No. 19-439

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

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QUESTIONS PRESENTED

In *National Institute of Family and Life Advocates v. Becerra*, __ U.S. __, 138 S. Ct. 2361, 2376 (2018) ("*NIFLA*"), this Court stated that it would "not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." The court of appeals followed that direction, and held that a requirement that cell phone retailers disclose information about Federal Communications Commission safety standards was constitutional under this standard and the rule announced in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). This case presents the following questions:

1. Whether *NIFLA* notwithstanding, intermediate First Amendment scrutiny should apply to "health and safety warnings."

2. Whether *Zauderer* applies beyond disclosures aimed at avoiding consumer deception, as every court of appeals to consider the question has held.

3. When *Zauderer* applies, whether its standard is met if the required disclosure is factually accurate and related to a substantial governmental interest.

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STATEMENT OF THE CASE

The Federal Communications Commission (FCC) strictly regulates cell phone radiofrequency (RF) radiation. The agency limits the amount of RF radiation that devices may emit, it mandates that cell phones be certified as not exceeding those limits, and it requires that cell phone manufacturers include within their user manuals information about the minimum separation distances required for their devices not to exceed those RF limits. There is no dispute that the federal government sets these limits in the interests of public health and safety. *See* 47 C.F.R. § 2.803(b)(1); 47 C.F.R. § 2.1093(d) (RF radiation limit "values have been related to threshold levels for potential biological hazards"). The FCC adopted current RF limits "to protect public health with respect to RF radiation from FCC-regulated transmitters." *In Re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15123, 15184 (¶ 169) (1996); *id*. at 15124 (¶ 2) ("[W]e believe that these guidelines represent a consensus view of the federal agencies responsible for matters relating to the public safety and health."). The purpose of the federal disclosure requirement is to enable consumers to select "accessories that meet the minimum *test separation distance* requirements" for RF radiation exposure and thereby avoid exceeding the federal RF exposure limits. FCC Office of Engineering and Technology Laboratory Division, *RF Exposure Procedures and Equipment Authorization Policies for Mobile and Portable Devices*, § 4.2.2(d) (Oct. 23, 2015). The requirement is thus a "health and safety warning" in the language of this Court in *NIFLA*. Neither Petitioner nor anyone else has challenged the constitutionality of this FCC health and safety warning.

Through survey research, the City of Berkeley determined that its residents were unaware of the information within the mandated federal health and safety warning. Pet. App. 26a. It therefore passed an ordinance to direct retailers of cell phones to provide an additional health and safety warning. The ordinance requires retailers "to disclose, in summary form, the same information to consumers that the FCC already require[d] cell phone manufacturers to disclose," and to "direct[] consumers to user manuals for more specific information." *Id.* at 63a.[1]

Berkeley's interest in mandating this health and safety warning is precisely the same as the FCC's: to give its residents the facts they would need to avoid exceeding the federal RF exposure limits — if they so choose. The exposure limits are, as the court below found and as the FCC states, "safety" standards. *Id.* at 26a, 116a. Those safety standards "includ[e] a significant 'safety' factor." Pet. App. 13a (quoting FCC rules).[2] Because of that safety factor, and given the

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[1] As amended, the ordinance requires cell phone retailers to provide consumers with the following statement:

> The City of Berkeley requires that you be provided the following notice:
>
> 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.

Berkeley Mun. Code § 9.96.030(A) (2015); Pet. App. 8a-9a.

[2] A "safety factor" refers to the multiple beyond regulated risks that any safety standard incorporates. For example, if an elevator is designed to lift up to 11,900 lbs., a safety factor of

required warnings, cell phones in the United States are, as the FCC has called them, "safe." Pet. App. 44a (Friedland, J., dissenting)).

Berkeley's interest is therefore not to avoid consumer deception. Its purpose instead is the same informational purpose that it shares with any other health and safety warning. In this respect, and as Petitioner's brief notes, Pet. 36-37, the ordinance is supremely ordinary. Like thousands of such health and safety warnings mandated by governments of every kind, *Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., & Dyk, J., concurring), its central aim is to increase the flow of factual information into the consumer marketplace, to better enable consumer choice. Like nutrition and ingredient labels, drug side-effect and interaction disclosures, or elevator safety warnings, Berkeley's ordinance gives consumers information that consumers could reasonably want to know — even if, as with nutrition labels or drug side-effect warnings, the entity required to provide that information often might prefer not to do so.

Asserting a constitutional right to remain silent, by refusing to provide factual information about its products to consumers — a right expressly rejected by this Court, *Zauderer* v. *Office of Disciplinary Counsel*

11.9 would require that the stated load limit be set at 1,000 lbs. Because of the safety factor, users of the elevator would be told the "maximum load" is 1,000 lbs., even though the design would permit a load of up to 11,900 lbs. before certain failure. *See IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz,* IEEE Std C95.1-2005 (Apr. 19, 2006), at 114 ("The term 'safety factor' is commonly interpreted to be the ratio of an exposure level causing an adverse effect to the corresponding allowable exposure limit.").

of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) — Petitioner challenged Berkeley's ordinance. Applying *Zauderer* and *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010), the district court rejected Petitioner's First Amendment claim.[3] *CTIA-The Wireless Ass'n* v. *City of Berkeley*, 158 F. Supp. 3d 897, 900-06 (N.D. Cal. 2016).

The court of appeals affirmed the district court judgment, with Judge Friedland dissenting. Pet. App. 49a–50a. Judge Fletcher, writing for the panel, reviewed the regulatory background of the Berkeley requirement — specifically, that Berkeley was requiring "the same information . . . that the FCC already requires cell phone manufacturers to disclose." Pet. App. 63a. Following the "unanimous[]" conclusion of sister circuits, the court held that *Zauderer*'s reasoning applied beyond the context of consumer deception. Pet. App. 67a. Between requiring a "substantial" or "less-than-substantial" interest, the court required the State demonstrate a "substantial" interest. Pet. App. 68a. The court further required that the mandated disclosure be "factual" and "uncontroversial" in the sense that the factual disclosure must be "accurate." Pet. App. 69a. Applying this standard — that "the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial governmental interest," Pet. App. 64a (citing *Zauderer*) — the court upheld the ordinance.

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[3] Petitioner also challenged Berkeley's ordinance on grounds of preemption. Pet. App. 77a–81a. Petitioner has not sought review of that issue.

The Ninth Circuit denied rehearing en banc, Pet. App. 169a, with Judge Wardlaw dissenting from the denial. Pet. App. 171a-75a.

Petitioner sought certiorari. Pet. App. 2a. On the basis of this Court's decision in *National Institute of Family and Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), the Court vacated the decision of the Ninth Circuit, and remanded.

Upon remand, Ninth Circuit determined that *NIFLA* further supported its prior decision, and it again affirmed the district court. The court held that the ordinance advanced a "substantial" interest: the ordinance addressed the health and safety of consumers — clearly a "substantial" interest under this Court's jurisprudence, Pet. App. 68a; the FCC had mandated the disclosure of the "same" information by cell phone manufacturers; and based on that FCC action, the court could not "disagree . . . that this compelled disclosure is 'reasonably related' to protection of the health and safety of consumers." Pet. App. 72a.

The court further held that the disclosure was "factual and uncontroversial": the disclosure was "true," Pet. App. 28a, 29a; and it was neither inflammatory nor misleading but instead "reassuring," because it "assures consumers that . . . cell phones . . . meet federally imposed safety guidelines" and informs consumers how they might avoid "exceeding [those] federal guidelines." Pet. App. 30a. The court rejected Petitioner's argument that the phrase "RF radiation" — the phrase used by the FCC itself to refer to the radio-frequency emissions from cell phones — was inflammatory. The court recognized that the ordinance expressly invited retailers to add information they thought necessary to clarify the disclosure. And it observed that Petitioner had provided no evidence

that any retailer thought any clarification "necessary, or even useful." Pet. App. 31a. Nor did Petitioner provide "any evidence in the district court showing how Berkeley consumers have understood the compelled disclosure, or evidence showing that sales of cell phones in Berkeley were, or are likely to be, depressed as a result of the compelled disclosure." *Id.* at 31a-32a.

Finally, the Court rejected Petitioner's argument that the health and safety warning was "controversial," merely because Petitioner disagreed with the scientific basis of the FCC's determination to require warnings in cell phone manuals. The court of appeals recognized that this Court in *NIFLA* had rejected a rule requiring family planning clinics to inform patients about the availability of abortion elsewhere. But it also rejected the idea that any debate about cell phone radiation was at all similar to the morally weighty debate over abortion.

REASONS FOR DENYING THE WRIT

In *NIFLA,* this Court clearly indicated that it did not intend its evolving First Amendment jurisprudence to now sweep "health and safety warnings" into the domain of regulations requiring intermediate First Amendment review. There is no reason now, a year and a half later, to revisit that determination. Instead, this Court should let stand the remarkable consensus within the courts of appeals about the scope and reach of the doctrine announced by this Court in *Zauderer* and confirmed in *Milavetz*. There is no split among the circuits upon any issue material to the disposition of this case. To the extent there are open questions at the margins of the doctrine, this case would be a poor vehicle for resolving them. Finally, the radical change in law that Petitioner advocates would impose substantial burdens on federal, state and local regulators.

Moreover, it would embroil the courts in adjudication involving countless health and safety regulations as constitutional cases, while serving no genuine First Amendment interests.

I. *NIFLA* CLEARLY INDICATES THAT "HEALTH AND SAFETY WARNINGS" DO NOT RECEIVE INTERMEDIATE FIRST AMENDMENT REVIEW.

In *NIFLA*, Justice Breyer charged that the decision of this Court would "radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk." 138 S. Ct. 138 at 2380 (Breyer, J., dissenting). The Court expressly rejected that suggestion. Instead, directly responding to Justice Breyer, the Court wrote that it did "not question the legality of health and safety warnings long considered permissible." *Id.* at 2367. Justice Breyer, nonetheless, was not convinced. Instead, as he wrote, "this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification." *Id.* at 2381 (Breyer, J., dissenting).

Essaying to prove Justice Breyer correct, Petitioner now asks this Court to apply intermediate First Amendment review to "health and safety warnings." Indeed, Petitioner writes as if this Court has long tested "health and safety warnings" under intermediate review, *NIFLA* notwithstanding. It asserts:

> This Court has never allowed the government to compel speech without satisfying intermediate scrutiny unless the government showed that the forced speech was necessary to prevent consumer deception.

Pet. 4.

Yet Petitioner's own brief demonstrates that this claim is plainly false. As Petitioner submits, "health and safety warnings" are extraordinarily common. They are commonly compelled by governments, local, state and federal. And they are plainly unrelated to "consumer deception." Yet in no case has this Court ever invalidated a "health and safety warning" because it was unrelated to "consumer deception." Indeed, this Court has *never* invalidated a "health and safety warning" on any First Amendment ground at all. And never has this Court questioned a health and safety warning simply because the commercial enterprise involved believes its product more safe than it reads the warning to imply. Instead, this Court has consistently allowed health and safety warning to stand without intermediate First Amendment review.

There is no reason now to reconsider this practice "long considered permissible." *NIFLA*, 138 S. Ct. at 2376. The court of appeals affirmed the finding of the district court that the factual assertions within the ordinance were both true *and* not misleading. It concluded the interest that Berkeley had in mandating these "health and safety warnings" was the same as the interest that the FCC had in mandating similar warnings from manufacturers. These warnings relate to the safety of cell phone use. They are therefore plainly related to a substantial governmental interest.

But if this Court is now keen to expand fundamentally the scope of intermediate First Amendment review to include health and safety warnings, this is a particularly weak case with which to launch that expensive enterprise.

Among all the "health and safety warnings" that this Court might review, Berkeley's is among the tamest. It is also not a clean vehicle for this Court's

review, resting as it does on a similar, yet unreviewed, federally mandated disclosure. The requirement of either a poster at the point of sale or a flyer included with a sale is minimally burdensome. The warning does not claim that the product causes any harm at all. It does not state that cell phones cause cancer (as some believe, *see, e.g.,* D. Belpomme et. al., *Thermal and non-thermal health effects of low intensity non-ionizing radiation: An international perspective,* 242 Environ Pollut. 643, 643 (July 6, 2018), *available at* http://bit.ly/CTIAvBerkeley-S0) or that cell phones have been found to harm sperm (as is an emerging consensus, *see, e.g.,* B.J. Houston et. al, *The effects of radio-frequency electromagnetic radiation on sperm function*, 152(6) Reproduction 263, 263 (Dec. 2016), *available at* http://bit.ly/CTIAvBerkeley-S1). And if Petitioner is correct that the FCC's regulations incorporate a fifty-fold safety factor into its RF radiation limits, then there are plenty of other "health and safety warnings" with rules that employ even greater safety factors. *See, e.g.*, Michael L. Dourson & Jerry F. Stara, *Regulatory history and experimental support of uncertainty (safety) factors*, 3 *Regulatory Toxicology and Pharmacology* 224, 225-226 (1983) (discussing FDA recommending hundred-fold safety factors for food toxicants; thousand-fold safety factors in the face of "added uncertainty"; and two-thousand-fold safety factors for "extra margin[s] of uncertainty"). If this Court wants to launch the judiciary upon the task of policing safety limits as a matter of constitutional law, there are many more extreme cases from which it could choose.

Such review, of course, would be extremely burdensome for the judiciary and as a practical matter almost impossible to carry out. For example, as indicated above, *see supra* note 2, elevator warnings typically include a safety-factor of 11.9. That means that an

elevator that warns it can only carry 1,000 lbs. safely can actually carry close to 12,000 lbs. safely. If this Court were to reverse the deference granted to regulators "long considered permissible," *NIFLA,* 138 S. Ct. at 2376, and insist upon intermediate scrutiny of required "health and safety warnings," how is a court to decide which warnings are too cautious? Could Otis Elevator complain that a load limit 11.9 times below the actual capacity of the elevator "misleads" the public, and creates unnecessary fear? What burden should the FDA bear to establish that the recommended daily intake of sodium not exceed 2,300mg? What standard does a city have to meet to be permitted to require warnings about carcinogens? What standard might the FDA have to demonstrate for a boxed warning label on heart medication, diabetes drugs, or heartburn medication? Will this Court be required to draw a line to regulate "health and safety warnings" generally? Or only within particular domains? Could any court draw such a line consistently? Or would, as Justice Breyer warned, such a test simply "invite[] courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulations, striking down [warnings] that judges may disfavor, while uphold others, all without grounding their decisions in reasoned principle"? *NIFLA*, 138 S. Ct. at 2381 (Breyer, J., dissenting).

This case would a poor vehicle to launch this enterprise of review for a second reason as well. In requiring retailers to provide a health and safety warning to consumers, Berkeley relied upon the FCC's similar determination that manufacturers must provide a "health and safety warning" about RF exposure in their own user manuals. The FCC's determination turned upon its own review of the views of safety regulators. Pet. App. 11a-12a. Berkeley made no

independent scientific review. It did not purport to reweigh the scientific evidence. In Berkeley's view, as a matter of federalism, it should be able to rely upon the FCC's scientific conclusions. If the FCC was correct, then the City of Berkeley should be free to rely upon that determination. If the FCC was not correct, then Petitioner should be challenging the FCC's determination, not Berkeley's regulation. Yet Petitioner has forced the City of Berkeley to bear the burden of four years of litigation to defend a rule based on FCC regulations. If CTIA disputes the federal health and safety standard or required disclosure, it should take it up with the FCC, rather than collaterally attack the federal rule as an end-run around the ongoing FCC proceeding reassessing the federal health and safety guidelines for cell phones.

Finally, Petitioner insists that Berkeley's "health and safety warning" is "misleading" because cell phones are "safe no matter how they are used." Pet. 31. Yet Petitioner cites no finding by the FCC to support this astonishing claim — a claim that in any case is belied by the extraordinary effort the FCC expends policing RF exposure limits. Pet. App. 10a-16a. Instead, Petitioner's only authority is its own self-serving argument, Pet. 31 ("*See supra* at Statement B.1."), and the anodyne statement by Judge Friedland that FCC guidelines incorporate a "many-fold safety factor, such that exposure to radiation in excess of the guideline level is considered by the FCC to be safe." Pet. App. 44a. Yet Judge Friedland does not claim that a cell phone is safe "no matter how it is used." And the FCC has for years required manufacturers to tell consumers how they can *avoid* exposures beyond its RF radiation limits for, as the court below indicated, "safety reasons," Pet. App. 105a, if they so choose.

II. THERE IS NO SPLIT IN THE CIRCUITS ON WHETHER *ZAUDERER*'S REASONING EXTENDS BEYOND DECEPTION.

In *Zauderer*, this Court held that a commercial speaker's free speech "rights are adequately protected" so long as any disclosure requirement is (1) not "unjustified or unduly burdensome" so as to "chill[] protected commercial speech" and (2) "reasonably related to the State's interest" — in that case, in preventing consumer deception. 471 U.S. at 651; *see also Milavetz,* 559 U.S. at 250.

Contrary to Petitioner's suggestion, there is no circuit split over whether *Zauderer* applies beyond its facts. Every circuit to consider the question has concluded that *Zauderer*'s reasoning reaches beyond a governmental interest in avoiding deception or misleading speech. *See, e.g.*, *Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (*Zauderer* applies when interest is in identifying country of origin); *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d 104, 113–16 (2d Cir. 2001) (*Zauderer* applies when interest is in identifying presence of mercury); *Disc. Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509, 556–58 (6th Cir. 2012) (*Zauderer* applies when interest is in safety warnings about tobacco); *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 310 & n.8 (1st Cir.) (opinion of Torruella, J.) (*Zauderer* applies when interest is in keeping health care costs low).

The reason for this remarkable consensus among the circuits is plain: the language of *Zauderer*, as the D.C. Circuit stated *en banc*, "sweeps far more broadly than the interest in remedying deception." *Am. Meat Inst.*, 760 F.3d at 22.

Until 1976, this Court extended no First Amendment protection to commercial speech at all. *See Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942). When the Court recognized a First Amendment interest protecting commercial speech against suppression, the reason it offered was society's "strong interest in the free flow of commercial information." *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). In *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of N.Y.*, 447 U.S. 557 (1980), this Court formalized that principle by setting a standard for reviewing regulations of commercial speech. *See id.* at 566-71.

Initially, those regulations reviewed under *Central Hudson* were regulations that *restricted* commercial speech. This left open the question of whether regulations that *require* — rather than *restrict* — commercial speech would also be subject to *Central Hudson* review.

In *Zauderer*, this Court answered that question with respect to at least one type of compelled commercial speech. As the Court explained:

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is *minimal*.

471 U.S. at 651 (second emphasis added) (citation omitted).

This standard reflects the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Unlike *restrictions* on commercial speech, mandated disclosure requirements

do not prevent sellers "from conveying information to the public"; they simply require sellers to provide "more information than they might otherwise be inclined to present." *Id*.

The difference between this standard and the more rigorous review applicable to laws that *restrict* the flow of commercial speech reflects that the "First Amendment's concern for commercial speech is based on [its] informational function." *Central Hudson*, 447 U.S. at 563. *See also Sorrell* v. *IMS Health Inc*., 564 U.S. 552, 565-66 (2011) (applying heightened scrutiny to Vermont law prohibiting dissemination of commercial information); *Zauderer*, 471 U.S. 626, 651 (applying "reasonably related" standard to mandated disclosure but *Central Hudson* test to restrictions on advertising). As this Court explained:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Va. State Bd. of Pharmacy, 425 U.S. at 765 (citations omitted).

Applying this reasoning, every circuit to consider the question has concluded that the principle behind

Zauderer extends beyond its facts to governmental interests in promoting greater commercial information flow, including regarding vital interests such as public health and safety. *See, e.g.*, *Am. Meat Inst.*, 760 F.3d at 22 (D.C. Cir.) ("The language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception."); *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 310 n.8 (1st Cir.) (opinion of Torruella, J.) ("In its reply brief, PCMA states that the holding in *Zauderer* is 'limited to potentially deceptive advertising directed at consumers.' None of the cases it cites, however, support this proposition, and we have found no cases limiting *Zauderer* in such a way." (citation omitted)); *id*. at 316 (Boudin, C.J. & Dyk, J.) (applying *Zauderer* beyond deception, stating: "What is at stake here . . . is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes. . . . The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken."); *id*. at 297-98 (per curiam) (explaining that the joint opinion of Chief Judge Boudin and Judge Dyk is controlling on the First Amendment issue); *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d at 113-15 (2d Cir.) (extending *Zauderer* to a public health disclosure, explaining that "[s]uch disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas,'" *id.* at 114, under the reasoning of this Court's commercial speech cases).

By contrast, courts have applied intermediate scrutiny to laws that *restrict* commercial speech, precisely because those restrictions *reduce* the flow of constitutionally valuable information to consumers, thereby conflicting with the "strong interest in the free flow of commercial information," *Va. State Bd. of Pharmacy*,

425 U.S. at 764. *See id.* at 773. Thus, as the court of appeals for the Third Circuit explained, "there exist different frameworks for analyzing restrictions on speech and disclosure requirements," *Dwyer* v. *Cappell,* 762 F.3d 275, 282 (3d. Cir. 2014) — at least within the context of commercial speech. *See also Expressions Hair Design* v. *Schneiderman*, ___ U.S. ___, 137 S. Ct. 1144, 1151 (2017) (remanding case for a determination of whether law was valid "speech regulation" under *Central Hudson* or could "be upheld as a valid disclosure requirement" under *Zauderer*).

The cases identified by Petitioner as creating a split are not to the contrary, as *none* involves a court rejecting the application of *Zauderer* to an interest beyond deception.

The regulations at issue in *Allstate Ins. Co.* v. *Abbott*, 495 F.3d 151 (5th Cir. 2007), cited at Pet. 26, were speech "prohibitions" — i.e., *restrictions* — not disclosure requirements. *Id.* at 164–65 (describing each regulation as "prohibit[ing]" speech). These "prohibit[ions]" were properly analyzed under *Central Hudson. Id.* at 165–68. The opinion of the Fifth Circuit did not purport to determine whether *Zauderer* applied when the state's interest was *other* than avoiding deception. *Id.* at 166. Instead, repeating earlier Fifth Circuit authority, the court wrote, interpreting *Zauderer*, "if a challenged speech provision prohibits advertising [i.e., *restricts* speech] a lawful commercial activity, the regulation is subject to . . . *Central Hudson*," *id.* at 166 n.60. Respondents emphatically agree — regulations that *restrict* commercial speech, as distinct from those that *require* it, are analyzed under *Central Hudson.*

Likewise with *Dwyer*, cited at Pet. 27: at issue in *Dwyer* was a regulation that forbade attorneys from quoting excerpts from judicial opinions praising their

work, without also including the full opinion from which the quote was drawn. 762 F.3d at 278 (3d Cir.). After distinguishing between the standard applicable to commercial speech *restrictions* and *disclosures*, *id*. at 280, the court chose to evaluate the rule as a disclosure requirement and described *Zauderer* as the "now-prevailing standard" for required disclosures. *Id.* at 281.

But the Third Circuit did not hold — because the issue was never presented — that no interest beyond deception could justify a speech requirement under *Zauderer*. Indeed, after concluding that a commercial advertisement that included an excerpt from a judicial opinion was not inherently misleading, *see id.* at 282 & n.5, the court nonetheless suggested an alternative "reasonable attempt at a disclosure requirement" that would "likely suffice under *Zauderer*." *Id.* at 283.[4] Yet if that disclosure would "likely suffice" even though the advertisement was *not* misleading, *Dwyer* was anticipating that the government might advance legitimate interests under *Zauderer* other than an interest in avoiding deception. The case turned instead on the burdensomeness of the disclosure requirement, *id. at* 284, not whether *Zauderer* applies beyond a governmental interest in combating deception.

Central Illinois Light Co. v. *Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987), cited at Pet. 27, is even less relevant. That case involved not a disclosure requirement, evaluated under *Zauderer*, but rather compelled noncommercial speech, analyzed under

[4] The Court wrote: "A reasonable attempt at a disclosure requirement might mandate a statement such as 'This is an excerpt of a judicial opinion from a specific legal dispute. It is not an endorsement of my abilities.' Such a statement or its analogue would, we believe, likely suffice under *Zauderer*." *Id.* at 283.

Pacific Gas & Electric Co. v. *Public Utilities Commission*, 475 U.S. 1 (1986) ("*PG&E*"). As the district court below explained, *PG&E* "involved noncommercial speech, not commercial speech as here." Pet. App. 148a (noting that the newsletter at issue in *PG&E* "covered a wide range of topics, 'from energy-saving tips to stories about wildlife conservation, and from billing information to recipes,' and thus 'extend[ed] well beyond'" commercial speech) (alteration in original) (quoting *PG&E*, 475 U.S. at 8-9). In mentioning *Zauderer,* the Seventh Circuit did not interpret its scope. *Cent. Ill.*, 827 F.2d at 1173. The court instead explained why *Zauderer* did not apply to noncommercial speech compulsions like those in *PG&E* — as indeed this Court had explained in *PG&E* itself. 475 U.S. at 8–9.[5]

The unanimous view of the circuits is that the reasoning of *Zauderer* and *Milavetz* reaches beyond deception. Thus, contrary to Petitioner's claim, there is no circuit split on the scope of *Zauderer*.

III. THIS CASE PRESENTS NO CERT-WORTHY ISSUE ON THE APPLICATION OF THE *ZAUDERER* STANDARD.

To the extent there are open questions at the margins of the *Zauderer* standard, this case is not well suited to resolving those questions.

1. Petitioner suggests a split between the Ninth Circuit and other circuits about the meaning of

[5] The same point applies to the second case from the Seventh Circuit that Petitioner cites. Pet. 27. In that case, the Court did no more than quote *Zauderer*. *Commodity Trend Serv., Inc.* v. *Commodity Futures Trading Comm'n*, 233 F.3d 981, 994-95 (7th Cir. 2000). It did not purport to determine whether *Zauderer* applied beyond the context of misleading speech. *Id.*

"uncontroversial" after *NIFLA*. There is no split in the standard to be applied.

In *NIFLA*, without resolving whether *Zauderer* even applied, this Court rejected a disclosure requirement about the availability of abortion services at other family planning clinics. That required speech, this Court held, was clearly controversial, and hence could not satisfy a requirement that the compelled speech be "uncontroversial."

The Ninth Circuit followed this Court's instruction to determine whether the speech at issue in this case was, in the sense of *NIFLA*, "uncontroversial." It remarked the obvious fact that abortion regulations are among the most controversial topics within American political discourse. It rejected the idea that RF radiation standards were similarly controversial. No doubt, the manufacturers of cell phones may have a strong and dissenting view about whether RF radiation is safe. But the Ninth Circuit rejected the suggestion that dissent by the target of the regulation was sufficient to render a disclosure "controversial."

No circuit has held that an objection by the target of a disclosure requirement is sufficient to render a regulation constitutionally "controversial." Thus, at most, Petitioner complains about the application of a settled standard in a particular case. Supreme Court review is not for the purpose of correcting errors by the lower courts — if indeed this was an error, which it was not.

2. Petitioner argues the Ninth Circuit has now upheld a health and safety warning that is "literally true" yet misleading. Pet. 34-35. Petitioner writes,

> Specifically, the Court held that . . . the compelled speech is constitutional so long as

> it does not force commercial speakers "to take sides in a heated political controversy" like abortion (as in *NIFLA*) and is not "literally" false — no matter what message the average consumer might take away.

Pet. 3.

Petitioner misstates the Ninth Circuit's holding. The court did not find that the City's ordinance was "literally true" and *only* literally true. Instead, the court determined *both* that the ordinance was "literally true" *and* not "misleading." Pet. App. 29a-32a. The court expressly acknowledged Petitioner's suggestion that a compelled disclosure could be "literally true" yet nonetheless misleading. *Id.* at 29a ("We recognize, of course, that a statement may be literally true but nonetheless misleading and, in that sense, untrue."). It thereby accepted Petitioner's suggestion that a misleading disclosure would not be protected under *Zauderer*. Yet after considering Petitioner's argument that Berkeley's ordinance was "misleading," the Court rejected it. *Id.* at 29a-32a. Thus, at most, and again, Petitioner seeks review of whether the agreed-upon legal standard was correctly applied to the facts of this case. This Court does not grant certiorari to review a quarrel over the fact-bound application of accepted legal standards.

3. To support its suggestion of a split, Petitioner relies upon cases that reject disclosures found to be "ideological" or "moral" — as for example when this Court concluded the regulation in *NIFLA* plainly was not "purely factual" and "uncontroversial." See Pet. 32. Yet the court below did not reject those cases or the standard they embrace. The court instead simply found that no such concern was implicated here. Berkeley's ordinance is grounded in precisely the same

factual basis that justified the FCC's own disclosure requirement. The FCC believes that cell phones are "safe," Pet. App. 41a, much as we might say sodium is "safe." Nonetheless, the FCC, like Berkeley, believes that consumers should be informed about how they can use their phones without exceeding the federal RF exposure limits if they so choose. Just as mandated nutrition labels disclose information regarding sodium content so consumers may make more informed choices.

Petitioner's parade-of-horribles, Pet. 32-33, is thus wholly inapt. Berkeley is not relying upon a minority view among scientists to justify its disclosure requirement contrary to the judgment of the primary federal regulator, the FCC. To the contrary, Berkeley is relying upon a determination by the primary regulator, the FCC, not that cell phones are unsafe, but that there is a sufficient safety reason to advise consumers about how to use cell phones without exceeding the FCC's RF exposure limits.[6] And as the FCC has stated, those "guidelines represent a consensus view of the federal agencies responsible for matters relating to the public safety and health." *In Re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15123, 15124 (¶ 2).

Because of the FCC's determination — which no one, including CTIA, has questioned — Berkeley's ordinance would satisfy any circuit court's understanding

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[6] In this way, the case is fundamentally different from the concern of the Second Circuit in *International Dairy Foods Association* v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996). In that case, the warning was about a chemical the FDA had concluded was safe regardless of exposure level. *See id.* at 73. In this case, the relevant regulator, the FCC, has devoted enormous regulatory effort to policing RF exposure limits generally, and with cell phones in particular. Pet. App. 10a-13a.

of "factual and uncontroversial." No one could reasonably argue that the FCC's decision to mandate disclosures was predicated upon an ideological opposition to cell phones. *Cf. Stuart* v. *Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) ("moral or ideological implications"). It cannot be reasonably suggested that the factual findings underlying it were "so one-sided or incomplete that they would not qualify as 'factual and uncontroversial.'" *Am. Meat. Inst.*, 760 F. 3d at 27. Nor does the FCC's determination in any sense create an unconstitutional "'innuendo' . . . or 'moral responsibility.'" *United States* v. *Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017) (quoting *Am. Meat Inst.*, 760 F.3d at 27 and *Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) ("*NAM*")). None could believe it forced any to "confess blood on its hands." *NAM*, 800 F.3d at 530. Instead, the FCC's findings were grounded in a careful analysis of the safety concerns raised by sister agencies about RF radiation, Pet. App. 10a-13a, and justify the minimal requirement of informing consumers about how to avoid exceeding the federal RF exposure limits. And none — save perhaps, the trade organization representing the cell phone industry — could believe that a rule requiring disclosure of information to enable people to avoid exceeding the federal RF radiation limit could implicate the highly personal and fundamental questions at issue in *NIFLA* — namely the state's decision to regulate abortion.

4. Finally, Petitioner suggests the Seventh Circuit "has held that a compelled disclosure 'intended to communicate' a 'message [that] may be in conflict with that of any particular retailer' was not 'uncontroversial' and therefore did not satisfy *Zauderer*." Pet. 34. This claim too is mistaken. The disclosure at issue in that case was held not to be factual. *Entm't Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006)

(explaining that "the game-seller [was forced] to include . . . non-factual information"). For factual disclosures, the Seventh Circuit quite explicitly acknowledges that when commercial speech is involved, "the Constitution permits the State to require speakers to express certain messages without their consent." *Id.* at 651. That is, the Seventh Circuit, like the Ninth Circuit below, recognizes that the Constitution permits requirements that commercial speakers provide "more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650.

5. Petitioner suggests there is a split about whether the interest that justifies *Zauderer* review must be "substantial" or whether an interest less than "substantial" secures the same standard of review. Pet. 4-5. That issue too is not properly presented in this case. The interest that justified the disclosure requirements of both the FCC and Berkeley was, as the court of appeals concluded, Pet. App. 23a-25a, a substantial interest in safety. Whatever else is a "substantial" interest, consumer safety plainly is.

IV. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

Petitioner insists that the opinion below is inconsistent with this Court's existing jurisprudence. Pet. 20-25. This claim is not correct.

The alleged conflict with this Court's cases is predicated upon a reading of *Zauderer* that every circuit to consider the question has rejected — namely, that *Zauderer* is limited to cases of deception. This Court has never held that *Zauderer* is so limited. Every circuit to consider the question has concluded that it is not. *See supra* at I.

Petitioner cites *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2011), to suggest that, *sub silentio*, this Court intended to limit the reach of *Zauderer* by requiring "intermediate scrutiny" for any mandated disclosure beyond deception. Pet. 21. But *United Foods* involved a compelled subsidy of competitors' advertising — specifically an ad about which mushroom was "best." *United Foods,* 533 U.S. at 408 ("In this case a federal statute mandates assessments on handlers of fresh mushrooms to fund advertising for the product."). There is no issue of improper subsidy presented in this case. At most, *United Foods* stands for the proposition "that the mandatory assessments imposed to require one group of private persons to pay for speech by others are [not] necessary to make voluntary advertisements nonmisleading for consumers." *Id.* at 416. The case says nothing about whether the reasoning of *Zauderer* reaches beyond deception.

Likewise with *In re R.M.J.,* 455 U.S. 191 (1982), a case that predates *Zauderer* by three years: the rules at issue in that case *prohibited* certain advertisements or conditioned their content severely. *Id.* at 193-96. The rules did not include a disclosure requirement independent of that speech restriction.

Finally, *Ibanez* v. *Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994), is not to the contrary. *Ibanez* struck a disclosure requirement because the requirement was too burdensome — not because the state had advanced an interest other than deception to support the disclosure requirement. *Id.* at 146 (disclosure not "appropriately tailored").

Contrary to Petitioner's suggestion, Pet. 24-25, and unlike with non-commercial speech, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), this Court has

never recognized a general right to be silent and refuse to provide factual information about one's products in the context of commercial speech. *See Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) ("[T]he interests at stake in this case are not of the same order as those discussed in *Wooley, Tornillo,* and *Barnette*"). *NIFLA* affirms the right not to speak for an entity whose mission is antithetical to the ideological or political content of the message the state insists upon. But while affirming that protection for disclosures regarding abortion, a deeply divisive issue of moral concern, *NIFLA* reaffirmed the trajectory of this Court's jurisprudence for ordinary commercial speech *requirements*: the standard announced by this Court in *Zauderer*, affirmed by this Court fifteen years later in *Milavetz*, and agreed upon by every circuit interpreting these cases.[7]

V. THE CHANGE IN LAW SOUGHT BY PETITIONER WOULD RADICALLY INCREASE THE BURDEN ON STATE AND LOCAL GOVERNMENTS AND THE JUDICIARY, BY TRANSFORMING EVERY SAFETY REGULATION INTO A FIRST AMENDMENT FIGHT.

As Petitioner notes, American law is filled with regulations that impose information requirements upon commercial speakers. Pet. 36 ("Federal, state,

[7] Four times in its petition, Petitioner cites the dissent from denial in *Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). Pet. 5, 23, 26, 31. That dissent called upon the Court to clarify the standard in *Zauderer*. *Borgner* at 1082. That is precisely what this Court did in *Milavetz* — seven years after *Borgner*.

and local governments compel commercial speech *all the time*.") (emphasis in original). Safety regulators require safety warnings. Food and drug regulators require food and drug labels. Financial regulators require financial disclosures, both to advance consumer protection and to aid the efficiency of financial markets.

On Petitioner's account of the First Amendment, unless these regulations can be shown to address deceptive or misleading speech, they are *all* subject to *Central Hudson*'s intermediate First Amendment scrutiny. When that obligation was grafted into our law Petitioner does not explain. Nor does Petitioner explain why no case in the history of this Court has ever applied intermediate scrutiny to health and safety warnings, if indeed that has been the standard.

As this Court expressly acknowledged in *NIFLA,* it has never applied heightened review, for example, to any of the thousands of "health and safety warnings" that would be subject to Petitioner's novel rule. Petitioner's theory would thus effect a radical change in the scope of First Amendment review and would substantially increase the burden not only upon the judiciary, but on state and local governments as well. These federalism concerns counsel strongly against this change.

The conceptual difficulties with Petitioner's theory are hard enough. Is a candy bar "deceptive" if the ordinary consumer does not know it contains 11 grams of fat? Is requiring the disclosure of that fat "misleading" because the manufacturer disputes whether or how much fat is, in fact, dangerous to a child's health? Does the FDA need to pass heightened First Amendment review to require a drug warning label? Is a dissenting view among interested researchers sufficient

to render such a warning "misleading" or not "uncontroversial"? At what point is the risk from exceeding the recommended daily salt or caloric intake sufficient to require disclosure of sodium or calorie content? At what rate of fetal alcohol syndrome or lung cancer may the government require disclosure of the health risks of alcohol during pregnancy or of smoking? At what level of prevalence of serious side effects may the government mandate a drug interaction or side-effect warning?

But it is the practical difficulties with Petitioner's new theory of the First Amendment that are the most obvious and overwhelming. If each time a government was considering a health and safety warning, it had to reckon the potential cost of First Amendment litigation, including the costs of fee-shifting, that risk alone would significantly constrain the ability of state and local jurisdictions to induce factual information related to safety into the commercial marketplace. No doubt there are many who are concerned about whether regulators require too many warnings. But concern about optimal levels of mandatory warnings does not warrant a constitutional rule requiring courts to micromanage risk regulation under the First Amendment. Then Justice Rehnquist was troubled enough by the *Lochneresque*-flavor of *Central Hudson* review, writing that the commercial speech doctrine could lead to a return

> to the bygone era of *Lochner* v. *New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies. I had thought by now it had become well

> established that a State has broad discretion in imposing economic regulations. As this Court stated in *Nebbia* v. *New York*: "[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects . . . ."

Cent. Hudson Gas & Elec. Corp. v. *Pub. Serv. Comm'n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (alterations in original) (citations omitted) (quoting *Nebbia* v. *New York*, 291 U.S. 502, 537 (1934)). To now craft a new rule that imposes the same level of review not on speech restrictions, but health and safety warnings, would effectively end the capacity of local governments to perform this traditional police function.

Petitioner resists this argument by insisting that RF radiation is simply not unsafe, and therefore that any mandated disclosure about RF radiation is unnecessary, and hence, misleading.

Petitioner is not the first to claim that its product is always and inherently safe, regardless of how it is used. Yet the practical consequences of a *constitutional* rule that turns upon an interested party's view about the risks that its own product creates are obvious. At most, Petitioner asserts that *in its view* any concern with RF exposure is overblown. But if the First Amendment requires heightened review every time an interested party believes regulatory concerns are overblown, there will be no end to the burden imposed upon federal and state courts. This Court has no good reason to launch the judiciary upon that extraordinary project of regulatory review — and the First Amendment does not require it.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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