Robert A. Mittelstaedt (#60359)
Craig E. Stewart (#129530)
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Fax: (415) 875-5700
ramittelstaedt@jonesday.com

Andrew G. McBride (pro hac vice)
Joshua S. Turner (pro hac vice)
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: (202)719-7000
Fax: (202) 719-7049
amcbride@wileyrein.com

Jane F. Thorpe (pro hac vice)
Scott A. Elder (pro hac vice)
ALSTON & BIRD LLP
1201 West Peachtree St., NW
Atlanta, Georgia 30309-3424
Telephone: (404) 881-7592
Fax: (404) 253-8875
jane.thorpe@alston.com

Seamus C. Duffy (pro hac vice)
Susan M. Roach (pro hac vice)
DRINKER BIDDLE & REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103-6996
Telephone: (215) 988-2700
Fax: (215) 988-2757
seamus.duffy@dbr.com

Terrence J. Dee (pro hac vice)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2099
Fax: (312) 862-2200
tdee@kirkland.com

Attorneys for Plaintiff
CTIA – The Wireless Association®

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CTIA - THE WIRELESS ASSOCIATION®,

Plaintiff,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,

Defendant.

Case No. 3:10-cv-03224 WHA

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Date: October 20, 2011
Time: 8:00 a.m.
Place: Courtroom 9, 19th Floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on October 20, 2011, at 8:00 A.M., Plaintiff CTIA–The Wireless Association® ("CTIA") will bring on for hearing this motion for preliminary injunction.

RELIEF SOUGHT

CTIA seeks a preliminary injunction prohibiting the City and County of San Francisco ("City") from enforcing the cell phone "Right to Know Ordinance" ("Ordinance"), to prevent imminent and irreparable injury to CTIA's members and harm to the public. The Ordinance violates the First Amendment and the Supremacy Clause of the U.S. Constitution. Preliminary relief is needed to afford this Court time to decide the important issues raised by the Ordinance, which is the first of its kind and with which Plaintiffs must comply on October 25.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Federal Communications Commission ("FCC"), acting at the direction of Congress, has established nationwide, comprehensive rules designed to ensure that all cell phones sold in the United States are safe for consumer use. These rules contain a substantial safety factor. The FCC set them at 1/50th of the point at which radiofrequency ("RF") energy begins to cause *any* known biological effects. The FCC struck a deliberate balance, taking into account both the need to safeguard the public from possible RF health effects and the need to encourage the development of a robust, nationwide telecommunications system—a system that has demonstrable public health and safety benefits of its own. By contrast, the City has concluded that the federal standard is inadequate to protect the public. As a result, it adopted the Ordinance and created mandatory display materials for use in retail stores, which warn consumers of what the City believes are health risks from using FCC-compliant cell phones. Among other things, the City requires retailers to prominently post and distribute alarmist graphics and warnings that consumers can and should "**reduce your exposure**" to cell phone emissions, "**Avoid[] cell phones**" in certain areas, and "**Limit[] cell phone use by children**."

The City's Ordinance (Exh. A hereto), regulations (Exh. B) and the associated Display Materials (Exhs. C-E) are unconstitutional for two reasons, either of which independently justifies

entry of a preliminary injunction. *First*, they violate the First Amendment by compelling CTIA members to disseminate the City's opinion about the safety of cell phones and the inadequacy of federal RF rules via one of CTIA members' most valuable communication channels—their retail stores. The City is not simply mandating the disclosure of uncontroversial factual information. Quite the opposite. The City's conclusion that FCC-compliant cell phones are dangerous is well outside the scientific mainstream, highly controversial, and in conflict with the statements and orders of the federal government. An RF science expert has reviewed the materials and determined they are misleading, and an expert in marketing and consumer perceptions finds that they "convey a strong warning to consumers about the safety of cellular telephones."[1] The City bears a heavy burden of justifying its deep intrusion into CTIA members' freedom of speech, and the Ordinance and Display Materials cannot survive any level of First Amendment scrutiny.

Second, the City's regime is preempted. Both the FCC and the courts have repeatedly recognized that the FCC's federal RF safety standards reflect a congressionally mandated balance between public health and safety, on the one hand, and the promotion of wireless services, on the other. The City's Ordinance and Display Materials alter that balance. They discourage use by publishing alarmist graphics and text to advise the public that there are dangers from mobile phone use, by indicating that consumers should be concerned about "exposure" to RF energy, and by "recommend[ing]" steps to reduce exposure, including limiting children's use of cell phones, holding the phone away from the body, avoiding cell phones entirely in certain areas, and turning the phone off when not in use. The City's attempt to frighten consumers into avoiding the use of FCC-approved cell phones impinges directly on the balance set by the FCC and is preempted.

The legal standard for the issuance of a preliminary injunction is easily met. CTIA is likely to succeed on the merits of its constitutional claims. At a minimum, the Ordinance, which the City touts as the first of its kind in the Nation, clearly raises substantial legal questions. Every other factor sharply tips in one direction: maintenance of the status quo. The irreparable injury

[1] Decl. of Dr. David Stewart, Exh. 1, Supplemental Report ¶ 17 ("Stewart Supp."); *see* Decl. of Ronald C. Petersen, Exh. 1, Preliminary Expert Report ("Petersen Prelim.").

factor overwhelmingly favors CTIA. The imminent First Amendment harms from the City's regime are irreparable as a matter of law, and the damage to CTIA members' business reputations and consumer goodwill from disseminating these alarmist warnings can never be repaired. The balance of harms also tips decidedly toward CTIA, because the City cannot articulate any harm to it from the short delay of enforcement needed to litigate this case properly. The original Ordinance provided many months for retailers to come into compliance, and the City liberally granted extensions of the deadline as it tinkered with and ultimately rewrote the Ordinance and Display Materials. Now, without explanation, the City has cut the time between adoption of the materials and enforcement to 25 days, placing the new compliance date several months *before* the date by which all retailers would have had to comply with the original Ordinance.[2] This artificial deadline should not insulate the Ordinance and Display Materials from judicial review.

Finally, the public interest factor tilts heavily in favor of injunctive relief because the public interest will be harmed by the City's misleading warnings and its effort to discourage cell phone use. Who knows how many people will forgo wireless communications and not be able to readily call 911 or receive emergency communications or obtain the full use of their wireless devices due to the City's baseless warning about illusory dangers of using cell phones and its recommendation to avoid cell phones in certain areas and turn them off. Once the warnings are disseminated, the damage cannot be undone. The Court should stay enforcement of the Ordinance to permit orderly litigation of its constitutionality *before* it goes into effect.

BACKGROUND

In 1996, at the direction of Congress, the FCC adopted uniform, nationwide, and comprehensive rules governing the RF emissions from cell phones. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123 (1996) ("*RF Order I*").

[2] The short compliance period precludes the introduction here of completed expert studies on the new Display Materials. Earlier schedules included a stay of compliance and accommodated expert testimony, including a consumer survey that conclusively demonstrated the misleading nature of the City's earlier regime. CTIA intends to similarly test the City's newest requirements with another consumer survey, *see* Stewart Supp. ¶ 17, which can only be done with the protection and time afforded by a preliminary injunction.

These rules were adopted after extensive public comment, review of exhaustive scientific studies, and close consultation with other expert federal agencies and expert scientific groups. The rules were supported by every federal health and safety agency and they "represent the best scientific thought and are sufficient to protect the public health," *id.* at 15184 (¶ 168). The cell phone standards contain a substantial safety factor, having been set at "one-fiftieth of the point at which RF energy begins to cause ***any*** unhealthful thermal effect."[3] The FCC rejected requests to make its rules even more conservative, explaining that its safety standards amply protect the public and rejecting the need to account for unsupported scientific theories. *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 F.C.C.R. 13494, 13504-08 (¶¶ 31-39) (1997) ("*RF Order II*").

The FCC's rules were upheld twice in federal Courts of Appeals against claims that they are insufficient. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000); *see also EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004). In light of this federal oversight, the FCC has repeatedly stated—and CTIA and its members agree—that all cell phones lawfully sold in the U.S. "are safe for use."[4] Because it set the standard with such a high measure of protection, and because cell phones are safe, the FCC "does not endorse the need" for consumers to take "measures to further reduce exposure to RF energy."[5] The FDA has likewise made clear that "[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure,

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[3] Brief for Respondents United States and FCC at 3 n.2, *Cellular Phone Taskforce v. FCC*, No. 00-393, 2000 WL 33999532 (Dec. 4, 2000) (emphasis added) ("FCC *Cellular Phone* Br."); *see also* FCC, Office of Engineering and Technology, OET Bulletin 56, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields* at 13, n.10 (4th ed. 1999) (http://www.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet56/oet56e4.pdf) ("OET Bulletin 56"). The general public, "[u]nlike the work force," is likely to be less informed and "have less control than workers over exposure to RF field," so "[t]o take into account those differences between occupational and general exposure, NCRP (and ANSI) set an exposure limit for members of the general public of one-fifth of the occupational exposure, . . . which is 1/50th of the adverse effects threshold." Br. of Respondents FCC and United States, *Cellular Phone Task Force v. FCC*, No. 97-4328, 1998 WL 34097631 (2d Cir. July 6, 1998).

[4] Brief of the United States and the FCC as Amicus Curiae at 15-16, *Murray v. Motorola*, No. 07-cv-1074, 2008 WL 7825518 (D.C. Apr. 8, 2008) ("FCC *Murray* Br.").

[5] FCC, Guide, *Wireless Devices and Health Concerns* (emphasis removed) (http://www.fcc.gov/guides/ wireless-devices-and-health-concerns) ("FCC, *Wireless Devices and Health Concerns*").

including children and teenagers"[6] and that "[t]he weight of scientific evidence has not linked cell phones with any health problems."[7] And when courts have examined whether there is any scientifically credible evidence that cell phones can cause adverse health effects, such as cancer, they have emphatically concluded that there is not.[8] The FCC has repeatedly emphasized that its rules strike the appropriate balance between protecting public health and encouraging the development of a robust, nationwide communications system. The FCC reiterated this position in an amicus brief filed with the Supreme Court this Summer.

The City disagrees with the federal government's conclusions and the balance it struck. The City's view is that the FCC's rules are not adequate to protect public health, and that consumers should reduce exposure to RF emissions from FCC-compliant devices. *See* Second Amended Complaint ("SAC"), ¶¶ 62-77, 90-95 (filed Oct. 4, 2011). As a result, the City passed the Ordinance at issue in this case and enacted implementing regulations that compel cell phone retailers (including CTIA members) to communicate the City's message about alleged dangers posed by using cell phones and the inadequacy of the federal standard.[9] It requires retailers to (1) "display in a prominent location visible to the public, within the retail store," a "poster," (2) disseminate a "factsheet" to any person that requests one and all persons who purchase a phone, and (3) display "statements" in connection with phones on display. Ordinance § 1103.

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

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

[8] *See, e.g.*, *Newman v. Motorola, Inc.*, 218 F. Supp. 2d 769, 783 (D. Md. 2002), *aff'd*, 78 Fed. Appx. 292 (4th Cir. 2003); *see also Reynard v. NEC*, 887 F. Supp. 1500 (M.D. Fla. 1995); *Ward v. Motorola, Inc.*, 478 S.E.2d 465 (Ga. Ct. App. 1996); *Kane v. Motorola*, 779 N.E.2d 302 (Ill. Ct. App. 2002).

[9] As explained fully in the SAC, the original Ordinance adopted a disclosure regime that led consumers to believe that they could – and should – reduce risks by purchasing a phone with a low Specific Absorption Rate ("SAR"). After it was unable to rebut CTIA's expert report showing there is no biologically significant difference between SAR values at or below the FCC limit, the City abandoned that and elected to simply warn consumers to be wary of cell phone use.

The mandatory display materials leave no doubt that the City wants the public to conclude that cell phones are dangerous. The Display Materials depict graphics of cell phones emitting bright red, orange, and yellow rings that penetrate into the head and mid-section of the body. They warn in large, often bold statements that consumers can and should "**limit exposure**," "**reduce your exposure,**" "**Limit[] cell phone use by children,**" and "**Keep distance between your phone and body**" because "**Cell Phones Emit Radio-frequency Energy**," "**Your head and body absorb RF Energy from cell phones,"** and RF energy is "**a possible carcinogen.**" The materials emphasize "**potential health effects of mobile phone use**," and then "recommend" that consumers concerned by the very dangers that the City has just identified take a series of steps to minimize "exposure." The materials send the obvious and intended message that cell phones are hazardous, that their use should be avoided, and that the City has recommendations to accomplish that goal.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction "'must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Jackmon v. America's Servicing Co.*, 2011 WL 3667478 (N.D. Cal. Aug. 22, 2011). Under the Ninth Circuit's "sliding scale" approach, a party seeking an injunction need only demonstrate "'that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor,'" if some showing is also made on the remaining factors. *Id.* (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)).

ARGUMENT

I. THE ORDINANCE COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

A. The City Bears the Burden of Justifying Its Infringement of CTIA's Members' First Amendment Rights.

The City's Ordinance directly infringes upon the core First Amendment rights of CTIA's members. 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). A law that "requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). This is true when the government compels a utility to include a third party's newsletter in its billing envelope, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1985), forces a person to carry the state's message on their car license plate, *Wooley*, 430 U.S. at 705, or requires a newspaper to publish replies to editorials, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), and it is equally true here. The City's regime is content-based regulation in its purest form. *See, e.g.*, *Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [and is therefore] a content-based regulation of speech.").

If permitted to take effect, the City's mandated speech regime will require CTIA members to use their private property to advance and disseminate the City's chosen message and opinions. The Ordinance conscripts the limited and valuable space in CTIA members' retail stores, directly adjacent to products being sold. These are critical locations for CTIA members' communications. *See* Declaration of Mr. D'Ambrosio (Verizon Wireless) ¶¶ 13-18 (describing importance of stores and product displays). Retailers carefully design the layout of and materials in these locations to communicate critical product and service information, *id.* ¶¶ 17-19, as well as communications on other matters, such as social and environmental policy unrelated to the sale of phones or service.[10]

The City will compel retailers to use this vital space to prominently display and disseminate "posters," "informational statements" and "factsheets" that convey the City's message of a health risk. This message and its subcomponents are created by the City, communicate its views, and invite inferences that are grossly misleading. There is no doubt these warnings are content-based and intended to promote the particular (and highly controversial) impression that cell phones and their use are to be limited or avoided, and to

[10] *See* D'Ambrosio Dec. ¶¶ 20-22 (describing the HopeLine program that provides refurbished cell phones to domestic violence victims, and environmental initiatives, like its "LEED Gold" certification, promoted through the store).

provide government-endorsed recommendations to reduce the putative danger. Nor is the content of the Display Materials an accident. The Ordinance's legislative findings, *see* SAC ¶¶ 62-77, 90-95, make clear that its purpose is to convey the City's view that existing federal safety standards are insufficient to protect public health, and that consumers should take precautions when using cell phones notwithstanding the fact that the FCC has determined phones are safe and that such precautions are unnecessary. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (noting that "a statute's stated purpose may also be considered" to determine whether it is content-based). CTIA's members vehemently disagree with these views.

Even if the Display Materials could be seen as reporting only certain "facts" selected by the City to spin its message, rather than the City's opinions, they still run afoul of the Supreme Court's decision in *Riley*. *See Riley*, 487 U.S. at 797-98 ("either form of compulsion" that is, compelled statements of "opinion" or "fact[,]" "burdens protected speech"). Such compelled speech has the negative effect of ousting other speech the private party might wish to reserve for that location. *See* D'Ambrosio Dec. ¶¶ 24-26. It changes the "agenda," by inserting the government's chosen message and "recommendations" into the conversation. And it calls for a response, which is another means by which the government dictates the terms of debate in violation of the First Amendment. As Justice Powell wrote in *PG&E*: "Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *PG&E*, 475 U.S. at 9.

Once a party makes a "colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, . . . the burden shifts to the government to justify" the infringement. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 474 (2007). But there is no "tie" here. The City simply cannot show, as it must, that the interest it seeks to further is "real, not merely conjectural," and that the Ordinance advances that interest in a "direct and material way." *Turner*, 512 U.S. at 664.

Because the Ordinance is a content-based regulation of speech, strict scrutiny applies as in *PG&E* and *Riley*.[11] To pass muster, the government must establish a compelling state interest, and must show that its regulation is narrowly tailored to serve that interest. *PG&E*, 475 U.S. at 19. As discussed below, the City cannot meet either prong of the test. Indeed, the Ordinance is invalid under any level of First Amendment scrutiny.

B. The Ordinance and Display Materials Cannot Satisfy Heightened Scrutiny.

The City cannot point to any valid state interest, let alone a "compelling" one. While the text of the Ordinance states that the City is acting to achieve a "public health purpose," Ordinance § 1.8, this alleged City-directed "public health purpose" does not exist. At Congress's direction, the FCC has worked with federal health and safety agencies to adopt and maintain nationwide health and safety standards for energy emissions from cell phones, and continues to do so. The FCC has made clear that cell phones "are safe for use,"[12] and that the federal limits "represent the best scientific thought and are sufficient to protect the public health," *RF Order I*, 11 F.C.C.R. at 15184 (¶ 168). The FDA agrees that "[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure, including children and teenagers."[13] The FCC "does not endorse the need for" consumers to take "measures to further reduce exposure to RF energy."[14]

Well before the City passed the Ordinance, the FCC, the FDA, and two federal Courts of Appeals made clear that, in their judgment, the FCC's standards are sufficient to protect public safety. Thus, any compelling interest in health and safety regarding RF emissions has already been vindicated on the federal level; a City interest in adding to the federal protections is far from compelling, if it exists at all. *See, e.g.*, *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67

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[11] The City emphasizes that the poster and "factsheet" convey its opinion and not retailers'. But the City's disclaimer that the poster and "factsheet" were "prepared solely by the City" and its clarification that the "recommend[ations]" are those of the City do not immunize the materials. The California PUC used the same type of disclaimer in *PG&E*, *see* 475 U.S. at 6-7, but the Court applied strict scrutiny and found that the compulsion did not satisfy that standard. *Id.* at 19-22. Moreover, this emphasis is an "appeal to authority" and a strong warning. Stewart Supp. ¶ 13(H).

[12] FCC *Murray* Br. at 15-16.

[13] FDA, *Children and Cell Phones*.

[14] FCC, *Wireless Devices and Health Concerns* (emphasis removed).

(2d Cir. 1996) (finding that Vermont lacked a substantial governmental interest in regulating products containing a synthetic growth hormone where the federal government "[a]fter exhaustive studies" had determined that products containing that hormone were safe). This is particularly so because the City's messages directly call into question applicable federal regulations.

Nor can the City justify the Ordinance based on an alleged state interest in serving an abstract "right to know" about RF emissions. To the extent such an interest exists, it is an insufficient basis for forcing CTIA members to convey the City's views. The Supreme Court has repeatedly recognized that, even where a disclosure may be relevant or useful, a general right to know is an inadequate basis for compelling speech. *See, e.g.*, *Riley*, 487 U.S. at 798; *see also Tornillo*, 418 U.S. at 248, 254-58 (a government's interest in ensuring "a wide variety of views reach the public" is insufficient to save a right-of-reply statute).

Applying *Riley* to a case involving facts very similar to those here, the Second Circuit also held that an abstract "right to know" is an "inadequate" basis for requiring speech. *Amestoy*, 92 F.3d at 73. In *Amestoy*, as here, the federal government had determined that there were no "'human safety or health concerns'" with the products in question, *id.* at 73, and the local government was therefore barred by preemption from claiming a public health purpose. The Second Circuit determined that a free-standing claim of a public "right to know" was insufficient to justify a First Amendment intrusion, because there is no case in which "consumer interest alone was sufficient to justify requiring a product's manufacturer to publish the functional equivalent of a warning about a production method that had no discernable impact on a final product." *Id.* Were such an interest adequate, "there is no end to the information that states could require manufacturers to disclose about their production methods." *Id*. at 74.

Even if the City could articulate a compelling government interest, its regime would still fail the narrow tailoring inquiry. The City cannot show that there are no less restrictive means to further its asserted interest. *See, e.g., U.S. v Playboy Entm't, Inc.*, 529 U.S. 803, 813 (2000). The City could publish materials on its own website (as it has done), disseminate "factsheets" itself, or use a variety of other means to promote its views and "recommend[ations]" about the safety and use of cell phones, "which would communicate the desired information to the public without

burdening a speaker with unwanted speech[.]" *Riley*, 487 U.S. at 800. These less restrictive available means are fatal to any attempt to justify the compelled speech here.

The City may contend that the Supreme Court's commercial speech test is applicable here. This is not the case because the City's compelled messages are not content-based and do not concern solely commercial speech. Strict scrutiny is clearly warranted where the government seeks to compel a private party to convey the government's views on a matter of public interest. The government forcing private parties to parrot its views is antithetical to bedrock First Amendment principles. *See id.* at 781; *PG&E*, 475 U.S. at 1.

In any event, here, "[a]s in previous cases, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial review is applied." *Sorrell*, 131 S. Ct. at 2667 (citations omitted). Under a commercial speech inquiry, the City must show that the Ordinance "advances a substantial government interest and that the measure is drawn to achieve that interest." *Id.* at 2667-68; *see also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980). For the reasons stated above, the City cannot show either that there is a "substantial" state interest or that the Ordinance is drawn to achieve one. Even in the commercial speech context, "[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 131 S.Ct at 2671. The City cannot justify its violation of CTIA's rights even under the commercial speech standard.

The City cannot argue, pursuant to the limited exception recognized in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), that heightened scrutiny does not apply. Courts have universally held that *Zauderer* applies only to a narrow class of cases in which compelled commercial speech is limited to "purely factual and uncontroversial information," such as the requirement that lawyers disclose the difference between fees and costs in their advertising. *Zauderer*, 471 U.S. at 651; *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-67 (9th Cir. 2009); *see also New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (ordinance compelling restaurants to disclose calorie counts on menus). Thus, in *PG&E*, the Supreme Court held that *Zauderer* does not apply where, as here, the compelled speech is "biased against or . . . expressly contrary to the corporation's views."

PG&E, 475 U.S. at 16 n.12. The City's compelled message here is as far from a prosaic factual recitation as one can get. It is not like requiring a restaurant to disclose calorie counts. It is much more like requiring a utility to publish speech from those who disagree with its legal and regulatory positions. Moreover, both the Supreme Court and the Ninth Circuit have strongly suggested that *Zauderer* may be invoked *only* where the government can show that disclosure of the factual and uncontroversial information is "reasonably related to the State's interest in preventing deception of consumers," *Zauderer*, 471 U.S. at 651; *see also Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 144-49 (1994); *Schwarzenegger*, 556 F.3d at 966-67, and where the government is regulating "inherently misleading commercial advertisements," *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 130 S.Ct. 1324, 1339-41 (2010). Here, even if the mandated speech were purely factual, which it is not, the City cannot claim to be correcting misleading commercial statements. The obligation to disseminate the Display Materials is not triggered by any speech at all; it is triggered solely by the sale of cell phones.[15]

C. The Ordinance Fails Any Level of First Amendment Scrutiny Because it Compels False and Misleading Speech.

The Ordinance and Display Materials violate the First Amendment for the independent reason that they force CTIA members to disseminate false and misleading speech, which is unlawful under any standard of review. "[T]he State has no legitimate reason to force retailers to affix false information on their products." *Schwarzenegger*, 556 F.3d at 967. A "state's requirement that a business post a false statement serves no legitimate governmental interest and, if allowed, would merely be a state-mandated political declaration." *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1072 (D. Minn. 2006), *aff'd on other grounds*, 519 F.3d 768 (8th Cir. 2008). The City compels false and misleading speech in a number of ways.

First, the mandated warnings send the message that cell phones are dangerous and that there is a need to reduce exposure in order to avoid the danger. As the federal government has

[15] The federal government has determined that cell phones are safe for use, so the City's regime cannot be sustained on the theory that it lawfully informs consumers about certain product dangers. *See, e.g., National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (upholding warning on product containing mercury, which is a hazardous substance).

determined, this is false. The Ordinance and Display Materials send this message by requiring retailers to advise the public at the point of sale about the supposed risks of cell phone use, by expressly and prominently warning consumers that they can and should "reduce your exposure," "limit exposure," "keep distance between your phone and body," and by showing threatening red and orange circles radiating from cell phones and penetrating the head and reproductive areas of the human body. *See* Stewart Supp. ¶ 13. However, the FCC has determined that cell phones "are safe for use," FCC *Murray* Br. at 15-16, and that there is no need for consumers to take "measures to further reduce exposure to RF energy," FCC, *Wireless Devices and Health Concerns* (emphasis removed), because its standards are set at "one-fiftieth of the point at which RF energy begins to cause ***any*** unhealthful thermal effect," FCC *Cellular Phone* Br. at 21; *see also* OET Bulletin 56, FCC, at 13 n.10 (discussing the safety factor).

Second, the materials send false and misleading messages about children's cell phone use. The "Factsheet's" first recommendation is a warning to "**Limit cell phone use by children.**" It further warns that, "Developing brains and thinner skulls lead to higher absorption in children." The FCC considered and rejected claims that children or any other allegedly "electrosensitive" persons warrant special protection or precautions, *RF Order II*, 12 F.C.C.R. at 13504-05 (¶¶ 25-31), and determined that its rules protect all members of the public, *id.*[16] Likewise, the FDA has concluded that "[t]he scientific evidence does not show a danger to any users of cell phones from RF exposure, **including children and teenagers**." FDA, *Children and Cell Phones.* The City's contrary statement is alarmist, *see* Stewart Supp. ¶ 13(c), and, as a scientific matter, false. Children's head tissue has no "higher absorption" rate than adult head tissue.[17]

[16] In *RF Order II*, the FCC considered and rejected allegations that the FCC should modify its rules because they do not protect "electrosensitive individuals" and "children" because of the size of a child's head. *See* Cellular Phone Taskforce Pet. for Recon. at 1-8, No. 93-62 (Sept. 3, 1996) (http://fjallfoss.fcc.gov/ecfs/ document/view?id=1682740001); *see* Ad-hoc Association of Parties Concerned About the FCC's Radiofrequency Health and Safety Rules Pet. for Recon. (Sept. 9, 1996) (http://fjallfoss.fcc.gov/ecfs/document/view?id=1685160001).

[17] *See* Petersen Prelim. ¶¶ 7(b) ("It is also inaccurate and misleading to state that '[d]eveloping brains and thinner skulls lead to higher absorption in children.'"), 37 (same).

Third, the mandated communications mislead the public about the state of the science on RF emissions' potential health effects. To start, the "factsheet" and poster state that "**studies continue to assess potential health effects of mobile phone use**," Factsheet (emphasis added); Poster (emphasis in original). This erroneously suggests that there are already known potential health effects and scientists are simply searching for additional knowledge about them. The suggestion that potential health effects exist is emphasized by the "factsheet" statement that "if you are concerned about potential health effects" the City recommends particular steps. But the idea that the weight of existing science confirms the existence of health effects (or even potential health effects) is not true; the weight of the existing science shows no health risk, despite continued research. Thus, "to suggest that studies are ongoing without recognizing or acknowledging the substantial database of studies already conducted supporting the safety of RF energy from cell phones is misleading." Petersen Prelim. ¶ 36. As the federal government explains, "[t]he scientific evidence does not show a danger to any users of cell phones" and FCC-compliant cell phones are safe. FDA, *Children and Cell Phones.*

The scientific inaccuracy in the City's statement does not end there. Indeed, the City underlines its suggestion that there are known dangers from FCC-compliant cell phones by stating that "[a]lthough studies continue to assess potential health effects of mobile phone use, the World Health Organization has classified RF Energy as a possible carcinogen." While the "factsheet" reports the WHO's classification, it omits context necessary for lay consumers, unfamiliar with the WHO's unique classification system, to understand the meaning of this determination.[18] Of the over 900 items considered by the WHO over the years, it has classified only *one* as "probably not carcinogenic" and has classified, *inter alia*, coffee and pickled vegetables as "possibly carcinogenic" (*i.e.*, in the same category as RF emissions).[19] Without this context, consumers

[18] The WHO uses five classifications, from "carcinogenic to humans" to "probably not carcinogenic." IARC, Preamble at 22-23 (http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf). Consumers are unlikely to know that the "possibly carcinogenic" category can be used even when there is "inadequate evidence of carcinogenicity in humans." *Id.*

[19] IARC, Agents Classified by the IARC Monographs (June 17, 2011) (http://monographs.iarc.fr/ENG/Classification/index.php)

will inevitably draw a conclusion from the word "carcinogen" that does not reflect the actual state of the science. *See* Petersen Prelim. ¶¶ 7(b), 36 ("to inform the consumers that the WHO has classified cell phones as 'a possible carcinogen' out of context is misleading"). The City omits additional important context, because the materials do not inform consumers that the weight of scientific literature has not linked cell phones with any health problems, including cancer, *see, e.g.*, FDA, *Children and Cell Phones*, or that the WHO's classification is not based on new research, but relies on existing research that the FDA has concluded shows no link to health problems. *See* IARC, Press Release No. 208 (May 31, 2011) (www.iarc.fr/en/media-centre/pr/2011/pdfs/pr208_E.pdf); *see also* Petersen Prelim. ¶¶ 36-37.[20]

Fourth, the City's characterizations of RF emissions are inaccurate and misleading. For example, the poster "recommends" that consumers "**Keep distance between your phone and body**" "**[t]o reduce your exposure**" and the "factsheet" likewise "recommends" that those concerned "**Reduc[e] the number and length of calls**" and "**Limit[] cell phone use,**" among other things. These statements convey the false impression that exposure to RF emissions at levels approved by the FCC is dangerous. That impression is reinforced by the use of red waves emanating toward and penetrating the human body—red being a universal sign for danger. *See* Stewart Supp. ¶ 13(B). The strong implication is that exposure to RF emissions is cumulative and that danger increases as the length of exposure increases. Both of these ideas are incorrect. *See* Petersen Prelim. ¶¶ 11-13. Mr. Petersen explains that X-Rays and nuclear reactions are forms of ionizing radiation, that "any exposure" to them can cause an adverse biological effect, and that "the effect of [such] exposure is cumulative." *Id.* ¶ 11. In contrast, the RF emissions from cell phones are non-ionizing, and there are no cumulative effects from exposure to them. *Id.* ¶¶ 12-13, 28. Contrary to the City's suggestion, it simply does not matter how long consumers use or talk on their phones. As long as the phones are within the threshold of safety (as all FCC compliant phones are), they could be used continuously and *still* not present any adverse health

[20] Such context is critical in this setting. For example, where wireless carriers provide information to consumers about RF emissions, they do so with appropriate context, devoid of inflammatory graphics or statements, and reflect the consistent views of the federal agencies responsible for RF safety. *See, e.g.*, D'Ambrosio Dec. ¶ 22.

effects. *Id.* The requirements of the Ordinance and the Display Materials, taken as a whole, give consumers the false impression that exposure to RF emissions is akin to exposure to X-Rays or other forms of ionizing radiation in other ways, as well. In the expert consumer survey report provided to the City in December 2010, Dr. Stewart explained that the City's use of the word "radiation" in the first set of display materials misled consumers into associating RF emissions with the health risks from exposure to ionizing forms of radiation. Expert Report of Dr. David Stewart, Ph.D., at 7 & n.16 (Dec. 17, 2011) ("Stewart Report"). Now, in lieu of "radiation," the City uses graphics (red and orange circles radiating from cell phones) and repeated references to reducing "exposures" to send the misleading message that RF emissions are, like ionizing radiation, inherently dangerous even at small exposure levels.

The Display Materials contain additional inaccuracies. For example, they tell consumers to "use[] a cell phone in areas of good reception" and recommend "**Avoiding cell phones in areas with weak signals**" to "**decrease[] exposure**." There is no need to physically avoid cell phones in "elevators" or "on transit," because the FCC has set limits for RF emissions that ensure cell phones are safe for use anywhere, without such precautions. Petersen Prelim. ¶ 34.

Finally, while there are some superficial similarities in verbiage between what the FCC has said and the Display Materials, the overall message could not be more different.[21] First, the FCC emphasizes that there is no evidence of any adverse health effects and that all cell phones must meet federal safety standards before it says anything about how consumers can reduce RF energy if they choose to despite the scientific evidence. *See* FCC, *Wireless Devices and Health Concerns*. Second, the FCC refuses to give any official or governmental endorsement to any of the means to reduce exposure, stating in bold that "**[t]he FCC does not endorse the need for these practices**." *Id.* It simply passes them along for any consumers who, notwithstanding the emphasized lack of demonstrated harm from RF emissions, are "skeptical of the science" or the

[21] As a legal matter, there is a substantial difference between the government speaking in its own voice on its own website and the government compelling a private actor to convey a governmental message with which it disagrees. If the City used its own website to transmit false and misleading information it might raise other concerns, but it would not violate CTIA members' First Amendment rights. *Riley*, 487 U.S. at 800.

FCC's rules. *Id.* And the FCC says nothing about heightened risks to children and nothing about "[a]voiding cell phones in areas with weak signals (elevators, on transit, etc.)," and does not suggest turning your cell phone off when not in use. The message from the Display Materials is that phones are dangerous, and that is intentional. The Ordinance itself commands the Department of the Environment ("DOE") to adopt materials that send that message to consumers.

Put simply, the City gets nearly every aspect of the Display Materials wrong — from the fundamental message about cell phone safety, to the alleged sensitivity of children, to the need for measures to minimize exposure. Petersen Prelim. ¶¶ 7, 34, 36. The Court should not allow the City to compel publication of misleading messages by every cell phone outlet in the City.

II. THE ORDINANCE IS PREEMPTED BY FEDERAL LAW.

CTIA is also likely to succeed on the merits because the Ordinance and Display Materials conflict with federal law. By warning consumers that cell phones are dangerous and instructing them to limit cell phone use, the Ordinance upsets the careful balance the FCC struck between addressing potential risks from RF energy and encouraging, rather than discouraging, the use of wireless services nationwide.

A. Federal Law And Policy In The Area of RF Safety Have Preemptive Force.

The FCC adopted its current RF exposure standards pursuant to the federal government's longstanding and comprehensive authority over wireless radio communications, *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 279 (1933), and at the specific direction of Congress. *See* Telecommunications Act of 1996, Pub. L. No. 104-204, § 704(b), 110 Stat. 56. Congress directed the FCC to strike "an appropriate balance in policy" between "[1] adequate safeguards of the public health and safety" and the "[2] speed[y] deployment and the availability of competitive wireless telecommunications services." H.R. Rep. No. 104-204(I), at 94 (1995); *see Farina v. Nokia*, 625 F.3d 97, 106-07 (3d Cir. 2010), *cert. denied* (Oct. 3, 2011).

The FCC thus calibrated the "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." *RF Order II*, 12 F.C.C.R. at 13505 (¶ 29). Striking this balance was an express policy choice critical to

Congressional objectives, and is therefore imbued with preemptive force. *See Cellular Phone Task Force*, 205 F.3d at 91-92. Indeed, where the federal government strikes a balance between competing national priorities, whether by statute or regulation, state prescriptions in the same area often stand as an "obstacle" to achievement of the federal goals. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). The United States recently reaffirmed this position. In its brief in *Farina v. Nokia*, No. 10-1064 (filed Aug. 26, 2011), the United States urged the Supreme Court to deny certiorari, which it did, in a case alleging that a different precaution—headsets—should be used to avoid potential adverse health effects from RF, reiterating that the FCC's "RF guidelines . . . reflected the agency's *substantive* determination that its standards for wireless phones would 'provide a proper balance'" and noting that "when a federal agency's rule reflects a balancing of competing considerations, the federal regulation preempts any state laws that could disrupt the balance struck." Br. of the United States as Amicus Curiae at 20.

Every court to address the issue with the benefit of the FCC's views has agreed that using state law to "second guess the FCC's conclusion on how to balance its objectives" in "setting its RF standards" is preempted. *Farina*, 625 F.3d at 123-24 (under "[t]he Supreme Court's preemption case law" when "an agency is required to strike a balance between competing statutory objectives" that balance is preemptive); *see also Murray v. Motorola*, 982 A.2d 764, 776 (D.C. 2009) ("Given 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."); *Bennett v. T-Mobile USA, Inc.*, 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008) ("Plaintiff claims that these phones are unsafe even though they do comply with FCC standards. . . . Allowing such claims would be to second-guess the balance reached by the FCC in setting RF emission standards under its delegated authority.").

B. <u>The City's Regime Upsets The Balance Struck By The FCC.</u>

In crafting its RF rules, the FCC carefully balanced two Congressionally mandated goals—"the need to protect the public" from high levels of RF energy and "the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *RF Order II*, 12 F.C.C.R. at 13496 (¶ 2). At the margins, "[t]here is

a trade-off between [these two goals]." FCC *Cellular Phone* Br at 21. The City's regime strikes a different balance than the FCC's by conveying a strong warning to consumers about the safety of cell phones generally, by urging consumers to limit use by children specifically, and by advising the public that they should avoid using their phones and turn them off when not in use. The overall effect of these messages is to interfere with core federal objectives, including the efficient deployment and use of wireless devices and services, a uniform national regulatory approach to wireless, and an efficient and accurate public safety system.

First and foremost, the Display Materials send the unmistakable message that there is danger from the use of FCC-approved cell phones. Consumers are likely to perceive the City's materials as a strong warning regarding the safety of these devices. Stewart Supp. ¶ 13; *see also id.* at ¶ 14 (the Display Materials "are very likely to be perceived by a reasonable consumer as a message of danger"). The alarmist nature of the Display Materials as a whole will almost certainly discourage some consumers from purchasing cell phones, and likely will discourage some portion of the public at large (the mobile wireless penetration rate is estimated to be 93.5 percent of the U.S. population)[22] from using phones they already own. In addition to the City's recommendations to limit use and turn phones off when not in use, the suggestion of danger to children, the reference to a "carcinogen," and the bright red, orange, and yellow rings emanating from cell phones and penetrating the head and pelvic areas, will all be perceived as a "strong warning," Stewart Supp. ¶ 12, and discourage the purchase and use of cell phones. The City's suggestion that these measures only be taken "[i]f you are concerned" does nothing to dilute this warning, because the materials go out of their way to create the very concern to which they refer. This conflicts with the federal policy to *encourage* the use of cell phones, including broadband-capable cell phones. *See* President Barack Obama, Presidential Memorandum: Unleashing the Wireless Broadband Revolution, (June 28, 2010) ("We are now beginning the next transformation in information technology: the wireless broadband revolution."); FCC, *Connecting America: The*

[22] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, Fifteenth Report, 26 F.C.C.R. 9664, 9758 (¶ 159) (2011) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1_Rcd.pdf).

National Broadband Plan, 75 (2010) ("Mobile broadband represents the convergence of the last two great disruptive technologies—Internet computing and mobile communications—and may be more transformative than either of these previous breakthroughs.").

Second, the warnings radically recalibrate the balance struck by the FCC with respect to children. The FCC directly considered the question of whether children and other allegedly sensitive groups should be subject to a different regulatory standard (and thus a different balance) than the general public, and concluded that the answer is no. *See* Part I.C *supra*. The Display Materials, in contrast, urge users to "Limit[] cell phone use by children" and state as fact that "Developing brains and thinner skulls lead to much higher absorption in children." This erroneous assertion, *see* Petersen Prelim. ¶¶ 7, 34-35, will plainly discourage parents from allowing children to use cell phones. The conflict with the FCC is both direct and intentional. Ordinance § 1.2 (alleged "health concerns for children" ignored by the FCC).

Third, if consumers follow the City's recommendation to turn cell phones "off" when not "in use," a variety of communication and advanced services, from personal safety applications,[23] to severe weather alerts,[24] to public health notifications,[25] would be rendered ineffective. And network operators' ability to manage and optimize networks would be compromised, because wireless carriers and manufacturers perform a variety of functions, including facilitating roaming and long-term planning, based on user volume, signal strength, device location, and other

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[23] For example, Verizon Wireless' "Family Locator provides a convenient and valuable service to help [users] securely determine the location of [their] family members' devices from the Family Locator website or the Family Locator Mobile website on your device." Verizon Wireless, FamilyLocator (http://support.verizonwireless.com/clc/faqs/Features%20and%20Optional%20Services/family_locator.html?grp=1&faq=1).

[24] *See The Weather Channel Mobile Launches Comprehensive Weather Application for Android Platform* ("location-enabled severe weather alerts let users know when dangerous weather threatens their area") (http://press.weather.com/press_detail.asp?id=208).

[25] *See, e.g.*, *IPhone App Tracks Swine Flu, Other Disease Outbreaks*, PC World, Sept. 2, 2009 ("With the app, iPhone users . . . can be notified on the device or by e-mail when new outbreaks are reported nearby or when the user enters an area where outbreaks have been reported") (http://www.pcworld.com/article/171336/iphone_app_tracks_swine_flu_other_disease_outbreaks.html).

information transmitted from devices that are "on" but are not in use.[26] *See* Declaration of Mr. Fitterer (AT&T Mobility) at ¶¶ 6-9 ("Fitterer Dec.").

Ironically, given the City's asserted public health purpose, these disruptions pose a real threat to public safety. Declaration of Kelly Springer (AT&T Mobility) at ¶¶ 6-8, 9-12. If consumers do not have a phone, or keep phones powered off when they are not in use, as instructed by the City, they might not receive critical assistance in an emergency. The Federal Emergency Management Agency and the FCC have standards for wireless devices that will enable government officials "to send 90 character geographically targeted text messages to the public regarding emergency alert and warning of imminent threats to life and property, Amber alerts, and Presidential emergency messages."[27] A phone that is powered off obviously cannot receive these messages. The City's recommendations also threaten the efficacy of the wireless E-911 system, which utilizes a wireless device's GPS functionality to transmit accurate location data to first responders and "enhance[s] the public's ability to contact emergency services personnel during times of crisis." *Wireless E-911 Location Accuracy Requirements*, 26 F.C.C.R. 10074, 10075 (¶ 1) (2011). After being off, all phones require time to acquire location signals, *see* Fitterer Dec. ¶ 6, and the lag in being able to contact first responders may be absolutely critical in an emergency. These public safety benefits are not theoretical. A Washington State resident recently was able to identify an abductor and his victim after receiving an Amber Alert

[26] For example, AT&T Mobility, in its privacy policy, states that it "monitors, collects and uses wireless location information" to provide its voice and data services. That information is employed along with "other usage and performance information obtained from our network and your wireless device, to maintain and improve our network and the quality of your wireless experience." AT&T, Privacy FAQ, Questions About Location Information (http://www.att.com/gen/privacy-policy?pid=13692#location).

[27] Press Release: FEMA and the FCC Announce Adoption of Standards for Wireless Carriers to Receive and Deliver Emergency Alerts via Mobile Devices (Dec. 7, 2009) (http://www.fema.gov/news/newsrelease.fema?id=50056); *see* FCC, News Release, New York City Unveils First-In-The-Nation Public Safety System; Enabled Mobile Devices Will Receive Emergency Alerts At Critical Moments With Potentially Life-Saving Messages (May 10, 2011) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306417A1.pdf).

on her wireless device.[28] And law enforcement officials routinely use wireless GPS data, Springer Dec. ¶¶ 9-11, to track and locate abduction victims.[29]

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST OVERWHELMINGLY SUPPORT MAINTENANCE OF THE STATUS QUO.

CTIA has demonstrated a strong likelihood of success. But even if it had only raised "serious questions," the equities tip sharply in CTIA's favor and preliminary relief is appropriate.

A. CTIA Has Established Irreparable Injury.

1. First Amendment Injuries Are Per Se Irreparable.

It is well-settled that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary injunction." *Sammartano v. First Judicial District* Court, 303 F.3d 959, 974 (9th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, "the fact that a case raises serious First Amendment questions compels a finding that there exists 'the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants'] favor.'" *Id.* at 973 (quoting *Viacom Int'l, Inc. v. FCC*, 828 F.Supp. 741, 744 (N. D. Ca. 1993)).

CTIA members use retail stores and display materials to convey an array of information to consumers and the public about their products and services, but also about social and policy initiatives. *See* D'Ambrosio Dec. ¶¶ 20-22. They exercise editorial discretion in determining what to say or not say, and how to present information, particularly in the valuable and limited space adjacent to products that usually conveys price and key features of interest to consumers. *Id*. ¶ 26 (describing nature and importance of "Call Out Cards" next to phones). CTIA members disagree with the alarmist and misleading messages compelled by the Ordinance, *see id.* ¶ 24, and agree with the FCC that the public does not need to, nor should be instructed to, limit use of their phones. *See id.* ¶ 30 (describing changes in stores' communications needed to comply); ¶ 28

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[28] *See Federal Way Woman Receives Award for Amber Alert Heroics*, FederalWayMirror.com (July 5, 2011) (http://www.pnwlocalnews.com/south_king/fwm/news/124890784.html).

[29] *See, e.g.*, *Lodi Police Officers Use GPS to Track Kidnap Victim's Cell Phone*, Recordnet.com (Sept. 23, 2008) (www.recordnet.com/apps/pbcs.dll/article?AID=/20080923/A_NEWS02/809230323).

(describing difficulty in presenting required information in third-party sales outlets). Nor can counter speech remedy this intrusion, because "[t]hat kind of forced response is [itself] antithetical to the free discussion that the First Amendment seeks to foster." *PG&E*, 475 U.S. at 16. As a matter of law, irreparable injury is present, and this fact alone entitles CTIA to a preliminary injunction.

2. Loss of Customer Goodwill and Business Reputation are Irreparable.

The harm to CTIA members' reputations and consumer goodwill is as obvious as it is irreparable. The Ordinance requires CTIA members to carry the City's warning that wireless products are dangerous and its "recommendation" that consumers stay away from their phones or use them less. It is difficult to conceive of a more damaging message for the wireless industry to deliver. The warnings will create uncertainty and fear and discourage the use and purchase of wireless products and services. D'Ambrosio Dec. ¶¶ 24-29. This threatens consumers' increasing replacement of landline telephones with wireless devices,[30] may give an advantage to companies selling the same or similar devices over the phone or Internet, who do not have to disseminate the City's warnings, and may interfere with other consumer-friendly initiatives conducted through retail stores. For example, requiring Verizon Wireless to hand out "factsheets" undermines its "paperless store" initiative, through which the company demonstrates its commitment to the environment by striving to eliminate all paper materials in its stores, including paper receipts. *Id*. ¶ 21. The "factsheet" may be the only piece of paper given to a customer in a Verizon Wireless store, which will further enhance its perceived significance. *See* Stewart Supp. ¶ 14. This "threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm," *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001), and supports injunctive relief, *see Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc*., 944 F.2d 597, 603 (9th Cir.1991)

[30] D'Ambrosio Dec. ¶ 10. In the second half of 2010, an estimated 29.7% of American homes had a mobile phone as their only phone. *See* Stephen J. Blumberg, Ph.D. and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, July-December 2010 2 (rel. June 8, 2011) (http://www.cdc.gov/nchs/ data/nhis/earlyrelease/ wireless201106.pdf).

(upholding preliminary injunction because "intangible injuries" to advertising efforts and goodwill can constitute irreparable harm).

B. There Will Be No Harm To The City, So The Balance Of Harms Favors CTIA.

The City has no basis to assert it will be harmed by a preliminary injunction to allow orderly litigation and its actions to date concede this point. First, the Ordinance as originally written provided for six months between adoption of the Display Materials and enforcement of the requirement to disseminate them. Three months of this delay was to allow retailers to adjust to the system. *See* Original Ordinance § 1105(a) (providing a three month ramp-up period for DOE to help retailers come into compliance). The City has, without explanation, shrunk that "compliance period" to 25 days.[31] Second, the Ordinance has been a moving target, and the City has repeatedly agreed to substantially extend enforcement and compliance dates in this litigation. *See* SAC ¶¶ 84-92 (enumerating repeated extensions). These delays belie any claim that the City will suffer from a modest delay to allow this Court time to fully and fairly litigate these serious federal claims. The Ordinance is the first of its kind in the Nation. Any suggestion that the City or its residents will suffer any form of concrete injury by not having the Ordinance go into effect during the time it takes this court to expeditiously litigate this mater to final judgment borders on the frivolous.

C. The Public Interest Strongly Favors Entry of Preliminary Relief.

1. The Public Will Be Misled and Harmed If the Ordinance Takes Effect.

The general public will be harmed by these misleading warnings. "[B]roadband and access to mobility are now essential needs," FCC, *Connecting America: The National Broadband Plan* 146 (2010), because mobile services are an "increasingly significant part of the lives of American consumers . . . and are used for a variety of both personal and business purposes, including back-up communications during emergencies and for accessibility." *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 26 F.C.C.R. 5411, 5418 (¶ 14) (2011). If the City's warnings and recommendations to use phones less have their intended

[31] The Ordinance itself provided for only 15 days, but the DOE has provided for 25 days.

effect, as explained above, they will interfere with the public's full use of wireless technology and limit access to the public safety system, while offering no benefit in terms of increased safety. Disseminating deceptive and unnecessary health and safety warnings is not harmless. Every unnecessary warning (even if it is not deceptive) directed to the public logically reduces the public's attention to necessary warnings.

2. The Public Interest Is Served By Enjoining the Ordinance Because It Conflicts With Federal Law.

The analysis tips further in CTIA's favor once the court weighs, as it must, "the public interest represented in Congress' decision" to commit the balancing of RF regulation and wireless deployment to the FCC, the FCC's determinations, and "the Constitution's declaration that federal law is to be supreme." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059-60 (9th Cir. 2009) (the balance of equities and public interest favor preliminary relief against a likely-preempted local requirement). CTIA members "face[] the imminent threat of enforcement of a preempted state law and the resulting injury may not be remedied by monetary damages" so they are "likely to suffer irreparable harm." *U.S. v. Arizona*, 703 F. Supp. 2d 980, 1006 (D. Ariz. 2010). The FCC has balanced several federal policies concerning wireless communications, a uniquely interstate mode of communication that has been traditionally and comprehensively regulated at the federal level. "'In such circumstances, the interest of preserving the Supremacy Clause is paramount.'" *U.S. v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (affirming preliminary injunction of likely-preempted state law) (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009)).

CONCLUSION

For the foregoing reasons, CTIA respectfully requests that this Court preliminarily enjoin enforcement of all aspects of the Ordinance on or before the compliance date of October 25, 2011, and that said injunction remain in effect until this Court reaches a final judgment.

Dated: October 4, 2011

JONES DAY

By: /s/ Robert A. Mittelstaedt

Robert A. Mittelstaedt (#60359)
Craig E. Stewart (#129530)
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Fax: (415) 875-5700
ramittelstaedt@jonesday.com

Andrew G. McBride (pro hac vice)
Joshua S. Turner (pro hac vice)
Megan Brown
Brendan T. Carr
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: (202)719-7000
Fax: (202) 719-7049
amcbride@wileyrein.com

Terrence J. Dee (pro hac vice)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2099
Fax: (312) 862-2200
tdee@kirkland.com

Seamus C. Duffy (pro hac vice)
Susan M. Roach (pro hac vice)
Drinker Biddle & Reath LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103-6996
Telephone: (215) 988-2700
Fax: (215) 988-2757
seamus.duffy@dbr.com

Jane F. Thorpe (pro hac vice)
Scott A. Elder (pro hac vice)
ALSTON & BIRD LLP
1201 West Peachtree St., NW

Atlanta, Georgia 30309-3424
Telephone: (404) 881-7592
Fax: (404) 253-8875
jane.thorpe@alston.com

Attorneys for Plaintiff
CTIA – The Wireless Association®

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