No. 19-439

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

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), this Court held that, although government regulation of commercial speech is generally subject to intermediate scrutiny, a narrow exception allowing for less rigorous review applies when the government seeks to combat misleading commercial speech by requiring the disclosure of "purely factual and uncontroversial information" that is "reasonably related to the State's interest in preventing deception of consumers."

On remand from this Court for further consideration under *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), the Ninth Circuit—in conflict with decisions of at least three other circuits (the Third, Fifth, and Seventh)—reaffirmed its prior holdings that rewrote *Zauderer*. It held that the government may compel commercial speech, absent *any* alleged deceptive communication, as long as the mandated message is "reasonably related to" any "more than trivial" governmental interest and "literally true." The Court of Appeals thus again upheld an ordinance forcing cell phone retailers to deliver a misleading and controversial message to customers.

The questions presented are:

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

2. When *Zauderer* applies, whether it is sufficient that the compelled speech be: (a) factually accurate—even if controversial and, when read as a whole, potentially misleading; and (b) merely reasonably related to any non-"trivial" governmental interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF AMICUS CURIAE

PLF was founded in 1973 and is widely recognized as the largest and most experienced non-profit legal foundation of its kind.[1] PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation has participated in several cases before this Court and others on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See, e.g.*, *Spirit Airlines*, *Inc. v. Dep't of Transp.*, 133 S. Ct. 1723 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Nike*, *Inc. v. Kasky*, 539 U.S. 654 (2003); *Am. Beverage Ass'n v. City and County of San Francisco*, 871 F.3d 884 (9th Cir. 2017); *CTIA – The Wireless Association v. City and County of San Francisco*, 494 F. App'x 752 (9th Cir. 2012). PLF supported the first petition for writ of certiorari in this case.

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[1] Pursuant to this Court's Rule 37.2(a), all parties consent 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.

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

The city of Berkeley, California, passed an ordinance requiring all cell phone retailers to provide a written poster or other large printed document that warns consumers that cell phones may be unsafe due to exposure to RF (radiofrequency) radiation. Pet. App. 8a–11a. The mandated summary includes the city's advice about "how to use your phone safely." *Id.* at 9a. This required speech contradicts the Federal Communication Commission's conclusions that all cell phones sold in the United States are safe. *Id.* at 12a–13a (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 asserted a "more than trivial" interest. Pet. App. 68a; C*TIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019).

Zauderer is inconsistently applied in lower courts and the Ninth Circuit's expansive approach to the factual-controversial-burdensome factors deprive speakers of First Amendment protection that they would enjoy in other Circuits. By expanding *Zauderer* to encompass effectively all mandatory disclosures in the commercial context, Pet. App. 20a, the decision below conflicts with First Amendment jurisprudence and promotes both over-warning and senseless mandatory labeling that ultimately harm consumers and the public interest. Employing the precautionary principle 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. The decision below thus 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 DECISIONS NARROWLY CONSTRUING THE *ZAUDERER* FACTORS

A court's analysis under *Zauderer* asks whether the compelled speech is: (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome. 471 U.S. at 651. Only when all three criteria are satisfied may a commercial disclosure be compelled to prevent consumer deception. *Id.*; *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (*NIFLA*). The Ninth Circuit decision below purports to distinguish all the precedents that favor freedom of speech in favor of a strong pro-government view that permits compulsion of any government-favored speech that could be considered commercial if the government can come up with any non-trivial reason to justify its impositions. It further fails to protect fundamental First Amendment rights by misinterpreting every one

of the *Zauderer* criteria. This approach is flatly incompatible with this Court's free speech jurisprudence and in conflict with multiple lower courts that properly apply the First Amendment.

A. What Is Factual?

The decision below parses each individual sentence of the mandatory disclosure and declares that each one is "literally true." Pet. App. 28a–33a. The American legal system depends on objective fact-finding and determining whether a statement is factually true rarely occurs solely with reference to the literal words, with no consideration of context. *See Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292, 302 (4th Cir. 2017) (under Lanham Act, falsity may be shown if a literally true statement is likely to mislead or confuse consumers given the merchandising context); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (recognizing possibility that required factual disclosures "could be so one-sided or incomplete that they would not qualify as 'factual and uncontroversial'") (citation omitted). This Court applies a similar approach with statutory construction, where a literal construction may not make sense given the larger context. *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979).

In *Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842 (E.D. Cal. 2018), the factual question was whether a chemical, glyphosate, causes cancer. One health organization said it did, but "virtually all other government agencies and health organizations that have reviewed studies on the chemical had found there was no evidence that it caused cancer." *Id.* at 851. Given this context, the state could not rely on the

outlier study and demand a disclosure that the chemical "is known to cause cancer" because such a disclosure—even though literally true given the single positive study—would be "inherently misleading" and therefore not factual. *Id.* at 852. *Cf. United States v. Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017) (messages that "convey a certain innuendo . . . or moral responsibility" are not "purely factual and uncontroversial").

Mandated disclosures often veer into misleading speech. *See* Meredith K. Schuh, *California's Proposition 37: Will Its Failure Forecast the Fate of the GM Food Labeling Movement in the United States Once and For All?*, 6 Ky. J. Equine, Agric. & Nat. Res. L. 181, 196 (2014) (mandatory labeling of bioengineered foods "may mislead consumers into thinking that bioengineered foods are less safe than their conventional counterparts"); Stephanie Barnes, *Labeling Our Way to a Leaner America*, 12 J.L. Society 116, 132 (2011) ("A common misperception is that low fat means fewer calories, [but] this can many times be quite the contrary."). Yet although incomplete disclosures are frequently misleading, government-mandated disclosures often are *intended* to be incomplete because people can be paralyzed into inaction when confronted with more complex choices. Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. Chi. L. Rev. 1349, 1352–53 (2011). The result of misleading speech is a confused public who do not know how to react to a given warning or disclosure and then become inured to future warnings and disclosures. Schmuel I. Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 Tul. L. Rev. 105, 118–20 (2018).

When it comes to marketing products, services, and activities, context makes a difference, particularly when the state mandates a warning that a product or activity may be "dangerous." Every aspect of life contains some risk of danger, and whether that risk is high enough to render the product or activity *inherently dangerous* often is in the eye of consumer or actor. On whom should one rely to determine a "danger" level? The Federal Communications Commission determined that RF radiation in cell phones does *not* present a danger to consumers. The Berkeley city council, responding to constituent fears, thinks that, under certain circumstances, there may be a danger. The dispute in this case plays out wherever studies disagree (and rare is the science that is truly "settled"). *See*, *e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 417 n.2 (2011) (opposing views exist on climate science). Each side describes its views as factual.

Several courts have found that "partial truth" is not equivalent to full, factual truth. For example, in *Masonry Building Owners of Oregon v. Wheeler*, the court considered a mandatory disclosure that buildings that failed to achieve a specific level of seismic retrofitting were made of "unreinforced masonry" and therefore "potentially unsafe" in a "major earthquake." 394 F. Supp. 3d 1279, 1284, 1293 (D. Or. 2019). The court held that the ordinance's mandatory disclosure was not purely factual because buildings were either deemed safe (fully retrofitted) or unsafe (not fully retrofitted) and many buildings were somewhere in-between—partially retrofitted. *Id.* at 1301–02. The court concluded, "the Ordinance does not compel purely factual information because it falsely identifies some buildings as unreinforced and

erroneously identifies some buildings as constructed of URM, even in situations where such a statement is patently untrue." *Id.* at 1301. *See also Am. Beverage Ass'n v. City and County of San Francisco*, 916 F.3d 749, 764 (9th Cir. 2019) (Christen, J., and Thomas, C.J., concurring) (sugary beverage disclosure was not factually accurate because not every consumer will acquire diabetes, suffer tooth decay, or become obese).

"Facts" change over time as scientific research makes findings and then contradicts itself. This is particularly prevalent with regard to nutrition and public health. The U.S. Department of Agriculture's nutritional advice can veer wildly in its recommendations, partially due to attempts to satisfy constituencies with different priorities, i.e., meat and dairy industry groups versus nutrition advocates for plant-based meals. As a result, its pronouncements often are marked by contradiction and confuse the public. "Besides the ever-changing language on whether to eat less meat or to eat more lean meat, coupled with incomplete nutritional advice, there has been much confusion arising from how to properly characterize the different food groups." *See* Nicole Scott, Note, *Saving Us from Ourselves: The Government's Role in Obesity and Personal Responsibility*, 17 Drake J. Agric. L. 211, 227 (2012).

For these reasons, First Amendment-protective courts share a narrow view of the types of facts that can be compelled, generally limiting them to unadorned data such as country-of-origin, *Am. Meat Inst.*, 760 F.3d at 27, or calorie counts, *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

B. What Is Controversial?

Despite the obvious controversy that generated this litigation, the decision below held that compelled disclosure of the Berkeley city council's view of potential cell phone dangers was "uncontroversial." Pet. App. 24a–25a. The decision below takes the view that controversy must be at a national level—such as the "heated" and "political" nature of abortion regulation. *Id.*; *NIFLA*, 138 S. Ct. at 2372. But this is a crabbed view of controversy in the First Amendment context.

Whether a matter is "controversial" is a separate question from whether it is "factual." *Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 528 (D.C. Cir. 2015). But they do not inhabit entirely separate spheres because the line between "fact" and "opinion" often is blurred and opinions, of course, can be very controversial. *Id.*; *Zauderer*, 471 U.S. at 651. Controversy exists in a wide variety of contexts, even though not everyone may be privy to every controversy. *See Am. Meat Inst.*, 760 F.3d at 54 (Brown, J., dissenting) ("In a world in which the existence of truth and objective reality are daily denied, and unverifiable hypotheses are deemed indisputable, what is claimed as fact may owe more to faith than science, and what is or is not controversial will lie in the eye of the beholder.").[2]

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[2] One court assumes that any subject that results in picketing is controversial. *Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1230 (S.D. Ala. 2016). *See also Martinez v. Sirius XM Radio, Inc.*, No. SACV 17-00205 17-00205 AG (KESx), 2017 WL 8223605, at *1 (C.D. Cal. Aug. 28, 2017) (FCC's definition of "autodialer" is "somewhat controversial."); *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 454 (S.D.N.Y. 2012) (art authentication is

"[A] disclosure is 'controversial' if it is 'inflammatory,' . . . designed to 'evoke emotion,'" or to discourage purchase of a disfavored product or engagement in a disfavored activity. *Kimberly-Clark Corp. v. Dist. of Columbia*, 286 F. Supp. 3d 128, 140–41 (D.D.C. 2017) ("flushability" of wipes "is a lightning rod for those in the know" and ordinance mandating notice that wipes are "not flushable" takes sides in a "long-running 'dispute over the proper definition of 'flushable'"); Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 909 (2015) (ordinance mandating disclosure of the nutritional content of certain beverages intended to convey "ideas of disgrace, shame, and guilt"). Words make a difference. Thus, the meat industry prefers to discuss the "harvest" of meat, rather than the "slaughter" of animals. *Am. Meat Inst.*, 760 F.3d at 27.

The battles over "natural" or "organic" food can get quite heated, especially in the context of genetic modification. "[T]he term 'natural' applied to most foods has no governmental definition, has very different meanings for different groups of consumers, and has spawned extensive litigation." Daniel Brown et al., *It's Only "Natural": Encouraging the FDA to Take a Stand in Defining "Natural" Food Products*, 31-Sum. Antitrust 91 (2017). For example, in *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 636 (D. Vermont 2015), the state argued that it could regulate or ban the use of the word "natural" to describe genetically engineered food products because it believed that such usage is inherently or actually misleading. The court rejected this argument because

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"inherently controversial" and largely dependent on connoisseurs).

there is no standard definition of "natural" and, more importantly, because there are myriad horticultural practices by which human beings alter plant growth yet do not render the agricultural products "unnatural." *Id.* at 637–38 (considering greenhouses, fertilizers, pesticides, watering, weeding, pruning, selective breeding, hybridization, cross-pollination, and grafting).

A disclosure can also be controversial by treating an accusation as proven misbehavior. For example, in *Associated Builders and Contractors of Southeast Texas v. Rung*, No. 1:16-cv-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016), the court enjoined an Executive Order that required government contractors to disclose "labor law violations" arising under Title VII of the Civil Rights Act and torts based on sexual assault or harassment. The problem was that the government defined "labor law violations" to include non-final administrative determinations, regardless of whether the accusation was considered at a hearing or an enforceable decision issued. *Id.* at *3. In short, the disclosures were not factual because "merely *alleged* violations" had to be treated as *actual* violations, even where the contractor vigorously contested the allegation or chose to settle without an admission of guilt. *Id.* at *10. The court found that these allegations "are certainly controversial in nature," especially where the contractor may later be absolved and found to have committed no violation whatsoever. *Id.*

C. What Is Unduly Burdensome?

Zauderer's "burden" prong usually entails discussion of the size and font of the mandatory disclosures, and whether the notices crowd out or override a speaker's own communication. But this view does not capture the entirety of the burden—especially on consumers.

Any notice, regardless of the specific words, signals risk. Researchers have developed a hierarchy of signal words: "Danger" is the most severe, followed by "warning," and then "caution." Michael Barsa, *California's Proposition 65 and the Limits of Information Economics*, 49 Stan. L. Rev. 1223, 1229 (1997) (citing W. Kip Viscusi, *Product-Risk Labeling: A Federal Responsibility* 64 (1993)). Notices cause more harm than good when the language is inconsistent with the actual degree of risk. For example, advertisements by personal injury attorneys trumpeting potential side effects of prescribed medications or medical devices can harm people who, fearing such side effects, stop taking medications they need without consulting their physician or experience negative placebo responses. Lars Noah, *Giving Personal Injury Attorneys Who Run Misleading Drug Ads a Dose of Their Own Medicine*, 2019 U. Ill. L. Rev. 701, 710; *see also* Kim Painter, *Antidepressant Warnings May Have Backfired*, USA Today, June 18, 2014 (publicity over the risk of suicidality dramatically reduced prescribing rates and increased the number of suicides from untreated depression).[3]

[3] https://www.usatoday.com/story/news/nation/2014/06/18/antidepressant-suicide-warning/10767201/.

See also Rebecca Tushnet, *It Depends On What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 Loy. L.A. L. Rev. 227, 233 (2007) (consumers may react in unanticipated ways where technical definitions differ from lay understanding of the same words).

Berkeley's ordinance is intended to provide consumers with "the information they need to make their own choices" about cell phones. Pet. App. 8a (citing ordinance). In this context, *any* language signals an alarm where consumers would otherwise expect silence. Signs are intended to be read and draw the eye. Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Roadscape*, 553 Ann. Am. Acad. Pol. & Soc. Sci. 117, 124 (1997) ("[Signs] are not passive elements in any landscape; they actively seek the eye and tend to dominate the visual field."). Even statements of fact can force people to think in certain ways. When a person asks not to hear what sausage contains or that insects grow to an enormous size in Florida, they object because they don't want to think about it. "Communicative activity can alter others' thought processes or their experiences of the world. Communication, in this sense, gives us power over other people's minds." Nicolas Cornell, *The Aesthetic Toll of Nudging*, 14 Geo. J.L. & Pub. Pol'y 841, 855 (2016). The burden on consumers to hear what they would prefer to ignore (or to hear what they cannot understand)[4] is rarely considered by courts but

[4] Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 711–12 (2011)

represents another reason to permit mandated disclosures only in the narrowest of circumstances.

The Ninth Circuit's decision employs the broadest, most government-centric reading to every aspect of *Zauderer*, to the detriment of those who are compelled to parrot the city's words and of the consumers who are directed to pay attention to the city's concerns. This is inconsistent with the First Amendment and the Court should grant this petition to establish a narrow construction of *Zauderer* or to eliminate the *Zauderer* exception from heightened scrutiny altogether.

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*

(hurdles to proper understanding of warnings include illiteracy, innumeracy, lack of necessary background information, and people's interpretation of data in a framework they can understand, regardless of whether that results in an accurate appraisal of the risk or danger).

Precautionary Principle, 36 Pepp. L. Rev. 301, 304 (2009). The precautionary 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.* 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. *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.").

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,[5] its insights are instructive. In *Dowhal*, the court noted that even a 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 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,

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[5] *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.*

"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 as-yet-unknown "unsafe" circumstance. Pet. App. 6a–7a. 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.[6] This precautionary principle is incompatible

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[6] The State of California Department of Public Health 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. and 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 (last visited Oct. 22, 2019) (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-

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 by 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 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 Judge Friedland, over-warning risks decreasing the effectiveness of warnings by burying the important among the trivial. Pet. App. 86a–87a. Described as "sensory overload" by one court, *Dunn v. Lederle Laboratories*, 121 Mich. App. 73, 81 (1982), "[t]he 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*

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public-health-cell-phone-radiation-guide-2017-12 (citing numerous studies finding no increase in cancer rates related to cell-phone use).

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.

Mandated disclosures are subject to the ratchet effect because regulation warnings frequently are ineffective or counterproductive and thus generate additional warnings to elaborate on or explain the earlier warnings. Ben-Shahar & Schneider, *Mandated Disclosure*, 159 U. Pa. L. Rev. at 685 ("No regulation eliminates problems, and mandated disclosure barely reduces them. Thus, there is constant pressure to cover newly noticed contingencies. The scope of mandates ratchets ever up, never down."). 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 in this case, "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. 46a.

"Overreaction" is the flipside, where consumers inundated with warnings "may become preoccupied with information about trivial hazards" and "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." 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, 297 (1994). 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 v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 804 (1988) (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."). "Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods." *International Dairy Foods Association v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). Here, federal regulations mandate that cell phone retailers provide certain information. Pet. App. 14a. The retailers comply with those regulations. Pet. App. 15a–16a. Berkeley's poster and large-print summary sheet notifications do not add any new facts; the ordinance instead compels speech that is misleading in tone and effect,[7] violating the retailers' First Amendment right to refrain from this unnecessary, alarmist speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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[7] *See* Pet. App. 42a (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").