No. 17-976

In the
Supreme Court of the United States

CTIA – THE WIRELESS ASSOCIATION,

Petitioner,

v.

CITY OF BERKELEY, CALIFORNIA, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

2. When *Zauderer* does apply, 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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INTEREST OF AMICUS CURIAE

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Berkeley, California, passed an ordinance requiring all cell phone retailers to provide a written poster or other large printed document summarizing information that warns consumers that cell phones may be unsafe due to exposure to RF (radiofrequency) radiation. Pet. App. 5a-8a. The mandated summary includes the city's advice about "how to use your phone safely." *Id.* at 7a. This required speech contradicts the Federal Communication Commission's conclusions that all cell phones sold in the United States are safe. *Id.* at 11a-12a (federal regulation regarding cell phone radiation deliberately set "with a large safety factor" well beyond what is needed to ensure consumer safety). Ostensibly applying *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the Ninth Circuit upheld the ordinance, holding that the compelled speech was warranted because the government has a "more than trivial" interest in conveying its own "compelled disclosure." Pet. App. 21a.

Expanding *Zauderer* to encompass all factual disclosures, and not merely those intended to combat misleading commercial speech, is incompatible with the First Amendment and promotes both over-warning and senseless mandatory labeling that ultimately harm consumers and the public interest. Employing the precautionary participle to mandate opinionated speech is flatly incompatible with First Amendment principles. Untethering *Zauderer* from its carefully circumscribed limits gives government a blank check to mandate disclosures based on "consumer curiosity," the "possibility of harm," or

other nebulous "right to know" theories. This conflicts with this Court's First Amendment jurisprudence, exacerbates a Circuit split as to how *Zauderer* applies (if at all) beyond its own factual context, and implicates an important national question that only this Court can resolve. The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES PROTECTING AGAINST COMPELLED COMMERCIAL SPEECH

The First Amendment protects the positive right to speak; "[t]here is necessarily . . . a concomitant freedom not to speak publicly" which applies with equal force. *PG&E Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986). This "right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), applies with equal force in the commercial speech context.[2] *PG&E*, 475 U.S. at 16 ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say." (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258

[2] These cases suggest "that the government may be required to assert an even *more* compelling interest when it infringes the right to refrain from speaking than is required when it infringes the right to speak." *Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 651 F.3d 218, 242 (2d Cir. 2011) (Straub, J., dissenting) (emphasis added); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

(1974) (holding that a right of reply for political candidates in newspapers unconstitutional)).

Although regulations of commercial speech are generally subject to intermediate scrutiny, *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), when a law is content-based it is subject to strict scrutiny even if the law regulates commercial speech. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226-27 (2015) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-66 (2011)); *PG&E*, 475 U.S. at 19. Because Berkeley's ordinance requires cell phone retailers to disseminate specific speech when they would otherwise be silent, the ordinance is content-based, and hence should be subjected to strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [and as such is] a content-based regulation of speech." (citing *Miami Herald Publ'g Co.*, 418 U.S. at 256)).

Even when the content is not mandated, this Court established a general rule that courts must apply heightened scrutiny to compelled commercial speech. The Constitution demands that "restrictions [including compulsions] on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny—that is, they must 'directly advanc[e]' a substantial governmental interest and be 'n[o] more extensive than is necessary to serve that interest.'" *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (quoting *Central Hudson*). Courts may use a lower standard only in narrow circumstances focused on preventing misleading commercial speech that results in

consumer deception. *Id.*; *see also Zauderer*, 471 U.S. at 651.

In *Zauderer*, this Court reviewed an Ohio state bar disciplinary regulation requiring attorneys who advertised contingency-fee representation to disclose in their advertisements that unsuccessful clients might be liable for certain litigation costs. "[B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," this Court reasoned that "[warnings] or [disclaimers] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." *Zauderer*, 471 U.S. at 651 (citation omitted). The holding was narrow: "[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in *preventing deception of consumers*." *Id.* (emphasis added). Thus, whether described as an "exception" to *Central Hudson*, Pet. App. 18a-19a, or an "application" of *Central Hudson*'s variety of intermediate scrutiny, Petition for Writ of Certiorari at 3, *Zauderer* should be invoked only in very limited circumstances.

Milavetz clarified the narrowness of the *Zauderer* rule. That case reviewed Bankruptcy Code provisions requiring certain professionals providing debt relief assistance to disclose in their advertisements that their services related to bankruptcy. This Court upheld the provisions because they "share the essential features of the rule at issue in *Zauderer*," namely that the required disclosures "are intended to combat the problem of inherently misleading commercial advertisements." *Milavetz*, 559 U.S. at 250. In other words, *Zauderer*'s lesser standard for

regulations attempting to prevent "deception of consumers" only applies to "inherently misleading" commercial speech.

In contrast to these unique cases and the decision below, this Court otherwise applies intermediate scrutiny when commercial speech is not misleading. For example, in *In re R.M.J.*, the Court applied *Central Hudson*'s intermediate scrutiny test to ethics rules prohibiting attorneys from advertising their practice areas other than in terms prescribed by the state supreme court. 455 U.S. 191, 197-98 (1982). Because the restricted statements were not inherently misleading, and the State failed to show that the petitioner's advertisements were in fact likely to mislead consumers, this Court applied *Central Hudson* and invalidated the rules. *Id.* at 205-06. As *Milavetz* points out, *R.M.J.* "emphasiz[ed] that States retain authority to regulate inherently misleading advertisements." *Milavetz*, 559 U.S. at 250 (citing *R.M.J.*, 455 U.S. at 203, 207).

Zauderer and its progeny "have not presumptively endorsed government-scripted disclaimers." *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., dissenting from denial of certiorari). This Court has never applied *Zauderer* beyond regulations aimed at false or misleading speech. *See Milavetz*, 559 U.S. at 257 (Thomas, J., concurring) ("[O]ur precedents make clear . . . a disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, [are inherently likely to deceive or have in fact been deceptive.]" (citations omitted)); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) ("Commercial speech that is not false, deceptive, or

misleading can be restricted, but only if the State shows that the restriction [passes *Central Hudson*'s intermediate scrutiny test].").

Moreover, this Court has refused to apply *Zauderer* outside of the false or misleading speech context. *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001), characterized *Zauderer* as a case where, because "substantial numbers of potential clients might be misled by omission of the explanation, the Court sustained the requirement as consistent with the State's interest in 'preventing deception of consumers.'" This Court then refused to apply *Zauderer* to the compelled subsidization of agricultural marketing because, under that circumstance, there was no indication "that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers." *See also Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-67 (9th Cir. 2009) (declining to determine what level of scrutiny applies to a requirement that "violent video game[s]" be labeled with a four-inch square label that reads "18" because the requirement failed under "the factual information and deception prevention standards set forth in *Zauderer*" (emphasis added)), *aff'd on other grounds, Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).

II

THE COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT THE "PRECAUTIONARY PRINCIPLE" HAS NO PLACE IN FIRST AMENDMENT LAW

A. The Precautionary Principle Is Incompatible with First Amendment Doctrine

The precautionary principle is antithetical to First Amendment doctrine. Indeed, "much of American free speech doctrine can be seen as a rejection of the precautionary principle." Frederick Schauer, *Free Speech in an Era of Terrorism: Is It Better to Be Safe Than Sorry?: Free Speech and the Precautionary Principle*, 36 Pepp. L. Rev. 301, 304 (2009). The principle extends far beyond mandated disclosures: the idea is that, "having identified the possibility of a catastrophic occurrence—whether it be nuclear disaster, environmental upheaval, or the loss of many important species—under conditions of uncertainty, we should err on the side of eliminating those conditions that might possibly produce the catastrophe." *Id.* at 305. Likewise, in the free speech context, if "we define the catastrophe as the overthrow of the government or a major terrorist attack, a commensurate precautionary principle would demand that we vigilantly restrict speech in the service of guarding against the catastrophe." *Id.* The problem with this idea is that "[a]ctual free speech doctrine, however, demands just the reverse. It requires us to accept the uncertain risk of a catastrophe rather than

restrict the speech that might cause it." *Id.*[3] As this Court explained in *United States v. Stevens*, 559 U.S. 460, 470 (2010), the First Amendment guarantee of free speech transcends any "ad hoc balancing of relative social costs and benefits" by establishing the default ground rule that the benefits of free speech outweigh any speculative social costs advanced to restrict it.

Thus, it is not permissible for government to compel speech to counteract an uncertain risk of harm. "The mere existence of [a] risk, however, is not necessarily enough to justify a warning." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 934 (2004). Although *Dowhal* arose in a different context,[4] its insights are instructive. In *Dowhal*, the court noted that even a literally truthful warning can be misleading. *Id*. at 931 (citing, among others, *United States v. Ninety-Five Barrels of Vinegar*, 265 U.S. 438, 444 (1924) (deception "may result from the use of statements not technically false or which may be literally true")). The court explained

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[3] *Accord Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[4] *Dowhal* was a preemption case to determine whether a California state regulation requiring a label for defendant's product (nicotine gum and patches), including language indicating that use of the product could harm a fetus, was preempted by a Food and Drug Administration (FDA) requirement that mandated other language that was not as broad in its communications about potential harm as the California label. 32 Cal. 4th at 917-18. The court held that the FDA regulations preempted California's regulation. *Id*.

that whether a label is potentially misleading "is essentially a judgment of how the consumer will respond to the language of the label." *Dowhal*, 32 Cal. 4th at 934. Even "a truthful warning of an uncertain or remote danger may mislead the consumer into misjudging the dangers stemming from use of the product and consequently making a medically unwise decision." *Id*. Thus, "[a]lthough there is reason to believe that nicotine [contained in defendant's gum and patches designed to help consumers quit smoking] can cause reproductive harm, plaintiff has offered no qualitative assessment of this risk" and hence the "mere existence of the risk . . . is not necessarily enough to justify a warning; the risk of harm may be so remote that it is outweighed by the greater risk that a warning will scare consumers into foregoing use of a product that in most cases will be to their benefit." *Id*. Therefore, "even if scientific evidence supports the existence of a risk, a warning is not necessarily appropriate: 'The problems of overwarning are exacerbated if warnings must be given even as to very remote risks.'" *Id*. at 932 (citation omitted).

Here, Berkeley acknowledged in the "Findings and Purpose" of its ordinance that the compelled warning rests not on any evidence of harm or deception, but only on the conjecture that users do not read the information already provided by cell phone retailers and may place themselves in some sort of "unsafe" circumstance. Pet. App. 5a-6a. Thus, the relevance of *Dowhal*'s insights: the risk of harm (from cell phone radio-frequency radiation) is so remote that it is outweighed by the greater risk that a warning will scare consumers into forgoing use of a product that in

most cases they perceive to be to their benefit.[5] This precautionary principle is incompatible with general First Amendment doctrine that requires citizens and legislatures to accept uncertain risks of harm rather than place restrictions on speech.

B. There Is No Public Interest Justification to Infringe First Amendment Rights for Over-Warning

Requiring retailers to include unnecessary warnings on their products leads to consumer frustration and confusion rather than added safety. "Not all warnings . . . promote user safety. Requiring manufacturers to warn their products' users in all instances would place an onerous burden on them and would 'invite mass consumer disregard and ultimate

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[5] The State of California Department of Public Health recently issued guidelines purporting to address the issue of RF radiation from cell phones. The language used to justify the guidelines exemplifies the vague foreboding typical of the precautionary principle: "*Some* scientists and public health officials believe RF energy *may* affect human health. . . . Although the science is *still evolving*, *some* laboratory experiments and human health studies have *suggested* the *possibility* that long-term, high use of cell phones *may* be linked to certain types of cancer and other health effects . . . ." Cal. Dep't of Health, Div. of Env. & Occupational Disease Control, *How to Reduce Exposure to Radiofrequency Energy from Cell Phones* https://www.cdph.ca.gov/Programs/CCDPHP/DEODC/EHIB/CDPH%20Document%20Library/Cell-Phone-Guidance.pdf (Dec. 13, 2017) (emphasis added). The alarmist nature of the guidelines generated an immediate response. *See, e.g.*, Kevin Loria, *California has issued a warning about the dangers of cell phone radiation – but the science is far from settled*, Business Insider (Dec. 18, 2017), http://www.businessinsider.com/california-public-health-cellphone-radiation-guide-2017-12 (citing numerous studies finding no increase in cancer rates related to cell phone use).

contempt for the warning process.'" *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56, 70 (2008) (citing *Finn v. G. D. Searle & Co.*, 35 Cal. 3d 691, 701 (1984) (quoting Aaron D. Twerski, et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 Cornell L. Rev. 495, 521 (1976)).

As noted by the dissenting judges below, over-warning risks decreasing the effectiveness of warnings by burying the important among the trivial. Pet. App. 43a (Friedland, J., dissenting); Pet. App. 129a-130a (Wardlaw, J., dissenting from denial of rehearing en banc). Described as "sensory overload" by one court, *Dunn v. Lederle Laboratories*, 121 Mich. App. 73, 81 (1982), "the more that product manufacturers warn of risks that never materialize, the less likely product users are to heed those warnings." Robert G. Knaier, *An Informed-Choice Duty to Instruct?* Liriano*,* Burke*, and the Practical Limits of Subtle Jurisprudence*, 88 Cornell L. Rev. 814, 853 (2003). Thus, "[w]arnings, in order to be effective, must be selective." *Dunn*, 121 Mich. App. at 81 (quoting Twerski, *Use and Abuse*, 61 Cornell L. Rev. at 514). Warnings "must call the consumer's attention to a danger that has a real probability of occurring and whose impact will be significant." *Id*. If consumers merely ignored excessive warnings, the problem might be minimal: the only superfluous costs would be those of providing the warnings. However, consumers might begin to ignore not only the excessive warnings, but also those that are crucial to safe product use.

When warnings proliferate with redundant admonitions, product users and consumers may

increasingly view all warnings as just so much wasted ink, thus missing the useful information that advises of non-obvious or likely risks. Knaier, *Duty to Instruct*, 88 Cornell L. Rev. at 853; *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 242 (1998) ("Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware."). As Judge Friedland counseled, "If Berkeley wants consumers to listen to its warnings, it should stay quiet until it is prepared to present evidence of a wolf." Pet. App. 43a.

Because over-warning causes consumers to become less attentive to warnings in general, it dilutes consumers' attention to legitimately flagged risks. Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" From the "Need to Know" About Consumer Product Hazards*, 11 Yale J. on Reg. 293, 296 (1994). "Overreaction" is the flipside, where consumers inundated with warnings "may become preoccupied with information about trivial hazards. For instance, consumers may forego use of net beneficial products in response to warning statements, or may shift to equally beneficial substitutes that actually pose greater (though perhaps less alarming) risks." *Id.* at 297. Thus, federal regulators caution against over-warning: for example, the regulations for general labeling conditions for over-the-counter drug labeling acknowledge that "if labeling contains too many required statements . . . the impact of all warning statements will be reduced." *Id.* at 381 (citing 40 Fed. Reg. 11,717 (Mar. 13, 1975) ("In addition there is a space limitation on the number of statements that can appear on the labeling.")); *see also* 53 Fed. Reg. 30,522, 30,530 (Aug. 12, 1988) ("The

agency agrees that too many warning statements reduce the impact of important statements."). Congress, too, has long acknowledged the dangers of over-warning of "trifling" matters, because of the sheer quantity of warnings such a low bar would engender. H.R. Rep. No. 86-1861 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2833, 2837.

It is precisely because warning labels are an important source of consumer information that resellers should not be forced to include material that does not serve a specific and necessary purpose. *See Riley*, 487 U.S. at 804 (Scalia, J., concurring) ("[I]t is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them."). Here, federal regulations mandate that cell phone retailers provide certain information. Pet. App. 34a. The retailers comply with those regulations. Pet. App. 13a-15a. Berkeley's poster and large-print summary sheet notifications do not add any new information; the ordinance instead compels speech that is misleading in tone and effect,[6] violating the retailers' First Amendment right to refrain from this unnecessary, alarmist speech.

[6] *See* Pet. App. 39a (Friedland, J., dissenting) (on the record in this case, the Berkeley ordinance would "require businesses to make false or misleading statements about their own products").

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: February, 2018.

Respectfully submitted,

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