Nos. 11-17707, 11-17773

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLANT CTIA – THE WIRELESS ASSOCIATION® ADVOCATING REVERSAL

PRELIMINARY INJUNCTION APPEAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae The Rutherford Institute is a nonprofit, non-stock corporation organized under the laws of the Commonwealth of Virginia. The Rutherford Institute has no parent corporation. No publicly held corporation owns more than ten percent of the stock of The Rutherford Institute.

No counsel for any party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparing or submitting this brief. No person other than the Institute or its counsel contributed money or anything else of value that was intended to fund preparing or submitting this brief.

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INTEREST OF AMICUS CURIAE

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

Foremost among the basic freedoms that the Institute seeks to uphold are the guarantees of the First Amendment. "The very reason for the First Amendment," in the words of Justice Hugo L. Black, "is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands." *International Association of Machinists v. Street*, 367 U.S. 740, 788 (1961). In this case, the Institute respectfully urges reversal because the City[1] is not willing to let its residents decide for themselves what to say and when to say it. Instead, the City insists that the Board of Supervisors can command residents of San Francisco what to say. That view is contrary to "[t]he very reason for the First Amendment."

[1] The City and County of San Francisco, California are referred to herein as the "City."

PRELIMINARY STATEMENT

As enacted by the Framers of the Constitution, the protections of the First Amendment could not be more clear: "Congress shall make no law … abridging the freedom of speech." By virtue of the Due Process Clause, the constitutional mandate that "Congress shall make no law … abridging the freedom of speech" has long since been applied to the States and their political subdivisions. *Gitlow v. New York*, 268 U.S. 652 (1925). In other words, the First Amendment applies with equal force to the San Francisco Board of Supervisors.

The City, however, proposes to turn the First Amendment on its head. As previously interpreted by the Supreme Court and this Court, the First Amendment limits the City's power to restrict free speech. The City obviously does not share this view. In the view of the City, the First Amendment is an affirmative grant of power to compel speech of the government's choosing. Unlike suspects being arrested for a crime, retailers engaged in the lawful act of selling cell phones in San Francisco no longer have the right to remain silent. Instead, they have to recite the commercial equivalent of a forced confession with which they may vigorously disagree. The only thing "free" about this type of speech is that it costs the City nothing to force residents of San Francisco to disseminate the political, social, religious, pseudo-scientific, or other views of the Board of Supervisors.

Recognizing an obvious conflict with the First Amendment, the District Court rewrote the Ordinance in an attempt to make it less objectionable. Notwithstanding the best of intentions, the District Court's efforts do not cure the constitutional infirmities in the Ordinance. To the contrary, its rewrite of the Ordinance would—if allowed to stand—effectively rewrite the First Amendment itself.

The First Amendment guarantees "both the right to speak freely and ***the right to refrain from speaking at all***." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). Any law that "requires the utterance of a particular message favored by the Government" thus "contravenes this essential right." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Under the rationale of the City and the District Court alike, there would be nothing left of this "essential right"—at least not in the Ninth Circuit. Instead, there would be few if any limits on the government's power to compel citizens to disseminate messages of the government's choosing. For example:

- The City of Provo, Utah could require retailers of condoms and other contraceptive devices to post warnings about the adverse psychological

effects of engaging in premarital sex[2] and to disseminate "fact sheets" about such effects.

- The City of Burbank, California could require retailers of books, magazines, and newspapers to post warnings and disseminate "fact sheets" about the adverse health effects—including obesity—of reading[3] and engaging in other sedentary pastimes.[4]
- The City of Wasilla, Alaska could require grocery stores to post warnings and disseminate "fact sheets" about the hazards—including infections

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[2] These adverse psychological effects have been well documented in a number of studies. *See, e.g.,* Robert Rector, Kirk Johnson, Ph.D., and Lauren Noyes, "Sexually Active Teenagers Are More Likely to Be Depressed and to Attempt Suicide" (June 3, 2003) (www.heritage.org/research/reports/2003/06/sexually-active-teenagers-are-more-likely-to-be-depressed).

[3] This cause and effect would be intuitively obvious even if not supported by any World Health Organization or other studies. In fact, however, there are numerous studies supporting this conclusion. *See, e.g.,* U.S. Department of Health and Human Services. *The Surgeon General's Vision for a Healthy and Fit Nation.* Rockville, MD: U.S. Department of Health and Human Services, Office of the Surgeon General, January 2010 (www.surgeongeneral.gov/library/obesityvision/obesityvision2010.pdf); Mark Stephen Tremblay, Rachel Christine Colley, Travis John Saunders, Genevieve Nissa Healy, and Neville Owen, "Physiological and health implications of a sedentary lifestyle," Appl. Physiol. Nutr. Metab. 35: 725–740 (2010) (blogs.plos.org/obesitypanacea/files/2010/12/Published-Paper.pdf).

[4] In view of the number of media and entertainment companies headquartered there, Burbank would presumably want to exempt retailers of movies, recorded music, and the like from any such disclosure requirements.

caused by *e. coli* bacteria—of taking home food in reusable cloth bags rather than disposable paper or plastic bags.[5]

In each of the foregoing examples, there would be more "scientific" evidence for the required warnings and "fact sheets" than the "studies" upon which the Ordinance is based. The merits of these and other particular facts, factoids, and/or opinions are not the central issue before the Court, however. The central issue is whether citizens of the United States can—consistent with the First Amendment—be forced to utter messages that have been scripted by their government.

The City would have the Court believe that its Ordinance affects "mere" commercial speech that is entitled to less protection under the First Amendment. To reject this argument, the Court need not address the compelling arguments against making commercial speech ride in the back of the constitutional bus. *See, e.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting). It is certainly true that the retailers in San Francisco who are subject to the Ordinance happen to be engaged in commerce. The mere status of being a retailer, however, is not an act of commercial speech. Commercial

[5] *See, e.g.*, Charles P. Gerba, David Williams, and Ryan G. Sinclair, "Assessment of the Potential for Cross Contamination of Food Products by Reusable Shopping Bags" (http://www.dpw.co.santa-cruz.ca.us/www.santacruzcountyrecycles/news/DocList/SC064-Univ_of_Arizona_report_on_reusable_bag_hygiene.pdf).

speech "does no more than propose a commercial transaction." *U.S. v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Like anyone else trying to earn a living in San Francisco, retailers of cell phones can and do engage in both commercial and non-commercial speech. Retailers can exercise their First Amendment rights in support of athletic, artistic, religious, or civic organizations of their choosing. They can express views on legislation, such as the Ordinance at issue in this case. And they can advocate the election or defeat of candidates for public office—including the current members of the San Francisco Board of Supervisors. Or the retailers can choose not to speak. Taken as a whole, the speech—or silence—of retailers subject to the Ordinance "does more than propose a commercial transaction." *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002). As a result, "it is entitled to full First Amendment protection." *Id.*

Even if viewed as a regulation of commercial speech, the Ordinance still cannot survive the intermediate scrutiny required by *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Even as rewritten by the District Court, the Ordinance is not narrowly drawn to further a substantial governmental interest in a direct and material way.

Last but not least, the Ordinance would—if upheld—allow a narrow and extremely limited exception to swallow the rule that the First Amendment protects "the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. The exception

recognized in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), allows the government to require the correction of ***misleading*** commercial speech. ***Misleading*** commercial speech, for obvious reasons, does not enjoy the same First Amendment protection as other types of speech. Even with respect to ***misleading*** commercial speech, however, *Zauderer* permits the government to require only "purely factual and uncontroversial" statements. *Id.* at 651. In this case, retailers are subject to the Ordinance regardless of whether they are otherwise speaking at all—much less engaged in commercial speech, deceptive or otherwise. The City cannot avail itself of the *Zauderer* exception by the simple expedient of calling the required disclosures a "fact sheet." The required disclosures are neither "factual" nor "uncontroversial." In short, the District Court's effort to rely upon *Zauderer* is misplaced. Unless the District Court's error is corrected, there will be no limits to what the government can force citizens to say—leaving the First Amendment a shadow of its former self.

ARGUMENT

I. DENYING RETAILERS THEIR RIGHT TO REFRAIN FROM SPEAKING IS NOT REGULATION OF COMMERCIAL SPEECH

The City concedes that the Ordinance forces retailers in San Francisco to disseminate the views about appropriate cell phone use advocated by the Board of Supervisors (as "blue-penciled" by the District Court). This intrusion on the First Amendment, the City pontificates, is justified because "San Francisco's effort to

help consumers make informed decisions about how to use their cell phones furthers an eminently legitimate public purpose." (City Cross-App./Ans. Br. at 20) (Doc. No. 29-1) (p. 28 of 69).

Legitimate or not, the ends simply do not justify the means. The City has plenty of alternative ways of spreading these views that do not require shredding the Constitution. The City has its own Web site on which it can—and often does—post all kinds of "information" that San Francisco residents, businesses, and visitors may (or may not) find helpful in making decisions in their daily lives. *See* www.sfgov.org. The City can post signs in public buildings and hand out leaflets in public places. The City's employees and elected officials can issue press releases, allow themselves to be interviewed by journalists, write letters to the editor, and author op-ed pieces. Or the City can record public service announcements about appropriate cell phone use, proper cell phone etiquette, or any other aspect of daily life about which the City thinks San Francisco residents need more "help." In short, there are plenty of ways that the City can further its proclaimed "legitimate public purpose" of lending "help" to consumers without violating the First Amendment.

Unfortunately, this is not a case in which the City is content to simply lend a helping hand. Instead, the City insists on using the heavy hand of government to force dissemination of the Board of Supervisors' views. The City is not content to

use its own property to get its message out. Instead, the City insists that it has every right to occupy the property of others. Like the drivers in *Wooley* whose cars were turned into mobile billboards for State sponsored messages, any San Francisco retailer who owns or leases a store from which cell phones are sold is—according to the City—fair game.

The City is wrong. The First Amendment simply does not permit the City to conscript retailers into service as unwilling missionaries forced to spread the gospel according to the Board of Supervisors. Unwittingly, the very authorities cited by the City demonstrate the fallacy of its argument. The City concedes, for example, that—if its cell phone "fact sheet" took the form of an op-ed piece or a public service announcement—the City could not force newspapers, radio stations, and television stations doing business in San Francisco to publish or broadcast it, as the case may be. Such a requirement would run afoul of the Supreme Court's decision in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The City also concedes that telecommunications carriers providing cell phone service in San Francisco could not be forced to insert the City's cell phone "fact sheet" in their billing envelopes. Such a mandate would run afoul of the Supreme Court's decision in *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U.S. 1, 5 (1986). As the City also concedes, not even the CTIA—a trade association representing the wireless industry—can be compelled to disseminate the City's

"fact sheet" about cell phones, display its posters, or otherwise become a mouthpiece for the Board of Supervisors. That would run afoul of the Supreme Court's decision in *Riley v. National Federation of the Blind*, 487 U.S. 781, 795-96 (1988). Just like the National Federation of the Blind and the CTIA, cell phone retailers in San Francisco cannot be compelled by the Board of Supervisors to make unwanted communications.

The protections of the First Amendment do not vary depending upon whether the actor is a provider of cell phone service as opposed to a retailer of cell phones. In this regard, the City does not contend that the First Amendment extends protections to media corporations, telecommunications companies, and non-profit organizations that are denied to retailers. Needless to say, such a contention would run afoul of longstanding First Amendment jurisprudence holding that "the identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas & Elec.,* 475 U.S. at 8 (1986).

The retailers targeted by the City are engaged in the peaceful and lawful activity of selling merchandise that happens to include cell phones. By the City's own admission, the mere act of retailing is not speech. Retailers have the right to remain silent. To the extent that retailers do speak to their customers—whether the subject is the weather, the high cost of doing business in San Francisco, or the totalitarian tendencies of the Board of Supervisors—such speech is not necessarily

"commercial speech" as both the Supreme Court and the Ninth Circuit have previously defined that term.[6] The mere fact that the retailer is engaged in commerce does not turn the Ordinance into "mere" regulation of commercial speech. By that reasoning, anyone who works for a living would be a second class citizen with ***no right*** "to refrain from speaking at all." *Wooley,* 430 U.S. at 714.

As the City concedes, the Ordinance "[m]andat[es] speech that a [San Francisco retailer] would not otherwise make." *Riley*, 487 U.S. at 795, citing *Miami Herald*, 418 U.S. at 256. Because forced dissemination of the "fact sheet" mandated by the Ordinance "necessarily alters the content of the speech," it is "a content-based regulation of speech." *Id.* The fact that the City's Ordinance is content-based "is all but dispositive" because it is subject to "heightened scrutiny." *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2667 (2011). Implicitly conceding that the Ordinance cannot begin to survive heightened scrutiny, the City makes no effort whatsoever to defend it under the standard that in fact applies.

[6] Again, pure commercial speech "does no more than propose a commercial transaction. *United Foods*, 533 U.S. at 409. To the extent that retailers of cell phones in San Francisco are engaged in any speech at all—other than that compelled by the City itself—such speech is not "purely commercial." As a result, retailers' speech "is entitled to full First Amendment protection." *Mattel*, 296 F.3d at 906.

II. FORCED DISSEMINATION OF THE CITY'S "FACT SHEET" FURTHERS NO SUBSTANTIAL GOVERNMENT INTEREST

Even if the mere act of being a retailer is deemed to be "commercial speech," the City bears the burden of showing that the Ordinance serves a "substantial interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980). To meet its burden under *Central Hudson*, the City must show that the Ordinance "directly advance[s]" its interest rather than providing "only ineffective or remote support for the government's purpose." *Id.* Even if the City can make such a showing, the Ordinance cannot stand "if the governmental interest could be served as well by a more limited restriction." *Id.* As previously discussed (see *supra* pp. 7-8), the City has plenty of other options for "help[ing] consumers make informed decisions about how to use their cell phones." Like the State of North Carolina whose mandatory disclosures were invalidated in *Riley*, "the [City of San Francisco] may itself publish the [fact sheet]." 487 U.S. at 800.

To meet its burden, the City must also show that the harms that it seeks to address are real and that the compelled speech will alleviate these harms to a material degree. *Ibanez v. Fla. Dept. of Bus. and Prof'l. Reg.*, 512 U.S. 136, 146 (1994). In this case, the City admits that the "harms" that it seeks to address are not real but rather merely "possible." In other words, the City makes the same

argument in favor of forced dissemination of its "fact sheet" that the Supreme Court rejected in *Ibanez*.

In *Ibanez*, the Supreme Court refused to allow "rote invocation of the words 'potentially misleading' to supplant the [government's] burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Id.* at 146, quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). In this case, the City does not even allege that retailers of cell phones are saying anything "potentially misleading." To the contrary, the City concedes that the Ordinance applies "[r]egardless of what the retailers are saying" and "indeed regardless of whether they are saying anything at all." (City Cross-App./Ans. Br. at 38) (Docket No. 29-1) (p. 46 of 69). Rather, the Ordinance "applies to them for the sole reason that they sell [cell] phones." *Id.* Nowhere does the City even suggest that cell phone retailers are engaged in speech that is "potentially misleading." *Ibanez*, 512 U.S. at 146. Instead, the City asserts merely that such retailers sell a product whose use involves "a *potential* risk." (City Cross-App./Ans. Br. at 35) (Docket No. 29-1) (p. 43 of 69) (emphasis in original).

This assertion is insufficient to meet the City's burden under *Ibanez*. If accepted by this Court, it would eviscerate the First Amendment guarantee of "the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. Like the "potentially misleading" speech at issue in *Ibanez*, the "potential" risk of using a

cell phone is simply insufficient to justify the City's abrogation of retailers' First Amendment rights. In this case, the required dissemination of the City's fact sheet cannot stand "[i]f the 'protections afforded commercial speech are to retain their force.'" *Ibanez*, 512 U.S. at 146, quoting *Zauderer*, 471 U.S. at 648-49.

III. *ZAUDERER* APPLIES ONLY TO "UNCONTROVERSIAL" FACTS REQUIRED TO CORRECT MISLEADING SPEECH

No matter how many times the Board of Supervisors and the District Court rewrite the "fact sheet" to try to make it less objectionable, the City cannot be allowed to succeed in its effort to rewrite the Supreme Court's decision in *Zauderer*. Unfortunately, that is precisely what the City is attempting to do. The City insists that *Zauderer* permits "disclosure" requirements for purposes other than "to prevent consumer deception." (City Cross-App./Ans. Br. at 31) (Docket No. 29-1) (p. 39 of 69). Yet the City cites no Supreme Court decision that says otherwise. That omission speaks volumes. What *Zauderer* actually says is as follows:

> 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.

471 U.S. at 638, citing *Central Hudson*, 447 U.S. at 566. *Zauderer* goes on to state that disclosure requirements must be "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. In this case, the City does not

allege that retailers of cell phones are engaged in conduct that is inherently deceptive (or unlawful). And there is no legitimate basis for this Court or any other U.S. Court of Appeals to opine that *Zauderer* means anything other than what it so obviously says.

Unfortunately, this is not the only way in which the City seeks to rewrite the plain language of *Zauderer* and the virtually identical holding of *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010). Curiously, the City cites *Milavetz* as permitting disclosure requirements that are reasonably related to "protecting public health." (City Cross-App./Ans. Br. at 8) (Docket No. 29-1) (p. 16 of 69). On its face, *Milavetz* had nothing to do with "protecting public health"—unless the City is prepared to argue that debt collectors are "possible" carcinogens as well. Quoting *Zauderer*, the Supreme Court in *Milavetz* held that "requirements that Milavetz identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services are 'reasonably related to the [Government's] interest in preventing deception of consumers.'" 130 S. Ct. at 1341 (citation omitted).

Unfortunately, the City's attempt to rewrite *Zauderer* is not limited to its insistence that it permits the government to compel speech for any reason it deems "legitimate"—not just the prevention of deception. As decided by the Supreme Court, *Zauderer* permits compulsory disclosure of information that is "factual."

471 U.S. at 651. As redrafted by the City, *Zauderer* would also permit compulsory dissemination of "the City's recommendations" about how San Francisco residents should live their lives. The Supreme Court certainly did not say that in *Zauderer*. It is telling that the City cites no Supreme Court decision that supposedly permits the piling on that the City advocates.

And although *Zauderer* says that compelled disclosures must be "uncontroversial" (471 U.S. at 651), the City insists that "[t]hat is not what *Zauderer* means." (City Cross-App./Ans. Br. at 34) (Docket No. 29-1) (p. 42 of 69). Then why did the Supreme Court say it? In *Zauderer*, *Milavetz*, and every other case in which it has upheld required disclosures, the Supreme Court has required the statements to be "factual and uncontroversial." There is simply no basis for this Court to rewrite the Supreme Court's First Amendment jurisprudence simply to indulge the whims of the San Francisco Board of Supervisors.

CONCLUSION

If the City wants to spark public debate about appropriate cell phone use, the City "can express [its] view through its own speech." *Sorrell*, 131 S. Ct. at 2671. What the City cannot do, however, is force its residents to be conduits for its recommendations about appropriate cell phone use. The retailers targeted by the City are selling a lawful product in a lawful manner. To the extent they are engaged in commercial speech at all, there is nothing deceptive about it. As a

result, there is no precedent under *Zauderer* or any other Supreme Court decision to mandate San Francisco retailers to "disclose" anything—much less to disseminate a "fact sheet" whose contents are neither purely "factual" nor "uncontroversial."

Dated: February 1, 2012

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

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Dated: February 1, 2012

/s/ Michael J. Lockerby
Michael J. Lockerby
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2012, I electronically filed the foregoing **AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLANT CTIA – THE WIRELESS ASSOCIATION® ADVOCATING REVERSAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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

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