16-15141

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CTIA – THE WIRELESS ASSOCIATION,

Plaintiff-Appellant,

v.

THE CITY OF BERKELEY, CALIFORNIA, and CHRISTINE DANIEL, CITY MANAGER OF BERKELEY, CALIFORNIA, in her Official Capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:15-cv-02529-EMC
The Honorable Edward M. Chen, Judge

BRIEF OF *AMICUS CURIAE* ATTORNEY GENERAL OF CALIFORNIA, SUPPORTING APPELLEES

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As the state's "chief law officer," the Attorney General of the State of California has "the duty . . . to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art V, § 13. In discharging this duty, the Attorney General enforces state laws that are designed to ensure public health and safety, including disclosure requirements that protect Californians from fraudulent, unfair, and illegal activities.

The Attorney General submits this brief in support of the City of Berkeley because her authority to enforce California's numerous and diverse disclosure requirements rests in part on the proper interpretation of the First Amendment to the United States Constitution. Courts have long maintained a distinction between noncommercial and commercial speech, *see, e.g.*, *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562-63 (1980), and between mandated disclosures of commercial speech and restrictions on commercial speech, *see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650 (1985). Reviewing mandated commercial disclosures under a deferential standard is consistent with the "constitutional presumption favoring disclosure over concealment," *see Ibanez v. Florida Department of Business and*

Professional Regulation, 512 U.S. 136, 145 (1994), because "disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas,'" *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104, 114 (2d. Cir. 2001).

Subjecting mandated commercial disclosures to heightened scrutiny would upend First Amendment jurisprudence and would invite challenges to countless disclosure requirements enforced by the Attorney General, ranging from warnings about the presence of harmful chemicals in household products to consumer loan disclosures. Maintaining a less exacting standard of review that preserves the government's ability to enforce reasonable disclosure requirements is critical to the Attorney General's mission to protect the health and safety of all Californians.

Per Federal Rule of Appellate Procedure 29(c)(5), the Attorney General states that no party's counsel authored this brief in whole or in part, and that no person contributed money that was intended to fund preparing or submitting this brief. All parties have cross-consented to the filing of all amicus briefs. *See* Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

This case concerns whether a City of Berkeley Ordinance that requires cell phone retailers to disclose information on federal radiation guidelines to consumers violates the First Amendment or is preempted by Federal Communications Commission standards on cell phone safety.[1] The Attorney General concurs with Defendant-Appellee City of Berkeley that the Ordinance's constitutionality under the First Amendment should be determined based on *Zauderer's* more lenient standard of review for mandated disclosures of commercial speech. Under this standard, a factual disclosure that is reasonably related to a governmental interest must be upheld. *Zauderer*, 471 U.S. at 651. The *Zauderer* test affords considerable deference to mandated commercial disclosures because such disclosures not

[1] The Ordinance requires the following disclosure be made to every customer who purchases or leases a cell phone:

> 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), (B).

only may prevent consumer deception, but also contribute to, rather than detract from, the dissemination of factual information.

Plaintiff-Appellant CTIA – The Wireless Association® rejects these settled principles, arguing instead that unless directed at deceptive advertising, mandated disclosures should be subjected to the heightened scrutiny reserved for content-, viewpoint-, and speaker-based speech or commercial speech restrictions. Br. for Appellant at 20. But limiting *Zauderer's* application to the review of disclosures directed at deceptive advertising alone, as CTIA advocates, is inconsistent with the First Amendment interest in providing more, not less, factual information to consumers, *see Zauderer*, 471 U.S. at 651, and is not supported by the decisions of other circuit courts. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 21-22 (D.C. Cir. 2014); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556-57 (6th Cir. 2012); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *Nat'l Elec.*, 272 F.3d at 115 (2d. Cir. 2001).

This brief urges the Court to decline CTIA's invitation to eviscerate longstanding and well-reasoned commercial speech doctrine and instead to review the Ordinance here under the standard set forth in *Zauderer*. Preserving the broader reach of the *Zauderer* test will ensure that reasonable

disclosure requirements withstand scrutiny, to the benefit of the health and safety of an informed public. The Attorney General takes no position on the merits of the Ordinance or the outcome of this appeal.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE ORDINANCE UNDER THE *ZAUDERER* STANDARD FOR COMMERCIAL SPEECH DISCLOSURES

Over the last four decades, commercial speech doctrine has developed based on the principle that the public interest is served by the free flow of nonmisleading information. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976); *Central Hudson*, 447 U.S. at 561-62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information"). This principle is reflected in *Zauderer*, the seminal case on the First Amendment review of commercial disclosure requirements.

In *Zauderer*, the Supreme Court addressed whether the government may seek to prevent deceptive advertising by requiring the disclosure of certain factual information to the public. 471 U.S. at 629. The Court distinguished the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Unlike speech restrictions,

disclosure requirements merely require commercial entities "to provide somewhat more information than they might otherwise be inclined to present." *Id.*

The Court recognized that in the context of speech on "politics, nationalism, religion, or other matters of opinion," the First Amendment interests at stake are the same whether speech is restricted or compelled. *Zauderer*, 471 U.S. at 651 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). But commercial speech is different; the interest in not providing factual information is minimal "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Zauderer*, at 651 (citing *Virginia State Bd. of Pharm.*, 425 U.S. 748). Thus, disclosure requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Zauderer*, at 651.

Noting that the government was merely attempting to require the inclusion of "factual and uncontroversial information" in the advertisement, the Court held that the disclosure requirement in *Zauderer* would not offend the First Amendment as long as it was "reasonably related" to the government's interest in preventing consumer deception. *Id.* at 651. The Court declined to subject the disclosure requirement to strict scrutiny

because "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not [] a fundamental right." *Id.* at 651 n.14.

Like the disclosure requirement in *Zauderer*, the Ordinance here mandates the disclosure of commercial information to the public. This Court should review the Ordinance under *Zauderer* to determine whether it compels a factual disclosure that is reasonably related to a governmental interest.

Yet CTIA argues that *Zauderer* does not apply because the Ordinance is not directed at combating misleading commercial speech. Br. for Appellant at 25-28. More broadly, CTIA suggests that *Zauderer* review is only appropriate when a disclosure requirement aims to cure deceptive commercial advertising. *Id.* at 27.

CTIA reads *Zauderer* far too narrowly. *Zauderer* stressed that disseminating factual information to consumers is the core principle of commercial speech doctrine. 471 U.S. at 651. Because *Zauderer* stands for this wider principle, no circuit court, including this Court, has limited

Zauderer's reach to cases involving potential deception.[2] Instead, the contrary is true. *Am. Meat Inst.*, 760 F.3d at 22 (D.C. Cir. 2014) ("The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception"); *Disc. Tobacco*, 674 F.3d at 556 (6th Cir. 2012) ("*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception"); *Pharm. Care Mgmt. Ass'n*, 429 F.3d at 310 n.8 (1st Cir. 2005) (rejecting argument that *Zauderer's* holding only applies to cases involving potentially deceptive advertising because the Court "found no cases limiting *Zauderer* in such a way"); *Nat'l Elec.*, 272 F.3d at 115 (2d. Cir. 2001) (*Zauderer*, not *Central Hudson*, "describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases").

[2] Quoting *Zauderer*, this Court stated that mandated disclosures are justified by the need to prevent consumer deception, but it made this observation in a case involving a disclosure requirement that purported to prevent consumer deception. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 564 U.S. __, 131 S. Ct. 2729 (2001). *Schwarzenegger* offers no support for CTIA's sweeping assertion that review under *Zauderer* is appropriate only when a mandated disclosure is related to an interest in preventing consumer deception.

No compelling reason supports departing from this circuit court authority. Indeed, as the district court observed, the government's interest in exercising its police powers to protect public health and safety is no less important than preventing deceptive advertising. *CTIA – The Wireless Association v. City of Berkeley*, 2015 WL 5569072, *14 (N.D. Cal. Sept. 21, 2015). Disclosure requirements directed at either or both of these interests, or at any other consumer protection interests, should be reviewed under the *Zauderer* standard.

CTIA maintains that the Ordinance should instead be subjected to heightened scrutiny. CTIA argues, in particular, that under *Sorrell v. IMS Health Inc.*, 564 U.S. __, 131 S. Ct. 2653 (2011), the Ordinance is a content-, viewpoint-, and speaker-based burden on commercial speech that is subject to a "more demanding form of scrutiny." Br. for Appellant at 19 (quoting *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 650 (9th Cir. 2016)).

But *Sorrell* and *Retail Digital* both address commercial speech restrictions, not mandated disclosures. *Sorrell*, at 2649 (invalidating Vermont statute that restricted the sale, disclosure, and use of pharmacy records for marketing purposes); *Retail Digital*, at 641-42 (finding that California statute that prohibited manufacturers and wholesalers of alcoholic

beverages from giving anything of value to retailers for advertising their alcoholic products is subject to heightened scrutiny). The distinction between speech restrictions and disclosures is fundamental to commercial speech doctrine. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (finding *Zauderer* review appropriate because "the challenged provisions impose[d] a disclosure requirement rather than an affirmative limitation on speech"). In *Milavetz*, the Supreme Court affirmed this distinction, and recognized again that "First Amendment protection for commercial speech is justified in large part by the information's value to consumers." *Id.* (citing *Zauderer*, 471 U.S. at 651). Neither *Sorrell* nor *Retail Digital* suggests that *Milavetz* has been overturned, or that *Zauderer* is no longer the standard of review for commercial speech disclosures. The Ordinance here should not be subjected to heightened scrutiny.

II. MAINTAINING *ZAUDERER* AS THE STANDARD OF REVIEW FOR COMMERCIAL SPEECH DISCLOSURES IS ESSENTIAL TO PUBLIC HEALTH AND SAFETY

The Attorney General's interest in maintaining *Zauderer* as the standard of review for commercial speech disclosures derives from her role as the primary state official tasked with enforcing laws that protect consumers statewide. Exposing "[i]nnumerable federal and state regulatory programs" to heightened scrutiny would be "neither wise nor

constitutionally required" and could have "wide-ranging implications." *Nat'l Elec.*, 272 F.3d at 116 (citing numerous disclosure requirements, including California's Proposition 65 warnings, that could be subjected to "searching scrutiny by unelected courts").[3]

If the approach advocated by CTIA were adopted by this Court, an array of consumer protection laws, long recognized as a constitutional exercise of the state's police powers under the authority cited above, could be called into question. State disclosure laws that could be subjected to heightened scrutiny range from the California Safe Cosmetics Act (Cal. Health & Safety § 111792; cosmetic product manufacturers required to disclose products that contain chemicals known to cause cancer or reproductive toxicity) to the California Finance Lenders Law (*see, e.g.*, Cal. Fin. Code § 22332; consumer loans required to disclose the amount of the loan, the time for which it is made, and the annual percentage rate). Other examples abound. *See, e.g.*, Cal. Penal Code § 23640 (child safety warning

[3] Indeed, abandoning *Zauderer* not only would undermine the Attorney General's police powers, but could prompt the reemergence of "a happily bygone era when judges scrutinized legislation for its interference with economic liberty." *See Sorrell*, 131 S. Ct. at 2679 (Breyer, J., dissenting); *see also Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting) (cautioning that heightened scrutiny of commercial speech could result in the return of the era of *Lochner v. New York*, 198 U.S. 45 (1905)).

required on firearms packaging); Cal. Bus. & Prof. Code § 19094 (flame retardant chemical statement required on upholstered furniture or bedding); Cal. Health & Safety § 110423 (warning for children and pregnant women required on dietary supplement products that contain ephedrine or steroid hormone precursors); Cal. Civil Code § 1916.5 (notice to borrower required on loan document that contains variable interest rate); Cal. Educ. Code § 94910 (disclosure of completion and job placement rates required on fact sheet provided to prospective students of private postsecondary education institutions).

Although these and other disclosure statutes should be upheld against a First Amendment challenge under a more stringent standard, *Zauderer* and its progeny recognize that the notion that "routine regulations require an extensive First Amendment analysis is mistaken," *see Pharm. Care Mgmt. Ass'n*, 429 F.3d at 316, and could have detrimental consequences to public health and safety. In short, neither legal precedent nor common sense warrants subjecting commercial disclosure requirements like the Ordinance to heightened judicial scrutiny.

CONCLUSION

The Attorney General respectfully requests that this Court review the Ordinance under the less exacting standard for commercial speech disclosures articulated by the United States Supreme Court in *Zauderer*.

Dated: April 25, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR 16-15141

I certify that: (check (x) appropriate option(s))

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4/25/16
Dated

/s/ R. Matthew Wise
R. Matthew Wise
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **CTIA - The Wireless Association v. City of Berkeley, et al. (Amicus)** No. **16-15141**

I hereby certify that on April 25, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

BRIEF OF *AMICUS CURIAE* ATTORNEY GENERAL OF CALIFORNIA, SUPPORTING APPELLEES

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Tracie L. Campbell	/s/ Tracie Campbell
Declarant	Signature

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