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
Opinion Filed April 21, 2017
Fletcher, Christen, Friedland (dissenting)

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF CTIA – THE WIRELESS ASSOCIATION® URGING REHEARING *EN BANC*

ROBERT CORN-REVERE
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W., Suite 800
Washington, DC 20006
Tel: (202) 973-4200
Fax: (202) 973-4499

Counsel for Amicus Curiae The Association of National Advertisers, Inc.

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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION

RULES

OTHER AUTHORITIES

INTRODUCTION

The divided panel decision in this case breaks with Circuit precedent and extends beyond what the Supreme Court has allowed for compelled disclosures in commercial speech, to allow the City of Berkeley to force cellphone retailers to provide customers with notices that misleadingly suggest the Federal Communications Commission ("FCC") believes cellphone radiofrequency ("RF") emissions are dangerous. *CTIA-The Wireless Ass'n v. City of Berkeley*, --- F.3d ----, 2017 WL 1416504 (9th Cir. Apr. 21, 2017). Significantly, another panel of this Court had previously held compelling such speech violates the First Amendment, *CTIA-The Wireless Ass'n v. City & County of San Francisco*, 494 F. App'x 752, 754 (9th Cir. 2012), as it is not "both purely factual and uncontroversial" as required under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

The panel ruling here eradicates limits on warning and labeling mandates previously honored under *Zauderer*. It pares down advertisers' First Amendment protection from compelled speech to allow "any governmental interest [to] suffice so long as it is" "more than trivial," and any compelled disclosure whose elements are arguably factual, regardless of their combined message, or whether it involves matters where opinions differ. *CTIA v. Berkeley*, at *8, *10-11.

Berkeley is free to hold or express its own opinions about cellphone safety, even those contradicted by scientific evidence. But the panel decision enables the

government to require others to convey its message, even though the City offers no reason why consumers cannot read neutrally-presented information already provided with their phones, or why it cannot deliver its own message. This effort "to tilt public debate" regarding cellphone use "in a preferred direction" is "incompatible" with the First Amendment restriction against censoring or otherwise burdening speech out of fear people will make bad choices, or to promote "'what the government perceives to be their own good.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 562, 577 (2011) (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1986) (plurality op.)).

Worse still, the panel decision leaves Berkeley—and every other city, town or county—free to pursue this approach with the marketing of ***every other*** good or service offered. All the First Amendment and *Zauderer* require, according to the panel majority, is that "compelled disclosure of commercial speech … is reasonably related to a substantial government interest and is purely factual." *CTIA v. Berkeley*, at *9. And it dilutes First Amendment protections further still by defining "substantial interest" to mean "more than trivial." *Id.* at *8. This strips down applicable law far beyond what the Constitution allows.

Amicus curiae the Association of National Advertisers, Inc. ("ANA") thus supports CTIA's Petition for Rehearing *En Banc* given the fundamen-

tal constitutional principles at stake.[1] The panel decision empowers local officials to compel speech whenever they feel like sending a government message, regardless of the interest to be served, so long as they believe it is rationally related to a particular product or service. This seriously misreads and misapplies *Zauderer*, and has no logical stopping point. If the decision is not reviewed *en banc* and reconciled with *Zauderer* and Circuit precedent, there is almost no limit to the messages public officials at all levels of government might compel.

INTERESTS OF *AMICUS*

Amicus curiae the 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 1,000 companies – 750 client-side marketers and 300 associate members, which include advertising agencies, law firms, suppliers, consultants, and vendors – with 15,000 brands that collectively spend over $250 billion annually in marketing and advertising. Further enriching the ecosystem is the work of the nonprofit Advertising Educational Foundation, an ANA subsidiary. The ANA protects the well-being of the

[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(b); Cir. R. 29-2 & Advisory Committee Note to Cir. R. 29-2.

marketing community while also serving its members by advocating for clear and coherent legal standards for advertising.

The ANA's interest here focuses on preserving robust protections afforded 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). As the Supreme Court recognized, "[a] consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell*, 564 U.S. at 566 (internal quotation marks and citation omitted). The commercial speech doctrine has steadily evolved, and since 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 protection afforded such expression.

Regulation of truthful advertising must directly and materially serve an important governmental interest without restricting speech more extensively than necessary to serve it. *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 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). While the Court 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 courts remain vigilant in barring the government from compelling overly burdensome disclosures or co-opting private speakers.

ARGUMENT

The district court erred in declining to enjoin Berkeley's cellphone notice ordinance, and the panel affirmed, even though there is no allegation cellphone marketing involves potentially deceptive or misleading claims, and the required disclosure is neither "purely factual" nor "non-controversial." Berkeley mandates

a warning that "begins and ends with references to safety, plainly conveying that the [] language describes something unsafe," without "any evidence that carrying a cell phone in a pocket is in fact unsafe." *CTIA v. Berkeley*, at *15 (Friedland, J. dissenting). Though the majority recounts at length what the FCC has said on the matter, *id*. at *3-5, Berkeley's message conflicts with the FCC's bottom-line, unequivocal conclusion that cellphones are safe.[2] Worse, the panel approved its mandated warnings without any requirement that retailing cellphones could potentially mislead without the disclosure, *id*. at *7-8; *contra id*. at *15 n.2 (Friedland, J., dissenting), under a particularly forgiving form of rational basis review. *See id*. at *9.

ANA fully endorses the cogent and compelling reasons in CTIA's Petition for Rehearing or Rehearing *En Banc* for why further review and vacatur of the panel decision is necessary: (1) its decision is contrary to binding precedents on a question of national importance, CTIA Pet. 2; (2) *en banc* review is needed to re-

[2] *See* FCC, *Wireless Devices and Health Concerns*, https://www.fcc.gov/consumers/guides/wireless-devices-and-health-concerns (last updated Nov. 1, 2016) ("no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses"). *Cf. CTIA v. Berkeley*, at *15 (Friedland, J., dissenting) ("There is thus no evidence in the record that the message conveyed by the ordinance is true."). The panel ruling unwittingly underscores the difference between the FCC and Berkeley warnings. It notes that, while the majority believes Berkeley's ordinance "requires cell phone retailers to disclose, *in summary form*, … information … the FCC already requires," "CTIA has not sued the FCC" over that more neutral disclosure, but "[r]ather, CTIA has sued Berkeley" given the different overall message the City requires. *Id*. at *5 (emphasis added).

solve confusion caused by the panel decision regarding *Zauderer* and its progeny, *id*. 7-9; (3) the First Amendment requires justifying compelled commercial disclosures with governmental interests that are "substantial," not just merely "more than trivial," in combatting potential deception, *id*. 6-8, 10-11; (4) compelled commercial speech must be "purely factual" and not even *potentially* misleading, *id*. 11-12; and (5) *Zauderer* allows only uncontroversial compelled commercial disclosures. *Id*. 13-14. Ultimately, there is no justification for the government to commandeer commercial speakers in order to control public debate and alter individual behavior—purposes foreign to the First Amendment. *See, e.g.*, *44 Liquormart*, 517 U.S. at 510, 516; *Sorrell*, 564 U.S. at 578-79. Nor does the panel justify watering down *Zauderer*'s standards governing the limited circumstances when the First Amendment allows compelled commercial disclosures.

I. THE PANEL OPINION RUNS COUNTER TO THE DOCTRINAL TREND FAVORING INCREASED PROTECTION FOR COMMERCIAL SPEECH

Compelling advertisers to disseminate government messages violates the First Amendment "right … to refrain from speaking." *Wooley*, 430 U.S. at 714. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion or force citizens to confess by word or act their faith therein." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Except for purely factual

and noncontroversial commercial disclosures necessary to prevent deception, *see infra* 9-14, the State may not compel private entities to publish government messages. *Wooley*, 430 U.S. at 715. This is as true for "corporations as for individuals." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 16 (1986).

The clear trajectory of Supreme Court jurisprudence is toward greater protection for commercial speech, not less.[3] As the Court set that course, it tightened standards for reviewing commercial speech, and has stressed that the government cannot relegate it to lower levels of scrutiny through simplistic classifications. *Discovery Network*, 507 U.S. at 416 n.11 (regulation under commercial speech doctrine not appropriate if government interest is unrelated to regulating 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.

---

[3] In the four decades since *Virginia State Board of Pharmacy*, 425 U.S. 748, the Supreme Court has invalidated: (1) prohibitions on 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 CPA solicitation, *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 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; (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*, 564 U.S. at 567-68.

Regardless whether expression is commercial or political, it is settled law that government "may not burden the speech of others in order to tilt public debate," and any such regulation is subject to "heightened scrutiny." *Sorrell*, 564 U.S. at 571, 578. Even where it is urged commercial speech regulation may promote public health, "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id*. at 571.

The narrow constitutional exception to the compelled speech doctrine for certain mandated commercial speech marketing and labeling disclosures does not support Berkeley's ordinance, or the panel's blessing of it. *See Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 249-50. A compelled disclosure may be permissible only if it serves a government interest in correcting potentially deceptive or misleading commercial speech, is "uncontroversial," and conveys "purely factual" information. *Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 249-50; *CTIA v. San Fran.*, 494 F. App'x at 754. In this case, the panel endorsed the District Court's misapplication of *Zauderer* by rejecting the first of these limits, as well as half the second by eliminating the requirement that disclosures must be uncontroversial. It compounded this by applying the "purely factual" criterion in a simplistic and misleading way.

The panel 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 *Zauderer*'s

rationale beyond the interest in preventing potentially deceptive speech. *CTIA v. Berkeley*, at *8. However, while that may be the D.C. Circuit's current view,[4] the panel here wholly failed to account for *this Circuit's* decisions, which expressly confine *Zauderer* to its original, more limited rationale. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009) (compelled disclosure allowed if "reasonably related to the State's interest in preventing deception") (quoting *Zauderer*, 471 U.S. at 651), *aff'd*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).

It also failed to apply a previous Circuit decision in an almost identical case. *CTIA v. San Fran.*, 494 F. App'x at 753-54. The panel in *CTIA v. San Francisco* held the First Amendment (and *Zauderer*) prohibits requiring such disclosures, because the prescribed language was not strictly factual, but "could … be interpreted … as expressing San Francisco's opinion that using cell phones is dangerous." *Id*. The same reasoning applies here, yet the panel does not even *mention* the *CTIA v. San Francisco* ruling. *See, e.g., CTIA v. Berkeley*, at *15 (quoting FCC) (Friedland, J., dissenting).

It makes no sense that the panel latched onto out-of-circuit interpretations of *Zauderer* that run contrary to the overwhelming trend toward tighter scrutiny and

[4] That said, Judge Brown's *AMI* dissent cogently explains why the analysis of *Zauderer*, as expressed in *this* Circuit, has it right. *See generally* 760 F.3d at 37-42, 45 (Brown, J., dissenting).

greater protection for commercial speech. The Supreme Court and the circuits—including this one—have moved ***away*** from reflexive application of commercial speech doctrine that dilutes protection for free expression. There is no reason why the law governing *compelled* commercial speech should evolve in precisely the opposite direction, particularly given the Supreme Court's view that it is not even a legitimate interest for government to "tilt the public debate" on issues of consumer safety. *Sorrell*, 564 U.S. at 567. Nor is there any basis for applying the most diminished form of rational basis review, especially where the government lacks any interest in preventing deception.

The Supreme Court has never applied *Zauderer* outside the context of misleading or deceptive commercial speech, nor suggested such application would be proper. *See Milavetz*, 559 U.S. at 249 (*Zauderer* was "directed at *misleading* commercial speech"). In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), it declined to apply *Zauderer* where there was "no suggestion … the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow *necessary to make [ads] nonmisleading*." *Id*. at 416 (emphasis added). The majority here expressly recognizes this narrow application, *CTIA v. Berkeley*, at *7 (noting *Milavetz* "follow[ed] *Zauderer* and us[ed] its 'preventing deception' language"), then runs roughshod over it. *See id*. at *8. But the reason for the Supreme Court's 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*, 567 U.S. 709 (2012), or "false" political speech. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016).[5] Consequently, the government has somewhat more latitude to compel disclosures to prevent potential deception, as the alternative would be banning the misleading commercial speech altogether.

The panel was wrong to read *Zauderer*'s mandate that required disclosures be "factual and uncontroversial"' as merely descriptive of what the state mandated in that case, nor is it how this Court has applied *Zauderer*. *E.g.*, *CTIA v. San Fran.*, 494 F. App'x at 753-54; *Video Software Dealers*, 556 F.3d at 966-67. Such supposition is similar to intervenor arguments the D.C. Circuit rejected in *National Ass'n of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), which held there was no way to apply controlling precedent "except as holding … *Zauderer* 'requires the disclosure to be of "purely factual and uncontroversial information."'" *Id*. at 527 (quoting *AMI*, 760 F.3d at 27).

[5] Nonetheless, there is no doubt forcing commercial speakers to carry government messages necessarily imposes significant First Amendment burdens. As the Supreme Court explained, "[m]andating speech that a speaker would not otherwise make necessarily alters [its] content," including where the mandate only forces the speaker simply to disclose "facts." *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795, 797-90 (1988) (noting other cases "cannot be distinguished simply because they involved compelled statements of opinion").

There is no basis in logic or precedent for the panel's acceptance of *Zauderer*'s requirement for factualness, while at the same time rejecting its requirement that compelled disclosures also be intrinsically "uncontroversial" as a mere qualifier of "factual accuracy." *CTIA v. Berkeley*, at *8. This renders the Supreme Court's reference to disclosures being "uncontroversial" a nullity. In this respect, too, the panel's decision directly conflicts with *CTIA v. San Francisco*, which treated the criteria as separate requirements, when it held compelled commercial disclosures must be "***both*** 'purely factual ***and*** uncontroversial.'" 494 F. App'x at 754 (quoting *Zauderer*) (emphasis added).

The compelled disclosure in this case is particularly problematic, where the "facts," reframed by the government, amount to opining the product is somehow unsafe. It is improper, as Judge Friedland recognized, to "interpret[] the sentences in Berkeley's forced disclosure statement one at a time and hold[] that each is 'literally true,'" when "consumers would not read [them] in isolation." Taken together, their "most natural reading [is to] warn[] that carrying a cell phone in one's pocket is unsafe." *CTIA v. Berkeley*, at *14.

Berkeley is just fine with the thought that consumers may develop skewed impressions of cellphone safety—but it would not be so forgiving if the shoe were on the other foot. If the advertiser's own speech were at issue, it would be required to satisfy the "net impression" standard for its factual claims. *See, e.g.*, *Stout v.*

FreeScore, LLC, 743 F.3d 680, 685 (9th Cir. 2014) (citing *FTC v. Gill*, 265 F.3d 944, 956 (9th Cir. 2000)). Such a double standard is the natural outcome of the panel's lax approach.

Here, there is nothing about cellphone retailers' speech in selling handsets that is potentially deceptive, which might allow narrowly crafted disclosures to ensure the accuracy of a marketer's message. The City merely wants to add its commentary on a safe and lawful product—one that already comes with all the information the City says consumers need—without offering any reason why the City cannot deliver its message itself, violating the admonition 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." *Western States*, 535 U.S. at 371.

Imposing such requirements instead on advertisers flunks even the threshold First Amendment hurdle because they fail to serve a legitimate government purpose, let alone a substantial one. *Sorrell*, 564 U.S. at 567. Not only does this force marketers "to speak where [they] would prefer to remain silent," it is "forced association with potentially hostile views." *PG&E*, 475 U.S. at 18. The government may not require private parties to vilify their own products, and certainly cannot require *misleading* statements about them. *Video Software Dealers*, 556 F.3d at 967.

II. THE RATIONALE EMBRACED BY THE PANEL CONTAINS NO LOGICAL STOPPING POINT FOR WHAT WARNINGS 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. The panel's ruling can affect *any* lawful product or service about which the government believes it knows best. There would be no reason Berkeley could not impose similar notice requirements for a multitude of products, and every one of the some 30,000 city, town, and county governments in the United States would be free to do so as well. Without strict application of *Zauderer*'s limiting principles, there is virtually no logical stopping point for disclosure requirements on any product any government body might decide should bear warnings to consumers, based on whatever "non-trivial" health- or safety-related hobby horse a regulator might dream up.

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 disfavored by the science of the moment becomes fair game for government-compelled warnings in their marketing, no matter how controversial

or shaky may be the science underlying officials' concerns. *Cf.* Peter Whoriskey, *Congress approves funding to review how dietary guidelines are compiled*, WASH. POST, Dec. 19, 2015, at A13 (noting "[n]utrition science has been in turmoil," 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 represents an "opportunity" (from the regulator's viewpoint) for adding to the public debate.[6] 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." *PG&E*, 475 U.S. at 9, 20. Considering the number of governmental units in the U.S. that could order disclosures about a vast array of products or services, the implications of the First Amendment limits on compelled commercial disclosures as endorsed by the panel are staggering.

[6] That Berkeley supplements disclosures the FCC already requires, *CTIA v. Berkeley*, at *9, does not help but only exacerbates matters, as it simply adds to material that detracts from the advertiser's message. It also suggests multiple governmental bodies can layer on requirements, leaving no limits to the number of disclosures any marketing message might be obligated to bear.

The panel's 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, with endless possibilities. There would be virtually no limit to similar efforts targeting other products and services, at any level of government. As Judge Brown warned in dissenting in *American Meat*, on which the panel here relied: "the victors today will be the victims tomorrow, because the standard created by this case will virtually ensure the producers supporting this labeling regime will one day be saddled with objectionable disclosure requirements …. Only the fertile imaginations of activists will limit what disclosures successful efforts from … as-yet-unknown lobbies may compel." *AMI*, 760 F.3d at 52 (Brown, J., dissenting). The panel's misreading of the First Amendment removes any reasonable limits to the types of notices or warnings that might be required.

Ultimately, 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." *Barnette*, 319 U.S. at 641. The only way to "avoid this beginning" is to grant rehearing and reconcile the panel decision with *Video Software Dealers*, *CTIA v. San Francisco*

and, most importantly, proper application of the Supreme Court's original intent in *Zauderer*.

CONCLUSION

Allowing public bodies to conscript and burden marketers' communications 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 deceptive or potentially misleading commercial speech. The Court should accordingly grant *en banc* review and vacate the panel decision in this case.

RESPECTFULLY SUBMITTED this 11th day of May, 2017.

By s/ Robert Corn-Revere
Robert Corn-Revere

Robert Corn-Revere
Ronald G. London
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W., Suite 800
Washington, DC 20006
(202) 973-4200

Counsel for *Amicus Curiae*
THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

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 4,176 words, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 11th day of May, 2017.

DAVIS WRIGHT TREMAINE LLP

By s/ Ronald G. London
Ronald G. London

Counsel for *Amicus Curiae*
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 May 11, 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