No. 20-16758

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF WHEAT GROWERS, *et al.*,
Plaintiffs/Appellees,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA, *et al.*,
Defendants/Appellants.

On Appeal from the United States District Court
for the Eastern District of California
(No. 2:17-cv-2401-WBS-EFB)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in California. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* 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); *CTIA–The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 658. (2019).

"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 Attorney General's cramped reading of the First Amendment prevails on appeal, the State will enjoy largely unchecked power to force almost any business to parrot the government's curated "facts"—no matter how false, misleading, or controversial a message they convey. Nothing in

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

this Court's First Amendment case law blesses so sweeping a power to compel speech. WLF urges the Court to affirm the district court's well-reasoned decision.

INTRODUCTION & SUMMARY OF ARGUMENT

A law compelling speech is no less pernicious than one banning it; the State as ventriloquist is no better than the State as censor. Yet the State of California insists that because Proposition 65's warning regime compels speech, it deserves less First Amendment scrutiny than a law restricting or chilling speech. That view brushes aside the Supreme Court's repeated insistence that, by forcing individuals "to speak a particular message" against their will, compelled disclosures "alte[r] the content of [their] speech." *Nat'l Inst. of Family & Life Advocates* (*NIFLA*) *v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Riley v. Nat'l Fed'n of Blind of N.C.*, 487 U.S. 781, 795 (1988)).

The State's contention 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). As the Supreme Court has consistently explained, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796.

Among other defects, the State badly misreads *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), which allows the government to compel advertisers to supplement their ads with purely factual and uncontroversial information. But nothing in *Zauderer* suggests that the State may commandeer a commercial speaker into serving as an involuntary mouthpiece for false, misleading, or controversial viewpoints it opposes. The State's deeply flawed misreading of *Zauderer*, if embraced on appeal, would gut the constitutional protections long guaranteed to all speakers.

Of course, the State is perfectly free to proselytize, at its own expense, its tendentious view of glyphosate. 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). By forcing Appellees to warn Californians that glyphosate "is known to cause cancer," the State's mandated warning conveys as true something that the Environmental Protection

Agency (EPA), a division of the World Health Organization (WHO), and government regulators from a half-dozen countries all agree is false. At best, any suggestion that glyphosate causes cancer is highly controversial. Far from being "purely factual and uncontroversial," then, as *NIFLA* and *Zauderer* require, the State's glyphosate warning is itself false and misleading. Simply put, compelling false, misleading, or controversial speech furthers no valid government interest.

Finally, the State cannot rely on *CTIA–The Wireless Ass'n v. City of Berkeley* to justify its glyphosate warning. Unlike Berkeley's "literally true" radiation warning upheld in *CTIA*, 928 F.3d at 846, the State's glyphosate warning is literally false. While Berkeley's mandated disclosure merely summarized a federal regulatory warning about exposure to cell-phone radiation, no federal regulatory warning for glyphosate exists. What's more, unlike the Berkeley ordinance, Prop 65's safe-harbor regulations prohibit Appellees from supplementing the mandated warning with their own message. And Prop 65's private enforcement mechanism poses heightened First Amendment risks that simply did not exist in *CTIA*.

ARGUMENT

I. THE FIRST AMENDMENT GUARANTEES EQUALLY BROAD RIGHTS TO SPEAK AND NOT TO SPEAK.

By compelling Appellees "to speak a particular message" against their will, Prop 65's mandatory disclosure impermissibly "alters the content of [their] speech." *Riley*, 487 U.S. at 795. Yet the State insists that the First Amendment protects a company's right *to* speak more than its right *not to* speak. *See* Appellant's Br. at 47-48 (asserting that First Amendment protection is "circumscribed when the speech in question is compelled rather than restricted"). That view finds no support in the Supreme Court's free-speech jurisprudence and should be rejected.

As the Supreme Court has consistently held, the distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. "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 "manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Rumsfeld v. Forum for Acad. &*

Inst'l Rights, Inc., 547 U.S. 47, 61 (2006) ("[L]eading First Amendment precedents have established * * * freedom of speech prohibits the government from telling people what they must say.").

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. That is why, *Zauderer* says, it is always preferable to supplement deceptive or misleading commercial speech with a clarifying disclosure, rather than ban it altogether. 471 U.S. at 650. But that narrow holding cannot plausibly justify the State's sweeping claim that a law *compelling* speech receives less scrutiny than a law *restricting* speech. On the contrary, both types of laws can impermissibly skew the debate in the government's direction.

Yet the State badly mangles *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 the four-part test from *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Court invalidated Ohio's bar on soliciting clients through

ads offering advice on "specific legal problems," *id.* at 639-47, as well as a bar on using illustrations in attorney ads, *id.* at 647-49.

Zauderer confirms that government compulsion of speech is *always* subject to meaningful First Amendment scrutiny. 471 U.S. at 650. If anything, *Zauderer* suggests, some speech compulsions may merit *more* exacting First Amendment scrutiny than traditional speech restrictions. *Zauderer* recalls, for example, that in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court declared that "'involuntary affirmation could be commanded only on *even more immediate and urgent grounds* than silence.'" *Zauderer*, at 650 (quoting *Barnette*, 319 U.S. at 633) (emphasis added).

True, *Zauderer* 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 costs if they lost their suit. 471 U.S. at 650-54. At least 13 times, however, the Court singled out the need to correct deceptive and misleading advertising as its *only* rationale for upholding Ohio's mandated disclosure. *Id.* 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.

Even in a commercial-speech context, *Zauderer* reasons, requiring a speaker to repeat a government-mandated disclaimer is acceptable only as an alternative to prohibiting speech altogether. For that reason, "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. *Zauderer* thus clarifies that relaxed scrutiny makes sense only when the government would otherwise be justified in restricting or banning deceptive speech. Shorn of any interest in preventing deception here, the State lacks constitutional justification for forcing even commercial entities to deliver a message the State can just as easily deliver itself.

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). When commercial speech is neither misleading nor tied to unlawful activity, the State's power to regulate it "is more circumscribed." *Central Hudson*, 447 U.S. at 564. *Zauderer* does not hold, and the Supreme 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).

It is no answer to insist that Appellees are entitled to less protection because they, or their members, 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).

Indeed, 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). And the Supreme 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).

II. BY COMPELLING FALSE, MISLEADING, AND CONTROVERSIAL SPEECH, THE STATE'S MANDATORY GLYPHOSATE WARNING FURTHERS NO VALID GOVERNMENTAL INTEREST.

To survive First Amendment scrutiny, a government-compelled disclosure must be "limited to 'purely factual and uncontroversial information.'" *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651); *CTIA*, 928 F.3d at 846-48. 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 interpretation, a compelled disclosure that glyphosate is "known to cause cancer" is misleading and thus highly controversial.

By warning Californians that glyphosate is "known to cause cancer," the State's mandatory disclosure sends an unmistakable message: exposure to glyphosate causes cancer. But that is a highly dubious proposition at best. No government regulator on the planet, including the International Agency for Research on Cancer (IARC), has uncovered evidence that glyphosate causes cancer at use levels. *See* 1-ER-4-5.

Far from being "purely factual and uncontroversial," as *Zauderer, NIFLA*, and *CTIA* all require, the warning is itself false and misleading. *See* 1-ER-10 ("It is inherently misleading for a warning to state that a chemical is known to the State of California to cause cancer * * * when apparently all other regulatory and governmental bodies have found the opposite.") At most, the State seeks to elevate the minority view in a scientific debate about whether exposure to glyphosate increases the

risk of cancer. At worst, the State seeks to spread a falsehood. Neither goal offers a valid governmental justification for compelling speech.

Under the First Amendment, the State is not free to require companies to spread its mistaken or 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) (cleaned up) (emphasis added).

Of course, even if the State's glyphosate warning were purely factual—it isn't—that wouldn't "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 State's false, highly misleading, and controversial compelled speech on glyphosate is zero.

Above all, the State never has a legitimate reason to force companies to deliver misleading information about their products to consumers. *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 State to force Appellees to utter misleading or controversial statements about glyphosate.

The State's glyphosate warning thus constitutes a significant constitutional and commercial harm. It would be ironic if the State could transform *Zauderer*, a First Amendment test created to require advertisers to correct or clarify false or misleading speech, into a justification for foisting false or misleading speech onto the public. But

that is precisely what the State asks this Court to allow it to do. The Court should decline that invitation.

III. THE STATE'S RELIANCE ON *CTIA* IS MISPLACED.

The State repeatedly relies on this Court's decision in *CTIA* to justify its mandatory glyphosate warning. But that decision is easily distinguishable, and the State's enthusiastic reliance is wide of the mark.

In *CTIA*, Berkeley required cell-phone retailers to warn its patrons (in part): "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 [radiofrequency] radiation." 928 F.3d at 838. The Berkeley ordinance allowed retailers to add "other information" to the warning "distinct from the notice language." *Id.*

The plaintiff, a wireless-telecom association, argued that Berkeley's warning, by implying that cell phones emit harmful radiation, was neither factual nor uncontroversial under *Zauderer*. *Id.* at 846. Finding the city's mandated radiation warning to be "literally

true," this Court upheld the warning against a First Amendment challenge. *Id.* at 843-49.

The State's mandatory glyphosate warning differs markedly from *CTIA*'s radiation warning. Although Berkeley's warning hinted at cell-phone radiation's potential dangers to "safety," it merely summarized, accurately, a preexisting federal regulation warning about RF radiation. In fact, the *CTIA* plaintiffs disclaimed any argument that the radiation warning was "controversial as a result of disagreement about whether radio-frequency radiation can be dangerous to cell-phone users." *Id.* at 848.

Unlike Berkeley's "literally true" radiation warning, the State's glyphosate warning is literally false. The State's glyphosate warning asserts, without qualification, that glyphosate is "known to cause cancer." At the very least, the truth of that statement is the subject of great controversy. No regulatory or public health authority has found that glyphosate causes cancer; even the IARC found only a probability of "hazard."

And unlike Berkeley's mandated disclosure, which merely summarized a federal regulatory warning about exposure to cell-phone

radiation, no federal regulatory warning for glyphosate exists. Indeed, the EPA has informed herbicide registrants that it cannot approve herbicide labels containing a Prop 65 warning because they would be "false and misleading," and thus "misbranded," under federal law. U.S. Env't Prot. Agency, *Opinion Letter on Proposition 65 Warning Language* (Aug. 7, 2019), *available at* https://bit.ly/ 3tHoSzm.

Nor is that all. *CTIA* emphasized that "the Berkeley ordinance allows a cell-phone retailer to add to the compelled disclosure * * * any further statement it sees fit to add." 928 F.3d at 848. Yet apart from allowing Appellees to provide the source of the exposure or to explain "how to avoid or reduce exposure," Prop 65's safe-harbor regulations prohibit Appellees from adding their own viewpoint to clarify (or mitigate) the State's misleading glyphosate warning. As *CTIA* suggests, that prohibition "drown[s] out" Appellees own "messaging," exacerbating the unconstitutional chilling effect of the warning.

As it did below, the State offers (at 57-58) to allow Appellees more speech than the statute's safe harbor allows. But the constitutionality of Prop 65's glyphosate warning must be evaluated based on the speech it compels, not on any additional private speech the State may, in its

extra-statutory magnanimity, permit. If anything, putting the onus on the private speaker to correct compelled misstatements further exacerbates, rather than alleviates, the First Amendment injury.

Finally, while enforcement of Berkeley's ordinance was at the city's sole discretion, Prop 65 authorizes "any person" to sue for a violation. Cal. Health & Saf. Code § 25249.7, subds. (c), (d). In such cases, 25% of any penalty (up to $2,500 per violation per day), plus attorneys' fees and costs, can go to the private plaintiff. *Id.* §§ 25192, subd. (a); 25249.7, subd. (b). The hydraulic leverage of a Prop 65 suit has been so successful at securing in terrorem settlements that Prop 65 private plaintiffs have been dubbed "bounty hunters." Anthony Caso, *Bounty Hunters and the Public Interest—A Study of Proposition 65*, 13 Engage: J. Federalist Soc'y Prac. Grps. 30, 31 (2012). Prop 65's private enforcement mechanism thus poses heightened First Amendment risks that simply did not exist in *CTIA*.

In short, the "seas beyond [Prop 65's] safe harbor are so perilous that no one risks a voyage." *Cal. Chamber of Commerce v. Becerra*, No. 19-cv-2019-KJM-EFB, 2021 WL 1193829, at *14 (E.D. Cal. March 30,

2021). Whatever else this Court's holding in *CTIA* may do, it offers no help to the State's cause on appeal.

CONCLUSION

This Court should affirm.

May 19, 2021

Respectfully submitted,

/s/ Cory L. Andrews

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CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3,191 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared using Microsoft Office Word 16 and is set in 14-point Century Schoolbook font.

May 19, 2021

/s/ Cory L. Andrews

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2021, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Cory L. Andrews