No. 16-15141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CTIA – THE WIRELESS ASSOCIATION®,

Plaintiff-Appellant,

vs.

THE CITY OF BERKELEY, CALIFORNIA, and CHRISTINE DANIEL, CITY MANAGER OF BERKELEY, CALIFORNIA, in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
The Honorable Edward M. Chen, Case No. 3:15-cv-02529-EMC

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF CTIA – THE WIRELESS ASSOCIATION® URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amicus curiae* the Association of National Advertisers, Inc., attests that it is incorporated as a nonprofit trade association, has no parent corporation, and has no stock or other interest owned by a publicly held company.

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I. INTRODUCTION

The City of Berkeley is seeking to compel retailers in its jurisdiction to convey messages, using language prescribed by the City, that erroneously suggest the Federal Communications Commission ("FCC") believes radio frequency ("RF") radiation from cell phones is dangerous. While the City is entitled to hold or express its own opinions about cell phone safety, it may not require others to mouth its words or be its microphone. The ordinance is constitutionally infirm even if the required warning could be characterized – though in this case inaccurately – as nothing more than an uncontroversial statement of "fact" that the City has concluded its residents "should" know. If, as Berkeley claims, its citizens want to know more about what the FCC requires on this subject, it offers no reason why consumers cannot read the neutrally-presented information that already comes with their cell phones. Far from being a "right to know federal standards law," the Berkeley ordinance is an improper attempt "to tilt public debate" regarding cell phone usage "in a preferred direction." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671-72 (2011).

Although this Court has held that compelling such speech is a violation of the First Amendment, *CTIA-The Wireless Ass'n v. City & County of San Francisco*, 494 F. App'x 752, 754 (9th Cir. 2012), the District Court denied preliminary injunctive relief in this case. *CTIA-The Wireless Ass'n v. City of Berkeley*, __

F.Supp.3d ___, 2015 WL 5569072 (N.D. Cal. Sept. 21, 2015) ("*CTIA v. Berkeley I*"); *CTIA-The Wireless Ass'n v. City of Berkeley*, 2016 WL 324283 (N.D. Cal. Jan. 27, 2016) ("*CTIA v. Berkeley II*"). It reached this conclusion by misreading governing precedent regarding compelled commercial speech that it inappropriately spliced with elements of the "government speech" doctrine. *CTIA v. Berkeley I*, at *10-19. The decision conflicts with numerous rulings holding that it is "incompatible with the First Amendment" to censor or otherwise burden speech based on fear that people will make bad decisions, or to promote "'what the government perceives to be their own good.'" *Sorrell*, 131 S. Ct. at 2671 (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1986) (plurality op.).

Amicus curiae the Association of National Advertisers, Inc. ("ANA"), submits this brief in support of CTIA because of the fundamental constitutional principles at stake.[1] The District Court's denial of injunctive relief advances the dangerous theory that local officials may constitutionally compel speech whenever they feel like sending a government message that they believe is rationally related to any particular product or service. This seriously misreads and misapplies the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S.

[1] This brief was not authored in whole or part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to preparation or submission of this brief. All parties have agreed to blanket cross-consents to the filing of *amicus* briefs. *See* F.R.A.P. 29(a); Cir. R. 29-3 & Advisory Committee Note to Cir. R. 29-3.

626 (1985), and its progeny, and has no logical stopping point. If the District Court is affirmed, there is almost no limit to the types of messages that governments of all levels might compel.

II. INTERESTS OF *AMICUS*

Amicus curiae ANA provides leadership for the advertising industry that advances marketing excellence and shapes the future of the industry. Founded in 1910, the ANA's membership includes more than 700 companies with 10,000 brands that collectively spend over $250 billion annually in marketing and advertising. The ANA also includes the Business Marketing Association and Brand Activation Association, which operate as divisions of the ANA, and the Advertising Educational Foundation, which is an ANA subsidiary. The ANA advances the interests of marketers and protects the well-being of the marketing community. The ANA also serves its members by advocating for clear and coherent legal standards for advertising.

The ANA's interest here focuses on preserving robust protections afforded to advertising by the First Amendment. In particular, it has a strong interest in safeguarding the longstanding vitality of constitutional protections for commercial speech. *See Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The Supreme Court has recognized that "[a] consumer's concern for the free flow of commercial speech often may be far keener than his concern for

urgent political dialogue." *Sorrell*, 131 S. Ct. at 2664 (internal quotation marks and citation omitted). The commercial speech doctrine has steadily evolved, and since the forerunner cases of *Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court has significantly increased the extent of protection it affords such expression.

Any regulation of truthful advertising must directly and materially serve an important governmental interest without restricting speech more extensively than necessary to serve that interest. *Central Hudson*, 447 U.S. at 565-66. The Court's "decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646. Thus, the First Amendment requires that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2000).

The First Amendment secures "both the right to speak [] and … to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Supreme Court has noted that some of its "leading First Amendment precedents

have established … that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 61 (2006). This is as true for "corporations as for individuals." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 16 (1986). And while courts have recognized a limited exception to the compelled speech doctrine to correct potentially deceptive or misleading commercial speech, *Zauderer*, 471 U.S. at 651; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010), the ANA seeks to ensure that courts remain vigilant in barring government from compelling overly burdensome disclosures or co-opting private speakers to deliver government propaganda.

III. ARGUMENT

Berkeley's so-called "right to know" Ordinance blows through all previously established limits on compelled commercial speech. The District Court declined to enjoin the law despite the fact there is no allegation that cell phone marketing involves potentially deceptive or misleading claims, and the required disclosure is neither "purely factual" nor "non-controversial." Berkeley mandates the use of frightening and inflammatory warnings asserting that such disclosure is needed "[t]o assure safety," and that "you may exceed the federal guidelines for exposure to RF radiation." Consumers are directed to the user manual "for information about how to use your phone safely." Unfortunately, these warnings are contrary

to FCC safety pronouncements. *See* FCC, *Wireless Devices and Health Concerns*, https://www.fcc.gov/consumers/guides/wireless-devices-and-health-concerns (last updated Nov. 7, 2015) ("no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses"). Worse, the District Court approved these mandated warnings under a particularly forgiving form of rational basis review. *See CTIA v. Berkeley I*, 2015 WL 5569072, at *12-17; *CTIA v. Berkeley II*, 2016 WL 324283, at *3-6.

ANA fully endorses the cogent and compelling reasons in Petitioner's merits brief for why the District Court's constitutional analysis is erroneous: (1) the Ordinance imposes an unconstitutional burden on commercial speech because it is content-, viewpoint-, and speaker-based, CTIA Br. 17-20; (2) the Ordinance cannot withstand heightened scrutiny, which applies equally to speech restrictions and compelled disclosures, *id*. 20-24; (3) lesser scrutiny under *Zauderer* is inappropriate because the Ordinance does not seek to remedy misleading or deceptive commercial speech, *id*. 25-31; and (4) even if *Zauderer* applied, the Ordinance still would fail constitutional review, because it does not mandate purely factual or noncontroversial information, and fails to advance a legitimate governmental interest. *Id*. 32-45.

In its earlier briefing of this case, the City of Berkeley asserted that CTIA "aims to change First Amendment law" in ways that "would radically alter the

scope and contours of First Amendment commercial speech doctrine," and that this "new First Amendment" would effect a "seismic shift" in the law. Opposition of Defendant-Appellee City of Berkeley to Urgent Motion Under Rule 27-3(b) of Appellant CTIA – The Wireless Association for a Preliminary Injunction Pending Appeal by March 21, 2016 at 1 ("Berkeley Opp."). These breathlessly hyperbolic statements have it completely backwards – it is the City of Berkeley and the District Court that are endeavoring to rewrite (or erase) significant areas of First Amendment law.

A. The District Court's Opinion Runs Counter to the Doctrinal Trend Favoring Increased Protection for Commercial Speech

The clear trajectory of the Supreme Court's jurisprudence is toward greater protection for commercial speech, not less. In the four decades since *Virginia State Board of Pharmacy*, 425 U.S. 748, the Supreme Court has invalidated: (1) prohibitions on the use of illustrations in attorney ads, *Zauderer*, 471 U.S. at 647-49; (2) an ordinance regulating placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a state ban on using "CPA" and "CFP" on law firm stationery, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); (5) a restriction on listing alcohol content on beer labels, *Rubin v. Coors*, 514 U.S. 476, 491 (1995); (6) a state ban on advertising alcohol prices, *44 Liquormart*, 517 U.S. at

503 (plurality op.); (7) a federal ban on broadcasting casino ads, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); (8) federal limits on advertising drug compounding practices, *Western States*, 535 U.S. at 377; and (9) a speaker-based state restriction on data mining. *Sorrell*, 131 S. Ct. at 2665.

As the Court has done so, it has tightened the standards for reviewing commercial speech, and has stressed that the government cannot relegate such speech to lower levels of scrutiny by using simplistic classifications. *Discovery Network*, 507 U.S. at 416 n.11 (regulation under the commercial speech doctrine is not appropriate where government's interest is unrelated to regulation of commerce). As Justice Stevens explained, "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *44 Liquormart*, 517 U.S. at 501.

Regardless of whether expression is commercial or political, it is settled law that the government "may not burden the speech of others in order to tilt public debate," and any such regulation is subject to "heightened scrutiny." *Sorrell*, 131 S. Ct. at 2671, 2664. The Court in *Sorrell* was unmoved by state arguments that commercial speech regulation promoted public health, and found "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id*. at 2667. *See Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 650 (9th Cir. 2016) ("*Sorrell* modified the *Central Hudson* analysis

by requiring heightened judicial scrutiny of content-based restrictions on non-misleading advertising of legal goods or services.").

The *en banc* U.S. Court of Appeals for the Federal Circuit recognized the import of this doctrinal trend toward greater First Amendment protection for commercial speech when it declared Section 2(a) of the Lanham Act facially invalid. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (*en banc*). It thus struck down a statutory provision adopted in 1946, and overruled *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981), which had been circuit precedent for 35 years, explaining that "First Amendment jurisprudence on the unconstitutional conditions doctrine and the protection accorded to commercial speech has evolved significantly since the *McGinley* decision." *In re Tam*, 808 F.3d at 1334. Notably, the court did not reflexively apply a lower level of scrutiny simply because trademark law pertains to "commercial" speech, holding that "[s]trict scrutiny must apply to a government regulation that is directed at the expressive component of speech." *Id*. at 1338.

These developments in the law illustrate why mere talismanic invocation of the commercial nature of speech cannot justify a lower level of constitutional scrutiny, as the City suggests. *See, e.g.*, Berkeley Opp. at 11. The District Court at least acknowledged the requirement of heightened scrutiny in cases such as *Sorrell* and *Retail Digital Network*, and noted that the latter "is undoubtedly a significant case." *CTIA v. Berkeley II*, 2016 WL 324283, at *3. The District Court further

identified that "the critical issue here is what impact *Sorrell* should have on the *Zauderer* line of cases." *Id.*

Fair enough. Perhaps the decision in this case should turn on what *Zauderer* means – or, more importantly, what it does *not* – and how it should be applied on these facts. This analytic approach, however, begs the threshold question of why the District Court latched onto out-of-circuit interpretations of *Zauderer* that run contrary to the overwhelming trend toward tighter scrutiny and greater protection for commercial speech. While the Supreme Court and various circuits – including this one – have moved away from knee-jerk applications of the commercial speech doctrine that dilute First Amendment review, it is a mystery why the law governing *compelled* commercial speech should evolve in precisely the opposite direction. Nor is there any basis for utilizing the most diminished form of rational basis review, particularly in a context well beyond any interest in preventing deception. The District Court, nevertheless, chose this anomalous path without even *trying* to square it with either the Supreme Court's or this Circuit's interpretations of *Zauderer*.

In this connection, the Supreme Court has never applied *Zauderer* outside the context of misleading or deceptive commercial speech, nor has it suggested that such application is appropriate. *See, e.g.*, *Milavetz*, 559 U.S. at 249 (*Zauderer* was "directed at *misleading* commercial speech"). The reason the court has followed

this approach is straightforward: The First Amendment does not protect false commercial speech, *Central Hudson*, 447 U.S. at 566, as distinguished from speech in general, *United States v. Alvarez*, 132 S. Ct. 2537 (2012), or "false" political speech. *Susan B. Anthony List v. Driehaus*, __ F.3d ___, 2016 WL 731971 (6th Cir. Feb. 24, 2016). For this reason, the government has more latitude to compel disclosures in the specific context of preventing potential deception, since the alternative would be to ban the misleading commercial speech altogether.

The government lacks justification for mandating more speech without an interest in preventing potentially false speech. *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) ("[C]onsumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement … in a commercial context."). And forcing commercial speakers to carry the government's message necessarily imposes a significant First Amendment burden. As the Supreme Court explained in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988), "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." This includes a mandate that the speaker simply disclose "facts." *Id.* at 797-98 ("[C]ases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact.'").

But the mandated disclosure in this case is particularly a problem when the "facts," as cherry-picked and reframed by the government, amount to an opinion that the product is somehow unsafe. Not only does this force marketers "to speak where [they] would prefer to remain silent," but it is in addition "forced association with potentially hostile views." *Pacific Gas & Elec.*, 475 U.S. at 18. In this regard, the government may not require private parties to vilify their own products.

The District Court embraces the D.C. Circuit's holding in *American Meat Institute v. USDA*, 760 F.3d 18, 26 (D.C. Cir. 2014) (*en banc*), which extended the rationale of *Zauderer* beyond the interest in preventing deceptive speech, but fails to account for the decisions of *this Court*, which has expressly confined *Zauderer* to its original, more limited rationale. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009) (compelled disclosures are permissible if "reasonably related to the State's interest in preventing deception of customers") (quoting *Zauderer*, 471 U.S. at 651), *aff'd*, *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). It also fails to apply this Circuit's teachings – in a case almost identical to this one – that requiring such disclosures violates the First Amendment (and the holding in *Zauderer*), because the prescribed language was not merely factual but "could … be interpreted … as expressing San Francisco's opinion that using cell phones is dangerous." *CTIA v. San Francisco*, 494 F. App'x at 753-54. The same reasoning applies in this case,

and the District Court fails completely to justify its anomalous approach to compelled commercial speech.

B. Framing Berkeley's Mandate as "Government Speech" Increases Rather than Lessens the First Amendment Problem

The fact that Berkeley tries to dress up its regulatory mandate as a "notice" from the "City of Berkeley" does nothing to ameliorate the constitutional infirmity of the Ordinance, and, if anything, makes matters worse. The District Court felt that diminished scrutiny was appropriate because the required message was "clearly and expressly attributed to the government." *CTIA v. Berkeley II*, 2016 WL 324283, at *3. That assertion is in significant part how it arrived at its conclusion that "a standard even less exacting than that established in *Zauderer* should apply." *CTIA v. Berkeley I*, 2015 WL 5569072, at *14. But this view is totally incorrect. There is no justification for conscripting commercial speakers to deliver the government's message.

If that simple expedient could suffice, it would allow the government to confiscate a portion of *any* advertisement it desires so long as it could articulate some legitimate purpose, which clearly the First Amendment does not allow. Also, any such "notice" is likely to be *presumed* to be government-required rather than the advertiser's own view, so the fact that the disclosure must recite that "The City of Berkeley requires … the following notice," Berkeley Mun. Code § 9.96.030, adds nothing of informational value. No case such as *Zauderer*, *Milavetz*, *CTIA v.*

San Francisco, *National Association of Manufacturers v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), *aff'd on reh'g*, 800 F.3d 518 (D.C. Cir. 2015), *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), nor any other that has struck down government-compelled labels or warnings, suggests that simply adding "this is a message from" the government as a tagline would have changed the outcome.

The District Court's allusion to the notice as constituting "the government's speech," *e.g.*, *CTIA v. Berkeley II*, 2016 WL 324283, at *1; *CTIA v. Berkeley I*, 2015 WL 5569072, at *14-15, cannot justify the Ordinance under the "government speech" doctrine. The Supreme Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), made clear that the government speech doctrine applies in only limited circumstances which are not present in this case.[2] Berkeley's Ordinance requires a government notice that must be incorporated into cell phone retailers' own point-of-sale displays on posters, or distributed via handout, Berkeley Mun. Code § 9.96.030(A), (B), and not some kind of cell phone notice embedded into a government medium. An "intent to speak" by a government body may be a hallmark of government speech, but such a

[2] In *Walker*, the Court found the State of Texas' specialty license plates to be "government speech" given that (1) license plates long have communicated state messages, (2) their designs are often closely identified in the public mind with the issuing state, and (3) the state maintains direct control over messages on specialty plates. *Id.* at 2248-49. *See also, e.g.*, *Rideout v. Gardner*, __ F.Supp.3d ___, 2015 WL 4743731, at *10 (D.N.H. Aug. 11, 2015), *appeal docketed*, No. 15-2021 (1st Cir. Sept. 9, 2015).

purpose has never been held to convert retail marketing material into government speech.[3]

Characterizing the notices – improperly – as "government speech" ironically leaves the City with no legitimate interest to support its regulation. Even if the City of Berkeley could articulate a valid interest in warning its citizens about perceived dangers of RF radiation from cell phones (contrary to scientific evidence and the FCC's express findings), there is still no reason it cannot speak for itself. Nothing is stopping the City from buying air time or online banner ads for public service announcements to carry its "notice" about cell phones, or from plastering City buses or rail cars with posters conveying the notice's message, or even from buying outdoor signage rights within sight of cell phone stores to proclaim its warnings.

Berkeley, however, has yet to set forth *any* justification for conscripting marketers to speak on its behalf, for "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Western States*, 535 U.S. at 371. This is not comparable to potentially deceptive speech, where narrowly crafted disclosures may be used to ensure the accuracy of the marketer's message. Here, the City merely wants to add its

[3] *Cf. Walker*, 135 S. Ct. at 2247; *In re Tam*, 808 F.3d at 1347 ("[U]se of the ® symbol, being listed in a database of registered marks, and having been issued a registration certificate … do not convert private speech into government speech.").

commentary on a safe and lawful product – one that already comes with all the information that the City says consumers need. Such requirements flunk even the threshold First Amendment hurdle because they fail to state a legitimate, let alone a substantial, government purpose. *Sorrell*, 131 S. Ct. at 2671-72.

C. The District Court's Rationale Contains No Logical Stopping Point for the Types of Warnings That May Be Compelled

The important issues in this case greatly transcend whatever skepticism Berkeley's City Council or its constituency may hold regarding the science of cell phone RF radiation, *see* CTIA Br. 10-11, and affect *any* lawful product or service about which the government believes it knows best. There would be no reason that Berkeley could not impose similar notice requirements for a multitude of products, so long as they built a record based on the testimony of "impassioned … residents" and could find a "consultant" to support the claimed need for a warning. *Id*. Furthermore, every one of the some 30,000 city, town, and county governments in the United States would be free to do so as well. There would be virtually no limit to similar efforts targeting other products, at any level of government.

Every technology that someone in government believes might have "bad" effects on its users becomes susceptible to having its marketing hijacked to become a platform for government hectoring. Worse still, the City may require speech with which the advertiser not only disagrees, but for which there may be data controverting the government position – much as there is here. Every food or

beverage that is disfavored by the science of the moment becomes fair game for government-compelled warnings in their ads, no matter how controversial or shaky the "science" underlying the government's concern. *Cf.* Peter Whoriskey, "Congress approves funding to review how dietary guidelines are compiled," *Wash. Post*, Dec. 19, 2015, at A13 (noting that "[n]utrition science has been in turmoil in recent years," and citing "scientific disagreements over the portions of the dietary guidelines … on salt, whole milk, saturated fat, cholesterol and the health implications of skipping breakfast").

Virtually all products may implicate issues touching on health, safety, or environmental impact, and each one represents an "opportunity" (from the regulator's point of view) for adding to the public debate. But the Supreme Court has rejected compelled speech as the solution, even when framed as a state interest in "promoting speech," because it imposes burdens and "forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Elec.*, 475 U.S. at 9, 20. Considering the number of governmental units in the United States that could decide to order disclosures about a vast array of products or services, the implications of Berkeley's view of the First Amendment are staggering.

Bottom line: People maintain all manner of beliefs about the products and services with which they interact every day. As CTIA demonstrated, Berkeley's Ordinance was supported in part by testimony by citizens who – contrary to the

scientific evidence – claimed to be "electro-magnetically sensitive," had friends who were "sure … [a] cell phone caused her brain tumor," or are convinced that cell phones "damage … sperm." CTIA Br. 11 (quoting ER 102, 105, 107). If such public statements expressing unfounded fears can suffice to allow the government to compel warnings that far exceed any informational, non-controversial warning that the Supreme Court has approved, virtually nothing is off limits.

This approach would open the floodgates for compelled disclosures and warnings for virtually all products or services, even where there is no risk of misleading or deceptive product claims. And if Berkeley's methodology of canvassing consumer "concerns" is sufficient to trigger such mandates, some truly bizarre requirements could be the result.[4] Even without extreme examples, the possibilities are endless. But Berkeley's theory of the First Amendment removes

[4] For example, one nationwide survey in 2013 found that twenty percent of respondents believed there is a link between childhood vaccines and autism. *See* http://www.publicpolicypolling.com/pdf/2011/PPP_Release_National_Conspiracy Theories_040213.pdf, at 2. Does that mean the First Amendment would permit an ordinance requiring the disclosure of "autism risks" anywhere vaccinations are offered? Nearly one in ten survey respondents reported believing that government fluoridation of the water supply is for "more sinister reasons" and not for dental health. *Id*. Would that allow county officials to require plumbing-supply retailers and home builders to warn consumers about a fluoride conspiracy? Even stranger, fifteen percent of respondents expressed a belief that "secret mind-controlling technology" is added to television broadcast signals. Under Berkeley's theory of the First Amendment, should the thousands of retailers around the country be concerned about municipally-imposed requirements to post "potential mind-control" notices?

any reasonable limits to the types of notices or warnings that might be required, given its lack of scrutiny and high level of deference to government authority.

Ultimately, if the District Court's analytical framework is permitted to stand, advertisers would face the risk of compelled warning "notices" tens of thousands of times over, from any city, town, county, or other municipal authority. As the Supreme Court explained over seven decades ago in striking down compelled speech requirements, "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). This Court should hold such compelled speech mandates are unconstitutional, and enjoin Berkeley's ordinance that makes cell phone retailers the canary in the coal mine for this unprecedented expansion of mandated disclosures in commercial speech.

IV. CONCLUSION

The District Court denied CTIA a preliminary injunction under an analysis that not only flies in the face of settled Supreme Court and Circuit precedent, but runs counter to the trend in the law pertaining to commercial speech. Allowing municipal officials to conscript and burden a marketer's communications – especially where they admit there is no scientific evidence to support the compelled disclosure, CTIA Br. at 11 – is an invitation for every level of government to force advertisers to carry government messages with which they disagree. Such

requirements cannot be justified where disclosures are not necessary to combat any deceptive or potentially misleading commercial speech. This Court should reject the District Court's sharp turn on these critical points of law, and reverse the decision below by ordering entry of a preliminary injunction in this case.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

By s/ Robert Corn-Revere
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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1. The *amicus* brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 4,661 words, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 7th day of March, 2016.

DAVIS WRIGHT TREMAINE LLP

By s/ Ronald G. London
Ronald G. London

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THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

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 March 7, 2016.

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

/s/ Robert Corn-Revere
Robert Corn-Revere