No. 19–___

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**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

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

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

The questions presented are:

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

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

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are identified in the caption.

Petitioner CTIA – The Wireless Association® has no parent corporation and no publicly held company owns 10% or more of its stock.

## STATEMENT OF RELATED PROCEEDINGS

- *CTIA – The Wireless Ass'n* v. *City of Berkeley, et al.*, No. 17-976 (U.S.) (petition granted, judgment vacated, and case remanded for further consideration June 28, 2018; judgment issued July 30, 2018).
- *CTIA – The Wireless Ass'n* v. *City of Berkeley, et al.*, No. 16-15141 (9th Cir.) (opinion issued and judgment entered July 2, 2019; prior opinion issued and judgment entered Apr. 21, 2017; order denying rehearing issued Oct. 11, 2017).
- *CTIA – The Wireless Ass'n* v. *City of Berkeley, et al.*, No. 3:15-cv-02529-EMC (N.D. Cal.) (order granting defendants' motion to dissolve preliminary injunction issued Jan. 27, 2016; order granting in part and denying in part motion for preliminary injunction issued Sept. 21, 2015).

There are no additional proceedings in any court that are directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner CTIA – The Wireless Association® ("CTIA") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Ninth Circuit's opinion on remand from this Court (Pet. App. 1a–46a) is reported at 928 F.3d 832. This Court's order (Pet. App. 47a) granting CTIA's prior petition for certiorari, vacating the Ninth Circuit's prior opinion, and remanding the case for further consideration in light of *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018), is reported at 138 S. Ct. 2708 (Mem.). The Ninth Circuit's prior opinion (Pet. App. 48a–89a) is reported at 854 F.3d 1105, and its denial of rehearing of that opinion (Pet. App. 166a–175a) is reported at 873 F.3d 774. The opinion of the United States District Court for the Northern District of California dissolving the preliminary injunction (Pet. App. 90a–108a) is reported at 158 F. Supp. 3d 897. That court's prior opinion issuing the preliminary injunction (Pet. App. 109a–165a) is reported at 139 F. Supp. 3d 1048.

## JURISDICTION

The Ninth Circuit entered judgment on July 2, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law … abridging the freedom of speech ….

Section 1 of the Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ….

Section 9.96.030(A) of the Municipal Code of the City of Berkeley, California provides:

> **§ 9.96.030 Required notice**
>
> A. A Cell phone retailer shall provide to each customer who buys or leases a Cell phone a notice containing the following language:
>
> > 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.

## STATEMENT

More than 30 years ago, this Court decided *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Since then, the Courts of Appeals have sharply divided over the proper standard of scrutiny for laws compelling commercial entities to speak. The conflict results from confusion about two fundamental aspects of the commercial speech doctrine: (1) whether *Zauderer*'s approach to forced speech applies outside the context of preventing consumer deception; and (2) when *Zauderer* does apply, what the government must establish to defend a speech mandate. In *National Institute of Family & Life Advocates* v. *Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018), this Court expressly declined to resolve central questions about *Zauderer*'s scope and application, and on remand the Ninth Circuit made crystal clear that it is not changing its expansive view of *Zauderer*. These exceptionally important questions presented were worthy of certiorari the last time around, and it is now time for this Court to resolve them.

In the decision below, the Ninth Circuit both expanded the scope of *Zauderer* and watered down its requirements, holding that *all* compelled speech about the speaker's products is subject to rational-basis review. Specifically, the court held that a commercial speech mandate need only be "reasonably related to" *any* governmental interest that is "more than trivial," and 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.

App. 23a–33a. These holdings substantially increase the government's ability to dictate the speech of commercial actors, in direct conflict with the precedent of this Court and other circuits.

In *Zauderer*, this Court "appl[ied] the teachings" of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980), and other cases articulating an intermediate-scrutiny standard for commercial speech to three Ohio laws regulating attorney advertising. 471 U.S. at 638. The Court upheld Ohio's requirement that the attorney provide additional "purely factual and uncontroversial information" necessary to cure otherwise deceptive advertising. *Id.* at 651. *Zauderer* explained that, when the government seeks to combat misleading speech, it has options short of banning the speech. In particular, it may consider "disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech" under *Central Hudson*, if the requirements are "reasonably related to the State's interest in *preventing deception of consumers*." *Id*. at 651 & n.14 (emphasis added). 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.

Nevertheless, in the ensuing three decades, this part of *Zauderer* has sown much confusion. From the outset, members of this Court found it "somewhat difficult to determine precisely what disclosure requirements" *Zauderer* permits. 471 U.S. at 659 (Brennan, J., joined by Marshall, J., concurring). Other Justices have subsequently recognized the need for "guidance" on the "oft-recurring" and "important" issue of the

First Amendment treatment of "state-mandated disclaimers" in the commercial speech context. *Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari).

This Court has yet to provide needed clarification. In *NIFLA*, for example, the Court did not need to "decide whether the *Zauderer* standard applie[d]" to the compelled disclosures at issue or "what type of state interest is sufficient to sustain a disclosure requirement" under *Zauderer*. 138 S. Ct. at 2377.

Not surprisingly, lower courts have struggled with both the scope and application of *Zauderer*. As Judge Wardlaw explained below, the circuits have fallen into "discord" about *Zauderer*, and "the law remains unsettled." Pet. App. 172a n.1. The D.C. Circuit has similarly 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).

Here, a divided panel of the Ninth Circuit ruled that "*Central Hudson*'s intermediate scrutiny test does not apply to compelled" speech. Pet. App. 19a. Rather, in the Court of Appeals' view, *Zauderer* extends to *all* commercial speech mandates about the speaker's products, even when the seller says nothing misleading or does not speak at all—in other words, even when the government has no interest in "preventing deception of consumers." Pet. App. 20a. And in so doing, it joined the wrong side of a deep circuit split and created more jurisprudential disarray on the proper scope of *Zauderer*.

The Ninth Circuit did not stop there. After enlarging *Zauderer*'s scope, the court weakened or eliminated entirely several aspects of *Zauderer*'s standard. The panel upheld the challenged notice by construing it "sentence by sentence" and finding that each was "literally true." Pet. App. 28a–33a. But as Judge Friedland explained in dissent, the government cannot force a private speaker to deliver a misleading message even if it is not technically false. This significance of this should not be lost on the Court: the Ninth Circuit would allow the government to compel the very type of speech—misleading speech—that could be "prohibited entirely." *R.M.J.*, 455 U.S. at 203. That cannot be right.

The panel majority also found that compelled speech is "uncontroversial" within the meaning of *Zauderer* even if it forces the speaker to express the government's side of a "controversy." Pet. App. 24a–25a. Other circuits have rightly held that a one-sided or ideological message, even if literally accurate, is not "uncontroversial" under *Zauderer*—even if it does not address a topic as politically fraught as abortion. The panel then further undermined *Zauderer* by redefining a "substantial" government interest as one that is merely "more than trivial." Pet. App. 23a.

The Ninth Circuit's decision enables the government to impose any number of speech mandates in the form of labels, warnings, disclosures, and disclaimers. Rather than subjecting these dictates to any form of meaningful review, the Ninth Circuit would bless them all so long as they pass rational-basis review under its incorrect reading of *Zauderer*. *But see Am. Meat Inst.* v. *USDA*, 760 F.3d 18, 33 (D.C. Cir. 2014)

(en banc) (Kavanaugh, J., concurring) ("It is important to underscore that those *Zauderer* fit requirements are far more stringent than mere rational basis review.").

The First Amendment does not allow the government to make businesses its mouthpiece without satisfying at least intermediate scrutiny. This Court should grant the petition and finally decide the exceedingly important questions of when and how *Zauderer* applies to laws compelling commercial speech.

### A. This Court Applies At Least Intermediate Scrutiny To Laws Abridging The Freedom Of Speech In The Commercial Context

1. This Court has long held that the government may not regulate commercial speech unless it satisfies intermediate scrutiny. *See Central Hudson*, 447 U.S. at 566. Under *Central Hudson*, the government must show that the regulation serves a "substantial" "governmental interest," that "the regulation directly advances the governmental interest asserted, and" that it is not "more extensive than is necessary to serve that interest." *Ibid*; *see also Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 249 (2010) (explaining that the "Court in [*Central Hudson*] held that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny").

In *In re R.M.J.*, 455 U.S. 191 (1982), the Court applied this test to a requirement that attorneys include state-mandated disclosures in their advertisements if they list their areas of practice. *See id.* at 194–95, 204.

The Court explained that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment." *Id.* at 203. Thus, "when a communication is not misleading," the government must, at a minimum, "assert a substantial interest and the interference with speech must be in proportion to the interest served." *Ibid.*

On the other hand, "[m]isleading advertising may be prohibited entirely." *R.M.J.*, 455 U.S. at 203. Importantly, however, "the remedy [to cure misleading commercial speech] in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation" that is "no broader than reasonably necessary to prevent the deception." *Ibid.* The advertisement at issue in *R.M.J.* "ha[d] not been shown to be misleading," so the state-compelled disclosure was "an invalid restriction upon speech." *Id.* at 205. As the Court later summarized, because "the State had failed to show that the appellant's advertisements were themselves likely to mislead consumers," *R.M.J.* "applied *Central Hudson*'s intermediate scrutiny and invalidated the restrictions as insufficiently tailored to any substantial state interest." *Milavetz*, 559 U.S. at 250.

2. Three years after *R.M.J.*, the Court "appl[ied] the teachings" of *Central Hudson* and *R.M.J.* to attorney advertising regulations. *Zauderer*, 471 U.S. at 638. It struck down two of the regulations, ruling that "[b]ecause" the speech they targeted "w[as] not false or deceptive," the government needed to—but could not—pass intermediate scrutiny. *Id.* at 641–49.

The Court also upheld a public reprimand of an attorney for deceptively advertising a contingency-fee

arrangement. *Zauderer*, 471 U.S. at 631–36, 652–53. The advertisement stated: "If there is no recovery, no legal fees are owed by our clients." *Id.* at 631. But the ad failed to mention that clients may nonetheless be liable for court costs. *Id.* at 633–35.

*Zauderer* held that the State could require the attorney to disclose potential client liability for those additional costs. 471 U.S. at 650–53. That disclaimer contained "purely factual and uncontroversial information" about the attorney's commercial services; absent this information, the advertisement would "misle[a]d" a "layman" by "suggest[ing] that employing [the attorney] would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge." *Id.* at 651–52.

Rather than prohibiting the misleading advertisement entirely, the State had adopted the "less restrictive alternative[]" of allowing the attorney to add language to his advertisement that would cure its misleading quality. *Zauderer*, 471 U.S. at 651–52 & n.14. Because these "disclosure requirements [we]re reasonably related to the State's interest in preventing deception of consumers," the Court found them constitutional. *Id.* at 651–52.

3. In the 34 years since *Zauderer*, the Court has sustained only those state-mandated disclaimers necessary to correct deceptive or misleading commercial speech. Thus, in *Milavetz*, the Court applied *Zauderer* to permit mandatory disclosures that "entail[ed] only an accurate statement" and were "intended to combat the problem of inherently misleading commercial advertisements." 559 U.S. at 250.

The Court, however, has repeatedly declined to apply *Zauderer* outside the context of deceptive speech. In *Ibanez* v. *Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136, 146 (1994), the Court invalidated a required disclaimer because it was not "an appropriately tailored check against deception or confusion" under *Zauderer*. And in *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001), the Court rejected the government's argument that mandatory assessments on businesses to pay for a product advertising program were permissible under *Zauderer*, since they were not "necessary to make voluntary advertisements nonmisleading for consumers."

Most recently, in *NIFLA*, the Court assumed, without deciding, that "the *Zauderer* standard applie[d] to" a notice required of unlicensed facilities that provide pregnancy-related services in California. 138 S. Ct. at 2377. But the Court held that, even under *Zauderer*, California had not carried its "burden to prove that the unlicensed notice [wa]s neither unjustified nor unduly burdensome," regardless of "what type of state interest [would be] sufficient to sustain a disclosure requirement like the unlicensed notice." *Ibid.*

These precedents make two things abundantly clear. *First*, this Court has never held that speech that is not false or misleading may be restricted subject only to rational-basis review. *Second*, the Court has never allowed the government to compel speech, unless necessary to remedy an otherwise false or misleading commercial message, without satisfying at least intermediate scrutiny.

### B. BERKELEY FORCES CELL PHONE RETAILERS TO DISSEMINATE THE MISLEADING MESSAGE THAT CELL PHONES ARE UNSAFE, CONTRARY TO THE FCC'S SCIENCE-BASED CONCLUSION

The ordinance at issue, enacted by the City of Berkeley, is unrelated to any need to prevent consumer deception—as the City admits. The ordinance forces cell-phone retailers to convey a government-scripted message implying that cell phones, when used in certain ways, are dangerous to human health. But the Federal Communications Commission has determined that they are *not*. Thus, the compelled disclosure is itself misleading, spreading the very anti-science misimpression about cell-phone emissions the FCC has sought to correct.

1. Based on the overwhelming consensus of health and safety authorities worldwide, the FCC has concluded "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).

The radiofrequency ("RF") signal emitted by cell phones is the same type of signal used by baby monitors, Wi-Fi networks, and many other household devices. As the FCC has explained, RF signals are non-ionizing, meaning that they are incapable of breaking chemical bonds in the body, damaging biological tissues, or adversely affecting DNA. *See* FCC, *Radiofrequency Safety: Frequently Asked Questions* (Nov. 25, 2015), https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety. Although very high levels of RF energy can cause heating, the RF produced by

"[c]ell phones and wireless networks" is "not at levels that cause significant heating." EPA, *Non-Ionizing Radiation from Wireless Technology* (Mar. 29, 2019), https://www.epa.gov/radtown/non-ionizing-radiation-wireless-technology.

The FCC limits the amount of RF energy that cell phones may produce, and sets the Specific Absorption Rate safety standards for cell phone users' exposure to RF energy, based on the recommendations of "expert organizations and federal agencies with responsibilities for health and safety." *In re Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 12 F.C.C. Rcd. 13,494, 13,505 (Aug. 25, 1997). The FCC's "exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure." *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3498, 3582 (Mar. 29, 2013). "As a result, exposure well above the [FCC's] limit should not create an unsafe condition." *Id.* at 3588.

The FCC also publishes guides for consumers that explain these exposure limits. The FCC has observed that "[t]here is considerable confusion and misunderstanding about the meaning of the maximum reported Specific Absorption Rate (SAR) values for cell phones." FCC, *Specific Absorption Rate (SAR) for Cell Phones: What It Means for You* (Sept. 8, 2017), https://www.fcc.gov/consumers/guides/specific-absorption-rate-sar-cell-phones-what-it-means-you ("SAR Guide"). The agency has debunked these concerns, explaining that "ALL cell phones must meet the FCC's RF exposure standard, which is set at a level

well below that at which laboratory testing indicates, and medical and biological experts generally agree, adverse health effects could occur." *Ibid.*

In short, according to the FCC, there is "*no scientific evidence*" causally linking "wireless device use and cancer or other illnesses." FCC, *Wireless Devices and Health Concerns* (Aug. 6, 2018), https://www.fcc.gov/consumers/guides/wireless-devices-and-health-concerns (emphasis added). For those who "are skeptical of the science," the FCC lists practices that would further reduce this harmless RF exposure, such as "[i]ncreas[ing] the distance between wireless devices and your body"—but the FCC emphasizes that it "does not endorse the need for these practices." *Ibid.*; *see also* FDA, *Health Issues: Do Cell Phones Pose a Health Hazard?* (Dec. 4, 2017), https://www.fda.gov/radiation-emitting-products/cellphones/health-issues (RF from cell phones "causes no known adverse health effects").

2. Berkeley enacted an ordinance, Berkeley Municipal Code § 9.96.030(A), that sends a message grounded in the very "misunderstanding" about the safety of cell phones that the FCC has tried to counter, SAR Guide.

A number of Berkeley residents urged passage of the ordinance based on a variety of scientifically baseless concerns. Some claimed they are "electromagnetically sensitive"; others believed that cell-phone signals are "carcinogens" that they were "sure" can "cause[] [a] brain tumor" or "damage … to sperm"; and some even suggested that cell phones are responsible for the "huge problems in our schools today." CA9 ER100–07. Council members *admitted* they had no

scientific evidence that cell phones pose a health risk. Instead, they deflected the problem by stating that "[t]he issue before us tonight is not the science itself" but the Council's "moral and ethical role … in this society." CA9 ER107–08.

The City Council enacted the ordinance, which currently 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 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.

### C. THE NINTH CIRCUIT HOLDS THAT THE GOVERNMENT MAY COMPEL COMMERCIAL SPEECH WHENEVER THE LAW IS REASONABLY RELATED TO ANY NON-TRIVIAL INTEREST

1. CTIA sued to enjoin enforcement of the ordinance, a suit over which the district court had jurisdiction under 28 U.S.C. § 1331. CTIA argued that the speech Berkeley compelled was false and misleading, and that the ordinance could not survive any level of scrutiny. The district court preliminarily enjoined a provision of the original ordinance that required a statement that the supposed "potential risk is greater for children" (Pet. App. 131a–33a), but vacated the injunction following repeal of that provision (Pet. App. 90a–91a). The court refused to enjoin the ordinance in its current form. *Ibid.*

2. CTIA appealed, arguing that the ordinance was subject to at least intermediate scrutiny and that, in any event, the compelled statement was not the sort of "purely factual and uncontroversial information" that could pass muster under *Zauderer*.

A divided panel of the Ninth Circuit affirmed, holding that "the *Zauderer* compelled-disclosure test applies" even "in the absence of a prevention-of-deception rationale." Pet. App. 66a. The panel majority concluded that any "governmental interest" may "permissibly be furthered by compelled commercial speech," so long as the interest is "substantial—that is, more than trivial." Pet. App. 68a.

The panel majority interpreted *Zauderer* to hold—as a blanket proposition—that "*Central Hudson*'s intermediate scrutiny test does not apply to compelled,

as distinct from restricted or prohibited, commercial speech." Pet. App. 64a. Instead, "[u]nder *Zauderer*, compelled disclosure of commercial speech complies with the First Amendment if the information in the disclosure is reasonably related to a substantial governmental interest and is purely factual." Pet. App. 70a.

The panel majority found that "the Berkeley ordinance satisfies this test." Pet. App. 70a. It first ruled that the ordinance was reasonably related to the government's interest in health and safety. The majority acknowledged that "CTIA is correct" that there is no evidence that cell phone signals are dangerous, but dismissed this fact as "beside the point," on the ground that the FCC had established RF limits nonetheless. Pet. App. 71a–72a.

Next, the panel majority held that the compelled statement was "purely factual." Pet. App. 73a–76a. It assessed, "sentence by sentence," whether the compelled disclosure was "literally true"; concluded that each of the three compelled sentences was "technically correct" or "literally true"; and affirmed the district court's dissolution of the preliminary injunction. Pet. App. 73a, 84a–85a.

Judge Friedland dissented. Pet. App. 85a–89a. She 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. 87a–88a n.2. Judge Friedland explained that the majority's "approach" of "pars[ing] the[] sentences individually and conclud[ing] that each is 'literally true'

… misses the forest for the trees." Pet. App. 86a. 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"—and the FCC has explained that it is not. Pet. App. 86a–87a. Judge Friedland finally observed that "overuse" of "false, misleading, or unsubstantiated product warnings" such as Berkeley's notice "may cause people to pay less attention to warnings generally." Pet. App. 88a–89a.

3. CTIA petitioned for panel rehearing and rehearing en banc. Judge Friedland voted to grant both. Pet. App. 169a. The Ninth Circuit, however, denied rehearing. *Ibid.* The two judges in the panel majority concurred in that denial. They acknowledged that "[t]wo of our sister circuits have sustained compelled commercial speech that prevented consumer deception," but professed not to "know" whether those courts would hold that "commercial speech may be compelled in the absence of deception." Pet. App. 170a.

Judge Wardlaw dissented, explaining that "the panel majority applied the wrong legal standard." Pet. App. 171a. The majority erred in "extend[ing] *Zauderer* beyond the context of preventing consumer deception to instances where the government compels speech for its own purposes." Pet. App. 171a–72a. Judge Wardlaw explained that "there is discord among our sister circuits about" the scope of *Zauderer* and that "the law remains unsettled." Pet. App. 172a n.1. But "Supreme Court precedent is clear that if the

government is to compel commercial speech," it must at least satisfy intermediate scrutiny. Pet. App. 172a. In light of the "proliferation of warnings" in today's culture, the panel's "troubling … loosening of long-held traditional speech principles governing compelled disclosures and commercial speech only muddies the waters." Pet. App. 173a–74a.

4. CTIA sought certiorari. This Court granted CTIA's petition, vacated the judgment, and remanded for further consideration in light of *NIFLA*. Pet. App. 47a.

5. On remand, the panel reaffirmed its previous judgment, by the same 2–1 vote, and re-issued its prior opinion with minimal changes. Pet. App. 1a–46a.

The panel majority first explained that it had "waited for an en banc panel … to address a similar issue in a separate case," *American Beverage Ass'n* v. *City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (en banc). Pet. App. 6a. In an odd procedural twist, the en banc panel in *American Beverage*—to which CTIA was not a party—had "reaffirmed" the "reasoning and conclusion in *CTIA* that *Zauderer* … provides the appropriate framework to analyze" any "First Amendment claim involving compelled commercial speech." *Ibid.* (punctuation omitted; quoting *American Beverage*, 916 F.3d at 756).

The majority also repeated its ruling that the ordinance satisfies *Zauderer*. Pet. App. 25a–33a. Although *NIFLA* expressly declined to reach larger questions about *Zauderer*, the panel purported to draw support from *NIFLA*. It acknowledged that *NIFLA*

held that the government may not compel "controversial" speech under *Zauderer*, and that "there is a controversy concerning whether radio-frequency radiation from cell phones can be dangerous if the phones are kept too close to a user's body over a sustained period." Pet. App. 32a–33a. Yet the panel found that, "[d]espite this disagreement, Berkeley's required disclosure is uncontroversial within the meaning of *NIFLA*" because "[i]t does not force cell phone retailers to take sides in a heated political controversy," unlike the issue of abortion as in *NIFLA*. *Ibid.*.

Judge Friedland again dissented, on the same grounds as before. Pet. App. 42a–46a. She added that she agreed with Judge Nguyen's concurring opinion in *American Beverage*, which explained that *Zauderer* is limited to disclosures needed to correct misleading commercial speech. Pet. App. 45 n.2. As Judge Nguyen observed, this Court in *NIFLA* "reiterated its 'reluctan[ce] to mark off new categories of speech for diminished constitutional protection.'" *American Beverage*, 916 F.3d at 768 (alteration in original; quoting *NIFLA*, 138 S. Ct. at 2372).

## REASONS FOR GRANTING THE PETITION

As Judge Wardlaw explained, the Courts of Appeals are divided as to *when Zauderer* controls and *what it means*. The Ninth Circuit's radical and unprecedented approach, which it recently enshrined en banc over the dissents of Judges Friedland and Nguyen, also directly conflicts with this Court's precedent. The acknowledged and continued discord and confusion among the Courts of Appeals demonstrates the need for this Court's review and clarification of the proper standard of review for compelled commercial

speech. The remand process in this case resulted only in the Ninth Circuit's entrenchment of its outlier views, and this Court should now take up and resolve these critical questions.

## I. THIS COURT SHOULD RESOLVE *ZAUDERER*'S SCOPE

This case was "the first time" the Ninth Circuit "had occasion … to squarely address the question whether, in the absence of a prevention-of-deception rationale, the *Zauderer* compelled-disclosure test applies." Pet. App. 66a. The court answered "yes," holding that *Zauderer* is not limited to "the prevention of consumer deception"; rather, any "substantial—that is, more than trivial—governmental interest" suffices. Pet. App. 68a. And the court doubled down on remand after this Court's ruling in *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018), erroneously finding support from inapposite portions of that opinion while ignoring its speech-protective analysis. The panel decision conflicts with the precedent of this Court and other circuits.

### A. The Ninth Circuit's Expansion of *Zauderer*'s Scope Contravenes This Court's Precedent

The Ninth Circuit categorically held that all "compelled" commercial speech is subject to lesser scrutiny than "restricted or prohibited commercial speech." Pet. App. 19a. It claimed that *Zauderer* so held. The opposite is true.

This Court has long taught that "*[t]ruthful* [commercial speech] related to lawful activities is entitled to the protections of the First Amendment." *In re R.M.J.*, 455 U.S. 191, 203 (1982) (emphasis added).

"At the outset" of judicial review of a commercial speech regulation, then, the court must "determine whether the [regulated] expression … concern[s] lawful activity and [is] *not … misleading*." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (emphasis added).

Where there is no misleading speech to correct, the government may not mandate a disclosure unless it satisfies at least intermediate scrutiny. *R.M.J.*, 455 U.S. at 203; *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001). More specifically, when a "communication is not misleading" the government "must assert a substantial interest and the interference with speech must be in proportion to the interest served." *R.M.J.*, 455 U.S. at 203; *accord Central Hudson*, 447 U.S. at 564.

On the other hand, commercial speech that is "[m]isleading … may be prohibited entirely." *R.M.J.*, 455 U.S. at 203. But the government may not ban misleading commercial speech if it could impose a less restrictive condition: that the speaker include additional information that cures the speech's potential to deceive. *See Zauderer* v. *Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 650–51 (1985); *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010); *R.M.J.*, 455 U.S. at 203; *Central Hudson*, 447 U.S. at 565.

Thus, far from subjecting all commercial speech mandates to lesser scrutiny, *Zauderer* simply "appl[ied] the[se] teachings" to permit the government to use the less restrictive tool of a "warning[] or disclaimer[]" to cure, rather than ban, misleading speech.

471 U.S. at 638, 651 (citation omitted). A "purely factual and uncontroversial" disclosure is thus constitutional "as long as [the] disclosure requirements are reasonably related to the State's interest in *preventing deception* of consumers" and not "unduly burdensome." *Id.* at 651 (emphasis added).

As multiple members of this Court have explained, *Zauderer* in no way diminished *Central Hudson*'s standard for non-deceptive commercial speech. *E.g.*, *Zauderer*, 471 U.S. at 657 (opinion of Brennan, J., joined by Marshall, J.) ("I agree with the Court's somewhat amorphous 'reasonable relationship' inquiry only on the understanding that it comports with the standards more precisely set forth in our previous commercial-speech cases."). In fact, *Zauderer* applied that standard to the other two speech regulations at issue precisely because they involved truthful, non-misleading speech. *Id.* at 631–49 (majority opinion). Thus, as other Justices have noted, "*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).

This Court has *never* upheld a commercial speech mandate under *Zauderer* outside the deception-prevention context. To the contrary, the Court consistently and repeatedly has described *Zauderer* as a decision about combatting consumer deception. For example, in *Milavetz*, the Court noted that the "essential features of the rule at issue in *Zauderer*" were that the "required disclosures [were] intended to combat the problem of inherently misleading commercial ad-

vertisements" with the use of "only an accurate statement." 559 U.S. at 250. Justice Thomas's concurrence explained that, under *Zauderer*, "a disclosure requirement passes constitutional muster only to the extent that it is aimed at [misleading] advertisements," and the majority did not "hold otherwise." *Id.* at 257 (opinion of Thomas, J.). Eight years earlier, Justice Thomas, joined by Justice Ginsburg, noted that "the advertisement in *Zauderer* was misleading as written" and urged the Court to review the question whether *Zauderer* could apply outside that context. *Borgner* v. *Fla. Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., dissenting from denial of certiorari).

The Ninth Circuit stretched to find support for its expansion of *Zauderer* in this Court's recent decision in *NIFLA*. Pet. App. 22a–23a. But *NIFLA* expressly *declined* to decide "what type of state interest is sufficient to sustain a disclosure requirement" under *Zauderer*. 138 S. Ct. at 2377. And as explained below, what *NIFLA* said about *Zauderer* supports reversal here.

In other cases, moreover, this Court has refused to apply lesser scrutiny to compelled speech that does not correct a misleading statement. In *United Foods*, the Court declined to apply *Zauderer* where a compelled subsidy for commercial speech was not "necessary to make voluntary advertisements nonmisleading for consumers." 533 U.S. at 416. And in *R.M.J.*, the Court invalidated a commercial speech mandate where the advertisement it supposedly targeted "ha[d] not been shown to be misleading" in the absence of the mandated language. 455 U.S. at 205.

The Ninth Circuit jettisoned these precedents by holding that *Zauderer* compels lesser scrutiny in *all* compelled disclosure cases—even where the commercial entity says nothing misleading or (as here) *does not even speak at all*. Pet. App. 18a, 20a–24a. In its flawed view of *Zauderer*, because compelled mandates supposedly add to—and do not restrict—commercial information, speakers enjoy only the skimpiest protection against being forced to utter a government-scripted message. *See* Pet. App. 19a–20a.

As Judge Nguyen emphasized, that conflicts with the teachings of this Court and "invites reversal." *Am. Beverage Ass'n* v. *City & Cty. of San Francisco*, 916 F.3d 749, 767–69 (9th Cir. 2019) (en banc) (concurrence). A speaker is entitled to only "minimal" protection from compulsory disclaimers when disseminating otherwise misleading messages that the government may ban outright. *Zauderer*, 471 U.S. at 651. But "the [commercial] speaker and the audience, not the Government, should be left to assess the value of *accurate and nonmisleading* information about lawful conduct." *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 195 (1999) (emphasis added). Here, Berkeley has never alleged any deceptive or misleading speech by cell-phone retailers.

More fundamentally, the Court's compelled-speech cases recognize that "[t]he right to speak and the right to refrain from speaking" are two sides of the same constitutional coin. *E.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). The "constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression" is long "established." *Riley* v. *Nat'l Fed'n for the Blind*, 487 U.S. 781, 797 (1988). Because "compelling cognizable

speech"—including "commercial speech"—is "just as suspect as suppressing it," all such regulations are "typically subject to the same level of scrutiny." *Glickman*, 521 U.S. at 481 (Souter, J., dissenting).

The Ninth Circuit's constitutional dividing line between compelling commercial speech and restricting commercial speech not only conflicts with these fundamental principles, it makes little sense. There is no practical difference between a law forbidding particular speech unless the speaker adds a specific disclaimer and a law compelling the disclaimer directly. Yet the Ninth Circuit would subject the former to intermediate scrutiny and the latter to rational-basis review.

The Ninth Circuit's holding that the right not to speak ranks lower on the constitutional scale than the right to speak cannot be squared with this Court's precedents. Indeed, in rejecting the Ninth Circuit's view that "professional speech" is also lesser speech, this Court explained that it "has been reluctant to mark off new categories of speech for diminished constitutional protection." *NIFLA*, 138 S. Ct. at 2372 (quotation marks omitted). Yet that is precisely what the Ninth Circuit has done (again). As Judge Wardlaw explained, "[t]he Supreme Court has never been so deferential to government-compelled speech" as the panel was here. Pet. App. 173a. This Court should grant certiorari to realign Ninth Circuit law with this Court's precedent.

### B. The Courts Of Appeals Are Divided Over *Zauderer*'s Scope

Despite the Court's consistent practice of applying at least intermediate scrutiny to regulations of truthful, non-deceptive commercial speech, the Courts of Appeals have fractured on this issue. Some circuits have applied *Zauderer* only in cases where the speaker's message is deceptive or misleading. Others, like the Ninth Circuit, have extended *Zauderer* to *all* compelled speech about the speaker's product.

Fifteen years ago, two Justices noted that the lower courts need "guidance" on the "oft-recurring" and "important" issue of the First Amendment treatment of "state-mandated disclaimers" in the commercial speech context. *Borgner*, 537 U.S. at 1080 (opinion of Thomas, J.). But the Court has not yet supplied that guidance, *see NIFLA*, 138 S. Ct. at 2377, and the confusion in the courts of appeals has only worsened.

Decisions from the Fifth, Third, and Seventh Circuits have reasoned that *Zauderer* applies only to regulations aimed at preventing consumer deception.

For example, in *Allstate Insurance Co.* v. *Abbott*, 495 F.3d 151 (5th Cir. 2007), the Fifth Circuit invalidated a law requiring insurers who promote their favored automobile repair shops to also promote other repair shops. *See id.* at 157, 164–68. The Court of Appeals held that, because the advertisement the insurer would use without the mandated disclosure carried only a "minimal" "potential for customer confusion," *Central Hudson*, rather than *Zauderer*, applied. *Id.* at 166. And since the law was not narrowly tai-

lored to the State's interests in promoting fair competition and consumer protection, it was invalid under *Central Hudson*. *Id.* at 167–68.

The Third Circuit likewise has declined to apply *Zauderer* outside the deception-prevention context. In *Dwyer* v. *Cappell*, 762 F.3d 275 (3d Cir. 2014), the court held that *Zauderer* applies to laws "directed at misleading commercial speech," and invalidated a regulation, which required that attorney advertisements that quote a court opinion include the full opinion, because that disclosure was "not reasonably related to preventing consumer deception." *Id.* at 282 (citation omitted).

Similarly, in *Central Illinois Light Co.* v. *Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987), the Seventh Circuit held unconstitutional a law that required utility companies to include in their bills messages scripted by a State board. *Id.* at 1170, 1173–74. The court explained that *Zauderer* permits disclosures "needed to avoid deception, [but] it does not suggest that companies can be made into involuntary solicitors" of the government's message. *Id.* at 1173; *see also Commodity Trend Serv., Inc.* v. *CFTC*, 233 F.3d 981, 994–95 (7th Cir. 2000) ("narrowly drawn affirmative disclosures that directly cure fraudulent speech are constitutionally permissible" under *Zauderer*).

By contrast, in this case, the Ninth Circuit joined the D.C., First, Second, and Sixth Circuits in concluding that *Zauderer* applies outside the prevention-of-deception context. Pet. App. 20a–24a; *Am. Meat Inst.* v. *USDA*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc); *Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell*,

272 F.3d 104, 115 (2d Cir. 2001); *Disc. Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509, 556 (6th Cir. 2012). These courts acknowledge that "*Zauderer* itself does not give a clear answer," and that "[s]ome of its language suggests possible confinement to correcting deception." *American Meat Institute*, 760 F.3d at 21. But they incorrectly reasoned that *Zauderer* held that any "First Amendment interests" against being compelled to speak "are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 22 (citation omitted). As explained above, this rationale cannot be squared with this Court's precedents.

Judges on the Courts of Appeals have highlighted the disagreement and confusion over *Zauderer*'s reach. For example, Judge Wardlaw explained below that "the law remains unsettled" and there is "discord among [the] … circuits." Pet. App. 172a n.1. And the D.C. Circuit has described the "flux and uncertainty of the First Amendment doctrine of commercial speech, and the conflict in the circuits regarding the reach of *Zauderer*." *NAM*, 800 F.3d at 524.

Commentators too have observed that "[c]ircuit courts [have] continue[d] to grapple with when to apply the *Zauderer* standard, … creating a circuit split on how to review compelled commercial speech." Emma Land, *Corporate Transparency and the First Amendment: Compelled Disclosures in the Wake of* National Association of Manufacturers v. SEC, 69 Okla. L. Rev. 519, 536 (2017). There is "a divisive split among federal circuits" over *Zauderer*'s "bounds." Jeffrey S. Wettengel, *Reconciling the Consumer "Right to Know" with the Corporate Right to First Amendment*

*Protection*, 12 J. Bus. & Tech. L. 325, 333 (2017). Specifically, "some courts have limited *Zauderer*'s rational basis application to compelled commercial speech disclosures that are 'factual and uncontroversial' *and* cure deception of consumers; while other courts have applied it to all compelled commercial speech disclosures that are 'factual and uncontroversial' regardless of whether the speech cures deception of consumers." Alexis Mason, *Compelled Commercial Disclosures:* Zauderer*'s Application to Non-Misleading Commercial Speech*, 72 U. Miami L. Rev. 1193, 1198–99 (2018); *accord*, *e.g.*, Eugene Volokh, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355, 394 (2018).

Because this important question has not been settled by this Court and the lower courts have long divided on it, this Court should grant the petition.

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

As explained above, the Ninth Circuit contravened this Court's precedent in ruling that the Berkeley ordinance is governed by *Zauderer*. The court then compounded its error by misapprehending how to *apply Zauderer*. The opinion below—contrary to the holdings of this Court and the Second, Fourth, Seventh, and D.C. Circuits—allows the government to require speakers to convey a misleading, controversial message. Pet. App. 28a–32a. And the Ninth Circuit stands alone in allowing the government to compel speech in pursuit of an interest that need only be "more than trivial." The Ninth Circuit's highly permissive standard of review for compelled disclosures provides the government free rein to compel a wide swath of commercial speech.

### A. The Ninth Circuit Watered Down *Zauderer*'s "Purely Factual And Uncontroversial" Requirements

The Ninth Circuit's application of *Zauderer* contradicts this Court's teachings. As Judge Friedland's dissent forcefully explained, requiring only that each sentence be technically correct when parsed sentence by sentence by judges guts *Zauderer* and "misses the forest for the trees." Pet. App. 43a.

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

*First*, a mandatory statement that, read as a whole, potentially conveys a misleading message is *not* "purely factual." *See American Meat Institute*, 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 upshot of the Ninth Circuit's approach is that the government may prohibit misleading speech but nonetheless possesses the power to force private speakers to engage in misleading speech. That makes no sense as a matter of First Amendment principles and cedes far too much power to the government to manipulate public debate.

In artificially parsing the compelled disclosure at issue, the Ninth Circuit set common sense aside and ignored the misleading nature of Berkeley's ordinance. By warning consumers about "how to use your

phone safely" and using alarming terms such as "exposure" and "radiation," the ordinance conveys (and certainly *potentially* conveys) to regular people the message that there are *unsafe* ways to use a cell phone. *See Zauderer*, 471 U.S. at 652 ("[I]t is a commonplace that members of the public are often unaware of the technical meanings of such terms."). As Judge Friedland concluded, "[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. 42a. "Yet," as she reiterated, "Berkeley has not attempted to argue, let alone to prove, that message is true." *Ibid.*

According to the FCC, the message is *not* true: The FCC has repeatedly found that cell phones approved for sale in the United States are safe no matter how they are used. *See supra*, Statement B.1. As Judge Friedland summarized, "FCC guidelines make clear that they are designed to incorporate a manyfold safety factor, such that exposure to radiation in excess of the guideline level is considered by the FCC to be safe." Pet. App. 44a.

Thus, rather than *prevent* consumer deception, the Berkeley ordinance *inflames* the "considerable confusion and misunderstanding" about the RF exposure guidelines that the FCC has been trying to correct. SAR Guide. Because "the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated." *Borgner*, 537 U.S. at 1082 (opinion of Thomas, J.).

Second, the panel erroneously downgraded *Zauderer*'s requirement that the disclosure be "uncontroversial." Pet. App. 24a–25a, 32a–33a. On remand, the Ninth Circuit was forced by *NIFLA* to acknowledge that compelled disclosures must be uncontroversial, and it noted that "there is a controversy" about the statement the ordinance mandates. Pet. App. 32a–33a. Nonetheless, the court confined *NIFLA* to its facts, holding that the ordinance is "uncontroversial within the meaning of *NIFLA*" because the controversy is not as "heated" and "political" as abortion. Pet. App. 24a–25a. As a result, the court held that the ordinance needed only to be "purely factual." Pet. App. 25a, 32a.

This cannot be reconciled with *Zauderer*. "'[U]ncontroversial,' as a legal test … mean[s] something different than 'purely factual.'" *NAM*, 800 F.3d at 528. And "[r]equiring a company to publicly condemn" its products, *id.* at 530 (citation omitted), via a "safety" warning about "radiation" fails that test just as much as other types of compelled speech invalidated by this Court.

The Ninth Circuit's standard is not only wrong, but dangerous. It empowers governments to manipulate commercial speech for their own ends by requiring, for example, pharmaceutical manufacturers to warn consumers that certain "studies have found vaccines to increase the risk of autism" or solar panel manufacturers to state that "some scientists have questioned whether carbon emissions contribute to climate change." While those statements are *literally* true, it would make no constitutional difference, on the Ninth Circuit's view, that they are misleading and extraordinarily controversial, so long as they do not

address a topic it concludes is as "heated" as the most highly charged "political" issues in our country.

The Ninth Circuit's rule gives "no end to the government's ability to skew public debate by forcing companies to use the government's preferred language," so long as they define that language in literally true terms. *NAM*, 800 F.3d at 530.

### B. The Courts Of Appeals Are Divided Over Whether A Compelled Message That Is Misleading And Ideological Satisfies *Zauderer*

Just as "circuits have split on … *Zauderer*'s reach (what types of disclosures it covers)," *see supra* Section I.B., they also have split on "its form (how it applies to disclosures within its bounds)." Note, *Repackaging* Zauderer, 130 Harv. L. Rev. 972, 973 (2017). In fact, lower courts are divided on the meaning and application of both the "purely factual" and "uncontroversial" prongs of *Zauderer*. *See* Lauren Fowler, *The "Uncontroversial" Controversy in Compelled Commercial Disclosures*, 87 Fordham L. Rev. 1651, 1655, 1674–85 (2019). The panel majority's approach to both prongs conflicts with those applied by other circuits.

*First*, in sharp contrast with the Ninth Circuit, the D.C. Circuit holds that a compelled disclosure is not "purely factual" where it "*could be* misinterpreted by consumers." *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (emphasis added), *overruled on other grounds by American Meat Institute*, 760 F.3d 18. As the D.C. Circuit explained, this Court has upheld under *Zauderer* only "clear statements that were both indisputably accurate and not subject to misinterpretation by consumers." *Ibid.*

Subsequent decisions from the D.C. Circuit are in accord. In *American Meat Institute*, for instance, the en banc court held that disclosures "could be so one-sided or incomplete that they would not qualify as 'factual and uncontroversial.'" 760 F.3d at 27.

Second, circuits other than the Ninth Circuit hold that "uncontroversial" encompasses more than just the most heated political issues. The D.C. Circuit explains that messages that "convey a certain innuendo … or moral responsibility" are not "uncontroversial" under *Zauderer*. *United States* v. *Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017) (quotation marks omitted).

Similarly, the Fourth Circuit recognizes 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, in the Fourth Circuit—unlike the Ninth—a compelled disclosure 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 too 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*—even though it concerned private video game ratings, not a highly charged political topic. *Entm't Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652–53 (7th Cir. 2006).

The Ninth Circuit allowed Berkeley to do precisely what the government may not do in other circuits: It forces cell-phone retailers to tell their customers that cell phones are unsafe due to "radiation," contrary to the retailers' (and the FCC's) views.*

### C. The Ninth Circuit Downgraded The Government Interest Necessary To Compel Commercial Speech

The Ninth Circuit further weakened *Zauderer* by downgrading the strength of the government interest necessary to sustain compelled commercial speech by redefining "substantial" to mean anything "more than trivial." Pet. App. 23a. The Court of Appeals cited no support for this novel proposition, and there is none: This Court has never suggested that the "substantial" interest required by *Zauderer* is merely an interest that can clear the exceptionally low bar of triviality, nor has any other Court of Appeals so held.

To the contrary, this Court made clear in *NIFLA* that "disclosures" must "remedy a harm that is potentially real not purely hypothetical." 138 S. Ct. at 2377 (quotation marks omitted). The licensed noticed flunked that test because the "only justification" California proffered "was ensuring that pregnant women in California know when they are getting medical care from licensed professionals." *Ibid.* (quotation marks omitted). That interest was insufficient because it

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* The panel asserted that Berkeley's notice only repeated, "in summary form," certain disclosures required by the FCC. Pet. App. 17a, 26a, 30a. As Berkeley conceded below, however, "the Ordinance does not repeat the statements in manufacturers' existing consumer disclosures." Berkeley Answer ¶ 85, Dist. Ct. Dkt. 31.

was "'purely hypothetical,'" *ibid.*—although it was surely "more than trivial."

Here, Berkeley has never attempted to prove that its ordinance will remedy a real harm—nor could it, in light of the FCC's views about the safety of cell phones. But under the Ninth Circuit's "non-trivial" standard, Berkeley's failure was irrelevant, and it is difficult to imagine a governmental interest that would *not* justify forced commercial speech.

This standard stands in sharp contrast to those applied by other circuits. For example, the Second Circuit has rejected the same informational interest asserted by Berkeley here, finding the supposed interest in satisfying "the demand of [the] citizenry for … information" insufficiently weighty to sustain a commercial speech mandate. *Int'l Dairy Foods Ass'n* v. *Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996).

By contrast, the Ninth Circuit's *de minimis* standard will further embolden governments to conscript private actors to serve as bulletin boards for the government's preferred messages.

## III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

The questions presented are of undeniable national importance. Federal, state, and local governments compel commercial speech *all the time*. As the Second Circuit explained in 2001, "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information." *Sorrell*, 272 F.3d at 116 (collecting examples). Since then, these laws have only grown, and compelled "[c]ommercial disclosures have become ubiquitous." Timothy J. Straub, *Fair Warning?: The First*

*Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 Fordham Urb. L.J. 1201, 1224–25 (2013).

Today, "[g]overnments at all levels frequently require the disclosure of potentially relevant information about goods or services offered for sale." Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 Ariz. L. Rev. 421, 424 (2016). It would be difficult, if not impossible, to participate as a consumer in the American economy for a single day without encountering several of these government-mandated disclosures.

This case affects how courts should analyze the plethora of commercial speech mandates under the First Amendment. "[T]he large number of States" (and municipalities such as Berkeley) with numerous laws that compel commercial speech demonstrates the practical importance of the questions presented. *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000). Under the decision below, every "state or local government in [the Ninth] Circuit" can "pass ordinances compelling disclosures by their citizens on any issue the city council votes to promote, without any regard to *Central Hudson*." Pet. App. 174a (Wardlaw, J., dissenting). The same is true in the D.C., First, Second, and Sixth Circuits, but not so in the Third, Fifth and Seventh Circuits.

By "extend[ing] *Zauderer* beyond" the limits set by this Court "to instances where the government compels speech for its own purposes," the decision below emboldens Berkeley and municipalities across the circuit to burden businesses with an ever-expanding rucksack of compelled disclosure

requirements—not to prevent any consumer deception, but to suit their own political, ideological, and normative views on a countless variety of topics. Pet. App. 171a–72a (Wardlaw, J., dissenting).

As Judge Friedland cautioned, "[t]here are downsides to false, misleading, or unsubstantiated product warnings. Psychological and other social science research suggests that overuse may cause people to pay less attention to warnings generally." Pet. App. 46a; *accord*, *e.g.*, David B. Fischer, *Proposition 65 Warnings at 30—Time for a Different Approach*, 11 J. Bus. & Tech. L. 131, 145 (2016); Devin S. Schindler & Tracey Brame, *This Medication May Kill You: Cognitive Overload and Forced Commercial Speech*, 35 Whittier L. Rev. 27, 61–69 (2013). Such warnings also "may deter appropriate use" of beneficial products. *Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices*, 73 Fed. Reg. 49,603, 49,605–06 (Aug. 22, 2008); *accord*, *e.g.*, Schindler & Brame, 35 Whittier L. Rev. at 63–65.

Indeed, many recent compelled-disclosure laws "are, for all practical purposes, requirements that commercial actors communicate value-laden messages about inherently political questions." Adler, 58 Ariz. L. Rev. at 450. The Ninth Circuit's opinion in this case blesses, with minimal scrutiny, any ideological or normative message a clever city council wants to conscript unwilling businesses to deliver, and thus poses enormous practical implications for free speech in modern society.

## CONCLUSION

The Court should finally resolve the long-standing confusion and division of authority over when and how *Zauderer* applies to commercial speech mandates.

Respectfully submitted.

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