No. 17-976

IN THE

Supreme Court of the United States

CTIA – THE WIRELESS ASSOCIATION®,

Petitioner,

v.

CITY OF BERKELEY, CALIFORNIA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, AND CAUSE OF ACTION INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Ilya Shapiro
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200

Megan L. Brown
Counsel of Record
Joshua S. Turner
Stephen J. Obermeier
Jeremy J. Broggi
Bethany A. Corbin
WILEY REIN LLP
1776 K Street N.W.
Washington, D.C. 20006
(202) 719-7000
mbrown@wileyrein.com

Counsel for Amici Curiae
(additional counsel on signature page)

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Statute

Administrative Materials

Other Materials

INTEREST OF *AMICI CURIAE*[1]

Amici believe that the right not to speak is an essential part of the liberty guaranteed by the First and Fourteenth Amendments—and that when someone is forced to act as a mouthpiece for particular government ideas, that warrants the most rigorous judicial review. *See generally W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). When state power treads on exercise of First Amendment liberty, whether individual or corporate, it threatens the fundamental "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quotation mark omitted).

The **Cato Institute** ("Cato") is a nonprofit public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies seeks to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **Competitive Enterprise Institute** ("CEI") is a nonprofit organization incorporated and

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part. Further, no person other than *amici*, their members, or their counsel made a monetary contribution to fund its preparation or submission. The parties lodged blanket consents to filing of *amicus* briefs.

headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

The **Cause of Action Institute** ("CoA Institute") is a nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. CoA Institute also frequently represents third-party clients in actions against the federal government in an effort to scale back regulatory abuses and overreach. CoA Institute is committed to protecting First Amendment rights as a vehicle to ensure citizens can hold their government accountable.

SUMMARY OF ARGUMENT

The Petition squarely presents an important and unsettled question of law that goes to the heart of the First Amendment and raises serious concerns about government power: How much scrutiny does the First Amendment require when governments impose "disclosure" regimes that force sellers to speak and disparage their own products or take sides in a public policy debate they would rather avoid?

The answer to this question is critical. Governments at all levels, across the country, are increasingly turning to compelled disclaimer or warning regimes that "are, for all practical purposes, requirements that commercial actors communicate value-laden messages about inherently political

questions." Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 Ariz. L. Rev. 421, 450 (2016). These mandates raise a serious concern that governments are using so-called disclosures to "burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011).

The proliferation of controversial "disclosure" requirements is dangerous. In addition to undermining the fundamental First Amendment "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence," *Agency for Int'l Dev.*, 570 U.S. at 213 (quotation mark omitted), these regimes harm speakers in tangible ways. Most obviously, they "burden[] a [private] speaker with unwanted speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988). But they also force private speakers "either to appear to agree" with the government's "views or to respond." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15 (1986) (plurality opinion). "That kind of forced response," however, requires speakers to alter their messages in a manner that "is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16.

Despite the push toward more forced speech, courts remain uncertain about how to apply the First Amendment to compelled commercial speech. The decision below illustrates the dubious doctrinal innovations this uncertainty encourages. The Ninth Circuit changed the constitutional test used by this Court to scrutinize state-mandated disclosures and permitted the City of Berkeley to avoid producing any

evidence to prove that the harms it purportedly seeks to address "are real." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Judge Wardlaw, dissenting from denial of rehearing en banc, rightly recognized that the panel's failure to apply the correct legal standard would embolden "state or local government[s] . . . to pass ordinances compelling disclosures by their citizens on any issue the city council votes to promote, without any regard" to the proper level of First Amendment scrutiny. Pet. App. 130a (Wardlaw, J., dissental).

Unfortunately, the Ninth Circuit is not alone in this confusion. As several members of this Court and the courts of appeal have recognized, the lower courts are sorely in need of additional guidance. In the absence of doctrinal clarity and a reaffirmation of First Amendment principles, some government entities are acting as if the First Amendment no longer meaningfully limits their power. The Court should grant the Petition to clarify that all government attempts to impose content-based speech mandates are subject to rigorous First Amendment scrutiny.

ARGUMENT

I. THE DEGREE OF FIRST AMENDMENT SCRUTINY APPLICABLE TO COMMERCIAL SPEECH MANDATES IS AN IMPORTANT AND UNSETTLED QUESTION OF LAW.

The Petition squarely presents a question at "the heart of the First Amendment," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994), and raises serious concerns about government power. The Ninth Circuit's decision below erroneously permits state power to be used to compel private speech in

service to any "more than trivial" government interest. Pet. App. 21a. It releases the government from its obligation to show that the content of its mandate is both "purely factual" *and* "uncontroversial." *See* Pet. App. 22a–23a (merging requirements). By thus relieving the government of its burden to adequately justify its compulsion of speech, the Ninth Circuit's lax approach threatens the fundamental "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev.*, 570 U.S. at 213 (quoting *Turner*, 512 U.S. at 641).

The case below involved an ordinance enacted by the City of Berkeley to force retailers to transmit a negative and controversial message about products they sell. Specifically, the ordinance requires cell-phone retailers to "provide to each customer who buys or leases a Cell phone" the following statement:

> The City of Berkeley requires that you be provided the following notice:
>
> To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Berkeley Municipal Code § 9.96.030(A).

The Ninth Circuit approved Berkeley's mandate after a series of doctrinal innovations that relieved the City of having to show that the warning was "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651–52 (1985).

It first modified *Zauderer*'s governmental interest requirement. This Court has never applied *Zauderer* outside the narrow deception-prevention context. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990). Despite this, the Ninth Circuit determined that "the prevention of consumer deception is not the only governmental interest that may permissibly be furthered by compelled commercial speech" and that any "more than trivial" interest will suffice. Pet. App. 21a.

The Ninth Circuit next modified *Zauderer*'s fit requirement. The Court in *Zauderer* required that mandatory corrective disclosures be "purely factual *and* uncontroversial." 471 U.S. at 651 (emphasis added); *accord Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Zauderer*); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer. J., concurring in judgment) (same). The Ninth Circuit thought otherwise. Although it "agree[d] that any compelled disclosure must be 'purely factual,'" Pet. App. 22a, it determined that "'uncontroversial' in this context refers [only] to the factual accuracy of the

compelled disclosure," Pet. App. 21a; *see* Pet. App. 23a ("*Zauderer* requires only that the information be 'purely factual.'"). In other words, it essentially read the word "uncontroversial" out of the *Zauderer* standard, interpreting it as nothing more than a reiteration of "purely factual." By conflating the separate elements of the *Zauderer* fit analysis, the panel majority freed itself to consider only whether the text of the compelled disclosure was "literally true" when "take[n] . . . sentence by sentence." Pet. App. 26a. It thus ignored the "clear," yet unsubstantiated, "message of the disclosure as a whole": "carrying a phone 'in a pants or shirt pocket or tucked into a bra' is *not* safe." Pet. App. 40a (Friedland, J., dissenting in part).

The Ninth Circuit's approach to *Zauderer* confirms the need for the Court to act. "[T]he conflict in the circuits regarding the reach of *Zauderer*" has created "uncertainty" and thrown the doctrine into "flux." *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015); *see also* Note, *Repackaging Zauderer*, 130 Harv. L. Rev. 972, 979 (2017) ("*Zauderer*'s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic."). As a result of this "discord," "the law remains unsettled." Pet. App. 128a n.1 (Wardlaw, J., dissental).

The Petition highlights many points of contention. These include both the range and strength of the governmental interests that properly trigger *Zauderer*, as well as the rigor with which the *Zauderer* fit analysis is applied. *See* Pet. 23–29. There are others.

Justices Thomas and Ginsburg have recognized that the "lower courts" are in need of "guidance" on

the "oft-recurring" and "important" subject of "state-mandated disclaimers." *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). According to these Justices, the Court has not "sufficiently clarified the nature and the quality of the evidence a State must present to show that the challenged legislation directly advances the governmental interest." *Id.* Relatedly, Justice Thomas has observed that "[t]he courts, including this Court," have found the existing commercial speech precedents "very difficult to apply with any uniformity." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 526–27 (1996) (Thomas, J., concurring). This echoes views expressed by Justices Brennan and Marshall, who found it "somewhat difficult to determine precisely what disclosure requirements" are permitted by the test adopted in *Zauderer*. 471 U.S. at 659 (Brennan, J., joined by Marshall, J., concurring in part).

One consequence of the uncertainty surrounding the Court's commercial speech precedents is that some governments have mistakenly come to believe that the First Amendment does not act as a meaningful constraint on their power to mandate speech. In the case below, for example, Berkeley did "not offer[] any evidence that carrying a cell phone in a pocket is in fact unsafe." Pet. App. 40a (Friedland, J., dissenting in part); *see id.* 41a ("There is . . . no evidence in the record that the message conveyed by the ordinance is true."). In similar litigation involving the City and County of San Francisco, those jurisdictions argued that their mandates were entirely "immunize[d] from First Amendment scrutiny" because private speakers remained free to

counter the compelled messages. Def.'s Opp'n Pl.'s Mot. for Prelim. Inj. at 2, *CTIA–The Wireless Ass'n v. City & Cty. of S.F., Cal.*, 827 F. Supp. 2d 1054 (N.D. Cal. 2011) (No. C10-03224 WHA), *aff'd* 494 F. App'x 752 (9th Cir. 2012). This approach to government power is anathema to First Amendment principles.

Under the First Amendment, it is *always* the government's burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771; *see also Texas v. Johnson*, 491 U.S. 397, 406–07 (1989) ("It is, in short, . . . the governmental interest at stake that helps to determine whether a restriction on . . . that expression is valid."). The Court should grant the Petition to clarify that governments must carry their burden in the compelled commercial speech context.

Finally, recent doctrinal developments have called into question the continuing vitality of *Zauderer* altogether, at least when applied to content-based compelled commercial disclosures. In *Sorrell*, the Court explained, in the context of invalidating a content-based commercial speech regulation, that "heightened judicial scrutiny is warranted" anytime a "content-based burden" is placed "on protected expression." 564 U.S. at 565. Then, in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), the Court held, in the course of invalidating a content-based local sign ordinance, that any government regulation of speech drawing a "'content based'" distinction "'on its face'" is "subject to strict scrutiny," *id.* at 2227 (citing *Sorrell*, 564 U.S. at 565–66); *see also* Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & Pol'y 289, 296–97 & n.33 (2016) (observing *Sorrell* and *Reed* seemed to strengthen commercial

speech protections). The Court has yet to explore how these principles interact with other aspects of its commercial speech doctrine. *See generally* Lee Mason, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. Chi. L. Rev. 955 (2017). The Petition presents an ideal vehicle for doing so.

II. THE NEED TO SETTLE THE APPROPRIATE DEGREE OF SCRUTINY BECOMES URGENT AS GOVERNMENTS INCREASINGLY TURN TO WARNING REGIMES THAT FORCE SELLERS TO DISPARAGE THEIR PRODUCTS AND TAKE SIDES IN POLICY DEBATES.

It has long been understood that "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Increasingly, however, governments at all levels are turning in the first instance to controversial disclosure and warning regimes that "are, for all practical purposes, requirements that commercial actors communicate value-laden messages about inherently political questions." Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 Ariz. L. Rev. 421, 450 (2016).

In recent years, government-compelled "[c]ommercial disclosures have become ubiquitous." Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 Fordham Urb. L.J. 1201, 1224 (2013); *see also* Brian E. Roe *et al.*, *The Economics of Voluntary Versus Mandatory Labels*, 6 Ann. Rev. Resource Econ. 407, 408–09 (2014) ("[P]roduct labeling is an increasingly popular tool of

regulators."). Vermont sought to compel food and dairy manufacturers to "warn" consumers about their methods for producing milk, *see Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), processed foods, *see Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015), and raw agricultural commodities, *see id.*—even though the U.S. Food & Drug Administration had determined that each of these methods was safe. Illinois mandated distribution of "opinion-based" warnings about video games it believed were "sexually explicit," *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006), and California did the same for games it believed were "violent," *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 788 (2011). New York City compelled "chain" restaurants to display a "Sodium Warning" on their menu boards. *Nat'l Rest. Ass'n. v N.Y.C. Dep't of Health & Mental Hygiene*, 148 A.D.3d 169, 172 (N.Y. App. Div. 2017). The City and County of San Francisco forced advertisers of sugar-sweetened beverages to "overwhelm[]" their messages with a large "black box warning" that "convey[ed] San Francisco's disputed policy views." *Am. Beverage Ass'n v. City & Cty. of S.F., Cal.*, 871 F.3d 884, 896–97 (9th Cir. 2017), *reh'g en banc granted*, No. 16-16072 (9th Cir. Jan. 29, 2018). San Francisco also sought to compel cell-phone retailers (in striking similarity to Berkeley here) to "express[] San Francisco's opinion that using cell phones is dangerous." *CTIA–The Wireless Ass'n v. City & Cty. of S.F., Cal.*, 494 F. App'x 752, 753 (9th Cir. 2012).

Federal administrative agencies, often at the behest of Congress, have gotten in on the act. The Securities and Exchange Commission, for example, required companies using "conflict minerals" to

investigate and disclose the origin of those minerals "on each reporting company's website and in its reports to the SEC." *Nat'l Ass'n of Mfrs.*, 800 F.3d at 522. The Food & Drug Administration forced tobacco companies to display explicit "color graphics depicting the negative health consequences of smoking." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012), *overruled by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). The Department of Agriculture mandated disclosure of country-of-origin information about meat products, *see Am. Meat Inst.*, 760 F.3d 18, and compelled payments from vegetable growers to support speech concerning the desirability of branded mushrooms, *see United States v. United Foods, Inc.*, 533 U.S. 405 (2001). And these are just a few of the challenged regimes.

The reason for the increase in mandatory disclosures is simple. Many regulators, especially at the state and local level, feel resource constrained. Commercial-speech mandates are thus attractive precisely because they provide a seemingly low-cost way to advance a preferred message, without many of the technical or political difficulties associated with developing new or complex regulatory regimes or speaking in the government's own voice.

But the easy resort to speech regulation is dangerous. As state-mandated disclosure regimes proliferate and courts decline to apply exacting scrutiny, the content of the government-prescribed messages is growing more controversial. Unlike the anodyne requirements of yesteryear designed to cure deception in the marketplace through enforcement of neutral measures like "honest weights", *see Armour & Co. v. North Dakota*, 240 U.S. 510, 516 (1916),

many of today's requirements promote one-sided, inaccurate, or even anti-science positions. They emphasize topics that the government deems important. They claim to be factual while actually promoting the government's preferred message.

The ubiquity of these mandates raises a serious concern that governments are using these so-called disclosures to "burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578–79. Worse, by compelling private speakers to distribute preferred messages, governments force affected entities "either to appear to agree" with the government's "views or to respond." *Pac. Gas & Elec. Co.*, 475 U.S. at 15. "That kind of forced response" compels commercial actors to alter their preferred messages in a manner that "is antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16.

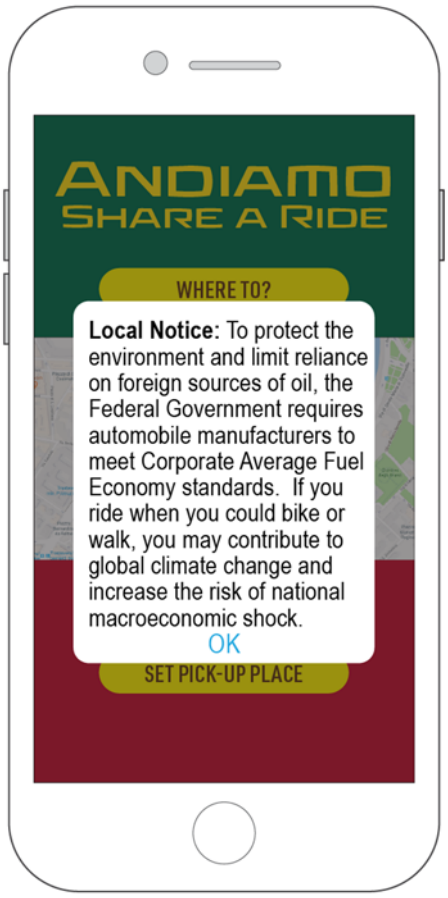
The adoption of the Berkeley Ordinance illustrates how easily a vocal faction[2] can capture a local political process and use it to ram through a speech mandate that requires commercial speakers to communicate controversial or unsubstantiated messages when they would prefer "to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As the Petition points out, Berkeley residents urged the city council to compel cell-phone

---

[2] "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, *adversed to the rights of other citizens*, or to the permanent and aggregate interests of the community." The Federalist No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

retailers' speech based upon scientifically unsubstantiated claims that some individuals are "electromagnetically sensitive" or "sure" that cell phone signals "damage . . . sperm" and cause "brain tumor[s]." Pet. 13 (citing CA9 ER100–107). Indeed, contemporaneous press reports indicate that only one person rose to express a contrary view, and that when that person cited authoritative scientific research conducted by the federal government, he was met with "a chorus of boos and hisses from [the] crowded council chamber." Lance Knobel, *Berkeley Passes Cellphone 'Right to Know' Law*, Berkeleyside (May 13, 2015), http://www.berkeleyside.com/2015/05/13/berkeley-passes-cellphone-right-to-know-law/. Not surprisingly, the ordinance that emerged from Berkeley's politicized process reflected the views of the loudest voices in the room. To justify their votes, council members even stated that "[t]he issue before us tonight is not the science itself," but the council's "moral and ethical role . . . in this society." Pet. 13 (citing CA9 ER69–70).

The problem is not unique to Berkeley. As many of the above-cited cases illustrate, in recent years similar processes have played out at all levels of government across the country. And if the relaxed standard of review adopted in the case below is permitted to stand, it is not hard to imagine the controversial speech mandates that might proliferate in our politically polarized climate. For example, a government might propose:



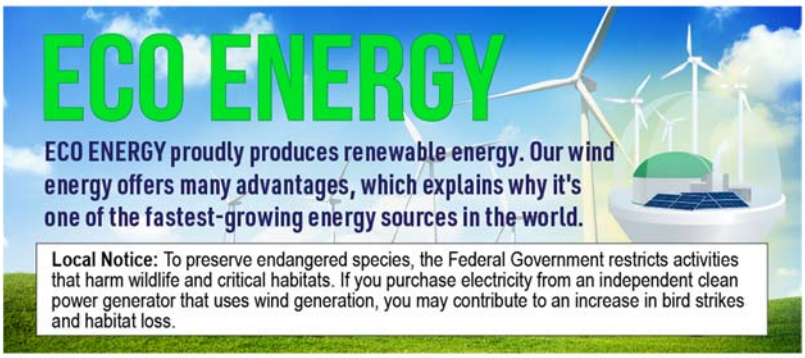
• On ridesharing apps, a notice: "To protect the environment and limit reliance on foreign sources of oil, the Federal Government requires automobile manufacturers to meet Corporate Average Fuel Economy standards. If you ride when you could bike or walk, you may contribute to global climate change and increase the risk of national macroeconomic shock."

• At medical facilities, a notice: "To assure safety, the Federal Government regulates vaccine products. Vaccines can cause adverse reactions in a small number of people, including children. If you vaccinate your child or yourself, there may be side effects. Refer to material published by the Centers for Disease Control and Prevention for information about vaccine side effects and safety."[3]

---

[3] *Cf.* Ctrs. for Disease Control and Prevention, *Vaccines & Immunizations: Possible Side Effects from Vaccines*, https://www.cdc.gov/vaccines/vac-gen/side-effects.htm (last

• On promotions for purchase of renewable energy in competitive energy markets, a notice: "To preserve endangered species, the Federal Government restricts activities that harm wildlife and critical habitats. If you purchase electricity from an independent clean power generator that uses wind generation, you may contribute to an increase in bird strikes and habitat loss."



• At health clinics operated by non-governmental organizations in the developing world, a notice: "To combat the spread of HIV/AIDS, the government of the United States appropriates billions of dollars to fund efforts by nongovernmental organizations. If you patronize a health clinic that does not expressly oppose prostitution and sex trafficking, you may undermine efforts to combat such prostitution and trafficking and contribute to the spread of HIV/AIDS."[4]

---

visited Jan. 29, 2018) (similar in concept to FCC information referenced by Berkeley).

[4] *Cf. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 208 (2013) (invalidating requirement that grant recipients adopt policy opposing prostitution and sex trafficking).

• At "big box" retail stores, a notice: "To protect workers, the Federal Government prescribes a minimum wage of $7.25 an hour. Annual earnings for a full-time minimum-wage worker are $15,080. The 2018 Federal Poverty Level for a family of four is $25,100."[5]

• On movies or video games, a notice: "To promote a healthy lifestyle, the Federal Government encourages daily exercise. If you sit still while consuming electronic media, you may decrease your opportunity to meet this goal."[6]

---

[5] *Cf.* U.S. Dep't of Health & Human Servs., *Poverty Guidelines*, https://aspe.hhs.gov/poverty-guidelines (last visited Jan. 29, 2018) (federal poverty guidelines); Univ. of Cal. Davis Ctr. for Poverty Research, *What are the annual earnings for a full-time minimum wage worker?*, https://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker (last visited Jan. 29, 2018) (annual wage calculation).

[6] *Cf.* Let's Move, *Reduce Screen Time and Get Outside*, https://letsmove.obamawhitehouse.archives.gov/reduce-screen-time-and-get-active (last visited Jan. 29, 2018) (similar in concept to FCC information referenced by Berkeley).

The list of potential examples is endless. Numerous matters of policy are hotly disputed, with the import of "factual" assertions subject to debate. It is cold comfort to conclude, as the Ninth Circuit did below, that compelled notices are permissible so long as each statement is "literally true" when "take[n] . . . sentence by sentence." Pet. App. 26a; *cf. Nat'l Ass'n of Mfrs.*, 800 F.3d at 537–38 (Srinivasan, J., dissenting) (asserting "controversial" means only "disclosures whose [factual] accuracy is contestable"). Under such a weak standard, the hypothetical notices above would arguably survive, even though each promotes a controversial message designed to disparage a commercial product and to take sides in a public policy debate. *Cf. Am. Beverage Ass'n*, 871 F.3d at 895–96 (invalidating beverage warning as "misleading and, in that sense, untrue" because it took sides where "there is still debate"); *Am. Meat Inst.*, 760 F.3d at 27 (recognizing "possibility" that some "one-sided" disclosures would be "controversial").

Of course, no one doubts that governments may themselves promote, or refrain from promoting, messages that some of their citizens find objectionable. "[W]hen the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). "In doing so, it represents its citizens and it carries out its duties on their behalf." *Id.* What governments generally may not do, however, is to require that *citizens* "utter or distribute speech bearing a particular message" "favored by the Government." *Turner*, 512 U.S. at 641–42; *see also Riley*, 487 U.S. at 800 (when government speaks it

"communicate[s] the desired information to the public without burdening a [private] speaker with unwanted speech"). "Were the government freely able to compel corporate speakers to propound political messages with which they disagree, [First Amendment] protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co.*, 475 U.S. at 16.

The Court should grant the Petition to address the expansion of commercial speech mandates and establish the degree of applicable scrutiny.

III. THE COURT SHOULD CLARIFY THAT GOVERNMENT ATTEMPTS TO IMPOSE CONTENT-BASED SPEECH MANDATES ARE SUBJECT TO STRICT SCRUTINY.

Because Berkeley's disclosure is content-based, it should be subject to strict scrutiny. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228. This principle necessarily reaches content-based commercial disclosure mandates, such as "requirements for content that must be included on labels of certain consumer electronics" or otherwise distributed at the point of sale. *Id.* at 2235 (Breyer, J., concurring in judgment); *accord Free Speech Coal., Inc. v. Attorney Gen. U.S.*, 825 F.3d 149, 155, 164 (3d Cir. 2016) (holding *Reed* required strict scrutiny of "labeling requirements" for commercial pornography).

It makes sense to apply strict scrutiny to content-based commercial disclosure mandates. The Court

has recognized in other contexts that "compelled statements of 'fact' . . . burden[] protected speech." *Riley*, 487 U.S. at 797–98; *see Hurley*, 515 U.S. at 573–74. And that observation is, as an empirical matter, no less true in the "commercial marketplace, [which,] like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Sorrell*, 564 U.S. at 579. Indeed, although "Justice Holmes' reference to the 'free trade in ideas' and the 'power of . . . thought to get itself accepted in the competition of the market,' *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion), was a metaphor," *Matal v. Tam*, 137 S. Ct. 1744, 1767–68 (2017) (Kennedy, J., concurring in part and concurring in judgment), in the realm of commercial information, "the metaphorical marketplace of ideas becomes a tangible, powerful reality," *id.* at 1768. There, as elsewhere, the state must be prevented from "burden[ing] the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578–79. Only the most rigorous scrutiny will achieve that end.

The Petition presents an ideal vehicle for the Court to clarify that content-based commercial speech mandates must be strictly scrutinized. Berkeley's disclosure requirement is facially content-based because it requires cell-phone retailers to "provide to each customer who buys or leases a Cell phone" a notice making claims about the "safety" of "exposure to RF radiation." Berkeley Municipal Code § 9.96.030(A). In other words, the ordinance is "targeted at specific subject matter." *Reed*, 135 S. Ct. at 2230. "'[O]n its face'" the ordinance "draws distinctions based on the message" that cell-phone retailers convey. *Id.* at 2227 (quoting *Sorrell*, 564

U.S. at 566).[7] Indeed, it is hard to imagine a more "content-based" regulation than one that literally dictates the precise content of the message that must be spoken by the targeted entity.

Some have erroneously suggested that "commercial speech" disclosure mandates should be exempt from the most rigorous First Amendment scrutiny because disclosures promote the "free flow of accurate information"—an important First Amendment value. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d. Cir. 2001); *see Nat'l Ass'n of Mfrs.*, 800 F.3d at 534 (Srinivasan, J., dissenting). But such analysis turns the Amendment on its head. "The First Amendment is a limitation on government, not a grant of power." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in judgment). Thus, when the Court articulated the "free flow" principle, it did so to establish limits on government power that reflect the "substantial individual and societal interests" served by economically motivated speech. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765–66 (1976). If that principle could be conscripted as justification in favor of government interference, there would be "no end to the information that states could require [sellers] to disclose." *Int'l Dairy Foods Ass'n*, 92 F.3d at 74. And indeed, the examples above show that various governments are well down that path with no end in sight. Our "history and tradition provide no support for that kind of free-wheeling government power."

---

[7] The ordinance is also viewpoint- and speaker-based because it takes one side of a debate and regulates the speech of cell-phone retailers. *See Sorrell*, 564 U.S. at 564–65.

Am. Meat Inst., 760 F.3d at 32 (Kavanaugh, J., concurring in judgment).

Nor is there any reason to worry that strict scrutiny would necessarily doom essential disclosures. Although some have cited that fear as reason to distinguish the Court's content-neutrality requirement "up, down, and sideways" rather than apply it straightforwardly, *see* Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1981–82 (2016), that position betrays a lack of confidence in the necessity of the speech mandates it seeks to preserve. Content-based speech regulations will survive even the most searching First Amendment review if they are narrowly tailored to serve a compelling interest. "Recently," the Court, "in a First Amendment challenge to Florida's judicial conduct rules regarding campaign solicitations, held that the regulation at issue was 'one of the rare cases in which a speech restriction withstands strict scrutiny.'" *Free Speech Coal.*, 825 F.3d at 164 (quoting *Williams–Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015)). That decision does not stand alone. *See Williams–Yulee*, 135 S. Ct. at 1666 (collecting speech regulations upheld under strict scrutiny); *Sorrell*, 564 U.S. at 579 ("[C]ontent-based restrictions on protected expression are sometimes permissible[.]"). Indeed, the Court acknowledged in *Reed* that "some lower courts have long held" that municipal sign regulations "receive strict scrutiny," with "no evidence" of "catastrophic effects." 135 S. Ct. at 2232; *see also* Mason, *supra*, at 985 (predicting "a considerable share of commercial speech regulation[s]" would survive strict scrutiny). If the same rule were consistently applied to all

compelled commercial speech, only unjustified regulations would need be struck.

Finally, where a government wishes to take sides in a policy debate but cannot meet strict scrutiny, the First Amendment does not prevent it from using its own resources to enter the marketplace of ideas. *See Walker*, 135 S. Ct. at 2245–46. Subjecting compelled commercial speech to the most searching First Amendment review would thus help ensure that regulation of speech is a last—rather than first—resort.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant the Petition.

Respectfully submitted,

Megan L. Brown
Counsel of Record
Joshua S. Turner
Stephen J. Obermeier
Jeremy J. Broggi
Bethany A. Corbin
WILEY REIN LLP
1776 K Street N.W.
Washington, D.C. 20006
(202) 719-7000
mbrown@wileyrein.com

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue N.W.
Washington, D.C. 20001
(202) 842-0200

Sam Kazman
Devin Watkins
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street N.W., 7th Floor
Washington, D.C. 20005
(202) 331-1010

John J. Vecchione
R. James Valvo, III
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W., Suite 800
Washington, D.C. 20006
(202) 499-4232

Counsel for Amici Curiae

January 30, 2018