Nos. 11-17707, 11-17773

IN THE 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.

On Appeal from the United States District Court
for the Northern District of California
(Honorable William H. Alsup)

BRIEF OF AMICI CURIAE ENVIRONMENTAL WORKING GROUP AND PUBLIC CITIZEN, INC., IN SUPPORT OF DEFENDANT-APPELLEE/CROSS-APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae Environmental Working Group and Public Citizen, Inc., state that each is a non-profit, non-stock corporation. Neither has a parent corporation, and no publicly held corporation owns 10% or more of either organization's stock.

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INTEREST OF AMICI CURIAE

Environmental Working Group (EWG), a nonprofit research organization with over a million online supporters, is dedicated to using the power of information to protect public health and the environment. EWG's staff includes scientists, engineers, policy experts, lawyers, and computer programmers who analyze government data, legal documents, scientific studies, and laboratory tests to educate the public and advocate policies at the local, state, and federal levels to protect vulnerable segments of the population.

Public Citizen, a nonprofit organization with members and supporters nationwide, is devoted to research, advocacy, and education on public-health and consumer-safety issues and also has substantial interest and expertise in commercial speech doctrine. Its lawyers argued, among other cases, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993).

EWG and Public Citizen participated as amici curiae at the panel stage of this appeal with the consent of both parties. Counsel for the City and County of San Francisco, the defendant-appellee/cross-appellant, has consented to the filing of this amicus brief, but counsel for CTIA – The Wireless Association, the plaintiff-appellant/cross-appellee, has not consented. A motion for leave to

participate as amici curiae in support of the petition for rehearing has been filed with this brief.[1]

STATEMENT

Amici submit this brief in support of the City and County of San Francisco's petition for rehearing en banc of the panel's September 10, 2012, decision. The panel held that an ordinance requiring cell phone retailers to distribute a consumer safety fact sheet should have been preliminarily enjoined because the requirement violates the First Amendment. Rehearing en banc is warranted because the panel's decision conflicts with *Rumsfeld v. Forum for Academic and Institutional Rights* (*FAIR*), 547 U.S. 47 (2006), which holds that requiring a private entity to host a governmental message is not an infringement of speech if it neither is triggered by nor affects the private entity's own speech. Instead of applying *FAIR*'s standard, the panel relied on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1986), which applies to government-compelled consumer disclosures that *do* affect private individuals' commercial speech. Rehearing en banc on this ground is thus necessary to secure and maintain the uniformity of the Court's decisions.

Rehearing en banc is also warranted because of the exceptional importance of the questions at issue. First, this case presents the question whether the First

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person aside from amici curiae and their members, contributed money intended for the preparation or submission of this brief.

Amendment requires only that consumer disclosure requirements applicable to commercial speech be reasonably related to the government's asserted interest in requiring the disclosure, *Zauderer*, 471 U.S. at 651, or whether—as the panel held—it also requires that disclosures be "both 'purely factual and uncontroversial,'" Mem. disp. at 2 (quoting *Zauderer*, 471 U.S. at 651). Although before this case this Court had never squarely addressed this important issue, the panel did so in a two-page memorandum disposition. The panel's decision in this regard contributes to a circuit split without providing useful guidance for district courts in this Circuit.

Second, this case presents the related questions whether a government-compelled consumer disclosure can permissibly include recommendations to mitigate health and safety risks and whether the government may require such a disclosure when the nature of the health or safety risk is not yet fully known. Under the panel's reasoning, the answer is no on both counts. The panel's decision threatens the authority of federal, state, and local governments acting in the Circuit to protect consumers' health and safety through mandatory disclosures. Accordingly, consideration by this Court en banc is appropriate.

INTRODUCTION

All cell phones send and receive radiofrequency (RF) radiation, a form of electromagnetic energy, which is transmitted between the cellphone antenna and

base stations. Cell phones transmit this energy outward in all directions. At sufficient intensity, RF radiation can be harmful to humans. *See* Federal Communications Commission, *Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, Office of Eng'g & Tech. Bulletin 56, at 6 (4th ed. Aug. 1999). Studies have also found biological effects at relatively low levels of exposure, including neurological and behavioral effects, alterations in brain metabolism, immune system damage, and breaks in DNA strands. *Id.* at 8. According to the Federal Communications Commission (FCC), "whether or not such effects might indicate a human health hazard is not presently known." *Id.*

Although the evidence is not definitive, public-health researchers have warned that long-term cell-phone use may increase risks of brain cancer and other conditions. The concern is particularly acute for children, whose developing brains appear to absorb more RF radiation.[2]

San Francisco responded to these concerns by requiring cell phone retailers to provide customers at the point of sale and on request with a single-page fact sheet advising them about possible risks from cell-phone RF radiation and measures they may take to reduce their exposure and their children's. The fact

[2] For a more detailed discussion of the extensive evidence on the health effects of RF exposure, see the initial Amicus Brief of the EWG and Public Citizen at 13-20.

sheet, as revised to comply with the district court's decision,[3] provides balanced, accurate, and conservative information about RF radiation. It accurately states that the FCC has issued standards applicable to cellphone RF emissions, but that studies have not ruled out the possibility of harm from exposure to RF radiation; that the World Health Organization (WHO) has classified RF emissions as a possible (though not known or probable) carcinogen; that studies of cell-phone health effects continue; and that children's brains and heads absorb more RF radiation than adults' brains. The fact sheet also accurately advises consumers that if they are concerned about possible risks, they can reduce RF radiation exposure by, among other things, using headsets or speakerphones or texting rather than making voice calls. The fact sheet tells consumers where they can obtain more information from the WHO, the FCC, and the San Francisco Department of the Environment. It concludes: "*This material was prepared solely by the City and County of San Francisco and must be provided to consumers under local law.*"

In a memorandum disposition, the panel held that distribution of the fact sheet should have been preliminarily enjoined because the requirement that cell phone retailers distribute it violates the First Amendment. Although the fact sheet

[3] This brief addresses the revised fact sheet that is the subject of CTIA's appeal, but much of its analysis is also relevant to San Francisco's cross-appeal, which concerned the original fact sheet, the distribution of which the district court declined to enforce.

provision does not require retailers to speak at all, the panel treated the fact sheet as compelled commercial speech subject to First Amendment scrutiny. Mem. disp. at 2. Moreover, although *Zauderer* held that disclosure requirements applicable to commercial speech are permissible if "reasonably related" to a permissible state interest, 471 U.S. at 651, the panel held, for the first time in this Circuit, that disclosures must also be both "'purely factual and uncontroversial'" under *Zauderer*. Mem. disp. at 2 (quoting *Zauderer*, 471 U.S. at 651). The panel concluded that steps described in San Francisco's fact sheet to reduce RF exposure were "recommendations" that could "be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous." *Id.* at 2-3. And it emphasized that the scientific community was engaged in an ongoing debate about the health effects of cell phone use and that the district court observed that San Francisco conceded there was no evidence that cell phones cause cancer. *Id.* at 3. On these grounds, the panel held the fact sheet is not purely factual and uncontroversial and, accordingly, that the city cannot compel retailers to distribute it. *Id.*

ARGUMENT

I. The Panel's Decision Is at Odds with *Rumsfeld v. Forum for Academic and Institutional Rights*.

The panel treated the fact sheet provision as a mandatory disclosure requirement that compelled cell phone retailers to speak, and it thus considered

whether the compulsion was valid under *Zauderer*. *See id.* at 2. But the ordinance does not direct the *retailer* to speak; rather, it requires the retailer to provide customers with a sheet of paper at the time of sale or upon request containing *governmental* speech—speech "in the name of the government itself." *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 917 (9th Cir. 2004). Moreover, the ordinance does not prevent cell-phone retailers from providing consumers with their own, possibly contrary views about cell-phone safety. *Cf. Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 850 (9th Cir. 2003) (holding compelled speech doctrine inapplicable to a law that did "not prohibit [plaintiff] from stating its own views" and that could be satisfied by "making available federally produced informational materials on the subject and identifying them as such").

Instead of analyzing this case under *Zauderer*, the panel should have relied on *Rumsfeld v. Forum for Academic and Institutional Rights* (*FAIR*), 547 U.S. 47 (2006), which holds that requiring a private entity to "host" or "accommodate" a governmental message is not an infringement of speech if it neither is triggered by nor affects the private entity's own speech. *Id*. at 63-64; *see also* Pet. for Reh'g at 16 (recognizing that clearly identifying speech as the government's speech mitigates First Amendment concerns and citing *FAIR*). *FAIR* concluded that requiring law schools to host government recruiters was not subject to First Amendment strict scrutiny because "the schools are not speaking when they host

interviews and recruiting receptions" and "a law school's decision to allow recruiters on campus is not inherently expressive." 547 U.S. at 64. Similarly, selling phones is neither speech nor "inherently expressive" activity, but commercial conduct pure and simple. And like the federal government in *FAIR*, here San Francisco "neither limits what [cell-phone retailers] may say nor requires them to say anything." *Id.* at 60.

To some extent, complying with the San Francisco requirement, like providing access to the government recruiters in *FAIR*, may involve some speech by retailers—such as, "here is San Francisco's cell-phone fact sheet," comparable to the sending of emails and posting of notices about the whereabouts of job interviews in *FAIR*. But *FAIR* makes clear that such "incidental" speech, which the government "does not dictate," does not transform a regulation into one that compels speech. *Id.* at 62.

Moreover, the requirement that retailers distribute a fact sheet in connection with commercial activity does not imply that retailers agree with the message conveyed in the fact sheet. Indeed, the fact sheet expressly attributes its message to San Francisco and states that distribution by retailers is a legal requirement. In *FAIR*, the Supreme Court pointedly commented that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's

policies." *Id*. at 65. So, too, nothing about selling phones suggests agreement with San Francisco's views, and nothing in the San Francisco ordinance restricts what cell-phone retailers may say about cell-phone safety.

In these respects, *FAIR* should control the outcome of this case, not *Zauderer*. Rehearing en banc is warranted on this ground alone.

II. The Panel's Interpretation of *Zauderer* Contributes to a Circuit Split and Is Erroneous.

Even assuming that *Zauderer* applies to this case, the panel's memorandum disposition adopted an erroneous interpretation of *Zauderer* that had never before been adopted by this Circuit, and as to which there exists a circuit split. Rehearing en banc is warranted to address the proper interpretation of *Zauderer* and provide guidance to district courts and governments acting in the Circuit.

Zauderer holds that disclosure and other mandatory informational requirements applicable to commercial speech are permissible if "reasonably related" to a permissible state interest. 471 U.S. at 651. It thus subjects commercial-speech disclosure requirements to a level of constitutional scrutiny "akin to the general rational basis test governing all government regulations." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005). Although the state interest considered in *Zauderer* was preventing consumer deception, *Zauderer*'s rational-basis standard applies fully to disclosure requirements that provide factual information about possible health and environmental effects of

commercial products, as well as their safe use or consumption. *See, e.g.*, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001) (applying *Zauderer*'s standard to uphold a statute requiring manufacturers of light bulbs containing mercury to use labeling that disclosed the presence of mercury and telling consumers how to dispose of mercury-containing products); *see also Envtl. Def. Ctr.*, 344 F.3d at 850, 851 n.27 (citing *Sorrell* with approval and concurring that requirements aimed at "[i]nforming the public about safe toxin disposal" are not subject to strict scrutiny).

In this case, the panel relied exclusively on *Zauderer* to hold that "any governmentally compelled disclosures to consumers must [also] be purely factual and uncontroversial." Mem. disp. at 2 (internal quotation marks omitted). But nothing in *Zauderer* compels that conclusion. In *Zauderer*, the Supreme Court upheld a state mandate requiring an attorney who advertised contingent-fee services to disclose that clients might still be responsible for certain expenses if they lost. *See* 471 U.S. at 650. The Court described the state requirement at issue as one under which the plaintiff must "include in his advertising purely factual and uncontroversial information about the terms under which his services [would] be available." *Id.* at 651. In a separate, later paragraph of the opinion, the Court "h[e]ld that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest," which in that case was

preventing consumer deception. *Id.* It then determined that the state requirement at issue "easily passe[d] muster under *this standard*." *Id.* at 652 (emphasis added).

As the above discussion of *Zauderer* makes clear, the panel went beyond a straightforward application of *Zauderer* by engrafting the "purely factual and uncontroversial" descriptor in that case onto *Zauderer*'s central requirement that disclosure provisions bear a reasonable relationship to a permissible state interest. In so doing, it also went beyond this Court's prior law. In *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009), *aff'd sub nom. Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), the most recent case in this Circuit applying *Zauderer*, this Court, after striking down a state restriction on the sale or rental of violent video games to minors, held that a related requirement to label the games with the number "18" did not pass muster under *Zauderer*.[4] *Id.* at 966-67. The Court emphasized the fact that its earlier holding striking down a restriction on the sale and rental of violent video games had rendered the labeling requirement, which indicated that minors could not buy or rent the games, false.

[4] The Supreme Court's review of *Video Software Dealers* did not extend to the constitutionality of the labeling requirement; instead, it addressed only the restriction on the sale or rental of violent video games, leaving this Court's holding on the labeling provision in place. *See Brown*, 131 S. Ct. at 2738; *see also* Pet. Br. at *i*, *Brown*, 131 S. Ct. 2729 (No. 08-1448), *available at* 2010 WL 2787546 (describing questions presented).

See id. In the Court's view, the falsity of the label "negate[d] the State's argument that the labeling provision only require[d] that video game retailers carry 'purely factual and uncontroversial information' in advertising." *Id.* at 966 (quoting *Zauderer*, 471 U.S. at 651). Moreover, the Court concluded that the state "ha[d] no legitimate reason to force retailers to affix false information on their products." *Id.* at 967.

As is relevant to this case, *Video Software Dealers* held only that the state's proffered argument that its label was purely factual and uncontroversial did not support a false statement. It did not directly hold that *all* consumer disclosures must be "purely factual" to survive First Amendment scrutiny or that disclosures must also be uncontroversial under *Zauderer*. *See id.* at 966-67; *see also United States v. Schiff*, 379 F.3d 621, 631 (9th Cir. 2004) (stating only that this Court had "held that mandated disclosure of factual, commercial information does not offend the First Amendment"). In this case, the panel *did* so hold, and its focus on the ongoing debate in the scientific community, among other facts, suggests that the perceived "controversial" nature of the fact sheet and whether the fact sheet conveyed "purely factual" information played a key role in the panel's decision to enjoin the ordinance.

Rehearing en banc is warranted because the panel's interpretation of *Zauderer* contributes to a circuit split and is at odds with the most well-reasoned

decision on this issue. In *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), the Sixth Circuit rejected as "unpersuasive" the very contention adopted by the panel here, that is, "that *Zauderer* applies to only purely factual and noncontroversial disclosures." *Id.* at 559 n.8 (internal quotation marks omitted). The Sixth Circuit read this language in *Zauderer* as a mere description of the disclosure at issue in that case. *Id.* It also emphasized that *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010), the Supreme Court's most recent case applying *Zauderer*, does not refer to a requirement that disclosures contain purely factual and uncontroversial information. *Discount Tobacco*, 674 F.3d at 559 n.8. The Sixth Circuit held, in response to a facial challenge to mandatory graphic warnings on cigarette labels, that warnings that convey factual information about health risks would be permissible under *Zauderer*'s rational-basis standard. *Id.* at 561-62.

In contrast, at least two circuits have held that the "purely factual and uncontroversial" language from *Zauderer* is a necessary requirement for *Zauderer*'s rational-basis analysis to apply. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, No. 12-5063, 2012 WL 3632003, at *7 (D.C. Cir. Aug. 24, 2012); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). But these decisions do not carefully parse the language of *Zauderer* as the Sixth Circuit did in *Discount Tobacco*. Moreover, *R.J. Reynolds Tobacco*, the only court

of appeals case applying as a requirement the "purely factual and uncontroversial" language post-*Milavetz*, does not attempt to reconcile *Milavetz* and *Zauderer*. Instead, it simply cites both standards alongside each other. *See R.J. Reynolds Tobacco*, 2012 WL 3632003, at *7. Because the Sixth Circuit has the better view of *Zauderer*, this Court should rehear this case en banc to follow that circuit's lead.

III. Other Questions of Exceptional Importance Warrant Rehearing En Banc.

Even if this case were properly viewed as a compelled-speech case and *Zauderer* were properly interpreted to permit only purely factual and uncontroversial disclosure requirements, en banc rehearing would nonetheless be necessary. The panel's application of *Zauderer* in this case has broad implications for any government disclosure requirement that includes mitigation steps that consumers can take to reduce health or safety risks or that applies before the nature of the health or safety risks addressed by the disclosure is fully known. The panel's logic, if allowed to stand, would cast a pall over the application of any such requirement in this Circuit.

1. The panel based its holding in part on the ground that the fact sheet contains more than "just facts," instead extending to "recommendations" from San Francisco about ways that consumers can reduce RF exposure. Mem. disp. at 2. The problem with the panel's decision is that the steps presented by the fact sheet to reduce RF exposure, such as using a headset or reducing the length of calls,

indisputably do reduce RF exposure and, therefore, are factual in nature. *See, e.g.*, Amicus Br. of EWG and Public Citizen at 23-24 (describing similar steps in statements by the U.S. Food and Drug Administration and the FCC). San Francisco's recitation of these steps for consumers concerned about RF exposure does not negate their truthfulness.

The panel also stated that the fact sheet's discussion of steps to reduce RF exposure might be interpreted by consumers as the government's opinion that cell phones are dangerous, thus offending the First Amendment. Mem. disp. at 3. But nothing in San Francisco's fact sheet expresses an opinion that cell phones are dangerous. To the contrary, San Francisco's fact sheet recognizes that there are ongoing studies in the scientific community to determine the health effects of cell phones—a statement that is entirely truthful.

If allowed to stand, the panel's holding will have sweeping implications for other disclosure requirements. Under the panel's rationale, if the government wishes to require a consumer disclosure about a risk of danger from using a product, it cannot require the product manufacturer or retailer to disclose methods—however time-tested or successful they might be—to minimize that risk if the methods might suggest that the government has an unspoken opinion on the issue. Such a distinction will limit governments' ability to fully inform consumers about health and safety risks or to prevent them from being misled.

2. The panel also based its holding on the grounds that the scientific community is engaged in an ongoing debate about the health effects of cell phones and that the district court observed that San Francisco had conceded that there was no evidence that cell phones cause cancer. The panel's decision thus indicates that a mandatory health or safety disclosure requirement, including information about possible mitigation measures, is impermissible where the government cannot say with scientific certainty that a danger exists. But the government need not be able to say with certainty that there *is* a danger to say that there *may* be a danger or that *we do not know* if there is a danger, so long as there is a genuine debate about a possible threat to health or safety. Any other conclusion would allow commercial interests to hold mandatory disclosure requirements hostage so long as debate about potential health and safety risks is ongoing.

Under a proper understanding of *Zauderer*, and assuming a compelled-speech analysis were even applicable, the panel should simply have asked whether San Francisco could reasonably conclude that the fact sheet statements are accurate. The answer to that inquiry is clear. Far from portraying the scientific community as unified in its conclusions about the health effects of RF exposure, the fact sheet makes explicit that "studies continue to assess the potential health effects of cell phones." And the fact sheet does not claim that cell phones cause cancer. Rather, it tells consumers that "no safety study has ever ruled out the

possibility of human harm from RF exposure" and that RF energy "has been classified by the World Health Organization as a possible carcinogen (rather than a known carcinogen or a probable carcinogen)." Those statements are supported by the record. *See, e.g.*, Supplemental Excerpts of Record (SER) 299-302, 334-40; *see also* Amicus Br. of EWG and Public Citizen at 13-20 (describing extensive evidentiary support). The requirement that this accurate information be disclosed is reasonably related to San Francisco's interest in ensuring that consumers are informed of the uncertainty surrounding RF exposure and the steps they can take to alleviate possible risks. *See* Amicus Br. of EWG and Public Citizen at 12-20.

CONCLUSION

For the foregoing reasons, this Court should grant San Francisco's petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it contains 3,948 words. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it was prepared in 14-point typeface in Times New Roman.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2012, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All parties in the case are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

October 24, 2012

/s/ Scott L. Nelson
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