers about the benefit of the offered product." *Schiff*, 379 F.3d at 630 (emphasis added).

United States v. Alvarez, 132 S. Ct. 2537 (2012), proves the point. First, the Court held that the Stolen Valor Act, making it a crime to falsely claim receipt of military decorations or medals and providing an enhanced penalty if the Congressional Medal of Honor is involved, violated the First Amendment, and reaffirmed the principle that in general, "falsity alone may not suffice to bring . . . speech outside the First Amendment." *Alvarez*, 132 S. Ct. at 2545 (Kennedy, J.). This principle is based on the notion that "[u]nder the First Amendment there is no such thing as a false idea, because proscribing false speech will usually chill truthful, valuable speech as well. *Gertz v. Robert Welch*, 418 U.S. 323, 339-40 (1974)). "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id*. at 34l.

Then, the Court went on to reaffirm the distinction between core political speech and commercial speech originally made in *Virginia State Bd.*, where the Court wrote: "the greater objectivity and hardiness of commercial speech[] may

make it less necessary to tolerate inaccurate statements for fear of silencing the speaker" and "may also make inapplicable the prohibition against prior restraints." *Virginia State Bd.*, 425 U.S. at 771 n.24. In *Alvarez*, the Court confirmed this view, noting that the government is permitted to restrict the dissemination of some false speech as long as that speech fits into one of several "historic and traditional categories long familiar to the bar," including fraudulent commercial speech.[15] *Alvarez*, 132 S. Ct. at 2544:

> [C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar . . . . Among these categories are advocacy intended, and likely, to incite imminent lawless action . . . , obscenity . . . , defamation . . . , speech integral to criminal conduct . . . , so-called "fighting words" . . . , child pornography . . . , *fraud* . . . , true threats . . . , and speech presenting some grave and imminent threat the government has the power to prevent[.]

Id. at 2544 (citations and quotation marks removed) (alteration in original) (emphasis added).[16] As the Court wrote, "[t]he vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules." *Id.*

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[15] The *Alvarez* Court traces the notion of fraud back to *Virginia State Board of Pharmacy.*, 425 U.S. 748 (1976), striking a ban on truthful and nonmisleading advertising. *See Alvarez*, 132 S. Ct. at 2544; *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing to *Virginia State Board of Pharmacy*).

[16] *See also Stevens*, 559 U.S. at 468 (quoting *Simon & Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)); *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003) ("the First Amendment does not shield fraud.").

III. The Ordinance Targets False or Misleading Commercial Speech Unprotected by the First Amendment.

In prohibiting false or misleading statements about pregnancy-related services and the performance or disposition of pregnancy-related services by limited PSCs, the Ordinance bans false or misleading commercial speech unprotected by the First Amendment. First Resort claims that because it provides "counseling" against abortion and contraception for free, statements in its advertisements that make it appear that it offers "Abortion Services" and "Contraceptive Services" at its facilities are not commercial speech. But not only does this ignore the other financial motivations of First Resort and its senior management team served by its advertising, *supra* at 7, whether a facility charges for services is not and never has been the determining factor in establishing the commercial nature of speech.[17]

Courts should apply the commercial speech doctrine in accordance with the informational value being served, and evaluate the speech as it is understood by the consumer. The appropriate question is how the target of the speech, a pregnant woman considering abortion who sees an advertisement listing "Abortion

[17] As the Fourth Circuit recently held *en banc*, the important inquiry is "whether the Center possesses economic interests apart from its ideological motivations." *Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (en banc) (in case where facility did not charge for services, "City's commercial speech theory should not have been so easily dismissed by the district court" and remanding for discovery on the question).

Services" will understand the advertisement. *See* Jennifer Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment,* 15 J. Const. L. 539, 589-95 (discussing contours of commercial speech doctrine).

The Court has recognized the "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 419 (1993). Originally, the Court characterized commercial speech as "speech which does no more than propose a commercial transaction." *Va. State Bd. of Pharm.*, 425 U.S. at 762 (internal quotation marks and citations omitted). This limited definition sufficed for the statute challenged in that 1976 case, which prevented pharmacists from advertising the price of prescription drugs.

In *Bolger v. Youngs Drug Prod. Corp.,* 463 U.S. 60, 66-67 (1983), the Court looked beyond this one factor and found that some speech that did not propose a commercial transaction was commercial speech. *Bolger* involved a challenge to a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives. The mailings at issue in the case included both materials directly promoting the plaintiff's products and "information pamphlets discussing the desirability and availability of prophylactics in general." *Id.* at 62. The Court quickly decided that the materials explicitly advertising the plaintiff's products were commercial speech, but the informational pamphlets "present[ed] a closer

question." *Id.* at 66. Ultimately, the Court held that even the informational pamphlets including "discussions of important public issues such as venereal disease and family planning," *id.* at 67-68 (footnotes omitted), fell within the definition of commercial speech. In making its determination the Court considered whether the speech was an advertisement, whether it referred to a specific product, and whether the speakers had an economic motivation for engaging in the speech. *Id.* at 66-68. The *Bolger* Court cautioned that not all of the relevant factors need be present for speech to be commercial, *id.* at 67 n.14; nor indeed was the presence of any one factor dispositive, *id.* at 66-67.

In *Central Hudson*, the court recognized that whether the speech would impact the economic interest of the audience was an important factor to be considered. *Central Hudson*, 447 U.S. at 561 (asking whether the speech is related to the "economic interests of the speaker *and its audience.*") (emphasis added). In *Riley v. Nat'l. Fed'n. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988), the Court held that the "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon."

Taking the *Bolger* factors into account and examining the nature of the speech as a whole, the speech at issue here is commercial speech, as the court below correctly held. First, as the Court emphasized in *Central Hudson*, because

the commercial speech doctrine is concerned with protecting the free flow of accurate information to consumers, the determination of whether speech is commercial should consider the nature of speech from the point of view of the consumer. *Central Hudson*, 447 U.S. at 561 (question is whether the speech is related to the "economic interests of the speaker *and its audience.*"). The listener's perspective on the speech and its impact on the consumer's economic interests and activities in the marketplace is equally important, if not more important, than the economic interests of the speaker.[18] As Daniel Halberstam explains, when commercial speech is at issue,

> The relationship between speaker and audience is transformed from an exploration of each other's opinions and beliefs into a strategy of striking a bargain that is ultimately objectified in a material transaction.[19]

Offering services for free, especially offering services one does not even provide in order to draws women to the limited PSCs under false pretenses skews the information available in the marketplace and pollutes the stream of information. Thus, this is exactly the type of false advertising that falls outside the limited First

[18] The "contextual inquiry into the social meaning of a particular speech act goes beyond the factors articulated in *Bolger* and requires analyzing the speech act as a whole." Keighley, 15 J. Const. L. at 591 (citing Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. at 18; Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 832 (1999) (definition of commercial speech turns on the relationship between the speaker and audience).

[19] Daniel Halberstam, supra n.17, at 832.

Amendment protections for commercial speech. *Bates*, 433 U.S. at 364 (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)) (protection of *truthful nonmisleading* commercial speech "serves individual and societal interests in assuring informed and reliable decisionmaking.").

As the North Dakota Supreme Court held, an anti-choice organization that provides free pregnancy tests engages in commercial speech when advertising services, regardless of whether they receive any money from clients, because the "advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas." *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986); *see also Nat'l Servs. Grp. v. Painting & Decorating Contractors*, No. SACV06-563CJC(ANX), 2006 WL 2035465, at *4 (C.D. Cal. Jul. 18, 2006) (looking to the First Amendment definition of commercial speech in a suit under the Lanham Act and concluding that "the mere fact that a speaker is a nonprofit organization does not preclude its speech from being commercial . . .").[20]

The Court's analysis in *Central Hudson* is informative. In that case, Central Hudson Gas & Electric Corporation held a monopoly over the sale of electricity in

[20] *Compare Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014) (declining to decide whether speech is commercial "because conclusions are the same under either intermediate scrutiny . . . or strict scrutiny"); *id.* ("under either level of review, the Government Message and Services Disclosure fail review while the Status Disclosure survives").

the area, and thus the speech could not have an economic impact on the electrical supplier because consumers could not take their business elsewhere. The petitioner had argued that this meant the speech in question could not be "commercial." The Supreme Court disagreed. It held the speech was commercial because of the impact it had on listeners operating in the marketplace. As the Court wrote:

> [e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment.

447 U.S. at 567 (noting "[a] consumer may need information to aid his decision whether or not to use the monopoly service at all. . .").

Moreover, just as charging for religious literature does not commercialize a clearly religious activity, providing services free of charge with a *hidden* ideological motive does not transform what is to the consumer a commercial transaction into an ideological one. For example, in *Jamison v. Texas*, 318 U.S. 413 (1943), the Court considered whether a Jehovah's Witness engaged in commercial speech when inviting individuals to a religious gathering, and offering to send religious books for 25 cents. The Court concluded that the context of the speech as a whole signaled that it was "in the pursuit of a *clearly religious activity*." *Id.* at 417 (emphasis added). *See also Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (concluding that where both speaker and audience were aware of the clearly

religious nature of speech, "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."); Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 16 (2000) (concluding that *Murdock's* analysis "does not focus on the narrow communicative act of selling a Bible, but rather on the larger 'venture' or 'activity' within which the particular communicative act is embedded").

Here, in contrast with *Jamison* and *Murdock*, any religious and ideological intent in First Resort's advertising is hidden from women seeking pregnancy-related medical care. While limited PSCs may believe they are engaged in a religious and ideological "venture" when they speak with pregnant women about their views on abortion, from the women's point of view limited PSCs engage in a solely commercial venture when they encourage women to visit a limited PSC to receive pregnancy-related medical services, "Abortion Services" and "Contraceptive Services." A facility should not be rewarded for hiding its ideological motivations for committing fraud. This would undermine the very purpose of the commercial speech doctrine to make information flow freely and cleanly.

Consider the ramifications of a rule that advertisements offering products or services were outside of the regulatory power of states if the services were offered

for free. If that were true, Christian Scientists could place billboards stating "Emergency Health Services this exit" or "Heart Attack? Come to us" and guide people to a facility where they offered free "counseling" for your heart attack or blood loss and this would not be considered false advertising. Religious groups opposed to blood transfusions could set up a "Sickle Cell Anemia Treatment Center," and advertise with signs saying "Seeking a Blood Transfusion?" and then counsel clients for free that blood transfusions would harm them and show pictures of people who had died from blood transfusions. If giving services for free brought these signs outside of the commercial speech doctrine, the government would be unable to prevent these organizations from preying on sick and desperate people, from drawing them into their facilities under false pretenses.

Second, the Ordinance impacts only false and misleading advertising, not "informational materials" like those at issue in *Bolger*, or indeed any speech that a pregnant woman would understand to be ideological in nature. In fact, rather than seeking to defend ideological information from censorship, the plaintiff seeks to defend its purposeful omission of its ideological viewpoint, its use of commercial advertising to mask ideological motivations, its offer of services designed to draw unsuspecting pregnant women seeking medical services into a facility where they will receive ideological information only. First Resort tries to defend the false and misleading way it advertises its services, its references to "specific product[s]," *see*

Bolger, 463 U.S. at 66—health services such as counseling, that First Resort does provide, and other health services, such as abortion and emergency contraceptive "services," that it does not—by claiming these are ideological speech, but if First Resort disclosed its ideology the women wouldn't come, and it knows that.

First Resort's advertising makes it appear to pregnant women who are often in desperate circumstances that First Resort will help them access abortion and contraceptive services when it will do the exact opposite. The offers of free pregnancy testing or free counseling only exacerbate this problem from the consumer's point of view. A group's ideological motivations should not "mean that all of its speech, even speech promoting the use of a product with commercial value, is per se [public discourse] speech that lies outside the commercial speech doctrine." Keighley, 15 J. Const. L. at 604.

Finally, First Resort's advertising is related to the "economic interests of the speaker." *Central Hudson*, 447 U.S. at 561; *Bolger*, 463 U.S. at 66-67. As noted above, members of First Resort's senior management receive enhanced compensation based directly on the number of new clients brought in, and the advertising serves as a significant fundraising tool as well. *Supra* at 7. First Resort's failure to charge for the "counseling" services it provides, Appellant's Br. at 20-21, does not negate these economic interests of the management team nor the economic impact of the advertisements. As the Fourth Circuit held en banc in

Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore, the important inquiry is "whether the Center possesses economic interests apart from its ideological motivations." 721 F.3d 264, 285 (4th Cir. 2013) (en banc) (holding that "the City's commercial speech theory should not have been so easily dismissed by the district court" and remanding for discovery on the question?).[21] Thus, this is not a case like *Tepeyac v. Montgomery County* where there was "no indication that Plaintiff is acting out of economic interest." *Tepeyac v. Montgomery County*, 779 F.Supp.2d 456, 463 (D. Maryland 2011).

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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[21] The court ordered discovery to substantiate the City's claim that the Center has economic interests in its advertising, noting "[s]uch discovery is 'especially important' where, as here, 'the relevant facts are exclusively in the control of the [summary judgment movant]' or the 'case involves complex factual questions about intent and motive.'" *Greater Baltimore Ctr*, 721 F.3d at 285.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 6,872 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that on this day I shall mail an original and seven copies of the foregoing to the Court, pursuant to Circuit Rule 31-1.

DATED: November 24, 2015 /s/ Priscilla Joyce Smith
PRISCILLA JOYCE SMITH