15-15434

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST RESORT, INC.,

Plaintiff-Appellant,

v.

DENNIS S. HERRERA, in his official capacity as City Attorney of the City of San Francisco,

Defendant-Appellee,

and

THE 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,
Northern District of California,
Case No. 4:11-cv-05534-SBA,
The Hon. Saundra Brown Armstrong, Judge

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ATTORNEY GENERAL OF CALIFORNIA, SUPPORTING APPELLEES AND AFFIRMANCE

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INTRODUCTION

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, *Amicus Curiae* Attorney General of the State of California requests leave to file the accompanying *amicus* brief in support of Defendants-Appellees Dennis S. 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, and in support of affirmance of the final judgment of the District Court. The Office of the Attorney General is the sole author of this *amicus* brief. Pursuant to Ninth Circuit Rule 29-3, the Office of the Attorney General attempted to obtain the consent of all parties herein to the filing of the brief, before making the present motion. All Defendants-Appellees have consented to the filing of the brief, but Appellant First Resort, Inc. ("First Resort"), refused to consent.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

In this case, First Resort claims that the California False Advertising Law, California Business and Professions Code section 17500 *et seq.*, preempts the City and County of San Francisco's Pregnancy Information Disclosure and Protection Ordinance (the "Ordinance"), San Francisco Administrative Code section 93 *et seq.*

The Attorney General is "the chief law officer of the State" of California, with "the duty . . . to see that the laws of the State are uniformly and adequately

enforced." Cal. Const. art. V, § 13. The Attorney General is expressly authorized to enforce statewide the California False Advertising Law. *See* Cal. Bus. & Prof. Code §§ 17508(c), 17535. The Attorney General's central role in combating false advertising in California is underscored by the requirement in the California False Advertising Law that the Attorney General be served with a copy of any petition or brief filed in a California state court that will be applying or construing that law. *Id.* § 17536.5.

The Attorney General has a strong general interest in the proper interpretation of the California False Advertising Law, and a specific interest in ensuring that that law's preemptive scope is construed appropriately, so as not to deprive California local government agencies of their rightful powers to enact complementary measures addressing false advertising.

Also, because U.S. states "traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citation omitted)), the Attorney General supports laws like the Ordinance, which aims to ensure the truthfulness of the commercial speech of healthcare providers.

THIS *AMICUS* BRIEF WILL ASSIST THE COURT IN RESOLVING THIS CASE

The Attorney General has a uniquely statewide perspective on legal efforts to protect consumers from false advertising in California. The Attorney General enforces the California False Advertising Law all over the State, and has been counsel of record or *amicus* counsel in many of the most important judicial proceedings construing the California False Advertising Law. *See, e.g.*, *In re Farm Raised Salmon Cases*, 175 P.3d 1170 (Cal. 2008); *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002); *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 61 Cal. Rptr. 3d 29 (Cal. Ct. App. 2007); *People v. Western Airlines, Inc.*, 202 Cal. Rptr. 237 (Cal. Ct. App. 1984); *People v. Super. Ct., Orange Cnty.*, 157 Cal. Rptr. 628 (Cal. Ct. App. 1979); and *People v. Witzerman*, 105 Cal. Rptr. 284 (Cal. Ct. App. 1972).

Resolution of the present case is likely to have significant legal impact, particularly on false advertising law in California, and the Attorney General hopes to provide useful advocacy for the Court as it considers the case.

The Attorney General offers this brief to explain that, contrary to the contentions of First Resort, the California False Advertising Law does *not* preempt the Ordinance in violation of the California Constitution and California case law.[1]

[1] Additionally, the Attorney General states her support of San Francisco's position that the Ordinance lawfully regulates commercial speech and does not run afoul of the First Amendment.

The Attorney General's brief provides significant discussion of the California legal doctrine of "duplication preemption" and the co-existence of the California False Advertising Law and local false advertising laws, including but not limited to the Ordinance. For those issues, the Attorney General's brief would be unique in this case.

CONCLUSION

For the foregoing reasons, the Attorney General requests that the Court accept the accompanying *amicus curiae* brief.

Dated: November 24, 2015

Respectfully Submitted,

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9th Circuit Case Number(s) 15-15434

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BRIEF OF ATTORNEY GENERAL OF CALIFORNIA AS *AMICUS CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONS

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

INTEREST AND AUTHORITY

This case concerns whether the City and County of San Francisco's Pregnancy Information Disclosure and Protection Ordinance (the "Ordinance") is preempted by the California False Advertising Law or violates the First Amendment to the U.S. Constitution.[1]

Section 93.2 of the Ordinance states the following findings: "[i]n recent years, clinics that seek to counsel clients against abortion have become common throughout California. . . . Many [CPCs] . . . seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling." The Ordinance therefore prohibits untrue or misleading advertising by CPCs. *See id.* § 93.4.

The Attorney General of the State of California has a strong general interest in the proper interpretation of the California False Advertising Law, which operates statewide, and a specific interest in ensuring that that law's preemptive scope is construed appropriately, so as not to deprive California local government agencies of their rightful powers to enact complementary measures addressing false advertising.

[1] The Ordinance is codified at San Francisco Administrative Code section 93.1 *et seq.* The California False Advertising Law is codified at California Business and Professions Code section 17500 *et seq.*

Because U.S. states "traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citation omitted)), the Attorney General supports laws like the Ordinance, which aims to ensure the truthfulness of the commercial speech of healthcare providers.

The Attorney General also supports San Francisco's position that the Ordinance lawfully regulates commercial speech and does not run afoul of the First Amendment. The Attorney General writes here specifically to address the issue of preemption, on which the Attorney General speaks with particular authority as California's chief law enforcement officer.

Per Federal Rule of Appellate Procedure 29(c)(5), the Attorney General states that no party's counsel authored this brief in whole or in part, and that no person (outside the Office of the Attorney General) contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Attorney General agrees with Defendants-Appellees Dennis J. Herrera, Board of Supervisors of the City and County of San Francisco, and the City and County of San Francisco and the District Court that the Ordinance neither is preempted by the California False Advertising Law nor

violates the First Amendment, and that this Court should affirm the final judgment of the District Court to that effect.

Plaintiff-Appellant First Resort, Inc. ("First Resort"), cannot establish that the California False Advertising Law preempts the Ordinance. Under Article XI, Section 7, of the California Constitution, the City and County of San Francisco was empowered to enact and may lawfully enforce the Ordinance.[2] Contrary to the contentions of First Resort, the California legal doctrine known as "duplication preemption" does not invalidate the Ordinance, notwithstanding the textual similarities between Section 17500 of California Business and Professions Code and Section 93.4 of the Ordinance. The California False Advertising Law does not "occupy the field" of false advertising law in California, but rather co-exists, without conflict, with many local false advertising laws.

[2] The California Constitution, article XI, section 7, provides as follows: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

ARGUMENT: THE CALIFORNIA FALSE ADVERTISING LAW DOES NOT PREEMPT SAN FRANCISCO'S PREGNANCY INFORMATION DISCLOSURE AND PROTECTION ORDINANCE

First Resort contends that the California False Advertising Law preempts the Ordinance, under the California legal doctrine of "duplication preemption." (Br. of Appellant at 43-46.) It does not.

I. CALIFORNIA'S "DUPLICATION PREEMPTION" DOCTRINE APPLIES TO CRIMINAL LAWS, NOT CIVIL LAWS LIKE THE ORDINANCE

Whether a California state law preempts a California local law is governed by the California Constitution, article XI, section 7. As this Court noted in *Fireman's Fund Insurance Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002), "the California Supreme Court has held that State Law is 'in conflict with' or preempts local law if the local law 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" *Id.*, 302 F.3d at 941 (quoting *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 536 (Cal. 1993)). However, as *Fireman's Fund* points out, "California courts have largely confined the duplication prong of the state preemption test to penal ordinances." *Id.*, 302 F.3d at 956 (citing *Baldwin v. Cnty. of Tehama*, 36 Cal. Rptr. 2d 886, 894 (Cal. Ct. App. 1994)). The "reason that a conflict with the general laws . . . is said to exist where an ordinance duplicates state law is that a conviction

under the ordinance will operate to bar prosecution under state law for the same offense." *Fireman's Fund*, 302 F.3d at 956 (quoting *Cohen v. Bd. of Supervisors of the City and Cnty. of San Francisco*, 707 P.2d 840, 848 n.12 (Cal. 1985)); *accord In re Portnoy*, 131 P.2d 1, 4 (Cal. 1942) (invalidating local ordinance because it "prohibit[s] acts already made criminal by the Penal Code"); *In re Application of Mingo*, 214 P. 850, 851 (Cal. 1923) ("The constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he [or she] could not be again tried for the same offense under the general law."); *In re Sic*, 14 P. 405, 408 (Cal. 1887) (same). The double-jeopardy concern arises in the enforcement of only criminal laws, not civil laws.

The Ordinance is a wholly civil ordinance, with no criminal provisions or penalties. *See id.* § 93.5 (establishing only civil penalties and remedies). Consequently, there is no double-jeopardy bar to a California state criminal prosecution for the same false advertising that the Ordinance prohibits, and, as the District Court held, duplication preemption does not come into play. (*See* Appellant's Excerpts of Record, Vol. I ("ER"), at 20-22.)

Addressing the District Court's holding, First Resort has counter-argued that "California courts have applied duplication preemption to civil

ordinances and have not limited duplication preemption to criminal laws." (Br. of Appellant at 45.) For support, First Resort cites two cases, *Sequoia Park Associates v. County of Sonoma*, 98 Cal. Rptr. 3d 669 (Cal. Ct. App. 2009), and *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 28 Cal. Rptr. 2d 530 (Cal. Ct. App. 1994). Neither case supports First Resort's argument.

Sequoia Park construed a civil Sonoma County ordinance (§ 25-39.6(a) *et seq.*) that regulated the conversion of mobile home parks from hosting rental units to hosting owner-occupied units. The *Sequoia Park* Court found that ordinance to be somewhat duplicative of California's Subdivision Map Act (Cal. Gov't Code § 66410 *et seq.*), a civil statute, because the local ordinance expressly commanded compliance with parts of the state statute. *See* 98 Cal. Rptr. 3d at 691.[3] However, the Sonoma County ordinance also contained other provisions that were construed by the *Sequoia Park* Court as making "improper *additions* to the exclusive statutory requirements of" the California Subdivision Map Act. *Sequoia Park*, 98 Cal. Rptr. at 691 (emphasis added); *see also id.* at 672 ("It imposed additional obligations . . . "). This aspect of the Sonoma County ordinance

[3] The Ordinance, in contrast, does not command compliance with the California False Advertising Law, or any other state statute.

was of paramount importance, because, as the *Sequoia Park* Court held, the California Subdivision Map Act expressly preempted related local ordinances if they "inject[ed] other factors" into the mobile home park conversion process. *Sequoia Park*, 98 Cal. Rptr. at 689.[4] The *Sequoia Park* Court further found that parts of the Sonoma County ordinance mandated what the California Subdivision Map Act forbade, meaning that the latter statute impliedly preempted the local ordinance on "contradiction" grounds. *Sequoia Park*, 98 Cal. Rptr. at 691.

The decision in *Sequoia Park* thus did not turn on whether the Sonoma County ordinance duplicated the California Subdivision Map Act. Instead, the decision turned on how the Sonoma County Ordinance incorporated and added substantive terms to the California Subdivision Map Act, despite the latter law's express prohibition of that practice. *Sequoia Park* thus cannot be fairly counted as a "civil duplication preemption" case.

Sequoia Park follows such cases as *Agnew v. Culver City*, 304 P.2d 788 (Cal. Ct. App. 1956), which states the principle that "[a] municipality may not impose a more stringent or additional requirement than imposed by

[4] The California False Advertising Law, in contrast, does not expressly preempt local prohibitions against false advertising.

the general [state] law." *Id.* at 793.[5] The scenario addressed in *Sequoia Park* and *Agnew* is the alteration or contradiction of state law by local law—not the duplication of state law by local law.

Korean American is also off-point. *Korean American* did include a claim that a civil Los Angeles ordinance (§ 12.24G), which imposed certain nuisance-abatement conditions and restrictions on the rebuilding of businesses, "duplicate[d]" and thereby was preempted by parts of California's Alcoholic Beverage Control Act (the "ABC Act," Bus. & Prof. Code § 23000 *et seq.*). *Korean Am.*, 28 Cal. Rptr. 2d at 534-35, 540. The trial and appellate courts rejected the preemption claim. *Id.* at 534. Moreover, the alleged duplication was not about the substance of nuisance-abatement conditions or restrictions, but rather which government agency or agencies—the California Department of Alcoholic Beverage Control ("ABC") and/or the City of Los Angeles—had authority to impose and to

[5] *See also Chavez v. Sargent*, 339 P.2d 801, 807 (Cal. 1959) (invalidating local labor ordinance for contradicting "both the legislatively declared general labor policy of this state and certain specific implementations thereof"), overruled on other grounds in *Petri Cleaners, Inc. v. Auto. Employees, Laundry Drivers and Helpers Local No. 88*, 349 P.2d 76, 88 (Cal. 1960); *Pipoly v. Benson*, 125 P.2d 482, 483 (Cal. 1942) (invalidating local traffic ordinance that contradicted criminal provision of California Vehicle Code), superseded by statute as indicated in *People v. McNeil*,118 Cal. Rptr. 2d 54, 57 (2002).

enforce such conditions or restrictions, regardless of their substance. *See Korean Am.*, 28 Cal. Rptr. 2d at 540. The *Korean American* Court and that case's plaintiffs-appellants had concerns that a rebuilding business could potentially be subject to substantively conflicting regulations propounded by different government agencies claiming overlapping jurisdiction. *See ibid.* The *Korean American* Court concluded that this concern was unfounded. *See id.* at 540-41. The *Korean American* Court next rejected the contention that the ABC Act "evidence[d] an intent for ABC to exercise sole and exclusive authority to abate nuisances . . . [W]e see no conflict in the City exercising its constitutionally authorized police powers to prohibit nuisances . . . ." *Korean Am.*, 28 Cal. Rptr. 2d at 541-42.

In other words, the decision in *Korean American* did not turn on whether a local law duplicated a state law. Instead, the case concerned whether the state law occupied the field, and whether the local law contradicted the state law. Hence, like *Sequoia Park*, *Korean American* cannot be a precedential basis for analysis regarding civil duplication preemption.[6]

[6] Other California civil cases have involved allegedly duplicative laws and claims of preemption, without being decided on duplication preemption grounds. *See, e.g., Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813,
(continued…)

II. THE CALIFORNIA FALSE ADVERTISING LAW DOES NOT OCCUPY THE FIELD OF FALSE ADVERTISING LAW IN CALIFORNIA, AND LEAVES ROOM FOR THE ORDINANCE

The California False Advertising Law has co-existed, without conflict, with many local false advertising laws that are similar to the Ordinance, including the following:

- Oakland Municipal Code section 5.06.100 (prohibiting false advertising, in text similar to Cal. Bus. & Prof. Code § 17500) and section 5.08.080 (prohibiting false advertising of origins of goods, wares, or merchandise in auction sales);
- San Diego Municipal Code section 33.3048(n) (prohibiting false advertising regarding bingo games, in text similar to Cal. Bus. & Prof. Code § 17500) and section 33.4308(d) (mandating truthful advertising of rates of currency exchange at money exchange houses);

(…continued)
818 (Cal. 2005) (considering financial services company's challenge, under Cal. Const. art. XI, § 7, that California predatory lending law preempted local predatory lending ordinance that was somewhat duplicative, somewhat different; deciding challenge based on whether state law completely occupied field); *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 96 Cal. Rptr. 3d 813, 836 (Cal. Ct. App. 2009) (mentioning possibility of but not finding civil duplication preemption, as pertinent state and local regulations found not to contradict each other).

- San Jose Municipal Code section 6.16.216 (prohibiting false advertising regarding bingo games, in text similar to Cal. Bus. & Prof. Code § 17500), and section 10.24.030 (prohibiting "untrue, deceptive, or misleading" advertising) and, generally, chapter 10.24 (regarding consumer protection);
- Anaheim Municipal Code section 7.34.140 (prohibiting false advertising regarding bingo games, in text similar to Cal. Bus. & Prof. Code § 17500);
- Los Angeles Municipal Code section 28.17 (mandating truthful advertising of gasoline brands available for purchase and prices thereof);
- Fresno Municipal Code section 9-803 (prohibiting California false advertising of origins of goods, wares, or merchandise in auction sales) and section 9-1310 (similar, regarding fire sales);
- Los Angeles County Code of Ordinances section 8.16.020 (prohibiting advertising of gasoline and similar products not immediately available for sale on premises);

- San Mateo County Code of Ordinances section 5.108.020 (prohibiting advertising of price of gasoline not immediately available for sale on premises at said price); and
- Kern County Code of Ordinances section 5.68.110(A) (prohibiting false statements at auctions about quality, quantity, general selling price of items for auction).

The development of this body of local false advertising law has been uncontroversial, because nothing in the California False Advertising Law precludes local government entities from enacting such measures. On the contrary, California Business and Professions Code section 17534.5 allows for "remedies . . . cumulative to each other."

Nonetheless, First Resort warns of a scenario in which a local law enforcement officer, with a choice of using a state law or its duplicative local analogue, picks the local law to enforce in order to avoid unfavorable judicial precedent construing the state law. (Br. of Appellant at 45-46.) However, First Resort has invoked a phantom danger, not a reason to invalidate the Ordinance.

The first problem with First Resort's warned-of scenario is that it is only speculative; First Resort has cited no examples of such picking-and-choosing.

Second, First Resort has overlooked the principle that when two laws use the same words and phrases, the two laws typically receive similar constructions. *See Town of Atherton v. Cal. High-Speed Rail Auth.*, 175 Cal. Rptr. 3d 145, 166 (Cal. Ct. App. 2014) (holding that "intent, logic and consistency suggest the same language in analogous statutes should be construed the same way," in absence of reason for thinking otherwise).[7]

Third, and contrary to First Resort's speculative concerns, there are important reasons for both local and state actors to be able to deter and to combat false advertising against the general public. Local governments play critical roles in identifying the specialized needs of people within their geographical jurisdictions, and in enacting laws tailored to address those needs. *See Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968). A local law could present a preemption problem if the law conflicts with California's statewide laws, makes it impossible for a person to comply with state and local law simultaneously, or, by being enforced, bars a subsequent state criminal prosecution. First Resort has failed to raise or to demonstrate any

[7] *Cf. In re Phyle*, 186 P.2d 134, 138 (Cal. 1947) (holding that two California statutes on same subject matter should receive similar constructions, under doctrine of *in pari materia*); *see also People v. Coker*, 15 Cal. Rptr. 3d 553, 557-58 (Cal. Ct. App. 2004) (similar); *Hill v. Hill*, 100 Cal. Rptr. 458, 461 (Cal. Ct. App. 1972) (similar).

such problem that would justify invalidating the Ordinance on one of those grounds.

In sum, under Article XI, Section 7, of the California Constitution, the California False Advertising Law and the Ordinance can and should co-exist.

CONCLUSION

For the foregoing reasons, California respectfully requests that this Court affirm the final judgment of the Court below, and decline to invalidate the Ordinance.

Dated: November 24, 2015

Respectfully submitted,

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STATEMENT OF RELATED CASES

To the best of the Attorney General's knowledge, there are no cases related to *First Resort, Inc. v. Herrera*, Case No. 15-15434.

Dated: November 24, 2015

Respectfully submitted,

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FOR 15-15434

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November 24, 2015
Dated

/s/ Jonathan M. Eisenberg
Jonathan M. Eisenberg
DEPUTY ATTORNEY GENERAL

9th Circuit Case Number(s) 15-15434

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