No. 17–___

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 United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court held that, although government regulation of commercial speech is generally subject to intermediate scrutiny, a narrow and limited exception allowing for less rigorous review applies when the government seeks to combat misleading commercial speech by requiring (as an alternative to restricting speech) the disclosure of "purely factual and uncontroversial information" that is not "unduly burdensome" and is "reasonably related to the State's interest in preventing deception of consumers."

The Ninth Circuit in this case—in conflict with *Zauderer* and decisions of at least three other circuits (the Third, Fifth, and Seventh)—materially changed and dramatically expanded *Zauderer*. The court held that government may compel commercial speech, absent *any* alleged false or deceptive communication, as long as the mandated message is "reasonably related to" any "more than trivial" governmental interest and "literally true." The Court thus upheld an ordinance forcing cell-phone retailers to deliver a misleading and controversial message to customers.

The questions presented are:

1. Whether *Zauderer*'s reduced scrutiny of compelled commercial speech applies beyond the need to prevent consumer deception.

2. When *Zauderer* applies, whether it is sufficient that the compelled 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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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are identified in the caption.

Petitioner CTIA – The Wireless Association® has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner CTIA – The Wireless Association® ("CTIA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's denial of rehearing (Pet App. 122a–131a) is reported at 873 F.3d 774. That court's panel opinion (Pet App. 1a–43a) is reported at 854 F.3d 1105. The opinion of the United States District Court for the Northern District of California dissolving the preliminary injunction (Pet App. 44a–62a) is reported at 158 F. Supp. 3d 897. That court's prior opinion issuing the preliminary injunction (Pet App. 63a–121a) is reported at 139 F. Supp. 3d 1048.

JURISDICTION

The Ninth Circuit entered judgment on April 21, 2017. CTIA timely filed a petition for panel rehearing and rehearing en banc on May 5, 2017. The Ninth Circuit denied rehearing on October 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law … abridging the freedom of speech ….

Section 1 of the Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law ….

Section 9.96.030(A) of the Municipal Code of the City of Berkeley, California provides:

> **§ 9.96.030 Required notice**
>
> A. A Cell phone retailer shall provide to each customer who buys or leases a Cell phone a notice containing the following language:
>
> > 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.

STATEMENT

More than 30 years ago, this Court decided *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Since then, the Courts of Appeals have been confused and divided over the proper standard of scrutiny for laws compelling commercial entities to speak. The confusion goes

to two fundamental aspects of commercial speech doctrine: (1) whether *Zauderer*'s approach to forced speech applies outside the context of preventing consumer deception; and (2) when *Zauderer* does apply, what the government must show successfully to defend a speech mandate. The time has come for this Court to resolve these exceptionally important questions, which are squarely presented by this case.

In the decision below, the Ninth Circuit both expanded the scope of *Zauderer and* watered down its requirements, holding that *all* compelled commercial speech is subject to only rational basis review. Specifically, the Court held that a commercial speech mandate need be only "reasonably related to" *any* governmental interest that is "more than trivial," and 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. These holdings substantially increase the government's ability to dictate the speech of commercial actors, in direct conflict with the precedent of this Court and other circuits.

In *Zauderer*, this Court addressed Ohio's ability to regulate an attorney's commercial speech. The Court invalidated two regulations of speech that was "not false or deceptive," *id.* at 641, applying intermediate scrutiny under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980). The Court upheld a third requirement that the attorney provide additional "purely factual and uncontroversial information" necessary to cure otherwise deceptive advertising. 471 U.S. at 651. In so ruling, *Zauderer* explained that, when government seeks to combat misleading speech, it has options short of prohibiting the speech entirely. Rather, it

may consider "disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech" under *Central Hudson*, if the requirements are "reasonably related to the State's interest in preventing deception of consumers." *Id*. at 651 & n.14.

In the ensuing three decades, this part of *Zauderer* has taken on a tumultuous life of its own. From the outset, members of this Court found it "somewhat difficult to determine precisely what disclosure requirements" *Zauderer* permits. 471 U.S. at 659 (Brennan, J., joined by Marshall, J., concurring). Other Justices have subsequently recognized the need for "guidance" on the "oft-recurring" and "important" issue of the First Amendment treatment of "state-mandated disclaimers" in the commercial speech context. *Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). This Court has yet to provide any such clarification.

Not surprisingly, the lower courts have struggled with both the scope and application of *Zauderer*. As Judge Wardlaw explained below, the circuits have fallen into "discord" about *Zauderer*, and "the law remains unsettled." Pet. App. 128a n.1. The D.C. Circuit has similarly pointed out the "conflict in the circuits regarding the reach of *Zauderer*." *Nat'l Ass'n of Mfrs.* v. *SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) ("*NAM II*").

Some Courts of Appeals hold that *Zauderer* created a separate, lower standard of scrutiny for commercial speech mandates related to *any* substantial

governmental interest, while others correctly recognize that *Zauderer* only permits compelled disclosures necessary to prevent speech from potentially misleading consumers. Even those circuits that extend *Zauderer* outside the context of false or misleading speech nonetheless limit its reach in some fashion, by restricting it to disclosures on product labels or advertisements.

All but the Ninth Circuit, that is. Here, a divided panel of the Ninth Circuit explicitly ruled that, under *Zauderer*, "*Central Hudson*'s intermediate scrutiny test does not apply to compelled" speech. Pet. App. 17a. Rather, in the Ninth Circuit's view, *Zauderer* extends to *all* commercial speech mandates, even where the commercial entity says nothing misleading or does not even speak at all. Pet. App. 19a.

The Ninth Circuit did not stop there. After enlarging *Zauderer*'s scope, the court then weakened or eliminated entirely several aspects of the *Zauderer* analysis. The panel majority found that *Zauderer* did not mean what it said in requiring compelled speech to be "factually accurate *and* uncontroversial," and thereby blinded itself to the "subjective impact on the audience." Pet. App. 22a–23a. Instead, the panel construed the challenged notice "sentence by sentence" and found it constitutionally sufficient that each was "literally true." Pet. App. 26a–29a. But as Judge Friedland explained in dissent, the government cannot force a private speaker to deliver a misleading message even if it is not technically false. Other circuits have rightly held that a one-sided or ideological message, even if literally accurate, is not "uncontroversial" under *Zauderer*. The panel then further un-

dermined *Zauderer* by redefining a "substantial" government interest as one that is merely "more than trivial." Pet. App. 21a.

The Ninth Circuit's sweeping decision implicates every one of the vast number of compelled labels, warnings, disclosures, and disclaimers that governments impose upon businesses across the nation. Rather than requiring these ubiquitous forced speech mandates to clear intermediate scrutiny, the Ninth Circuit would bless them all so long as they pass a permissive form of rational-basis review under its skewed reading of *Zauderer*.

That standard is inimical to principles of free speech. It empowers government to manipulate commercial speech for its own ends by requiring, for example, pharmaceutical manufacturers to warn consumers that "studies have found vaccines to increase the risk of autism" or solar panel manufacturers to state that "some scientists have questioned whether carbon emissions contribute to climate change." These statements are literally true, but none the less controversial, misleading, and offensive to the speaker that disagrees with their implications and objects to communicating them.

The First Amendment does not allow the government to make businesses its mouthpiece without satisfying at least intermediate scrutiny. This Court should grant the petition and resolve the exceptionally important questions of when and how *Zauderer* applies to laws compelling commercial speech.

A. THIS COURT APPLIES AT LEAST INTERMEDIATE SCRUTINY TO LAWS ABRIDGING THE FREEDOM OF SPEECH IN THE COMMERCIAL CONTEXT

1. This Court has long held that the government may not regulate commercial speech unless it satisfies a test that has come to be known as "intermediate scrutiny." *See Central Hudson*, 447 U.S. at 566. Under *Central Hudson*, the government must show that the regulation serves a "substantial" "governmental interest," that "the regulation directly advances the governmental interest asserted, and" that it is not "more extensive than is necessary to serve that interest." *Ibid*; *see also Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010) (explaining that the "Court in [*Central Hudson*] held that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny").

In *In re R.M.J.*, 455 U.S. 191 (1982), the Court applied this test to a requirement that attorneys include state-mandated disclosures in their advertisements if they list their areas of practice. *See id.* at 194–95, 204. The Court explained that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment." *Id.* at 203. Thus, "when a communication is not misleading," the government must, at a minimum, "assert a substantial interest and the interference with speech must be in proportion to the interest served." *Ibid.* (citing *Central Hudson*, 447 U.S. at 563–64).

On the other hand, "[m]isleading advertising may be prohibited entirely." *Ibid.* Importantly, however,

"the remedy [to cure misleading commercial speech] in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation" that is "no broader than reasonably necessary to prevent the deception." *Ibid.* The advertisement at issue in *R.M.J.* "ha[d] not been shown to be misleading," so the state-compelled disclosure was "an invalid restriction upon speech." *Id.* at 205. As the Court later summarized, because "the State had failed to show that the appellant's advertisements were themselves likely to mislead consumers," *R.M.J.* "applied *Central Hudson*'s intermediate scrutiny and invalidated the restrictions as insufficiently tailored to any substantial state interest." *Milavetz*, 559 U.S. at 250.

2. Three years after *R.M.J.*, the Court again evaluated the constitutionality of attorney advertising regulations. *See Zauderer*, 471 U.S. at 629. It struck down two such regulations, ruling that "[b]ecause" the speech they targeted "w[as] not false or deceptive," the government needed to—but could not—pass intermediate scrutiny. *Id.* at 641–49.

The Court also upheld a public reprimand of an attorney for deceptively advertising a contingency-fee arrangement. *Id.* at 631–36, 652–53. The advertisement stated: "If there is no recovery, no legal fees are owed by our clients." *Id.* at 631. But the ad failed to mention that clients may nonetheless be liable for court costs. *Id.* at 633–35.

Zauderer held that the State could require the attorney to disclose potential client liability for those additional costs. 471 U.S. at 650–53. Such a disclaimer contained "purely factual and uncontroversial infor-

mation" about the attorney's commercial services; absent this information, the advertisement would "misle[a]d" a "layman" by "suggest[ing] that employing [the attorney] would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge." *Id.* at 651–52.

Rather than prohibiting the misleading advertisement entirely, the State had adopted the "less restrictive alternative[]" of allowing the attorney to add language to his advertisement that would cure its misleading quality. *Zauderer*, 471 U.S. at 651–52 & n.14. Because these "disclosure requirements [we]re reasonably related to the State's interest in preventing deception of consumers," the Court found them constitutional. *Id.* at 651–52.

3. In the 33 years since *Zauderer*, the Court has sustained only those state-mandated disclaimers necessary to correct deceptive or misleading commercial speech. Thus, in *Milavetz*, the Court applied *Zauderer* to permit mandatory disclosures that "entail[ed] only an accurate statement" and were "intended to combat the problem of inherently misleading commercial advertisements." 559 U.S. at 250.

The Court, however, has repeatedly declined to apply *Zauderer* outside the context of deceptive speech. In *Ibanez* v. *Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136, 146 (1994), the Court invalidated a required disclaimer because it was not "an appropriately tailored check against deception or confusion" under *Zauderer*. And in *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001), the Court rejected the government's argument that mandatory assessments on

businesses to pay for a product advertising program were permissible under *Zauderer*, since they were not "necessary to make voluntary advertisements non-misleading for consumers."

This precedent makes two things abundantly clear. First, the Court has never held that speech that is not false or misleading may be restricted subject only to rational basis review. Second, the Court has never allowed the government to compel speech, unless necessary to remedy an otherwise false or misleading commercial message, without satisfying at least intermediate scrutiny.

B. BERKELEY FORCES CELL PHONE RETAILERS TO DISSEMINATE THE MISLEADING MESSAGE THAT CELL PHONES ARE UNSAFE, CONTRARY TO THE FCC'S SCIENCE-BASED CONCLUSION

The ordinance at issue, enacted by the City of Berkeley, is admittedly unrelated to any need to prevent consumer deception. It forces cell phone retailers to convey to their customers a government-scripted message implying that cell phones, when used in certain ways, are dangerous to human health. But the Federal Communications Commission ("FCC") has determined that they are *not*. Thus, the compelled disclosure is itself misleading, spreading the very anti-science misimpression about cell phone emissions the FCC has sought to correct.

1. Based on the overwhelming consensus of health and safety authorities worldwide, the FCC has concluded "that any cell phone legally sold in the United States is a 'safe' phone." *Farina* v. *Nokia, Inc.*, 625 F.3d 97, 105 (3d Cir. 2010).

The radiofrequency ("RF") signal emitted by cell phones is the same type of signal used by baby monitors, Wi-Fi networks, and many other household devices. As the FCC has explained, RF signals are non-ionizing, meaning that they are incapable of breaking chemical bonds in the body, damaging biological tissues, or adversely affecting DNA. *See* FCC, *Radiofrequency Safety: Frequently Asked Questions*, https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety. Although very high levels of RF energy can cause heating, the RF produced by "[c]ellphones and wireless networks" is "not at levels that cause significant heating." EPA, *Non-Ionizing Radiation From Wireless Technology*, available at https://www3.epa.gov/radtown/wireless-technology.html.

The FCC limits the amount of RF energy that cell phones may produce, and sets standards for cell phone users' exposure to RF energy, 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). The FCC's "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 laboratory animals as a result of tissue heating resulting from RF exposure." *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3498, 3582 (Mar. 29, 2013). "As a result, exposure well above the [FCC's] limit should not create an unsafe condition." *Id.* at 3588.

The FCC also publishes guides for consumers that explain these exposure limits. The FCC has observed that "[t]here is considerable confusion and misunderstanding about the meaning of the maximum reported Specific Absorption Rate (SAR) values for cell phones." FCC, *Specific Absorption Rate (SAR) for Cell Phones: What It Means for You*, https://www.fcc.gov/consumers/guides/specific-absorption-rate-sar-cell-phones-what-it-means-you ("SAR Guide"). The agency has debunked these concerns, explaining that "ALL cell phones must meet the FCC's RF exposure standard, which is set at a level well below that at which laboratory testing indicates, and medical and biological experts generally agree, adverse health effects could occur." *Ibid.*

In short, according to the FCC, there is "*no scientific evidence*" causally linking "wireless device use and cancer or other illnesses." FCC, *Wireless Devices and Health Concerns*, https://www.fcc.gov/consumers/guides/wireless-devices-and-health-concerns; *see also* FDA, *Do Cell Phones Pose a Health Hazard?*, https://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116282.htm (RF from cell phones "causes no known adverse health effects").

2. Berkeley enacted an ordinance that sends a message grounded in the very "misunderstanding" about the safety of cell phones that the FCC has tried to counter. Berkeley Municipal Code § 9.96.030(A); SAR Guide.

Berkeley's residents urged passage of the ordinance based on a variety of scientifically baseless concerns. Some claimed they are "electromagnetically sensitive"; others believed that cell phone signals are "carcinogens" that they were "sure" can "cause[] [a] brain tumor" or "damage … to sperm"; and some even suggested that cell phones are responsible for the "huge problems in our schools today." CA9 ER100–107. Council members *admitted* they had no scientific evidence that cell phones pose a health risk. Instead, they deflected the problem by stating that "[t]he issue before us tonight is not the science itself" but the Council's "moral and ethical role … in this society." CA9 ER69–70.

The City Council enacted the ordinance, which currently requires cell phone retailers to post or distribute 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 for information about how to use your phone safely.

Berkeley Municipal Code § 9.96.030(A).

The stated purpose of the ordinance is to provide consumers with "the information they need to make their own choices" about cell phones. *Id.*

§ 9.96.010(I). At no time has the City ever asserted that the ordinance was necessary to prevent consumer deception.

C. THE NINTH CIRCUIT HOLDS THAT THE GOVERNMENT MAY COMPEL COMMERCIAL SPEECH WHENEVER THE LAW IS REASONABLY RELATED TO ANY NON-TRIVIAL INTEREST

1. CTIA sued to enjoin enforcement of the ordinance, arguing that the speech it compelled was false and misleading, and that it could not survive any level of scrutiny. The district court preliminarily enjoined a provision of the original ordinance that required a statement that the supposed "potential risk is greater for children" (Pet. App. 63a–121a), but vacated the injunction following repeal of that provision (Pet. App. 44a–62a). The court refused to enjoin the ordinance in its current form. *Ibid.*

2. CTIA appealed, arguing that the ordinance was subject to at least intermediate scrutiny and that, in any event, the compelled statement was not the sort of "purely factual and uncontroversial information" that could pass muster under *Zauderer*.

A divided panel of the Ninth Circuit affirmed, holding that "the *Zauderer* compelled-disclosure test applies" even "in the absence of a prevention-of-deception rationale." Pet. App. 19a. The panel majority concluded that "any governmental interest" may "permissibly be furthered by compelled commercial speech," so long as the interest is "substantial—that is, more than trivial." Pet. App. 21a.

The panel majority interpreted *Zauderer* to hold—as a blanket proposition—that "*Central Hudson*'s intermediate scrutiny test does not apply to compelled, as distinct from restricted or prohibited, commercial speech." Pet. App. 17a. Instead, "[u]nder *Zauderer*, compelled disclosure of commercial speech complies with the First Amendment if the information in the disclosure is reasonably related to a substantial governmental interest and is purely factual." Pet. App. 23a.

The panel majority found that "the Berkeley ordinance satisfies this test." Pet. App. 23a. It first ruled that the ordinance was reasonably related to the government's interest in health and safety. The majority acknowledged that "CTIA is correct" that there is no evidence that cell phone signals are dangerous, but dismissed this fact as "beside the point," on the ground that the FCC had established RF limits nonetheless. Pet. App. 24a–25a.

Next, the panel majority held that the compelled statement was "purely factual." Pet. App. 26a–29a. The majority recognized that this Court had described the disclosure in *Zauderer* as "purely factual *and uncontroversial*." Pet. App. 22a (quoting *Zauderer*, 471 U.S. at 651 (emphasis added)). But, it held, "'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience." *Ibid.*

Instead of asking how regular people would understand the message conveyed by the ordinance as a whole, the court simply assessed, "sentence by sentence," whether the compelled disclosure was "literally true." Pet. App. 26a. The court concluded that

each of the three compelled sentences was "technically correct" or "literally true," and affirmed the district court's dissolution of the preliminary injunction. Pet. App. 26a, 37a–38a.

Judge Friedland dissented. Pet. App. 39a–43a. She was "inclined to conclude that *Zauderer* applies only when the government compels a truthful disclosure to counter a false or misleading advertisement," but believed the Berkeley ordinance was in any event not "purely factual and uncontroversial." Pet. App. 41a–42a n.2. Judge Friedland explained that the 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. Given the compelled statement's repeated references to safety, "[t]he message of the disclosure as a whole is clear: carrying a phone 'in a pants or shirt pocket or tucked into a bra' is not safe." *Ibid.* Yet neither Berkeley nor the majority "offered any evidence that carrying a cell phone in a pocket is in fact unsafe"—and the FCC has explained that it is not. Pet. App. 40a–41a. Judge Friedland finally observed that "overuse" of "false, misleading, or unsubstantiated product warnings" such as Berkeley's notice "may cause people to pay less attention to warnings generally." Pet. App. 42a–43a.

3. CTIA petitioned for panel rehearing and rehearing en banc. "Judge Friedland voted to grant both." Pet. App. 125a. The court, however, denied any rehearing. *Ibid.* The two judges in the panel majority concurred in that denial. They acknowledged that "[t]wo of our sister circuits have sustained compelled commercial speech that prevented consumer deception," but professed not to "know" whether those

courts would hold that "commercial speech may be compelled in the absence of deception." Pet. App. 127a.

Judge Wardlaw dissented, explaining that "the panel majority applied the wrong legal standard." Pet. App. 127a. The majority erred in "extend[ing] *Zauderer* beyond the context of preventing consumer deception" and beyond advertising "to instances where the government compels speech for its own purposes." Pet. App. 128a. Judge Wardlaw explained that "there is discord among our sister circuits about" the scope of *Zauderer* and that "the law remains unsettled." Pet. App. 128a n.1. But "Supreme Court precedent is clear that if the government is to compel commercial speech," it must at least satisfy intermediate scrutiny. Pet. App. 129a. In light of the "proliferation of warnings" in today's culture, the panel's "troubling … loosening of long-held traditional speech principles governing compelled disclosures and commercial speech only muddies the waters." Pet. App. 130a.

REASONS FOR GRANTING THE PETITION

As the two dissenting judges below explained, the Courts of Appeals are divided as to *when Zauderer* controls and *what it means*. The Ninth's Circuit's radical and unprecedented approach also directly conflicts with this Court's precedent. The acknowledged discord and confusion among the Courts of Appeals powerfully demonstrates the need for this Court's review and clarification of the proper standard of review for compelled commercial speech. Such review is particularly important at a practical level given the mul-

titude of government-mandated warnings, disclosures, and disclaimers that today's consumer encounters numerous times every day.

I. THIS COURT SHOULD RESOLVE *ZAUDERER*'S SCOPE

This case was "the first time" the Ninth Circuit "had occasion to squarely address the question whether, in the absence of a prevention-of-deception rationale, the *Zauderer* compelled-disclosure test applies." Pet. App. 19a. The Court of Appeals answered "yes," holding that *Zauderer* is not limited to "the prevention of consumer deception," and indeed "*any* governmental interest will suffice so long as it is substantial … that is, more than trivial." Pet. App. 21a (emphasis added). That ruling conflicts with the precedent of this Court and other circuits.

A. ALLOWING THE GOVERNMENT TO COMPEL COMMERCIAL SPEECH SUBJECT ONLY TO RATIONALITY REVIEW, REGARDLESS OF THE EXISTENCE OF MISLEADING OR DECEPTIVE SPEECH, CONTRAVENES THIS COURT'S PRECEDENT

The panel majority categorically held that all "compelled" commercial speech is subject to lesser scrutiny than "restricted or prohibited commercial speech." Pet. App. 17a. The panel claimed that *Zauderer* so held. The opposite is true.

This Court has long taught that "*[t]ruthful* [commercial speech] related to lawful activities is entitled to the protections of the First Amendment." *In re R.M.J.*, 455 U.S. 191, 203 (1982) (emphasis added).

"At the outset" of judicial review of a commercial speech regulation, then, the court must "determine whether the [regulated] expression … concern[s] lawful activity and [is] *not … misleading*." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (emphasis added). Commercial speech that is "[m]isleading … may be prohibited entirely." *R.M.J.*, 455 U.S. at 203; *accord Central Hudson*, 447 U.S. at 563.

The government, however, may permit a speaker to deliver an otherwise misleading message, subject to a condition: that the speaker include additional information that cures the speech's potential to deceive. *See Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650–51 (1985); *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010). The Court has endorsed this option as a less restrictive alternative to banning the misleading speech entirely. *See R.M.J.*, 455 U.S. at 203; *Central Hudson*, 447 U.S. at 565. But where there is no misleading speech to correct, the government may not mandate a disclosure unless it satisfies at least intermediate scrutiny. *R.M.J.*, 455 U.S. at 205; *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001).

Thus, far from subjecting all commercial speech mandates to lesser scrutiny, *Zauderer* simply "appl[ied] the[se] teachings" to permit the government to use the less restrictive tool of a "warning[] or disclaimer[]" to cure, rather than ban, misleading speech. 471 U.S. at 638, 651 (citation omitted). A "purely factual and uncontroversial" disclosure is thus constitutional "as long as [the] disclosure requirements are reasonably related to the State's interest in *preventing*

deception of consumers" and not "unduly burdensome." *Id.* at 651 (emphasis added).

As multiple members of this Court have explained, *Zauderer* in no way diminished *Central Hudson*'s standard for non-deceptive commercial speech. *E.g.*, *id.* at 657 (Brennan, J., joined by Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I agree with the Court's somewhat amorphous 'reasonable relationship' inquiry only on the understanding that it comports with the standards more precisely set forth in our previous commercial-speech cases."). In fact, *Zauderer* faithfully applied that standard to the other two speech regulations at issue precisely because they involved truthful, non-misleading speech. *Id.* at 631–49. Thus, as other Justices have similarly noted, "*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).

This Court has *never* applied *Zauderer* outside the deception-prevention context. To the contrary, the Court consistently and repeatedly has described *Zauderer* as a decision about combatting consumer deception. For example, in *Milavetz*, the Court noted that the "essential features of the rule at issue in *Zauderer*" were that the "required disclosures [were] intended to combat the problem of inherently misleading commercial advertisements" with the use of "only an accurate statement." 559 U.S. at 250. Justice Thomas's concurrence explained that, under *Zauderer*, "a disclosure requirement passes constitutional

muster only to the extent that it is aimed at [misleading] advertisements," and the majority did not "hold otherwise." *Id.* at 257 (Thomas, J., concurring in part and in the judgment). Eight years earlier, Justice Ginsburg joined Justice Thomas in noting that "the advertisement in *Zauderer* was misleading as written" and urging the Court to review the question whether *Zauderer* could apply outside that context. *Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., dissenting from denial of certiorari). And just last Term, Justice Breyer wrote that, under *Zauderer*, "a challenged regulation [that] requires a commercial speaker to disclose purely factual and uncontroversial information" would need to be "reasonably related to the State's interest *in preventing deception of consumers*." *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring in the judgment) (emphasis added; punctuation omitted).

Indeed, the Court has refused to apply lesser scrutiny to compelled speech that does not correct a misleading statement. In *United Foods*, the Court declined to apply *Zauderer* where a compelled subsidy for commercial speech was not "necessary to make voluntary advertisements nonmisleading for consumers." 533 U.S. at 416. And in *R.M.J.*, the Court invalidated a commercial speech mandate where the advertisement it supposedly targeted "ha[d] not been shown to be misleading" in the absence of the mandated language. 455 U.S. at 205.

The Ninth Circuit jettisoned these precedents by holding that *Zauderer* compels lesser scrutiny in *all* compelled disclosure cases—even where the commercial entity says nothing misleading or (as here) *does*

not even speak at all. Pet. App. 18a–21a. In its flawed view of *Zauderer*, because compelled mandates supposedly add to—and do not restrict—commercial information, speakers enjoy only the skimpiest protection against being forced to utter a government-scripted message. *See* Pet. App. 16a–18a, 22a. That conflicts with the teachings of this Court. A speaker is entitled to only "minimal" protection from compulsory disclaimers when disseminating otherwise misleading messages that the government may ban outright. *Zauderer*, 471 U.S. at 651. But "the [commercial] speaker and the audience, not the Government, should be left to assess the value of *accurate and nonmisleading* information about lawful conduct." *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 195 (1999) (emphasis added). Here, Berkeley has never alleged any deceptive or misleading speech by cell phone retailers.

More fundamentally, the Court's compelled-speech cases recognize that "[t]he right to speak and the right to refrain from speaking" are two sides of the same constitutional coin. *E.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). The "constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression" is long "established." *Riley* v. *Nat'l Fed'n for the Blind*, 487 U.S. 781, 797 (1988). Because "compelling cognizable speech"—including "commercial speech"—is "just as suspect as suppressing it," all such regulations are "typically subject to the same level of scrutiny." *Glickman*, 521 U.S. at 481 (Souter, J., dissenting). "Government action … that requires the utterance of a particular message favored by the Government," no less

than "[g]overnment action that stifles speech on account of its message," poses "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 641 (1994).

The Ninth Circuit's holding that the right not to speak ranks lower on the constitutional scale than the right to speak in the commercial speech context is a further departure from this Court's precedent. "The clear trajectory of the Supreme Court's jurisprudence is toward greater protection for commercial speech, not less." *Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18, 43 (D.C. Cir. 2014) (en banc) (Brown, J., dissenting) (collecting cases). The Ninth Circuit is moving in precisely the opposite direction. As Judge Wardlaw explained, "[t]he Supreme Court has never been so deferential to government-compelled speech" as the Ninth Circuit was here. Pet. App. 129a. This Court should grant certiorari to realign the Ninth Circuit with this Court's precedent.

B. THE COURTS OF APPEALS ARE SPLIT OVER THE SCOPE OF *ZAUDERER*

Despite the Court's unbroken practice of applying at least intermediate scrutiny to regulations of truthful, non-deceptive commercial speech, the Courts of Appeals have fractured on this issue. Some circuits faithfully have applied *Zauderer* only in cases where the speaker's message is deceptive or misleading. Others have extended *Zauderer* outside these circumstances, but only where the government regulates

what must be said on a product label or advertisement. Only the Ninth Circuit has taken the extreme position that *Zauderer* applies to *all* compelled commercial speech.

Courts have always found it "somewhat difficult to determine precisely what disclosure requirements" *Zauderer* permits. *Zauderer*, 471 U.S. at 659 (Brennan, J., joined by Marshall, J., concurring). Fifteen years ago, two Justices noted that the lower courts need "guidance" on the "oft-recurring" and "important" issue of the First Amendment treatment of "state-mandated disclaimers" in the commercial speech context. *Borgner*, 537 U.S. 1080 (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). But the Court has not yet supplied that guidance, and the "discord," Pet. App. 128a n.1 (Wardlaw, J.), and "conflict in the circuits regarding the reach of *Zauderer*," *NAM II*, 800 F.3d at 524, have not gotten any better.

As a result, "[c]ircuit courts [have] continue[d] to grapple with when to apply the *Zauderer* standard, … creating a circuit split on how to review compelled commercial speech." Emma Land, *Corporate Transparency and the First Amendment: Compelled Disclosures in the Wake of* National Association of Manufacturers v. SEC, 69 Okla. L. Rev. 519, 536 (2017). As another commentator recently explained, there is "a divisive split among federal circuits" over *Zauderer*'s "bounds." Jeffrey S. Wettengel, *Reconciling the Consumer "Right to Know" with the Corporate Right to First Amendment Protection*, 12 J. Bus. & Tech. L. 325, 333 (2017).

1. The circuits are split over the question whether *Zauderer* applies outside the prevention-of-deception context.

Decisions from the Fifth, Third, and Seventh Circuits have reasoned that *Zauderer* applies only to regulations aimed at preventing consumer deception.

For example, in *Allstate Ins. Co.* v. *Abbott*, 495 F.3d 151 (5th Cir. 2007), the Fifth Circuit invalidated a law requiring insurers who promote their favored automobile repair shops to also promote other repair shops. *See id.* at 157, 164–68. The Court of Appeals held that, because the advertisement the insurer would use without the mandated disclosure carried only a "minimal" "potential for customer confusion," *Central Hudson*, rather than *Zauderer*, applied. *Id.* at 166. And since the law was not narrowly tailored to the State's interests in promoting fair competition and consumer protection, it was invalid under *Central Hudson*. *Id.* at 167–68.

Like the Fifth Circuit, the Third Circuit has declined to apply *Zauderer* outside the deception-prevention context. In *Dwyer* v. *Cappell*, 762 F.3d 275 (3d Cir. 2014), the court held that *Zauderer* applies to laws "directed at misleading commercial speech," and invalidated a regulation, which required that attorney advertisements that quote a court opinion include the full opinion, because that disclosure was "not reasonably related to preventing consumer deception." *Id.* at 282 (quotation marks omitted).

Similarly, in *Central Illinois Light Co.* v. *Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987), the Seventh Circuit held unconstitutional a law that required utility companies to include in their bills messages

scripted by a State board. *Id.* at 1170, 1173–74. The court explained that *Zauderer* permits disclosures "needed to avoid deception, [but] it does not suggest that companies can be made into involuntary solicitors" of the government's message. *Id.* at 1173; *see also Commodity Trend Serv., Inc.* v. *CFTC*, 233 F.3d 981, 994–95 (7th Cir. 2000) ("narrowly drawn affirmative disclosures that directly cure fraudulent speech are constitutionally permissible" under *Zauderer*).

By contrast, in this case, the Ninth Circuit joined the D.C., Second, Sixth, and First Circuits in concluding that *Zauderer* applies outside the prevention-of-deception context. Pet. App. 19a–21a; *American Meat Institute*, 760 F.3d at 22; *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *Disc. Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509, 556 (6th Cir. 2012); *Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005). These courts acknowledge that "*Zauderer* itself does not give a clear answer," and that "[s]ome of its language suggests possible confinement to correcting deception." *American Meat Institute*, 760 F.3d at 21. But, they incorrectly reason, *Zauderer* held that any "First Amendment interests" against being compelled to speak "are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 22 (quotation marks omitted). As explained above, this rationale cannot be squared with this Court's precedent.

2. The circuits are also fractured over the question whether *Zauderer* applies beyond the contexts of advertising and labelling. Even those circuits, such as the D.C. and Second, that find that *Zauderer* applies beyond the prevention-of-deception context confine it to advertising and labelling.

The D.C. Circuit, for instance, has held that *Zauderer* does not "reach[] compelled disclosures that are unconnected to advertising or product labeling at the point of sale." *NAM II*, 800 F.3d at 522. "*Zauderer* is confined to advertising, emphatically and, one may infer, intentionally." *Ibid.* The D.C. Circuit accordingly applied *Central Hudson* review to a requirement that companies post statements regarding conflict minerals on their websites and securities filings, and found the challenged disclosure unconstitutional. *Id.* at 522–24.

Relatedly, in *Safelite Group* v. *Jepsen*, 764 F.3d 258 (2d Cir. 2014), the Second Circuit held that *Zauderer* does not apply where the government "compels speech that goes beyond the speaker's own product or service." *Id.* at 264. Such mandates must satisfy at least *Central Hudson* scrutiny—and the challenged law did not. *Id.* at 264–66.

The only circuit that has applied *Zauderer* even where the commercial entity wishes to remain entirely silent—and regardless of the subject matter of the mandated speech—is the Ninth. *See* Pet. App. 23a. The panel majority held that *Zauderer* applies to *all* "compelled disclosure of commercial speech," and therefore "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, 23a. As Judge Wardlaw explained, the panel "expanded *Zauderer* to retailers who sell, and not necessarily advertise, the consumer products at issue." Pet. App. 128a.

The decision below thus conflicts with decisions of the D.C. and Second Circuits, as well as those of the

Fifth, Third, and Seventh Circuits. It also conflicts with this Court's statement in *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995), that "outside th[e] context" of "commercial advertising," the State "may not compel affirmance of a belief with which the speaker disagrees." *Id.* at 573 (citation omitted).

3. Judges on the Courts of Appeals have noted the disagreement and confusion over *Zauderer*'s reach. For example, Judge Wardlaw explained below that "the law remains unsettled" and there is "discord among [the] … circuits." Pet App. 128a n.1. Just two years ago, the D.C. Circuit noted the "flux and uncertainty of the First Amendment doctrine of commercial speech, and the conflict in the circuits regarding the reach of *Zauderer*." *NAM II*, 800 F.3d at 524. Even the Ninth Circuit acknowledges that this Court "ha[s] applied *Zauderer*'s analytic framework only to government-mandated disclosures aimed at preventing consumer deception," and that it "has not yet considered whether the *Zauderer* framework applies when a state requires disclosures for a different state interest, such as to promote public health." *Am. Beverage Ass'n* v. *City & Cty. of S.F.*, 871 F.3d 884, 892 (9th Cir. 2017) (citation omitted). Both because this important question has not been settled by this Court and because the lower courts have divided on it, this Court should grant the petition. *See* S. Ct. R. 10(a), (c).

II. THE COURT SHOULD RESOLVE HOW TO APPLY *ZAUDERER*

As explained above, the Ninth Circuit contravened this Court's precedent in ruling that the Berke-

ley ordinance—and *all* other commercial speech mandates—are governed by *Zauderer*. But the court then compounded its error by misapprehending *how* to apply *Zauderer*, even assuming that decision created a lower standard of scrutiny for compelled commercial speech. The opinion below—contrary to the holdings of the this Court *and* the Second, Fourth, Seventh, and D.C. Circuits—allows the government to require speakers to convey a *misleading*, *controversial* message in pursuit of an interest that need only be "more than trivial." Pet. App. 21a–23a. The Ninth Circuit stands alone in establishing this highly permissive standard of review for compelled disclosures, giving government free rein to compel a wide swath of commercial speech.

A. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A COMPELLED MESSAGE THAT IS MISLEADING AS A WHOLE SATISFIES *ZAUDERER*

Just as "circuits have split on … *Zauderer*'s reach (what types of disclosures it covers)," they also have split on "its form (how it applies to disclosures within its bounds)." Note, *Repackaging* Zauderer, 130 Harv. L. Rev. 972, 973 (2017).

The decision 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. App. 26a. Not only is this conclusion incorrect—because the "FCC guidelines … incorporate a many-fold safety factor, such that exposure to radiation in excess of the guideline level is considered by the FCC to be safe"—the majority's "approach" conflicts with the approach

applied by other circuits. Pet. App. 40a–41a (Friedland, J., dissenting); *see also Farina* v. *Nokia, Inc.*, 625 F.3d 97, 105 (3d Cir. 2010) ("any cell phone legally sold in the United States is a 'safe' phone").

Other Courts of Appeals have held that a compelled disclosure fails *Zauderer* where it "*could be* misinterpreted by consumers." *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled on other grounds by American Meat Institute*, 760 F.3d 18 (emphasis added). As the D.C. Circuit explained, *Zauderer* requires that the mandated information be "purely factual and uncontroversial," and this Court has only upheld "clear statements that were both indisputably accurate and not subject to misinterpretation by consumers" under that standard. *Ibid.* (quoting *Zauderer*, 471 U.S. at 651).

Subsequent decisions from the D.C. Circuit are in accord. In *American Meat Institute*, for instance, the en banc court held that disclosures "could be so one-sided or incomplete that they would not qualify as 'factual and uncontroversial.'" 760 F.3d at 27. And the court recently confirmed that messages that "convey a certain innuendo … or moral responsibility" are not "purely factual and uncontroversial" under *Zauderer*. *United States* v. *Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017). Similarly, the Fourth Circuit recognizes that a disclosure must be more than literally true: Even if "the words the state puts into the [speaker]'s mouth are factual, that does not divorce the speech from its moral or ideological implications." *Stuart* v. *Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). Thus, in the Fourth Circuit—unlike the Ninth—a compelled disclosure is unconstitutional if it "explicitly promotes" an ideological message "by demanding

the provision of facts that all fall on one side of the … debate." *Ibid.*

The Seventh Circuit too 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*. *Entm't Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006). Berkeley has been allowed to do precisely what the government may not do in other circuits: It forces cell phone retailers to tell their customers that cell phones are unsafe, contrary to the retailers' (and the FCC's) views.[1]

B. A Misleading And Controversial Disclosure Does Not Satisfy *Zauderer*, Even If Each Sentence Is Literally True

1. The panel majority's application of *Zauderer* contradicts this Court's teachings. As Judge Friedland's dissent forcefully explained, requiring only that each sentence be technically correct when parsed sentence by sentence by judges (Pet. App. 39a–41a) guts *Zauderer*: This "approach misses the forest for the trees." Pet. App. 40a.

Zauderer requires a mandated disclaimer to be "purely factual and uncontroversial." 471 U.S. at 651. The panel's approach blesses disclaimers that fail

[1] The panel asserted that Berkeley's notice only repeated, "in summary form," certain disclosures required by the FCC. Pet. App. 16a, 24a. Berkeley conceded below, however, that "the Ordinance does not repeat the statements in manufacturers' existing consumer disclosures." Berkeley Answer ¶ 85.

each of these requirements, and thus contravenes *Zauderer* in two ways.

First, a mandatory statement that, as a whole, potentially conveys a misleading message is not "purely factual." *See American Meat Institute*, 760 F.3d at 27. Indeed, the advertisement in *Zauderer* that triggered the curative disclosure was literally accurate, but deceptive "to a layman not aware of the meaning of … terms of art." 471 U.S. at 652. The panel ruling permits the government to *compel* the very sort of misleading speech that is so devoid of value it may be *banned* entirely.

Second, the panel erroneously excised *Zauderer*'s requirement that the disclosure be "uncontroversial." Pet. App. 22a–23a. A statement does not pass *Zauderer* simply because it is factual; it must be "purely factual *and* uncontroversial." 471 U.S. at 651 (emphasis added). These requirements are independent; it is thus not sufficient for each statement, taken in isolation, to be literally true. As the D.C. Circuit explained, "'uncontroversial,' as a legal test … mean[s] something different than 'purely factual.'" *NAM II*, 800 F.3d at 528.

The Ninth Circuit held exactly the opposite: "'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience." Pet. App. 22a. Thus, the Ninth Circuit "conclude[d]" below that "*Zauderer* requires only that the information be 'purely factual.'" Pet. App. 23a. In other words, the Court of Appeals held that *Zauderer* does not mean what it says: that the speech the government compels must be "uncontroversial."

This standard is not only wrong but dangerous. It empowers government to manipulate commercial speech for its own ends by requiring, for example, pharmaceutical manufacturers to warn consumers that certain "studies have found vaccines to increase the risk of autism" or "studies have linked birth control pills to breast cancer," or abortion service providers to state that "studies have shown aborted fetuses feel pain," or solar panel manufacturers to state that "some scientists have questioned whether carbon emissions contribute to climate change." While those statements are *literally* true, it would make no constitutional difference, on the panel majority's view, that they are misleading and extraordinarily controversial.

Other Courts of Appeals have recognized what the Ninth Circuit does not: Even if true, a message is not "uncontroversial" where it "requires [commercial actors] to state the City's preferred message" or "to mention controversial services that some [commercial actors], such as Plaintiffs in this case, oppose." *Evergreen Ass'n, Inc.* v. *City of N.Y.*, 740 F.3d 233, 245 n.6 (2d Cir. 2014); *see Nat'l Ass'n of Mfrs.* v. *SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014) ("*NAM I*") (striking down compelled commercial speech requirement because "it is far from clear that the description at issue—whether a product is 'conflict free'—is factual and non-ideological"), *overruled on other grounds by American Meat Institute*, 760 F.3d 18.

The Ninth Circuit's rule gives "no end to the government's ability to skew public debate by forcing companies to use the government's preferred language" so long as they define that language in literally true terms. *NAM II*, 800 F.3d at 530. As the D.C. and

Second Circuits have correctly reasoned, this Court's "cases dealing with ideological messages 'cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of fact.'" *NAM I*, 748 F.3d at 371 (quoting *Riley*, 487 U.S. at 797); *accord Int'l Dairy Foods Ass'n* v. *Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996). ("The right not to speak inheres in political and commercial speech alike, and *extends to statements of fact* as well as statements of opinion." (citations omitted; emphasis added)).

2. Here, by artificially limiting the *Zauderer* analysis, the Ninth Circuit set common sense aside and ignored the plainly misleading nature of Berkeley's ordinance. 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. *See Zauderer*, 471 U.S. at 652 ("[I]t is a commonplace that members of the public are often unaware of the technical meanings of such terms."). As Judge Friedland concluded, "[t]aken 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. "Yet," as she reiterated, "Berkeley has not attempted to argue, let alone to prove, that message is true." *Ibid.*

According to the FCC, the message is *not* true: The FCC has repeatedly found that cell phones approved for sale in the United States are safe no matter how they are used. *See supra* at Statement B.1. As Judge Friedland summarized, "FCC guidelines make clear that they are designed to incorporate a many-

fold safety factor, such that exposure to radiation in excess of the guideline level is considered by the FCC to be safe." Pet. App. 41a.

Thus, rather than *prevent* consumer deception, the Berkeley ordinance *inflames* the "considerable confusion and misunderstanding" about the RF exposure guidelines that the FCC has been trying to correct. SAR Guide. Because "the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated." *Borgner*, 537 U.S. 1080, 1082 (Thomas, J., joined by Ginsburg, J., dissenting from the denial of certiorari).

C. The Ninth Circuit Downgraded The Strength Of The Government Interest Necessary To Sustain Compelled Commercial Speech

The Ninth Circuit further weakened *Zauderer* by downgrading the strength of the government interest necessary to sustain compelled commercial speech, redefining "substantial" to mean anything "more than trivial." Pet. App. 21a. The Court of Appeals cited no support for this novel proposition, and there is none: This Court has never suggested that the "substantial" interest required by *Zauderer* is merely an interest that can clear the bar of triviality, nor has any other Court of Appeals so held.

In fact, the Second Circuit has rejected asserted governmental interests, such as the supposed interest in satisfying "the demand of [the] citizenry for … information," as insufficiently weighty to sustain a commercial speech mandate. *International Dairy*, 92 F.3d

at 73. Under the Ninth Circuit's "non-trivial" standard, it is difficult to imagine a governmental interest that would *not* justify forced commercial speech. That standard will further embolden governments in the Ninth Circuit and beyond to conscript private actors to serve as bulletin boards for the government's politically-preferred messages.

III. THE ISSUES PRESENTED AFFECT THE UBIQUITOUS GOVERNMENT-MANDATED WARNINGS FOUND ON NUMEROUS PRODUCTS, AT NUMEROUS STORES, AND IN NUMEROUS ADVERTISEMENTS ACROSS THE COUNTRY

The issues presented are of undeniable national importance. Federal, state, and local governments compel commercial speech *all the time*. As the Second Circuit explained in 2001, "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information." *Sorrell*, 272 F.3d at 116 (collecting examples). Since then, these laws have only grown, and compelled "[c]ommercial disclosures have become ubiquitous." Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 Fordham Urb. L.J. 1201, 1224 (2013).

Today, "[g]overnments at all levels frequently require the disclosure of potentially relevant information about goods or services offered for sale." Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 Ariz. L. Rev. 421, 424 (2016). It would be difficult, if not impossible, to participate as a consumer in the American economy

for a single day without encountering several of these government-mandated warnings. An immense number of products, advertisements, and places contain mandatory labels such as ingredient lists, warnings, country-of-origin disclosures, and nutrition information.

This case affects how courts should analyze this plethora of commercial speech mandates under the First Amendment. "[T]he large number of States" (and municipalities such as Berkeley) with numerous laws that compel commercial speech demonstrates the practical importance of the questions presented. *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000).

Under the decision below, every "state or local government in [the Ninth] Circuit" can "pass ordinances compelling disclosures by their citizens on any issue the city council votes to promote, without any regard to *Central Hudson*." Pet App. 130a (Wardlaw, J., dissenting). The same is true in the D.C., Second, Sixth, and First Circuits, where government can compel disclosures on product labels or advertisements without passing intermediate scrutiny. In these circuits, "a business owner no longer has a constitutionally protected right to refrain from speaking, as long as the government wants to use the company's product to convey 'purely factual and uncontroversial' information." *American Meat Institute*, 760 F.3d at 37 (Brown, J., dissenting).

By "extend[ing] *Zauderer* beyond" the limits set by all other circuits "to instances where the government compels speech for its own purposes," the decision below undoubtedly incentivizes the City of Berkeley and

municipalities across the circuit to burden businesses with an ever-expanding rucksack of compelled disclosure requirements—not to prevent any consumer deception, but to suit their own political, ideological, and normative views on a countless variety of topics. Pet. App. 128a–131a (Wardlaw, J., dissenting).

As Judge Friedland cautioned, "[t]here are downsides to false, misleading, or unsubstantiated product warnings. Psychological and other social science research suggests that overuse may cause people to pay less attention to warnings generally." Pet. App. 42a–43a; *accord*, *e.g.*, David B. Fischer, *Proposition 65 Warnings at 30-Time for A Different Approach*, 11 J. Bus. & Tech. L. 131, 145 (2016); *accord*, *e.g.*, Devin S. Schindler & Tracey Brame, *This Medication May Kill You: Cognitive Overload and Forced Commercial Speech*, 35 Whittier L. Rev. 27, 61–69 (2013). Such warnings also "may deter appropriate use" of beneficial products. HHS, *Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices*, 73 Fed. Reg. 49,603, 49,605–06 (2008); *accord*, *e.g.*, Schindler & Brame, 35 Whittier L. Rev. at 63–65.

Indeed, many recent compelled-disclosure laws "are, for all practical purposes, requirements that commercial actors communicate value-laden messages about inherently political questions." Adler, 58 Ariz. L. Rev. at 450. The Ninth Circuit's opinion in this case blesses, with minimal scrutiny, any ideological or normative message a clever city council wants to conscript unwilling businesses to deliver, and thus poses enormous practical implications for free speech in modern society.

CONCLUSION

The Court should finally resolve the long-standing confusion and division of authority over when and how *Zauderer* applies to commercial speech mandates.

Respectfully submitted.

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