No. 16-15141

IN THE

United States Court of Appeals for the Ninth Circuit

CTIA - THE WIRELESS ASSOCIATION®,
Plaintiff-Appellant,

v.

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, No. 3:15-cv-02529
District Judge Edward M. Chen

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule Appellate Procedure 26.1, the Chamber of Commerce of the United States of America states that it is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every geographic region of the country. The Chamber represents its members' interests in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community.

Because the Chamber's members speak on myriad issues and promote products, services, and brand awareness using all manner of communications, the Chamber zealously protects its members' First Amendment rights to participate fully in the marketplace of ideas, free from improper government regulation. The Chamber and its members thus have an interest in this case. The panel'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 the Supreme Court has applied only to speech regulations designed to cure consumer

deception. That decision undermines the speech rights of the Chamber's members and other private speakers, and warrants *en banc* review.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the exceptionally important issue of whether and in what circumstances the First Amendment permits the government to compel private speakers to relay the government's own advocacy messages. By relieving the City of Berkeley of its heightened burden to justify such compelled speech, the panel majority enables it to do precisely what the Supreme Court and this Court have long prohibited: force speakers to "use their private property as a *** 'billboard'" to convey the government's preferred message, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); "burden the speech of others in order to tilt public debate in a preferred direction," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-579 (2011); and compel "businesses to make false or misleading statements about their own products," *CTIA-The Wireless Ass'n v. City of Berkeley*, No. 16-15141, 2017 WL 1416504, at *14 (9th Cir. Apr. 21, 2017) (Friedland, J., dissenting in part) (citing *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009)).

[1] Amicus hereby certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than amicus, its members, and its counsel contributed money intended to fund preparation or submission of this brief. The parties have provided blanket consent to the filing of amicus briefs.

The First Amendment stands as a bulwark against such impermissible and unlawful government conscription of private speakers.

The ordinance in question requires CTIA's members to issue warnings about the products they sell. The City has never attempted to suggest that these warnings are necessary to prevent consumer deception, and the overall message conveyed by the warnings is (at a minimum) misleading. But rather than scrutinize those warnings under the heightened review that should be applied to such compelled speech, the panel majority asked only whether the warning statements were factually accurate and "reasonably related" to any "more than trivial" government interest—even in the absence of any deception necessitating correction. Making matters worse, the panel majority paid only lip service to its acknowledgment that heightened scrutiny governs "literally true" compelled speech that is nonetheless misleading.

If permitted to stand, the panel's decision will have far-reaching effects. It will invite federal, state, and local governments to trample on the speech rights of private companies and individuals across a wide swath of industries and topics. Equipped with the expansive power to coopt private speakers as mouthpieces (and funding sources) to advocate for their own policy preferences, governments will have every incentive to follow Berkeley's lead and choose compelled speech over traditional government advocacy campaigns. That result—

already proliferating—will come at significant cost to companies, consumers, and the marketplace of ideas.

The majority's decision is also wrong, as Judge Friedland's well-reasoned dissent persuasively explains, and cannot be reconciled with Supreme Court or this Court's precedent. Not only did the panel majority incorrectly extend *Zauderer*'s reduced scrutiny beyond the limited context of consumer deception; it distorted *Zauderer*'s "purely factual and uncontroversial" test. Each of those legal errors, alone and in combination, merits *en banc* review.

ARGUMENT

I. THE PANEL MAJORITY'S DECISION INVITES GOVERNMENTS TO TRAMPLE ON THE SPEECH RIGHTS OF BUSINESSES

The panel's mistaken ruling has deeply troubling implications for *amicus*, its members, and consumers whose "concern for the free flow of commercial speech often may be far keener than [their] concern for urgent political dialogue." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). The majority's decision would leave federal, state, and local governments free to coopt businesses' private speech to further their own political or economic agendas so long as the compelled message is "reasonably" related to a "more than trivial" government interest.

Armed with that expansive right, governments will have no incentive to spend their own resources on advocating for issues that are important to them, when they can more easily and cheaply coerce companies into subsidizing the

communication of the government's policy positions. That is true even if the compelled speech disparages the very products that companies lawfully promote; indeed, in some cases that may be the government's actual goal. Such a legal regime not only forces speakers to speak when they would rather remain silent but deters them "from speaking out in the first instance." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 10 (1986) ("*PG&E*"). That result "reduc[es] the free flow of information and ideas that the First Amendment seeks to promote," *id.* at 14—to the detriment of companies and consumers alike.

The panel majority's decision charts a perfect course for future regulatory overreach. The majority concluded that the City could compel CTIA's members to deliver a message that makes cell phones less desirable to consumers, despite *no* allegation of any antecedent misleading speech by the members, on the ground that the City has merely required retailers to provide a summary of information that the FCC already determined cell phone manufacturers should provide to their customers. *CTIA*, 2017 WL 1416504, at *9-10. As CTIA has explained, the government's compelled speech actually sends a far different message than the FCC: the notice communicates that cell phones are unsafe, when the FCC has determined the opposite. *See* CTIA Pet'n for Reh'g at 16-17. In any event, under the majority's reasoning, governments across the country can (and doubtlessly

will) follow a similar roadmap in other contexts in an attempt to discourage consumption of certain disfavored or politically unpopular products.

Under the panel majority's lax approach to the First Amendment, where a compelled disclosure is untethered to the goal of preventing consumer deception, there is simply "no end to the information that states could require manufacturers [and other private speakers] to disclose" in support of their own advocacy goals. *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). Without meaningful scrutiny, the government's authority to compel private speech is virtually unconstrained. *See Sorrell*, 564 U.S. at 572 (application of heightened scrutiny ensures that "the State's interests are proportional to the resulting burdens placed on speech"). But our "history and tradition provide no support for that kind of free-wheeling government power to mandate compelled commercial disclosures." *American Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J., concurring).

It is no answer that companies may engage in counter-speech, as the unconstitutional burden on their First Amendment rights remains. Because the "pressure to respond" is "antithetical to the free discussion that the First Amendment seeks to foster," *PG&E*, 475 U.S. at 15-16, courts have often held that "[r]equiring a private party to give significant space to a third party whose message potentially conflicts with the plaintiff's" is "unconstitutional," *e.g.*,

Entertainment Software Ass'n v. Blagojevich, 469 F.3d 641, 653 (7th Cir. 2006) (citing *PG&E*, 475 U.S. at 13-17).

Regrettably, this case is no one-off. The City of San Francisco already tried to enact a similar law that this Court held likely violated the First Amendment. *See CTIA-The Wireless Ass'n v. City & Cty. of S.F.*, 494 F. App'x 752, 753-754 (9th Cir. 2012) (mem.). Since Berkeley enacted this ordinance, San Francisco has tried again in a different context, enacting another intrusive ordinance—currently stayed pending resolution of its constitutionality in this Court—requiring manufacturers of sugar-sweetened beverages to provide "safety" warnings about their own products. *See American Beverage Ass'n v. City & Cty. of S.F.*, Nos. 16-16072, 16-16073 (9th Cir.). If left in place, the panel majority's ruling threatens to spawn other similar regulations that curtail the commercial speech rights of private entities. *En banc* review is necessary to protect against that incursion on the First Amendment and to retract the panel majority's invitation of copycat regulations across this Circuit and beyond.

II. THE PANEL MAJORITY COMMITTED AT LEAST TWO LEGAL ERRORS THAT WARRANT *EN BANC* REVIEW

The majority opinion not only resolves First Amendment questions of exceptional legal and practical importance, but it gets them wrong. The Chamber here emphasizes two of the errors addressed in CTIA's rehearing petition that in particular cry out for *en banc* review: (1) the panel majority's extension of

Zauderer's reduced level of scrutiny beyond its foundational moorings, and (2) its watered-down application of *Zauderer*'s "purely factual and uncontroversial" standard.

A. The Panel Majority Erroneously Expanded *Zauderer*'s Scope Beyond The Consumer Deception Context

In *Zauderer*, the Supreme Court held that the government may compel disclosure of "purely factual and uncontroversial information" when "reasonably related to the State's interest *in preventing deception of consumers*." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis added). By its terms, *Zauderer* applies *only* in the context in which that case arose: a compelled disclosure designed to combat deceptive and misleading commercial speech. *See id.* *Zauderer* extends no further. *See, e.g.*, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (concluding, although the majority did not address the question, that "*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages"). And no subsequent Supreme Court case undermines that conclusion. To the contrary, "[g]iven that the disclosure in *Zauderer* itself prevented an advertisement from being misleading," it is highly doubtful "that the Supreme Court intended the *Zauderer* test to apply in broader circumstances." *CTIA*, 2017 WL 1416504, at *15 n.2 (Friedland, J., dissenting).

The majority nevertheless concluded that *Zauderer*'s framework applies *any time* the government compels commercial speech, so long as the government asserts a "substantial—that is, more than trivial—governmental interest." *Id.* at *8 (majority opinion). That unwarranted expansion of *Zauderer*'s limited reach creates *intra*-circuit tension with this Court's decision "in *Video Software Dealers*, which treated *Zauderer* as applying only in the context of disclosures aimed at combatting otherwise misleading advertising," *id.* at *15 n.2 (Friedland, J., dissenting) (citing *Video Software Dealers*, 556 F.3d at 967), and deepens an *inter*-circuit divide among the federal courts of appeals, *see* CTIA Pet'n for Reh'g at 9-10.

Beyond exacerbating conflict and confusion within and among the circuits, the panel majority's decision also unfairly stacks the deck in the government's favor. Under the majority's approach, the government may evade heightened First Amendment scrutiny (and invoke *Zauderer*'s lesser standard of review) simply by asserting a "more than trivial" interest to justify a compelled disclosure. But that nebulous standard is not a meaningful check on the government's ability to compel speech. Many interests can broadly be framed in terms of "health," "safety," "security," or the like, and might well be deemed "more than trivial" by a reviewing court. Nothing in *Zauderer* or subsequent Supreme Court precedent permits the government to require an unwilling speaker to convey a hostile

government message in support of *any* interest that can overcome the panel's modest "non-trivial" bar. *Cf. Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994) (government "'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree'") (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993)).

This is a case in point. Although the majority concluded that Berkeley's compelled disclosure was reasonably related to a "more than trivial" interest in protecting health and safety, *CTIA*, 2017 WL 1416504, at *8-*9, the City presented no evidence that the compelled disclosure would meaningfully vindicate those safety interests, *see id.* at *15 (Friedland, J., dissenting) (noting that there is "no evidence in the record that the message conveyed by the ordinance is true"). Indeed, the panel majority acknowledged that "CTIA is correct in pointing out that there was nothing then before the district court showing that such radiation had been proven dangerous." *Id.* at *9 (majority opinion). That lack of evidence is no surprise given the FCC's conclusion that "exceed[ing]" cell-phone radio frequency "limits" does *not* "pos[e] a health hazard to humans." *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 FCC Rcd. 3498, 3582-3583 (2013). If anything, Berkeley's message could affirmatively *undermine* such safety interests, given that "overuse" of warnings "may cause people to pay less

attention to warnings generally." *CTIA*, 2017 WL 1416504, at *16 (Friedland, J., dissenting).

Luckily, a good solution to the problem of overly permissive standards for the review of compelled government speech already exists. Indeed, it is one that this Court has previously adopted: simply do not extend *Zauderer* beyond the consumer deception context in which the Supreme Court decided it or beyond the way this Court has previously understood it. *See Video Software Dealers*, 556 F.3d at 966-967; *see also CTIA*, 2017 WL 1416504, at *15 n.2 (Friedland, J., dissenting) (recognizing that the panel majority's decision "seems *** to be in tension with" *Video Software Dealers*).

B. The Panel Majority Diminished *Zauderer*'s "Purely Factual And Uncontroversial" Test

Even if *Zauderer*'s reach extends beyond the context of consumer deception—indeed, *particularly* if *Zauderer* extends more broadly—the panel majority's blinkered application of *Zauderer*'s "purely factual and uncontroversial" standard is deeply flawed and independently warrants the full Court's intervention.

To be sure, the majority purported to recognize that "a statement may be literally true but nonetheless misleading and, in that sense, untrue." *CTIA*, 2017 WL 1416504, at *10. But in actually assessing whether Berkeley's compelled disclosure was "purely factual and uncontroversial," the majority placed

dispositive emphasis on whether each sentence of Berkeley's compelled disclosure, read in isolation, was "literally true." *Id.* at *10-*11. As Judge Friedland's dissent explained, that myopic line-by-line focus is improper, for several reasons.

For one thing, the test required by this Court's precedent is not whether each line is "literally true" in the court's view, but rather whether the compelled disclosure would "arguably" mislead or "convey a false statement" to consumers. *See Video Software Dealers*, 556 F.3d at 967; *CTIA*, 494 F. App'x at 753. The majority failed to meaningfully confront that standard.

For another, the panel majority's "sentence by sentence" parsing ignores the real-world impact of the compelled disclosure. *CTIA*, 2017 WL 1416504, at *10. As Judge Friedland explained, "consumers would not read those sentences in isolation the way the majority does," but instead would read the disclosure "as a whole." *Id.* at *14 (Friedland, J., dissenting). So construed, "the most natural reading of the disclosure warns that carrying a cell phone in one's pocket is unsafe." *Id.* Of course, "that implication is a problem for Berkeley because it has not offered any evidence that carrying a cell phone in a pocket is in fact unsafe." *Id.* at *15. That failure of proof is fatal to the ordinance. Absent evidence that the compelled disclosure could not reasonably convey the false message that carrying a cell phone in a pocket is unsafe, the City simply cannot meet its burden under

Zauderer—particularly at this preliminary procedural stage. The majority held otherwise only by defanging *Zauderer*'s "purely factual and uncontroversial" standard.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing *en banc*.

Respectfully submitted,

Dated: May 15, 2017

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULES 29-2 AND 32-1 FOR CASE NUMBER 16-15141

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 29-2. The brief is 2,712 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: May 15, 2017

/s/ Pratik A. Shah
Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 15, 2017.

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

Dated: May 15, 2017

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