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 a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the legal standard of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), requiring 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.

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INTEREST OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files amicus briefs on behalf of the retail industry.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters

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[1] Pursuant to this Court's Rule 37.2(a), *amici* timely notified all parties of their intention to file this brief. Counsel for all parties have consented to the filing of this *amicus* brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community.

The Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have more than $6 trillion in annual revenues, employ nearly 15 million employees, and pay more than $220 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

Amici and their members have an interest in this case. Because *amici*'s members speak on myriad issues and promote products, services, and brand awareness using all manner of communications, *amici* zealously protect their members' First Amendment rights to participate fully in the marketplace of ideas, free from improper government regulation. The Ninth Circuit's decision sanctioned an ordinance that compels Berkeley businesses to distribute a message, in furtherance of the City's policy views, under a relaxed form of scrutiny that this Court has previously applied only to speech regulations designed to cure consumer deception. That decision undermines the speech rights of *amici*'s members and other private speakers, and warrants this Court's review.

SUMMARY OF ARGUMENT

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), this Court

upheld a statute requiring advertisers to disclose information that was necessary to prevent consumer confusion and deception. The circuits are divided on *Zauderer*'s reach. In the decision below, the Ninth Circuit held that *Zauderer* requires applying a deferential standard of review to statutes that compel speech by businesses—even if that speech is not necessary to prevent consumer confusion and deception. Other courts of appeals have held that *Zauderer*'s deferential standard applies *only* when compelled speech is necessary to prevent consumer confusion and deception. Thus, the Ninth Circuit would have upheld statutes that were invalidated in other jurisdictions, while other circuits would have struck down Berkeley's ordinance.

The question presented warrants review. Laws that compel speech can inflict the same First Amendment harms as laws restricting commercial speech: both types of laws skew the marketplace of ideas in the government's preferred direction. Under the Ninth Circuit's legal standard, governments could deter the purchase of unpopular products, and thwart free market competition, by compelling disfavored industries to make statements to their customers designed to make their products look unappealing. The Court should grant certiorari to ensure that States cannot undermine this Court's decisions rejecting attempts by the government to regulate the speech of businesses in order to interfere with the marketplace of ideas.

ARGUMENT

I. The Circuits Are Divided On What Legal Standard to Apply to Laws Compelling Speech by Businesses.

There is a true circuit split on the meaning of *Zauderer*. This is not a case in which different circuits are articulating the same idea in different ways: The Ninth Circuit's legal standard is fundamentally different from the legal standard of its sister circuits. In the Ninth Circuit, the government has free rein to compel speech by commercial actors, subject to the minimal constraints that the compelled speech be literally true and serve a "more than trivial" state interest. Pet. 3. In other circuits, *Zauderer*'s deferential standard applies only when speech is necessary to prevent deception or confusion: for speech falling outside that category, heightened scrutiny applies. Thus, if a law compels speech that is *not* necessary to prevent consumer confusion or deception, the Ninth Circuit would subject that law to a standard that resembles rational basis review, while other circuits would apply heightened scrutiny.

This disparity in legal standard matters in practice. As shown below, other circuits would have invalidated Berkeley's ordinance, while the Ninth Circuit would have upheld statutes that were struck down in other circuits.

Fifth Circuit. In *Allstate Insurance Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), the Fifth Circuit invalidated a law requiring insurers to disclose multiple auto repair shop options to their policyholders. The Fifth Circuit

found that the State had "successfully asserted a legitimate interest in consumer protection and the promotion of fair competition." *Id.* at 167. But it nonetheless invalidated the law. It found that "[u]nlike the situation in the principal case relied upon by the State Defendants, *Zauderer v. Office of Disciplinary Counsel*, the potential for customer confusion here is minimal." *Id.* at 166 (footnote omitted). It then held that the statute could not withstand scrutiny under the stringent standard of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). 495 F.3d at 165-68.

Allstate conflicts with the decision below. Under the legal standard applied below, the Ninth Circuit would have had no difficulty upholding the statute at issue in *Allstate*. In *Allstate*, the Fifth Circuit expressly acknowledged that the compelled speech at issue was justified by a "more than trivial" state interest. *Id.* at 167. And the compelled speech was literally true—all of the auto body shops existed and were prepared to offer their services. That would have ended the Ninth Circuit's analysis. Conversely, the Fifth Circuit would have had equally little difficulty invalidating Berkeley's statute. Not even the Ninth Circuit majority suggested that Berkeley's statute mitigated the potential for customer confusion—indeed, as Judge Friedland explained in dissent, Berkeley's law was more likely to create customer confusion than to reduce it. In the Fifth Circuit, that would have precluded the court from applying *Zauderer*'s deferential approach.

Seventh Circuit. In *Central Illinois Light Co. v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987),

public utilities were required to enclose messages with utility bills written by the Illinois Citizens Utility Board. These messages disclosed, for instance, that utility bills had increased and would continue increasing. *Id.* at 1171 n.2. The Seventh Circuit refused to apply *Zauderer*, explaining: "While *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their ideological opponents." *Id.* at 1173. The court accordingly held that the disclosure requirement was flatly unconstitutional, citing this Court's application of strict scrutiny in *Pacific Gas & Electric Company v. Public Utilities Commission*, 475 U.S. 1 (1986). *See Central Illinois*, 827 F.2d at 1174.

Central Illinois would have played out differently in the Ninth Circuit. There was no allegation that the statements in the mailings were false. And there is a "more than trivial" state interest in informing ratepayers that their rates are going up. That would have been enough for the Ninth Circuit to uphold the statute. Conversely, the Seventh Circuit would have invalidated Berkeley's statute. Berkeley retailers are not being "forced to declare information about themselves needed to avoid deception," *id.*, but instead must disclose extraneous information about cell phones. Under *Central Illinois*, the statute would therefore be invalid.

Third Circuit. In *Dwyer v. Cappell*, 762 F.3d 275 (3d Cir. 2014), Dwyer, an attorney, included excerpts from judicial opinions on his webpage. In response, the New Jersey Supreme Court promulgated a rule prohibiting

attorneys from using excerpts from judicial opinions in their advertising, unless the complete judicial opinion was provided. The Third Circuit invalidated the statute, finding, *inter alia*, that New Jersey's rule "does not require disclosing anything that could reasonably remedy conceivable consumer deception stemming from Dwyer's advertisement." *Id.* at 283.

The Ninth Circuit would have viewed matters differently. It would have instead asked whether compelling disclosure of full judicial opinions was "literally true" and served a "more than trivial" state interest. The answer to both those questions would have been yes: there is nothing false about a judicial opinion, and quoting full judicial opinions offers useful context for would-be clients. The Ninth Circuit would have therefore upheld New Jersey's rule. Meanwhile, the Third Circuit would have invalidated Berkeley's law because Berkeley's law, like New Jersey's rule, "does not require disclosing anything that could reasonably remedy conceivable consumer deception." *Id.*

There is thus a true circuit split—a difference in legal standards that leads to different results on the same facts. A multitude of laws that would survive in the Ninth Circuit would fall in its sister circuits, and vice versa. The Court should grant certiorari to decide the correct legal standard to apply when governments compel speech by commercial actors.

II. The Court Should Grant Certiorari In View of the Major Practical Implications of the Question Presented.

The Court should also grant certiorari because the Ninth Circuit's decision confers on governments an enormous loophole to evade fundamental First Amendment protections that apply to commercial actors and individuals alike. This Court has consistently held that businesses do not lose the protection of the First Amendment simply because they operate in the commercial sphere. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (quotation marks omitted).

The Ninth Circuit's lenient approach toward compelled speech of businesses undermines that protection. "Government action ... that requires the utterance of a particular message favored by the Government" poses "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

It is easy to understand why laws compelling speech, like laws restricting speech, harm First Amendment interests. This Court has repeatedly held that a State cannot restrict commercial speech regarding an

otherwise-legal product merely to skew public opinion about that product. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (the government may not "prevent[] the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."). But compelling speech—just like restricting speech—involuntarily alters a message. Forcing a seller to convey unflattering information at the point of sale serves the same purpose as banning a seller from portraying the product positively at the point of sale: it shields the public from commercial speech that, in the government's view, makes products appear excessively appealing to would-be buyers. The government, of course, has a legitimate interest in preventing confusion or deception: People who buy a product should not be misled about what they are buying. But when the government compels speech not to prevent confusion or deception, but instead to promote a particular agenda, it skews the marketplace of ideas in a manner that the First Amendment forbids.

It is no answer to say that the compelled speech is literally true.[2] As Petitioner points out, a statement can be "misleading and controversial, … even if each

[2] In this case, the statements at issue may not even be literally true. Two recent government studies demonstrated that cell phones result in little, if any, increased cancer risk; indeed, "rats exposed to … cellphone radiation actually lived longer than the controls." Denise Grady, *Cancer Risk From Cellphone Radiation Is Small, Studies Show*, N.Y. Times (Feb. 2, 2018), https://www.nytimes.com/2018/02/02/health/cell-phones-cancer.html.

sentence is literally true." Pet. 31. Here, as Judge Friedland explained, even if the statements at issue are true in isolation, they nonetheless convey a profoundly distorted impression of the risks of cell phones.

Moreover, even when governments force sellers to disclose statements that are literally true and *not* misleading, the First Amendment harms do not go away. The problem is that for any given product, an innumerable number of statements are literally true and non-misleading. One can imagine governments compelling speech about the ways in which the products have been used and misused; the location of the company's manufacturing facilities; the environmental effects of the manufacturing process; the composition of the company's workforce; its treatment of its employees; any causes the company has sponsored; and many other messages. Many of those facts may be unappealing to the general public, and the public's perception of a product will inevitably be shaped by which statements are disclosed and which are left out. By selectively requiring the disclosure of particular facts that it deems relevant, a government can alter the public's perception of a product to the same extent as it would through flat bans or restrictions on commercial speech.

For instance, suppose government officials want to deter alcohol consumption. This Court has already held that a State cannot ban alcohol advertising in the interest of promoting temperance. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). But in the Ninth Circuit, a State could take a different road to the same end: compel speech by alcohol sellers that creates negative public perceptions about alcohol. For instance,

a State could require alcohol sellers to put up large placards at their stores disclosing facts regarding the rate of drunk-driving accidents or the link between alcoholism and crime. Such laws would accomplish the same result as the law in *44 Liquormart*: they would prevent the public from hearing unadulterated messages that characterize alcohol as an attractive product and tilt the playing field in favor of the government's preferred policy outcome. Such laws should be unconstitutional, in light of this Court's teaching that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *Id.* at 512 (plurality opinion). Yet such laws would be upheld under the Ninth Circuit's legal standard, given that there is a "more than trivial" interest in notifying the public of the risks of alcohol.

Indeed, under the Ninth Circuit's approach, governments would be free to conscript private speakers to further any policy goal so long as they could muster a rational connection between their preferred policy and the compelled speech. Video game manufacturers could be required to warn customers of the risks of a sedentary lifestyle. Candy makers could be forced to lecture customers about the risks of a diet high in sugar. Or car dealers could be made to warn buyers of the costs of driving a car rather than riding a bicycle.

The Ninth Circuit's deferential approach to compelled speech would carry an additional risk: it would allow the legislature to thwart fair competition by compelling speech designed to favor some market participants over others.

Take one real life example: genetically engineered salmon. The FDA has determined that genetically engineered salmon are just as safe to eat as other salmon. *See* U.S. FDA, AquAdvantage Salmon Fact Sheet, https://www.fda.gov/AnimalVeterinary/DevelopmentApprovalProcess/GeneticEngineering/GeneticallyEngineeredAnimals/ucm473238.htm (page last updated Dec. 1, 2017). This was "the announcement the Alaskan salmon industry has long feared." Liz Ruskin, *FDA OK's Engineered Salmon; Lawmakers Seek Mandatory Labels*, Alaska Public Media (Nov. 19, 2005), https://www.alaskapublic.org/2015/11/19/after-fda-approval-lawmakers-seek-labeling-for-engineered-salmon/.

Shortly thereafter, Congress enacted an appropriations rider preventing genetically engineered salmon from being sold until FDA "publishes final labeling guidelines for informing consumers of such content." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 §761(a), 129 Stat. 2242, 2285. Further, Congress is currently considering legislation providing that "the acceptable market name of any salmon that is genetically engineered shall include the words 'Genetically Engineered' or 'GE' prior to the existing acceptable market name. *See* Genetically Engineered Salmon Labeling Act, S. 1528, 115th Cong. § 3(a) (2017).

This proposed legislation illustrates the risk of the Ninth Circuit's deferential approach. Governmental action forcing certain companies to use unpopular market names for their products as a means of propping up competitive products is anathema to the First

Amendment. Yet that is exactly the type of legislation that the Ninth Circuit's decision authorizes. The Court should grant certiorari to review the Ninth Circuit's far-reaching and misguided ruling.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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