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

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI FILED BY CTIA – THE WIRELESS ASSOCIATION®

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, Virginia 22901
Telephone: (434) 987-3888
Facsimile: (434) 978-1789

Michael J. Lockerby*
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007-5109
Telephone: (202) 945-6079
Facsimile: (202) 672-5399
mlockerby@foley.com

**Counsel of Record*

Counsel for Amicus Curiae The Rutherford Institute

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

RULE 29.6 STATEMENT

Amicus curiae The Rutherford Institute is a nonprofit, non-stock corporation organized under the laws of the Commonwealth of Virginia. The Rutherford Institute has no parent corporation. No publicly held corporation owns more than ten percent of the stock of The Rutherford Institute.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTE

RULE

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

Foremost among the basic freedoms that the Institute seeks to uphold are the guarantees of the First Amendment. "The very reason for the First Amendment," in the words of Justice Hugo L. Black, "is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 788 (1961). The decision of the Ninth Circuit at issue violates the fundamental principle that the First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). With all due respect to the Ninth Circuit, it has expanded beyond all recognition the limited circumstances under which the government may compel commercial speech recognized by this Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S.

---

[1] No counsel for any party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparing or submitting this brief. No person other than the Institute or its counsel contributed money or anything else of value that was intended to fund preparing or submitting this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a).

626 (1985). Merely by selling cell phones, retailers in Berkeley are not engaged in commercial speech—much less misleading commercial speech that, under *Zauderer*, retailers might be required to "correct."

This conflict with the First Amendment in general and *Zauderer* in particular ought not be allowed to stand. Otherwise state and local governments throughout the Ninth Circuit will be free to compel citizens to make statements with which they disagree—even though the statements may be misleading and controversial—so long as the statements are "literally true" and "reasonably related to" a governmental interest that is "more than trivial." The prospect of U.S. citizens being forced to become unwilling mouthpieces for the controversial viewpoints of their elected officials is certainly not something that the Framers of the Constitution ever envisioned. The Institute therefore respectfully requests that this Court grant CTIA's petition so that the Ninth Circuit's decision can be reconciled with the First Amendment.

PRELIMINARY STATEMENT

The protections of the First Amendment could not be more clear: "Congress shall make no law … abridging the freedom of speech." By virtue of the Due Process Clause, the constitutional mandate that "Congress shall make no law … abridging the freedom of speech" has long since been applied to the States and their political subdivisions. *Gitlow v. New York*, 268 U.S. 652 (1925). In other words, the First Amendment applies with equal force to the City.[2]

---

[2] The City of Berkeley, California, and the City Manager are referred to collectively as the "City."

The elected officials who run the City are obviously entitled to their opinions about how best to carry or use a cell phone "in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network." CITY OF BERKELEY MUN. CODE § 9.96.030(A) (emphasis in original). The City is also entitled to its belief that the residents of Berkeley need to be reminded to "[r]efer to the instructions in your phone or user manual for information about how to use your phone safely." *Id.*

Like any state or local government, the City has plenty of means at its disposal to spread the gospel of safe cell phone use. The City can post such messages on municipal property and on its website. The City can include reminders about what it considers to be safe cell phone use in mailings to residents. Or the City can prepare public service announcements about cell phone safety for broadcast on television, radio, or the Internet.

What the City cannot do is conscript cell phone retailers selling a lawful product in a truthful, non-deceptive manner to become apostles for the City's views on this subject. The extent to which the City's required notice is arguably misleading is addressed at length in CTIA's Petition, and the Institute has no independent data or research to either challenge or support this characterization.

The Institute does know, however, that—as a practical matter—the Ninth Circuit's decision does not limit the types of messages that retailers could be compelled to relay to their customers. For example:

- Grocery stores and restaurants selling meat could be required to inform their customers

and patrons that, because research shows that eating meat contributes to climate change, they should consider vegetarian options instead.

- Retailers of electronic games could be required to inform customers that watching violent images and engaging in simulated acts of violence have been shown to increase the propensity to engage in actual violence.[3]

- Retailers of books, magazines, and newspapers could be required to inform customers of research suggesting that reading may cause obesity.[4]

---

[3] Previously, the Ninth Circuit considered a California statute requiring "violent" video games to be labeled with a sticker that said "18"—suggesting that the products could not be sold or rented to minors (a prohibition that was part of the law until it was invalidated). The Ninth Circuit found this compelled commercial speech unconstitutional under the First Amendment, and this Court agreed. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011). No intervening decision of this Court would warrant a different result at this juncture.

[4] *See, e.g.*, U.S. Dep't of Health and Human Services, *The Surgeon General's Vision for a Healthy and Fit Nation*, Rockville, MD: U.S. Dep't of Health and Human Services, Office of the Surgeon General, Jan. 2010 (www.surgeongeneral.gov/library/obesityvision/obesityvision2010.pdf); Mark Stephen Tremblay, Rachel Christine Colley, Travis John Saunders, Genevieve Nissa Healy, and Neville Owen, "Physiological and health implications of a sedentary lifestyle," Appl. Physiol. Nutr. Metab. 35: 725–740 (2010) (blogs.plos.org/obesitypanacea/files/2010/12/Published-Paper.pdf).

In its Petition, CTIA has briefed at length the inconsistency between the First Amendment and the City's cell phone ordinance. Although the Institute agrees with CTIA's analysis of this Court's commercial speech jurisprudence, the Institute questions whether retailers subject to the ordinance are even engaged in commercial speech that they can be compelled to "correct." To the extent that they are, the retailers cannot—consistent with *Zauderer*—be compelled to deliver their customers the message that the City is requiring.

ARGUMENT

I. THE MERE STATUS OF BEING A CELL PHONE RETAILER IN BERKELEY, CALIFORNIA IS NOT COMMERCIAL SPEECH

Before considering whether the ordinance is within the scope of compelled speech permitted by this Court's decision in *Zauderer*, the Court should first scrutinize whether the conduct of retailers that the City is regulating is even commercial speech at all. The Institute respectfully submits that it is not. The mere status of being a retailer is not an act of "commercial speech" within the meaning of this Court's precedents. Commercial speech "does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). To the extent that the retailers in Berkeley are engaged in commercial speech with respect to cell phone safety, it is only because the City is forcing them to. The First Amendment, however, protects "the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714.

This Court's precedents would not permit the City to force newspapers, radio stations, and television stations doing business in Berkeley to publish or broadcast a "public service announcement" containing the message that the ordinance forces retailers to deliver. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). Telecommunications carriers providing cell phone service in Berkeley could not be forced to deliver the messages along with their bills to customers. *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 5 (1986).

Why should retailers be compelled to make statements against their will that others cannot be required to make? This Court's precedents could not be more clear that "[t]he identity of the speaker is not decisive in determining whether speech is protected." *Id.* at 8. Like others, retailers in Berkeley have the right "to refrain from speaking at all." *Wooley*, 430 U.S. at 714. As a result, the Court need not even reach the issue of whether the *Zauderer* exception applies because the City is impermissibly forcing commercial speech—not requiring correction of deceptive commercial speech.

II. FORCING RETAILERS TO DELIVER THE CITY'S MESSAGE FURTHERS NO "SUBSTANTIAL" GOVERNMENT INTEREST

Even if the mere act of being a retailer is deemed to be "commercial speech," the City bears the burden of showing that the Ordinance serves a "substantial interest." *Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm'n. of New York*, 447 U.S. 557, 564 (1980). The "substantial interest" sufficient

to invoke the *Zauderer* exception is "the State's interest in preventing deception of consumers." 471 U.S. at 628. Here, the Ninth Circuit has impermissibly lowered the bar in a number of respects. According to the Ninth Circuit, retailers in Berkeley can be compelled to deliver the City's required message even if they have not engaged in misleading commercial speech for which—under *Zauderer*—corrective disclosures can be compelled in certain circumstances. Rather than require the showing of a "substantial interest" required under *Central Hudson*, the Ninth Circuit says that a "more than trivial" governmental interest will suffice. On its face, the distinction between a governmental interest that is "substantial" and one that is "more than trivial" is—in a word—substantial.

III. *ZAUDERER* APPLIES ONLY TO "UNCONTROVERSIAL" FACTS REQUIRED TO CORRECT DECEPTIVE COMMERCIAL SPEECH

The scope of regulation of commercial speech permitted by *Zauderer* is narrow indeed:

> Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.

471 U.S. at 638, citing *Cent. Hudson*, 447 U.S. at 566. CTIA's Petition addresses in detail the inconsistency between the Ninth Circuit's decision and *Zauderer* as decided by this Court and applied by other Circuits.

The need to reconcile this conflict is heightened by the fact that it implicates the First Amendment.

CONCLUSION

The inconsistency between the ordinance at issue and *Zauderer* is clear. If the protections of the First Amendment are to be narrowed, the Framers provided a mechanism for constitutional amendments through the democratic process. If the City believes that *Zauderer* was wrongly decided, it can and should ask this Court to reconsider its prior holdings in this and other First Amendment cases. The Ninth Circuit should not, however, be permitted to engage in judicial nullification of *Zauderer* or any other precedent of this Court.

Dated: February 8, 2018

Michael J. Lockerby
Counsel of Record
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007-5109
Telephone: (202) 945-6079
Facsimile: (202) 672-5399
mlockerby@foley.com

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, Virginia 22901
Telephone: (434) 987-3888
Facsimile: (434) 978-1789

Counsel for Amicus Curiae The Rutherford Institute