No. 19-439

IN THE
Supreme Court of the United States

CTIA-THE WIRELESS ASSOCIATION®,
Petitioner,

v.

THE CITY OF BERKELEY, CALIFORNIA, AND CHRISTINE DANIEL, CITY MANAGER OF BERKELEY, CALIFORNIA, IN HER OFFICIAL CAPACITY,
Respondents.

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

BRIEF OF THE RETAIL LITIGATION CENTER, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE BUSINESS ROUNDTABLE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the legal standard of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), requiring reduced scrutiny of compelled commercial speech, applies beyond the need to prevent consumer deception?

2. When *Zauderer* applies, whether it is sufficient that the compelled speech be: (a) factually accurate—even if controversial and, when read as a whole, potentially misleading; and (b) merely reasonably related to any non-"trivial" governmental interest.

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INTEREST OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. (the "RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its

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[1] Pursuant to this Court's Rule 37.2(a), *amici* timely notified all parties of their intention to file this brief. Counsel for all parties have consented to the filing of this *amicus* brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community.

The Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have more than $6 trillion in annual revenues, employ nearly 15 million employees, and pay more than $220 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici and their members have an interest in this case. Because *amici*'s members speak on myriad issues and promote products, services, and brand awareness using all manner of communications, *amici* zealously protect their members' First Amendment rights to

participate fully in the marketplace of ideas, free from improper government regulation.

SUMMARY OF ARGUMENT

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), this Court upheld a statute requiring advertisers to disclose information that was necessary to prevent consumer confusion and deception. The circuits are divided on *Zauderer*'s reach. In the decision below, the Ninth Circuit held that *Zauderer* requires applying a deferential standard of review to statutes that compel speech by businesses—even if that speech is not necessary to prevent consumer confusion and deception. Other courts of appeals have held that *Zauderer*'s deferential standard applies *only* when compelled speech is necessary to prevent consumer confusion and deception.

The question presented warrants review. Laws that compel speech can inflict the same First Amendment harms as laws restricting commercial speech: both types of laws skew the marketplace of ideas in the government's preferred direction. The Court should grant certiorari to ensure that States cannot regulate the speech of businesses in order to interfere with the marketplace of ideas.

The Ninth Circuit's reinstatement of its judgment following *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), underscores the need for this Court's review. The Ninth Circuit erred in holding that *NIFLA* does not affect the outcome of this case. And the Ninth Circuit's

reinstatement of its judgment confirms that this Court's intervention is needed to resolve the split.

ARGUMENT

I. The Circuits Are Divided On What Legal Standard to Apply to Laws Compelling Speech by Businesses.

There is a circuit split on the meaning of *Zauderer*. In the Ninth Circuit, the government has free rein to compel speech by commercial actors, subject to the minimal constraints that the compelled speech be literally true and serve a "more than trivial" state interest. Pet. 3. In other circuits, *Zauderer*'s deferential standard applies only when speech is necessary to prevent deception or confusion: for speech falling outside that category, heightened scrutiny applies. This disparity in legal standard matters in practice. As shown below, other circuits would have invalidated Berkeley's ordinance, while the Ninth Circuit would have upheld statutes that were struck down in other circuits.

Fifth Circuit. In *Allstate Insurance Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), the Fifth Circuit invalidated a law requiring insurers to disclose multiple auto repair shop options to their policyholders. The Fifth Circuit found that the State had "successfully asserted a legitimate interest in consumer protection and the promotion of fair competition." *Id.* at 167. But it nonetheless invalidated the law. It found that "[u]nlike the situation in [*Zauderer*], the potential for customer confusion here is minimal." *Id.* at 166.

Allstate conflicts with the decision below. In *Allstate*, the Fifth Circuit acknowledged that the compelled speech at issue was justified by a more than trivial state interest. *Id.* at 167. And the compelled speech was literally true—all of the auto body shops existed and were prepared to offer their services. That would have been enough for the Ninth Circuit to uphold the statute. Conversely, the Fifth Circuit would have invalidated Berkeley's statute. Not even the Ninth Circuit majority suggested that Berkeley's statute mitigated the potential for customer confusion—indeed, as Judge Friedland explained in dissent, Berkeley's law was more likely to create customer confusion than to reduce it. In the Fifth Circuit, that would have precluded the court from applying *Zauderer*'s deferential approach.

Seventh Circuit. In *Central Illinois Light Co. v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987), public utilities were required to enclose messages written by the Illinois Citizens Utility Board with the utility's bills to consumers. These messages disclosed, for instance, that utility bills had increased and would continue increasing. *Id.* at 1171 n.2. The Seventh Circuit refused to apply *Zauderer*, explaining: "While *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their ideological opponents." *Id.* at 1173.

Central Illinois would have played out differently in the Ninth Circuit. There was no allegation that the statements in the mailings were false. And there is a "more than trivial" state interest in informing

ratepayers that their rates are going up, which would have been enough for the Ninth Circuit to uphold the statute. Conversely, the Seventh Circuit would have invalidated Berkeley's statute because Berkeley retailers are not being "forced to declare information about themselves needed to avoid deception," *id.*, but instead must disclose extraneous information about cell phones.

Third Circuit. In *Dwyer v. Cappell*, 762 F.3d 275 (3d Cir. 2014), Dwyer, an attorney, included excerpts from judicial opinions on his webpage. In response, the New Jersey Supreme Court promulgated a rule prohibiting attorneys from using excerpts from judicial opinions in their advertising, unless the complete judicial opinion was provided. The Third Circuit invalidated the rule, finding, *inter alia*, that it "does not require disclosing anything that could reasonably remedy conceivable consumer deception stemming from Dwyer's advertisement." *Id.* at 283.

The Ninth Circuit would have viewed matters differently. It would have instead asked whether compelling disclosure of full judicial opinions was "literally true" and served a "more than trivial" state interest. The answer to both of those questions would have been yes: there is nothing false about a judicial opinion, and quoting full judicial opinions offers useful context for would-be clients. Meanwhile, the Third Circuit would have invalidated Berkeley's law because it "does not require disclosing anything that could reasonably remedy conceivable consumer deception." *Id.*

There is thus a true circuit split—a difference in legal standards that leads to different results on the same facts. The Court should grant certiorari to decide the correct legal standard to apply when governments compel speech by commercial actors.

II. The Court Should Grant Certiorari Because the Ninth Circuit's Ruling Will Inflict Significant First Amendment Harm.

The Court should also grant certiorari because the Ninth Circuit's decision confers on governments an enormous loophole to evade fundamental First Amendment protections. This Court has consistently held that businesses do not lose the protection of the First Amendment simply because they operate in the commercial sphere. To the contrary, "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (quotation marks omitted). This Court has given the First Amendment a wide scope in the context of commercial speech. It has held that courts must scrutinize not only restrictions on commercial advertising, but also restrictions on communications between buyers and sellers, such as speech about a product's price. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (state statute "regulates speech" when it "regulate[s] the communication of prices rather than the prices themselves").

The Ninth Circuit's lax treatment of government actions that compel businesses to speak undermines that protection. "Government action ... that requires the

utterance of a particular message favored by the Government" poses "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

It is easy to understand why laws compelling speech, like laws restricting speech, harm First Amendment interests. Forcing a seller to convey unflattering information at the point of sale serves the same purpose as banning a seller from portraying the product positively at the point of sale: it shields the public from commercial speech that, in the government's view, makes products appear excessively appealing to would-be buyers. The government, of course, has a legitimate interest in preventing confusion or deception: People who buy a product should not be misled about what they are buying. But when the government compels speech not to prevent confusion or deception, but instead to promote a particular agenda, it skews the marketplace of ideas in a manner that the First Amendment forbids.

It is no answer to say that the compelled speech is literally true. A literally true statement can be misleading. Here, as Judge Friedland explained, even if the statements at issue are true in isolation, they nonetheless convey a profoundly distorted impression of the risks of cell phones.

Moreover, even when governments force sellers to disclose statements that are literally true and *not* misleading, the First Amendment harms do not go away. The problem is that for any given product, an

innumerable number of statements are literally true and non-misleading. One can imagine governments compelling speech about the ways in which the products have been used and misused; the environmental effects of the manufacturing process; any causes the company has sponsored; and many other messages. The public's perception of a product will inevitably be shaped by which statements are disclosed and which are left out. By selectively requiring the disclosure of particular facts, a government can alter the public's perception of a product to the same extent as it would through restrictions on commercial speech.

For instance, suppose government officials want to deter alcohol consumption. This Court has already held that a State cannot ban alcohol advertising in the interest of promoting temperance. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). But in the Ninth Circuit, a State could take a different road to the same end: compel speech by alcohol sellers that creates negative public perceptions about alcohol. For instance, a State could require alcohol sellers to put up large placards at their stores disclosing facts regarding the consequences of alcoholism. Such laws would accomplish the same result as the law in *44 Liquormart*: they would prevent the public from hearing the alcohol seller's own speech, and tilt the playing field in favor of the government's preferred policy outcome. Such laws should be unconstitutional, in light of this Court's teaching that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *Id.* at 512 (plurality opinion). Yet such laws would be upheld under the Ninth Circuit's legal

standard, given that there is a "more than trivial" interest in notifying the public of the risks of alcohol.

Indeed, under the Ninth Circuit's approach, governments would be free to conscript private speakers to further virtually any policy goal. Video game manufacturers could be required to warn customers of the risks of a sedentary lifestyle. Candy makers could be forced to lecture customers about the risks of a diet high in sugar. Or car dealers could be made to warn buyers of the costs of driving a car rather than riding a bicycle. The Court should reject an interpretation of the First Amendment that gives the government such freewheeling authority to regulate commercial speech.

III. The Ninth Circuit's Reinstatement of Its Judgment In Light of *NIFLA* Underscores the Need for Review.

This case is before the Court for the second time. The first time, this Court granted certiorari, vacated, and remanded for further consideration in light of *NIFLA*. In *NIFLA*, this Court held that two provisions of California law violated the First Amendment. The Court's analysis on both issues strongly supports CTIA's claim that Berkeley's ordinance is unconstitutional. And the Ninth Circuit's refusal to reconsider its decision in the face of an on-point Supreme Court decision confirms that this Court's review, and reversal, is warranted.

Licensed notice requirement. The first California law at issue in *NIFLA* required that licensed clinics serving pregnant women notify those women that

California provides free or low-cost services, including abortions, and give them a phone number to call. 138 S. Ct. at 2368. California argued that the requirement was a permissible compelled disclosure under *Zauderer*. *Id.* at 2372. The Court held that the "*Zauderer* standard does not apply here." *Id.* It explained that under *Zauderer*, speech may be compelled if it is "limited to purely factual and uncontroversial information about the terms under which services will be available." *Id.* (quotation marks and ellipses omitted). But "[t]he notice in no way relates to the services that licensed clinics provide." *Id.* "Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an uncontroversial' topic." *Id.*

On remand, the Ninth Circuit reinstated its opinion regarding Berkeley's cell phone disclosure requirement, finding that the "text of the compelled disclosure is literally true" and "is uncontroversial within the meaning of *NIFLA*." Pet. App. 28a, 32a. According to the Ninth Circuit, the compelled disclosure "does not force cell phone retailers to take sides in a heated political controversy," but is instead "no more and no less than a safety warning." *Id.* In response to CTIA's argument that the disclosure "has nothing to do with the terms upon which cell phones are offered," the court held that "*NIFLA* plainly contemplates applying *Zauderer* to purely factual and uncontroversial disclosures *about commercial products*." Pet. App. 33a (emphasis in original).

The Ninth Circuit erred in its application of *NIFLA*. The Ninth Circuit essentially held *NIFLA* to its facts: it

found that *NIFLA* did not apply because: (a) cell phone safety is less controversial than abortion (a "heated political controversy"), and (b) unlike pregnancy clinics, cell phone providers sell commercial products. Thus, in the Ninth Circuit's view, *NIFLA* has no impact on free speech doctrine outside the context of abortion or similarly "heated political controvers[ies]"; and even more improbably, *NIFLA* has no impact on free speech doctrine in the context of "commercial products," as opposed to pregnancy counseling. It is implausible that this Court would have granted certiorari and decided *NIFLA* if it intended such a fact-bound result.

The Ninth Circuit should have held that under *NIFLA*'s refinement of the *Zauderer* standard, Berkeley's ordinance was unconstitutional. *NIFLA* teaches that the mere fact that speech may be literally true, and even *useful* to consumers, does not justify compelling it. In *NIFLA*, the compelled speech at issue—information about abortion providers—was literally true. Abortion providers did, indeed, exist. And the information may have been useful to women who entered the clinic. But that did not justify compelling the clinic's speech, which served no purpose in counteracting deception.

The same analysis requires invalidating Berkeley's statute. Berkeley does not claim that its purported "safety warnings" are necessary to dispel confusion. At most, Berkeley's justification for its law is a vague sense that consumers might benefit from additional information about radiation. *Amici* disagree with even that premise, given the controversial and misleading nature of the warning. But even if the premise is

correct, *NIFLA* does not permit compelled speech when the government's interest is so weak.

The Ninth Circuit construed *NIFLA* to hold that compelled speech about *other* service providers is unconstitutional, but compelled speech about the provider's *own* products is constitutional—regardless of the state's interest in compelling that speech. That reading of *NIFLA* makes little sense. The degree of First Amendment protection should turn on the state's *interest* in compelling speech, not merely on the subject matter of the speech. And the state's interest in compelling speech in *NIFLA* is *greater* than the state's interest here—the compelled speech in *NIFLA* was at least possibly helpful to women considering all of their health-related options, whereas the compelled speech in this case is distracting at best. There is therefore no reasoned justification for invalidating the statute at issue in *NIFLA* while upholding Berkeley's law.

Unlicensed notice requirement. The second California law at issue in *NIFLA* required unlicensed clinics to disclose on site, and in all advertising materials, the following notice: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." 138 S. Ct. at 2370 (quotation marks omitted). The Court assumed without deciding that *Zauderer* supplied the appropriate test, *id.* at 2376-77, and held that even under *Zauderer*, the law was unconstitutional. The Court held that California had not adequately justified the law because "California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed

by unlicensed medical professionals." *Id.* at 2377. Moreover, the law "impose[d] a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest." *Id.* For instance, "It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers." *Id.* Finally, the required disclosures were so conspicuous that the law had the effect of "drown[ing] out the facility's own message." *Id.* at 2378.

On remand, the Ninth Circuit held that this holding, too, did not affect its prior conclusion regarding the compelled disclosure about cell phones. The Ninth Circuit's analysis was remarkably cursory: "[T]he ordinance may be satisfied by a single 8.5 x 11 posted notice or 5 x 8 handout to which the retailer may add additional information so long as that information is distinct from the compelled disclosure. This minimal requirement does not interfere with advertising or threaten to drown out messaging by the cell phone retailers subject to the requirement." Pet. App. 34a.

Once again, the Ninth Circuit limited *NIFLA* to its facts—in the Ninth Circuit's apparent view, compelling *any speech* is reasonable under *Zauderer* as long as the speech is limited to a message on a single piece of paper or handout. And once again, the Ninth Circuit erred. *NIFLA* dictates a close examination of the benefits and burdens of a compelled-speech law that is at odds with the Ninth Circuit's freewheeling approach.

Under a faithful application of *NIFLA*, Berkeley's statute would have been struck down. As in *NIFLA*,

nothing in the record demonstrated that any consumers had any confusion that the notice would dispel. As in *NIFLA*, Berkeley's ordinance is a blanket rule that applies irrespective of what cell phone providers say on site or in their advertisements. As in *NIFLA*, Berkeley's law is remarkably under-inclusive, imposing burdensome requirements on cell phone providers while imposing no comparable requirements on providers of much riskier products. And as in *NIFLA*, Berkeley's requirement of a conspicuous government-provided script threatened to drown out the cell phone provider's own speech about the benefits and risks of cell phone use—regardless of the size of the physical piece of paper that the provider was required to distribute.

The Ninth Circuit's reinstatement of its decision under *NIFLA* confirms that this Court's review is warranted. The circuit split will not go away without this Court's intervention. In light of *NIFLA*, the Third, Fifth, and Seventh Circuit need not reconsider their views—to the contrary, *NIFLA* confirms that those circuits have correctly interpreted the First Amendment. And the Ninth Circuit's recalcitrance to reconsider its free speech jurisprudence makes clear that only a decision by this Court will set it on the right path. This Court should grant certiorari and bring the Ninth Circuit's errant jurisprudence in line with the rest of the country.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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