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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

CTIA - THE WIRELESS ASSOCIATION, Plaintiff, VS. CITY OF BERKELEY, ET AL., Defendants.	)	**NO. CV 15-2529-EMC**

San Francisco, California
Thursday, August 20, 2015

TRANSCRIPT OF PROCEEDINGS

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Thursday - August 20, 2015 **1:42 p.m.**

P R O C E E D I N G S

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THE CLERK: Calling CV 15-2529-EMC, CTIA - The Wireless Association vs. City of Berkeley.

Counsel, please come to the podium and state your name for the record.

MR. OLSON: Theodore Olson, Your Honor, on behalf of the plaintiffs, Cellular Telephone Industry Association.

THE COURT: Good afternoon, Mr. Olson.

MR. LESSIG: Lawrence Lessig on behalf of the City of Berkeley, Your Honor.

THE COURT: All right. Good afternoon. When I was talking about running for office, I was not making any reference to --

MR. LESSIG: I appreciate that, Your Honor.

THE COURT: Okay. Let me ask kind of a fundamental question as we try -- the first thing I want to address is the legal framework for all this. I understand there's been a lot of discussion about content, viewpoint, discrimination and whether we are in the realm of commercial speech, and if so, which branch of commercial speech, whether it's *Central Hudson* or *Zauderer*, etc., etc., but one thing that hasn't been talked about a lot, but it does seem to me ought to be relevant in some sense -- I mean, it is referred to in CTIA's brief, and

that is the fact that in this particular case, the ordinance clearly requires that the message be attributed to the City of Berkeley, right? The ordinance actually says *City of Berkeley requires you be provided with the following*, so that's part of the notice that has to be posted.

So perhaps unlike the San Francisco ordinance where, as one court described it, the attribution coming from the city was in tiny print or something and unlike other cases like *Zauderer* itself where it is the speech compelled of the speaker, of the business, this is clearly the City's message, coming from the City, compelled by the City.

Now, it is true, it is forced upon retailers on their premises, on their property. So I'm not necessarily saying there is no First Amendment interests, but it does seem like it ought to be a factor somehow. Isn't that relevant, that it is clearly speech attributable and being compelled by a government agency and not the speaker itself?

MR. OLSON: I think, Your Honor -- and I would submit that it makes a great -- it's of great import in the sense that the City is entitled to speak its opinions and its points of view with respect to products sold within the City, but the City does not like the message that my clients, the cell phone retailers, are supplying with their products.

It has its own opinion with respect to the use of the product and it wants to transmit that opinion through the

resources of my client and the facilities of my client so my clients are being asked to transmit someone else's message, a government message.

And as I read the cases, right from the beginning, the right not to speak another person's message, especially a government message, is very, very fundamental to the First Amendment.

THE COURT: So what are the cases that say the right not to speak a clearly governmental message, not attributed to yourself, but attributed to somebody else, that that has the same level as the core protections of requiring somebody --

MR. OLSON: I haven't parsed those cases out in that way, but I think that the import of the cases -- many of these cases, I do believe -- well, the San Francisco case did have -- it was clear that it was going -- it may have been in small print. I can't remember because I haven't gone back to look at the size of the message or something. But it was San Francisco's message. San Francisco was saying it wanted the retailers to transmit San Francisco's message. And I believe in a number of the other cases, it has not been unclear that it's the city's message.

And it seems to me that when it is coming with the products that my clients sell, it's going to be attributed to them and it's carrying the burden of our client saying something that is controversial, contradictory to the message

that my clients are transmitting. It's the City's message and it's inconsistent with my client's message. It doesn't really help that the City of Berkeley openly acknowledges it. It's a City ordinance, it's a public ordinance, so there shouldn't be any dispute about the fact that this is being forced down the throat of the cell phone retailers by the City of Berkeley, whether that legend was on it or not.

THE COURT: So if the City, instead of enacting its ordinance, decided to put a sandwich board outside of each phone retailer with -- bigger than 8 1/2 by 11, about two-by-four message, that's okay, because it's speaking -- presuming that it's on public property, etc.

MR. OLSON: The City may speak the message that it wants to transmit on City property, if it wishes, yes.

THE COURT: But as soon as it crosses the line and goes inside, trespasses, sort of, into the store and says no, you've got to put my sign in here, not outside, it's got to be inside, that raises the First Amendment problem.

MR. OLSON: That is correct, in our submission, that it is then saying to a private citizen you must carry the governmental message, and, remember, we're starting with the proposition that my clients are engaged in lawful speech, not deceptive speech. It is speech that is perfectly permissible and carries a true and accurate message.

So the government is coming along and saying you must

transmit the City's message, which is intentioned with your own message.

MR. LESSIG: Your Honor, if I may address this point. This is just flat-out first -- failed First Amendment law, wrong as a statement of what existing law is.

The plaintiffs have asserted, as they assert at page 14 of their brief, *the First Amendment protects the right not to speak just as the right to speak.* That is just not true.

Of course, with respect to noncommercial speech, that's absolutely true, but the whole purpose of *Zauderer* was to ask the question with respect to commercial speech whether that's true.

And if a first -- if a Supreme Court opinion can chuckle, the Supreme Court chuckled just at the point that it answered that question because what the Supreme Court said was that the interests that a commercial speaker has not to be compelled to utter commercial speech was, quote, minimal.

THE COURT: Well, not just commercial speech, but commercial speech that was purely factual and uncontroversial.

MR. LESSIG: That's right. Let me address that, Your Honor.

But first let's make clear what the standard was that the Court identified. The Court said of course there is a First Amendment issue here. And the language is very important because it's been ignored by plaintiffs in their briefs.

Zauderer says, quote, we recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.

The same with *Milavetz*, the next case that addressed this. They said, quote, unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech.

Now, the striking thing about plaintiff's submissions is that in none of the four substantive submissions they've made to this Court have they identified any way in which Berkeley's ordinance has chilled their protected commercial speech.

The one time they aver to this issue citing *Pacific Gas*, *Pacific Gas*, of course, is addressing noncommercial speech.

So the standard the Court has set has this chilled commercial speech they haven't even begun to address in any of their submissions, instead raising the flag about burdensomeness unrelated to the standard of --

THE COURT: I didn't understand the main gravamen of the Complaint being chilling speech. It's compelled to carry speech they don't want to carry.

MR. LESSIG: That's right, Your Honor.

THE COURT: That's different from chilling speech.

MR. LESSIG: Absolutely right, Your Honor. But my point is the standard the Supreme Court has set is not related to their desire to utter speech. That's the standard that

applies to you and me as private citizens.

They, as commercial speakers, the Supreme Court has said, can be compelled, so long as their being compelled does not, quote, chill protected commercial speech. That is the standard. And they've created a false standard by suggesting that commercial speakers have the same right as noncommercial speakers --

THE COURT: Well, do you admit that there is any First Amendment right for limitation on the Government's ability to compel speech where there's no chilling? They're just compelled to carry speech that they don't want to carry in a commercial context? Are you saying there is no First Amendment line there?

MR. LESSIG: I'm saying the line is exactly as *Zauderer* and *Milavetz* draws --

THE COURT: What is that line?

MR. LESSIG: The line is, as the Court says, if it is -- as the Court says, unjustified or unduly burdensome because it, quote, chills protected commercial speech. That is the standard.

And what the plaintiffs have done is suggested a completely different standard.

THE COURT: What about the language in *Zauderer* that says you can compel disclosures, but they've got to meet certain parameters, i.e., purely factual and uncontroverted.

MR. LESSIG: That's right. So the question the Court has got to address is whether the disclosure here is factual and uncontroversial.

And as the Second Circuit has held, the standard that is applied in that context is going to be a standard which is more like a rational basis test standard as it evaluates whether in fact it's factual and noncontroversial.

Now, there is no question that this is factual. The plaintiffs have asserted this is controversial. But the sense of controversial --

THE COURT: Well, there is some -- there is some dispute about whether this is really factual, but they're saying it's misleading. I mean, yeah, you can say it is true that, you know -- it is literally true that wearing a cell phone in your shirt pocket without any holster or something may cause radiation exposure to exceed the SAR limit, but they're saying -- number one, it's so highly unlikely, it's got to be under certain circumstances, the thing is on and you're searching for -- etc., etc., and the actual risk of harm is so small that it's implying that you're going to get cancer if you wear this thing in your shirt pocket every day. It doesn't say that. They're saying that's implied, that there is a high risk to health, even though it's literally true. It's purely factual, but they're saying it is a misleading connotation.

MR. LESSIG: But, Your Honor, this is why the argument

of the plaintiffs is so radical in this context.

You know, when you get on the elevator to come up to this floor, it says that 3600 pounds is the limit -- safety standard limit for that elevator. And many people interpret that to mean if there is 3700 pounds, that there would be some danger there. But in fact that safety standard, like every safety standard, has a safety factor.

The safety factor for an elevator is 11.9, which means there could be 42,000 pounds on that elevator before there is any danger of that elevator falling. But under --

THE COURT: That's not true. Here actually it's double the safety standard. If you have ever been in our elevators and seen it drop five floors --

MR. LESSIG: Yeah. I haven't been in those.

THE COURT: The federal buildings have different standards.

MR. LESSIG: Here's what they say in their reply brief. Quote, CTIA contends the Government must point to real harms before they compel private speech. Without any evidence that exceeding the guidelines presents an actual safety concern, Berkeley can offer nothing but speculation or conjecture.

Well, if that standard were adopted, then every time a government tries to regulate a safety standard, there would be a question, a First Amendment question inside of your court

asking how safe is too safe. You would have to decide whether a safety factor of 5 or 10 or 20 or 50 --

THE COURT: So it's a question of risk. It's a question of magnitudes of risk, not absolutes.

MR. LESSIG: Absolutely.

THE COURT: That's what we're dealing with. And I hear your point, that there is also some risk and you can always say well, it's always subject to some misinterpretation, but on the other hand, you can also imply risk that is much greater than it really is. If it's really a one in a million risk, but you kind of make it sound like it's pretty high risk --

MR. LESSIG: But the point is we have never had a court that has struck down a safety standard on the basis that the safety factor was so high as to mean that deviating from the safety standard creates, as they say a, quote, real harm or an actual risk. That is just not the law.

And so the question before this Court is when Berkeley simply repeats what the FCC has determined as a safety factor and asks that retailers make it available to customers, whether Berkeley has got to go and defend the actual calculation made by the FCC to determine what the appropriate safety factor here is.

THE COURT: Let me ask Mr. Olson this question. A lot of the brief talks about there is no -- there is such a

margin -- 50-fold margin of safety, etc., etc., and even if you wore it here, it's so unlikely and even less likely to be any risk to safety. And yet it is clear the SAR's standards are based on safety. That's why they are enacted. Maybe they have a lot of margin built in, but it is a safety-driven regime, is it not?

MR. OLSON: Well, yes and no. As this Court previously looked at the San Francisco situation, which was quite similar to this, the Court says look, you can parse words, but taking it as a whole, which Judge Alsup did and the Ninth Circuit did, it conveys the message that this product has safety risks to it.

If you said -- and Berkeley could say this and say it's perfectly true -- the FCC manual or the FCC regulation in this area contains the word *safety, risk, radiation, penetration of bodies, especially for children*. And if you just said, *The manual or the FCC statement on this contained those words, please go ahead and read again the manual*, the message that you would be conveying is this is a product that is dangerous and it's something that you have to be careful with.

The statement that Berkeley requires our clients to put out contains all kinds of code words that are intended to worry the consumer.

It's important that we get, first of all, it seems to me, to the standard that we're applying here in the first place.

This is a viewpoint content regulation. The City does not like the statements that are being made by my client.

THE COURT: Well, let's talk about that because you're saying that, but it seems to me that every disclosure case would -- is content and viewpoint -- contains viewpoint and distinctions and discrimination.

It can't be the law that every disclosure requirement is suddenly subject to strict scrutiny, the highest scrutiny under the Constitution and the First Amendment, because it has a built-in -- I mean, the line between commercial speech and noncommercial speech is itself content-driven distinction.

So it's just not true that, you know, any distinction requires strict scrutiny because *Zauderer* itself was arguably viewpoint or content based, but, you know, the Court has laid out a regime, laid out certain schematics here of what constitutes, you know, different levels of -- warrants different levels of scrutiny.

MR. OLSON: We submit under the Supreme Court's most recent ruling, *Reed vs. Town of Gilbert*, the Court will focus on viewpoint discrimination and content discrimination.

There isn't any question with respect to this -- is that the City has decided this is not the message we want to convey. We have different content. We have a different viewpoint.

We submit that under the Supreme Court's most recent rulings, that requires the application of strict scrutiny. But

even if the Court were not willing to go that far, the *Central Hudson* standard would require a very substantial establishment of need by the City, a narrowly-tailored response to that, and something that was really going to be effective to accomplish that goal.

And even if we were talking about *Zauderer*, the Supreme Court made it clear in *Zauderer* that it was talking about -- and it confirmed this in the *Milavetz* case, that the predicate for the review under that standard was deceptive speech. If there is -- if -- the Government may have a reason to go into the marketplace if it's dealing with deceptive or misleading or confusing speech to make sure that it's correctly submitted.

THE COURT: Well, but a number of circuits have now said *Zauderer* is not limited to preventing deception in the commercial world. It extends to other governmental interests. Maybe you disagree with that, but even the D.C. Circuit has so --

MR. OLSON: Yes. There are some circuits that haven't gone that far, but the Supreme Court used the word *deception* seven or eight times --

THE COURT: Well, because that's what was involved in that case. It wasn't necessarily a limiting principle.

MR. OLSON: But it specifically said that's the trigger. In the case of deceptive speech, then the government has a reason to go in and add --

THE COURT: So even a case of public safety where it's not a matter of deception but just knowledge on the part of the public in terms of safety issues, whether it's sodium, calories or lead content or anything else, you think that *Zauderer* would apply to consumer deception but not to consumer safety?

MR. OLSON: *Milavetz* makes it clear that the -- both of those requirements, deception or the need to clarify the speech given to make sure that the public gets accurate information.

But under any of these standards, the Berkeley ordinance falls because, as you point out, we believe that deception is a predicate, and the *Milavetz* case, which comes along later, uses the word *and*, particularly to describe both parts of that equation, but furthermore that it's unquestionable that the standard is purely factual.

Berkeley's statement is not purely factual. It has a number of opinions contained within it with respect to safety, radiation, and so forth and safe for children, and it is controversial. The entire record before the City is that people were talking about the safety risks, and the City tries to have it both ways by saying this ordinance is not about safety, it's not about safety, it's not about safety. It's not about the science. And then the ordinance comes along and uses the word -- the first word or the third word and the last word is *safety* interspersed with the words *risk, radiation and*

particularly for children.

This is a controversy that Berkeley has taken sides on and it wants my clients to communicate the point of view of the City of Berkeley.

Furthermore, Your Honor, this is -- the fourth requirement under *Zauderer* is that it not be unduly burdensome. You can imagine when Berkeley enacts an ordinance requiring this disclosure to be posted in its stores or to be submitted with its product, what the City of San Leandro might do or the City of Santa Monica might do.

And the burden is that Berkeley is doing something -- is asking my clients to do something that it perfectly could do for itself. Why is it imposing the burden on the private party, the private person in the commercial world? Because it wants to impose that burden and all of the obligations on someone else.

THE COURT: Well, because that's the most effective way of transmitting -- if you're disseminating, you know, the message that the government wants to get across by going right to the point of sale --

MR. OLSON: Well, that's why we have a First Amendment because the First Amendment says you don't have to speak the other person's -- especially if it's the government's -- you don't have to speak the other person's message because that's -- that is chilling speech, in addition to everything

else, because when -- when my message is diluted with the government's message, then I may have to explain. I may have to go out and explain well, they're saying -- Berkeley is making us say this, but even if you exceed these limits, the product is perfectly safe. The City says that on -- in a portion of its brief. They're saying we're not saying by talking about these things that the product isn't safe, even if these standards are exceeded.

Well, my clients are going to have a responsibility to themselves and to the people that buy their products to explain that, well, Berkeley is saying -- implying innuendo, giving you the impression that the product is not safe if, under the unusual and very unlikely circumstances, facts not contained in the Berkeley statement, that you use it continuously at full power, even if that happened, there is not a risk to safety there. So there's a lot of --

THE COURT: And nothing in the Berkeley ordinance precludes the retailers from adding in their own sign; right?

MR. OLSON: That's right. And you can imagine -- put Your Honor in this position. If you are being told by your government that you must go out and say something about your home, your car, or where you live or the business that you're in and the government says, *Well, that's okay, you can go ahead and explain that what we're forcing you to say isn't true or it's misleading or it's -- it's disparaging the product that*

you're manufacturing, you can go ahead and try to correct that.

Now the consumer is faced with your explanation and the City of Berkeley's explanation, and which do they choose? That is chilling speech, and it's --

THE COURT: Is it chilling speech or does it further the core of First Amendment marketplace of idea of principles, more speech is better?

MR. OLSON: Well, more speech is better because Berkeley can speak all at once. Berkeley has the complete freedom to speak.

It's chilling speech every time you have to explain the words that you have used yourself. When you have to make -- if you have to make corrective statements because Berkeley has made you disseminate something that's misleading or controversial, inviting you into that battle --

THE COURT: Well, and that gets me into the case which I would have thought might be a little more on point but nobody seems to emphasize it much -- you have cited it a couple times -- the *PG&E vs. PUC* case. That is an example where the entity was forced to carry in its envelope the message of another party that they didn't like.

One of the things that the court said -- they said two things. The reason why they defended under the First Amendment is, one, that requirement of carrying terms of speech was triggered by what PG&E said and therefore it might chill PG&E

from engaging. But we don't have that -- I don't see that chilling effect here.

The second rationale was that by including it, you force a response. You force them to speak when they didn't want to speak. Kind of a novel approach, but at least that's what the plurality said.

So that seems to be kind of a model here. What you're saying is that by Berkeley -- even though it's attributable to Berkeley, they're putting their sign in the store in order to straighten out this misleading -- what you claim to be misleading overstating or over-connoting the risk -- the safety factor. Now, the retailer, the wireless carriers, have to put up their own things. They say, *Oh, wait a minute, no, these things are set at 50 times the level,* etc., etc.

So why doesn't that -- that is a First Amendment issue, isn't it? By compelling the retailer to speak when they otherwise wouldn't have to, you're forcing them to enter the marketplace of ideas against their normal preference. Isn't that a First Amendment issue under the *PUC* case?

MR. LESSIG: It is only a First Amendment issue under *Zauderer* if it's chilling their opportunity to engage in commercial speech.

The *PG&E* case is not commercial speech. That's the whole reason the court engages in this analysis that says it's chilling because it forces them to enter a political debate

they don't want to enter.

So in this case, the question is whether this chills commercial speech. And my Brother Olson now has raised an argument for the first time to establish that in fact it is chilling their speech, but it's just not plausible that this chills their speech.

If they're concerned that the customer doesn't understand that the FCC believes that cell phones are safe, even at the -- even exceeding a little bit of levels at which the SAR standard is set, they could put on the notice *the FCC believes this is safe; nonetheless, Berkeley requires we say the following*. There is no chill involved in that.

And if I may, I would like to respond to some of the other points that have now just been made.

Mr. Olson is, of course, one of America's greatest lawyers, and he will have an opportunity to argue this case in the Supreme Court. And when he argues this case in the Supreme Court or a case like this, he can make the point that *Reed* has eliminated the Commercial Speech Doctrine or that *Reed* has radically changed the way the First Amendment deals with commercial speech.

But that is just not the law right now. *Reed* did not sub silentio eliminate the Commercial Speech Doctrine and this Court should not so read it.

And, number two, I'm sorry this wasn't clear in our brief,

but I thought we had made it perfectly clear. We said we are not engaging in a scientific debate, but of course there are two scientific debates. There is the scientific debate that is settled and the scientific debate that's ongoing.

The scientific debate that is settled is the one that was settled 20 years ago when the FCC looked at the evidence and said we are setting RF exposure limits in light of what we know today to protect the consumer.

The scientific debate that is not settled is the scientific debate that asserts that cell phones cause cancer or cells phones cause ulcers or other illnesses unrelated to what was addressed 20 years ago.

What we have said over and over is that we are not engaged in the scientific debate that's ongoing. We are accepting that the science that we rely on is the science the FCC relied on when the FCC set out its RF limits --

THE COURT: Well, you don't expressly, but the argument is that impliedly creeps in when you say *to ensure safety*.

MR. LESSIG: Yes. We say *safety* just like the FCC says *safety* --

THE COURT: But your definition of *safety*, they would say, doesn't have enough footnotes to it because in order to understand what safety means in terms of the FCC parlance in their SAR standards has a lot of qualifications. So in a way,

it's almost a Rule of Completeness that I think they're arguing. That if you're going to say *safety*, you better more fully explain what this SARs standard really is because the public might think it's not a 50-fold or 20-fold, whatever it is. You know, this is right on the margin or maybe just slightly above and the chances of getting cancer by wearing this phone in my shirt pocket are a lot higher than at least the FCC thinks it is.

MR. LESSIG: Right. But, again, Your Honor, the question is what is the standard that is being applied to Berkeley's ordinance, and the standard that *Zauderer* sets and *Milavetz* confirms is the question is whether it has chilled their ability to engage in commercial speech.

THE COURT: Or does it compel more speech that the retailer would otherwise or the carrier otherwise would not have wanted to engage in.

MR. LESSIG: With respect, Your Honor, that could be a different standard that the Supreme Court could utter. That could be a different rule that the --

THE COURT: Doesn't it all turn on how misleading this is? I mean, at the end of the day, we're all using different cases and standards, but when I read the briefs, it kind of boils down to how misleading is this? How incomplete, how much connotation is here?

You can contrast this to the seemingly, as described by

the Court, more inflammatory ordinance of the graphic pictures or radiation and silhouette heads and everything in the San Francisco ordinance. This one is a little more mild --

MR. OLSON: But those were taken out by the time it got to the Ninth Circuit. Those were already out of the picture --

THE COURT: Well, there are some other things. That's the point. It seems to me -- whatever test it is, it sounds like how misleading is this because that's what do -- the more misleading it is, it seems to me, the more damage it does from a First Amendment perspective. The less the interest is of the government. The less misleading it is, you get a balance.

MR. OLSON: But it's certainly controversial. Because we're talking about -- I hear now there are two scientific debates going on. I hadn't quite appreciated that from my colleague's brief, but apparently there is two scientific debates because on the one hand, Berkeley is contending -- this is from page 19 of their brief.

Plaintiffs', my client, *respond to these facts* -- and this has to do with the warning itself -- *by arguing that cell phones remain safe, even if our exposure exceeds the SAR limits*.

That is the truth and that's what the FCC did. That's not the impression that you get from reading Berkeley's disclosure. And then they -- Berkeley then goes on to say, *But nothing in*

the ordinance contradicts that proposition; that is to say that they're safe, even if the limits are exceeded. But you wouldn't know that by reading it.

This is interjecting -- and then -- I will also say that if you look at -- I think it's Footnote 2 where there's a statement attributed to one of Berkeley's witnesses that the radio frequency radiation does damage to sperm.

Well, Berkeley was concerned about safety. The hearing talks about safety, but they didn't want to engage in the scientific debate. They're speaking out of several sides of their mouth by saying this is not about science, but they're leading people to believe that this is a controversial, potentially dangerous thing.

The word *risk* means something. And they go on to say *the potential risk is greater for children*. That is not a factual statement. That is a controversial statement. It is not plainly factual and it is controversial.

THE COURT: But it is factual to say if you wear it directly, you don't have that separation. It's referred to in the FCC guidance about --

MR. OLSON: Right. But the risk of harm is not justified by that statement.

THE COURT: Well, it doesn't say *risk*. It says you may exceed, if you do this, the federal guidelines for exposure to RF radiation. That is literally true.

What you're saying is that's not complete because it doesn't then go on to say even if you exceed those radiation limits, exposure limits, that doesn't mean it's dangerous.

MR. OLSON: An imaginary test. What if the SEC, Securities and Exchange Commission, found this inner prospectus. They would say it does not contain statements necessary to make the statements made not misleading.

This is a misleading statement because it omits material facts necessary to what they are saying and what the innuendo is, not misleading. And it certainly is not --

THE COURT: What are the material facts to make this not misleading and therefore consistent with the First Amendment? What would you add?

MR. OLSON: Well, in the first place, we would not accept the idea that Berkeley can rewrite what the FCC -- this gets us to our preemption point.

The FCC engaged in a delicate balance between safety on the one hand and convenience and efficiency and accessibility on the other. So as soon as Berkeley puts its thumb on one side of that scale, it's changing the balance that the FCC --

THE COURT: Well, it's a little different arena where you're actually saying that something specifically approved by the FCC as found to be safe is assertedly unsafe under state tort law, and there is a square conflict. You want to pull out of the marketplace an entire subset or large set of the thing

that had been approved.

MR. OLSON: It's much more like the *Geier* case where the automobile agency had decided that we wanted a continuing process to go on so we're -- we're allowing the balance to take place with respect to air bags in a certain way.

Here the FCC specifically said in the exact language that has been quoted in our brief that they wanted to provide a balance. That included a balance to allow the manufacturers and retailers flexibility with respect to how these messages were sent.

THE COURT: Allow them flexibility, but it mandates under the 4.2.24 of the exposure guidelines that they have to have some instructions about orienting the device in accordance with test results --

MR. OLSON: Absolutely.

THE COURT: And minimum -- 2.5 millimeters, centimeters.

MR. OLSON: My clients have complied with the FCC's guidance with respect to those things, but it --

THE COURT: Arguably all this ordinance does is say bottom line is refer to the instructions in your phone or user manual, which is exactly the thing that appears to be mandated by the FCC.

MR. OLSON: With respect to your taking pieces of the statement, which has to be read as a whole and has to be read

in context and has to be read in the context of what Berkeley is trying to communicate here and apparently there is a scientific debate going on that Berkeley either wants or doesn't want to be involved in, but it's requiring a private citizen to carry the Berkeley message. This is a very, very important principle. Government has to prove a reason before it can impose its views on private citizens.

MR. LESSIG: Again, that is not the law.

THE COURT: Hold on. Let him finish.

MR. OLSON: It has to have a reason for doing that, and then when it imposes that burden, it has to justify that it's narrow enough to achieve that burden.

Here is what Berkeley -- what it comes down to, Berkeley says this again and again on 19 -- 18, 19, 20, and 21 of its brief. It says all we're doing is asking for the same information or the same kind of information that the FCC already requires.

Well, then they're basically saying well, we just want to duplicate what you're already doing anyway. How is that a standard that the government can use to justify requiring someone else to speak? It is -- it is -- it is -- it would justify practically anything by any government inserting itself in the marketplace and telling private citizens --

THE COURT: What is the limit of your proposition? What about the Surgeon General's warning on cigarette packages

or Proposition 65 --

MR. OLSON: The government -- Proposition 65, is that what you're referring to?

THE COURT: Yeah.

MR. OLSON: It's allegedly a statement of what the State of California has determined with respect to certain products.

THE COURT: You've got to put it on a building.

MR. OLSON: And significant health risks.

We're not talking about health risks or safety here. That is something that has been disavowed by --

THE COURT: You just said that the First Amendment prohibits the government from foisting its message and requiring people to carry it. You walk around a lot of buildings, and it's right there. It's tacked up on the wall --

MR. OLSON: It has to be justified by the government, and we have a whole parade of possible alternative situations in Berkeley's brief and in the amicus brief of where there were other justifications for the government doing what it was doing.

All I'm saying is that the government, yes, can do this under the First Amendment and under certain circumstances --

THE COURT: What are those circumstances? What's the test?

MR. OLSON: Well, we believe it has to be -- we'll go

back to what the government -- what ***Reed vs. Gilbert*** says, the Town of Gilbert says. If it's a viewpoint that the government is foisting on a private citizen, it is a strict scrutiny, narrowly-tailored standard. In any event --

THE COURT: What would that mean for Proposition 65, chemical list that contains things that people -- you know, science debating exactly what is a level at which something poses a substantial risk of cancer. It's all --

MR. OLSON: Yeah. And to the extent that someone wanted to litigate that you're asking us to put a sign on our building when the product can't possibly cause any harm, someone might come in here at the airport or --

THE COURT: Not can't possibly. It possibly can, but the science is in flux as to what -- we're still studying.

Can a state take prophylactic measures and put it on the Prop 65 --

MR. OLSON: Under the circumstances, it has to have a justification for doing that, and under the Supreme Court standards, it can't -- what it does -- do what Berkeley has done here, is ask us to provide something that is controversial and contains omissions necessary to make the factual statements not misleading.

What Berkeley has done is putting big, red -- it's the same thing as the pictures in the San Francisco case. It's basically saying ***radiation***, and people -- the FCC has already

discussed this. This is a different kind of non-ionizing radiation that doesn't cause cells to break down.

By using the word *radiation, safety, risk, potential harm to children* and things like that, it is putting a -- pretty much like putting a skull and crossbones on the product and saying, *You have to be very wary of this product. Be careful.*

Now, Berkeley --

MR. LESSIG: Your Honor --

MR. OLSON: -- can make that allegation, can make that publication. It can use its resources to communicate to its citizens -- it has plenty of ability to do that -- those messages.

But it's asking someone else to carry an inaccurate, controversial message where the message that our clients are sending is lawful, not misleading, and perfectly approved by the federal government.

THE COURT: Let me ask you this. What if the FCC -- let's take Berkeley out of it.

The FCC required that the Apple manual segment that is consistent with the guidance says, *iPhone SAR measurement may exceed FCC exposure guidance for body-worn operation if position less than 15 millimeters or five-eighths of an inch from the body, i.e., carrying an iPhone in your pocket.* That is in the manual. It's consistent.

What if the FCC said, *You know what? That's important*

enough. We're going to bold that and put it in red and make sure it's on the front page of every manual. Would that violate the First Amendment?

MR. OLSON: Well, we'd have to take a look at it, Your Honor, because what the FCC specifically wanted to do -- and that's why it gave -- you will see quotes from different manuals here because the FCC wanted the manufacturers to be able to have flexibility with respect to the marketing of their product because the FCC wanted to do two things and it created this balance.

It wanted to provide for safety, and it did exhaustive studies with respect to the safety of this product. But it also wanted people to have access -- convenient and efficient and effective access to cell phones.

MR. LESSIG: But, Your Honor --

MR. OLSON: Once you start -- that would be changing what the FCC has required, but they have set the balance, and it may or may not be justified if you change the terms of that.

MR. LESSIG: Your Honor, there is no doubt that under *Reed*, Prop 65 is unconstitutional. There is no doubt under *Central Hudson*, the FCC's regulation would be unconstitutional. But there is no doubt that under *Zauderer*, the FCC's regulation is perfectly fine and Berkeley's regulation is perfectly fine. Berkeley has not issued --

THE COURT: Is there any case law on that? Has there

been any litigation on Prop 65?

MR. LESSIG: There has not been litigation because the very idea that there would be a constitutional problem with requiring people to carry safety standards has not yet percolated up, but no doubt Mr. Olson would love to take the case on, not only to defend people who want to strike down Proposition 65, but the elevator manufacturer who doesn't like the fact that people are terrified by statements that say only 12 people are allowed on an elevator when in fact 34 could be on an elevator.

The point is this is completely new law that he is arguing for here. Under the existing law, *Zauderer* says not that you have a right not to speak. That is not in the law. *Zauderer* says that claim is, quote, minimal. What *Zauderer* says is you have a First Amendment complaint if you can show that you have been chilled in uttering commercial speech. That has not been shown by them in this case.

THE COURT: You keep saying *chilled*. I don't know if the limit is chilled. The limit is being forced to carry -- actually, in *Zauderer* it's *speak*. Not just carry speech but actually speak. And disclose something that is against your interests, but it's a minimal interest if it's purely factual --

MR. LESSIG: I understand -- I understand that characterization. That's their characterization.

What I'm submitting is that is not what the Supreme Court says. What the Supreme Court says is, quote, we recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.

That is the only way the Supreme Court identified compelled disclosures as possibly implicating the First Amendment. And so the whole question for this case should be whether they have established that this compelled disclosure chills protected commercial speech.

Now, they've created a completely different standard based on what they predict Mr. Olson will achieve when he argues this in the Supreme Court. And that's fine. It might be what the Supreme Court does. Who knows what the Supreme Court will do.

But what I know is under the law as it exists right now, there is no problem with the Berkeley ordinance. The Berkeley ordinance was carefully crafted in light of what San Francisco had done. And we had explicitly said again and again -- and I'm a little surprised Mr. Olson doesn't see this distinction.

We are not challenging the potential harms that many people believe exist with cell phone usage, and indeed we would concede that under the *Zauderer* test, it would be controversial for a city to say, quote, cell phones cause cancer. That would be controversial because in the scientific community --

THE COURT: Controversial in your brief means

uncontroversially true.

MR. LESSIG: Uncontroversially true, given the scientific debate. And so all we have said --

THE COURT: So what about Berkeley's statement -- what about Berkeley's statement about risk, greater risk to children. There is debate going on. I don't know how you can say that that is -- I mean, a lot of people think that's the case. There is some studies to support that, but it's not uncontroversially true.

MR. LESSIG: We believe it's uncontroversially true that children use their phones differently from adults, and what we said is that this risk, meaning the risk of body on contact with the cell phones, is higher for children, greater for children.

So that risk we believe is uncontroversially true, and they have not offered any evidence to rebut it and it is their burden to offer evidence to rebut it because as the Second Circuit has said, this is a rational basis test, and they have the burden of rebutting it.

Now, to go back -- to be very clear about something about what the standard is here, you pointed, Your Honor, to the D.C. Circuit and to the First and Second Circuit. But the Ninth Circuit, too, in a case that we cited this week, has also indicated in the case that was cited that we just gave to you yesterday -- they also indicated that the standard in the Ninth

Circuit is that restrictions on commercial speech shall be governed by *Central Hudson*, but disclosure requirements shall be governed by *Zauderer*, and that's exactly how they applied the test.

And in the context of that, they held that the burden was on the person challenging the disclosure requirement to establish that that disclosure requirement unjustly burdened commercial speech.

THE COURT: Let me ask --

MR. OLSON: That was not briefed. That's the *Crazy Eddie* case or Crazy --

MR. LESSIG: *Crazy Ely*.

MR. OLSON: And the issue of burden of proof was not briefed.

I submit that all of the cases make the proposition that when you have an imposition of a burden on speech or an inhibition of speech, the burden is on the Government to justify its restriction.

MR. LESSIG: But *Zauderer* --

THE COURT: That is certainly true in the traditional suppression context, but what about in the -- I know you don't necessarily buy into this, but this commercial versus noncommercial disclosure versus suppression distinction when you're in the zone of *Zauderer*, whatever it is, who's got the burden in that case?

MR. OLSON: We've already talked a little bit about *Zauderer*, but I have refer the Court to the *Sorrell* case and particularly on page 2664 -- this is the *Supreme Court Reporter*.

The Court says, *The Court has recognized that the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burden must satisfy the same rigorous scrutiny as its content-based bans,* and in the very next paragraph, it says that commercial speech is no exception, citing to discovery network.

MR. LESSIG: Both of those -- those --

THE COURT: Let him finish. Hold on.

MR. OLSON: We submit that the -- the full line of authorities with respect to making someone speak a certain way -- and, by the way, Berkeley not only says what might be said, it says what type of -- what typeface must be used, how it must be displayed.

So it is taking its message and saying you must communicate this message in this way. It's an aphorism that if you define the terms of the debate, you're going to win the debate. That is what Berkeley is doing, defining the message that will go out to the consumers of these products in words that contain risk --

THE COURT: Well, that's -- it's not limiting the

debate coming from the other side. It may stimulate that, but it doesn't limit --

MR. LESSIG: Berkeley is --

MR. OLSON: It is putting its words in our mouth, and when it does that --

THE COURT: Well, on your premises, not your mouth.

MR. OLSON: Well, metaphorically speaking.

THE COURT: It may be different.

MR. LESSIG: The government does this all the time --

MR. OLSON: I don't think there is any difference between oral speech and written speech, as far as that goes.

THE COURT: No. But the problem is -- the very first question I had, whose speech is it, and if you're forced to carry someone else's speech, is that different from you having to speak yourself --

MR. OLSON: Yes. And I submit the full bulk of the cases -- if I may respectfully disagree with my colleague. The thrust of the cases is that conveying someone else's message -- this is in the *Hurley* case. It goes back to the New Hampshire License Plates cases.

When you're conveying someone else's message, it is the same as someone else telling you how you can convey your own message. That is so that from a constitutional standpoint, from a First Amendment standpoint, that is a burden, as -- I was just reading from *Sorrell*, it's the same as a ban in the

sense that it is -- the First Amendment wants Berkeley to have its freedom to say anything it wants, but it does not want the government to dictate the content of the speech of private citizens, because as soon as you can control what I have to say, you're changing the message that I wish to communicate.

MR. LESSIG: That's true only if --

MR. OLSON: The First Amendment wants me to be free to communicate my own message and not to be burdened with some government's message --

THE COURT: So that would be true of every compelled disclosure --

MR. OLSON: Well, we also have the additional factor here of the FCC carefully looking into the safety considerations and the convenience considerations, so we have a conflict preemption issue that is overlaid --

THE COURT: Well, except the FCC is requiring manufacturers to instruct consumers about body-worn accessories and how to carry these things --

MR. OLSON: It is requiring certain things and it is specifically not requiring certain things because it does not want to inhibit, consistent with safety, the availability and accessibility of cell phones.

THE COURT: Does the FCC guidance, in addition to requiring disclosure by manufacturers about minimum test separation distance requirements, also require them to say that

even if you don't meet those standards, there is very unlikelihood of actual risk, safety risk?

MR. OLSON: It doesn't require that statement.

THE COURT: Well, that's kind of interesting.

So they require manufacturers to tell consumers about how -- what the minimum test separation distance is, which is 1.5 centimeters, and closer to that you may -- you may exceed SAR, but it doesn't require them to explain, well, what does it mean? Just because you exceed it, it's not that dangerous.

MR. OLSON: Well, what we're dealing with here is a carefully-calibrated, reticulated analysis by the FCC of the safety of this product setting a standard that's 50 times more safe than anybody could be --

THE COURT: As measured by thermal radiation, not nonthermal, and as tested against animals, as I recall.

MR. OLSON: Yes. So it's even more safe than the 50 times ratio would suggest because it's -- it's talking about that very, very low level that you might meet if you were a small animal or something like that.

So the safety factor is considerable. And the FCC, having established a fairly reticulated standard, also wanted the public to be -- have access to these devices because they are -- they're safe -- it's safe to have these devices. Children use them to call their parents when they're lost or something like that.

So when a city like Berkeley interjects itself into the national debate, decides what standards will be developed with respect to communications with respect to this product, you can imagine, Your Honor, what it would be like if every city in the State of California decides well, we're -- we didn't like the way Berkeley did it. We'd like to do it a little differently. We'll take some swords out of the FCC's regulatory regime and use those words. We'll require a little bit more --

MR. LESSIG: Your Honor --

THE COURT: Well, but this is a requirement of retailers so it's something that can be tailored to each locale. Each retailer has got to get a business license, do certain things --

MR. OLSON: Well, absolutely. But now you have all the retailers marketing their cell phones in a different manner throughout the State of California and throughout the United States.

MR. LESSIG: And the FCC has explicitly said if that happens, it will step in and preempt.

MR. OLSON: If. If --

THE COURT: Let me ask, has the FCC said anything about this?

MR. LESSIG: No, it has not.

MR. OLSON: The FCC has said -- and we've quoted it -- that it created a carefully-balanced set of standards to impose

and it decided to balance -- pursuant to congressional direction, the FCC conducted these studies and developed a balance.

MR. LESSIG: But --

THE COURT: And soliciting more input because it is still --

MR. LESSIG: Because the --

MR. OLSON: It's constantly doing that.

THE COURT: One at a time.

MR. OLSON: Good for that. Good for the FCC. It is consistently, continuously examining these things, but if you have Berkeley entering into it and Santa Monica entering into it and Bakersfield entering into it, Oklahoma City entering into it, what kind of chaos will that be?

We have a system -- that's why we have conflict preemption under federal law and particularly important when we have the -- the messages that are being required by various different governments on private citizens.

MR. LESSIG: Your Honor, the FCC explicitly in the reassessment was asked to preempt in the safety area and said that they are watching it and they are not preempting generally in the safety area, number one. They are able to do it if that creates a problem. There is no reason for that to be a judicial determination.

But I'd like to go back to a point I was trying to

interject about 5 or 10 or 20 or an hour ago -- I can't remember now -- about what the burden is because Mr. Olson has misstated the law fundamentally.

In the context of commercial speech, as *Zauderer* and *Milavetz* explicitly say, *Zauderer* -- the Court noted that there was no evidence offered by the government to justify its disclosure requirements, and *Zauderer* said, quote, this case does not provide any factual basis for finding that Ohio's disclosure requirements are unduly burdensome, implying that the burden is on the plaintiff to challenge it. And in Footnote 14 they said that *unduly burdensome* means, quote, if it chills protected commercial speech, end quote.

And then in *Milavetz*, it's also the case. *Milavetz* says, quote, *Milavetz* makes much of the fact that the government in these consolidated cases have adduced no evidence that its advertisements are misleading. *Zauderer* forecloses that argument.

Well, there is only one way *Zauderer* forecloses that argument; if the burden is on the plaintiff, not on the government. So this is not the ordinary case in the First Amendment where the government bears a burden. This is a special rule in the context of commercial speech, and the rule is the only right the commercial speaker has is to complain that the government's mandated disclosure chills protected commercial speech.

That is the exclusive remedy that they have in the context of disclosure and that's why there are thousands of disclosure requirements all through state and federal law that have never been challenged by anybody because there is no plausible --

THE COURT: Well, tell me where again in *Zauderer* do you glean that the burden is on the challenger, the one asserting First Amendment right?

MR. LESSIG: Okay. So here is the quote, Your Honor. It says --

THE COURT: What page --

MR. LESSIG: I'm sorry. That's stupid of me. I don't have the page here. I can point you to Footnote 14 -- it's right next to Footnote 14 in the majority opinion.

THE COURT: So you're looking at the text or the footnote?

MR. LESSIG: I'm looking at the text and the footnote. The footnote explains more about the text. In the footnote, what the court says -- the question is whether it's unduly burdensome and it, quote, chills protected commercial speech. And in the text, what the court said is this case does not provide any factual basis for finding that Ohio's disclosure requirements are unduly burdensome.

Well, in that case, the government had offered no evidence. So if the government had offered no evidence and the court concludes that there is nothing to find that it's unduly

burdensome, that is a signal that the burden is on the plaintiff to make that showing.

And that's explicitly the issue that was raised in *Milavetz*. *Milavetz* complained that the government had offered no evidence. They said that argument is foreclosed. Quote, *Zauderer* forecloses that argument. The burden is on the plaintiff to challenge the government's disclosure requirement by showing, quote, it chills protected commercial speech.

Not the standard Mr. Olson utters when he says commercial entities have a right not to be told what to speak. That is explicitly what *Zauderer* says they don't have a right to. That's why *Zauderer* says that interest is minimal and the only First Amendment interest is the interest not to have, quote, protected commercial speech chilled, close quote.

MR. OLSON: And *Zauderer* comes up in the context, as I said before, of a misleading speech that was -- that gave the government the justification for the right to proceed.

The court specifically says as long as there's a misleading statement that can be corrected by the government in that way, and the court says -- talks about deception seven or eight times in that opinion --

THE COURT: But still there was a government-imposed mandate that arguably infringed on First Amendment interests because it was --

MR. OLSON: In order to correct a deception. And then

the *Milavetz* decision that my colleague is repeatedly referring to at the bottom of page 1339 -- again, unfortunately this is the U.S. -- this is the *Supreme Court Reports* -- says as long -- *The advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.*

MR. LESSIG: So that's --

THE COURT: Let him finish.

MR. OLSON: This is a commercial speech case. And it's a disclosure case because of requirements being imposed upon the attorney under the -- under what circumstances he could describe where he was entitled to practice law and his specialties were.

MR. LESSIG: That's exactly right. But as the Ninth, D.C., First and Second Circuit have held, that standard extends beyond deception --

THE COURT: I understand that. We've already covered that and I -- you know, I understand the law on that.

Let me go back to this point, though. It seems to me that there is a distinction in the ordinance one could draw between the statement about if you carry your phone in your pants pocket, etc., etc., because it echos the guidelines -- the guidelines, as well as what is actually, you know, contained in the manuals, in the instructions of iPhones and other cell phones, but the statement, *this potential risk is greater for*

children, that's not mandated anywhere in the same way by the FCC guidance. That's not contained in the manuals as a result of any of that guidance.

It does seem to me that that statement is broad because it says this potential risk is greater. It doesn't say because they are likely to sleep and have them next to their head or the way they use it is different. It suggests that there is an inherit greater risk to RF radiation. And if that's true, I don't see how you can say that that's uncontroversially true. Or that's not controversial if you define *controversial* as meaning something that is universally true and not contested.

MR. LESSIG: Well, we believe it is true and they haven't contested it, that the way children use their phone increases the probability that they will be exposed this way.

THE COURT: They say the way it's used. This one has -- to the extent you have to read it in context, it does have a broader connotation, this potential for risk. This potential for risk is greater for children. It doesn't say because of the way they use it.

MR. LESSIG: Right.

THE COURT: It may suggest just biologically it's greater risk.

MR. LESSIG: You're right, Your Honor. Of course the standard isn't that the ordinance be perfect, but if the complaint is that this is not precise enough, the City of

Berkeley is perfectly happy to remove that line or to add a line that clarifies exactly that because it is true that children use their phones differently, and if the CTIA is eager not do have a warning about children included in this, then we can accommodate that.

But it doesn't change the fact that the standard here is only whether it's chilling protected commercial speech, and there is nothing that Berkeley has -- that the CTIA has said to signal that this is chilling protected commercial speech.

MR. OLSON: And the potential risk that the public would take away from this is that the emissions, the radio frequency energy that would be transmitted is causing a risk for children, and the word -- coupled with the word *radiation* and all of the hearings about cancer and that sort of thing that Berkeley indulged in with respect to putting this ordinance out -- by the way, they said it's not about safety. It's about *ethics and our moral obligation*. That's what the sponsor of the ordinance says. Not about safety or science at all.

But the message -- I will submit that you have been very patient with us, Your Honor, and I appreciate that. And I'm sure Professor Lessig does as well. We've had ample opportunity to discuss this, and I appreciate it.

But the message -- and this is what Judge Alsup did and this is what the Ninth Circuit did. It looked at this message

and it said that a reasonable person could take that message to suggest that this product is not safe, that it contains risks. It indeed does have safety, both at the beginning, at the end of the message. And it does have potential risk. And it does have radiation.

Anyone -- any reasonable person reading that, at least, would be triggered to think that's a product that I am not so sure about. That's got some safety -- that is controversial and that is not the message that the FCC --

THE COURT: Although the risk that's implied under -- if there is one that is implied here -- pertains to the way the phone is worn, not the use of the phone, so it's a narrower substance. It may not be true with the children sentence, but for everything else, the fact that it talks about if you carry it in this way, this way, you may exceed the limit, and the final tag line, *look to your manual for information about how to use your phone safely.* It doesn't say *don't buy this phone*.

MR. OLSON: It says be careful about using this product and if you -- you or your children, when they're not around you, might use it in -- hold it in a certain way, there is danger caused there.

And the point is that we respond, as I said before in our brief, that it suggests that -- it fails to suggest that the FCC says the cell phones remain safe and even if our exposure receives SAR limits. SAR limits. And that's a pretty

important statement.

If the -- the measure would, among other things, need to say that -- all of these things we just warned you about, they don't mean that the cell phone or its use is not safe.

MR. LESSIG: And the cell phone --

MR. OLSON: That's not what they say.

THE COURT: Hold on.

MR. OLSON: Berkeley says we'll go back and amend the ordinance. Maybe they have plenty of opportunities to do that. We are here on a hearing for a preliminary injunction.

The way the ordinance stands now it conveys a controversial, nonfactual, misleading statement and it puts -- and it hasn't been justified by anything Berkeley has proven.

Berkeley has a responsibility, under whatever standard, to defend against a First Amendment challenge when they're asking someone else to speak their message to justify it.

They haven't justified it. They haven't justified how this -- this message itself, which they say conveys the same information as the guidelines --

THE COURT: How does one determine -- how does the Court determine whether something is sufficiently misleading as to then cross the line of the First Amendment? I mean, every statement where the science is unclear you can always make less misleading by adding more footnotes, more information about studies. There is almost a level of specificity, and, again, I

keep talking about the Rule of Completeness, but where do you draw the line? Do you say -- when we say *may*, that means there are studies on both sides. Is that enough? Or do you have them describe the studies --

MR. OLSON: I think, A, the burden is on the City. Number two, Judge Alsup looked at this and he explained it. He said if a reasonable person reading this may come to that conclusion, then it is misleading and it's controversial. It is -- we've -- we have to keep coming back to the fact that the City is asking someone else to communicate their message because the City does not like the message that the private citizen lawfully and in a non-deceitful and non-misleading way is communicating to the public.

So the City of Berkeley is saying we don't like your message, even though it's legal, lawful, and ordained by the federal government. We don't like your message. We want to say something else. Why does Berkeley want the --

MR. LESSIG: That is --

MR. OLSON: -- cell phone retailers to say something else?

MR. LESSIG: Can I answer that question please, Your Honor?

MR. OLSON: Berkeley has a different message.

MR. LESSIG: The answer is Berkeley doesn't have any concern like that. What Berkeley is concerned about is from

its survey, we know 70 percent of residents in Berkeley don't know anything about the separation difference and 85 percent say they've not read anything in the --

THE COURT: All right. They may have an interest. Why don't you answer this question. At what point -- you would agree that something that is misleading that is mandated at some point violates the First Amendment.

MR. LESSIG: Well, we don't have an opinion in the Supreme Court that says that. I understand the intuition. But this is only misleading because they --

THE COURT: I'm asking you for a larger theoretical framework. So I'm asking you, you would concede at some point disclosure could cross the line of the First Amendment if it's so misleading. If it said *this will cause cancer* --

MR. LESSIG: Absolutely.

THE COURT: All right. So how does one -- how -- you're the judge. How do you draw the line between what is sufficiently misleading so as to impede First Amendment rights and yet give enough breathing space for the government to enact prophylactic risk disclosure measures? How do you draw that line, even if it could be misleading?

Somebody out there is going to -- you say anything, they're going to take it as oh, well -- like you say, the salt, the sodium content, somebody could take that and say sodium is extremely dangerous. I better not even take one grain of it.

How do you draw a line?

Is it a reasonable consumer test? It is a reasonable consumer may misconceive or likely to misconceive. What is the -- how does one draw that line?

MR. LESSIG: Well, first I appreciate your saying I could be the judge. Nobody has ever said that to me before, but that's an entertaining idea.

But the answer is exactly the language of *Zauderer*. So if it's uncontroversial, then it's permitted for the state to impose that requirement. So, for example, your statement if the state said cell phones cause cancer, then that is controversial in the scientific community. That would not --

THE COURT: What if it says *may cause cancer*?

MR. LESSIG: That's still -- that's what the San Francisco ordinance case was about. That still is controversial and there is a debate whether it's a probable carcinogen or possible carcinogen. That's still up in the air.

But the only reason there's uncertainty or confusion in this case is because plaintiffs have consistently said that our challenge is a challenge that's premised on this argument that cell phones cause cancer.

What our challenge is premised on, what our ordinance is premised on is the same science that the FCC has used to mandate SAR limits and to require manufacturers to include that --

THE COURT: I understand that, and their argument is that when you start off by saying to ensure safety without explaining that this was a huge margin --

MR. LESSIG: Paragraph 3 of the FCC's statement setting out the SAR limits starts, *We believe these guidelines represent a consensus of views of the federal agencies responsible for matters relating to public safety and health.*

It is a safety standard. It's not an aesthetic standard. It's not a compliance standard. It's a safety standard.

So all we're referring to is exactly what the FCC has called it, a safety standard, and we're saying that you should understand something that we know you don't understand; namely, that there is a separation distance implied in the compliance that cell phone manufacturers have when they use the cell phone.

And that's not misleading. That is true. It has been framed as misleading because they constantly suggest that what we're talking about is a debate that we've explicitly said we're having nothing to do with.

Indeed, in their Complaint, they cite me when I introduce the ordinance talking about the fact that there is a huge debate out there about whether cell phones are causing cancer. They omit the very next sentence in that statement where I say this case, this ordinance, has nothing to do with that debate.

We have tried over and over to make it clear that we're

only talking about what the FCC already regulates. Everything we said is consistent with what the FCC says --

THE COURT: Well, that's somewhat accurate, except with respect to the risk is greater for children because there is no specific mandate that I could see that you've cited in terms of telling manufacturers what to say, how they conduct these tests. It's under study and they've invited more --

MR. LESSIG: But the question, Your Honor, is who has the burden here. What we have said is this has the -- the use of children with cell phones increases the probability they will use it against their phone -- against their body. The burden is on them to show that that's not true.

That's why Judge Boudin in the First Circuit said, *The test is akin to the general rational basis test. The test is so obviously met in these cases as to make elaboration pointless.*

If it's a rational basis test -- and we have asserted that there is this increased risk and we've gone beyond merely asserting. We have actually provided declaration testimony about this.

Then they at least have to come forward with something to say why that's not true. They've not done that. All they have done is to avert to their belief that this has no possible increased effect.

Well, that doesn't meet their burden. The burden is on

them. They have failed to meet their burden. We ought to be able to regulate in the way that we have under this the law.

THE COURT: What if one were to conclude that that sentence is not just about the way children can use the phone, but it's their natural vulnerability because of cell development, etc; that that's what is implied by this. That given the same amount of SAR, same amount of radiation, they have a greater risk of contracting --

MR. LESSIG: Well, then, you should strike -- if that's your judgment, if you believe that we've misled in that way, you should strike that sentence, but you should uphold the ordinance --

THE COURT: You would concede that that part is controversial.

MR. LESSIG: No, I don't concede it's controversial.

THE COURT: If so construed.

MR. LESSIG: If so construed --

THE COURT: That would be a controversial proposition.

MR. LESSIG: And they should be required to meet the burden of demonstrating its controversiality, but they haven't come forward with anything to meet that burden.

MR. OLSON: We would be very happy to test a decision of this Court that the private citizen, who is being required to carry the government's message, has the burden of proof with respect to these factors. I cannot imagine that that would be

the outcome in the Ninth Circuit or in the United States Supreme Court.

Professor Lessig says with respect to *Zauderer*, all we have to show is that it's not controversial. Well, this is a very controversial message. But that's not all *Zauderer* says. It says must be purely factual and not burdensome.

And I revert to the fact that it's a right that the City might have when it's necessary to correct a situation like deceitful speech, but this ordinance is controversial, it's not purely factual, and it's going to impose a substantial burden in context.

The words we keep hearing from Berkeley that it's not about science and it's not about safety -- or not about science. We're not interested in the scientific.

But if you look at Footnote 2 of the Berkeley brief, they talk about radiation causing cancer or causing damage to sperm. There was all kinds of testimony about -- from Berkeley citizens with respect to their concern about cancer and tumors and that sort of thing.

But the point is that if all Berkeley wants to do is to tell its citizens *please read the manual*, this is an infinitesimally low standard for Berkeley imposing an obligation on a private citizen to say, *We want you to do a redundant thing. Read the manual that you're already getting. Read the manual that you're getting* --

THE COURT: Could they highlight the manual and explain why they should read it?

MR. OLSON: Well, I think that -- what Berkeley has the obligation to prove -- take the burden that it is imposing an imposition on a private speaker to speak Berkeley's message, and it's got a good reason for doing so, whether it's a substantial reason or a -- or a higher level than that, it's got to have a reason for doing so, and then the burden that it's imposing has got to respond to that burden.

Berkeley says taking a small sample of persons with respect to a questionnaire that Mr.-- Professor Lessig apparently had a hand in preparing, they had a small sample of persons saying well, we really don't read the manuals and we might change our conduct. That is -- if that's a First Amendment standard, we're going to change the law of the First Amendment in this country. We're going to have cities like Berkeley imposing all their own burdens with respect to the sale of these products -- not just these products but other products.

MR. LESSIG: If we are going to talk about the First Amendment --

MR. OLSON: At the end of the line, there is a very important thing that the First Amendment protects my right and your right and Professor Lessig's rights and everybody's right to speak the things that they believe in and the things that

they think are true and not to have government dictate what they might say, except --

THE COURT: Well, it goes back --

MR. OLSON: -- except where there are good reasons.

THE COURT: It goes back to my question, why is the location of the government's speech -- and that's what this is really about. It's about the location. Why does that have such significant First Amendment implications? If they were right outside the door, they've got somebody with a sandwich board handing out flyers in front of every AT&T and Verizon thing, you have no problem with that.

As soon as they go into the store and say, *Hey, I got a right to be here; let me just put my brochure stand right by your cash register and you have* -- it almost sounds more like a Takings issue --

MR. OLSON: In a sense it is because the word *conscription* occurs to me. Berkeley is conscripting that retailer to sell its message, to send its message.

MR. LESSIG: Your Honor, this has no relation --

MR. OLSON: I would be here defending Berkeley's right to have that sandwich board on a public sidewalk expressing Berkeley's opinion. Berkeley doesn't want to do that. It not only wants to put it in the store, it wants to put it in the mouth, figuratively speaking, of the seller of the product. It wants to ascribe to a retailer what Berkeley wants to say.

THE COURT: So if Berkeley insisted that they would have somebody stand inside the store with a little kiosk, that would be okay.

MR. OLSON: That would not be -- inside the store, no, it would not be okay.

THE COURT: Even though it was clearly a Berkeley person with a Berkeley hat and --

MR. OLSON: They can't come into a private establishment and conscript the space to sell their products, to sell their message, to sell -- I don't think --

MR. LESSIG: This is exactly what the First Amendment --

MR. OLSON: I don't think --

THE COURT: I'm asking that question. I'm trying to figure out what the First Amendment --

MR. OLSON: Right. The First Amendment injury -- and it's a very serious one -- is that you have a right to speak and you have the right not to speak. You have the right to speak what you believe and you do -- you have the right not to speak what someone else believes. That's the unanimous decision of the Supreme Court in the *Hurley* case involving the parade in Boston and other cases.

MR. LESSIG: Your Honor, that is absolutely correct, with respect to noncommercial speech. It is absolutely not correct with respect to commercial speech.

The whole point about the disclosure law under commercial speech is in fact the Government does have the right to tell a commercial actor --

THE COURT: Under certain circumstances, and that's what the courts are struggling with.

MR. LESSIG: That's exactly right. But when Mr. Olson says that you have a constitutional right not to speak, he's not being accurate when we're talking about commercial speech. In fact, you do. You have a constitutional right not to say something if you're not engaged in commercial speech, but if you're engaged in commercial speech, then they can say you must say this so long as it is factual and not burdensome.

And then one final point. Again and again, Mr. Olson quotes a standard that is not the standard the Supreme Court has uttered. It says it can't be burdensome, but that's not what the Supreme Court says.

What the Supreme Court says is unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech. It's not unburdensome in the abstract. It is in both *Milavetz* and *Zauderer* explicitly tied to the problem of chilling protected commercial speech. That is the only standard for measuring whether some disclosure requirement exceeds the bounds of the First Amendment limitation here.

MR. OLSON: And that's absolutely contradicted by the

Sorrell speech -- the language of the *Sorrell* --

MR. LESSIG: Which is not a disclosure case.

MR. OLSON: -- which specifically said commercial speech is no exception after talking about the burden of -- imposing burdens on speakers as the equivalent of a restricting speech. Because it's the same -- it's another part of the same thing, Your Honor. If you -- if I'm being forced to present your message or the City's message, it's the same thing as the City telling me that I can't communicate in my own way my own message. If they say you can't do that, what they're doing here is the same thing. They're saying you must do it in this way. You must communicate that message, which is the same thing as putting a restriction on my ability to speak my mind.

MR. LESSIG: As the NRDC in their brief makes clear, that restriction happens thousands of times. And if, in fact, there is a constitutional principle that we're going to discover now that says that they can't do that unless you can show the absolute harm for the particular standard that is being uttered, then we're going to have nothing in these courts except challenging those standards and --

THE COURT: All right. I will take it under submission. I appreciate the argument. It has been helpful.

MR. OLSON: Thank you, Your Honor.

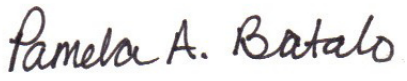
MR. LESSIG: Thank you, Your Honor.

(Proceedings adjourned at 3:01 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Tuesday, August 25, 2015



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