Nos. 11-17707, 11-17773

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CTIA - THE WIRELESS ASSOCIATION®
Plaintiff-Appellant,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PLAINTIFF-APPELLANT CTIA

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February 1, 2012

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(c)(1), Amici hereby state as follows:

The Chamber of Commerce of the United States of America (the "U.S. Chamber") has no parent corporation. No publicly held corporation owns any portion of the U.S. Chamber, and the U.S. Chamber is neither a subsidiary nor an affiliate of any publicly owned corporation.

The California Chamber of Commerce ("CalChamber") is a nonprofit corporation. It has no parent corporation and there is no publicly held corporation that owns any portion of CalChamber.

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INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

The U.S. Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the U.S. Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the U.S. Chamber files briefs as *amicus curiae* in cases that raise issues of vital concern to the nation's business community. The U.S. Chamber frequently files briefs in cases implicating the First Amendment rights of businesses. *E.g.*, Amicus Brief, *Sorrell v. IMS Health, Inc.*, U.S. Supreme Court No. 10-779 (2010); Amicus Brief, *Schwarzenegger v. Entm't Merchants Assoc.*, U.S. Supreme Court No. 08-1448 (2008).

CalChamber is a non-profit business association with over 14,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of

legislative, regulatory and legal issues. CalChamber often advocates before the courts by filing *amicus curiae* briefs in cases involving issues of paramount concern to the business community. This is one such case.

This case presents questions of significant importance to members of both the U.S. Chamber and CalChamber (collectively, "Amici") concerning the circumstances under which government may mandate speech by businesses. The First Amendment's protections are integral to the work of American businesses, including its protection of the right not to speak. Businesses face a serious threat if, as San Francisco argues here, the government can force businesses to deliver government messages based merely on the possibility that a business's product may at some point in the future be shown to pose a health danger. Amici have a vital interest in ensuring that businesses are afforded the protections guaranteed by the First Amendment against overreaching government speech requirements. Amici also have a fundamental interest in ensuring that the First Amendment's boundaries are clear and that its standards are not eroded by the incorporation of the so-called "precautionary principle," a European environmental policymaking concept.

Amici file this brief pursuant to Fed. R. App. P. 29(a), as the parties in this matter consented to the filing of *amicus* briefs. App. Dkt. #15 at 1; App. Dkt. #26 (denying motion for leave to file an *amicus* brief "as unnecessary"). Pursuant

to Fed. R. App. P. 29(c)(5), Amici here state that (1) no party's counsel has authored this *amicus curiae* brief in whole or in part; (2) no party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and (3) no person other than Amici, their members and their counsel have contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

San Francisco's "Cell Phone Right To Know" Ordinance (the "Ordinance") violates the First Amendment. This case does not involve ordinary economic regulation. Instead, San Francisco seeks to carry out its objectives by compelling private parties to disseminate its message. This extraordinary and dangerous measure demands exacting scrutiny. The First Amendment protects private parties' right to choose the content and means of their speech, including the right to refrain from speaking. As a result, San Francisco must satisfy the stringent standards of the First Amendment, which require the government at least to adduce evidence proving the existence of a real, actual harm that its regulation addresses.

San Francisco did not even attempt to meet this First Amendment burden, instead appealing to an international environmental policy concept, the so-called "precautionary principle," which San Francisco contends allows it to regulate speech without "wait[ing] for scientific proof of a health or safety risk." Ordinance §1, ¶ 1 (Appellants' Opening Brief ("AOB"), Addendum at A-1). The District Court agreed with San Francisco, incorporating the "precautionary principle" to hold that the government may force a private party to disseminate "government opinion" about a "debatable question" of public health, "based on nothing more than the possibility that an agent may (or may not) turn out to be harmful." Oct. 27, 2011 Order ("Order") at 7, 10. This is plain error.

The "precautionary principle" is fundamentally at odds with the First Amendment's broad protections against government speech regulation. By allowing regulation based merely on the speculative possibility that harm may later be found, it eviscerates the First Amendment's bedrock requirement that a government must present evidence proving the existence of a real, actual harm before compelling a private party to speak about that supposed harm. Acceptance of the "precautionary principle" as a justification for suppressing free speech rights would improperly shift the burden on the regulated party to rule out the possibility that harms exist. This turns the First Amendment on its head. The burden is on the government to prove the existence of a harm, not on the private party to disprove that possibility.

Relying on the "precautionary principle," San Francisco contends that it can compel speech without evidence that there is an actual link between cell phone use and cancer. Instead, San Francisco proceeds on its radical policy of compelling speech first, and speculating that scientific evidence of an actual health threat will emerge later. It is no surprise that what "evidence" San Francisco does point to does not come close to establishing the existence of an actual health danger. San Francisco employs the "precautionary principle" to lower its burden to justify the Ordinance because San Francisco cannot meet the First Amendment's established requirements.

A "precautionary principle"-based speech regime would result in a dramatic and dangerous erosion of First Amendment rights for businesses. Under the "precautionary principle," the government could require businesses to distribute warnings about countless substances found in all manner of everyday products, based solely on the speculative possibility that those products might pose a health risk. What is more, businesses could be required to voice messages that ultimately prove untrue. The First Amendment does not tolerate this kind of government interference in the free speech rights of American businesses.

The portion of the District Court's Order permitting San Francisco to compel retailers to distribute the "factsheet" must be reversed. Order at 11. The parts of the Court's Order barring San Francisco from requiring the placement of posters or stickers in cell phone retail locations should be affirmed. *Id.* at 13-14.

ARGUMENT

I. BACKGROUND

A. The Origins Of The So-Called "Precautionary Principle"

The "precautionary principle" has no foundation in, or connection to, the First Amendment. It is a concept rooted in international environmental law and policymaking. It reflects a policy choice that prioritizes the avoidance of risk of harm, without requiring conclusive evidence about the harm or its cause before undertaking regulatory action.

The "precautionary principle" stems from "Vorsorgeprinzip," a 1970s-era German environmental policy, and has since been referenced in various forms in the European Union treaty and other international documents. *See* Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. Pa. L. Rev. 1003, 1005-06 (2003). Although prevalent in Europe and some countries in other parts of the world, the "precautionary principle" has a minimal presence in American environmental policy and is almost nonexistent in American law. As San Francisco itself has recognized, "precautionary action has been the exception rather than the rule in U.S. environmental policy," San Francisco, White Paper, "The Precautionary Principle and the City and County of San Francisco," March 2003, at 9, *available at* http://www.sfenvironment.org/downloads/library/13precprin whitepaper.pdf. Although the principle has been referenced in a few U.S. court decisions, no U.S. court has endorsed the "precautionary principle" as a justification for restricting, burdening or mandating speech.

San Francisco adopted a form of the "precautionary principle" as a part of its Environment Code in 2003. S.F. Env. Code Ch. 1, § 101 ("All officers, boards, commission, [*sic*] and departments of the City and County shall implement the Precautionary Principle in conducting the City and County's affairs … .").

B. San Francisco's Reliance On Its "Precautionary Principle" Despite Expert Agency Findings That There Are No Health Risks From Cell Phone Use

San Francisco passed the Ordinance according to its philosophy of acting first, and letting the science come—if it ever does—later. It thus expressly based the Cell Phone Right-to-Know Ordinance on its policy of "adher[ing] to the Precautionary Principle, which provides that the government *should not wait for scientific proof of a health or safety risk*" before acting. Ordinance § 1, ¶ 1 (emphasis added). Armed with this act-first imperative, San Francisco then needed only to find an iota of a suggestion that RF energy from some level of cell phone use *could* possibly be carcinogenic to humans. Or, more particularly, San Francisco, under its "precautionary principle," sought only to determine whether ill effects *could not be ruled out*.

San Francisco was forced to rely on the "precautionary principle" because it could not identify science to support a conclusion that cell phone use poses an actual health danger. Multiple federal agencies and international bodies have been monitoring the hundreds of scientific studies that have been conducted to assess the potential health effects of cell phone use and radiofrequency energy ("RF energy") like that emitted by cell phones. Numerous federal agencies have announced that the weight of the scientific evidence does not show that cell phone use causes cancer or has other harmful effects:

- Federal Communications Commission ("FCC"): "There is no scientific evidence that proves that wireless phone usage can lead to cancer or a variety of other problems … ." FCC Website, "FAQs - Wireless Phones," *available at* http://www.fcc.gov/encyclopedia/faqs-wireless-phones.

- Food and Drug Administration ("FDA"): "The weight of scientific evidence has not linked cell phones with any health problems." FDA Website, "Health Issues: Do cell phones pose a health hazard?" *available at* http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116282.htm.

- National Cancer Institute ("NCI") at the National Institutes of Health ("NIH"): "Although there have been some concerns that radiofrequency energy from cell phones held closely to the head may affect the brain and other tissues, to date there is no evidence from studies of cells, animals, or humans that radiofrequency energy can cause cancer." NCI Website, Factsheet, "Cell Phones and Cancer Risk," *available at* http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones.

The City has sought to meet its low "precautionary" bar by turning primarily to the work of the International Agency for Research on Cancer ("IARC"), which is a part of the World Health Organization ("WHO"), and which assigned a working group to evaluate the scientific literature on the potential health effects of RF energy and cell phone use. Based on that review, the WHO declined to classify RF energy as actually "carcinogenic" or even "probably carcinogenic," and settled on the lesser classification of "possibly carcinogenic to humans." *See* Order at 8-9 (citing IARC Monographs Preamble at 22-23, *avail. at* http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf). As WHO explained, it categorized RF energy as "possibly carcinogenic" based on a determination that there was "limited evidence of carcinogenicity"—where a

"positive association has been observed between exposure to the agent and cancer for which a causal interpretation is considered by the Working Group to be credible, but chance, bias or confounding could not be ruled out with reasonable confidence." WHO Press Release No. 208 ("WHO Press Release"), May 31, 2011, *available at* http://www.iarc.fr/en/media-centre/pr/2011/pdfs/pr208_E.pdf. In other words, WHO's "possibly carcinogenic" classification means nothing more than that the possibility of carcinogenicity cannot be ruled out. In its Fact Sheet on cell phone safety issued *after* it announced the "possibly carcinogenic" classification, WHO reported that "[t]o date, no adverse health effects have been established as being caused by mobile phone use." WHO Fact Sheet No. 193, "Electromagnetic fields and public health: mobile phones," June 2011, *available at* http://www.who.int/mediacentre/factsheets/fs193/en/index.html. It is against this background that San Francisco exercised its precautionary prerogative to impinge upon the free speech rights of cell phone retailers.

II. DISCUSSION

A. The First Amendment Guards Against Government Compelled Speech

1. The First Amendment Protects The Right Not To Speak

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "'Since all speech inherently involves choices of what to say and what to

leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986)); *accord Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 765-66 (5th Cir. 2008). The ability to decide "the ideas and beliefs deserving of expression" is "[a]t the heart of the First Amendment … ." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Thus, "[g]overnment action … that requires the utterance of a particular message favored by the Government [] contravenes this essential right." *Id.*

This right not to speak protects corporations and individuals alike: "speech does not lose its protection because of the corporate identity of the speaker." *Pacific Gas*, 475 U.S. at 16. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Id.* (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)); *Hurley*, 515 U.S. at 574 (holding that the right to tailor one's speech is "enjoyed by business corporations" as well as individuals and the press).

The First Amendment applies to compelled disclosures of fact, which for First Amendment purposes are indistinguishable from compelled statements of opinion. "[E]ither form of compulsion burdens protected speech." *Riley v. Nat'l*

Fed. of the Blind of N.C., Inc., 487 U.S. 781, 797-98 (1988); *Hurley*, 515 U.S. at 573 (noting that the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion or endorsement, but equally to statements of fact the speaker would rather avoid … .") (citations omitted).

As a result, the First Amendment limits the government's ability to regulate businesses' communications with their customers and the general public, including inside stores and at the point-of-sale. *E.g.*, *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009) (striking down law requiring warning label on purportedly violent video games), *aff'd on other grounds*, *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729 (2011); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566-67 (2001) (recognizing that commercial speech falls within the purview of the First Amendment and striking down regulation mandating placement of in-store tobacco advertising). The Supreme Court emphasized the right of companies to choose what *not* to say to their customers in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. at 16-18. In that case, the government had required a utility to include, in its mailings to its customers, materials written by a consumer advocacy group. The Court found that the First Amendment prohibited the government from requiring that the utility disseminate another's views, *id.* at 14, noting that such a requirement would "pressure [the utility] to respond" if it disagreed with the

message it was compelled to deliver. *Id.* at 15-16. In both respects, the government's action violated the "freedom *not* to speak publicly … '" *Id.* at 11 (citation omitted) (emphasis in original); *see also Tornillo*, 418 U.S. at 256-57 (holding that a "right-of-reply" statute requiring newspaper to publish candidate's response to newspaper content violated the First Amendment).

Applying these First Amendment principles, courts have struck down laws mandating warning labels or messages in a variety of contexts. *E.g.*, *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, __ F. Supp. 2d __, No. 11-1482 (RJL), 2011 WL 5307391, at *7-*8 (D.D.C. Nov. 7, 2011) (striking down tobacco labeling requirement); *Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 146 (1994) (striking down disclaimer requirement); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652-53 (7th Cir. 2006) (striking down video game warning label requirement); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73-74 (2d Cir. 1996) (striking down requirement to disclose that milk came from cows that may have been treated with bovine growth hormone).

2. The First Amendment Requires The Government To Adduce Evidence Demonstrating That A Compelled Speech Requirement Addresses An Actual Harm

It is axiomatic that the government has the burden of justifying its abridgment of First Amendment rights. *E.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983) ("The party seeking to uphold a restriction on

commercial speech carries the burden of justifying it."); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) ("[T]he government bears the burden of justifying its speech-restrictive law."). The First Amendment "impos[es] on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985) (rejecting argument that government should be able to impose prophylactic restriction of speech where the government had difficulty determining whether restricted speech was truthful).

This standard must be rigorously enforced. The First Amendment substantially limits the government's regulatory authority when it seeks to exercise that authority by regulating free speech, long recognized as one of "our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Thus, the First Amendment requires the courts to scrutinize government regulation affecting speech with far greater rigor than when the government engages in non-speech-related policy-making. As the Supreme Court has explained:

> The text of the First Amendment makes clear that the Constitution presumes that *attempts to regulate speech are more dangerous* than attempts to regulate conduct. … As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as

> simply another means that the government may use to achieve its ends.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996) (rejecting argument that the power to regulate a particular product "necessarily includes" the "lesser power" to regulate advertising about that product) (emphasis added); *accord Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173, 193 (1999) ("It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone.").

To meet its First Amendment burden, the government must adduce empirical or other evidence establishing that there is a real "harm" or "problem" that its regulation of speech is designed to alleviate. This requirement applies regardless of the level of First Amendment scrutiny applied. Amici agree with CTIA that strict scrutiny is the proper framework because the Ordinance imposes a content-based and speaker-based speech mandate. *Riley*, 487 U.S. at 795 (holding that a government requirement that compels speech that a speaker "would not otherwise make" is a content-based regulation subject to strict scrutiny); *Turner*, 512 U.S. at 642, ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject" to "the most exacting scrutiny.") (citations omitted); *R.J. Reynolds*, 2011 WL 5307391, at *6 (applying strict scrutiny to strike down warning label requirement); *Blagojevich*, 469 F.3d at 652-53 (same); *see also Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2663 (2011) (holding that speech

regulation disfavoring pharmaceutical manufacturers was both content- and speaker-based).

But even if intermediate scrutiny applied, the government must still "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (citations omitted); *accord Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). In other words, the government must establish that its regulation will address "what is in fact a serious problem." *Edenfield*, 507 U.S. at 776. "This burden is not satisfied by mere speculation or conjecture … ." *Id.* at 770; *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980) (rejecting government concerns that were "highly speculative" or "tenuous" as insufficient to satisfy the First Amendment). Instead, the government must proffer objective evidence, such as empirical studies, supporting its rationale for burdens on speech. Absent such a showing, the courts have consistently invalidated government-imposed burdens on speech. *Edenfield*, 507 U.S. at 771-72 (noting lack of studies or empirical data in support of speech regulation, and dismissing affidavit as making merely conclusory statements); *Borgner v. Brooks*, 284 F.3d 1204, 1211 (11th Cir. 2002) ("Courts have generally required the state to present tangible evidence" of harm in justifying speech restrictions).

San Francisco contends that the Ordinance should be reviewed under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which held that the government may require "purely factual and uncontroversial" disclosures that are reasonably related to the government's interest in preventing consumer deception. Amici agree with CTIA that *Zauderer* does not apply in this case. AOB at 27-38. But even if *Zauderer* were applicable, San Francisco would still be required to adduce evidence demonstrating that there is an "identifiable" or "actual" harm that the Ordinance addresses. In *Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136 (1994), the Supreme Court rejected a requirement that an accountant claiming to be a "specialist" include a disclaimer stating, *inter alia*, that the agency recognizing the accountant as a specialist was not affiliated with the government. The Court noted that although the government purportedly intended the disclaimer to prevent consumer deception, there was a "'complete absence of any evidence of deception'" and only a concern about the "possibility of deception in hypothetical cases." *Id.* at 145 (citation omitted). The government thus failed to demonstrate that the "'harms it recites are real'" (*id.* at 146 (quoting *Edenfield*, 507 U.S. at 771)) and its disclaimer requirement was found to impose "'unduly burdensome disclosure requirements [that] offend[ed] the First Amendment.'" *Id.* (quoting *Zauderer*, 471 U.S. at 651).

Similarly, in *Mason v. Florida Bar*, 208 F.3d 952, 957-58 (11th Cir. 2000), the Eleventh Circuit held that a disclaimer requirement violated the First Amendment. In that case, the Florida Bar required a lawyer advertising that he was "'AV' Rated" to include a statement in his advertisement explaining the meaning of the rating and how the rating was reached, contending that absent the explanation, the public would be misled. *Id.* at 954. The court noted that the Florida Bar "presented no studies, nor empirical evidence of any sort" to satisfy its burden to show an "identifiable harm." *Id.* at 957, 958. The court concluded that "the [government] is not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer, rather than a complete ban on [plaintiff's] speech." *Id.* at 958.

Under any standard, therefore, the First Amendment requires that the government present evidence to show "actual harm."

3. The "Precautionary Principle" Is Antithetical To Core First Amendment Principles

The "precautionary principle" is fundamentally incompatible with the First Amendment. Whereas the First Amendment requires the government to present tangible evidence of a "real problem" or "concrete, non-speculative harm" before it may abridge First Amendment rights, *Ibanez*, 512 U.S. at 145; *Mason*, 208 F.3d at 957, the "precautionary principle" operates on exactly the opposite premise, encouraging government regulation based on the *absence* of proof that a

harm *could not* exist. The "precautionary principle" would gut the First Amendment standard, effectively allowing the government to regulate speech without any showing of a real problem.

The "precautionary principle" also runs headlong into the First Amendment's proscription of speech burdens based on "mere conjecture or speculation." *Edenfield*, 507 U.S. at 771; *accord Greater New Orleans*, 527 U.S. at 188 (quoting *Edenfield*, 507 U.S. at 770-71). Under the "precautionary principle," the government acts without evidence of actual harm, but instead based on the possibility that harm may one day be established—in short, based on speculation. The Ordinance illustrates the kind of conjecture governments would be allowed to employ if the "precautionary principle" became a part of First Amendment law. Because the scientific evidence is insufficient to show that cell phone use poses a real health danger, San Francisco is left to surmise that "[a]lthough the harm [from cell phone use] is not certain, it would have a far more devastating impact" than obesity or mercury exposure. S.F. Opp. to CTIA's Emergency Mot. for Stay Pending App. ("S.F. Opp. to Stay Mot."), Nov. 18, 2011, App. Dkt. #7-2, at 34; S.F. Opp. to Mot. for Prelim. Inj. ("S.F. Opp. to PI Mot."), Oct. 7, 2011, D.C. Dkt #66, at 19 ("If it turns out that cell phone use causes health effects, this could be a serious public health issue for the City … ."). This is

exactly the kind of government guesswork that the First Amendment's "proof of harm" burden precludes.

The effect of the "precautionary principle" is to shift the burden in First Amendment cases to the *speaker* to demonstrate that a speech regulation is unwarranted. For example, in this case, cell phone retailers would have to demonstrate that cell phone use is not only safe now, but will never be found to have adverse health effects in the future to avoid the speech regulation. *See* Order at 5 ("San Francisco expressly based its [Ordinance] on the absence of a definitive study ruling out any and all risk of harm … ."); Argument of S.F. Counsel at Hrg. On Mot. for Prelim. Inj., Oct. 20, 2011 Hrg. Tr. at 22-23 (acknowledging that there is no proof of a link between cell phone use and cancer and arguing that it would not be harder for cell phone retailers to prove the negative). The First Amendment, however, does not require the speaker to prove anything. The government, not the speaker, bears the burden of justifying a restriction on speech. *See, e.g.*, *Thalheimer*, 645 F.3d at 1116; *Turner*, 512 U.S. at 685 (Stevens, J., concurring) ("[T]he First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals.").

In short, the "precautionary principle" cannot be adopted into First Amendment law without eviscerating the First Amendment's core protections.

B. San Francisco's Employment Of Its "Precautionary Principle" Does Not Come Close To Satisfying Its First Amendment Burden

The First Amendment requires San Francisco to adduce evidence showing that there is a "real," "concrete, non-speculative" health threat justifying its Ordinance. *Edenfield*, 507 U.S. at 771; *Mason*, 208 F.3d at 958. In other words, San Francisco must demonstrate that it has a "reasonable concern for human health or safety … ." *Amestoy*, 92 F.3d at 74 (rejecting labeling requirement where evidence showed that there were "no human safety or health concerns" associated with the substance in question). Absent such a showing, San Francisco has no legitimate basis to infringe on cell phone retailers' free speech rights.

A future case may require a court to determine how much scientific evidence is needed to establish that a particular product presents an actual health risk that could support a government mandate requiring a private party to spread the government's message about the purported risk. There is no need to announce a definitive standard in this case, however, because San Francisco does not come close to meeting any standard that would comply with the First Amendment. In fact, relying on the "precautionary principle," San Francisco takes the position that it need not demonstrate "actual harm" at all.

San Francisco itself recognizes that there is a "debate in the scientific community" about whether using cell phones causes adverse health effects (Ordinance § 1, ¶ 2), but has never argued that the debate will be resolved in its favor, nor that any such health effects from cell phones will be found or even are likely to be found. *See* S.F. Opp. to PI Mot. at 19 (arguing that the disclosure requirement is necessary in case "it turns out that cell phone use causes health effects"). In fact, "San Francisco concedes that there is no evidence of cancer caused by cell phones." Order at 14. Nevertheless, according to San Francisco, it may compel speech because the "precautionary principle" allows it to act without "wait[ing] for scientific proof of a health or safety risk," Ordinance, § 1, ¶ 1. Thus, under its new "precautionary principle"-based standard, San Francisco contends that it can regulate speech so long as it has "some indication"—no matter how insignificant—of a *potential* health threat. S.F. Opp. to Stay Mot. at 8, 15. This is a far cry from the First Amendment's well-established "actual harm" requirement. San Francisco's showing does not pass constitutional muster.

San Francisco relies heavily upon the IARC's classification of cell phone-emitted RF energy as "possibly carcinogenic to humans." S.F. Opening Br. at 17-19. But the IARC classification does not establish that cell phone use has been found to cause cancer (or is even likely to cause cancer). Instead, the IARC classification supports the proposition that it is *possible* that cell phone use may be

linked to cancer in the future, but that the current science is inconclusive, as "chance, bias or confounding could not be ruled out … ." WHO Press Release. The IARC classification thus means nothing more than that additional scientific study is warranted. The IARC statement that cell phone-emitted RF energy is "possibly carcinogenic" does not come close to showing actual harm that the First Amendment requires before San Francisco may force the cell phone retailers to speak.

San Francisco's only other "evidence" that cell phone use potentially causes cancer is one statistic, taken from an article citing a study that found "'a *40% increase in risk* … for glioma [for people] in the highest decile of cumulative call time.'" S.F. Opening Br. at 19 (emphasis and second alteration in original). This lone figure cannot save the Ordinance. The very article San Francisco cites identifies methodological problems undermining this statistic, D.C. Dkt. #70, Ex. E at 1; San Francisco does not mention scientific studies and articles finding no link between cell phone use and cancer, *see* Plfs' Mem. in Resp. to Court's 2d Not. Requesting Add'l Info, Oct. 25, 2011, D.C. Dkt #87, at 5 & Exs. 4, 5; and expert federal agencies like the FDA, FCC and NCI all agree that the weight of evidence shows no link between cell phone use and cancer. *See supra* at 9. San Francisco is not a public health agency with expertise or experience in weighing scientific evidence. *Cf. Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998)

(giving deference to expert agencies' "'evaluations of scientific data within its area of expertise'") (citation omitted). Particularly in light of the conclusions reached by the expert federal agencies in the field, this single data point cannot suffice to demonstrate "actual harm," and underscores why San Francisco needed to cling to the "precautionary principle."

The City's attempt to overlay this otherwise inadequate support for an actual harm with its act-first "precautionary principle" does not satisfy the First Amendment. In the realm of constitutionally protected speech, San Francisco cannot weaken the standards for acting and then act when those diluted standards are met.

While there may be cases where the government can produce scientific evidence that demonstrates that a product or a substance is harmful to human health, or even that it is probably harmful to human health, this is not one of those cases. San Francisco argues that the evidence upon which it relies indicates that its suspicion that cell phone use could be harmful is not "purely hypothetical." *See* S.F. Opening Br. at 17. In other words, San Francisco argues that the Ordinance is justified by a health risk that, as the District Court noted, is "a large step shy of the normal use of 'risk.'" Order at 9. The court reasoned that unlike health dangers from *known* carcinogens, which present "a statistical risk" of "leading to cancer for any given individual," San Francisco's version of "risk" is

far more expansive: "As for anything in the 'possibly carcinogenic' category, … there is no known statistical correlation and the word 'risk' is being used in a different way, namely that there is a 'risk' that the 'possible' may turn out to be a 'definite.'" *Id.*

While San Francisco's evidence does not demonstrate the existence of health dangers from cell phone use, it does make clear why San Francisco must attempt to create a new First Amendment standard based on the "precautionary principle"—the evidence falls far short of the established First Amendment standard. San Francisco's argument boils down to the proposition that the government can mandate speech because, in its view, there is *a risk of something becoming a risk* in the future. That is the essence of speculation and conjecture and is far short of what the First Amendment demands.

C. The "Precautionary Principle" Would Undermine Businesses' Free Speech Rights

A First Amendment regime that allowed governments to force private actors to speak based on the "precautionary principle" would result in a serious erosion of the First Amendment rights of businesses.

If adopted as a First Amendment standard, the "precautionary principle" would eliminate any real barrier to the government's imposition of forced speech requirements and open the floodgates to required warnings. *See Amestoy*, 92 F.3d at 73 (stating that unless the government could establish a

substantial concern justifying a warning requirement, "there is no end to the information that states could require manufacturers to disclose"). The government could require businesses to post or disseminate warnings any time the government had even the slightest indication that a substance could potentially have adverse health effects. The list of substances that could trigger such a warning regime is endless, starting with any agent on the IARC list of "possible carcinogens"—which includes common household products like coffee, talcum powder and pickled vegetables, as well as agents contained in or emitted by other everyday items, like caffeic acid (found in apples, carrots and other fruits and vegetables), or extremely low frequency magnetic fields (generated by hair dryers, electric razors, and other electric devices). *See* IARC "Agents Classified by the IARC Monographs, Volumes 1-102," *available at* http://monographs.iarc.fr/ENG/Classification/ClassificationsGroupOrder.pdf (listing "possibly carcinogenic" agents as Group 2B agents, and including coffee, talcum powder, pickled vegetables, caffeic acid, and extremely low frequency magnetic fields); Alexander Volokh, *The Pitfalls of the Environmental Right-to-Know*, 2002 Utah L. Rev. 805, 838 (2002) (noting that caffeic acid is found in coffee, apples and carrots); Jonathan C. Mosher, *A Pound of Cause for a Penny of Proof: The Failed Economy of an Eroded Causation Standard in Toxic Tort Cases*, 11 N.Y.U. Envtl. L.J. 531, 537-38 (2003) (noting that carcinogens are found even in organic fruits and

vegetables); Patsy W. Thomley, *EMF at Home: The National Research Council Report on the Health Effects of Electric and Magnetic Fields*, 13 J. Land Use & Envtl. L. 309, 321 & n.91 (1998) (identifying sources of common exposure to magnetic fields). Any other substances for which there is "some indication" of carcinogenicity—a list that includes lettuce and orange juice—could also be subject to a warning label or handout. *See* Richard J. Pierce, Jr., *Causation in Government Regulation and Toxic Torts*, 76 Wash. U.L.Q. 1307, 1315-16 (1998) (quoting Lois Swirsky Gold et al., *Rodent Carcinogens: Setting Priorities*, 258 Science 261, 263 (1992)) (noting that known animal carcinogens are found in commonplace items like "wine, beer, lettuce, root beer, apples, mushrooms, pears, plums, peanut butter, tea, celery, carrots, bread, and chlorinated water"); *id.* at 1314 (stating that orange juice is a plausible cause of cancer). Simply put, there would be no limit to the warnings the government could require businesses to issue.

Worse yet, because the government need not verify the accuracy of its compelled statements under the "precautionary principle," the government could require business to voice messages that ultimately prove false or misleading. The danger of requiring private parties to spread falsehoods is palpable here. San Francisco does not contend that its suspicions about the dangers of cell phone use are true or will prove true in the future; the message the "factsheet" sends about the

purported dangers of cell phone use, as San Francisco concedes, may be shown to be utterly baseless. S.F. Opp. to Stay Mot. at 34 (recognizing that "the harm is not certain"). It would be a serious breach of the First Amendment if the government could require private actors to make false statements. *See Schwarzenegger*, 556 F.3d at 967 (noting that the government "has no legitimate reason to force retailers to affix false information on their products"). The offense to the First Amendment incursion is no less severe where the government does not know, one way or the other, whether its mandated message is true.

III. CONCLUSION

The "precautionary principle" is fundamentally incompatible with the First Amendment and the District Court's adoption of it was error. The District Court's Order must be reversed to the extent it permitted San Francisco to require cell phone retailers to distribute San Francisco's "factsheet," and must be affirmed to the extent it barred San Francisco from requiring cell phone retailers to display posters in their store and apply stickers to their display materials.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). It contains 6,309 words.

Dated: February 1, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 1, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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