JOSEPH H. HUNT
Assistant Attorney General
ERIC WOMACK
Assistant Branch Director
JUSTIN M. SANDBERG
(IL Bar No. 6278377)
Senior Trial Counsel
Civil Division, Federal Programs Branch
1100 L. St. NW, Room 11004
Washington, DC 20005
Phone: (202) 514-5838
Email. Justin.sandberg@usdoj.gov

Attorneys for United States

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CTIA – THE WIRELESS ASSOCIATION, Plaintiff, v. THE CITY OF BERKELEY, CALIFORNIA, et al., Defendants.	Case No.: 3:15-cv-2529-EMC **STATEMENT OF INTEREST OF THE UNITED STATES**

The United States respectfully submits a Statement of Interest on behalf of the Federal Communications Commission, pursuant to 28 U.S.C. § 517,[1] to set forth its views concerning the above-captioned case. The Statement of Interest is set forth in the attached letter from the Federal Communications Commission.

[1] Pursuant to 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Dated: June 22, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
ERIC WOMACK
Assistant Branch Director

/s/ Justin M. Sandberg
JUSTIN M. SANDBERG
Senior Trial Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
1100 L Street, N.W., Room 11004
Washington, D.C. 20005
Telephone: (202) 514-5838
Email: Justin.Sandberg@usdoj.gov

Counsel for the United States

THOMAS M. JOHNSON, JR.
General Counsel
ASHLEY S. BOIZELLE
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
JAMES M. CARR
Attorney
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Telephone: (202) 418-1762
Fax: (202) 418-2819
Email: james.carr@fcc.gov

EXHIBIT 1

Federal Communications Commission
Washington, D.C. 20554

June 22, 2020

Joseph H. Hunt
Assistant Attorney General
Civil Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

RE: *CTIA—The Wireless Association v. City of Berkeley*, No. 3:15-cv-02529 (N.D. Cal.)

Dear Mr. Hunt:

The above referenced case involves a challenge to an ordinance adopted by the City of Berkeley, California. The ordinance requires cell phone retailers located in the City of Berkeley to provide consumers who buy or lease cell phones with a specific notice at the point of sale concerning the radiofrequency (RF) energy emitted by those phones. The plaintiff in this case, CTIA (a trade association of providers of wireless telecommunications service), has moved for judgment on the pleadings on two separate grounds: (1) the ordinance violates the First Amendment; and (2) the ordinance is preempted by federal law. The Commission wishes to participate in this case to provide its views on why the Berkeley ordinance should be deemed preempted.

We note that the Department of Justice recently filed a Statement of Interest on the FCC's behalf addressing this issue in another case in the same district court. *See* Statement of Interest, *Cohen v. Apple, Inc.*, No. C 19-05322 WHA (N.D. Cal.) (filed Apr. 13, 2020). The Commission respectfully requests that the Department of Justice file a Statement of Interest in this case attaching this letter.

INTRODUCTION AND SUMMARY

In the Communications Act of 1934, Congress conferred on the FCC comprehensive authority to regulate the provision of wireless telecommunications

services. As part of this mandate, the Act expressly authorizes the Commission to adopt limits on radiofrequency emissions for mobile devices, including cell phones. *See* 47 U.S.C. § 303(e). The Commission's radiofrequency emission standards and testing parameters reflect the agency's expert judgment in advancing the goal of safeguarding the health of American consumers, while facilitating broad deployment of wireless telecommunications technology.

Under the FCC's rules, a cell phone manufacturer is not permitted to sell cell phones in the United States until the FCC certifies that they comply with all applicable rules and regulations, including the FCC's RF limits. To obtain this certification, the manufacturer must test its cell phones in accordance with FCC procedures and submit the test results to the Commission. If the test results demonstrate that the phones comply with the FCC's RF limits, and the manufacturer further demonstrates that its phones comply with all other applicable rules and regulations, the Commission certifies the cell phones for sale in the United States. The Commission has found that RF emissions from FCC-certified cell phones pose no health risks.

The FCC has also determined that the information on its website and in cell phone user manuals about RF exposure is adequate to inform consumers of this issue without overwarning or creating the false impression that RF emissions from FCC-certified cell phones are unsafe. *See Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, 34 FCC Rcd 11687, 11697 ¶ 16 (2019) (*2019 RF Order*). As the Commission has explained, these statements reflect the agency's "considered policy judgment regarding how best and in what form to disseminate relevant information about RF exposure to the public." *See* FCC Statement of Interest, *Cohen v. Apple*, Attachment at 19.

The Berkeley ordinance conflicts with the FCC's determination that the information provided on its website and in cell phone user manuals is sufficient to inform consumers about the risk of RF exposure, and that additional notices risk "overwarning" and misleading consumers into believing that RF emissions from FCC-certified cell phones are unsafe. In addition, the notice mandated by Berkeley informs consumers that, when the phones are carried against the body, consumers may experience unsafe levels of RF exposure. That statement inaccurately describes the safety of cell phones and may inhibit the broad

availability of safe wireless communications devices. For these reasons, the Berkeley ordinance conflicts with, and is preempted by, federal law.

BACKGROUND

The FCC's Regulatory Authority. Under the Communications Act of 1934 (Communications Act or Act), the FCC is the "centraliz[ed] authority" for regulating radio communications and is charged with "mak[ing] available … to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. § 151.

To achieve this objective, "Congress endowed" the FCC "with comprehensive powers to promote and realize the vast potentialities of radio." *Nat'l Broad. Co. v. FCC*, 319 U.S. 190, 217 (1943). Among other things, the Communications Act empowers the Commission to regulate "the kind of apparatus to be used" for wireless radio communications and "the emissions" that such equipment may produce. 47 U.S.C. § 303(e). The Supreme Court has recognized that "the Commission's jurisdiction over" such "technical matters … is clearly exclusive." *Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 430 n.6 (1963).

FCC Regulation of Radiofrequency Emissions. In establishing technical standards for radio communications, the FCC has taken into account its obligations under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq*., which "requires agencies of the Federal Government to evaluate the effects of their actions on the quality of the human environment." *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd 15123, 15125 ¶ 5 (1996) (*1996 RF Order*). In accordance with NEPA, the FCC has promulgated regulations to limit human exposure to radiofrequency (RF) energy from all transmitting facilities, operations, and devices it regulates. *See* 47 C.F.R. §§ 1.1307, 1.1310, 2.1091, 2.1093. The agency adopted such restrictions in response to scientific findings that exposure to high levels of RF energy can result in the overheating of human tissue. *See* RF Safety FAQ, Question 5, available at https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety#Q5. The Commission declined to "adopt stricter standards" based on "controversial" and unsubstantiated claims that RF energy at the relevant frequencies causes "non-thermal" biological effects.

Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 12 FCC Rcd 13494, 13505 ¶ 31 (1997) (*1997 RF Order*).

Nearly every form of wireless communications—from television, radio, and cell phones to dispatch systems for police and fire departments—uses RF electromagnetic waves to send and receive signals. *See* RF Safety FAQ, Question 3, available at https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety#Q3. Cell phones use RF waves to connect calls "using a system of base stations—also known as cell sites—that relay calls between telecommunications networks." FCC, Consumer and Governmental Affairs Bureau, Understanding Wireless Telephone Coverage, Consumer Guide, available at https://www.fcc.gov/consumers/guides/understanding-wireless-telephone-coverage-areas. Unlike radio and television broadcast stations, which generate high levels of RF energy "because of their relatively high operating power," *1996 RF Order* ¶ 6, cell phones are "low-power devices designed to be used in the immediate vicinity of the body," and they emit relatively low levels of RF energy. *Id.* ¶ 46.

The FCC first adopted RF rules in the 1980s, based on safety guidelines adopted by the American National Standards Institute (ANSI) in 1982. At that time, the Commission decided "to exclude" cellular phones and low-power devices "from routine environmental evaluation with respect to RF radiation" because it determined that such devices did not present "significant exposure hazards." *Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices*, 2 FCC Rcd 2064, 2065 ¶¶ 14, 16 (1987).

In 1992, ANSI adopted a new RF exposure standard (ANSI/IEEE C95.1-1992) that was "generally more stringent in the evaluation of low-power devices" than its previous standard. *1996 RF Order* ¶ 9. The following year, the FCC commenced a rulemaking proposing to revise its rules to adopt the new ANSI/IEEE RF standard in part. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 8 FCC Rcd 2849 (1993). That proceeding was still pending when Congress enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. Section 704 of the 1996 Act directed the FCC to "complete action" within 180 days on its pending proceeding "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." 110 Stat. 152.

The House Commerce Committee, which drafted Section 704(b), stated that the FCC should adopt uniform federal RF standards that strike "an appropriate balance" between "adequate safeguards of the public health" and "speed[y] deployment … of competitive wireless telecommunications services." H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 94 (1995) (House Report No. 104-204). The Committee explained that "[a] high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community." *Id*. at 95. Therefore, the Committee concluded, "[n]o State or local government, solely on the basis of RF emissions, should block the construction of sites and facilities or installation of equipment which comply with the [FCC's] RF standards." *Ibid*. That legislative admonition was codified in section 332(c)(7) of the Act, which provides that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

In compliance with the deadline set by the 1996 Act, the FCC in August 1996 issued an order adopting new RF exposure guidelines. *1996 RF Order* ¶ 1. The new guidelines were "based substantially on the recommendations of … the federal agencies responsible for matters relating to the public safety and health," including the U.S. Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA). *Id.* ¶ 2. Consistent with the 1992 ANSI/IEEE standard, the Commission for the first time adopted RF exposure limits for cellular telephones and other portable low-power devices. *See id.* ¶¶ 63-64. Those limits were set to reflect a level of "safe [RF] exposure from low-power devices designed to be used in the immediate vicinity of the body." *Id.* ¶ 62.

The FCC concluded that its revised RF regulations reflected "the best scientific thought" and were "sufficient to protect the public health." *1996 RF Order* ¶ 168. In response to a petition for reconsideration, the Commission affirmed its rules, finding that the revised "RF exposure limits provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *1997 RF Order* ¶ 29.

On review, the Second Circuit upheld the FCC's revised RF rules. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 88-97 (2d Cir. 2000). Observing that the establishment of "safety margins" is "a policy question, not a legal one," the court held that the FCC had acted reasonably in setting RF standards that, while sufficient to protect the public, would not unduly impede the provision of wireless "telecommunications services to the public in the most efficient and practical manner possible." *Id*. at 91-92 (internal quotation marks omitted). The court noted that "[a]ll of the expert agencies consulted" by the FCC on this issue "found the FCC's approach to be satisfactory." *Id*. at 90; *see also EMR Network v. FCC*, 291 F.3d 269, 273 (D.C. Cir. 2004) (affirming Commission's denial of petition for rulemaking to revisit RF standards and upholding the agency's reliance on the views of expert agencies).

In 2013, the FCC launched an inquiry to assess whether it should amend its RF exposure standards. *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies*, 28 FCC Rcd 3498, 3570-89 ¶¶ 205-252 (2013) (*2013 Notice of Inquiry*). After reviewing the latest scientific research on the subject, the Commission concluded in an order issued in December 2019 that its existing RF limits "reflect the best available information concerning safe levels of RF exposure for workers and members of the general public." *2019 RF Order* ¶ 2. The agency found no "data in the record to support modifying [the] existing exposure limits," and "no expert public health agency expressed concern" about them. *Id*. ¶ 10. To the contrary, the FDA's "public statements continue to support the current limits." *Ibid*. Accordingly, the FCC terminated its RF inquiry in 2019 and "decline[d] to initiate a rulemaking to reevaluate the existing RF exposure limits." *Ibid*.[1]

FCC Rules and Procedures Governing the Evaluation of Radiofrequency Emissions by Cell Phones. Before any entity is permitted to sell cell phones in the United States, it must submit an application for equipment authorization to an FCC-authorized Telecommunication Certification Body. *See* 47 C.F.R. § 2.911. The applicant must demonstrate that its phones comply with the FCC's RF exposure limits by submitting with its application the results of testing "performed

[1] The *2019 RF Order* is the subject of pending petitions for review. *See Environmental Health Trust v. FCC*, D.C. Cir. No. 20-1025 (consolidated with *Children's Health Defense v. FCC*, D.C. Cir. No. 20-1138).

by an FCC-recognized accredited testing laboratory" and consistent with FCC specifications concerning the testing protocol. *See* FCC, Equipment Authorization Procedures, available at https://www.fcc.gov/general/equipment-authorization-procedures. The applicable RF limits are "quantified in terms of specific absorption rate (SAR), a measure of the rate of RF energy absorption." *1996 RF Order* ¶ 3; *see* 47 C.F.R. § 1.1310(a). The SAR limits for RF emissions from cell phones are 0.08 watts per kilogram averaged over the whole body and 1.6 watts per kilogram (averaged over one gram of tissue) for localized exposure to areas such as the head "averaged over a time period not to exceed 30 minutes." 47 C.F.R. § 2.1093(d)(2).

"Compliance with SAR limits can be demonstrated by either laboratory measurement techniques or by computational modeling." 47 C.F.R. § 2.1093(d)(3). "Guidance regarding SAR measurement techniques can be found in the [FCC's] Office of Engineering and Technology (OET) Laboratory Division Knowledge Database (KDB)." *Ibid*.

"Current evaluation procedures require" that cell phones "be tested at maximum power under normal use conditions." *2019 RF Order* ¶ 14. To account for the different ways in which cell phones are used, RF testing for the devices is conducted both "against the head, representing normal use during a phone call, and at a separation distance of up to 2.5 centimeters (about one inch) from the body," *ibid.*, reflecting other types of phone use, like "operation" of a phone "using a headset while the device is in [the user's] pocket." *2013 Notice of Inquiry*, 28 FCC Rcd at 3587 n.441 (distinguishing between use of the phone against the head and "body-worn" usage configurations); *see also* KDB Publication 447498 D01 General RF Exposure Guidance v06, "RF Exposure Procedures and Equipment Authorization Policies for Mobile and Portable Devices" (Oct. 2015), at 10-11, available at https://apps.fcc.gov/kdb/GetAttachment.html?id=f8IQgJxTTL5y0oRi0cpAuA%3D%3D&desc=447498%20D01%20General%20RF%20Exposure%20Guidance%20v06&tracking_number=20676.

For many modern cell phones, the required testing separation distance from the body is less than 2.5 centimeters. "For example, phones with tethering capabilities (*i.e.*, 'hotspot mode') are tested at a maximum separation distance from the human body of 1 [centimeter]" and are tested both in and out of hotspot mode at that distance. *2019 RF Order* ¶ 14; *see* KDB Publication 941225 D06 Hot Spot

SAR v02r01, "SAR Evaluation Procedures for Portable Devices with Wireless Router Capabilities" (Oct. 2015), at 2, available at https://apps.fcc.gov/kdb/GetAttachment.html?id=I99UsWMxKw2Y756AxzqjJw%3D%3D&desc=941225%20D06%20Hotspot%20Mode%20v02r01&tracking_number=26930. And if cell phones that are held against the head during phone calls are also "designed to operate on the body of users" when used for other purposes, those phones "must be tested for SAR compliance using a conservative" maximum test separation distance of 0.5 centimeters "to support compliance." KDB Publication 447498 D01, General RF Exposure Guidelines v06, at 11. The FCC has explained that the 0.5 centimeter distance from the body is appropriate because: (1) cell phones are "tested against the head without any separation distance"; (2) testing is currently performed at maximum power, "under more extreme conditions than a user would normally encounter"; and (3) the "existing exposure limits are set with a large safety margin, well below the threshold for unacceptable rises in human tissue temperature." *2019 RF Order* ¶ 14. Taking these factors into account, the FCC has found it "unnecessary" to "require [RF] testing with a 'zero' spacing—against the body." *Ibid.*

After the FCC-authorized Telecommunication Certification Body reviews the exhibits and test data submitted by an applicant for equipment authorization and determines that the applicant's cell phones comply with all applicable technical standards (including RF exposure limits), the FCC issues a certification authorizing sale of the cell phones. 47 C.F.R. § 2.907(a). Certification is "the most rigorous approval process for RF devices." FCC, Equipment Authorization Procedures, available at https://www.fcc.gov/general/equipment-authorization-procedures. To obtain FCC certification, cell phones must be tested "at maximum power," that is, "under more extreme conditions than a user would normally encounter." *2019 RF Order* ¶ 14. Moreover, the FCC's RF "exposure limits are set with a large safety margin." *Ibid*. "ALL cell phones must meet the FCC's RF exposure standard, which is set at a level well below that at which laboratory testing indicates, and medical and biological experts generally agree, adverse health effects could occur." FCC, Consumer and Governmental Affairs Bureau, Specific Absorption Rate (SAR) for Cell Phones: What It Means for You, Consumer Guides, available at https://www.fcc.gov/consumers/guides/specific-absorption-rate-sar-cell-phones-what-it-means-you. The FCC's RF limits "are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure. This 'safety' factor can well accommodate … the

potential for exposures to occur in excess of [the FCC's RF] limits without posing a health hazard to humans." *2013 Notice of Inquiry*, 28 FCC Rcd at 3582 ¶ 236.

In view of these safeguards built into its testing and certification procedures, the Commission has found that "phones legally sold in the United States" (*i.e.*, FCC-certified phones) "pose no health risks." *2019 RF Order* ¶ 14. The Commission also concluded in December 2019 that the information already provided on its website and in cell phone user manuals regarding the RF emissions of FCC-certified cell phones is "adequate to inform consumers" about RF exposure issues and does "not risk contributing to an erroneous public perception or overwarning of RF emissions from FCC certified or authorized devices." *Id*. ¶16.

The Berkeley Ordinance and CTIA's Complaint. In 2015, the City of Berkeley passed an ordinance requiring cell phone retailers to provide consumers who buy or lease cell phones with the following notice:

> The City of Berkeley requires that you be provided the following notice: To assure safety, the Federal Government requires that cell phones meet radiofrequency (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.

See CTIA—The Wireless Ass'n v. City of Berkeley, 139 F. Supp. 3d 1048, 1051 (N.D. Cal. 2015). (The third sentence, regarding the potential risk to children, was later deleted.)

CTIA, a trade association representing the wireless telecommunications industry, challenged this ordinance in a lawsuit filed against the City of Berkeley in the United States District Court for the Northern District of California. *CTIA*, 139 F. Supp. 3d at 1050-51. On April 24, 2020, CTIA filed with the district court a motion for judgment on the pleadings, arguing that the Berkeley ordinance violates the First Amendment and is preempted by federal law. In support of its preemption argument, CTIA cited the FCC's *2019 RF Order* and the statement of interest filed by the Commission in *Cohen*. *See* CTIA Motion at 2-3, 22-25. CTIA asserted that the Commission made a "clear pronouncement" in the *2019 RF Order*

"objecting to warnings outside the 'context and placement' of existing information" on the FCC's website and in cell phone user manuals. *Id*. at 23 (quoting *2019 RF Order* ¶ 16). According to CTIA, "Berkeley's Ordinance undermines" the Commission's regulatory regime "by compelling a warning that the FCC does not require or endorse." *Ibid*. Citing the FCC's statement of interest in *Cohen*, CTIA maintained that "requiring warnings like the Berkeley Ordinance would 'conflict with the FCC's considered policy judgment'" about how best to disseminate information regarding RF exposure to the public. *Id.* at 24 (quoting FCC Statement of Interest, *Cohen v. Apple*, Attachment at 19).

DISCUSSION

I. THE BERKELEY ORDINANCE IS PREEMPTED BECAUSE IT CONFLICTS WITH THE FCC'S POLICY JUDGMENT REGARDING THE PROPER CONTEXT AND PLACEMENT OF INFORMATION REGARDING RF EXPOSURE

Federal law preempts state law when, "under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016) (internal quotation marks omitted). "Federal regulations have no less preemptive effect than federal statutes." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (internal quotation marks omitted). A state law stands as an obstacle to the implementation of a federal regulatory scheme if it conflicts with or undermines the policy judgment made by the federal agency. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 862, 881 (2000) (a state mandate requiring auto manufacturers to install air bags would present "an obstacle to the variety and mix of [passive restraint] devices that [a] federal regulation sought" and "the gradual passive restraint phase-in that the federal regulation deliberately imposed").[2] "The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

---

[2] *See also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (finding conflict preemption where a state law "limit[ed] the availability of an option [the federal regulator] considers essential to the economic soundness" of the regulated industry).

The FCC has acted "to ensure that relevant information" about RF emissions from cell phones "is made available to the public." *2019 RF Order* ¶ 16. Among other things, the FCC Laboratory has stated that cell phone user manuals must include "[s]pecific information … to enable users to select body-worn accessories that meet the minimum *test separation distance* requirements." KDB 447498 D01, at 11. In addition, to supplement and place in context the information on RF emissions that appears in device manuals, "the Commission maintains several webpages that provide information about RF exposure to the public." *2019 RF Order* ¶ 16. One of those webpages informs "consumers who are skeptical" of the science underlying the FCC's RF guidelines about "simple steps [they] can take to reduce [their] exposure to RF energy from wireless phones," while at the same time emphasizing that the Commission "does not endorse the need" for such measures. *Id*. ¶ 16 n.56 (citing FCC, Consumer and Governmental Affairs Bureau, Wireless Devices and Health Concerns, Consumer Guide, available at https://www.fcc.gov/consumers/guides/wireless-devices-and-health-concerns).

Pursuant to guidance from the FCC Laboratory, the operating manuals for cell phones provide similar information. *See 2019 RF Order* ¶ 16. For example, the manual for Apple's iPhone 11 informs users that the iPhone meets applicable RF limits, and it describes the testing procedures used to determine the iPhone's compliance. The manual also advises users that they can "reduce exposure to RF energy" by " us[ing] a hands-free option, such as the built-in speakerphone, the supplied headphones, or other similar accessories," and that "[c]ases with metal parts may change the RF performance of the device, including its compliance with RF exposure guidelines, in a manner that has not been tested or certified." *See* https://www.apple.com/legal/rfexposure/iphone12,1/en/.

In December 2019, the FCC concluded that the information about RF exposure on its website and in cell phone user manuals was "adequate to inform consumers" of potential health risks associated with RF emissions from FCC-certified cell phones. *2019 RF Order* ¶ 16. Explaining that "the context and placement of RF exposure information is so important," the Commission found that any additional warnings about RF exposure could create "an erroneous public perception or overwarning of RF emissions from FCC certified or authorized devices" and "contribute to a feeling of uncertainty or a lack of control" among consumers. *Ibid*. These findings reflect "the FCC's considered policy judgment regarding how best and in what form to disseminate relevant information about RF

exposure to the public." FCC Statement of Interest, *Cohen v. Apple*, Attachment at 19.

The Berkeley ordinance conflicts with that policy judgment and therefore is preempted. Given the FCC's calibrated regime regarding RF disclosures and its determination that existing RF exposure information provided on the FCC's website and in cell phone user manuals is adequate to inform consumers without prompting unwarranted fears about RF emissions, the Berkeley ordinance is not only unnecessary but likely detrimental to the public. On its face, the notice mandated by Berkeley goes beyond what the FCC provides on its website and requires in user manuals, and therefore has the potential to "overwarn" consumers, creating the false impression that FCC-certified cell phones are unsafe when carried against the body.

State disclosure requirements that stand as an obstacle to the implementation of federal disclosure rules are preempted by federal law. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1135-36 (9th Cir. 2005) (holding that federal disclosure rules preempt disclosure requirements imposed by the California Ethics Standards). More specifically, courts have recognized that federal concerns about "overwarning" provide a valid basis for preempting state regulations. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1673 (2019) (FDA regulation of drug labeling "is designed to prevent overwarning" in order "to exclude [e]xaggeration of risk, or inclusion of speculative or hypothetical risks," which "could discourage appropriate use of a beneficial drug") (internal quotation marks omitted); *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 392 (7th Cir. 2010) ("overwarning can deter potentially beneficial uses of [a] drug by making it seem riskier than warranted and can dilute the effectiveness of valid warnings"); *Monzon v. United States*, 253 F.3d 567, 572 (11th Cir. 2001) (it was reasonable for the National Weather Service to adopt "a general 'don't overwarn' policy that "strives for the highest rate of severe weather detection while maintaining the lowest possible false alarm rate in the issuance of warnings") (internal quotation marks omitted). Here, the FCC has a legitimate interest in guarding against "overwarning" about the potential dangers of a product sold to consumers. The Berkeley ordinance conflicts with the FCC's judgment about how best to convey RF exposure information to the public. Because the ordinance stands as an obstacle to the implementation of federal policy, it is preempted.

II. THE BERKELEY ORDINANCE IS PREEMPTED, DUE TO CONFLICT WITH THE FCC'S RF REGULATIONS, BECAUSE THE REQUIRED NOTICE INACCURATELY SUGGESTS THAT CELL PHONES ARE UNSAFE

The notice mandated by the Berkeley ordinance inaccurately suggests that cell phones are unsafe. Thus, it has the potential to "overwarn" consumers and impede the accomplishment of the FCC's goal of fostering a safe and robust wireless communication system. Accordingly, Berkeley's ordinance is preempted. *See, e.g., Merck Sharp & Dohme Corp*., 139 S. Ct. at 1673.

The required notice suggests that an RF emission, at a distance of zero spacing from the body, might exceed the FCC's limits set at other distances, as previously described, and, therefore, poses a threat to human health. But the FCC's RF limits "are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure. This 'safety' factor can well accommodate … the potential for exposures to occur in excess of [the FCC's RF] limits without posing a health hazard to humans." *2013 Notice of Inquiry*, 28 FCC Rcd at 3582 ¶ 236. In an earlier phase of CTIA's litigation with Berkeley, the Ninth Circuit described the FCC's adoption of this substantial safety margin as "a better-safe-than-sorry policy." *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 839 (9th Cir. 2019).

Against this backdrop, the FCC has declared that RF emissions from certified cell phones "pose no health risks." *2019 RF Order* ¶ 14. In reaching that conclusion, the Commission explained that "even if certified or otherwise authorized devices" might "produce RF exposure levels in excess of Commission limits under normal use" when used against the body, any "such exposure would still be well below levels considered to be dangerous" because the RF limits "are set with a large safety margin." *Ibid*.; *see also* FCC Statement of Interest, *Cohen v. Apple*, Attachment at 17.

By implying that FCC-certified cell phones could emit unsafe levels of RF energy when carried against the body, the Berkeley notice could create "the erroneous public perception of a possible risk from [RF] exposure" that is "unsupported by evidence." *2019 RF Order* ¶ 16. The Ordinance, thus, is an

obstacle to the FCC's fostering of a widely available and safe wireless communications system, and is preempted for this additional reason.

CONCLUSION

The FCC has made a carefully considered judgment about how best to disseminate information to the public regarding the potential risks associated with RF emissions from cell phones. In the Commission's view, the information provided on the FCC's website and in cell phone user manuals is sufficient to inform consumers on this subject, and additional warnings at the point of sale may create an erroneous perception that RF emissions from FCC-certified phones are unsafe. The Berkeley ordinance conflicts with the FCC's judgment concerning how best and in what form to provide information about RF exposure to the public. The ordinance also implies that RF emissions from FCC-certified cell phones are unsafe when the phones are carried at zero spacing from the body. In that respect, the ordinance conflicts with the FCC's determination that RF emissions from FCC-certified cell phones pose no health risks. For these reasons, the Commission agrees with CTIA that the Berkeley ordinance is preempted by federal law.

Respectfully submitted,

/s/ Thomas M. Johnson, Jr.
Thomas M. Johnson, Jr.
General Counsel
Federal Communications Commission