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 United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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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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REPLY BRIEF FOR PETITIONERS

Berkeley's response confirms the need for this Court to resolve the widespread confusion about the proper standard of scrutiny for laws compelling commercial entities to speak. Berkeley never denies that Members of this Court, judges on the Courts of Appeals, and commentators repeatedly have expressed uncertainty over the scope of *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). And Berkeley openly acknowledges that the issues presented by this petition are exceptionally important, affecting "thousands" of speech mandates nationwide. BIO 3, 22–25. Berkeley further concedes that only the Ninth Circuit has adopted the extreme position that *all* compelled commercial speech receives only a permissive form of rational-basis review under *Zauderer*. *Id.* at 6–9, 14–16. Berkeley also admits that there are "open questions" on "the application of the *Zauderer* standard." *Id.* at 14 (capitalization omitted). Whatever one's view about the correct answer to these foundational First Amendment questions, it is clear that the time has come for this Court to resolve them.

That Berkeley advances a radical view of the law is unsurprising given that Berkeley freely admits that its speech mandate is not meant to cure or prevent any consumer deception. For this reason alone, Berkeley's ordinance would need to—but could not—pass heightened scrutiny in the Third, Fifth, and Seventh Circuits. It would also have to survive more rigorous review in the D.C., Second, and Fourth Circuits, because these courts do not permit the government to compel an ideological or misleading message (even if

characterized as "informational"), or one outside the context of advertising and labelling, without passing heightened scrutiny.

The decision below entrenched a deep split among the circuits and further amplified the confusion and division that has surrounded the extent of commercial speech rights since *Zauderer's* inception. Thirty-three years is long enough for the issue to percolate. The Court should grant the petition.

I. THE COURT SHOULD RESOLVE THE SPLIT OVER *ZAUDERER*'S SCOPE

Berkeley's central argument against certiorari is that the Ninth Circuit was correct to hold that all "regulations that *require*—rather than *restrict*—commercial speech" are not "subject to *Central Hudson* review," but only to a permissive form of rationality review. BIO 8; *accord* Pet. App. 17a. Berkeley concedes, however, that no circuit but the Ninth has adopted this sweeping position—and many have rejected it.

A. BERKELEY CONCEDES THAT OTHER CIRCUITS DO NOT APPLY *ZAUDERER* TO ALL COMPELLED SPEECH

1. Berkeley does not deny that Members of this Court, judges on the Courts of Appeals, and commentators repeatedly have noted confusion over *Zauderer*'s scope. *See* Pet. 24, 28–29; NAM Br. 7–8; IJ Br. 14–16; Cato Br. 7–8.

Berkeley's only response is the astounding position that *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010), supplied the necessary

clarification. BIO 20 n.7. But the regulations challenged in *Milavetz* "share[d] the essential features of the rule at issue in *Zauderer*"— they "combat[ted] the problem of inherently misleading commercial advertisements." 559 U.S. at 250. Thus, the Court had no occasion to consider whether *Zauderer* applies outside the consumer-deception context. Since *Milavetz*, circuit judges have *continued* to lament that "the law remains unsettled" and there is "discord among [the] circuits." Pet. App. 128a n.1 (Wardlaw, J., dissenting).

2. The question that has generated the most "discord" is whether *Zauderer* applies where there is no deceptive speech to correct. The Third, Fifth, and Seventh Circuits hold that *Zauderer* applies only to regulations aimed at preventing consumer deception. *See* Pet. 25–28; RLC Br. 4–7; IJ Br. 5–10. Berkeley's efforts to dismiss these decisions misapprehend their import.

Berkeley first argues that the regulations that *Allstate Insurance Co.* v. *Abbott*, 495 F.3d 151 (5th Cir. 2007) and *Dwyer* v. *Cappell*, 762 F.3d 275 (3d Cir. 2014) invalidated under *Central Hudson* "were speech *prohibitions*, not disclosures." BIO 11. In fact, the regulations at issue took the same form as those in *Zauderer* and *Milavetz,* as well as those in *In re R.M.J.*, 455 U.S. 191 (1982) and *Ibanez* v. *Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994). That is, if the commercial actor chose to speak, the government required it to add a message to that speech. Yet the courts still reached opposite results: *Zauderer* and *Milavetz* upheld conditional compulsions that were necessary to prevent the speaker's message from mis-

leading consumers, whereas *R.M.J.* and *Ibanez* invalidated conditional compulsions that were not. Similarly, in *Allstate*, the Fifth Circuit held *Zauderer* inapplicable because there was no "false []or misleading" speech at issue. 495 F.3d at 166. And in *Dwyer*, the Third Circuit rejected the very distinction Berkeley claims is dispositive: Whether the challenged Attorney Guideline was a restriction or a mandate was irrelevant "because the Guideline is not reasonably related to preventing consumer deception" and therefore not permitted by *Zauderer*. 762 F.3d at 282.

All of this vividly illustrates why Berkeley's attempt to draw an arbitrary line between speech restrictions and mandates fails. A conditional compulsion necessarily implicates both "[t]he right to speak *and* the right to refrain from speaking." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). As this Court has consistently held, these are two sides of the same coin. Pet. 22–23.

Lastly, Berkeley does not even attempt to distinguish the Seventh Circuit's opinion in *Central Illinois Light Co.* v. *Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987). It argues that a *different* case, *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986), involved *non*commercial speech. BIO 13. But in *Central Illinois*, the Seventh Circuit never disputed that only commercial speech was at issue, and it declined to apply *Zauderer* on the ground that the compelled message was not "needed to avoid deception." 827 F.2d at 1173.

3. Berkeley concedes that only the Ninth Circuit has adopted the extreme position that *all* compelled commercial speech is limited to rational-basis review

under *Zauderer*. BIO 6–9, 14–16. For example, the D.C. Circuit holds that *Zauderer* does not "reach[] compelled disclosures that are unconnected to advertising or product labeling at the point of sale." *Nat'l Ass'n of Mfrs.* v. *SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015) ("*NAM II*"). By contrast, the panel majority "expanded *Zauderer* to retailers who sell, and not necessarily advertise, the consumer products at issue." Pet. App. 128a (Wardlaw, J., dissenting). Berkeley's ordinance reaches *all* "[c]ell phone retailer[s]," not advertisers or labelers. Pet. App. 133a–134a. Nor does Berkeley deny that the Ninth Circuit—unlike the Second—permits compelled speech that goes "beyond the speaker's own product or service." BIO 14 (citation omitted).

B. *ZAUDERER* APPLIES ONLY TO COMPULSIONS THAT CORRECT MISLEADING SPEECH

Berkeley defends the panel's breathtaking holding that *Zauderer* governs all compelled commercial speech regulations by arguing that *Zauderer* "expressly rejected" the "constitutional right to remain silent … in the context of commercial speech." BIO 3. It is unsurprising Berkeley takes such a radical view, as only this extreme position could save its speech mandate.

Berkeley admits that its "interest in enacting its regulation is … not to avoid consumer deception." BIO 3. But, as CTIA has explained, *Zauderer* applies *only* to prevent such deception. *See* Pet. 7–10, 18–23; *see also* WLF Br. 6–18; NAM Br. 10–13, 18–19; ANA Br. 8–16; PLF Br. 4–7; IJ Br. 16–19; Cato Br. 6. In-

deed, the Court recited the consumer-deception rationale five separate times in its opinion; it never issued an unstated license to apply a relaxed standard in other circumstances. *See* 471 U.S. at 651–53 & n.15. The Court reasoned that deceptive speech may be banned entirely, and permitting such speech *if accompanied by a curative disclaimer* provides the speaker with another option beyond remaining silent. *See id.* at 638, 651; Pet. 7–10, 18–23; WLF Br. 11–14.

Rather than addressing this rationale, Berkeley asserts that the only reason to afford commercial speech *any* protection is that more information is good, and speech mandates produce more information. BIO 8–9. Not so. The public's interest in "the *free* flow of commercial information," *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976) (emphasis added), is impeded, not served, by scripting what private actors must say. *See PG&E*, 475 U.S. at 14; Cato Br. 20–22; ANA Br. 10–16; RLC Br. 8–13. That is especially true given the copious evidence that the proliferation of government-mandated "warnings" hinders consumers' absorption of important information. *See*, *e.g.*, Pet. 38; PLF Br. 11–14. And there is no valid governmental interest at all when, as here, the government mandates a misleading message. *See Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). More fundamentally, the First Amendment is not purely an instrumental tool to other ends—and nor are Berkeley's conscripts. *See* Cato Br. 3, 20–22.

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

In another important concession, Berkeley admits that there are "open questions" on "the application of the *Zauderer* standard." BIO 14 (capitalization omitted). That puts it mildly. In fact, there is direct conflict in the lower courts. The Ninth Circuit—contrary to holdings of this Court and the Second, Fourth, Seventh, and D.C. Circuits—allows the government to require businesses to convey a "factually accurate" (albeit misleading and controversial) message in pursuit of any "more than trivial" interest. *See* Pet. 29–36.

A. THE NINTH CIRCUIT PERMITS THE GOVERNMENT TO COMPEL A MISLEADING, IDEOLOGICAL MESSAGE, IN CONFLICT WITH EVERY OTHER CIRCUIT

1. Even where *Zauderer* properly applies, a compelled disclaimer still must be "purely factual *and* uncontroversial." 471 U.S. at 651 (emphasis added). These requirements are independent; 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 the opposite. Berkeley omits entirely the panel's legal "conclu[sions]" that: (1) "'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience"; and (2) therefore "*Zauderer* requires *only* that the information be 'purely factual.'" Pet. App. 22a–23a (emphasis added). These holdings read "uncontroversial" out of *Zauderer*.

Indeed, Berkeley admits that, under the law of every other circuit, the government may not compel businesses to make a controversial "ideological" statement. BIO 15–17. Yet, Berkeley says, this rule is of no moment here because *the FCC's* regulations about cell phone manuals are not one-sided or ideological. *Id.* at 17. That may be. But *Berkeley's* very different mandate—which, contrary to the FCC's findings, suggests certain uses of cell phones are unsafe—*is* "'ideological' or 'moral.'" *Id.* at 15–16. In fact, the City Council disavowed any claim that the ordinance was grounded in science, relying instead on its "moral and ethical role … in this society" as the reason for the ordinance. CA9 ER69–70 (citation omitted).

2. The Ninth Circuit also erred—and split from its sister circuits—by holding legally irrelevant the message's "subjective impact on the audience." Pet. App. 22a. As the D.C. Circuit found, a statement fails *Zauderer* if it "*could* be misinterpreted *by consumers*." *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (emphases added), *overruled on other grounds by Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

Berkeley contends that the panel recognized that a statement that is literally true could be misleading, but simply concluded Berkeley's was not. BIO 15. In reality, the majority dismissed concerns that the ordinance could mislead customers about the safety of cell phones approved by the FCC by stating, "*We* read the text differently." Pet. App. 28a–29a (emphasis added); *contra R.J. Reynolds*, 696 F.3d at 1216.

Berkeley contends that this legally erroneous methodology was harmless because Berkeley compels

disclosure of the same information already mandated by the FCC. BIO 1, 4–5, 16–18; *see* Pet. App. 28a. This ignores the commonsense implication of Berkeley's warning, and grossly distorts what the FCC has actually said regarding the safety of cell phones. The ordinance—which Berkeley relegates to a footnote, BIO 1–2 n.1—admonishes customers "to use your phone safely," cautioning that, by carrying a phone in certain ways, "you may exceed the federal guidelines for exposure to RF radiation." Pet. App. 134a–135a. This tells—or at least *could* tell—consumers that radiation from FCC-approved cell phones is a safety issue to be concerned about. *See* Pet. App. 39a (Friedland, J., dissenting).

The FCC has concluded the precise opposite. It advises the public that, because phones are tested under "the most *severe, worst-case (and highest power) operating conditions*," it is highly unlikely that a phone would ever exceed the guidelines, 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"), and even if a phone were to exceed those guidelines if used near the body, "exposure well above the [FCC's] limit should not create an unsafe condition," *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3498, 3588 (Mar. 29, 2013).

Berkeley's alarmist message spreads the very "confusion and misunderstanding" the FCC has been trying to correct. SAR Guide; *see* WLF Br. 19; Pet. App. 39a (Friedland, J., dissenting). Berkeley is forcing that misleading speech on retailers because it "wishes to tilt the public debate regarding cell phones

in a particular direction" of a small but vocal minority that disbelieves the scientific consensus. NAM Br. 14 (punctuation omitted); *accord id.* at 16–17; WLF Br. 22–24.

B. The Ninth Circuit's Redefinition Of "Substantial Interest" Sanctions Purely "Informational" Interests

Berkeley conveniently ignores that the Ninth Circuit redefined "substantial" as "more than trivial." *See* Pet. 35–36. Berkeley tries to avoid the issue by arguing that "consumer safety plainly is" a substantial interest. BIO 18.

Berkeley, however, has squarely stated that consumer safety is *not* its asserted interest and even claims it "believes that cell phones are 'safe.'" BIO 16. Rather, the ordinance's "purpose is informational." *Id.* at 3; *accord* Pet. App. 133a. This interest is not substantial under any standard. Accordingly, the Second Circuit invalidated a similar speech mandate requiring disclosure of "a chemical the FDA had concluded was safe." BIO 16 n.6; *Int'l Dairy Foods Ass'n* v. *Amestoy*, 92 F.3d 67, 70, 74 (2d Cir. 1996). As here, the government disavowed any argument that the product "impacts public health" and instead identified its interest as "the demand of its citizenry for … information." *International Dairy*, 92 F.3d at 73. The court held that an informational interest is "not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." *Id.* at 74.

Under Berkeley's own (disingenuous) view that the notice merely requires conveyance of the same information as the FCC, its interest would be even less significant than in *International Dairy* because it is

simply demanding its own redundant articulation of information already imparted by the FCC. If every municipality could craft such mandatory messages, the burden on a retailer's speech would be endless. At bottom, Berkeley contends—and the Ninth Circuit held—that the government can compel any commercial speech a consumer might want to hear, so long as there is any conceivable non-trivial interest in the information. That is flatly inconsistent with *Zauderer* and *International Dairy*.

This Court should review the question whether the substantial interest required by *Zauderer* can be satisfied by the assertion of any concern that is a just a step above trivial.

III. This Case Provides An Optimal Vehicle To Resolve These Issues Of Conceded Importance

Berkeley admits that the issues presented by this petition are exceptionally important, affecting "thousands" of speech mandates across the country that consumers encounter every day. BIO 3, 22–25. *Amici* add numerous examples of such compulsions—both ones that exist now and ones that are sure to follow unless this Court intervenes. IJ Br. 5–14; RLC Br. 10–13; Cato Br. 10–18; Rutherford Br. 3–6; ANA Br. 16–18. Berkeley desires to shield *all* of these laws from even the moderate standard of intermediate scrutiny that, it concedes, all commercial speech restrictions must satisfy. BIO at 8, 11, 22–25. By contrast, many *amici* argue that speech compulsions like Berkeley's must satisfy strict scrutiny. *See* Cato Br. 19–23; NAM Br. 8–15; PLF Br. 4; IJ Br. 4 n.2. That

such a foundational question—what standard of review should apply to thousands of laws and regulations implicating core First Amendment interests—remains unsettled demands this Court's review. *See* S. Ct. R. 10(c).

Berkeley nonetheless argues that the Court need not review this case because the full Ninth Circuit is reconsidering a decision invalidating a commercial speech regulation in *American Beverage Association* v. *City & County of San Francisco*, No. 16-16072 (9th Cir.). But *ABA* does not "present[] the questions raised … here" (BIO 21)—in particular, the core question whether *Zauderer* applies beyond the context of consumer deception. The *ABA* panel followed the *CTIA* decision below on this point, and the petition for rehearing *accepted* this holding (as well as *CTIA*'s explication of how to apply *Zauderer*). *See* Pet. 6–7, *ABA* (Dkt. 77). The petition challenged only the *ABA* panel's conclusion that the advertising law at issue failed even the minimal requirements that the compelled speech be factually accurate and not unduly burdensome. *Id.* at 6–13. These fact-bound questions will not affect the central doctrinal issues in dire need of clarification. By contrast, this petition is here now and cleanly presents those issues.

CONCLUSION

The Court at long last should take up and resolve the questions of when and how *Zauderer* applies to commercial speech mandates.

Respectfully submitted.

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