




Office of the City Manager

ACTION CALENDAR

October 6, 2015

To: Honorable Mayor and Members of the City Council

From:  Dee Williams-Ridley, Interim City Manager

Submitted by: Zach Cowan, City Attorney

Subject: Amending Berkeley Municipal Code Chapter 9.96 Regarding Point of Sale Cell Phone Warnings in Response to District Court Order

RECOMMENDATION

Adopt first reading of an Ordinance amending Section 9.96.030.A consistent with the order issued by the U.S. District Court in *CTIA v. City of Berkeley* (USDC ND CA C-15-2529 EMC).

FISCAL IMPACTS OF RECOMMENDATION

None. The proposed amendment would enable the City to enforce an already-adopted ordinance. This would require staff time to enforce.

CURRENT SITUATION AND ITS EFFECTS

On May 12, 2015, the Council adopted the first reading of an ordinance requiring cell phone retailers in Berkeley to provide a notice with every sale or lease of a cell phone that warns customers to maintain a minimum separation between their bodies and their cell phones. The CTIA filed suit in federal court alleging that the ordinance was preempted and violated the First Amendment, and sought a preliminary injunction against its enforcement.

On September 21, 2015, the court, Judge Edward Chen presiding, issued an order enjoining the ordinance “unless and until the sentence in the City notice regarding children safety is excised from the notice.” A copy of the court’s order is attached.

The proposed amendment to Section 9.96.030.A complies with Judge Chen’s order by deleting the referenced sentence in the required warning language.

BACKGROUND

On November 18, 2014, the Council directed staff to draft an ordinance that would require cell phone retailers in Berkeley to provide a notice with every sale or lease of a cell phone that warns customers to maintain a minimum separation between their bodies and their cell phones. Staff returned with the ordinance (now codified as Chapter 9.96 of the Berkeley Municipal Code) on May 12, 2015, and the Council adopted the first reading at that time.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the proposed ordinance.

RATIONALE FOR RECOMMENDATION

The proposed amendment responds to a court order. See Attachment 1.

ALTERNATIVE ACTIONS CONSIDERED

N/A

CONTACT PERSON

Zach Cowan, City Attorney (510) 981-6998

Attachments:

- 1: Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction, *CTIA v. City of Berkeley* (USDC ND CA C-15-2529 EMC).
- 2: Ordinance Amending Berkeley Municipal Code Section 9.96.030.A Concerning Point of Sale Notice Warning for Cell Phones.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CTIA – THE WIRELESS ASSOCIATION@,

No. C-15-2529 EMC

Plaintiff,

v.

THE CITY OF BERKELEY, CALIFORNIA,
et al.,

Defendants.

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,

1 as well as the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part the
2 motion.¹

3 **I. FACTUAL & PROCEDURAL BACKGROUND**

4 A. City Ordinance

5 RF energy is ““a form of electromagnetic radiation that is emitted by cell phones.”” *In re*
6 *Reassessment of FCC Radiofrequency Exposure Limits & Policies*, 28 F.C.C. Rcd. 3498, 3585 (Mar.
7 29, 2013) [hereinafter “2013 FCC Reassessment”]. The City ordinance at issue concerns RF energy
8 emitted by cell phones.

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

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

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

15 To assure safety, the Federal Government requires that
16 cell phones meet radio frequency (RF) exposure
17 guidelines. If you carry or use your phone in a pants or
18 shirt pocket or tucked into a bra when the phone is ON
and connected to a wireless network, you may exceed
19 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.

20 B. The notice required by this Section shall either be provided to
21 each customer who buys or leases a Cell phone or shall be
22 prominently displayed at any point of sale where Cell phones
23 are purchased or leased. If provided to the customer, the notice
24 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

26 ¹ The National Resources Defense Council (“NRDC”) has filed a motion for leave to file an
27 amicus brief in conjunction with the preliminary injunction proceedings. This motion is hereby
28 **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.

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

4 Berkeley Mun. Code § 9.96.030.

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

- 6 A. Requirements for the testing of cell phones were established by
 7 the federal government [*i.e.*, the Federal Communications
 Commission ("FCC")] in 1996.
- 8 B. These requirements established "Specific Absorption Rates"
 9 (SAR^[2]) for cell phones.^[3]
- 10 C. The protocols for testing the SAR for cell phones carried on a
 11 person's body assumed that they would be carried a small
 12 distance away from the body, e.g., in a holster or belt clip,
 which was the common practice at that time. Testing of cell
 13 phones under these protocols has generally been conducted
 based on an assumed separation of 10-15 millimeters.
- 14 D. To protect the safety of their consumers, manufacturers
 recommend that their cell phones be carried away from the
 15 body, or be used in conjunction with hands-free devices.
- 16 E. Consumers are not generally aware of these safety
 17 recommendations.
- 18 F. Currently, it is much more common for cell phones to be
 19 carried in pockets or other locations rather than holsters or belt
 20 clips, resulting in much smaller separation distances than the
 safety recommendations specify.
- 21 G. Some consumers may change their behavior to better protect
 themselves and their children if they were aware of these safety
 22 recommendations.
- 23 H. While the disclosures and warnings that accompany cell
 24 phones generally advise consumers not to wear them against
 their bodies, e.g., in pockets, waistbands, etc., these disclosures
 25 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.

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

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

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

4 Berkeley Mun. Code § 9.96.010.

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

10 B. FCC Pronouncements

11 As indicated by the above, the FCC has set RF energy exposure standards for cell phones.
12 The present RF energy exposure limits were established in 1996. *See generally* FCC Consumer
13 Guide, Wireless Devices and Health Concerns, *available at*
14 <https://www.fcc.gov/guides/wireless-devices-and-health-concerns> (last visited September 17, 2015)
15 [hereinafter “FCC Consumer Guide”]. This was done pursuant to a provision in the
16 Telecommunications Act of 1996 (“TCA”) that instructed the agency “to prescribe and make
17 effective rules regarding the environmental effects of radio frequency emissions.” 104 P.L. 104
18 (1996).

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

21 1. FCC KDB Guidelines

22 First, as CTIA alleges in its complaint,

23 [t]he FCC’s Office of Engineering and Technology Knowledge
24 Database (“KDB”) advises cell phone manufacturers [as opposed to
25 cell phone retailers] to include in their user manual a description of
26 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).

27 Compl. ¶ 75; *see also* 2013 FCC Reassessment, 28 F.C.C. Rcd. 3498, 3587 (stating that

28 “[m]anufacturers have been encouraged since 2001 to include information in device manuals to

1 make consumers aware of the need to maintain the body-worn distance – by using appropriate
 2 accessories if they want to ensure that their actual exposure does not exceed the SAR measurement
 3 obtained during testing”).

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

5 Specific information must be included in the operating manuals to
 6 enable users to select body-worn accessories that meet the minimum
 7 test separation distance requirements. Users must be fully informed of
 8 the operating requirements and restrictions, to the extent that the
 9 typical user can easily understand the information, to acquire the
 10 required body-worn accessories to maintain compliance. Instructions
 11 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. . . .

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

15 2. FCC Consumer Guide

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

- 18 • “Several US government agencies and international organizations work cooperatively to
 19 monitor research on the health effects of RF exposure. According to the FDA and the World
 20 Health Organization (WHO), among other organizations, to date, the weight of scientific
 21 evidence has not effectively linked exposure to radio frequency energy from mobile devices
 22 with any known health problems.” FCC Consumer Guide.
- 23 • “Some health and safety interest groups have interpreted certain reports to suggest that
 24 wireless device use may be linked to cancer and other illnesses, posing potentially greater
 25 risks for children than adults. While these assertions have gained increased public attention,
 26 currently no scientific evidence establishes a causal link between wireless device use and
 27 cancer or other illnesses. Those evaluating the potential risks of using wireless devices agree
 28 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,

1 “request[ing] comment to determine whether our RF exposure limits and policies need to be
2 reassessed.” *Id.* at 3500.

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

17 *Id.* at 3501.

18 The FCC included the following comments in its Reassessment:

- 19 • “Since the Commission is not a health and safety agency, we defer to other organizations and
20 agencies with respect to interpreting the biological research necessary to determine what
21 levels are safe. As such, the Commission invites health and safety agencies and the public to
22 comment on the propriety of our general present limits and whether additional precautions
23 may be appropriate in some cases, for example with respect to children. We recognize our
24 responsibility to both protect the public from established adverse effects due to exposure to
25 RF energy and allow industry to provide telecommunications services to the public in the
26 most efficient and practical manner possible. In the Inquiry we ask whether any
27 precautionary action would be either useful or counterproductive, given that there is a lack
28 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

1 whether the Commission should consistently require either disclosure of the maximum SAR
2 value or other more reliable exposure data in a standard format – perhaps in manuals, at
3 point-of-sale, or on a website.” *Id.* at 3502.

4 • “The Commission has a responsibility to ‘provide a proper balance between the need to
5 protect the public and workers from exposure to potentially harmful RF electromagnetic
6 fields and the requirement that industry be allowed to provide telecommunications services
7 to the public in the most efficient and practical manner possible.’ The intent of our exposure
8 limits is to provide a cap that both protects the public based on scientific consensus and
9 allows for efficient and practical implementation of wireless services. The present
10 Commission exposure limit is a ‘bright-line rule.’ That is, so long as exposure levels are
11 below a specified limit value, there is no requirement to further reduce exposure. The limit
12 is readily justified when it is based on known adverse health effects having a well-defined
13 threshold, and the limit includes prudent additional safety factors (e.g., setting the limit
14 significantly below the threshold where known adverse health effects may begin to occur).
15 Our current RF exposure guidelines are an example of such regulation, including a
16 significant ‘safety’ factor, whereby the exposure limits are set at a level on the order of 50
17 times below the level at which adverse biological effects have been observed in laboratory
18 animals as a result of tissue heating resulting from RF exposure. This ‘safety’ factor can
19 well accommodate a variety of variables such as different physical characteristics and
20 individual sensitivities – and even the potential for exposures to occur in excess of our limits
21 without posing a health hazard to humans.”⁴ *Id.* at 3582.

22 • “Despite this conservative bright-line limit, there has been discussion of going even further
23 to guard against the possibility of risks from non-thermal biological effects, even though
24

25 ⁴ Some contend that RF energy can have both thermal biological effects and nonthermal
26 biological effects. *See, e.g.*, Miller Decl. ¶¶ 7, 10-14 (noting that “RF radiation is non-ionizing
27 radiation,” that “[n]on-ionizing radiation can harm through thermal effects, usually only in high
28 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.

1 such risks have not been established by scientific research. As such, some parties have
2 suggested measures of ‘prudent avoidance’ – undertaking only those avoidance activities
3 which carry modest costs.” *Id.* at 3582-83 (emphasis added).

4 • “Given the complexity of the information on research regarding non-thermal biological
5 effects, taking extra precautions in this area may fundamentally be qualitative and may not
6 be well-served by the adoption of lower specific exposure limits without any known,
7 underlying biological mechanism. Additionally, adoption of extra precautionary measures
8 may have the unintended consequence of ‘opposition to progress and the refusal of
9 innovation, ever greater bureaucracy, . . . [and] increased anxiety in the population.’
10 Nevertheless, we invite comment as to whether precautionary measures may be appropriate
11 for certain locations which would not affect the enforceability of our existing exposure
12 limits, as well as any analytical justification for such measures.” *Id.* at 3583.

13 • “We significantly note that extra precautionary efforts by national authorities to reduce
14 exposure below recognized scientifically-based limits is considered by the WHO to be
15 unnecessary but acceptable so long as such efforts do not undermine exposure limits based
16 on known adverse effects. Along these lines, we note that although the Commission supplies
17 information to consumers on methods to reduce exposure from cell phones, it has also stated
18 that it does not endorse the need for nor set a target value for exposure reduction, and we
19 seek comment on whether these policies are appropriate. We also observe that the FDA has
20 stated that, ‘available scientific evidence – including World Health Organization (WHO)
21 findings released May 17, 2010 – shows no increased health risk due to radiofrequency (RF)
22 energy, a form of electromagnetic radiation that is emitted by cell phones.’ At the same
23 time, the FDA has stated that ‘[a]lthough the existing scientific data do not justify FDA
24 regulatory actions, FDA has urged the cell phone industry to take a number of steps,
25 including ... [d]esign[ing] cell phones in a way that minimizes any RF exposure to the user.’
26 We seek information on other similar hortatory efforts and comment on the utility and
27 propriety of such messaging as part of this Commission’s regulatory regime.” *Id.* at 3584-
28 85.

1 • “Commission calculations similar to those in Appendix D suggest that some devices may not
2 be compliant with our exposure limits without the use of some spacer to maintain a
3 separation distance when body-worn, although this conclusion is not verifiable for individual
4 devices since a test without a spacer has not been routinely performed during the body-worn
5 testing for equipment authorization. Yet, we have no evidence that this poses any significant
6 health risk. Commission rules specify a pass/fail criterion for SAR evaluation and equipment
7 authorization. However, exceeding the SAR limit does not necessarily imply unsafe
8 operation, nor do lower SAR quantities imply ‘safer’ operation. The limits were set with a
9 large safety factor, to be well below a threshold for unacceptable rises in tissue temperature.
10 As a result, exposure well above the specified SAR limit should not create an unsafe
11 condition. We note that, even if a device is tested without a spacer, there are already certain
12 separations built into the SAR test setup, such as the thickness of the mannequin shell, the
13 thickness of the device exterior case, etc., so we seek comment on the implementation of
14 evaluation procedures without a spacer for the body-worn testing configuration. We also
15 realize that SAR measurements are performed while the device is operating at its maximum
16 capable power, so that given typical operating conditions, the SAR of the device during
17 normal use would be less than tested. In sum, using a device against the body without a
18 spacer will generally result in actual SAR below the maximum SAR tested; moreover, a use
19 that possibly results in non-compliance with the SAR limit should not be viewed with
20 significantly greater concern than compliant use.” *Id.* at 3588.

21 II. DISCUSSION

22 A. Legal Standard

23 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
24 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
25 balance of equities tips in his favor, and that an injunction is in the public interest.” *Network*
26 *Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Winter v.*
27 *Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008) (rejecting the position that, “when a plaintiff
28 demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered

1 based only on a ‘possibility’ of irreparable harm’’). The Ninth Circuit has held that the “serious
 2 questions” approach survives *Winter* when applied as part of the four-element *Winter* test. In other
 3 words, “serious questions going to the merits” and a hardship balance that tips sharply toward the
 4 plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test
 5 are also met. *See Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

6 B. Likelihood of Success on the Merits

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

10 1. Preemption

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

17 Here, CTIA puts at issue only obstacle preemption, not impossibility preemption. Under
 18 Supreme Court law, “[w]hat is a sufficient obstacle is a matter of judgment, to be informed by
 19 examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby v.*
 20 *Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). “‘If the purpose of the [federal] act cannot
 21 otherwise be accomplished – if its operation within its chosen field must be frustrated and its
 22 provisions be refused their natural effect – the state law must yield to the regulation of Congress
 23 within the sphere of its delegated power.’” *Id.*

24 In the case at bar, the federal statute at issue is the TCA, “which [*inter alia*] directed the FCC
 25 to ‘make effective rules regarding the environmental effects of [RF] emissions’ within 180 days of
 26

27 ⁵ CTIA has claimed only conflict preemption and not other kinds of preemption such as *e.g.*,
 28 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).

1 the TCA’s enactment [in 1996].” *Farina*, 625 F.3d at 106; *see also* 47 C.F.R. § 2.1093 (setting
2 exposure limits). CTIA argues that the purposes underlying the statute are twofold: (1) to achieve a
3 balance between the need to protect the public’s health and safety and the goal of providing an
4 efficient and practical telecommunications services for the public’s benefit and (2) to ensure
5 nationwide uniformity as to this balance. In support of this argument, CTIA relies on the Third
6 Circuit’s decision *Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir. 2010).

7 The Court agrees with CTIA that *Farina* is an instructive case with respect to the purposes
8 underlying the above TCA provision. In *Farina*, the plaintiff sued on the ground that “cell phones,
9 as currently manufactured, are unsafe to be operated without headsets because the customary manner
10 in which they are used – with the user holding the phone so that the antenna is positioned next to his
11 head – exposes the user to dangerous amounts of radio frequency (‘RF’) radiation.” *Id.* at 104. The
12 Third Circuit held that the plaintiff’s lawsuit was subject to obstacle preemption. The court noted
13 first that, “although [the plaintiff] disavow[ed] any challenge to the FCC’s RF standards, that is the
14 essence of his complaint. . . . In order for [the plaintiff] to succeed, he necessarily must establish that
15 cell phones abiding by the FCC’s SAR guidelines are unsafe to operate without a headset.” *Id.* at
16 122. The court then concluded that there was obstacle preemption, particularly because “regulatory
17 situations in which an agency is required to strike a balance between competing statutory objectives
18 lend themselves to a finding of conflict preemption.” *Id.* at 123.

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

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

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

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

10 *Id.* at 126.

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

15 The Committee finds that current State and local requirements, siting
16 and zoning decisions by non-federal units of government, have created
17 an inconsistent and, at times, conflicting patchwork of requirements
18 which will inhibit the deployment of Personal Communications
19 Services (PCS) as well as the rebuilding of a digital technology-based
20 cellular telecommunications network. The Committee believes it is in
21 the national interest that uniform, consistent requirements, with
22 adequate safeguards of the public health and safety, be established as
23 soon as possible. Such requirements will ensure an appropriate
24 balance in policy and will speed deployment and the availability of
25 competitive wireless telecommunications services which ultimately
26 will provide consumers with lower costs as well as with a greater
27 range and options for such services.

28 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:

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”).

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

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

10 Berkeley Mun. Code § 9.96.030(A). This disclosure, for the most part, simply refers consumers to
11 the fact that there are FCC standards on RF energy exposure – standards which assume a minimum
12 spacing of the cell phone away from the body – and advises consumers to refer to their manuals
13 regarding maintenance of such spacing. The disclosure mandated by the Berkeley ordinance is
14 consistent with the FCC’s statements and testing procedures regarding spacing. *See, e.g.*, FCC
15 Consumer Guide (advising “on some simple steps that you can take to reduce your exposure to RF
16 energy from cell phones[;] [f]or example, wireless devices only emit RF energy when you are using
17 them and, the closer the device is to you, the more energy you will absorb”); 2013 FCC
18 Reassessment, 28 F.C.C. Rcd. at 3588 (stating that “Commission calculations . . . suggest that some
19 devices may not be compliant with our exposure limits without the use of some spacer to maintain a
20 separation distance when body-worn, although this conclusion is not verifiable for individual
21 devices since a test without a spacer has not been routinely performed during the body-worn testing
22 for equipment authorization”). It is also consistent with the FCC’s own requirement that cell phone
23 manufacturers disclose to consumers information and advice about spacing. *See* FCC KDB, No.
24 447498, *General RF Exposure Guidelines*, § 4.2.2(4). Thus, the ordinance does not ban something
25 the FCC authorizes or mandates. And CTIA has failed to point to any FCC pronouncement
26 suggesting that the agency has any objection to warning consumers about maintaining spacing
27 between the body and a cell phone. Moreover, the City ordinance, because it is consistent with FCC
28 pronouncements and directives, does not threaten national uniformity.

29 There is, however, one portion of the notice required by the City ordinance that is subject to
30 obstacle preemption – namely, the sentence “This potential risk is greater for children.” Berkeley
31 Mun. Code § 9.96.030(A). Notably, this sentence does not say that the potential risk *may* be greater

1 for children; rather, the sentence states that the potential risk *is* greater. But whether the potential
2 risk is, in fact, greater for children is a matter of scientific debate. The City has taken the position in
3 this lawsuit that its notice is simply designed to reinforce a message that the FCC already requires
4 and make consumers aware of FCC instructions and mandates, *see, e.g.*, Opp’n at 1, 4, but the FCC
5 has never made any pronouncement that there *is* a greater potential risk for children, and, certainly,
6 the FCC has not imposed different RF energy exposure limits that are applicable to children
7 specifically. At most, the FCC has taken note that there is a scientific debate about whether children
8 are potentially at greater risk. *See, e.g.*, FCC Consumer Guide (“Some health and safety interest
9 groups have interpreted certain reports to suggest that wireless device use may be linked to cancer
10 and other illnesses, posing potentially greater risks for children than adults. While these assertions
11 have gained increased public attention, currently no scientific evidence establishes a causal link
12 between wireless device use and cancer or other illnesses.”); 2013 FCC Reassessment, 28 F.C.C.
13 Rcd. at 3501 (“[T]he Commission invites health and safety agencies and the public to comment on
14 the propriety of our general present limits and whether additional precautions may be appropriate in
15 some cases, for example with respect to children.”). Importantly, however, the FCC has not
16 imposed different exposure limits for children nor does it mandate special warnings regarding
17 children’s exposure to RF radiation from cell phones. Thus, the content of the sentence – that the
18 potential risk *is* indeed greater for children compared to adults – threatens to upset the balance struck
19 by the FCC between encouraging commercial development of all phones and public safety, because
20 the Berkeley warning as worded could materially deter sales on an assumption about safety risks
21 which the FCC has refused to adopt or endorse.⁷

22
23
24 ⁷ At the hearing, the City argued that there *is* a greater potential risk because of behavioral
25 differences between children and adults. *See* Cortesi Decl. ¶¶ 5-8 (testifying, *inter alia*, that children
26 are heavy users of cell phones, that they often sleep with their phones on or next to their beds, that
27 they often text which leads to them keeping phones close to their bodies, etc.). The City contends
28 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. 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.

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

4 2. First Amendment

5 Having determined that the required statement, “This potential risk is greater for children,” is
6 likely preempted by federal law, the Court now addresses CTIA’s likelihood of success with respect
7 to its First Amendment challenge to the remainder of the notice.⁸

8 a. Level of Scrutiny

9 With respect to CTIA’s First Amendment claim, the Court must first determine what First
10 Amendment test should be used to evaluate the ordinance at issue. CTIA contends that strict
11 scrutiny must be applied because the ordinance is neither content nor viewpoint neutral. *See Reed v.*
12 *Town of Gilbert*, 135 S. Ct. 2218, 2228, 2230 (2015) (stating that “strict scrutiny applies either when
13 a law is content based on its face or when the purpose and justification for the law are content
14 based”; adding that “[g]overnment discrimination among viewpoints . . . is a ‘more blatant’ and
15 ‘egregious form of content discrimination’”). But in making this argument, CTIA completely
16 ignores the fact that the speech rights at issue here are its members’ *commercial* speech rights. *See*
17 *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011) (stating that “[c]ommercial speech is ‘defined
18 as speech that does no more than propose a commercial transaction’”; “‘strong support’ that the
19 speech should be characterized as commercial speech is found where the speech is an advertisement,
20 the speech refers to a particular product, and the speaker has an economic motivation”). The
21 Supreme Court has clearly made a distinction between commercial speech and noncommercial
22 speech, *see, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63

23
24 ⁸ The Court shall evaluate the ordinance as if the sentence regarding children were excised
25 from the text. This approach is appropriate in light of Berkeley Municipal Code § 1.01.100 which,
26 in effect, allows for severance. *See* Berkeley Mun. Code § 1.01.100 (“If any section, subsection,
27 sentence, clause or phrase of this code is for any reason held to be invalid or unconstitutional, such
28 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.”).

1 (1980) (stating that “[t]he Constitution . . . accords a lesser protection to commercial speech than to
2 other constitutionally guaranteed expression”); *see also Nat’l Ass’n of Mfrs. v. SEC*, No. 13-5252,
3 2015 U.S. App. LEXIS 14455, at *75-76 (D.C. Cir. Aug. 18, 2015) (noting that, “as the Supreme
4 Court has emphasized, the starting premise in all commercial speech cases is the same: the First
5 Amendment values commercial speech for different reasons than non-commercial speech”), and
6 nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-
7 established distinction is no longer valid.⁹

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

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

20 *Central Hudson*, 447 U.S. at 564. But as indicated by the above language, *Central Hudson* was
21 addressing *restrictions* on commercial speech. Here, the Court is not confronted with any
22 restrictions on CTIA members’ commercial speech; rather, the issue is related to *compelled*
23 *disclosure* of commercial speech. The Supreme Court has treated restrictions on commercial
24 speech differently from compelled disclosure of such speech. This difference in treatment was first
25 articulated in the plurality decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme*
26 *Court of Ohio*, 471 U.S. 626 (1985), and subsequently affirmed by the majority opinion in *Milavetz,*
27 *Gallp & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

28 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

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.

1 represent women who had suffered injuries resulting from their use of a contraceptive device known
2 as the Dalkon Shield Intrauterine Device.” *Id.* at 630. In the advertisement, the plaintiff stated that
3 “[t]he case are handled on a contingent fee basis of the amount recovered. If there is no recovery,
4 no legal fees are owed by our clients.” *Id.* at 631. Based on the advertisement, the state Office of
5 Disciplinary Counsel filed a complaint against the plaintiff, alleging that the plaintiff had violated a
6 disciplinary rule because the advertisement “fail[ed] to inform clients that they would be liable for
7 costs (as opposed to legal fees) even if their claims were unsuccessful” and therefore was deceptive.
8 *Id.* at 633. The state supreme court agreed with the state Office of Disciplinary Counsel. The
9 plaintiff appealed, asserting that his First Amendment rights had been violated.

10 In resolving the issue, the plurality began by noting that

11 [o]ur general approach to restrictions on commercial speech is . . . by
12 now well settled. The States and the Federal Government are free to
13 prevent the dissemination of commercial speech that is false,
14 deceptive, or misleading. Commercial speech that is not false or
15 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].

16 *Id.* at 638.

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

22 [t]he State has attempted only to prescribe what shall be orthodox in
23 commercial advertising, and its prescription has taken the form of a
24 requirement that appellant include in his advertising purely factual and
25 uncontroversial information about the terms under which his services
26 will be available. Because the extension of First Amendment
27 protection to commercial speech is justified principally by the value to
28 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]

1 or [disclaimers] might be appropriately required . . . in order to
2 dissipate the possibility of consumer confusion or deception.”

3 We do not suggest that disclosure requirements do not
4 implicate the advertiser’s First Amendment rights at all. We recognize
5 that unjustified or unduly burdensome disclosure requirements might
6 offend the First Amendment by chilling protected commercial speech.
7 But we hold that an advertiser’s rights are adequately protected as long
8 as disclosure requirements are reasonably related to the State’s interest
9 in preventing deception of consumers.

10 *Id.* at 651 (emphasis added).

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

12 Appellant’s advertisement informed the public that “if there is no
13 recovery, no legal fees are owed by our clients.” The advertisement
14 makes no mention of the distinction between “legal fees” and “costs,”
15 and to a layman not aware of the meaning of these terms of art, the
16 advertisement would suggest that employing appellant would be a
17 no-lose proposition in that his representation in a losing cause would
18 come entirely free of charge. The assumption that substantial numbers
19 of potential clients would be so misled is hardly a speculative one: it is
20 a commonplace that members of the public are often unaware of the
21 technical meanings of such terms as “fees” and “costs” – terms that, in
22 ordinary usage, might well be virtually interchangeable. When the
23 possibility of deception is as self-evident as it is in this case, we need
24 not require the State to “conduct a survey of the . . . public before it
25 [may] determine that the [advertisement] had a tendency to mislead.”
26 The State’s position that it is deceptive to employ advertising that
27 refers to contingent-fee arrangements without mentioning the client’s
28 liability for costs is reasonable enough to support a requirement that
information regarding the client’s liability for costs be disclosed.

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

22 Approximately fifteen years later, a majority of the Supreme Court addressed *Zauderer* in
23 *Milavetz*. *Milavetz* concerned the constitutionality of the Bankruptcy Abuse Prevention and
24 Consumer Protection Act of 2005 (“BAPCPA”). The act regulated the conduct of debt relief
25 agencies, *i.e.*, “professionals who provide bankruptcy assistance to consumer debtors.” *Milavetz*,
26 559 U.S. at 232. Part of the act required debt relief agencies to make certain disclosures in their
27 advertisements. *See id.* at 233. The parties disagreed as to whether *Central Hudson* or *Zauderer*

1 provided the applicable standard in evaluating the statute. The Supreme Court concluded that
2 *Zauderer* governed, noting as follows:

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

13 *Id.* at 250. The Court then determined that “§ 528's requirements that [the petitioner] identify itself
14 as a debt relief agency and include information about its bankruptcy-assistance and related services
15 are ‘reasonably related to the [Government’s] interest in preventing deception of consumers.’” *Id.* at
16 252-53. Accordingly, it “upheld those provisions as applied to [the petitioner].” *Id.* at 253.

17 Since *Zauderer* and *Milavetz*, circuit courts have essentially characterized the *Zauderer* test
18 as a rational basis or rational review test. *See, e.g., Nat'l Ass'n*, 2015 U.S. App. LEXIS 14455, at
19 *55 (stating that “[t]he Supreme Court has stated that rational basis review applies to certain
20 disclosures of ‘purely factual and uncontroversial information’”; quoting *Zauderer*); *King v.*
21 *Governor of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014) (stating that *Zauderer* “outlin[ed] the ‘material
22 differences between disclosure requirements and outright prohibitions on speech’ and subject[ed] a
23 disclosure requirement to rational basis review”); *Safelite Group v. Jepsen*, 764 F.3d 258, 259 (2d
24 Cir. 2014) (characterizing *Zauderer* as “rational basis review”); *Centro Tepeyac v. Montgomery*
25 *County*, 722 F.3d 184, 189 (4th Cir. 2013) (noting that, under *Zauderer*, “disclosure requirements
26 aimed at misleading commercial speech need only survive rational basis scrutiny”); *Disc. Tobacco*
27 *City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (characterizing *Zauderer*
28 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

1 not offend the core First Amendment values of promoting efficient exchange of information or
2 protecting individual liberty interests” – indeed, “disclosure further, rather than hinders, the First
3 Amendment goal of the discovery of truth and contributes to the efficiency of the ‘marketplace of
4 ideas.’” *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001).

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

16 *Zauderer* itself does not give a clear answer. Some of its
17 language suggests possible confinement to correcting deception.
18 Having already described the disclosure mandated there as limited to
19 “purely factual and uncontroversial information about the terms under
20 which [the transaction was proposed],” the Court said, “we hold that
21 an advertiser’s rights are adequately protected as long as [such]
22 disclosure requirements are reasonably related to the State’s interest in
23 preventing deception of consumers.” (It made no finding that the
24 advertiser’s message was “more likely to deceive the public than to
25 inform it,” which would constitutionally subject the message to an
26 outright ban. The Court’s own later application of *Zauderer* in
27 *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229
28 (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

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

15 *Id.* at 21-22.

16 In *National Electrical*, the Second Circuit also rejected a reading of *Zauderer* as being
17 limited to a situation where the government’s interest is prevention of consumer deception. The
18 case concerned a Vermont statute that “require[d] manufacturers of some mercury-containing
19 products to label their products and packaging to inform consumers that the products contain
20 mercury and, on disposal, should be recycled or disposed of as hazardous waste.” *Nat’l Elec.*, 272
21 F.3d at 107. The court acknowledged that

22 the compelled disclosure at issue here was not intended to prevent
23 “consumer confusion or deception” per se, but rather to better inform
24 consumers about the products they purchase. Although the overall
25 goal of the statute is plainly to reduce the amount of mercury released
26 into the environment, it is inextricably intertwined with the goal of
27 increasing consumer awareness of the presence of mercury in a variety
28 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

1 eliminate all or even most mercury pollution in the state.

2 *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)
3 (stating that “*Zauderer*’s holding was broad enough to encompass nonmisleading disclosure
4 requirements”).

5 The First and Sixth Circuits are in accord with the D.C. and Second Circuits. *See Pharm.*
6 *Care*, 429 F.3d at 310 n.8 (noting that “we have found no cases limiting *Zauderer* [to potentially
7 deceptive advertising directed at consumers]”); *Disc. Tobacco*, 674 F.3d at 556-57 (discussing
8 *National Electrical* approvingly); *cf. Pharm. Care*, 429 F.3d at 316 (Boudin, J., concurring) (stating
9 that “[t]he idea that these thousands of routine regulations require an extensive First Amendment
10 analysis is mistaken” because *Zauderer* is in essence a rational basis test). Furthermore, in an
11 unpublished decision, the Ninth Circuit addressed a San Francisco ordinance which also imposed a
12 notice requirement on cell phone retailers (based on RF energy emission), but the court did not hold
13 that *Zauderer* was limited to circumstances in which a state or local government was trying to
14 prevent potentially misleading advertising. *See generally CTIA – The Wireless Ass’n v. City &*
15 *County of San Francisco*, 494 Fed. Appx. 752 (9th Cir. 2012). The court assumed *Zauderer* applied
16 to mandatory disclosures directed at health and safety, not consumer deception.

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

25 Moreover, there is a persuasive argument that, where, as here, the compelled disclosure is
26 that of clearly identified *government* speech, and not that of the *private speaker*, a standard even less
27 exacting than that established in *Zauderer* should apply. In *Zauderer*, the plaintiff-attorney was
28 being compelled to speak, and nothing about that compelled speech indicated it was anyone’s speech

1 but the plaintiff-attorney's. In contrast, here, CTIA's members are being compelled to communicate
2 a message, but the message being communicated is clearly the City's message, and not that of the
3 cell phone retailers. *See, e.g.*, Berkeley Mun. Code § 9.96.030(A)-(B) (providing that the notice
4 shall state "The City of Berkeley requires that you be provided the following notice" and that "the
5 notice shall include the City's logo"). In other words, while CTIA's members are being compelled
6 to provide a mandated disclosure of Berkeley's speech, no one could reasonably mistake that speech
7 as emanating from a cell phone retailer itself. Where a law requires a commercial entity engaged in
8 commercial speech merely to permit a disclosure by the *government*, rather than compelling speech
9 out of the mouth of the *speaker*, the First Amendment interests are less obvious. Notably, at the
10 hearing, CTIA conceded that there would be no First Amendment violation if the City handed out
11 flyers or had a poster board immediately outside a cell phone retailer's store. But that then begs the
12 question of what is the difference between that conduct and the conduct at issue herein – *i.e.*, where
13 the City information is being provided at the sales counter inside the store instead of immediately
14 outside the store. While the former certainly seems more intrusive, that is more so because it seems
15 to impinge on property rights rather than on expressive rights. CTIA has not cited any appellate
16 authority addressing the proper standard of First Amendment review where the government requires
17 mandatory disclosure of *government* speech by a private party in the context of commercial speech.

18 To be sure, there are First Amendment limits to the government's ability to require that a
19 speaker carry a hostile or inconsistent message of a third party, at least in the context of
20 noncommercial speech. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515
21 U.S. 557 (1995) (holding that First Amendment rights of a parade organizer and council were
22 violated when they were required to include a gay rights organization in their parade); *Pac. Gas &*
23 *Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality decision) (concluding that the
24 First Amendment rights of privately owned utility company were violated by an order from the
25 California Public Utilities Commission that required the company to include in its billing envelopes
26 speech of a third party with which the company disagreed); *Miami Herald Pub'g Co. v. Tornillo*,
27 418 U.S. 241, 243, 256, 258 (1974) (holding that "a state statute granting a political candidate a right
28 to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees

1 of a free press”; noting that the “statute exacts a penalty on the basis of the content of a newspaper”
2 and also “intru[des] into the function of editors”). But, as stated above, these cases involved
3 noncommercial speech, not commercial speech as here. *See, e.g., PG&E*, 475 U.S. at 9 (noting that
4 company’s newsletter, which was included in the billing envelopes, covered a wide range of topics,
5 “from energy-saving tips to stories about wildlife conservation, and from billing information to
6 recipes,” and thus “extend[ed] well beyond speech that [simply] proposes a business transaction”;
7 citing *Zauderer* and *Central Hudson*). This is a significant distinction, particularly because First
8 Amendment analysis in the commercial speech context assumes that more speech, so long as it is not
9 misleading, enhances the marketplace (as well as the marketplace of ideas). *See Zauderer*, 471 U.S.
10 at 651 (noting that “the extension of First Amendment protection to commercial speech is justified
11 principally by the value to consumers of the information such speech provides”). That is why the
12 Court in *Zauderer* afforded particular deference to the government’s decision to compel disclosures
13 (in contrast to laws restricting speech). Here, the ordinance expressly affords retailers the right to
14 add comments to the notice, and there is no showing that adding comments would be a significant
15 burden on retailers.

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

25 While CTIA has argued that being forced to engage in counter-speech (*i.e.*, speech in
26 response to the City notice) is, in and of itself, a First Amendment burden (as indicated in *PG&E*),
27 that is not necessarily true where commercial speech is at issue. As the City points out, *Zauderer*
28 spoke only in terms of chilling speech as a First Amendment burden in the context of commercial

1 speech. *See Zauderer*, 471 U.S. at 651 (stating that “unjustified or unduly burdensome disclosure
2 requirements might offend the First Amendment by chilling protected commercial speech”); *see also*
3 *Am. Meat*, 760 F.3d at 27 (acknowledging the same; also stating that “*Zauderer* cannot justify a
4 disclosure so burdensome that it essentially operates as a restriction on constitutionally protected
5 speech”). This makes sense as the value of commercial speech comes from the information it
6 provides – *i.e.*, more speech, not less. That being said, even if CTIA were correct that the right not
7 to speak had some application to commercial speech, the need for counter-speech – at least in the
8 circumstances presented herein – are minimal, as discussed *infra*.

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

20 Instead, under more general rational basis principles, the challenged law must be reasonably
21 related to a legitimate governmental interest. In particular, if the law furthers a legitimate
22 government interest in requiring disclosure of governmental speech, it should be upheld. This is not
23 to say that First Amendment interest in this context is nonexistent. Even though no speech is
24 compelled out of the mouth of retailers and there is no claim that their speech is chilled, the fact that
25 they may feel compelled to respond to Berkeley’s notice arguably implicates to some extent the First
26 Amendment. *See PG&E*, 471 U.S. at 15 (in case involving noncommercial speech, noting that the
27 company “may be forced either to appear to agree with [third party’s] views [included in the
28 company’s billing envelope] or to respond”). Because there is an arguable First Amendment

1 interest, it may reasonably be contended that the more exacting forum of rational basis review
2 (which some commentators have labeled “rational basis with bite,” *see Bishop v. Smith*, 760 F.3d
3 1070, 1099 (10th Cir. 2014) (citing law review articles addressing “rational basis with bite,”
4 “rational basis with teeth,” or “rational basis plus”); *Powers v. Harris*, 379 F.3d 1208, 1224-25 n.21
5 (10th Cir. 2004) (same)), which requires an examination of actual state interests and whether the
6 challenged law actually furthers that interest rather than the traditional rational basis review which
7 permits a law to be upheld if rationally related to any conceivable interest. *Compare Romer v.*
8 *Evans*, 517 U.S. 620 (1996) (holding that a Colorado constitutional amendment that prohibited all
9 legislative, executive, or judicial action designed to protect homosexual persons from discrimination
10 “lacks a rational relationship to legitimate state interests”); *City of Cleburne, Tex. v. Cleburne Living*
11 *Ctr.*, 473 U.S. 432 (1985) (striking down under rational basis city council decision preventing group
12 home for mentally disabled); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating under rational basis
13 portion of statute excluding immigrant children from public schools), *with Williamson v. Lee*
14 *Optical*, 348 U.S. 483 (1955) (applying traditional rational relationship test in evaluating
15 constitutionality of legislation). *See also Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d
16 1023, 1038, n 6 (E.D. Cal. 2007) (recognizing *Cleburne/Romer* approach commonly referred as
17 “rational basis with bite”).

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

21 b. Application of Rational Basis Test

22 In identifying the government interest supporting the notice required by the ordinance,
23 Berkeley argues that it simply seeks to insure fuller consumer awareness of the FCC’s SAR testing
24 procedures and directive to manufacturers to disclose the spacing requirements used to insured SAR
25 does not exceed stated levels. Promoting consumer awareness of the government’s testing
26 procedures and guidelines obviously is a legitimate governmental interest. *Compare Sorrell v. IMS*
27 *Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (stating that “the government’s legitimate interest in
28 protecting consumers from ‘commercial harms’ explains ‘why commercial speech can be subject to

1 greater governmental regulation than noncommercial speech”), *with Int’l Dairy Foods Ass’n v.*
2 *Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (stating that “consumer curiosity alone is not a strong
3 enough state interest to sustain the compulsion of even an accurate, factual statement in a
4 commercial context”). And the mandated notice (apart from the warning about risk to children)
5 furthers and is reasonably related that governmental interest. As noted in the preemption analysis
6 above, nothing in the required Berkeley notice contradicts what the FCC has said and done, and the
7 upshot of the notice (advising consumers to consult the cell phone instructions or user manual on
8 how to safely use the phone) tracks what the FCC requires.

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

20 While there is scientific uncertainty as to the relationship between SAR levels and the risk
21 of, *e.g.*, cancer, and there is scientific debate about whether nonthermal as well as thermal effects of
22 RF radiation may pose health risks, there is a reasonable scientific basis to believe that RF radiation
23 at some levels can and do present health risks. The SAR limits were established by the FCC in the
24 interests of safety in view of the potential risks of RF radiation exposure. Although current
25 maximum SAR levels set by the FCC were designed to provide a comfortable margin, at least with
26 respect to risks posed by the thermal effect of RF radiation, the FCC has in fact established specific
27 limits to SAR exposure and uses those limits in the testing and approval of cell phones for sale to the
28 public. And testing procedures governed by FCC rules incorporating those SAR limits assume a

1 minimal amount of spacing of the cell phone from the body, without which SAR levels may exceed
 2 the established guidelines. *See CTIA*, 827 F. Supp. 2d at 1062 (noting that “the FCC has implicitly
 3 recognized that excessive RF radiation is potentially dangerous[;] [i]t did so when it ‘balanced’ that
 4 risk against the need for a practical nationwide cell phone system,” and “[t]he FCC has never said
 5 that RF radiation poses no danger at all, only that RF radiation can be set at acceptable levels”),
 6 *rev’d on other grounds*, 494 Fed. Appx. 752 (9th Cir. 2012). Unless the Court were to find that the
 7 FCC guidelines themselves are scientifically baseless and hence irrational – which no one has asked
 8 this Court to do – the mandated notice here, being predicated on the FCC’s guidelines, is reasonably
 9 related to a legitimate governmental interest.¹⁰ In short, so long as the challenged law requiring
 10 display and disclosure of governmental message in the context of commercial speech is supported by
 11 some reasonable scientific basis, it is likely to pass the rational basis test applicable under the First
 12 Amendment.

13 c. Application of *Zauderer* Test

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

19
 20
 21 ¹⁰ The mere fact of scientific uncertainty and/or inexactitude does not render the
 22 government’s interest in issuing safety warnings to the public irrational or unreasonable. Such
 23 uncertainty and inexactitude inheres in the assessment of any risk. To require the government to
 24 prove a particular quantum of danger before issuing safety warnings would jeopardize an
 25 immeasurable number of laws, regulations, and directives. *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,” ranging from securities disclosures and disclosures in prescription drug
 advertisements to tobacco and nutritional labeling and California’s Proposition 65).

26 ¹¹ At the hearing, the Court discussed with the parties who had the burden of proof with
 27 respect to the *Zauderer* test. Where a commercial speech restriction is at issue, the party seeking to
 28 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.

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

17 As for the requirement that the compelled speech be factual (or accurate), in any given case,
18 it is easy to conceive of an argument that, even if the compelled speech is technically accurate, (1) it
19 is still suggestive of an opinion or (2) it is misleading. For example, on the former, one could
20 contend that the mere fact that the government is compelling the speech in the first place indicates
21 that it is the government’s opinion that there is a point of concern for the public. One could also
22 argue that the compelled speech is misleading because it omits more specific information.

23 But *Zauderer* cannot be read to establish a “factual and uncontroversial” requirement that
24 can be so easily manipulated that it would effectively bar any compelled disclosure by the
25 government. This is particularly true where public health and safety are at issue, as in the instant
26 case. Any time there is an element of risk to public health and safety, practically any speech on the
27 matter could be deemed misleading unless there were a disclosure of everything on each side of the
28 scientific debate – an impossible task. One could easily imagine that an overly rigorous “factual and

1 uncontroversial” test would render even the Surgeon General’s textual warnings found on cigarette
2 packages a violation of the First Amendment. *See* 15 U.S.C. § 1333(a) (listing warnings, including
3 “Tobacco smoke can harm your children,” “Tobacco smoke causes fatal lung disease in
4 nonsmokers,” and “Quitting smoking now greatly reduces serious risks to your health”); *see also*
5 *Nat’l Elec.*, 272 F.3d at 116 (taking note of “the potentially wide-ranging implications of NEMA’s
6 First Amendment complaint,” as “[i]nnumerable federal and state regulatory programs require the
7 disclosure of product and other commercial information,” ranging from securities disclosures and
8 disclosures in prescription drug advertisements to tobacco and nutritional labeling and California’s
9 Proposition 65).

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

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

16 To assure safety, the Federal Government requires that cell phones
17 meet radio frequency (RF) exposure guidelines. If you carry or use
18 your phone in a pants or shirt pocket or tucked into a bra when the
19 phone is ON and connected to a wireless network, you may exceed the
20 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.

21 Berkeley Mun. Code § 9.96.030(A).

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

1 CTIA takes issue with the use of the words “safety” and “radiation,” but the use of both
2 words is accurate and uncontroversial. Regarding “safety,” the FCC clearly imposed limits because
3 of safety concerns. The limits that the agency ultimately chose reflected a balancing of the risk to
4 public health and safety against the need for a practical nationwide cell phone system, but it cannot
5 be denied that safety was a part of that calculus. *See CTIA*, 827 F. Supp. 2d at 1062 (in the San
6 Francisco ordinance case, noting that, “[e]ven the FCC has implicitly recognized that excessive RF
7 radiation is potentially dangerous” because it “‘balanced’ that risk against the need for a practical
8 nationwide cell phone system[;] [t]he FCC has never said that RF radiation poses no danger at all,
9 only that RF radiation can be set at acceptable levels”), *rev’d on other grounds*, 494 Fed. Appx. 752
10 (9th Cir. 2012). As for the term “radiation,” RF energy is undisputedly a form of radiation. *See*
11 2013 FCC Reassessment, 28 F.C.C. Rcd. at 3585 (stating that RF energy is “‘a form of
12 electromagnetic radiation that is emitted by cell phones’”). That the City notice does not make the
13 finer distinction that RF energy is non-ionizing radiation rather than ionizing radiation is immaterial
14 as that distinction would likely have little meaning to the public. As for CTIA’s contention that
15 there may be a negative association with nuclear radiation (ionizing radiation), that seems unlikely,
16 particularly in this day and age when radiation comes from various sources in everyday life,
17 including, *e.g.*, radios, televisions, and microwave ovens. No one seriously contends that consumers
18 are likely to believe cell phones emit nuclear radiation or something akin to that.

19 Finally, CTIA protests that the notice is misleading because, even if a cell phone is worn
20 against the body, it is unlikely that the federal guidelines for SAR will be exceeded. *See Mot.* at 15-
21 16 (arguing that “this may be possible only ‘with the device transmitting continuously and at
22 maximum power [such as might happen during a call with a handset and the phone in the user’s
23 pocket at the fringe of a reception area],’ and that ‘using a device against the body without a spacer
24 will generally result in an actual SAR below the maximum SAR testing’”). But as indicated above,
25 the Court is wary about any contention that a compelled disclosure – particularly where the message
26 in the disclosure is attributed to the government – is misleading simply because the disclosure does
27 not describe with precision the magnitude of the risk; the point remains that the FCC established
28 certain limits regarding SAR, limits which have not been challenged as illegal. The mandated

1 disclosure truthfully states that federal guidelines *may* be exceeded where spacing is not observed,
2 just as the FDA accurately warns that “Tobacco smoke *can* harm your children.” More importantly,
3 the sentence criticized by CTIA is tempered by the following sentence: “Refer to the instructions in
4 your phone or user manual for information about how to use your phone safely.” That is the upshot
5 of the disclosure – users are advised to consult the manual wherein the FCC itself mandates
6 disclosures about maintaining spacing. *See* FCC KDB, No. 447498, *General RF Exposure*
7 *Guidelines*, § 4.2.2(4). This is, in essence, factual in nature for purposes of *Zauderer*.

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

11 d. Government Interest

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

20 e. Undue Burden

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

25 CTIA has not made any argument that the City ordinance would chill its or its members’
26 speech; rather, it contends that there is a burden on its or its members’ speech because they would
27 rather remain silent but, with the compelled disclosure, are now being forced to engage in counter-
28 speech. As noted above, the City asserts that, where commercial speech is at issue, the only

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

9 f. Summary on First Amendment Claim

10 On the first preliminary injunction factor, the Court cannot say that CTIA has established a
 11 strong likelihood of success on the merits with respect to its First Amendment claim. Nor has it
 12 raised serious question on the merits. While the sentence in the Berkeley ordinance regarding the
 13 potential risk to children is likely preempted, the remainder of the City notice is factual and
 14 uncontroversial and is reasonably related to the City’s interest in public health and safety.
 15 Moreover, the disclosure requirement does not impose an undue burden on CTIA or its members’
 16 First Amendment rights.

17 C. Likelihood of Irreparable Harm and Balancing of Equities

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

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

26 ¹³ CTIA also argues irreparable harm to its members’ customer goodwill and business
 27 reputations and from the threatened enforcement of a preempted ordinance, *see Mot.* at 22, but
 28 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.

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

3 D. Public Interest

4 Finally, the fourth preliminary injunction factor does not weigh in CTIA's favor – again
5 because of the weakness of its claims on the merits. CTIA contends that the public interest does not
6 weigh in favor of the City because “accurate and balanced disclosures regarding RF energy are
7 *already* available,” Mot. at 23 (emphasis in original), but the City has a fair point that, in spite of the
8 availability, there is evidence that the public does not know about those disclosures. *See, e.g.*,
9 Jensen Decl., Ex. A (survey) (reflecting that a majority of persons surveyed were, *e.g.*, not “aware
10 that the government's radiation tests to assure the safety of cell phones assume that a cell phone
11 would not be carried against your body, but would instead be held at least 1- to 15 millimeters from
12 your body”). Furthermore, as suggested above, there is a public interest in public safety as well as
13 assuring fuller consumer awareness, particularly where the federal government through the FCC has
14 endorsed consumer awareness by requiring that cell phone manufacturers provide information about
15 spacing to consumers.

16 **III. CONCLUSION**


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

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

24 This order disposes of Docket Nos. 4 and 36.

25 IT IS SO ORDERED.

26 Dated: September 21, 2015

27 
EDWARD M. CHEN
United States District Judge

ORDINANCE NO. #,###-N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTION 9.96.030.A CONCERNING
POINT OF SALE NOTICE WARNING FOR CELL PHONES

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Section 9.96.030.A of the Berkeley Municipal Code is amended to read as follows:

Section 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. ~~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.

Section 2. Copies of this Bill shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.