No. 19-439

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 AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute ("Cato") is a nonpartisan, nonprofit think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato believes 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 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 the State treads on the 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 and citation omitted).

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the Cato Institute, its members, or its counsel made a monetary contribution to fund the preparation or submission of this brief. Counsel provided timely notice to all parties of its intent to file this brief, and all parties lodged blanket consents to the filing of *amicus* briefs.

The mandatory disclosure law imposed by Berkeley, California threatens the expressive freedom protected by the First Amendment. The law requires cell phone retailers to provide—"on a prominently displayed poster no less than 81/2 by 11 inches with no smaller than 28-point font, or on a handout no less than 5 by 8 inches with no smaller than 18-point font," Pet. App. 9a—the following statement:

> 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.

Id. at 8a–9a.

Forcing private parties to prominently display a "government-drafted script," *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*"), such as Berkeley's is exactly the sort of government coercion the First Amendment is designed to prevent and with which Cato is deeply concerned.

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 a government-scripted message that disparages their own products or compels them to take sides in a public policy debate they would rather avoid?

The Court should issue a definitive answer: strict scrutiny. Well-established First Amendment doctrine provides that "compelling individuals to speak a particular message" "is a content-based regulation of speech." *NIFLA*, 138 S. Ct. at 2371. And "[a] law that is content based on its face is subject to strict scrutiny[.]" *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015). To be sure, this Court's precedents have sometimes applied a lower level of scrutiny to laws that compel disclosure in the "commercial speech" context. But the Court should reject that distinction because there is no reasoned basis for it.

Clarifying the standard of review for compelled commercial disclosures is sorely needed. 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. Despite the content-based nature of Berkeley's compelled disclosure law, the Ninth Circuit did not require Berkeley to produce any evidence to prove that the harms it purportedly seeks to address "are real,"

Edenfield v. Fane, 507 U.S. 761, 771 (1993). *See* Pet. App. 42a (Friedland, J., dissenting) ("Berkeley has not attempted to argue, let alone to prove, that [its] message is true."). 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. 174a (Wardlaw, J., dissental).[2] Unfortunately, the Ninth Circuit is not alone in this confusion. Indeed, 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). The lower courts themselves have echoed the call for guidance. *See, e.g., Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) (avoiding the "troubled waters" of the standard of review for commercial speech).

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. Governments at all levels, across the country,

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[2] Although Judge Wardlaw's dissent was written in response to the majority's denial of *en banc* review in 2018, the decision on remand applied the same standard of review. *Compare* Pet. App. 25a with Pet. App. 169a–70a.

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 and citation 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.

ARGUMENT

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

A. Commercial Disclosure Requirements Should Be Subjected To Strict Scrutiny.

Berkeley's mandated disclosure is content-based. It requires cell-phone retailers to "provide to each customer who buys or leases a Cell phone" a government-scripted notice making claims about the "safety" of "exposure to RF radiation." Berkeley Mun. Code § 9.96.030(A). There is no doubt that a regulation is "content-based" on its face when it literally dictates the precise content of the message that must be spoken by the targeted entity. *NIFLA*, 138 S. Ct. at 2371.

Indeed, Berkeley's mandated disclosure is the "'more blatant' and 'egregious form of content discrimination'" because it "discriminat[es] among viewpoints." *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). As Judge Friedland explained in dissent, "the most natural reading of the disclosure warns that carrying a cell phone in one's pocket is unsafe." Pet. App. 42a. The disclosure thus forces private parties to take a side in a policy debate that they would rather not take, made worse by the fact that "Berkeley [did] not attempt[] to argue, let alone to prove, that [its compelled] message [wa]s true." *Id.*

Because Berkeley's mandatory disclosure law is content-based, the Ninth Circuit should have subjected it 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 (citation omitted); *see also NIFLA*, 138 S. Ct. at 2371 ("[content-based] laws are presumptively unconstitutional"). In principle, this teaching 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. *Reed*, 135 S. Ct. 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 also makes sense to apply strict scrutiny to content-based commercial disclosure mandates. This Court has recognized in other contexts that "compelled statements of 'fact' . . . burden[] protected speech." *Riley*, 487 U.S. at 797–98; *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573–74 (1995). Indeed, compelled disclosure laws may be justified on only "'even *more* immediate and urgent grounds' than a law demanding silence." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (emphasis added) (quoting *Barnette*, 319 U.S. at 633; citing *Riley*, 487 U.S. at 796–97). And this observation is 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. 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,' was a metaphor," *Matal v. Tam*, 137 S. Ct. 1744, 1767–68 (2017) (citation omitted) (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.

To be sure, this Court's precedents have sometimes applied a lower level of scrutiny to laws that compel disclosure in the "commercial speech" context. *See NIFLA*, 138 S. Ct. at 2372. But the Court should reject that distinction because, as Justice Thomas has explained, there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech," and in fact, "some historical materials suggest to the contrary." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment).

There is also no reasoned basis for attributing a lower value to "commercial speech." 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 also Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 534 (D.C. Cir. 2015) (Srinivasan, J., dissenting). But such analysis turns the First 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). 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 v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). And indeed, the examples *infra* 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." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (en banc) (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. As Justice Breyer noted last term, even regulations subject to strict scrutiny may be "constitutional after weighing the competing interests involved." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring in part & dissenting in part).

Justice Breyer's observation holds true. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (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* Lee Mason, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. Chi. L. Rev. 955, 985 (2017) (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, applying strict scrutiny to content-based disclosures still allows government participation in public debate. The First Amendment does not prevent

the government from using *its own* resources to enter the marketplace of ideas. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015). 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.

B. The Petition Is An Ideal Vehicle To Affirm The Application Of Strict Scrutiny To Content-Based Commercial Disclosure Requirements.

The lower courts need clarification on the standard of review applicable to commercial disclosures. 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*, 537 U.S. 1080 (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,* 517 U.S. at 526–27 (Thomas, J., concurring in part and concurring in the judgment).

Echoing these justices, at least three circuits have explicitly avoided deciding whether strict scrutiny applies to content-based commercial speech

regulations. *See, e.g.*, *Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Prof'l Eng'rs & Surveyors*, 916 F.3d 483, 493 n.18 (5th Cir. 2019) (declining to "reach the issue . . . because the Board's ban fails to meet the traditional scrutiny test outlined in *Central Hudson*"); *Ocheesee Creamery*, 851 F.3d at 1235 n.7 ("We need not wade into these troubled waters . . . because the State cannot survive *Central Hudson* scrutiny"); *Educ. Media Co. at Va. Tech v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013) ("we need not determine whether strict scrutiny is applicable here"); *accord Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (Ikuta, J., dissenting in part, concurring in part) (citing *NIFLA*, 138 S. Ct. at 2372) ("[A] government regulation that compels a disclosure . . . is a content-based regulation of speech, which is subject to heightened scrutiny under the First Amendment unless the *Zauderer* exception applies. The majority fails to follow this analytical framework[.]"); *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 853 (9th Cir. 2017) (Thomas, C.J., dissental) ("Because the district court did not analyze the statute under the heightened scrutiny required by *Sorrell*, I would reverse and remand.").

Other circuits have taken a more troubling path—acknowledging the doctrinal ambiguity but nevertheless applying "relaxed scrutiny." *See, e.g., Vugo, Inc. v. City of N.Y.*, 931 F.3d 42, 49–50 (2d Cir. 2019) (citations and internal quotations omitted) (collecting cases). These relaxed approaches erode key limits on government power. Indeed, this kind of "misplaced analysis" will 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. 174a (Wardlaw, J., dissental).

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 Mun. 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 disclosure requirement "draws distinctions based on the message" that cell-phone retailers convey. *Id.* at 2227 (quoting *Sorrell*, 564 U.S. at 566).[3] 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. *See NIFLA*, 138 S. Ct. at 2371 (internal quotation marks and citations omitted) ("By compelling individuals to speak a particular message, such notices alter the content of their speech." (cleaned up)). Yet, the Ninth Circuit refused to hold Berkeley to even the low bar of substantiating the harm it purported to remedy. *See* Pet. App. 27a ("CTIA is correct in pointing out that there was nothing then before the district court showing that such radiation

[3] 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.

had been proven dangerous. But this is beside the point.").

The Court should thus take the opportunity presented by the Petition to clarify that strict scrutiny is warranted where—as here—the government "force[s] citizens to confess by word or act their faith" in government orthodoxy. *Janus*, 138 S. Ct. at 2463 (quoting *Barnette*, 319 U.S. at 642).

II. THE COURT NEEDS TO ADDRESS THE APPROPRIATE DEGREE OF SCRUTINY NOW, BECAUSE 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. W. 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." Adler, 58 Ariz. L. Rev. at 450.

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*, 92 F.3d 67, 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), and *on reh'g en banc*, 916 F.3d 749 (9th Cir. 2019). 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 attractive 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 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 strict 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 Berkeley's mandatory disclosure law illustrates how easily a vocal faction[4] 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 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), https://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

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[4] "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).

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. 14 (citing CA9 ER107–08).

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." *See* App. 1a.

- 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."[5]

- 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." *See* App. 2a.

- 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."[6]

- On movies or video games, a notice: "To promote a healthy lifestyle, the federal government encourages daily exercise. If you sit still while consuming

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[5] *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 visited Oct. 31, 2019) (similar in concept to FCC information referenced by Berkeley).

[6] *Cf. Agency for Int'l Dev.*, 570 U.S. at 208 (invalidating requirement that grant recipients adopt policy opposing prostitution and sex trafficking).

electronic media, you may decrease your opportunity to meet this goal."[7] *See* App. 3a.

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. 28a; *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. Meat Inst.*, 760 F.3d at 27 (recognizing "possibility" that some "one-sided" disclosures would be "controversial").

Of course, 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." *Sons of Confederate Veterans*, 135 S. Ct. at 2246. "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

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[7] *Cf.* Let's Move, *Reduce Screen Time and Get Active*, https://letsmove.obamawhitehouse.archives.gov/reduce-screen-time-and-get-active (last visited Oct. 31, 2019) (similar in concept to FCC information referenced by Berkeley).

bearing a particular message" "favored by the Government." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994); *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.

CONCLUSION

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

Respectfully submitted,

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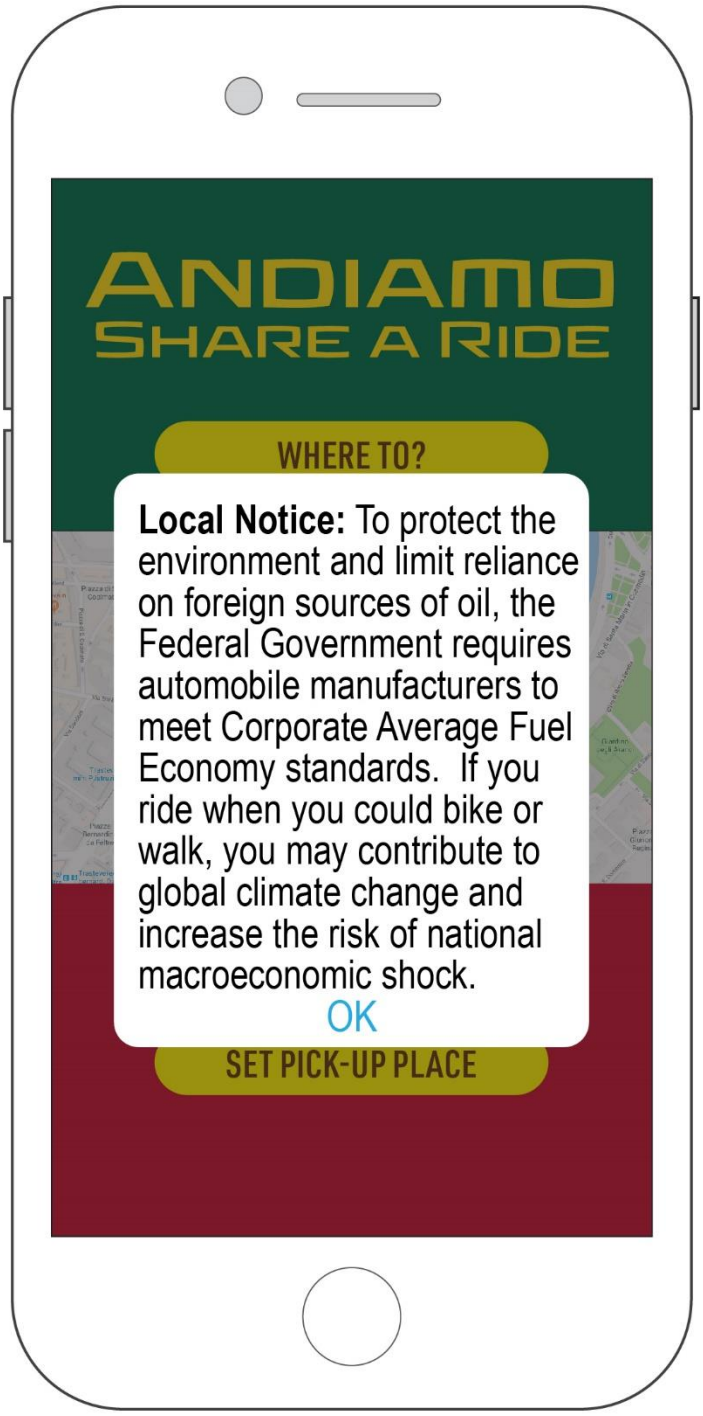
November 1, 2019

APPENDIX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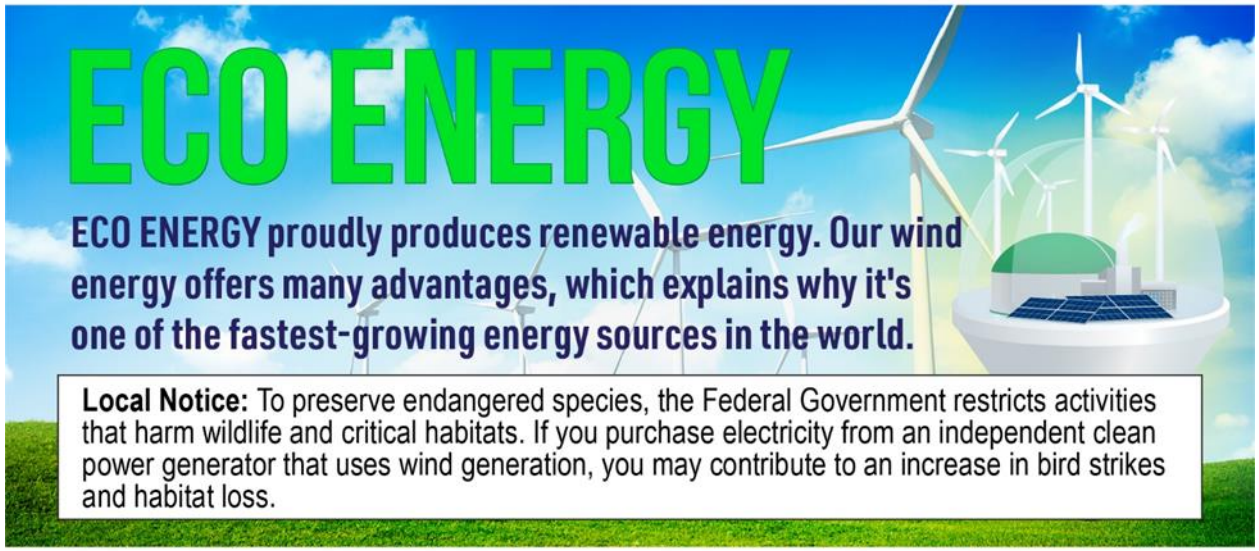
OK
SET PICK-UP PLACE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