IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CTIA – THE WIRELESS ASSOCIATION®, Plaintiff/Appellant, vs. THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, Defendant/Appellee/Cross-Appellant.	Nos. 11-17707 & 11-17773 U.S. District Court No. C10-03224 WHA

CROSS-APPEAL OPENING BRIEF AND ANSWERING BRIEF OF APPELLEE CITY AND COUNTY OF SAN FRANCISCO

On Appeal from the United States District Court
for the Northern District of California

The Honorable William H. Alsup

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INTRODUCTION

San Francisco's ordinance requires retailers to disclose information to customers about the possible health effects of cell phone use and about simple measures they can take to reduce their radiation exposure. To justify this consumer disclosure requirement under the First Amendment, the City must demonstrate that the information being disclosed is reasonably related to the City's indisputably legitimate goal of protecting the health of its people. The voluminous materials that were before the Board of Supervisors and that the City submitted to the district court (none of which CTIA included in its excerpts of the record) clearly satisfy the City's burden. They show that there is a potential link between heavy cell phone use and brain cancer, that cell phone use is heavier and more widespread than ever, and that therefore, if it turns out that cell phone use does indeed cause brain cancer, serious public health consequences would result. Indeed, as the City showed below, the World Health Organization has now classified radiation from cell phones as a possible carcinogen – based on the conclusions reached by a team of 31 scientists from around the world who reviewed all the scientific and epidemiological work conducted on this issue to date.

CTIA submitted no evidence to the district court to rebut the City's showing. Instead, it relies on the premise that the government may not impose a consumer disclosure requirement unless there is absolute scientific proof that a product harms people. This is preposterous. Although it is certainly true that the City may not impose a disclosure requirement based on pure speculation about the health effects of a product, neither must it wait for definitive proof that a product is killing people. The City's disclosure requirement is not based on speculation, it is based on the work of the WHO scientists, and on the recommendations of leading experts

in the field that precautionary measures should be taken with cell phones to avoid a possible brain cancer epidemic. The First Amendment cannot possibly prevent San Francisco from ensuring that customers are aware of these important and easy-to-follow recommendations.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over both the appeal and cross-appeal under 28 U.S.C. § 1292(a)(1). The district court granted in part and denied in part CTIA's motion for a preliminary injunction in orders dated October 27, 2011 and November 7, 2011. ER 1-16. CTIA timely appealed on November 9, 2011, and the City timely cross-appealed on November 17, 2011. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

(1) Does San Francisco's requirement that cell phone retailers provide a factsheet about cell phone safety to customers (as revised by the City in the wake of the district court's ruling), violate the First Amendment rights of the retailers?

(2) Are San Francisco's cell phone disclosure requirements preempted by federal law?

(3) Did the district court commit jurisdictional error by issuing an order holding that some aspects of the factsheet were valid and some were not, and then giving the City the opportunity to cure the constitutional defects to avoid a complete injunction?

(4) On cross-appeal, did the district court err in ruling that, aside from the factsheet as revised, the disclosure requirements violated the First Amendment?

STATEMENT OF FACTS

A. San Francisco's Original Ordinance.

In July 2010, San Francisco adopted an ordinance to inform consumers about ways they could reduce their exposure to radiofrequency ("RF") energy from cell phones. The original ordinance contained two basic requirements. The first was that cell phone retailers post "SAR values" of cell phones at the point of sale. SER 45-46. SAR is a measure of the amount of RF energy a device will cause specified parts of the body to absorb, under specified conditions. The FCC requires cell phone manufacturers to certify that their phones have a maximum SAR value at or below 1.6 w/kg, as measured over one gram of tissue.

The second requirement of the original ordinance was that retailers provide information about cell phone radiation to customers, by making a factsheet available upon request and by displaying in the store either a poster or individual stickers as part of cell phone displays. SER 47. The ordinance tasked the City's Department of the Environment ("DoE") with drafting the language to be contained in the factsheet, poster, and stickers. *Id.*

CTIA promptly sued to challenge the ordinance. CTIA's original complaint contained just a single cause of action, for federal preemption.

On September 20, 2010, pursuant to its rulemaking authority, DoE released drafts of the language to be included on the stickers, posters and factsheets, and solicited public comment on the draft materials. SER 123. These disclosure materials used the word "radiation" numerous times, and provided tips for reducing radiation exposure, such as buying a phone with a lower SAR value, using a headset, and texting instead of talking. SER 126-31. Most of the content came directly from the FCC's website, including the suggestion to buy a phone with a lower SAR value. SER 124, 144-45 (Sanders Dec.).

B. CTIA's New First Amendment Claim.

Although CTIA received notice of DoE's draft disclosure materials and was invited to comment, it did not do so. SER 123. Instead, after those materials became final, CTIA filed a First Amended Complaint ("FAC"). The FAC added a First Amendment claim, which alleged that DoE's disclosure materials were inaccurate and misleading. Specifically, CTIA alleged: "The FCC's SAR standard was never intended and cannot be used as a comparative measure that consumers would use to shop for cell phones and is affirmatively misleading when portrayed as a measure of likely exposure in everyday use." SER 4, 22. CTIA also took issue with DoE's use of the word "radiation" in the disclosure materials, asserting that it was misleading to use that term without further qualification. SER 8, 22.

C. San Francisco's Decision To Amend The Ordinance.

In late January 2011, after CTIA filed its FAC, the City announced it would delay enforcement of the ordinance so that it could consider further changes. SER 73-76. The Board of Supervisors ultimately amended the ordinance, addressing the most significant issues identified by CTIA's new First Amendment claim. For example, the Board removed the requirement that retailers disclose SAR values to consumers at the point of sale, having concluded that SAR indeed can be misleading when used for comparing different phones. The Board also removed all reference to the word "radiation."

The amended ordinance required DoE to develop new disclosure materials to "inform consumers of issues pertaining to radiofrequency energy emissions from cell phones and actions that can be taken by cell phone users to minimize exposure to radiofrequency energy . . ." SER 328 (S.F. Env. Code § 1104(b)). The ordinance provided that retailers must disclose this information about radiofrequency energy on: (i) a factsheet to be given to everyone who purchases a

cell phone; (ii) a poster displayed in the store at a prominent location selected at the retailer's discretion; and (iii) a sticker posted on any cell phone display materials the retailer may use. SER 326-27 (S.F. Env. Code §§ 1103(a), (b), (c)).

D. The New Disclosure Materials.

The factsheet (as drafted by the DoE before the district court enjoined aspects of it) is attached as Appendix A to this brief. The front of that factsheet stated at the top: "You can limit exposure to Radio-frequency (RF) Energy from your cell phone." The City Seal appeared prominently on either side of that statement. Immediately below the statement was an image of human silhouettes holding cell phones with lines emanating from them. The factsheet then stated: "Although studies continue to assess potential health effects of mobile phone use, the World Health Organization has classified RF energy as a possible carcinogen." Below that appeared a disclaimer which explained that the material is prepared by the City and must be provided under local law.

The second side of the factsheet stated at the top: "If you are concerned about potential health effects from cell phone RF energy, the City of San Francisco recommends" five measures: "Limiting cell phone use by children," "Using a headset, speakerphone or text instead," "Using belt clips and purses to keep distance between your phone and body," "Avoiding cell phones in areas with weak signals (elevators, on transit, etc.)," and "Reducing the number and length of calls." Each recommendation contained subtext that elaborated on the reasons for the recommendations. At the bottom of the second side of the factsheet, the websites for the DoE, the FCC, and the WHO were all displayed, along with the City Seal and the disclaimer as described above.

The poster is attached as Appendix B. It similarly included two imprints of the City seal at the top, with the words "Cell Phones Emit Radio-frequency

Energy." The images appeared below those words, followed by the statement, "[s]tudies continue to assess potential health effects of mobile phone use," and then followed by a repeat of some of the recommendations for how to reduce exposure.

The sticker is attached as Appendix C. It states: "Your head and body absorb RF energy from cell phones. If you wish to reduce your exposure, ask for San Francisco's free factsheet."

E. The District Court's Preliminary Injunction Ruling.

CTIA filed a second amended complaint ("SAC"), and simultaneously moved for a preliminary injunction. CTIA again argued that the ordinance was preempted and that the disclosure materials violated the First Amendment.

The district court granted CTIA's motion in part and denied it in part. It rejected CTIA's preemption arguments, ER 6, but as to the First Amendment, the court enjoined the poster on the ground that it was "not reasonably necessary and would unduly intrude on the retailers' wall space." ER 13. It enjoined the stickers as well, reasoning that because the ordinance required the retailers to place the stickers on preexisting in-store displays, they would "unduly intrude upon the retailers' own message." *Id.*

As to the factsheet, the district court concluded that certain aspects made it constitutionally infirm. It concluded that the silhouettes of human figures holding cell phones were invalid because they were "not facts but images subject to interpretation." ER 12. It also concluded that the factsheet left the impression that cell phones were not subject to any federal RF energy emissions standards, and that it failed to place the WHO's classification of RF energy from cell phones in the proper context. ER 11-12. The court held that, aside from these defects, the factsheet satisfied First Amendment scrutiny, and thus it would not be enjoined if the City opted to cure the defects. The court explained:

> Even the FCC has implicitly recognized that excessive RF radiation is potentially dangerous. It did so when it "balanced" that risk against the need for a practical nationwide cell phone system. The FCC has never said that RF radiation poses no danger at all, only that RF radiation can be set at acceptable levels. Given this implicit recognition of a risk and given the "possible carcinogen" classification by the World Health Organization, it cannot be said that San Francisco has acted irrationally in finding a potential public health risk and in requiring disclosures to mitigate that potential risk.

ER 11.

In the wake of this ruling, the City's Department of the Environment decided to cure the defects perceived by the district court in the factsheet, and submitted a revised factsheet to the district court to show that it had done so. That revised factsheet is attached to this brief as Appendix D.

F. The Appeal

CTIA appealed, and simultaneously filed an emergency motion to stay, pending appeal, the aspect of the district court's ruling allowing the City to require retailers to provide the factsheet to cell phone buyers. CTIA did not advance its preemption argument in its motion, instead relying only on its First Amendment argument. This Court granted CTIA's motion for a stay pending appeal.

The City has timely cross-appealed from the aspect of the district court's ruling enjoining the poster, the sticker, and the parts of the factsheet that the court found constitutionally infirm.

STANDARD OF REVIEW

The City mostly agrees with CTIA's recitation of the standard of review, but wishes to emphasize three points. First, particularly in cases where a plaintiff merely raises "serious questions" on the merits, the balance of equities must tip "sharply" in favor of the plaintiff for a preliminary injunction to issue. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Second, although in First Amendment cases irreparable harm to the plaintiff is presumed

when the plaintiff has made its showing on the merits, such harm can still be "limited," in which case a preliminary injunction should be denied if the injunction would harm the public interest. *Sammartano v. First District Judicial Court*, 303 F.3d 959, 974 (9th Cir. 2002). Third, measures duly enacted by the people's representatives are reflective of the public interest, and courts generally should not preliminarily enjoin them unless the plaintiff has made a "strong showing" of unconstitutionality, to the point that the measure's constitutional invalidity is "obvious." *Planned Parenthood of the Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997); *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) ("*Golden Gate I*").

SUMMARY OF ARGUMENT

I. The City's factsheet, as revised in response to the district court's ruling, does not violate the First Amendment. Consumer disclosure requirements are valid if reasonably related to a legitimate governmental purpose, such as preventing consumer deception or protecting public health. *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 130 S.Ct. 1324, 1339 (2010); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Public Citizen, Inc. v. Louisiana Atty. Disc. Bd.*, 632 F.3d 212, 220 (5th Cir. 2011); *N.Y.S.R.A. v. New York City Board of Health*, 556 F.3d 114, 132-35 (2d Cir. 2009); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001). The government may satisfy its burden under the reasonable relationship test by resorting to legislative history materials; it is not required to put on expert testimony. *Milavetz*, 130 S.Ct. at 1340; *Zauderer*, 471 U.S. at 652; *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 97-98 (2d Cir. 2010); *N.Y.S.R.A.*, 556 F.3d at 134-35. The legislative materials submitted by the City more than satisfy its burden to show that the factsheet is reasonably related to the goal of preventing a

potential brain cancer epidemic. These materials include numerous studies indicating a possible link between heavy cell phone use and cancer, as well as materials published by the World Health Organization explaining its decision to classify cell phone radiation as a possible carcinogen. The legislative materials submitted by the City also include recommendations by some of the world's leading epidemiologists that, given the possible cancer link and the ubiquity of cell phone use today, people should take simple precautionary measures to reduce their exposure to RF energy from cell phones (such as using a headset), to avoid a potentially far-reaching public health problem. CTIA submitted no evidence to the district court to rebut the City's showing that the harm it seeks to mitigate is "potentially real, not purely hypothetical," *Ibanez v. Florida Dept. of Bus. and Prof. Reg.*, 512 U.S. 136, 146 (1994), and therefore the factsheet clearly satisfies First Amendment scrutiny.

II. Nor does federal law preempt the City from imposing disclosure requirements about cell phone safety. CTIA asserts only conflict preemption, which occurs when a local law stands as an obstacle to the accomplishment of a congressional purpose. In adopting an RF emissions standard for cell phones, the federal government sought to balance safety needs with the need to promote an efficient and uniform wireless market. Local laws upset that balance when they penalize cell phone manufacturers for doing something that federal government explicitly allows upset that balance, but local laws do not upset that balance when they merely require that information be provided to consumers. *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010); *Murray v. Motorola, Inc.*, 982 A.2d 764, 785 (D.C. Ct. App. 2009). Grasping at straws, CTIA asserts that the City's disclosure requirements conflict with an alleged federal policy of making sure people keep their cell phones on (so that they can receive important messages quickly and so

their wireless carriers can track their physical locations), but there is no such policy.

III. The district court did not commit jurisdictional error when it ruled on CTIA's motion by explaining in detail which aspects of the City's factsheet were constitutionally infirm and which were not, and then giving the City an opportunity to cure the legal defects before issuing a preliminary injunction. This is precisely the kind of flexible exercise of equitable powers that federal courts can, should, and do engage in.

IV. Regarding the City's cross-appeal, the district court should have denied CTIA's motion for a preliminary injunction entirely, rather than ruling that the First Amendment precluded the City's poster and sticker requirements along with certain aspects of the factsheet. This is so for many of the same reasons that the revised factsheet passes First Amendment muster – the remaining disclosure requirements are also reasonably related to the mitigation of a potentially serious public health risk, the City made a strong showing that this is so, and CTIA submitted no evidence to the district court to rebut the City's showing. Moreover, the specific aspects of the disclosure requirements that the district court enjoined were not constitutionally problematic. The image on the factsheet accurately conveyed that RF energy emanates from cell phones, that it is absorbed by the head or hip when the phone is close to the head or hip, but that the strength of the radiation diminishes as it emanates farther from the phone. And the City did not need to amend its factsheet to state that cell phones sold in the United States must satisfy FCC safety standards or that the WHO did not classify cell phones as a "probable" carcinogen. With respect to the poster and sticker, they did not interfere with any message the retailers may have wished to convey. The district court's analysis appeared to be based on the assumption that a retail store has the same rights as a

newspaper to avoid being required to disseminate content it does not wish to disseminate, but that is wrong.

V. Even if CTIA could demonstrate a likelihood of success on the merits of its First Amendment claim, preliminary relief was not warranted because the First Amendment harm is "limited," *Sammartano v. First District Judicial Court*, 303 F.3d 959, 974 (9th Cir. 2002), and therefore by definition the equities do not tip "sharply" in CTIA's favor, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). This is particularly so where, as here, an injunction would stall implementation of a measure duly enacted by the people's representatives. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) ("*Golden Gate I*"); *Planned Parenthood of the Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997).

ARGUMENT

CTIA's appeal is from the district court's decision not to enjoin the factsheet, as revised by the City in the wake of the district court's order. The City's cross-appeal is from the district court's ruling that the factsheet was unconstitutional absent the revisions, and that the poster and sticker were unconstitutional as well. Although there is overlap between these issues, this brief will address the appeal first. Accordingly, Section I explains why the factsheet, as revised following the district court's ruling, does not violate the First Amendment. Section II explains why the district court was correct to rule that federal law does not preempt any of the City's disclosure requirements. Section III explains that the district court did not act outside its jurisdiction when it issued a detailed opinion explaining which aspects of the factsheet were constitutional and which were not, and then gave the City the opportunity to cure the defects in the factsheet before issuing an injunction. Section IV addresses the City's cross-appeal, explaining why the

factsheet, even before the City revised it, did not violate the First Amendment. This section also explains why the First Amendment does not prohibit the ordinance's requirement that retailers also display a poster in the store, and stickers on any cell phone display materials within the store. Finally, Section V explains that even if CTIA managed to establish a likelihood of success on the merits, the equities weighed against the grant of a preliminary injunction – an issue relevant both to the appeal and cross-appeal.

I. THE FACTSHEET, AS REVISED BY THE CITY IN THE WAKE OF THE DISTRICT COURT'S ORDER, DOES NOT VIOLATE THE FIRST AMENDMENT.

A. San Francisco Has Shown That The Serious Public Health Issues Presented By Cell Phone Radiation Justify A Disclosure Requirement.

1. The City need only show that its disclosure requirement is reasonably related to the protection of public health.

The factsheet does not restrict advertising or other speech by cell phone retailers. It is a consumer disclosure requirement. While this point is perhaps obvious, it is an important one, because in the commercial context, the First Amendment's primary purpose is to ensure that relevant information is *not* withheld from consumers. As the Supreme Court explained in 1976 when it rejected Virginia's argument that the public would be better off not receiving information on the price of prescription drugs,

> [t]here is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

As the Supreme Court later explained, this principle – that the commercial speech doctrine helps ensure that the government does not *prevent* consumers from receiving potentially useful information – underlies any inquiry into the validity of consumer disclosure requirements. A company's "constitutionally protected interest in not providing any particular factual information" to its customers "is minimal," and therefore "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech . . . ." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). *See also Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 130 S. Ct. 1324, 1339 (2010) (confirming the "minimal" nature of the First Amendment interest in avoiding factual disclosure requirements). Accordingly, as a general matter disclosure requirements are valid under the First Amendment if they are "reasonably related" to a legitimate public purpose. *Zauderer*, 471 U.S. at 651. *See also, e.g., Public Citizen, Inc. v. Louisiana Atty. Disc. Bd.*, 632 F.3d 212, 220 (5th Cir. 2011) (disclaimer requirement for attorney advertising was "sufficiently related to the substantial interest in promoting the ethical integrity of the legal profession"); *N.Y.S.R.A. v. New York City Board of Health*, 556 F.3d 114, 132-35 (2d Cir. 2009) (local menu labeling requirement was reasonably related to the government's public health interest in reducing obesity and diseases associated with it); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001) (required disclosure that fluorescent light bulbs contain mercury and must be disposed of as hazardous waste was reasonably related to environmental and public health concerns).

To be sure, although courts sometimes refer to this level of scrutiny as "rational basis review," it still involves free speech rights. Therefore, while review of disclosure requirements is "less exacting" than the intermediate scrutiny courts

apply to actual restrictions on commercial speech, *Milavetz*, 130 S. Ct. at 1339, the government must still show that the harm it seeks to mitigate through a disclosure requirement is "potentially real, not purely hypothetical." *Ibanez v. Florida Dept. of Bus. and Prof. Reg.*, 512 U.S. 136, 146 (1994). The government must provide "some indication that [the disclosed] information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern . . . ." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

CTIA argues that the government's burden under the reasonable relationship test is far greater than set forth above. For this proposition, CTIA relies almost exclusively on *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009). CTIA characterizes *Schwarzenegger* as striking down a disclosure requirement for violent video games on the grounds that "evidence from three doctors and a university" was not enough to clear the high evidentiary hurdle that faces the government in such cases. O.B. at 20. CTIA further states that "the Supreme Court affirmed" this "more demanding standard" that allegedly applied to the disclosure requirement in *Schwarzenegger*. *Id*.

In making these representations about *Schwarzenegger*, CTIA must be assuming that nobody will actually read the case. In truth, *Schwarzenegger* involved two questions: the primary question whether a *ban* on the sale of video games to people under the age of 18 (i.e., a restriction on speech) violated the First Amendment; and the secondary question whether, if the ban violated the First Amendment, the law's accompanying requirement that an "18" label be placed on the package could survive. This Court properly applied strict scrutiny *to the ban*, closely analyzing the government's evidence and concluding it did not clear the strict scrutiny hurdle. 556 F.3d at 961-65. The quotes in CTIA's brief from *Schwarzenegger* about the government's failure to meet its evidentiary burden are

from the section of the opinion discussing the ban, even though CTIA tries to give the impression that these quotes were about the label requirement. O.B. at 19-20; *id*. at 22.

As for the label requirement, which was not addressed until the subsequent section of the opinion, this Court simply held that: (1) the only justification the State advanced for the label was to prevent people from thinking that people under 18 were allowed to buy the games when they could not do so under the law; (2) it was no longer the case that people under 18 could not buy the games, because the Court had struck that restriction down; and therefore (3) "the State's mandated label would arguably now convey a false statement that certain conduct is illegal when it is not, and the State has no legitimate reason to force retailers to affix false information on their products." *Schwarzenegger*, 556 F.3d at 967. In reaching this conclusion, the Court never suggested that the same type of evidentiary burden applied to the label requirement as applied to the sales ban. To the contrary, the Court made clear this is not the case, citing favorably the Second Circuit's application of the reasonable relationship test in *Sorrell*, and scratching its head at an apparent attempt by the Seventh Circuit to apply strict scrutiny to a labeling requirement in *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006). *See Schwarzenegger*, 556 F.3d at 966 & n.20.

What's more, the Supreme Court did not "affirm" this Court's alleged application of a heightened evidentiary standard to the labeling requirement in *Schwarzenegger*, O.B. at 20, because that issue was never presented to the Supreme Court. The Supreme Court affirmed this Court's application of strict scrutiny to the sales ban; the State never even bothered to argue to the Supreme Court that the labeling requirement could survive a holding that the sales ban was

invalid. *See Brown v. Entertainment Merchants Ass'n,* 131 S. Ct. 2729, 2738-41 (2011).[1]

That CTIA feels the need to overreach so badly on *Schwarzenegger* speaks volumes – it underscores the absence of authority for the proposition that the City must make some heightened evidentiary showing to satisfy the reasonable relationship test. In fact, under this test, it is sufficient for the government to point to materials from the legislative record; it need not put on expert testimony to justify a consumer disclosure requirement. As the Supreme Court recently reiterated, "[e]vidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost . . . is adequate to establish that the likelihood of deception in this case 'is hardly a speculative one.'" *Milavetz,* 130 S.Ct. at 1340 (quoting *Zauderer,* 471 U.S. at 652). *See also Connecticut Bar Ass'n v. United States,* 620 F.3d 81, 97-98 (2d Cir. 2010) ("[W]hile the First Amendment precludes the government from *restricting* commercial speech without showing that 'the harms it recites are real and that its restriction will in fact alleviate them to a material degree,' it does not demand 'evidence or empirical data' to demonstrate the rationality of mandated *disclosures* in the commercial context") (internal citations

[1] CTIA similarly quotes *Ibanez* as saying "[t]he State's burden is not slight" with respect to disclosure requirements, and *Zauderer* as saying that disclosure requirements "may not be lightly justified." O.B. at 19. Both these quotes, however, are from the portions of the opinions striking down a speech restriction.

The other case cited by CTIA for the proposition that the government must meet a heightened evidentiary burden in justifying disclosure requirements is *Mason v. Florida Bar,* 208 F.3d 952, 958 (11th Cir. 2000). It is true that the Eleventh Circuit applied the intermediate scrutiny standard set forth in *Central Hudson* to a disclosure requirement, but that court simply made a mistake, having failed to consider the Supreme Court's clear instruction in *Zauderer* to apply the reasonable relationship test – an instruction the Supreme Court subsequently repeated in *Milavetz*.

omitted, emphasis added); *N.Y.S.R.A.*, 556 F.3d at 134-35 (explaining that legislative findings and judicially noticeable legislative materials were more than enough to justify disclosure requirement).

2. The record demonstrates that the revised factsheet is reasonably related to the mitigation of a potentially serious public health problem.

Accordingly, CTIA can only win its First Amendment argument if San Francisco has failed to show that the factsheet addresses an issue that is "potentially real, not purely hypothetical," *Ibanez* , 512 U.S. at 146, and that the City has failed to provide "some indication" that the disclosure information "bears on a reasonable concern for human health . . . ." *Amestoy*, 92 F.3d at 74. CTIA cannot even come close to winning that argument. The record below is filled with material from the legislative record that shows there is good reason to fear a link between cell phone use and brain cancer, and that shows there would be a serious public health problem if such a link does exist.

First, the World Health Organization ("WHO") has classified RF energy from cell phones as a "possible carcinogen." Specifically, there is an agency within the WHO, called the International Agency for Research on Cancer ("IARC"), which studies substances and agents that have been alleged to cause cancer to determine whether the allegation has merit. When such an allegation occurs, the IARC forms a working group to review all the scientific studies and all the literature on the topic, and applies a classification to the substance. In most cases, the IARC working group concludes that the evidence is inadequate to establish a link between the agent and cancer. SER 826-27. But in some cases the working group concludes that the agent is either a "possible carcinogen," a "probable carcinogen," or a "carcinogen." *Id*.

Under federal occupational safety and health standards, if the IARC classifies a substance as a "possible carcinogen," it must be disclosed as "hazardous" by the distributor of the substance, and by the employer who uses the substance. SER 814; *see also infra* at 26 & n.8. Under California law, a determination by the IARC that a chemical is a possible carcinogen regularly results in placement on the "Proposition 65 List," meaning that businesses that use the substance must warn consumers about it. SER 812-14, 828-75; *see also infra* at 26 & n.9.[2]

The IARC working group formed to consider the issue of cell phones was headed by Dr. Jonathan Samet, who is the Chair of the Department of Preventive Medicine at the Keck School of Medicine at USC, as well as the Director of the USC Institute for Global Health. The group consisted of 31 scientists from 14 different countries. After comprehensively reviewing the studies and the scientific literature, Dr. Samet and his group concluded that RF energy from cell phones is a "possible carcinogen" because "[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

[2] Incidentally, the district court, after hearing argument but before issuing its ruling, requested supplemental briefing on some very specific questions, including whether other disclosure requirements in the United States are triggered by an IARC decision to classify a substance as a "possible carcinogen." The City filed a brief in response to this request, citing and attaching numerous examples of disclosure requirements that were triggered by such an IARC finding, and requesting that the court take judicial notice of these materials. SER 812-888. The court issued an order granting the City's request for judicial notice of all materials it submitted in the case, except those submitted for the first time in response to the district court's request for supplemental briefing. SER 947. This decision was arbitrary, as the materials directly responded to the questions the court had asked. In any event, they are part of the record because the City submitted them, and the City now requests that this Court take judicial notice of them. In an abundance of caution, the City has filed a separate request for judicial notice of the materials that the district court declined to notice.

ruled out with reasonable confidence." SER 278, 280 (WHO Fact Sheet No. 193, Electromagnetic fields and public health: mobile phones, June 2011). Moreover, although CTIA notes that in the past the IARC has classified some agents as "possible carcinogens" based only on studies of laboratory animals, that did not occur here. Here, the working group concluded that the lab animal studies were inadequate to draw any conclusion, but that the *human* studies established a credible link between cell phone use and brain cancer. SER 301 ("Carcinogenicity of radiofrequency electromagnetic fields").[3]

One of the studies considered by the working group was the "Interphone" study – the largest direct epidemiological study conducted to date on the issue. In the past, CTIA has been fond of citing the Interphone study as proof that there is nothing to worry about when it comes to cell phones. SER 306-07 (statement of CTIA's lobbyist to Board of Supervisors). However, two key architects of the Interphone study, Elisabeth Cardis and Siegal Sadetski, recently published a paper in which they emphasized several significant points. First, the Interphone study (and many others) "were conducted at a time when mobile communication was still a relatively new phenomenon with low levels of use compared with today." SER 310 ("Indications of possible brain-tumour risk in mobile-phone studies: should we be concerned?"). Second, even within the Interphone study, "an increased risk of glioma [that is, brain cancer] was seen among long-term users, with an indication of a trend for increasing risk with increasing time since start of use," and "a *40% increase in risk* was seen for glioma [for people] in the highest decile of cumulative call time." *Id.* (emphasis added). Third and most importantly, these

[3] A full list of the scientific studies and articles reviewed by the working group is at SER 891-944.

epidemiologists concluded that the potential health risks are significant enough to warrant precautionary measures to reduce RF energy exposure from cell phones:

> While more studies are needed to confirm or refute these results, indications of an increased risk in high- and long-term users from Interphone and other studies are of concern. There are now more than 4 billion people, including children, using mobile phones. Even a small risk at the individual level could eventually result in a considerable number of tumours and become an important public health issue. Simple and low-cost measures, such as the use of text messages, hands-free kits and/or the loud-speaker mode of the phone could substantially reduce exposure to the brain from mobile phones. Therefore, *until definitive scientific answers are available, the adoption of such precautions, particularly among young people, is advisable*.

SER 311 (emphasis added).

All of this shows that San Francisco's effort to help consumers make informed decisions about how to use their cell phones furthers an eminently legitimate public purpose. San Francisco is the health care provider of last resort for its citizens. If the scenario posited by the architects of the Interphone study comes to pass, the City would suffer greatly, both in human terms and in terms of the impact on its health care system. And although there is no definitive scientific proof that this scenario will come to pass, it is also far from pure speculation that it may. The risk of such ill consequences is based on rigorous study by the people in this world who are best equipped to judge the issue thoroughly and objectively. It is, to quote CTIA, a "real problem," O.B. at 23, and therefore the City is more than justified in imposing a disclosure requirement under these circumstances.[4]

[4] The City's factsheet is also a reasonable response to the problem because it does not overreact. It does not tell people that cell phones cause cancer, and it does not tell people to refrain from buying cell phones. It merely gives people simple tips about how to *use* cell phones if they are concerned about the possible health risk. Indeed, arguably the most likely reaction people will have to these materials is not to spend less money at the stores, but more – to buy a headset that allows them to keep their phones away from their heads and bodies.

3. CTIA has failed to rebut the City's showing.

In its attempt to convince everyone that cell phone safety is not a "real problem," CTIA relies primarily on statements by the FCC. CTIA contends these statements demonstrate that the federal government long ago concluded that cell phones are absolutely safe. CTIA is wrong. For example, when San Francisco's original ordinance was enacted, the FCC stated on its website, in a document called "Wireless Devices and Health Concerns," the following:

> Recent reports by some health and safety interest groups have suggested that wireless device use can be linked to cancer and other illnesses. These questions have become more pressing as more and younger people are using the devices, and for longer periods of time. No scientific evidence currently establishes a definite link between wireless device use and cancer or other illnesses, but almost all parties debating the risks of using wireless devices agree that more and longer-term studies are needed.

SER 144. In the same document, the FCC provided tips, very similar to the ones provided by the City's original ordinance, about how to reduce exposure to RF energy from cell phones. SER 145.[5]

Similarly, whenever the FCC or its lawyers have described cell phones as "safe," they have been careful (and commendably so) to explain what they mean by that: the federal government, in its adoption of RF emissions standards for cell phones, has engaged in *balancing* between safety and efficiency, and has settled upon a standard that it believes makes sense in light of the available scientific evidence and the concurrent need to promote efficiency and growth in the wireless market. For example, in its final order explaining its RF energy standards, the FCC stated: "We continue to believe that these RF exposure limits provide a

[5] Shortly after CTIA sued the City, the FCC altered the content of its website, although the new content still references measures to reduce RF energy exposure from cell phones. The FCC also now provides a link to the WHO's factsheet on cell phones, which explains why RF energy from cell phones is classified as a possible carcinogen. SER 147-49.

proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *In the Matter of Procedures for Reviewing Requests for Relief from State & Local Regulations Pursuant to Section 332(c)(7)(b)(v) of the Communications Act of 1934 in the Matter of Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, ¶29, 12 F.C.C.R. 13494 (1997) ("*RF Order II*"). Similarly, Department of Justice and the FCC have explained as follows to the Supreme Court: "There is a *trade-off* between those goals and public exposure to RF energy: *all risk* from RF energy *could* be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise." Brief for Respondents United States and FCC at 21, *Cellular Phone Taskforce v. FCC*, No. 00-393, 2000 WL 33999532 (Dec. 4, 2000) (emphasis added).[6]

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[6] CTIA states that the FCC's RF emissions limit includes a fifty-fold safety factor. O.B. at 9. Although there are a number of things wrong with this statement, suffice now to say that the safety factor to which CTIA refers is intended only to protect against the acute thermal effects of RF energy. In contrast, the recent concerns expressed by the WHO and the epidemiologists who are studying this issue are about the chronic, non-thermal effects of RF energy on the human body. In other words, the concern is not about the slight heating effect our phones might have on us when we make one long call; it is about the fact that we are absorbing cumulatively large amounts of radiation over the years. As the EPA's Office of Air and Radiation explained in 2002,

> The FCC's current exposure guidelines . . . are thermally based, and do not apply to chronic, nonthermal exposure situations . . . . The FCC's exposure guideline is considered protective of effects arising from a thermal mechanism but not from all possible mechanisms. Therefore, the generalization by many that the guidelines protect human beings from harm by any or all mechanisms is not justified.
>
> These guidelines are based on findings of an adverse effect level of 4 watts per kilogram (W/kg) body weight. This SAR was observed in laboratory research involving acute exposures that elevated the body temperature of animals, including nonhuman primates. The exposure guidelines did not

CTIA also asserts that "[w]hen courts have examined whether there is credible scientific evidence that cell phones can cause adverse health effects, like cancer, they have emphatically concluded that there is not." O.B. at 11. But these were individual tort cases. The courts did not consider the Interphone study, the decision by the WHO to classify cell phone radiation as a possible carcinogen, or the hundreds of studies and articles considered by WHO's working group. They considered only what the plaintiffs submitted in those individual cases to try to prove causation. Accordingly, these cases simply stand for the proposition that, at the time they were decided, the evidence submitted by the plaintiffs was "inconclusive." They did not "close the door to the possibility that science may advance to a point at which damage . . . is legally cognizable and [an] action may lie." *Motorola, Inc. v. Ward*, 478 S.E.2d 465, 466 (Ga. Ct. App. 1996 (quoting *Jordan v. Ga. Power Co.*, 466 S.E.2d 601, 694-95 (Ga. Ct. App. 1995) (brackets in original).

> consider information that addresses nonthermal, prolonged exposures, i.e., from research showing effects with implications for possible adversity in situations involving chronic/prolonged, low-level (nonthermal) exposures. Relatively few chronic, low-level exposure studies of laboratory animals and epidemiological studies of human populations have been reported and the majority of these studies do not show obvious adverse health effects. However, there are reports that suggest that potentially adverse health effects, such as cancer, may occur. Since EPA's comments were submitted to the FCC in 1993, the number of studies reporting effects associated with both acute and chronic low-level exposure to RF radiation has increased.
>
> . . . . exposures that comply with the FCC's guidelines generally have been represented as "safe" by many of the RF system operators and service providers who must comply with them, even though there is uncertainty about possible risk from nonthermal, intermittent exposures that may continue for years.

See http://www.emrpolicy.org/litigation/case_law/docs/noi_epa_response.pdf.

Most disturbingly, CTIA quotes the expert declaration of Ronald Peterson as standing for the proposition that "the FCC-compliant phone is already safe." CTIA Emergency Motion at 5; *see also* O.B. at 23. Mr. Peterson did not opine that FCC-compliant cell phones are already safe. In fact, he expressly stated: "The purpose of my review is not to offer my opinion as to whether the FCC safety criteria adequately protect consumers or whether wireless phones are 'safe' . . . ." ER 130. Nor, in any event, would Mr. Peterson have been qualified to provide such an opinion. He did not consider the vast amount of epidemiological evidence considered by the IARC working group. He is not even an epidemiologist, nor is he a medical doctor, nor does he have any education in the area of public health. He is an engineer who understands how RF energy is absorbed into the body and how exposure to RF energy cell phones can be minimized, ER 128, but he has no qualifications to provide expert testimony about the epidemiology of the long-term health consequences of RF exposure from heavy cell phone use over time.

Accordingly, in the proceedings below, CTIA submitted *no evidence at all* to rebut the voluminous materials, contained in the legislative history to the ordinance and presented by the City to the district court, that cell phone use could pose a serious public health risk. CTIA provided no grounds for concluding that cell phone safety is not a "real" issue. It provided no grounds to ignore the WHO's classification of RF energy from cell phones as a possible carcinogen. And it provided no grounds to brush aside the recommendations by the architects of the Interphone study that precautionary measures be taken to mitigate a potentially serious public health problem.

CTIA seeks to mitigate its failure to present any evidence on this topic by complaining that the City, in the proceedings below, relied "only" on judicially noticeable legislative history materials, rather than presenting expert testimony or

other such evidence. O.B. at 22. But as already discussed fully at pages 16-17, CTIA overlooks the rule that "while the First Amendment precludes the government from *restricting* commercial speech without showing that 'the harms it recites are real and that its restriction will in fact alleviate them to a material degree,' it does not demand 'evidence or empirical data' to demonstrate the rationality of mandated *disclosures* in the commercial context." *Connecticut Bar Ass'n*, 620 F.3d at 97-98 (internal citations omitted, emphasis added). Especially in a case like this, which involves issues of specialized knowledge, the legislature obviously may rely on the conclusions and recommendations of the experts when it acts to protect against a possible brain cancer epidemic. The *fact* that the IARC has classified RF energy from cell phones as a possible carcinogen, the *fact* that this conclusion was the product of rigorous analysis by a group of the world's leading scientists, and the *fact* that the architects of the largest study on the issue (and other leading epidemiologists) recommend precautionary measures in light of the risks, are more than sufficient to demonstrate that the City acted reasonably.[7]

On a related note, CTIA attempts to portray the City's position (and the district court's ruling) as standing for the proposition that the First Amendment allows disclosure requirements whenever a company cannot provide scientific proof that its product is entirely free from risk. O.B. at 24. This is a straw man. If it were true that the City had imposed a disclosure requirement for cell phones based on the mere speculation of some lunatic fringe and on the failure of the

[7] Incidentally, it should be clear by now that CTIA has ignored a crucial difference between this case and *Amestoy*, where the Second Circuit struck down a state labeling requirement for milk products that may contain the synthetic growth hormone rBST. In *Amestoy*, the State *agreed* with the defendant that rBST posed no health or safety concerns; it merely sought to justify its disclosure requirement as necessary to satisfy consumer curiosity. 92 F.3d at 73. The City does not advance that rationale in this case.

wireless industry to rebut that speculation with absolute proof that cell phones are safe, CTIA's concern would be legitimate. But in light of the evidence that supports the City's policy in this case, CTIA's alarm rings hollow.

Although the City does not take the extraordinary position that a disclosure requirement is permissible whenever a company cannot prove the absence of risk, CTIA *does* take the equally extraordinary position that the First Amendment prohibits disclosure requirements unless there is definitive scientific proof that a product harms people. *Id*. at 23-24. It simply cannot be that a City is precluded from acting on a realistic and documented possibility that cell phone radiation causes cancer – that it must wait until science knows to a certainty that cell phone radiation is killing people before imposing a disclosure requirement that informs its residents of simple ways to reduce exposure. To the contrary, it is common, and wholly unsurprising, for governments to impose disclosure requirements to help mitigate health risks that, while real, are not yet confirmed by scientific proof. For example, as mentioned previously, federal OSHA regulations require manufacturers and employers to disclose a chemical as "hazardous" if it "may" harm employees.[8] California's Proposition 65 also requires disclosure to the public of any substance that the WHO has classified as a "possible carcinogen."[9] From

[8] The regulations require chemical manufacturers and employers to disclose a chemical as "hazardous" if it is "a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic effects *may* occur in exposed employees." 29 C.F.R. §§ 1910.1200(b), (c) (emphasis added). This explicitly includes substances classified by the WHO as possible carcinogens. *Id*. at §§ 1910.1200(d)(4)(ii), 1910.1200(g)(2)(vii).

[9] The State publishes a list of substances that "cause cancer or reproductive toxicity within the meaning of this chapter . . . ." Cal. Health & Safety Code § 25249.8(a). Anyone who uses such substances and may expose people to them must issue a "clear and reasonable warning." *Id*. § 25249.6. There are several ways a substance can make the State's list, including if the WHO classifies it as a possible carcinogen. *Id*. § 25249.8(a), § 25249.8(b); Cal. Code Regs. Tit. 22, § 12306(m). *See also* Doc. 88 at 1-3. This has resulted in numerous chemicals

1978 to 2000, federal law required warning labels for products containing saccharin, even though the only evidence of potential harm was from studies of laboratory animals.[10] Today, alcoholic beverage containers must include a warning from the Surgeon General that women should not touch alcohol during pregnancy, even though there is no scientific proof that small amounts of alcohol can harm a fetus.[11]

In sum, the City agrees that the government may not impose disclosure requirements based merely on the absence of proof that a product is safe, but neither must the government refrain from imposing disclosure requirements until it obtains absolute proof that the product kills people. The government may not rely on pure speculation, but it may justify a disclosure requirement by pointing to legislative materials which show that the disclosure is reasonably related to a real public health risk. San Francisco has easily satisfied that burden here.

B. CTIA's Arguments For Heightened Scrutiny Are Without Merit.

Perhaps recognizing it is wrong about the burden governments must carry to satisfy the "reasonable relationship test," CTIA makes numerous arguments about why that test should not apply to this particular consumer disclosure requirement,

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being placed on the Proposition 65 list for the sole reason that the WHO classified them as possible carcinogens. SER 812-14; 828-75 (examples).

[10] *See* Pub. L. No. 95-203, S, 91 Stat. 1451, 1452 (1977).

[11] Specifically, 27 C.F.R. § 16.21 requires alcoholic beverage containers to say: "GOVERNMENT WARNING: According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects." This advice by the Surgeon General is very much an exercise of the "precautionary principle" that CTIA derides, as pregnant women are regularly advised that there is no scientific proof that small amounts of alcohol cause harm to fetuses. *See, e.g.*, Mayo Clinic, Fetal Alcohol Syndrome ("Although doctors aren't sure how much alcohol you'd have to drink to place your baby at risk, they do know that the more you drink, the greater the chance of problems") (available at http://www.mayoclinic.com/health/fetal-alcohol-syndrome/DS00184/DSECTION=risk-factors); *see also* H. Murkoff, A. Eisenberg & S. Hathaway, What to Expect When You're Expecting 57 (2002).

and why strict or intermediate scrutiny should apply instead. For example, it argues paternalistically that the factual statements contained in the City's disclosure materials might give people the wrong idea and cause them to make bad decisions with their cell phones. It argues that the only governmental interest a disclosure requirement may serve under the reasonable relationship test is prevention of consumer deception (and not prevention of consumer death). And it analogizes San Francisco's consumer disclosure requirement to some of the more noteworthy governmental intrusions upon speech, including attempts by the government to insert unwanted speech into parades, charitable solicitations, newspapers, and newsletters. As discussed below, none of CTIA's myriad arguments justifies a departure from the "reasonable relationship" test.

1. The factsheet is accurate and not misleading.

The revised factsheet states that cell phones emit RF energy, which is true. It states that the body is "exposed" to RF energy from cell phones, which is true. It states that the WHO has classified RF energy from cell phones as a possible carcinogen, which is true. And it explains that if people wish to take measures to mitigate the potential health effects of cell phone use, there are a few simple measures they can take, each of which would indisputably reduce exposure. Ex. D, attached.

The factsheet also takes pains (unnecessary pains, in fact) to place the issue of cell phone safety in context. It makes clear that phones sold in the United States must comply with an emissions standard set by the FCC. It makes clear that the WHO has not classified RF energy from cell phones as a "probable" carcinogen, but just a "possible" carcinogen. And it does not say that cell phones are dangerous – it merely makes the accurate statement that, while no definitive

conclusion has been reached, "studies are ongoing" to assess the health effects of RF energy exposure from cell phones. *See* Appendix D, attached.

The only aspect of the factsheet whose accuracy CTIA makes any real effort to challenge is the statement that "[a]verage RF energy deposition for children is two times higher in the brain and up to ten times higher in the bone marrow of the skull compared with cell phone use by adults." This quote, however, is taken verbatim from the WHO. SER 300 (carcinogenicity of radiofrequency electromagnetic fields). It is confirmed by numerous studies that were before the Board. SER 377, 403, 553, 654, 781. Against all this, CTIA has only Mr. Peterson's declarations, which, as CTIA conceded at oral argument, do not stand for the proposition that the statement is inaccurate, but only that people could get the wrong impression from it. ER 255; *see also* ER 233-36.

And that is the point: CTIA's real complaint is not with the accuracy of the City's words, but with the conclusions people might draw from them. However, CTIA has cited no First Amendment case – and the City is aware of none – in which the compelled disclosure of factually accurate words to consumers is constitutionally problematic because of conclusions it might provoke in consumers' minds. *Cf. N.Y.S.R.A.*, 556 F.3d at 133-35 (rejecting the argument that the required disclosure of calorie counts, without the disclosure of other nutritional information, violates the First Amendment because people might get the wrong idea about the relative health values of different foods). Indeed, CTIA's approach seems quite inconsistent with the First Amendment, whose primary purpose is to promote the marketplace of ideas and allow people to reach their own informed decisions.[12]

[12] As such, the expert report CTIA submitted from David Stewart, which does not question the factual accuracy of the materials but merely speculates about how people might *react* to them, is irrelevant to the purely legal question presented here. And even if such a report could theoretically be relevant, Stewart's particular brand of speculation is worthless. As an initial matter, the survey he conducted

If we are to start down the treacherous path of making a First Amendment issue out of the conclusions people might or might not draw from accurate words, then it is worth reviewing the user manuals created by the cell phone manufacturers themselves. Some of those manuals seem far more likely to scare people than the City's factsheet. For example, BlackBerry users are told that "[u]se of holsters that have not been approved by Rim might, in the long term, present a *risk of serious harm*," and that "[t]he *long term effects* of *exceeding radiofrequency exposure standards* might present a *risk of serious harm*." SER 141-42 (emphasis added). The users are also told to "keep the BlackBerry device at least 0.98 inches (25mm) from your body when the device is connected to a wireless network." *Id*. Instructions like these are typically provided under bolded headings such as "**Important safety precautions**," or "**Exposure to Radio Frequency energy**." SER 134, 137, 141. And the user manual for Apple iPhone 4 provides:

> "If you are still concerned about exposure to RF energy, you can further limit your exposure by limiting the amount of time using iPhone, since time is a factor in how much exposure a person receives, and by using a hands-free device and placing more distance between your body and iPhone, since exposure level drops off dramatically with distance."

SER 138.

In sum, the City's factsheet, like the industry's own user manuals, conveys the points that (i) cell phones emit RF energy; (ii) there is a possibility this could

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about the City's original disclosure materials (the ones that that focused on SAR values) was fundamentally flawed – he asked leading questions designed to move respondents in the direction of concluding cell phones were dangerous. SER 156-57 (Scott Report). Thus any reliance on his old survey results to speculate about consumer reaction to the new materials is inherently useless. SER 159. What's more, Stewart barely acknowledged the significant differences between the old materials and the new ones. For example, Stewart's conclusion about the prior materials was based almost exclusively on the fact that the materials repeatedly used the term "radiation," whereas the new materials use the parlance used by the wireless industry. SER 158-59 (Scott Report), SER 240 (Peterson Report). Finally, the factsheet has changed even more in response to the district court's order, further obviating Stewart's already-specious objections to it.

cause health problems; and (iii) if one has concerns about this, he can take simple measures to mitigate those concerns. There is nothing inaccurate or misleading about this.

2. *Zauderer*'s "reasonable relationship" test is not confined to disclosure requirements that combat consumer deception.

CTIA argues that because *Zauderer* itself involved an effort by the government to prevent consumer deception through the use of a disclosure requirement, a disclosure requirement can *only* avoid heightened scrutiny if it is designed to prevent consumer deception; it cannot avoid heightened scrutiny if it is designed to prevent some other harm, such as death. O.B. at 36-37. This is preposterous. What if a product, when used by pregnant women, caused birth defects or killed fetuses? If "preventing deception of consumers" were the only basis for imposing disclosure requirements, the First Amendment would mandate the bizarre result of precluding governments from requiring companies to disclose that their products cause such harm. In light of the implications of CTIA's argument, it is no accident that every court to have considered the issue has rejected the notion that heightened scrutiny must apply to a consumer disclosure requirement when the governmental interest at issue is something other than preventing deception. *See, e.g., N.Y.S.R.A.*, 556 F.3d at 133 (rejecting the argument that "all other disclosure requirements are subject to heightened scrutiny"); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) ("we have found no cases limiting *Zauderer* in such a way"); *Envtl. Def. Ctr., Inc. v. E.P.A.*, 344 F.3d 832, 850 (9th Cir. 2003) (disclosure requirement was reasonably related to environmental protection and public health); *Nat'l Elec. Mfrs. Assoc. v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (rejecting argument that disclosure requirements in furtherance of environmental protection and public

health are subject to higher level of scrutiny than *Zauderer*). *Cf. Public Citizen*, 632 F.3d at 228 (disclosure requirements in attorney advertisements "are also sufficiently related to the substantial interest in promoting the ethical integrity of the legal profession").

CTIA cites *Milavetz* as having "confirmed *Zauderer*'s limitation to correcting confusing or deceptive speech." O.B. at 35. *Milavetz* says no such thing. It was simply a case *about* preventing deception; it did not inquire whether the *Zauderer* standard applies when the government seeks to further some other public purpose, such as protecting people's health. Indeed, it would be odd if *Milavetz* was intended to silently overturn cases like *N.Y.S.R.A.* and *Sorrell*, since Justice Sotomayor wrote *Milavetz* but was on the panel in both those Second Circuit cases.

CTIA similarly describes *Schwarzenegger* as limiting the "reasonable relationship" test to measures that seek to prevent consumer deception. But again, in that case the deception rationale was the only one advanced for the disclosure requirement, and it was eliminated by the Court's holding that the actual ban on the sale of violent video games to minors was unconstitutional. 556 F.3d at 966. *Schwarzenegger* said nothing to suggest that *only* the interest in preventing deception could justify a consumer disclosure requirement. To the contrary, the Court cited and quoted with approval the Second Circuit's opinion in *Sorrell*. *Id*. at 966.

3. That the factsheet includes the City's recommendations does not preclude the Court from applying the *Zauderer* test.

CTIA also appears to believe that *Zauderer*'s "reasonable relationship" test cannot apply because the factsheet includes the City's recommendations in addition to the factual statements. The federal alcohol warning discussed on page 27 is

instructive on this point as well. The warning contains both factual information (alcohol may harm fetuses) and a recommendation about how to deal with this risk (don't drink alcohol). San Francisco's factsheet similarly contains factual information (RF energy from cell phones may cause adverse health effects) and a recommendation for how to deal with this risk (if you are concerned, here are some measures you can take). Does CTIA believe the alcohol warning is invalid because it includes a recommendation along with factual information – that the warning is "viewpoint advocacy" prohibited by the First Amendment?[13]

It particularly curious, in a case like this, to argue that the government cannot include its factually accurate recommendations. After all, in contrast to the alcohol warning, San Francisco is not telling people to refrain from purchasing the products being sold by the retailers. It is merely providing consumers with easy-to-follow tips for *using* cell phones in a way that reduces RF energy exposure. From the retailer's perspective, this seems preferable to a simple disclosure requirement which states that cell phones are possibly carcinogenic. That statement, standing on its own, seems much more likely to cause people to refrain from buying a cell phone.

CTIA's view – that going beyond pure facts to discuss what might be done about those facts renders disclosure requirements infirm – also seems to conflict with *Sorrell*. The law in *Sorrell* required fluorescent light bulb manufacturers "to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste." 272 F.3d at107. It included facts (the

[13] One could imagine CTIA responding that the alcohol warning is subject to, but could satisfy, strict scrutiny. Such an argument, however, would be at odds with CTIA's argument that a disclosure requirement cannot satisfy strict scrutiny because the government must first try to conduct its own public awareness campaign on its website and elsewhere. *See* O.B. at 39.

light bulbs contain mercury) and a statement about how to deal with the facts (dispose of the light bulbs as hazardous waste). The statement about mercury would have been virtually useless without the accompanying instruction; indeed, it might have caused people not to buy the light bulbs at all, which was not the point. The same is true in this case. The government does not have to make a disclosure virtually useless to survive a First Amendment challenge.

4. That the disclosure involves a controversial topic does not preclude the Court from applying the *Zauderer* test.

Because the *Zauderer* test applies to disclosure requirements that provide information that is "factual and uncontroversial," 471 U.S. at 651, CTIA has also suggested that the factsheet is invalid because there is a controversy in society over whether cell phones cause health problems. That is not what *Zauderer* means. Abortion is controversial, but governments are regularly permitted to impose disclosure requirements to promote the state's interest in protecting fetal life. *See Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 733-35 (8th Cir. 2008) (discussing cases). Birth control is a controversial topic, but nobody could reasonably argue that the First Amendment prevents the government from requiring pharmaceutical companies to disclose important information about the effectiveness (or relative lack of effectiveness) of birth control products.

To be sure, because there is a legitimate controversy over the degree to which cell phones should be considered a threat, the First Amendment would preclude the government (at this point in time) from requiring retailers to tell their customers that "cell phones cause cancer," or "cell phones are dangerous." But that is not what San Francisco is doing. Although the topic is controversial, the City is being careful to require disclosure of only factual information about that topic, to

help consumers make their own choice about how to deal with what all responsible parties agree is a *potential* risk.

5. The length of the factsheet does not trigger strict scrutiny.

CTIA also argues that the reasonable relationship test cannot apply because the 5x8 inch factsheet, which retailers may keep behind the counter, is "long-winded," citing *Ibanez*. O.B. at 34. However, the Court in *Ibanez* never suggested disclosures must be terse for the reasonable relationship test to apply. Rather, the Court simply observed that even if the state had been able to "point to any harm that is potentially real, not purely hypothetical," in support of the disclosure requirement, there still could be an issue with the validity of the disclosure because its length effectively prevented placement of a listing in the yellow pages at all – there would be no room left for the listing. 512 U.S. at 146-47. If this passing observation were in fact a rule that disclosure requirements must always be terse, regardless of the circumstances, the cacophony of disclosures required by the state statutes in the abortion cases would automatically be invalid. *See, e.g., Rounds*, 530 F.3d at 726-27.

6. CTIA's reliance on cases that did not involve consumer disclosure requirements is misplaced.

In support of its strict scrutiny argument, CTIA relies on numerous cases that did not involve consumer disclosure requirements. It need hardly be said that casual importation of First Amendment doctrine from one line of cases to another is a dangerous endeavor. "[T]he Supreme Court often develops different tests when it evaluates the permissible scope of restrictions on the various categories of speech. This difference in treatment is really to be expected because the relevant interests of one type of speech, e.g., political speech, may vary from those of

another, e.g., obscene speech." J. Nowak & R. Rotunda, Constitutional Law 986 (5th ed., 1995).

Even aside from the fact (or perhaps because of the fact) that so many of CTIA's cases did not involve consumer disclosure requirements, they differ fundamentally in other ways as well. For example, many of CTIA's cases involved compelled speech requirements where the government tried to insert unwanted content into speech that private actors were already engaging in, thereby necessarily altering the content of that speech. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), the Court recognized that a parade is an inherently expressive activity, and held that the government could not force the parade organizers to include unwanted content in their message. It explained, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id*. at 576. In *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974), the government attempted to force unwanted messages into a newspaper in the form of "reply editorials," and the Court explained that this requirement "exacts a penalty on the basis of the content of the newspaper." In *Riley v. National Federation of the Blind*, 487 U.S. 781, 795-96 (1988), the government sought to insert unwanted content into charitable solicitations, and the Court applied strict scrutiny to strike down this regulation because, by inserting speech into the solicitation, the government was "necessarily alter[ing] the content of the speech." And in *PG&E v. Pub. Utils. Comm'n*, 475 U.S. 1, 5 (1986) (plurality opinion), the opponents of a utility complained that the utility was disseminating its advocacy newsletter in its taxpayer-subsidized billing envelope. The government responded by requiring utility to insert the newsletter of *the opponents* four months out of the year. As such, the regulation was

triggered by the utility's speech. As the full Court later explained about the plurality opinion in PG&E, "when the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility's ability to communicate its own message in [its] newsletter." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) ("*FAIR*").

In contrast, First Amendment concerns often diminish when a compelled speech requirement *does not* intrude upon, and *is not* triggered by, any message that the regulated party may already be expressing. For example, at issue in *FAIR* was the so-called Solomon Amendment, which denied federal funding if law schools refused to disseminate information for military recruiters on equal terms as for other recruiters. The Court recognized that this forced law schools to speak when they objected to doing so, but rejected the law schools' First Amendment argument because "nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." 547 U.S. at 65. "The compelled-speech violation in each of our prior cases," the Court explained, "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id*. at 63. *See also Envtl. Def. Ctr., Inc. v. E.P.A.*, 344 F.3d 832, 850 (9th Cir. 2003) (requirement to inform public about environmental and safety issues with a product "does not prohibit the [regulated party] from stating its own views about the proper means of managing toxic materials").

To put it another way, the City's disclosure requirement may be "content based" in the sense that it requires disclosure of specific content that the retail stores do not want to disclose. But there is nothing remarkable about that – by their very definition, consumer disclosure requirements prescribe content, and these disclosure requirements are ubiquitous in our society. What's important is that the City's disclosure requirements are *not* "content-based" in the sense that we

usually use that term in the First Amendment context, because the regulation is not triggered by the *content* of any speech by the speaker (in this case, the retailer). San Francisco's consumer disclosure requirements are not imposed "on expressive activity because of its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Regardless of what the retailers are saying – indeed, regardless of whether they are saying anything at all – the regulation applies to them for the sole reason that they sell phones.[14]

On a related note, the ordinance does not require the retailers to endorse any message about cell phones. Indeed, the factsheet goes out of its way to make clear that the message about cell phone safety is San Francisco's. It prominently displays the City seal in multiple places, makes clear that the recommendations for reducing RF energy exposure are San Francisco's, and states that the retailers are providing the factsheet under government mandate. *See* Appendix D. Even if the retailers chose to say nothing in response to the factsheet (and remember that they are free to say whatever they want), nobody could ever conclude that the retailers are endorsing San Francisco's message when they provide the City's factsheet in connection with the sale of a phone. As the Court explained in *FAIR*: "We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy . . . . Surely students have not lost that ability by

[14] One famous case upon which CTIA relies involving a compelled speech requirement that applied irrespective of whether the regulated party was already speaking is *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), in which the Court struck down a New Hampshire requirement that people display the state motto, "Live Free or Die," on their cars. But *Wooley* involved a requirement that each individual serve as a "mobile billboard" for the state's "ideological message." *Id.* In analogizing the City's consumer disclosure requirement to the regulation at issue in *Wooley*, CTIA "trivializes the freedom" that the Supreme Court was protecting in that case. *FAIR*, 547 U.S. at 62.

the time they get to law school." 547 U.S. at 65. *See also Envtl. Def. Ctr.*, 344 F.3d at 850 ("Nor is the [plaintiff] prevented from identifying its dissemination of public information as required by federal law."); *cf. Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (no forced "affirmation of a belief" where reasonable observer would not associate the views being expressed on a shopping center with the shopping center's owner).

In sum, the off-point cases discussed by CTIA do nothing to detract from the proposition that the reasonable relationship test applies to this consumer disclosure requirement, and that San Francisco's factsheet is reasonably related to the mitigation of a possible brain cancer epidemic.

II. THE ORDINANCE IS NOT PREEMPTED.

CTIA does not argue that the federal government has occupied the field with respect to disclosures about RF energy and cell phones; it argues only that the ordinance is invalid under the doctrine of conflict preemption. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). The City's requirement that retailers provide information to their customers creates no obstacle to the accomplishment of the federal government's goal of promoting a uniform and efficient wireless network.

The City agrees with CTIA that the framework for conflict preemption analysis is provided by *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010), and *Murray v. Motorola, Inc.*, 982 A.2d 764, 785 (D.C. Ct. App. 2009). These cases recognize that the FCC, in deciding to allow the sale of phones with SAR values of 1.6 W/kg

or less, and to disallow the sale of phones with SAR values of higher than 1.6 W/kg, struck a balance between the need to promote safety and the need to allow the nationwide market for wireless telecommunications to grow efficiently. *See* RF Order II at ¶ 29. *Farina* and *Murray* show that local laws which disrupt that balance are preempted, and those which don't disrupt the balance are not.

Farina was a putative class action, on behalf of current and future purchasers of cell phones, which alleged that "the marketing of cell phones as safe for use without headsets violates several provisions of Pennsylvania law." 625 F.3d at 104. The named plaintiff sought to impose liability under state law based on the argument that "these phones were, in fact, unsafe to operate without headsets because of their emission of RF radiation – despite the fact that their emission levels were in compliance with FCC standards." *Id*. at 122. "In order for Farina to succeed," the court explained, "he *necessarily must establish* that cell phones abiding by the FCC's SAR guidelines are unsafe to operate without a headset. In other words, Farina must show that these standards are inadequate – that they are insufficiently protective of public health and safety." *Id.* (emphasis added). Allowing state law causes of action of this sort, with plaintiffs recovering damages against cell phone manufacturers for engaging in conduct the FCC expressly permits, would upset the balance struck by the FCC when it decided to impose a SAR limit of 1.6 W/kg. *Id.* at 125-26.

The plaintiffs' state-law cause of action in *Farina* also conflicted with federal law because "the resulting state-law standards could vary from state to state, eradicating the uniformity necessary to regulating the wireless network." *Id.* That network, the court explained, "is an inherently national system." *Id.* "In order to ensure the network functions nationwide and to preserve the balance between the FCC's competing regulatory objectives, both Congress and the FCC

recognized uniformity as an essential element of an efficient wireless network." *Id.* Emissions standards that varied from state to state "would hinder the accomplishment of the full objectives behind wireless regulation." *Id.*

Similarly, in *Murray* the District of Columbia Court of Appeals held preempted a state law cause of action that sought to impose liability on cell phone manufacturers for selling "unsafe" phones, even though the phones complied with FCC standards. The court explained: "[g]iven the FCC's contemporaneous explanations of the balance it sought to achieve by rejecting a more stringent safety standard, we conclude that state regulation that would alter the balance is federally preempted." 982 A.2d at 776. In contrast, the court held that other claims against the cell phone manufacturers, for providing false or misleading *information* to consumers, were *not* conflict-preempted because they did not threaten to upset the regulatory balance struck by the FCC: "Defendants could be held liable for providing plaintiffs with false and misleading information about their cell phones, or for omitting to disclose material information about the phones, without plaintiffs having to prove that cell phones emit unreasonably dangerous levels of radiation." *Id.* at 783. Because these state law claims did not conflict with the FCC's regulatory regime, they could only be preempted if the federal government had *occupied the field* of consumer disclosures. And the *Murray* court concluded that the federal government only occupies the field of *technical standards* relating to RF energy emissions from cell phones, not "the field of consumer disclosures to cell-phone purchasers." *Murray*, 982 A.2d at 788. *See also id*. (no basis to conclude that "there needs to be uniformity with respect to such matters as what disclosures must be made to consumers").

CTIA argues that San Francisco's ordinance stands as an obstacle to the achievement of federal objectives in a manner similar to the state law causes of

action in *Farina* and *Murray*. But the only federal "objective" CTIA identifies is the alleged objective to get people to keep their cell phones on. This is important, CTIA argues, because it will help people receive important phone calls promptly, and will help wireless carriers to track their customers' physical locations. O.B. at 47-49. But the FCC's decision to allow the sale of phones with a SAR value of 1.6 W/kg or less does not reflect a federal determination that people should keep their cell phones on so that they can receive important calls or so that their wireless carrier can find them. It reflects a balancing of the "need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *RF Order II* at ¶ 29.

San Francisco's ordinance does not upset that balance, because, in contrast to the state-law causes of action at issue in *Farina* and *Murray*, it does not even come close to interfering with the ability of the wireless industry to manufacture and sell phones as they have always done. The ordinance does not impose a different emissions standard from the one adopted by the FCC. It does not impose liability for conduct that the FCC expressly allows. The existence of multiple ordinances of this kind would not subject the wireless industry to varying emissions standards. It would not require them to change the way they manufacture their phones. It would not affect the operation of the nationwide wireless network. In short, the ordinance in no way stands as "an obstacle to the accomplishment of the objectives of Congress." *Farina*, 625 F.3d at 122.[15]

[15] Incidentally, Congress has demonstrated an acute awareness of preemption issues in the telecommunications context, knowing full well how to preempt local regulation in areas where it felt such regulation would interfere with federal uniformity, and how to avoid preemption in other areas. For example, Congress has explicitly divested state and local governments of the authority to regulate "entry of and rates charged by any commercial mobile service . . ." 47 U.S.C. § 332(c)(3)(A). And it has divested them of the authority to regulate the

CTIA's only other argument for preemption is that the ordinance is "premised" on a disagreement with the FCC about the adequacy of its safety standard. But the ordinance embodies no view – explicit or implicit – that the FCC's SAR standard of 1.6 w/kg is too low or too high. Indeed, there now seems to be agreement among the City, CTIA and the FCC that SAR is not a reliable proxy for the amount of radiation to which a phone will expose people. Rather, the ordinance is premised on the view that, regardless of the federal SAR standard for cell phones, people should be informed of the potential health consequences of RF exposure from cell phones and of the easy means achievable to reduce risk. No federal regulation takes the contrary view that people should be kept in the dark about these issues.[16]

In any event, preemption does not exist whenever a local government disagrees with the federal government about something. Taken to its logical conclusion, CTIA's argument that the ordinance is preempted because it is "premised" on disagreement with the federal government would mean the City is preempted from enacting an ordinance requiring that the Department of the Environment put a comparable factsheet about cell phones and health issues on its

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placement or construction of cell towers "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). Conversely, Congress included in the Telecommunications Act of 1996 provisions both preserving state and local authority over certain aspects of telecommunications regulation, *see* 47 U.S.C. §§ 253, 332(c)(7)(A), and stating that it "shall not be construed to modify, impair, or supersede Federal, State or local law *unless expressly so provided*." Pub.L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (codified as Note to 47 U.S.C. § 152) (emphasis added).

[16] As CTIA's papers show, the FCC regularly files amicus briefs in these preemption cases, stepping in quickly when a local regulation in fact does upset the regulatory balance struck by the federal government regarding RF energy emissions from cell phones. Yet it has not filed a brief in this case to argue that local governments should be precluded from requiring that people be informed about health issues posed by cell phones.

own website. The statements on the City's website would be no less "premised" on a disagreement with the federal government. But that is not how preemption works – it is not triggered by mere disagreement, but by local regulatory action that stands "as an obstacle to the accomplishment of the objectives of Congress." *Farina*, 625 F.3d at 122. As the above discussion shows, San Francisco's ordinance creates no obstacle to the achievement of any statutory or regulatory objective.[17]

III. THE DISTRICT COURT COMMITTED NO JURISDICTIONAL ERROR.

The district court did not act outside its jurisdiction when it identified the purported constitutional errors in the City's factsheet and stated that the factsheet would be enjoined unless the errors were cured. This is the type of procedure district courts can, should, and do use in the exercise of their flexible equitable powers.

Nobody would dispute that the district court had the power to enjoin the ordinance right off the bat, in an order setting forth its reasoning in great detail

[17] For the reasons provided above, the preemption question in this case is an easy one. But even if the question were close, CTIA would not be entitled to relief because of the presumption against preemption. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Farina*, 625 F.3d at 116; *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1120 (9th Cir. 2008) ("*Golden Gate I*"). Although this Court has held that the preemption "usually" does not apply in areas where the federal government has long had a "significant presence," *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003), "the presence of federal regulation, however longstanding, does not by itself defeat the application of the presumption." *Farina*, 625 F.3d at 116. And this case involves something that is right in the wheelhouse of the local police power: protection of the public health. "While Congress has long exerted control over radio communications, state governments have traditionally regulated the field of public health and welfare. State-law actions based on the risks associated with RF emissions fall squarely within the traditional police power." *Id.* Although the preemption question presented by this case is easy to resolve even without a presumption, the presumption against preemption makes the answer even more clear.

about which aspects of the factsheet were constitutionally problematic and which aspects were constitutionally permissible. Nor would anybody dispute that, if the City responded to that order an hour later by coming back and informing the district court it was eliminating the constitutionally problematic aspects of the factsheet, the district court could promptly lift the injunction. But there is no legal distinction between that approach and the approach the district court took here. The district court did not rewrite the factsheet; it explained that for the factsheet to be constitutional, the images would have to be eliminated, the existence of an FCC emissions standard would have to be disclosed, and the WHO's "possible carcinogen" classification would have to be placed in context. Although the district court suggested specific language that would cure the constitutional infirmities, the court made clear that it was for the City to decide whether to make the changes. Nor did the court state that the City must adopt the suggestions verbatim. Indeed, the fact that the district court required the City to submit any revised factsheet shows that the City was not bound by the district court's precise language suggestion. Otherwise, there would have been no need to resubmit it – the court would have simply rewritten the factsheet and denied the motion for a preliminary injunction, as occurred in the cases cited by CTIA which involved judicial "rewrites" of statutes. Because the district court did not re-write the factsheet, the cases cited by CTIA about rewriting statutes are not relevant. And because the district court simply explained in detail, after full and vigorous briefing and argument by both sides, which aspects of the factsheet it believed were invalid and why, the cases cited by CTIA about advisory opinions are not relevant either.[18]

[18] CTIA suggests that the decision by the City's Department of the Environment to revise the factsheet to address the purported legal defects, without first subjecting the revisions to the public comment process, violated local law, and implies that this somehow bears on whether the district court had jurisdiction to issue the ruling that it did. But CTIA points to no local law – nor is there any –

"Federal courts are courts of equity with the flexibility to 'mould each decree to the necessities of the particular case.'" *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 989 (9th Cir. 2004) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). As the Supreme Court has stated,

> An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. The historic injunctive process was designed to deter, not to punish . . . . Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Hecht, 321 U.S. at 329-30. CTIA's jurisdictional argument, which seeks to divest district courts of the ability to accomplish in a less cumbersome and less punitive manner what they could undeniably accomplish in a more cumbersome and more punitive manner, is contrary these principles of equity. The district court's shortcut may have been unorthodox (and efficient), but it is just the type of procedure district courts can use in the flexible exercise of their equitable powers.[19]

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that requires the City to reopen the public comment process when it merely sets out to cure legal defects in a regulation.

[19] *See, e.g.*, *Morales v. Tilton*, 465 F.Supp.2d 972, 982 (N.D. Cal. 2006) (finding California's lethal injection procedure unconstitutional but withholding judgment because California could cure constitutional defects if it responded properly to court's ruling). *See also Animal Protection Inst. v. Holstein*, 541 F.Supp.2d 1073, 1081-82 (D. Minn. 2008) (in Endangered Species Act case, holding that the government must take action to prevent "taking" of the Canada Lynx or apply for an incidental take permit, and allowing the government to report back to the court about, and obtain approval of, the avenue it selected); *United States v. Alisal Water Corp.*, 326 F.Supp.2d 1032, 1034 (N.D. Cal. 2004) (identifying alternative remedies under the Safe Drinking Water Act and allowing the parties to report back about which remedy to opt for). *Cf. Coleman v. Schwarzenegger*, 2010 WL 99000, *4 (N.D. Cal.) (holding that prison population reduction was required but allowing the State to report back on whether and how reduction would be achieved).

IV. THE DISTRICT COURT ERRED IN RULING THAT OTHER ASPECTS OF THE ORDINANCE VIOLATED THE FIRST AMENDMENT.

The discussion in Section I focuses on why the factsheet, as revised by the City in the wake of the district court's ruling, does not violate the First Amendment. This section discusses the City's cross-appeal and explains why this Court should reverse the district court's rulings that: (1) the factsheet was unconstitutional prior to revision; and (2) the ordinance's poster and sticker requirements were unconstitutional.

As a preliminary matter, the First Amendment issues in the appeal and cross-appeal overlap, and most of the City's arguments for the validity of the revised factsheet apply equally to the original factsheet and to the ordinance's requirement that retailers display a poster and stickers. For example:

- The reasonable relationship test applies to all the disclosure materials. *Supra* at pp. 12-16.
- It is more than sufficient, under the reasonable relationship test, for the government to submit legislative history materials to make its showing that a disclosure requirement is reasonably related to a legitimate public purpose. *Supra* at pp. 16-17.
- The City made a strong showing to the district court, through legislative history and other judicially noticeable materials, which demonstrated that the disclosures contained in the original factsheet, poster and sticker are reasonably related to the mitigation of a potentially serious public health problem. *Supra* at pp. 17-20.
- CTIA submitted no evidence to the district court to rebut the City's showing. *Supra* at pp. 20-25.
- The information contained in the original factsheet, poster and sticker is accurate. *Supra* at pp. 28-30.
- Retailers are not being required to endorse the City's message, and they remain free to say whatever they want about disclosures, including that they are not necessary and only provided under government mandate. *Supra* at pp. 38-39.

In light of these similarities, the differences between the revised factsheet on the one hand and the original factsheet, poster, and sticker on the other do not justify a conclusion that the latter violate the First Amendment.

A. The Original Factsheet.

The district court found three infirmities in the original factsheet. First, the court concluded that the images on the factsheet, of "silhouettes with RF beaming into the head and hips," were constitutionally infirm because they are "images subject to interpretation." ER 12. It is true that images (like words) are subject to interpretation. However, the question under the reasonable relationship test is not whether disclosure material is "subject to interpretation," but whether it is accurate. The images depict RF energy coming from cell phones and diminishing in strength as it gets further away from the phone. And the images show that if the phone is held close to the head or hip, RF energy is absorbed into those parts of the body. All of that is accurate.

Presumably CTIA will invoke the reasoning of the district court that struck down the new federal cigarette warnings in *RJ Reynolds Tobacco Co. v. FDA*, 2011 WL 5307391 (D.D.C. Nov. 7, 2011), namely, that it is inappropriate under the First Amendment to include an image in a disclosure requirement when it is designed to elicit a "reaction" from the viewer. However, that court cited no authority – and the City is aware of none – for the proposition that disclosure requirements cannot call attention to facts with accurate illustrations. *Cf. Zauderer*, 471 U.S. at 647 (explaining, in striking down state's ban on use of illustrations in advertising, that such illustrations serve the "important communicative function" of "attract[ing] the attention of the audience"); *see also id*. at 648-49 (explaining that illustrations should not be presumed to be misleading). In any event, in this case the image is not a photograph of someone

dying in a gruesome way; it is a bare-bones (and rather boring) illustration of someone being exposed to an agent, RF energy, which carries "possible" adverse health risks – risks that can easily be mitigated. To the extent it could be deemed relevant that an image in a disclosure requirement might draw an "emotional" response, that is far less true of the City's cell phone disclosure than with the federal government's new tobacco disclosure.

Second, the district court held that, by omitting the fact that the FCC regulates RF emissions from cell phones, the original factsheet left the misimpression that the cell phones being sold "have never been vetted by the FCC." ER 11. This ruling led the City to add a statement to the factsheet explaining that cell phones sold in the United States must comply with limits set by the FCC. However, the reason the factsheet did not include such a statement originally is that, regardless of whether cell phones have been "vetted by the FCC," there is a health issue with cell phone use, and for people who are concerned about that issue there are simple ways to mitigate the potential risk posed by RF energy emissions. The absence of a statement that federal standards exist does not make the City's message any less accurate.

Third, the district court held that the original factsheet's reference to the WHO's classification of RF energy from cell phones as a "possible carcinogen" was constitutionally problematic because "[t]he uninitiated will tend to misunderstand this as more dangerous than it really is . . . ." ER 12. This ruling led the City to add the statement that the WHO has not classified RF energy from cell phones as a "probable" carcinogen. But the district court gave short shrift to the significance of the WHO's "possible carcinogen" classification, while at the same time wrongly assuming that people don't know what the word "possible" means.

Regarding the significance of the classification, the district court noted that other substances the WHO has classified as possible carcinogens include coffee and pickled vegetables, as if this means the classification is useless. However, anyone who has been to Starbucks in California knows that customers are routinely warned of the cancer-causing effects of products sold there. SER 180 (Scott Report). And the WHO's list of possible carcinogens also includes products such as DDT, Lead, and Trichloromethine.[20] Furthermore, of all the substances alleged to cause cancer that the WHO has examined, it has refused to classify the large majority as even "possibly" carcinogenic, which makes the classification quite significant. *See also supra*, at 17-19 (explaining the rigor behind and significance of the WHO's classification decision).

Regarding the word "possible," there is no reason to assume that people reading this word will equate it with "probable" unless those two words are juxtaposed. Possible means "being within the limits of . . . realization,"[21] whereas probable means "supported by evidence strong enough to establish a presumption but not proof."[22] The First Amendment does not require courts to assume that people won't know the difference between those two definitions.

B. The Poster.

The factsheet is a 5x8 inch piece of paper that retailers can keep behind the counter and give to customers when they purchase a cell phone. The poster is also small (11x17 inches) but the ordinance requires that retailers display it prominently within the store. This distinction was legally significant to the district court, which

[20] *See* http://monographs.iarc.fr/ENG/Classification/ClassificationsGroupOrder.pdf.

[21] http://www.merriam-webster.com/dictionary/possible

[22] http://www.merriam-webster.com/dictionary/probable

concluded that the poster "would unduly intrude on the retailers' wall space" and was not necessary since customers would already receive the factsheet. ER 13.

In using the phrase "unduly intrude on the retailers' wall space," the district court appeared to adopt CTIA's argument that a retail store is the constitutional equivalent of a newspaper, *i.e.*, that both are inherent vehicles of expression and that the First Amendment precludes a governmental "intrusion into the function of editors" in both instances. *Tornillo*, 418 U.S. at 258. But a retail store is not like a newspaper. A newspaper's predominant function is to publish news articles and opinion pieces. A retail store's predominant function is to sell products, just like a restaurant's predominant function is to serve food. Nobody would ever argue that the First Amendment precludes the government from requiring a restaurant to post information about its compliance (or lack thereof) with food safety regulations merely because the owner might prefer to hang a piece of art on that wall space.

C. The Sticker.

The sticker requirement possesses a quality that the factsheet and poster requirements do not: it applies only if the retailer has decided to post display materials about cell phones in the store, and if so, the sticker must be included as part of those display materials. In this respect, the ordinance's sticker requirement requires retailers to insert content into or alongside speech that is already taking place. However, as should be clear by now, companies are required to include content in their pre-existing packaging and advertising all the time. Although CTIA asserted this as a reason for the sticker requirement's constitutional infirmity, it only begs the question in the context of a consumer disclosure requirement.

The district court also described the ordinance as requiring "retailers to paste the stickers *over* their own promotional literature." ER 13 (emphasis added). This is a factual error. Although at oral argument CTIA gave the district court a

demonstration of a cell phone display that did not have enough blank space to fit the City's sticker, ER 220-21, it does not follow that the ordinance requires a retailer with that type of display to paste the sticker *over* preexisting content. The display may simply be enlarged, so that the retailer may include the sticker and continue to say everything it was already saying about the product (plus anything it may wish to say, in its own discretion, about cell phone safety).

V. THE EQUITABLE FACTORS WEIGH AGAINST INJUNCTIVE RELIEF.

Even assuming CTIA had a colorable preemption argument, that argument does not result in a showing of any irreparable harm. And even assuming CTIA had established a likelihood of success on its First Amendment claim, the equities would weigh heavily against a preliminary injunction. Although at least some irreparable harm is presumed from a First Amendment violation, the degree of that harm must still be balanced against the public interest. And a First Amendment interest "has in some cases been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities . . . are only *limited*, rather than entirely eliminated." *Sammartano v. First District Judicial Court*, 303 F.3d 959, 974 (9th Cir. 2002) (emphasis added).

Even if the retailers could be deemed to suffer any First Amendment harm, this case involves a consumer disclosure requirement that, by definition, involves "minimal" First Amendment interests. *Milavetz*, 130 S. Ct. at 1339. The retailers remain free to communicate anything they wish to their customers, including the view that people should disregard the City's bogus safety concerns and keep their cell phones on at all times to help their wireless carrier track them down or to ensure that they get important phone calls quickly. Therefore, by definition the balance of hardships does not tip "sharply" in CTIA's favor, which is a prerequisite

for a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Furthermore, weighing against any minimal First Amendment harm is the City's interest in helping residents make informed decisions about how to use a relatively new form of technology that has penetrated the consumer market at breakneck speed and that might pose health risks. Given the consequences that could result if there were a health issue with cell phones, the public interest in allowing these disclosures is great. Nor, contrary to CTIA's suggestion, do the voluntary delays that have already occurred in implementing the ordinance provide cause for further, court-ordered delay. As should now be clear, the voluntary delays were the result of a conscientious public entity responding to reasonable legal objections originally raised by CTIA, notwithstanding the fact that CTIA deliberately withheld its objections during the public comment process only to make them in an amended complaint, thereby wasting a great deal of time and expense for everyone. *See supra* at 3-4. It would be perverse to penalize the City now for having taken seriously the rights of CTIA's members in earlier proceedings.

Finally, the public interest is harmed when a law duly enacted by the elected representatives of the people is prevented from being implemented, absent a showing by the plaintiff of a "substantial" likelihood of success on the merits. *Planned Parenthood of the Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997). There is nothing "substantial" about CTIA's First Amendment showing, and so to delay enforcement of the measure at this point would be to disrupt the status quo, not to maintain it. *Id*. ("In this context, the status quo is that which the People have wrought . . ."). Or as this Court has put it in a statement that applies word-for-word to this case:

> Finally, our consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal. The San Francisco Board of Supervisors passed it unanimously, and the mayor signed it . . . . We are not sure on what basis a court could conclude that the public interest is not served by an ordinance adopted in such a fashion. Perhaps it could so conclude if it were obvious that the Ordinance was unconstitutional or preempted by a duly enacted federal law, in which elected federal officials had balanced the public interest differently; but, as evidenced by our analysis above, we think the opposite is likely to be held true in this case.

Golden Gate I, 512 F.3d at 1126-27.

CONCLUSION

The Court should hold that CTIA has failed to establish a likelihood of success on its First Amendment and preemption challenges.

Dated: January 25, 2012

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Deputy City Attorneys

By: /s/ *Vince Chhabria*
VINCE CHHABRIA
Deputy City Attorney

Attorneys for Defendant/Appellee/Cross-Appellant
CITY AND COUNTY OF SAN FRANCISCO

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 17,627 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 25, 2012.

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Deputy City Attorneys

By: s/*Vince Chhabria*
VINCE CHHABRIA
Deputy City Attorney

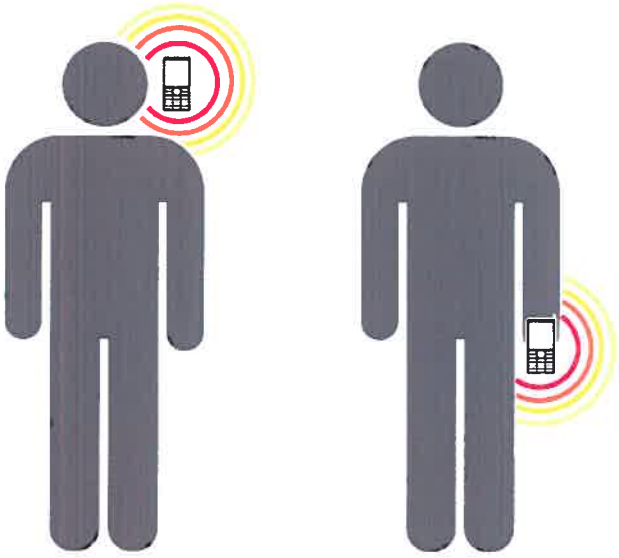
Attorneys for Defendant/Appellee/Cross-Appellant
CITY AND COUNTY OF SAN FRANCISCO

APPENDIX

TO

CROSS-APPEAL OPENING BRIEF AND ANSWERING BRIEF OF CROSS-APPELLANT CITY AND COUNTY OF SAN FRANCISCO

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



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

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

09/11

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

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

Learn More:

SF Department of the Environment @ SFEnvironment.org/cellphoneradiation • (415) 355-3700
Federal Communications Commission @ FCC.gov/cgb/consumerfacts/mobilephone.html
World Health Organization @ WHO.int/mediacentre/factsheets/fs193/en/

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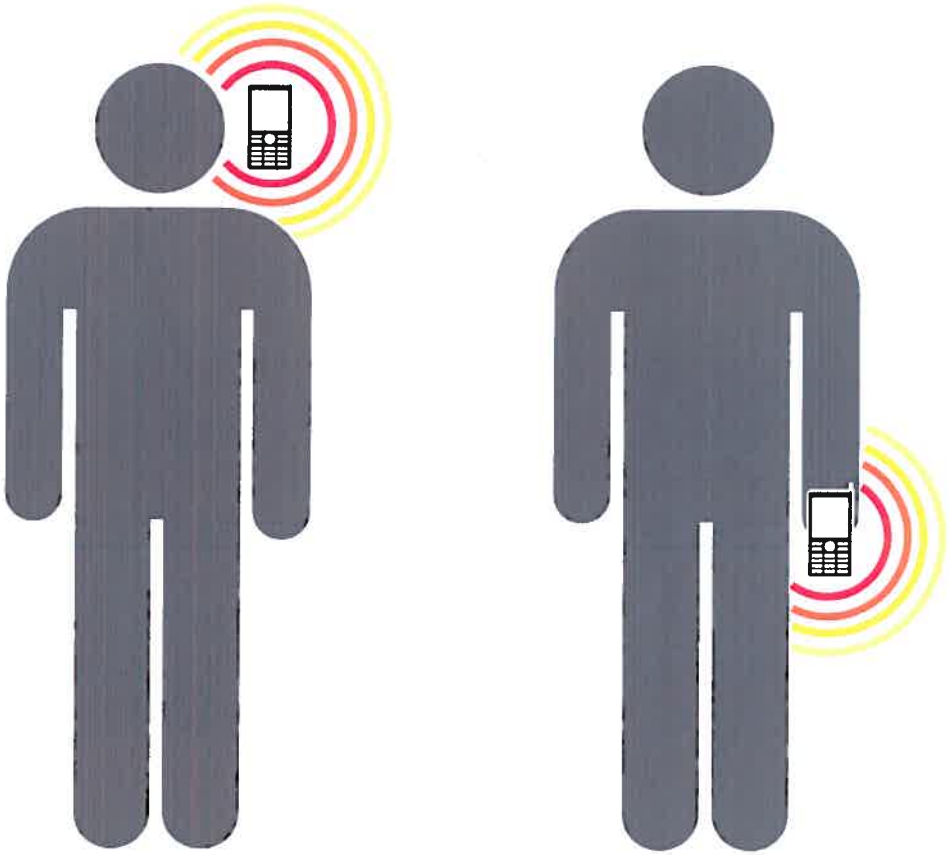
APPENDIX A 09/11

Cell Phones Emit Radio-frequency Energy



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

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

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

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

Learn More:

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

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09/11

APPENDIX B

Your head and body absorb RF Energy from cell phones

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

Your head and body absorb RF Energy from cell phones

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

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

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

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

11/11

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

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

11/11

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following 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 January 25, 2012:

CROSS-APPEAL OPENING BRIEF AND ANSWERING BRIEF OF APPELLEE CITY AND COUNTY OF SAN FRANCISCO

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

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

Cynthia Franklin
520 Ridgeway Drive
Bellingham, WA 98225

Executed January 25, 2012, at San Francisco, California.

s/*Pamela Cheeseborough*
Pamela Cheeseborough

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CTIA – THE WIRELESS ASSOCIATION®, Plaintiff/Appellant, vs. THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, Defendant/Appellee.	Nos. 11-17707 & 11-17773 U.S. District Court No. C10-03224 WHA

UNOPPOSED MOTION TO EXCEED PAGE LIMITATIONS IN CROSS-APPEAL OPENING BRIEF AND ANSWERING BRIEF OF APPELLEE CITY AND COUNTY OF SAN FRANCISCO; DECLARATION OF VINCE CHHABRIA IN SUPPORT THEREOF

On Appeal from the United States District Court
for the Northern District of California

The Honorable William H. Alsup

DENNIS J. HERRERA, State Bar #139669
City Attorney
WAYNE SNODGRASS, State Bar #148137
VINCE CHHABRIA, State Bar #208557
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Attorneys for Defendant/Appellee/Cross-Appellant CITY AND COUNTY OF SAN FRANCISCO

In accordance with 9th Cir. R. 32-2, Defendant/Appellee City and County of San Francisco ("City") respectfully seeks the Court's leave to file its Cross-Appeal Opening Brief and Answering Brief in excess of the 16,500 words allotted by the applicable rule. *See* Fed. R. App. P. 28.1(e). Specifically, the City respectfully requests the Court's leave to file a Cross-Appeal Opening Brief and Answering Brief of 17,627 words in length. CTIA does not oppose this request. As set forth more fully in the declaration below, the City has diligently condensed its presentation, but the overlength brief is necessary to properly address the detailed factual and legal arguments presented by Plaintiff/Appellant CTIA in its 58-page Opening Brief, as well as the distinct arguments presented by the City's cross-appeal.

Dated: January 25, 2012

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Deputy City Attorneys

By: /s/ *Vince Chhabria*
VINCE CHHABRIA
Deputy City Attorney

Attorneys for Defendant/Appellee
CITY AND COUNTY OF SAN FRANCISCO

DECLARATION OF VINCE CHHABRIA

I, Vince Chhabria, declare as follows:

1. I am a Deputy City Attorney in the Office of the City Attorney, counsel of record to Appellee and Cross-Appellant City and County of San Francisco in this action.

2. This appeal and cross-appeal involve important questions regarding the authority of local governments under the First Amendment and the Supremacy Clause to impose consumer disclosure requirements to protect the health and safety of their residents.

3. The issues presented by the appeal alone are complicated. They are: (i) whether San Francisco's requirement that cell phone retailers provide a factsheet about cell phone safety to purchasers of cell phones (as revised by the City in the wake of the district court's ruling), violates the First Amendment rights of the retailers; (ii) whether all of the disclosure requirements imposed by the City's ordinance are preempted by federal law; (iii) whether the district court committed jurisdictional error by issuing an order which held that some aspects of the factsheet were valid and some were not, and then giving the City the opportunity to cure the constitutional defects to avoid a complete injunction against it; and (iv) whether the equities favored a preliminary injunction in light of the public interests at stake and the nature of the regulation with which the retailers must comply. CTIA's Opening Brief takes 58 pages to address these questions.

4. The issues presented by the City's cross-appeal are: (i) whether the original factsheet – before the City revised it – violated the First Amendment in three different ways; (ii) whether the City was barred under the First Amendment from requiring retailers to display a poster regarding cell phone safety; and (iii) whether the City was barred under the First Amendment from requiring retailers to

display a sticker addressing the issue of cell phone safety on any display materials already present in the retail stores. Although there is some overlap between these questions and those raised by the appeal, they raise additional factual and legal issues.

5. Although I have diligently attempted to condense the City's brief to fit within the 16,500-word limit, a proper discussion of these issues requires a brief of ____ words, which is the length of the brief submitted herewith.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this 25th day of January, 2012 at San Francisco, California.

s/*Vince Chhabria*
Vince Chhabria

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following 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 January 25, 2012:

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