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 *AMICI CURIAE* INSTITUTE FOR JUSTICE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, IJ challenges laws across the nation that regulate a wide array of both commercial and noncommercial speech. IJ's commercial speech cases, which IJ takes *pro bono*, generally involve small business owners who do not have substantial advertising budgets and must therefore rely almost entirely on limited marketing methods, such as storefront signage and product labels, to communicate with potential customers.

In defending the free speech rights of these small business owners, IJ has observed a troubling trend: the closing of honest, law-abiding businesses caused by the proliferation of compelled commercial speech requirements. This trend is directly traceable to two mistakes commonly made by the lower courts: 1) overusing *Zauderer* instead of applying the *Central Hudson* test or strict scrutiny; and 2) applying an incorrect version of *Zauderer* that is inconsistent with this Court's

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[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 the filing of *Amicus* briefs. It should also be noted that much of this brief is similar to the brief *Amici* filed in support of Petitioner's first petition for a writ of certiorari in this case.

precedent. Thus, IJ believes this case presents an opportunity for the Court to reaffirm the validity of *Central Hudson*'s "threshold prong," which requires the government to, at a minimum, meet its burdens under the full *Central Hudson* test before it may force lawful, honest businesses to adopt government-mandated speech. It also provides an opportunity for the Court to provide further clarification as to how lower courts should apply the Court's holding in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*").

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing member businesses in Washington, D.C., and all fifty state capitals. Founded in 1943 as a nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. Like IJ, NFIB has observed the increasing harm caused to small business owners by compelled commercial speech requirements, as well as the roles *Zauderer*'s overuse and misuse have played in it. NFIB has joined this brief because it agrees with IJ that this case presents a crucial opportunity for this Court to reaffirm the validity of *Central Hudson*'s threshold prong or, alternatively, the extent of *Zauderer*'s burdens, thereby ensuring that the free speech rights of small business owners receive meaningful judicial protection.

IJ and NFIB both agree that the Ninth Circuit got these vitally important constitutional questions wrong. *Amici* are also concerned that this ruling, if allowed to

stand, will continue to undermine this Court's important precedent upon which the First Amendment rights of our nation's small business owners rely. *Amici*'s interests are not tied to whether Petitioner ultimately prevails once the correct test is applied, but *Amici* instead ask the Court to accept this case in order to provide much-needed guidance to the courts below regarding the proper test to apply.

SUMMARY OF ARGUMENT

More than 17 years ago, Justices Thomas and Ginsburg warned that this Court's decisions had not "sufficiently clarified the nature and quality of evidence a State must present" to justify compelled commercial speech under the *Central Hudson* test. *See Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari and discussing *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of NY*, 447 U.S. 557 (1980)). In the years since *Borgner*, the confusion among lower courts has only intensified. Worse, several circuits have responded to this confusion by abandoning *Central Hudson*'s protections against compelled commercial speech, instead applying a watered-down version of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), to situations for which no version of *Zauderer* was ever intended to be used.

This erosion of First Amendment protection is most felt by small business owners. Giant corporate conglomerates have equally giant advertising budgets,

thereby allowing them numerous alternative methods to reach consumers when one method becomes compromised. Small business owners do not. They overwhelmingly rely on the most cost-efficient forms of marketing, such as storefront signage and product labels. When government mandates undermine these limited forms of speech, the small business owners are often left with no other option but to go out of business. And many of them do.

This brief will first examine the harms caused to small businesses when their limited marketing methods are burdened by compelled commercial speech. Second, it will examine the warnings of Justices Thomas and Ginsburg from seventeen years ago that have been realized today. Third, it will show that the Ninth Circuit's ruling directly conflicts with this Court's controlling precedent.[2]

ARGUMENT

I. Small Businesses Are the Most Harmed by Compelled Disclaimers.

Although Petitioner is a large industry association, it is small business owners, and particularly those

[2] This brief does not examine the question of whether strict scrutiny should apply instead of intermediate scrutiny, as this brief primarily focuses on the harm caused to small business owners by *Zauderer*'s overuse. However, it should be noted that *Amici*'s position is that Respondent City of Berkeley's compelled speech requirement is content-based and should therefore be subject to strict scrutiny.

with limited advertising budgets, who are most harmed by the current proliferation of compelled disclaimers. This proliferation is a direct result of the misapplication of *Zauderer* to government disclaimers imposed upon lawful, non-misleading commercial speech. Therefore, the present case, where the core issue is the court of appeals' misapplication of *Zauderer* outside of this Court's precedent (both in applying *Zauderer* at all and in the manner in which it was applied), presents an opportunity to restore protection for small business owners' First Amendment rights.

First, this section will illustrate this point by examining a recent case in the Eleventh Circuit involving a small farmer from the Florida Panhandle named Mary Lou Wesselhoeft, whose business almost closed when she was ordered to mislabel her pure skim milk as "imitation milk product." Second, it will contrast Ms. Wesselhoeft's case to a recent compelled speech case involving a neighborhood grocery store in New York State. Third, it will show that these situations are not unusual. To the contrary, the increased use of compelled disclaimers is harming small business owners across our nation.

A. Mary Lou Wesselhoeft's Right Not to Confuse Her Customers.

Mary Lou Wesselhoeft understands the crucial importance of clear, plain-language commercial speech. She owns a small, all-natural creamery in the Florida Panhandle, and her food labels are the only way in

which she is able to communicate with most of her customers. Like many small business owners, she has no advertising budget.

Ms. Wesselhoeft was understandably alarmed, therefore, when the State of Florida informed her that she needed to change the label for one of her products. Specifically, the government told her that the term "imitation milk product" must be used on the labels for her creamery's pure, pasteurized skim milk because she does not inject it with artificial additives. The State conceded that no one had ever been misled, confused, or harmed by her creamery's skim milk or its labels. But the State had decided that the product "skim milk" consisted of three ingredients: (i) skim milk; (ii) Vitamin A additives; and (iii) Vitamin D additives. Thus, even though pure skim milk without the vitamin additives was safe to drink and legal to sell, its label was legally required to include an "imitation" disclaimer.

This mandate created a tremendous problem for Ms. Wesselhoeft's business. Unable to afford more expensive methods of communicating with customers, her business had no way to overcome the confusion caused by the compelled language. She was left with only one choice: to stop selling skim milk. She still sold cream, which meant she still had skim milk left over, but she was forced to discard it instead of selling it with the mandated disclaimer.

She tried to offset this harm, but nothing worked. When she raised the cost of cream[3] to compensate for the unsold skim milk, the demand plummeted. Her situation was tenuous. Without a clear, plain-language label, free from the confusing disclaimer, she could not sell skim milk. And without selling skim milk, her thin profit margins became losses.

With the aid of *pro bono*[4] legal assistance, Ms. Wesselhoeft also fought back in court, and an Eleventh Circuit panel unanimously[5] ruled in her favor. *See Ocheesee Creamery v. Putnam*, 851 F.3d 1228, 1234-40 (11th Cir. 2017). As a result, her creamery has resumed selling pure skim milk with a clear label. *See Ocheesee Creamery v. Putnam*, 2017 WL 5619435, *3 (N.D. Fla. 2017). Although it was a close call, her business survived and is starting to rebound.

The reason Ms. Wesselhoeft's business exists today is that the Eleventh Circuit still follows this Court's precedent requiring that mandated disclaimers imposed upon lawful, non-misleading speech must pass the full *Central Hudson* test, at a minimum, in order to be upheld. *See Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000) (holding that compelled disclaimer for attorney advertising failed *Central Hudson* test and was therefore unconstitutional); *see also Borgner*

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[3] Ocheesee Creamery sells both cream and ice cream, and sales of both were affected by the price changes.

[4] The undersigned counsel represented Ocheesee Creamery in the litigation.

[5] The panel included Senior D.C. Circuit Judge David B. Sentelle, sitting by designation.

v. Brooks, 284 F.3d 1204 (11th Cir. 2002) (applying *Central Hudson* test to compelled disclaimer for dentists).

Due to the Eleventh Circuit's ironclad precedent on this issue, the State of Florida only argued *Zauderer* in a cursory fashion. Instead, the requirement that Ms. Wesselhoeft label her pure skim milk as imitation milk product was argued by both sides under *Central Hudson* and analyzed by both the district and circuit court using *Central Hudson*,[6] just like any other common restriction on commercial speech. So she won.

If Ms. Wesselhoeft lived in the Ninth Circuit, then the result would likely have been very different. The government would have argued *Zauderer* at length, the court would have applied *Zauderer* in its most-watered-down form, and Ms. Wesselhoeft probably would have lost. Ms. Wesselhoeft and her employees would be looking for jobs.

B. Market Fresh's Right to Not Waste Money.

The Ninth Circuit is not the only place where Ms. Wesselhoeft would have lost. The Second Circuit follows a similar approach to the Ninth, as the owners of a small grocery store named Market Fresh recently discovered.

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[6] Ocheesee Creamery's counsel and the Eleventh Circuit panel recognized that strict scrutiny may apply instead of intermediate scrutiny, but that they "need not wade into these troubled waters" caused by this "uncertainty," as the mandated label could not survive intermediate scrutiny. *See* 851 F.3d at 1235 n.7.

While larger than Ms. Wesselhoeft's creamery, Market Fresh is not a particularly large business by most standards. It has three locations in Upstate New York. Grocery stores operate on notoriously small margins, but Market Fresh's efforts to focus its limited resources on the issues most important to its customers were recently stymied by a compelled commercial speech requirement.

The law in question required every item sold in a grocery store to be individually labeled as to price. Although there is no contention that any customer was ever confused by the store's price signage, Dutchess County nonetheless determined that businesses should bear the expense of applying redundant price stickers to every individual item sold. For Market Fresh, this meant an additional cost of $45,000 per year, not counting the fines incurred. *See* Craig Wolf, *Dutchess to Reply to Price-Tag Lawsuit*, Poughkeepsie Journal (March 1, 2015), https://www.poughkeepsiejournal.com/story/news/local/2015/03/01/grocer-sues-dutchess-item-pricing/24222123/. This requirement also made it difficult for Market Fresh to quickly change prices to respond to consumer demand or to include items in promotional sales. *See Poughkeepsie Supermarket Corp. v. County of Dutchess, NY*, 140 F.Supp.3d 309, 316 (S.D.N.Y. 2015).

The owners asserted their First Amendment rights, but to no avail. The district court dismissed the lawsuit, and the dismissal was affirmed by the Second Circuit. The Second Circuit panel appeared to recognize the law's problems and mentioned in its summary

order that the grocery's allegations sought to "show that some of the reasons for implementing the law are no longer valid." *See Poughkeepsie Supermarket Corp. v. Dutchess County, NY*, 648 F. Appx. 156, 158 (2d Cir. 2016) (summary order). But under the Second Circuit's view of compelled commercial speech precedent, the facts did not matter. *See id*. There was a hypothetical rationale for the law, so the Second Circuit's precedent required the court to dismiss the First Amendment lawsuit. *See id*.

If Market Fresh were located in the Eleventh Circuit, or in any of the other circuits that still apply *Central Hudson*'s threshold prong to questions of compelled commercial speech, then the case might have turned out differently. Instead, this relatively small business was saddled with the substantial expense of providing redundant information to customers who never asked for it.[7]

C. This Is a Nationwide Problem.

These stories are not unusual. Across the nation, small business owners are disproportionately harmed by compelled disclaimers, and the reason is two-fold. First, the types of speech used by small business owners are common targets for compelled disclaimer laws. Second, many small business owners have neither the large advertising budgets needed to overcome these

[7] The undersigned has learned that after the Second Circuit's ruling, the law was eventually changed to no longer apply to Market Fresh.

burdens nor the war-chests necessary for protracted legal challenges.

Commercial speech cases often involve the precise types of commercial speech on which many small businesses depend. Some, like Ocheesee Creamery, rely exclusively on their product labels. *See supra* Part I(A). For others, it is their signage. *See Solantic v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) (holding that restrictions on medical clinic's signage violated First Amendment). And for others, it might be their business cards or letterhead. *See Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990) (holding that attorney's truthful use of the term "specialist" was protected by the First Amendment). But all are affected.

Compelled disclaimer cases are no different. For practically every type of commercial speech upon which a cost-conscious small business depends, there is a corresponding legal challenge involving a compelled disclaimer. *See*, *e.g.*, *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg. Bd. of Acct.*, 512 U.S. 136, 146 (1994) (business cards and stationery); *Am. Beverage Ass'n v. City & Cty. of S.F.*, 871 F.3d 884, 888 (9th Cir. 2017) (beverage labels); *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015) (internet websites); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (food labels); *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 117 (2d Cir. 2009) (restaurant menus).

When compelled disclaimers obstruct these limited forms of speech, small business owners are left with few options. Often, they cannot afford more expensive means of communicating with potential customers, nor can they afford lengthy legal challenges.

The U.S. government has itself recognized that many small businesses are totally dependent on limited, cost-effective marketing methods. In a 2001 report, the U.S. Small Business Association:

(i) compared the cost of signage to other forms of marketing;

(ii) found storefront signage to be the most efficient form of marketing for small businesses;

(iii) advised small businesses to focus their marketing resources on their storefront signage in order to maximize their limited marketing budgets; and

(iv) cautioned America's small business owners that for many of them, their storefront signage may be the only "opportunity to capture [potential customers'] attention."

See R. James Claus & Susan, *SIGNS: Showcasing Your Business on the Street*, U.S. Small Business Ass'n (2001), http://danitesign.com/wp-content/uploads/2014/05/Importance-of-Signs.pdf.

Other studies confirm the SBA's findings and advice. For example, when researchers at the University of Cincinnati examined this issue, they found that

signage presents substantial benefits to small businesses and consumers alike. *See* Economics Center, University of Cincinnati, *The Economic Value of On-Premise Signage* (2012), http://martin-supply.com/pdf/Cirrus/Studies/Economic_Value_of_Signs_University_of_Cincinnati.pdf. Consequently, the researchers went so far as to caution local governments that regulations restricting storefront signage likely result from understating the harms these regulations cause to both businesses and society as a whole. *Id*.

Small business owners who depend on other forms of speech, like product labels, face similar obstacles. *See supra* Part I(A). Often, these compelled disclaimers have the perverse effect of actually increasing confusion, as regulators consistently understate the public's need for jargon-free, plain-language labels. Indeed, the public's lack of understanding regarding scientific information and technical jargon was shown in shocking fashion when one recent study found that over 80 percent of Americans were in favor of warning labels for any food containing DNA. *See* Ilya Somin, *New study confirms that 80 percent of Americans support labeling foods that contain DNA*, The Washington Post (May 27, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/27/new-study-confirms-that-80-percent-of-americans-support-mandatory-labeling-of-foods-containing-dna/?utm_term=.6951e0139807.

Without substantial advertising budgets allowing other channels of communication, small business owners whose product labels have been compromised by compelled speech must sometimes make the same

choice as Ms. Wesselhoeft – to stop selling a lawful product rather than follow a government mandate requiring them to confuse their own customers.

But while small business owners are the group most adversely affected by compelled disclaimers, they are also the least capable of fighting back. Modern litigation's exploding costs and small business owners' inability to absorb those costs are both well-known and oft-discussed. *See*, *e.g.*, Neil Gorsuch, *A Republic, If You Can Keep It* 244-67 (Crown Forum 2019) (addressing problem that "[o]ur civil justice system is too expensive for most to afford" and exploring possible solutions); Samuel Estreicher and Joy Radice, *Beyond Elite Law: Access to Civil Justice in America* 202-04 (2016) (discussing rise of non-traditional public interest legal clinics to assist for-profit small business owners who cannot afford substantial legal fees); Carrie Lukas, *It's Time for Legal Reform*, Forbes (Aug. 10, 2015), https://www.forbes.com/sites/carrielukas/2015/08/10/its-time-for-legal-reform/#12573a8730f0 (discussing harm to businesses caused by expensive legal system and "especially" harm to "small firms"); Jeffrey A. Jenkins, *The American Courts: A Procedural Approach* 237 (1st ed. 2011) (discussing substantial costs imposed on businesses to bring or defend lawsuits).

For these reasons, the hundreds of thousands of small business owners represented by *Amici* ask the Court to grant review, even though no small business owner is a party to this specific dispute. In the view of these small business owners, this case provides an important opportunity to clarify that they are protected

by meaningful judicial review when the government compels disclaimers to be added to truthful, lawful speech.

II. These Problems Have Only Become Worse with Time.

Over 17 years ago, Justices Thomas and Ginsburg warned of the lower courts' confusion over compelled commercial speech. *See Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). Sadly, the confusion has only worsened since then.

Borgner's sole issue was one of compelled commercial speech. *Id*.[8] Specifically, Florida required dentists who advertised certain private credentials to also include a disclaimer. The Eleventh Circuit applied the correct test, which was the *Central Hudson* test, but found the disclaimer requirement's burden to be reasonable under *Central Hudson*'s fourth prong.

This Court denied the dentists' petition for writ of certiorari, but Justices Thomas and Ginsburg dissented. The Justices explained that the issue of compelled commercial speech was "oft-recurring" and that the lower courts required guidance from this Court on "the subject of state-mandated disclaimers." 537 U.S. at 1080. The Justices agreed with the Eleventh Circuit that *Central Hudson* was the proper test for compelled

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[8] At the Eleventh Circuit, the case was styled *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002).

commercial speech but were concerned that the Eleventh Circuit might have understated the burden while applying *Central Hudson*'s fourth prong, and that this confusion might spread if not addressed by the Court. *See id*.

History has corroborated the Justices' concerns. As discussed in Petitioner's brief, a hodgepodge of approaches has broken out among the circuits, and the confusion is not merely limited to weighing the burden under *Central Hudson*'s fourth prong. *See* Pet'r Br. 26-29. A handful of circuits have almost completely discarded *Central Hudson* for compelled commercial speech cases. *See id.*

Things have become so convoluted that one circuit, the D.C. Circuit, has single-handedly become a microcosm of this nationwide confusion. First, the Circuit held that *Central Hudson* applied to all compelled disclaimers involving lawful, non-misleading commercial speech. *See R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205 (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). But only two years later, it reached the opposite conclusion. *See Am. Meat Inst.*, 750 F.3d at 27. The following year, it changed course again. *See National Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015) (limiting *Am. Meat Inst.*'s holding to point-of-sale disclosures).

It appears that Justices Thomas and Ginsburg may have foreseen this type of confusion as well. This would explain why the Justices' dissent took

the time to explain that *Zauderer* had no application to compelled disclosure cases involving lawful, non-misleading speech. The Justices pointed out that *Zauderer*'s application is limited in that "the advertisement in *Zauderer* was misleading as written and because the government did not mandate any particular form, let alone the exact words, of the disclaimer." 537 U.S. at 1080. Unfortunately, this guidance did not prevent the Ninth Circuit from drawing the opposite conclusion in the case at hand.

III. The Ninth Circuit's Holding Directly Conflicts with this Court's Precedent.

Finally, certiorari should be granted because the court of appeals' opinion is based on two doctrinally incorrect premises: 1) that *Zauderer* can be applied to compelled disclaimers imposed on lawful, non-misleading speech; and 2) that *Zauderer* does not impose meaningful evidentiary burdens on the government. The court of appeals' first incorrect premise directly conflicts with the controlling precedent established by this Court in *Ibanez*, as well as the additional guidance provided by this Court in *Milavetz*. The Ninth Circuit's second incorrect premise conflicts with this Court's recent decision in *NIFLA*.

A. *Zauderer* Does Not Apply Here.

The Ninth Circuit's first mistake was to apply *Zauderer* at all. Indeed, doing so directly conflicted

with this Court's holding in *Ibanez* and the additional guidance this Court provided in *Milavetz*.

In *Ibanez*, this Court addressed three government arguments for restricting commercial speech. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Reg. Bd. of Acct.*, 512 U.S. 136 (1994). The first two were whether the government could ban the use of the credentials "CPA" and "CFP," respectively. *Id*. at 142-45. The third was whether the government could alternatively compel a disclaimer to accompany the use of "CFP." *Id*. at 146-49. This Court rejected all three arguments, and in so doing, foreclosed the approach taken by the Ninth Circuit in the case at hand. *See id*. at 142-49.

This Court held that since Ms. Ibanez actually possessed these credentials, mentioning them was neither actually nor inherently misleading and therefore could not be banned. *See id*. at 142-45. The Court also held that, since Ms. Ibanez's underlying speech was not misleading, intermediate scrutiny must be applied to the compelled disclaimer. *See id*. at 146. This led the Court to find the compelled commercial speech to be unconstitutional. *Id*. at 146-49.

Significantly, the Court in *Ibanez* distinguished *Zauderer* on the grounds that *Zauderer* involved inherently misleading speech. In doing so, the Court explained that if Florida had shown Ms. Ibanez's speech to be inherently misleading, then the compelled disclaimer would have received the more lenient approach shown by *Zauderer*'s best-known section. *See Ibanez*, 512 U.S. at 146-47 (citing *Zauderer*'s section

addressing the inherently misleading fees advertisement, 471 U.S. at 651). But since Florida had not shown Ms. Ibanez's speech to be inherently misleading, the full *Central Hudson* test was required for the compelled disclaimer, just as it was required regarding *Zauderer*'s other claims. *See Ibanez*, 512 U.S. at 146, 149 (citing *Zauderer*'s section applying *Central Hudson* to regulations on non-misleading speech, 471 U.S. at 648-49).

This Court reaffirmed this understanding of *Zauderer*'s limited application in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). There, the Court justified its use of reduced First Amendment scrutiny by noting that:

> The challenged provisions . . . share the essential features of the rule at issue in *Zauderer*. As in that case, [the] required disclosures are intended to combat the problem of *inherently misleading* commercial advertisements. . . .

Id. (emphasis added).

To be clear, this precedent does not bar the government from ever compelling speech. Instead, the Court's precedent merely requires the lower courts to apply the correct test. The court of appeals failed to do so.

B. *Zauderer* Places Meaningful Burdens on the Government.

The court of appeals' second mistake was to apply a version of *Zauderer* that conflicted with this Court's

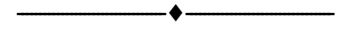
recent decision in *NIFLA*. In *NIFLA*, the Court expressly declined to address the question of whether *Zauderer* or a higher level of scrutiny applied, as the compelled disclaimer at issue there could not even survive *Zauderer*. 138 S. Ct. at 2377. The Court then granted the petition for a writ of certiorari in this case, vacated the court of appeals' prior opinion, and remanded the case so the court of appeals could apply *NIFLA*. *See* 138 S. Ct. at 2708 (Mem.). The court of appeals failed to do so.

In *NIFLA*, the Court explained that *Zauderer* imposes on government the "burden to prove" that: (i) the compelled disclaimer will actually "remedy a harm"; (ii) the supposed harm being addressed is "potentially real not purely hypothetical"; and (iii) the compelled disclaimer "extends no broader than reasonably necessary." 138 S. Ct. at 2377.

Instead of faithfully applying *NIFLA*, the court of appeals applied a watered-down version of *Zauderer* that bore a striking resemblance to the version it applied the first time around. Although the court of appeals' opinion mentioned *NIFLA*, it primarily relied on Circuit precedent predating *NIFLA*. *See* 928 F.3d at 843-49. Not surprisingly, the court of appeals proceeded to reach the same mistaken result as before: It upheld the compelled disclaimer even though the City produced no evidence that the disclaimer remedied any real harm, and even though there is substantial reason to believe that the disclaimer affirmatively misleads consumers into thinking that cell phones are more dangerous than they actually are. That result cannot be squared with *NIFLA*.

Again, this does not mean that the government can never require a disclaimer. It merely means that, even under *Zauderer*, a disclaimer can only be required if the government can meet meaningful burdens. Anything less results in the sort of problems currently playing out across our nation – a never-ending cascade of compelled disclosures which may each be loosely related to some legitimate government interest, but confuse customers, crowd out the business owners' messages, and ultimately cause more harm than good. These compelled disclosures could include any conceivable topic, ranging from the precise location where a product was made to the demographic characteristics of the sellers' employees. And while these details may be interesting to some people, that fact alone cannot be sufficient to compel small businesses to use their limited marketing space in ways they would rather not.

In conclusion, the Ninth Circuit's holding cannot be reconciled with this Court's controlling precedent. This Court has held that, at a minimum, the *Central Hudson* test continues to apply to compelled supplements to lawful, non-misleading speech after *Zauderer*, just as it did before *Zauderer*. This Court has also held that, even when *Zauderer* applies, *Zauderer* imposes meaningful burdens on the government. By applying the wrong test and then applying an incorrect version of that test, the court of appeals' opinion conflicts with both lines of this Court's precedent.



CONCLUSION

Zauderer addressed the rare situation where the government compels a correction to inherently or actually misleading speech instead of banning it. Even then, *Zauderer* is supposed to impose meaningful burdens on the government when it compels speech. Sadly, *Zauderer*'s overuse and watered-down misuse by lower courts have become a tremendous problem for small business owners around this country, and particularly for those without the necessary advertising budgets to afford alternative means of communication when their primary method becomes compromised. *Amici* respectfully request that the Court grant a writ of certiorari to Petitioner to provide much-needed guidance to the courts below, and to ensure that small business owners receive the First Amendment protection to which they are entitled.

Dated: October 31, 2019

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