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 United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

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 OF PETITIONER

Berkeley's response only 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). Berkeley acknowledges that the issues presented by this petition are exceptionally important, potentially affecting "thousands" of speech mandates nationwide. BIO 3. It does not dispute that this Court has never addressed the appropriate standard of review for compelled commercial speech outside the narrow context of mandated disclosures aimed at preventing consumer deception. And Berkeley cannot deny that this Court in *National Institute of Family & Life Advocates* v. *Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018), left "open questions" about *Zauderer*'s scope and application. BIO 18. The time has come for this Court to answer them.

Berkeley responds primarily by previewing its merits arguments. Berkeley contends that, under *NIFLA*, "health and safety warnings" are categorically exempt from even "intermediate First Amendment review." BIO 7–11. But *NIFLA* held no such thing, and the government cannot avoid the First Amendment by calling a speech mandate a "health and safety" warning. That is especially obvious here, given that Berkeley has never "attempted to argue, let alone to prove" that "carrying a cell phone in one's pocket is unsafe." Pet. App. 42a (Friedland, J., dissenting). Berkeley

also misleads this Court—just as it misleads consumers—in characterizing the ordinance as an innocuous recitation of FCC regulations regarding cell phones. It is not: Contrary to the suggestion of the ordinance that FCC-approved cell phones are dangerous, the FCC has made clear "that any cell phone legally sold in the United States is a 'safe' phone." *Farina* v. *Nokia, Inc.*, 625 F.3d 97, 105 (3d Cir. 2010).

Those unpersuasive merits arguments only highlight exactly why certiorari is so badly needed.

Berkeley freely admits that its speech mandate is *not* meant to cure or prevent any consumer deception. BIO 3. For this reason alone, Berkeley's ordinance would need to—but could not—pass heightened scrutiny in the Third, Fifth, and Seventh Circuits. Nor could it 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, without passing heightened scrutiny.

The decision below entrenched a deep split among the circuits and further amplified the confusion that has surrounded the extent of commercial speech rights since *Zauderer's* inception and worsened over time. The time has come for this Court to resolve this confusion and division. The petition should be granted.

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

Berkeley believes 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 13. But at least three other circuits disagree and, as *NIFLA* confirms, this Court has never categorically exempted speech mandates from First Amendment scrutiny.

A. The Third, Fifth, And Seventh Circuits Refuse To Apply *Zauderer* Where The Government Is Not Correcting Misleading Speech

Berkeley does not deny that Members of this Court, judges on the Courts of Appeals, and commentators repeatedly have identified significant confusion over *Zauderer*'s scope. *See* Pet. 28–29; IJ Br. 15–17; Cato Br. 11–14. The City'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 25 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. 172a n.1 (Wardlaw, J., dissenting).

Specifically, multiple circuits have taken divergent views from the Ninth. The Third, Fifth, and Seventh Circuits rightly hold that *Zauderer* applies only

to regulations aimed at preventing consumer deception. *See* Pet. 26–28; RLC Br. 4–7; ANA Br. 7 n.3. Berkeley's efforts to dismiss these decisions fail.

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'—i.e., *restrictions*—not disclosure requirements." BIO 16–17. In fact, those regulations took the same form as the regulations at issue 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. *Zauderer* and *Milavetz* upheld conditional compulsions that were necessary to prevent the speaker's message from misleading 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, holding that 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. 24–25; ANA Br. 9–13; WLF Br. 9; Cato Br. 7–8. Compelling retailers to disparage their products implicates the First Amendment just as much as prohibiting them from praising their products. RLC Br. 7–10. The constitutional standard should not turn on whether a court characterizes the law as a speech mandate or a speech restriction.

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 18. But *Central Illinois* 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.

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

Berkeley defends the panel's holding by arguing that *Zauderer* "expressly rejected" the "constitutional right to remain silent … in the context of commercial speech." BIO 3. But as CTIA and numerous *amici* explain, *Zauderer* applies *only* to prevent consumer deception. *See* Pet. 7–10, 20–25; WLF Br. 11–17; ANA Br. 7–9. Rather than addressing *Zauderer*'s rationale—that misleading speech may be prohibited entirely, and a curative disclaimer is a less restrictive

alternative, 471 U.S. at 638, 651; Pet. 8–9, 21; WLF Br. 12–13—Berkeley asserts that the only reason to afford commercial speech *any* protection is that more information is beneficial, and speech mandates produce more information. BIO 13–15. 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 forcing private parties to deliver a "government-drafted script." *NIFLA*, 138 S. Ct. at 2371; *see PG&E*, 475 U.S. at 14; Cato Br. 8–9; ANA Br. 10a–11a. And that interest is *disserved* when, as here, the government mandates a misleading message. *See Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari).

In any event, Berkeley's categorical distinction between speech mandates and speech restrictions cannot be squared with *NIFLA*. There, the Court declined to decide whether *Zauderer* applied to one of the speech mandates at issue, the "unlicensed notice." *See NIFLA*, 138 S. Ct. at 2377. If Berkeley were correct that *Zauderer* applies to all compelled commercial speech, this Court would not have left that question unresolved.

Like the Ninth Circuit, Berkeley stretches to find support in *NIFLA*'s statement that the Court had no occasion in that case to "question the legality of health and safety warnings long considered permissible." 138 S. Ct. at 2376. But *NIFLA* did not hold that governments may evade meaningful First Amendment scrutiny merely by incanting the words "health and

safety" during the course of litigation. To the contrary, *NIFLA invalidated* the unlicensed notice, which informed patients that the medical care they were receiving was not from a licensed professional. *See id.* at 2377.

Berkeley will be free to argue on the merits that, notwithstanding *NIFLA*, "diminished constitutional protection" should apply whenever the government invokes health and safety to justify a commercial speech mandate. 138 S. Ct. at 2371–72. But that unpersuasive argument provides no basis for denying certiorari. Notably, *Berkeley* presents it as another question for this Court's review. *See* BIO i ("Whether *NIFLA* notwithstanding, intermediate First Amendment scrutiny should apply to 'health and safety warnings.'").

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

In another critical concession, Berkeley admits that there are "open questions" on "the application of the *Zauderer* standard." BIO 18. These questions also merit review.

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

Even where *Zauderer* properly applies, a compelled disclaimer still must be "purely factual and uncontroversial." 471 U.S. at 651. The Ninth Circuit downgraded each of these requirements. It held that a court need only confirm that each "sentence" of the text, in isolation, is "purely factual" (Pet. App. 28a–

31a), and that taking one side of an acknowledged "controversy" is nonetheless "uncontroversial" if the subject matter is not as "heated" and "political" as abortion (*id.* at 24a–25a, 32a–33a).

Berkeley admits that, under the law of every other circuit, the government may not compel businesses to make a controversial "ideological" statement. BIO 20–23. Yet, Berkeley argues, this rule is of no moment here because *the FCC's* regulations about cell phone manuals are not "predicated upon an ideological opposition to cell phones." *Id.* at 22. That may be. But *Berkeley's* very different mandate—which, contrary to the FCC's findings, misleadingly suggests that the FCC has found that certain uses of cell phones are unsafe—*is* admittedly "'ideological' or 'moral.'" *Id.* at 20. 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 ER107–08 (citation omitted). Thus, Berkeley itself believes that the ordinance enters into a "morally weighty debate"—just like the law invalidated in *NIFLA*. BIO 6.

Not only is the compelled disclosure ideological by any definition; it also is not purely factual because it, at the very least, "*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 argues that the panel recognized that literally true statements can be misleading, but simply concluded that Berkeley's was not. BIO 20. In reality, the majority dismissed concerns that the ordinance

could mislead consumers by stating, "*We* read the text differently." Pet. App. 30a (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 10–11, 20–21; *see* Pet. App. 26a, 30a. 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 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. 178a. This tells—or at least *could* tell—consumers that radiation from FCC-approved cell phones is a safety issue to be concerned about. *See id.* 43a–45a (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. 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). Thus, a "use that possibly results in noncompliance with the [exposure] limit

should not be viewed with significantly greater concern than compliant use." *Id.* (emphasis added).

Berkeley's alarmist message spreads the very "confusion and misunderstanding" the FCC has been trying to correct. *Id.*; *see* Pet. 11–13; WLF Br. 17–19; Pet. App. 43a–45a (Friedland, J., dissenting). Berkeley cannot regulate speech to "tilt public debate in a preferred direction" of a small but vocal minority that disbelieves the scientific consensus. *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 578–79 (2011); Cato Br. 18–19.

B. No Other Circuit Would Hold That The Ordinance Advances A Substantial Interest

Berkeley also conveniently ignores that the Ninth Circuit redefined a "substantial" governmental interest to mean any interest that is merely "more than trivial." *See* Pet. 35–36. Berkeley tries to avoid the issue by arguing that "consumer safety plainly is" a substantial interest. BIO 23.

Berkeley cannot save its speech mandate and evade review by simply incanting "consumer safety." Last time, it told this Court that "[t]he FCC, *like Berkeley*, believes that cell phones are 'safe.'" BIO 16, *CTIA* v. *Berkeley*, No. 17-976 (U.S.) (emphasis added). Although Berkeley has now changed its tune, it still concedes that "cell phones in the United States are, as the FCC has called them, 'safe.'" BIO 3. In any event, "Berkeley has not attempted to argue, let alone to prove" that "carrying a cell phone in one's pocket is unsafe." Pet. App. 42a (Friedland, J., dissenting).

The ordinance's true "purpose" is "informational" at best—to "give[] consumers information that consumers could reasonably want to know." BIO 3; *accord* Pet. App. 177a (the ordinance's "purpose" is "to assure that consumers have the information they need"). 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 21 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. Berkeley admits that the FCC's conveyance of that information already has ensured that "cell phones in the United States are … safe." BIO 2–3.

Accordingly, the ordinance can serve no purpose except expressing Berkeley's "moral and ethical" stance. CA9 ER69–70. That is not a proper purpose of a speech mandate. If Berkeley wishes to express its view of the science, it should use its own funds and soapbox to deliver its message—not force retailers to

disparage their own products. *See NIFLA*, 138 S. Ct. at 2376; ANA Br. 13–14; Cato Br. 21–22.

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 hair 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 25–28. *Amici* add numerous examples of such compulsions—both ones that exist now and ones that are sure to follow unless this Court intervenes. Cato Br. 14–21; ANA Br. 15–18; IJ Br. 5–10; RLC Br. 9–10; PLF Br. 4–10.

The Ninth Circuit would shield *all* of these laws from even the moderate standard of intermediate scrutiny that, it concedes, all commercial speech restrictions must satisfy. Pet. App. 18a. By contrast, many *amici* argue that speech compulsions like Berkeley's must satisfy strict scrutiny. *See* Cato Br. 6–11; WLF Br. 9; IJ Br. 4 n.2. Allowing uncertainty and confusion about such a foundational question—what standard of review should apply to thousands of laws and regulations implicating core First Amendment interests—to persist will make lower courts' jobs harder, not easier. *Contra* BIO 7–10, 25–28.

CONCLUSION

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

Respectfully submitted.

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