No. 11-17707

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CTIA - THE WIRELESS ASSOCIATION,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Honorable William Alsup, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CASCADE POLICY INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REVERSAL

DEBORAH J. LA FETRA
ADAM R. POMEROY
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae
Pacific Legal Foundation
and Cascade Policy Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Pacific Legal Foundation, a non-profit corporation organized under the laws of California, and Cascade Policy Institute, a non-profit, non-partisan public policy research and educational organization organized under the laws of Oregon, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Rule of Court

Page

Miscellaneous

Page

Page

IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) and Cascade Policy Institute (CPI) file this amicus curiae brief in support of Plaintiff-Appellant CTIA-The Wireless Association® (CTIA). Both parties have consented to the filing of this brief. *See* Motion to Set January 18, 2002 as the Deadline for Filing of All Briefs Amicus Curiae at 1.

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced non-profit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. Through that project, PLF seeks to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice systems, and barriers to the freedom of contract. To that end, PLF has participated in several cases before this Court and others on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See*, *e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island & Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); and *Bank of America v. City & County of San Francisco*, 309 F.3d 551 (9th Cir. 2002). PLF attorneys also have

published on the commercial speech doctrine. *See*, *e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004); Timothy Sandefur, *The Right to Earn a Living* (2010).

CPI is a twenty-one year old non-profit public policy research organization based in Portland, Oregon. Its mission is to advance public policy alternatives that foster individual liberty, personal responsibility, and economic opportunity. CPI published a key study cited in this brief's explanation of how mandatory labeling requirements can harm the public interest by raising the cost of goods and services to consumers. The study sets out arguments for why voluntary labeling is a better alternative for consumers, likely providing better information in more understandable forms without the deleterious effects of their mandatory counterparts. The study also discusses the constitutional limitations on mandatory labeling that likely apply to this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

San Francisco's novel cell phone warning regime requires the disclosure of an alarmist and misleading message about the safety of cell phones, even though the City concedes that there is absolutely no evidence that cell phones have adverse health effects, specifically carcinogenic effects, on human beings. *See CTIA - The Wireless Ass'n v. City & County of San Francisco*, No. C10-03224, 2011 U.S. Dist. LEXIS 124505, at *26 (N.D. Cal. Oct. 27, 2011) (order granting motion for preliminary

injunction). Furthermore, the Federal Communications Commission (FCC) has adopted Radio Frequency (RF) energy emission safety standards that ensure that all cell phone use is safe for the general public. *Id.* at *21 (criticizing the factsheet as misleading because it implies that cell phones are dangerous when "all of the cell phones sold in the United States must comply with safety limits set by the FCC").

Despite the clear lack of any evidence of harm, the lower court incorrectly held that San Francisco could compel government warnings and recommendations on the basis of nothing more than a "precautionary principle" that there is a *possibility* that one day cell phones *might* be shown to carry some risk of harm.

First Amendment doctrine and the public interest all weigh heavily in favor of granting relief to CTIA. Accepting San Francisco's arguments, as the district court did, and expanding *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), to encompass all factual disclosures, and not merely those intended to combat misleading commercial speech, is incompatible with the First Amendment and promotes both over-warning and senseless mandatory labeling that ultimately harm consumers and the public interest.

Additionally, applicable precedent requires that, at a minimum, this Court review San Francisco's ordinance under the intermediate scrutiny test laid out in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), not the rational basis test laid out in *Zauderer*, 471 U.S. at 651, because

Zauderer is an extremely narrow exception for misleading or deceptive speech that does not apply in this case. Lastly, even if the *Zauderer* test did apply, the lower court incorrectly upheld the "factsheet" requirement under that test. Under rational basis scrutiny, San Francisco lacks any legitimate interest for demanding dissemination of its alarmist, controversial, and misleading warnings.

ARGUMENT

I

PUBLIC POLICY AND FIRST AMENDMENT VALUES STRONGLY FAVOR RELIEF

Expanding *Zauderer* to encompass all factual disclosures, and not merely those combating misleading commercial speech, as the City seeks, is constitutionally infirm and unwise. Employing the precautionary participle to mandate opinionated speech is flatly incompatible with First Amendment principles. Untethering *Zauderer* from its carefully circumscribed limits would give government a blank check to mandate disclosures based on "consumer curiosity," the "possibility of harm," or other nebulous "right to know" theories. Doing so is against the public interest because it can result in overwarning as well as senseless and costly labeling of commodities.

A. The Precautionary Principle Is Incompatible with First Amendment Doctrine

The precautionary principle is antithetical to First Amendment doctrine. Indeed, "much of American free speech doctrine can be seen as a rejection of the

precautionary principle." Frederick Schauer, *Free Speech in an Era of Terrorism: Is It Better to Be Safe Than Sorry?: Free Speech and the Precautionary Principle*, 36 Pepp. L. Rev. 301, 304 (2009). The principle extends far beyond mandated disclosures: the idea is that, "having identified the possibility of a catastrophic occurrence—whether it be nuclear disaster, environmental upheaval, or the loss of many important species—under conditions of uncertainty, we should err on the side of eliminating those conditions that might possibly produce the catastrophe." *Id.* at 305. Likewise, in the free speech context, if "we define the catastrophe as the overthrow of the government or a major terrorist attack, a commensurate precautionary principle would demand that we vigilantly restrict speech in the service of guarding against the catastrophe." *Id.* The problem with this idea is that "[a]ctual free speech doctrine, however, demands just the reverse. It requires us to accept the uncertain risk of a catastrophe rather than restrict the speech that might cause it." *Id.*; *accord Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

Similarly, it is not permissible for government to force speech to counteract an uncertain risk of harm. "The mere existence of [a] risk, however, is not necessarily

enough to justify a warning." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 14 (Cal. 2004). Although *Dowhal* arose in a different context,[1] its insights are instructive. In *Dowhal*, the court noted that even a truthful warning can be misleading. *Id.* at 12. The court explained that whether a label is potentially misleading "is essentially a judgment of how the consumer will respond to the language of the label." *Id.* at 14. Even "a truthful warning of an uncertain or remote danger may mislead the consumer into misjudging the dangers stemming from use of the product and consequently making a medically unwise decision." *Id.* Thus, even though "there is reason to believe that nicotine [contained in defendant's over the counter nicotine replacement therapies, i.e., gum and patches designed to help consumers quit smoking] can cause reproductive harm, plaintiff has offered no qualitative assessment of this risk" and hence the "mere existence of the risk . . . is not necessarily enough to justify a warning; the risk of harm may be so remote that it is outweighed by the greater risk that a warning will scare consumers into foregoing use of a product that in most cases will be to their benefit." *Id.* Therefore, "even if

[1] Specifically, *Dowhal* was a preemption case. 88 P.3d at 3. The question was whether a California state regulation requiring a label for defendant's product, including language indicating that use of the product could harm a fetus, was preempted by a Food and Drug Administration (FDA) requirement which mandated other language that was not as broad in its communications about potential harm as the California label. *Id.* at 3-4. The court found that the FDA regulations preempted California law. *Id.* at 14-15.

scientific evidence supports the existence of a risk, a warning is not necessarily appropriate: 'The problems of overwarning are exacerbated if warnings must be given even as to very remote risks.'" *Id.* at 13 (quoting *Carlin v. Superior Court*, 920 P.2d 1347, 1360 (Cal. 1996)).

Just as in *Dowhal*, San Francisco has not produced any actual evidence that cell phones, the regulated product, lead to any danger. Indeed, San Francisco admitted that there is no evidence that cell phone emissions cause cancer. It rests its warnings on the conjecture that one day such a link *might* be found. Thus, the relevance of *Dowhal*'s insights: the risk of harm (from cell phone energy) is so remote that it is outweighed by the greater risk that a warning will scare consumers into forgoing use of a product that in most cases will be to their benefit. San Francisco has no legitimate interest in mandating warnings where there is no evidence that cell phone energy emissions carry a risk of harm. Furthermore, San Francisco's precautionary principle is incompatible with general First Amendment doctrine which requires citizens and legislatures to accept uncertain risks of harm rather than place restrictions on speech.

B. Over-Warning Is Against the Public Interest

Requiring retailers to include unnecessary warnings on their products leads to consumer frustration and confusion rather than added safety. "Not all warnings . . . promote user safety. Requiring manufacturers to warn their products' users in all

instances would place an onerous burden on them and would 'invite mass consumer disregard and ultimate contempt for the warning process.'" *Johnson v. American Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2008) (citing *Finn v. G. D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984) (quoting Aaron D. Twerski, *et al.*, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 Cornell L. Rev. 495, 521 (1976)).

Over-warning risks decreasing the effectiveness of warnings by burying the important among the trivial. Described as "sensory overload" by one court, *Dunn v. Lederle Laboratories*, 328 N.W.2d 576, 580 (Mich. Ct. App. 1982), "the more that product manufacturers warn of risks that never materialize, the less likely product users are to heed those warnings." Robert G. Knaier, *An Informed-Choice Duty to Instruct? Liriano, Burke, and the Practical Limits of Subtle Jurisprudence*, 88 Cornell L. Rev. 814, 853 (2003). Thus, "[w]arnings, in order to be effective, must be selective." *Dunn*, 328 N.W.2d at 581 (quoting Twerski, *supra*, *Use and Abuse*, at 514). Warnings "must call the consumer's attention to a danger that has a real probability of occurring and whose impact will be significant." *Id.* If consumers merely ignored excessive warnings, the problem might be minimal: the only superfluous costs would be those of providing the warnings. However, consumers might begin to ignore not only the excessive warnings, but also those that are crucial to safe product use.

As warning labels become increasingly crowded with seemingly redundant, useless admonitions to avoid subjecting oneself to obvious or speculative risks, product users and consumers may increasingly view all warnings as similarly useless, even those that advise of non-obvious or likely risks. Knaier, *supra*, at 853. Thus, the New York Court of Appeals counsels that "[r]equiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware." *Liriano v. Hobart Corp.*, 700 N.E.2d 303, 308 (N.Y. 1998). In considering the imposition of a warning in a case of non-existent, or even marginal, risk, the "story of the boy who cried wolf is an analogy worth contemplating." Twerski, *supra*, *Use and Abuse*, at 514; *see also Ayers v. Johnson & Johnson Baby Products Co.*, 818 P.2d 1337, 1342 (Wash. 1991) (describing "a deluge of indiscriminate warnings" as the " 'boy-who-cried-wolf' syndrome").

The combination of warnings required by government regulations and products liability law results in over-warning and thereby dilutes consumers' attention to legitimately flagged risks. Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" From the "Need to Know" About Consumer Product Hazards*, 11 Yale J. on Reg. 293, 296 (1994). The problems that ensue are described as

> dilution[, which] refers to the risk that additional warnings about relatively inconsequential hazards may cause consumers to become less attentive to labels as a whole, including some important aspects of

> labeling such as directions for proper use. Overreaction is a complementary problem, meaning that consumers may become preoccupied with information about trivial hazards. For instance, consumers may forego use of net beneficial products in response to warning statements, or may shift to equally beneficial substitutes that actually pose greater (though perhaps less alarming) risks.

Id. at 297. Thus, federal regulators caution against over-warning: for example, the regulations for general labeling conditions for over-the-counter drug labeling acknowledge that "if labeling contains too many required statements . . . the impact of all warning statements will be reduced." *Id.* at 381 (citing 40 Fed. Reg. 11,717 (Mar. 13, 1975) ("In addition there is a space limitation on the number of statements that can appear on the labeling.")); *see also* 53 Fed. Reg. 30,522, 30,530 (Aug. 12, 1988) ("The agency agrees that too many warning statements reduce the impact of important statements."). And Congress, too, has acknowledged the dangers of over-warning:

> If labeling were required to caution against the risk of even the most trifling indisposition, there would hardly be any substance . . . which would not have to bear cautionary labeling, so that consumers would tend more and more to disregard label warnings, thus inviting indifference to cautionary statements on packages of substances presenting a real hazard of substantial injury or illness.

H.R. Rep. No. 86-1861 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2833, 2837.

San Francisco's ordinance, based on nothing more than a highly speculative "possibility of harm," mandates exactly the type of over-warnings that courts, federal agencies, and commentators have cautioned against:

> [B]oth common sense and experience suggest that if every report of a possible risk, no matter how speculative, conjectural, or tentative, imposed an affirmative duty to give some warning, a manufacturer would be required to inundate [consumers] indiscriminately with notice of any and every hint of danger, thereby inevitably diluting the force of any specific warning given.

Finn, 677 P.2d at 1153 (citing Aaron D. Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 Hofstra L. Rev. 861, 932-35 (1983); *Thompson v. County of Alameda*, 614 P.2d 728, 736 (Cal. 1980)). It is precisely because warning labels are an important source of consumer information that resellers should not be forced to include material that does not serve a specific and necessary purpose. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 804 (1988) (Scalia, J., concurring) ("[I]t is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.").

C. Approving San Francisco's "Factsheet" Could Lead to Harmful and Senseless Mandatory Labeling

Adopting the City's proposed standard of review would provide a legal framework that *per se* approves senseless mandatory labeling of commodities. An example of one such folly is the labeling of genetically modified (GM) food.

The movement to mandate labeling for GM food rests entirely on a consumer's "right to know." For example, both Oregon and the United States Congress have

proposed laws which would force labeling of genetically modified food. *See* Oregon Ballot Measure 27 (2002);[2] H.R. 3553, 112th Cong. (2011).[3] Furthermore, California is poised to have the California Right to Know Genetically Engineered Food Act, mandating GM food labels, on the November 2012 ballot.[4] Like San Francisco's Ordinance, what all these various movements have in common is that they are supported not by a question of safety or quality differences, but upon a generalized consumer interest or "right to know."[5]

Furthermore, and similar to cell phone RF energy, there is no conclusive evidence that GM food or the technologies that produce it give rise to health or safety risks. In fact, the FDA has concluded that there is "no material difference in

---

[2] *Available at* http://www.sos.state.or.us/elections/pages/history/archive/nov52002/guide/measures/m27.htm (last visited Jan. 23, 2012).

[3] The Generally Engineered Food Right to Know Act has been introduced in every congressional session from 1999 (106th Congress) to 2011 (112th Congress). *See* http://www.govtrack.us/congress/bill.xpd?bill=h112-3553&tab= related (last visited Jan. 23, 2012).

[4] The Committee for the Right to Know Press Release, *California Ballot Initiative to Require Labeling of Genetically Engineered Foods Submitted to Attorney General*, Nov. 9, 2011, *available at* http://www.labelgmos.org/initiative_filed_with_the_state (last visited Jan. 23, 2012).

[5] *See* Oregon's 2002 General Election Online Voters' Guide, Measure 27, Arguments in Favor, *available at* http://www.sos.state.or.us/elections/pages/history/archive/nov5 2002/guide/measures/m27fav.htm (last visited Jan. 23, 2012); The California Right to Know Genetically Engineered Food Act, H.R. 3553, 112th Cong., § 2 Statement of Purpose, § 1 Findings and Declarations (2011), *available at* http://www.organic consumers.org/CAinitiativelanguage.pdf (last visited Jan. 23, 2012).

nutrition, composition, or safety" between genetically modified food and food that has not been genetically modified; GM food and conventional food are substantial equivalents. Frederick H. Degnan, *The Food Label and the Right-to-Know*, 52 Food Drug L.J. 49 (1997); *accord Statement of Policy: Foods Derived From New Plant Varieties*, 57 Fed. Reg. 22,984 (May 29, 1992); *see also* U.S. Food & Drug Admin., *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering*; Draft Guidance (Jan. 2001) ("The [1992] policy states that FDA has no basis for concluding that bioengineered foods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding.").[6] In the future, tests could be developed which might identify some harm or currently unknown long-term effect, but for the time being the FDA has concluded that such concerns are not substantial. *Id.* They remain a mere possibility.

[6] *Available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm059098.htm (last visited Jan. 23, 2012).

The harms of imposing such forced labeling, on the other hand, are quite clear:

- **Enormous Monetary Costs.** GM food labels would increase a consumer's food bill 10% or more.[7] This is so because accurate labeling requires an extensive identity preservation system from farmer to elevator to grain processor to food manufacturer to retailer.[8] In other words, a wholly separate commodity stream would be have to be created for each product because GM and conventional food are often indistinguishable from each other.[9] Additionally, either testing or record-keeping would have to be done at various steps along the food supply chain. Lastly, complex regulatory agencies would either need to be created or expanded in order to administer the law.

---

[7] P. Byrne, Colo. State Univ., *Labeling of Genetically Engineered Food* (Sept. 2010), *available at* http://www.ext.colostate.edu/pubs/foodnut/09371.html (last visited Jan. 23, 2012) (citing Guillaume P. Gruère & S.R. Rao, *A Review of International Labeling Policies of Genetically Modified Food to Evaluate India's Proposed Rule*, 10(1) AgBioForum 51 (2007), *available at* http://www.agbioforum.org/v10n1/v10n1a06-gruere.pdf (last visited Jan. 23, 2012)); Cascade Policy Institute, *Eat, Drink, and Be Merry: Why Mandatory Biotech Food Labeling Is Unnecessary*, at 14 (Oct. 2002) ("a labeling mandate would be expected to raise the retail price of processed foods by at least nine to ten percent" (citation omitted)), *available at* http://cascadepolicy.org/pdf/env/I_120.pdf (last visited Jan. 23, 2012).

[8] Byrne, *supra*, note 7 (citing Richard Maltsbarger & Nicholas Kalaitzandonakes, *Direct and Hidden Costs in Identity Preserved Supply Chains*, 3(4) AgBioForum 236 (2000), *available at* http://www.agbioforum.org/v3n4/v3n4a10-maltsbarger.pdf (last visited Jan. 23, 2012)).

[9] Cascade Policy Institute, *supra*, note 7, at 9, 14.

- **Misleading.** Labels are a valuable source of information for consumers. This is why federal law prohibits label statements that are likely to be misunderstood by or deceive consumers, even if technically true. Labeling a food, such as broccoli, as being "cholesterol-free" could run afoul of the FDA's rules because no broccoli contains cholesterol. The misleading inference is that the labeled broccoli is cholesterol-free, while other broccoli is not. Similarly, a GM food label could be misunderstood by consumers as a warning about an essential difference in nutrition, composition, or safety between GM and conventional foods. The inference the label provides is misleading, however, because the evidence does not support this.[10]

- **Cost Shifting.** The call for labeling GM food suggests that the actual demand for the information is low, since the calls come primarily from those who either wish to purchase non-GM food or who desire that others purchase non-GM food.[11] One of the most important measures of true consumer demand for information is a willingness to pay for the service. Segregation, certification, and labeling carry

---

[10] *Id.* at 13 (citation omitted).

[11] Mandating GM labeling is indeed seen as a way of exorcizing GM food from the food chain entirely. Citing Europe as an example proving that "Labels Drive GMOs off the Market," the backers of the proposed California Right to Know Genetically Engineered Food Act have made the removal of GM foods from the market place their explicit goal. Ronnie Cummins, Organic Consumers Association, *The California Ballot Initiative: Standing Up to Monsanto* (Oct. 7, 2011), *available at* http://www.organicconsumers.org/articles/article_24074.cfm (last visited Jan. 23, 2012).

enormous costs and requiring producers to label GM food shifts much of this cost from those who are demanding it onto those consumers who are not. This indicates that those who favor labeling are not actually willing to pay the full cost of the information they wish to use in making decisions—forcing others to pay the bill for them is hardly reasonable or equitable.[12]

Mandatory labeling of GM food carries significant costs and no clear benefit. Adopting the City's proposed standard of review—which would *per se* authorize this sort of labeling—could lead any number of such senseless mandatory disclosure requirements. The point is not that government should be prohibited from mandating labels, in this or any other circumstance, but rather that due to the high costs of such labeling the public interest demands that forced labeling be subjected to normal, heightened scrutiny review. The public interest weighs in favor of applying *Zauderer*'s rational basis review only where the government is seeking to prevent consumer deception or misleading statements—a situation not present in this case.

[12] Cascade Policy Institute, *supra*, note 7, at 14-15.

II

COMPELLED DISTRIBUTION OF THE "FACTSHEET" IS UNCONSTITUTIONAL

A. Heightened Scrutiny, Not Rational Basis Under *Zauderer*, Is the Proper Test in This Case

Heightened scrutiny, not rational basis review, is the proper test for reviewing San Francisco's requirement to distribute the "factsheet." Restrictions and compulsions are two sides of the same First Amendment coin: just as the First Amendment protects the positive right to speak, "[t]here is necessarily . . . a concomitant freedom not to speak publicly" which applies with equal force. *PG&E Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986). This "right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), applies with equal force in the commercial speech context.[13] *PG&E*, 475 U.S. at 16 ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say." (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a right of reply for political candidates in newspapers

[13] "In fact, the Supreme Court has suggested, without holding, that the government may be required to assert an even more compelling interest when it infringes the right to refrain from speaking than is required when it infringes the right to speak." *Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 651 F.3d 218, 242 (2d Cir. 2011) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.")).

unconstitutional))). What form of heightened scrutiny applies here is the harder question.

Although regulations of commercial speech are generally subject to intermediate scrutiny, *see Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566, when a law is content-based it is subject to strict scrutiny even if the law is regulating commercial speech. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 2667-68 (2011); *PG&E*, 475 U.S. at 19; *R.J. Reynolds Tobacco Co. v. USFDA*, No. 11-1482, 2011 U.S. Dist. LEXIS 128372, at *21-*26 (D.D.C. Nov. 7, 2011), *appeal docketed*, No. 11-5332 (D.C. Cir. Nov. 30, 2011). Because San Francisco's ordinance requires cell phone retailers to disseminate opinions with which they disagree, the ordinance appears to be content based, and hence should be subjected to strict scrutiny. *See Riley*, 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [and as such is] a content-based regulation of speech." (citing *Miami Herald Publ'g Co.*, 418 U.S. at 256)). Even if the ordinance is not content-based, however, it is still subject to heightened scrutiny.

The United States Supreme Court recently held that "restrictions [including compulsions] on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010) (stating the holding of *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566). The United States Supreme Court has only applied a lower

standard in narrow cases focused on preventing misleading commercial speech. *See*, *e.g.*, *Zauderer*, 471 U.S. at 651; *Milavetz*, 130 S. Ct. at 1339-41.

Zauderer is the very limited, narrow exception to *Central Hudson*'s general rule. In *Zauderer*, the Supreme Court reviewed an Ohio state bar disciplinary regulation requiring attorneys who advertised contingency-fee representation to disclose in their advertisements that unsuccessful clients might be liable for certain litigation costs. Only "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech" did the court reason that "[warnings] or [disclaimers] *might* be appropriately required . . . *in order to* dissipate the possibility of consumer confusion or deception." *Zauderer*, 471 U.S. at 651 (emphasis added, citation omitted). The holding was narrow: "we hold that an advertiser's rights are adequately protected *as long as* disclosure requirements are reasonably related to the State's interest in *preventing deception of consumers*." *Id.* (emphasis added). The Court understood it was creating an exception to general First Amendment rules and cabined its approach carefully.

Milavetz further clarified the narrowness of the exception. That case reviewed revisions to the Bankruptcy Code, including provisions requiring certain professionals providing debt relief assistance to disclose in their advertisements that their services related to bankruptcy. The Court upheld the provisions, finding that the challenged provisions "share the essential features of the rule at issue in *Zauderer*,"

namely that the required disclosures "are intended to combat the problem of inherently misleading commercial advertisements." *Milavetz*, 130 S. Ct. at 1340. In other words, *Zauderer*'s lesser standard for regulations attempting to prevent "deception of consumers" applies to "inherently misleading" commercial speech.

In contrast to these unique cases, the Supreme Court applies intermediate scrutiny when the commercial speech is not misleading. For example, in *In re R.M.J.*, the Court applied *Central Hudson*'s intermediate scrutiny test to ethics rules prohibiting attorneys from advertising their practice areas other than in terms prescribed by the State Supreme Court. 455 U.S. 191, 197-98 (1982). Because the restricted statements were not inherently misleading, and the State had failed to show that the appellant's advertisements were in fact likely to mislead consumers, the Court applied *Central Hudson* to invalidate the measures. *Id.* at 205-06. As *Milavetz* points out, *R.M.J.* "emphasiz[ed] that States retain authority to regulate *inherently misleading* advertisements." *Milavetz*, 130 S. Ct. at 1340 (citing *R.M.J.*, 455 U.S. at 203, 207).

Zauderer and its progeny "have not presumptively endorsed government-scripted disclaimers." *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., dissenting from denial of certiorari). The Supreme Court has never applied *Zauderer* beyond regulations aimed at false or misleading speech. *See Milavetz*, 130 S. Ct at 1344 (Thomas, J., concurring) ("[O]ur precedents make

clear . . . a disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, [are inherently likely to deceive or have in fact been deceptive.]"); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) ("Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction [passes *Central Hudson*'s intermediate scrutiny test].").

Moreover, the Supreme Court has refused to apply *Zauderer* outside of the false or misleading speech context. *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (citation omitted) (characterizing *Zauderer* as a case where, because "substantial numbers of potential clients might be misled by omission of the explanation, the Court sustained the requirement as consistent with the State's interest in 'preventing deception of consumers'" and then refusing to apply *Zauderer* to a compulsion of speech because "[t]here [wa]s no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers").

Similarly, this Court recently declined the invitation to apply *Zauderer* outside of that context. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-67 (9th Cir. 2009) (declining to determine what level of scrutiny applies to a requirement that "violent video game[s]" be labeled with a four inch square label that

reads "18" because the requirement failed under "the factual information and *deception prevention standards* set forth in *Zauderer*" (emphasis added)), *aff'd on other grounds*, *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729 (2011).[14]

The Fifth and Eleventh Circuits also agree that *Zauderer* only applies to regulations aimed at false or misleading speech. *See Innovative Database Sys. v. Morales*, 990 F.2d 217, 220 (5th Cir. 1993) (citation omitted) ("commercial free speech that is not false or deceptive . . . may be restricted only [if it passes

---

[14] *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003) is not to the contrary. *See* Defendant's Cross-Appeal and Opening Brief (D. C-Ap.) at 31. The EPA promulgated a rule mandating that small municipal storm sewer systems be subject to federal permitting requirements. *Id.* at 840. To obtain a permit, municipalities could choose from two alternative processes. *Id.* at 842. One process, but not the other, required the municipalities to "distribute educational materials to the community." *Id.* at 848 (citation omitted). Far from finding that the "disclosure requirement was reasonably related to environmental protection and public health," *see* D. C-Ap. at 31, the court actually found that the regulation did not even compel speech. *Envtl. Def. Ctr., Inc.*, 344 F.3d at 849 (the regulation "falls short of compelling such speech"). The court cited *Zauderer*, but not for the rational basis test. *Id.* Rather, the court said that even if the regulation compelled speech, the regulation was like that upheld in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), which upheld an economic regulation forcing farmers to subsidize generic advertising because the regulation did not compel actual speech or finance any particular view and was "consistent with an overall regulatory program that did not abridge protected speech." *Envtl. Def. Ctr., Inc.*, 344 F.3d at 850 (citing *Glickman*, 521 U.S. at 469-70). Here, however, private companies are being forced to disseminate a particular message (*i.e.*, compelled speech), which is completely unlike a municipality that seeks a permit under a comprehensive regulatory scheme where one of two alternative permitting paths includes a requirement that was found to not actually compel speech. Even if *Envtl. Def. Ctr.* is good law, it does not justify expanding *Zauderer* beyond the boundaries the Supreme Court has set.

intermediate scrutiny]"); *Mason v. Florida Bar*, 208 F.3d 952, 955, 958 (11th Cir. 2000) (regulations of commercial speech "not false, deceptive, or misleading" must withstand intermediate scrutiny).

Moreover, the Fifth Circuit case San Francisco cites actually supports CTIA and refutes San Francisco. *Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011), involved regulations imposed on attorney advertisements by the Louisiana Supreme Court. The Court determined that inherently misleading advertising may be prohibited entirely. *Id.* at 218 (citing *R.M.J.*, 455 U.S. at 202). But for advertising that is only potentially misleading, one of two standards must be met: a regulation restricting "potentially misleading commercial speech" must pass *Central Hudson*'s intermediate scrutiny test, *id.* (citing *Central Hudson*, 447 U.S. at 566), while a regulation that "imposes a disclosure obligation on a potentially misleading form of advertising will survive First Amendment review if the required disclosure is 'reasonably related to the State's interest in preventing deception of consumers.'" *Id.* (citing *Zauderer*, 471 U.S. at 651). The court then upheld one prohibition under *R.M.J.*, reviewed five prohibitions under *Central Hudson*, and reviewed two disclosure requirements on potentially misleading speech under *Zauderer*.

In applying rational basis review to the two disclosure requirements, the Fifth Circuit reiterated that "'warning[s] or disclaimer[s] might be appropriately

required . . . in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 227 (citations omitted) (alterations in original). And thus, "[s]uch disclosure requirements need only be 'reasonably related to the State's interest in preventing deception of consumers.'" *Id.* (citation omitted). The court then found that disclosure requirements for where an actor portrays a client, or where events, scenes, or pictures are not of an actual event, "are reasonably related to the State's interests in preventing consumer deception." *Id.* at 228.

San Francisco's parenthetical quotation of *Public Citizen*, in an attempt to support applying *Zauderer* outside its proper limits, *see* D. C-Ap. at 13, is a distortion and misuse of the case because the quote is ripped out of context. In context, the quote is understandable: "the disclaimers required by Rule 7.2(c)(1)(I) [regarding portrayals of clients, etc] are reasonably related to the State's interests in preventing consumer deception. [citation omitted]. They are also sufficiently related to the substantial interest in promoting the ethical integrity of the legal profession." *Id.* at 228. The second sentence, the one cited by San Francisco, refers to the Courts' earlier discussion of intermediate scrutiny. It is *Central Hudson* that requires a "substantial interest." Far from applying *Zauderer* outside the consumer deception context, the Fifth Circuit offered two different rationales: the regulation passed *Zauderer* by being rational related to the interest of consumer deception, and it also

passed *Central Hudson* by sufficiently advancing a substantial governmental interest in ethical integrity in the legal profession.

This Court should follow this precedent, and persuasive authority, and apply intermediate scrutiny to San Francisco's Ordinance. Plaintiff-Appellant CTIA has aptly explained why the ordinance does not pass that review.

B. Heightened Scrutiny Does Not Undermine Government's Ability to Compel Legitimate Disclosures

This case is not about hampering government's ability to require disclosures. Rather, it is about making sure individuals' and businesses' constitutional right not to be compelled to speak in the commercial setting is adequately protected.

San Francisco has incorrectly argued that applying heightened scrutiny "makes no sense," because applying heightened scrutiny would allegedly undermine regulations related to public health. Defendant City and County of San Francisco's Opposition to Plaintiff's Motion for Preliminary Injunction at 17. San Francisco points to *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), where the court, in dicta, worried that numerous federal and state regulatory schemes, including tobacco labeling, securities disclosure, posting notification of workplace hazards, and reporting the releases of toxic substances, would be subject to heightened judicial review. *Id.* at 116. What *Nat'l Elec. Mfrs. Ass'n* and San Francisco miss, however, is that subjecting regulations to heightened scrutiny is not a death knell. Heightened

scrutiny requires that regulations be substantially related to an important government interest. *See Central Hudson*, 447 U.S. at 566. There are many important government interests, including the public health and safety, that may justify disclosure requirements. *See Western States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1093 (9th Cir. 2001) (discussing an advertising restriction and finding that "protecting the public health and safety" and "preserving the integrity of the [FDA] drug approval process" are "substantial" interests); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485, 488 (1995) (finding a "significant interest in protecting the health, safety, and welfare of its citizens" and a substantial interest in "preventing brewers from competing on the basis of alcohol strength," but striking down a labeling ban that did not advance those interests). Requiring government to prove that its forced disclosures are substantially related to such interests is the least that this Court can do to protect individuals' and businesses' constitutional rights.

C. Consumer Curiosity and the Precautionary Principle Are Not Legitimate State Interests

Even if this Court applies rational basis scrutiny the "factsheet" requirement fails the test.

1. Consumer Curiosity, or a "Right to Know," Is Not a Legitimate State Interest

Consumer curiosity, or a "right to know," cannot satisfy rational basis review. "[C]onsumer curiosity alone is not a strong enough state interest to sustain the

compulsion of even an accurate, factual statement." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). In *Amestoy*, the Second Circuit reviewed Vermont's requirement that milk producers label milk produced by cows that had been treated with recombinant bovine growth hormone (rBGH, also known as rBST). *Id.* at 69-70. Vermont did not claim that health, safety, or some other substantial concern justified the law, but rather defended the law based on "strong consumer interest and the public's 'right to know.'" *Id.* at 73 (citation omitted). The court held that interest insufficient because "[w]ere consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods." *Id.* at 74 (giving as an example cattle, which "consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered"). "Even though we may be a bit more permissive about mandating purely factual statements, it's not enough that some consumers may care about it." Jonathan Adler, *Food Biotechnology: A Legal Perspective: Regulating Genetically Modified Foods: Is Mandatory Labeling the Right Answer?*, 10 Rich. J.L. & Tech. 14 (2004). "Instead, those consumers interested in such information should exercise the power of their

purses by buying products from manufacturers who voluntarily reveal it." *Amestoy*, 92 F.3d at 74.[15] Consumer curiosity is not a legitimate state interest.

2. The "Precautionary Principle," or "Possibility of Harm," Is Not a Legitimate State Interest

The "precautionary principle," or "possibility of harm," is discussed in section I.A, *supra*. That section explains how the precautionary principle is fundamentally incompatible with First Amendment doctrine and has been rejected by First Amendment precedent. Given that the principle is the antithesis of First Amendment doctrine, the interest cannot be considered a legitimate state interest under rational basis review.

3. San Francisco's Factsheet Requirement Cannot Pass Rational Basis Review

San Francisco's ordinance relies on the asserted interests of consumer curiosity and an overly cautious "possibility of harm." Neither of these interests are "legitimate" for purposes of rational basis review. Nor is there any other interest that could save the ordinance. There is simply no state interest that supports forcing a cell

[15] Although the *Amestoy* court reviewed the regulation under heightened security, which asks if there is a substantial government interest, the court's reasoning applies equally well as to whether consumer curiosity is a legitimate public interest. Indeed, the court itself did not so limit its holding, finding that consumer curiosity could not "sustain the compulsion of even an accurate, factual statement." *Amestoy*, 92 F.3d at 74 (citing *Riley*, 487 U.S. at 797-98 (compelled disclosure of "fact" is no more acceptable than compelled disclosure of opinion)).

phone retailer to provide warnings about cell phone emissions where there is no evidence that such emissions cause any danger whatsoever to the consumer. *See Silveira v. Lockyer*, 312 F.3d 1052, 1088-89 (9th Cir. 2002) ("Although the government is relieved of providing a justification for a statute challenged under the rational-basis test, such a justification must nevertheless exist, or the standard of review would have no meaning at all."); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); *Brown v. Barry*, 710 F. Supp. 352, 356 (D.D.C. 1989) ("Even the minimal rational basis test does not require the court to muse endlessly about this regulation's conceivable objectives nor to 'manufacture justifications' for its continued existence." (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting)). The "factsheet" requirement cannot survive even rational basis review.

CONCLUSION

For the foregoing reasons, this Court should grant CTIA's Preliminary Injunction Appeal and enjoin the requirement that retailers disseminate the revised "factsheet."

DATED: February 1, 2012.

Respectfully submitted,

DEBORAH J. LA FETRA
ADAM R. POMEROY

By s/ Adam R. Pomeroy
ADAM R. POMEROY

Counsel for Amici Curiae
Pacific Legal Foundation
and Cascade Policy Institute

CERTIFICATE OF COMPLIANCE

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 6,997 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), *or*

❑ this brief uses a monospaced typeface and contains ____ lines of text, 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 WordPerfect X5 in 14-point Times New Roman, *or*

❑ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

DATED: February 1, 2012.

s/ Adam R. Pomeroy
ADAM R. POMEROY

Attorney for Amici Curiae
Pacific Legal Foundation
and Cascade Policy Institute

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:

CYNTHIA FRANKLIN
520 Ridgeway Drive
Bellingham, WA 98225

s/ Adam R. Pomeroy
ADAM R. POMEROY