No. 17-976

IN THE
Supreme Court of the United States

CTIA – THE WIRELESS ASSOCIATION®,
Petitioner,

v.

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

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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QUESTIONS RESENTED

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), this Court held that government regulation of commercial speech is generally subject to intermediate scrutiny, but a 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 not "unduly burdensome" and is "reasonably related to the State's interest in preventing deception of consumers" as an alternative to restricting speech.

The Ninth Circuit in this case expanded the *Zauderer* exception by holding that government may compel commercial speech, even in the absence of any allegedly false or deceptive communication, as long as the mandated message is "reasonably related to" any "more than trivial" governmental interest and is "literally true."

The questions presented are:

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

2. Whether *Zauderer* applies (a) when the compelled speech is merely reasonably related to any non-"trivial" governmental interest and (b) is literally accurate but potentially misleading when read as a whole and controversial.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* state the following:

The National Association of Manufacturers ("NAM") is a non-governmental trade association. It is not owned in whole or in part by a parent corporation or a publicly traded company, and does not issue stock.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

In addition, the NAM has an abiding interest in the issue of compelled speech by commercial entities, and has been involved in litigation concerning compelled speech by its members and others, including *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), *overruled in part on other*

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[1] Pursuant to Rule 37.2(a), notice of intent to file this *amicus* brief was provided to the parties and the parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amicus* 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* or their counsel made a monetary contribution to the preparation or submission of this brief.

grounds by Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014), *Nat'l Ass'n of Mfrs.* v. *SEC*, 800 F.3d 518 (D.C. Cir. 2015) as a plaintiff and *CTIA-The Wireless Ass'n v. Cnty. of S.F.*, 494 F. App'x 752 (9th Cir. 2012) as *amicus*.

INTRODUCTORY STATEMENT

The City of Berkeley, California ("City") enacted an ordinance that requires cell phone retailers to post or distribute the following statement to its customers:

> 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 Municipal Code § 9.96.030(A) (the "Ordinance").

The stated purpose of the Ordinance is to provide consumers with "the information they need to make their own choices" about cell phones. *Id.* § 9.96.010(I). At no time has the City ever asserted that the ordinance was necessary to prevent consumer deception.

In the decision below, the Ninth Circuit held that all compelled commercial speech is subject to only "rational basis" review, specifically holding that mandated commercial speech need be only "reasonably related to" some governmental interest

that is "more than trivial," and that the compelled speech may be controversial so long as it is not "literally" false, regardless of the likely understanding the average consumer might have of the required message. The Ninth Circuit expanded the scope of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) and eviscerated its requirements. The holdings increase the government's ability to dictate the speech of commercial actors, in direct conflict with the precedents of this Court and other circuits.

SUMMARY OF ARGUMENT

This case presents an unsettled but vital First Amendment issue that implicates serious issues of government power to compel individuals or companies to speak: Under what circumstances can the government impose "disclosure" regimes that force sellers to speak either to disparage their own products or participate in a public policy debate they wish to avoid and what criteria must the government satisfy before compelling speech?

Instead of scrutinizing the mandated warnings under a heightened review standard that should be applied to compelled speech, the Ninth Circuit majority asked only whether the warning statements were factually accurate[2] and "reasonably related" to

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[2] In this case, the City has never attempted to suggest that these warnings are necessary to prevent or correct deception of consumers. Moreover, the overall message conveyed by the required poster is misleading. Berkeley did "not offer[] any evidence that carrying a cell phone in a pocket is in fact unsafe." Pet. App. 40a (Friedland, J., dissenting in part); *see id.* 41a ("There is . . . no evidence in

any "more than trivial" government interest – even in the absence of any deception necessitating correction.

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As the Supreme Court observed in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("*Rumsfeld*"):

> Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943)[rest of citation omitted], we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley v. Maynard,* [citation omitted], we held unconstitutional another that required New Hampshire motorists to display the state motto – 'Live Free or Die' – on their license plates.

Except in limited circumstances, a private speaker should not be burdened with "unwanted speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

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the record that the message conveyed by the ordinance is true."). See also *CTIA–The Wireless Ass'n v. City & Cty. of S.F., Cal.*, 494 F. App'x 752 (9th Cir. 2012).

If permitted to stand, the Ninth Circuit decision will encourage government at all levels to dragoon private persons as propagandists for the government's own policies.

The Ordinance forces stores that lawfully sell cell phones to display warnings that cell phones are dangerous. That message is neither a factual nor uncontroversial and it is most certainly one with which CTIA's members – and the relevant federal agencies – disagree. The mandated and prescribed communications contain non-factual, controversial and misleading opinions that are contrary to those held by cell phone manufacturers and merchants. The Ordinance violates the First Amendment because it compels cell phone merchants to convey a message that radiation from cell phones is dangerous – with which they (and the federal agency charged with regulating cell phones) disagree and which is neither factual nor non-controversial.

Rather than conveying its views of the potential health risks of cell phones to the public, the City seeks to require those who sell cell phones to post "warnings" that express the City's (not the merchant's) opinion as to the health risks of cell phone use. If the City's position were sustained, any number of legal products that the City disfavors could be a target of mandatory warnings.

Where, as here, the government requires private citizens to communicate the government's message, heightened scrutiny is the rule, not the exception. *See, e.g.*, *Pac. Gas & Elec. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9-17 (1985); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011). When the compelled

speech is purely factual and uncontroversial and directed at preventing consumer deception, however, a less rigorous standard for compelled commercial disclosures applies, see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985). But when, as here, the message is not purely factual and uncontroversial, the government's requirement that a private party speak must satisfy stricter constitutional scrutiny.

Under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980), which is generally applicable, restrictions on non-misleading commercial speech regarding lawful activity must withstand intermediate scrutiny – that is, the restriction must "directly advanc[e]" a substantial governmental interest and be "n[o] more extensive than is necessary to serve that interest."). The City has available many alternatives to advance its goal of informing the public of the City's concerns about cell phones that do not compel private parties to speak, including the City purchasing its own public health advertising time or space.

But the Ordinance even fails the least searching level of First Amendment scrutiny under *Zauderer* because the speech it compels is neither purely factual and uncontroversial nor directed at preventing consumer deception. The court below incorrectly extended *Zauderer*'s reduced scrutiny beyond the limited context of consumer deception and it distorted *Zauderer*'s "purely factual and uncontroversial" test. The Ninth Circuit's decision cannot be reconciled with this Court's precedents. The legal errors by the Ninth Circuit have significant

implications for First Amendment rights and merit certiorari review. Judge Wardlaw recognized that the panel's failure to apply the correct legal standard would embolden "state or local government[s] . . . to pass ordinances compelling disclosures by their citizens on any issue the city council votes to promote, without any regard" to the proper level of First Amendment scrutiny. Pet. App. 130a (Wardlaw, J., dissenting from the denial of en banc rehearing).

Several members of this Court past and present and the courts of appeal have recognized that the lower courts need additional guidance. Justices Thomas and Ginsburg have recognized that the "lower courts" are in need of "guidance" on the "oft-recurring" and "important" subject of "state-mandated disclaimers." *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). According to Justices Thomas and Ginsburg, the Court has not "sufficiently clarified the nature and the quality of the evidence a State must present to show that the challenged legislation directly advances the governmental interest." *Id.* Justice Thomas has observed that "[t]he courts, including this Court," have found the existing commercial speech precedents "very difficult to apply with any uniformity." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 526–27 (1996) (Thomas, J., concurring). Earlier, Justices Brennan and Marshall found it "somewhat difficult to determine precisely what disclosure requirements" are permitted by the test adopted in *Zauderer*. 471 U.S. at 659 (Brennan, J., joined by Marshall, J., concurring in part).

The D.C. Circuit has pointed out the "conflict in the circuits regarding the reach of *Zauderer*." *Nat'l Ass'n of Mfrs.* v. *SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) ("*NAM II*") and, as Judge Wardlaw, dissenting below, put it, the circuits have fallen into "discord" about *Zauderer*, and "the law remains unsettled." Pet. App. 128a n.1.

This uncertainty has led some governments to believe that the First Amendment does not constrain their power to mandate speech.

The Court should grant the Petition to clarify that all government attempts to impose speech mandates are subject to rigorous First Amendment scrutiny.

ARGUMENT

I. THE NINTH CIRCUIT COMMITTED SERIOUS ERRORS OF LAW BECAUSE THE ORDINANCE FAILS ANY FIRST AMENDMENT TEST.

A. The Traditional First Amendment Strict Scrutiny Standard Should Apply.

The Ordinance violates the First Amendment's guarantee of "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. at 714 (1977). The right not to speak is as protected as the right to speak. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (striking down state school requirement that all children must salute the American flag).

The government may not force persons, including businesses, to use their private property to communicate a message that is not wholly factual and uncontroversial, without satisfying strict

scrutiny. See *Wooley v. Maynard*, at 715; *see also Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2nd Cir. 2011).[3]

The Ordinance requires cell phone merchants to display in their stores posters containing controversial and non-factual statements as to the risks of cell phone use.[4] The City urged the Ninth Circuit to apply a relaxed standard of First Amendment review – the *Zauderer* standard – which is applicable to purely factual compelled commercial disclosures that are required to avoid misleading or deceiving the public.

This Court has rejected claims that the government is entitled to greater latitude to affect the free speech interests of those who make or sell a disfavored product under the guise of seeking to protect public health, and that less demanding First Amendment scrutiny is appropriate. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (striking down a California law that banned the sale or rental

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[3] Whether a compelled statement is one of fact or one of opinion may affect the degree of First Amendment scrutiny applied. As discussed *infra*, a compelled commercial disclosure is either purely factual and uncontroversial and directed at preventing consumer deception, in which case the standard for compelled commercial disclosures articulated in *Zauderer* applies, or it is not, in which case strict scrutiny applies. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

[4] The government may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of commercial-speech regulations. *Central Hudson*, 447 U.S. 557, 569 (1980).

of violent video games to minors and holding that preventing youth violence is not enough to exempt sales restrictions on violent video games from strict scrutiny); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011) (improving physicians' decisions does not protect restrictions on commercial speech – in that case the collection and dissemination of aggregated pharmaceutical prescription data – from heightened scrutiny). Good intentions, or even efforts to serve the public interest, do not give the government authority to regulate what businesses must or may say, without satisfying rigorous First Amendment review. This Court should reject the City's arguments to the contrary and require the Ordinance to withstand strict scrutiny.

Restrictions involving commercial speech that is not itself deceptive must be narrowly crafted to serve the State's purposes. *See Central Hudson,* 447 U.S. at 565, 569-571; *Zauderer* at 644. Compelled disclosures are excepted from strict scrutiny only if they are "purely factual and uncontroversial" and "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. A government may, in order to correct misleading messages, require disclosure of purely noncontroversial facts under a lower standard, *id*. at 651, but heightened scrutiny always applies where a government requires a private party to publicize the government's opinion. *Pac. Gas & Elec. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (striking down requirement that utility include third-party material in billing envelopes sent to customers). Even if the compelled speech is purely factual and non-

controversial, such compelled disclosures will be stricken if they are "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651.

Zauderer upheld the imposition of sanctions against an attorney under a rule of professional conduct that required advertisements for contingency-fee services to disclose that losing clients might be responsible for litigation fees and costs. *Zauderer*, 471 U.S. at 650-653. The Court reasoned that "because disclosure requirements trench much more narrowly on the advertiser's interests than do flat prohibitions on speech, warning[s] or disclaimer[s] might be appropriately required . . . *in order to dissipate the possibility of consumer confusion or deception*." 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982) (brackets and ellipses in original, emphasis supplied)). There is no claim here that the City's goal is to prevent consumer confusion or deception.[5]

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[5] *Zauderer* does not stand for the proposition that the government can constitutionally compel the use of a scripted message at odds with the merchant's own interests whenever it claims to be preventing deception, let alone merely educating consumers. *Zauderer*, 471 U.S. at 650-653. The regulation in *Zauderer* did not mandate the specific form or text of the disclosure. Even under *Zauderer*'s relaxed scrutiny, the Court has refused to "presumptively endorse[ ]" laws requiring the use of "government-scripted disclaimers" in commercial advertising. *See Borgner v. Florida Bd. of Dentistry,* 537 U.S. 1080 (2002) (Thomas, J., dissenting from denial of certiorari).

The Ninth Circuit majority concluded that Berkeley could compel CTIA's members to deliver a message that likely makes cell phones less desirable to consumers, despite the absence of any allegation of misleading speech by cell phone manufacturers or sellers, on the ground that the City has merely required retailers to provide a summary of information that the FCC already determined cell phone manufacturers should provide to their customers. Pet. App. 16a, 24a. As CTIA has explained, the government's compelled speech actually sends a far different message than does the FCC: the notice communicates that cell phones are unsafe, whereas the FCC has determined 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); see Pet. at 16, 30-32.

The speech required under the Ordinance stands in stark contrast to factual warnings that have been upheld in *Zauderer* and later cases applying it in situations in which the required disclosures clarify issues as to which there were concerns about consumer confusion or deception.

In *Zauderer*, this Court upheld a mandate that attorneys disclose in their advertising that losing clients may be responsible for certain fees and costs. 471 U.S. at 652–53. In *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 130 S.Ct. 1324 (2010), the Court upheld a requirement that attorney advertisements disclose whether the law firm functioned as a debt recovery agency, because the words "entail[ed] only an accurate statement identifying the advertiser's legal status and the

character of the assistance provided." 130 S. Ct. at 1339-40.[6] In this case, there is no claim by the City that cell phone merchants have promoted consumer confusion or deception.

Zauderer applies *only* to a compelled disclosure designed to combat deceptive and misleading commercial speech. *See, e.g.*, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (concluding, although the majority did not address the question, that "*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages"). No subsequent decision of this Court case undermines that conclusion, but certiorari should be granted to clarify the issue.

The Ninth Circuit found that individual statements in Berkeley's required posters are purely factual. This is not actually true, because the statements are premised on the unarticulated, but implicit, (and incorrect) assumption that cell phone radio frequency emissions are dangerous. The required posters express the City's subjective judgment that cell phone shoppers are at risk and need to take precautions. The government may express that viewpoint in multiple ways, but compelling private parties to do so on their own property is not one of them.

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[6] We also note the historic role of the state in regulating attorney conduct and disciplining attorneys and the special relationship of trust between attorneys and clients.

B. The Ordinance Fails Strict Scrutiny.

The Ordinance does not satisfy strict scrutiny. Under strict scrutiny review, the Ordinance must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). If the City could achieve its interest through an alternative that is non-restrictive or less restrictive of speech, then it must do so. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

1. The Ordinance does not serve a compelling interest.

The City has not articulated a compelling interest. The Court has rejected such a broad appeal to public health interests as justification for burdening speech. *See Sorrell*, 131 S.Ct. 2653, at 2670. In this case, the City unambiguously wishes to "tilt [the] public debate" regarding cell phones in a particular direction to achieve public health benefits. Otherwise there would be no rationale for the Ordinance at all. *Sorrell* makes clear that the City may not do so by requiring cell phone retailers to convey the City's message.

2. The Ordinance is not narrowly tailored.

The City cannot demonstrate that forcing private retailers to display the mandated posters is narrowly tailored to the prevention of "risky" cell phone use. The City has available to it numerous alternatives to further its interest in curbing cell phone use or to encourage more cautious use of cell phones that do not trammel free speech rights. The City could, for example, disseminate advertisements in the public media, using its own funds, property, or other

resources, *see, e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562-65 (2005); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 911 (9th Cir. 2005), or use the myriad other pervasive and inexpensive "online" media outlets now available and commonly used.

The City has instead chosen to compel non-factual and controversial speech, without any legally compelling interest and despite having numerous alternatives to compelled speech. That does not satisfy strict scrutiny.

C. *Central Hudson* Does Not Save the Ordinance.

In *Central Hudson*, the Court struck down a regulation that banned promotional advertising by a utility, and in so doing the Court established criteria for evaluating the constitutionality of commercial speech restrictions. To regulate non-misleading commercial speech regarding lawful activity, the government must establish that: (1) there is a substantial state interest; (2) the regulation directly advances that state interest; and (3) the regulation is narrowly tailored to advance that substantial interest. *Central Hudson* demands heightened, but not strict, scrutiny.

Thus, even under the *Central Hudson* standard, the City must show that the Ordinance directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. *Central Hudson*, 447 U. S. 557, 566 (1980)*; Sorrell*, 131 S.Ct. 2653 at 2667; see also *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 480-481 (1989). There must be a "fit between the legislature's

ends and the means chosen to accomplish those ends." *Id*. at 480 (internal quotation marks omitted). *Central Hudson* is no less demanding with respect to narrow tailoring than traditional First Amendment strict scrutiny. 447 U.S. at 569-70 (restrictions on commercial speech must be "no more extensive than necessary to further the State's interest").

The distinction, if any, between "compelling" interest and "substantial" interest is not relevant to this case because in *Sorrell* the Supreme Court rejected broad public health objectives as a "substantial state interest" that would justify restrictions on commercial speech under *Central Hudson*. *Sorrell*, 131 S.Ct. 2653, 2670. The City has proffered no interest in this case other than an belief on the part of some members of the community that cell phones may be pose an amorphous, hypothetical health risk. This interest is neither compelling nor substantial. As this Court explained in *Sorrell*, it is often unnecessary to decide between strict scrutiny and *Central Hudson* review, because, as is the case here, speech restrictions frequently fail both tests. *Sorrell*, 131 S.Ct. 2653, at 2667.

The Ninth Circuit's creation of a "substantial– that is, more than trivial – governmental interest" test is, as far as we can discern, without precedent in First Amendment jurisprudence and is flat-out dangerous. Under the Ninth Circuit majority's approach, the government can evade heightened First Amendment scrutiny simply by asserting a "more than trivial" interest to justify compelled speech by private persons. Many government

interests can broadly be framed as pertaining to "health," "safety," "security," or the like, and might be found to be "more than trivial" by a court. Nothing in *Zauderer* or later Supreme Court decisions permits the government to require an unwilling speaker to convey a government message in support of any interest that can pass the Ninth Circuit's "non-trivial" test. See *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994) (government "'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree'") (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993)).

Although the majority concluded that Berkeley's prescribed poster was reasonably related to a "more than trivial" interest in protecting health and safety, *CTIA*, Pet. App. 21a–23a, the majority below conceded that the "CTIA is correct in pointing out that there was nothing then before the district court showing that such radiation had been proven dangerous." Pet. App. 24a-25a. That lack of evidence is consistent with the FCC's conclusion that "exceed[ing]" cell-phone radio frequency "limits" does *not* "pos[e] a health hazard to humans." *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 FCC Rcd. 3498, 3582-3583 (2013)(emphasis added).

D. The Ordinance Does Not Pass *Zauderer* Scrutiny.

Even if this Court were to determine that the *Zauderer* standard applies, CTIA would prevail. Compelled purely factual and uncontroversial

disclosures violate the First Amendment if they are unjustified and unduly burdensome. *See Zauderer*, 471 U.S. at 651; *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-47 (1994) (striking down mandated disclosure of "reasonable information" when the state did not make evidence-based findings of fact to justify the proposed restriction).

While not as demanding as strict scrutiny or the *Central Hudson* test, *Zauderer* and its progeny require the government to bear the burden of proving that the compelled disclosure is justified and not unduly burdensome. *See Ibanez*, 512 U.S. at 146; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

Zauderer does not stand for the proposition that the government can constitutionally compel the utterance of the government's message in any circumstance in which its interest in preventing consumer deception might plausibly be at stake. Regulations aimed at false or misleading advertisements are permissible where "the particular advertising is *inherently likely* to deceive or where the record indicates that a particular form or method of advertising has *in fact* been deceptive." *In re R.M.J.,* 455 U.S. 191, 202 (1982) (emphasis added). A disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, are deceptive or likely to deceive. *See R.M.J.*, *id.*, at 202; *Ibanez,* 512 U.S. 136, 143, 146-147 (1994). The City in this case has not claimed that it is

attempting to correct or prophylactically prevent false advertising.[7]

Courts applying *Zauderer* have required evidence from the government that there is a real problem to be corrected. *See, e.g., Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). There is no evidence in this case that there is any consumer misunderstanding to correct or that cell phone use by adults or children exceeds any safety rational threshold. The bare assertion by the government that a disclosure requirement is intended to prevent consumer deception, standing alone, is not sufficient to uphold the requirement as applied to all speech that falls within its sweep. In this case even a claim of consumer deception is notably absent.

E. A Misleading and Controversial Disclosure Does Not Satisfy *Zauderer*.

Zauderer requires a mandated disclaimer to be "purely factual and uncontroversial." 471 U.S. at 651. The panel's approach blesses disclaimers that fail each of these requirements, and thus contravenes *Zauderer*.

Instead of asking how ordinary readers would understand the message as a whole, the court assessed whether the required disclosure was "literally true "sentence by sentence." Pet. App. 26a. The court concluded that each of the three

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[7] Zauderer's advertisement was found to be misleading, and the regulation upheld in that case did not mandate a specific form or text of the disclosure, as the Ordinance here does.

sentences was "technically correct" or "literally true." *Id.*[8]

A statement that, as a whole, potentially conveys a misleading message is not "purely factual." *See Am. Meat Inst.*, 760 F.3d at 27. Indeed, the advertisement in *Zauderer* that triggered the curative disclosure was literally accurate, but deceptive "to a layman not aware of the meaning of... terms of art." 471 U.S. at 652. The Ninth Circuit's ruling permits the government to compel the sort of misleading speech that may be *banned* entirely.

Other Courts of Appeals have held that a compelled disclosure fails the *Zauderer* test where it "*could be* misinterpreted by consumers." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled on other grounds by Am. Meat Inst.*, 760 F.3d 18 (emphasis added). As the

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[8] Judge Friedland, dissenting, was "inclined to conclude that *Zauderer* applies only when the government compels a truthful disclosure to counter a false or misleading advertisement," but believed the Berkeley ordinance was in any event not "purely factual and uncontroversial." Pet. App. 41a-42a n.2. Judge Friedland explained that the majority's "pars[ing] the[ ] sentences individually and conclud[ing] that each is 'literally true' ... misses the forest for the trees." Pet. App. 40a. Given the compelled statement's repeated references to safety, "[t]he message of the disclosure as a whole is clear: carrying a phone 'in a pants or shirt pocket or tucked into a bra' is not safe." *Ibid.* Yet neither Berkeley nor the majority "offered any evidence that carrying a cell phone in a pocket is in fact unsafe"(Pet. App. 40a-41a) – and, as previously noted, the FCC has concluded that it is not.

D.C. Circuit explained, *Zauderer* requires that the mandated information be "purely factual and uncontroversial," and this Court has only upheld "clear statements that were both indisputably accurate and not subject to misinterpretation by consumers" under that standard. *Ibid.* (quoting *Zauderer*, 471 U.S. at 651).

The Fourth Circuit has held that a disclosure must be more than literally true: Even if "the words the state puts into the [speaker]'s mouth are factual, that does not divorce the speech from its moral or ideological implications." *Stuart* v. *Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). Thus, the Fourth Circuit held that a compelled disclosure requirement is unconstitutional if it "explicitly promotes" an ideological message "by demanding the provision of facts that all fall on one side of the. . . debate." *Ibid.* 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*. *Entm't Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006). Berkeley forces cell phone retailers to tell their customers that cell phones are unsafe, contrary to the retailers' (and the FCC's) views.

The Ninth Circuit panel eliminated *Zauderer*'s explicit requirement that the disclosure must be "uncontroversial." Pet. App. 22a-23a. Under *Zauderer* a statement must be "purely factual *and* uncontroversial." 471 U.S. at 651 (emphasis added). It is thus not sufficient for each statement, taken in isolation, or to be literally true. As the

D.C. Circuit explained, "'uncontroversial,' as a legal test . . . mean[s] something different than 'purely factual.'" *NAM II*, 800 F.3d at 528.

The Ninth Circuit held exactly the opposite: "'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience." Pet. App. 22a. Thus, the Ninth Circuit concluded that "*Zauderer* requires only that the information be 'purely factual.'" Pet. App. 23a. The Ninth Circuit simply chose to ignore the vital conjunction "and." It held that *Zauderer* does not mean what it says: that the speech the government compels must be "uncontroversial."

The Ninth Circuit's rule provides no limits on "the government's ability to force companies to use the government's preferred language" so long as they use language that is literally true. *NAM II*, 800 F.3d at 530. This Court's "cases dealing with ideological messages "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of fact." *NAM I*, 748 F.3d at 371 (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. at 797); *accord Int'l Dairy Foods Ass'n* v. *Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996). ("The right not to speak inheres in political and commercial speech alike, and extends to statements of fact as well as statements of opinion." (citations omitted).

The Ninth Circuit ignored common sense and the plainly misleading thrust of the Ordinance., contrary to *Zauderer*, 471 U.S. at 652). As Judge

Friedland observed, "[t]aken as a whole, the most natural reading of the disclosure warns that carrying a cell phone in one's pocket is unsafe." Pet. App. 39a.

II. THE CIRCUITS ARE DIVIDED ON THE SCOPE OF *ZAUDERER*.

As some members of this Court, current and past, have noted, the confusion about the scope and applicability of *Zauderer*. In the Third, Fifth, and Seventh Circuits *Zauderer* applies only to regulations relating to prevention of deception.

The Third Circuit has invalidated a regulation pertaining to lawyer advertisements, holding that *Zauderer* applies only to laws "directed at misleading commercial speech," and that the required disclosure was "not reasonably related to preventing consumer deception." *Dwyer v. Cappell*, 762 F.3d 275, 282 (3d Cir. 2014) (quotation marks omitted). In *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) the Fifth Circuit invalidated a law requiring insurers who promote competing auto repair shops because without the mandated disclosure there was only a "minimal" "potential for customer confusion," and applied *Central Hudson*, rather than Zauderer. The Seventh Circuit has held unconstitutional a law that required utility companies to include in their bills State-prescribed messages because *Zauderer* is based on a need to avoid deception, but "it does not suggest that companies can be made into involuntary solicitors" of the government's message. *Cent. Ill. Light Co.* v. *Citizens Utility*

Board, 827 F.2d 1169, 1170, 1173-74 (7th Cir. 1987).

The Ninth Circuit has joined the D.C., First, Second and Sixth Circuits in applying *Zauderer* outside the deception context. See Pet. App. 19a-21a; *Am. Meat Inst.*, 760 F.3d 18 (D.C. Cir. 2014); *Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294 (1st Cir. 2005) *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d 104 (2d Cir. 2001); *Disc. Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509 (6th Cir. 2012). Those courts reason that First Amendment protections against being compelled to speak "are substantially weaker than those at stake when speech is actually suppressed." *Am. Meat Inst.* at 22 (quotation marks omitted).

This Court should grant the petition to resolve the circuit conflict.

CONCLUSION

The proliferation of mandated speech raises a serious concern that state actors are using required "disclosures" to "burden the speech of others in order to tilt public debate in a preferred direction," *Sorrell*, 564 U.S. at 578-79, and to "force speakers to 'use their private property as a *** 'billboard'" to convey the government's message, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). By compelling private persons to disseminate the government's message, government forces the unwilling speaker "either to appear to agree" with the government's views "or to respond." *Pac. Gas & Elec. Co.*, 475 U.S. at 15. That kind of forced speech is antithetical to the free discussion that the First Amendment seeks to foster..

For the foregoing reasons and those set forth in the Petition, the Court should grant the Petition.

Respectfully submitted,

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