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 H. Alsup)

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLANT CTIA –THE WIRELESS ASSOCIATION®

[All Parties Have Consented. FRAP 29(a)]

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CORPORATE DISCLOSURE STATEMENT

[FRAP 26.1]

National Federation of Independent Business Small Business Legal Center has no parent corporations and no publicly held corporation owns 10% or more of the stock of National Federation of Independent Business Small Business Legal Center.

PARTIES' CONSENT TO FILE AND AMICUS DISCLOSURE STATEMENT

[FRAP 29(a) & (c)]

All parties have consented to the filing of this *amicus* brief.

This brief was not authored by a party's counsel in whole or in part. Nor did a party or party's counsel contribute money that was intended to fund preparing or submitting the brief.

No person—other than National Federation of Independent Business Small Business Legal Center, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This appeal raises an important issue about whether a local government may compel a business to express the government's own controversial warnings and recommendations to customers, based on nothing more than the government's conjecture about unproven health risks.

Amicus National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

As a representative of small and independent business owners throughout the country, NFIB is concerned about the City of San Francisco's unprecedented assertion of power to compel retailers to act as mouthpieces for

the City's own, speculative warnings and recommendations. NFIB supports Plaintiff-Appellant CTIA—The Wireless Association®'s action challenging the City's efforts to compel retailers to host and convey the City's message concerning cell phone use. NFIB believes that the district court erred in its October 27 and November 7, 2011 Orders on CTIA's Motion for a preliminary injunction by (1) holding that the government can compel speech by retailers to customers without showing a real danger of deception or harm; (2) failing to apply heightened scrutiny to content-based speech regulations; (3) dramatically expanding *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); and (4) creating a new "factsheet" that failed to ameliorate, and in fact highlighted, the problems with a government compelling a private business to express the government's own warnings and recommendations based on no evidence of any real danger. If this Court were to affirm the district court's Order or accept the City's arguments in favor of its original "factsheet," poster, and stickers, it would establish a dangerous precedent threatening the freedoms of all businesses, especially the small and independent businesses that NFIB represents and that often do not have the resources to oppose burdensome government regulations or engage in effective counter-speech regarding such government messages.

SUMMARY OF ARGUMENT

The district court correctly determined that the Ordinance was unconstitutional insofar as it required retailers to pay for, display, and distribute certain posters, stickers, and a factsheet designed by a City department conveying the City's message about the characteristics and use of cell phones. But unfortunately the district court veered off course in its legal analysis, disregarded several bedrock constitutional free speech principles, and erroneously concluded that the City could compel retailers to distribute a revised factsheet.

Specifically, the district court "presume[d]" that the City may compel retailers to give customers "facts" (1) "alerting" customers to "a possible health risk" and (2) "suggesting precautionary steps to mitigate that risk"—all "based on nothing more than the possibility that an agent may (or may not) turn out to be harmful." ER 7, 10 (Oct. 27 Order). The court did not require the City to demonstrate that cell phone use is dangerous to human health or show that the Ordinance would alleviate any known risk. The court further treated the Ordinance as a routine regulation of "commercial speech," even though the Ordinance is not triggered by, or limited to, voluntary speech proposing a commercial transaction. And the court improperly extended the "reasonable relationship" standard articulated in *Zauderer* beyond government efforts to combat inherently misleading commercial advertising.

These legal mistakes, in turn, led the district court to propose, and simultaneously approve, a revised "factsheet" that the City now embraces and

seeks to compel all retailers to distribute to customers after a sale. Controlling precedent requires that this Court reject the district court's flawed legal analysis and erroneous result. The order should be reversed with instructions to enjoin all aspects of the Ordinance.

ARGUMENT

I. The First Amendment Protects Individuals And Associations From Being Compelled To Express A Particular Message Favored By The Government.

A. The Government Bears The Burden Of Proving The Constitutionality Of Compelled Speech Regulations.

"'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of Cal.* (*"P.G.&E."*), 475 U.S. 1, 11, 16 (1986) (plurality opinion) (emphasis in original)). "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *P.G.&E.*, 475 U.S. at 16 (1986) (citation omitted).

Accordingly, the United States Supreme Court consistently has required the government to bear the burden of justifying regulations that compel speech and has struck down laws compelling speakers to express or convey a government message that is at odds with the speakers' own beliefs

or interests and their right to choose not to express a particular message. *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down compulsory flag salute and recitation of Pledge of Allegiance for schoolchildren); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (striking down statute compelling drivers to display New Hampshire state motto "Live Free or Die" on a license plate); *P.G.&E.*, 475 U.S. at 11 (striking down statute compelling utility company to include messages of others in its billing envelopes); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (striking down statute compelling professional charity-solicitation companies to disclose details about how they were paid); *Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (rejecting government application of rule requiring attorney to accompany her "CFP" designation with a disclaimer); *Hurley*, 515 U.S. at 572-73 (striking down application of statute compelling parade organizers to allow participants in their parade with whose views they disagreed).

B. Regulations Compelling Speech Are Content-Based And Therefore Subject To Heightened Scrutiny.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). They are "presumptively invalid" and subject to heightened scrutiny. *United States v. Stevens*, 130 S.Ct. 1577, 1580 (2010) (striking down ban on videos depicting

animal cruelty); *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795 (striking down statute requiring charitable solicitors to disclose details about how they were paid). Therefore, statutes that compel speech must be treated "as a content-based regulation of speech." *Id.* (citing *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 256 (1974) (statute compelling newspaper to print an editorial reply "exacts a penalty on the basis of the content of a newspaper")).

As the Supreme Court has explained in numerous cases, heightened scrutiny is applied to government compulsions of speech, just as it is to government bans of speech:

> Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994) (citations omitted). For example, the Court has applied heightened scrutiny to strike down both content-based regulations *banning* utilities from including inserts in their billing envelopes and content-based regulations *compelling* utilities to include inserts in their billing envelopes. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980); *P.G.&E.*, 475 U.S. at 19-21.

Furthermore, heightened scrutiny is applied to both "compelled statements of 'facts'" and "compelled statements of opinion" because "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797-98 (applying heightened scrutiny to factual disclosures); *see also Hurley*, 515 U.S. at 573 ("[T]his 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.").

To survive heightened scrutiny, the government must show that the compelled speech regime promotes a compelling government interest and that the compelled speech is "a narrowly tailored means of serving [that] compelling state interest." *P.G.&E.*, 475 U.S. at 19; *Wooley*, 430 U.S. at 716-17.

II. The Fact That A Regulation Compels Speech In A Commercial Context Does Not Relieve The Government Of Its Burden Of Justifying The Regulation; Nor Does It Necessarily Reduce The Scrutiny That Must Be Applied By A Court.

The City's Ordinance conscripts retailers to present the City's message in their stores and to convey the City's message to customers after a sale. As implemented by the San Francisco Department of Environmental Regulations at an early point in this case, the Ordinance compelled retailers to (1) display an 11 by 17 inch, color poster prominently in their stores, (2) affix address-label-size stickers to their display materials, and (3) provide customers a two-sided 8.5 by 5.5 inch, color "factsheet" upon request and after each sale.

A13-A19 (S.F. Dep't of Envtl. Reg. SFE 11-07-CPO).[1] The City provides the posters and "starter kits" of 50 "factsheets," but the retailers must print the stickers and subsequent color "factsheets" at their own expense. *Id.*

The fact that the Ordinance compels speech inside a store and after a sale does not relieve the City of its burden to justify its compulsion of speech and show that the Ordinance survives constitutional scrutiny. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566-67 (2001) (invalidating regulations of in-store cigarette advertising). Similarly, the Ordinance is not necessarily subject to a lower level of scrutiny by a reviewing court simply because it compels speech by a business to customers. *See P.G.&E.*, 475 U.S. at 8; *Riley*, 487 U.S. at 796.

Regulations compelling a business to express the government's own warnings and recommendations to customers implicate core values protected by the First Amendment, including individual rights to free expression and society's interest in a free exchange of ideas. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to [support] speech on the side that it favors; and there is no apparent principle which distinguishes . . . minor [commercial] debates [from political ones]." *United States v. United Foods, Inc.*, 533 U.S. 405, 411, 413 (2001). Such compelled speech regulations threaten the individual interest "at

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[1] "A__" refers to the Addendum to the Opening Brief of Appellant CTIA—The Wireless Association®.

the heart of the First Amendment . . . that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State" and "pose the inherent risk that the Government seeks . . . to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Turner Broad. Sys.*, 512 U.S. at 641.

The adverse effects of such compulsory regulations are clear. They infringe on the right to free association by "impermissibly requir[ing the speaker] to associate with speech with which [the speaker] may disagree." *P.G.&E.*, 475 U.S. at 15. They infringe on the "'freedom *not* to speak publicly'" by forcing the speaker "either to appear to agree with [the contrary] views or to respond." *Id.* at 11 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 559 (1985)), 16. Therefore, the Supreme Court has applied heightened scrutiny to regulations compelling speech in the context of the interactions between businesses and customers.

In *P.G.&E.*, the Supreme Court struck down a California regulation compelling the Pacific Gas and Electric Company ("PG&E") to include the message of a third party in mailings to its customers. *P.G.&E.*, 475 U.S. at 20. Each month, PG&E mailed its customers a newsletter called *Progress* along with their bills. *Id.* at 8. The California Public Utilities Commission ordered PG&E to include a newsletter from a group seeking to communicate their own facts and opinions about utility rates and other issues to PG&E's

customers. *Id.* at 5. The Supreme Court found the Commission's order "necessarily burden[ed] the expression of" PG&E and subjected the order to heightened scrutiny because it was a content-based compelled speech regime that "force[d]" PG&E "to assist in disseminating" the message of a government-favored third party. *Id.* at 14-15 (quotation marks and citations omitted).

In *Riley*, the Supreme Court struck down a North Carolina statute compelling professional charity-solicitation companies to disclose to potential donors details about how they were paid. *Riley*, 487 U.S. at 795. The statute compelled the disclosure of purely commercial facts. *Id.* at 796. Nonetheless, the Court applied heightened scrutiny because of the nature of the speech being compelled and its likely intrusive and burdensome effect on the companies' business. As the Court explained, the "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Id.* at 796.

Considering the nature of the speech compelled by the City's Ordinance and its likely intrusion and burden on retailers' dealings with their customers, the Ordinance likewise must be subject to heightened scrutiny. *See* CTIA Opening Brief 24-39.

In a number of cases, the U.S. Supreme Court has addressed the government's power to regulate so-called "commercial speech"—*i.e.*, voluntary expression by an individual or business that "*propose[s]* a

commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (emphasis added); *see also, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (the "commercial speech" doctrine is limited to speech that proposes a commercial transaction); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (same); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (same).

Under the Supreme Court's "commercial speech" cases, voluntary expression proposing a commercial transaction is protected by the First Amendment but can be regulated by a government entity in a manner that is consistent with the government entity's power to regulate the underlying transaction. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772-73 (1976).

Therefore, the government may prevent expression that proposes an illegal transaction. *E.g.*, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973). The government also may enact and enforce regulations that prevent the dissemination of expression that proposes a lawful transaction in a manner that is false, deceptive, or misleading. *E.g.*, *Friedman v. Rogers*, 440 U.S. 1, 15 (1979). Two notable examples of the exercise of this government power to combat false, deceptive, or misleading commercial advertisements are *Zauderer*, 471 U.S. at 638, and *Milavetz, Gallop & Milavetz, P.A. v. United States*, --- U.S. ----, 130 S.Ct. 1324, 1339 (2010).

In *Zauderer*, the Supreme Court addressed the validity of an Ohio rule of professional conduct that requires attorneys who advertise contingent-fee services to disclose in their advertisements that a losing client might still be responsible for certain litigation costs and expenses. *Zauderer*, 471 U.S. at 638. The Supreme Court held that the state's advertising rule could be applied to an attorney whose advertisement (1) informed the public that "if there is no recovery, no legal fees are owed by our clients" and (2) failed to mention the non-obvious "technical" distinction between "legal fees" and litigation "costs." *Id.* at 651-52. The Court held that the "possibility of deception" from that type of contingent-fee advertisement was "*self-evident*" and there was no need for the state to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." *Id.* at 652-53 (emphasis added). "The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs" was deemed by the Court to be "reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed." *Id.* at 653.

In *Milavetz*, the Supreme Court addressed the validity of provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that require certain qualifying professionals to identify themselves as "debt relief agencies" in advertisements and further disclose that their potential professional services include filing for bankruptcy relief. *Milavetz*, 130 S.Ct. at 1330. The Court held that the federal statute's disclosure requirements

were constitutional as applied to attorneys who provide bankruptcy assistance to clients. *Id.* at 1341. As in *Zauderer*, the Court found that the federal statute was enacted to combat a "likelihood of deception" from professional advertising that was "self-evident" and thoroughly documented in the congressional record. *Id.* at 1340.

Under *Zauderer* and *Milavetz*, the government may require the disclosure of "accurate" factual information that is "reasonably related" to government efforts "to combat the problem of inherently misleading commercial advertisements." *Milavetz*, 130 S.Ct. at 1339; *Zauderer*, 471 U.S. at 651-52. However, that is as far as *Zauderer* and *Milavetz* go. The Supreme Court never has applied *Zauderer* or *Milavetz* to cases where "commercial speech" (advertising) proposes a *lawful* transaction in a manner that is *not* false, misleading, or deceptive.

Indeed, the Court has made it clear that when expression proposes a lawful transaction in a manner that is not false, misleading, or deceptive, the government may not regulate the expression unless it can show, at a minimum, that (1) there is a substantial government interest in regulating the expression, (2) the government's regulation directly advances that substantial government interest, and (3) the government's regulation is no more extensive than necessary to advance that substantial government interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

For example, in *In re R. M. J.*, 455 U.S. 191 (1982), the Supreme Court struck down the application of a Missouri Supreme Court Rule

regulating attorney advertising. The rule at issue restricted attorneys to advertising only certain specialties, accompanied by a particular disclaimer of expertise. *Id.* at 194-95. Because there was "no finding that [the attorney's] speech was misleading" and the advertisement in question was not "inherently misleading," the Court applied the intermediate scrutiny from *Central Hudson*. *Id.* at 203. Because "the State lawfully may regulate only to the extent regulation furthers the State's substantial interest," the Court required the state to show "a substantial interest" and that the restrictions on attorney advertising were "narrowly drawn." *Id.* at 203. As the Court made clear in *Milavetz*, that level of scrutiny applies to regulations of non-misleading speech, whether the regulation is a speech ban or a speech compulsion. *Milavetz*, 130 S.Ct. at 1340 (distinguishing *In re R.M.J.* from *Zauderer* and *Milavetz*, on the ground that *In re R.M.J.* did not involve inherently misleading advertising).

Furthermore, the Supreme Court has never applied *Zauderer* and *Milavetz* (or even the "intermediate" scrutiny standard articulated in *Central Hudson*) *outside* the context of government efforts to regulate voluntary speech by private parties proposing a commercial transaction. To the contrary, the Supreme Court has made it clear that *Zauderer*, *Milavetz*, and other "commercial speech" cases are concerned exclusively with government efforts to regulate speech by individuals and businesses that proposes a commercial transaction. Thus, "the *test* for identifying commercial speech" is whether the expression "propose[s] a commercial transaction." *State Univ.*

of N.Y. v. Fox, 492 U.S. at 473-74 (emphasis added, quotation marks and citations omitted). *See also*, *Thompson*, 535 U.S. at 367; *Cincinnati v. Discovery*, 507 U.S. at 423; *United States v. Schiff*, 379 F.3d 621, 626-31 (9th Cir. 2004) (applying "commercial speech" doctrine and *Zauderer* only after finding that speech ban and compelled speech were triggered by voluntary speech "urging the readers to buy his products," which was "an integral part of [the plaintiff's] whole program to market his various products"). The Supreme Court's careful formulation of the test for commercial speech tracks the rationale of the commercial speech doctrine: that the government's power to regulate the underlying transaction carries with it regulatory authority to protect customers by ensuring the accuracy and fairness of its ancillary solicitation. *See Virginia State Bd. Of Pharm.*, 425 U.S. at 772-73.

As discussed more fully below, the Ordinance is not limited to, or even concerned with, voluntary speech by private parties proposing a commercial transaction (*i.e.*, advertising), nor does it require the disclosure of "accurate" factual information that is "reasonably related" to government efforts "to combat the problem of inherently misleading commercial advertisements." Indeed, the Ordinance is not based on the City's power to regulate the underlying sale of cell phones. This case, accordingly, should not be viewed as a traditional "commercial speech" case and certainly should not be viewed as a routine application of *Zauderer* or *Milavetz*. Heightened scrutiny is required.

III. The District Court Erred In Its Analysis Of The Ordinance And In Refusing To Enjoin The Ordinance In Its Entirety.

The district court correctly determined that the Ordinance was unconstitutional insofar as it required retailers to host, pay for, and distribute the posters, stickers, and "factsheets" designed by the San Francisco Department of the Environment concerning the City's warnings and recommendations about the nature and use of cell phones. However, the district court's analysis of the First Amendment issues was flawed in multiple respects, and these legal mistakes led the court to the erroneous conclusion that the City could compel retailers to distribute a revised "factsheet" that the district court wrote and the City subsequently accepted. The controlling Supreme Court authorities discussed above preclude this Court from following the path charted by the district court and require a more rigorous constitutional review of the Ordinance. Under that more rigorous analysis, enforcement of the entire Ordinance must be enjoined.

There can be no serious dispute that the Ordinance compels retailers to present and distribute to customers the City's message expressing a clear viewpoint chosen by the City—a government-mandated warning that cell phones may not be safe and government-prescribed recommendations about using cell phones.

The Ordinance required retailers to display a poster "in a prominent location visible to the public" and "informational statements" (the stickers) alongside phones for sale. A5 (Ordinance). The poster and stickers must tell

customers that cell phones emit radiofrequency energy that is absorbed by the body, suggest ways customers can reduce exposure to radiofrequency energy, and inform customers that a "factsheet" is available from the retailer. *Id.* Retailers must also provide a copy of the "factsheet" to "every customer that purchases a cell phone." *Id.* The poster, stickers, and "factsheet" are all developed and designed by the San Francisco Department of the Environment. *Id.* at A8. The poster designed by that department includes a large, color graphic and the City's recommendations to reduce exposure to radiofrequency energy. A18 (poster). The stickers state, "Your head and body absorb RF energy from cell phones" and direct customers to "ask for San Francisco's free factsheet." A19 (stickers). The "factsheet" provides more of the same warnings, including that "[a]lthough studies continue to assess potential health effects of mobile phone use, the World Health organization has classified RF energy as a possible carcinogen," along with a series of recommendations "if you are concerned about potential health effects from cell phone RF energy." A17 (original "factsheet").

In requiring retailers to display the poster and affix the stickers alongside cell phones in stores, the Ordinance is like the statute struck down in *Wooley*, which forced New Hampshire drivers to display the state's "Live Free or Die" motto on their automobiles and thus turned the drivers' private property into a "billboard" for a state-selected message. *Wooley*, 430 U.S. at

715.[2] In requiring retailers to provide "factsheets" to customers after sales, the Ordinance is like the utility commission order struck down in *P.G.&E.*, which forced the utility to distribute a newsletter in its billing envelopes along with customers' bills for the utility's commercial services. *P.G.&E*, 475 U.S. at 5.

A. The District Court Improperly Relieved The Government Of Its Burden To Justify The Ordinance.

The district court's analysis of the First Amendment issues in this case is expressly based on a *presumption* that the government may compel retailers to give customers "facts" "alerting" customers to "a possible health risk" and "suggesting precautionary steps to mitigate that risk"—all "based on nothing more than the possibility that an agent may (or may not) turn out to be harmful." ER 10 (Oct. 27 Order). That presumption is unprecedented and irreconcilable with controlling law.

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[2] Below, the City argued that, because the poster and "factsheet" bear the seal of the City or otherwise attribute the message to the City, the Ordinance simply required retailers to subsidize speech by the government. Now, the City argues that the Ordinance does not require retailers to endorse the City's message, for the same reasons. City Cross-Appeal Opening Brief and Answering Brief ("City Brief") at 38-39. That argument was rejected in *Wooley*. *Compare Wooley*, 430 U.S. at 715, 715 n.11 *with* 430 U.S. at 719-22 (Rehnquist, J., dissenting, arguing that the state seal would cause viewers to attribute the message to the state); *cf. Caruso v. Yamhill Cnty.*, 422 F.3d 848, 858 (9th Cir. 2005) (holding a voter ballot is government speech because "unlike . . . [in] *Wooley*, [the statute did] not require that owners use their private property to transmit the State's message").

As the City concedes, the government *always* bears the burden of justifying *any* speech regulation. *Compare above* Section I.A, *and* CTIA Opening Brief 18 *with* City Brief 13-14. Accordingly, the City always has an obligation to demonstrate that the "harms it recites are real" and that its regulation of speech "will, in fact, alleviate them to a material degree." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000) (applying heightened scrutiny); *Lorillard Tobacco*, 533 U.S. at 555 (applying *Central Hudson* intermediate scrutiny); *Ibanez*, 512 U.S. at 143 (applying *Zauderer*). "Unsupported assertions" about unknown risks are insufficient under heightened scrutiny, intermediate scrutiny, or any other possible standard of scrutiny. *See Playboy Entm't Grp.*, 529 U.S. at 817 (2000); *Lorillard Tobacco*, 533 U.S. at 555; *Ibanez*, 512 U.S. at 143.

Measured against this controlling legal principle, the district court's presumption in favor of government speech regulations cannot stand. The First Amendment forbids any government entity from compelling retailers to give customers "facts" "alerting" customers to "a possible health risk" and "suggesting precautionary steps to mitigate that risk," "based on nothing more than the possibility that an agent may (or may not) turn out to be harmful." ER 10 (Oct. 27 Order). Before the government can restrict or compel speech, it must show a reviewing court that there is either *evidence* or a self-evident *reason* to believe that the danger it recites is real, and it must show that the speech regulations will, in fact, alleviate the danger in a material way. Here, the City can provide no actual evidence or self-evident

reason to believe that the characteristics and use of cell phones pose a genuine danger to humans, and it has no way to show that the compulsory presentation and dissemination of its message to customers will, in fact, alleviate any genuine danger.

The district court's presumption is contrary to controlling law and threatens fundamental interests at the heart of the First Amendment. *See above* Section II. Moreover, if the district court's presumption is adopted by this Court, the precedent would disproportionately harm the small and independent businesses that NFIB represents. Rather than making the government show that there is a real danger of harm, businesses will be forced to prove that the dangers alleged by the government do not exist. A small business could be forced to acquiesce to compelled speech regimes because it lacks the wherewithal to undertake legal action and/or fund scientific study to overcome such a presumption. It could be forced to comply based on nothing more than the government's assertion that there may (or may not) be a compelling reason.

It was error for the district court to relieve the government of its burden to show a real interest justifying its speech regime.

B. The District Court Improperly Treated The Ordinance As A Traditional Regulation Of Advertisers' "Commercial Speech" And Improperly Extended The U.S. Supreme Court's Decisions In *Zauderer* And *Milavetz*.

Because this case involves a government effort to compel speech under circumstances that concern core First Amendment values, the district court should have required the City to show that the Ordinance satisfies the type of heightened scrutiny applied to compelled speech in *P.G.&E.*, *Riley*, and *Wooley*. Under such heightened scrutiny, the City should have been required to show that the speech mandated by the Ordinance is "a narrowly tailored means of serving [a] compelling state interest." *P.G.&E.*, 475 U.S. at 19; *Riley*, 487 U.S. at 798-99; *Wooley*, 430 U.S. at 716-17.

The district court, however, did not subject the Ordinance to such heightened scrutiny. Instead, the court believed that a "less exacting" form of scrutiny was appropriate because the Ordinance compels the distribution of carefully edited "factoids" "[i]n the commercial marketplace." ER 7 (Oct. 27 Order). In other words, the district court *presumed* that the Ordinance was a traditional effort to regulate "commercial speech" subject to the "reasonable relationship" standard applied by the Supreme Court in *Zauderer* and *Milavetz*. *Id.* This was a serious misstep.

The Supreme Court's "commercial speech" doctrine does not apply to all efforts to regulate speech inside a store, after a sale, or in some other "commercial" context. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Instead, the "commercial speech" doctrine applies exclusively to

government efforts to regulate voluntary speech by an advertiser that proposes a commercial transaction. *See P.G.&E.*, 475 U.S. at 8. That is why the Supreme Court repeatedly has specified that "*the test for identifying commercial speech*" is whether the expression "propose[s] a commercial transaction." *State Univ. of N.Y. v. Fox*, 492 U.S. at 473-74 (emphasis added). As discussed above, this test ensures that the government can regulate advertising only in accordance with its power to regulate the underlying commercial transaction. *See Virginia State Bd. of Pharm.*, 425 U.S. at 772-73.

The City's Brief demonstrates why the Ordinance is not a traditional effort to regulate "commercial speech" under Supreme Court precedent. The City takes pains to note that (1) the Ordinance is *not* triggered by, or limited to, voluntary speech by retailers proposing a commercial transaction and (2) is *not* an effort to protect consumers from false, misleading, or deceptive commercial advertisements by anyone. *See* City Brief 37-38 (acknowledging that the Ordinance compels retailers to convey the City's message "[r]egardless of what the retailers are saying—indeed, regardless of whether they are saying anything at all . . . for the sole reason that they sell phones"); *id.* at 17-20, 31 (acknowledging that the Ordinance is not an effort to protect consumers from false, misleading, or deceptive commercial advertisements).

Furthermore, the City's Brief concedes (as it must) that the Ordinance is not based on any governmental power that the City possesses to regulate the underlying commercial transaction—*i.e.*, the sale of cell phones that have

been expressly approved for sale by the FCC. *Compare* City Brief 41-42 *with United Foods, Inc.*, 533 U.S. at 412 (finding compelled speech regime permissible as part of broader, economic regulation, but impermissible absent such regulation). It is clear that the City may not restrict the sale of cell phones approved for use by the FCC. The City's position—that it can compel speech absent any speech by the retailers and despite the City's own lack of authority to regulate the underlying commerce—would dramatically expand the reach of governmental speech compulsions, allowing any government entity to compel speech anywhere commerce takes place.

Finally, unlike the limited disclosures in *Zauderer* and *Milavetz*, the extensive warnings mandated by the Ordinance contain much more than "accurate" factual information. *Milavetz*, 130 S.Ct. at 1339; *Zauderer*, 471 U.S. at 651-52.

In sum, this is not a case, like *Zauderer* or *Milavetz*, where a government actor (1) has the power to regulate the underlying commercial transaction or activity and (2) has attempted to require the disclosure of "accurate" factual information "to combat the problem of inherently misleading commercial advertisements." *Milavetz*, 130 S.Ct. at 1339; *Zauderer*, 471 U.S. at 651-52. It was an error for the City to treat the Ordinance as a traditional regulation of "commercial speech" and to expand the "reasonable relationship" standard applied by the Supreme Court in *Zauderer* and *Milavetz* to this government action. The Ordinance should have been subjected to heightened scrutiny consistent with *P.G.&E.* and *Riley*.

P.G.&E., 475 U.S. at 19; *Riley*, 487 U.S. at 798-99. And tellingly, the City makes no argument in this Court that the Ordinance could survive such heightened scrutiny.

IV. The District Court's Revised "Factsheet" Highlights The Problems With The District Court's Improper Presumption In Favor Of The City And Expansion Of The Reasonable Relationship Standard.

The district court struck down most of the Ordinance, but it held that the City could compel the dissemination of a revised "factsheet" created by the district court itself. ER 10-13 (Oct. 27 Order). The district court sought to correct some of the flaws in the original "factsheet," specifically the "overall impression . . . that cell phones are dangerous" and "the failure to explain the limited significance of the WHO 'possible carcinogen' classification." *Id.* As CTIA points out, the district court exceeded its Article III authority by rewriting the "factsheet" rather than requiring the City to undertake the normal legislative process. CTIA Opening Brief 49-52. In addition, the revised factsheet does not cure, and in fact highlights, the fundamental problems with the district court's own presumption in favor of the government and its expansion of the commercial speech doctrine and the "reasonable relationship" standard applied by the Supreme Court in *Zauderer* and *Milavetz*.

The court's effort to rewrite the original "factsheet" for the City is a direct manifestation of its legally erroneous *presumption* that the City can

compel retailers to give customers "facts" "alerting" customers to "a possible health risk" and "suggesting precautionary steps to mitigate that risk," all "based on nothing more than the possibility that an agent may (or may not) turn out to be harmful." ER 10 (Oct. 27 Order). The revised "factsheet" is still not supported by any evidence or self-evident reason suggesting that the characteristics and use of cell phones pose a genuine danger to anyone or that the compulsory presentation and dissemination of the revised factsheet to customers will, in fact, alleviate any danger. The district court's effort to rewrite the "factsheet" likewise does not bring the Ordinance within the ambit of the "commercial speech" doctrine. The revised "factsheet" is still unrelated to any speech by the retailers proposing a commercial transaction and, in fact, will be disseminated to customers only after a sale has been completed. *Bolger*, 463 U.S. at 66; *see Cent. Hudson* 447 U.S. at 566; *Zauderer*, 471 U.S. at 638. Nor does the factsheet combat any inherently false, deceptive, or misleading commercial advertising. *See Milavetz*, 130 S.Ct. at 1339; *Zauderer*, 471 U.S. at 652.

Under heightened scrutiny, the City would have been obliged to show (and the district court would have been unable to conclude) that the mandatory dissemination of the revised "factsheet" promotes a compelling government interest and is "a narrowly tailored means of serving [that] compelling state interest." *P.G.&E.*, 475 U.S. at 19. Like the City's original poster, stickers, and "factsheet," the district court's revised "factsheet" does not satisfy this standard.

If the City wants to inform consumers of the *possibility* of an *unknown risk* of harm from cell phone use, it is free to do so by speaking to the public itself, without conscripting retailers to convey its message to customers and thereby abridging retailers' free speech rights. Yet, the City has not even attempted to speak to the public on its own. Instead, the City's first reaction to an *unknown risk* of harm from a product it cannot regulate has been to conscript retailers to convey the City's alarmist message. This approach is unprecedented and unconstitutional. *See e.g. Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 538 (W.D. Ky. 2010) (noting that Congress spent "decades . . . implementing various measures," including programs to educate the public about the known risks of tobacco use, before it "decided to add label and advertising restrictions to its comprehensive regulation of the tobacco industry").

CONCLUSION

If this Court were to permit the City to compel the distribution of the district court's revised "factsheet" or accept the City's arguments in favor of its original "factsheet," poster, and stickers, it would directly harm small retailers; independent electronics or convenience stores that sell cell phones would be forced to incur the costs of complying with the Ordinance, including the costs of printing the materials and displaying the poster as well as the costs of implementing new policies and training employees. It also would

establish a precedent threatening the freedoms of all businesses, especially the small and independent businesses that NFIB represents.

The order should be reversed with instructions to enjoin all aspects of the Ordinance.

DATED: February 1, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rules 29 (c)(7) and 32-1, the attached brief is proportionately spaced, has a plain Roman typeface of 14 points or more and contains 6,335 words, excluding the parts of the brief exempted by Rule 32(a)(7)(b)(iii), as counted by Microsoft Word 2003, the word processing software used to prepare this brief, *i.e.* it is less than one-half the maximum length authorized by these rules for the Appellant CTIA's opening brief (14,000 words).

DATED: February 1, 2012.

/s/ David J. Bird

David J. Bird

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2012, I electronically filed the foregoing brief of *amicus curiae* National Federation of Independent Business Small Business Legal Center with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

I also certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing brief by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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