No. 17-976

IN THE

Supreme Court of the United States

CTIA – THE WIRELESS ASSOCIATION,
Petitioner,

v.

THE CITY OF BERKELEY, CALIFORNIA, AND CHRISTINE DANIEL, CITY MANAGER OF BERKELEY, CALIFORNIA, IN HER OFFICIAL CAPACITY,
Respondents.

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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

2. When *Zauderer* applies, whether it is sufficient 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" government interest.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the Association of National Advertisers, Inc. ("ANA") provides leadership for the advertising industry that advances marketing excellence and shapes the future of the industry. Founded in 1910, the ANA's membership includes more than 1,000 companies—750 client-side marketers and 300 associate members, which include advertising agencies, law firms, suppliers, consultants, and vendors—with 15,000 brands that collectively spend over $400 billion annually in marketing and advertising. The ANA serves its members by advocating for coherent legal standards for advertising, including clear and consistent constitutional protections for commercial speech.

As this Court recognized, a consumer's concern "for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell v. IMS Health Inc.*, 564 U.S. 562, 552 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)). The ANA supports this understanding of the importance of commercial speech and participates in these types of cases to help ensure constitutional safeguards are maintained. Consistent with this view, this Court's decisions have evolved along a clear trajectory toward greater First Amendment protection since it first articulated the commercial speech doctrine in *Bigelow v. Virginia*,

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[1] All parties consented to this *amicus curiae* brief through letters filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

421 U.S. 809, 818-20 (1975), and *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976).[2]

Despite this, maintaining coherent constitutional protection for commercial speech has presented a unique challenge. The Court's reliance on "'common-sense' distinction[s]" between expression proposing commercial transactions and "other varieties of speech," has not promoted simplicity. *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980) (citation omitted). It has instead spawned a complex jurisprudence with multiple levels of scrutiny and few bright lines.

Most commercial speech regulations are subject to intermediate scrutiny under *Central Hudson*. *Id.* at 565-66. More relaxed scrutiny has applied where certain disclosures are used to keep commercial

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[2] In the four decades since *Virginia State Board*, the Court invalidated: (1) prohibitions on use of illustrations in attorney ads, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985); (2) an ordinance regulating placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a state ban on using "CPA" and "CFP" on law-firm stationery, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); (5) a restriction on listing alcohol content on beer labels, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); (6) a state ban on advertising alcohol prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1986) (plurality op.); (7) a federal ban on broadcasting casino ads, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); (8) federal limits on advertising drug compounding practices, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 377 (2002); and (9) speaker-based state restrictions on data mining. *IMS Health*, 564 U.S. at 579-80.

messages from misleading consumers. *Zauderer*, 471 U.S. at 650-51. And "heightened scrutiny" is the rule when the government regulates speech—including commercial speech—based on "disagreement with the message it conveys." *IMS Health*, 564 U.S. at 566 (citation omitted). Choosing which line of authority controls in a given case is not always easy. *See Discovery Network*, 507 U.S. at 419 ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.").

The decision below complicates the task of determining the proper level of scrutiny by treating it as if it were a simple binary choice. It assumes all compelled commercial disclosures are necessarily subject to the most relaxed constitutional scrutiny. In doing so, it exceeds boundaries previously drawn by this Court, *e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010), and widens fault lines that divide circuit courts on how *Zauderer* applies.

The Ninth Circuit upheld a City of Berkeley ordinance that forces cell phone retailers to provide a disclosure unrelated to any interest in combatting deception, and that misleadingly suggests that the Federal Communications Commission ("FCC") believes handset radiofrequency ("RF") emissions are dangerous. It dilutes First Amendment protection from compelled commercial speech to allow "any governmental interest [to] suffice" so long as it is "more than trivial," and any disclosure that is arguably factual, regardless of the overall impression created. Pet. App. 21a, 130a. The Ninth Circuit's

decision thus misreads and misapplies *Zauderer*, and has no logical stopping point.

Because the Ninth Circuit's approach automatically applies diminished scrutiny to disclosure requirements without regard to their purpose, it overlooks basic First Amendment principles, such as:

- The government's power to regulate commercial speech "is more circumscribed" where communication is neither misleading nor related to unlawful activity, and a "substantial interest" is required. *Central Hudson*, 447 U.S. at 564.
- Compelling commercial speech does not automatically receive diminished scrutiny, and instead may merit heightened scrutiny, particularly where required messages favor or disfavor a speaker. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 15-16 n.2 (1986).
- If the Government can achieve its interests "in a manner that does not restrict speech, or that restricts less speech, [it] must do so," even in the commercial arena. *Western States*, 535 U.S. at 371.

By disconnecting this Court's compelled commercial speech cases from the government's interest in curing deception, the Ninth Circuit disregarded bedrock First Amendment requirements. It makes the law in this area incoherent, and opens a significant loophole that would permit government manipulation of the marketplace of ideas. It further fragments the approach various circuit courts have taken in applying *Zauderer*.

The ANA thus believes this case presents an important opportunity to resolve uncertainty among circuit courts and to impose discipline in how they should analyze compelled disclosures under the First Amendment's commercial speech doctrine.

BACKGROUND

The City of Berkeley requires cell phone retailers to post or distribute to consumers a warning that:

> 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.

Pet. 13. It deemed the ordinance necessary to "assure that consumers have the information they need to make their own choices about the extent and nature of their exposure to [RF] radiation" from cell phones, *id.*; Pet. App. 133a, a purpose unrelated to preventing actual or potential consumer deception.

Taken as a whole, Berkeley's message suggests cell phones are not safe, or in certain circumstances can cause harm, despite contrary FCC findings. Pet. 10-12. This represents the City's commentary on a safe, lawful product—one that already comes with all information the City says consumers need.

Petitioner moved to enjoin the Ordinance as unconstitutional, but the district court denied relief. *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048 (N.D. Cal. 2015) (Pet. App. 63a). A divided Ninth Circuit panel affirmed, *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017) (Pet. App. 1a), and rehearing was denied, also over objections of dissenting judges. *CTIA-The Wireless Ass'n v. City of Berkeley*, 873 F.3d 774 (9th Cir. 2017) (Pet. App. 122a).

SUMMARY OF ARGUMENT

The decision below is among a spate of recent rulings under the commercial speech doctrine that raise questions about its core underpinnings. For four decades, the Court has held commercial speakers enjoy substantial First Amendment protections, while at the same time it came to suggest compelled disclosures may receive lesser scrutiny if such statements are necessary to keep commercial messages from being deceptive or potentially misleading.

The decision below disconnects this prevention-of-deception rationale and holds diminished scrutiny applies regardless of the government interest. Doing so undercuts doctrinal consistency with general First Amendment principles. Speech bans and compulsions are equally repugnant to the First Amendment, and diminished scrutiny makes sense only where the government otherwise would be empowered to restrict or ban speech. Without an interest in preventing deception, there is no consistent rationale to justify forcing commercial speakers to deliver mes-

sages the government is fully capable of delivering itself.

Because the Ninth Circuit's rationale is unmoored from bedrock First Amendment requirements, it lacks any serious limiting principle. The resulting rule would empower local officials to compel speech whenever they feel like sending a government message, regardless of the interest to be served, unless checked by this Court.

The decision below is the latest among circuit decisions that have moved further beyond what this Court intended in *Zauderer*, and illustrates growing confusion among the lower courts. This includes disagreement about not just when *Zauderer*'s diminished scrutiny may apply, but how to administer that test. The Ninth Circuit collapsed *Zauderer*'s analysis of whether a disclosure is "purely factual" and "noncontroversial" into a single inquiry and virtually dispensed with the requirement that compelled speech not be "unduly burdensome." That approach cannot be reconciled with other circuits' rulings, and only this Court can resolve that tension.

ARGUMENT

I. THE COURT NEEDS TO RECONCILE THE LAW GOVERNING COMPELLED COMMERCIAL SPEECH WITH GENERAL FIRST AMENDMENT PRINCIPLES AND THE COMMERCIAL SPEECH DOCTRINE

A. The Ninth Circuit Exceeded This Court's Compelled Commercial Speech Precedent

The Ninth Circuit held Berkeley's (and all other) compelled commercial disclosure requirements receive diminished scrutiny under *Zauderer*. It held this is appropriate without regard to any need to cure deceptive speech. The court also found that a substantial interest is anything more than "trivial." Pet. App. 21a. It joined a growing number of circuits that have held any substantial government interest can justify compelled commercial disclosures, and that diminished scrutiny applies even when the state is not seeking to cure potential deception.[3] Noting

[3] *See* Pet. App. 18a-21a. Along with the Ninth Circuit, the D.C., First, Second, and Sixth Circuits have upheld disclosures targeting interests other than preventing deceptive or misleading commercial speech. *American Meat Inst. v. USDA*, 760 F.3d 18, 22 (D.C. Cir. 2014) (*en banc*) ("*AMI*"); *Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 506, 556 (6th Cir. 2012). The Third, Fifth, and Seventh Circuits limit *Zauderer* to its original application of addressing potential deception. *Dwyer v. Cappell*, 762 F.3d 275, 282 (3d Cir. 2014); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 157, 164-68 (5th Cir. 2007); *Central Ill. Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987).

this was the Circuit's first occasion to address the issue directly, it concurred with the D.C. Circuit's analysis that the anti-deception rationale merely described the interests in *Zauderer*, but that "any governmental interest will suffice so long as it is substantial." *CTIA*, 854 F.3d at 1116-17 (citing *AMI*, 760 F.3d 18; *National Elec. Mfrs.*, 272 F.3d 104).

The Ninth Circuit's decision, like prior rulings of other circuits, simply got ahead of this Court. No Supreme Court decision has ever applied *Zauderer* outside the context of misleading or deceptive commercial speech, nor suggested doing so is proper. In *Milavetz*, it explained that *Zauderer* was "directed at misleading commercial speech," to "combat … inherently misleading [] advertisements," with disclosures that "entail[ed] only an accurate statement." *See* 559 U.S. at 249-50. The Court described these as "essential features of the rule at issue," *id.* at 250, and Justice Thomas reinforced that, under *Zauderer*, a disclosure "passes constitutional muster only to the extent [] it is aimed at" "false or misleading ad[s]." *Id.* at 257 (Thomas, J., concurring in part).

Otherwise, this Court has declined to apply *Zauderer* without some suggestion the regulation at issue was "somehow necessary to make [ads] nonmisleading." *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001). In *Ibanez*, 512 U.S. 136, for example, it declined to expand the scope of *Zauderer* in invalidating a Florida bar disclosure, holding that "[i]f [] protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the

[State's] burden." *Id.* at 146 (internal quotation marks and citation omitted).

The Ninth Circuit's disconnection of diminished scrutiny from what it calls "*Zauderer*'s preventing-deception criterion," Pet. App. 21a, overlooks the underlying premise of commercial speech doctrine, that where communication is neither misleading nor related to unlawful activity, government power to regulate "is more circumscribed." *Central Hudson*, 447 U.S. at 564.

B. The Ninth Circuit Decision Ignores Basic First Amendment Principles

The Ninth Circuit's conclusion regarding reduced scrutiny under *Zauderer* obscures a significant First Amendment issue and thus renders the commercial speech doctrine essentially incoherent. It assumes diminished scrutiny applies whenever a commercial speech regulation takes the form of a "disclosure," so long as the government interest is considered "substantial." *CTIA*, 854 F.3d at 1117.[4] This is not the law.

1. The analysis below commenced from a flawed premise: It assumes compelling commercial speech inherently intrudes less on First Amendment guarantees than does restricting it. The confusion arises from *Zauderer*'s statement about "material differences between disclosure requirements and

[4] The Ninth Circuit applied the same false binary choice in *American Beverage Ass'n v. City & Cty. of San Fran.*, 871 F.3d 884, 891 (9th Cir. 2017) ("*ABA*"), *reh'g granted*, 880 F.3d 1019 (9th Cir. 2018).

outright prohibitions on speech," and the suggestion that the First Amendment is not offended by requiring commercial speakers to provide "somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. It is a mistake to read this as establishing a general rule that compelling speech (so long as it is commercial) is less of an infringement than banning it.

Such a reading distorts the proposition that First Amendment values are better served by "more speech." *United States v. Alvarez*, 567 U.S. 709, 727-28 (2012). Quoting *Zauderer*, the panel majority posited that commercial speech receives First Amendment protection so long as it promotes the flow of accurate information to consumers. From this premise, it concluded a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." Pet. App. 18a (quoting *Zauderer*, 471 U.S. at 651). However, divorced from preventing deception, it is wrong to conclude disclosure requirements inherently "trench much more narrowly" on advertiser interests "than do flat prohibitions on speech." *Id.* If that were so, purely factual disclosures could *never* violate the First Amendment unless they were excessively burdensome; they would instead promote "freedom of speech."

The idea that forced speech somehow protects the First Amendment is a contradiction; it assumes the government can save free expression by destroying it. Properly understood, *Zauderer*'s dictum makes sense only given that *deceptive* commercial speech is unprotected by the First Amendment and may be

banned entirely rather than the government requiring a disclosure. *See*, *e.g.*, *In re R.M.J.*, 455 U.S. 191, 203 (1982). In that circumstance, appropriately tailored disclosures are obviously less restrictive. *Zauderer*, 471 U.S. at 651-52 & n.14. But outside that context, compulsion is every bit an abridgement as is a prohibition. *E.g.*, *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 61 (2006) ("[L]eading First Amendment precedents have established … freedom of speech prohibits the government from telling people what they must say."); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795, 797-800 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters [its] content," including where it forces the speaker simply to disclose "facts.").

The facts of *Central Hudson* illustrate the Ninth Circuit's error. There, the Court applied intermediate scrutiny to invalidate a ban on advertising by public utilities that had been justified by the state's interest in supporting energy conservation. 447 U.S. at 559-60. Nothing suggests the state could have evaded this level of scrutiny simply by refashioning its regulation to require the utility to publish pro-conservation tips.[5] To the contrary, a year later, in *Pacific Gas & Electric*, 475 U.S. at 15-16, the Court held a utility could not be forced to include in its billing envelopes information from a citizen's group.

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[5] In dictum, the Court mentioned potentially less restrictive alternatives to a ban—such as requiring advertisements to include information about "relative efficiency and expense of the offered service," *Central Hudson*, 447 U.S. at 571—but neither addressed the merits of such options nor hinted they would be subject to less scrutiny than a ban.

It observed that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say," and that "speech does not lose its protection because of the corporate identity of the speaker." *Id.* at 16.

By decoupling *Zauderer*'s more relaxed scrutiny from curing potentially deceptive speech, the Ninth Circuit created a doctrinal anomaly. In no other context has this Court held compelling speech is less of an affront to the First Amendment than banning expression, and it misreads *Zauderer* to suggest that was the Court's intent there. In context, it held only that compelling speech to prevent consumers from being misled is a less restrictive alternative to banning it, with the "reasonable fit" of such a requirement assessed by factors set forth in *Zauderer*. 471 U.S. at 651.

Nor is the Ninth Circuit's reasoning reconcilable with another basic First Amendment rule—that heightened scrutiny applies to viewpoint discrimination as well as to regulation disfavoring particular speakers. *See IMS Health*, 564 U.S. at 573-74, 577-78; *Pacific Gas & Elec.*, 475 U.S. at 15-16. This is the law regardless of whether a regulation is framed as a disclosure or a speech restriction. Any rule that commercial disclosures are inherently less infringing cannot account for this principle. Consequently, this Court has never suggested viewpoint-based commercial speech regulation receives less scrutiny if simply fashioned as a disclosure requirement.[6] Under the

[6] Such a regulation would most likely fail under *Zauderer* as well, as some circuits have held. *National Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) ("*NAM*"); *Evergreen*

rationale below, however, compelled commercial disclosures would necessarily receive relaxed scrutiny even if viewpoint-discriminatory or speaker-based.

2. For similar reasons, where a "disclosure requirement" is really a government message—as Berkeley's is here—there is an irreconcilable tension with the basic principle that the state must proceed "in a manner that does not restrict speech" or restricts "less speech." *Western States*, 535 U.S. at 371. Where a disclosure is not necessary to cure misleading speech or otherwise serve a substantial governmental interest, no justification can support conscripting commercial speech as a vehicle for a government message.

Nothing prevents the government from communicating views to the public to support its policies and programs—largely free of constitutional constraints—as this Court fleshed out a "government speech" doctrine in recent Terms. *See*, *e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). For example, a city may promote its recycling program by communicating directly with residents, or support public health by publishing information about vaccination programs. *Sons of Confederate Veterans*, 135 S. Ct. at 2246. On numerous occasions, this Court has held the government always has the option of using its own speech, through public service

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Ass'n v. City of N.Y., 740 F.3d 233, 245 n.6 (2d Cir. 2014). *Cf. Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). But it is still necessary to identify the proper level of scrutiny at the outset.

announcements or other means. *See*, *e.g.*, *IMS Health*, 564 U.S. at 578; *44 Liquormart*, 517 U.S. at 507 ("[E]ducational campaigns focused on … excessive, or even moderate, drinking might prove to be more effective."); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (suggesting counter-speech rather than speech restrictions). When the government speaks, it does not restrict others' First Amendment rights, unless it "seeks to compel private persons to convey the government's speech." *Sons of Confederate Veterans*, 135 S. Ct. at 2246.

Here, nothing stops Berkeley from ensuring consumers "have the information they need to make their own choices" (Pet. App. 133a), or communicating disagreement with FCC conclusions about cell-phone safety. It may fully serve these asserted interests without adversely affecting anyone's First Amendment rights. Instead, the City chose to compel cell-phone retailers to deliver a statement that begins with the words "[t]he City of Berkeley requires that you be provided the following notice." Pet. App. 134a. But if Berkeley wants its residents to know something, all it has to do is say so.

Its Ordinance is thus a prototypical example of a state interest that can be served without restricting *any* speech. This makes it unlike regulations such as that in *Zauderer*, where curative disclosure was necessary to prevent commercial speech from undermining an important interest.

This tension with traditional understandings of First Amendment principles exists because of the Ninth Circuit's view that the government may draft

a commercial speaker to deliver its message to serve some "more than trivial" state interest. By disconnecting *Zauderer* from its origins of addressing potential deception, the Ninth Circuit (and other circuits taking the same approach) articulates a compelled speech doctrine at odds with the rest of this Court's First Amendment jurisprudence.

C. The Ninth Circuit Decision Provides No Logical Stopping Point

The issues in this case transcend cell phones or confusing multi-sentence disclosures on point-of-sale posters and hand-outs. They affect *any* lawful product or service about which the government has something it wants to say and believes commercial speakers should be its messenger. If this view of the law were to prevail, every one of the some 30,000 city, town and county governments in the U.S. would be free to impose whatever disclosures they could "rationally" justify, with virtually no limit to similar efforts targeting other products, even if there is no risk of misleading or deceptive claims.

Myriad products implicate issues touching on health, safety, or environmental impact, and each offers an "opportunity" (from a regulator's viewpoint) to "add" to the public debate. To say disclosures must be limited to "purely factual" statements is not an adequate safeguard, as this case illustrates. The D.C. Circuit explained the perils of disclosure requirements for promoting public health where scientific understanding tends to evolve.[7] Under the

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[7] *See NAM*, 800 F.3d at 528 & n.27 (citing *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977),

Ninth Circuit's ruling, ads for any product or service disfavored by the science of the moment becomes fair game for government-compelled warnings, no matter how controversial or shaky the underlying science.[8]

If Berkeley's methodology of canvassing consumer "concerns" suffices for disclosure mandates, some truly bizarre requirements could result. The public and their representatives maintain all manner of beliefs about products and services they use. As CTIA showed, Berkeley's ordinance was supported by testimony from citizens who—contrary to scientific evidence—claimed to be "electro-magnetically sensitiv[e]," or to have friends who were sure a cell phone "caused her brain tumor," or that cell phones "damage … sperm." Pet. 13.

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where Seventh Circuit upheld FTC order requiring petitioners to cease placing newspaper ads stating eggs do not increase a person's cholesterol level and to make certain disclosures). As the D.C. Circuit noted, things change. Disclosures considered "factual" (or even scientific) can become obsolete. The court pointed to a 2015 report by a Department of Agriculture advisory panel, which found "no appreciable relationship between the consumption of dietary cholesterol and serum [blood] cholesterol." *Id.* at n.27 (quoting U.S. Dep't of Agric., *Scientific Report of the 2015 Dietary Guidelines Advisor Committee*, Part D Ch. 1, 17 (2015)). It is one thing for government to change its mind about the messages it wants to convey. It is quite another to force private parties to deliver fluctuating messages.

[8] *Cf.* Peter Whoriskey, *Congress approves funding to review how dietary guidelines are compiled*, WASH. POST, Dec. 19, 2015, at A13 (noting "[n]utrition science has been in turmoil in recent years," and citing "disagreements over the portions of the dietary guidelines … on salt, whole milk, saturated fat, cholesterol and the health implications of skipping breakfast").

Advertisers risk compelled warnings for any product category where a governmental unit believes more information would be useful, and for which they would like to force a commercial speaker to foot the bill. The possibilities are endless. This could be repeated tens of thousands of times over, in any city, town, county, or other municipal authority, not to mention by state and federal regulators. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943), this Court, in invalidating government-compelled speech, explained that "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." The Court should take this opportunity to hold that compelled disclosure mandates such as Berkeley's are incompatible with the strong protections the First Amendment affords commercial speech.

II. THE COURT SHOULD GRANT REVIEW TO DISPEL CONFUSION ABOUT HOW TO APPLY *ZAUDERER*

In addition to highlighting divergent views among the circuits regarding *when Zauderer* sets the level of scrutiny, the Ninth Circuit revealed the circuits' different approaches for how *Zauderer*'s test should apply. Discord persists because this Court has had little to say on the subject. From the beginning, *Zauderer*'s requirements have been less than precise. 471 U.S. at 659 (Brennan, J., concurring in part and dissenting in part) (finding it "difficult to determine precisely what disclosure requirements the Court approve[d]"). *See Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., dissenting from denial of certiorari) (stressing need to "provide

lower courts [] guidance on … state-mandated disclaimers").

To date, the Court has never clarified what it means for disclosures to be "purely factual," "non-controversial" or "non-burdensome." It is hardly surprising, then, that circuit courts arrive at different conclusions on these key questions. *See, e.g.*, *NAM*, 800 F.3d at 522, 524 (noting "flux and uncertainty of the … doctrine of commercial speech," especially "conflict in the circuits regarding … *Zauderer*"); Judge Wardlaw noted the "discord" regarding *Zauderer*, and observed "the law remains unsettled." *CTIA*, 873 F.3d at 776 n.1 (Wardlaw, J., dissenting from denial of reh'g). As a consequence, "[n]obody knows exactly" how the *Zauderer* test should be applied. *Kimberly-Clark Corp. v. District of Columbia*, --- F. Supp. 3d ---, 2017 WL 6558500, at *7 (D.D.C. Dec. 22, 2017).

A. Guidance is Needed Regarding What it Means for Compelled Commercial Disclosures to Be Purely Factual and Uncontroversial

This Court has never specified when compelled commercial disclosures satisfy *Zauderer*'s requirement of being "purely factual and uncontroversial." 471 U.S. at 651. The Petition surveys how circuits struggle to assess when compelled disclosures meet *Zauderer*'s criteria. Pet. 23-28. Some courts afford the government great latitude, Pet. App. 21a-29a, while others more carefully limit how *Zauderer* applies. *E.g.*, *NAM*, 800 F.3d at 524, 530; *Blagojevich*, 469 F.3d at 652.

1. The Court should first clarify that *Zauderer*'s three elements ("purely factual," "noncontroversial," and "non-burdensome") are distinct and must be independently satisfied. The Ninth Circuit disagreed that these are separate characteristics, and combined factualness and absence of controversy. While it agreed any compelled disclosure must be accurate, the court assumed this alone suffices to dispel any controversy, and that it should not be concerned with "subjective impact on the audience." Pet. App. 22a.

Other circuits do not share the assumption that "factualness" and "lack of controversy" are synonymous, and as a consequence, several read *Zauderer*'s "purely factual" requirement differently from the Ninth Circuit. The D.C. Circuit addressed this directly and held "'uncontroversial,' as a legal test, must mean something different than 'purely factual.'" *NAM*, 800 F.3d at 528. To read it otherwise turns the test "into a redundancy." *Id.* at 529 n.28.

The court thus held an SEC requirement for disclosing whether minerals used from the Democratic Republic of the Congo were "conflict free" violated the First Amendment under any standard (including *Zauderer*), because it was "hardly 'factual and non-ideological.'" *Id.* at 524, 530 (citation omitted). That court also has held compelled disclosures violate the First Amendment under *Zauderer* if they "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 AMI,* 760 F.3d 18. *See also United States v. Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017) (disclosures which "convey … innuendo" or "moral responsibility"

cannot be "purely factual and uncontroversial") (citation omitted). Similarly, the Seventh and Ninth Circuits invalidated age-based video game labels as not "factual." *Blagojevich*, 469 F.3d at 652 (law's definition "is far more opinion-based than … whether a particular chemical is [in] any given product"); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-67 (9th Cir. 2009) ("*VSDA*"), *aff'd sub nom. Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786 (2011).

2. The Court also should clarify that determining whether a disclosure is "purely factual" requires consideration of its impression on the consumer. This is only fair; if an advertiser's speech were at issue, any factual claims would have to satisfy a "net impression" standard.[9] Here, however, the Ninth Circuit expressly rejected any concern for what it called "subjective impact on the audience," and read Berkeley's disclosure "sentence by sentence" to determine if each was "literally true" and "technically correct." Pet. App. 26a, 37a-38a. Doing so, however, creates a misimpression and can hardly be considered "factual." As Judge Friedland recognized, it is highly misleading to interpret the sentences "one at a time and hold[ ] each is 'literally true,'" when "consumers would not read [them] in isolation." Taken together, their "most natural reading" is that

[9] *See*, *e.g.*, *Stout v. FreeScore, LLC*, 743 F.3d 680, 685 (9th Cir. 2014) (citing *FTC v. Gill*, 265 F.3d 944, 956 (9th Cir. 2000)).

"carrying a cell phone in one's pocket is unsafe." Pet. App. 39a (Friedland, J., dissenting).[10]

Zauderer cannot reasonably be read to permit the government to require corporations to transmit such "a state-sanctioned opinion." *Discount Tobacco*, 674 F.3d at 556. Accordingly, this Court should make clear the test for a "purely factual" disclosure is not met simply by recasting opinions behind "technically correct" or "literally true" facts. Pet. App. 26a, 29a, 39a-41a, 129a.

3. The Court also should clarify when disclosures are "noncontroversial." The Ninth Circuit erroneously reasoned this inquiry was subsumed into whether the disclosure is "purely factual" and concluded the required statement need only be accurate. However, other circuits rightfully disagree.

In ruling on this aspect of *Zauderer*, other courts have invalidated disclosures that create false impressions or that disfavor the commercial speaker. For example, the Second Circuit held—in direct conflict with the decision below here—that even a disclosure that is true in the abstract is not "uncontroversial" if it "requires [the company] to state the [government's] preferred message" or to "mention controversial services that some, … such as [the regulated company] oppose." *Evergreen Ass'n*, 740 F.3d at 245 n.6. The Seventh Circuit similarly held *Zauderer*'s "uncontroversial" criterion is not met if a disclosure "intend[s]

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[10] Berkeley's warning "begins and ends with references to safety," plainly conveying "something unsafe," without "any evidence" that such is the case. Pet. App. 40a (Friedland, J., dissenting).

to communicate" a message that "may be in conflict with that of any particular" business required to bear the disclosure on the goods it offers. *Blagojevich*, 469 F.3d at 653.[11]

The government also may not require private parties to vilify their own products, and certainly cannot require *misleading* statements about them. *VSDA*, 556 F.3d at 967. "*Zauderer* does not leave the state 'free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.'" *AMI*, 760 F.3d at 27 (quoting *Pacific Gas & Elec.*, 475 U.S. at 15-16 n.12).

Only this Court can resolve the disagreement among the circuit courts.

B. The Court Should Explain What Makes Compelled Commercial Disclosures Unduly Burdensome

This Court has never explained when a compelled commercial disclosure is "unjustified or unduly burdensome [so as to] offend the First Amendment." *Zauderer*, 471 U.S. at 651. *See Dwyer*, 762 F.3d at 283 (in *Zauderer*, the Court "did not explain in what circumstances a disclosure requirement could be 'un-

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[11] Other recent Ninth Circuit decisions illustrate how confused this inquiry has become. After one panel parsed Berkeley's disclosure "sentence by sentence," a different Ninth Circuit panel struck down a warning on display ads for sugar-sweetened beverages given its overall misleading impression. *ABA*, 871 F.3d at 895-96. However, the Ninth Circuit has granted rehearing *en banc*. *ABA*, 880 F.3d 1019.

duly burdensome"'). The Ninth Circuit glosses over the issue, which underscores why this Court should clarify what *Zauderer* requires.

Various circuits have examined different ways in which compelled disclosures can be burdensome. First, and most directly, they can be quantitatively over-burdensome, like those conscripting half an ad's space, *e.g.*, *Blagojevich*, 469 F.3d at 652; *but see Discount Tobacco*, 674 F.3d at 561-62, or twenty percent of it, *ABA*, 871 F.3d at 896, or, analogously, a sixth of a television ad's run time. *Tillman v. Miller*, 133 F.3d 1402, 1404 n.4 (11th Cir. 1998). Not only does this effect a taking of commercial time or space, such warnings are distracting, and can easily become an ad's central focus.[12] Some disclosures or warnings may prompt visceral reactions, not unlike graphic warning labels that undercut the product promoted. *See R.J. Reynolds*, 696 F.3d at 1216. These are quintessential burdens.

Compelled commercial disclosures can impose undue burdens in other ways as well. For example, those seeking to affect competitive balance can "chill commercial speech" by forcing advertisers to carry messages "contrary to the corporation's views," *ABA*, 871 F.3d at 894 (quoting *Pacific Gas & Elec.*, 475 U.S. at 15 n.12), because they require promoting competitors. This matter of qualitative burdens splits the circuits as well. *Compare*, *e.g.*, *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 260, 266 (2d Cir. 2014), *with Nationwide Biweekly Admin., Inc. v.*

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[12] This effect is well illustrated by the appendix in *ABA*, 871 F.3d at 900-01.

Owen, 873 F.3d 716, 722-23, 731-34 (9th Cir. 2017) (split between Second and Ninth Circuits regarding laws that effectively force a choice between carrying a government message that detracts from the company's own, or refraining from speaking altogether). The Court should make clear that forcing a commercial speaker to tout a competitor's service or denigrate its own is excessively burdensome, and that, more generally, disclosures that chill what would otherwise be protected commercial expression impose undue burdens.

CONCLUSION

Allowing public bodies to conscript marketers' communications under a diminished level of First Amendment scrutiny is an invitation for every level of government to force advertisers to carry state-sponsored messages. The ANA concurs with CTIA that "[t]his Court should grant the petition and resolve the exceptionally important questions of how and when *Zauderer* applies to laws compelling commercial speech." Pet. 6.

Respectfully submitted,

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