Nos. 11-17707, 11-17773

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CTIA - THE WIRELESS ASSOCIATION®
Plaintiff-Appellant / Cross-Appellee,

v.

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

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PLAINTIFF-APPELLANT / CROSS-APPELLEE

PRELIMINARY INJUNCTION APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by *amicus curiae* National Association of Manufacturers of the following corporate interests:

a. Parent companies of the corporation:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation:

None.

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INTEREST OF *AMICUS*[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. Many of its members will be affected by the decision in this case.

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[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to its preparation or submission.

INTRODUCTION

The City of San Francisco (hereafter "City") enacted its "Cell Phone Right to Know" ordinance (the "Ordinance"), which required retailers to display a large poster in their premises, affix stickers to cell phone displays, and distribute a lengthy leaflet it calls a "factsheet," all containing the City's own "recommendations" about who should use cell phones and when and how they should be used. The Ordinance is premised on the view that someday science may establish health risks from using cell phones.

The City has acknowledged that there is no known way to measure the actual amount of radio frequency electromagnetic energy that a user will absorb from a particular cell phone, and that there is no reliable scientific evidence that FCC-compliant cell phones cause cancer or other adverse health effects. ER (Oct. 27 Op. 14). It nonetheless seeks as a "precautionary" measure to provide additional information to customers regarding radio frequency energy emitted by cell phones.[2] Federal

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[2] The City's exaggerated – over the top – perception of the "danger" posed by cell phone emissions is apparent from its own Opening Brief, where it states that the basis for its Ordinance 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 (continued...)

agencies and international scientific bodies have concluded that exposure to non-ionizing radio frequency radiation from cell phone usage is not likely to be carcinogenic.[3] Based on the weight of scientific evidence, the federal government has determined that cell phones lawfully sold in the United States are safe. *See* United States Food and Drug Administration, *Children and Cell Phones*, http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/

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[2](...continued)
avoid a possible brain cancer *epidemic*." (City's Cross-Appeal Opening Brief and Answering Brief (hereafter "City Opening Brief") at 1-2) The carefully worded reports of WHO and the National Cancer Institute (cited *infra* at footnotes 3 and 4) do not warn of any such "cancer epidemic."

[3] The City cites the World Health Organization's classification of radio frequency energy as a "possible carcinogen." (City Opening Brief at 18, *et seq*.) WHO itself, however, has acknowledged the flaws and limitations of that classification, *see* WHO, Electromagnetic fields and public health: mobile phones, Fact Sheet 193 (June 2011) (http://www.who.int/mediacentre/factsheets/fs193/en/) ("WHO Factsheet") Indeed, of the 942 substances or exposures WHO's International Agency for Research on Cancer (IARC) has studied, ***only one*** has been deemed to "probably not" be carcinogenic to humans. *See* IARC, "Agents Classified by the *IARC Monographs*, Volumes 1-102, http://monographs.iarc.fr/ENG/Classification/ClassificationsGroupOrder.pdf (last accessed 01/30/2012). The failure of the City's prescribed poster, stickers, and the district court's approved "factsheet" to put the information about cell phone emissions in this context renders the statements misleading by omission and certainly not "factual."

HomeBusinessandEntertainment/CellPhones/ucm116331.htm (last accessed 01/30/2012).[4]

If the mere possibility that some hypothetical health risk might exist were a sufficient justification for compelling private speech, local, state or federal government agencies would be able to require individuals, businesses and other organizations to communicate opinions with which they strongly disagree about a wide range of products.

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[4] The City relies heavily on the "The Interphone Study," which was conducted by a consortium of researchers from 13 countries, and is the largest health-related case-control study of use of cell phones and head and neck tumors. As the National Cancer Institute states:

> Most published analyses from this study have shown no statistically significant increases in brain or central nervous system cancers related to higher amounts of cell phone use. One recent analysis showed a statistically significant, albeit modest, increase in the risk of glioma among the small proportion of study participants who spent the most total time on cell phone calls. However, the researchers considered this finding inconclusive because they felt that the amount of use reported by some respondents was unlikely and because the participants who reported lower levels of use appeared to have a reduced risk of brain cancer). Another recent study from the group found no relationship between brain tumor locations and regions of the brain that were exposed to the highest level of radiofrequency energy from cell phones.

National Cancer Institute, Factsheet, Cell Phones and Cancer Risk, http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones(last accessed 01/30/2012).

While the district court correctly found that the requirement that merchants display posters and affix stickers was unconstitutional, that court erred in authorizing the City to require distribution of a revised "factsheet."

In its opening brief, CTIA explains why, as a matter of both First Amendment and preemption law, the district court's decision is incorrect. We do not repeat those arguments. Rather, we focus on the compelled speech aspect of the First Amendment analysis, and the appropriateness and need for heightened scrutiny in this case.

Strict scrutiny is the appropriate standard to apply in this case because the Ordinance compels cell phone merchants to convey a message with which they disagree and which is neither factual nor non-controversial. The district court erred in not applying a strict scrutiny standard to all mandates of the Ordinance. The district court also erred by failing to apply heightened scrutiny to the compelled speech. Instead, the court allowed the City to compel private parties to convey a controversial government message based on, in the court's own words, "the mere unresolved possibility that" a product "may (or may not)" be harmful. ER (Oct. 27 Op.) 9-10. The limited exception to heightened

scrutiny – that the government can correct misleading commercial speech by adding "purely factual and uncontroversial" facts – is not applicable in this case. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1986).

Under strict scrutiny, or even a lower standard, however, the Ordinance does not comply with the First Amendment. The City has not shown that the Ordinance and the speech it compels was appropriately tailored to prevent or remediate any realistic health or safety risks.

STATEMENT OF FACTS[5]

The three main requirements of the Ordinance required retailers to: (1) "display in a prominent location visible to the public, within the retail store, an informational poster developed by the City's Department of the Environment" ("DEP") (sec. 1103(a)) (the prescribed size of the poster is 17 inches by 11 inches); (2) provide to every purchaser and any customer who requests it a free copy of an informational factsheet developed by the DEP (sec. 1103(b)); and (3) affix on phone display materials a DEP sticker that includes statements that cell phones emit radio frequency energy absorbed by the body and describing methods of reducing cell phone

[5] We merely highlight the salient facts, and refer the Court to the detailed Statement of Facts in CTIA's Opening Brief.

exposure (sec. 1103(c). The factsheet promulgated by DEP included graphic images purporting to show emissions from cell phones penetrating the head and pelvic regions of the human body, thereby conveying the message that cell phones are not safe.

The district court agreed with the plaintiff that the poster, the sticker and the "factsheet" required by the Ordinance violated the merchants' First Amendment rights.[6] However, instead of banning the constitutionally defective "factsheet," the district court undertook to "cure" the defects by rewriting the "factsheet" to comply with that court's own view of what the Constitution requires. The City accepted the judge's "suggestions" for new language and accordingly revised the "factsheet." The district court in turn determined that the City could start requiring cell phone retailers to begin disseminating the revised and "vetted" factsheet. The cross-appeals followed.

[6] Judge Alsup did not clearly articulate which level of constitutional scrutiny he was applying.

SUMMARY OF ARGUMENT

The Ordinance violates the First Amendment to the United States Constitution because it compels cell phone merchants to convey a message with which they disagree and which is neither factual nor non-controversial – that radiation from cell phones is dangerous.

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As the Supreme Court observed in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("*Rumsfeld*")

> Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943)[rest of citation omitted], we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley v. Maynard,* [citation omitted], we held unconstitutional another that required New Hampshire motorists to display the state motto – 'Live Free or Die' – on their license plates.

The district court correctly concluded that all three of the government mandated and prescribed communications (the large poster,

the stickers, and the handouts) contained non-factual, controversial and misleading opinions that were contrary to those held by cell phone merchants.

The Ordinance crosses the constitutional boundary no matter which level of First Amendment scrutiny is applied. Rather than simply telling consumers about its views of the potential health risks of cell phones, the City seeks to require those who sell cell phones to post "warnings" that express the City's opinion as to the health risks of cell phone use. If the City's position were sustained, any number of legal products that the City disfavors could be the next target of mandatory warnings. The courts have held repeatedly that such compelled warnings violate the First Amendment.

Where, as here, the government seeks to require a private citizen to communicate the government's message, the First Amendment inquiry is binary. Heightened scrutiny is the rule, not the exception, when the government forces a private party to speak. *See, e.g.*, *Pac. Gas & Elec. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9-17 (1985); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011). When the compelled speech is purely factual and uncontroversial and directed at preventing consumer deception,

however, a less rigorous standard for compelled commercial disclosures applies, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985). When, as here, the message is not purely factual and uncontroversial, the government's requirement that a private party speak must satisfy traditional strict constitutional scrutiny.

The Ordinance forces stores that lawfully sell cell phones to display or distribute warnings that cell phones are dangerous. That message is neither a factual nor an uncontroversial statement and it is most certainly one with which CTIA's members – and the relevant federal agencies – disagree.

A strict scrutiny analysis requires that the district court's ban on posters and stickers be affirmed and that the allowance of the revised "factsheet" be reversed. Even if the City's warnings were warranted, the speech by cell phone sellers mandated by the Ordinance is not the least restrictive means of achieving a compelling government interest.

Even under the *Central Hudson* standard, the district court's disapproval of the posters and stickers should be affirmed, while that court's revision of the "factsheet" and the City's adoption of the revised language must be reversed because, among other reasons, the regulation

is not narrowly tailored to advance a substantial public interest. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (restrictions on non-misleading commercial speech regarding lawful activity must withstand intermediate scrutiny – that is, they must "directly advanc[e]" a substantial governmental interest and be "n[o] more extensive than is necessary to serve that interest.") The City has available many alternatives to accomplish its goal of informing the public of the City's concerns about cell phones that do not compel private parties to speak, including the City purchasing its own public health advertising time or space.

The Ordinance also fails the least searching level of First Amendment scrutiny under *Zauderer* because the speech it compels is neither purely factual and uncontroversial nor directed at preventing consumer deception.

ARGUMENT

I. THE ORDINANCE FAILS ANY FIRST AMENDMENT TEST.

A. The Traditional First Amendment Strict Scrutiny Standard Should Apply.

The Ordinance violates the First Amendment's guarantee of "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. at 714 (1977). The right not to speak is as protected as the right to speak. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (striking down state school requirement that all children must salute the American flag).[7]

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[7] The City cites *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) for the proposition that only compelled expressions of belief are proscribed by the First Amendment. The City seriously misconstrues the context, reasoning and holding of *Rumsfeld*. In that case, an association of law schools and law faculties brought suit challenging the constitutionality of the Solomon Amendment, a law which required the Department of Defense to deny federal funding to institutions of higher education that did not offer military job recruiters the same access to its campus and students that the university provided to non-military job recruiters receiving the most favorable access. The legislation gave universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forego certain federal funds. 547 U.S. at 58.

The Court in *Rumsfeld* characterized the Solomon Amendment as "only ***incidentally*** affect[ing] expression." *Rumsfeld,* 547 U.S. at 70 (emphasis supplied). The sort of recruiting assistance at issue, such as sending e-mails or posting notices on bulletin boards on an employer's behalf, is a

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The government may not force persons, including businesses, to use their private property to communicate a message that is not wholly factual and uncontroversial, without passing strict scrutiny. *See Wooley v. Maynard*, at 715; *see also Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2nd Cir. 2011).[8]

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[7](...continued)
far cry from the compelled speech in the case at bar. The Solomon Amendment did not compel schools to speak the government's message, nor was the conduct regulated by the Solomon Amendment inherently expressive conduct that would implicate First Amendment concerns. As the Supreme Court explained, "The Solomon Amendment neither limits what law schools may say nor requires them to say anything." 547 U.S. at 60.) The Solomon Amendment, unlike the Ordinance at issue in this cases, did not dictate the content of the speech at all, and the conduct was "compelled" only if, and to the extent, the school provided assistance to other recruiters. *Id.*, 547 U.S. at 62. The Ordinance in this case, by contrast, explicitly does involve government dictated speech the content of which is dictated by the City for everyone who sells cell phones.

[8] "[C]ompelled statements of fact, like compelled statements of opinion, are subject to First Amendment scrutiny." *Rumsfeld*, 547 U.S. at 62. However, whether a compelled statement is one of fact or one of opinion may affect the degree of First Amendment scrutiny applied. As discussed *infra*, a compelled commercial disclosure is either purely factual and uncontroversial and directed at preventing consumer deception, in which case the standard for compelled commercial disclosures articulated in *Zauderer* applies, or it is not, in which case strict scrutiny applies. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

The Ordinance requires cell phone merchants to produce and distribute in their stores leaflets containing controversial and non-factual (and, we submit, purely speculative) opinions as to the risks of cell phone use.[9] The City urges this Court to apply a relaxed standard of First Amendment review – the *Zauderer* standard – which is applicable to purely factual compelled commercial disclosures that are required to avoid misleading or deceiving the public.

Just last year, however, the Supreme Court twice rejected similar claims that the government is entitled to greater latitude to affect the free speech interests of those who make or sell a disfavored product under the guise of seeking to protect public health, and that less demanding First Amendment scrutiny is appropriate. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (striking down a California law that banned the sale or rental of violent video games to minors and holding that preventing youth violence is not enough to exempt sales restrictions on violent video games from strict scrutiny); *Sorrell v. IMS Health Inc.*, 131

[9] The government may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, supra, Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980).

S.Ct. 2653 (2011) (improving physicians' decisions does not protect restrictions on commercial speech – in that case the collection and dissemination of aggregated pharmaceutical prescription data – from heightened scrutiny). Good intentions or even efforts to serve the public interest do not allow the government to regulate what businesses must or may say, without satisfying rigorous First Amendment review. This Court should reject the City's arguments to the contrary and require the Ordinance to withstand strict scrutiny.

Restrictions involving commercial speech that is not itself deceptive must be narrowly crafted to serve the State's purposes. *See Central Hudson Gas & Electric,* 447 U.S. at 565, 569-571; *Zauderer* at 644. Compelled disclosures are excepted from strict scrutiny only if they are "purely factual and uncontroversial" and "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. A government may, in order to correct misleading messages, require disclosure of purely noncontroversial facts under a lower standard, *id*. at 651, but heightened scrutiny always applies where a government requires a private party to publicize the government's opinion. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (striking down requirement

that utility include third-party material in billing envelopes sent to customers). Even if the compelled speech is purely factual and non-controversial, such compelled disclosures will be struck down if they are "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651.

Zauderer upheld the imposition of sanctions against an attorney under a rule of professional conduct that required advertisements for contingency-fee services to disclose that losing clients might be responsible for litigation fees and costs. *Zauderer*, 471 U.S. at 650-653. The Court reasoned that "because disclosure requirements trench much more narrowly on the advertiser's interests than do flat prohibitions on speech, warning[s] or disclaimer[s] might be appropriately required . . . *in order to dissipate the possibility of consumer confusion or deception*." 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982) (brackets and ellipses in original, emphasis supplied)). There is no claim here that the City's goal is to prevent consumer confusion or deception.

Zauderer does not stand for the proposition that the government can constitutionally compel the use of a scripted disclaimer whenever it claims

to have an interest in preventing deception, let alone merely educating consumers. *Zauderer*, 471 U.S. at 650-653.[10]

The speech required under the Ordinance stands in stark contrast to factual warnings that have been upheld in *Zauderer* and later cases applying it in situations in which the required disclosures clarify issues as to which there were concerns about consumer confusion or deception. In *Zauderer*, the Supreme Court upheld a mandate that advertising attorneys disclose that losing clients may be responsible for certain fees and costs. 471 U.S. at 652–53. In *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 130 S.Ct. 1324 (2010), the Court upheld a mandate that attorney advertisements disclose whether the law firm functioned as a debt relief agency, because the words "entail[ed] only an accurate statement identifying the advertiser's legal status and the character of the assistance provided." 130 S. Ct. at 1339–40.[11] In the case at bar, there is

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[10] The regulation in *Zauderer* did not mandate the specific form or text of the disclosure. Even under *Zauderer*'s relaxed scrutiny, the Supreme Court has refused to "presumptively endorse[ ]" laws requiring the use of "government-scripted disclaimers" in commercial advertising. *See Borgner v. Florida Bd. of Dentistry,* 537 U.S. 1080 (2002) (Thomas, J., dissenting from denial of certiorari).

[11] We also note the historic role of the state in regulating attorney conduct and disciplining attorneys and the special relationship of trust

(continued...)

no claim by the City that cell phone merchants have promoted consumer confusion or deception.

The City argues that individual statements in the required posters, stickers and "factsheet" are purely factual. (City Opening Brief at 48 - 51) This is not the case, because the statements are based on nothing more than opinion or conjecture, the unfounded assumption that cell phone radio frequency emissions are dangerous.

The Seventh Circuit's decision in *Entertainment Software* is instructive of the Ordinance's constitutional flaws. There, the court invalidated under strict scrutiny an Illinois requirement that "sexually explicit" games bear an "18 or over" sticker. The court applied strict scrutiny because the compelled message conveyed not fact, but the State's subjective judgment that the game was "sexually explicit" and should not be used by those under 18. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652-53 (7th Cir. 2006). Here, the posters, stickers and handouts express the City's subjective judgment that cell phone shoppers are at risk and need to take precautions. The government may express that

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[11](...continued)
between attorneys and clients.

viewpoint in multiple ways, but compelling private parties to do so on their own property is not one of them.

The City can make no convincing argument that the Ordinance can survive demanding standards of constitutional scrutiny. If this Court decides that strict scrutiny (or the *Central Hudson* test) applies to the Ordinance as a matter of law, it should declare the Ordinance unconstitutional in all respects and enjoin its enforcement.[12]

The City attempts to exempt the Ordinance from First Amendment scrutiny by implicitly invoking the "government speech" doctrine, repeatedly asserting that the speech the Ordinance requires is clearly attributable to the City, and not the merchants. (City Opening Brief at 48).

It is true that the First Amendment "does not regulate government speech." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009). The City is therefore free to post cell phone radiation risk posters or billboards on its own property, or to purchase advertising space to express its own views. But the Ordinance requires that a prescribed message be

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[12] Even if the Court determines that *Zauderer* applies, the result would be the same, as discussed *infra*.

posted or distributed on the private property of those very persons who most object to the message.[13]

Government-compelled speech by a private person is not government speech. The Supreme Court's decision in *Wooley* drives home this point. The State of New Hampshire enacted a law that required all license plates to bear the state motto "Live Free or Die." New Hampshire argued that the First Amendment did not apply because the motto would be attributed to the State, not to private citizens. The Supreme Court rejected the notion that the license plate constituted the State's speech. As the Court explained, "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological

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[13] "Citizens may challenge compelled support of private speech," but they have no First Amendment right not to fund government speech, *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 562 (2005). *See also R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 911 at 1128 (9th Cir. 2005) ("advertisements that criticize the tobacco industry" funded by a tobacco tax treated as government speech do not violate tobacco companies' First Amendment rights); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000) (statements on bulletin boards that "were the property and responsibility" of a public high school are government speech). For speech to be government speech, however, it must occur on government property or be funded by the expenditure of government funds. *See Summum*, 129 S. Ct. at 1129. Neither condition is satisfied here.

message – or suffer a penalty." *Wooley*, 430 U.S. at 715.[14] The Supreme Court has since extended *Wooley* beyond "compelled confessions of ideology" to "statements of fact the speaker would rather avoid." *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995).

B. The Ordinance Fails Strict Scrutiny.

The City cannot successfully argue that the Ordinance satisfies strict scrutiny. Under strict scrutiny review, the Ordinance must be "justified by a compelling government interest" and "narrowly drawn to serve that interest." *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). If the City could achieve its interest through an alternative that is non-restrictive or less restrictive of speech, then it must do so. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

[14] The City's attempt to distinguish *Wooley* is not persuasive. The City's argument that a mandated sign or handout with the government's logo is likely to be attributed to the government and is therefore constitutional was advanced by Justices Rehnquist and Blackmun in dissent in *Wooley*. 430 U.S. at 719-22 (Rehnquist, J., dissenting). Here, as in *Wooley*, the Ordinance forces cell phone merchants to use their private property as a "billboard" for the City's message.

1. The Ordinance does not serve a constitutionally compelling interest.

The City has not articulated a compelling interest, other than the usual "public health" rubric. (City Opening Brief at 12 - 13). The Supreme Court has rejected such a broad appeal to public health interests as justification for burdening speech. *See Sorrell*, 131 S.Ct. 2653, at 2670 . In *Sorrell*, Vermont sought to burden a particular type of speech between pharmacies and pharmaceutical companies, allegedly to improve the functioning of the medical system and reduce expenditures for health care. The Court explained that "[w]hile Vermont's stated policy goals may be proper, [the state] does not advance them in a permissible way . . . [because t]he State seeks to achieve its policy objectives through the indirect means of restraining certain speech." *Id*. The government may not "burden the speech of others in order to tilt public debate in a preferred direction." *Id*. at 2671. While *Sorrell* is not a compelled speech case, its holding should, under *Wooley*, apply equally to the right not to speak.[15]

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[15] While the majority in *Sorrell* did not explicitly overrule *Central Hudson*, the majority opinion may evidence a shift in First Amendment analysis by carving out, in commercial speech cases, content or speaker-based restrictions that receive greater scrutiny than under *Central*

(continued...)

In this case, the City unambiguously wishes to "tilt [the] public debate" regarding cell phones in a particular direction to achieve public health benefits. Otherwise there would be no rationale for the Ordinance at all. *Sorrell* makes clear that the City may not do so by requiring cell phone retailers to convey the City's message.

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[15](...continued)
Hudson. *Sorrell*, 131 S.Ct. 2653 , at 2677. The minority opinion by Justice Breyer characterizes the majority opinion as undermining the historical differentiation between commercial speech and so-called "core" First Amendment speech. *Sorrell*, *id*. at 2677. The decision in *Sorrell* may signal a move by the Court towards Justice Thomas' position that commercial speech should not be treated differently from core speech. *See* Justice Thomas' concurrence in *Milavetz*, 130 S.Ct. 1324 (2010).

2. The Ordinance is not narrowly tailored.

The City cannot demonstrate that forcing private retailers to distribute the "factsheets" is narrowly tailored to the prevention of "risky" cell phone use.[16, 17]

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[16] In particular, the mandated posters, which the district court found unconstitutional, "literally fail[]" narrow tailoring review because of their size and format. *See Entm't Software*, 469 F.3d at 652. They would be visible throughout the store. The posters would occupy valuable retail space, restricting advertising and promotion of cell phones and other products. They impose a substantial burden on merchants' ability to use their store space in ways they find most effective. The Seventh Circuit invalidated the characters "18" in the corner of a package because they were too big. *Entm't Software*, 469 F.3d at 652-53. The Ordinance's required posters are far more intrusive.

[17] The City disingenuously attempts to minimize the intrusiveness of the compelled speech by arguing that the City's factsheet is also a reasonable response to the problem because "[The City] 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" and that the warnings will prompt customers to spend more money at the cell phone store – for example by buying "a headset that allows [consumers] to keep their phones away from their heads and bodies" and thus the City knows what is best not only for consumers, but for the merchants as well. City Opening Brief at 20, n. 4. There are two obvious flaws in this argument: first, the mandated communications are designed to make customers concerned cell phones are dangerous, and thus to provide an incentive to keep the cell phone away from their head or body; second, if cell phone sellers thought these warnings were a good way to boost their sales, they would do it without the City's requirement. What is objectionable is the City's "We know what's best for you and we will make you do it" approach.

Indeed, the City has available to it numerous alternatives to further its interest in curbing cell phone use or to encourage more cautious use of cell phones, that do not trammel free speech rights. The City could disseminate advertisements in the public media, using its own funds, property, or other resources, *see, e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562–65 (2005); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 911 (9th Cir. 2005), and/or use the myriad of pervasive and inexpensive "online" media outlets. While purchasing advertising space is more expensive than confiscating private property, no court applying strict scrutiny ever has sacrificed constitutional values in favor of the government's balance sheet.

The City has chosen to try to compel non-factual and controversial speech, without any legally compelling interest and despite having numerous alternatives to compelled speech. That does not satisfy strict scrutiny.

C. *Central Hudson* Would Not Save the Ordinance.

In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the Supreme Court struck down a regulation that banned promotional advertising by a utility, and in so doing the Court

established criteria for evaluating the constitutionality of commercial speech restrictions. To regulate non-misleading commercial speech regarding lawful activity, the government must establish that (1) there is a substantial state interest, (2) the regulation directly advances that state interest, and (3) the regulation is narrowly tailored to advance that substantial interest. *Central Hudson* demands heightened, but not strict, scrutiny.[18]

Thus, even under the *Central Hudson* standard, the City must show that the Ordinance directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. *Central Hudson*, 447 U. S. 557, 566 (1980)*; Sorrell*, 131 S.Ct. 2653 at 2667*; see also Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U. S. 469, 480-481 (1989). There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 480 (internal quotation marks omitted). Central Hudson is no less demanding with respect to narrow tailoring than traditional First Amendment strict scrutiny. 447 U.S. at 569-70

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[18] In *Sorrell*, the Supreme Court made it clear that the First Amendment requires "heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell*, 131 S.Ct. 2653 at 2664 and "[c]ommercial speech is no exception." *Id*. at 2664.

(restrictions on commercial speech must be "no more extensive than necessary to further the State's interest").

The distinction, if any, between "compelling" interest and "substantial" interest is not relevant to this case because in *Sorrell* the Supreme Court rejected broad public health objectives as a "substantial state interest" that would justify restrictions on commercial speech under *Central Hudson*. *Sorrell*, 131 S.Ct. 2653 , at 2670. The City has proffered no interest in this case other than an amorphous and hypothetical claim that cell phones may be injurious to "public health."[19] This interest is neither compelling nor substantial. As the Supreme Court explained in *Sorrell*, it is often unnecessary to decide between strict scrutiny and *Central Hudson* review, because, as is the case here, speech restrictions frequently fail both tests. *Sorrell*, 131 S.Ct. 2653, at 2667.

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[19] The speculative nature of the City's concern is well illustrated by its own brief, *e.g.*: "*if it turns out that cell phone use does indeed cause brain cancer*, serious public health consequences would result." City's Opening Brief at 1. The City may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S., at 569.

D. Even Under *Zauderer* the Ordinance Is Unjustified and Unduly Burdensome and Does Not Pass First Amendment Scrutiny.

Even if this Court were to determine that the *Zauderer* standard applies, CTIA would prevail as to all of the forms of expression mandated by the Ordinance. Compelled purely factual and uncontroversial disclosures violate the First Amendment if they are unjustified and unduly burdensome. *See Zauderer*, 471 U.S. at 651; *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-47 (1994) (striking down disclosure of "reasonable information" when the state relied on the rote invocation of the words "potentially misleading" rather than making evidence-based findings of fact to justify the proposed restriction). While not as demanding as strict scrutiny or the *Central Hudson* test, under *Zauderer* and its progeny the government still bears the burden of proving that the compelled disclosure is justified and not unduly burdensome. *See Ibanez*, 512 U.S. at 146; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

The Supreme Court has not endorsed laws requiring the use of "government-scripted disclaimers" in commercial advertising. *Zauderer* upheld the imposition of sanctions against an attorney under a rule of

professional conduct that required advertisements for contingency-fee services to disclose that losing clients might be responsible for litigation fees and costs. *See* 471 U.S. at 650-653. Zauderer's advertisement was found to be misleading on its face, and the regulation upheld in that case did not mandate a specific form or text of the disclosure, as the Ordinance here does. *Ibid.* *Zauderer* does not stand for the proposition that the government can constitutionally turn private persons into ventriloquists' dummies, and compel the use of a scripted advertisement or disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake.[20]

Courts applying *Zauderer* have required evidence from the government that there is a problem to be corrected. *See, e.g., Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). There is no evidence in this case that there is any consumer misperception

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[20] Regulations aimed at false or misleading advertisements are permissible only where "the particular advertising is *inherently likely* to deceive or where the record indicates that a particular form or method of advertising has *in fact* been deceptive." *In re R.M.J.,* 455 U.S. 191, 202 (1982) (emphasis added). A disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, are deceptive or likely to deceive. *See R.M.J.*, *id.*, at 202; *Ibanez,* 512 U.S. 136, 143, 146-147 (1994). The City in this case is not claiming that it is attempting to correct or prophylactically prevent false advertising.

to correct or that cell phone use by adults or children exceeds any rational threshold. A bare assertion by the government that a disclosure requirement is intended to prevent consumer deception, standing alone, is not sufficient to uphold the requirement as applied to all speech that falls within its sweep. But even a claim of consumer deception is notably absent in this case.

CONCLUSION

The Court should affirm the portion of the decision below granting CTIA's motion for preliminary injunction as to the poster and sticker requirements of the Ordinance, reverse the portion of the decision below denying CTIA's motion for preliminary injunction as to the revised "factsheet" and order the entry of a preliminary injunction prohibiting the City from requiring retailers to disseminate any of the materials mandated by the Ordinance.

February 1, 2012

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to 9th Circuit Rules 28-4,29-2(c)(2) and (3), 32-2 or 32-4 for Case Numbers 11-17707, 11-17773

I certify that this brief complies with the length limits set forth at Ninth Circuit Rule 32-4, and contains **6,239** words. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2012, I electronically filed the foregoing brief of *Amicus Curiae* The National Association of Manufacturers with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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

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