APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CTIA - THE WIRELESS ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF BERKELEY, California; CHRISTINE DANIEL, City Manager of Berkeley, California, in her official capacity,

Defendants-Appellees.

No. 16-15141

D.C. No.

3:15-cv-02529-EMC

OPINION

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted September 13, 2016
San Francisco, California

Filed April 21, 2017

Before: William A. Fletcher, Morgan B. Christen, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge W. Fletcher;
Dissent by Judge Friedland

SUMMARY*

First Amendment/Preemption

The panel affirmed the district court's order denying a request for a preliminary injunction seeking to stay enforcement of a City of Berkeley ordinance requiring cell phone retailers to inform prospective cell phone purchasers that carrying a cell phone in certain ways may cause them to exceed Federal Communications Commission guidelines for exposure to radio-frequency radiation.

Applying *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the panel held that the City's compelled disclosure of commercial speech complied with the First Amendment because the information in the disclosure was reasonably related to a substantial governmental interest and was purely factual. Accordingly, the panel concluded that plaintiff had little likelihood of success on its First Amendment claim that the disclosure compelled by the Berkeley ordinance was unconstitutional.

The panel determined that there was little likelihood of success on plaintiff's contention that the Berkeley ordinance was preempted. The panel held that Berkeley's compelled disclosure did no more than alert consumers to the safety disclosures that the Fed-

*This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

eral Communication Commission requires, and to direct consumers to federally compelled instructions in their user manuals providing specific information about how to avoid excessive exposure. The panel held that far from conflicting with federal law and policy, the Berkeley ordinance complements and reinforces it.

In affirming the denial of a preliminary injunction, the panel further determined that there was no irreparable harm based on the First Amendment or preemption, that the balance of equities tipped in Berkeley's favor, that the ordinance was in the public interest, and that an injunction would harm that interest.

Dissenting in part, Judge Friedland stated that Berkeley's ordinance likely violates the First Amendment and therefore should have been preliminarily enjoined. She stated that taken as a whole, the most natural reading of the Berkeley disclosure warns that carrying a cell phone in one's pocket is unsafe. Yet Berkeley had not attempted to argue, let alone to prove, that message was true.

COUNSEL

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Cowan, City Attorney; Berkeley City Attorney's Office, Berkeley, California; for Defendants-Appellants.

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Selena Kyle, Chicago, Illinois; Aaron Colangelo, Washington, D.C.; as and for Amicus Curiae Natural Resources Defense Council.

R. Matthew Wise, Deputy Attorney General; Mark R. Beckington, Supervising Deputy Attorney General; Douglas J. Woods, Senior Assistant Attorney General; Kathleen A. Kenealy, Chief Assistant Attorney General; Sacramento, California; as and for Amicus Curiae Attorney General of California.

OPINION

W. FLETCHER, Circuit Judge:

A City of Berkeley ordinance requires cell phone retailers to inform prospective cell phone purchasers that carrying a cell phone in certain ways may cause them to exceed Federal Communications Commission guidelines for exposure to radio-frequency radiation. CTIA, a trade association formerly known as Cellular Telephone Industries Association, challenges the ordinance on two grounds. First, it argues that the ordinance violates the First Amendment. Second, it argues that the ordinance is preempted.

CTIA requested a preliminary injunction staying enforcement of the ordinance. The district court denied CTIA's request, and CTIA filed an interlocutory

appeal. We affirm and remand for further proceedings.

I. Factual and Procedural Background

In May 2015, the City of Berkeley passed an ordinance requiring cell phone retailers to disclose information to prospective cell phone purchasers about the federal government's radio-frequency radiation exposure guidelines relevant to cell phone use. Under "Findings and Purpose," the ordinance provided:

> A. Requirements for the testing of cell phones were established by the federal government in 1996.
>
> B. These requirements established "Specific Absorption Rates" (SAR) for cell phones.
>
> C. The protocols for testing the SAR for cell phones carried on a person's body assumed that they would be carried a small distance away from the body, e.g., in a holster or belt clip, which was the common practice at that time. Testing of cell phones under these protocols has generally been conducted based on an assumed separation of 10–15 millimeters.
>
> D. To protect the safety of their consumers, manufacturers recommend that their cell phones be carried away from the body, or be used in conjunction with hands-free devices.
>
> E. Consumers are not generally aware of these safety recommendations.

> F. Currently, it is much more common for cell phones to be carried in pockets or other locations rather than holsters or belt clips, resulting in much smaller separation distances than the safety recommendations specify.
>
> G. Some consumers may change their behavior to better protect themselves and their children if they were aware of these safety recommendations.
>
> H. While the disclosures and warnings that accompany cell phones generally advise consumers not to wear them against their bodies, e.g., in pockets, waistbands, etc., these disclosures and warnings are often buried in fine print, are not written in easily understood language, or are accessible only by looking for the information on the device itself.
>
> I. The purpose of this Chapter is to assure that consumers have the information they need to make their own choices about the extent and nature of their exposure to radio-frequency radiation.

Berkeley Mun. Code § 9.96.010 (2015).

CTIA challenged the compelled disclosure provision of the ordinance, arguing that it violated the First Amendment and was preempted. One sentence of the compelled disclosure stated, "The potential risk is greater for children." The district court held that this sentence was preempted, and it issued a preliminary injunction against enforcement of the ordinance. In

December 2015, Berkeley re-passed the ordinance without the offending sentence. In its current form, the compelled disclosure provision provides:

> A. A Cell phone retailer shall provide to each customer who buys or leases a Cell phone a notice containing the following language:
>
> The City of Berkeley requires that you be provided the following notice:
>
> To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Berkeley Mun. Code § 9.96.030(A) (2015).

The ordinance requires that the compelled disclosure be provided either on a prominently displayed poster no less than 8½ by 11 inches with no smaller than 28-point font, or on a handout no less than 5 by 8 inches with no smaller than 18-point font. The logo of the City of Berkeley must be placed on the poster and handout. The ordinance provides that a cell phone retailer may include additional information on the poster or handout if it is clear that the additional information is not part of the compelled disclosure. § 9.96.030(B) ("The paper on which the notice is printed

may contain other information in the discretion of the Cell phone retailer, as long as that information is distinct from the notice language required by subdivision (A) of this Section.").

CTIA challenged the current ordinance, arguing, as it had before, that the ordinance violates the First Amendment and is preempted. The district court noted that the preempted sentence had been removed from the ordinance, dissolved its previously entered injunction, and denied CTIA's request for a new preliminary injunction. CTIA filed an interlocutory appeal.

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1292. We review a denial of a preliminary injunction for abuse of discretion. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 944 (9th Cir. 2013). "An abuse of discretion occurs when the district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (citation and internal quotation marks omitted). We will not reverse the district court where it "got the law right," even if we "would have arrived at a different result," so long as the district court did not clearly err in its factual determinations. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc).

III. Regulatory Background

The Federal Communications Commission ("FCC") has regulatory jurisdiction over transmitting services in the United States. In 1996, after extensive consultation with other agencies, the FCC issued a

rule designed to limit the Specific Absorption Rate ("SAR") of radio-frequency ("RF") radiation from FCC-regulated transmitters, including cell phones:

> 1. By this action, we are amending our rules to adopt new guidelines and methods for evaluating the environmental effects of *radio-frequency (RF) radiation* from FCC-regulated transmitters. We are adopting Maximum Permissible Exposure (MPE) limits for electric and magnetic field strength and power density for transmitters operating at frequencies from 300 kHz to 100 GHz . . . *We are also adopting limits for localized ("partial body") absorption that will apply to certain portable transmitting devices . . . We believe that the guidelines we are adopting will protect the public and workers from exposure to potentially harmful RF fields.*
>
> 2. In reaching our decision on the adoption of new RF exposure guidelines we have carefully considered the large number of comments submitted in this proceeding, and particularly those submitted by the U.S. Environmental Protection Agency (EPA), the Food and Drug Administration (FDA) and other federal health and safety agencies. The new guidelines we are adopting are based substantially on the recommendations of those agencies, and *we believe that these guidelines represent a consensus view of*

> *the federal agencies responsible for matters relating to the public safety and health.*

In re Guidelines for Evaluating the Environmental Effects of Radio-frequency Radiation, 61 Fed. Reg. 41006, 41006–07 (Aug. 7, 1996) (emphases added).

Out of concern for the safety of cell phone users, the FCC rejected an industry proposal to exclude "low-power devices" such as cell phones from the rule adopting SAR limits:

> Most commenting parties, including Federal health and safety agencies, support the use of the ANSI/IEEE [American National Standards Institute/ Institute of Electrical and Electronic Engineers] SAR limits for localized (partial body) exposure for evaluating low-power devices designed to be used in the immediate vicinity of the body. . . . *Therefore, in view of the consensus and the scientific support in the record, we are adopting the SAR limits for the determination of safe exposure from low-power devices designed to be used in the immediate vicinity of the body* based upon the 1992 ANSI/IEEE guidelines. . . .
>
> The SAR limits we are adopting will generally apply to portable devices . . . that are designed to be used with any part of the radiating structure of the device in direct contact with the body of the user or within 20 cm of the body under normal conditions of use. *For example,*

> *this definition would apply to hand-held cellular telephones. . . .*

In re Guidelines for Evaluating the Environmental Effects of Radio-frequency Radiation ("FCC Guidelines for Radio-frequency Radiation"), FCC 96-326, ¶¶ 62–63(Aug. 1, 1996) (emphases added).

The FCC has a better-safe-than-sorry policy with respect to SAR limits:

> . . . The intent of our exposure limits is to provide a cap that both protects the public based on scientific consensus and allows for efficient and practical implementation of wireless services. The present Commission exposure limit is a "bright-line rule." That is, so long as exposure levels are below a specified limit value, there is no requirement to further reduce exposure. . . . Our current RF exposure guidelines are an example of such regulation, including a significant "safety" factor, whereby the exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure.

In re Reassessment of FCC Radiofrequency Exposure Limits and Policies, 28 FCC Rcd. 3498, 3582 (Mar. 29, 2013). The FCC recognizes that its required margin of safety is large:

> . . . [E]xceeding the SAR limit does not necessarily imply unsafe operation, nor do lower SAR quantities imply

> "safer" operation. *The limits were set with a large safety factor*, to be well below a threshold for unacceptable rises in tissue temperature. As a result, exposure well above the specified SAR limit should not create an unsafe condition. . . . In sum, using a device against the body without a spacer will generally result in actual SAR below the maximum SAR tested; moreover, a use that possibly results in non-compliance with the SAR limit should not be viewed with significantly greater concern than compliant use.

Id. at 3588 (emphasis added).

There are two ways to ensure compliance with SAR limits—reducing the amount of RF radiation from a transmitting device, and increasing the distance between the device and the user. Different low-power devices emit different amounts of RF radiation, with the result that the minimum distance between the device and the user to achieve compliance with SAR limits varies somewhat from device to device. The FCC requires that cell phone user manuals contain information that alerts users to the minimum distances appropriate for the device they are using:

> *Specific information must be included in the operating manuals to enable users to select body-worn accessories that meet the minimum test separation distance requirements*. Users must be fully informed of the operating requirements and restrictions, to the extent that the

> typical user can easily understand the information, to acquire the required body-worn accessories to maintain compliance. Instructions on how to place and orient a device in body-worn accessories, in accordance with the test results, should also be included in the user instructions. *All supported body-worn accessory operating configurations must be clearly disclosed to users, through conspicuous instructions in the user guide and user manual, to ensure unsupported operations are avoided.*

In re Exposure Procedures and Equipment Authorization Policies for Mobile and Portable Devices, FCC Office of Engineering and Technology Laboratory Division § 4.2.2(d) (Oct. 23, 2015) ("FCC Exposure Procedures") (emphasis added). Compliance with this disclosure requirement is a prerequisite for approval of a transmitting device by the FCC. *See id*. at § 1.

The following are examples of cell phone user manuals that comply with the FCC's disclosure requirement:

Apple:

> iPhone's SAR measurement may exceed the FCC exposure guidelines for body-worn operation if positioned less than 15 mm (5/8 inch) from the body (e.g. when carrying iPhone in your pocket). *See* iPhone 3G manual, at 7, http://manuals.info.apple.com/MANUALS/0/MA618/en_US/iPhone_3G

Important Product_Information_Guide.pdf.

Samsung:

> If there is a risk from being exposed to radio-frequency energy (RF) from cell phones - and at this point we do not know that there is - it is probably very small. But, if you are concerned about avoiding even potential risks, you can take a few simple steps to minimize your RF exposure.
>
> - Reduce the amount of time spent using your cell phone;
> - Use speaker mode or a headset to place more distance between your head and the cell phone.

See Samsung Common Phone Health and Safety and Warranty Guide, at 8, http://www.samsung.com/us/Legal/PHONE-HS_GUIDE_English.pdf.

LG:

> The highest SAR value for this model phone when tested for use at the ear is 1.08 W/Kg (1g) and when worn on the body, as described in this user guide, is 0.95 W/Kg (1g) (body-worn measurements differ among phone models, depending upon available accessories and FCC requirements). While there may be differences between SAR levels of various phones and at various positions, they all meet the government requirement for safe exposure. The FCC has granted an

> Equipment Authorization for this model phone with all reported SAR levels evaluated as in compliance with the FCC RF emission guidelines. SAR information on this model phone is on file with the FCC and can be found under the Display Grant section of http://www. fcc.gov/oet/ea/fccid/ after searching on FCC ID ZNFL15G.

See LG Sunrise User Guide, at 93, http://www.lg.com/us/ support/manuals-documents

IV. Discussion

"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." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "[A] stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). For example, "a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *Id.* at 1132 (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).

A. Likelihood of Success

CTIA makes two merits-based arguments against the Berkeley ordinance. First, it argues that the ordi-

nance violates the First Amendment. Second, it argues that the ordinance is preempted. We take the arguments in turn.

1. First Amendment

The underlying disclosure at issue is the disclosure that the FCC compels cell phone manufacturers to provide to consumers. However, CTIA has not sued the FCC. Rather, CTIA has sued Berkeley, challenging the disclosure Berkeley compels cell phone retailers to provide to the same consumers. The Berkeley ordinance requires cell phone retailers to disclose, in summary form, the same information to consumers that the FCC already requires cell phone manufacturers to disclose. The Berkeley disclosure then directs consumers to user manuals for more specific information.

a. *Central Hudson or Zauderer*

The parties agree that Berkeley's ordinance is a regulation of commercial speech. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980); *see Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011). However, they disagree about whether the ordinance's compliance with the First Amendment should be analyzed under *Central Hudson* or under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

Under *Central Hudson*, the government may restrict or prohibit commercial speech that is neither misleading nor connected to unlawful activity, as long as the governmental interest in regulating the speech is substantial. 477 U.S. at 564. The restriction or prohibition must "directly advance the governmental interest asserted," and must not be "more extensive

than is necessary to serve that interest." *Id.* at 566. Under *Zauderer* as we interpret it today, the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is "reasonably related" to a substantial governmental interest. *Zauderer*, 471 U.S. at 651; *see discussion infra*.

We apply the intermediate scrutiny test mandated by *Central Hudson* in commercial speech cases where speech is restricted or prohibited, on the ground that in such cases intermediate scrutiny appropriately protects the interests of both the speaker (the seller) and the audience (the purchaser). But one size does not fit all in commercial speech cases. In *Central Hudson* itself, the Supreme Court cautioned, "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, 477 U.S. at 563.

Five years after *Central Hudson*, the Court held that *Central Hudson*'s intermediate scrutiny test does not apply to compelled, as distinct from restricted or prohibited, commercial speech. In *Zauderer*, defendant Zauderer advertised legal services to prospective Dalkon Shield plaintiffs in a number of Ohio newspapers. The advertisement stated, *inter alia*, "'The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.'" *Zauderer*, 471 U.S. at 631. Zauderer was disciplined under Ohio state bar disciplinary rules on the ground that the advertisement was "deceptive" within the meaning of the rules, *id*. at 633, because it failed to disclose "the client's potential liability for costs even if her suit were unsuccessful." *Id.* at 635. The Court noted that the bar disciplinary

rules required Zauderer to "include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." *Id.* at 651. The Court wrote, "Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650. The Supreme Court declined to apply the *Central Hudson* test:

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information is minimal. . . . We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Id. at 651 (internal citation omitted). *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 253 (2010) (following *Zauderer* and using its "preventing deception" language).

b. The *Zauderer* Test

i. Substantial Governmental Interest

CTIA contends that the *Zauderer* exception to the general rule of *Central Hudson* does not apply in this

case because the speech compelled by the Berkeley ordinance does not prevent deception of consumers. This is the first time we have had occasion in this circuit to squarely address the question whether, in the absence of a prevention-of-deception rationale, the *Zauderer* compelled-disclosure test applies. *Cf. Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009) (invalidating compelled disclosure on video game packaging, noting that the disclosure would "arguably now convey a false statement that certain conduct is illegal when it is not, and the State has no legitimate reason to force retailers to affix false information on their products"). Several of our sister circuits, however, have answered this question. They have unanimously concluded that the *Zauderer* exception for compelled speech applies even in circumstances where the disclosure does not protect against deceptive speech.

In *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), a Department of Agriculture regulation required identification of the country of origin on the packaging of meat and meat products. *Id.* at 20. The regulation implemented a federal statute requiring country-of-origin labeling. *See* 7 U.S.C. § 1638, 1638a. The D.C. Circuit held that *Zauderer* should not be read to apply only to cases where government-compelled speech prevents or corrects deceptive speech. It noted that on the facts of both *Zauderer* and *Milavetz* (in which the Court repeated *Zauderer*'s "preventing deception" language) there had been deceptive speech: "Given the subject of both cases, it was natural for the Court to express the rule in such terms. The language could have been simply descriptive of the circumstances to

which the Court applied its new rule[.]" *Am. Meat*, 760 F.3d at 22. The D.C. Circuit concluded, "The language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception." *Id.*

In *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), a Vermont statute required manufacturers of mercury-containing products to label their products and packaging to inform consumers that the products contained mercury and instructing them that the products should be disposed of or recycled as hazardous waste. *Id.* at 107. The Second Circuit held that the compelled disclosure was supported by a "substantial state interest in protecting human health and the environment." *Id.* at 115 n. 6. Citing *Zauderer*, the court recognized that the compelled disclosure did not "prevent 'consumer confusion or deception.'" *Sorrell*, 272. F.3d at 115. It nonetheless upheld the disclosure as not "inconsistent with the policies underlying First Amendment protection of commercial speech." *Id.* "[M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *Id.* at 114; *see also N.Y. St. Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) ("*Zauderer*'s holding was broad enough to encompass nonmisleading disclosure requirements."); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556–58 (6th Cir. 2012) (upholding federally required health warnings on cigarette packaging and in cigarette advertisements, relying on the Second Circuit's opinion in *Sorrell*); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310

n.8 (1st Cir. 2005) (noting that the court had found no cases limiting application of the *Zauderer* compelled speech test to prevention or correction of deceptive advertising); *cf. Dwyer v. Cappell*, 762 F.3d 275, 281–82 (3d Cir. 2014) (describing but not relying on *Zauderer*'s preventing-deception criterion).

We agree with our sister circuits that under *Zauderer* the prevention of consumer deception is not the only governmental interest that may permissibly be furthered by compelled commercial speech. We conclude that any governmental interest will suffice so long as it is substantial. In *American Meat*, the D.C. Circuit declined to decide whether the governmental interest must be substantial, leaving open the question whether a less-than-substantial interest might suffice. *See Am. Meat*, 760 F.3d at 23 ("Because the interest motivating the 2013 [country-of-origin] rule is a substantial one, we need not decide whether a lesser interest could suffice under *Zauderer*."). We answer the question avoided in *American Meat*, holding that *Zauderer* requires that the compelled disclosure further some substantial—that is, more than trivial—governmental interest. *Central Hudson* explicitly requires that a substantial interest be furthered by a challenged regulation prohibiting or restricting commercial speech, and we see nothing in *Zauderer* that would allow a lesser interest to justify compelled commercial speech. To use the words of the Second Circuit in *Sorrell*, the interest at stake must be more than the satisfaction of mere "consumer curiosity." *Sorrell*, 272 F.3d at 115 n.6; *see also Am. Meat*, 760 F.3d at 23 ("Country-of-origin information has an historical pedigree that lifts it well beyond 'idle curiosity.'").

ii. Purely Factual Information

The Court in *Zauderer* noted that the compelled disclosure in that case was of "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. The Court did not, however, require in its constitutional test that the disclosed information be "purely factual and uncontroversial." Some lower courts have recited, without discussion, the "purely factual and uncontroversial" language as part of the *Zauderer* test. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518, 541 (D.C. Cir. 2015) ("But whatever may be the complexities of applying the standard in discrete situations, as a matter of precedent, an obligation in the commercial sphere to disclose 'purely factual and uncontroversial' information about a product draws deferential First Amendment review."); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263 (2d Cir. 2014) ("On a cursory review, our precedent arguably supports the district court's conclusion that this law simply requires disclosure of accurate, factual information."); *Cent. Illinois Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987) ("In *Zauderer*, the Court held that Ohio could constitutionally require an attorney to include in a commercial advertisement, purely factual and uncontroversial information about the terms under which the attorney's services are available.").

Given that the purpose of the compelled disclosure is to provide accurate factual information to the consumer, we agree that any compelled disclosure must be "purely factual." However, "uncontroversial" in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience. This is clear from *Zauderer* itself. The

State of Ohio required attorneys to disclose "the client's potential liability for costs even if her suit were unsuccessful." *Zauderer*, 471 U.S. at 635. Ohio law permitted attorneys to charge clients for costs even after advertising and agreeing to represent their clients on a contingency-fee basis and losing the suit. Recognizing that the difference between fees and costs might not be apparent to prospective clients, Ohio required attorneys to disclose that a contingency fee arrangement might still require the client to pay some money to the attorney. This required disclosure was factually accurate. That the disclosure may have caused controversy, for example by discouraging customers from hiring lawyers who offered contingency-fee arrangements because they feared "hidden costs" or by harming the reputation of the lawyers who offered such fee arrangements, did not affect the constitutional analysis. What mattered was that the disclosure provided accurate factual information to the consumer. We therefore conclude that *Zauderer* requires only that the information be "purely factual."

c. Application of *Zauderer* Test

Under *Zauderer*, compelled disclosure of commercial speech complies with the First Amendment if the information in the disclosure is reasonably related to a substantial governmental interest and is purely factual. The question before us is whether the speech compelled by the Berkeley ordinance satisfies this test.

i. Reasonably Related to a Substantial Governmental Interest

There is no question that protecting the health and safety of consumers is a substantial governmental

interest. *See*, *e.g.*, *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) ("[H]ealth, safety, and welfare constitute[] a 'substantial' governmental interest"). The federal government and Berkeley have both sought to further that interest. By adopting SAR limits on exposure to RF radiation, the FCC has furthered the interest of protecting the health and safety of cell phone users in the United States. It has done so by adopting a highly protective policy, setting low SAR limits on RF radiation and compelling cell phone manufacturers to disclose information to cell phone users that will allow them to avoid exceeding those limits. By passing its ordinance, the City of Berkeley has furthered that same interest. After finding that cell phone users are largely unaware of the FCC policy and of the information in their user manuals, the Berkeley City Council decided to compel retailers in Berkeley to provide, in summary form, the same information that the FCC already requires cell phone manufacturers to provide to those same consumers, and to direct those consumers to their user manuals for more detailed information. *See* Jensen Decl., Ex. A (survey) (reflecting that a majority of persons surveyed were not "aware that the government's radiation tests to assure the safety of cell phones assume that a cell phone would not be carried against your body, but would instead be held at least 1 to 15 millimeters from your body").

CTIA argues strenuously that radio-frequency radiation from cell phones has not been proven dangerous to consumers. Limiting itself to research published when the record was made in this case, CTIA is correct in pointing out that there was nothing then before the district court showing that such radiation had

been proven dangerous. But this is beside the point. The fact that RF radiation from cell phones had not been proven dangerous was well known to the FCC in 1996 when it adopted SAR limits to RF radiation; was well known in 2013 when it refused to exclude cell phones from its rule adopting SAR limits; and was well known in 2015 when it required cell phone manufacturers to tell consumers how to avoid exceeding SAR limits. After extensive consultation with federal agencies with expertise about the health effects of radio-frequency radiation, the FCC decided, despite the lack of proof of dangerousness, that the best policy was to adopt SAR limits with a large margin of safety.

The FCC concluded that requiring cell phone manufacturers to inform consumers in their users manuals of SAR limits on RF radiation, and to tell them how to avoid excessive exposure, furthered the federal government's interest in protecting their health and safety. The City of Berkeley concluded that consumers were largely unaware of the contents of their users manuals. Agreeing with the FCC that the information about SAR limits and methods of avoiding excessive exposure is important, Berkeley requires cell phone retailers to provide some of that same information to consumers and to direct them to their user manuals for further details. We are not in a position to disagree with the conclusions of FCC and Berkeley that this compelled disclosure is "reasonably related" to protection of the health and safety of consumers.

ii. Purely Factual

CTIA argues that Berkeley's compelled disclosure is not "purely factual" within the meaning of *Zauderer*. We disagree.

For the convenience of the reader, we again provide the full text of the compelled disclosure:

> The City of Berkeley requires that you be provided the following notice:
>
> > To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.
>
> Berkeley Mun. Code § 9.96.030(A) (2015).

The text of the compelled disclosure is literally true. We take it sentence by sentence:

(1) "To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines." This statement is true. As recounted above, beginning in 1996 the federal government has set RF exposure guidelines with which cell phones must comply.

(2) "If you carry or use your cell phone in a pants or shirt pocket or tucked into a bra when the phone is

ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation." This statement is also true. The FCC has established SAR limits for RF radiation, and has concluded that maintaining a certain separation between a cell phone and the user's body protect consumers from exceeding these limits.

(3) "Refer to the instructions in your phone or user manual for information about how to use your phone safely." This sentence is an instruction rather than a direct factual statement. However, it clearly implies a factual statement that "information about how to use your phone safely" in compliance with the FCC's RF "exposure guidelines" "to assure safety," may be found either in a cell phone or user manual. This implied statement, too, is true.

We recognize, of course, that a statement may be literally true but nonetheless misleading and, in that sense, untrue. That is what CTIA argues here. CTIA argues that the compelled disclosure is inflammatory and misleading, and that it is therefore not "purely factual." CTIA bases its argument solely on the text of the ordinance.

CTIA argues that "[t]he Ordinance requires an inflammatory warning about unfounded safety risks"; that "[t]he Ordinance clearly and deliberately suggests that the federal RF energy testing guideline (the SAR limit) is the demarcation point of 'safety' for cell phones, such that 'exposure' to RF energy above that limit creates a safety hazard"; and that "[t]he Ordinance is misleading for the additional reason that it uses the inflammatory term 'radiation,' which is fraught with negative associations, in order to stoke

consumer anxiety." CTIA argues further that the phrase "RF radiation" is "fraught with negative associations," that it is used in the compelled disclosure "in order to stoke consumer anxiety," and that it is therefore not "purely factual."

We read the text differently. The first sentence tells consumers that cell phones are required to meet federal "RF exposure guidelines" in order "[t]o assure safety." Far from inflammatory, this statement is largely reassuring. It assures consumers that the cell phones they are about to buy or lease meet federally imposed safety guidelines.

The second sentence tells consumers what to do in order to avoid exceeding federal guidelines. This statement may not be reassuring, but it is hardly inflammatory. It provides in summary form information that the FCC has concluded that consumers should know in order to ensure their safety. Indeed, the FCC specifically requires cell phone manufacturers to provide this information to consumers. *See* "FCC Exposure Procedures" § 4.2.2(d) ("Specific information must be included in the operating manuals to enable users to select body-worn accessories that meet the minimum *test separation distance* requirements. . . . All supported body-worn accessory operating configurations must be clearly disclosed to users, *through conspicuous instructions in the user guide and user manual*, to ensure unsupported operations are avoided.") (emphasis added).

The third sentence tells consumers to consult their user manuals to obtain further information—

that is, to obtain the very information the FCC requires cell phone manufacturers to provide in "conspicuous instructions" in user manuals.

Further, the phrase "RF radiation," used in the second sentence, is precisely the phrase the FCC has used, beginning in 1996, to refer to radio-frequency emissions from cell phones. *See* FCC Guidelines for Radio frequency Radiation at ¶ 1, *supra* at 9 ("radio-frequency (RF) radiation"). We do not fault Berkeley for using the term "RF radiation" when referring to cell phone emissions when it is not only the technically correct term, but also the term the FCC itself uses to refer to such emissions.

Finally, we note that the Berkeley ordinance allows a cell phone retailer to add to the compelled disclosure. If a retailer is concerned, as CTIA contends it should be, that the term "RF radiation" is inflammatory and misleading, the retailer may add to the compelled disclosure any further statement it sees fit to add. *See* § 9.96.030(B) ("The paper on which the notice is printed may contain other information in the discretion of the Cell phone retailer[.]"). CTIA has put nothing in the record to indicate that any Berkeley retailer has felt it necessary, or even useful, to add explanatory information about the nature of RF radiation. Nor has CTIA presented any evidence in the district court showing how Berkeley consumers have understood the compelled disclosure, or evidence showing that sales of cell phones in Berkeley were, or are likely to be, depressed as a result of the compelled disclosure.

d. Likelihood of Success

Based on the foregoing, we conclude that CTIA has little likelihood of success on its First Amendment claim that the disclosure compelled by the Berkeley ordinance is unconstititutional.

2. Preemption

a. Conflict Preemption

"Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in the legislative field." *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (internal quotation marks omitted). CTIA contends that Berkeley's compelled disclosure is invalid because of conflict preemption.

"Conflict preemption is implicit preemption of state law that occurs where there is an actual conflict between state and federal law." *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (citations and internal quotation marks omitted). "When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize those objectives. Allowing a state law to impose a different standard [impermissibly] permits a rebalancing of those objectives." *Farina v. Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010). Conflict preemption arises either when "compliance with both federal and state regulations is a physical impossibility . . . or when state law stands as an obstacle to the accomplishment and execution of the full

purposes and objectives of Congress." *McClellan*, 776 F.3d at 1039 (citations and internal quotation marks omitted). We are concerned here with "obstacle" preemption. CTIA contends that Berkeley's compelled disclosure creates an impermissible obstacle by requiring more disclosure than is required by the FCC. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (finding preemption where a challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (internal quotation marks omitted).

b. Telecommunications Act of 1996

"Preemption analysis 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 438 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). "Congressional intent, therefore, is the ultimate touchstone of preemption analysis." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007) (citing *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000)).

The FCC's organic statute is the Telecommunications Act of 1996 ("the Act"), 110 Stat. 56. Legislative hearings, as well as the Act itself, show that Congress desired "uniform, consistent requirements, with adequate safeguards of public health and safety" in nationwide telecom services. *See* H.R. Rep. No. 104-204, 94 (1996). The Act delegated to the FCC the authority "to 'make effective rules regarding the environmental

effects of [RF] emissions.'" *Farina v. Nokia Inc.*, 625 F.3d 97, 106 (3d Cir. 2010) (quoting 110 Stat. 56, 152). Specifically, "the FCC was tasked not only with protecting the health and safety of the public, but also with ensuring the rapid development of an efficient and uniform network[.] *Id.* at 125. This led to the creation of the regulatory measures described *supra*.

The centerpiece of CTIA's argument is that the FCC does not compel cell phone manufacturers to provide information to consumers about SAR limits on RF radiation exposure. CTIA did not make this argument in the district court. Indeed, it conceded in its briefing in the district court that the FCC did so require. *See*, *e.g.*, Plaintiff's Reply in Support of Motion for a Preliminary Injunction at 12 ("The manner in which Berkeley requires CTIA's members to deliver Berkeley's message—at the point of sale, rather than in a user manual—also distinguishes the Ordinance from *the FCC's requirements*.") (emphasis added). CTIA made this argument for the first time in its Reply Brief in this court, and it repeated the argument during oral argument to our panel.

Because CTIA conceded the point in the district court and made its argument to the contrary only before us (and even then only in its Reply Brief and during oral argument), it is waived. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) ("This issue is raised for the first time on appeal, and we therefore treat the issue as waived."); *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) ("we ordinarily decline to consider arguments raised for the first time in a reply brief"). But we note that if we were to consider CTIA's argument

on the merits, we would reject it. Beginning in October 2015, the FCC required cell phone manufacturers to inform consumers of minimum separation distances in user manuals. We quoted the relevant passage, *supra* at 12–13. For the convenience of the reader, we repeat much of the passage here:

> Specific information *must be included* in the operating manuals to enable users to select body-worn accessories that meet the minimum test separation distance requirements. Users *must be fully informed* of the operating requirements and restrictions, to the extent that the typical user can easily understand this information, to acquire the required body-worn accessories to maintain compliance. . . . All supported body-worn accessory operating configurations *must be clearly disclosed* to users, through conspicuous instructions in the user guide and user manual, to ensure unsupported operations are avoided.

In re Exposure Procedures and Equipment Authorization Policies for Mobile and Portable Devices, FCC Office of Engineering and Technology Laboratory Division § 4.2.2(d) at 11 (Oct. 23, 2015) ("FCC Exposure Procedures") (emphases added). The FCC document containing this language "is one of a collection of guidance publications referred to as the *published RF exposure KDB procedures*." *Id.* § 1 at 1 (emphasis in original). The document specifies that "[a]pplications for equipment authorization must meet all the requirements described in the applicable *published RF exposure KDB procedures*." *Id.* § 2 at 3 (emphasis in

original). That is, in order for a cell phone to be authorized by the FCC for consumer use, it must satisfy the requirements outlined in FCC Exposure Procedures.

c. Likelihood of Success

Given the FCC's requirement that cell phone manufacturers must inform consumers of "minimum test separation distance requirements," and must "clearly disclose[ ]" accessory operating configurations "through conspicuous instructions in the user guide and user manual, to ensure unsupported operations are avoided," we see little likelihood of success based on conflict preemption. Berkeley's compelled disclosure does no more than to alert consumers to the safety disclosures that the FCC requires, and to direct consumers to federally compelled instructions in their user manuals providing specific information about how to avoid excessive exposure. Far from conflicting with federal law and policy, the Berkeley ordinance complements and reinforces it.

B. Irreparable Harm

Irreparable harm is relatively easy to establish in a First Amendment case. "[A] party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury . . . by demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002) (citation omitted), *abrogated on other grounds by Winter v. Natural Res. Def. Council.*, 555 U.S. 7, 22 (2008). We nonetheless conclude that it has not been established here.

"[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury." *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). But the mere assertion of First Amendment rights does not automatically require a finding of irreparable injury. It is the "purposeful unconstitutional suppression of speech [that] constitutes irreparable harm for preliminary injunction purposes." *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984). We have already concluded under the *Zauderer* test for compelled disclosure that, on the record before us, Berkeley's ordinance complies with the First Amendment. *Sammartano*, 303 F.3d at 973–74 ("[T]he test for granting a preliminary injunction is 'a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness,' when the harm claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness."). Further, there is nothing in the record showing harm to CTIA or its members through actual or threatened reduction in sales of cell phones caused by the disclosure compelled by the ordinance.

We conclude similarly that there has been no irreparable harm based on preemption.

C. Balance of the Equities

A court must "balance the interests of all parties and weigh the damage to each" in determining the balance of the equities. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009).

CTIA asserts that implementing the ordinance will cause its members substantial economic harm and violate their First Amendment rights. We have concluded that CTIA's First Amendment claim is unlikely to succeed, and the record provides no evidence

to support a finding of economic or reputational harm to cell phone retailers. However, CTIA relies on *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 15–16 (1986), to argue that, while disclosures may not violate the First Amendment, the ordinance imposes an "undue burden" on CTIA's members because it creates significant "pressure to respond," and that this pressure is "antithetical to the free discussion that the First Amendment seeks to foster." There is no showing of any such pressure. The ordinance requires CTIA's members to inform their customers that the FCC has promulgated regulations concerning RF emissions and to advise customers to refer to their user manuals for more information. To the extent that a cell phone retailer is dissatisfied with the disclosure as written, it can append additional disclosures. Berkeley Ordinance, § 9.96.030(C) (May 26, 2015). CTIA has put nothing in the record showing that any Berkeley cell phone retailer has felt pressured, or has sought to take advantage of the provision of the ordinance allowing it to make any additional disclosure it desires. *See also Milavetz*, 559 U.S. at 250 ("not preventing . . . [the] convey[ance] of any additional information" is one of the essential features of a *Zauderer* disclosure).

Berkeley properly asserts that it has a substantial interest in protecting the health of its citizens. CTIA, on the other hand, has failed to demonstrate any hardship tipping the balance in its favor. We conclude that the balance of the equities favors Berkeley.

D. The Public Interest

"The public interest inquiry primarily addresses impact on non-parties rather than parties. It embodies the Supreme Court's direction that[,] in exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Bernhardt v. Los Angeles Cty.*, 339 F.3d 920, 931–32 (9th Cir. 2003) (internal quotation marks and citation omitted) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). We agree with the district court that an injunction would injure the public interest in having a free flow of accurate information.

"Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal." *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 114. The district court found that while "'accurate and balanced disclosures regarding RF energy are already available' . . . there is evidence that the public does not know about those disclosures." (citing Jensen Decl., Ex. A (survey)). Because "disclosure furthers, rather than hinders . . . the efficiency of the 'marketplace of ideas,'" we hold that the ordinance is in the public interest and that an injunction would harm that interest. *See Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 114.

Conclusion

Our assessment of the probability of CTIA's success on the merits, the likelihood of irreparable harm, the balance of the hardships, and the public interest lead us to conclude that the district court did not abuse its discretion in denying preliminary injunctive

relief to CTIA. Accordingly, the district court's order denying such relief is

AFFIRMED.

FRIEDLAND, Circuit Judge, dissenting in part:

The majority interprets the sentences in Berkeley's forced disclosure statement one at a time and holds that each is "literally true." But consumers would not read those sentences in isolation the way the majority does. Taken as a whole, the most natural reading of the disclosure warns that carrying a cell phone in one's pocket is unsafe. Yet Berkeley has not attempted to argue, let alone to prove, that message is true.

It is clear that the First Amendment prevents the government from requiring businesses to make false or misleading statements about their own products. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011). Because—at least on the current record—that is what Berkeley's ordinance would do, I believe the ordinance likely violates the First Amendment and therefore should have been preliminarily enjoined.[1] *See Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) ("Both this court and the Supreme Court have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

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[1] I agree with the majority's preemption analysis so dissent only from sections IV.A.1., IV.B., IV.C., and IV.D. of the majority opinion.

I

Berkeley's ordinance requires stores selling cell phones to provide a disclosure stating:

> To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or use manual for information about how to use your phone safely.

Berkeley Mun. Code § 9.96.030(A) (2015).

The majority parses these sentences individually and concludes that each is "literally true." In my view, this approach misses the forest for the trees. On its face, the disclosure begins and ends with references to safety, plainly conveying that the intervening language describes something unsafe. Indeed, the disclosure directs consumers to their user manuals for instructions on "how to use your phone safely." The message of the disclosure as a whole is clear: carrying a phone "in a pants or shirt pocket or tucked into a bra" is *not* safe. Yet that implication is a problem for Berkeley because it has not offered any evidence that carrying a cell phone in a pocket is in fact unsafe. Instead, it has expressly denied that the required disclosure conveys that message. I disagree.

Berkeley insists the ordinance "rests exclusively upon existing FCC regulations." But those regulations communicate something far different than does the

ordinance. The FCC guidelines make clear that they are designed to incorporate a many-fold safety factor, such that exposure to radiation in excess of the guideline level is considered by the FCC to be safe:

> Our current RF exposure guidelines . . . include[e] a significant "safety" factor, whereby the exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure. This "safety" factor can well accommodate a variety of variables such as different physical characteristics and individual sensitivities—and even the potential for exposures to occur in excess of our limits *without posing a health hazard to humans*.

In re Reassessment of FCC Radiofrequency Exposure Limits and Policies, 28 FCC Rcd. 3498, 3582 (Mar. 29, 2013) (emphasis added). There is thus no evidence in the record that the message conveyed by the ordinance is true.[2]

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[2] Because even under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), any forced disclosure statement must be truthful, *see id.* at 651, I do not think that any discussion of *Zauderer* is appropriate in this case. If nevertheless I were to consider the extent of *Zauderer*'s applicability, as the majority does, I would be inclined to conclude that *Zauderer* applies only when the government compels a truthful disclosure to counter a false or misleading advertisement. Given

II

The First Amendment clearly does not permit the government to force businesses to make false or misleading statements about their products. In *Video Software Dealers*, we considered a challenge to a California law requiring that "violent" video games be labeled with a sticker that said "18" and preventing the sale or rental of violent video games to minors. 556 F.3d at 953–54. After striking down the law's sale and rental prohibition, we concluded that continuing to require the label "18" "would arguably . . . convey a false statement" that minors could not buy or rent the video game, and was therefore unconstitutional. *Id.* at 965–67. The same principle applies here: the First Amendment prohibits Berkeley from compelling retailers to communicate a misleading message. I would thus hold that CTIA is likely to succeed on the merits of its First Amendment challenge.

There are downsides to false, misleading, or unsubstantiated product warnings. Psychological and

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that the disclosure in *Zauderer* itself prevented an advertisement from being misleading, I have serious doubt that the Supreme Court intended the *Zauderer* test to apply in broader circumstances. *See id.* ("[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."). The majority's contrary conclusion also seems to me to be in tension with our decision in *Video Software Dealers*, which treated *Zauderer* as applying only in the context of disclosures aimed at combatting otherwise misleading advertising. *See* 556 F.3d at 967 ("[T]he labeling requirement fails *Zauderer*'s rational relationship test, which asks if the 'disclosure requirements are reasonably related to the State's interest in preventing deception of customers.'" (quoting *Zauderer*, 471 U.S. at 651)).

other social science research suggests that overuse may cause people to pay less attention to warnings generally: "[A]s the number of warnings grows and the prevalence of warnings about low level risks increases, people will increasingly ignore or disregard them." J. Paul Frantz et al., *Potential Problems Associated with Overusing Warnings*, Proceedings of the Human Factors & Ergonomics Soc'y 43rd Ann. Meeting 916, 916 (1999). Relatedly, "[w]arnings about very minor risks or risks that are extremely remote have raised concerns about negative effects on the believability and credibility of warnings. . . . In essence, such warnings represent apparent false alarms as they appear to be 'crying wolf.'" *Id.* at 918; *see also* David W. Stewart & Ingrid M. Martin, *Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research*, 13 J. Pub. Pol'y & Marketing 1, 7 (1994). If Berkeley wants consumers to listen to its warnings, it should stay quiet until it is prepared to present evidence of a wolf.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CTIA - THE WIRELESS ASSOCIATION, Plaintiff, v. CITY OF BERKELEY, et al., Defendants.	Case No. 15-cv-02529-EMC **ORDER GRANTING DEFENDANTS' MOTION TO DISSOLVE PRELIMINARY INJUNCTION** Docket No. 59

Plaintiff CTIA – The Wireless Association has filed suit against Defendants the City of Berkeley and its City Manager (collectively, "City" or "Berkeley"), asserting that a Berkeley ordinance is preempted by federal law and further violates the First Amendment. Previously, CTIA moved for a preliminary injunction and, in September 2015, the Court granted CTIA relief, enjoining the ordinance "unless and until the sentence in the City notice regarding children safety is excised from the notice." Docket No. 53 (Order at 35).

Subsequently, the City amended the ordinance to excise the language regarding children's safety. Berkeley now moves for dissolution of the preliminary injunction. Having considered the parties' briefs and

accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Berkeley's motion. The Court also **DENIES** CTIA's request for a stay of dissolution pending appeal.

I. FACTUAL & PROCEDURAL BACKGROUND

In granting in part and denying in part CTIA's motion for preliminary injunction, the Court found that Berkeley's required notice warning about risk to children was preempted, but that the remainder of the required notice was not preempted because it was consistent with the FFC's statements and testing procedures. The Court noted the "disclosure, for the most part, simply refers consumers to the fact that there are FCC standards on RF energy exposure – standards which assume a minimum spacing of the cell phone away from the body – and advises consumers to refer to their manuals regarding maintenance of such spacing." Docket No. 53 (Order at 14). The notice was consistent with the FCC's requirement that cell phone manufacturers disclose to consumers information and advice about spacing between the body and a cell phone. *See* Docket No. 53 (Order at 14).

The Court also concluded the notice (after omission of the statement regarding children's safety) did not violate the First Amendment, and noted the distinction drawn by cases between *commercial* and *noncommerical* speech, between *restrictions* on and compelled *disclosures* of commercial speech, and between compelling speech *by the speaker* and requiring disclosure of the *government's* speech. It found the City ordinance in this case was subject to rational basis review, under both a general rational basis test (more

particularly rational basis "with a bite") and the particularized test under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), and *Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). The Court found that *Zauderer* applied a species of the rational basis test and that *Zauderer* was not limited to disclosures designed to prevent consumer deception, but extended to matters of public health and safety. *See* Docket No. 53 (Order at 21-23). In applying *Zauderer*, the Court adopted the Sixth Circuit's analysis of the phrase "'purely factual and uncontroversial'" as used in *Zauderer*, Docket No. 53 (Order at 18-19, 29-33) (quoting *Zauderer*, 471 U.S. at 651), and concluded that the compelled disclosure must only be factual and accurate, not undisputed. *See* Docket No. 53 (Order at 30). The Court found the information mandated by the ordinance met the *Zauderer* test because the information that "the FCC has put limits on RF energy emission with respect to cell phones and that wearing a cell phone against the body (without any spacer) may lead the wearer to exceed the limits," Docket No. 53 (Order at 31), was consistent with the FCC's directive. It was factual and accurate because "the FCC established certain limits regarding SAR limits which have not been challenged as illegal. The mandated disclosure truthfully states that federal guidelines may be exceeded where spacing is not observed," Docket No. 53 (Order at 32-33), and accurately advises users "to consult the manual wherein the FCC itself mandates disclosures about maintaining spacing." Docket No. 53 (Order at 33). The Court found that any burden on cell phone retailers was minimal because there likely was no First Amendment right violated, and retailers were authorized by the ordinance

to add their own language clarifying or countering the City's message on the required notice. *See* Docket No. 53 (Order at 33-34). The Court thus issued a preliminary injunction against the portion of the ordinance regarding children's safety, but denied CTIA's motion as to the remainder of the notice language.

Thereafter, the City amended the ordinance to excise the language regarding children's safety. Berkeley now moves for dissolution of the preliminary injunction.

II. DISCUSSION

Given the Court's prior ruling, the fact that the ordinance has now been amended should lead to dissolution of the preliminary injunction. However, CTIA has taken this opportunity to argue in its opposition brief that the Court's analysis in its preliminary injunction order was erroneous. While CTIA has not technically asked the Court to reconsider its prior order (nor would it since the Court ultimately issued CTIA's requested preliminary injunction), CTIA has asked the Court to stay dissolution of the preliminary injunction pending appeal because of the purported errors. Accordingly, evaluating CTIA's request for a stay essentially requires this Court to retread ground already covered in its prior order.

A. Legal Standard

In *Hilton v. Braunskill*, 481 U.S. 770 (1987), the Supreme Court held that, in evaluating whether there should be a stay of an order pending appeal, a court should consider the following:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 776. "The 'irreparably-injured' and 'likelihood-of-success' factors are considered on 'a sliding scale . . . .'" *Stormans Inc. v. Selecky*, 526 F.3d 406, 412 (9th Cir. 2008) (discussing applications for a stay pending appeal). That is, relief may be appropriate where the likelihood of success is such that serious questions going to the merits are raised and the balance of hardships tips sharply in the stay applicant's favor. *Cf. Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (holding that the serious questions approach survives in the context of deciding whether a preliminary injunction should issue).

B. Likelihood of Success on the Merits or Serious Questions Going to the Merits

In its opposition, CTIA largely makes arguments that it previously made as part of the briefing on the motion for preliminary injunction. The Court shall not re-address those arguments but instead will focus on the arguments made by CTIA that are different from, or least slightly different from, those made as part of the briefing on the preliminary injunction motion. CTIA's new arguments concern the First Amendment issue rather than the preemption issue.

1. *Retail Digital*

Post-briefing, CTIA provided the Court with a recent decision issued by the Ninth Circuit, *Retail Digital Network, LLC v. Appelsmith*, No. 13-56069 (9th Cir. Jan. 7, 2016). *See* Docket No. 67 (statement of recent decision). CTIA asserts that *Retail Digital* supports its position that a more demanding standard of review should apply in evaluating the City's ordinance for constitutionality.

In *Retail Digital*, the Ninth Circuit held that *Central Hudson*'s immediate scrutiny test should *not* be applied when there are content- or speaker-based restrictions on nonmisleading commercial speech regarding lawful goods or services; rather, under the Supreme Court's decision in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), heightened judicial scrutiny should apply. *See Retail Digital*, slip. op. at 4, 16. The Ninth Circuit implicitly acknowledged that *Sorrell* did not precisely define what heightened judicial scrutiny meant but indicated that it was something less than strict scrutiny, s*ee* slip op. at 16 n.3, but more than intermediate scrutiny. In essence, the Ninth Circuit suggested that a more exacting form of *Central Hudson* review would constitute heightened judicial scrutiny within the meaning of *Sorrell*. *See also* slip. op. at 16-18 (stating that "[h]eightened judicial scrutiny may be applied using the familiar framework of the four-factor *Central Hudson* test").

While *Retail Digital* is undoubtedly a significant case, it does not address the critical issue here which is what impact *Sorrell* should have on the *Zauderer* line of cases. *Retail Digital* involved outright *restriction* on commercial speech based on content, and

the court described *Sorrell* as involving "content- or speaker-based restrictions" on non-misleading commercial speech. Slip op. at 16. The court also described Eighth, Second, and Third Circuit opinions as involving "restrictions" on speech as well. *See* slip. op. at pp. 18-19. Quoting *Sorrell*, the *Retail Digital* court emphasized that heightened security was designed to check the raw paternalism of laws which "'keep people in the dark,'" slip. op. at 18 (quoting *Sorrell*) and which allowed the government to "silence truthful speech." Slip. op. at 22.

As this Court indicated in its prior order, *Zauderer* and other cases have noted that laws requiring *disclosure* of accurate information does not silence truthful speech or keep people in the dark; disclosures are designed precisely to accomplish the opposite. Thus, nothing in *Retail Digital*'s holding or reasoning suggests *Sorrell* did away with the Supreme Court's distinction (as articulated in *Zauderer* and embraced in *Milavetz*) between restrictions on commercial speech and compelled disclosure of such speech. Unless and until *Zauderer* and *Milavetz* are overruled or narrowed by the Supreme Court or Ninth Circuit, this Court adheres to its earlier analysis.

2. Rational Review

CTIA argues next that the Court erred in holding that "even the more forgiving requirements of *Zauderer* do not apply because the compelled commercial speech in this case is attributed to the City of Berkeley." Opp'n at 7. In other words, according to CTIA, the Court improperly applied rational review (with some bite) rather than *Zauderer*. But CTIA has not cited any authority involving the combination of (1)

commercial speech, (2) compelled disclosure (as opposed to restriction or suppression), and (3) speech clearly and expressly attributed to the government to support its position.

The CTIA's reliance upon *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), is misplaced. There, the Supreme Court was called upon to evaluate whether a mushroom producer was fairly subject to a mandatory assessment under federal law (the Mushroom Act), where the funds were used to sponsor an advertising message with which it did not agree. The message was that "mushrooms are worth consuming whether or not they are branded," and the mushroom producer disagreed with this message because it wanted "to convey the message that its brand of mushrooms is superior to those grown by other producers." *Id.* at 411. The Supreme Court held that there was a First Amendment violation. But it is not clear from the opinion whether the advertising message was clearly attributed to the federal government in the first place. Moreover, the Supreme Court did not evaluate the First Amendment issue under *Zauderer*. It simply stated that its conclusion was not inconsistent with *Zauderer*. *See id.* at 416 ("There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers [as in *Zauderer*]."). Notably, the Supreme Court's analysis was guided by a different line of cases involving the compelled subsidization of speech with which the speaker/contributor disagreed. *See id.* at 413 ("conclud[ing] . . . that the mandated support is contrary to the First Amendment principles set forth

in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity") (citing, *inter alia*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (agreeing that union members "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative")).

In any event, the Court need not dwell on this argument because, in its prior order, the Court did not take a firm position as to whether general rational basis review should in fact apply – *i.e.*, rational review *without* the specific requirement in *Zauderer* that the compelled speech be factual and uncontroversial. While the Court did note that there was a "persuasive argument" in favor of such general rational review, Docket No. 53 (Order at 23, 26), ultimately, it applied both general rational review and *Zauderer*.

3. Voluntary Advertising

In its papers, CTIA presents the new argument (not articulated in its briefing on the preliminary injunction) that *Zauderer* is applicable only when a party has put out "'voluntary advertisements'" and, here, "the Amended Ordinance does not 'involve voluntary commercial advertising.'" Opp'n at 6. In support of this argument, CTIA relies primarily on two cases: *United Foods, Inc.*, 533 U.S. at 405, and *National Association of Manufacturers v. SEC,* 800 F.3d 518 (D.C. Cir. 2015) (hereinafter "*NAM*").

United Foods, however, provides little support for CTIA's position. *United Foods* simply states that *Zauderer* was

> a case involving attempts by a State to prohibit certain voluntary advertising by licensed attorneys. The Court invalidated the restrictions in substantial part but did permit a rule requiring that attorneys who advertised by their own choice and who referred to contingent fees should disclose that clients might be liable for costs.

United Foods, 533 U.S. at 416. But the rationale of *Zauderer*'s holding was not conditioned on the fact that the plaintiff therein had engaged in voluntary advertising. Rather, it was based on the reasoning that the plaintiff in *Zauderer* had a minimal constitutional interest in not disclosing purely factual and uncontroversial information. *See, e.g.*, *Zauderer*, 471 U.S. at 651 (stating that "the interests at stake in this case are not of the same order as those discussed in [other cases;] Ohio has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein'"). United *Foods* did not purport to change the core rational of *Zauderer*; as noted above, its analysis was focused on *Abood*, not *Zauderer* and *Milavetz*.

CTIA's citation to *NAM* does provide more support for its position. There, the D.C. Circuit, in a divided opinion, considered certain SEC-required disclosures regarding "conflict minerals" (*i.e.*, certain minerals such as gold, tantalum, tin, and tungsten which can

be used by armed groups, *e.g.*, in the Congo, to finance their war operations). *See NAM*, 800 F.3d at 522 (noting that "[c]onflict mineral disclosures are to be made on each reporting company's website and in its reports to the SEC"). The specific issue for the court was "whether *Zauderer* . . . reaches compelled disclosures that are unconnected to advertising or product labeling at the point of sale." *NAM*, 800 F.3d at 521. The panel majority in *NAM* held that *Zauderer* does not:

> [T]he Supreme Court's opinion in *Zauderer* is confined to advertising, emphatically, and, one may infer, intentionally. In a lengthy opinion, the Court devoted only four pages to the issue of compelled disclosures. Yet in those few pages the Court explicitly identified advertising as the reach of its holding no less than thirteen times. Quotations in the preceding footnote prove that the Court was not holding that any time a government forces a commercial entity to state a message of the government's devising, that entity's First Amendment interest is minimal. Instead, the *Zauderer* Court . . . held that the advertiser's "constitutionally protected interest in *not* providing any particular factual information *in his advertising* is minimal."

Id. at 522 (emphasis in original). But CTIA has read too much into the statements from *NAM* above. *NAM* understandably focused on advertising because of the specific issue presented before it – *i.e.*, whether *Zauderer* should apply to SEC disclosures, a context entirely different from the typical case which involves

speech directed at consumers which lies at the core of the definition of commercial speech – proposal of a commercial transaction. *See Retail Digital*, slip op. at 12. Although the Court in *Zauderer* may have referred repeatedly to advertising (as noted by the court in *NAM*), theses references were contextual and not the *sine qua non* of *Zauderer*'s reasoning. *Zauderer* did not base its holding on any notion of estoppel or equity, but on the lack of a significant constitutional interest in not disclosing factual and noncontroversial information to consumers.

In any event, the *NAM* majority opinion did not restrict *Zauderer*'s reach to advertising only. Indeed, as indicated above, the court noted that *Zauderer* required a connection to either advertising *or* a point-of-sale disclosure. *See also id*. (stating that the SEC "recognized that this case does not deal with advertising *or with point of sale disclosures*") (emphasis added). In restricting *Zauderer*'s reach, the majority in *NAM* accepted the D.C. Circuit's *en banc* decision in *America Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), which applied *Zauderer* to a law requiring disclosure of country-of-origin information about meat products at the time of sale, even though there had been no voluntary advertising to the contrary. *See id.* at 20.

In the instant case, the ordinance requires a point-of-sale disclosure: "The notice required by this Section shall either be provided to each customer who buys or leases a Cell phone or shall be prominently displayed at any point of sale where Cell phones are purchased or leased. " Berkeley Mun. Code § 9.96.030(B). Like the disclosure in *AMI*, and unlike the disclosure in *NAM*, the notice in the case at bar

occurs at the time of sale and is targeted directly at the consumer who has a direct interest in the matter. Accordingly, even under *NAM*, *Zauderer* is applicable to the instant case.

Finally, no other circuit court has limited *Zauderer*'s holding to voluntary advertising. *See, e.g.*, *Disc. Tobacco City & Lottery, Inc. v. United States,* 674 F.3d 509, 518 (6th Cir. 2012) (addressing, *inter alia*, statute's requirement that "tobacco manufacturers reserve significant packaging space for textual health warnings"); *Nat'l Elec. Mfrs. v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001) (addressing statute that required "manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste"). *NAM* does not state the prevailing view.

4. *Zauderer*'s "Uncontroversial" Requirement

According to CTIA, even if *Zauderer* is applicable, the Court has not properly interpreted *Zauderer*'s "factual and uncontroversial" requirement. More specifically, CTIA contends that the Court improperly construed "uncontroversial" to mean accurate. According to CTIA, this position, although endorsed by the Sixth Circuit, is a minority position.

CTIA's argument is problematic for several reasons. First, although CTIA claims that the majority of cases go against the Sixth Circuit, it has cited only one case in support of its position – *i.e.*, *NAM*, where the majority opinion stated that "'uncontroversial,' as a legal test, must mean something different than 'purely factual.'" *NAM*, 800 F.3d at 528. As the sole

circuit opinion so holding, *NAM* hardly represents the majority view on this issue.

Second, even in *NAM*, the court did not come up with a clear definition for the term "uncontroversial" and even suggested that uncontroversial should not necessarily be equated with undisputed *See id.* at 529 (noting that "[a] controversy, the dictionaries tell us, is a dispute, especially a public one" but, under that definition, it was difficult to understand an earlier court decision that certain country-of-origin disclosures were "uncontroversial" because there was a public dispute over such).

Third, *NAM* is not irreconcilable with the Court's ruling. There is a difference, under this Court's interpretation, between "factual" and "uncontroversial." "Uncontroversial" should generally be equated with the term "accurate"; in contrast, "factual" goes to the difference between a "fact" and an "opinion." Notably, in the San Francisco CTIA case, the Ninth Circuit made that distinction between fact and opinion in discussing *Zauderer*. *See CTIA – Wireless Ass'n v. City & County of San Francisco*, 494 Fed. Appx. 752, 753-54 (9th Cir. 2012) (stating that the city's "fact sheet contains more than just facts" – *i.e.*, it also contained the city's "recommendations"; the "language could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous"). The Seventh Circuit also made that same distinction in *Entertainment Software Association v. Blagojevich*, 469 F.3d 641, 652-53 (7th Cir. 2006) (stating that "[t]he State's definition of this term [*i.e.*, sexually explicit] is far more opinion-based than the question of whether a particular chemical is within any given product").

Finally, the Court finds CTIA's interpretation of "uncontroversial" untenable. A "controversy" cannot be created any time there is a disagreement between the parties because *Zauderer* would never apply, especially where there are health and safety risks, which invariably are dependent in some degree on the current state of science and research. A "controversy" cannot automatically be deemed created any time there is a disagreement about the science behind a warning because science is almost always debatable at some level (*e.g.*, even if there is agreement that there is a safety issue, there is likely disagreement about at what point a safety concern is fairly implicated). Under CTIA's position, any science-based warning required by a governmental agency would automatically be subject to heightened scrutiny under the First Amendment. *See Nat'l Elec.*, 272 F.3d at 116 (taking note of "the potentially wide-ranging implications of NEMA's First Amendment complaint" as "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," including tobacco and nutritional labeling and reporting of toxic substances and pollutants).

5. Misleading

CTIA asserts that, even if *Zauderer*'s "uncontroversial" requirement simply demands accuracy, here, there is inaccuracy or, more specifically, the compelled disclosure is misleading because it claims there is a safety issue when, in fact, there is none. This argument is predicated on the fact that the FCC's standards have built in a substantial safety margin (at least for thermal effects of RF radiation) *See* 2013 FCC Reassessment, 28 F.C.C. Rcd. 3498, 3588 (2013) ("The

limits were set with a large safety factor, to be well below a threshold for unacceptable rises in tissue temperature. As a result, exposure well above the specified SAR limit should not create an unsafe condition.").

CTIA's argument is not persuasive, particularly when the actual text of the notice required by the amended ordinance is taken into account. The notice provides:

> To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

The first two sentences are undisputedly accurate. The FCC promulgated guidelines for safety reasons. Even though the FTC built a large margin into its RF exposure guidelines, it did set specific limits and did so in order to assure safety. CTIA does not challenge those guidelines. Furthermore, carrying or using a phone in the above-identified manner (without spacing) could lead a person to exceed the FCC guidelines for exposure.

CTIA contends that, even if the two sentences are technically accurate, the juxtaposition of the two gives rise to the implication that carrying or using your phone in a pants or shirt pocket or tucked into a bra

when the phone is on and connected to a wireless network is unsafe.[1] But even though the FCC has indicated that such *should* not be unsafe (at least from a thermal effects perspective), the fact remains that the FCC still decided to set the guidelines at particular levels because of its safety concerns. Thus, ultimately, CTIA's beef should be with the FCC. If CTIA believes that the safety margin is too generous because there is no real safety concern at that level, it should take that matter up with the FCC administratively. It has not done so. Berkeley's reference to these unchallenged FCC guidelines does not violate the First Amendment.

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[1] CTIA indicated at the hearing that it would take the same position *even* if the safety-related words (*e.g.*, "safety," "radiation") were removed from the notice or modified so as to read:

> The Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF energy. Refer to the instructions in your phone or user manual for information about how to use your phone.

CTIA's position borders on the extreme.

6. Government Interest

Finally, CTIA reiterates its prior argument that, even if *Zauderer* were to apply, there is no legitimate governmental interest here because "courts have consistently held that the public's right to know is insufficient to justify compromising protected constitutional rights." Docket No. 4 (Mot. at 11) (internal quotation marks omitted). But the authority cited by CTIA is not on point. For example, in *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), the state did not claim that health or safety concerns prompted the passage of its labeling law but instead defended the statute simply on the basis of strong consumer interest and the public's right to know. *See id.* at 73 (also stating, that, "[a]bsent . . . some indication that this information bears on a reasonable concern for human health or safety . . . , the manufacturers cannot be compelled to disclose it"). Here, Berkeley's ordinance specifically identifies safety as an animating concern in the stated findings and purpose behind the notice requirement. *See, e.g.*, Berk. Mun. Code § 9.96.010(E) ("Consumers are not generally aware of these *safety recommendations*.") (emphasis added). Because the ordinance is ultimately anchored in consumer awareness of FCC guidelines designed to insure safety, the Court concludes that there is a legitimate, indeed substantial, government interest here.

C. Irreparable Injury

As it did before, CTIA claims irreparable injury because it could not "undo the damage to its reputation and customer goodwill from having put out a misleading disclosure that generated fear in consumers

about 'exposure' to cell phone 'radiation.'" Opp'n at 16. However, CTIA has generated no evidence to substantiate any such damage. Moreover, CTIA could prevent or substantially mitigate any such damage by engaging in counterspeech as the ordinance authorizes. While CTIA argues that forced counterspeech itself inflicts a First Amendment injury, that depends on there being a First Amendment violation in the first place. As the Court noted in its preliminary injunction order, the claim of irreparable harm is ultimately "predicated on the First Amendment argument," an argument which has no merit. Docket No. 53 (Order at 34 n.13).

The Court again concludes that, even if serious questions going to the merits were raised here (and the Court finds that there are not), the balance of hardships does not tip *sharply* in CTIA's favor.

III. CONCLUSION

For the foregoing reasons, the Court grants the City's motion to dissolve the preliminary injunction. The Court further denies CTIA's request that this order dissolving the preliminary injunction be stayed pending appeal.

This order disposes of Docket No. 59.

IT IS SO ORDERED.

Dated: January 27, 2016 /s/

EDWARD M. CHEN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CTIA – THE WIRELESS ASSOCIATION®,

Plaintiff,

v.

THE CITY OF BERKELEY, CALIFORNIA, *et al.*,

Defendants.

_____/

No. C-15-2529 EMC

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; AND GRANTING NRDC'S MOTION FOR LEAVE TO FILE AMICUS BRIEF

(Docket Nos. 4, 36)

As alleged in its complaint, Plaintiff CTIA – The Wireless Association ("CTIA") is a not-for-profit corporation that "represents all sectors of the wireless industry, including but not limited to manufacturers of cell phones and accessories, providers of wireless services, and sellers of wireless services, handsets, and accessories." Compl. ¶ 18. Included among CTIA's members are cell phone retailers. *See* Compl. ¶ 19. CTIA has filed suit against the City of Berkeley and its City Manager in her official capacity (collectively "City" or "Berkeley"), challenging a City ordinance that requires cell phone retailers to provide a certain

notice regarding radiofrequency ("RF") energy emitted by cell phones to any customer who buys or leases a cell phone. According to CTIA, the ordinance is preempted by federal law and further violates the First Amendment. Currently pending before the Court is CTIA's motion for a preliminary injunction in which it seeks to enjoin enforcement of the ordinance. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part the motion.[1]

I. FACTUAL & PROCEDURAL BACKGROUND

A. City Ordinance

RF energy is "'a form of electromagnetic radiation that is emitted by cell phones.'" *In re Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3498, 3585 (Mar. 29, 2013) [hereinafter "2013 FCC Reassessment"]. The City ordinance at issue concerns RF energy emitted by cell phones.

The ordinance at issue is found in Chapter 9.96 of the Berkeley Municipal Code. It provides in relevant part as follows:

> A. A Cell phone retailer shall provide to each customer who buys or leases a

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[1] The National Resources Defense Council ("NRDC") has filed a motion for leave to file an amicus brief in conjunction with the preliminary injunction proceedings. This motion is hereby **GRANTED**. CTIA has failed to show that it would be prejudiced by the Court's consideration of the brief, particularly because CTIA had sufficient time to submit a proposed opposition to NRDC's proposed amicus brief.

Cell phone a notice containing the following language:

The City of Berkeley requires that you be provided the following notice:

To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. This potential risk is greater for children. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

B. The notice required by this Section shall either be provided to each customer who buys or leases a Cell phone or shall be prominently displayed at any point of sale where Cell phones are purchased or leased. If provided to the customer, the notice shall include the City's logo, shall be printed on paper that is no less than 5 inches by 8 inches in size, and shall be printed in no smaller than a 18-point font. The paper on which the notice is printed may contain other information in the discretion of the Cell phone retailer, as long as that information is distinct from the notice language required by subdivision (A) of this Section. If prominently displayed at a point of sale, the

> notice shall include the City's logo, be printed on a poster no less than 8-1/2 by 11 inches in size, and shall be printed in no small than a 28-point font. The City shall make its logo available to be incorporated in such notices.

Berkeley Mun. Code § 9.96.030.

The stated findings and purpose behind the notice requirement are as follows:

> A. Requirements for the testing of cell phones were established by the federal government [*i.e.*, the Federal Communications Commission ("FCC")] in 1996.
>
> B. These requirements established "Specific Absorption Rates" (SAR[2]) for cell phones.[3]
>
> C. The protocols for testing the SAR for cell phones carried on a person's body assumed that they would be carried a small distance away from the body, e.g., in a holster or belt clip, which was the common practice at that time. Testing of cell phones under these protocols has generally been conducted based on

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2 SAR is "a measure of the amount of RF energy absorbed by the body from cell phones." *CTIA – The Wireless Ass'n v. City & County of San Francisco*, 827 F. Supp. 2d 1054, 1056 (N.D. Cal. 2011) (Alsup, J.).

3 *See* 47 C.F.R. § 2.1093 (setting RF energy exposure limits).

an assumed separation of 10-15 millimeters.

D. To protect the safety of their consumers, manufacturers recommend that their cell phones be carried away from the body, or be used in conjunction with hands-free devices.

E. Consumers are not generally aware of these safety recommendations.

F. Currently, it is much more common for cell phones to be carried in pockets or other locations rather than holsters or belt clips, resulting in much smaller separation distances than the safety recommendations specify.

G. Some consumers may change their behavior to better protect themselves and their children if they were aware of these safety recommendations.

H. While the disclosures and warnings that accompany cell phones generally advise consumers not to wear them against their bodies, e.g., in pockets, waistbands, etc., these disclosures and warnings are often buried in fine print, are not written in easily understood language, or are accessible only by looking for the information on the device itself.

> I. The purpose of this Chapter is to assure that consumers have the information they need to make their own choices about the extent and nature of their exposure to radio frequency radiation.

Berkeley Mun. Code § 9.96.010.

Prior to issuing the ordinance, the City conducted a telephone survey on the topic of cell phones. Data was collected from 459 Berkeley registered voters. *See* Jensen Decl. ¶ 6. Seventy percent of those surveyed were not "aware that the government's radiation tests to assure the safety of cell phones assume that a cell phone would not be carried against your body, but would instead be held at least 1- to 15 millimeters from your body." Jensen Decl., Ex. A (survey and results).

B. FCC Pronouncements

As indicated by the above, the FCC has set RF energy exposure standards for cell phones. The present RF energy exposure limits were established in 1996. *See generally* FCC Consumer Guide, Wireless Devices and Health Concerns, *available at* https://www.fcc.gov/guides/wireless-devices-and-health-concerns (last visited September 17, 2015) [hereinafter "FCC Consumer Guide"]. This was done pursuant to a provision in the Telecommunications Act of 1996 ("TCA") that instructed the agency "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." 104 P.L. 104 (1996).

The FCC has also issued some pronouncements regarding RF energy emission and cell phones, three of which are discussed briefly below.

1. FCC KDB Guidelines

First, as CTIA alleges in its complaint,

> [t]he FCC's Office of Engineering and Technology Knowledge Database ("KDB") advises cell phone manufacturers [as opposed to cell phone retailers] to include in their user manual a description of how the user can operate the phone under the same conditions for which its SAR was measured. *See* FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4).

Compl. ¶ 75; *see also* 2013 FCC Reassessment, 28 F.C.C. Rcd. 3498, 3587 (stating that "[m]anufacturers have been encouraged since 2001 to include information in device manuals to make consumers aware of the need to maintain the body-worn distance – by using appropriate accessories if they want to ensure that their actual exposure does not exceed the SAR measurement obtained during testing").

The relevant guideline from the FCC's KDB Office provides as follows:

> Specific information must be included in the operating manuals to enable users to select body-worn accessories that meet the minimum test separation distance requirements. Users must be fully informed of the operating requirements and restrictions, to the extent that the typical

> user can easily understand the information, to acquire the required body-worn accessories to maintain compliance. Instructions on how to place and orient a device in body-worn accessories, in accordance with the test results, should also be included in the user instructions. All supported body-worn accessory operating configurations must be clearly disclosed to users through conspicuous instructions in the user guide and user manual to ensure unsupported operations are avoided. . . .

FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4), *available at* https://apps.fcc.gov/oetcf/kdb/forms/FTSSearchResultPage.cfm?switch=P&id=20676 (last visited September 17, 2015).

2. FCC Consumer Guide

The FCC currently has a FCC Consumer Guide regarding wireless devices and health concerns. In the FCC Consumer Guide, the agency states, *inter alia*, as follows:

- "Several US government agencies and international organizations work cooperatively to monitor research on the health effects of RF exposure. According to the FDA and the World Health Organization (WHO), among other organizations, to date, the weight of scientific evidence has not effectively linked exposure to radio frequency energy from mobile devices with any known health problems." FCC Consumer Guide.

- "Some health and safety interest groups have interpreted certain reports to suggest that wireless device use may be linked to cancer and other illnesses, posing potentially greater risks for children than adults. While these assertions have gained increased public attention, currently no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses. Those evaluating the potential risks of using wireless devices agree that more and longer-term studies should explore whether there is a better basis for RF safety standards than is currently used. The FCC closely monitors all of these study results. However, at this time, there is no basis on which to establish a different safety threshold than our current requirements." *Id.*

- "Even though no scientific evidence currently establishes a definite link between wireless device use and cancer or other illnesses, and even though all cell phones must meet established federal standards for exposure to RF energy, some consumers are skeptical of the science and/or the analysis that underlies the FCC's RF exposure guidelines. Accordingly, some parties recommend taking measures to further reduce exposure to RF energy. **The FCC does not endorse the need for these practices**, but provides information on some simple steps that you can take to reduce your exposure to RF energy from cell phones. **For example**, wireless devices only emit RF energy when you are using them and, the closer the device is to you, the

more energy you will absorb." *Id.* (emphasis in original).

- "Some parties recommend that you consider the reported SAR value of wireless devices. However, comparing the SAR of different devices may be misleading. First, the actual SAR varies considerably depending upon the conditions of use. The SAR value used for FCC approval does not account for the multitude of measurements taken during the testing. Moreover, cell phones constantly vary their power to operate at the minimum power necessary for communications; operation at maximum power occurs infrequently. Second, the reported highest SAR values of wireless devices do not necessarily indicate that a user is exposed to more or less RF energy from one cell phone than from another during normal use (see our guide on SAR and cell phones). Third, the variation in SAR from one mobile device to the next is relatively small compared to the reduction that can be achieved by the measures described above. Consumers should remember that all wireless devices are certified to meet the FCC maximum SAR standards, which incorporate a considerable safety margin." *Id.*

3. 2013 FCC Reassessment

Finally, in 2013, the FCC issued its Reassessment. *See generally* 2013 FCC Reassessment, 28 F.C.C. Rcd. 3498. One of the components of the Reassessment was a Notice of Inquiry, "request[ing] comment to determine whether our RF exposure limits and policies need to be reassessed." *Id.* at 3500.

> We adopted our present exposure limits in 1996, based on guidance from federal safety, health, and environmental agencies using recommendations published separately by the National Council on Radiation Protection and Measurements (NCRP) and the Institute of Electrical and Electronics Engineers, Inc. (IEEE). Since 1996, the International Commission on Non-Ionizing Radiation Protection (ICNIRP) has developed a recommendation supported by the World Health Organization (WHO), and the IEEE has revised its recommendations several times, while the NCRP has continued to support its recommendation as we use it in our current rules. In the Inquiry, we ask whether our exposure limits remain appropriate given the differences in the various recommendations that have developed and recognizing additional progress in research subsequent to the adoption of our existing exposure limits.

Id. at 3501.

The FCC included the following comments in its Reassessment:

- "Since the Commission is not a health and safety agency, we defer to other organizations and agencies with respect to interpreting the biological research necessary to determine what levels are safe. As such, the Commission

invites health and safety agencies and the public to comment on the propriety of our general present limits and whether additional precautions may be appropriate in some cases, for example with respect to children. We recognize our responsibility to both protect the public from established adverse effects due to exposure to RF energy and allow industry to provide telecommunications services to the public in the most efficient and practical manner possible. In the Inquiry we ask whether any precautionary action would be either useful or counterproductive, given that there is a lack of scientific consensus about the possibility of adverse health effects at exposure levels at or below our existing limits. Further, if any action is found to be useful, we inquire whether it could be efficient and practical." *Id.* at 3501-02.

- "In the Inquiry we ask questions about several other issues related to public information, precautionary measures, and evaluation procedures. Specifically, we seek comment on the feasibility of evaluating portable RF sources without a separation distance when worn on the body to ensure compliance with our limits under present-day usage conditions. We ask whether the Commission should consistently require either disclosure of the maximum SAR value or other more reliable exposure data in a standard format – perhaps in manuals, at point-of-sale, or on a website." *Id.* at 3502.

- "The Commission has a responsibility to 'provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.' The intent of our exposure limits is to provide a cap that both protects the public based on scientific consensus and allows for efficient and practical implementation of wireless services. The present Commission exposure limit is a 'bright-line rule.' That is, so long as exposure levels are below a specified limit value, there is no requirement to further reduce exposure. The limit is readily justified when it is based on known adverse health effects having a well-defined threshold, and the limit includes prudent additional safety factors (e.g., setting the limit significantly below the threshold where known adverse health effects may begin to occur). Our current RF exposure guidelines are an example of such regulation, including a significant 'safety' factor, whereby the exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure. This 'safety' factor can well accommodate a variety of variables such as different physical characteristics and individual sensitivities — and even the potential for

exposures to occur in excess of our limits without posing a health hazard to humans."[4] *Id.* at 3582.

- "Despite this conservative bright-line limit, there has been discussion of going even further to guard against the possibility of risks from non-thermal biological effects, even though such risks have not been established by scientific research. As such, some parties have suggested measures of 'prudent avoidance' – undertaking only those avoidance activities which carry modest costs." *Id.* at 3582-83 (emphasis added).

- "Given the complexity of the information on research regarding non-thermal biological effects, taking extra precautions in this area may fundamentally be qualitative and may not be well-served by the adoption of lower specific exposure limits without any known, underlying biological mechanism. Additionally, adoption of extra precautionary measures may have the

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[4] Some contend that RF energy can have both thermal biological effects and nonthermal biological effects. *See, e.g.*, Miller Decl. ¶¶ 7, 10-14 (noting that "RF radiation is non-ionizing radiation," that "[n]on-ionizing radiation can harm through thermal effects, usually only in high dosage," and that "[t]here is an increasingly clear body of evidence that non-ionizing radiation can harm through non-thermal effects as well," including cancer; adding that the evidence indicates that "RF fields are not just a *possible* human carcinogen but a *probable* human carcinogen"). The safety factor built in by the FCC seems to be addressed to the thermal biological effects only.

unintended consequence of 'opposition to progress and the refusal of innovation, ever greater bureaucracy, . . . [and] increased anxiety in the population.' Nevertheless, we invite comment as to whether precautionary measures may be appropriate for certain locations which would not affect the enforceability of our existing exposure limits, as well as any analytical justification for such measures." *Id.* at 3583.

- "We significantly note that extra precautionary efforts by national authorities to reduce exposure below recognized scientifically-based limits is considered by the WHO to be unnecessary but acceptable so long as such efforts do not undermine exposure limits based on known adverse effects. Along these lines, we note that although the Commission supplies information to consumers on methods to reduce exposure from cell phones, it has also stated that it does not endorse the need for nor set a target value for exposure reduction, and we seek comment on whether these policies are appropriate. We also observe that the FDA has stated that, 'available scientific evidence – including World Health Organization (WHO) findings released May 17, 2010 – shows no increased health risk due to radiofrequency (RF) energy, a form of electromagnetic radiation that is emitted by cell phones.' At the same time, the FDA has stated that '[a]lthough the existing scientific data do not justify FDA regulatory actions, FDA has urged the cell phone industry to take a number of steps, including ... [d]esign[ing] cell

phones in a way that minimizes any RF exposure to the user.' We seek information on other similar hortatory efforts and comment on the utility and propriety of such messaging as part of this Commission's regulatory regime." *Id.* at 3584-85.

- "Commission calculations similar to those in Appendix D suggest that some devices may not be compliant with our exposure limits without the use of some spacer to maintain a separation distance when body-worn, although this conclusion is not verifiable for individual devices since a test without a spacer has not been routinely performed during the body-worn testing for equipment authorization. Yet, we have no evidence that this poses any significant health risk. Commission rules specify a pass/fail criterion for SAR evaluation and equipment authorization. However, exceeding the SAR limit does not necessarily imply unsafe operation, nor do lower SAR quantities imply 'safer' operation. The limits were set with a large safety factor, to be well below a threshold for unacceptable rises in tissue temperature. As a result, exposure well above the specified SAR limit should not create an unsafe condition. We note that, even if a device is tested without a spacer, there are already certain separations built into the SAR test setup, such as the thickness of the mannequin shell, the thickness of the device exterior case, etc., so we seek comment on the implementation of evaluation procedures without a spacer for the body-worn testing configuration. We also realize that SAR

> measurements are performed while the device is operating at its maximum capable power, so that given typical operating conditions, the SAR of the device during normal use would be less than tested. In sum, using a device against the body without a spacer will generally result in actual SAR below the maximum SAR tested; moreover, a use that possibly results in non-compliance with the SAR limit should not be viewed with significantly greater concern than compliant use." *Id.* at 3588.

II. DISCUSSION

A. Legal Standard

"'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008) (rejecting the position that, "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm")). The Ninth Circuit has held that the "serious questions" approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also

met. *See Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

B. Likelihood of Success on the Merits

As noted above, the thrust of CTIA's complaint is twofold: (1) the Berkeley ordinance is preempted by federal law and (2) the ordinance violates the First Amendment. Thus, the Court must evaluate the likelihood of success as to each contention.

1. Preemption

The specific preemption argument raised by CTIA is conflict preemption.[5] "Conflict preemption is implicit preemption of state law that occurs where 'there is an actual conflict between state and federal law.' Conflict preemption 'arises when [1] 'compliance with both federal and state regulations is a physical impossibility,' . . . or [2] when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1040 (9th Cir. 2015).

Here, CTIA puts at issue only obstacle preemption, not impossibility preemption. Under Supreme Court law, "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). "'If the purpose of the [federal] act cannot otherwise be accomplished – if its

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[5] CTIA has claimed only conflict preemption and not other kinds of preemption such as *e.g.*, field preemption. *See, e.g.*, Reply at 12-13 (arguing that the City "challenges a *field* preemption argument that CTIA does not raise") (emphasis in original).

operation within its chosen field must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated power.'" *Id.*

In the case at bar, the federal statute at issue is the TCA, "which [*inter alia*] directed the FCC to 'make effective rules regarding the environmental effects of [RF] emissions' within 180 days of the TCA's enactment [in 1996]." *Farina*, 625 F.3d at 106; *see also* 47 C.F.R. § 2.1093 (setting exposure limits). CTIA argues that the purposes underlying the statute are twofold: (1) to achieve a balance between the need to protect the public's health and safety and the goal of providing an efficient and practical telecommunications services for the public's benefit and (2) to ensure nationwide uniformity as to this balance. In support of this argument, CTIA relies on the Third Circuit's decision *Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir. 2010).

The Court agrees with CTIA that *Farina* is an instructive case with respect to the purposes underlying the above TCA provision. In *Farina*, the plaintiff sued on the ground that "cell phones, as currently manufactured, are unsafe to be operated without headsets because the customary manner in which they are used – with the user holding the phone so that the antenna is positioned next to his head – exposes the user to dangerous amounts of radio frequency ('RF') radiation." *Id.* at 104. The Third Circuit held that the plaintiff's lawsuit was subject to obstacle preemption. The court noted first that, "although [the plaintiff] disavow[ed] any challenge to the FCC's RF standards, that is the essence of his complaint. . . . In order for [the plaintiff] to succeed, he necessarily must estab-

lish that cell phones abiding by the FCC's SAR guidelines are unsafe to operate without a headset." *Id.* at 122. The court then concluded that there was obstacle preemption, particularly because "regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Id.* at 123.

> The reason why state law conflicts with federal law in these balancing situations is plain. When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives. Allowing state law to impose a different standard permits a re-balancing of those considerations. A state-law standard that is more protective of one objective may result in a standard that is less protective of others.

Id. The FCC was tasked with a balancing act – not only to "protect[] the health and safety of the public, but also [to] ensur[e] the rapid development of an efficient and uniform network, one that provides effective and widely accessible service at a reasonable cost." *Id.* at 125. "Were the FCC's standards to constitute only a regulatory floor upon which state law can build, juries could re-balance the FCC's statutory objectives and inhibit the provision of quality nationwide service." *Id.*

Moreover, in *Farina*, the Third Circuit also stated that uniformity was one of the purposes underlying the TCA:

> The wireless network is an inherently national system. In order to ensure the network functions nationwide and to preserve the balance between the FCC's competing regulatory objectives, both Congress and the FCC recognized uniformity as an essential element of an efficient wireless network. Subjecting the wireless network to a patchwork of state standards would disrupt that uniformity and place additional burdens on industry and the network itself.

Id. at 126.

Finally, as noted in *Farina*, the legislative history for the TCA, which instructed the FCC to "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions," 104 P.L. 104 (1996) (discussing § 704), includes a House Report that also indicates uniformity is an important goal. The House Report states, *inter alia*:

> The Committee finds that current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular tel-

> ecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

H.R. Rep. No. 104-204, at 94 (1996).[6]

But even though *Farina* persuasively identifies the purposes underlying the TCA provision at issue, the limited disclosure mandated by the Berkeley ordinance does not, with one exception, impose an obstacle to those purposes. As noted above, the notice required by the City ordinance states as follows:

> The City of Berkeley requires that you be provided the following notice:

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6 The Court notes, however, that statement in the House Report is not clearly targeted at the requirement that the agency make rules regarding RF energy emissions. This is because § 704 of the TCA concerned not only this directive but also another – *i.e.*, that the FCC "prescribe a national policy for the siting of commercial mobile radio services facilities." H.R. Rep. No. 104-204, at 94 (also stating that "[t]he siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with the Commission RF emission regulated levels").

> To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. This potential risk is greater for children. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Berkeley Mun. Code § 9.96.030(A). This disclosure, for the most part, simply refers consumers to the fact that there are FCC standards on RF energy exposure – standards which assume a minimum spacing of the cell phone away from the body – and advises consumers to refer to their manuals regarding maintenance of such spacing. The disclosure mandated by the Berkeley ordinance is consistent with the FCC's statements and testing procedures regarding spacing. *See, e.g.*, FCC Consumer Guide (advising "on some simple steps that you can take to reduce your exposure to RF energy from cell phones[;] [f]or example, wireless devices only emit RF energy when you are using them and, the closer the device is to you, the more energy you will absorb"); 2013 FCC Reassessment, 28 F.C.C. Rcd. at 3588 (stating that "Commission calculations . . . suggest that some devices may not be compliant with our exposure limits without the use of some spacer to maintain a separation distance when body-worn, although this conclusion is not verifiable for individual devices since a test without a spacer has not

been routinely performed during the body-worn testing for equipment authorization"). It is also consistent with the FCC's own requirement that cell phone manufacturers disclose to consumers information and advice about spacing. *See* FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4). Thus, the ordinance does not ban something the FCC authorizes or mandates. And CTIA has failed to point to any FCC pronouncement suggesting that the agency has any objection to warning consumers about maintaining spacing between the body and a cell phone. Moreover, the City ordinance, because it is consistent with FCC pronouncements and directives, does not threaten national uniformity.

There is, however, one portion of the notice required by the City ordinance that is subject to obstacle preemption – namely, the sentence "This potential risk is greater for children." Berkeley Mun. Code § 9.96.030(A). Notably, this sentence does not say that the potential risk *may* be greater for children; rather, the sentence states that the potential risk *is* greater. But whether the potential risk is, in fact, greater for children is a matter of scientific debate. The City has taken the position in this lawsuit that its notice is simply designed to reinforce a message that the FCC already requires and make consumers aware of FCC instructions and mandates, *see, e.g.*, Opp'n at 1, 4, but the FCC has never made any pronouncement that there *is* a greater potential risk for children, and, certainly, the FCC has not imposed different RF energy exposure limits that are applicable to children specifically. At most, the FCC has taken note that there is a scientific debate about whether children are potentially at greater risk. *See, e.g.*, FCC Consumer Guide

("Some health and safety interest groups have interpreted certain reports to suggest that wireless device use may be linked to cancer and other illnesses, posing potentially greater risks for children than adults. While these assertions have gained increased public attention, currently no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses."); 2013 FCC Reassessment, 28 F.C.C. Rcd. at 3501 ("[T]he Commission invites health and safety agencies and the public to comment on the propriety of our general present limits and whether additional precautions may be appropriate in some cases, for example with respect to children."). Importantly, however, the FCC has not imposed different exposure limits for children nor does it mandate special warnings regarding children's exposure to RF radiation from cell phones. Thus, the content of the sentence – that the potential risk *is* indeed greater for children compared to adults – threatens to upset the balance struck by the FCC between encouraging commercial development of all phones and public safety, because the Berkeley warning as worded could materially deter sales on an assumption about safety risks which the FCC has refused to adopt or endorse.[7]

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[7] At the hearing, the City argued that there *is* a greater potential risk because of behavioral differences between children and adults. *See* Cortesi Decl. ¶¶ 5-8 (testifying, *inter alia*, that children are heavy users of cell phones, that they often sleep with their phones on or next to their beds, that they often text which leads to them keeping phones close to their bodies, etc.). The City contends that CTIA has done nothing to refute the evidence submitted by the City on the behavioral differences, and thus the evidence of record establishes that the potential risk is greater.

Accordingly, although CTIA has not demonstrated a likelihood of success or even serious question on the merits in its preemption challenge to the main portion of the notice, it has established a likelihood of success on its claim that the warning about children is preempted.

2. First Amendment

Having determined that the required statement, "This potential risk is greater for children," is likely preempted by federal law, the Court now addresses CTIA's likelihood of success with respect to its First Amendment challenge to the remainder of the notice.[8]

a. Level of Scrutiny

This argument, however, has little merit in light of the FCC evidence cited above, which indicates that at most there is a scientific debate regarding the risk to children. Moreover, the wording of the notice suggests to the general public that the danger to children arises from their inherent biological susceptibility to RF radiation, not behavioral susceptibility.

8 The Court shall evaluate the ordinance as if the sentence regarding children were excised from the text. This approach is appropriate in light of Berkeley Municipal Code § 1.01.100 which, in effect, allows for severance. *See* Berkeley Mun. Code § 1.01.100 ("If any section, subsection, sentence, clause or phrase of this code is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this code. The council hereby declares that it would have passed this code, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional, and if for any reason this code should be declared invalid or unconstitutional, then the original ordinance or ordinances shall be in full force and effect.").

With respect to CTIA's First Amendment claim, the Court must first determine what First Amendment test should be used to evaluate the ordinance at issue. CTIA contends that strict scrutiny must be applied because the ordinance is neither content nor viewpoint neutral. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228, 2230 (2015) (stating that "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based"; adding that "[g]overnment discrimination among viewpoints . . . is a 'more blatant' and 'egregious form of content discrimination'"). But in making this argument, CTIA completely ignores the fact that the speech rights at issue here are its members' *commercial* speech rights. *See Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011) (stating that "[c]ommercial speech is 'defined as speech that does no more than propose a commercial transaction'"; "'strong support' that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation"). The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, *see, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) (stating that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"); *see also Nat'l Ass'n of Mfrs. v. SEC*, No. 13-5252, 2015 U.S. App. LEXIS 14455, at *75-76 (D.C. Cir. Aug. 18, 2015) (noting that, "as the Supreme Court has emphasized, the starting premise in all commercial speech cases is the same: the First Amendment values commercial speech for different reasons than non-commercial speech"), and

nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well- established distinction is no longer valid.[9]

CTIA contends that, even if the commercial speech rubric is applied, the ordinance should be subject to at least intermediate scrutiny, pursuant to *Central Hudson*:

> If the communication is neither misleading nor related to unlawful activity, . . . [t]he State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved. . . . . Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Central Hudson, 447 U.S. at 564. But as indicated by the above language, *Central Hudson* was addressing *restrictions* on commercial speech. Here, the Court is

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9 Ironically, the classification of speech between commercial and noncommercial is itself a content-based distinction. Yet it cannot seriously be contended that such classification itself runs afoul of the First Amendment.

not confronted with any restrictions on CTIA members' commercial speech; rather, the issue is related to *compelled disclosure* of commercial speech. The Supreme Court has treated restrictions on commercial speech differently from compelled disclosure of such speech. This difference in treatment was first articulated in the plurality decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), and subsequently affirmed by the majority opinion in *Milavetz, Gallp & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

Because *Zauderer* is a critical opinion, the Court briefly discusses its holding. The plaintiff in *Zauderer* was an attorney. He ran an advertisement in which he "publiciz[ed] his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device." *Id.* at 630. In the advertisement, the plaintiff stated that "'[t]he case are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.'" *Id.* at 631. Based on the advertisement, the state Office of Disciplinary Counsel filed a complaint against the plaintiff, alleging that the plaintiff had violated a disciplinary rule because the advertisement "fail[ed] to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful" and therefore was deceptive. *Id.* at 633. The state supreme court agreed with the state Office of Disciplinary Counsel. The plaintiff appealed, asserting that his First Amendment rights had been violated.

In resolving the issue, the plurality began by noting that

> [o]ur general approach to restrictions on commercial speech is . . . by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest [*i.e.*, *Central Hudson*].

Id. at 638.

The plurality pointed out, however, that there are "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. While, "in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech," that is not always the case. *Id.* Here, the state was not "'prescrib[ing] what shall be orthodox in politics, religion, [etc].'"; rather,

> [t]he State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by

> the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that *because disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech*, "[warnings] or [disclaimers] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."
>
> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Id. at 651 (emphasis added).

The plurality then held that this standard was satisfied in the case at hand.

> Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the

> distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs" – terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

Id. at 652-53. Accordingly, *Zauderer* suggests that compelled disclosure of commercial speech, unlike suppression or restriction of such speech, is subject to rational basis review rather than intermediate scrutiny.

Approximately fifteen years later, a majority of the Supreme Court addressed *Zauderer* in *Milavetz*.

Milavetz concerned the constitutionality of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The act regulated the conduct of debt relief agencies, *i.e.*, "professionals who provide bankruptcy assistance to consumer debtors." *Milavetz*, 559 U.S. at 232. Part of the act required debt relief agencies to make certain disclosures in their advertisements. *See id.* at 233. The parties disagreed as to whether *Central Hudson* or *Zauderer* provided the applicable standard in evaluating the statute. The Supreme Court concluded that *Zauderer* governed, noting as follows:

> The challenged provisions of § 528 share the essential features of the rule at issue in *Zauderer*. As in that case, § 528's required disclosures are intended to combat the problem of inherently misleading commercial advertisements – specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs. Additionally, the disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies . . . from conveying any additional information.

Id. at 250. The Court then determined that "§ 528's requirements that [the petitioner] identify itself as a debt relief agency and include information about its bankruptcy-assistance an related services are 'reasonably related to the [Government's] interest in prevent-

ing deception of consumers.'" *Id.* at 252-53. Accordingly, it "upheld those provisions as applied to [the petitioner]." *Id.* at 253.

Since *Zauderer* and *Milavetz*, circuit courts have essentially characterized the *Zauderer* test as a rational basis or rational review test. *See, e.g.*, *Nat'l Ass'n*, 2015 U.S. App. LEXIS 14455, at *55 (stating that "[t]he Supreme Court has stated that rational basis review applies to certain disclosures of 'purely factual and uncontroversial information'"; quoting *Zauderer*); *King v. Governor of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014) (stating that *Zauderer* "outlin[ed] the 'material differences between disclosure requirements and outright prohibitions on speech' and subject[ed] a disclosure requirement to rational basis review"); *Safelite Group v. Jepsen*, 764 F.3d 258, 259 (2d Cir. 2014) (characterizing *Zauderer* as "rational basis review"); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 189 (4th Cir. 2013) (noting that, under *Zauderer*, "disclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny"); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (characterizing *Zauderer* as a "rational-basis rule"); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, J., concurring) (stating that "[t]he idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken" because *Zauderer* is in essence a rational basis test). This is consistent with the underlying theory of the First Amendment. As the Second Circuit has noted, "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of

information or protecting individual liberty interests" – indeed, "disclosure further, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001).

CTIA protests that, even if *Zauderer* makes a distinction between restrictions on commercial speech and compelled disclosure, the more lenient test articulated in *Zauderer* is applicable only where the governmental interest at issue is the prevention of consumer deception, and that, here, the governmental interest is in public health or safety, not consumer deception. But tellingly, no court has expressly held that *Zauderer* is limited as CTIA proposes. In fact, several circuit courts have held to the contrary. For example, in *American Meat Institute v. United States Department of Agriculture.*, 760 F.3d 18 (D.C. Cir. 2014), the D.C. Circuit, sitting en banc, considered a regulation of the Secretary of Agriculture that required disclosure of country-of-origin information about meat products. The plaintiffs argued that the regulation violated their First Amendment rights. The question for the court was whether "the test set forth in *Zauderer* applies to government interests beyond consumer deception." *Id.* at 21. The court began by acknowledging that

> *Zauderer* itself does not give a clear answer. Some of its language suggests possible confinement to correcting deception. Having already described the disclosure mandated there as limited to "purely factual and uncontroversial information about the terms under which

[the transaction was proposed]," the Court said, "we hold that an advertiser's rights are adequately protected as long as [such] disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." (It made no finding that the advertiser's message was "more likely to deceive the public than to inform it," which would constitutionally subject the message to an outright ban. The Court's own later application of *Zauderer* in *Milavetz, Gallop & Milavetz, P.A. v. United* States, 559 U.S. 229 (2010), also focused on remedying misleading advertisements, which was the sole interest invoked by the government. Given the subject of both cases, it was natural for the Court to express the rule in such terms. The language could have been simply descriptive of the circumstances to which the Court applied its new rule, or it could have aimed to preclude any application beyond those circumstances.

The language with which *Zauderer* justified its approach, however, sweeps far more broadly than the interest in remedying deception. After recounting the elements of *Central Hudson*, Zauderer rejected that test as unnecessary in light of the "material differences between disclosure requirements and outright prohibitions on speech." Later in the opinion, the Court observed that "the

> First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." After noting that the disclosure took the form of "purely factual and uncontroversial information about the terms under which [the] services will be available," the Court characterized the speaker's interest as "minimal": "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." All told, *Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as "minimal" seems inherently applicable beyond the problem of deception, as other circuits [*e.g.*, the Second and First] have found.

Id. at 21-22.

In *National Electrical*, the Second Circuit also rejected a reading of *Zauderer* as being limited to a situation where the government's interest is prevention of consumer deception. The case concerned a Vermont statute that "require[d] manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or

disposed of as hazardous waste." *Nat'l Elec.*, 272 F.3d at 107. The court acknowledged that

> the compelled disclosure at issue here was not intended to prevent "consumer confusion or deception" per se, but rather to better inform consumers about the products they purchase. Although the overall goal of the statute is plainly to reduce the amount of mercury released into the environment, it is inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products. Accordingly, we cannot say that the statute's goal is inconsistent with the policies underlying First Amendment protection of commercial speech, described above, and the reasons supporting the distinction between compelled and restricted commercial speech. We therefore find that it is governed by the reasonable-relationship rule in *Zauderer*.
>
> We believe that such a reasonable relationship is plain in the instant case. The prescribed labeling would likely contribute directly to the reduction of mercury pollution, whether or not it makes the greatest possible contribution. It is probable that some mercury lamp purchasers, newly informed by the Vermont label, will properly dispose of them and thereby reduce mercury pollution. By encouraging such changes in consumer

> behavior, the labeling requirement is rationally related to the state's goal of reducing mercury contamination.
>
> We find that the Vermont statute is rationally related to the state's goal, notwithstanding that the statute may ultimately fail to eliminate all or even most mercury pollution in the state.

Id. at 115; *see also N.Y. St. Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) (stating that "*Zauderer*'s holding was broad enough to encompass nonmisleading disclosure requirements").

The First and Sixth Circuits are in accord with the D.C. and Second Circuits. *See Pharm. Care*, 429 F.3d at 310 n.8 (noting that "we have found no cases limiting *Zauderer* [to potentially deceptive advertising directed at consumers]"); *Disc. Tobacco*, 674 F.3d at 556-57 (discussing *National Electrical* approvingly); *cf. Pharm. Care*, 429 F.3d at 316 (Boudin, J., concurring) (stating that "[t]he idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken" because *Zauderer* is in essence a rational basis test). Furthermore, in an unpublished decision, the Ninth Circuit addressed a San Francisco ordinance which also imposed a notice requirement on cell phone retailers (based on RF energy emission), but the court did not hold that *Zauderer* was limited to circumstances in which a state or local government was trying to prevent potentially misleading advertising. *See generally CTIA – The Wireless Ass'n v. City & County of San Francisco*, 494 Fed.

Appx. 752 (9th Cir. 2012). The court assumed *Zauderer* applied to mandatory disclosures directed at health and safety, not consumer deception.

The circuit authority cited above is persuasive, and thus the Court disagrees with CTIA's interpretation of *Zauderer* as being limited to preventing consumer deception. Indeed, it would make little sense to conclude that the government has greater power to regulate commercial speech in order to prevent deception than to protect public health and safety, a core function of the historic police powers of the states. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (stating that "[it] is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens'"); *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (noting that "[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals").

Moreover, there is a persuasive argument that, where, as here, the compelled disclosure is that of clearly identified *government* speech, and not that of the *private speaker*, a standard even less exacting than that established in *Zauderer* should apply. In *Zauderer*, the plaintiff-attorney was being compelled to speak, and nothing about that compelled speech indicated it was anyone's speech but the plaintiff-attorney's. In contrast, here, CTIA's members are being compelled to communicate a message, but the message being communicated is clearly the City's message, and not that of the cell phone retailers. *See, e.g.*, Berkeley Mun. Code § 9.96.030(A)-(B) (providing that the notice shall state "The City of Berkeley requires that you be provided the following notice" and that "the notice shall include the City's logo"). In other

words, while CTIA's members are being compelled to provide a mandated disclosure of Berkeley's speech, no one could reasonably mistake that speech as emanating from a cell phone retailer itself. Where a law requires a commercial entity engaged in commercial speech merely to permit a disclosure by the *government*, rather than compelling speech out of the mouth of the *speaker*, the First Amendment interests are less obvious. Notably, at the hearing, CTIA conceded that there would be no First Amendment violation if the City handed out flyers or had a poster board immediately outside a cell phone retailer's store. But that then begs the question of what is the difference between that conduct and the conduct at issue herein – *i.e.*, where the City information is being provided at the sales counter inside the store instead of immediately outside the store. While the former certainly seems more intrusive, that is more so because it seems to impinge on property rights rather than on expressive rights. CTIA has not cited any appellate authority addressing the proper standard of First Amendment review where the government requires mandatory disclosure of *government* speech by a private party in the context of commercial speech.

To be sure, there are First Amendment limits to the government's ability to require that a speaker carry a hostile or inconsistent message of a third party, at least in the context of noncommercial speech. *See*, *e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995) (holding that First Amendment rights of a parade organizer and council were violated when they were required to include a gay rights organization in their parade); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1

(1986) (plurality decision) (concluding that the First Amendment rights of privately owned utility company were violated by an order from the California Public Utilities Commission that required the company to include in its billing envelopes speech of a third party with which the company disagreed); *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 243, 256, 258 (1974) (holding that "a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press"; noting that the "statute exacts a penalty on the basis of the content of a newspaper" and also "intru[des] into the function of editors"). But, as stated above, these cases involved noncommercial speech, not commercial speech as here. *See*, *e.g.*, *PG&E*, 475 U.S. at 9 (noting that company's newsletter, which was included in the billing envelopes, covered a wide range of topics, "from energy-saving tips to stories about wildlife conservation, and from billing information to recipes," and thus "extend[ed] well beyond speech that [simply] proposes a business transaction"; citing *Zauderer* and *Central Hudson*). This is a significant distinction, particularly because First Amendment analysis in the commercial speech context assumes that more speech, so long as it is not misleading, enhances the marketplace (as well as the marketplace of ideas). *See Zauderer*, 471 U.S. at 651 (noting that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides"). That is why the Court in *Zauderer* afforded particular deference to the government's decision to compel disclosures (in contrast to laws restricting speech). Here, the ordinance expressly affords retailers the right to add comments to

the notice, and there is no showing that adding comments would be a significant burden on retailers.

Moreover, *Miami Herald* can be distinguished on an additional ground. More specifically, in *Miami Herald*, the primary concern was the chilling of speech by the entity subject to the disclosure requirement as a consequence of the challenged law. *See Miami Herald*, 418 U.S. at 257 (noting that, "[f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy"). In contrast to *Miami Herald*, here, there is no real claim that the retailer's speech is chilled by the Berkeley ordinance; in fact, as indicated above, the ordinance expressly allows retailers to add "other information" at the retailer's discretion. Berkeley Mun. Code § 9.96.030(B).

While CTIA has argued that being forced to engage in counter-speech (*i.e.*, speech in response to the City notice) is, in and of itself, a First Amendment burden (as indicated in *PG&E*), that is not necessarily true where commercial speech is at issue. As the City points out, *Zauderer* spoke only in terms of chilling speech as a First Amendment burden in the context of commercial speech. *See Zauderer*, 471 U.S. at 651 (stating that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech"); *see also Am. Meat*, 760 F.3d at 27 (acknowledging the same; also stating that "*Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech"). This makes sense as the value of commercial speech

comes from the information it provides – *i.e.*, more speech, not less. That being said, even if CTIA were correct that the right not to speak had some application to commercial speech, he need for counter-speech – at least in the circumstances presented herein – are minimal, as discussed *infra*.

Thus, there is good reason to conclude that the First Amendment test applicable in this case should be even more deferential to the government than the test in *Zauderer*. More particularly, the rational basis test applicable to compelled display of government speech need not be cabined by the *Zauderer*'s requirement that the compelled disclosure be "purely factual and uncontroversial." *Zauderer*, 471 U.S. at 651. In *Zauderer*, it made sense that the Supreme Court imposed the baseline requirement that the compelled speech be purely factual and uncontroversial because, where speech is in fact purely factual and uncontroversial, then the speaker's interest in countering such information is minimal. The *Zauderer* test thus insures any First Amendment interest against compelled speech is minimal. But where there is attribution of the compelled speech to someone other than the speaker – in particular, the government – the *Zauderer* factual-and-uncontroversial requirement is not needed to minimize the intrusion upon the plaintiff's First Amendment interest.

Instead, under more general rational basis principles, the challenged law must be reasonably related to a legitimate governmental interest. In particular, if the law furthers a legitimate government interest in requiring disclosure of governmental speech, it should be upheld. This is not to say that First Amendment interest in this context is nonexistent. Even though

no speech is compelled out of the mouth of retailers and there is no claim that their speech is chilled, the fact that they may feel compelled to respond to Berkeley's notice arguably implicates to some extent the First Amendment. *See PG&E*, 471 U.S. at 15 (in case involving noncommercial speech, noting that the company "may be forced either to appear to agree with [third party's] views [included in the company's billing envelope] or to respond"). Because there is an arguable First Amendment interest, it may reasonably be contended that the more exacting forum of rational basis review (which some commentators have labeled "rational basis with bite," *see Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014) (citing law review articles addressing "rational basis with bite," "rational basis with teeth," or "rational basis plus"); *Powers v. Harris*, 379 F.3d 1208, 1224-25 n.21 (10th Cir. 2004) (same)), which requires an examination of actual state interests and whether the challenged law actually furthers that interest rather than the traditional rational basis review which permits a law to be upheld if rationally related to any conceivable interest. *Compare Romer v. Evans*, 517 U.S. 620 (1996) (holding that a Colorado constitutional amendment that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination "lacks a rational relationship to legitimate state interests"); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (striking down under rational basis city council decision preventing group home for mentally disabled); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating under rational basis portion of statute excluding immigrant children from public schools), *with Williamson v. Lee Optical*, 348 U.S. 483 (1955) (applying traditional rational relationship test in

evaluating constitutionality of legislation). *See also Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023, 1038, n 6 (E.D. Cal. 2007) (recognizing *Cleburne/Romer* approach commonly referred as "rational basis with bite").

For purposes of this opinion, the Court shall evaluate the Berkeley ordinance under the more rigorous rational basis review as well as the *Zauderer* test. As discussed below, both of these standards have been met in the instant case.

b. Application of Rational Basis Test

In identifying the government interest supporting the notice required by the ordinance, Berkeley argues that it simply seeks to insure fuller consumer awareness of the FCC's SAR testing procedures and directive to manufacturers to disclose the spacing requirements used to insured SAR does not exceed stated levels. Promoting consumer awareness of the government's testing procedures and guidelines obviously is a legitimate governmental interest. *Compare Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (stating that "the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech'"), *with Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (stating that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement in a commercial context"). And the mandated notice (apart from the warning about risk to children) furthers and is reasonably related that governmental interest. As noted in the preemption

analysis above, nothing in the required Berkeley notice contradicts what the FCC has said and done, and the upshot of the notice (advising consumers to consult the cell phone instructions or user manual on how to safely use the phone) tracks what the FCC requires.

CTIA argues that framing the governmental interest as insuring consumer awareness begs the question and misses the real mark. It contends that the real asserted interest here is purported public safety and that the mandated notice is misleading because it suggests a substantial risk to health that does not in fact exist. To the extent the true ultimate governmental interest for the ordinance is public health and safety (since the purpose of referring consumers to the user manual is so that consumers will know how to "use your phone safely"), such an interest undoubtedly is a legitimate public interest. *See, e.g.*, *Hispanic Taco Vendors v. Pasco*, 994 F.2d 676, 680 (9th Cir. 1993) (finding ordinance that regulated itinerant vending and imposed licensing fees supported by legitimate governmental interests in, *e.g.*, health and safety). The question then is whether the ordinance is reasonably related to such interest. Notwithstanding CTIA's argument to the contrary, the Court concludes that it is.

While there is scientific uncertainty as to the relationship between SAR levels and the risk of, *e.g.*, cancer, and there is scientific debate about whether nonthermal as well as thermal effects of RF radiation may pose health risks, there is a reasonable scientific basis to believe that RF radiation at some levels can and do present health risks. The SAR limits were established by the FCC in the interests of safety in view

of the potential risks of RF radiation exposure. Although current maximum SAR levels set by the FCC were designed to provide a comfortable margin, at least with respect to risks posed by the thermal effect of RF radiation, the FCC has in fact established specific limits to SAR exposure and uses those limits in the testing and approval of cell phones for sale to the public. And testing procedures governed by FCC rules incorporating those SAR limits assume a minimal amount of spacing of the cell phone from the body, without which SAR levels may exceed the established guidelines. *See CTIA*, 827 F. Supp. 2d at 1062 (noting that "the FCC has implicitly recognized that excessive RF radiation is potentially dangerous[;] [i]t did so when it 'balanced' that risk against the need for a practical nationwide cell phone system," and "[t]he FCC has never said that RF radiation poses no danger at all, only that RF radiation can be set at acceptable levels"), *rev'd on other grounds*, 494 Fed. Appx. 752 (9th Cir. 2012). Unless the Court were to find that the FCC guidelines themselves are scientifically baseless and hence irrational – which no one has asked this Court to do – the mandated notice here, being predicated on the FCC's guidelines, is reasonably related to a legitimate governmental interest.[10] In short, so

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[10] The mere fact of scientific uncertainty and/or inexactitude does not render the government's interest in issuing safety warnings to the public irrational or unreasonable. Such uncertainty and inexactitude inheres in the assessment of any risk. To require the government to prove a particular quantum of danger before issuing safety warnings would jeopardize an immeasurable number of laws, regulations, and directives. *See Nat'l Elec.*,

long as the challenged law requiring display and disclosure of governmental message in the context of commercial speech is supported by some reasonable scientific basis, it is likely to pass the rational basis test applicable under the First Amendment.

c. Application of *Zauderer* Test

Even if the ordinance is subject to the more specific *Zauderer* test,[11] *see CTIA*, 494 Fed. Appx. at 752 (addressing San Francisco ordinance also imposing a notice requirement on cell phone retailers and applying *Zauderer*), the Berkeley ordinance would likely be upheld. Under *Zauderer*, the predicate requirement is that the compelled speech must be factual and uncontroversial. But how a court should determine whether such speech is factual and uncontroversial is not clear.

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272 F.3d at 116 (taking note of "the potentially wide-ranging implications of NEMA's First Amendment complaint," as "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," ranging from securities disclosures and disclosures in prescription drug advertisements to tobacco and nutritional labeling and California's Proposition 65).

11 At the hearing, the Court discussed with the parties who had the burden of proof with respect to the Zauderer test. Where a commercial speech restriction is at issue, the party seeking to uphold the restriction bears the burden of proof in justifying it. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). But here, the Court is not dealing with a commercial speech restriction but rather a compelled disclosure. For purposes of this opinion, the Court need not resolve the issue of who bears the burden of proof.

For example, a good case can be made that a court should tread carefully before deeming compelled speech controversial for *Zauderer* purposes. As the Sixth Circuit has noted, facts alone "can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason"; thus, the court rejected "the underlying premise that a disclosure that provokes a visceral response must fall outside *Zauderer*'s ambit." *Disc. Tobacco*, 674 F.3d at 569 (adding that "whether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opinion, not on whether the disclosure emotionally affects its audience or incites controversy"). The Sixth Circuit also made the point that the use of the word "uncontroversial" appeared only once in *Zauderer* and that elsewhere the *Zauderer* plurality simply "refer[red] to a commercial speaker disclosing 'factual information' and 'accurate information.'" *Id.* at 559 n.8 (citing *Zauderer*, 471 U.S. at 651 & n.14). Furthermore, in *Milavetz*, the Supreme Court did not repeat the use of the term and instead "use[d] the language *required factual information* and *only an accurate statement* when describing the characteristics of a disclosure that is scrutinized for a rational basis." *Id.* (emphasis in original; citing *Milavetz*, 1130 S. Ct. at 1339-40). Accordingly, this Court agrees with the Sixth Circuit that the term "uncontroversial" should generally be equated with the term "accurate."

As for the requirement that the compelled speech be factual (or accurate), in any given case, it is easy to conceive of an argument that, even if the compelled speech is technically accurate, (1) it is still suggestive of an opinion or (2) it is misleading. For example, on

the former, one could contend that the mere fact that the government is compelling the speech in the first place indicates that it is the government's opinion that there is a point of concern for the public. One could also argue that the compelled speech is misleading because it omits more specific information.

But *Zauderer* cannot be read to establish a "factual and uncontroversial" requirement that can be so easily manipulated that it would effectively bar any compelled disclosure by the government. This is particularly true where public health and safety are at issue, as in the instant case. Any time there is an element of risk to public health and safety, practically any speech on the matter could be deemed misleading unless there were a disclosure of everything on each side of the scientific debate – an impossible task. One could easily imagine that an overly rigorous "factual and uncontroversial" test would render even the Surgeon General's textual warnings found on cigarette packages a violation of the First Amendment. *See* 15 U.S.C. § 1333(a) (listing warnings, including "Tobacco smoke can harm your children," "Tobacco smoke causes fatal lung disease in nonsmokers," and "Quitting smoking now greatly reduces serious risks to your health"); *see also Nat'l Elec.*, 272 F.3d at 116 (taking note of "the potentially wide-ranging implications of NEMA's First Amendment complaint," as "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," ranging from securities disclosures and disclosures in prescription drug advertisements to tobacco and nutritional labeling and California's Proposition 65).

Turning to the City ordinance at issue here, the Court finds that the factual-and-uncontroversial predicate requirement has likely been met, particularly as the Court has now found the sentence regarding children preempted. With that sentence excised, the ordinance provides in relevant part as follows:

> The City of Berkeley requires that you be provided the following notice:
>
> To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. ~~This potential risk is greater for children.~~ Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Berkeley Mun. Code § 9.96.030(A).

The notice contains accurate and uncontroversial information – *i.e.*, that the FCC has put limits on RF energy emission with respect to cell phones and that wearing a cell phone against the body (without any spacer) may lead the wearer to exceed the limits. This is consistent with the FCC's directive to cell phone manufacturers to advise consumers about minimum spacing to be maintained between the body and a cell phone, and although there is in fact a good safety margin (at least for thermal effects of RF radiation), nothing indicates that the FCC objects to informing consumers about spacing the phone away from the body.

CTIA takes issue with the use of the words "safety" and "radiation," but the use of both words is accurate and uncontroversial. Regarding "safety," the FCC clearly imposed limits because of safety concerns. The limits that the agency ultimately chose reflected a balancing of the risk to public health and safety against the need for a practical nationwide cell phone system, but it cannot be denied that safety was a part of that calculus. *See CTIA*, 827 F. Supp. 2d at 1062 (in the San Francisco ordinance case, noting that, "[e]ven the FCC has implicitly recognized that excessive RF radiation is potentially dangerous" because it "'balanced' that risk against the need for a practical nationwide cell phone system[;] [t]he FCC has never said that RF radiation poses no danger at all, only that RF radiation can be set at acceptable levels"), *rev'd on other grounds*, 494 Fed. Appx. 752 (9th Cir. 2012). As for the term "radiation," RF energy is undisputedly a form of radiation. *See* 2013 FCC Reassessment, 28 F.C.C. Rcd. at 3585 (stating that RF energy is "'a form of electromagnetic radiation that is emitted by cell phones'"). That the City notice does not make the finer distinction that RF energy is non-ionizing radiation rather than ionizing radiation is immaterial as that distinction would likely have little meaning to the public. As for CTIA's contention that there may be a negative association with nuclear radiation (ionizing radiation), that seems unlikely, particularly in this day and age when radiation comes from various sources in everyday life, including, *e.g.*, radios, televisions, and microwave ovens. No one seriously contends that consumers are likely to believe cell phones emit nuclear radiation or something akin to that.

Finally, CTIA protests that the notice is misleading because, even if a cell phone is worn against the body, it is unlikely that the federal guidelines for SAR will be exceeded. *See* Mot. at 15-16 (arguing that"this may be possible only 'with the device transmitting continuously and at maximum power [such as might happen during a call with a handset and the phone in the user's pocket at the fringe of a reception area],' and that 'using a device against the body without a spacer will generally result in an actual SAR below the maximum SAR testing'"). But as indicated above, the Court is wary about any contention that a compelled disclosure – particularly where the message in the disclosure is attributed to the government – is misleading simply because the disclosure does not describe with precision the magnitude of the risk; the point remains that the FCC established certain limits regarding SAR, limits which have not been challenged as illegal. The mandated disclosure truthfully states that federal guidelines *may* be exceeded where spacing is not observed, just as the FDA accurately warns that "Tobacco smoke *can* harm your children." More importantly, the sentence criticized by CTIA is tempered by the following sentence: "Refer to the instructions in your phone or user manual for information about how to use your phone safely." That is the upshot of the disclosure – users are advised to consult the manual wherein the FCC itself mandates disclosures about maintaining spacing. *See* FCC KDB, No. 447498, *General RF Exposure Guidelines*, § 4.2.2(4). This is, in essence, factual in nature for purposes of *Zauderer*.

For the foregoing reasons, the Court finds that the City notice, with the sentence regarding children excised from the text on preemption grounds, *likely* meets the *Zauderer* factual-and-uncontroversial predicate requirement.

d. Government Interest

As indicated above, under the *Zauderer* test, if the disclosure requirement is factual and uncontroversial, then it does not violate the First Amendment so long as it is reasonably related to the governmental interest. This test has been met, for largely the reasons articulated above in discussing the traditional rational review test. Given the fact that the spacing requirements employed by the FCC were established to insure maximum specific levels of SAR are not exceeded and the FCC acknowledges there is a connection between SAR and safety, even if the precise parameters and limits are matters of scientific debate, the ordinance appears "reasonably related" to a legitimate government interest.

e. Undue Burden

Finally, CTIA contends that the disclosure requirement here cannot be upheld because it still violates the First Amendment as it is unduly burdensome. But for this argument to succeed, CTIA cannot show just any kind of burden; rather, it must show a *First Amendment* burden, *i.e.*, a burden on speech.

CTIA has not made any argument that the City ordinance would chill its or its members' speech; rather, it contends that there is a burden on its or its members' speech because they would rather remain silent but, with the compelled disclosure, are now being forced to engage in counter-speech. As noted

above, the City asserts that, where commercial speech is at issue, the only cognizable burden is chilling of speech, not the burden of being compelled to speak. While this position has some grounding in *Zauderer*, which identified only the chilling of commercial speech as a burden, *see Zauderer*, 471 U.S. at 651, the Court need not definitively resolve whether compelled commercial counter-speech can be an undue burden because, even accepting that it can,[12] the burden here to CTIA or its members is nothing more than minimal. The ordinance gives retailers the discretion to add their own speech to Berkeley's message. And because the City's required notice contains factual and uncontroversial information, the need for "corrective" counter-speech is minimal.

f. Summary on First Amendment Claim

On the first preliminary injunction factor, the Court cannot say that CTIA has established a strong likelihood of success on the merits with respect to its First Amendment claim. Nor has it raised serious question on the merits. While the sentence in the Berkeley ordinance regarding the potential risk to children is likely preempted, the remainder of the City notice is factual and uncontroversial and is reasonably related to the City's interest in public health and safety.

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12 As noted above, there is an arguable First Amendment interest in not being compelled to respond to speech of a third party, though the only precedent for such a proposition is in the context of noncommercial speech.

Moreover, the disclosure requirement does not impose an undue burden on CTIA or its members' First Amendment rights.

C. Likelihood of Irreparable Harm and Balancing of Equities

CTIA's argument on both the likelihood of irreparable harm and the balancing of equities largely depends on there being preemption or a First Amendment violation in the first place.[13] *See* Mot. at 21 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (stating that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury")). But, as discussed above, the likelihood of success on both the preemption and First Amendment claims is weak once the sentence on children is excised from the text of the City notice.

Accordingly, the second and third preliminary injunction factors, like the first, do not weigh in CTIA's favor.

D. Public Interest

Finally, the fourth preliminary injunction factor does not weigh in CTIA's favor – again because of the weakness of its claims on the merits. CTIA contends that the public interest does not weigh in favor of the

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[13] CTIA also argues irreparable harm to its members' customer goodwill and business reputations and from the threatened enforcement of a preempted ordinance, *see* Mot. at 22, but ultimately these arguments are predicated on the First Amendment argument. In any event, CTIA has made no satisfactory showing that its business interests are jeopardized by the Berkeley notice if the warning about children is excised.

City because "accurate and balanced disclosures regarding RF energy are *already* available," Mot. at 23 (emphasis in original), but the City has a fair point that, in spite of the availability, there is evidence that the public does not know about those disclosures. *See, e.g.*, Jensen Decl., Ex. A (survey) (reflecting that a majority of persons surveyed were, *e.g.*, not "aware that the government's radiation tests to assure the safety of cell phones assume that a cell phone would not be carried against your body, but would instead be held at least 1- to 15 millimeters from your body"). Furthermore, as suggested above, there is a public interest in public safety as well as assuring fuller consumer awareness, particularly where the federal government through the FCC has endorsed consumer awareness by requiring that cell phone manufacturers provide information about spacing to consumers.

III. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part CTIA's motion for a preliminary injunction. The motion is granted to the extent the Court finds a likely successful preemption claim with respect to the sentence in the City notice regarding children's safety. The motion is denied to the extent the Court finds that a First Amendment claim and preemption claim are not likely to succeed on the remainder of the City notice language.

The Berkeley ordinance is enjoined, unless and until the sentence in the City notice regarding children safety is excised from the notice.

This order disposes of Docket Nos. 4 and 36.

IT IS SO ORDERED.

Dated: September 21, 2015

/s/
EDWARD M. CHEN
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CTIA–THE WIRELESS ASSOCIATION, *Plaintiff-Appellant*, v. CITY OF BERKELEY, California; CHRISTINE DANIEL, City Manager of Berkeley, California, in her official capacity, *Defendants-Appellees.*	No. 16-15141 D.C. No. 3:15-cv-02529-EMC ORDER

Filed October 11, 2017

Before: William A. Fletcher, Morgan B. Christen, and Michelle T. Friedland, Circuit Judges.

Order;

Concurrence by Judges W. Fletcher and Christen;
Dissent by Judge Wardlaw

SUMMARY*

Civil Rights

The panel denied a petition for panel rehearing and denied a petition for rehearing en banc on behalf of the court. Judge Friedland voted to grant both.

In its opinion filed on April 21, 2017, the panel affirmed the district court's order denying a request for a preliminary injunction seeking to stay enforcement of a City of Berkeley ordinance requiring cell phone retailers to inform prospective cell phone purchasers that carrying a cell phone in certain ways may cause them to exceed Federal Communications Commission guidelines for exposure to radio-frequency radiation. Applying *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the panel held that the City's compelled disclosure of commercial speech complied with the First Amendment because the information in the disclosure was reasonably related to a substantial governmental interest and was purely factual. Accordingly, the panel concluded that plaintiff had little likelihood of success on its First Amendment claim that the disclosure compelled by the Berkeley ordinance was unconstitutional.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Concurring in the denial of the petition for rehearing en banc, Judges W. Fletcher and Christen stated that their majority opinion held that under *Zauderer*, the City of Berkeley may compel "purely factual and controversial" speech by a retailer at the point of sale. The judges stated that the majority joined four sister circuits when it held that *Zauderer* permitted compelled commercial speech even in the absence of consumer deception. The judges stated that applying *Zauderer* to permit compelled commercial speech only when it prevents consumer deception, as suggested by the dissent, would result in a circuit split.

Dissenting from the denial of rehearing en banc, Judge Wardlaw stated that the court should have taken this case en banc to clarify that *Zauderer*'s rational basis standard applies only when the government compels speech to prevent consumer deception.

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ORDER

Judge W. Fletcher and Judge Christen have voted to deny the Appellant's petition for rehearing and petition for rehearing en banc, filed May 5, 2017. Judge Friedland voted to grant both.

A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the non-recused active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc, filed May 5, 2017, are **DENIED**.

W. FLETCHER and CHRISTEN, Circuit Judges, concurring in the denial of the petition for rehearing en banc:

Our opinion largely speaks for itself. We held under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), that the City of Berkeley may compel "purely factual and controversial" speech by a retailer at the point of sale. Our dissenting colleague would read *Zauderer* narrowly to permit compelled commercial speech only when it prevents consumer deception.

Four of our sister circuits have read *Zauderer* broadly to permit compelled commercial speech when it conveys purely factual and uncontroversial information, even in the absence of consumer deception. *See Nat'l Ass'n of Mfrs.v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015) (upholding compelled "point of sale disclosures"); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *Safelite Group v. Jepsen*, 764 F.3d 258 (2d Cir. 2014) (declining to extend *Zauderer* to compelled speech describing the goods or services of another company, but leaving intact earlier Second Circuit cases upholding compelled commercial speech about a company's own goods or services); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 566 (6th Cir. 2012). We joined these circuits. *See CTIA–The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017); *see also Am. Beverage Ass'n v. City & Cty. of San Francisco*, Nos. 16-16072 & 16-16073 (9th Cir. Sept. 19, 2017).

Two of our sister circuits have sustained compelled commercial speech that prevented consumer deception. Because there was such deception, they did not need to reach the question whether "purely factual and uncontroversial" commercial speech may be compelled in the absence of deception. *See Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011); *1-800-411-Pain Referral Serv.v. Otto*, 744 F.3d 1045 (8th Cir. 2014). We do not know how, if the facts had presented the question, these circuits would have decided it.

Our colleague would have us create a circuit split with the D.C., First, Second and Sixth Circuits. We decline to do so on two grounds. First, circuit splits are generally to be avoided. Second, and more important, we believe that our four sister circuits got it right.

WARDLAW, Circuit Judge, dissenting from denial of rehearing en banc:

Ordinarily, I do not file "dissentals," particularly where there is an existing dissent. I am compelled to write here, however, because Judge Friedland's dissent, which I agree with entirely, rests principally on the ground that the required disclosure is itself misleading, whereas I believe the panel majority applied the wrong legal standard. We should have taken this case en banc to clarify that *Zauderer*'s rational basis standard applies only when the government compels speech to prevent consumer deception. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than

do flat prohibitions on speech, 'warnings or disclaimers might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'"). The majority extended *Zauderer* beyond the context of preventing consumer deception to instances where the government compels speech for its own purposes.[1] *See CTIA–The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017). Moreover, it expanded *Zauderer* to retailers who sell, and not necessarily advertise, the consumer products at issue. *See id.* at 1110. By allowing the opinion to stand, we have condoned the panel majority's deference to the City of Berkeley's well-intentioned, but unconstitutional, incursion into First Amendment rights.

Although commercial speech is afforded "lesser protection" than "other constitutionally guaranteed speech," commercial speech is nonetheless protected speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub.*

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[1] Despite the panel majority's insistence to the contrary, there is discord among our sister circuits about whether *Zauderer* applies broadly to allow the government to compel commercial speech to serve its own purposes. *Compare, e.g.*, *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) (applying *Zauderer* to a Department of Agriculture labeling requirement), with *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015) (confining *Zauderer* to advertising only), *and Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2011) (applying *Zauderer* to a Vermont labeling law), *with Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263–64 (2d Cir. 2014) (applying intermediate scrutiny to a Connecticut disclosure law that required automobile insurers to notify car owners of their repair shop options). Rather than advocate a circuit split, my reading of our sister circuits' opinions simply acknowledges that the law remains unsettled.

Serv. Comm'n, 447 U.S. 557, 562–63 (1980). Supreme Court precedent is clear that if the government is to compel commercial speech that is "neither misleading nor related to unlawful activity, . . . [t]he State must assert a substantial interest to be achieved by [the] restrictions . . . [and] the restriction must directly advance the state interest involved." *Id.* at 564. The panel majority opinion applies minimal constitutional scrutiny to Berkeley's potentially misleading radiation disclosure, merely because it is not technically false. *CTIA*, 854 F.3d at 1120. The Supreme Court has never been so deferential to government-compelled speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011) ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"). The government is not allowed to compel disclosures to shape consumer behavior to its own design, particularly when governments have other powerful means, such as taxation, market regulation, and education efforts, to advance their interests. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 507 (1996).

I share Judge Friedland's concerns that a proliferation of warnings and disclosures compelled by local municipal authorities could detract from the attention consumers should pay to warnings that really matter. *See CTIA*, 854 F.3d at 1126 (Friedland, J., dissenting in part). Time which a prospective purchaser must spend puzzling over the City of Berkeley's warning is

time not spent acquiring more pertinent product information. In this era where accurate, unbiased information is an increasingly rare commodity, the panel majority's holding that the government can compel a private entity to disclose "factual" and "uncontroversial" information with only a tenuous link to a "more than trivial" government interest is quite troubling.

The loosening of long-held traditional speech principles governing compelled disclosures and commercial speech only muddies the waters. After this case, the City of Berkeley is permitted to require retailers to display a potentially misleading disclosure about the dangers of cell phones that is completely unnecessary in light of the carefully calibrated, FCC-approved disclosures in the user's manual accompanying each new cell phone. Meanwhile, across the bay, San Francisco may not require advertisers of soft drinks with added sugars to warn of the products' adverse health effects. *Am. Beverage Ass'n v. City & Cty. of S.F.*, Nos. 16-16072 & 16-16073, slip op. at 5–6 (9th Cir. Sept. 19, 2017) (purporting to rely on *CTIA* and *Zauderer*). These opinions, which require district judges to make essentially factual judgments about a disclosure's veracity and its burden on a business even before the parties have developed an evidentiary record, are bound to frustrate any court that attempts to reconcile them. And, more importantly, what's next? Is each state or local government in our Circuit going to rely on the misplaced analysis of *Zauderer* in *CTIA* and *American Beverage Association* to pass ordinances compelling disclosures by their citizens on any issue the city council votes to promote, without any regard to *Central Hudson*?

If the multitudinous governing bodies in our Circuit desire to compel speech from their citizens, they should show a substantial state interest and use narrowly tailored means to achieve it. Judge Nelson's concurrence in *American Beverage Association*, slip op. at 28, adds to the confusion by evoking the *Central Hudson* standard, and concluding that San Francisco's means were not narrowly tailored to the interest it sought to promote. We should have taken the opportunity that *CTIA* provided us to clarify our conflicting law on compelled disclosures and explain when *Zauderer*'s rational basis standard applies, as opposed to the *Central Hudson* standard generally applicable to commercial speech.

I respectfully dissent from the denial of rehearing en banc, and am looking forward to our next compelled disclosure case.

APPENDIX E

Berkeley Municipal Code Chapter 9.96 – Requiring Notice Concerning Radio Frequency Exposure of Cell Phones

§ 9.96.010. Findings and Purpose

A. Requirements for the testing of cell phones were established by the federal government in 1996.

B. These requirements established "Specific Absorption Rates" (SAR) for cell phones.

C. The protocols for testing the SAR for cell phones carried on a person's body assumed that they would be carried a small distance away from the body, e.g., in a holster or belt clip, which was the common practice at that time. Testing of cell phones under these protocols has generally been conducted based on an assumed separation of 10-15 millimeters.

D. To protect the safety of their consumers, manufacturers recommend that their cell phones be carried away from the body, or be used in conjunction with hands-free devices.

E. Consumers are not generally aware of these safety recommendations.

F. Currently, it is much more common for cell phones to be carried in pockets or other locations rather than holsters or belt clips, resulting in much smaller

separation distances than the safety recommendations specify.

G. Some consumers may change their behavior to better protect themselves and their children if they were aware of these safety recommendations.

H. While the disclosures and warnings that accompany cell phones generally advise consumers not to wear them against their bodies, e.g., in pockets, waistbands, etc., these disclosures and warnings are often buried in fine print, are not written in easily understood language, or are accessible only by looking for the information on the device itself.

I. The purpose of this Chapter is to assure that consumers have the information they need to make their own choices about the extent and nature of their exposure to radio frequency radiation. (Ord. 7404-NS § 1 (part), 2015)

§ 9.96.020. Definitions

For the purposes of this Chapter, the following terms shall have the following meanings, unless the context requires otherwise.

A. "Cell phone" means a portable wireless telephone device that is designed to send or receive transmissions through a cellular radiotelephone service, as defined in Section 22.99 of Title 47 of the Code of Federal Regulations. A cell phone does not include a wireless telephone device that is integrated into the electrical architecture of a motor vehicle.

B. "Cell phone retailer" means any person or entity that sells or leases, or offers to sell or lease, Cell phones to the public, where the sale or lease occurs within the City of Berkeley, including Formula cell

phone retailers. "Cell phone retailer" shall not include: (1) anyone selling or leasing Cell phones over the telephone, by mail, or over the internet; or (2) anyone selling or leasing Cell phones directly to the public at a convention, trade show, or conference, or otherwise selling or leasing Cell phones directly to the public within the City of Berkeley on fewer than 10 days in a year.

C. "Formula cell phone retailer" means a Cell phone retailer that sells or leases cell phones to the public, or which offers Cell phones for sale or lease, through a retail sales establishment located in the City of Berkeley that, along with eleven or more other retail sales establishments located in the United States, maintains two or more of the following features: a standardized array of merchandise; a standardized facade; a standardized decor and color scheme; a uniform apparel; standardized signage; or, a trademark or service mark. (Ord. 7404-NS § 1 (part), 2015)

§ 9.96.030. Required notice

A. A Cell phone retailer shall provide to each customer who buys or leases a Cell phone a notice containing the following language:

The City of Berkeley requires that you be provided the following notice:

To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your phone or

user manual for information about how to use your phone safely.

B. The notice required by this Section shall either be provided to each customer who buys or leases a Cell phone or shall be prominently displayed at any point of sale where Cell phones are purchased or leased. If provided to the customer, the notice shall include the City's logo, shall be printed on paper that is no less than 5 inches by 8 inches in size, and shall be printed in no smaller than a 18-point font. The paper on which the notice is printed may contain other information in the discretion of the Cell phone retailer, as long as that information is distinct from the notice language required by subdivision (A) of this Section. If prominently displayed at a point of sale, the notice shall include the City's logo, be printed on a poster no less than 8-1/2 by 11 inches in size, and shall be printed in no small than a 28-point font. The City shall make its logo available to be incorporated in such notices.

C. A Cell phone retailer that believes the notice language required by subdivision (A) of this Section is not factually applicable to a Cell phone model that retailer offers for sale or lease may request permission to not provide the notice required by this Section in connection with sales or leases of that model of Cell phone. Such permission shall not be unreasonably

withheld. (Ord. 7443-NS § 1, 2015; Ord. 7404-NS § 1 (part), 2015)

§ 9.96.040. Violation – remedies

A. Each individual Cell phone that is sold or leased contrary to the provisions of this Chapter shall constitute a separate violation.

B. Remedies for violation of this Chapter shall be limited to citations under Chapter 1.28.