No. 17-976

IN THE
Supreme Court of the United States

CTIA — THE WIRELESS ASSOCIATION®,
Petitioner,
v.

CITY OF BERKELEY, CALIFORNIA and
CHRISTINE DANIEL, City Manager of Berkeley,
California, in Her Official Capacity,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has litigated frequently in support of the speech rights of market participants, appearing in numerous federal courts in cases raising commercial speech issues. *See, e.g. IMS Health, Inc. v. Sorrell*, 564 U.S. 552 (2011); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). In particular, WLF has litigated regularly in opposition to government efforts to compel speech. *See, e.g., American Beverage Ass'n v. City and County of San Francisco*, 871 F.3d 884 (9th Cir. 2017), *reh. en banc granted*, 880 F.3d 1019 (9th Cir. 2018); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

WLF is concerned that, unless the decision below is overturned, state and local governments will possess largely unchecked authority to require speech by commercial entities without regard to whether the compelled speech serves a substantial government interest, whether the speech is designed to prevent

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to filing this brief, WLF notified counsel for Respondent of its intent to file. All parties have consented to the filing; blanket letters of consent are on file with the clerk.

deception of consumers, or whether it qualifies as uncontroversial. No decision from this Court has ever condoned such expansive authority.

The Petition fully documents the confusion exhibited by lower courts in applying this Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and demonstrates the need for review in order to resolve the sharp conflict between the Ninth Circuit's decision and the decisions of other federal appeals courts. WLF writes separately to urge that review be granted because the decision below is based on a misreading of *Zauderer* and is fundamentally at odds with the constitutional protections that this Court has long afforded to commercial speakers.

STATEMENT OF THE CASE

An ordinance adopted by Respondent City of Berkeley requires cell phone retailers to speak when they would prefer to remain silent. The Ordinance, Section 9.96.030(A) of the Municipal Code, requires retailers to provide cell phone customers a lengthy "notice" regarding cell phone safety. Petitioner CTIA, whose members include cell phone manufacturers and retailers, objects to the mandated Notice because (in its view) the Notice conveys a misleading message: that normal cell phone usage is unsafe. CTIA's facial challenge contends that the Ordinance violates the First Amendment because Berkeley cannot demonstrate that its speech regulation directly advances a substantial governmental interest in a narrowly tailored manner.

After Berkeley amended the Ordinance to eliminate language regarding children's safety from the mandated Notice, the district court held that CTIA was not entitled to a preliminary injunction against enforcement of the Ordinance. Pet. App. 44a-62a. The court held that less exacting First Amendment review is warranted when a government seeks to *compel* speech by a commercial entity than when it seeks to *restrict* commercial speech. *Id.* at 50a. It held that the Notice was constitutionally permissible because it satisfied *Zauderer*'s "factual and uncontroversial" requirement, *id.* at 56a-60a, and because it furthered Berkeley's "substantial" government interest in ensuring consumer safety. *Id.* at 60a.

A divided Ninth Circuit panel affirmed. Pet. App. 1a-43a. The majority agreed with the district court's conclusion that commercial entities enjoy lesser First Amendment protection against compelled speech than against speech restrictions. *Id.* at 17a-18a. Although this Court held in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), that commercial speech regulation is subject to "intermediate" First Amendment scrutiny, the Ninth Circuit cited *Zauderer* for the proposition that a commercial entity's "constitutionally protected interest in *not* providing any particular factual information is minimal." *Id.* at 18a (quoting *Zauderer*, 471 U.S. at 651).

The Ninth Circuit held that "under *Zauderer* the prevention of consumer deception is not the only governmental interest that may permissibly be furthered by compelled commercial speech." Pet. App. 21a. It concluded that "*any* governmental interest will

suffice" so long as it is "substantial"—a term the court defined to mean a "more than trivial ... government interest." *Ibid* (emphasis added). The court stated that to pass First Amendment scrutiny, any compelled disclosure must be "purely factual," but it held that *Zauderer*'s reference to "uncontroversial" disclosures added nothing to the "factual" requirement: "'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience." *Id.* at 22a.

The court concluded that the Notice mandated by Berkeley satisfied the First Amendment test outlined above. Pet. App. 23a. It held that the Notice is "reasonably related to a substantial government interest" in protecting the health and safety of consumers, *id.* at 23a-25a, and is "factual accurate." *Id.* at 26a-29a. It rejected CTIA's contention that the Notice is "inflammatory" and is likely to mislead consumers, and noted that any retailer who believes that the Notice is misleading "may add to the compelled disclosure any disclosure it sees fit to add." *Id.* at 29a.

Judge Friedland dissented. Pet. App. 39a-43a. She concluded, "Taken as a whole, the most natural reading of the disclosure warns that carrying a cell phone in one's pocket is unsafe. Yet Berkeley has not attempted to argue, let alone to prove, that message is true." *Id.* at 39a. She asserted that Berkeley's compelled speech violated the First Amendment in the absence of evidence that the speech was truthful. *Id.* at 42a. In light of that conclusion, she deemed it unnecessary to address the precise contours of *Zauderer*. She stated, "If nevertheless I were to

consider the extent of *Zauderer*'s applicability, ... I would be inclined to conclude that *Zauderer* applies only when the government compels a truthful disclosure to counter a false or misleading advertisement." *Id.* at 41a n.2.

Judges Friedland and Wardlaw both voted to grant the petition for rehearing *en banc*. In an opinion dissenting from the denial of rehearing *en banc*, Judge Wardlaw stated, "The panel majority's holding that the government can compel a private entity to disclose 'factual' and 'uncontroversial' information with only a tenuous link to a 'more than trivial' government interest is quite troubling." Pet. App. 130a. Decrying what she viewed as overly deferential review of government compelled speech, Judge Wardlaw asserted, "The government is not allowed to compel disclosures to shape consumer behavior to its own design, particularly when governments have other powerful means, such as taxation, market regulation, and education efforts, to advance their interests." *Id.* at 129a.

SUMMARY OF ARGUMENT

The Petition raises issues of exceptional importance. For the past four decades, this Court has consistently held that the First Amendment requires very close scrutiny of any government regulation of commercial speech. The Ninth Circuit has now concluded, however, that the close-scrutiny requirement applies to only one-half of such regulation: when the government is seeking to restrict commercial speech. It held that commercial entities have virtually no First Amendment rights to resist orders that they

utter "factual" speech composed by the government, and that such orders are subject to review under an easy-to-satisfy rational-basis standard. Review is warranted because that holding conflicts sharply with this Court's First Amendment case law and because Berkeley's Ordinance very likely would not pass constitutional muster if examined under the "intermediate" standard of review that this Court has traditionally applied to commercial speech regulation.

No party to these proceedings disputes that the government is entitled to adopt broadly applicable laws that require sellers to disclose truthful, uncontroversial information about their goods and services so that consumers are not misled by a seller's advertisements. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). But the information that Berkeley is requiring cell phone retailers to convey cannot plausibly be viewed as information designed to prevent deception of consumers. As this Court has recognized, the somewhat-relaxed review standard articulated by *Zauderer* for government-imposed disclaimer requirements is wholly inapplicable when, as here, the disclaimer is not aimed at preventing consumer deception.

This is not to say that the government is barred from compelling commercial speech for the purpose of promoting public health and safety. Rather, the point is that any such compelled speech must pass constitutional muster under a review standard at least as stringent as the intermediate standard articulated

in *Central Hudson*.[2]

The Ninth Circuit's adoption of a far more lenient review standard was based on a fundamental misunderstanding of *Zauderer*. That decision is best understood as a special application of *Central Hudson* to a particular type of case: cases in which the government has a substantial interest in preventing misleading commercial speech but in which, instead of banning the speech altogether, it seeks to advance its substantial interest by requiring the commercial speaker to append disclaimers that minimize the possibility that consumers will be misled.

Under those circumstances, *Zauderer* directs that the third and fourth prongs of the *Central Hudson* test (direct advancement and narrow tailoring) are met so long as the government limits its compelled speech to "purely factual and uncontroversial information" about goods and services being offered for sale. *Zauderer*, 471 U.S. at 651. In other word, if those requirements are met, courts should not closely parse the precise wording mandated by the government in its efforts to render the commercial speech nonmisleading. *Id.* at 651 & n.14 (stating that "we do not think it

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[2] *Central Hudson* adopted a four-prong test to be applied by courts in evaluating First Amendment challenges to commercial-speech restrictions. First, courts consider whether the commercial speech is either inherently misleading or related to an unlawful activity. If not, the government may regulate the speech only upon a showing that: (2) the government has a substantial interest that it seeks to achieve; (3) the regulation directly advances the asserted interest; and (4) the regulation serves that interest in a narrowly tailored manner. *Central Hudson*, 447 U.S. at 566.

appropriate to strike down [disclosure] requirements merely because other possible means by which the State might achieve its purposes can be hypothesized"). When, as here, the compelled speech is not designed to prevent consumer deception, *Zauderer* is inapposite. Nothing in *Zauderer* supports the Ninth Circuit's conclusion that this Court's longstanding recognition of the constitutional right to remain silent is somehow inapplicable to commercial entities.

Zauderer is inapposite for the additional reason that Berkeley's compelled speech does not qualify as "purely factual and uncontroversial information." 471 U.S. at 651. The Ninth Circuit interpreted *Zauderer*'s "factual and uncontroversial" language as requiring only that compelled speech be "purely factual," thereby writing the word "uncontroversial" out of the equation. That constricted interpretation cannot be squared with *Zauderer* and other decisions of this Court.

Under any plausible interpretation of the word, the mandated Notice includes language that qualifies as "controversial." As Judge Friedland pointed out, "Taken as a whole, the most natural reading of the disclosure warns that carrying a cell phone in one's pocket is unsafe." Pet. App. 39a. Even if such a warning could be classified as a statement of scientific opinion (and thus arguably not subject to the prohibition against factually untrue statements), it is indisputably controversial—particularly in light of the broad number of respected scientific groups (including the Federal Communications Commission) that disagree with the warning. Moreover, it is irrelevant that Berkeley states that it does not interpret its Notice as asserting that carrying a cell phone in one's

pocket is unsafe. Because many consumers will reasonably interpret the Notice as making such an assertion, Berkeley's compelled speech is "controversial" and thus not entitled to the relaxed First Amendment review standard set forth in *Zauderer*.

The Ninth Circuit misinterpretation of *Zauderer* cannot be dismissed as harmless error. Because *Zauderer* is inapplicable to this case, the appeals court should have examined CTIA's claims under a First Amendment standard at least as stringent as the "intermediate scrutiny" standard set forth in *Central Hudson*. CTIA's evidence strongly suggests that Berkeley could satisfy neither the third prong (direct advancement of its substantial government interest) nor the fourth prong (narrowly tailoring) of the *Central Hudson* test. Accordingly, review is warranted to resolve the substantial conflict between the decision below and this Court's First Amendment case law.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASE LAW RECOGNIZING THE RIGHT TO REMAIN SILENT

The First Amendment protects not only freedom of speech, but also the freedom not to speak. *Wooley v. Maynard*, 430 U.S. 705, 713-715 (1977) (upholding right to refuse to display state motto, "Live Free or Die," on automobile license plate); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (upholding right to refuse to recite Pledge of Allegiance). The right not to speak extends to businesses too, even when the

compelled speech focuses explicitly on their commercial dealings. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (barring compelled financial support of mushroom advertising campaign to which the plaintiff objected based on its content).

Although the Court has stated that commercial speech—that is, speech that does no more than propose a commercial transaction—is afforded a somewhat lower level of First Amendment protection than is speech that is noncommercial in character, it has consistently held that commercial speech is nonetheless entitled to a substantial degree of constitutional protection. *See, e.g., Central Hudson*, 447 U.S. at 562-63; *Thompson v. Western States Medical Ctr.*, 535 U.S. 357 (2002). In sharp conflict with the Court's consistent support of the First Amendment rights of commercial speakers, the court below held that such speakers possess virtually no rights to resist mandates that they convey messages crafted by the government. The Ninth Circuit held that laws compelling speech by commercial entities are subject to review under a standard akin to the extremely lenient rational-basis review standard routinely applied to government economic regulation. Pet. App. 17a.

WLF agrees with CTIA that review is warranted to resolve the sharp conflict among the federal appeals courts regarding the proper standard for reviewing constitutional challenges to compelled commercial speech. WLF writes separately to urge that review is also warranted to resolve the sharp conflict with the decision below and this Court's compelled-commercial-speech case law. That latter conflict derives almost

entirely from the Ninth Circuit's misunderstanding of this Court's *Zauderer* decision.

A. *Zauderer* Strongly Affirmed the Broad First Amendment Protections Afforded to Commercial Speakers

The Ninth Circuit misinterpreted *Zauderer* by ignoring the context within which it arose. The case was a largely successful First Amendment challenge to Ohio's efforts to impose significant restrictions on truthful attorney advertising. Applying the four-part *Central Hudson* test, the Supreme Court struck down prohibitions on soliciting legal business through advertisements containing advice and/or information regarding specific legal problems, *Zauderer*, 471 U.S. at 639-47, and restrictions on the use of illustrations in attorney advertising. *Id*. at 647-49.

The appeals court relied on *Zauderer*'s final section, which upheld Ohio's decision to discipline an attorney because he ran an advertisement that offered services on a contingency-fee basis without simultaneously disclosing that clients could be liable for litigation costs should they lose their case. *Id*. at 650-52. This Court concluded that by imposing discipline on the attorney, Ohio was directly advancing its "substantial interest" in preventing consumer misunderstandings; it noted that in the absence of a disclaimer regarding court costs, it was "self-evident" that consumers might erroneously conclude that retaining an attorney to file a lawsuit on a contingency-fee basis could never cost the consumer any money. *Ibid.*

Zauderer recognized that requiring an attorney to include a disclaimer in his advertising is a form of compelled speech that is subject to First Amendment protection without regard to whether the speech is commercial or noncommercial.[3] But in the commercial-speech context, the Court concluded that requiring a company to include in its advertisement a government-mandated disclaimer designed to prevent consumer deception is preferable to prohibiting the advertisement altogether:

> In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

Id. at 650.

Having concluded that Ohio was warranted in requiring a disclaimer as a more-narrowly-tailored alternative to an outright speech ban, the Court cautioned against close scrutiny of the disclaimer's

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[3] Indeed, the Court noted that government orders directing one to speak against one's will are often subject to more exacting First Amendment review than speech restrictions. *Id.* at 650 ("involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.") (quoting *Barnette*, 319 U.S. at 633).

precise wording, so long as it was not "overly burdensome": "[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to *the State's interest in preventing deception of consumers*." *Id.* at 651 (emphasis added).

That limited "hold[ing]" cannot be understood as an endorsement of the Ninth Circuit's wider view that government *compulsion* of commercial speech deserves less First Amendment scrutiny than *restrictions* on commercial speech. Ohio was only compelling speech in the limited sense that it required attorneys wishing to advertise their services to include additional language "to dissipate the possibility of consumer confusion or deception." *Id.* at 651. In other words, *Zauderer* explained, it is preferable for the government to require speech to be accompanied by disclaimers rather than to ban speech altogether in those instances in which (in the absence of a disclaimer) it is potentially misleading.[4]

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[4] Thus, as the D.C. Circuit has recognized, *Zauderer* and *Central Hudson* apply precisely the same standard of review to commercial speech regulation. *Zauderer* simply involves application of the *Central Hudson* test to a specific form of speech regulation: government efforts to prevent consumer deception by mandating that any advertising be accompanied by a disclaimer as an alternative to banning the advertisement altogether. *Am. Meat Inst. v. U.S. Dep't of Agriculture*, 760 F.3d 18, 26-27 (D.C. Cir. 2014) (*en banc*). The D.C. Circuit explained:

> To the extent that the government's interest is in assuring that consumers receive particular information (as it plainly is when mandating disclosures that prevent deception), the means-end

Zauderer provides no support for the Ninth Circuit's conclusion that Berkeley is entitled to require merchants to convey virtually any "factual" speech of the City's choosing to their customers—even when the compelled speech is not designed to dissipate the potential for consumer confusion and even when the merchants wishes not to speak at all (*i.e.*, the merchant cannot avoid the compelled speech by withdrawing an advertisement to which the speech must be appended). Pet. App. 17a (holding that the compelled disclosures need only be "reasonably related to a substantial government interest"). The Ninth Circuit's standard imposes virtually no limits on the government's power to compel merchants to convey its messages. For example, Berkeley would be permitted to require *all* merchants to post the following statement: "Regular exercise improves one's health." That statement is "factual" and is undoubtedly "reasonably related" to the City's substantial interest in public health and safety, but a statute mandating its display is utterly inconsistent with the Court's recognition of the First Amendment right to remain silent.

> fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose "purely factual and uncontroversial information" about attributes of the product or service being offered. In other words, [*Zauderer* instructs that] this particular method of achieving a government interest will almost always demonstrate a reasonable means-ends relationship.

Id. at 26.

B. Subsequent Case Law Confirms that the *Zauderer* Standard Applies Only to Compelled Speech Designed to Prevent Consumer Deception

In the 33 years since *Zauderer*, this Court has never suggested that the standard of review described above applies outside the context of compelled speech designed to prevent consumer deception. Indeed, applying that standard broadly and thereby depriving advertisers of virtually all protection against compelled commercial speech is inconsistent with the Court's rationale for granting commercial speech somewhat reduced (but still considerable) First Amendment protection.

Thus, in *Milavetz*, the Court considered a First Amendment challenge to a federal statute that requires attorneys and other professionals providing debt-relief and bankruptcy assistance to include in any advertisements disclosures designed to prevent consumers from being misled regarding the nature of services being offered. The Court upheld the statute, finding that *Zauderer* set forth the appropriate standard of review—a standard it described as follows: "[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to *the State's interest in preventing deception of consumers*." *Milavetz*, 559 U.S. at 250 (emphasis added) (quoting *Zauderer*, 471 U.S. at 651).

In *Ibanez v. Fla. Dep't of Bus. & Professional Reg.*, 512 U.S. 136, 146 (1994), the Court relied on *Zauderer* to invalidate Florida's efforts to require an attorney to attach a disclaimer to an advertisement

announcing her status as a Certified Financial Planner (CFP). The Court held that a disclaimer requirement does not pass First Amendment muster when, as in *Ibanez*, the government can point to no evidence of consumer deception that is "potentially real, not purely hypothetical." *Ibid*. Had the Court in *Ibanez* shared the Ninth Circuit's understanding of *Zauderer*, the Court would have upheld the disclaimer Florida sought to mandate (a truthful statement that CFP status was not sanctioned by Florida or the federal government) even in the absence of evidence of consumer deception.

The Ninth Circuit's interpretation of *Zauderer* also conflicts with *United Foods*. In that case, the Court held that the federal government, by compelling commercial mushroom growers to finance a mushroom-promotion campaign to whose content they objected, violated the growers' First Amendment protections against compelled commercial speech. 533 U.S. at 413-16. The Court distinguished *Zauderer* solely on the ground that the compelled speech in *Zauderer* was designed to prevent consumer deception, while "[t]here is no suggestion in the case before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers." *Id.* at 416.

The appeals court's conclusion that merchants enjoy virtually no protection against compelled commercial speech is inconsistent with the rationale articulated by the Supreme Court over the past 40 years regarding why commercial speech is entitled to somewhat reduced (but still considerable) First Amendment protection. In explaining its decision to

afford the government more leeway in its regulation of commercial speech, the Court has stated that "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 499-500 (1996) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976)). That justification has very limited relevance to government efforts to *compel* speech, except in those instances in which the government contends that the compelled speech is necessary to prevent consumer deception. When, as here, the government is seeking to compel speech for reasons unrelated to preventing consumer deception, "the greater objectivity of commercial speech" does not provide a logical basis for distinguishing between constitutional protections afforded to commercial and noncommercial speakers.

Indeed, the Ninth Circuit articulated no rationale for failing to afford commercial entities the same protections against compelled speech that are afforded to all other citizens. The First Amendment provides a reduced level of protection to speech that "does no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy*, 425 U.S. at 762. But a merchant that wishes to remain silent is not thereby proposing a commercial transaction.

In sum, applying rational-basis review to all compelled commercial speech is supported by neither this Court's case law nor the rationale underlying commercial-speech doctrine. Instead, outside the limited *Zauderer* context, compelled speech must pass constitutional muster under a review standard at least

as stringent as the intermediate standard articulated in *Central Hudson*. A large number of disclosure requirements routinely imposed on the business community (*e.g.*, requirements that consumer product labels list all ingredients) can meet that standard with no difficulty. But there is strong reason to doubt that Berkeley could satisfy either the "directly advance" or the "narrowly tailored" prongs of the four-part *Central Hudson* test. Review is warranted to resolve the sharp conflict between the decision below and this Court's commercial speech case law.

II. REVIEW IS WARRANTED TO CLARIFY THAT LAWS COMPELLING MISLEADING AND CONTROVERSIAL SPEECH FURTHER NO LEGITIMATE GOVERNMENT INTEREST

A. The Berkeley Ordinance's Compelled Disclosure Is Misleading and Controversial

Sometimes, "determining whether a disclosure is 'uncontroversial' may be difficult." *Am. Meat Inst.*, 760 F.3d at 34 (Kavanaugh, J., concurring in the judgment). That is *not* a problem in this case. Under any plausible interpretation of the word, the City's mandated Notice qualifies as "controversial." The Berkeley Ordinance requires all cell-phone retailers within the City to post or disseminate the following statement to its customers:

> 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 about how to use your phone safely.

Berkeley Municipal Code § 9.96.030(A). Given the clear scientific consensus on cell phone safety, that statement is not only incredibly misleading but highly controversial.

As the record shows, the FCC has concluded "that any cell phone legally sold in the United States is a 'safe' phone" no matter how it is used. *Farina v. Nokia, Inc.*, 625 F.3d 97, 105 (3d Cir. 2010). Indeed, FCC regulations limit the amount of RF energy that cell phones may produce based on the recommendations of "expert organizations and federal agencies with responsibilities for health and safety." *In re Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 12 F.C.C. Rcd. 13,494, 13,505 (Aug. 25, 1997). Those "exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed." *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3498, 3582 (Mar. 29, 2013).

As petitioner persuasively argues: "By warning consumers about 'how to use your phone safely' and using alarming terms such as 'exposure' and 'radiation,' the ordinance conveys (and certainly *potentially* conveys) to regular people the message that

there are *unsafe* ways to use a cell phone." Pet. at 34. Moreover, it is irrelevant that Berkeley contends that it does not interpret its Notice as asserting that carrying a cell phone in one's pocket is unsafe. What matters is that many consumers will understandably interpret the Notice as making precisely that assertion. Far from being "purely factual and uncontroversial," as *Zauderer* expressly requires, the City's mandated warning is itself misleading.

The Ninth Circuit's answer to this manifest deficiency leaves much to be desired. Rather than carefully consider how the City's mandated message would be perceived by the average reader when read in full context, the Ninth Circuit panel majority undertook a "sentence-by-sentence" analysis of whether each statement in the disclosure was "literally true." Pet. App. 26a. Concluding that each of the City's three compelled statements was "technically correct," the panel majority affirmed the district court's dissolution of the preliminary injunction. *Id.* at 26a, 37a-38a.

But that blinkered, hermetically sealed approach to "truth" was squarely rejected by *Zauderer* itself. Remember, every sentence of the attorney's advertisement at issue in *Zauderer* was "technically true." Among other things, that advertisement informed members of the public that "if there is no recovery, no legal fees are owed by our clients." 471 U.S. at 652. While that statement was undeniably true in every respect, the "possibility of deception" was "self-evident":

> The advertisement makes no mention of the distinction between "legal fees" and

> "costs," and to a layman not aware of the meaning of those terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge.

Id. The *Zauderer* Court ultimately sustained the government's argument "that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs." *Id.* at 653.

Here, even under the Ninth Circuit's own watered-down construction of *Zauderer*, there can be little question that the statement mandated by the Berkeley ordinance is neither uncontroversially accurate nor nonmisleading. To the contrary, the mandated disclosure creates a misapprehension among retail customers that cell phones are potentially dangerous to use, even though the overwhelming consensus of health and safety authorities, including the FCC, has determined that they are not. As Judge Friedland noted in her dissent, the panel majority's "approach" of "pars[ing] the[ ] sentences individually and conclud[ing] that each is 'literally true' ... misses the forest for the trees." Pet. App. 40a.

Above all, this Court has never upheld under the First Amendment a regulation compelling a disclosure that fails *Zauderer*'s "purely factual and uncontroversial" standard. While the City's mandated disclosure may accurately convey a majority of the Berkeley City Council's subjective opinion and

impressions, this Court has long recognized that "[d]eception may result from the use of statements not technically false or which may be literally true." *United States v. Ninety-Five Barrels More or Less Alleged Apple Cider Vinegar*, 265 U.S. 438, 443 (1924). This is just such a case.

B. Under the First Amendment, No Government Interest Justifies Compelling Misleading or Factually Controversial Speech

Outside the narrow context of providing "purely factual and uncontroversial information" to consumers who may be deceived otherwise, "[n]othing in *Zauderer* suggests *** that the State is equally free to require corporations to carry messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15 n.12 (1986). For that very reason, when "[t]here are divergent views regarding" an issue of public debate, "'the general rule is that the speaker and the audience, not the government, assess the value of the information.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

When the government compels disclosure of misleading or factually controversial messages, the value of that speech to consumers is less than zero. In such cases, the forced disclosure itself constitutes a significant constitutional and commercial harm. "If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this

speech regulation is defeated." *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

The City's claimed purpose for the ordinance is to provide consumers with "the information they need to make their own choices." Berkeley Municipal Code § 9.96.030(A). As a threshold matter, however, *Central Hudson* and its progeny do not recognize a legitimate governmental interest in regulating private commercial speech for that purpose. And the notion that misleading and controversial warnings are somehow appropriate because the City's leaders are frustrated with the continued success of cell phones in the marketplace finds even less support in this Court's First Amendment precedents. If allowed to stand, that limitless principle would permit government regulators to impose public service advertisements on virtually any good or service marketed in interstate commerce under the guise of providing "information" to consumers.

Further, this Court's decision in *Sorrell* emphatically rejects the notion that the government has the right to undermine persuasive commercial speech by altering the speaker's message to the government's liking, much less by overwhelming the prospective consumer with a government-imposed message that effectively states or implies: "think before you buy this product, it *might* give you cancer." Like the prohibition at issue in *Sorrell*, the City's regulation here has nothing to do with prohibiting retailers from conveying false or misleading information about their products, but rather it has everything to do with influencing public opinion by persuading consumers

not to purchase goods about which the government has reservations.

So while the government arguably is entitled to compel the disclosure of a product's undisputed country of origin, *Am. Meat Inst.*, 760 F.3d at 27, or to require an attorney to inform his or her contingency-fee clients that they will incur costs instead of fees, *Zauderer*, 471 U.S. at 653, it follows that *no* First Amendment justification exists for compelling speakers to convey the government's false, misleading, or factually controversial message. Simply put, "the State has no legitimate reason to force retailers to affix false [or misleading] information on their products." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011); *see R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (holding that a compelled disclosure fails First Amendment scrutiny if it "could be misinterpreted by consumers").

Under the City's untethered theory, there is no end to the "disclosures" the government could require of any disfavored product. Of course, the City is perfectly free to embrace controversy in crafting its *own* advocacy messaging. But "[it] may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578. "If the law were otherwise, there would be no end to the government's ability to skew public debate by forcing companies to use the government's preferred language." *Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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