Nos. 11-17707, 11-17773

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CTIA – THE WIRELESS ASSOCIATION®
Plaintiff-Appellant / Cross-Appellee

v.

THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA
Defendant-Appellee / Cross-Appellant

Appeal from United States District Court for the Northern District of California
Civil Case No. 3:10-cv-03224 WHA (Honorable William A. Alsup)

BRIEF OF AMICUS CURIAE CONSUMER ELECTRONICS RETAILERS COALITION SUPPORTING PLAINTIFF-APPELLANT

PRELIMINARY INJUNCTION APPEAL

Robert S. Schwartz
Seth D. Greenstein (counsel of record)
David D. Golden
CONSTANTINE CANNON LLP
One Franklin Square
1301 K St. NW, Suite 1050 East
Washington, DC 20005
Telephone: (202) 204-3508
Fax: (202) 204-3501
rschwartz@constantinecannon.com
sgreenstein@constantinecannon.com

Counsel for Amicus Curiae Consumer Electronics Retailers Coalition

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* Consumer Electronics Retailers Coalition ("CERC") states that it is a not-for-profit section 501(c)(6) corporation, has no parent corporation, and has not issued shares of stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Rules, Statutes & Regulations

San Francisco Ordinances & Codes

Administrative Materials and Other Authorities

STATEMENT OF INTEREST[1]

CERC is a not-for-profit public policy organization that includes major specialist and general retailers of consumer electronics products, and retailer associations. Established in 1991 as an informal coalition, and incorporated in 2003, CERC members bring unique and expert perspectives to policy issues facing the consumer electronics retail industry and their customers.

Members of CERC are among the largest sellers of electronics products, including cell phones. Collectively, these companies operate tens of thousands of physical locations in communities in California, around the United States, and in other countries of the world, and reach consumers online through many of the largest retail "stores" on the Internet.

CERC and its members have worked closely with the Federal Communications Commission ("FCC") in providing accurate, consensus-based information to consumers on matters of pressing importance, such as the national transition from analog to digital television broadcasting. The experience of CERC and its members in these efforts, including the national training of tens of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), CERC states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Further, CERC states that no person other than *amicus curiae*, its respective members, or its counsel made a monetary contribution to its preparation or submission.

thousands of sales personnel, and the provision of effective and consistent printed and electronic in-store and on-line messaging to consumers, informs CERC's views as an *amicus curiae* in this appeal.

CERC's members include Amazon.com, Inc., Best Buy Co., Inc., RadioShack Corporation, Sears Holdings Corporation, Target Corporation, and Wal-Mart Stores, Inc.

SUMMARY OF ARGUMENT

In claiming that its ordinance does not violate the First Amendment because it would not require retailers to "insert unwanted content into speech that private actors were already engaging in," San Francisco demonstrates ignorance of, and lack of regard for, the retail environment, nationally and locally. San Francisco is asking this Court, in order to uphold the ordinance crafted by the court below, to ignore the obvious: that consumer electronics retailers train their staffs to convey information to consumers on a national basis, based on federal regulation and guidance. Whether consumer information is conveyed verbally or through signage, the City's ordinance would insert mandatory opinion – not fact – that is contrary to this training and to the information that retailers would provide to customers *but for* the City's ordinance.

Consumer electronics retailers have provided information to consumers on voluntary and compelled bases. Where the information is voluntary, it is based on a national advisory consensus arrived at with federal agencies, others in the private sector, and public interest groups. Where the information is compelled it is factual, and is generally *product model specific*, based on testing of *that model* according to nationally approved technical standards.

For San Francisco to commandeer the facilities of local retailers so as to mandate that its opinion appear in retailers' stores is indeed to require the insertion

of a compelled message into the daily conversation between store and customer. For San Francisco and potentially other localities to do this is to impose an impossible burden on national retailers: Within San Francisco, and in the metropolitan area where those who shop in San Francisco also shop, employees would have to be taught *both* the City's message and the store's national training, and how to reconcile and explain them. All employees dealing with customers who shop in San Francisco would have to be prepared either to explain a message with which they have been trained to disagree, or *why* the retailer believes the City's message can be ignored. The assumption that this is feasible, like San Francisco's assertion that its fact sheet can merely be kept "under the counter," demonstrates a lack of attention to or study of the retail environment.

Since the order challenged by CTIA is not tied to the specific attributes of any particular product or model, San Francisco can point to no reason why retailers' facilities should be the venues expropriated by the City to communicate with its own residents. The City has not claimed that all purchasers of phones in San Francisco live in the City, or that all residents purchase their phones there. Hence the choice of retail stores as local billboards and fora is arbitrary rather than rational, and certainly cannot be said to be compelling.

A national checkerboard of such insertions of local *opinion* at retail would be an impossible burden on retailers and an imposition on the public. Hence, San

Francisco cannot possibly meet its burden to justify the mandated use of retail facilities and employee training to project its own opinions.

ARGUMENT

I. COMPELLED INSERTION OF LOCAL SPEECH AT VARIANCE WITH FEDERAL POLICY WOULD CONFUSE AND CHILL RETAILERS' ABILITY TO COMMUNICATE WITH AND SERVE CONSUMERS.

Remarkably, San Francisco's Opening And Answering Brief contains this argument and representation: "[M]any of CTIA's cases involved compelled speech requirements where the government tried to insert unwanted content into speech that private actors were already engaging in, thereby necessarily altering the content of that speech."[2] This is *precisely* what this case and appeal are about, and why CERC is participating as an *amicus curiae* in support of CTIA.

The local ordinance, as drafted by the District Court, would prescribe and compel messaging to the public by CERC members and other retailers that is contrary to federal policy, contrary to the national training currently being given to employees, contrary to information provided by product manufacturers, and contrary to answers currently given to customers in San Francisco and in adjacent jurisdictions. If this Court approves San Francisco's *insertion* into ongoing retail speech, there will be nothing to prevent similar and contrary (though perhaps differing) local messages being inserted and compelled by other jurisdictions as well.

[2] Cross-Appeal Opening Br. And Answering Br. Of Appellee City And County Of San Francisco at 36 ("Cross-Appeal Opening Br. And Answering Br.").

The training of national retail sales staffs with respect to consumer electronics products, into which San Francisco would now insert itself, is organized, national, and continuous. It includes and reflects information provided by manufacturers (including federally mandated disclosures) and material compiled and updated by the retailer on a national basis. As in other retail sectors, there is a relatively high annual turnover in the sales staff, yet employees must be aware of latest trends in electronic product designs and capacities. This requires that the training information provided to employees be vetted for accuracy and updated frequently. Such training is not shaped by, nor conducive to, the insertion of local opinions on national issues.

In the national transition to digital television broadcasting successfully concluded in June 2009, the FCC found that CERC members "… assured the Commission of their intention to engage in extensive outreach, and have since demonstrated an admirable degree of focus, ingenuity, and dedication to the needs of viewers as they approach the digital transition."[3] CERC, in consultation with the FCC and others, voluntarily maintained and continuously updated a "Q&A"

[3] *In the Matter of DTV Consumer Education Initiative*, 23 F.C.C.R. 4134, 4159 (Mar. 3, 2008). *Cf. In the Matter of DTV Consumer Education Initiative*, 23 F.C.C.R. 7272 (Apr. 23, 2008). CERC and its members collaborated as to voluntary, advisory content with the FCC, broadcasters, and other interested parties. The *product-specific* factual information as to the tuning capability of each product model, comparable to caloric information provided with particular food products – *see n.*16, *infra* – was addressed by FCC regulation.

web page that was a common reference for consumers and retailers (whether or not CERC members), and thus was incorporated in retailer training programs.

CERC also participated actively in the extension of the Federal Trade Commission's ("FTC's") "EnergyGuide" program to television displays. EnergyGuide for several years has required average annual power consumption labels to be affixed to major appliances, but was extended to TVs only after the FTC and the private sector agreed that *standard means of testing could produce factually reliable, model-specific results*.[4] CERC advocated that products be rated on a comparative scale, based on standard tests and verifiable data. This proposal was adopted.[5]

Through national training and the implementation of nationally standard fact-based messaging, retailers have been able to give consumers trustworthy and consistent information. It has been neither necessary nor desirable to tailor training and messaging to local, non-verifiable opinions on, *e.g.*, the technical attributes of televisions, the relative significance of energy usage, or the relation of energy usage to global warming in the absence of specific and compelling local

[4] *See* Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act (Appliance Labeling Rule), 76 Fed. Reg. 1038 (Jan. 6, 2011) (to be codified at 16 C.F.R. 305).

[5] *Id.* This information is specific to the particular model on display and is based on the results of tests of that model according to a nationally standard test.

circumstance.[6] In the few instances in which state or local jurisdictions have attempted to insert their own, idiosyncratic messaging, this has been struck down by the courts, including this Court.[7]

To require retailers, who have trained their employees and keyed their materials to presenting reliable facts, to modify materials and ask employees now to insert local opinion is to diminish the credibility of both government and industry. A retail employee would be required to give conflicting "local" and "federal" answers – each purportedly "fact based" – to the identical consumer question.[8] An employee in Daly City or Oakland would not (unless that locality adopted yet a third set of "facts"). Conversely, consumers would be taught one perspective when shopping in San Francisco and another at home in Daly City.

Consumer confusion and retail burden would be compounded if – as would seem inevitable if San Francisco's ordinance were to become law – other municipalities were then free to mandate the airing of their own conclusions as inserted compelled speech by retailers. CERC members have literally tens of

---

[6] Where information has varied locally, it has been on *local factual* issues, such as local TV transmitter frequencies and transmission area coverage as determined by FCC regulations. These can have an impact on the type of antenna best suited to a particular location.

[7] *See infra* Part II, discussion of *Blagojevich* and *Schwarzenegger*.

[8] To demonstrate the absurdity of this Ordinance's requirements, consider that CERC members collectively have more than 20 stores within the City and County of San Francisco, and more than 30 additional stores in surrounding areas just outside the City.

thousands of stores throughout the United States. Differing local advice to consumers, based on the same national facts, would have disastrous consequences in several respects:

(1) It would confuse consumers who shop in more than one jurisdiction, or who live in one and work in another.

(2) It would confuse rather than educate employees who deal with customers who shop in more than one jurisdiction.

(3) It would confuse the training of employees who work in more than one store.

(4) It would degrade the credibility of *all* retail messaging, whether provided voluntarily or included by manufacturers per federal regulation.

(5) It would put consumer electronics retailers in the unprecedented position of presenting to consumers a product message which they and their vendors dispute, and which differs from federal guidance.

San Francisco has not even attempted to point to any unique and compelling local circumstance that could justify imposing a national checkerboard of inconsistent and incoherent opinions on retailers and their customers, as locally inserted and compelled speech.

II. EVEN IF A VALID STATE COMPELLING INTEREST IN LOCALLY INSERTED SPEECH COULD BE DEMONSTRATED, THE BURDEN IMPOSED BY SAN FRANCISCO'S ORDINANCE ON RETAILERS AND CITIZENS OUTWEIGHS THE INTERESTS SERVED.

CERC takes particular exception to the notion and rationale advanced by San Francisco that it would not be burdensome for consumer electronics retailers

to advise their customers that the store finds "worthless" the message that San Francisco has required the retailer to post – and that stores should feel free to tell customers to ignore (or that the store disagrees with) the officially mandated message:[9]

- "They may tell their customers that the disclosure materials are 'worthless' and are provided 'only under government mandate.'"[10]
- The regulation would not require a retailer "to endorse a message they disagreed with or significantly [interfere] with the ability of the speaker to effectively disseminate a message."[11]
- "[T]he factsheet does nothing to alter any speech that the retailers may, or may not, be engaging in …."[12]
- "[T]his is not a situation in which the City is requiring somebody to alter to their editorial comment."[13]

There are two common circumstances in which consumers are likely to encounter the City's message in a retail store: (1) A specialist retailer, whose employees are expected to offer advice and guidance to consumers, and (2) A "self service" general retailer that provides guidance primarily through signage, labels,

[9] Apparently Defendant felt compelled to take this position – which any national retailer would find absurd – in an attempt to avoid Supreme Court holdings that, in order to mandate speech with which the speaker disagrees, a compelling state interest, not present in this case, would have to be identified. *See discussion infra*, pp. 14-15.
[10] Defendant's Opp'n. To Motion For Prelim. Inj. at 14.
[11] *Id.* at 16.
[12] Defendant/Appellee's Opp'n To Emergency Mot. For Stay at 20.
[13] Tr. of Proceedings at 15, Oct. 20, 2011.

and printed materials. In either case, the City's intrusion cannot be ignored and imposes burdens to the point of impossibility.

A specialist retailer cannot and responsibly should not train sales personnel to offer differing and opposing versions of consumer guidance – a federal version, a state version, a store version, and a personal version. Retailers train sales associates to respect official policy – federal, state, local, and of the product vendor as guided by regulation – and to offer a coherent message that supports and respects all of these. They cannot train their personnel, particularly in entry level retail floor jobs, to pick and choose among these messages, and to develop a personal solution after weighing their relative merits.[14] To attempt to do so would be not only a severe burden on the retailer; it would also burden public discourse and potentially subject a retailer to suit or liability if any retailer *did* begin to tell consumers to "ignore" officially mandated warnings and advisories.

The self-service retailer is more heavily reliant on printed material, for which space is at a premium. Thus, the City's mandated message competes for space with the store's own information, and the information from the product vendor. The choice for the retailer, then, is to display *conflicting* messages side by

[14] In this respect, CERC finds the City's reliance on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, which involved personal opinions and forward looking personal choices of *law students,* particularly inappropriate to the retail, and entry level retail employee, circumstance. 547 U.S. 47 (2006).

side, or to display *only* the City's message.[15] Choosing the former course entails an imposition on customers, a burden on the retailer – likely requiring additional, extraordinary and unique training of staff – and a potential denigration of respect for retailing as well as government. To choose the latter course is to suppress one's own speech – which even the City admits is constitutionally impermissible.

If weighed against the burden and imposition on retailers' speech rights, and on their ability to manage their businesses and train their personnel coherently, San Francisco's asserted justification for commandeering retail shelf space, eye contact, and employee training seems puny indeed. Not every phone bought in San Francisco will be used by a San Francisco resident. Not every phone used in San Francisco will be bought in San Francisco. Nor will the usage of phones already bought and owned be affected. The City, having an opinion and a message to its citizens, has the free airwaves and Internet available via press conference. If the City finds interest in its message to be insufficient or sporadic it can always periodically request or buy time and attention on local TV and radio stations – rather than commandeering public notice through a mandate on private retail

[15] The notion – also advanced by Defendant – that the retailer should "hide" the City's information "behind the counter" until the sale has been completed (Cross Appeal Opening Br. and Answering Br. at 50; Opp'n To Emergency Stay at 20) appears to envision a bygone retail environment far different from that of CERC's members and most other independent retailers.

facilities.[16] Indeed, it would likely be far more rational, and less of a burden on speech, for San Francisco to exercise its domain over wall or billboard space in areas of high visibility and congregation of its own residents, such as civic arenas and public transit.[17]

CERC's experience and concerns are well supported in the case law. In *Entertainment Software Ass'n v. Blagojevich*, the Seventh Circuit held that Illinois could not compel a retailer to display signs and distribute brochures about a video game rating system and its judgment on the content of video games because a retailer might disagree with those judgments. 469 F.3d 641, 652-53 (7th Cir. 2006) ("Careful consideration of what the signs and brochures are in fact communicating reveals that the message is neither purely factual nor uncontroversial."); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009) (similar). In *Blagojevich*, the Seventh Circuit recognized that such problems

---

[16] This further distinguishes this case from *Rumsfeld*, in which the most efficient recruiting venue was a law school, and students were truly free to disagree with or disregard opinions. This case also differs from cases involving food caloric and ingredient information or FTC energy use labels, which are strictly factual and are necessarily tied and specific to the relative merits, vis a vis other products, of the item being considered for purchase.

[17] San Francisco's initial goal was to compel retailers to provide comparative "SAR" information to consumers *while* they purchase phones. This was at least somewhat rationally related to the choice of retail stores as the place for the information to be provided. But, the City's Board recognized that this approach was "misleading" and abandoned it – destroying the last rational justification for the City to appropriate the use of retailer facilities to communicate with its own residents. Cross Appeal Opening Br. And Answering Br. at 4.

impose unnecessary and unconstitutional burdens on retailers, especially in the context of compelled speech. 469 F.3d at 653. ("[T]he retailers affected by the [Sexually Explicit Video Game Law] have salespeople and their own information that communicate messages about the relative value of various games for buyers of different age groups. The State cannot force them to potentially compromise this message by inclusion of the ESRB ratings."); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . .") (internal citations omitted).

III. REFERENCE TO A "PRECAUTIONARY PRINCIPLE" CANNOT LESSEN A LOCALITY'S FIRST AMENDMENT BURDENS. IF ANYTHING, LOCAL INVOCATION OF SUCH A PRINCIPLE SHOULD REQUIRE A SHOWING OF COMPELLING LOCAL AS WELL AS GENERAL CIRCUMSTANCE, NEITHER OF WHICH IS PRESENT HERE.

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all," a constitutional protection that applies equally to individuals and corporations. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."). Content-based regulations of speech "are presumptively invalid," *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188

(2007), and will only pass constitutional muster if they are narrowly tailored to address a compelling state interest. *See, e.g., Consol. Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York*, 447 U.S. 530, 537-538 (1980).

In enacting the ordinance on which the sign drafted by the District Court is based, San Francisco simply and inadequately declared that "it is in the interest of the public health to require cell phone retailers to inform consumers about the potential health effects of cell phone use, and about measures they can take to reduce their exposure to radiofrequency energy from cell phones." S.F. Ordinance 165-11 § 1 (2011). The District Court recognized that there is no "precautionary principle" that would allow the federal government to regulate in the absence of affirmative, factual findings.[18] Yet the court went on to "presume" that a government may nevertheless impose "at least some disclosure requirements based on nothing more than the possibility that an agent may (or may not) turn out to be harmful." *Id*. This analysis not only contradicts the precedent cited; it also fails to recognize that compelled speech raises First Amendment issues, hence is subject to even *stricter* scrutiny than mere regulation.

Where a municipality would compel speech, it must, like any other governmental entity, justify its action through a compelling state interest which, as CTIA explains in its own briefing, is not present in this case. It is CERC's view,

[18] Order on Mot. for Prelim. Inj. at 10 ("Opinion"), citing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 653 (1980).

on behalf of national retailers who would bear the burden of checkerboard impositions by municipalities, that, *additionally*, there must be some compelling reason why municipalities should be able to require the insertion of locally mandated speech, with which retailers disagree, when national retailers answer questions of national concern. There is no hint in this case that San Francisco considered this question or has an answer to it.

Hypothetically, where a dam upstream of a valley town shows ominous cracks, local government might claim an emergency power to commandeer the facilities of local businesses, in addition to other communication tools at its disposal, to help alert the community to a unique and unarguably compelling circumstance. In such a case, *both* the authorities' responsibility for the safety of the public *and* the pertinent facts are strictly local in origin and in nature, and the power claimed would, perforce, be temporary. Whatever the outcome in such a case, this is not that case.

A. Municipalities Have No Recognized Or Delegated Responsibility To Educate The Public Or Govern Speech With Respect To Radiation By Telecommunications Devices.

Retailers are perforce guided by Congress's delegation to the FCC of the responsibility to establish regulations and to inform the public about mobile phone radiation. *See* Telecommunications Act of 1996, Pub. L. No. 104-204, § 704(b),

110 Stat, 56, 152 (1996); H.R. Rep. No. 104-204(I), at 94 (1995).[19] Retailers are aware that Congress declared: "[I]t is in the *national interest* that *uniform, consistent* requirements, with adequate safeguards of the public health and safety, be established as soon as possible." *Id.* (emphasis added).[20] Local mandates that insert messaging contrary or orthogonal to federal guidance would interfere with ongoing retailer efforts to cooperate with and promote such guidance, as well as with the messaging of their own national staffs and their product vendors.

Even where local activism is consistent with federal policy, it has been constitutionally suspect when independently implemented. For example, in a Fourteenth Amendment case, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989), the Supreme Court invalidated an affirmative action ordinance of Richmond, Virginia. Even where, according to federal law, remedies should be available to "identify and redress the effects of society-wide discrimination," this "does not mean that, *a fortiori*, the States and their political subdivisions are free to

---

[19] *See also In the Matter of Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123 (1996). In its brief, CTIA provides the Court with a comprehensive description of the Federal regulatory environment for cell phones. *See, e.g.*, Opening Brief of Appellant CTIA – The Wireless Association® at 8-11, 20-21, 40-49 ("CTIA Opening Br.").

[20] In addition to protecting the public health and safety of the U.S. citizenry with the passage of the Telecommunications Act Congress also sought to "speed deployment and the availability of competitive wireless telecommunications services" throughout the nation. H. R. Rep. No. 104-204(I) at 94. Put another way, Congress viewed the promotion of cell phone usage as a *national* interest that should not be impeded through a patchwork of state laws and local ordinances.

decide that such remedies are appropriate." 488 U.S. at 490. Analogously, even if San Francisco agreed, rather than disagreed, with federal safety research and findings, it could not rely on any compelling *federal* interest as justification for its own burden on speech. *See NAACP v. Button*, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject *within* the State's constitutional power to regulate can justify limiting First Amendment freedoms.") (emphasis added).

B. San Francisco Also Cannot Point To Any Local Factual Basis To Justify Its Imposition on Protected Speech.

San Francisco has not cited any local facts or special circumstances to support forcing retailers to devote signage and employee training to advising customers of San Francisco's unique opinion. *See* CTIA Opening Br. at 22-24. Nor does or can the City claim any special or unique insight or responsibility based on local obligation or circumstance.

- San Francisco conducted no local studies of cell phone safety and has not claimed that its residents use cell phones differently or in ways not approved by the FCC.
- Rather than study or account for the burdens compelled speech would place on retailers, San Francisco merely asserted that retailers are free to urge customers to ignore whatever San Francisco says.

- San Francisco has made no showing that its Department of the Environment, which is tasked with evaluating safety standards, is as technically competent in comparison to the FCC.

San Francisco admits it cannot point to "evidence" of cell phones causing cancer. ER (Oct. 27 Op.) 14. ("San Francisco concedes that there is no evidence of cancer caused by cell phones.") Rather it asserts that harms "could" occur "if" some sort of "health issue" is identified at some future date. A potential danger is not a compelling local interest and does not even rise to the level of "posit[ing] the existence of the disease sought to be cured."[21]

In contrast, the federal government's cell phone safety rules "were supported by every federal health and safety agency," and the federal government "considers all phones in compliance with its standards to be safe." Br. for Respondents United States and FCC at 16-17, *Cellular Phone Taskforce v. FCC*, No. 00-393, 2000 WL 33999532 (U.S. Dec. 4, 2000); *Farina v. Nokia Inc.*, 625 F.3d 97, 126 (3d Cir. 2010). Accordingly, San Francisco's purported interest in cell phone safety is completely devoid of factual support for the District Court's

[21] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion) (internal citation and quotation omitted). When a government defends a regulation on speech "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.; cf. Schwarzenegger*, 556 F.3d at 963-964 (holding that studies "based on correlation, not evidence of causation" do not provide evidence of a compelling interest).

"presumption." *Cf. Ramsey v. City of Pittsburg*, 764 F. Supp. 2d 728, 733 (W.D. Pa. 2011) (finding "little justification" for a municipal ordinance restricting leafleting "when the City already has an ordinance that proscribes littering").

As the City appears to admit, official opinion cannot serve as a compelling interest to justify an ordinance that compels speech in violation of the Constitution. Indeed, the Supreme Court has recognized that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943); *see also Wooley*, 430 U.S. at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

CERC is unaware of any case holding that a municipal opinion can serve as the basis for a compelling interest. Conversely, precedent teaches that unsupported legislative statements and conjecture provide no such basis. *See, e.g., Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129-130 (1989) ("[A]side from conclusory statements during the debates by proponents of the bill, . . . the congressional record presented to us contains no evidence as to *how* effective or ineffective the . . . regulations were or might prove to be") (footnote omitted);

Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").[22] More than "anecdote and supposition" are necessary to demonstrate a compelling local interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000). *See also, Interactive Digital Software v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003) (finding "conclusory comments of county council members" and "a small number of ambiguous, inconclusive, or irrelevant" studies insufficient to support a compelling state interest).

C. Adopting A "Precautionary Principle" Based On A State Interest That Is Merely Presumed Would Impermissibly Reverse The Burden Of Proof In First Amendment Cases.

The District Court, faced with all of the deficiencies outlined above, "presumed" that San Francisco "may impose, out of caution, at least some disclosure requirements based on nothing more than the possibility that an agent may (or may not) turn out to be harmful." This formulation cannot stand because, *inter alia*, it impermissibly re-assigns the burden of proof from state to citizen.

[22] *See also Turner Broad. Sys., Inc.*, 512 U.S. at 664 (internal citation and quotation omitted) (holding that when a government defends a regulation on speech "it must do more than simply posit the existence of the disease sought to be cured. . . . [i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.").

1. San Francisco Must Demonstrate a Compelling Interest Rather Than Placing The Burden On The Retailers Whose Speech Is Being Compelled.

"Reversal of the burden of proof is often cited as a corollary to the precautionary principle." Sonia Boutillon, *Book Review*, 16 Eur. J. Int'l L. 164, 164 (Feb. 2005). Supreme Court precedent strictly forbids such a result because content-based regulations of speech shift the burden of proof to the government. *Consol. Edison Co. of N.Y.*, 447 U.S. at 536 (holding that content-based regulations are presumptively invalid); *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *Schad v. Mount Ephraim*, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring) ("[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment.").[23]

[23] *See also Schneider v. State*, 308 U.S. 147, 161 (1939) ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the [First Amendment] rights."); *815 Foxon Rd., Inc. v. Town of East Haven*, 605 F. Supp.

The First Amendment places the burden of proof on the government, and the precautionary principle impermissibly shifts it to the private party. This reversal undermines one of the central purposes of the strict scrutiny standard, which is to "smoke out" abuses of Constitutional rights "by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *See Croson*, 488 U.S. at 493. In effect, strict scrutiny and the compelling interest standard ask the government to disprove the inference of a bad motive that presumptively applies to violations of Constitutional rights. *See Adarand Constructors v. Pena*, 115 S. Ct. 2097, 2014 (1995).[24]

The First Amendment allocates the burdens in this way for a reason. San Francisco must be required to show *something* more than the remote possibility of a public health risk; the City must show that it is pursuing an important goal, and the importance of that goal justifies the injury to retailers' First Amendment rights. To carry that burden, and to avoid total deference to government when constitutional rights are at stake, San Francisco must demonstrate a compelling *state* interest, *and* a compelling local interest. It has done neither.

1511, 1516 (D. Conn. 1985) ("Municipalities may regulate land use, but they may not regulate the exercise of first amendment rights.").

[24] "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. . . . The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury." *Id.*

2. The Ordinance As Finally Ordered Does Not Meet The Preconditions Of San Francisco's Statutory Adoption Of A "Precautionary Principle" Hence Is, *Inter Alia, Ultra Vires.*

The District Court asked whether "mere unresolved possibility that something may (or may not) be a carcinogen [is] enough to justify compelled warnings and compelled recommended precautions by store owners?" Opinion at 9. Under San Francisco's own statutory language defining the precautionary principle, the answer is clearly no. San Francisco defines its "Precautionary Principle" as "*Where threats of serious or irreversible damage to people or nature exist*, lack of full scientific certainty about cause and effect shall not be viewed as sufficient reason for the City to postpone cost effective measures to prevent the degradation of the environment or protect the health of its citizens." S.F. Env. Code § 101 (2011) (emphasis added).

Neither the District Court nor San Francisco has ever identified any threats – serious, irreversible, or otherwise – that exist because of cell phone usage. San Francisco has admitted that there is no evidence that cell phones cause cancer, and the District Court acknowledged that "there is no known statistical correlation" between cell phone usage and cancer. Opinion at 9 (describing the theoretical carcinogenic effect of "radio frequency electromagnetic fields" as a "mere unresolved possibility"). The District Court characterized the evidence of "impending death" as "weak," Opinion at 14, and also cited to a World Health

Organization statement that "no adverse health effects have been established as being caused by mobile phone use." *Id.* at 9 (quoting WHO, *Electromagnetic Fields and Public Health: Mobile Phones*, Fact Sheet 193 (June 2011)), ("WHO Fact Sheet 193"), http://www.who.int/mediacentre/factsheets/fs193/en/). Also, as shown previously, the federal government believes cell phones are safe.[25]

San Francisco requires the City to use "the best available science" when conducting an "alternatives assessment" under the precautionary principle. S.F. Env. Code § 100 (2011) ("A central element of the precautionary approach is the careful assessment of available alternatives using the best available science.") San Francisco's ordinance fails this test. According to the federal government and the World Health Organization, the best available science concludes that there is no health risk associated with cell phone usage. *See* Food and Drug Administration, Cell Phones, Health Issues ("The weight of scientific evidence has not linked cell phones with any health problems.");[26] WHO Fact Sheet 193 ("A large number of

[25] *See* FCC, Frequently Asked Questions, Wireless Phones, http://www.fcc.gov/encyclopedia/faqs-wireless-phones#safe (last visited Jan. 30, 2012) ("All wireless phones sold in the United States meet government requirements that limit their RF energy to safe levels. . . . There is no scientific evidence that proves that wireless phone usage can lead to cancer or a variety of other problems, including headaches, dizziness or memory loss.").

[26] Food and Drug Administration, Radiation-Emitting Products, Health Issues, http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116282.htm (last visited Jan. 30, 2012) ("Over the past 15 years, scientists have conducted hundreds of studies looking at the biological

studies have been performed over the last two decades to assess whether mobile phones pose a potential health risk. To date, no adverse health effects have been established as being caused by mobile phone use.").

Since San Francisco has established no basis under its own governing statutes for compelling speech, it cannot establish that it has a compelling constitutional interest in mandating retailers' speech. *See, e.g., Playboy Entm't Grp.*, 529 U.S. at 821 (finding no compelling interest where "there is no probative evidence in the record which differentiates . . . [or] otherwise quantifies" the problem alleged to exist by the government); *Turner Broad. Sys.*, 512 U.S. at 666-668; *Interactive Digital Software*, 329 F.3d at 958-59 (finding the municipality's compelling interest "simply unsupported in the record" and that a "vague generality falls far short of a [sufficient] showing"); *see also Croson*, 488 U.S. at 490 ("The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress . . .").

---

effects of the radiofrequency energy emitted by cell phones. While some researchers have reported biological changes associated with RF energy, these studies have failed to be replicated. The majority of studies published have failed to show an association between exposure to radiofrequency from a cell phone and health problems.").

CONCLUSION

For the reasons stated above, CERC joins CTIA's request to reverse the portion of the decision below denying CTIA's motion for preliminary injunction and order the entry of a preliminary injunction prohibiting San Francisco from requiring retailers to disseminate material provided by the City.

Respectfully submitted,

/s/ Seth D. Greenstein
Robert S. Schwartz
Seth D. Greenstein (counsel of record)
David D. Golden
CONSTANTINE CANNON LLP
One Franklin Square
1301 K St. NW, Suite 1050 East
Washington, DC 20005
Telephone: (202) 204-3508
Fax: (202) 204-3501
rschwartz@constantinecannon.com
sgreenstein@constantinecannon.com

Counsel for Amicus Curiae
Consumer Electronics Retailers Coalition

February 1, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,602 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2/1/2012
Date

/s/ Seth D. Greenstein

Robert S. Schwartz
Seth D. Greenstein
David D. Golden
Attorneys for Consumer Electronics Retailers Coalition
CONSTANTINE CANNON LLP
One Franklin Square
1301 K St. NW, Suite 1050 East
Washington, DC 20005
Telephone: (202) 204-3508
Fax: (202) 204-3501
rschwartz@constantinecannon.com
sgreenstein@constantinecannon.com

9th Circuit Case Numbers: No. 11-17773, 17707

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

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 February 1, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Jane F. Thorpe
Scott A. Elder
ALSTON & BIRD LLP
1201 West Peachtree St.
Atlanta, GA 30309-3434

Cynthia Franklin
520 Ridgeway Drive
Bellingham, WA 98225

Signature: /s/ Seth D. Greenstein