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 REPLY BRIEF OF 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

CTIA bravely insists that the City submitted no evidence to the district court about the health risks posed by cell phone radiation, and that CTIA submitted evidence that cell phones are safe. The exact opposite is true. The City put before the district court all the materials on the risks of cell phone radiation relied upon by the Board of Supervisors – from the IARC's classification of cell phone radiation as a possible carcinogen, to the assessments made by the architects of the Interphone Study of the possible cancer link and the impact it would have on our public health care system, to numerous individual epidemiological and other studies which show that long-term exposure to low levels of cell phone radiation is a legitimate public health concern. Legislative material submitted via request for judicial notice is indeed "evidence," and it was entirely appropriate for the district court to rely this material, just as the Supreme Court used "only" legislative history material in 2010 to unanimously uphold the consumer disclosure requirement in the federal bankruptcy statute.

CTIA could have tried to rebut the City's evidence by submitting epidemiological studies of its own, or by presenting expert testimony from an epidemiologist or other public health professional to try to explain why the materials considered by the Board were insufficient to show that the long-term effects of cell phone use present a real public health risk. But CTIA did not do so. Instead, it rested on two things: the federal government's regulatory regime and the declaration of Mr. Peterson.

As for the federal government, the FCC's 1996 guidelines and statements in support of them are not helpful to CTIA, because they do not respond to the issues recently brought to light by the Interphone Study and the IARC classification regarding the long-term, non-thermal effects of cell phone radiation. In other

words, the public health concern driving San Francisco's ordinance is not the one-time heating effect we experience when we hold a cell phone to our heads; rather, it is the potential health consequences of absorbing small amounts of cell phone radiation over a long period of time. This is presumably why, at the time San Francisco's original ordinance was adopted, the FCC was citing "recent reports" of a possible cancer link, calling this a "pressing" issue given the increased use of cell phones by young people, and stating that "more and longer-term studies are needed" to address this public health concern. City's O.B. at 21.

As for Mr. Peterson, CTIA misrepresents his declaration as standing for the proposition that cell phones are safe. In reality, Mr. Peterson's declaration contains the express proviso that he is not providing an opinion on whether cell phones are safe. He provides no opinion on the validity of the IARC's classification of cell phone radiation as a possible carcinogen, no discussion whatsoever of the Interphone Study, and no assessment of the implications of a cancer link for our public health system. Nor could Mr. Peterson provide an opinion on these matters, because he is an engineer who has no training in epidemiology or public health, and would be totally incapable of helping the Court to understand the long-term health effects of cell phone use or to assess whether it is reasonable from a health policy standpoint to take action on this issue immediately.

In short, the district court record reveals a reality that CTIA steadfastly refuses to confront: (i) there is a possible link between cell phone radiation and cancer; (ii) typically cancer only manifests itself decades after exposure to carcinogens, such that a potential carcinogen will not be definitively "proven" to cause cancer for a long time; and (iii) in the context of cell phones, this is a particularly vexing public health concern, because billions of people are using this relatively young technology with increasing frequency – on a far greater scale than

people were ever exposed to asbestos or tobacco smoke. Given the true state of the record, CTIA's contention at page 23 of its reply brief that "the unrebutted scientific evidence in this record shows that the City's regime will not make consumers any safer" is nothing short of mind-blowing.

DISCUSSION

I. THE MATERIAL CONSIDERED BY THE BOARD OF SUPERVISORS AND PRESENTED TO THE DISTRICT COURT SHOWS THAT CELL PHONE RADIATION PRESENTS A SERIOUS PUBLIC HEALTH ISSUE.

As discussed at length in the City's opening brief, courts (including the Supreme Court) regularly uphold disclosure requirements based solely on material contained in the legislative record. In fact, courts (including the Supreme Court) uphold disclosure requirements based on pure common sense, even without reference to material from a legislative record. City O.B. at 8, 16-17, 24-25; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985) (reasonableness of disclosure "self-evident"); *Pharm. Care Mgm't Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (same); *Nat. Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (same). Accordingly, it was more than sufficient for the City to submit the voluminous material considered by the Board of Supervisors, to request judicial notice of that material, and to argue that it supports a conclusion that cell phone radiation presents a serious public health issue, thereby justifying the disclosure requirements. That is how these cases are litigated and decided.

In this case, the City's showing included material explaining the determination by the International Agency for Research on Cancer ("IARC") that cell phone radiation is a possible carcinogen, including how that determination was reached and the significance of it. The City will not repeat its prior discussion of

the IARC's determination,[1] except to highlight the ways in which CTIA gives short shrift to its significance. For one thing, CTIA states that the IARC has only classified one agent as "probably not carcinogenic to humans," as if to imply that the IARC is some rubber stamp for carcinogenicity. But as the record reflects, the IARC does not study every agent on the face of the earth; it studies agents that are alleged to cause cancer, and even within that universe the IARC has refused to acknowledge a link between cancer and the majority of the agents it has studied. SER 816, 827. It has, however, found a possible link between cancer and cell phone radiation, after its team of 31 scientists reviewed roughly 1,000 studies and articles on the topic. SER 889-946. *See also* City O.B. at 17-19; EWG Br. at 12-15.

CTIA attempts to downplay the regulatory significance in this country of a decision by IARC to classify an agent as possibly carcinogenic. But CTIA cannot change the fact that the federal government requires manufacturers and employers to disclose a chemical as "hazardous" if the IARC has classified it as a possible carcinogen. *See* City O.B. at 26 & n.8. Nor can CTIA change the fact that California regularly places substances on the "Proposition 65" list if they have been deemed "possible carcinogens" by the IARC. *See* City O.B. at 26 & n.9. CTIA tepidly notes that this "may" be the case, CTIA Reply at 40, but one need only read a few pages from the record to see that it *is* the case. For example, California has placed titanium dioxide, bleomycins, chlorophenoxy herbicides, marine diesel fuel, progestins, styrene and vinyl acetate on the Proposition 65 list solely because the IARC classified these chemicals as possibly carcinogenic to humans. SER 813-14; 829-33.

[1] City O.B. at 17-19. *See also* EWG Br. at 12-15.

CTIA may believe that Proposition 65 and the federal occupational safety and health laws violate the First Amendment, but it cannot deny that they rely upon IARC classifications of possible carcinogenicity – and in a notably more aggressive way than San Francisco has done here. The City's disclosure materials provide only that RF energy from cell phones *might* pose health concerns; the federal and state regimes require chemicals classified by the IARC as possible carcinogens be disclosed by companies unequivocally as hazardous. The federal government's and California's reliance on IARC classifications in this fashion underscore that San Francisco's reliance on the IARC in adopting a disclosure requirement for cell phones is eminently reasonable.

The conclusion of the world's leading research body on the causes of human cancer is enough to justify San Francisco's disclosure requirement, but the record contains much more. The City also presented the assessment and recommendations of two of the architects of the Interphone Study, in which a significant increase in brain tumors was found among the heaviest cell phone users considered in the study. Again, the City will not repeat its discussion of the Interphone Study or the Cardis/Sadetzki paper from its opening brief,[2] but it bears noting that CTIA has failed to acknowledge the importance of Cardis and Sadetzki's assessment of this issue from a health policy standpoint. The Interphone Study began in 2000, examining people's cell phone use prior to that date. SER 310. As Cardis and Sadetzki explain, no participant in the study had used cell phones for longer than 12 years, and back then cell phone use was not nearly as heavy as it is today. *Id*. However, for most known carcinogens, "identification of increased risk of solid tumours (particularly brain tumours) has required long

[2] City O.B. at 19-20. *See also* EWG Br. at 14.

follow-up periods of subjects with substantial exposure." *Id*. Because it usually takes a long time to establish a link between exposure to an agent and cancer, Cardis and Sadetzky explain, there is particular urgency to the fact that a potential link has been identified so early in the historical process. *Id*. Given the possible brain cancer link for the highest-exposed group in the study, and given that people use cell phones with greater frequency and from a much earlier age today, even a slight increase in brain cancer risk "could eventually result in a considerable number of tumours and become an important public-health issue." SER 311.

Again, the recommendations by these leading epidemiologists are enough to justify the City's disclosure requirement, but the legislative record (and the district court record) contains still more. The Board considered numerous individual studies and papers by epidemiologists, public health professionals and others, the totality of which supports the conclusion that it is reasonable for the government to require disclosures about a technology whose long-term public health effects could be very serious and widespread.

On this point, the submissions of the amici shine a bright spotlight on the true state of the record. One would expect, in a case like this, that CTIA's amici would seek to assist the Court in interpreting the record – to help the Court make a more informed determination about whether the evidence presented to the district court indicates a sufficient public health risk to justify a consumer disclosure requirement. But none of CTIA's amici even attempts to grapple with the material contained in the record. They simply intone that cell phones are safe (perhaps assuming that CTIA is being truthful in its characterization of the record), and then express concern about the doctrinal implications of upholding a disclosure requirement imposed in the absence of any indication of a legitimate public health concern. Such briefs would be helpful in a case involving a product for which

there was no evidence of a real health threat, where the government has based its regulatory action on pure guesswork. But this is not such a case, and therefore the briefs in support of CTIA are useless.

In contrast, the brief of the Environmental Working Group and Public Citizen ("EWG Brief") combs through the district court record, explaining how the material considered by the Board of Supervisors makes a strong case for a disclosure requirement. To provide just a few examples, the EWG brief cites Swedish studies published in 2006 and 2009 which identified an increased risk for malignant brain tumors after a ten-year latency period. EWG Br. at 14-15 (SER 495, 506). The Nordic countries were among the first to introduce cell phone use on a more widespread basis, making the studies from this region particularly important. SER 487. The EWG brief also cites studies that discuss the issue from a health policy perspective and explain that even though cell phone use might not increase brain cancer risk to the point that an individual person should lose sleep over it, those concerned with our public health system *should* lose sleep because the magnitude of the potential increase "poses substantial problems for neurosurgical care." SER 574. San Francisco, of course, must approach the problem from this health policy perspective as well, since the City is the health care provider of last resort for its residents. *See* Cal. Welf. & Inst. Code § 17000.

The EWG brief also cites to the material in the record which explains why the WHO was correct to state (SER 300) that children's brains absorb more cell phone radiation than adults. EWG Br. at 17-19 (SER 792; *see also* SER 390, 409-10, 459-60, 778). And EWG notes that the National Research Council has identified the need for epidemiological studies of cell phone use targeted at particular subgroups of the population, including children, "[o]wing to the widespread use of mobile phones among children and adolescents and the

possibility of relatively high exposures to the brain." SER 645. This shows why CTIA cannot reasonably dispute the aspect of the City's disclosure requirement that addresses RF energy absorption by children.

Rather than confronting any of the material discussed above, CTIA brushes it off as hearsay because it is from the legislative file rather than from the declaration of an expert. But in contrast to strict scrutiny, *Zauderer*'s reasonable relationship test permits courts to rely on legislative materials. If that were not so, the Supreme Court could not have unanimously upheld the disclosure requirements in the federal bankruptcy statute in 2010. *See Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324, 1340 (2010) ("Evidence in the congressional record," in the form of hearing transcripts, sufficient to justify consumer disclosure requirement). *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") (emphasis added). *See also* City O.B. at 13-17.

The point is that the legislature acts "reasonably" within the meaning of *Zauderer* when, rather than engaging in groundless speculation, it undertakes a serious, reasoned inquiry into the subject matter it is regulating. In a case like this, it is easy for the Court to find that the City's legislature acted reasonably, because it acted on the conclusions of the IARC, on the recommendations of Cardis and Sadetzky, and on numerous other studies and papers regarding the health effects of cell phone use. Whether that material was presented to the district court by way of a request for judicial notice or through an expert witness is, for purposes of the

reasonable relationship test, irrelevant. What matters is that these conclusions and recommendations have been made by the world's leading researchers and scientists, and therefore it is entirely reasonable for governments to rely on them.

On a related note, CTIA makes repeated reference to the City's alleged use of "extra-record material" and "new evidentiary submissions." CTIA Reply at 3. This is even more confusing than CTIA's references to hearsay. Every single document cited in the above discussion was submitted to the district court in connection with the City's opposition to CTIA's preliminary injunction motion. To be sure, CTIA decided against including any of that material in its own excerpts of record on appeal, thereby requiring the City to submit supplemental excerpts of record. But CTIA's decision not to put the material before this Court does not make it "new" or "extra-record."

CTIA also asserts that the City conceded below "that there is no evidence that cell phones cause harm." CTIA Reply at 25. This is false. The City merely responded to a question from the district court by saying that there is currently no scientific *proof* that cell phones cause cancer. ER 237. The City did not, and never has, accepted CTIA's nonsequitur that because there is no scientific proof that cell phones cause brain cancer, it follows that there is "no evidence" or "no indication" that cell phones pose a real cancer risk.

In sum, the record demonstrates that the City far exceeded its burden to show that the disclosure requirement is reasonably related to the mitigation of a serious public health concern. In contrast, as discussed below, CTIA submitted nothing to the district court that would call the City's showing into doubt.

II. NOTHING IN THE RECORD CASTS DOUBT ON THE BOARD'S CONCLUSION THAT CELL PHONE RADIATION PRESENTS A SERIOUS PUBLIC HEALTH CONCERN.

As the City noted in its opening brief, this is not a classic "rational basis" case in which courts must uphold a regulation whenever anyone can conjure up a conceivable connection between the regulation and some policy goal. *See* City's O.B. at 12-13. This is a First Amendment case, in which the burden is on the government to establish the relationship between the disclosure requirement and the public purpose actually asserted by the legislature. But as discussed above, the City submitted material that, on its face, more than carries that burden. Given the City's showing, if CTIA believed the legislative materials submitted to the district court in support of the disclosure requirement were inaccurate or unreliable, it should have made its own evidentiary presentation to that effect. It did not bother to do so.

CTIA's cavalier approach to the evidence began during the legislative process. At the committee hearing on the revised ordinance, CTIA's lobbyist gave a presentation that included no discussion of the material before the Board of Supervisors – not even the IARC determination. Instead, he stuck to CTIA's question-begging argument that because science has not yet established definitive *proof* of a connection between cell phone use and adverse health effects, San Francisco should not impose a disclosure requirement about it. SER 288-90. After the presentation, a member of the committee granted CTIA's lobbyist additional time at the podium to answer questions about a number of the studies that were part of the legislative record, with a particular focus on the potential risks for children. SER 290-92. CTIA's lobbyist exhibited no familiarity with these studies and did not respond to the committee member's questions about them. SER 293-94. Nor did CTIA's lobbyist (or anyone else from CTIA) submit any material to

the Board of Supervisors to supplement a record they now baselessly describe as incomplete.

Of course, CTIA could have compensated for its disregard of the legislative record when it got to the district court. It could have submitted epidemiological studies which it believes demonstrate that cell phone radiation does not present a legitimate long-term public health concern. It could have hired an epidemiologist or some other public health professional to serve as an expert, in an attempt to rebut the findings of the IARC and the recommendations of Cardis and Sadetzky. Instead, CTIA relied on statements from the federal government, and on a declaration from an engineer who has no training in epidemiology or public health and who therefore rightly disclaims any expert opinion on whether cell phones are safe.

As discussed in the City's opening brief, the federal government's statements and regulatory actions do not stand for the proposition that concerns about the health effects of cell phone radiation are illegitimate. *See* City O.B. at 21-22; EWG Br. at 20-26. Rather, they stand for the proposition that cell phones are "safe" in the sense that the federal government has balanced the need for an efficient wireless market with the need to promote safety, and set a maximum exposure level that strikes a balance between those two interests. Furthermore, the FCC's standard does not attempt to mitigate the recent concerns that have developed (as a result of the Interphone Study and others) about the non-thermal, long-term effects of cell phone radiation. City O.B. at 22-23 & n.6; EWG Br. at 20-26. Indeed, by the time San Francisco's original ordinance was enacted, the FCC recognized that recent advances in knowledge about the possible non-thermal effects of long-term cell phone use rendered this issue "pressing." In full, this paragraph from the Commission stated as follows:

> 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. *See also* City O.B. at 21-22.

What's more, even if the federal government did share CTIA's steadfast insistence that cell phone radiation presents no legitimate public health concern, that would not preclude the City from taking a different approach, particularly in light of the IARC's conclusions, Cardis and Sadetzky's recommendations, and the other evidence in the record. To be sure, the First Amendment would preclude a state or local government, without any evidence, from imposing a health-related disclosure requirement about a product that the federal government had certified as posing no health risk. But if the federal government asserted that a product posed no health risk, and state and local governments had evidence that the federal government was wrong, the First Amendment would not prevent state or local governments from making their own policy judgments in imposing a consumer disclosure requirement – so long as those judgments are reasonable and not purely speculative. After all, the federal government has been wrong before about issues of product safety. *See* EWG Br. at 24-26.

Finally, there is Mr. Peterson's declaration. As previously discussed, Mr. Peterson's declaration states: "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. Accordingly, the declaration, by its own terms, is simply not relevant to the question before the Court, namely, whether cell phone radiation presents a legitimate public health concern. Nonetheless, because

CTIA continues, even in the face of Mr. Peterson's disclaimer, to describe his declaration as constituting "unrebutted scientific evidence" that cell phones are safe, it is worth examining his presentation.

Mr. Peterson has a bachelor's degree in electrical engineering, and a master's degree in electrophysics. ER 128. His opinion discusses the science of RF energy and how RF energy is absorbed into the body, with the goal of providing "an explanation of the scientific basis for the RF safety standards developed by the scientific community and later adopted by the FCC." ER 130. These standards, which were developed in the 1980's and 1990's, establish a "threshold" below which the heating effects of RF energy is understood not to cause "injury" to people. ER 131, 139, 140.

The repeated use of the word "injury" in Mr. Peterson's declaration is noteworthy. For example, he states that the standards developed in the 1980's and 1990's "are based on the scientific principle (adopted by the FCC) that any potential *injury* from exposure to RF energy is a threshold phenomenon – there is no reliable scientific evidence of *injury* at exposures below the threshold." ER 144 (emphasis added). It makes sense that Mr. Peterson would use the word "injury" rather than "illness" or "cancer," because a one-time burst of too much RF energy can lead to injury, not illness or cancer. For example, as Mr. Peterson explains, RF energy from cell phones is in the same class of radiation as RF energy from microwave ovens. ER 135. The radiation from a microwave oven can "injure" us if we receive too strong a burst of it, but we are not concerned about being "injured" if we feel a slight amount of heat emanating from the oven while we wait for our food to be cooked.

San Francisco's public health concern is not with "injury" caused by absorbing a one-time burst of RF energy into our heads during a cell phone

conversation. As should now be clear, San Francisco's concern is with human exposure to lower levels of RF energy from cell phones over a long period of time, which recent studies have indicated may cause brain cancer. Mr. Peterson provides no opinion about the validity of the IARC's decision to classify cell phone radiation as a possible carcinogen on the basis of these recent studies. He provides no opinion about the Interphone Study. In fact, he provides no opinion about the roughly 1,000 studies and papers on the health effects of cell phone radiation that the IARC considered in making its determination. SER 889-946. Mr. Peterson does observe that "there are many studies, articles and editorials," and notes that they should be "evaluated in the context of the entire body of relevant literature on the subject." ER 173. But that is exactly what the IARC did, and it is exactly what Mr. Peterson did not do.

Perhaps most importantly, Mr. Peterson never asks the question posed by Cardis and Sadetzky: what are the implications of a link between cell phone radiation and brain cancer from the standpoint of public health professionals, and from the standpoint of local governments whose health systems would be impacted by a spike in brain cancer? In the face of the evidence that exists today, should public officials stand by and wait for definitive "proof" that cell phone radiation causes brain cancer? Or should they take steps to ensure that customers are informed of modest measures to minimize their RF exposure, thereby dramatically mitigating the public health concern that presently exists?

It is understandable that Mr. Peterson would not ask these questions or provide opinions on them, since he is not a medical doctor or an epidemiologist, and he has no education or training in the area of epidemiology or public health. His lack of qualifications in these areas presumably explains why he stated at the outset that he offers no opinion on whether FCC-compliant cell phones are safe.

ER 130. CTIA simply has no business passing off Mr. Peterson's declaration as evidence that would delegitimize the conclusions of the IARC or the architects of the Interphone Study.

III. GIVEN THE SERIOUS PUBLIC HEALTH CONCERN PRESENTED BY CELL PHONE RADIATION, THE CITY'S DISCLOSURE REQUIREMENTS ARE REASONABLE AND SHOULD BE UPHELD ENTIRELY.

As discussed in the City's opening brief, the factsheet, as revised in response to the district court's ruling, is a reasonable, minimally intrusive response to a serious public health concern. But in light of the record discussed above, the City's full set of disclosures is justified as well.

These disclosures, even in their totality, intrude far less on the wireless industry than, for example, the new federal cigarette warnings intrude upon the tobacco industry. The cigarette warnings require that 50% of a package consist of a warning, including gruesome images designed to grab the attention of the customer in a way that mere words cannot. San Francisco's disclosure requirement involves keeping a factsheet behind the counter, putting an 11x17-inch poster on the wall, and including a small label with product displays.

In addition to using a far grater percentage of the company's space than San Francisco's cell phone disclosure, the federal tobacco warnings differ in another significant way – the warnings use the industry's own packaging to convince customers not to buy the industry's products. Here, San Francisco is not commandeering the retailers' own packaging, and it is not trying to convince people to stop buying the wireless industry's products. Rather, the City is trying to get people to use the products in a way that will expose them to less radiation. This includes, most obviously, buying a headset *in addition* to a phone.

Notwithstanding the ways in which the new federal tobacco warnings are more intrusive than San Francisco's ordinance, the Sixth Circuit recently upheld the new federal warnings. *See Discount Tobacco City & Lottery, Inc. v. United States*, __ F.3d __, 2012 WL 899073 (6th Cir., Mar. 19, 2012). In so doing, the Sixth Circuit confirmed many of the principles set forth in the City's opening brief – principles that explain why the City's entire ordinance should be upheld. For example, the Court emphasized that "First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id*. at *36 (quoting *Zauderer*, 471 U.S. at 651); *see also* City O.B. at 12-13. The Court rejected CTIA's argument that *Zauderer*'s reasonable relationship test is limited to governmental efforts to prevent consumer deception, joining every other court to have been presented with this question. *Id*. at *38; *see also* City O.B. at 31-32. The Court discussed the burden the government must meet under the reasonable relationship test, explaining that "[a] common-sense analysis will do." *Id*. at *39. And the Court explained that a consumer disclosure requirement need not be limited *only* to pure factual information, which rebuts CTIA's argument that the City's disclosure requirement is subject to strict scrutiny because it describes the ways in which people can respond to those facts. *Id*. at *41 & n.8; *see also* City O.B. at 32-34.

Finally, as pertinent to the district court's decision to bar the City from using images on its cell phone disclosure materials, the Sixth Circuit rejected the argument that pictures are somehow different from words in their ability to convey factual information. *Id*. at *41; *see also* City O.B. at 48-49. It concluded that the graphic images were reasonably related to the goal of effectively communicating with tobacco users. *Id*. at *45-46. And the Court emphasized, again, that evidence was not necessary to conclude that the images were justified: "[w]e can

similarly assume, based on common sense, that larger warnings incorporating graphics will better convey the risks of using tobacco to consumers." *Id*. at *45. The images in the City's disclosure are far less startling than those required in the tobacco warnings, but it is equally obvious that the images will help get customers' attention.

For the reasons discussed by the Sixth Circuit, and for the reasons set forth at pages 47-52 of the City's opening brief, the Court should uphold the City's ordinance in its entirety. The record in this case shows that the population's long-term exposure to low levels of cell phone radiation raises a serious public health concern. In the face of this record, the First Amendment does not require the government forestall meaningful action to protect the health of its people.

CONCLUSION

This Court should reverse the district court in part and hold that CTIA was not entitled to a preliminary injunction.

Dated: April 4, 2012

Respectfully submitted,

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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 5,200 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 April 4, 2012.

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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 April 4, 2012:

CROSS-APPEAL REPLY BRIEF OF 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:

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Executed April 4, 2012, at San Francisco, California.

/s/Holly Chin
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