No. 19-439

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 WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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November 1, 2019

QUESTIONS PRESENTED

1. Whether reduced scrutiny of compelled speech under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), applies beyond the need to prevent consumer deception.

2. When *Zauderer* applies, whether it suffices 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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INTERESTS OF *AMICUS CURIAE*[*]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in important compelled-speech cases. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986).

"The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Yet if the decision below stands, the government will enjoy largely unchecked power to compel any business to parrot the government's curated facts, no matter how misleading or controversial a message they convey.

None of this Court's First Amendment precedents blesses so sweeping a governmental power. Among other defects, the Ninth Circuit's decision badly misreads *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). That misreading flouts the constitutional protections this Court has long granted to all speakers, including businesses. WLF urges the Court to

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, contributed money for preparing or submitting this brief. At least ten days before the brief's due date, WLF notified all counsel of record of WLF's intent to file as *amicus curiae*. All parties have granted blanket consent to *amicus* briefs under Rule 37.2(a).

grant review and confirm, once and for all, *Zauderer*'s properly limited scope.

STATEMENT OF THE CASE

Section 9.96.030(A) of the Berkeley Municipal Code requires all cell-phone retailers in the City to post or distribute the following warning:

> 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.

Pet. App. 8a-9a. CTIA – The Wireless Association® (CTIA), whose members include cell-phone makers and retailers, objects to the ordinance's mandate. It contends that the City's mandated warning misleads the reader by suggesting that normal cell-phone use is unsafe.

CTIA alleges that the City's ordinance violates the First Amendment because its mandated warning fails directly to advance a substantial government interest in a narrowly tailored way. CTIA sought a preliminary injunction to stay enforcement of the ordinance, but the district court refused that request. According to the district judge, the First Amendment demands less exacting scrutiny when the City seeks

to *compel* speech by a commercial entity than when it seeks to *restrict* commercial speech. Pet. App. 96a.

On interlocutory appeal, a divided panel of the Ninth Circuit affirmed. Pet. App. 48a-85a. CTIA then petitioned for a writ of certiorari. This Court granted the petition, vacated the panel's opinion, and remanded for further consideration under *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*). *Id*. at 47a. Emphasizing that the government may not "co-opt" disfavored speakers "to deliver its message for it," *NIFLA* held that a California law requiring crisis pregnancy centers to display two factually accurate notices likely violated the First Amendment. 138 S. Ct. at 2376.

Following the parties' supplemental briefing on *NIFLA*, the panel majority reaffirmed the district court. Adopting the district court's reasoning that businesses enjoy lesser First Amendment protection from speech compulsions than from speech restrictions, the Ninth Circuit unaccountably held that the intermediate scrutiny of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), "does not apply to compelled, as distinct from restricted or prohibited, commercial speech." Pet. App. 19a. In the appeals court's novel view, because a company's "'constitutionally protected interest in *not* providing any particular factual information is minimal,'" *Zauderer*'s reduced scrutiny applies virtually any time the law compels a business to utter government-selected facts. *Id*. at 19a-20a (quoting *Zauderer*, 471 U.S. at 651).

Although *Zauderer* confined its scope to compelled disclosures "reasonably related to the State's interest in preventing deception of consumers," 471 U.S. at 651, the Ninth Circuit expanded that scope. It joined with a minority of other circuits to hold "that the prevention of consumer deception is not the only governmental interest that may permissibly be furthered by compelled commercial speech." Pet. App. 22a. Going forward, the panel majority announced, a compelled-speech mandate need only "further some substantial—that is, more than trivial—government interest." *Id.* at 23a. It concluded that the City's interest in "protecting the health of its citizens" suffices under *Zauderer*. *Id*. at 41a.

Under *NIFLA*, the Ninth Circuit conceded, *Zauderer* applies "only if the compelled disclosure involves 'purely factual and uncontroversial' information." Pet. App. 24a. But rather than evaluate how readers would most likely interpret the City's warning, the panel majority parsed the ordinance's mandated script sentence-by-sentence to find that the "text of the compelled disclosure is literally true." *Id*. at 28a-29a. It rejected CTIA's contention that, even if technically true, the warning is both "inflammatory and misleading"—and thus highly controversial. *Id.* at 29a. Instead, the appeals court proposed that any retailer who finds the City's warning misleading "may add to the compelled disclosure any further statement it sees fit to add." *Id*. at 31a.

Judge Friedland dissented. Pet. App. 42a-46a. "Taken as a whole," she explained, "the most natural reading" of the City's warning is "that carrying a cell phone in one's pocket is unsafe." *Id.* at 42a. In Judge Friedland's view, because the warning is itself mis-

leading, the City's ordinance likely violates the First Amendment; she would enjoin it. *Id.* at 43a. Given that conclusion, she found no need to address the precise contours of *Zauderer*. If she were "writing on a blank slate," however, she "would conclude that *Zauderer* applies only when the government compels a truthful disclosure to counter a false or misleading advertisement." *Id.* at 45a n.2.

SUMMARY OF ARGUMENT

The City of Berkeley requires a business to speak when it wishes to remain silent. But under the First Amendment, government as puppet master is no different from government as censor. At bottom, the compelled recitation of government-selected facts allows the government to promote its own agenda at the expense of its citizens' freedom of speech. The Ninth Circuit's watered-down test ignores this threat to our First Amendment liberties. Under that test, the government may compel a business owner to recite any fact the government deems relevant—no matter how little the compulsion has to do with preventing consumer deception, no matter how much the government's mandated script misleads or inflames, and no matter if the business even advertises its goods or services.

The Ninth Circuit relied on *Zauderer* to justify its extraordinary holding. *Zauderer* allows the government to prevent consumer deception by compelling advertisers to include in their ads purely factual and uncontroversial information about themselves and their goods or services. But nothing in *Zauderer* remotely suggests that the government may commandeer a business owner into serving as an invol-

untary mouthpiece for controversial viewpoints she opposes.

As the petitioner explains, by converting *Zauderer* into a rational-basis-review standard, the decision below contradicts this Court's precedents, widens an entrenched circuit split, and adds to the doctrinal uncertainty that *Zauderer* has spawned over the past three-and-a-half decades. We write to elaborate on just how far the Ninth Circuit's holding departs from settled First Amendment law:

First, by unmooring the City's authority to compel speech from the need to remedy pre-existing commercial speech, the decision below grants the City a roving commission to compel speech entirely on its own terms. The City's mandated warning is therefore not a traditional commercial-speech disclosure under *Zauderer*, but a freestanding speech compulsion subject to strict scrutiny.

Second, the Ninth Circuit's view that compelled speech receives less First Amendment scrutiny than banned or restricted speech has no support in law or logic. On the contrary, the "right to speak and the right to refrain from speaking are complimentary components" of the broader right to freedom of speech. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Third, this Court has never applied *Zauderer* outside the small-bore context of requiring a business to supplement its own advertisements with clarifying speech to prevent consumer deception. By expanding *Zauderer*'s scope and sweep, the Ninth

Circuit renders the First Amendment's protection against compelled speech a dead letter.

Fourth, by warning retail customers not to exceed safe levels of radiation exposure from their cell phones, and by urging them to learn how to use their cell phones "safely," the City's mandated warning misleads readers into believing that ordinary cell-phone use may be dangerous.

Of course, the City is perfectly free to proselytize, at its own expense, its tendentious view of cell-phone safety. But under the First Amendment, "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec.*, 475 U.S. at 16 (plurality opinion). The decision below, if left to stand, would deprive the City's business owners of that constitutionally guaranteed choice.

In short, the goals of fairness, uniformity, and stare decisis were all injured by the decision below. WLF joins the petitioner in urging the Court to grant the petition.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NEEDED TO CLARIFY THAT STRICT SCRUTINY APPLIES TO ANY SPEECH COMPULSION UNCONNECTED TO PRE-EXISTING COMMERCIAL SPEECH.

Despite all appearances, this is not a case about "commercial speech," much less one about "compelled commercial speech." The *only* speech at issue is the City's mandated warning, which discourages, rather than invites, commerce. Even so, the Ninth Circuit held that *Zauderer* allows the City to force cell-phone retailers to recite the City's controversial view of cell-phone safety when they would prefer not to. But *Zauderer* does not hold, and this Court has never suggested, that "any time a government forces a commercial entity to state a message of the government's devising, that entity's First Amendment interest is minimal." *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015).

On the contrary, *Zauderer*, like *Central Hudson*, applies only to regulations of commercial *speech*. Yet nothing in the City's ordinance regulates speech. Neither the ordinance, nor its mandated warning, polices a retailer's advertising or promotions. Nor has the City pointed in the record to any pre-existing commercial speech it seeks to clarify or correct. Instead, merely to provide consumers with "the information they need to make their own choices," Berkeley Municipal Code § 9.96.010(I), the ordinance forces a cell-phone retailer into becoming an evangelist for the City's own views about cell phones.

But absent a need to clarify pre-existing commercial speech, strict scrutiny applies. The First Amendment's guarantee of "freedom of speech" encompasses "the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988). Under this Court's default rule, all government compulsions "to utter or distribute speech bearing a particular message" receive strict scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). This protection covers not only laws that would impose the government's message, but also laws that would force an entity to "host or accommodate another speaker's message." *Rumsfeld v. FAIR*, 547 U.S. 47, 63 (2006) (collecting cases).

True enough, the First Amendment provides a somewhat reduced level of protection for advertisements—speech that "does no more than propose a commercial transaction." *United Foods*, 533 U.S. at 409. But a retailer who wishes to remain silent is not thereby proposing anything. In fact, the City's compelled-speech mandate applies to cell-phone retailers *whether or not* they advertise or speak. The Ninth Circuit's opinion thus fails to accord the City's cell-phone retailers the same protection against compelled speech that the First Amendment accords to everyone else.

It is no answer to insist that cell-phone retailers are entitled to less protection because they are commercial entities in search of a profit. "Such wrong-headed analysis confuses regulation of *conduct* with regulation of *expression*." Martin H. Redish, *Compelled Commercial Speech and the First*

Amendment, 94 Notre Dame L. Rev. 1749, 1762 (2019). This Court "has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1744 (2018); *see also Pac. Gas & Elec. Co.*, 475 U.S. at 8 ("The identity of the speaker is not decisive in determining whether speech is protected.") (plurality opinion).

By divorcing the City's authority to compel speech from the need to correct pre-existing commercial speech, the decision below grants the City a freestanding power to force anyone to speak. Under the Ninth Circuit's curious view of "compelled commercial speech," *Zauderer*'s relaxed scrutiny would apply even if the City forced the City's newspapers, television broadcasters, and radio stations to deliver its mandated warning to their readers, viewers, and listeners. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

What's more, nothing in logic would seem to bar the City from forcing cell-phone service carriers to deliver its mandated warning to customers along with their monthly billing statements. *Cf. Pac. Gas & Elec. Co.*, 475 U.S. at 5. Indeed, it is no exaggeration to suggest that, in "protecting the health of its citizens," Pet. App. 41a, the City could require *all* retail establishments to inform their patrons that "Low levels of physical activity can contribute to heart disease, type-2 diabetes, some kinds of cancer, and obesity." *See Lack of Physical Activity*, Centers for Disease Control & Prevention (Sep. 25, 2019), <https://tinyurl.com/yy7rpssh>.

Put simply, the Ninth Circuit's anything-goes First Amendment standard places virtually no limits on the government's power to compel business owners to convey, against their will, the government's controversial views. The petition thus presents an ideal vehicle for the Court to provide doctrinal clarity by tackling the glaring inconsistency between its view of the First Amendment's right not to speak and the Ninth Circuit's.

II. THE DECISION BELOW RESTS ON A DEEPLY FLAWED MISREADING OF *ZAUDERER*.

A. *Zauderer* Confirms that Businesses Enjoy Equally Broad First Amendment Rights to Speak and Not to Speak.

Even if this were a commercial-speech case, "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing * * * the harmless from the harmful." *Zauderer*, 471 U.S. at 646. Yet the Ninth Circuit badly mangled *Zauderer*, ignoring just how much that case's modest holding hinged on its sui generis facts. *Zauderer* was a mostly successful challenge to Ohio's restrictions on truthful attorney advertising. Applying *Central Hudson*'s four-part test, the Court invalidated Ohio's prohibitions on soliciting clients through ads offering advice on "specific legal problems," 471 U.S. 639-47, as well as its restrictions on using illustrations in attorney ads, *id.* at 647-49.

The decision below rests on four pages in *Zauderer* that upheld Ohio's right to discipline an

attorney who advertised his legal services for a contingency fee without also disclosing that his clients would be responsible for all costs if they lost their suit. 471 U.S. at 650-54. At least thirteen times, the Court singled out the need to correct deceptive advertising as its only rationale for upholding Ohio's mandated disclosure. *Ibid*. The Court found that Ohio, by disciplining the attorney, was directly advancing its "substantial interest" in preventing consumer deception and confusion. Without a clarifying disclaimer about court costs, the Court explained, it was "self-evident" that some consumers would mistakenly assume that hiring an attorney for a contingency fee is a no-cost proposition. *Id*. at 652-53.

Yet *Zauderer* also stressed that government compulsion of speech is always subject to meaningful First Amendment scrutiny. 471 U.S. at 650. If anything, the Court suggested, some speech compulsions may merit *more* exacting First Amendment scrutiny than traditional speech restrictions. *Zauderer* recalled that, in *West Virginia Board of Education v. Barnette*, the Court declared that "'involuntary affirmation could be commanded only on *even more immediate and urgent grounds* than silence.'" *Id*. at 650 (quoting *Barnette*, 319 U.S. at 633) (emphasis added).

Even in a commercial-speech context, *Zauderer* reasoned, requiring a speaker to repeat a government-mandated disclaimer to prevent consumer deception is better than prohibiting speech altogether. After all, Ohio had not "attempted to prevent attorneys from conveying information to the public." 471 U.S. at 650. Rather, it "only required them to provide somewhat more information than they might

otherwise be inclined to present." *Ibid.* For that reason, the Court opined, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

A consumer's interest in commercial speech "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). That is why, *Zauderer* says, it is always preferable to supplement deceptive or misleading commercial speech with a clarifying disclosure, rather than to ban it altogether. 471 U.S. at 650. But that limited holding cannot plausibly justify the Ninth Circuit's view that any law *compelling* a retailer to speak should receive less scrutiny than a law *restricting* a retailer from speaking. On the contrary, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796.

Indeed, as the D.C. Circuit has recognized, *Zauderer* and *Central Hudson* both apply the same level of intermediate scrutiny to commercial-speech regulations. *Zauderer* simply applies that scrutiny to one kind of regulation: government-mandated disclaimers on deceptive or misleading advertising. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26-27 (D.C. Cir. 2014) (en banc). In such cases, "the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about attributes of the product or service being offered." *Id.* at 26. *Zauderer* is thus best understood as "an *application* of *Central Hudson*,

where several of *Central Hudson*'s elements have already been established." *Id.* at 27 (citation and quotation marks omitted).

By compelling retailers "to speak a particular message" they would not otherwise recite, the City's ordinance "alters the content of [their] speech." *Riley*, 487 U.S. at 795. Yet the decision below holds that the First Amendment values a company's right *to* speak more than its right *not to* speak. That holding, which finds no support in this Court's vast free-speech jurisprudence, exacerbates a growing doctrinal morass that merits this Court's review.

B. *Zauderer* Authorizes Compelled Disclosures Only to Prevent Consumer Deception.

The Ninth Circuit says that *Zauderer* allows the government to compel any speech reasonably related to furthering a non-trivial governmental interest. But that wide-open expansion of *Zauderer*'s scope distorts the *Central Hudson* balancing already built into *Zauderer*'s standard of review. *See Am. Meat Inst.*, 760 F.3d at 26-27 (en banc). Consistent with that balancing, this Court has never suggested that *Zauderer* applies outside the narrow context of requiring a business to supplement its own advertising with a disclosure to prevent consumer deception. Just the opposite. *See NIFLA*, 138 S. Ct. at 2374 (emphasizing that Philip Zauderer's statements "would have been 'fully protected' if they were made in a context other than advertising") (quoting *Zauderer*, 471 U.S. at 637 n.7).

In *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010), for example, the Court considered a First Amendment challenge to a federal law requiring attorneys and other debt-relief professionals to include disclosures in their advertisements. 559 U.S. at 232-33. Congress required the disclosures to prevent consumers from being misled about the services being offered. *Ibid*. Deciding that *Zauderer* supplied the proper First Amendment test, the Court upheld the disclosure requirement. The Court reiterated, however, that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id*. at 250 (quoting *Zauderer*, 471 U.S. at 651).

Likewise, in *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136, 146 (1994), the Court relied on *Zauderer* to invalidate a Florida regulation that mandated a disclaimer on any ad that (truthfully) held out a professional as a Certified Financial Planner (CFP). The Court held that Florida's compelled-speech mandate could not survive First Amendment scrutiny without evidence of "potentially real, not purely hypothetical" consumer deception. *Ibid*. Had this Court shared the Ninth Circuit's view of *Zauderer*, *Ibanez* would have upheld Florida's compelled-speech mandate—a "literally true" disclosure stating that neither Florida nor the federal government licenses CFPs—even without the possibility of consumer deception.

The decision below also contravenes *United Foods*. In that case, the Court invalidated a federal law forcing mushroom growers to finance a government-run advertising campaign for mushrooms. 533

U.S. at 413-16. The Court refused to apply *Zauderer*. Whereas Ohio had compelled speech in *Zauderer* to prevent consumer deception, there was no suggestion in *United Foods* "that the mandatory assessments imposed to require one group of private persons to pay for speech by others [was] somehow necessary to make voluntary advertisements nonmisleading for consumers." *Id.* at 416. Again, under the Ninth Circuit's expansive reading of *Zauderer*, *United Foods* would have come out the other way.

By expanding the universe of permissible justifications for government-compelled speech, the decision below undermines the Court's historical rationale for giving commercial speech somewhat reduced—but still considerable—First Amendment protection. The "greater 'objectivity' of commercial speech," this Court has said, "justifies affording the State more freedom to distinguish false advertisements from true ones." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499-500 (1996) (quoting *Va. State Bd.*, 425 U.S. at 771 n.24). But that rationale can justify government *compulsion* of speech only if the mandated speech aims at preventing consumer deception. When, as here, the government seeks to compel speech for some other reason, "the greater objectivity of commercial speech" supplies no justification for treating commercial and noncommercial speakers differently.

As Justice Souter noted more than twenty years ago, "however long the pedigree of [compelled-speech] mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete com-

mercial messages." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 490 (1997) (Souter, J., dissenting). In the intervening years, the need for this Court's doctrinal clarity on that point has only increased. The Ninth Circuit's unrecognizable rendition of *Zauderer* demands this Court's review.

III. REVIEW IS NEEDED TO CLARIFY THAT LAWS COMPELLING MISLEADING AND CONTROVERSIAL SPEECH FURTHER NO VALID GOVERNMENT INTEREST.

A. The City's Mandated Warning Is Misleading and Thus Highly Controversial.

Sometimes "determining whether a disclosure is 'uncontroversial' may be difficult." *Am. Meat Inst.*, 760 F.3d at 34 (Kavanaugh, J., concurring in the judgment). This is not one of those times. Under any plausible meaning of the word, the City's mandated warning qualifies as "controversial."

The Federal Communications Commission (FCC), in concert with "expert organizations and federal agencies with responsibilities for health and safety," regulates the amount of radiofrequency (RF) energy that U.S. cell phones may produce. FCC, *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 "on the order of 50 times below the level at which adverse biological effects have been observed." FCC, *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3,498, 3,582 (Mar. 29, 2013). The FCC has determined "that any cell

phone legally sold in the United States is a 'safe' phone," no matter how used. *Farina v. Nokia, Inc.*, 625 F.3d 97, 105 (3d Cir. 2010).

By warning people not to "exceed" safe levels of "radiation" "exposure" from their cell phones, and by urging cell-phone users to seek further instruction on how to "use [their] phone[s] safely," the City's mandated warning sends an unmistakable message: "there are *unsafe* ways to use a cell phone." Pet. Br. 31. Far from "purely factual and uncontroversial," then, as *Zauderer* requires, the City's mandated warning is itself misleading.

The panel majority disagrees. Rather than probe how the average reader would understand the City's mandated warning, however, the Ninth Circuit undertook a sentence-by-sentence analysis of whether the warning's content is "literally true." Pet. App. 28a-29a. Concluding that each of the City's three compelled statements is "technically correct," *id*. at 31a, the panel majority affirmed the district court's dissolution of the preliminary injunction.

But the City's compartmentalized approach to "truth" quickly unravels. "We must think things, not words," Justice Holmes warned, "or at least we must constantly translate our words into facts for which they stand, if we are to keep to the real and the true." Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1889). The mandated warning must be read in its entirety, not distorted as an exercise in disjointed parsing. As Judge Friedland noted in her dissent, because it "begins and ends with references to safety," the City's mandated warning "plainly convey[s]"

the message that normal cell-phone use is potentially dangerous. Pet. App. 43a-44a. Many, if not most, readers would interpret the warning as making precisely that claim.

Nor is that all. *Zauderer* itself rejected the Ninth Circuit's blinkered approach to "purely factual" speech. Remember, every sentence of Philip Zauderer's advertisement was "literally true." Among other things, his ad promised that "if there is no recovery, no legal fees are owed by the clients." 471 U.S. at 652. Although factually accurate, the "possibility of deception" for readers of that ad was "self-evident." *Ibid*.

Because the ad made "no mention of the distinction between 'legal fees' and 'costs,'" a layman might take the ad to mean that retaining Zauderer "in a losing cause would come entirely free of charge." *Ibid*. *Zauderer* therefore sustained Ohio's argument that it was deceptive to advertise "contingent-fee arrangements without mentioning the client's liability for costs." *Id.* at 653. In short, Zauderer's ad was controversial because, though factually accurate, it was misleading.

So too is the City's mandated warning greater than the sum of its parts. Even if every sentence is "literally true," "[d]eception may result from the use of statements not technically false or which may be literally true." *United States v. Ninety-Five Barrels of Vinegar*, 425 U.S. 438, 443 (1924). In all events, "[i]t is not difficult to choose statements * * * which will not deceive." *Ninety-Five Barrels*, 425 U.S. at 443. This applies no less to the City than to any commercial speaker. Whatever else the City's man-

dated warning may be, it is inherently misleading and thus highly controversial.

B. No Government Interest Justifies Compelling Misleading or Controversial Speech.

Nothing in *Zauderer* suggests that the City is free to require retailers to spread its idiosyncratic viewpoint, particularly "where the messages themselves are biased against or are expressly contrary to the corporation's views." *Pac. Gas & Elec.*, 475 U.S. at 15 n.12 (plurality opinion). On the contrary, when "divergent views" exist on an issue of public debate, "'the general rule is that the speaker and the audience, *not the government*, assess the value of the information.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) (quoting *Edenfield*, 507 U.S. at 767) (emphasis added).

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). "If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for [the] speech regulation is defeated." *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas and Ginsburg, JJ., dissenting from denial of certiorari). Here, the value to the reading public of the City's highly misleading and controversial compelled speech is zero.

The government never has a legitimate reason to force companies to deliver misleading information about their products. *See Video Software Dealers*

Ass'n v. Schwarzenegger, 556 F.3d 950, 967 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011); *see also R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (a compelled disclosure fails First Amendment scrutiny if it "could be misinterpreted by consumers"), *overruled on other grounds by Am. Meat Inst.*, 760 F.3d 18. Likewise, nothing in the First Amendment or this Court's case law would allow the City to force a retailer to utter misleading or controversial statements.

The City's controversial warning itself thus constitutes a significant constitutional and commercial harm. It would be ironic indeed if the government could transform a First Amendment test created to correct false or misleading speech into a justification for foisting false or misleading speech onto the public. But that is precisely what the Ninth Circuit has let the City do.

* * *

For more than three decades, *Zauderer* has generated great confusion among the lower courts. Much, if not all, of that confusion is on display here in the Ninth Circuit's decision. Unfortunately, *NIFLA* did little to mitigate the problem. This Court should grant the petition and prevent the Ninth Circuit's unhinged view of compelled speech from doing even more damage to the First Amendment.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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November 1, 2019