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)

OPENING BRIEF OF APPELLANT CTIA - THE WIRELESS ASSOCIATION®

PRELIMINARY INJUNCTION APPEAL

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant / Cross-Appellee CTIA—The Wireless Association® ("CTIA") (formerly known as the Cellular Telecommunications & Internet Association) is a section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held companies own any stock in CTIA.

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INTRODUCTION

The City of San Francisco ("City") admits that there is no reliable scientific evidence that FCC-compliant cell phones cause cancer or other adverse health effects. It acknowledges that expert federal agencies have agreed upon and adopted national safety standards for all cell phones. Based on and consistent with the overwhelming weight of scientific evidence, those agencies have determined that cell phones that comply with the federal standards—*i.e.*, all phones lawfully sold in the U.S.—are safe. Nevertheless, the City enacted its "Cell Phone Right to Know" ordinance ("Ordinance") premised on the view that someday science may establish as-yet undemonstrated health risks from using cell phones. The Ordinance directs retailers to distribute a lengthy "factsheet" containing the City's subjective "recommendations" about who should use cell phones and whether, when, and how they should be used. The gossamer predicate for this compelled speech—the mere possibility that some unestablished danger might exist—could apply to most products and services in this country. It would grant sweeping authority to all levels of government to compel private parties to communicate controversial opinions with which they strongly disagree.

To convey the City's warnings, the Ordinance requires that cell phone retailers do three things: (1) prominently display a 17 by 11 inch "poster" drafted by the City conveying the message that cell phones are not safe and using graphics

to depict RF emissions from cell phones penetrating deep into the head and pelvic regions of the human body; (2) place City-drafted "stickers" onto display materials adjacent to phones offered for sale; and (3) hand out a City-drafted "factsheet" containing the City's views and recommendations about alleged "health effects" and proper use of cell phones to every purchaser of a phone and anyone who asks for it.[1]

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The district court correctly concluded that all three of these compelled, government-scripted communications—controversial and misleading opinions with which CTIA members strongly disagree—violated the First Amendment. Nonetheless, in what the City itself describes as an "unorthodox shortcut,"[2] the district court rewrote the "factsheet," offering the City two hypothetical versions that the court thought would pass First Amendment muster. The City took the court up on its offer and revised the "factsheet." *See* A-20, ER 277. The district court then "vetted" the revised "factsheet" and permitted its forced dissemination

[1] The Ordinance is appended hereto at page A-1 to A-12 of CTIA's Addendum and can be found in CTIA's Excerpts of Record ("ER") at 76-88. The implementing regulations are at A-13 to A-16 and ER 89-93, the "poster" is at A-18 and ER 95, the "factsheet" is at A-17 and ER 99, and the "stickers" are at A-19 and ER 97.

[2] DktEntry 7-2, City's Opposition To CTIA's Emergency Motion For Stay Pending Appeal at 36 (Nov. 18, 2011) ("City Appellate Opp.").

in retail stores on December 1, 2011. On November 28, 2011, this Court granted CTIA's emergency motion to enjoin forced distribution of the revised "factsheet" pending appeal.

The district court committed four errors of law in authorizing the City to require distribution of the revised "factsheet." *First*, it relieved the City of its traditional burden—under any level of First Amendment scrutiny—to demonstrate the existence of a real problem and to show that its action was properly tailored to provide a solution. Instead, the court allowed the City to force private parties to convey a controversial government message based on "the mere unresolved possibility that" a product "may (or may not)" be harmful. ER (Oct. 27 Op.) 9-10. Shifting the burden to the compelled party to prove that a product is "absolutely safe" or "totally safe," *see id.* at 6 & 11 n.2, is directly contrary to the decisions of the Supreme Court and this Court. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009), *aff'd*, *Brown v. Entm't Merch. Ass'n*, 131 S.Ct. 2729 (2011). For this reason, the City's warning regime fails regardless of the level of First Amendment scrutiny applied.

Second, the district court refused to apply heightened scrutiny to what is obviously a content-based compelled speech regime. While the government can correct misleading commercial speech by adding "purely factual and

uncontroversial" facts, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1986), that limited exception to heightened scrutiny does not apply here. The message that FCC-approved cell phones are potentially unsafe and that users should follow the City's recommendations to avoid harm, is not grounded in reliable scientific evidence. It is misleading, and at a minimum highly controversial. The lower court erroneously turned the narrow *Zauderer* exception into a broad license to force private parties to voice governmental opinions with which they vehemently disagree. Controlling precedent does not allow this. *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n.*, 475 U.S. 1, 16 (1985); *Schwarzenegger*, 556 F.3d at 953.

Third, the district court erred in rejecting CTIA's preemption arguments. The City's regime, including the revised "factsheet," directly challenges the adequacy of the FCC's comprehensive RF safety regime, and frustrates important federal policies. Indeed, the City's arguments confirm that the animating purpose of its Ordinance is the belief that, if not supplemented, the FCC's rules could permit "devastating" public health consequences. City Appellate Opp. at 34.

Fourth, the district court exceeded its authority under Article III in re-drafting the "factsheet." In essence, it rendered an advisory opinion on a "factsheet" of its own creation. Because the lower court stepped far outside its adjudicatory role, its opinion must be vacated and a preliminary injunction entered.

This Court need not tarry long on the remaining preliminary injunction factors—the grant of an injunction pending appeal virtually decides the issue. Even the lower court recognized that the balance of equities and public interest sharply favor CTIA. ER (Oct. 27 Op.) 14-15. In fact, the City's recommendation to "Turn off your cell phone when not in use" would do affirmative harm by frustrating first responders' ability to locate persons in danger with E911 technology. The City's regime will not make anyone safer, but it will adversely impact the use and effectiveness of the national wireless network.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court granted in part and denied in part CTIA's motion for preliminary injunction in orders dated October 27, 2011 and November 7, 2011. ER 1-16. CTIA timely appealed those orders on November 9, 2011. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

This appeal presents the following issues:

1. Whether the First Amendment requires the City to provide substantial and credible evidence of causation of actual harm before it can force a private party to disseminate governmental opinions regarding the safety and proper use of a product.

2. Whether the City's mandate to publish a controversial statement regarding an issue of public concern must be subject to heightened First Amendment scrutiny.

3. Whether federal conflict preemption bars the City from imposing its own safety regime based on its determination that the FCC safety standards are not adequate.

4. Whether, in rewriting the "factsheet," the district court exceeded the Article III limits on the "judicial power" by issuing an advisory opinion and usurping the local government's role.

STATEMENT OF THE CASE

CTIA commenced this action in July 2010 challenging the City's first attempt to impose a warning regime. The original "Cell Phone Right to Know Ordinance," ER 17-28, required disclosure of the SAR ("specific absorption rate")

of cell phones at the point of sale.[3] It was designed to encourage consumers to comparison shop based on the SAR numbers submitted to the FCC. After CTIA established through an unrebutted expert report that the City's initial regime was based on a fundamental scientific misunderstanding, *see* ER (CTIA's Sec. Am. Compl.) 63 ¶ 87, the City came up with the amended Ordinance currently at issue. *See* A-1 to A-12.

On October 4, 2011, after the City adopted implementing regulations (A-13 to A-16) and display materials (A-17 to A-19) for the new Ordinance, CTIA filed a Second Amended Complaint ("SAC") and motion for preliminary injunction. This appeal arises from the district court's October 27, 2011 and November 7, 2011 orders granting in part and denying in part CTIA's motion. The district court agreed that all the materials promulgated by the City violated the First Amendment. With respect to the "factsheet," however, the court suggested new language that would, in its view, allow the "factsheet" to pass muster. The district court also fashioned a unique "meet and confer" procedure to create and approve the revised "factsheet." ER (Oct. 27 Op.) 15.

CTIA filed a Notice of Appeal on November 9, 2011, and moved this Court for an injunction pending appeal to stop forced dissemination of the revised

[3] SAR, as submitted to the FCC for regulatory purposes, is a measure of the absorption rate of RF energy by human tissue. ER (Petersen Prelim. Rpt.) 135 ¶ 15.

"factsheet." The City cross-appealed on November 18. This Court granted CTIA's emergency motion on November 28. The district court has stayed further proceedings pending this appeal.

STATEMENT OF FACTS

I. THE FEDERAL GOVERNMENT MAINTAINS UNIFORM SAFETY AND TESTING STANDARDS FOR ALL CELL PHONES SOLD IN THE UNITED STATES.

In 1996, Congress directed the FCC to adopt uniform, nationwide safety standards that are adequate to protect public health and safety.[4] The FCC complied by adopting comprehensive rules governing RF emissions from cell phones. *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123 (1996) ("*RF Order I*").

The FCC's safety standard is predicated on its determination that, below a certain threshold, there is no reliable scientific evidence of any biological mechanism by which exposure to RF energy from cell phones could affect human

[4] *See* Telecommunications Act of 1996, Pub. L. No. 104-204, § 704(b), 110 Stat, 56, 152 (1996); H.R. Rep. No. 104-204(I), at 94 (1995) ("[I]t is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible."). Congress instructed the FCC to "prescribe and make effective rules regarding the environmental [health] effects of radio frequency emissions." Pub. L. No. 104-204, § 704(b), 110 Stat. 56, 152. Congress directed that the FCC develop "adequate safeguards of the public health and safety" that also foster "speed[y] deployment and the availability of competitive wireless telecommunications services." H. R. Rep. No. 104-204(I) at 94.

health. ER (Petersen Prelim. Rpt.) 134 ¶ 7. The FCC set the federal RF emission limit fifty times below that threshold.[5]

The FCC adopted its rules after review of exhaustive scientific studies, extensive public comment, and close consultation with other expert agencies and scientific groups. The rules "represent the best scientific thought and are sufficient to protect the public health," *RF Order I*, 11 F.C.C.R. at 15184 (¶ 168), and "were supported by every federal health and safety agency," FCC *Cellular Phone* Br. at 16-17. The FCC's standards "will protect the public and workers from exposure to potentially harmful RF fields." *RF Order I*, 11 F.C.C.R. at 15124 (¶ 1). All cell phones lawfully sold in the U.S. "are safe for use."[6] *Accord Farina v. Nokia*, 625 F.3d 97, 126 (3d Cir. 2010) ("[T]he FCC considers all phones in compliance with its standards to be safe."). The FDA agrees. "The scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers"[7] and "[t]he weight of scientific evidence has not linked cell phones with any health problems."[8]

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[5] Brief for Respondents United States and FCC at 3 n.2, *Cellular Phone Taskforce v. FCC*, No. 00-393, 2000 WL 33999532 (Dec. 4, 2000) ("FCC *Cellular Phone* Br.").

[6] Brief of the United States and the FCC as Amicus Curiae at 15-16, *Murray v. Motorola*, No. 07-cv-1074, 2008 WL 7825518 (D.C. Apr. 8, 2008) ("FCC *Murray* Br.").

[7] FDA, Radiation-Emitting Products, Children and Cell Phones (updated Mar. 10, 2009) (http://www.fda.gov/Radiation-

In fulfilling its dual mandate to protect the public from excessive RF exposure and promote efficient, ubiquitous wireless communications, the FCC rejected requests to make its rules even more conservative, emphasizing that the rules protect all members of the public (including children). *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 F.C.C.R. 13494, 13504-08 (¶¶ 31-39) (1997) ("*RF Order II*"). Since then, the FCC has monitored the scientific evidence and "ensure[d] that [its] guidelines continue to be appropriate and scientifically valid."[9] The FCC "does not endorse the need" for consumers to take "measures to further reduce exposure to RF energy."[10]

Two Courts of Appeals have upheld the RF standards against claims that the FCC failed to consider so-called "non-thermal" effects and that the rules are insufficiently stringent. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir.

EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116331.htm) ("FDA, *Children and Cell Phones*").

[8] FDA, Radiation-Emitting Products, Health Issues (updated May 18, 2010) (http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116282.htm) ("FDA, *Health Issues*").

[9] FCC *Murray* Br. at 8; *see also Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses*, 23 F.C.C.R. 17444, 17536 (¶ 207) (2008).

[10] FCC, Guide, *Wireless Devices and Health Concerns* (emphasis removed) (http://www.fcc.gov/guides/wireless-devices-and-health-concerns) ("FCC, *Wireless Devices and Health Concerns*").

2000); *EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004). Courts have held that state law actions premised on the federal standards' perceived inadequacy are preempted.[11] Moreover, when courts have examined whether there is credible scientific evidence that cell phones can cause adverse health effects, like cancer, they have emphatically concluded that there is not.[12]

II. <u>HISTORY OF THE CITY'S RF REGIME.</u>

When the City launched its first RF warnings almost two years ago, the Mayor asserted that "questions around the potential health effects [of cell phones] are significant enough to warrant precautionary action." ER (SAC) 60 ¶ 72. The City sought to address perceived inadequacies in the federal regulatory regime and adopt protections that go beyond what the FCC determined are necessary and appropriate. ER (SAC) 61 ¶¶ 75-78.

In addition to mandating disclosure of each phone's "SAR value," the City required cell phone retailers to disseminate "factsheets" and other "display

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[11] *See, e.g.*, *Bennett v. T-Mobile USA, Inc.*, 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008) (holding that claims that cell phones are unsafe even though they comply with FCC standards "are a collateral attack on the FCC regulations themselves" and that "[a]llowing such claims would be to second-guess the balance reached by the FCC in setting RF emission standards under its delegated authority"); *Farina*, 625 F.2d at 122; *Murray v. Motorola*, 982 A.2d 764 (D.C. 2009).

[12] *See, e.g.*, *Newman v. Motorola, Inc.*, 218 F. Supp. 2d 769, 783 (D. Md. 2002), *aff'd*, 78 F. App'x. 292 (4th Cir. 2003); *see also Reynard v. NEC*, 887 F. Supp. 1500 (M.D. Fla. 1995); *Motorola, Inc. v. Ward*, 478 S.E.2d 465 (Ga. Ct. App. 1996); *Kane v. Motorola, Inc.*, 779 N.E.2d 302 (Ill. Ct. App. 2002).

materials" regarding what the City contends are possible risks associated with cell phone use and ways to reduce them. ER 21-23. In October 2010, the City informed CTIA that it needed to make a clarifying amendment, ER (SAC) 62 ¶ 84, and delayed that amendment until January 2011, which required the City to delay the compliance date. ER (SAC) 62 ¶ 85. After deposing CTIA's expert, and without producing its own scientific expert, the City revised the implementing regulations and further extended the compliance date. ER (SAC) 62-64 ¶¶ 86-88, 90. The City conceded that its original approach "indeed can be misleading," City Appellate Opp. at 4, as CTIA's evidence proved.

In May 2011, the City adopted its current approach. The amended Ordinance requires retailers to: (1) prominently post a 17 by 11 inch poster developed by the City's Department of the Environment ("DOE") (A-18); (2) provide a City-drafted "factsheet" to all phone purchasers and anyone who requests one (A-17); and (3) paste a sticker onto display materials next to phones informing consumers that RF energy is absorbed by the head and body, and encouraging consumers to request the "factsheet" (A-19). The latest amendment gave retailers 15 days to comply after the DOE adopted new implementing regulations.

CTIA sought a preliminary injunction on October 4, asserting that the regime violates the First Amendment and is preempted. CTIA supported its motion with two preliminary expert reports and three declarations from CTIA

members. The expert reports demonstrated that the City's new approach does not solve the problems from its original iteration; it makes them worse. Carrier declarations showed the regime's impact on both protected speech in retail stores and the efficiency and use of wireless networks, ER (D'Ambrosio) 103-07, ER (Fitterer) 114-15, ER (Springer) 117-19. In Opposition, the City submitted, *inter alia*, a rebuttal report responding to CTIA's marketing expert report analyzing the messages communicated to consumers. ER (Scott Supp. Rpt.) 151-55. CTIA submitted two supplemental expert reports with its reply. ER (Petersen Supp. Rpt.) 170-73; ER (Stewart Second Supp. Rpt.) 160-67. The City provided no expert scientific evidence.

At the October 20 hearing, the City agreed to suspend enforcement until the district court could rule on CTIA's motion. ER (Transcript) 249. On October 27, the district court granted in large part CTIA's motion, but accepted the premise that the City could vindicate the so-called "precautionary principle" by compelling private parties to speak. The court agreed with CTIA that the City's regime compelled dissemination of "nonfactual, misleading and alarmist" messages in violation of the First Amendment, ER (Oct. 27 Opp.) 10-15, because the "overall impression left is that cell phones are dangerous" which "is untrue and misleading." *Id.* 11. CTIA satisfied the remaining factors for preliminary relief. *Id.* 14. The court rejected CTIA's preemption arguments.

Rather than stopping there, the court decided that the "factsheet" could and should be rewritten. *Id.* 11-13. It struck the graphics, directed the removal of certain sentences, drafted new material, and indicated that the "factsheet" requirement could be enforced "once corrected and vetted by the Court." *Id.* 15. The City submitted a revised "factsheet" for "vet[ting]" on November 4, 2011, ER 273-76, and the Court ruled that the City could require CTIA members to begin disseminating it on December 1, 2011. ER (Nov. 7 Order) 16.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Under this Court's "sliding scale," CTIA need only demonstrate "that serious questions going to the merits were raised and the balance of hardships tip[ped] sharply in" its favor, provided some showing is also made on the remaining factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

This Court will reverse the denial of a preliminary injunction for abuse of discretion. *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). A two-part test governs that inquiry. *First*, the Court must "determine

de novo whether the trial court identified the correct legal rule." *Park Vill. Apartments Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1155 (9th Cir. 2011) (quotation marks omitted). *Second*, the Court determines whether the district court's "application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The district court's conclusion that the City may require dissemination of the revised "factsheet" rests on four fundamental errors of law.

First, it held that San Francisco could compel speech based on no more than "the mere unresolved possibility that something may (or may not) be a carcinogen." ER (Oct. 27 Op.) 9. This is inconsistent with decades of First Amendment precedent, under which the burden is squarely on the City to demonstrate that the harms it seeks to address through regulation of speech are real. By indulging the so-called "precautionary principle," the lower court significantly expanded governmental power over private speech, eliminating the required showing of a real, non-speculative concern. This places a nearly impossible burden on private parties to show that their products are "absolutely safe" or "totally safe" to escape compelled speech. The mere *possibility* of unknown risk might justify government speech through its own media, but cannot

justify compelling private speech, particularly where that speech consists of highly-controversial state-held opinions.

Second, the district court failed to apply heightened scrutiny to the City's content-based regime. Instead, it expanded the narrow *Zauderer* exception far beyond anything this Court or the Supreme Court has ever sanctioned. *Zauderer*'s relaxed scrutiny applies only to government-compelled disclosures of straightforward, factual, and uncontroversial information added to correct deceptive or confusing commercial advertising.

In both content and volume, the compelled speech here is wholly unlike the factual and concise disclosures sanctioned in cases applying *Zauderer*. No other court has allowed the government to force its controversial *opinions* down the throat of a private speaker in the fashion permitted here, and Supreme Court and Ninth Circuit precedent stand in opposition to this dangerous innovation.

Third, the district court erred in finding that CTIA had not shown a likelihood of success on its preemption claim. The Ordinance is based on the notion that the FCC failed to consider pertinent factors and that FCC-approved cell phones have the potential to cause human harms of epidemic proportions. City Appellate Opp. at 34. The lower court narrowly focused on field preemption and misunderstood the conflict preemption analysis in cases like *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) and *Farina v. Nokia Inc.*, 625 F.3d 97 (3d Cir.

2010). Where, as here, the federal government balances competing concerns, such as RF safety and the efficient use of wireless technology, no local government can rebalance them.

Fourth, the district court overstepped Article III's limits when it rewrote the "factsheet." Having found the City's regime unconstitutional, the lower court should have enjoined the Ordinance's requirements and stopped there.

Finally, the balance of equities overwhelmingly favors injunctive relief. Unjustified compelled speech is *per se* irreparable injury, and undisputed evidence establishes irreparable injury to retailers' goodwill and business reputation. Undisputed evidence also shows harm to the public interest. On the other side of the ledger, there is simply no evidence of any incipient public health crisis that necessitates immediate forced dissemination of the City's materials.

ARGUMENT

I. FORCED DISSEMINATION OF THE REVISED "FACTSHEET" VIOLATES THE FIRST AMENDMENT.

A. The District Court Erred By Effectively Reversing The Burden In A Compelled Speech Case.

Under any standard, the government cannot force private parties to speak unless it carries the burden of demonstrating that the harms it is addressing are real and the compulsion will alleviate them to a material degree. *See Ibanez v. Fla. Dept. of Bus. and Prof'l. Reg.*, 512 U.S. 136, 146 (1994); *Zauderer*, 471 U.S. at 650-53. The district court failed to hold the City to this burden, allowing the

"factsheet" mandate to go forward based on speculation that some undocumented harm may be established in the future.

1. The City Bears The Burden Of Justifying Its Regulation With Actual Evidence Of Substantial Harm.

The burden always rests with the government to justify regulation of speech, whether it is a restriction, *Thalheimer v. San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011), or a compulsion, *Ibanez*, 512 U.S. at 146. Rather than hold the City to this burden, the district court endorsed the City's reliance on the "precautionary principle" and "presume[d] that a government may impose, out of caution, at least some disclosure requirements *based on nothing more than the possibility that an agent may (or may not) turn out to be harmful*." ER (Oct. 27 Op.) 10 (emphasis added).

This was error. Even under the lowest level of First Amendment scrutiny—the *Zauderer* exception applicable to pure, uncontroversial disclosures of fact—the government cannot compel speech based only on a "possibility" of harm. *Ibanez* makes that clear. There, the government invoked *Zauderer* to argue that, in lieu of banning advertisements, it could compel disclosure of "reasonable information," Brief of Respondents at 33 (1994 WL 114666), because "Ibanez' use of the CFP designation is '*potentially misleading*,'" *Ibanez*, 512 U.S. at 146 (emphasis added, quoting Brief of Respondent at 33). The Supreme Court disagreed. "If the 'protections afforded commercial speech are to retain their force,'" *id.* (quoting

Zauderer, 471 U.S. at 648-49), "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree,'" *id.* (quoting *Edenfield*, 507 U.S. at 771).

Thus, even under *Zauderer*, the City must meet the harms-are-real test. *Id.* at 143; *Mason v. Florida Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (following *Ibanez* and "hold[ing] that the [State] is not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer"). Under this standard, "[t]he State's burden is not slight," *Ibanez*, 512 U.S. at 143. First Amendment intrusions "may not be . . . lightly justified." *Zauderer*, 471 U.S. at 649. Requiring governments to show real harms is consistent with the long-standing principle that "prophylactic" rules burdening speech are incompatible with the First Amendment. *Edenfield*, 507 U.S. at 773-77; *NAACP v. Button*, 371 U.S. 415, 438 (1963).

The district court's newly-created "possibility of harm" standard would permit the government to compel speech as long as the government's message has "some anchor in the scientific literature." ER (Oct. 27 Op.) 11. But that standard runs headlong into *Schwarzenegger*. *See Schwarzenegger*, 556 F.3d at 962-64 (holding that thinly supported claims based on a minority view of a potential for harm are insufficient to meet the harms-are-real test). There, California sought to

compel retailers to label certain violent video games with an "18" and restrict their sale to prevent "actual harm to the brain of the child playing the video game," *id.* at 961, and proffered evidence from three doctors and a university suggesting alleged harms from violent video games, *id.* at 961-64.

If the district court here were correct that "some anchor in the scientific literature" concerning the "possibility of harm" was sufficient, the State's evidence in *Schwarzenegger* would have been enough; but it wasn't. *See id.* This Court applied a more demanding standard and the Supreme Court affirmed. *See Brown*, 131 S.Ct. at 2738-41.[13]

2. The City Has Not Carried Its Burden Under *Ibanez* and *Schwarzenegger* Of Demonstrating Real Harms.

There is no basis in this record (or elsewhere) for concluding that any alleged harms from cell phones "are real" or that the revised "factsheet" would "alleviate them to a material degree." *Ibanez*, 512 U.S. 146. At the outset, the City's position is rendered untenable by the comprehensive federal regulatory regime addressing RF safety concerns, an overlay not present in *Schwarzenegger*. As discussed, the FCC has determined that its safety and compliance standards

[13] The City attempted to distinguish this portion of *Schwarzenegger* on the grounds that it was addressing a restriction on speech rather than a compulsion. But *Schwarzenegger* does no more than apply the harms-are-real requirement that *Ibanez* determined applies equally under *Zauderer* to compelled speech. *See Schwarzenegger*, 556 F.3d at 962 (the government "'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way'").

adequately protect public health and safety. The FCC's rules contain a fifty-fold safety factor and have twice been upheld on appeal against claims that they are insufficient. The FDA agrees that "[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers,"[14] and that "[t]he weight of scientific evidence has not linked cell phones with any health problems."[15] "There is no evidence to suggest that transmitters or facilities that comply with [FCC] guidelines will cause adverse health effects." *RF Order II*, 12 F.C.C.R. at 13538 (¶ 111).

Against this backdrop, the City cannot establish that a real problem exists, or that its regime makes cell phone users any safer than the FCC standards alone. The Second Circuit made this point in *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996). There, Vermont required labels on milk products stating that they may contain the synthetic growth hormone rBST. As here, the federal government determined there was no scientific evidence suggesting the product affected human health: "After exhaustive studies, the FDA ha[d] 'concluded that . . . there are no human safety or health concerns associated with food products derived from cows treated with rBST.'" *Id.* In light of the FDA's conclusion, "Vermont's failure to defend its constitutional intrusion on the ground

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[14] FDA, *Children and Cell Phones*.

[15] FDA, *Health Issues*.

that it negatively impacts public health is easily understood." *Id.* But in the absence of a real concern, it cannot "justify requiring a product's manufacturer to publish the functional equivalent of a warning," *id.* (citing *Ibanez*, 512 U.S. at 145-46). Otherwise, "there is no end to the information that states could require manufacturers to disclose." *Id.*

Even if the federal government had not determined that cell phones are safe, the City would still be unable to establish actual harm. The City did not introduce evidence below, relying instead on citations to reports that the district court held were inadmissible for their truth. ER (Oct. 26 Order) 257. The City primarily cited the WHO's classification of RF energy as a "possible carcinogen," but the WHO classification falls far short of meeting the harms-are-real requirement. Indeed, the WHO itself has acknowledged the flaws and limitations of that classification, *see* WHO, Electromagnetic fields and public health: mobile phones, Fact Sheet 193 (June 2011) (http://www.who.int/mediacentre/factsheets/fs193/en/) ("WHO Factsheet"); *see also* ER (Petersen Prelim. Rpt.) 130-31, 146-47 ¶¶ 7, 36, which are the same types of flaws identified by this Court in *Schwarzenegger*. *Schwarzenegger*, 556 F.3d at 961-62 (finding the State's evidence insufficient to support its asserted interest in preventing harm to children's brains because it suffered from "admitted flaws in methodology," did not establish or suggest a

"casual link" between violent video games and harm to children (only a correlation)).

As with the *Schwarzenegger* studies, the WHO classification does not purport to show a causal connection between cell phones and harm, and the studies upon which it relies suffer from admitted flaws in methodology. ER (Petersen Prelim. Rpt.) 130-31, 146-47 ¶¶ 7, 36. Following the classification, the WHO made clear that "no adverse health effects have been established as being caused by mobile phone use." WHO Factsheet. Indeed, the broad "possibly carcinogenic" category into which the WHO placed RF energy includes both coffee and pickled vegetables. ER (Petersen Prelim. Rpt.) 146-47 ¶ 36. The expert record evidence shows that because of these and other issues, the WHO classification does not provide a basis for concluding that there are health effects from FCC-compliant cell phones. Such a conclusion would be directly contrary to "the substantial database of studies already conducted supporting the safety of RF energy from cell phones." *Id.*

The City has not contested this. It has not tried to show that the alleged harms from cell phones are real or that its regime alleviates them to a material degree. "San Francisco concedes that there is no evidence of cancer caused by cell phones." ER (Oct. 27 Op.) 14. The City simply posits that harms "*could* result *if* there were a health issue with cell phones," City Appellate Opp. at 37 (emphasis

added). *Ibanez* and *Schwarzenegger* make clear that this conjecture is insufficient to compel speech. Otherwise, the government could convert every merchant into its marionette, perpetually bound to mouth the government's concerns because it is unable to prove an impossible negative.

B. The District Court Erred By Not Applying Heightened Scrutiny.

1. Heightened Scrutiny Applies To The City's Regime.

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. A law that "requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner*, 512 U.S. at 641.

Heightened scrutiny is the rule, not the exception, when the government forces a private party to speak. *See, e.g.*, *PG&E*, 475 U.S. at 9-17; *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *see also R.J. Reynolds Tobacco Co. v. FDA.*, __F. Supp. 2d _, 2011 WL 5307391 (D.D.C. Nov. 7, 2011), *appeal docketed*, No. 11-5332 (D.C. Cir. Nov. 30, 2011). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [and is therefore] a content-based regulation of speech." *Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)). "In the ordinary case it is all but dispositive to conclude that a law is content-based," *Sorrell*, 131 S.Ct. at 2667, because such a law is

subject to "heightened scrutiny" regardless of whether it affects mixed, commercial, or fully protected speech. *Id.*

The City's regime is explicitly content-based. It mandates the expression of highly controversial opinions about cell phone safety, the use of cell phones by children, and when, where, and how cell phones should be used. It does so in service of the "precautionary principle," itself a controversial doctrine about how one should approach unproven dangers.

The district court and the City attempt to distinguish *PG&E* and other compelled speech cases on the grounds that the revised "factsheet" is not triggered by speech and supposedly burdens no expressive activity.[16] But freedom from compelled expression does not turn on whether forced speech is triggered by speech or expressive conduct. *PG&E* makes this clear. There, strict scrutiny applied to a law that forced a utility to include a third party's messages in its billing envelopes. While the regime was "not conditioned on any particular expression by appellant," *PG&E*, 475 U.S. at 13-14, strict scrutiny applied because the government required PG&E to carry "one-sided" messages with which it disagreed. *Id.* at 12-14. Similarly, strict scrutiny applied in *Wooley* despite the fact that there is nothing expressive about driving a car. *Wooley*, 430 U.S. at 705.

[16] *See* ER (Oct. 27 Op.) 7 (asserting that mandatory disclosures of "mere facts" are subject to heightened scrutiny only where disclosure would impact protected speech, like the "charitable telephone or door-to-door solicitations" in *Riley*).

The content of the compelled message, not the triggering conduct, compelled strict scrutiny.

The district court also suggested that heightened scrutiny does not apply "so long as it is clear to everyone that the warnings come from local government and not from the store." ER (Oct. 27 Op.) 11. This is the argument made by the dissent and rejected by the majority in *Wooley*.[17] The Supreme Court's rejection of this argument goes back at least to *Miami Herald*, where strict scrutiny applied despite the fact that the newspaper was not required to endorse the opposing editorial. Similarly, the *PG&E* Court noted that there was little prospect of an implication of endorsement, *PG&E*, 475 U.S. at 6-7, but that was irrelevant. The state's setting of the expressive agenda in a matter of debate is anathema and always subject to heightened scrutiny.

Nor is the City correct that the First Amendment is a grant of power to influence the marketplace of ideas. *See* City Appellate Opp. at 16. As in *PG&E*, the City is using coercion to correct a perceived imbalance in what it says is a public debate. *See PG&E*, 475 U.S. at 7; *accord Sorrell*, 131 S. Ct. at 2671 (explaining that while "[t]he State can express [its] views through its own speech,"

[17] *See Wooley*, 430 U.S. at 719-22 (Rehnquist, J., dissenting) ("The State has simply required that all . . . noncommercial automobiles bear license tags with the state motto . . . . Appellees have not been forced to affirm or reject that motto;" and "there is nothing in state law which precludes appellees from displaying their disagreement with the state motto").

it cannot infringe the rights of others to advance its preferred view). Such "leveling" has long been rejected. Where California sought to force opposing views into a utility's newsletter on the theory that consumers would "benefit from . . . 'exposure to a variety of views,'" the Supreme Court applied strict scrutiny. *PG&E*, 475 U.S. at 7. The Court likewise applied strict scrutiny to strike down a requirement that a newspaper publish replies to editorials "to ensure that a wide variety of views reach the public." *Miami Herald*, 418 U.S. at 248. The City simply cannot tilt discourse in this way without a compelling state interest.

2. The Revised "Factsheet" Does Not Fit Within The *Zauderer* Exception To Heightened Scrutiny.

The revised "factsheet" does not fit within *Zauderer*'s narrow exception to heightened review. The district court's contrary conclusion expands *Zauderer* beyond anything this or the Supreme Court has ever sanctioned and threatens First Amendment freedoms.

a. The "Factsheet" Is Not Limited To Purely Factual And Uncontroversial Information.

The *Zauderer* exception only applies where the government compels "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651; *PG&E*, 475 U.S. at 16 n.12. It does not apply when the government forces private parties to disseminate the government's opinions. *Schwarzenegger*, 556 F.3d at 953; *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

Both the predicate for compelled dissemination of the "factsheet" and its content are pure (and highly controversial) opinion. Working with other expert agencies, the FCC designed safety standards that are supported by the scientific evidence and are sufficient to protect the public health, *see* Statement of Fact, Part I, *supra*. It is the City's opinion that the FCC standards are insufficient. The basis for this opinion is San Francisco's endorsement of the "precautionary principle," which "provides that the government should not wait for scientific proof of a health or safety risk before taking steps to inform the public of the potential for harm." Ordinance § 1.1 (A-1, ER 77). The City believes that consumers should be warned about and act based on what the City characterizes as scientific uncertainty about the sufficiency of the FCC's standards, even when "there is no evidence of" harm. ER (Oct. 27 Op.) 14. This is a highly controversial position. Whatever the merit of the "precautionary principle" in the abstract, private parties cannot be forced to promote it.

Schwarzenegger makes this clear. There, the Ninth Circuit held that free-floating "disclosures" that are not properly grounded in specific showings of causation of a demonstrated harm are per force opinions, not facts. The labeling requirement there simply required retailers to place an "18" on certain products. Nonetheless, "the Act's labeling requirement is unconstitutionally compelled speech under the First Amendment because it does not require the disclosure of

purely factual information; but compels the carrying of the State's controversial opinion." *Schwarzenegger*, 556 F.3d at 953.

The Seventh Circuit reached the same conclusion in an analogous case. *See Blagojevich*, 469 F.3d at 651-53. That court recognized that an advisory that only those over 18 should play certain video games "ultimately communicates a subjective and highly controversial message" and that the First Amendment does not allow the government to force a private party to carry the views of a "third party whose view potentially conflicts with the plaintiff's." *Id.*

The revised "factsheet" is vastly more opinion laden than the compelled speech at issue in *Schwarzenegger* or *Blagojevich*. To start, it includes numerous "recommend[ations]" about whether, when, and how to use cell phones. Recommendations are, by definition, opinions.[18]

Even those statements that may superficially appear factual either pertain to matters of scientific controversy or are presented in a misleading manner. As in *PG&E*, they voice one side of a debate: the side with which the compelled speaker disagrees. For example, unrebutted expert evidence shows that the City's recommendation to "Limit[] cell phone use by children" on the theory that

[18] *See, e.g.*, *Stoddard v. West Telemarketing, L.P.*, 316 Fed. Appx. 350, 355 (5th Cir. 2009) (noting that a recommendation is "an opinion and not a verifiable fact"); Webster's II New College Dictionary 948 (3d ed.) (defining "recommend" as "[t]o praise or commend (one) to another as being desirable or worthy . . . [t]o make attractive or acceptable").

children's brains are more vulnerable to RF is an alarmist instruction predicated on what is, at best, a controversial statement of opinion. *See* ER (Petersen Prelim. Rpt.) 131 ¶ 7(b); *see also* ER (Petersen Supp. Rpt.) 171-72 ¶ 3 (the idea that children's brains are more vulnerable is "[a]t most . . . [a] statement of scientific opinion upon which others in the scientific community disagree").

This "recommend[ation]" confirms how different the City's regime is from any lawful *Zauderer* disclosure. Since September 16, 2011 alone, the City has changed this recommendation three times, demonstrating that its scientific message is not a simple, "purely factual" disclosure like calorie counts on menu boards or other disclosures upheld under *Zauderer*.[19] It is a complicated and disputed assertion.

The revised "factsheet" compels not only controversial opinions but also false and misleading statements. The government can never force a private party to disseminate erroneous or misleading speech. *Schwarzenegger*, 556 F.3d at 967

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[19] On September 16, 2011, the City released a draft of the "factsheet," stating that "Developing brains and thinner skulls lead to much higher absorption in children." *See* San Francisco, Draft Materials (http://www.sfenvironment.org/downloads/library/toxics_health_cell_phone_factsheet_draft.pdf). Two weeks later, the City's "final" version of the "factsheet," changed this sentence to "Developing brains and thinner skulls lead to higher absorption in children," A-17, ER 99, replacing "much higher" with "higher." Then, after the district court's October 27, 2011 decision, the City changed it again, to read that: "Average RF energy deposition for children is two times higher in the brain and up to ten times higher in the bone marrow of the skull compared with cell phone use by adults." A-20, ER 277.

("[T]he State has no legitimate reason to force retailers to affix false information on their products."). Unrebutted expert evidence established that it is misleading "to suggest that studies are ongoing without recognizing or acknowledging the substantial database of studies already conducted supporting the safety of RF energy from cell phones." ER (Petersen Prelim. Rpt.) 146 ¶ 36. The revised "factsheet" says "studies continue to assess the potential health effects of cell phones" and that "no safety study has ever ruled out the possibility of human harm from RF exposure." A-20. But it nowhere acknowledges that the overwhelming weight of scientific studies supports the safety of cell phones.

The revised "factsheet's" statement that "RF Energy has been classified by the World Health Organization as a 'possible carcinogen'" is also misleading. Unrebutted expert evidence established that it is "misleading to refer to the World Health Organization's classification of RF energy 'as a possible carcinogen,' without providing the proper context." ER (Petersen Prelim. Rpt.) 131 ¶ 7(b). The district court's revisions to the "factsheet" do not provide this context. The WHO uses the "possibly carcinogenic" category in a specific, defined manner, ER (Petersen Prelim. Rpt.) 146-47 ¶ 36, and nowhere does the revised "factsheet" explain how the WHO defines that term. Lay consumers will never know that the WHO does not require any evidence of causation for placement of a substance in

the capacious "possibly carcinogenic" category, or that commonplace items like coffee and pickled vegetables are included in that category. *Id.*

Nor will consumers who read the revised "factsheet" know that the WHO states there is no evidence that cell phones cause cancer. *See* WHO Factsheet. The City plucks the scientific term of art "possibly carcinogenic" from the literature and presents it without adequate explanation. This is misleading, as the chief medical officer at the American Cancer Society makes clear: "When we as consumers hear 'possibly carcinogenic' we freak."[20]

In addition, the revised "factsheet" "recommends" that persons "concerned about the potential health effects from cell phone RF energy" take a number of steps to reduce their exposure. As unrebutted expert evidence established, "the implication . . . that it is advisable from a safety standpoint to reduce RF exposure from an FCC-compliant phone is false." ER (Petersen Prelim. Rpt.) 144 ¶ 34.

The revised "factsheet" also "recommends" "Avoiding cell phones" in certain areas, "Reducing the number and length of calls," and "Turn[ing] off your cell phone when not in use." Devoid of a factual predicate grounded in any known harm, these are opinions about how consumers should use a product, not factual disclosures. For example, parents might prefer that their children leave their

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[20] Liz Szabo & Mary Brophy Marcus, *WHO: Cellphone Possibly Carcinogenic*, USA Today, June 1, 2011 (http://www.usatoday.com/news/world/2011-05-31-cellular-radiation-cancer_n.htm).

phones on because of obvious public safety benefits. In fact, the FCC expressly emphasizes on its website that it "**does not endorse the need for**" for consumers to take steps such as those advocated in the revised "factsheet's" recommendations.[21]

None of these prolix contentions, whether merely opinion, subtly misleading, or outright false, fit within *Zauderer*. Courts have applied *Zauderer* where the disclosure involves simple and indisputable fact: a hamburger has 340 calories,[22] the person in the advertisement is an actor not a client,[23] or this "debt relief agency" provides bankruptcy services.[24] These statements do not advocate avoiding hamburgers, reducing use of products that are not promoted by actual clients, or limiting use of debt relief services. The City's "factsheet" is viewpoint advocacy, and private parties cannot be forced to disseminate it unless the City satisfies heightened scrutiny.

b. The "Factsheet" Is Far More Burdensome Than The Types Of Disclosures Sanctioned Under *Zauderer*.

The sheer volume of speech in the "factsheet," coupled with the requirement to hand it to everyone who purchases a phone, also places it far outside the

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[21] "FCC, *Wireless Devices and Health Concerns*") (emphasis in original).

[22] *See New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

[23] *Pub. Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

[24] *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 130 S. Ct. 1324 (2010).

Zauderer exception. The government cannot force private speakers to engage in long-winded disquisitions under the guise of "disclosures." *Ibanez*, 512 U.S. at 146 (recognizing that a lengthy explanation of the designation "CFP" on a financial planner's promotional speech would violate the First Amendment). Unjustified and unduly burdensome requirements have never been upheld under *Zauderer*. *See Zauderer*, 471 U.S. at 651.

The amount of speech in the revised "factsheet" far exceeds any permissible *Zauderer* "disclosure." It is nothing like the limited, factual disclosures involved when government requires attorneys to include a short statement explaining the differences between "fees" and "costs" in advertising, restaurants to post calories, or manufacturers to identify a substance in a product. The City's lengthy statements about its view of the science are more a soliloquy on what it says is a "public debate" than a "disclosure" of non-controversial fact.

The impact of the mandated speech should not be underestimated. For example, Verizon Wireless's "paperless store" initiative essentially eliminates all paper materials traditionally provided at the point of sale. ER (D'Ambrosio) 104 ¶ 21. In those locations, consumers may leave the store with just two things—their new phone and the City's alarmist "factsheet." It is undisputed that this will enhance the "factsheet's" significance, *see* ER (Stewart Supp. Rpt.) 270-71 ¶ 14, giving undue weight to the City's distinctly minority view.

c. The District Court Erroneously Expanded *Zauderer* Outside The Context Of Confusing Or Deceptive Commercial Speech.

The City has never suggested that its regime corrects any deceptive or confusing speech in advertisements or otherwise. It has stressed that the Ordinance is not triggered by speech at all. City Appellate Opp. at 17-18. The district court erroneously expanded *Zauderer* beyond its roots in correcting confusing or deceptive commercial speech, ER (Oct. 27 Op.) 7, which is the only place the Supreme Court or this Court has ever applied it. *Zauderer*, 471 U.S. at 651 ("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").

The Supreme Court recently confirmed *Zauderer*'s limitation to correcting confusing or deceptive speech. In *Milavetz*, the Court explained that heightened scrutiny has applied when the government fails to show that "advertisements were themselves likely to mislead consumers." *Milavetz*, 130 S. Ct. at 1340. In response to Milavetz's argument that *Zauderer* could not apply because the government did not adduce "evidence that its advertisements are misleading," the Court could have held that *Zauderer* is not limited to that context. Instead, the Court held that the government's evidence established a "likelihood of deception" without the compelled statements. *Id.* It did not expand *Zauderer*'s limits.

After *Milavetz*, many circuit courts agree that *Zauderer* is limited to correction of deceptive or confusing speech. *See International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640-41 (6th Cir. 2010) ("The Supreme Court recently clarified the standard of review to apply to disclosure requirements in *Milavetz* . . . [and] *Milavetz* . . . established that *Zauderer* applies where a disclosure requirement targets speech that is inherently misleading" (emphasis removed)); *Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 92 n.14 (2d Cir. 2010) ("As the Supreme Court explained in *Zauderer*, to pass the rational basis test, a mandated disclosure must be 'reasonably related to the State's interest in preventing deception of consumers' in circumstances otherwise likely to be misleading.").

Even before *Milavetz*, this Court recognized that *Zauderer* asks "if the 'disclosure requirements are reasonably related to the State's interest in *preventing deception*.'" *Schwarzenegger*, 556 F.3d at 966 (quoting *Zauderer*, 471 U.S. at 651) (emphasis added). In *Schwarzenegger*, the labeling requirement did not survive even *Zauderer* because "there is no chance for deception." *Id*; *see also U.S. v. Schiff*, 379 F.3d 621, 631 (9th Cir. 2004) (*Zauderer* allows government to regulate speech "to prevent the deception of customers."). The Ninth Circuit has never expanded *Zauderer* beyond this context.

The City identified First and Second Circuit cases that adopt what it calls a "broader reading" of *Zauderer*, City Appellate Opp. at 26, but they pre-date

Milavetz. And the First Circuit only upheld the disclosure after finding it related to an interest in "'preventing deception of consumers.'" *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005).[25] The decision to eliminate the prevention of deception prong has not been followed in other circuits,[26] and was not a decision the district court was authorized to make.

Moreover, the revised "factsheet" is ineligible for *Zauderer* scrutiny because that exception only applies to disclosures involving pure commercial speech. *See Zauderer*, 471 U.S. at 650-53. Commercial speech "does no more than propose a commercial transaction," *U.S. v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Undisputed evidence establishes that the City wishes to insert its views into CTIA members' retail stores, where they otherwise engage in "mixed speech," largely commercial with non-commercial components. ER (D'Ambrosio) 104-05 ¶¶ 20-

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[25] The City cites *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), in discussing cases that allegedly have rejected *Zauderer*'s correction of deception requirement. *See* City Appellate Opp. at 26. *EPA* neither applied *Zauderer* nor addressed the correction-of-deception issue. *Dex Media West, Inc. v. Seattle*, C10-1857-JLR, 2011 WL 2559391 (W.D. Wash. June 28, 2011), which followed other circuits extending *Zauderer*, is not controlling and incorrectly decided.

[26] *See, e.g.*, *U.S. v. Phillip Morris USA Inc.*, 566 F.3d 1095, 1144-45 (D.C. Cir. 2009); *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002); *U.S. v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2010); *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 541 F.3d 785, 795-96 (8th Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1324 (2010); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640-41 (6th Cir. 2010); *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011); *Ficker v. Curran*, 119 F.3d 1150, 1152 (4th Cir. 1997); *U.S. v. Bell*, 414 F.3d 474, 484 (3d Cir. 2005).

22. Regulations affecting such mixed speech receive strict scrutiny. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002).

3. The City Has Never Attempted To And Cannot Satisfy Any Form Of Heightened Scrutiny.

Since the narrow *Zauderer* exception does not apply, the City must satisfy strict scrutiny, *see, e.g.*, *R.J. Reynolds*, 2011 WL 5307391 *6, or at least the intermediate *Central Hudson* standard.[27] The City has never attempted to do so.

The City has not argued that its regime serves a compelling or substantial government interest. Nor could it. There is no interest in forcing a private party to issue a warning based on the hypothetical possibility that an unknown harm will be discovered, particularly where the federal government has said the product is safe. *See Ibanez*, 512 U.S. at 146; *Amestoy*, 92 F.3d at 67.

Moreover, the obligation to disseminate the revised "factsheet" is not adequately tailored. There are obvious, far less restrictive alternatives to

[27] The obligation to disseminate the "factsheet" directly intrudes on the dialogue between the vendor and the purchaser at the time of purchase. Although this obligation is not triggered by retailers' speech, there is no doubt that it will have a profound impact on retailers' communication. Instead of "Thank you for your purchase" or "Enjoy your phone," retailers would have to send a message, scripted by the City, regarding unknown dangers and the City's "recommendations" about cell phones' advisable use. Messages sent by a retailer at the time of purchase are, like liquor prices, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), at least protected commercial speech. While CTIA believes commercial and non-commercial speech should not receive different First Amendment treatment, *see, e.g.*, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting), that question need not be answered now. The City here must at a minimum satisfy the *Central Hudson* standard.

compelling retailers to speak the City's opinion which must be considered. *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). The City has never explained why less restrictive alternatives would not suffice. It is posting information on its website, and it could conduct public awareness campaigns at its own expense. Its first resort cannot be to make private parties its messengers. *See Riley*, 487 U.S. at 800 ("[T]he State may itself publish the [material.] This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech."); *see also Blagojevich*, 469 F.3d at 652. The City must vindicate the so-called "precautionary principle" (itself an opinion) on its own.

II. THE OBLIGATION TO DISSEMINATE THE REVISED "FACTSHEET" IS PREEMPTED.

The district court concluded that the City's regime, including the revised "factsheet," is not preempted. This conclusion is reviewed "de novo," *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 660 F.3d 384, 395 (9th Cir. 2011), and is wrong. The regime, including the revised "factsheet," conflicts with federal law. It is premised on the notion that FCC-compliant phones pose a "serious health risk," City Appellate Opp. at 14, and that the federal standards are inadequate. This alone is sufficient to find it preempted. *See Farina*, 625 F.2d at 122. Further, City warnings to limit or avoid using cell phones undermine core federal objectives in promoting an efficient wireless network.

A. The City's Regime Directly Challenges The Adequacy Of The FCC's RF Regulations.

In adopting its regime, the City explicitly second-guessed the policy choices made when the FCC established a comprehensive, prophylactic approach to RF safety. The City's defense confirms that it believes the FCC has not done its job. To survive First Amendment scrutiny, the City posits a potentially dire public health crisis from the ubiquitous use of FCC-certified cell phones. But this "crisis" can only exist if the FCC's rules are inadequate.

State and federal courts have concluded that claims premised on the perceived inadequacy of the FCC's RF standards constitute a preempted collateral attack. *Farina*, 625 F.2d at 122; *see also Murray*, 982 A.2d at 777; *Bennett*, 597 F. Supp. 2d at 1053. The FCC confirms that where state claims "rest on the premise that the FCC's RF standards do not *adequately* protect cell phone users from *potentially* harmful RF emissions, … those claims are preempted under federal law."[28]

[28] *See* ER 214 (Letter from Austin C. Schlick, General Counsel, FCC to Tony West, Assistant Attorney General, DOJ (Sept. 13, 2010) (emphasis added) (filed in *Dahlgren v. Audiovox Comms. Corp*., No. 2002 CA 007884B (D.C. Super. Ct.))). While the district court suggested that the statements in FCC briefs are not those of the agency, ER (Oct. 27 Op.) 11 n.2, this contravenes the Supreme Court's holding that views expressed in briefs by the DOJ and agency are the agency's and "should make a difference." *Geier*, 529 U.S. at 883; *Williamson v. Mazda Motor of Am., Inc*., 131 S. Ct. 1131, 1139 (2011).

San Francisco unabashedly challenges the adequacy of the FCC standards. *See* A-2, ER 78 (Ordinance Findings) ¶ 6 ("FCC regulations presently do not require cell phone manufacturers to measure the amount of [RF] energy an average user will absorb"); ¶ 7 (urging the FCC to change its regulations); ¶ 8 (finding that until the FCC changes its rules, "it is in the interest of the public health to require cell phone retailers to inform consumers about the potential health effects of cell phone use"). The City claims that the revised "factsheet" is needed to address alleged risks, including increased vulnerability of children and purported non-thermal effects. *See* City Appellate Opp. n.5. The FCC specifically rejected these alleged risks as inadequate to justify additional or different regulation. *RF Order II*, 12 F.C.C.R. at 13505 (¶ 31). The City's defense relies on a potential health crisis it fears from the normal use of phones approved by the FCC. The revised "factsheet"—like the rest of the regime—"rest[s]" on the notion that FCC-compliant cell phones are potentially dangerous, *Murray*, 982 A.2d at 777, and "expressly challenge[s] the FCC standards," *Farina*, 625 F.3d at 122. It is preempted.

The district court found that "[n]othing in the federal statutes or FCC regulations bars local disclosure requirements" and the City "does not wish to set its own emissions standards or to impose liability for compliance with the FCC standard." ER (Oct. 27 Op.) 6. This misapprehends the issue. That no regulation

explicitly bars local disclosure requirements is no response to a claim of conflict preemption based on FCC regulations. *Farina*, *Murray*, and *Bennett* make clear that collateral attacks on the FCC's regime are preempted regardless of the form they take. Requiring a statement that the FCC rules are insufficient would obviously be preempted. *See Murray*, 982 A.2d at 784 n.35 (concluding that a claim that defendants "omitted telling plaintiffs that the FCC SAR standards are not adequate cannot be distinguished in any material way from a failure-to-warn claim (i.e., a claim that defendants failed to warn defendants that FCC-compliant cell phones are unreasonably dangerous), and would be preempted"). Yet that is the message conveyed by San Francisco's regime. ER (Stewart Supp. Rpt.) 267-68 ¶ 12.

Farina makes clear that the City's Ordinance is preempted. Those plaintiffs did not seek to "set [state] emission standards," ER (Oct. 27 Op.) 6, and "disavow[ed]" any intent to directly challenge "the FCC's RF standards." *Farina*, 625 F.3d at 122. Rather, they sought to require wireless companies to provide headsets and a warning to use them to enable users to mitigate perceived potential risks. Their suit was preempted despite the fact that the remedy would not require changes to cell phone emissions. The Third Circuit concluded that the claims conflicted with federal law because in order to prevail plaintiffs "necessarily must establish that cell phones abiding the FCC's SAR standards are unsafe to operate

without a headset. In other words, Farina must show that these standards are inadequate—that they are insufficiently protective of public health and safety." *Id*.

Rather than downplay its attack, the City places the alleged inadequacy of the federal regime at the heart of its defense. The City argues that immediate dissemination of the revised "factsheet" is necessary to "mitigat[e] . . . a serious public health risk," from FCC-approved phones. City Appellate Opp. at 34. The City makes plain that this "serious public health risk" exists because the FCC's standards are inadequate. *See* A-2 (Ordinance Findings) ¶¶ 6-8. Like the claims in *Farina*, the regime is preempted.

B. <u>The City's Warnings And Recommendations Interfere With Federal Policy And Are Preempted.</u>

The Ordinance, including the revised "factsheet," is preempted for the independent reason that it is an obstacle to the achievement of the objectives of Congress and the FCC. Permitting the City to "second-guess the FCC's conclusion would disrupt the expert balancing underlying the federal scheme," *Farina*, 625 F.3d at 126, threaten the national uniformity necessary to an efficient wireless system, *id*. at 124, 126, and undermine myriad federal policies.

The FCC made a policy choice at Congress's direction to strike "an appropriate balance in policy" between "adequate safeguards of the public health and safety" and the "speed[y] deployment and the availability of competitive wireless telecommunications services." H.R. Rep. No. 104-204(I), at 94 (1995);

see Telecommunications Act of 1996, Pub. L. No. 104-204, § 704(b), 110 Stat. 56; *Farina*, 625 F.3d at 106-07. The FCC evaluated the science and set a standard fifty times below the level at which there is any known risk. This struck the "proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *RF Order II*, 12 F.C.C.R. at 13505 (¶ 29).

Because there is no known risk from exposures at the low levels permitted, the FCC concluded that addressing uncertain *potential* for risk at even lower levels was neither required nor justified.[29] The "controversial" notion that there may be some undocumented "non-thermal" effects from RF energy did not justify a different approach. *RF Order II*, 12 F.C.C.R. at 13504-5 (¶¶ 26, 28, 31). Although "all risk from RF energy could be eliminated by prohibiting wireless communications technologies[,] Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise." FCC *Cellular Phone* Br. at 21. The Second Circuit agreed: "[R]equiring exposure

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[29] The district court, ER (Oct. 27 Op.) 6, perceived a gap between the FCC's numerous statements, in official orders and briefs to various courts, that cell phones are safe and that its standards are sufficient to protect the public health, on the one hand, and the concept of "absolute safety," on the other. But this is a straw man. The FCC and other government agencies have said that cell phones are safe, and the FCC has specifically declined to issue stricter standards based on unsupported claims that its rules do not address all potential risk.

to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with [the FCC's] mandate." *Cellular Phone Taskforce*, 205 F.3d at 92. The FCC's highly-protective standard enables free adoption and use of cell phones without individual consumers needing to evaluate and manage exposure.[30]

The City disagrees with and seeks to recalibrate that approach. But "[w]here the federal government strikes a balance between competing national priorities—whether by statute or regulation—state prescriptions in the same area often stand as an 'obstacle' to achievement of the federal goals." FCC *Murray* Br. at 17 (citing *Geier*, 529 U.S. at 861); *see Farina*, 625 F.3d at 123 (under "[t]he Supreme Court's preemption case law" when "an agency is required to strike a balance between competing statutory objectives" that balance is preemptive); *Murray*, 982 A.2d at 776 ("state regulation that would alter the balance is federally preempted").

The City warns of dangers the FCC rejected and encourages behavior the FCC refused to endorse. Most directly, the revised "factsheet" contains specific instructions to "avoid[]" cell phones and "limit use" of them. It refers to RF

[30] As the FCC has explained, the general public is likely to "have less control than workers over exposure" so "[t]o take into account those differences between occupational and general exposure, NCRP (and ANSI) set an exposure limit for members of the general public of one-fifth of the occupational exposure, . . . which is 1/50th of the adverse effects threshold." Br. of Respondents FCC and United States, *Cellular Phone Task Force v. FCC*, No. 97-4328, 1998 WL 34097631 *8 (2d Cir. July 6, 1998).

energy as a "possible carcinogen." This "strong warning" will discourage the purchase and use of cell phones. ER (Stewart Supp. Rpt.) 267 ¶ 12. The City's own expert indicated that language about possible carcinogenicity may cause consumers to "avoid" cell phones altogether. ER (Scott Supp. Rpt.) 155 n.8.

The district court's edits do not change the core message conveyed by the "factsheet" or cure specific errors suggesting a looming danger. Adding a few sentences that try to put the WHO's complex and controversial grouping in context is inadequate. Under the WHO's technical approach, any substance that is not proven "probably not" or "not carcinogenic" is considered "possibly carcinogenic." This is not how lay persons think or speak. The "factsheet" retains core elements that the record shows convey a strong warning that FCC-approved devices are unsafe for normal use. *See* ER (Stewart Supp. Rpt.) 267 ¶ 12;[31] ER (Stewart Second Supp. Rpt.) 163-64 ¶ 8.

The City's recommendations are at odds with the federal government's position. The FCC expressly "**does not endorse the need for**" consumers to take

[31] Because consumers confronted with conflicting risk information place more weight on high risk assessment, ER (Stewart Supp. Rpt.) 267-68 ¶ 12, the message that, "Although all cell phones" must comply with FCC limits, "no safety study has ever ruled out the possibility of human harm from RF exposure" is likely to alarm consumers. Similarly, the retained warnings about children "may cause parents to reflexively conclude" that phones are dangerous. ER (Stewart Supp. Rpt.) 268 ¶ 13(C). The "factsheet" reinforces elements that appeal "to authority" and make the "psychological impact of the word 'carcinogen' more powerful." ER (Stewart Supp. Rpt.) 269 ¶ 13(H).

measures to reduce exposure, including specific advisories on the "factsheet."[32] Warnings and instructions about children contradict the FCC's rejection of special standards for children or other groups. *RF Order II*, 12 F.C.C.R. at 13505-08 (¶¶ 31-39).[33] The "factsheet" reflects the City's attempt to strike its own balance on issues the FCC considered and addressed. It is preempted.

Undisputed record evidence confirms that the City's warnings and recommendations will have deleterious effects on federal policy. Federal policy seeks a robust and ubiquitous national wireless network by *encouraging* adoption and use of cell phones, particularly broadband capable cell phones.[34] CTIA showed that if consumers follow the City's instruction to turn cell phones "off" when not "in use," or "avoid[] cell phones" in "elevators, on transit, etc.," a variety of services, including personal safety applications, severe weather alerts, and

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[32] FCC, Guide, Wireless Devices and Health Concerns (emphasis in original) (http://www.fcc.gov/guides/wireless-devices-and-health-concerns).

[33] *See also* FDA, Radiation-Emitting Products, Children and Cell Phones (updated April 30, 2009) (http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116331.htm) ("scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers").

[34] *See, e.g.*, President Barack Obama, Presidential Memorandum: Unleashing the Wireless Broadband Revolution, Memorandum for the Heads of Executive Departments and Agencies (June 28, 2010) ("We are now beginning the next transformation in information technology: the wireless broadband revolution."); FCC, *Connecting America: The National Broadband Plan*, 75 (rel. Mar. 16, 2010).

public health notifications, would be rendered ineffective. D.C. Dkt. 60 at 20-21. Operators' ability to manage and optimize networks would be compromised, because various functions, including roaming and long-term planning, depend on user volume, signal strength, device location, and other information transmitted from devices that are "on" but not in use.[35] ER (Fitterer) 114-15 ¶¶ 7-8. This will undermine the efficient wireless network Congress instructed the FCC to facilitate.

These disruptions undermine other federal public safety policies. For example, FEMA and FCC standards enable government officials "to send 90 character geographically targeted text messages to the public regarding emergency alert and warning of imminent threats to life and property, Amber alerts, and Presidential emergency messages."[36] A phone that is powered off will not receive them. The City's instructions threaten wireless E-911, which uses wireless devices' GPS functionality to send location data to first responders, "enhanc[ing] the public's ability to contact emergency services personnel during times of crisis." *Wireless E-911 Location Accuracy Requirements*, 26 F.C.C.R. 10074, 10075

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[35] AT&T Mobility, for example, "monitors, collects and uses wireless location information" to provide its voice and data services. That information, along with "other usage and performance information obtained from our network and your wireless device, to maintain and improve our network and the quality of your wireless experience." http://www.att.com/gen/privacy-policy?pid=13692#location.

[36] Press Release: FEMA and the FCC Announce Adoption of Standards for Wireless Carriers to Receive and Deliver Emergency Alerts via Mobile Devices (rel. Dec. 7, 2009) (http://www.fema.gov/news/newsrelease.fema?id=50056).

(2011). These benefits are not theoretical. Law enforcement regularly uses GPS data to locate abduction victims,[37] and a Washington State resident recently identified an abductor and his victim after receiving an Amber Alert on her wireless device.[38]

The City has never rebutted and the district court ignored these consequences, which raise serious questions about whether forced dissemination of the "factsheet" conflicts with federal policy.

III. THE DISTRICT COURT EXCEEDED ARTICLE III'S LIMITS BY REWRITING THE "FACTSHEET" AND ISSUING AN ADVISORY OPINION.

The district court found all of the materials promulgated by the City to be unconstitutional. But instead of simply enjoining those materials, the court designed a new "factsheet" and opined that it would not violate the First Amendment. Its instructions were singular in detail and specificity. *See* ER (Oct. 27 Op.) 12, 15 ("corrections should be made in a font equal in dignity to the font used throughout the fact-sheet" and would be "corrected and vetted" by the district

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[37] *See, e.g.*, *Lodi Police Officers Use GPS to Track Kidnap Victim's Cell Phone*, Recordnet.com (Sept. 23, 2008) (http://www.recordnet.com/apps/pbcs.dll/article?AID=/20080923/A_NEWS02/809230323).

[38] *See Federal Way Woman Receives Award for Amber Alert Heroics*, FederalWayMirror.com (July 5, 2011) (http://www.pnwlocalnews.com/south_king/fwm/news/124890784.html).

court).[39] The City then submitted a revised "factsheet" that accepted the district court's changes "verbatim." ER 273-77. The result is a "factsheet" never conceived, considered, or adopted pursuant to local law,[40] and, respectfully, a judicial role never contemplated by the Framers.

The City conceded this was an "unorthodox shortcut," City Appellate Opp. at 36, but suggested that there is no need to consider whether it was a "jurisdictional error," because it obviated what could have been a tedious process, *id.* at 35. While it might be "efficient" to "shortcut" the adversarial process by having judges rewrite and vet regulations before a municipality goes to the trouble to enact them, "[t]he premise of our adversarial system" is that courts "do not sit as self-directed boards of legal inquiry and research." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

The district court's rewrite exceeded Article III. Federal courts cannot rewrite state law to cure constitutional infirmities. *See Wyoming v. Oklahoma*, 502

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[39] The court even purported to give the City a menu of options to choose from, offering different formulations for the City's consideration. ER (Oct. 27 Op.) 12.

[40] City law provides that it could only amend the "factsheet" after a public hearing and public notice. *See* City Charter § 4.104 ("No rule or regulation shall be adopted, amended or repealed, without a public hearing. At least ten days' public notice shall be given for such public hearing."); Ordinance § 1104(d) (directing DOE to "issue regulations specifying the contents, size, and format for the elements the poster, the factsheet, and the statements" "[f]ollowing a public hearing"), A-8, ER 84. The City did not hold a public hearing before submitting the revised "factsheet" to the court for "vetting" and approval.

U.S. 437, 460 (1992) ("[I]t is clearly not this Court's province to rewrite a state statute."); *Tucker v. Dep't of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996) ("[I]t is not within the province of [a federal] court to 'rewrite' [a state enactment] to cure its substantial constitutional infirmities."). It is one thing to narrow a statute by severing unconstitutional components or providing a limiting construction. It is quite another to rewrite an enactment, directing that specific language be used and requiring that the final product be "corrected and vetted" by the court. While a federal court may employ a narrowing construction where language permits, it may "not rewrite a state law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 398 (1988).

The district court did something no federal court should do. It remade the enactment, adding concepts never considered by the legislative body. *Cf. Iselin v. U.S.*, 270 U.S. 245, 251 (1926) (rejecting government's invitation to supply omitted terms from a statute and thereby enlarge its scope in a manner favorable to the government, indicating that "supply[ing] omissions [to a statute] transcends the judicial function"); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 937 (9th Cir. 2004) ("federal courts ought not be redrafting state statutes at the level of individual words").

This was a judicial "invasion of the legislative domain," *U.S. v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 n.26 (1995). A court may not "blue-

pencil" a law, "such editorial freedom . . . belongs to the Legislature, not the Judiciary." *Free Ent. Fund v. PCAOB*, 130 S. Ct. 3138, 3162 (2010); *see Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) ("We cannot rewrite [a state law] to reflect our perception of legislative purpose."); *Chapman v. U.S.*, 500 U.S. 453, 464 (1991) (canons of construction are "'not a license for the judiciary to rewrite language enacted by the legislature'"). "[T]he principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991) (citations omitted). "[A] federal court, on reviewing a state statute, does not assume the task of making such choices for the state legislature." *Id.* at 1127. In short, federal courts are supposed to call constitutional balls and strikes. They should not be in the business of guiding state legislators on how to get the pitch over the proverbial plate.

The City cannot claim that it "cured" the problem by having City officials approve the Court's draft. "For [the Court] to review regulations not yet promulgated, the final form of which has only been hinted at, would be wholly novel." *EPA v. Brown*, 431 U.S. 99, 103–04 (1977); *see Calderon v. U.S. Dist. Court*, 134 F.3d 981, 989 (9th Cir. 1998) ("any ruling as to the legitimacy of a step not yet taken would be tantamount to an advisory opinion"). Subsequent City endorsement underlines the advisory nature of the Court's action.

IV. THE OBLIGATION TO DISSEMINATE THE REVISED "FACTSHEET" WILL CAUSE IRREPARABLE INJURY.

A. First Amendment Injuries Are *Per Se* Irreparable.

Forcing CTIA members to disseminate the revised "factsheet" will violate their constitutional rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Unrebutted evidence shows that retail stores convey an array of information about products and services, as well as social and policy initiatives. *See* ER (D'Ambrosio) 104-05 ¶¶ 20-22. Unrebutted evidence also shows that retailers exercise editorial discretion in those spaces, determining what, where, and how to speak in a critical communications channel. *Id*. 105-06 ¶ 26. CTIA members vigorously disagree with the City's alarmist and misleading messages, and agree with the FCC that the public does not need to be instructed to limit cell phone use. *Id.* 104-05 ¶¶ 20-22. This amply supports entry of an injunction.

B. CTIA Members Will Face Irreparable Loss Of Consumer Goodwill And Business Reputation.

CTIA members face imminent loss of goodwill, customer relationships, and competitive position, *see* ER (D'Ambrosio) 105 ¶ 24 (consumer confusion and distraction); 106 ¶ 29 (harms from forced product disparagement); 107 ¶ 30 (impact of changing display and promotional materials), and harm to business operations, ER (Fitterer) 115 ¶ 8-9 (network harms from public turning phones

off). These are precisely the sort of harms that courts deem irreparable. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

The City offered no evidence to rebut these showings and, with respect to the revised "factsheet," the district court ignored them. ER (Oct. 27 Op.) 15. It simply announced that the revised "factsheet" would cause "little irreparable injury" and asserted, without support, that "[i]ndustry profits will not sag." *Id.* CTIA's unrebutted showing entitles it to relief.

V. <u>THE CITY AND PUBLIC WILL NOT BE HARMED IF THE REVISED "FACTSHEET" IS NOT DISSEMINATED.</u>

The district court correctly determined that neither the City nor the public interest will be harmed by maintaining the status quo. It enjoined the entire regime indefinitely and the revised "factsheet" through November 30. ER (Oct. 27 Op.) 14. The Ninth Circuit agreed that the revised "factsheet" should be enjoined pending appeal. DktEntry 12. The City has made no credible argument why it or the public will be harmed if the revised "factsheet" is not disseminated while courts consider the merits of the City's regulatory regime.

The City's conduct confirms there is no harm from a preliminary injunction. The Ordinance originally allowed many months between the City's adoption of final regulations and enforcement. ER (SAC) 61-62 ¶ 80; *see also* ER 21-25. The

City delayed compliance for over a year while it considered and adopted revisions. And the City agreed at the hearing below to stay enforcement pending a ruling. *See* ER (Transcript) 249. Any suggestion that the City will suffer by not having distribution of the revised "factsheet" begin immediately borders on the frivolous.

Nor will the public suffer. The FCC's RF standards incorporate a fifty-fold safety factor, ensuring that all cell phones lawfully sold in the U.S. "are safe for use."[41] As such, the attempt to create a public health concern justifying urgent enforcement fails. The City's assertions are so conditional that they are unavailing. *See* City Appellate Opp at 2 ("impact on the public health system, that *would* occur *if it turns out* there is a public health threat" (emphasis added)); *id*. at 37 (arguing that the public interest is served by forced compliance "[g]iven the consequences that *could* result *if* there were a health issue" (emphasis added)). There is no safety issue that could justify disseminating this information prior to final judgment.

VI. THE PUBLIC INTEREST AFFIRMATIVELY FAVORS INJUNCTIVE RELIEF AGAINST THE REVISED "FACTSHEET."

There is no plausible public interest that would be injured by injunctive relief against the revised "factsheet." Indeed, several harms will flow from its forced dissemination.

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[41] FCC *Murray* Br. at 15-16.

First, it is unquestionably in the public interest to uphold First Amendment rights and vindicate federal law by preventing forced dissemination of the revised "factsheet." *See U.S. v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees."); *PG&E*, 475 U.S. at 8 ("'The constitutional guarantee of free speech serves significant societal interests.'"). This Court agrees. *See Sammartano v. First Judicial Dist.*, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles."). Because First Amendment rights are threatened, the public interest favors relief.

The City has identified no "critical public interest that would be injured by the grant of preliminary relief." *Indep. Living Ctr. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *cert. granted, in part*, 131 S. Ct. 992 (Jan. 18, 2011) (No. 09-958); *see Alliance for the Wild Rockies*, 632 F.3d at 1138. Apart from its disagreement about First Amendment injury, the City relied principally below on the general public interest in "duly enacted" local laws. This reasoning proves too much because federal law and policy equally reflect democratically-enacted visions of the public interest. *See Maxwell-Jolly*, 572 F.3d at 658 (rejecting under irreparable injury analysis the claim that state is *per se* harmed when a duly enacted law is enjoined). Public interest in a duly enacted local ordinance yields

where it is "obvious that the Ordinance was unconstitutional or preempted by duly enacted federal law, in which elected federal officials had balanced the public interest differently." *Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008). The revised "factsheet" has not been duly enacted by the Board or the DOE under local law, but crafted by a federal judge, the City attorney, and the DOE under threat of injunction. It does not reflect the people's view of the public interest.

Second, the record shows that the public interest will be *harmed* by distribution of the unscientific and misleading warnings in the revised "factsheet." Unrebutted evidence demonstrates that if the City's warnings to turn off and use phones less have their intended effect, consumers will lack access to a variety of communications and emergency services. ER (Springer) 117-19 ¶¶ 5-14. Networks will not be optimized because carriers and manufacturers will not have access to critical information. ER (Fitterer) 114-15 ¶¶ 6-9.

The City never countered these showings, so it is undisputed that the revised "factsheet" will undermine substantial public benefits. The FCC has determined that the public interest is served by a robust and innovative wireless network, including critical public safety and emergency services. *See, e.g.*, *RF Order II*, 12 F.C.C.R. at 13497 (¶ 5). San Francisco authorities agree that "any interruption of cellular service poses serious risks to public safety" and "available open

communications networks are critical to our economy and democracy and should be preserved to the fullest extent possible." BART, Cell Phone Interruption Policy (Dec. 1, 2011). It makes no sense to jeopardize these benefits, particularly where the FCC has taken decisive action to ensure that all cell phones sold in the United States are safe for general use. Federal policy supports injunctive relief. *See Am. Trucking*, 559 F.3d at 1059-60 (concluding that the public interest is represented by "the Constitution's declaration that federal law is to be supreme").

Despite the "importance of assessing the balance of the equities and the public interest in determining whether to grant a preliminary injunction," *Winter v. NRDC*, 555 U.S. 7, 26 (2008), the district court ignored this unrebutted evidence and did not explain how the public interest could favor distribution of the revised "factsheet." That decision cannot stand. *See id.* (criticizing the district court's single-sentence, "cursory" analysis of the balance of equities and public interest factors); *accord U.S. v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (a lower court abuses its discretion where its decision is "without support in inferences that may be drawn from facts in the record").

CONCLUSION

The Court should reverse the portion of the decision below denying CTIA's motion for preliminary injunction and order the entry of a preliminary injunction prohibiting the City from requiring retailers to disseminate the revised "factsheet."

Dated: December 14, 2011

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: December 14, 2011

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, CTIA is unaware of any related case currently pending in this Court.

Dated: December 14, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2011, I electronically filed the foregoing opening brief of CTIA and accompanying addendum 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 further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing brief and accompanying addendum 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:

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I also certify that I have sent four copies of the Excerpts of Record by Fed Ex overnight delivery to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, and one copy of the Excerpts of Record by Fed Ex overnight delivery to:

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ADDENDUM OF ORDINANCE AND REGULATIONS

Ordinance No. 165-11, the “Cell Phone Right-to-Know Ordinance”…………...A-1

San Francisco Department of Environment Regulations SFE11-07-CPO……..A-13

“Factsheet” Adopted September 30, 2011…………………………...…...…A-17

“Poster” Adopted September 30, 2011……………………………………....A-18

“Stickers” Adopted September 30, 2011………….…………………...……….A-19

Revised “ Factsheet”……………..…………………………………………….A-20

A-1 to A-12

Ordinance No. 165-11, the "Cell Phone Right-to-Know Ordinance"

FILE NO. 110656

Amendment of the Whole – 7/11/11
ORDINANCE NO. 165-11

[Environment Code—Cell Phone Disclosure Requirements]

Ordinance amending the San Francisco Environment Code Sections 1101 through 1105 to require cell phone retailers to provide their customers with information regarding how to limit exposure to the radiofrequency energy emitted by cell phones in place of the mandatory disclosure of Specific Absorption Rate values for cell phone models.

NOTE: Additions are *single-underline italics Times New Roman*; deletions are ~~*strike-through italics Times New Roman*~~. Board amendment additions are double-underlined; Board amendment deletions are ~~strikethrough normal~~.

Be it ordained by the People of the City and County of San Francisco:

Section 1. **Findings.**

1. It is the policy of the City and County of San Francisco to adhere to the Precautionary Principle, which provides that the government should not wait for scientific proof of a health or safety risk before taking steps to inform the public of the potential for harm.

2. There is a debate in the scientific community about the health effects of cell phones.

3. Numerous studies have identified evidence of an increased risk of brain cancer and other illnesses as a result of cell phone use, as well as heightened health concerns for children and pregnant women.

4. Leading epidemiologists who have studied the effects of radiofrequency energy absorbed from cell phones have recommended that the public be informed of the potential for adverse health effects from long-term cell phone use, particularly for children. See Cardis and Sadetski, "Indications of possible brain-tumour risk in mobile-phone studies: Should we be concerned?," Journal of Occupational and Environmental Medicine, Jan. 24, 2011.

5. Most cellular phone user manuals disclose, in fine print, that if a user holds a phone too close to his or her body, his or her phone may exceed the radiofrequency energy exposure limitation set by the Federal Communications Commission ("FCC").

6. FCC regulations presently do not require cell phone manufacturers to measure the amount of radiofrequency energy an average user will absorb from each model of cell phone. The amount of radiofrequency energy a user will absorb from a particular model of cell phone depends on numerous factors, including how the phone is used, the frequency on which it operates and the communication system it uses (for example, CDMA technology or GSM technology).

7. The Board urges the FCC and the scientific community to develop a metric for measuring the actual amount of radiofrequency energy an average user will absorb from each model of cell phone. Such a metric would better enable consumers concerned about the potential effects of radiofrequency emissions to compare cell phone models and make informed purchasing decisions.

8. The Board finds that until such a metric is developed, it is in the interest of the public health to require cell phone retailers to inform consumers about the potential health effects of cell phone use, and about measures they can take to reduce their exposure to radiofrequency energy from cell phones. The purpose of this legislation is to improve and strengthen the disclosures required under the original Cell Phone Right-to-Know Ordinance to better achieve this public health purpose.

/ / /

/ / /

/ / /

1 Section 2. The San Francisco Environment Code is hereby amended by amending
2 Sections 1101 through 1105, to read as follows:
3 **SEC. 1101. DEFINITIONS.**
4 For the purposes of this Chapter, the following terms shall have the following
5 meanings, unless the context requires otherwise:
6 (a) "Cell phone" means a portable wireless telephone device that is designed to send
7 or receive transmissions through a cellular radiotelephone service, as defined in Section
8 22.99 of Title 47 of the Code of Federal Regulations. A cell phone does not include a wireless
9 telephone device that is integrated into the electrical architecture of a motor vehicle.
10 (b) "Cell phone retailer" means any person or entity within the City which sells or
11 leases cell phones to the public or which offers cell phones for sale or lease. ~~*"Cell phone*~~
12 ~~*retailer" shall include a "formula cell phone retailer."*~~ "Cell phone retailer" shall not include
13 anyone selling or leasing cell phones solely over the phone, by mail, or over the internet. "Cell
14 phone retailer" shall also not include anyone selling or leasing cell phones directly to the
15 public at a convention, trade show, or conference, or otherwise selling or leasing cell phones
16 directly to the public within the City for fewer than 10 days in a year.
17 (c) "Cell phone service provider" means a telecommunications common carrier
18 authorized to offer and provide cellular service for hire to the general public.
19 (d) "Director" means the Director of the Department of the Environment, or his or her
20 designee.
21 (e) "Display materials" means informational or promotional materials posted adjacent
22 to a sample phone or phones on display at the retail location that describe or list the features
23 of the phone. "Display materials" shall not include any tag, sticker, or decal attached to a cell
24 phone by the manufacturer, the manufacturer's packaging for a cell phone, or materials that
25 list only the price and an identifier for the phone.

~~*(f) "Formula cell phone retailer" means a cell phone retailer which sells or leases cell phones to the public, or which offers cell phones for sale or lease, through a retail sales establishment located in the City which, along with eleven or more other retail sales establishments located in the United States, maintains two or more of the following features: a standardized array of merchandise; a standardized facade; a standardized decor and color scheme; a uniform apparel; standardized signage; or, a trademark or service mark.*~~

~~*(g) "SAR value" means the maximum whole-body and spatial peak Specific Absorption Rate for a particular make and model of cell phone as registered with the Federal Communications Commission. (See, generally, Section 2.1093 of Title 47 of the Code of Federal Regulations.)*~~

SEC. 1102. REQUIREMENTS FOR CELL PHONE SERVICE PROVIDERS.

~~*(a) Beginning September 1, 2010, any*~~ *Any* cell phone service provider that sells its service through a retailer in the City must provide a list of those retail locations to the Department of the Environment in a form determined by the Department. The service provider must update the list annually. The Department shall adopt regulations governing the form and submission of the lists.

~~*(b) Beginning November 1, 2010, any cell phone service provider that sells its service through a retailer in the City must provide those retailers with the SAR value for each make and model of cell phone sold or leased at that location in connection with cell phone service from the provider. The service provider must update the information it provides to retailers whenever new makes and models of cell phones covered by the service provider are added or old makes and models dropped, or whenever the service provider receives new information on the SAR values of any of the phones.*~~

~~*(c) If a cell phone service provider is unable to provide this information (in subsection b) to retailers in the City, then the Department of Environment upon the request of the service provider shall provide assistance in procuring that information.*~~

1
2 **SEC. 1103. REQUIREMENTS FOR CELL PHONE RETAILERS.**
3 *(a) Beginning 15 days after the Department of the Environment adopts the regulations required*
4 *under Section* 1104(d) ~~1104(b)~~, *cell phone retailers must display in a prominent location visible to the*
5 *public, within the retail store, an informational poster developed by the Department of the Environment*
6 *as referenced in Section 1104.*
7 *(b) Beginning 15 days after the Department of the Environment adopts the regulations required*
8 *under Section* 1104(d) ~~1104(b)~~, *cell phone retailers must provide to every customer that purchases a*
9 *cell phone a free copy of an informational factsheet developed by the Department of the Environment*
10 *as referenced in Section 1104. A copy of this factsheet must also be provided to any customer who*
11 *requests it, regardless of whether they purchase a cell phone or not.*
12 *(c)* ~~*(a)*~~ *Beginning 30 days after the Department of the Environment adopts the regulations*
13 *required under Section* 1104(d) ~~1104(b)~~, *if* ~~*If*~~ a cell phone retailer posts display materials in
14 connection with sample phones or phones on display, the display materials must include
15 these three informational statements, whose contents, and size, and format as printed, shall
16 be determined by the Department of the Environment ~~elements~~:
17 *(1) A statement explaining that cell phones emit radiofrequency energy that is absorbed*
18 *by the head and body;*
19 *(2) A statement referencing measures to reduce exposure to radiofrequency energy from*
20 *the use of a cell phone; and,*
21 *(3) A statement that the informational factsheet referenced in subsection (b) is available*
22 *from the cell phone retailer upon request.*
23 ~~*(1) The SAR value of that phone and the maximum allowable SAR value for cell phones*~~
24 ~~*set by the FCC;*~~
25 ~~*(2) A statement explaining what a SAR value is; and,*~~

~~*(3) A statement that additional educational materials regarding SAR values and cell phone use are available from the cell phone retailer.*~~

~~*The Department of the Environment shall adopt regulations specifying the content and format for the elements required by this subsection (a), and shall develop a template for those elements. The SAR values and header text shall be printed in type no smaller than the size and readability equivalent of "Arial" 11 point, and the copy text shall be printed in type no smaller than the size and readability equivalent of "Arial" 8 point.*~~

~~*Formula cell phone retailers must comply with the requirements of this subsection (a) beginning May 1, 2011. All other cell phone retailers must comply by February 1, 2012.*~~

~~*(b) If a cell phone retailer does not post display materials in connection with sample phones or phones on display, the retailer must display, in a prominent location within the retail location visible to the public, a poster that includes these three elements:*~~

~~*(1) The SAR value of each make and model of cell phone offered for sale or lease at that retail location and the maximum allowable SAR value for cell phones set by the FCC;*~~

~~*(2) A statement explaining what a SAR value is; and,*~~

~~*(3) A statement that additional educational materials regarding SAR values and cell phone use are available from the cell phone retailer.*~~

~~*The Department of the Environment shall adopt regulations specifying the content and format for the elements required by this subsection (b), and shall develop a template for those elements. The store poster shall be no smaller than 8.5 inches by 11 inches.*~~

~~*Formula cell phone retailers must comply with the requirements of this subsection (b) beginning May 1, 2011. All other cell phone retailers must comply by February 1, 2012.*~~

(d) ~~*(c)*~~ The Director may, in his or her discretion, authorize a retailer to use alternate means to comply with the requirements of subsections (a)*, (b) and (c)* ~~*and (b)*~~. The Director shall authorize such alternate means through the adoption of a regulation after a noticed

hearing, and no retailer may sell or lease cell phones to the public or offer to sell or lease cell phones to the public using any alternate means of compliance with this Chapter unless specifically authorized to do so in advance in writing by the Director.

~~*(d) Retailers shall provide any customer who requests one with a free copy of the supplemental factsheet prepared by the Department of the Environment under Section 1104(a), as referenced in subsections (a)(3) and (b)(3).*~~

SEC. 1104. *REQUIREMENTS FOR THE DEPARTMENT OF THE ENVIRONMENT* ~~*DEPARTMENTAL FACTSHEETS; ASSISTANCE WITH COMPLIANCE*~~.

(a) Following a public hearing, the Department of the Environment, in consultation with the Department of Public Health, shall develop*:* ~~*a supplemental factsheet regarding SAR values and the use of cell phones, as well as templates for display materials and store posters required by this Chapter.*~~

(1) An informational poster, as referenced in Section 1103(a);

(2) An informational factsheet, as referenced in Section 1103(b); and,

(3) A set of statements that must be included in display materials, as referenced in Section 1103(c).

(b) The materials shall inform consumers of issues pertaining to radiofrequency energy emissions from cell phones and actions that can be taken by cell phone users to minimize exposure to radiofrequency energy, such as turning off cell phones when not in use, using a headset and speaker phone, or using the phone to send text messages ("texting").

(c) The Director may by regulation require the inclusion of additional information in the poster, the factsheet, and/or the statements required in connection with display materials.

~~*The Department of the Environment shall hold the initial public hearing by September 1, 2010, and complete the supplemental factsheet by November 1, 2010. The supplemental factsheet shall be no larger than 8.5 inches by 11 inches*~~.

(d) ~~*(b)*~~ *By* ~~*November 1, 2010,*~~ *Within 15 days after the effective date of this ordinance or as soon thereafter as is practicable,* the Department of the Environment shall*, after a noticed public hearing,* issue regulations specifying the contents, *size,* and format for ~~*the elements*~~ *the poster, the factsheet, and the statements required in connection with display materials as referenced in subsection (a), and provide templates of them for use by retailers.*

(1) The informational poster shall be a maximum size of 11 inches by 17 inches;

(2) The informational factsheet shall be a maximum size of 5.5 inches by 11 inches (half-sheet of paper); and,

(3) The informational statements shall be printed in a space no smaller than 1 inch by 2.625 inches.

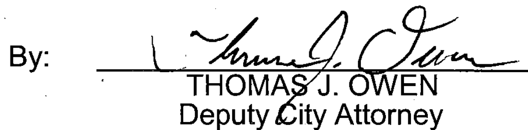
~~*required by Section 1103, subsections (a) and (b), for display materials and store posters, respectively. By that date, the Department of the Environment shall also adopt templates for display materials and store posters.*~~

~~*(c) The Department shall develop content for all of these materials that is based on and consistent with the relevant information provided by the FCC or other federal agencies having jurisdiction over cell phones, explaining the significance of the SAR value and potential effects of exposure to cell phone radiation. The materials shall also inform customers of actions that can be taken by cell phone users to minimize exposure to radiation, such as turning off cell phones when not in use, using a headset and speaker phone, or texting.*~~

(c) Should the scientific community or the FCC develop a new metric to measure the actual amount of radiofrequency energy an average user will absorb from each model of cell phone, the

1 *Department of the Environment shall make recommendations to the Board of Supervisors for*
2 *amendments to this Chapter to require notification to the public of this metric at the point of sale.*
3
4 **SEC. 1105. ~~*IMPLEMENTATION AND*~~ ENFORCEMENT.**
5 ~~*(a) During the period leading up to May 1, 2011, the Department of the Environment shall*~~
6 ~~*conduct an education and assistance program for formula cell phone retailers regarding the provisions*~~
7 ~~*of Section 1103(a), (b), and (d), and shall visit the retailers and assist them with meeting the*~~
8 ~~*requirements of the subsections.*~~
9 ~~*(b) Notwithstanding those provisions of Section 1103(a), (b) and (d) applicable to all cell*~~
10 ~~*phone retailers other than formula cell phone retailers, requiring them to make certain disclosures and*~~
11 ~~*statements in connection with cell phone sales and leases, the City shall not enforce those provisions*~~
12 ~~*until August 1, 2012. During the period between the operative date for those requirements, February 1,*~~
13 ~~*2012, and August 1, 2012, the Department of the Environment shall conduct an education and*~~
14 ~~*assistance program for those cell phone retailers, and shall visit the retailers and assist them with*~~
15 ~~*meeting the requirements of the subsections.*~~
16 *(a)* ~~*(c)*~~ The City Administrator shall issue a written warning to any person he or she
17 determines is violating provisions of this Chapter or any regulation issued under this Chapter.
18 If 30 days after issuance of the written warning the City Administrator finds that the person
19 receiving the warning has continued to violate the provisions of the Chapter or any regulation
20 issued under this Chapter, the City Administrator may impose administrative fines as provided
21 below in subsections *(b), (c) and (d)* ~~*(d), (e), and (f)*~~.
22 *(b)* ~~*(d)*~~ Violation of this Chapter or any regulation issued under this Chapter shall be
23 punishable by administrative fines in the amount of:
24 (1) Up to $100.00 for the first violation;
25 (2) Up to $250.00 for the second violation within a twelve-month period; and,

1 (3) Up to $500*.00* for the third and subsequent violations within a twelve-month
2 period.
3 *(c)* ~~(e)~~ Except as provided in subsection *(b)* ~~(d)~~, setting forth the amount of
4 administrative fines, Administrative Code Chapter 100, "Procedures Governing the Imposition
5 of Administrative Fines," as may be amended form time to time, is hereby incorporated in its
6 entirety and shall govern the imposition, enforcement, collection, and review of administrative
7 citations issued by the City Administrator to enforce this Chapter or any regulation issued
8 under this Chapter. Violation of this Chapter is not a misdemeanor, and the Board of
9 Supervisors intends that the requirements of this Chapter be enforced only through
10 administrative fines as provided in this Section.
11 *(d)* ~~(f)~~ For purposes of this Chapter, each individual item that is sold or leased, or
12 offered for sale or lease, contrary to the provisions of this Chapter or any regulation issued
13 under this Chapter shall constitute a separate violation.
14
15 Section 3. **Additional Provisions.**
16 (a) **Disclaimer.** In adopting and implementing this Chapter, the City and County of
17 San Francisco is assuming an undertaking only to promote the general welfare. It is not
18 assuming, nor is it imposing on its officers and employees, an obligation for breach of which it
19 is liable in money damages to any person who claims that such breach proximately caused
20 injury.
21 (b) **Conflict with State or Federal Law.** This Chapter shall be construed so as not to
22 conflict with applicable federal or State laws, rules or regulations. Nothing in this Chapter
23 shall authorize any City agency or department to impose any duties or obligations in conflict
24 with limitations on municipal authority established by State or federal law at the time such
25 agency or department action is taken.

1 (c) **Severability.** If any of the words, phrases, clauses, sentences, sections, or
2 provisions of this ordinance or the application thereof to any person or circumstance are held
3 invalid, the remainder of this ordinance's words, phrases, clauses, sentences, sections, or
4 provisions, including the application of such part or provisions thereof to persons or
5 circumstances other than those to which it is held invalid, shall not be affected thereby and
6 shall continue in full force and effect. To this end, the provisions of this ordinance are
7 severable.
8 (d) **Environmental Findings.** The Planning Department has determined that the
9 actions contemplated in this ordinance are in compliance with the California Environmental
10 Quality Act (Cal. Pub. Res. Code §§ 21000 et seq.). Said determination is on file with the
11 Clerk of the Board of Supervisors in File No. 110656 and is incorporated herein by
12 reference.
13
14
15
16 APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney
17
18
By: 
19 THOMAS J. OWEN
Deputy City Attorney
20
21
22
23
24
25

City and County of San Francisco
Tails
Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 110656 **Date Passed:** July 26, 2011

Ordinance amending the San Francisco Environment Code Sections 1101 through 1105 to require cell phone retailers to provide their customers with information regarding how to limit exposure to the radiofrequency energy emitted by cell phones in place of the mandatory disclosure of Specific Absorption Rate Values for cell phone models.

July 11, 2011 City Operations and Neighborhood Services Committee - AMENDED, AN AMENDMENT OF THE WHOLE BEARING SAME TITLE

July 11, 2011 City Operations and Neighborhood Services Committee - RECOMMENDED AS AMENDED

July 19, 2011 Board of Supervisors - PASSED, ON FIRST READING

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

July 26, 2011 Board of Supervisors - FINALLY PASSED

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

File No. 110656

I hereby certify that the foregoing Ordinance was FINALLY PASSED on 7/26/2011 by the Board of Supervisors of the City and County of San Francisco.

Angela Calvillo
Clerk of the Board

Mayor Edwin Lee

8/3/11
Date Approved

A-13 to A-16

San Francisco Department of the Environment Regulations SFE 11-07-CPO

San Francisco Department of the Environment Regulations SFE 11-07-CPO
Requirement for cell phone retailers to provide information to their customers regarding how to limit their exposure to cell phone radiofrequency energy
Ordinance No. 165-11, Adopted July 11, 2011

Regulation Effective Date: September 30, 2011

A. Authorization

San Francisco Environment Code Chapter 11:

SEC. 1103. REQUIREMENTS FOR CELL PHONE RETAILERS.

(a) Beginning 15 days after the Department of the Environment adopts the regulations required under Section 1104(d), cell phone retailers must display in a prominent location visible to the public, within the retail store, an informational poster developed by the Department of the Environment as referenced in Section 1104.

(b) Beginning 15 days after the Department of the Environment adopts the regulations required under Section 1104(d), cell phone retailers must provide to every customer that purchases a cell phone a free copy of an informational factsheet developed by the Department of the Environment as referenced in Section 1104. A copy of this factsheet must also be provided to any customer who requests it, regardless of whether they purchase a cell phone or not.

(c) Beginning 30 days after the Department of the Environment adopts the regulations required under Section 1104(d), if a cell phone retailer posts display materials in connection with sample phones or phones on display, the display materials must include these three informational statements, whose contents, and size, and format as printed, shall be determined by the Department of Environment:

(1) A statement explaining that cell phones emit radiofrequency energy that is absorbed by the head and body;
(2) A statement referencing measures to reduce exposure to radiofrequency energy from the use of a cell phone; and,
(3) A statement that the informational factsheet referenced in subsection (b) is available from the cell phone retailer upon request.

(d) The Director may, in his or her discretion, authorize a retailer to use alternate means to comply with the requirements of subsections (a), (b) and (c). The Director shall authorize such alternate means through the adoption of a regulation after a noticed hearing, and no retailer may sell or lease cell phones to the public or offer to sell or lease cell phones to the public using any alternate means of compliance with this Chapter unless specifically authorized to do so in advance in writing by the Director.

SEC. 1104. REQUIREMENTS FOR THE DEPARTMENT OF THE ENVIRONMENT

(a) Following a public hearing, the Department of the Environment, in consultation with the Department of Public Health, shall develop:

(1) An informational poster, as referenced in Section 1103(a);
(2) An informational factsheet, as referenced in Section 1103(b); and,
(3) A set of statements that must be included in display materials, as referenced in Section 1103(c).

(b) The materials shall inform consumers of issues pertaining to radiofrequency energy emissions from cell phones and actions that can be taken by cell phone users to minimize exposure to radiofrequency energy, such as turning off cell phones when not in use, using a headset and speaker phone, or using the phone to send text messages ("texting").

(c) The Director may by regulation require the inclusion of additional information in the poster, the factsheet, and/or the statements required in connection with display materials.

(d) Within 15 days after the effective date of this ordinance or as soon thereafter as is practicable, the Department of the Environment shall, after a noticed public hearing, issue regulations specifying the contents, size, and format for the poster, the factsheet, and the statements required in connection with display materials as referenced in subsection (a), and provide templates of them for use by retailers.

(1) The informational poster shall be a maximum size of 11 inches by 17 inches;
(2) The informational factsheet shall be a maximum size of 5.5 inches by 11 inches (half-sheet of paper); and,
(3) The informational statements shall be printed in a space no smaller than 1 inch by 2.625 inches.

(e) Should the scientific community or the FCC develop a new metric to measure the actual amount of radiofrequency energy an average user will absorb from each model of cell phone, the Department of the Environment shall make recommendations to the Board of Supervisors for amendments to this Chapter to require notification to the public of this metric at the point of sale.

B. Policy or Findings

According to the World Health Organization (WHO),

- Mobile phone use is ubiquitous with an estimated 4.6 billion subscriptions globally.
- The electromagnetic fields produced by mobile phones are classified by the International Agency for Research on Cancer as possibly carcinogenic to humans.
- Studies are ongoing to more fully assess potential long term effects of mobile phone use.
- WHO will conduct a formal risk assessment of all studied health outcomes from radiofrequency fields exposure by 2012.

Leading epidemiologists who have studied the effects of radiofrequency energy absorbed from cell phones have recommended that the public be informed of the potential for adverse health effects from long-term cell phone use, particularly for children.

Cell phones are an important communication tool, especially during emergencies, and radiation exposure from cell phones can be reduced by using a speakerphone or a headset, or by sending text messages.

C. Applicability

This regulation applies to all San Francisco cell phone retailers, defined by the San Francisco Environment Code Chapter 11, Section 1101 as:

> (b) "Cell phone retailer" means any person or entity within the City which sells or leases cell phones to the public or which offers cell phones for sale or lease. "Cell phone retailer" shall not include anyone selling or leasing cell phones over the phone, by mail, or over the internet. "Cell phone retailer" shall also not include anyone selling or leasing cell phones directly to the public at a convention, trade show, or conference, or otherwise selling or leasing cell phones directly to the public within the City for fewer than 10 days in a year.

D. Requirements

- SEC. 1103(a): Informational poster. See poster (Attachment A).

The attached poster is formatted to fit standard paper size of 11 x 17 inches. The cell phone retailer must display the poster identical to attachment A (in size, content, format and graphics).

The Department will provide hardcopy posters to cell phone retailers and make replacements available upon request. The cell phone retailers are responsible for contacting the Department to obtain the poster and future replacements in order to ensure compliance with this law. The request for posters can be made in two ways:

- o In person at The Department of the Environment, M-F (9AM to 5PM):
  11 Grove St. San Francisco, CA 94102
- o A written request to:
  - Toxics Reduction Program, SF Department of the Environment, 11 Grove St. San Francisco, CA 94102; Or
  - cellphone@sfenvironment.org

- SEC. 1103(b): Department factsheet. See factsheet template (Attachment B).

The attached supplemental factsheet template is formatted to fit standard paper size 8.5 x 11 inches, with two 8.5 x 5.5 inches sized factsheets per sheet. Cell phone retailers are required to provide this factsheet to customers upon request and with every cell phone sale. The factsheet provided to customers must be identical in content, format, color and graphics.

The Department shall make the factsheet template available in PDF or Microsoft Word format for printing by cell phone retailers. The Department shall provide starter kits to retailers with 50 factsheets each, and retailers are responsible for making color copies for distribution thereafter.

- SEC. 1103(c): Statements to include in display materials. See label template (Attachment C)

The attached sticker template is formatted to fit on Avery standard 5160-address labels. The font type and size are Futura size 12. A cell phone retailer may print and paste stickers on cell phone display materials or include the content of the sticker in cell phone display materials in a manner that preserves the font size, type and meets the space requirement of no smaller than 1 x 2.625 inches.

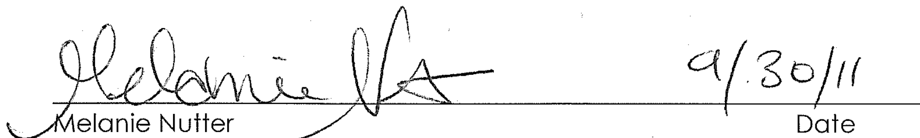
The Department shall make the sticker template available in PDF or Microsoft Word format for printing by cell phone retailers.

E. Attachments

Attachment A: Informational poster
Attachment B: Informational factsheet
Attachment C: Sticker template for inclusion of informational statements in display materials

The Director of the Department of the Environment hereby adopts these regulations as of the date specified below.

Approved:



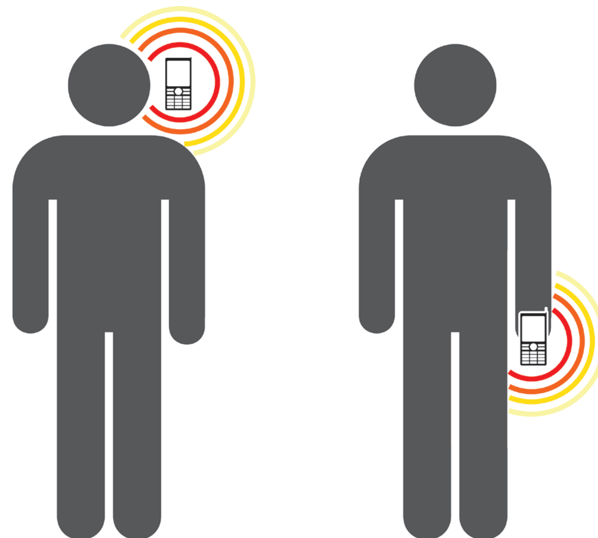
Melanie Nutter — Date: 9/30/11

Director, Department of the Environment

A-17

"Factsheet" Adopted September 30, 2011

You can limit exposure to Radio-frequency (RF) Energy from your cell phone.



Although studies continue to assess potential health effects of mobile phone use, the World Health Organization has classified RF Energy as a possible carcinogen.

This material was prepared solely by the City and County of San Francisco and must be provided to consumers under local law.

09/11

If you are concerned about potential health effects from cell phone RF Energy, the City of San Francisco recommends:

- **Limiting cell phone use by children**
  Developing brains and thinner skulls lead to higher absorption in children.
- **Using a headset, speakerphone or text instead**
  Exposure decreases rapidly with increasing distance from the phone.
- **Using belt clips and purses to keep distance between your phone and body**
  Do not carry on your body to at least meet the distance specified in your phone's user manual
- **Avoiding cell phones in areas with weak signals (elevators, on transit, etc.)**
  Using a cell phone in areas of good reception decreases exposure by allowing the phone to transmit at reduced power.
- **Reducing the number and length of calls**
  Turn off your cell phone when not in use.

Learn More:

SF Department of the Environment @ SFEnvironment.org/cellphoneradiation • (415) 355-3700

Federal Communications Commission @ FCC.gov/cgb/consumerfacts/mobilephone.html

World Health Organization @ WHO.int/mediacentre/factsheets/fs193/en/

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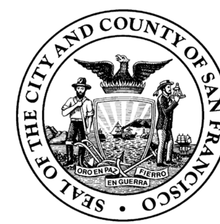
09/11

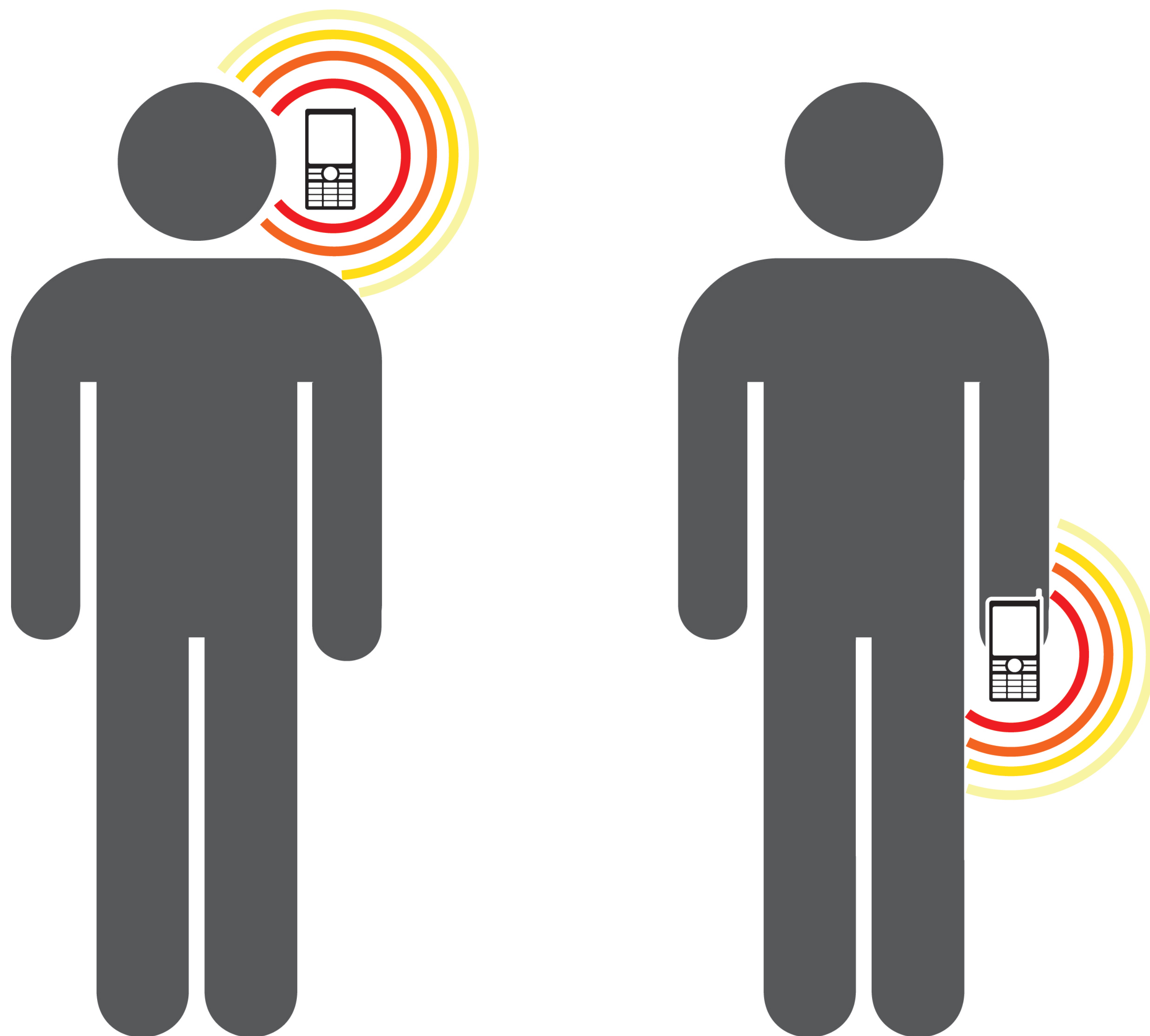
A-18

"Poster" Adopted September 30, 2011

This material was prepared solely by the City and County of San Francisco and must be provided to consumers under local law.



Cell Phones Emit Radio-frequency Energy



Studies continue to assess potential health effects of mobile phone use.

If you wish to reduce your exposure, the City of San Francisco recommends that you:

- Keep distance between your phone and body
- Use a headset, speakerphone, or text instead
- Ask for a free factsheet with more tips

SF Environment
Our home. Our city. Our planet.
A Department of the City and County of San Francisco

Learn More:

SF Department of Environment @ SFEnvironment.org/cellphoneradiation
Federal Communications Commission @ FCC.gov/cgb/consumerfacts/mobilephone.html
World Health Organization @ WHO.int/mediacentre/factsheets/fs193/en/

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A-19

“Stickers” Adopted September 30, 2011

Your head and body absorb RF Energy from cell phones

If you wish to reduce your exposure, ask for San Francisco's free factsheet.

Your head and body absorb RF Energy from cell phones

If you wish to reduce your exposure, ask for San Francisco's free factsheet.

Your head and body absorb RF Energy from cell phones

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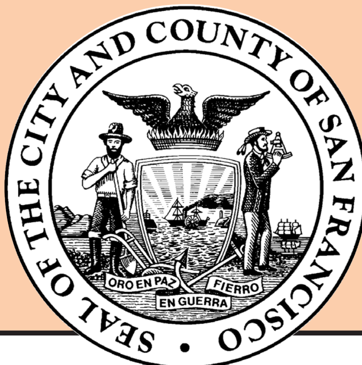
A-20

Revised “Factsheet”

You can limit exposure to Radio-frequency (RF) Energy from your cell phone.



Although all cell phones sold in the United States must comply with RF safety limits set by the Federal Communications Commission (FCC), no safety study has ever ruled out the possibility of human harm from RF exposure.

This material was prepared solely by the City and County of San Francisco and must be provided to consumers under local law.

11/11

RF Energy has been classified by the World Health Organization as a possible carcinogen (rather than as a known carcinogen or a probable carcinogen) and studies continue to assess the potential health effects of cell phones. **If you are concerned about potential health effects from cell phone RF Energy, the City of San Francisco recommends:**

- **Limiting cell phone use by children**
  Average RF energy deposition for children is two times higher in the brain and up to ten times higher in the bone marrow of the skull compared with cell phone use by adults.
- **Using a headset, speakerphone or text instead**
  Exposure decreases rapidly with increasing distance from the phone.
- **Using belt clips and purses to keep distance between your phone and body**
  Do not carry on your body to at least meet the distance specified in your phone's user manual.
- **Avoiding cell phones in areas with weak signals (elevators, on transit, etc.)**
  Using a cell phone in areas of good reception decreases exposure by allowing the phone to transmit at reduced power.
- **Reducing the number and length of calls**
  Turn off your cell phone when not in use.

Learn More: **SF Department of the Environment** @ SFEnvironment.org/cellphoneradiation • (415) 355-3700
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11/11