No. 17-976

In the Supreme Court of the United States

CTIA – THE WIRELESS ASSOCIATION®,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), this Court held that a disclosure requirement applicable to commercial speech does not violate the First Amendment if it is not unduly burdensome and is reasonably related to the State's interest – in that case, in preventing consumer deception. In the decision below, the court of appeals held that a requirement that cell phone retailers disclose information about Federal Communications Commission safety standards was constitutional under the *Zauderer* standard. This case presents the following questions:

1. Whether *Zauderer* applies beyond disclosures aimed at avoiding consumer deception, as every court of appeals to consider the question has held.

2. When *Zauderer* applies, whether its standard is met if the required disclosure is factually accurate and related to a substantial governmental interest.

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STATEMENT OF THE CASE

The Federal Communications Commission (FCC) has established safety limits for the radiofrequency (RF) radiation that cell phones emit. As part of that regulatory regime, the FCC requires cell phone manufacturers to include within their user manuals information about the minimum separation distances appropriate for their device, so as to enable consumers to select "accessories that meet the minimum test separation distance requirements" for RF radiation exposure and thereby avoid exceeding the federally mandated RF exposure limits. Pet. App. 68a-70a; *id.* at 11a-13a. This information must be "clearly disclosed to users, through conspicuous instructions," so as to assure that, as the FCC directs, "unsupported operations are avoided." *Id.* at 13a. Neither Petitioner nor anyone else has challenged the constitutionality of the FCC disclosure mandate.

Through survey research, the City of Berkeley determined that its residents were unaware of the information within this mandated FCC disclosure. *Id.* at 24a. It therefore passed an ordinance to direct retailers "to disclose, in summary form, the same information to consumers that the FCC already require[d] cell phone manufacturers to disclose," and to "direct[] consumers to user manuals for more specific information." *Id.* at 16a.[1]

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[1] As amended, the ordinance requires cell phone retailers to provide consumers with the following statement:

Berkeley's interest in mandating this disclosure is precisely the same as the FCC's: to give its residents the facts they would need to avoid exceeding the federal RF exposure limits – if they so choose. Those exposure limits are, as the court below found and as the FCC states, "safety" standards. Pet. App. 8a-15a. Those safety standards "includ[e] a significant 'safety' factor." Pet. App. 11a (quoting FCC rules).[2] Because of that safety factor, cell phones in the United States are, as the FCC has called them, "safe." Pet. 29 (quoting Pet. App. 41a (Friedland, J., dissenting)).

> The City of Berkeley requires that you be provided the following notice:
>
> To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Berkeley Mun. Code § 9.96.030(A) (2015); Pet. App. 134a-135a.

[2] A "safety factor" refers to the multiple beyond certain or proven risks that any safety standard incorporates. For example, if an elevator is designed to lift 11,900 lbs., a safety factor of 11.9 would require that the stated load limit be set at 1,000 lbs. Because of the safety factor, users of the elevator would be told the "maximum load" is 1,000 lbs., even though the design would permit a load of up to 11,900 lbs. *See IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz*, IEEE Std. C95.1-2005, at 114 ("The term 'safety factor' is commonly interpreted to be the ratio of an exposure level causing an adverse effect to the corresponding allowable exposure limit.").

Berkeley's interest in enacting its regulation is therefore not to avoid consumer deception. Its purpose is informational. In this respect, and as Petitioner's brief notes, Pet. 36-37, the ordinance is supremely ordinary. Like thousands of such informational disclosure requirements established by governments of every kind, its central purpose is to increase the flow of factual information into a consumer marketplace, to better enable consumer choice. Like nutrition and ingredient labels, drug side-effect and interaction disclosures, or elevator safety warnings, Berkeley's ordinance gives consumers information that consumers could reasonably want to know – even if, as with nutrition labels or drug side-effect warnings, the entity required to provide that information would often prefer not to do so.

Asserting a constitutional right to remain silent – a right expressly rejected by this Court in the context of commercial speech, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) ("the interests at stake in this case are not of the same order as those discussed in *Wooley, Tornillo*, and *Barnette*") – Petitioner challenged Berkeley's ordinance. Applying *Zauderer* and *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010), the district court rejected Petitioner's First Amendment claim.[3] Pet. App. 44a-62a.

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[3] Petitioners also challenged Berkeley's ordinance on grounds of preemption. Pet. App. 30a-34a. Petitioner has not sought review of that issue.

A divided court of appeals affirmed the district court judgment, Judge Friedland dissenting. Pet. App. 2a-3a. Judge Fletcher, writing for the panel, reviewed the regulatory background of the Berkeley requirement – specifically, that Berkeley was requiring "the same information . . . that the FCC already requires cell phone manufacturers to disclose." Pet. App. 16a. Following the "unanimous[]" conclusion of sister circuits, the court held that *Zauderer*'s reasoning applied beyond the context of consumer deception. Pet. App. 19a. Between requiring a "substantial" or "less-than-substantial" interest, the court required the State demonstrate a "substantial" interest. Pet. App. 21a. The court further required that the mandated disclosure be "factual" and "uncontroversial" in the sense that the factual disclosure must be "accurate." Pet. App. 22a. Applying this standard – that "the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial governmental interest," Pet. App. 17a (citing *Zauderer*) – the court upheld the ordinance.

The court held that the ordinance advanced a "substantial" interest: the ordinance addressed the health and safety of consumers – clearly a "substantial" interest under this Court's jurisprudence, Pet. App. 21a; the FCC had mandated the disclosure of the "same" information by cell phone manufacturers; and based on that FCC action, the court could not "disagree . . . that this compelled disclosure is 'reasonably related' to

protection of the health and safety of consumers." Pet. App. 25a.

The court held that the disclosure was "factual and uncontroversial": the disclosure was "true," Pet. App. 26a, 27a; and it was neither inflammatory nor misleading but instead "reassuring," because it "assures consumers that . . . cell phones . . . meet federally imposed safety guidelines" and informs consumers how they might avoid "exceeding [those] federal guidelines." Pet. App. 28a. The court rejected Petitioner's argument that the phrase "RF radiation" – the phrase used by the FCC itself to refer to the radiofrequency emissions from cell phones – was inflammatory. The court recognized that the ordinance expressly invited retailers to add information they thought necessary to clarify the disclosure. The court observed that petitioner had provided no evidence that any retailer thought any clarification "necessary, or even useful." Pet. App. 29a. Nor did Petitioner provide "any evidence in the district court showing how Berkeley consumers have understood the compelled disclosure, or evidence showing that sales of cell phones in Berkeley were, or are likely to be, depressed as a result of the compelled disclosure." *Id.*

The Ninth Circuit denied rehearing en banc. Pet. App. 122a-31a. Judge Wardlaw alone dissented from the denial. Pet. App. 127a-31a.

REASONS FOR DENYING THE WRIT

The courts of appeals have achieved remarkable consensus about the scope and reach of the doctrine announced by this Court in *Zauderer* and confirmed in *Milavetz*. There is no split among the circuits upon any issue material to the disposition of this case. To the extent there are open questions in the doctrine, this case would be a poor vehicle for resolving them. Finally, the radical change in law that Petitioner advocates would impose substantial burdens on federal, state and local regulators while serving no genuine First Amendment interests.

I. THERE IS NO SPLIT IN THE CIRCUITS ON WHETHER *ZAUDERER*'S REASONING EXTENDS BEYOND DECEPTION

In *Zauderer*, this Court held that a commercial speaker's free speech "rights are adequately protected" so long as any disclosure requirement is (1) not "unjustified or unduly burdensome" so as to "chill[] protected commercial speech" and (2) "reasonably related to the State's interest" – in that case, in preventing consumer deception. 471 U.S. at 651; *see also Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010).

Contrary to Petitioner's suggestion, there is no circuit split over whether *Zauderer* applies beyond its facts. Every circuit to consider the question has concluded that *Zauderer*'s reasoning reaches beyond a governmental interest in avoiding deception or

misleading speech. *See, e.g.*, *Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (*Zauderer* applies when interest is in identifying country of origin); *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d 104, 113-16 (2d Cir. 2001) (*Zauderer* applies when interest is in identifying presence of mercury); *Disc. Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509, 556-58 (6th Cir. 2012) (*Zauderer* applies when interest is in safety warnings about tobacco); *Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294, 310 & n.8 (1st Cir. 2005) (Torruella, J.) (*Zauderer* applies when interest is in keeping health care costs low).

The reason for the circuits' consensus is plain: the language of *Zauderer* – read against the background of the evolution of this Court's commercial speech doctrine generally – "sweeps far more broadly than the interest in remedying deception." *Am. Meat Inst.*, 760 F.3d at 22.

Until 1976, this Court extended no First Amendment protection to commercial speech at all. *See Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942). When the Court recognized First Amendment protection for commercial speech, the reason it offered was society's "strong interest in the free flow of commercial information." *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). In *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of N.Y.*, 447 U.S. 557 (1980), this Court formalized that principle by setting a standard for reviewing regulations of commercial speech. *See id.* at 566-71.

Initially, the regulations considered under *Central Hudson* were regulations that *restricted* commercial speech. This left open the question of whether regulations that *require* – rather than *restrict* – commercial speech would also be subject to *Central Hudson* review.

In *Zauderer*, this Court held that they would not. As the Court explained:

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is *minimal*.

471 U.S. at 651 (second emphasis added) (citation omitted).

This standard reflects the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Unlike restrictions on commercial speech, mandated disclosure requirements do not prevent sellers "from conveying information to the public"; they simply require sellers to provide "more information than they might otherwise be inclined to present." *Id*.

The difference between this standard and the more rigorous review applicable to laws that *restrict* the flow of commercial speech reflects that the "First Amendment's concern for commercial speech is based on [its] informational function." *Central Hudson*, 447 U.S. at 563. *See also Sorrell* v. *IMS Health Inc*., 564 U.S.

552, 565-66 (2011) (applying heightened scrutiny to Vermont law prohibiting dissemination of commercial information); *Zauderer*, 471 U.S. 626, 651 (applying "reasonably related" standard to mandated disclosure but *Central Hudson* test to restrictions on advertising). As this Court explained:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Va. State Bd. of Pharmacy v. *Va. Citizens Consumer Council*, *Inc.*, 425 U.S. 748, 765 (1976) (citations omitted).

Applying this reasoning, every circuit to consider the question has concluded the principle behind *Zauderer* extends beyond its facts to governmental interests in promoting greater commercial information flow, including regarding vital interests such as public health and safety. *See, e.g.*, *Am. Meat Inst.*, 760 F.3d at 22 (D.C. Cir.) ("The language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception."); *Pharm. Care*

Mgmt. Ass'n, 429 F.3d at 310 n.8 (1st Cir.) (Torruella, J.) ("In its reply brief, PCMA states that the holding in *Zauderer* is 'limited to potentially deceptive advertising directed at consumers.' None of the cases it cites, however, support this proposition, and we have found no cases limiting *Zauderer* in such a way." (citation omitted)); *id*. at 316 (Boudin, C.J. & Dyk, J.) (applying *Zauderer* beyond deception, stating: "What is at stake here . . . is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes. . . . The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken."); *id*. at 297-98 (per curiam) (explaining that the joint opinion of Chief Judge Boudin and Judge Dyk is controlling on the First Amendment issue); *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d at 113-15 (extending *Zauderer* to a public health disclosure, explaining that "[s]uch disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas,' " *id.* at 114, under the reasoning of this Court's commercial speech cases).

By contrast, courts have applied heightened scrutiny to laws that *restrict* commercial speech, precisely because those restrictions *reduce* the flow of constitutionally valuable information to consumers, thereby conflicting with the "strong interest in the free flow of commercial information," *Va. State Bd. of Pharmacy*, 425 U.S. at 764. *See id.* at 773. Thus, "there exist different frameworks for analyzing restrictions on speech and disclosure requirements," *Dwyer* v. *Cappell*, 762

F.3d 275, 282 (3d Cir. 2014) – at least within the context of commercial speech. *See also Expressions Hair Design* v. *Schneiderman*, ___ U.S. ___, 137 S.Ct. 1144, 1151 (2017) (remanding case for a determination of whether law was valid "speech regulation" under *Central Hudson* or could "be upheld as a valid disclosure requirement" under *Zauderer*).

The cases identified by Petitioner are not to the contrary, as none involves a court rejecting the application of *Zauderer* to an interest beyond deception.

The regulations at issue in *Allstate Ins. Co.* v. *Abbott*, 495 F.3d 151 (5th Cir. 2007), cited at Pet. 25, were speech *prohibitions*, not disclosures. 495 F.3d at 164-65 (describing each regulation as "prohibit[ing]" speech). These "prohibit[ions]" were properly analyzed under *Central Hudson*. *Id.* at 165-68. The opinion of the Fifth Circuit did not purport to determine whether *Zauderer* applied when the state's interest was *other* than avoiding deception. *Id.* at 166. Instead, repeating earlier Fifth Circuit authority, the court wrote, interpreting *Zauderer*, "if a challenged speech provision prohibits advertising [i.e., *restricts* speech] a lawful commercial activity, the regulation is subject to . . . *Central Hudson*," *id.* at 166 n.60. Respondents emphatically agree – regulations that *restrict* commercial speech, as opposed to those that *require* it, are analyzed under *Central Hudson.*

Likewise with *Dwyer* v. *Cappell*, 762 F.3d 275 (3d Cir. 2014), cited at Pet. 25: at issue in *Dwyer* was a regulation that forbade attorneys from quoting excerpts

from judicial opinions praising their work, without also including the full opinion from which the quote was drawn. After distinguishing between the standard applicable to commercial speech *restrictions* and *disclosures*, 762 F.3d at 280, the court chose to evaluate the rule as a disclosure requirement and described *Zauderer* as the "now-prevailing standard" for required disclosures. *Id.* at 281.

But the Third Circuit did not hold – because the issue was never presented – that no interest beyond deception could justify a speech requirement under *Zauderer*. Indeed, after concluding that a commercial advertisement that included an excerpt from a judicial opinion was not inherently misleading, *see id.* at 282 & n.5, the court nonetheless suggested an alternative "reasonable attempt at a disclosure requirement" that would "likely suffice under *Zauderer*." *Id.* at 283.[4] Yet if that disclosure would "likely suffice" even though the advertisement was *not* misleading, *Dwyer* anticipated that the government might advance legitimate interests under *Zauderer* other than an interest in avoiding deception. The case turned instead on the burdensomeness of the disclosure requirement, *id.* at 284, not whether *Zauderer* applies beyond a governmental interest in combating deception.

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[4] The Court wrote: "A reasonable attempt at a disclosure requirement might mandate a statement such as 'This is an excerpt of a judicial opinion from a specific legal dispute. It is not an endorsement of my abilities.' Such a statement or its analogue would, we believe, likely suffice under *Zauderer*." *Id.* at 283.

Central Illinois Light Co. v. *Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987), cited at Pet. 25-26, is even less relevant. That case involved not a disclosure requirement, evaluated under *Zauderer*, but rather compelled noncommercial speech, analyzed under *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986) ("*PG&E*"). As the district court below explained, *PG&E* "involved noncommercial speech, not commercial speech as here." Pet. App. 104a (noting that the newsletter at issue in *PG&E* "covered a wide range of topics, 'from energy-saving tips to stories about wildlife conservation, and from billing information to recipes,' and thus 'extend[ed] well beyond'" commercial speech) (alteration in original) (quoting *PG&E*, 475 U.S. at 8-9). In mentioning *Zauderer*, the Seventh Circuit did not interpret its scope. *Cent. Ill.*, 827 F.2d at 1173. The court instead explained why *Zauderer* did not apply to noncommercial speech compulsions like those in *PG&E* – as indeed this Court had explained in *PG&E* itself. 475 U.S. at 8-9.[5]

The unified view of the circuits is that the reasoning of *Zauderer* and *Milavetz* reaches beyond deception. Thus, contrary to Petitioner's claim, there is no split on the scope of *Zauderer*.

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[5] The same point applies to the second case from the Seventh Circuit that Petitioner cites. Pet. 26. In that case, the Court did no more than quote *Zauderer*. *Commodity Trend Serv., Inc.* v. *Commodity Futures Trading Comm'n*, 233 F.3d 981, 994-95 (7th Cir. 2000). It did not purport to determine whether *Zauderer* applied beyond the context of misleading speech. *Id.*

II. THIS CASE PRESENTS NO CERT-WORTHY ISSUE ON THE APPLICATION OF THE *ZAUDERER* STANDARD

To the extent there are open questions at the margins of the *Zauderer* standard, this case is not well suited to resolving those questions.

1. Petitioner suggests there is a split about whether *Zauderer* should be limited to disclosures affecting commercial advertising, Pet. 27-28, as the D.C. Circuit held in *National Association of Manufacturers* v. *SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015) ("*NAM*"). Yet as *NAM* indicated, whatever the outer boundaries of commercial advertising, "point of sale" transactions fall within its core. *Id*. This case involves point of sale disclosures only. Thus, even if this Court were to restrict the reach of *Zauderer* to certain commercial advertising, the result in this case would be the same.

Petitioner suggests "relatedly," Pet. 27, that the Ninth Circuit is in conflict with the Second regarding the applicability of *Zauderer* if a required disclosure reaches "beyond the speaker's own product or service." Pet. 27 (quoting *Safelite Group* v. *Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014)). There is no conflict: the required speech here plainly affects Petitioner's own product, cell phones.

2. Petitioner suggests a split about whether *Zauderer* requires a mandated disclosure be "uncontroversial" in some sense other than, as the Ninth Circuit held below, true and grounded in fact. Pet. i. It asserts that the court below "concluded that Berkeley's

ordinance satisfied *Zauderer* only by reading each sentence of the compelled disclosure in isolation and concluding that each was 'literally true.'" Pet. 29. Petitioner writes:

> Specifically, the Court held that . . . the compelled speech may be controversial so long as it is not 'literally' false – no matter what message the average consumer might take away.

Pet. 3.

Petitioner misstates the Ninth Circuit's holding. The court did not find that the City's ordinance was "literally true" and *only* literally true. More "[s]pecifically," the court did not conclude that the disclosure was "controversial" yet allowed since not "literally false." Instead, the court determined *both* that the ordinance was "literally true" *and* not "misleading." Pet. App. 27a-29a. The court expressly acknowledged Petitioner's suggestion that a compelled disclosure could be "literally true" yet nonetheless misleading. *Id.* at 27a ("We recognize, of course, that a statement may be literally true but nonetheless misleading and, in that sense, untrue."). Yet after considering Petitioner's argument, the Court rejected it. *Id.* at 28a-29a. At most, Petitioner seeks review of whether the agreed-upon legal standard was correctly applied to the facts of this case. This Court does not grant certiorari to review a quarrel over the fact-bound application of accepted legal standards.

To support its suggestion of a split, Petitioner relies upon cases that reject disclosures found to be

"ideological" or "moral." Pet. 5-6, 30-31, 34, 37-38. Yet the Court below did not reject those cases or the standard they embrace. The court instead simply found that no such concern was implicated here. Berkeley's ordinance is grounded in precisely the same factual basis that justified the FCC's disclosure requirement. The FCC, like Berkeley, believes that cell phones are "safe." Pet. App. 41a. Nonetheless, the FCC, like Berkeley, believes that consumers should be informed about how to use their phones without exceeding the federal RF exposure limits if they so choose.

Petitioner's parade-of-horribles, Pet. 6, is thus wholly inapt. Berkeley is not relying upon a minority view among scientists to justify its disclosure requirement contrary to the judgment of the primary federal regulator, the FCC. To the contrary, Berkeley is relying upon a determination by the FCC – not that cell phones are unsafe, but that it there is a sufficient safety reason to advise consumers about how to use cell phones without exceeding the FCC's RF exposure limits.[6]

Because of the FCC's determination – which no one, including CTIA, has questioned – Berkeley's ordinance would satisfy any circuit court's understanding

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[6] In this way, the case is fundamentally different from the concern of the Second Circuit in *International Dairy Foods Association* v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996). In that case, the warning was about a chemical the FDA had concluded was safe. *See id.* at 73. In this case, the relevant regulator, the FCC, has devoted enormous regulatory effort to policing RF exposure limits generally, and with cell phones in particular. Pet. App. 8a-15a.

of "factual and uncontroversial." No one could reasonably argue that the FCC's decision to mandate disclosures was predicated upon an ideological opposition to cell phones. *Stuart* v. *Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) ("moral or ideological implications"). No one could reasonably say that the factual findings underlying it were "so one-sided or incomplete that [they] would not qualify as 'factual and uncontroversial.'" *Am. Meat. Inst.*, 760 F.3d at 27. No one could reasonably suggest the FCC's determination creates an unconstitutional "'innuendo' . . . or 'moral responsibility.'" *United States* v. *Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017) (quoting *Am. Meat Inst.*, 760 F.3d at 27 and *NAM*, 800 F.3d at 530). None could believe it forced any to "confess blood on its hands." *NAM*, 800 F.3d at 530. Instead, the FCC's findings were grounded in a careful analysis of the safety concerns raised by sister agencies about RF radiation, Pet. App. 8a-11a, and justify the minimal requirement of informing consumers about how to avoid exceeding RF exposure limits.

Finally, Petitioner suggests the Seventh Circuit has held that "a compelled disclosure 'intended to communicate' a 'message [that] may be in conflict with that of any particular retailer' was not 'uncontroversial' and therefore did not satisfy *Zauderer*." Pet. 31. This claim too is mistaken. The disclosure at issue in that case was held not to be factual. *Entm't Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (explaining that "the game-seller [was forced] to include . . . non-factual information"). For factual disclosures, the

Seventh Circuit quite explicitly acknowledges that "the Constitution permits the State to require speakers to express certain messages without their consent." *Id.* at 651. That is, the Seventh Circuit, like the Ninth Circuit below, recognizes that the Constitution permits requirements that commercial speakers provide "more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650.

3. Petitioner suggests there is a split about whether the interest that justifies *Zauderer* review must be "substantial" or whether an interest less than "substantial" secures the same standard of review. Pet. 4-5. That issue too is not properly presented in this case. The interest that justified the disclosure requirements of both the FCC and Berkeley was, as the court of appeals concluded, Pet. App. 23a-25a, a substantial interest in safety. Whatever else is a "substantial" interest, consumer safety plainly is.

III. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE

Petitioner insists that the opinion below is inconsistent with either this Court's existing jurisprudence or its "clear trajectory." Pet. 23 (quoting *Am. Meat Inst.*, 760 F.3d at 43). Neither claim is correct.

The alleged conflict with this Court's cases is predicated upon a reading of *Zauderer* that every circuit to consider the question has rejected – namely, that *Zauderer* is limited to cases of deception. This Court has never held that *Zauderer* is so limited. Every circuit to

consider the question has concluded that it is not. *See supra* at I.

Petitioner cites *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2011), to suggest that, *sub silentio*, this Court intended to limit the reach of *Zauderer* by requiring "intermediate scrutiny" for any mandated disclosure beyond deception. Pet. 19. But *United Foods* involved a compelled subsidy of competitors' advertising. *United Foods*, 533 U.S. at 408 ("In this case a federal statute mandates assessments on handlers of fresh mushrooms to fund advertising for the product."). There is no issue of improper subsidy presented in this case. At most, *United Foods* stands for the proposition "that the mandatory assessments imposed to require one group of private persons to pay for speech by others are [not] necessary to make voluntary advertisements nonmisleading for consumers." *Id.* at 416. The case says nothing about whether the reasoning of *Zauderer* reaches beyond deception.

Likewise with *In re R.M.J.*, 455 U.S. 191 (1982), a case that predates *Zauderer* by three years: the rules at issue in that case *prohibited* certain advertisements or conditioned their content severely. *Id.* at 193-96. The rules did not include a disclosure requirement independent of that speech restriction.

Finally, *Ibanez* v. *Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994) is not to the contrary. *Ibanez* struck a disclosure requirement because the requirement was too burdensome – not because the state had advanced

an interest other than deception to support the disclosure requirement. *Id.* at 146 (disclosure not "appropriately tailored").

Petitioner may well be correct that the "trajectory" of this Court's jurisprudence has been to police speech *restrictions* more aggressively. Pet. 23. By contrast, the "trajectory" of this Court's jurisprudence for speech *requirements* has been steady. The standard announced by this Court in *Zauderer* was affirmed by this Court fifteen years later in *Milavetz*, and every circuit interpreting these cases has agreed upon the reach of the *Zauderer* doctrine.[7]

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[7] Four times in its petition, Petitioner cites the dissent from denial in *Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). Pet. at 4, 21, 24, 35. That dissent called upon the Court to clarify the standard in *Zauderer*. *Id.* at 1082. That is precisely what this Court did – seven years after *Borgner* in *Milavetz*. And if anything, *Milavetz* signaled a less restrictive standard for speech *requirements* than *Zauderer*: while *Zauderer* had characterized the requirement as "factual and uncontroversial," *Milavetz* does not repeat the term "uncontroversial." *Milavetz*, 559 U.S. at 250 ("Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but '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.' ") (quoting *Zauderer*, 471 U.S. at 651).

IV. THE NINTH CIRCUIT IS ACTIVELY REVIEWING A CASE RAISING A RELATED ISSUE, MAKING THIS CASE INAPPOSITE FOR SUPREME COURT REVIEW

Shortly after Petitioner filed for certiorari in this case, the Ninth Circuit granted rehearing en banc in a case that presents the questions raised by Petitioner here. *Am. Beverage Ass'n* v. *City & Cnty. of San Francisco*, 871 F.3d 884 (9th Cir. 2017), *reh'g en banc granted*, 880 F.3d 1019 (2018).

In *American Beverage*, the Ninth Circuit held unconstitutional an "ordinance that would require warnings about the health effects of certain sugar-sweetened beverages on specific types of fixed advertising within San Francisco." *Id.* at 887. Following the Circuit's decision in this case, the court applied *Zauderer*, but concluded the burden of the San Francisco ordinance was too severe and the disclosure was not uncontroversial. *Id.* at 895-97.

Because the Ninth Circuit is actively reviewing its *Zauderer* precedents en banc, including the questions Petitioner asks this Court to address, review here would be premature. Moreover, if this Court determines it would like to reconsider the scope of *Zauderer*, *American Beverage* would be a better vehicle for that review. Not only does that case more cleanly frame questions about the meaning of "uncontroversial" – both because of the affirmative showing by plaintiffs and the absence of a federal regulation relied upon by the City, as here – but plaintiffs in that case had also

made a showing that the disclosure itself was burdensome. In this case, Petitioner offered no evidence to support either showing, leaving the court below to determine the matter "solely on the text of the ordinance." Pet. App. 27a.

V. THE CHANGE IN LAW SOUGHT BY PETITIONER WOULD RADICALLY INCREASE THE BURDEN ON STATE AND LOCAL GOVERNMENTS ESPECIALLY, BY TRANSFORMING EVERY SAFETY REGULATION INTO A FIRST AMENDMENT FIGHT

As Petitioner notes, American law is filled with regulations that impose information requirements upon commercial speakers. Pet. 36 ("Federal, state, and local governments compel commercial speech *all the time*.") (emphasis in original). Safety regulators require safety warnings. Food and drug regulators require food and drug labels. Financial regulators require financial disclosures, both to advance consumer protection and to aid the efficiency of financial markets.

On Petitioner's theory of the First Amendment, unless these regulations can be shown to address deceptive or misleading speech, they are *all* subject to *Central Hudson*'s heightened First Amendment review.

Yet this Court has never applied heightened review, for example, to any of the thousands of safety warnings that would be subject to Petitioner's novel rule. Petitioner's theory is thus a radical change in the

scope of First Amendment review and would substantially increase the burden upon state and local governments in particular. Those federalism concerns further counsel against this change.

The conceptual difficulties with Petitioner's theory are hard enough. Is a candy bar "deceptive" if the ordinary consumer does not know it contains 11 grams of fat? Is requiring the disclosure of that fat "misleading" because the manufacturer disputes whether or how much fat is, in fact, dangerous to a child's health? Does the FDA need to pass heightened First Amendment review to require a drug warning label? Is a dissenting view among interested researchers sufficient to render such a warning "misleading"? At what point is the risk from exceeding the recommended daily salt or caloric intake sufficient to require disclosure of sodium or calorie content? At what rate of fetal alcohol syndrome or lung cancer may the government require disclosure of the health risks of alcohol during pregnancy or of smoking? At what level of prevalence of serious side effects may the government mandate a drug interaction or side-effect warning?

The practical difficulties with Petitioner's theory are also obvious and overwhelming. If each time a government was considering a disclosure requirement, it had to reckon the potential cost of First Amendment litigation, including the costs of fee-shifting, that exposure alone would significantly constrain the ability of state and local jurisdictions to induce factual information into the commercial marketplace. No doubt, that is precisely the objective of many, including some

of the amici in this case, as they conjure a ghost of *Lochner* in the guise of the First Amendment. But concern about optimal warning levels does not warrant a constitutional rule requiring courts to micromanage risk regulation under the First Amendment.

Petitioner resists this argument by insisting that RF radiation is simply not unsafe, and therefore that any mandated disclosure about RF radiation is unnecessary, and hence, misleading.

To support its argument, Petitioner has asserted – falsely – that the FCC has said that cell phones are "safe no matter how they are used." Pet. 34. Petitioner cites no finding by the FCC to support this astonishing claim – a claim that in any case is belied by the extraordinary effort the FCC expends policing RF exposure limits. Pet. App. 8a-15a. Petitioner's only citation is to its own argument. Pet. 34 ("*See supra* at Statement B.1."). Yet it is from this false premise that Petitioner insists that any requirement to inform is unconstitutional.

Petitioner is not the first to claim that its product is always and inherently safe, regardless of how it is used. Yet the practical consequences of a *constitutional* rule that turns upon an interested party's view about the risks that its own product creates are obvious. At most, Petitioner asserts that *in its view* any concern with RF exposure is overblown. But if the First Amendment requires heightened review every time an interested party believes regulatory concerns are overblown, there will be no end to the burden imposed upon

federal and state courts. This Court has no good reason to launch the judiciary upon that extraordinary project of regulatory review – and the First Amendment does not require that it does.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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