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)

RESPONSE AND REPLY BRIEF OF APPELLANT CTIA - THE WIRELESS ASSOCIATION®

PRELIMINARY INJUNCTION APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

REGULATIONS

ADMINISTRATIVE MATERIALS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY

The City argued and the court below found that San Francisco is permitted to compel speech based on the possibility of as-yet unknown health effects in service of the so-called "Precautionary Principle." The lower court acknowledged the City's concession that there is no evidence that FCC-compliant phones cause any adverse effects in humans, ER (Oct. 27 Op.) 14, and found that the City's compelled message was "a matter of opinion, not fact." *Id.* 7. The lower court characterized the question presented as whether San Francisco could require warnings based on "the mere unresolved possibility that something may (or may not) be a carcinogen." *Id.* 9.

In answering that question in the affirmative, the court below became the first in the country to approve government-compelled speech based only on as-yet unknown, scientifically unproven "risk." It turned First Amendment jurisprudence on its head, effectively shifting the burden to the private citizen to prove that the product being offered to the public is "absolutely" safe—essentially, to prove a negative by proving the absence of any possible harm. As a result, the seller of almost any product can be forced to disseminate the government's opinion about how to approach unproven risk, even if those views are directly contrary to those of the private party seller.

The District Court's errors in allowing this forced speech are multiple and manifest. If any clear principle can be distilled from the Supreme Court's compelled speech cases it is this: the *government* has the burden to demonstrate that an *actual problem* exists and that its intrusion on First Amendment rights is

properly tailored to redress that problem. Were that not so, the more than 40,000 political subdivisions in this country could force citizens to voice opinions on a host of controversial scientific issues, such as the health benefits of organic foods or the dangers of violent video games. The question is not whether San Francisco is entitled to believe that cell phones should be presumed dangerous until proven "absolutely" safe, or whether the City should be able to broadcast that view in its own voice through its own media. Rather, the question is whether the City can conscript private parties to use their own limited channels of communication to do so.

This is not a case about genuine product warnings, because no true warning could be justified here. Rather, the compelled speech is based on the City's "opinion" that people should adopt a certain attitude toward unknown risk. In the Display Materials (i.e., the Poster, Stickers, and "factsheet," ER 95, 97, 99), this takes the form of the City's "recommendations" regarding who should use cell phones, and how, when, and where they should use them. None of this qualifies as a provable fact like the number of calories in a hamburger or the presence of mercury in a light bulb. A restaurant cannot disagree with the number of calories in its hamburgers; but CTIA vehemently disagrees with the content of and need for the City's warnings. Under *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1985) ("*PG&E*"), and this Court's opinion in *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), *aff'd*, *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), the City

cannot compel CTIA's members to mouth the City's opinions on an issue of public concern.

The City all but concedes that the predicate for its regime, as articulated by the District Court, is insufficient to satisfy any First Amendment test. City Br. 1, 20, 25-27 (conceding that a disclosure requirement based on "speculation" is unconstitutional). Having abandoned the reasoning of the court below, the City seeks to use extra-record material to argue that FCC-approved cell phones might well be dangerous. But this Court does not sit to receive new evidentiary submissions or resolve scientific questions. The City's highly selective and misleading hearsay submission does not rise to the level of evidence required even under the most lenient of First Amendment standards. It also violates fundamental canons of proper scientific inquiry. ER (Petersen Supp. Rpt.) 173. CTIA put in the only cognizable scientific evidence below in the form of declarations and reports by an expert in electrical engineering and RF safety. ER 125-150, 168-173. Those submissions make clear that the great weight of scientific evidence, the relevant federal agencies, and international bodies (including the International Agency for Research on Cancer ("IARC")) see no credible evidence that cell phones cause any adverse effects for humans, including children. Indeed, the FCC has made clear that the cell phones it approves for sale are safe based on a conservative approach to existing scientific evidence, and that any lawsuit or enactment that challenges their safety is preempted.

Unable to demonstrate a substantial governmental interest and appropriate tailoring, the City rests on a plea for an unprecedented expansion of the *Zauderer*

line of cases. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). That effort fails. *First*, *Zauderer* permits compelled disclosures only to correct misleading commercial speech. As the Supreme Court confirmed in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340 (2010), "inten[t] to combat the problem of inherently misleading commercial" speech is one of "the essential features of the rule at issue in *Zauderer*." *Second*, corrective disclosures must be limited to "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. Here, the revised "factsheet" presents opinions, assumptions, and recommendations with which CTIA members strongly disagree. *Third*, as the Supreme Court noted in *Ibanez v. Fla. Dept. of Bus. and Prof'l. Reg.*, 512 U.S. 136, 146 (1994), a disclosure requirement cannot be unduly burdensome. The "factsheet" is more dissertation than disclosure. Even standing alone, it would be by far the most prolix *Zauderer* "disclosure" ever approved.

The District Court's authorization of the revised "factsheet," ER 277, should also be reversed on federal preemption grounds. The City makes clear its belief that the FCC has not done enough to ensure RF safety. For example, the City argues (incorrectly) that the FCC standards are insufficient because they fail to account for so-called "non-thermal effects." City Br. 22-23 n.6. That is exactly the kind of "collateral attack" that *Murray v. Motorola*, 982 A.2d 764 (D.C. 2009), and *Farina v. Nokia Inc.*, 625 F.3d 97 (3d Cir. 2010), found to be preempted. Just as tort liability cannot rest on the premise that FCC-approved phones are not safe, local legislation cannot be based on the alleged inadequacy of the FCC standards.

The "recommendations" in the revised "factsheet," particularly regarding children's use of cell phones and turning phones off when "not in use," conflict with the FCC's rejection of special rules for children and frustrate FCC initiatives regarding wireless 911 calls and other public safety programs. Like the District Court, the City does not answer these arguments for conflict preemption; it simply continues to argue that it is not trying to change the FCC standard. *Farina* and *Murray* both rejected this exact argument. San Francisco cannot force companies to give advice that conflicts with and frustrates FCC determinations and programs.

The District Court's revision and approval of the "factsheet" also exceeded the court's proper role under Article III. Rather than adjudicate the case before it, the court invented a new case by scripting and approving new language for a revised "factsheet." This requires this Court to vacate the ruling on the revised "factsheet" and enjoin all aspects of the Ordinance.

Finally, the City's cross-appeal borders on the frivolous. The District Court properly enjoined the alarmist messages conveyed by the totality of the City's Display Materials. It also correctly held that the Stickers violated the First Amendment because they "unduly intrude upon the retailers' *own* message," as retailers must paste them "over their own promotional literature." ER (Oct. 27 Op.) 13-14 (citing *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006)). This was a straightforward application of *Ibanez*'s admonition that a disclosure that interferes with a private party's speech cannot be sustained. *See Ibanez*, 512 U.S. at 146-47. Further in keeping with *Ibanez*, the lower court correctly found that the oversize Poster would "unduly intrude on the retailers'

wall space," and was not purely factual, so there was no "reasonable" basis for forcing retailers to "convert their walls [in]to billboards for the municipal message." ER (Oct. 27 Op.) 13.

ARGUMENT

I. THE CITY'S COMPELLED SPEECH MANDATE VIOLATES THE FIRST AMENDMENT.

A. Compelled Speech Regarding A Matter Of Public Controversy Must Be Subjected To Heighted Scrutiny.

The District Court erred by not applying heightened scrutiny. CTIA Br. 24-27. The City is not correcting factual misstatements or even adding an uncontroverted fact to the commercial dialogue. Rather, as the District Court acknowledged, ER (Oct. 27 Op.) 7, the City is expressing its opinion on cell phone safety—an opinion with which CTIA members vehemently disagree. Such viewpoint discrimination is exactly the predicate for applying heightened scrutiny recognized in *PG&E*. Because the City has never contended that the Ordinance satisfies any form of heightened scrutiny (including *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980)), the lower court's ruling on the revised "factsheet" must be reversed,[1] and affirmed in all other respects.

[1] While some amici attempt to frame arguments under heightened scrutiny, the City has waived any such argument by neither raising it below nor in its opening brief. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009).

1. Labeling The Revised "Factsheet" A "Consumer Disclosure" Cannot Exempt It From Heightened Scrutiny.

Heightened scrutiny is the default test for all content-based compelled speech regimes. CTIA Br. 24-27; *see also* CERC Br. 15-17; Chamber Br. 15-16; NAM Br. 5-6, 9-10, 12-21; NFIB Br. at 5-7; Rutherford Br. 7-16; PLF Br. 17-25.[2] The First Amendment prohibits compelled speech except to resolve real problems in a manner that is properly tailored to avoid unnecessary intrusions on protected speech. Without heightened scrutiny, courts lack the tools to differentiate between fact-based, narrowly tailored warnings (e.g., "Warning: Contains Mercury Do Not Ingest") and opinions or preferences on debatable issues or choices (e.g., "The City Recommends That You Buy Organic."). *PG&E* and a host of circuit precedent in its wake make clear that, where compelled speech offers an opinion or one side of a debate, heightened scrutiny applies. *PG&E*, 475 U.S. at 13. Indeed, far less burdensome disclosures than these are subject to heightened scrutiny. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72-74 (2d Cir. 1996); *Mason v. Fl. Bar*, 208 F.3d 952 (11th Cir. 2000);[3] *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002); *Blagojevich*, 469 F.3d at 652.

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[2] Brief of Amicus Curiae Consumer Electronics Retailers Coalition ("CERC Br."); Brief of Amicus Curiae Chamber of Commerce of the United States of America and California Chamber of Commerce ("Chamber Br."); Brief of Amicus Curiae National Association of Manufacturers ("NAM Br."); Brief of Amicus Curiae National Federation of Independent Business Small Business Legal Center ("NFIB

The City cites no law to the contrary. None of the cases it relies on to avoid strict scrutiny involve the expression of opinion on a matter of controversy. That is because no court has taken the leap the City asks of this Court—allowing the state to use its police power to advance its own viewpoint in a public debate. All of the City's cases involve government correction of misleading speech, *see, e.g.*, *Zauderer*, 471 U.S. at 626, or the disclosure of non-controversial facts to address a proven public health problem, *see, e.g.*, *New York State Restaurant Ass'n v. N.Y.C. Board of Health*, 556 F.3d 114 (2d Cir. 2009); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). What the City cannot find is a case applying *Zauderer* where the government admits it has no evidence of real harm and is seeking only to advance its opinion in the marketplace of ideas.

2. The City's Attempt To Turn The Supreme Court's Compelled Speech Jurisprudence Into Isolated Pin Pricks of First Amendment Freedom Must Be Rejected.

The City's effort to avoid heightened scrutiny also turns on a crabbed reading of compelled speech jurisprudence, in which the facts of each case take on exaggerated importance and the case's legal principles fade into the background.

Br."); Brief of Amicus Curiae Rutherford Institute ("Rutherford Br."); Brief of Amicus Curiae Pacific Legal Foundation and Cascade Policy Institute ("PLF Br.").

[3] The City says that *Mason* was "a mistake." City Br. 16 n.1. Numerous precedents must be labeled "mistakes" for the City to plow the path it has chosen through settled First Amendment doctrine.

City Br. 34-39. But the vast majority of these cases apply heightened scrutiny and strike down government-compelled speech.

There is no doubt the compelled-speech regime at issue here is content-based. City Br. 37. As in *PG&E*, the City is using its police power to advance a viewpoint. And as the Supreme Court emphasized last Term, all content-based regimes are presumptively invalid and subject to heightened scrutiny. *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2667 (2011); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988).

The City claims its regime is "*not* 'content-based'" because it "is not triggered by the *content* of any speech." City Br. 37-38. CTIA has rebutted this canard. *See* CTIA Br. 24-26. A regime is content-based if it scripts the precise message a party must carry, *Riley*, 487 U.S. at 795, or forces a party to disseminate "one-sided" messages with which it disagrees, *PG&E*, 475 U.S. at 12-14.[4] The Supreme Court has never held that a regime is "content-based" only if it is triggered by the content of other speech. Rather, the Court held that the forced speech requirement in *Wooley v. Maynard*, 430 U.S. 705 (1977), was content-based even though it was triggered by registering and driving a car. CTIA Br. 25-26. The City cannot deny that the trigger for its compelled speech is a non-

[4] The City argues *PG&E* is distinguishable because the compulsion was "triggered by the utility's speech." City Br. 36-37. Not so. The compelled speech was "not conditioned on any particular expression." *PG&E*, 475 U.S. at 13-14.

expressive act. To distinguish *Wooley*, the City turns to ipse dixit. The compelled speech in *Wooley*, it says, turned each individual into a "'mobile billboard' for the state's 'ideological message.'" City Br. 38 n.14. But the City nowhere explains why its Ordinance does not turn every retail outlet into a "stationary billboard" for its "ideological message" regarding cell phone safety and the Precautionary Principle. ER (Oct. 27 Op.) 13 (characterizing the Poster requirement as "requiring retailers to convert their walls [in]to billboards for the municipal message").

Nor does heightened scrutiny apply only to compulsions of "ideological message[s]," City Br. 38 n.14, as *Riley*, *Amestoy*, *Mason*, *Borgner*, and *Blagojevich*—all involving alleged consumer disclosures—make clear. *See also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004) ("[T]he First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry."). *Riley* involved a factual, non-ideological "disclosure." *Riley*, 487 U.S. at 795. While the City tries to distinguish *Riley* as involving the insertion of unwanted content into protected communications, City Br. 36, that is precisely what the City is doing here. CTIA Br. 38 n.27. Its message intrudes directly into the protected presentation in retail stores. The compulsion and the state's hijacking of the "speech agenda" is the same as in both *Riley* and *PG&E*. *See* CERC Br. 6-15.

The City next argues against heightened scrutiny by suggesting retailers need not "endorse" the City's message and can express their views. City Br. 37-39, 47, 52. This ignores CTIA's demonstration that this argument is drawn from the losing side of First Amendment history, CTIA Br. 26, and was specifically rejected in *Wooley*, *PG&E*, *Riley*, and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Relying on *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), which involved conditions on the voluntary acceptance of government funds, the City argues that First Amendment concerns here are "diminish[ed]." City Br. 37. But the statute there "regulate[d] conduct, not speech," *FAIR*, 547 U.S. at 60, and did "*not dictate the content of the speech at all*," *id*. at 62 (emphasis added). It simply required that military recruiters not be barred from campuses. Placing conditions on the acceptance of government funds is not analogous to commanding a private party to speak. *Id*. at 59.

Finally, the City suggests that because the First Amendment promotes a "marketplace of ideas," it can command retailers to convey information it deems inadequately represented there. City Br. 29. But "[t]he First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring). The Supreme Court

has repeatedly rejected the argument that the government can level the playing field in the battle of ideas. *PG&E*, 475 U.S. at 14 (recognizing PG&E's "right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents"). As the Supreme Court reaffirmed last Term, the government "can express [its] view through its own speech," but it "may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 131 S. Ct. at 2671; *see also PG&E*, 475 U.S. at 13-14.

3. The City's Regime Cannot Meet Any Of The Criteria For Application Of The *Zauderer* Exception.

The thrust of the City's argument is that its multi-faceted disclosure regime—Stickers, Posters, and "factsheets"—is one big factual disclosure within the *Zauderer* exception. That argument, which would cut a gaping hole in the First Amendment, fails under Supreme Court and Ninth Circuit precedent.

a. *Zauderer* Is Limited To Correcting Misleading Commercial Speech.

Ignoring its own admonition that "importation of First Amendment doctrine from one line of cases to another is a dangerous endeavor," City Br. 35, the City invites this Court to expand *Zauderer* beyond correcting misleading commercial speech. *See* CTIA Br. 35-38. The Court should decline.

Whenever the Supreme Court has discussed application of less than heightened review in the compelled speech context, it has linked such review to the

goal of preventing deceptive commercial speech. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976); *Zauderer*, 471 U.S. at 651; *U.S. v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *Milavetz*, 130 S. Ct. at 1340; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977). The City cannot dispute that the Supreme Court has never applied *Zauderer* outside this context, but argues there is no reason why the Court would create a rule that applies only to misleading speech. *See* City Br. 31-32.[5]

The City is wrong. *Zauderer*'s less stringent standard is limited to correcting misleading commercial speech because such speech in and of itself is of less value under the First Amendment. *Central Hudson*, 447 U.S. at 564. In this limited circumstance, the government is not so much compelling speech of its own selection as it is filling in the blanks of a subject chosen by the private speaker—blanks that render the private speech misleading. *Zauderer*'s language about preferring "more disclosure" and the "minimal" interest in not providing it, 471 U.S. at 651, applies where the government could arguably ban the speech entirely as failing the first prong of *Central Hudson*. Supreme Court precedent holds that it

[5] In arguing that three circuits have adopted a broader reading of *Zauderer*, the City badly over reads those cases. Two applied *Zauderer* after finding that the disclosures prevented consumer deception. *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (per curiam); *Pub. Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 228 (5th Cir. 2011). While the Second Circuit may have applied *Zauderer* outside the pure correction of deception context, it has never extended it to the kind of controversial statement of opinion or the sheer volume of government-compelled speech at issue here.

is better to *correct* such speech rather than to *prohibit* it, *see In re R.M.J.*, 455 U.S. 191, 203 (1982). *Zauderer* simply has no application to government-scripted statements where there is no misleading speech to correct. *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 123 S.Ct. 688, 689 (2002) (Thomas, J., dissenting from denial of *certiorari*) (The Court's "decisions have not presumptively endorsed government-scripted disclaimers" and *Zauderer* is of no use when speech is not misleading and the government is scripting a disclaimer's exact words); *Mason*, 208 F.3d at 958.[6]

Thus, the great body of case law supports the proposition that the relaxed scrutiny applied in *Zauderer* must be linked to the correction of some misleading statement or omission. *See, e.g.*, *Zauderer*, 471 U.S. at 651 (advertisement mentioning "fees" but silent on costs); *Milavetz*, 131 S. Ct. 1339-41 (offer of debt relief services without mentioning bankruptcy); *Connecticut Bar Association v. U.S.*, 620 F.3d 81, 95-98 (2d Cir. 2010) (same as *Milavetz*); *Public Citizen*, 632

[6] The City lumps *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), into its string cite of cases that allegedly rejected the notion that *Zauderer* is limited to deceptive speech. City Br. 31. But *EPA* is not a commercial speech case, and it neither applied *Zauderer* nor addressed the correction-of-deception issue. The City's reliance on *Dex Media West, Inc. v. City of Seattle*, 793 F. Supp. 2d 1213 (W.D. Wash. 2011), *appeal docketed*, No. 11-35399 (9th Cir. May 11, 2011) is also misplaced. The purely factual and noncontroversial speech there was part of a larger regulatory regime intended to reduce waste. As discussed, Part I.C, the government has greater leeway when it incidentally regulates speech as part of broader regulatory scheme, a rationale that is inapplicable here.

F.3d at 227 (portrayal of "client" without saying person is an actor). This Court has referred to "the factual information and deception prevention standards set forth in *Zauderer*," *Schwarzenegger*, 556 F.3d at 966, and has never decoupled the more relaxed standard from the deception requirement.

The City concedes that its regime is not triggered by any speech, let alone misleading speech in need of correction. That concession is fatal. This regime is simply unlike typical "consumer disclosure" laws. Confronted with a doctrinal brick wall, the City argues that a deception requirement is "preposterous" because it would preclude warnings connected with products that are proven to cause harm. City Br. 31. The City ignores the fact that where there is a real danger, properly demonstrated to a court sitting in First Amendment review, a narrowly-tailored warning can and should survive heightened scrutiny.[7]

Next, the City tries to distinguish between speech compulsions and restrictions, contending this is not a "restriction" case. City Br. 12. But "*in the context of protected speech*, the difference is without constitutional significance." *Riley*, 487 U.S. at 796-97 (emphasis added). Since retailers' speech is not

[7] The City uses manufacturers' voluntary discussion of RF safety to justify its regime. City Br. 30. This is wrong. *See* CTIA Br. 30. Most of the speech compelled here is not in (and is contrary to) voluntary statements in manuals. *See* SER 133-144. Manuals place RF safety in context, *see id.*, which is why the City's analogy to them is "disingenuous." ER (Stewart Sec. Supp. Rpt.) 164-66 ¶ 9. In any event, voluntary speech by certain members of an industry does not justify forcing others to speak.

misleading, it is protected. Moreover, the suggestion that this is not a "restriction" case is belied by the unrebutted evidence showing that the City's regime intrudes on retailers' carefully scripted and space-constrained presentations and messages in stores. ER (D'Ambrosio) 103-106 ¶¶ 15-29; ER (Oct. 27 Op.) 13.[8]

Finally, the City has no response to the point that *Zauderer* only applies to commercial speech. CTIA Br. 37-38. "[C]ommercial speech" does no "more than propose a commercial transaction." *United Foods*, 533 U.S. at 409. The City's warnings provide opinions outside the context of particular transactions and must be provided to any person who asks for them (not just phone purchasers). The Display Materials and revised "factsheet" do not address any commercial speech already in the stores. Rather, they are the City's attempt to interject its point of view, which it believes is underrepresented in the free market of ideas.

b. The Compelled Statements Are Not Purely Factual And Uncontroversial.

Zauderer also does not apply because the materials mandated are not "purely factual and uncontroversial." *Zauderer*, 471 U.S. at 651.

[8] The City's claim that the District Court committed "factual error" in finding the materials intruded upon retailers' speech is contradicted by sworn, uncontroverted evidence. ER (D'Ambrosio) 105-06 ¶ 26; ER (Transcript) 220-221. The Ordinance requires retailers to display the Poster in a "prominent" space, and they must paste Stickers on display materials. Space for promotional materials is either non-existent or "limited" such that retailers would "likely be forced to eliminate some of" their own speech to accommodate the City's message. ER (D'Ambrosio) 106 ¶ 28. Amici agree. CERC Br. 6-10.

First, the materials convey the City's opinion, CTIA Br. 27-29, and compelled statements of opinion can never be justified under *Zauderer*. *See Schwarzenegger*, 556 F.3d at 953; *Blagojevich*, 469 F.3d at 652. The City does not address this, although one of its main cases makes the very point. *Sorrell*, 272 F.3d at 114 n.5.

Second, the materials' particular statements are neither purely factual nor uncontroversial. CTIA Br. 29-30.[9] The City tries to defend only the statement about RF absorption by children, claiming it is taken "verbatim from the WHO," City Br. 29. The WHO materials cannot be taken for their truth, and even if they could, it would not matter. *Zauderer* only allows the government to compel "uncontroversial information," *Zauderer*, 471 U.S. at 651, and the unrebutted Petersen report explained that this statement is, at best, controversial. ER (Petersen Supp. Rpt.) 171-72 ¶ 3. The original statement about "Developing brains and thinner skulls" is no less controversial. *Id.* The graphics showing bright red, orange, and yellow rings emanating from cell phones and penetrating the head and pelvic areas of consumers, ER 95, 99, are also far from purely factual, *accord R.J. Reynolds Tobacco Co. v. FDA*, No. 11-482, 2011 WL 5307391, at *5 (D.D.C. Nov. 7, 2011). The City can only limp to their defense, citing precedent that finds *bans*

[9] The City argues *Zauderer* does not prohibit it from mandating disclosures on controversial topics. City Br. 35. This misses the point. The specific statements in its materials are controversial. They are also completely one-sided as in *PG&E*.

on illustrations unconstitutional, City Br. 48, to support the proposition that it can foist its own alarmist graphic on cell phone retailers.

Third, the few literally true statements send misleading messages because they lack adequate context. CTIA Br. 29-33; ER (Stewart Supp. Rpt.) 261-72; ER (Petersen Prelim. Rpt.) 128-50. The City concedes that the First Amendment would not allow it to tell consumers that "'cell phones are dangerous,'" City Br. 34, but it contends this only applies if it uses those precise words and it is "irrelevant" if its materials use other words to provoke the same reaction in consumers. *Id*. at 29 & n.29. The City thus betrays its tactic—assemble a selection of what it views as arguably true statements in a way that causes alarm, but coyly deny the import and impact of the message conveyed.[10]

Common sense and precedent reject this ploy. Factually accurate words can be presented in a false and misleading manner. *See U.S. v. Ninety-Five Barrels (More or Less) Alleged Apple Cider Vinegar*, 265 U.S. 438, 443 (1924) ("Deception may result from the use of statements . . . which may be literally true."); *Zauderer*, 471 U.S. at 652 (misleading despite accurate use of the word "fees"); *accord Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1,

[10] The District Court made the same legal error, concluding that the City could limit its "factsheet" to a series of "factoids," "which seem to be literally true," and approving a revised version on that basis. ER (Oct. 27 Op.) 7. It did not address the Stewart reports or CTIA's argument that any "factoids" send false and misleading messages. CTIA District Court P.I. Br. at 12-17 [D.C. Doc. 60].

14 (Cal. 2004) (even "a truthful warning of an uncertain or remote danger may mislead the consumer into misjudging the dangers").

CTIA's consumer marketing expert explained that the City's warnings are "alarmist" and send a "strong warning" of "imminent danger," and that parents may conclude that cell phones "must be dangerous for children," ER (Stewart Supp. Rpt.) 265-270, ¶¶ 11-13, which is false. CTIA Br. 29-33. Assessments of consumer perceptions are not "irrelevant"; they are routinely used to determine whether statements are misleading. *Borgner*, 284 F.3d at 1211.[11]

Any literally true statements in the materials are further misleading because they emphasize "uninformative fact[s]." *R.M.J.*, 455 U.S. at 205. The FCC has determined that cell phones are safe, so telling consumers that cell phones emit RF energy and that consumers can "limit exposure" is no different than Vermont's attempt to force sellers to tell consumers that milk was treated with rBST.[12] This

[11] Nor can the City burden retailers to correct its misleading messages. Requiring responses is a First Amendment violation, *PG&E*, 475 U.S. at 9, and consumers would still place greater weight on the City's high risk message. ER (Stewart Supp. Rpt.) 267-268 ¶ 12.

[12] The City cites *Sorrell*, 272 F.3d at 104, for the proposition that "recommendations" fit within *Zauderer*, City Br. 31-32, but *Sorrell* did not involve a "recommendation." State law prohibited disposal of mercury-containing products in solid waste landfills. *Sorrell*, 272 F.3d at 107 n.1. The statement that bulbs "may not be disposed of or placed in a waste stream," *id.*, was a simple statement of law.

information has no relevance to health and safety because the responsible federal agency has so found after extensive inquiry.

Finally, the City's self-serving supposition that consumers will not "overreact" when faced with a "carcinogen" warning is belied by its own expert, who indicated consumers may "avoid" cell phones altogether. ER (Scott Supp. Rpt.) 155 n.8; *see Dowhal*, 88 P.3d at 14 ("[t]he mere existence of . . . risk . . . is not necessarily enough to justify a warning; the risk of harm may be so remote that it is outweighed by the greater risk that a warning will scare consumers").

c. The City's Regime Imposes Undue Burdens And Otherwise Fails *Zauderer*'s Tailoring Requirement.

The original Display Materials and the revised "factsheet" also fail *Zauderer*'s tailoring requirement. *First*, the regime's intrusive, prolix nature is unlike anything that has been subject to or survived *Zauderer* analysis. CTIA Br. 33-34; *Ibanez*, 512 U.S. 146-47. The Ordinance requires retailers to prominently post in stores an 11 x 17 inch Poster listing the City's recommendations and to place a Sticker on top of their own displays, ER (Oct. 27 Op.) 13. The revised and original "factsheet," which retailers must give to cell phone purchasers and anyone else who asks for it, is a lengthy document setting forth City opinions on what it concedes is a matter of "public debate." City District Court P.I. Opp. [Doc. No. 66 at 4]. These are not the type of factual statements subject to *Zauderer*, such as the

fact that a hamburger has 340 calories,[13] a product contains mercury,[14] an advertisement features an actor,[15] or a "debt relief agency" provides bankruptcy services.[16] CTIA introduced uncontroverted evidence that this regime burdens retailers, ER (D'Ambrosio) 103-106 ¶¶ 15-29, and the Consumer Electronics Retailers Coalition underscores that point, *see* CERC Br. 6-15.

The City argues that its regime must be viewed as just another "consumer disclosure" subject to *Zauderer* because, otherwise, "the cacophony of disclosures required by the state statutes in the abortion cases would automatically be invalidated." City Br. 35 (citing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008)). This alarmist *non sequitur* proves CTIA's point. None of the abortion cases cited by the City subject those disclosures to the relaxed standard announced in *Zauderer*.

Lengthy discourses cannot be upheld under the rubric of a consumer disclosure. *Ibanez*, 512 U.S. at 146-47. The City is wrong to suggest that *Ibanez* does not impose limits that are clearly transgressed here. City Br. 35. "The poles of the spectrum of disclosure requirements . . . are clear." *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 117 n.2 (1990)

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[13] *See NYSRA*, 556 F.3d at 114.

[14] *Sorrell*, 272 F.3d at 104.

[15] *Public Citizen*, 632 F.3d at 212.

[16] *Milavetz*, 130 S. Ct. at 1324.

(Marshal, J., concurring). *Zauderer* "did not give regulatory authorities a blank check to make every advertisement look like a securities prospectus." J. Nowak & R. Rotunda, 5 Treatise on Const. L. § 20.31(g)(vi) (4th ed.). The City's tripartite treatise on its views of cell phone safety is about as far as one can get from a traditional "consumer disclosure" subject to *Zauderer*.

Second, while *Zauderer* does not impose a least restrictive means requirement, 471 U.S. at 651 n.14, the government must use a "more limited disclosure" if doing so "would suffice to prevent" the asserted harm, *Peel*, 496 U.S. at 117 n.2 (Marshall, J., concurring). The City has not attempted to show that a less burdensome approach would not work. Nor could it. *See Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 643 (6th Cir. 2010) (invalidating requirement because government had no evidence that the specific, mandated placement of the required disclosure was reasonable). It points to nothing that supports a need to force retailers from Wal-Mart to Verizon Wireless to disseminate its message through three different channels.

Third, the City has not established that the regime can actually further the asserted interest, even under its own cases. The Fifth Circuit upheld a disclosure requirement based on survey evidence showing that the advertisement was deceptive without the disclaimer. *Public Citizen*, 632 F.3d at 227-28. The Second Circuit found the requisite relationship "plain" without a survey because the

"labeling would likely contribute directly to the reduction of mercury pollution." *Sorrell*, 272 F.3d at 115-16.

The City has made no showing on this point. Nor is it "plain" that the materials advance any interest. If the interest is health and safety, the FCC has determined that its rules protect the public, and the unrebutted scientific evidence in this record shows that the City's regime will not make consumers any safer. ER (Petersen Prelim. Rpt.) 144-147 ¶¶ 34-37. In fact, the record demonstrates that consumers will sacrifice numerous critical functionalities of cell phones without any increase in safety if they take the City's "recommendations." *Id.*; ER (Fitterer) 114-115. A "disclosure" that does no good (or, as here, does affirmative harm) cannot pass constitutional muster under any standard.

B. The City Cannot Meet The Burden That The Government Must Satisfy In Every Compelled Speech Case.

CTIA is entitled to preliminary relief because the City has not come close to meeting the burden the government bears in every First Amendment case—that is, "to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez*, 512 U.S. at 146 (quotation marks omitted). Instead of holding the City to its burden, the District Court adopted a new, relaxed standard found nowhere in prior case law. The court sanctioned a novel use of the Precautionary Principle to compel speech based only on "the mere unresolved possibility that something may (or may not) be" harmful. ER (Oct. 27

Op.) 9. This was error. Left uncorrected, it would allow the government to require warnings on almost every consumer product.

1. The City's Claim That The Harms-Are-Real Standard Does Not Apply Is Unfounded.

There is no dispute that *Ibanez* sets forth the government's burden under even the lowest level of scrutiny enunciated in *Zauderer*. CTIA Br. 18-20; City Br. 12-17. But the City misreads *Ibanez*, arguing it does not require the City to show a real harm but instead allows it to compel speech based on a harm that is only "'potentially real.'" City. Br. 17; *id.* at 9, 35 (quoting *Ibanez*, 512 U.S. at 146). In fact, *Ibanez* requires the government to carry its "burden to 'demonstrate that *the harms it recites are real* and that its restriction will in fact alleviate them to a material degree.'" 512 U.S. at 146 (emphasis added). While the City never addresses this portion of *Ibanez*, its *amici* acknowledge that it requires the City to "identify a real harm." Brief of Amicus Curiae Environmental Health Trust and the California Brain Tumor Association at 6 ("EHT Br.").

Ibanez rejected an argument like the City's. There, the government argued that it could compel Ibanez to include a disclosure because her speech was "potentially misleading," i.e., that it had the potential to cause harm. Brief of Respondent at 33, *Ibanez v. Fla. Dept. of Bus. and Prof'l. Reg.*, No. 93-639, 1994 WL 114666 (Mar. 30, 1994). *Ibanez* squarely rejected this theory, requiring a

showing that the "harms [the government] recites *are* real," not merely potentially so. *Ibanez*, 512 U.S. at 146 (emphasis added).

The City similarly misreads *Amestoy* as allowing it to force speech so long as it shows "some indication" of a reasonable concern for harm. City Br. 14, 17. *Amestoy* applied *Central Hudson* intermediate scrutiny to the labeling law and, like *Ibanez*, held that the government "'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Amestoy*, 92 F.3d at 72-73.

2. The City Has Not Carried Its Burden.

The City fails to satisfy the harms-are-real standard. The justifications it offers fall far short of the required showing of real harm.

a. The Precautionary Principle Cannot Satisfy The City's First Amendment Burden.

This case comes to the Court in a simple posture: having conceded that there is no evidence that cell phones cause harm,[17] and that the FCC has determined that cell phones are "safe,"[18] the City invoked the "Precautionary Principle" to compel warnings about *as yet unknown risks*, ER (Ordinance) 77 § 1.1. The District Court relieved the City of its burden by accepting the

[17] ER (Transcript) 237; ER (Oct. 27 Op.) 14 ("San Francisco concedes that there is no evidence of cancer caused by cell phones").

[18] *See, e.g.*, *Farina*, 625 F.3d at 126 ("[T]he FCC considers all phones in compliance with its standards to be safe.").

Precautionary Principle as a basis to compel speech. *See* ER (Oct. 27 Op.) 9. This was error. CTIA Br. 20-24; CERC Br. 15- 24; PLF Br. 4-7; Chamber Br. 6-10; 18-25.

No court has ever accepted the Precautionary Principle as a basis for impinging free speech, for good reason. Whatever its merits, the Precautionary Principle is predicated on regulating *before* there is evidence of harm, and cannot be used to compel speech. *See* Chamber Br. 6-10; 18-25. The First Amendment "*impos[es] on would-be regulators the costs* of distinguishing . . . the harmless from the harmful." *Zauderer*, 471 U.S. at 646 (emphasis added). Use of the Precautionary Principle inverts this—it regulates speech first and places the burdens of ruling out the possibility of "risk" on the speaker. Here, it means retailers must disseminate the government's views unless and until there is "a definitive study ruling out any and all risk of harm." ER (Oct. 27 Op.) 5. This approach turns the First Amendment on its head.

b. The City's Efforts To Bolster The Precautionary Principle By Attacking The Federal Standards In Its Appellate Brief Must Fail.

Recognizing that the District Court's acceptance of the Precautionary Principle is indefensible under existing First Amendment precedent, the City runs away from that holding. Instead, with the assistance of its amici, it attempts to use hearsay submissions of selected scientific statements and reports to cast doubt on

the safety of FCC-approved cell phones in this Court. Here the City confronts a litigation dilemma. If it claims unequivocally that FCC-approved cell phones present real health concerns, then it runs headlong into federal preemption. But if it rests solely on the Precautionary Principle, it cannot carry its First Amendment burden of demonstrating some real problem that would justify the disfavored remedy of government-compelled speech.

The City tries to overcome this dilemma by arguing that the FCC did not *really* determine that phones are safe, but instead struck a balance that compromised on safety to achieve a more efficient wireless network. City Br. 21-22. That is not correct. The FCC's standards are based on the scientific principle that "any potential injury from exposure to RF energy is a threshold phenomena—there is no reliable scientific evidence of injury at exposures below the threshold." ER (Petersen Prelim. Report) 144 ¶ 34. The FCC set its standards "fifty times below the threshold for potential injury." *Id.*; *see also* FCC, Guide, "Specific Absorption Rate (SAR) For Cell Phones: What It Means For You" (http://www.fcc.gov/guides/specific-absorption-rate-sar-cell-phones-what-it-means-you) ("FCC, *SAR Guide*").[19]

[19] The City and its amici's suggestion that the FCC has not adopted a fifty-fold safety factor shows their misunderstanding of the science and the FCC's rules, as Petersen's report explains. The threshold for injury from whole body exposure is 4 W/kg, and the FCC's limit is fifty times below that at .08 W/kg. The 1.6 W/kg limit for spatial peak SAR is "based on the demonstrated peak to whole-body

The suggestion that the FCC compromised on safety is further refuted by the FCC's rejection of the view that a phone with a SAR value below the FCC's limit is "safer" than a phone with a higher but still FCC-compliant SAR. *See* FCC, *SAR Guide*. As unrebutted expert evidence shows, "the implication that wireless phones present the potential for adverse health effects or that it is necessary or advisable from a safety standpoint to reduce RF exposure from an FCC-compliant phone is false." ER (Petersen Prelim. Rpt.) 144 ¶ 34. "The FCC-compliant phone is already safe."[20]

Next, the City incorrectly argues that the FCC's RF safety standards are incomplete because they only account for thermal effects from RF energy. *See* City Br. 22 n.6; EHT Br. 20-21. The unrebutted record evidence is that the FCC's

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averaged SAR ratio of 20." Institute of Electrical and Electronics Engineers, IEEE C95.1-1991, *IEEE Standard for Safety Levels with Respect to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz* at 25 (September 26, 1991) [available at District Court Doc. No. 65]. Since the whole body exposure threshold for injury is 4 W/kg, the corresponding spatial peak SAR threshold for injury is 80 W/kg. The FCC spatial peak SAR limit of 1.6 W/kg is fifty times lower. ER (Petersen Prelim. Rpt.) 136 ¶ 17, 144-145 ¶ 34; IEEE C95.1-1991 at 24-25.

[20] ER (Petersen Prelim. Rpt.) 144 ¶ 34. The City calls "disturbing[]" CTIA's statement that Mr. Petersen stated that FCC-compliant phones are safe. This is what his declaration says. *Id.* at 144 ¶ 34, 130 ¶ 7. The report explains the "principles on which the scientific community reached consensus" when setting the standards adopted by the FCC. *Id.* at 130 ¶ 7. One such principle is that any phone below the threshold for injury is "safe." *Id.* at 144 ¶ 34. It is improper for the City to use its appellate brief to attack Petersen's qualifications when it said nothing about them or challenged his report below. *See, e.g., Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 931-32 (8th Cir. 2001). Petersen is eminently qualified to provide the evidence in his report.

"standard is based on thresholds for the most sensitive, reproducible biological effect that could be related to adverse effects in humans regardless of the nature of the interaction mechanism," thermal or non-thermal. ER (Petersen Prelim. Rpt.) 140 ¶ 28; *see also Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000); Brief of Respondent FCC, *EMR Network v. FCC*, No. 03-1336, 2004 WL 1159534) (D.C. Cir. Mar. 8, 2004) (explaining FCC's monitoring of research on non-thermal effects).[21] The FCC's RF standard was upheld against claims that it does not account for alleged non-thermal effects, *Cellular Phone Taskforce*, 205 F.3d at 90-93. State law obligations predicated on the notion that the FCC did not adequately address so-called "non-thermal effects" have been found to be preempted. *Murray*, 982 A.2d at 779-80. The FCC was aware of theories about non-thermal effects, but determined (with the FDA's concurrence) that they provided no reason to alter its already highly protective RF standard.[22]

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[21] The City cites a ten year old letter from EPA's Mr. Norbert Hankin as evidence that the FCC's standards do not protect against non-thermal effects. City Br. 22 n.6. Use of the letter is improper as it is hearsay, and neither in the record nor part of the City's request for judicial notice. It is also misleading—the City fails to inform the Court that the Director of Hankin's division subsequently repudiated Mr. Hankin's letter and confirmed that "it remains EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms." Letter from Frank Marcinowski, EPA, Director, Radiation Protection Division, to CTIA (Sep. 16, 2002) (http://www.radhaz.com/docs/EPA%20Marcinowski%20letter%20regarding%20support%20of%20FCC%20rules%20(9-16-2002).pdf).

[22] The Consumers for Safe Cell Phones, Inc. ("CFSCP") also attacks the adequacy of the FCC's standards by claiming that phantoms used in FCC-compliance testing

Amicus EHT incorrectly states that the FDA and EPA viewed the FCC's standards as inadequate. *See* EHT Br. 20-23. In fact, "the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard." Brief for Respondents United States and FCC at 22, *Cellular Phone Taskforce v. FCC*, No. 00-393, 2000 WL 33999532 (Dec. 4, 2000). EHT cites concerns raised in *comments* on the proposed rules. The FCC's final rules *responded* to those concerns, and the FCC's later actions undermine claims that the FCC has ignored such concerns since the late 1990s.[23] The FDA *agrees* with the FCC that "[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and

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result in "90% of the population" being "exposed to radiation absorption greater than the FCC safety standard. CFSCP Br. 9-10. This is incorrect. As Petersen explained, test phantoms *overestimate* the level of RF absorption. ER (Petersen Prelim Rpt.) 138, 147 ¶¶ 22, 37.

[23] For example, the FCC expressly rejected petitions to change its RF regime, which was sustained by the D.C. Circuit in *EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004). Amicus EHT's reliance on a 1999 OET bulletin is puzzling, because the FCC has long been aware of these issues.

teenagers"[24] and that "[t]he weight of scientific evidence has not linked cell phones with any health problems."[25]

c. The Selective Citation Of Scientific Materials Cannot Satisfy The Harms-Are-Real Standard.

In addition to attacking the FCC's standards, the City tries to expand the evidentiary record on appeal. CTIA's expert reports are the only scientific evidence that can be taken for the truth of the matters asserted. ER (Petersen Prelim. Rpt.) 127-150; ER (Petersen Supp. Rpt.) 168-173. They explain that (1) any harmful effects from RF emissions are a threshold phenomena; (2) there is no reliable scientific evidence of injury from exposure below that level; and (3) that the FCC limits are well below the threshold for potential injury. ER (Petersen Prelim. Rpt.) 144 ¶ 34.

The City submitted no expert scientific evidence and did not rebut CTIA's reports. It now tries to shore up its theory with selective documents, including the IARC classification[26] and selected "legislative materials." City Br. 17-20. These

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[24] FDA, *Radiation-Emitting Products, Children and Cell Phones* (updated Mar. 10, 2009) (http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116331.htm) ("FDA, *Children and Cell Phones*").

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

[26] The City suggests that the Ordinance is based on and responds to the May 2011 IARC classification. The timeline proves otherwise. The City introduced the

documents can only be considered for the fact of their existence, not their truth. SER 947. And, in any event, the City does not argue that they satisfy the harms-are-real standard. Rather, it argues that it need not put on evidence, suggesting it can satisfy its First Amendment burden by "point[ing] to materials from the legislative record." City Br. 16-17.

The government need not always introduce *expert* evidence, but it still must establish a record demonstrating that the recited harms are real. *Ibanez*, 512 U.S. at 146. In other words, the final determination of whether a regulation satisfies the First Amendment is a judicial one, not legislative. The history of the *Turner* must-carry cases is illustrative. After the Court determined that intermediate scrutiny was appropriate in *Turner I*, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), the case was remanded for 18 months of evidentiary submissions. Only upon a proper *judicial* record did the Supreme Court rule on the ultimate issue of constitutionality. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

The City's cases are not to the contrary. City Br. 16. They hold that the government satisfied its substantial burden because the harm to consumers was not only real but "self-evident." *Milavetz*, 130 S. Ct. at 1340; *Zauderer*, 471 U.S. at

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current version of the Ordinance *before* IARC's classification, and it enacted the original version of the Ordinance more than 10 months before that.

651-52; *Connecticut Bar Ass'n*, 620 F.3d at 96-97;[27] *NYSRA*, 556 F.3d at 134-36. There is no such self-evident harm here—in fact, the City's theory of harm is contradicted by the federal government and the only expert scientific evidence in the record.

Nor is the City correct that the presence of studies in the legislative record shifts the burden to CTIA to "rebut" them. City Br. 16-17. The City confuses traditional "rational basis" scrutiny with the burden imposed in First Amendment cases. Under rational basis scrutiny, courts uphold government action as long as there is some "conceivable state of facts that could provide a rational basis for the classification" and "those attacking the rationality of the legislative [action] . . . have the burden 'to negative every conceivable basis which might support it.'" *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993).[28] This does not apply in First Amendment cases. *Id.*; *Landmark Commc'ns, Inc. v. Virginia*, 435

[27] The City suggests *Connecticut Bar Ass'n* provides that the harms-are-real test applies only to restrictions on speech, not compulsions. City Br. 25. But the City *is* restricting speech by displacing retailers' speech in limited channels for its own. *See supra*. In any event, the Second Circuit could not depart from *Ibanez*, and it does not go as far as the City suggests. It noted that Congress could compel debt relief agencies to make disclosures because the record demonstrated actual instances of consumer deception and harm. *Connecticut Bar Ass'n*, 620 F.3d at 97. That record of actual harm is not present here.

[28] The City may be confusing the traditional "rational basis" standard with *Zauderer* because some courts refer to *Zauderer* as a type of rational basis review. For example, *NYSRA* erroneously quotes from an equal protection clause "rational basis" case when discussing *Zauderer*. *See NYSRA*, 556 F.3d at 135 n.23.

U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."), *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). Identification of some inconclusive studies does not shift the burden. Even for content-neutral laws, "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real." *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)); *Quincy Cable*, 768 F.2d at 1463 (invalidating must-carry rules because "the Commission has failed entirely to determine whether the evil the rules seek to correct is a real or merely a fanciful threat." (quotation marks omitted)).

The City's focus on a handful of materials out of thousands of studies analyzing RF health effects highlights the misguided nature of its endeavor. CTIA demonstrated through qualified experts that "[n]o single report or set of reports is dispositive," and each must be evaluated "in the context of the entire body of relevant literature on the subject." ER (Petersen Supp. Rpt.) 173. Here, the "weight of scientific evidence does not show an association between exposure to radiofrequency from cell phones and adverse health outcomes."[29] The City's focus

[29] FDA, *Radiation-Emitting Products, Current Research Results* (www.fda.gov/Radiation-

on selected reports is unsound and fails to establish a real harm. Indeed, its failure to meet its burden is confirmed by amicus briefs' almost desperate attempts to introduce improper, extra-record materials.[30]

The centerpiece of the City's defense is the IARC classification, but this falls far short of meeting the harms-are-real standard. *See* CTIA Br. 22-24. IARC did not conduct any new research before placing RF in the uniquely defined 2B classification. That classification does not mean that cell phones pose a danger, as unrebutted evidence shows. ER (Petersen Prelim. Rpt.) 145-47.[31] Indeed, IARC's parent, WHO, reiterated after that classification was published that "no adverse health effects have been established as being caused by mobile phone use." SER 278. Moreover, both IARC and the Petersen report show that the classification does not purport to show causation. CTIA Br. 22. And IARC itself noted that "chance, bias or confounding could not be ruled out" for the studies it relied on.

EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116335.htm).

[30] *See e.g.*, EWG Br. 14-21; EHT Br. Part I.B.C. This Court cannot credit or rely on these references, which are not properly before it. *See N.D. v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1113 n.7 (9th Cir. 2010) ("we view only the district court record on appeal" (citing FRAP 10)); *Metcalf v. Daley*, 214 F.3d 1135, 1141 n.1 (9th Cir. 2000) (striking extra-record documents submitted by amici with its brief).

[31] The City suggests that an IARC Group 2B classification, standing alone, can place a chemical on the "Proposition 65 list." This is not correct. Proposition 65 applies to "known" carcinogens and only certain types of Group 2B classifications trigger a listing. RF did not receive the type of 2B classification that would satisfy the state standard. *See* Part I.C *infra*.

SER (IARC Press Release) 336; *accord* SER (WHO Fact Sheet No. 193) 279 ("researchers concluded that biases and errors" plagued underlying conclusions); ER (Petersen Report) 146-147 ¶ 36. These are the types of flaws identified in *Schwarzenegger*, where the State's evidence was insufficient to show that violent video games harmed children. 556 F.3d at 961-62. The City argues that this portion of *Schwarzenegger* only addressed a prohibition on speech, not a compulsion. But it applied the harms-are-real standard that *Ibanez* makes clear applies equally to disclosure requirements. CTIA Br. 20 n.13.

The City's reliance on Interphone fares no better. The FDA and FCC explained that the study "shows no increased health risk."[32] While the City suggests Interphone demonstrated increased risk among higher-volume users, the study made clear that no causal conclusion can be drawn.[33] The City cites an "editorial" from two Interphone members who suggest the study calls for

[32] FDA, No Evidence Linking Cell Phone Use To Risk of Brain Tumors (http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm212273.htm); FCC, Radio Frequency Safety (http://transition.fcc.gov/oet/rfsafety/).

[33] SER 543-545, The Interphone Study Group, Brain tumour risk in relation to mobile telephone use: results of the INTERPHONE international case–control study, 39 Int'l J. Epidemiology 675, 686-87 (May 17, 2010) (http://ije.oxfordjournals.org/content/39/3/675.full.pdf+html?sid=40dd5694-5abf-48c9-b07a-b9c9afbe01aa).

precautionary measures, *see* City Br. 19-20. But even these individual opinions are contested by other members of Interphone.[34]

The City asserts that CTIA's position would require the government to show "absolute scientific proof that a product harms people." City Br. 1, 27. That is not CTIA's argument. This Court "do[es] not require the State to demonstrate a 'scientific certainty,' [but] the State must come forward with more than it has," *i.e.* more than a few minority studies that disavowed causation conclusions and acknowledged likely bias and error. *Schwarzenegger*, 556 F.3d at 964. When expert federal agencies have determined that FCC-compliant phones are safe and the unrebutted expert evidence shows "there is no reliable scientific evidence of injury," ER (Petersen Prelim. Rpt.) 146, the City cannot carry its burden.

C. The City's Policy Arguments And Analogies To Other Warning Regimes Are Inapposite.

The City claims that if its approach is not accepted, all other disclosure regimes will fall. But the regimes it identifies were never challenged under the First Amendment and their existence offers no guidance concerning the

[34] Joseph Bowman, PHD, CIH, Reflection on the INTERPHONE Study of Cell Phones and Brain Cancer, NIOSH Science Blog (July 26, 2010) (http://blogs.cdc.gov/niosh-science-blog/2010/07/cancer/) (a member of Interphone, the Head of the Epidemiology Section at The Institute of Cancer Research, says it "does not give reason for precautionary measures").

constitutionality of the City's warnings.[35] None reaches as far as the City's three-headed warning based on "the risk of risk."

First, none of the regimes cited compelled speech based on the mere *possibility* that something may or may not turn out to be harmful. On the contrary, they were aimed at products known (or, in the case of saccharin, believed by the FDA) to be harmful based on credible scientific evidence.[36] The federal government sees no uncertainty about cause and effect between Fetal Alcohol Spectrum Disorders (FASD) and consumption of alcohol in pregnancy.[37] Similarly, Proposition 65 warnings expressly apply only to chemicals "*known* to

[35] CTIA is not aware of First Amendment challenges to alcohol or saccharin warnings, or to California's Proposition 65.

[36] The saccharin warning is a cautionary tale that supports CTIA. Based on studies linking saccharin to bladder cancer in rats, federal law required foods containing saccharin to bear this label: "Use of this product may be hazardous to your health. This product contains saccharin which has been determined to cause cancer in laboratory animals." Saccharin Study and Labeling Act, Pub. L. No. 95-203, 91 Stat. 1451 (1977). After research showed no cancer risk in humans, the warning label was abandoned. *See* 21 C.F.R. § 180.37; Elena Conis, *Saccharin's Mostly Sweet Following*, L.A. Times (Dec. 21, 2010). Saccharin's saga shows the importance of requiring the government to demonstrate "real harms" before it compels speech.

[37] The government is unequivocal: "FASDs are *caused by* a woman drinking alcohol during pregnancy. There is no known amount of alcohol that is safe to drink while pregnant. There is also no safe time to drink during pregnancy and no safe kind of alcohol to drink while pregnant." U.S. Centers for Disease Control and Prevention, Facts About FASDs, "Cause and Prevention" (www.cdc.ncbddd/fasd/facts.html) (emphasis added).

the state to cause cancer or reproductive toxicity." Cal. Health & Safety Code § 25249.6 (emphasis added).[38]

Second, the burdens imposed are far less intrusive than those imposed here. Each was relatively concise and purely factual. Alcoholic beverage labels must state: "(1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." 27 C.F.R. § 16.21. The saccharin warning was similar and referenced the animal studies predicate. Proposition 65 simply requires "clear and reasonable" warnings, and covered consumer products must include the following: "WARNING: This product contains a chemical known to the State of California to cause cancer."[39] Cal. Code. Regs. tit. 27 § 25603.2(a)(1). They do not contain alarmist graphics like the figures on the City's Poster and original "factsheet" or controversial recommendations.

[38] "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical *known to the state to cause cancer* or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10." Cal. Health & Safety Code § 25249.6 (emphasis added).

[39] Administrative regulations specify the details of some of the warning methods, including the text. *See* Cal. Code. Regs. tit. 27, § 25601.

Third, each warning was part of a broader regime—from alcohol and drug policy[40] to pervasive authority over food additives like saccharin[41]—in which government had direct authority over the speaker and speech regulation was incidental. The government has broader leeway to incidentally burden speech in implementing a comprehensive regulatory program. *See United Foods*, 533 U.S. at 405; *Glickman v. Wileman Brothers & Elliot Inc.*, 521 U.S. 457 (1997). The City's compelled speech is not incidental to any broader regulatory program; compelling dissemination of the City's viewpoint *is* the program.

The City contends that some chemicals covered by California's Proposition 65 may have been listed pursuant to the "authoritative bodies" mechanism following classification by IARC in Group 2B ("possible carcinogens").[42] It provides no clear support for the proposition that an IARC Group 2B classification

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[40] The federal alcohol labeling requirement was part of the Alcoholic Beverage Labeling Act of 1988. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4186, 27 U.S.C. § 215.

[41] *See* 21 U.S.C. §§ 321 (definitions); 342-43 (restrictions on adulterated and misbranded food); 348(a)-(j) (food additive provisions). Lewis A. Grossman, *Food, Drugs and Droods: A Historical Consideration of Definitions and Categories in American Food and Drug Law*, 93 Cornell L.R. 1091, 1129 (2008) (discussing additive framework in context of adulterated food).

[42] *See* Cal. Health & Safety Code § 25249.8(b) ("A chemical is known to the state to cause cancer or reproductive toxicity within the meaning of this chapter if" among other options, "a body considered to be authoritative by such experts has formally identified it *as causing cancer or reproductive toxicity*") (emphasis added); *see also* Cal. Code Regs. tit. 27 § 25306(m)(1) (listing IARC as an authoritative body "for the identification of chemicals as causing cancer").

alone justifies the listing of a substance under Proposition 65, and the only court to consider that question answered it in the negative.[43] The City cites extra-record material,[44] but the statutory standard remains that the chemical be "known" to the state "to cause cancer." The City never argues that RF is "known" to it or anyone to "cause cancer."[45] In fact, the City admits there is no evidence RF does cause cancer.

Reliance on federal chemical regulation likewise fails. OSHA requires chemical manufacturers to evaluate hazards and make certain information available to employees exposed to chemicals in the workplace. *See* Hazard Communication

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[43] *SIRC v. OEHHA*, Judgment for Plaintiff, No. 34-2009-00053089-CU-JR-GDS (Cal. Super. Ct. Sacramento County, Dec. 17, 2009), *appeal pending*, Case No. C064301 (Cal. App. 3d Dist) [copy at District Court Doc. 87-1]; *SIRC v. OEHHA*, Minute Order, No. 34-2009-00053089-CU-JR-GDS (Cal. Super. Ct. Sacramento County, Dec. 17, 2009) [copy at District Court Doc. 87-2]; *see also AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425, 436-37 (Cal. Ct. App. 3 Dist. 1989) ("only those chemicals that are known, *and not merely suspected*, of causing cancer or reproductive toxicity must be on the [Proposition 65] list") (emphasis added). *SIRC* is currently on appeal.

[44] The City relies on unauthenticated documents related to Prop 65. *See* City Br. 18 & 26-27 n.9. As noted, many are not properly subject to judicial notice. *See* CTIA Ninth Circuit Response (DE 62) at 6-8 (identifying SER 832-837, 842-857, and 871-875). Fundamentally, they do not confirm the City's view of state law. They reference the statutory standard, "known to cause cancer." *See*, *e.g.*, SER 0832, 0842, 0846, 0871. At most, they indicate that IARC classifications are considered in evaluating whether a chemical meets the standard.

[45] RF energy is not on the State's list of "chemicals" "known to the state to cause cancer." Office of Environmental Health Hazard Assessment, Proposition 65: Current Proposition 65 List (http://oehha.ca.gov/prop65/prop65_list/files/P65single021712.pdf).

Standard (HCS), 29 C.F.R. § 1910.1200, App. E.[46] The HCS is unlike the City's regime. Like the FDA requirements discussed above, HCS disclosures are incidental burdens on speech imposed as part of a broader regulatory program. They are not a public awareness campaign, but part of OSHA's control of workplace safety. They do not rely on the Precautionary Principle, but target hazardous chemicals.[47] HCS disclosures do not mandate the precise information to be provided, but the HCS provides for disclosures that are factual, limited, and targeted at employees who have been trained to understand the information. *See* 29 C.F.R. § 1910.1200(e)-(h), App. E.

The City's list of regimes requiring relatively unobtrusive disclosures based on more rigorous scientific evidence cannot save the novel regime at issue here.

[46] The HCS exempts non-chemicals such as "[i]onizing and non-ionizing radiation" from the regulation's requirements." 29 C.F.R. § 1910.1200(a)(6)(xi).

[47] The HSC identifies IARC monographs as a source for treating a chemical as a "carcinogen or potential carcinogen," 29 C.F.R. § 1910.1200(d)(4)(ii), but this does not transform the HCS into an exercise in the Precautionary Principle. Complex questions surround whether a 2B "possible" classification standing alone satisfies the HCS "potential carcinogen" standard. The Court need not resolve these issues, as the question here is not whether a 2B classification satisfies the HCS regime (it may), or whether the HCS satisfies the First Amendment (it might). The question is whether the Precautionary Principle satisfies the First Amendment in the very different context of public warnings and safety recommendations.

II. THE CITY'S REGIME CONFLICTS WITH FEDERAL LAW AND WIRELESS POLICY AND IS PREEMPTED.

The City's regime is founded on its opinion that there is a "potentially serious" risk from the normal use of FCC-compliant cell phones, despite the FCC's repeated determination that these phones "are safe for use."[48] The perceived inadequacy of the FCC's standard is the regime's *raison d'etre.* The record leaves no doubt that the City's warnings will frustrate federal policies. Neither a retail store nor this Court is an "appropriate forum for [the City] to dispute the merits of the FCC's" judgments. *Vonage Holdings Corp. v. Minn. Pub. Util. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004).

A. The City Attacks The Sufficiency Of The FCC's RF Safety Standards.

The City mounts a preempted assault on the sufficiency of the FCC's safety standards, asserting that use of FCC-certified phones poses a "potentially serious public health problem." City Br. 17. The City's stated concerns are manifestly claims that the FCC's regime is insufficient.

First, the City states that the FCC's standards are "intended only to protect against the acute thermal effects" of RF and that the City is motivated by "recent

[48] Brief of the United States and the FCC as Amicus Curiae in Support of Appellees at 15-16, *Murray v. Motorola*, 982 A.2d 764 (D.C. 2009) (No. 07-cv-1074) (2008 WL 7825518) ("FCC *Murray* Br.") ER 175-205. The FCC has repeatedly made clear that it "considers all phones in compliance with its standards to be safe." *Farina*, 625 F.3d at 126.

concern[]" over non-thermal effects. City Br. 22 n.6. Its amici join the refrain. EHT Br. 19-20. This is wrong. The FCC accounted for non-thermal effects in setting its standards, and such concerns are not "new." *See supra*. The FCC's decision not to regulate based on "controversial" claims regarding alleged non-thermal effects is itself preemptive as both the courts, *Murray*, 982 A.2d at 779-80, and the FCC have made clear, FCC *Murray* Br. 19-20 (ER 198-199). The City cannot use alleged non-thermal effects as a predicate for action, because that ground is denied to it by FCC decisions and the Supremacy Clause.

Second, the City's regime reflects its opinion that the FCC's standards inadequately protect certain populations, like children. *See* ER (Ordinance) 77 § 1.3; ER ("factsheet") 99; ER (revised "factsheet") 277. Its amici agree. *See* Brief of Amicus Curiae Environmental Working Group and Public Citizen, Inc. at 17-20 ("EWG/Public Citizen Br."); CFSCP Br. 9; EHT Br. 26-27. But the FCC specifically rejected the idea that its standards are insufficient to protect children or other members of the public. *See 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 (¶ 26) (1997) ("*RF Order*

II"). The FDA agrees.[49] Expert evidence confirms this. ER (Petersen Prelim. Rpt.) 147 ¶ 37.

Third, the City and amici mischaracterize the FCC's testing protocols, safety margins, and the science surrounding RF. Criticisms of the fifty-fold safety margin and the testing phantom misunderstand the science, ignore the FCC's explanations, and merely repeat criticisms raised in unsuccessful challenges to the federal standards. *See supra* n.19 & n.22.

Finally, the City calls for regulatory changes it characterizes as improvements, admonishing the FCC for, among other things, "not requir[ing] cell phone manufacturers to measure the amount of radiofrequency energy an average user will absorb." ER (Ordinance) 78 § 1.6. This criticism is misplaced, because, as the City conceded, SAR levels recorded during testing and reported to the FCC for certification are higher than levels typically experienced during actual use. ER (Petersen Supp. Rpt.) 172 ¶ 4; ER (Petersen Prelim. Rpt.) 147 ¶ 37.

B. The City Artificially Narrows The Scope Of Conflict Preemption.

1. State Obligations That Attack The Sufficiency of the FCC RF Standard And Testing Regime Conflict With Federal Law.

The City argues that preemption only invalidates regimes seeking to impose emissions standards or "require [manufacturers] to change the way they

[49] "The scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers." FDA, *Children and Cell Phones.*

manufacture their phones." City Br. 42-44. But preemption is triggered where a regime is "premised" on an attack on the FCC's standards or the safety of FCC-compliant phones. Neither *Farina* nor *Murray*[50] sought revisions to RF emissions standards,[51] but both were preempted: "[A]lthough [plaintiff] disavows any challenge to the FCC's RF standards, that is *the essence* of his complaint." *Farina*, 625 F.3d at 122 (emphasis added, citations omitted). The claims were preempted because, to succeed on his claims, Farina had to "show that [the FCC's] standards are inadequate—that they are insufficiently protective of public health and safety." *Id*. This is what the City believes, why it acts, and the message it sends. The City cannot claim on the one hand that its regime is necessary to avoid "serious public health consequences," City Br. 1, and argue on the other hand that it is not attacking the FCC's regime as inadequate.

The City's claim that the Ordinance does not seek to compel technical changes, City Br. 42, is belied by its original purpose—to "encourage telephone manufacturers *to redesign their devices to function at lower radiation levels*." Press Release, Mayor Newsom Introduces Cell-Phone Radiation Labeling Legislation (Jan. 26, 2010) (emphasis added)

[50] The City does not address *Bennett v. T-Mobile USA Inc.*, 597 F. Supp. 2d 1050 (C.D. Cal. 2010), which reaches the same conclusion. CTIA Br. 40.

[51] EHT's statement that *Farina* "involved changing the technical requirements of cell phones," EHT Br. 31, reflects a significant misunderstanding of the case. *Farina* rejected this characterization.

(http://www.sfmayor.org/ftp/archive/209.126.225.7/press-room/press-releases/press-release-cell-phone-radiation-labeling/); *see* Compl. [District Court Doc. 1] ¶ 55. In any event, Farina too claimed his remedy required no handset changes and "would have no effect upon the efficiency of the wireless network." *Farina*, 625 F.3d at 132. The Court found preemption nonetheless. "Preemption speaks in terms of claims," *id.* at 133, and "[t]he inexorable effect of allowing suits like Farina's to continue is to permit juries to second-guess the FCC's balance of its competing objectives," *id.* at 134. If preemption bars suits that invite juries to second-guess federal standards, it bars direct regulation based on explicit second-guessing.

Likewise, *Murray* proscribed any law that requires "accept[ance]" of the "premise that the FCC's SAR maximum is inadequate to ensure the safe use of cell phones." 982 A.2d at 781. The plaintiffs alleged a failure to warn about "*potential* risks or methods that could be used to minimize their exposure to radiation." *Id.* at 770 (emphasis added). But federal law preempts state obligations to tell consumers about alleged inadequacy in the FCC's regime or alleged dangers from FCC-compliant phones. *Id.* at 784 n.35.

Like the City, the court below ignores this holding, which the FCC embraces:

> It continues to be the Commission's position (and *Murray* holds) that state law claims *premised on the contention that*

> *FCC-compliant cell phones are unsafe* are preempted by federal law. Therefore, to the extent that plaintiffs CPPA claims in this case rest on the *premise that the FCC's RF standards do not adequately protect cell phone users from potentially harmful RF emissions*, it is the FCC's position that those claims are preempted under federal law[.]

ER (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.)) ("*Dahlgren* Letter")) 208-215.[52] Because the City's regime is "premise[d]" on the inadequacy of the FCC's regime to protect against "potentially harmful RF emissions," it is preempted.

The City's claim that this conclusion requires invalidation of any "disagreement" with the FCC, *see* City Br. 44, is a straw man. Federal law does not prevent the City from speaking in the "marketplace of ideas," City Br. 29, or using its own voice. It is because the City is using its police power to regulate conduct that its action is either preempted or without the necessary factual predicate to satisfy the First Amendment.

[52] This letter refutes the claim that the lack of a brief from the FCC sends a message about the lawfulness of the City's regime. *See* City Br. 43 n.16. The FCC has explained that it "does not file amicus briefs in every case in which the position of the Commission is at issue or in which the agency has an interest. *No particular significance should be attributed to the absence of such a brief.*" ER (*Dahlgren* Letter) 213 (emphasis added).

2. The City Never Addresses The Ordinance's Effects On Public Safety And Other Federal Policies.

The City asserts that "the only federal 'objective' CTIA identifies is the alleged objective to get people to keep their cell phones on." City Br. 42. This caricature is absurd. CTIA presented uncontested evidence demonstrating the regime's impact on federal policies from public safety to wireless deployment.[53]

Beyond interfering with the balance the FCC struck in its RF regime, *see* CTIA Br. 43-47, unrefuted evidence identified serious public safety tradeoffs from the City's "recommendations." CTIA Br. 48-49; ER (Springer) 117-119. The City trivializes the consequences of the public turning cell phones "off" or not having phones, City Br. 43, but public safety and connectivity are critical federal policies. For example, "one of [the FCC's] highest priorities" is "to ensure that all Americans have the capability to receive timely and accurate" emergency alerts "irrespective of what communications technologies they use." *Commercial Mobile*

[53] The City downplays the nature and likely effectiveness of its warnings, claiming they do not literally tell people "that cell phones cause cancer" or "to refrain from buying cell phones." City Br. 20 n.4. It speculates that, confronted with language about carcinogenicity and the City's "recommendations," consumers will not "avoid" cell phones, "reduce the number and length of calls," "limit" cell phone use, or "turn phones off." This runs counter to logic, and the conclusions of both CTIA's expert, ER (Stewart Supp. Rpt.) 268-71 ¶ 13, and the City's expert, who admitted that the Display Materials might dissuade people from buying or using cell phones. *See* ER (Scott Supp. Rpt.) 155 n.8. If the City really believes that the "recommendations" will have no effect, its regime cannot survive even rational basis review.

Alert System, 23 F.C.C.R. 6144, 6146 (2008) ("*CMAS Order*").[54] The Ordinance will impede such alerts. And while the FCC does not require phones to remain on at all times, City regulation that *discourages* the purchase and use of cell phones and tells consumers to turn them off is clearly inconsistent with the federal public safety initiatives. *See, e.g.*, *Vonage Holdings Corp. v. Minnesota Public Utilities Com'n*, 290 F. Supp. 2d 993, 1002 (D.Minn. 2003) ("Where federal policy is to encourage certain conduct, state law discouraging that conduct must be pre-empted."); 1 Laurence H. Tribe, American Constitutional Law § 6–29, at 1181–82 (3d ed. 2000) ("state action must ordinarily be invalidated if its manifest effect is to penalize or discourage conduct that federal law specifically seeks to encourage").

The City is wrong that its regime will not "affect the operation of the nationwide wireless network." City Br. 42. "[W]ireless networks employ dynamic power control to maximize network capacity. Power control operates by precisely adjusting the power of the base stations and handsets." *Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage Through The Use of Signal Boosters*, 26 F.C.C.R. 5490, 5497 (2011). Network management uses volume, traffic, and location information from devices even

[54] Device location and "geographic targeting" are at the heart of this system, *see CMAS Order*, 23 F.C.C.R. at 6146; 10 C.F.R. § 10.450, which is scheduled to become operative in April 2012.

when they are not "in use," *see* ER (Fitterer) 114-115, which cannot be accessed if the phone is switched off per the City's recommendation.

The risk of disruption is real. Other municipalities and states have considered RF safety regulations like this Ordinance.[55] A patchwork of local laws will undermine the national, deregulatory regime mandated by Congress. *See e.g.*, *Implementing Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1418 (¶ 15) (1994); *Petition on Behalf of the Louisiana Public Service Commission*, 10 F.C.C.R 7898, 7901 (1995) ("Congress intended … to establish a national regulatory policy for CMRS, not a policy that is balkanized state-by-state.").

3. The Presumption Against Preemption Is Inapplicable.

The City half-heartedly invokes the presumption against preemption, City Br. 44 n.17, but it is inapplicable "'when the State regulates in an area where there has been a history of significant federal presence.'" *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)).

[55] Hawaii is considering requiring handset labels that state cell phones "may cause" cancer and recommending that certain users avoid them. S.B. 2477, 26th Leg. (Haw. 2012) (http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2477). Connecticut is considering a SAR labeling requirement of the sort that even the City acknowledged is misleading. S.B. 268, 2012 Gen. Sess. (Conn. 2012) (http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=268&which_year=2012&SUBMIT1.x=11&SUBMIT1.y=15). Under the City's approach, so long as a regulator could point to some "support" for the "views" required to be communicated, there is virtually no limit to such warnings.

"Although Plaintiff's claims assert matters of health and safety, the telecommunications industry generally, and RF emissions from cell phones specifically, have long been regulated by Congress and the [FCC]. Given the strong federal presence of regulation in this industry, a presumption against preemption is unwarranted." *Bennett*, 597 F. Supp. 2d at 1052. It does not matter that the City frames the case as involving "protection of the public health" any more than it mattered that *Ting* involved "consumer protection."[56]

C. Preemption Arguments Raised By Amici Are Irrelevant and Wrong.

Amici raise preemption arguments that are incorrect and not properly before this Court. EWG/Public Citizen Br. 27-36; EHT Br. 32-33. Because the City did not make these arguments, they are outside the scope of this appeal. *See U.S. v. Gementera*, 379 F.3d 596, 607 (9th Cir. 2004); *Zango*, 568 F.3d at 1177 (party cannot adopt in reply arguments first raised by amici).

In any event, these arguments have been rejected by courts, the FCC, and the U.S. Solicitor General. *See Farina*, 625 F.3d at 122-134, *cert. denied*, 132 S. Ct. 365 (2011); *Murray*, 982 A.2d at 778; *Pinney v. Nokia, Inc.*, 402 F.3d 430, 440

[56] In this respect, *Farina* missed the mark. The Third Circuit viewed the relevant "area" as protection of public health through the police power, rather than control over radio communications. 625 F.3d at 116 (citation omitted). This was incorrect, but is of no moment, particularly in light of *Ting*. And even in *Farina*, the clear conflict overcame the presumption.

(4th Cir. 2005); Brief for the United States as Amicus Curiae at 16-20, *Farina v. Nokia*, 132 S. Ct. 365 (2011) (2011 WL 3799082) ("U.S. *Farina* Br.").

First, amici assert that the FCC's regime cannot preempt because it was promulgated under the National Environmental Policy Act of 1969 ("NEPA"). EWG/Public Citizen Br. 27-35. The Third Circuit and the FCC (through the U.S. Solicitor General) explain this is wrong. *See Farina*, 625 F.3d at 128; U.S. *Farina* Br. 18-21. The FCC acted under NEPA *and* the Communications Act of 1934, which all agree has preemptive effect. *See, e.g.*, *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123, 15185 (¶ 171) (1996) ("*RF Order I*"); *RF Order II*, 12 F.C.C.R. at 13562 (¶ 162).

Second, EWG/Public Citizen argue that the standards are not "substantive" and lack preemptive force. EWG/Public Citizen Br. 27-35. The FCC's standards are "not simply procedural in nature, but reflect[] the agency's *substantive* determination that its standards for wireless phones" are adequate to protect the public. U.S. *Farina* Br. 18-21 (emphasis in original). Every court to consider the question agrees that the federal RF rules impose substantive limits with preemptive effect. *See Farina*, 625 F.3d at 125; *Pinney*, 402 F.3d at 440; *Murray*, 982 A.2d at 778.

Third, amici invoke two "savings clauses"—Section 601 of the Telecommunications Act of 1996 ("TCA") and Section 414 of the

Communications Act of 1934. EWG/Public Citizen Br. 35-36. Savings clauses do not bar the ordinary working of conflict preemption. *See Williamson v. Mazda Motor of America*, 131 S. Ct. 1131, 1136 (2011); *Geier v. Am. Honda Motor Co.*, 429 U.S. 861, 869-70 (2000); *AT&T Co. v. Cent. Office Telephone Co.*, 524 U.S. 214, 228 (1998) (Section 414 does not save claim for services in conflict with statutory filed-tariff requirements); *Farina*, 625 F.3d at 132 n.30. Section 601 is also inapposite.[57] The FCC and Solicitor General have explained that it has no application to the FCC's RF rules, which were promulgated under the Communications Act of 1934. U.S. *Farina* Br. 16-17.

Finally, EHT notes that the FCC declined to preempt state regulation in its 1996 Order. EHT Br. 32. This too has been raised and rejected. That Order reserved the question of the RF regime's preemptive effect pending an actual conflict. *Farina*, 625 F.3d at 127. The FCC has explained that federal law preempts state or local law that conflicts with its regime,[58] and courts agree. *Farina*, 625 F.3d at 127; *Murray*, 982 A.2d at 777.[59]

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[57] The City mentions the 1996 Act's savings clause in a footnote, but does not frame any argument around it. City Br. n.15.

[58] *See, e.g.*, FCC *Murray* Br. 12-26 (ER 191-205); *see also* ER (*Dahlgren* Letter) 213-215.

[59] EWG/Public Citizen argues that Congress gave FDA authority "to issue preemptive radiation standards for consumer products." EWG/Public Citizen Br. 32-33. The FCC and the FDA have overlapping authority. "[T]he fact that the

CTIA is likely to prevail on its preemption claim and has raised substantial legal questions that, at a minimum, support preliminary relief.

III. THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY REWRITING THE "FACTSHEET" AND ISSUING AN ADVISORY OPINION.

The City claims that the district court's "unorthodox" directive prescribing "corrections" to the factsheet was merely an "efficient shortcut." City Br. 44-46. This tepid defense is unavailing. While courts possess equitable authority to fashion appropriate remedies, the District Court should have enjoined enforcement of the Ordinance and Display Materials, as presented, and stopped there.

The City's assertion that it could have had the injunction "lifted" "an hour later" by revising the factsheet on its own, *id*. at 45, ignores local law and federal procedure. If the Court had enjoined enforcement of the Ordinance and materials, the City could have revised them, but DOE would have had to notice revised materials for public comment, under local law. *See* CTIA Br. 50 n.40.[60] And if the City wanted to "lift" the injunction, federal rules would have required a motion for reconsideration under Federal Rule 59(e) or for vacatur/dissolution of the

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FCC does not possess sole jurisdiction over health and safety standards does not preclude a finding of preemption." *Farina*, 625 F.3d at 127.

[60] The City's argument that CTIA cites no authority for its position regarding procedural requirements ignores footnote 40 of CTIA's Opening Brief and provides no contrary authority.

injunction under Rule 54(b). Essential to both scenarios and missing from the City's posited machinations is the opportunity for CTIA (and others) to be heard.[61]

Many deprivations of rights could be cast as "efficient shortcuts," but that does not mean they are constitutional. The District Court's action here is unlike any of the cases cited by the City. In several, courts exercised *statutorily-granted discretion* to fashion equitable remedies. *See, e.g.*, *Coleman v. Schwarzenegger*, 2010 WL 99000, at *4 (N.D. Cal. Jan. 12, 2010) (exercise of court's authority under the Prison Litigation Reform Act); *see also United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1032, 1034 (N.D. Cal. 2004) (exercise of court's authority under the Safe Drinking Water Act).

In others, resolution was needed to prevent ongoing or imminent constitutional violations. *See, e.g.*, *Coleman*, 2010 WL 99000 at *4 (Governor had proclaimed that prisons were "in a state of emergency due to overcrowding"); *Morales v. Tilton*, 465 F. Supp. 2d 972, 981-82 (N. D. Cal. 2006) ("[A] judgment adverse to Defendants . . . is far more likely to delay the resumption of executions in California than is one favorable to Defendants.").[62] The District Court here did

[61] Although courts can modify preliminary injunctions *sua sponte* in certain circumstances, "both the structure of the federal rules and the constitutional guarantee of due process require that a court not do so without giving prior notice to the parties and an opportunity for them to be heard." *Dr. Jose Belaval, Inc. v. Perez-Perdomo*, 465 F.3d 33, 37 (1st Cir. 2006) (citations omitted).

[62] Reliance on *Morales* is particularly inapposite. The court gave the government an opportunity to correct unconstitutional implementation of an otherwise

not possess statutorily-granted discretion and was not faced with any emergency that justified its "unorthodox shortcut."

The appropriate way to correct the Ordinance's defects would have been to enjoin it entirely and return the matter to the City. The Board of Supervisors, the DOE, and the public could have weighed in on revisions (if there were to be any). Instead, the process was circumvented and the lower court took the extraordinary step of drafting suggested language for the new factsheet. This "short-cut" provides a clear basis to vacate the revised "factsheet."

IV. THE BALANCE OF EQUITIES SHARPLY FAVORS CTIA.

The District Court properly determined that "[t]he balance of equities and the public interest factor favor preliminary relief," ER (Oct. 27 Op.) 14. The City offers no basis for disturbing this finding. It made no effort to rebut CTIA's sworn declarations showing irreparable harm. There will be no harm to the City or the public by enjoining the regime given the federal RF safety standards in place.

A. Evidence Of CTIA's Irreparable Injury Is Unrefuted.

CTIA demonstrated irreparable harm through unrebutted declarations establishing harm to goodwill, customer relationships, and business reputation,

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constitutional scheme, because "comity and separation of powers" required the "particulars" to remain the province of the state. *Morales*, 465 F. Supp. 2d at 981-822 (internal quotation and citation omitted); *see also Animal Protection Institute v. Holsten*, 541 F. Supp. 2d 1073, 1081-82 (D. Minn. 2008).

which the City ignored in its brief. *See* CTIA Br. 53-54. The City merely asserts, without support, that retailers will benefit because consumers will buy headsets.

CTIA also showed through uncontroverted evidence that it will suffer a loss of its First Amendment freedoms, which is *per se* irreparable. *Id.* at 53; *see also* CERC Br. 10, 13. The City claims that CTIA's First Amendment harm could be outweighed if the government makes a "strong showing" on the public interest prong, City Br. 52, but *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002), does not hold that a "strong showing" on the public interest prong can trump individual First Amendment harms. The discussion cited by the City deals solely with whether the general public interest in vindicating the First Amendment could be overcome by a strong showing of competing public interests. *Id.*

The City also contends that First Amendment interests here are "'minimal.'" City Br. 52 (quoting *Milavetz*, 130 S.Ct at 1339). *Milavetz* did not address First Amendment harm for purposes of preliminary relief. *Milavetz* held only that a private party has a minimal interest in not providing true and uncontroversial factual information *if* the compelled disclosure is necessary to correct misleading speech and otherwise satisfies *Zauderer*. *Zauderer*, 130 S.Ct at 1339. That is not this case. There is no argument that the speech in CTIA members' retail stores is anything but a mix of fully protected speech and true commercial speech. ER

(D'Ambrosio) 105-06 ¶ 26. Under Supreme Court precedent, the First Amendment harm here must be considered irreparable. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

B. The City Has Not Demonstrated Any Injury To It Or To The Public Interest.

The only "public interest" the City asserts is "helping residents make informed decisions about how to use a relatively new form of technology." City Br. 53. This does not move the scales. *See* CTIA Br. 54-58. There is "no factual showing, on the current record, to support the claimed need" to inform consumers about how to use cell phones. *Sammartano*, 303 F.3d at 974-75. There is no evidence that consumers do not know how to use phones or that user manuals do not contain this information. Indeed, the City's evidence and arguments refute this suggestion. *See* City Br. 30.

The City nowhere explains how an unsupported interest in informing consumers about product use could outweigh a demonstrated violation of First Amendment rights and other unrefuted harms. Nor has the City explained why it must immediately conscript retailers, rather than promote its own message. *See Sammartano*, 303 F.3d at 974-75; *Sorrell*, 131 S. Ct at 2671.

The City invokes "consequences that *could* result *if* there were a health issue with cell phones." City Br. 53 (emphasis added). But this is not the same thing as asserting that the public health *would be* harmed by an injunction. The City

concedes that there is no evidence that cell phones cause harm. ER (Transcript) 237; ER (Oct. 27 Op.) 14. Even the District Court was not swayed by the City's dire predictions of possible, but completely unproven, future harms. ER (Oct. 27 Op.) 14-15.

The City's final redoubt is the public interest in "duly enacted" legislation. City Br. 53. But, as the City recognizes, *id.*, this must yield where the movant shows a likelihood of success on the merits. *Sammartano*, 303 F.3d at 974; *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059-60 (9th Cir. 2009).

V. AT A MINIMUM, CTIA HAS RAISED SERIOUS QUESTIONS OF LAW ENTITLING IT TO FULL PRELIMINARY RELIEF.

CTIA is also entitled to preliminary relief under the alternative, sliding scale formulation because it has raised "serious questions" going to the merits. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

The First Amendment innovations necessary to sustain the City's novel regime demonstrate this. The City wants this Court to allow the forced dissemination of government messages based on nothing more than the "Precautionary Principle" and the risk of risk, even though expert federal agencies have determined that cell phones are safe. It asks the Court not to apply heightened scrutiny to a content-based compelled speech regime. It implores the Court to expand and apply a relaxed form of *Zauderer* to protected commercial

speech, which neither the Supreme Court nor Ninth Circuit has ever done. And it asks the Court to indulge illogical assertions about its regime's nature and effect.

The preemption issues are also substantial. The City broadly attacks the safety of phones certified for sale under a federal regime blessed by multiple agencies and courts, and disputes that regime's adequacy. Its recommendations will alarm the public and impede federal policies.

The balance of hardships tips sharply in CTIA's favor and CTIA has established irreparable harm and the public interest in enforcing the First Amendment and Supremacy Clause. *Id.* The City offers no reason why it cannot address its concerns in some less intrusive way. The Court can thus confidently enjoin the entire regime under the alternative formulation for preliminary relief.

CONCLUSION

The Court should affirm the District Court's decision to enjoin the Display Materials as promulgated by the City, and reverse the portion of the decision denying CTIA's motion for preliminary injunction and permitting forced dissemination of the revised "factsheet."

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in a proportionally spaced typeface using Microsoft WORD 2003 in 14 point Times New Roman. According to the "word count" feature in Microsoft WORD, this brief contains 15,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CTIA has filed herewith an unopposed motion seeking to exceed the type-volume limitation for this brief. CTIA is allotted 14,000 words under the rules. *See* Fed. R. App. P. 28.1(e)(2)(A).

Dated: March 7, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, I electronically filed the foregoing response and reply brief of CTIA with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that participants in the case that are registered CM/ECF users will be served by the appellate CM/ECF system.

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

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