No. 19-15019

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOAN PAYMENT ADMINISTRATION LLC, *ET AL.*,

Plaintiffs-Appellants,

v.

JOHN F. HUBANKS, DEPUTY DISTRICT ATTORNEY, MONTEREY COUNTY DISTRICT ATTORNEY'S OFFICE, IN HIS OFFICIAL CAPACITY, *ET AL.*,

Defendants-Appellees.

On Appeal from a Final Order of the United States
District Court for the Northern District of California
No. 5:14-cv-04420-LHK
Hon. Lucy H. Koh, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLEES AND AFFIRMANCE

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August 23, 2019

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen and its attorneys have long been involved in First Amendment cases, particularly those involving the development of commercial-speech doctrine. Public Citizen has filed briefs as amicus curiae addressing commercial-speech issues in a number of this Court's recent cases, *see*, *e.g.*, *Am. Bev. Ass'n v. City & County of San Francisco*, 916 F.3d 749 (2019); *Contest Promotions, LLC v. City & County of San Francisco*, 704 F. Appx. 665 (2017); *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (2017), as well as in the Supreme Court, *see*, *e.g.*, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), and many other courts.

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[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

Among Public Citizen's interests is preservation of reasonable requirements that providers of goods and services disclose information relevant to consumers. The Supreme Court, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), recognized that the First Amendment concerns posed by commercial disclosure requirements are limited and that such requirements are permissible if they are reasonably related to a government interest and are not unduly burdensome. *Id.* at 651. Increasingly, however, marketplace participants—even those who engage solely in commercial speech—have challenged such regulations and advocated alterations in *Zauderer*'s relaxed standard of scrutiny that would subject disclosure requirements to the same standards of review as outright prohibitions on commercial speech (or in some cases, fully protected speech). Such limitations of *Zauderer*'s holding—including the ones sought by the appellants in this case—would impede legitimate consumer-protection measures without advancing significant First Amendment values. Public Citizen therefore respectfully submits this brief as amicus curiae in the expectation that it may be of assistance to this Court in its consideration of the issues in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Loan Payment Administration LLC, *et al*. (collectively, "LPA"), operate a business that depends on convincing homeowners to pay them to do something homeowners could as easily do themselves: make extra mortgage payments to reduce the terms of their mortgages and the total amount of interest paid over the life of their loans. Whether by arranging biweekly payments directly with their lenders, adding additional principal amounts to each payment, or through any number of other means, homeowners can achieve any benefits they may perceive in accelerating their mortgage payments—without paying LPA's hefty set-up fee and the additional fee it charges for each payment, and without putting their money in the hands of a third party to hold for what adds up to 26 weeks out of the year.

To help it convince homeowners to avail themselves of services of such dubious utility, LPA's solicitation letters have prominently featured the names of homeowners' mortgage lenders, and their loan amounts, in a way that may suggest that the offer comes from the lender or someone affiliated with or authorized by it. That impression, as this Court has previously explained, may add credibility to LPA's solicitation because

the homeowner may perceive it as coming from someone with whom she already has an established relationship. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 735 (2017). At the same time, it may tend to obscure the fact that the third party that is in fact behind the offer seeks to profit by charging significant fees for the arrangement. *See id*.

Recognizing the significant possibility that such solicitations may deceive or confuse consumers, California legislators enacted two statutory provisions requiring modest factual disclosures to prevent consumers from being misled. Specifically, the statutes provide that a person offering financial services to a consumer with respect to a loan may not, without the lender's consent. use the lender's name or logo in written solicitations to the consumer, or use the consumer's loan number of loan amount in such solicitations, without making clear disclosures that the person offering services "is not sponsored by or affiliated with the lender and that the solicitation is not authorized by the lender," Cal. Bus. & Prof. Code §§ 14701(a), 14702, and that the loan information was not provided be the lender, *id*. § 14702. These simple disclosures must be made "in close proximity to, and in the same or larger font size as, the

first and the most prominent use or uses" of the information triggering the disclosure requirement, "including on an envelope or through an envelope window." *Id*. §§ 14701(a), 14702.

LPA brought this action challenging California's straightforward commercial disclosure requirement as a violation of the First Amendment. This Court, in an earlier appeal from the district court's denial of a preliminary injunction, held that LPA was unlikely to prevail on its First Amendment claim because the statutory disclosure requirement was permissible under the standard set forth in *Zauderer* v, *Office of Disciplinary Counsel*, 471 U.S. at 651, which allows disclosure requirements applicable to commercial speakers if they are "reasonably related" to a governmental interest, including the interest in preventing consumer deception. *See Nationwide*, 873 F.3d at 731–32. The Court held that the disclosure requirements at issue are "purely factual and uncontroversial" and not "unduly burdensome," *id*. at 732–34, and are reasonably related to the state's substantial interest in preventing consumer deception, *id*. at 734–35. The Court concluded:

> It was reasonable for California to determine that use of a lender's name in solicitations of this type poses a risk of consumer deception. The required disclaimers—short, accurate,

> and to the point—are reasonably related to California's interest in preventing that deception.

Id. at 735.

Following the interlocutory appeal, the district court concluded, unsurprisingly, that LPA's First Amendment challenge to the disclosure requirements failed to state a claim on which relief could be granted, and the court dismissed LPA's complaint with prejudice. LPA has now again appealed, again arguing that the disclosure requirement cannot be sustained under *Zauderer*. In the face of the Court's rejection of those arguments in its earlier appeal, LPA contends that the Supreme Court's intervening decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), together with this Court's en banc decision in *American Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, requires reconsideration of the Court's earlier analysis in three respects. First, LPA argues, *NIFLA* limits *Zauderer*'s permissive reasonable-relationship standard to requirements that commercial speakers disclose the terms under which their goods and services are offered. Second, LPA contends that *NIFLA* points to a need to reconsider the prior panel's view that the statutes here are reasonably related to the interest in preventing deception. And third, LPA asserts

that, under both *NIFLA* and *American Beverage*, this Court should hold the disclosure requirement to be burdensome because LPA would rather omit its references to lender names and loan details from its solicitations than attempt to comply with the California requirements.

None of these arguments has merit. First, this Court has already rejected the argument that *NIFLA* limits *Zauderer* to disclosures narrowly focused on the terms upon which products and services are offered, *see CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 848 (2019), and rightly so: *Zauderer*'s rationale extends broadly to information about a commercial speaker's products and services and the representations it makes to induce consumers to do business with it. The required disclosures here fit comfortably within *Zauderer*'s ambit.

Second, *NIFLA*'s holding that the government must put forward a "nonhypothetical justification" that "plausibly" supports a disclosure requirement, 138 S. Ct. at 2377, 2378, does nothing to walk back the Court's longstanding recognition that the interest in "preventing deception of consumers" is among the governmental interests that justify commercial disclosure requirements. *Zauderer*, 471 U.S. at 651. Nor does *NIFLA* question, let alone overrule, the Supreme Court's repeated

recognition that the "possibility of deception" inherent in some statements may be sufficiently "self-evident" to allow a court to conclude that a straightforward corrective disclosure is permissible as a matter of law. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (quoting *Zauderer*, 471 U.S. at 652–53). *NIFLA* does not call into doubt this Court's conclusion in *Nationwide* that the disclosure requirements here address just such a self-evident possibility of deception.

Finally, the burden of the required disclosures here—the insertion of a sentence or two in a solicitation letter—is in no way comparable to the burdens that troubled the Supreme Court in *NIFLA* and this Court in *American Beverage*. Those modest disclosures do not threaten to "drown out" LPA's message that consumers should pay it to collect money from them on a biweekly basis. Nor do they threaten to chill valuable speech. Unlike the soda advertisers in *American Beverage*, who presented evidence that they would give up certain forms of advertising altogether if their ads had to be dominated by a message they opposed, LPA does not contend that it intends to stop soliciting consumers if the disclosure requirement is enforced. It says only that it will omit the potentially

misleading statements that trigger the disclosure requirements. A commercial advertiser's choice to refrain from making potentially misleading statements in preference to providing disclosures that will prevent consumer misunderstanding does not demonstrate an undue burden on protected expression.

ARGUMENT

I. *Zauderer*'s reasonable-relationship standard is not limited to disclosures about the "terms" under which a commercial speaker offers goods or services.

LPA's lead argument is that *NIFLA* held that "heightened scrutiny" rather than *Zauderer*'s reasonable-relationship standard applies to all "content-based" disclosure requirements, including those applicable to purely commercial speech, "unless the disclaimer at the very least relates to 'the terms under which … services will be available.'" LPA Br. 1 (quoting *NIFLA*, 138 S. Ct. at 2372). LPA asserts that the disclosure requirements here concern aspects of its offer to provide services to homeowners other than the "terms" under which it proposes to do so and thus, under its reading of *NIFLA*, are subject to some form of heightened scrutiny rather than the relaxed scrutiny *Zauderer* mandates for commercial disclosure requirements.

A. The short answer to LPA's argument is that a panel of this Court has already rejected it in light of *NIFLA*, *see CTIA*, 928 F.3d at 848, and this Court is bound by that precedent. In *CTIA*, this Court addressed the City of Berkeley's requirement that cell phone retailers disclose information about how to use cell phones so that exposures to radiofrequency radiation do not exceed Federal Communications Commission guidelines. Addressing an appeal from the denial of a preliminary injunction, the Court initially held that a First Amendment challenge was unlikely to succeed because the disclosure satisfied the *Zauderer* standard: It was purely factual and was "reasonably related" to a substantial government interest in "protection of the health and safety of consumers." *CTIA – The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1119 (2017). The Supreme Court, following its decision in *NIFLA*, vacated this Court's decision in *CTIA* and remanded for further consideration. *CTIA – The Wireless Ass'n v. City of Berkeley*, 138 S. Ct. 2708 (2018). After further briefing about the implications of *NIFLA*, the panel again affirmed, holding that the *Zauderer* standard applies to Berkeley's disclosure requirement and reaffirming its earlier conclusion

that that requirement is reasonably related to a substantial government interest and is purely factual and uncontroversial. *CTIA*, 928 F.3d at 846.

In so holding, the Court addressed CTIA's argument that the *Zauderer* standard did not apply because *NIFLA* had newly limited it to disclosures about the terms under which products and services are offered. Because Berkeley's disclosure had nothing to do with the terms under which retailers sold their phones, but related to characteristics of the products and their usage, CTIA contended that *Zauderer* no longer governed. *See id*. at 848. The Court, however, rejected the argument that *NIFLA* had limited *Zauderer* to disclosures about the terms of transactions; rather, it held that "*NIFLA* plainly contemplated applying *Zauderer* to 'purely factual and uncontroversial disclosures *about commercial products*.'" *Id*. (quoting *NIFLA*, 138 S. Ct. at 2376 (emphasis added by *CTIA* Court)).

Now that a panel of this Court has ruled, following *NIFLA*, that *NIFLA* does not limit *Zauderer* to disclosures about the terms under which products and services are offered, that ruling is the law of this Circuit and is binding on subsequent panels unless it is overruled by the en banc Court (or is itself undermined by another intervening Supreme

Court decision). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (holding that circuit precedent is binding until a subsequent Supreme Court decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are irreconcilable"). Once this Court determines the effect of a Supreme Court decision, that ruling is binding (absent en banc consideration) unless there is a *further* decision by the Supreme Court that is irreconcilable with this Court's decision. *See*, *e.g.*, *United States v. Green*, 722 F.3d 1146, 1148–51 (9th Cir. 2013) (holding circuit precedent construing Supreme Court decisions binding unless irreconcilable with intervening Supreme Court precedent). And obviously, no intervening Supreme Court precedent undermines *CTIA*'s construction of *NIFLA*.

B. *CTIA* was, in any event, correct in refusing to limit *Zauderer*'s standard to disclosures about the *terms* under which a commercial speaker offers a product or service. *Zauderer*'s rationale was not so limited; the Supreme Court has applied it to disclosures that are not about transactional terms; and *NIFLA* does not limit it to disclosures about such terms. Of course, *Zauderer* itself was about a disclosure concerning the terms under which an attorney would represent clients in

contingent-fee cases, and thus it referred to the disclosure requirement as one concerning that subject. *See* 471 U.S. at 651. But nothing in *Zauderer*'s reasoning limits its application to information about terms of transactions, as opposed to other relevant facts about the commercial speaker, the nature of its products and services, and the meaning of the statements it makes in promoting them. Rather, *Zauderer*'s central insight was that a commercial speaker's "constitutionally protected information in *not* providing any particular factual information in his advertising is minimal," *id*., and thus disclosure requirements need only be "reasonably related" to a state interest implicated by the speaker's solicitation, *id*.

Accordingly, in *Milavetz*, the Supreme Court upheld application of the *Zauderer* standard to disclosures that were about "the advertiser's legal status and the character of the assistance provided," 559 U.S. at 250, rather than about the "terms" under which it was offering its services. Under LPA's construction of *Zauderer*, those disclosures should not have been subject to *Zauderer* and would have required heightened scrutiny, but the Court emphatically rejected application of heightened scrutiny. *Id*. at 249. *Milavetz* is flatly inconsistent with LPA's assertion

that the state may pursue its interest in preventing consumer deception (or other substantial interests) by requiring preventive disclosures only about the terms under which goods or services are offered, and not about other potentially misleading aspects of commercial solicitations.

NIFLA does not limit *Zauderer* to disclosures about the terms under which advertisers offer products and services, let alone overrule *Milavetz*'s holding applying *Zauderer* to disclosures concerning relevant information about the commercial speaker itself and the nature of the products and services it offers. Rather, *NIFLA* quoted *Zauderer*'s language, including its descriptive reference to "terms," *see* 138 S. Ct. at 2372, but did not indicate that the reference to "terms" was the critical limitation on *Zauderer*'s application. *NIFLA* held that one of the disclosure requirements at issue in that case was not subject to *Zauderer*, but not because the disclosure was unrelated to the "terms" of an offer of services; rather, as the Court explained, the disclosure requirement fell outside *Zauderer* because it "in no way *relate[d] to the services* that licensed clinics provide." *Id*. (emphasis added). Moreover, the Court cited *Milavetz* approvingly, *see id*., with no hint that the kinds of disclosures *Milavetz* upheld, concerning characteristics of the commercial speaker

itself and the nature of the services it offered, would no longer be subject to review under *Zauderer*'s reasonable-relationship standard.

Moreover, as this Court pointed out in *CTIA*, the *NIFLA* Court explicitly stated that it did not "question the legality of … purely factual and uncontroversial disclosures *about commercial products*," 138 S. Ct. at 2376 (emphasis added)—not, as LPA would have it, only disclosures about the *terms* under which such products are offered. In the same passage, *NIFLA* endorsed the legality of "health and safety warnings long considered permissible," *id*., even though such disclosure requirements generally concern features of a commercial speaker's goods and services that do not directly concern the "terms" under which they are offered.

C. Limiting *Zauderer* solely to disclosures about terms of services would radically curtail its scope and call into question a host of uncontroversial disclosure requirements. The list of required disclosures that would be subject to heightened scrutiny under such a view of the law is almost endless, but is illustrated by the following examples:

- Federal law directs vehicle manufacturers to label each vehicle with its fuel economy, in accordance with regulations issued by the Environmental Protection Agency. 49 U.S.C. § 32908(b).

- With limited exceptions, the Food, Drug, and Cosmetic Act requires that a food product containing artificial coloring or flavoring bear a label so stating. 21 U.S.C. § 343(k).
- The Securities and Exchange Commission compels a securities issuer to state whether it has a code of ethics, 17 C.F.R. § 229.406, and disclose information about certain officers' executive compensation, *id.* § 229.402.
- California requires facilities that advertise special care for residents with dementia to disclose the "experience and education" and "required training" for staff members who provide such care. 22 Cal. Code Regs. § 87706(a)(2)(F)–(G).
- Federal law requires that foods be labeled with, among other things, sodium content. *See* 21 U.S.C. § 343(q)(1)(D).
- Federal law requires that items of fur apparel bear a label identifying the type of animal that produced the fur and the country of origin of imported fur and stating that the apparel contains used fur (if it does). 15 U.S.C. § 69b.

- The Federal Trade Commission mandates disclosures of relationships between an endorser and a seller of a product. 16 C.F.R. § 255.5.

All these disclosure requirements serve evident purposes including preventing consumer deception, protecting consumer health and safety, and promoting informed consumer choice. All would be threatened by a reading of *NIFLA* that, contrary to that decision's expressly stated intent, "question[ed] the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about consumer products," 138 S. Ct. at 2376, by limiting *Zauderer* to disclosures about the terms of offers to provide goods or services.

Restricting *Zauderer*'s application to disclosure requirements about commercial terms would be particularly nonsensical when, as here, the interest being served is that of preventing consumer deception, and the disclosure requirement is triggered by potentially misleading statements a commercial speaker has chosen to make that bear on who it is and the nature of its products and services. Statements that may mislead or confuse consumers are of concern regardless of whether they involve the terms of the proposed commercial transaction. If a commercial advertiser

chooses to use potentially misleading statements to sell its services, the state's interest in requiring purely factual disclosures to avoid possible deception—and the speaker's lack of a significant First Amendment interest in *not* providing such disclosures—does not depend on whether the potential for deception concerns the terms of the transaction or relates to other relevant matters, such as the nature of the product or services, the identity and characteristics of the company providing them, or the consumer's need to enter into the transaction. The applicable legal standard likewise should not turn on that distinction.

II. The disclosure requirement at issue is reasonably related to the substantial interest in preventing consumer deception.

Citing *NIFLA*'s statement that the government must establish that a disclosure requirement "plausibly furthers" a state interest in order to satisfy *Zauderer*'s reasonable-relationship standard, 138 S. Ct. at 2377, LPA asks the Court to reconsider its earlier conclusion that the disclosure requirements at issue here "are reasonably related to California's interest in preventing [consumer] deception." *Nationwide*, 873 F.3d at 735. *NIFLA*, however, did not change the law with respect to the showing required to sustain a disclosure requirement; rather, it relied on

longstanding precedents establishing that even under *Zauderer*'s relaxed scrutiny, a disclosure requirement cannot be "unjustified," 138 S. Ct. at 2377 (quoting *Zauderer*, 471 U.S. at 651), but must address "a harm that is 'potentially real, not purely hypothetical,'" *id.* (quoting *Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994)).

Applying that well-established standard, the Supreme Court's decisions have long made clear that when disclosures addressing potentially misleading statements are at issue, courts can apply common sense in determining whether statements have a tendency to mislead that is sufficient, as a matter of law, to support a disclosure requirement targeted to the potential for consumer deception or confusion. Thus, "'[w]hen the possibility of deception is … self-evident …, we need not require the State to "conduct a survey of the … public before it [may] determine that the [advertisement] had a tendency to mislead."'" *Milavetz*, 559 U.S. at 251 (quoting *Zauderer*, 471 U.S. at 652–53 (citation omitted)). Likewise, courts may treat the legislative record of disclosure legislation as "adequate to establish that the likelihood of deception … 'is hardly a speculative one.'" *Id.* (quoting *Zauderer*, 471 U.S. at 652).

Nothing in *NIFLA* casts any doubt on these principles. And both the panel in *Nationwide* and the district court in its subsequent dismissal order applied them faithfully in concluding that the disclosure requirements at issue are reasonably related to the state's interest in addressing a potential for confusion that, in *NIFLA*'s terms, "is 'potentially real, not purely hypothetical.'" 138 S. Ct. at 2377. As *Nationwide*'s reasoning demonstrates, this is a case, like *Zauderer* and *Milavetz*, where the potential for deception is self-evident: The *Nationwide* panel "had no difficulty in concluding that the disclosure requirements have a relationship to preventing deception," 873 F.3d at 734, given that the use of a lender's name and loan information could "lead a consumer to believe that the solicitation relates to a service offered by the lender or an affiliated party rather than an entirely separate entity" that is attempting to profit by interposing itself between the borrower and the lender, *id*. And the district court, in concluding that the statutes' justification is "more than 'purely hypothetical,'" ER0020 (quoting *NIFLA*, 138 S. Ct. at 2377), properly took account of the legislative record supporting the state's concern that consumers were being "inundated with solicitations" that sought to "trick" them by using

lenders' names and loan information, ER0019. The district court's references to the legislative record mirror the Supreme Court's determination in *Milavetz* that the legislative record of the statute before it was "adequate to establish" a non-speculative "likelihood of deception," 559 U.S. at 251.

Moreover, the disclosure requirements here do much more than "plausibly further[]" the state's interest in avoiding the potential for deception. *NIFLA*, 138 S. Ct. at 2377, They succinctly and directly dispel precisely the confusion that the use of lenders' names or logos, and loan information that consumers would reasonably believe came from their lenders, could otherwise generate. As the *Nationwide* panel put it, they are "short, accurate, and to the point." 873 F.3d at 735. LPA's quibble that the legislative history does not explicitly say that the "not authorized" part of the disclosure is necessary when a solicitation uses a lender's name or logo, even if it fairly characterized the history (*but see* Appee. Br. 26–28), would remain just that: a quibble. It falls far short of establishing that the disclosure is not reasonably related to the state's consumer-protection interest.

III. The disclosure requirement is not unduly burdensome.

California's statutes require a terse disclosure that need be no more prominent than the potentially misleading statements that trigger it. In *Nationwide*, this Court concluded that "the required disclosures are reasonable and not disproportionate," that "[t]hey clearly do not rule out Nationwide's ability to send its solicitation letters, effectively or otherwise," and that "[t]hey are therefore not unduly burdensome." 873 F.3d at 734. Nothing in the Supreme Court's decision in *NIFLA*, or this Court's en banc decision in *American Beverage*, undermines that conclusion.

The requirements that were held unduly burdensome in *NIFLA* and *American Beverage* are not remotely comparable to those here. In *NIFLA*, any advertisement by an "unlicensed" facility offering pregnancy-related services would trigger a lengthy notice, in larger text or contrasting type or color, in as many as 13 different languages. The Supreme Court concluded that the requirement would effectively rule out the possibility of some forms of advertising and drown out the facility's own message. 138 S. Ct. at 2378. In *American Beverage*, the required disclosure had to occupy 20% of the area of a covered advertisement and

be set off by a contrasting rectangular border—requirements that this Court concluded could drown out an advertiser's message, effectively rule out the use of advertisements covered by the requirement, and "chill[] protected speech." 916 F.3d at 757.

The few words that California's disclosure requirement would require LPA to add to its letters (in the same typeface and without any intrusive formatting) impose no similar obstacle to LPA's ability to write letters attempting to convince homeowners of the claimed benefits of its services. Even if LPA's assertion that it might have to use as many as five disclaimers is correct (because its letters and envelopes contained multiple instances of the triggering language), those disclosures hardly threaten to drown out its message in the same way that the disclosures in *NIFLA* and *American Beverage* were found to overwhelm the advertising to which they applied.

Seeking to play a trump card, however, LPA claims that its speech has been burdened because it says it will *choose* not to use the language that triggers the disclosure requirements, and thus the requirements must be viewed as "essentially operat[ing] as a restriction on constitutionally protected speech." LPA Br. 34 (quoting *Am. Meat Inst. v.*

U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014)). LPA's attempt to convert the statute from a disclosure requirement to a prohibition on speech through its own unilateral advertising choices, however, is unconvincing.

The "chilling effect" that LPA cites is based on its subjective perception that statutes straightforwardly requiring a disclosure that is "short, accurate, and to the point," *Nationwide*, 873 F.3d at 716, under clearly specified circumstances, are in fact hopelessly vague and ambiguous. But a plaintiff cannot manufacture a "chilling effect" based on unreasonable fears. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417–18 (2013). LPA's suppositions that the statutes might penalize it even if it were to attempt in good faith to comply with them—which it does not claim it has ever done—provide no credible basis for its assertion that the statutes effectively require it to cease using its preferred language. LPA's assertion that it fears that compliant letters it has not in fact attempted to use would subject it to liability rings particularly hollow because it discounts altogether the possibility that LPA could work with California authorities to ascertain whether particular disclosures would comply with the statutes.

Moreover, even assuming that LPA has in fact ceased to use the triggering language rather than comply with the accompanying disclosure requirements, its action does not reflect any significant burden on its ability to convey its advertising message. Unlike the plaintiffs in *American Beverage*, who submitted evidence that some advertisers would cease advertising in regulated media altogether as a result of the disclosure requirements they claimed were burdensome, *see Am. Beverage*, 916 F.3d at 761 (Ikuta, J., concurring), LPA claims only that it has stopped using the potentially deceptive language that the disclosure requirements address, not that it has stopped sending solicitation letters. ER0038. Thus, it cannot show that the law, as in *NIFLA*, "'effectively rules out' the possibility" of conveying its message. 138 S. Ct. at 2378. LPA's ability to tout the purported benefits of its services remains unimpeded.

This case is thus nothing like *Ibanez*, where a burdensome disclaimer requirement prevented an advertiser from providing truthful, nonmisleading, and potentially valuable information to consumers. See 512 U.S. at 146–47. Instead, LPA has claimed, at most, that it prefers to stop using language with an obvious potential to mislead consumers

rather than continue using it while providing the purely factual disclosures that the state has reasonably crafted to counter the possibility of consumer deception. That choice implicates genuine First Amendment interests minimally, if at all, and does not suggest an undue burden under *Zauderer*.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court.

Respectfully submitted,

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August 23, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 4,887, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on August 23, 2019, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including representatives of all parties required to be served.

/s/ Scott L. Nelson
Scott L. Nelson