IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION and CALIFORNIA RETAILERS ASSOCIATION, Plaintiffs/Appellants, vs. CITY AND COUNTY OF SAN FRANCISCO Defendant/Appellee.	No. 16-16072 U.S. District Court No. 3:15-cv-03415 EMC
CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION, Plaintiff/Appellant, vs. CITY AND COUNTY OF SAN FRANCISCO Defendant/Appellee.	No. 16-16073 U.S. District Court No. 3:15-cv-03415 EMC

ANSWERING BRIEF OF APPELLEE CITY AND COUNTY OF SAN FRANCISCO

On Appeal from the United States District Court
for the Northern District of California

The Honorable Edward M. Chen

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether the government can require health or safety warnings in commercial speech at all. On the view of the soda industry, a health or safety warning is fatally inaccurate if a reasonable consumer ***could*** be misled by the warning. If even the possibility of misunderstanding is enough to render a warning inaccurate, then there is no health and safety warning that passes muster. A concise warning can never explain risk with perfect precision, and risk quantifications are never free from debate. Since the construction or import of statements like "women should not drink alcoholic beverages during pregnancy" or "this product contains chemicals known to the State of California to cause cancer and birth defects" could be debated or misunderstood, then according to the soda industry these longstanding State and federal warning requirements must be struck down.

That expansive view of the protection afforded commercial speech under the First Amendment is unsupported. Commercial speech is protected because it provides valuable information for the public about goods and services, but in view of its hardiness and the government's important interests in regulating the marketplace, it has always been subject to greater regulation than other kinds of speech. Disclosures in particular—whether they are California's Prop 65 warnings, or ingredient disclosures, or health warnings like those at issue in this case—trigger relaxed First Amendment scrutiny because they do not ***restrict*** the flow of information about commercial products, but instead ***augment*** it, promoting the very values the First Amendment protects in the commercial speech context. If a warning is factual and accurate, then the commercial speaker has only a "minimal" constitutional interest in not providing it, and the government may compel the warning so long as it is reasonably related to legitimate public interests.

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

The City and County of San Francisco's health warning, required on fixed advertisements for sugar-sweetened beverages, meets that test. There is no credible debate about whether sodas and other sugary beverages contribute to obesity, diabetes, and tooth decay. They are the single largest source of added sugar in American diets; they typically provide no nutrients; they are marketed, sold, and consumed in single-serving amounts that approach or exceed the FDA's recommendations for an entire day's allowance of added sugar; many people (and especially vulnerable groups like children, low-income people, and communities of color) lack accurate information about the risks of sugary beverages; and there is a broad consensus among doctors and health organizations that sugary beverage consumption contributes to serious health harms. Measured against the values the First Amendment protects with respect to commercial speech, the City's warning promotes those values by providing accurate, commercially useful information about the products the soda industry invests so heavily in persuading consumers to buy. Indeed, the warning is more accurate and useful for consumers than the messages of many soda ads—such as the promise that Coca-Cola promotes "happiness," or that a Pepsi will "refresh your world." *See* ABA Br. 49.

Because the warning is factual and accurate, it must be upheld if it is reasonably related to the City's strong interest in promoting the health of San Franciscans—including children and disadvantaged communities who lack knowledge of important health facts—by ensuring they have useful information about the health risks of soda and other sugary drinks. The warning requirement readily meets that test.

Nor does the industry show that the district court abused its discretion in rejecting claims that advertisers' speech would be chilled or unduly burdened by the warning requirement. With regard to chilling, the district court carefully considered advertisers' evidence that they would shift away from the fixed media that are covered by the warning—billboards, bus shelters, convenience store displays, and the like—and switch their advertising to transient media like internet and TV ads that a local government cannot regulate without raising concerns about extraterritorial effects. The court found the evidence conclusory and unpersuasive, a judgment well within its discretion. And with regard to undue burdens, the soda industry essentially argued that any warning that consumers notice and pay attention to is unduly burdensome because it undermines their chosen message of carefree consumption. It cannot be that the only constitutional warning message is one that consumers do not notice.

The First Amendment does not put regulators to the choice between an ineffective warning and no warning at all. Nor does it require the government to run the gauntlet of heightened scrutiny when it compels factual disclosures; a disclosure requirement is fundamentally different from a speech prohibition. Plaintiffs' arguments cannot be squared with the subordinate position of commercial speech in First Amendment values, and would upset not only the City's warning requirement but a great many other health and safety warnings as well. For these reasons, and others discussed below, this Court should affirm the district court's order denying a preliminary injunction.

STATEMENT OF ISSUES

1. Whether the First Amendment test for compelled disclosures set out in *Zauderer*, 471 U.S. 626, applies to the City's requirement that sugary beverage advertisers include a health warning on fixed advertisements.

2. Whether the district court abused its discretion in concluding that the City's warning is factually accurate and that Plaintiffs did not demonstrate their speech would be unduly burdened or chilled.

3. Whether the City's warning directly advances its compelling public health interests without burdening soda advertisers' commercial speech excessively.

STATEMENT OF THE CASE

I. The Public Health Crisis of Obesity, Diabetes, and Tooth Decay

For the first time in our history, some health experts predict, a generation of American children will die younger and sicker than their parents on average. ER 481.[1] The source of this shift is obesity and the health conditions linked to it, most notably Type II diabetes. The breadth, and the public health consequences, of our national epidemic of obesity and diabetes are hard to overstate. More than two-thirds of adults in the U.S. are obese or overweight, and more than a third are obese. ER 480. In the African American and Hispanic communities, rates are still higher, and in San Francisco more than 61% of Hispanics and 51% of African Americas are overweight or obese. *Id*. Among children, nearly 17% were obese in 2011-2012, and in San Francisco 32% of children are overweight or obese. *Id.*. Obesity, in turn, is a major risk factor for diabetes. Nearly one in seven American adults has diabetes, and that rate is one in five for minorities and people who are economically disadvantaged. ER 481. As with obesity, rates of diabetes are the highest among disadvantaged communities of color. ER 483. And nearly 40% of U.S. adults have pre-diabetes—elevated fasting blood sugar levels—placing them at significant risk of developing full-blown diabetes in five to 10 years. ER 481.

[1] Citations to "ER" refer to the Excerpts of Record filed by the ABA and CRA in Case No. 16-16072. The Excerpts of Record filed by the CSOAA in Case No. 16-16073 are cited as "CSOAA ER."

The mortality consequences of obesity and diabetes are staggering: Extreme obesity is associated with nearly double the death rate for heart disease, diabetes, and cancer as compared to people of normal weight. ER 480. Diabetes in particular impacts both mortality and quality of life. People diagnosed with diabetes between the ages of 20 and 60 lose an average of five to seven years of life and often face debilitating complications like amputations, kidney failure, and vision loss. ER 482, ER 549-51. The national economic costs of obesity and diabetes are also staggering; the cost of treatment, lost productivity, and premature mortality is estimated to be $227 billion annually. ER 481.

There is a broad consensus in the medical and public health establishments that drinking sugary beverages contributes to obesity and diabetes, and that reducing sugary beverage consumption is an important step in addressing this epidemic. ER 488-489. The 2015-2020 Dietary Guidelines for Americans, promulgated by the Secretaries of Health and Human Services and Agriculture pursuant to congressional command every five years, and required to be "based on the preponderance of the scientific and medical knowledge," 7 U.S.C. § 5341, recommend that individuals should consume no more than 10% of their daily calories in added sugars, ER 489. The World Health Organization has adopted the same recommendation. ER 192. Yet a single-serving 20-ounce soda bottle[2] exceeds this daily allowance of added sugars, as does even a 12-ounce can of soda for children. ER 490. The FDA, the Centers for Disease Control, the United

[2] The ABA claims in its brief that "the actual serving size for full-calorie soda is 12 fluid ounces (*i.e.* one can)" rather than 20 ounces. ABA Br. 14 n.4. Both Coca-Cola and the FDA disagree; they treat 20-ounce bottles as a single serving. *See* http://www.coca-colaproductfacts.com/en/coca-cola-products/coca-cola/; http://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/UCM501663.pdf.

States Surgeon General, the American Diabetes Association, and the American Academy of Pediatrics all recommend reducing or eliminating sugary beverage consumption to prevent obesity or diabetes. ER 192, 490; SER 62-63; 79 Fed. Reg. 11880, 11903 (Mar. 3, 2014) (FDA recommends "reducing the intake of sugar-sweetened beverages" to manage weight). That consensus also holds true among practicing doctors; the standard of care in the field is to counsel patients at risk for obesity and diabetes to limit or eliminate sodas and other sugary beverages. ER 489.

A further word about the position of the FDA is warranted, given Plaintiffs' specious claim that the FDA believes that sugary beverages are no different from other foods in contributing to the obesity and diabetes crisis. *See* ABA Br. 1, 12, 26; CSOAA Br. 10, 42 (citing 79 Fed. Reg. 11880, 11904 (Mar. 3, 2014)). Plaintiffs repeatedly quote the FDA to contend that calories from added sugar do not contribute to obesity any more than other calorie sources—yet they omit the portion of that very sentence where the FDA rejects their claim: "Although foods containing solid fats and added sugars do not contribute to weight gain any more than another calorie source, ***they make up a significant percentage of the American diet and are a source of excess calories***." 79 Fed. Reg. at 11904 (emphasis added). That same FDA notice also noted the link between sugary beverages and weight gain, and emphasized the FDA's standing recommendation that "***reducing the intake of sugar-sweetened beverages*** may help individuals control their total calorie intake and manage their body weight." *Id.* at 11903 (emphasis added). More recently, the FDA decided in May 2016 to require the disclosure of added sugar content on product labels in light of how commonly added sugar is overconsumed. *See* 81 Fed. Reg. 33742, 33802-03 (May 27, 2016) ("We agree that excess calories from any source can contribute to weight gain.

However, Americans are consuming too many calories from added sugars, and those calories typically are not accompanied by other beneficial nutrients."). The FDA's decision was based in part on its view that "the evidence on sugar-sweetened beverages and body weight/adiposity is strong and consistent." *Id.* at 33803. At the time, the FDA was urged by commenters to add a health warning to ***all*** foods with added sugars. *Id.* at 33829. The FDA rejected this suggestion, in part because the evidence about the relationship between body weight and added sugar comes mostly from studies about ***sugary beverages*** and body weight, and sugary beverage studies might not be an "appropriate proxy" to draw conclusions about the effects of added sugar in other foods. *Id.* at 33803, 33829. In other words, the FDA thought it might be unwarranted to tarnish other sugary foods with the conclusion that they lead to the same health risks as sugary beverages. *See also infra* at 42 & n.19.

The medical and public health consensus that sugary beverages contribute to obesity and diabetes is abundantly supported by data. Sugary beverages are the single largest source of added sugar in American diets and the third and fourth leading sources of overall calories for children and adults, respectively. ER 192, 197. Yet these calories supply no meaningful nutrition. ER 193. About half of Americans consume soda on a daily basis, and consumption is higher among African-Americans, Hispanics, and low-income people. ER 192, 197. Children and young people are particularly likely to drink soda. Among boys under age 19, 70% drink SSBs daily; consumption for girls is somewhat lower. And a significant number of adults and youth are supersized consumers: 16% of adolescents and 20% of young adults consume more than 500 calories of soda per day, the equivalent of two 20-ounce single-serving bottles. ER 196. These are likely to be

underestimates, since they are based on self-reported surveys, and people typically underreport consumption of unhealthy foods by up to 40%. ER 195-96.

Empirical studies establish beyond cavil that consuming sugary beverages contributes to obesity and diabetes. ER 219-222, 224. Indeed, the debate remaining in this field is not whether they contribute to these conditions but instead whether they contribute through only one channel—by supplying excess calories—or through other, unique channels by which liquid sugar blunts the mechanisms in the body that signal fullness, alters the metabolism in the liver so that sugars are more readily converted to fat, or fosters insulin resistance because of sudden spikes in blood sugar. ER 11, 215-16. But whether sodas cause obesity and diabetes merely through one channel or through two or more channels, there is no reasonable dispute that sugary beverage consumption contributes to obesity. ER 197; ER 485. Even the soda industry does not dispute this; the industry has "set a goal ***to reduce beverage calories consumed*** per person nationally by 20 percent by 2025, the single-largest voluntary effort by an industry ***to address obesity***." SER 54 (emphasis added). And the Plaintiffs' own expert in this case has written that, to address excess calories, a "***reduction in consumption of added sugars should head the list*** because they provide no essential nutrients." R. Kahn & J.L. Sievenpiper, "Dietary Sugar and Body Weight: Have We Reached a Crisis in the Epidemic of Obesity and Diabetes?" *Diabetes Care* 2014; 37:961 (emphasis added) (cited at D.Ct. Dkt. No. 55 at 2 n.1).

Indeed, there is no real debate in this case that the plain language of the City's warning about obesity and diabetes is true. While the City supported its empirical claims about sugary beverages' contribution to obesity and diabetes with expert reports from Dr. Walter Willett of the Harvard School of Public Health, the most-cited nutritionist in the world, and from Dr. Dean Schillinger, the former

chief of the California Health Department's diabetes prevention program and current Chief of Internal Medicine at UCSF, Plaintiffs supported their claims with a report from a nutrition expert, Richard Kahn, Ph.D., who is notable in the field for having previously endorsed the nutritional benefits of vitamin-enriched Froot Loops and Fudgsicles. ER 129, 217.[3] But even Kahn agrees that people who consume excess sugary beverage calories become obese and are at greater risk for diabetes, ER 117, and he offers no evidence to dispute that a significant number of people consume sugary beverages in amounts that exceed—and sometimes greatly exceed—the FDA's recommendations for added sugar intake for all foods.[4]

Kahn's expert report initially attacked a straw man, citing scientific debate about whether sugary beverages cause obesity and diabetes ***by means other than through their caloric contributions***, claiming that the two-channel hypothesis was still controverted, but offering no opinion about the widely accepted one-channel mechanism. ER 640-51. Even in a lengthy rebuttal report, Kahn did not dispute Willett's opinions that large observational studies have consistently demonstrated the association between weight gain and diabetes and sugary beverage consumption. ER 117-19. Instead Kahn responded that other foods also contribute to obesity. ER 118. He also claimed that observational studies, no matter how

[3] Kahn is also the former medical and scientific director of the American Diabetes Association, whose employ he left in 2009. ER 658. Since his departure, the American Diabetes Association has taken a different view than the one he endorses here. It has issued standards of care to doctors which advise them to counsel patients at risk for diabetes to avoid sugary beverages, ER 488, and it recently endorsed a warning label requirement proposed by New York State that is nearly identical to San Francisco's warning, SER 62-63.

[4] The beverage industry argues that the majority of people who drink sodas consume them in moderation. ABA Br. 13. That is likely also true of alcohol, yet alcoholic beverages nonetheless bear a warning that consumption may cause health problems. 27 U.S.C. § 215(a). It should go without saying that harmful consumption patterns by significant numbers of people, even if they are not a majority of the population, can have devastating public and private consequences.

large or consistent, are not enough to demonstrate that sugary beverage consumption, and not some other unknown factor, causes weight gain, and thus that a randomized trial is necessary to truly prove causation. ER 118. By that metric, it will likely never be proven to the soda industry's satisfaction that their product contributes to obesity and diabetes. Randomized trials of nutrition hypotheses are difficult to blind, expensive to sustain over the years it takes for obesity and diabetes to develop, and experience high rates of noncompliance that may invalidate their results. ER 222-23.[5] But there is no reason to await some ideal randomized trial that may never occur. As was the case with cigarette warnings or occupational exposure standards or air-quality standards set by the EPA or warnings about the long-term side effects of pharmaceuticals, well-designed and consistent observational studies provide sufficient basis for the government to set safety standards or abate known risks. ER 204.

There is also broad consensus that drinking sugary beverages contributes to tooth decay, the single most common chronic disease of childhood in the United States, which cost $150 billion in lost productivity and treatment in 2010. ER 487. Dietary sugars are well established to cause tooth decay, and sugary beverages are the single largest source of added sugar in American diets. ER 486. Moreover, interventions that reduce sugar beverage consumption have been shown in turn to reduce tooth decay. ER 486-87. Schillinger's report established this causal link,

[5] Kahn claims conclusorily that randomized trials are "eas[y]" to perform, ER 119, but he never rebuts or acknowledges Willett's account of the reasons randomized trials of obesity and diabetes causal factors are very difficult and expensive to perform, ER 222-23. Moreover, as Willett's report indicates, while the majority of evidence about the link between sugary beverages and obesity and diabetes comes from observational studies because of the difficulties with performing randomized trials, those trials that have been performed support the conclusion that drinking sugary beverages contributes to obesity and diabetes. ER 205-09, 212-13.

and Plaintiffs submitted no evidence to rebut it. Their sole rebuttal is a citation to comments from the American Dental Association ***supporting*** the FDA's proposal to set federal guidelines for added sugar at no more than 10% of daily calories—a recommendation that is impossible to achieve by someone who drinks even one single-serving 20-ounce bottle of soda. In those comments, the ADA acknowledged the relationship between added sugar consumption and tooth decay, stated that "it is a worthwhile goal to recommend that consumers minimize their intake of added sugar(s)," and in particular supported efforts to reduce consumption of sugary beverages by children. Am. Dental Ass'n, Technical Comments of ADA on Scientific Advisory Report of the 2015 Dietary Guidelines Advisory Committee at 1, 2, 6 (May 8, 2015) (http://www.ada.org/~/media/ADA/Advocacy/Files/ltr_150508_hhs_dgac2015_nosig.pdf?la=en).

II. San Francisco's Sugary Beverage Warning Is Likely to be an Effective Tool in Increasing Health Knowledge and Reducing Sugary Beverage Consumption

To address the public health crisis of obesity, diabetes, and tooth decay, San Francisco enacted Ordinance No. 100-15 on June 25, 2016. The ordinance requires sugary beverage advertisements on fixed media in San Francisco to include the statement: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." S.F. Health Code § 4203(a). This warning must cover at least 20% of the ad and be set off in a rectangular border. *Id.* The warning requirement applies to ads for sodas and other nonalcoholic beverages that contain added sugars and more than 25 calories per 12 ounces of beverage, but it does not apply to milk and 100% fruit-juice drinks, S.F. Health Code § 4202, which have more nutritional value and are consumed far less frequently than sodas

and other sugary beverages covered by the warning requirement, ER 193 n.2. The warning requirement applies broadly to any advertisement in San Francisco that markets, promotes, or identifies a sugary beverage for sale or use on advertising space that is fixed within the City's borders, including in-store advertisements, but does not apply to advertisements on specified media that are distributed both inside and outside the city: newspapers and other periodicals as well as television and electronic media. S.F. Health Code § 4202.

The City's warning is intended to inform people about the health risks of sugary drinks and help them make better beverage choices. S.F. Health Code § 4201. While the risks of drinking sodas regularly may be obvious to some, the City's evidence demonstrated that a third of the public is health-illiterate, *i.e.*, lacks the basic information about health facts needed to make healthy choices. ER 493. The highest levels of health illiteracy are among vulnerable populations like children and youth, minorities, and those with lower educational attainment, and health illiteracy is a strong predictor of whether someone consumes sugary beverages. *Id.* The warning combats this lack of information about sugary beverages with design and text that adhere to international standards for effective health warnings. ER 378-85. As the report of health warnings expert David Hammond, Ph.D., explained, advertising warnings like the City's are an effective way to convey important health information to consumers, helping to insure that the health message is conveyed at a time when consumers are processing other information about a product. ER 385-86. Moreover, the size of the City's warning ensures that it will be noticed by consumers; small or inconspicuous warnings are often ignored. ER 387-88. Based on established literature about risk communication and the efficacy of health warnings, and on an empirical study of a similarly worded sugary beverage warning, Hammond opined that the City's

warning is highly likely to be effective in informing consumers about the health risks of sugary beverages, and may reduce sugary beverage consumption. ER 374, 388.

Plaintiffs have never contested the City's evidence about widespread health illiteracy, or its evidence that the warning will be effective in raising awareness of the health risks of sugary drinks. Instead, they contend that the warning will work ***too*** well, overwhelming the message of soda ads or causing consumers to overestimate or misunderstand the health risks of soda. Plaintiffs' evidence about consumers' reception of the warning was presented not through a health warnings or risk communication expert, but instead through a report by a marketing professor, Peter Golder, Ph.D., who specializes in figuring out how businesses succeed through branding and marketing in persuading people to buy their products. ER 688. The upshot of Golder's opinions was that the warning would be too successful: it would "disrupt" the ability of soda ads to convey a message "that will help consumers to recall strong, favorable, and unique brand associations." ER 708. Consumers who saw the warning, he opined, would be impacted by it too much and would "focus on the content of the Warning Message, instead of other messages intended by the marketer." ER 709. Some people might even decide not to purchase or consume sugary drinks as a result of receiving information that these drinks contribute to health harms. ER 711. As Hammond put it, "[b]y Dr. Golder's logic, the best warning is one that is not noticed." ER 390.

Golder also opined that consumers would misinterpret the warning, believing either that beverages with natural sugar (like fruit juice) were less

harmful than beverages with added sugar;[6] or that lifestyle factors like exercise were irrelevant to the development of obesity, diabetes, and tooth decay; or that the risks of drinking sugary beverages were greater than they are. ER 711-13. Hammond, however, stated that Golder's opinions were not grounded in fact. There is no evidence to suggest that health warnings somehow "overwhelm" the advertisements they are affixed to, or so distort their messages that they are useless as advertisements; if that were the case then tobacco companies would have halted print advertisements 40 years ago, yet they have not. ER 390-91. Nor did Hammond find ***anything*** in the empirical literature of risk communications to support Golder's claims that people would believe other sugary foods were better for them than sodas, or that lifestyle factors like smoking or exercise were irrelevant to obesity, diabetes, and tooth decay. In light of the paucity of empirical support, Hammond concluded that "Dr. Golder appears to be unfamiliar both with the scientific literature on risk communications, as well as regulatory practice and international standards for consumer product warnings." ER 398.

The ABA also claims that the City's warning is the largest required on any consumer product. ABA Br. 8 & n.3. This is incorrect. Prescription drug advertisements are required to devote about half of their space to warnings and disclosures. 21 C.F.R. § 202.1(e)(viii) (presentation of negative information must be "reasonably comparable with the presentation of information relating to effectiveness of the drug"). Under a 2009 amendment to federal cigarette laws, cigarette packages must bear warnings on the top 50% of the front and rear panels

[6] In fact they are less harmful. While fruit juices contain naturally occurring sugar, they also supply vitamins and other nutrients, and most importantly there is no evidence that people overconsume them to the same extent as sodas and other beverages with added sugar. ER 193 n.2.

of each package. 15 U.S.C. § 1333(a)(2).[7] Smokeless tobacco packages must bear warnings comprising at least 30% of the two principal display panels of each package, and regulators are authorized by Congress to increase that to 50%. 15 U.S.C. § 4402(a)(2)(A), (d). Smokeless tobacco ads must include warnings covering 20% of their space. *Id.* § 4402(b). And, as the industry acknowledges, the FDA issued a rule requiring cigarette ads to include graphic warnings covering 20% of their space, but the D.C. Circuit invalidated this rule on other grounds, and the FDA has not yet issued a replacement rule. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (holding that *Zauderer* reaches only disclosures intended to correct deceptive advertising) *overruled by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); ABA Br. 8 n.3.

III. The District Court Determined That Plaintiffs Showed Little Likelihood of Success on the Merits

Plaintiffs the American Beverage Association, the California Retailers Association, and the California State Outdoor Advertising Association sued in July 2015, seeking injunctive relief to halt implementation of the warning ordinance, which was originally set to take effect on July 25, 2016. ER 762; S.F. Health Code § 4203(a). In January 2016, Plaintiffs moved for a preliminary injunction. The district court denied their motion after a careful review of the expert evidence submitted by both parties, finding that the City's warning was a factual and accurate disclosure required on commercial speech. ER 9-10, 15-23.[8] Accordingly

[7] Implementation of this statute is awaiting the FDA's rulemaking, as discussed *infra* in this paragraph.

[8] Plaintiffs argued below, as they do here, that the warning also applied to their noncommercial speech, such as ads displaying the Coca-Cola logo alongside political or other messages. ER 9, ABA Br. 8. The district court found this argument irrelevant on a facial challenge, because Plaintiffs did not demonstrate that the warning reaches a substantial amount of noncommercial speech. ER 10 (citing *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003)). Plaintiffs do not contest this holding.

the court applied the test set out in *Zauderer*, 471 U.S. 626, finding that the City had a reasonable basis to require the warning. ER 23. The court also rejected Plaintiffs' arguments that the warning unduly burdened or chilled advertisers' speech. The court credited the City's expert testimony that the 20% requirement was reasonable because a warning must be large enough to catch consumers' attention, and research on health warnings for tobacco products has recommended even larger warnings. ER 18, 25.[9] As discussed further at pages 29-31 *infra*, the court rejected as unpersuasive the conclusory declarations of major soda companies that they would stop advertising on media where warnings are required. ER 26-28. Finally, the court determined that the remaining preliminary injunction factors did not favor an injunction. ER 29-30.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Under this Circuit's sliding-scale test, where the plaintiff has shown a likelihood of irreparable harm and that an injunction is in the public interest, he may obtain an injunction upon a showing of "serious questions going to the merits . . . and [that] the balance of hardships tips

[9] While finding the 20% size requirement reasonable and unlikely to render the warning unconstitutional, the court added that the size was nonetheless substantial, and at least created a "close question" about whether Plaintiffs had raised serious questions on the merits. ER 26, 29. On this ground, and also because this Court has not addressed *Zauderer* in the context of health and safety warnings, the court granted Plaintiffs' subsequent motion for an injunction pending appeal. ER 81-84.

sharply in plaintiff's favor." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011).

This Court reviews the district court's decision to deny a preliminary injunction for abuse of discretion. *See, e.g., Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). The Court reviews the district court's conclusions of law de novo and findings of fact for clear error. *Id.* This review is "limited and deferential." *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (quotation marks omitted). "Under this standard, as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Thalheimer*, 645 F.3d at 1115 (quotation marks and brackets omitted).

CSOAA contends that the facts at issue in this case are "constitutional facts" that are subject to de novo review. CSOAA Br. 23. As this Circuit has explained, however, "constitutional questions of fact" are questions like "whether certain restrictions create a 'severe burden' on an individual's First Amendment rights." *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006). In other words, they are mixed questions of fact and law concerning constitutional questions, in contrast to "historical questions of fact" that depend on the weighing of conflicting evidence, as trial courts are accustomed to doing. *Id.* Here, the factual disputes the trial court resolved—whether the City's warning is accurate and whether sugary beverage companies would stop advertising if they were subject to the warning requirement—are the latter kinds of fact, and the trial court's findings are subject to deferential review.

ARGUMENT

I. The Warning Requirement Does Not Violate The First Amendment

A. The Government May Require Factual Warnings In Service Of Any Legitimate Interest

The First Amendment protects advertisements for Coca-Cola as well as political ads and philosophical treatises—but it offers them different protections, and for different reasons. While "[f]reedom of speech and thought flows . . . from the inalienable rights of the person," *United States. v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opn.), commercial speech is protected not because of any expressive or liberty-based interest of the speaker but instead because listeners have an interest in receiving accurate information about goods and services. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). Because commercial speech protection is listener-focused rather than speaker-focused, a commercial speaker has only a "minimal" First Amendment interest in not providing any particular piece of information to the listener. *Zauderer*, 471 U.S. at 651; *see also id.* ("disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech"). Indeed, providing the listener with truthful disclosures "furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" *Nat'l Elec. Mfrs. Ass'n v. Sorrell* ("*NEMA*"), 272 F.3d 104, 114 (2d Cir. 2001). Accordingly, the Supreme Court held in *Zauderer*, requiring an advertiser to make a factual and accurate disclosure does not offend the First Amendment so long as the disclosure is reasonably related to the government's interest. 471 U.S. at 651.

Plaintiffs argue that *Zauderer*'s rational basis test cannot apply here because the City seeks to advance an interest in public health rather than in preventing deception. But those Circuits to have considered this argument are united in

rejecting it, and for good reason. *Zauderer*'s reasoning is grounded in the listener-focused nature of commercial speech protection. That reasoning applies fully to San Francisco's interest in seeing that consumers receive accurate and important facts about sugary beverages.

Courts did not recognize First Amendment protection for commercial speech at all until 1976, when the Supreme Court recognized that both the consumer and society generally "have a strong interest in the free flow of commercial information." *Virginia State Bd. of Pharmacy*, 425 U.S. at 764. "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Id.* at 765. Conspicuously absent from this justification for protecting commercial speech, however, is any concern for an expressive or autonomy interest possessed by a commercial speaker. To the contrary, the Court brushed quickly past the speaker's interest, noting only that "we may assume that the advertiser's interest is a purely economic one," which did not *disqualify* an advertiser from First Amendment protection, but did not qualify him for it either. *Id.* at 762. And while the Court has subsequently recognized that advertisers, too, have a First Amendment interest in conveying truthful information about their products, *see, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001), that interest is conceived as an informational interest rather than an autonomy-based interest, in keeping with the "subordinate position" of commercial speech in the "scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Plaintiffs repeatedly ignore or elide the differences between the First Amendment interests of commercial and noncommercial speakers in their briefs. For instance, they repeatedly rely on cases involving noncommercial compelled

speech, like *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), which concerned New Hampshire's requirement that every license plate it issued bear the words "Live Free or Die," and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (plurality opn.), which concerned the requirement that space in a utility company's noncommercial newsletter must be periodically turned over to an advocacy group to express its hostile views. The billboard association even announces on page one of its brief that this case is about thought control, about " 'regulations . . . that [seek] to shape our unique personalities.' " CSOAA Br. 1 (quoting *United States v. Playboy Entmt. Grp., Inc.*, 529 U.S. 803, 818 (2000)). Hardly. The case is about commercial speech, not the flowering of personal expression. Relying on concepts and principles from pure speech cases in an advertising case "invite[s] dilution, simply by a leveling process, of the force of the Amendment's guarantee." *Ohralik*, 436 U.S. at 456.

Because the listener's informational interest is advanced whenever the government requires accurate disclosures, and because there is only a "minimal" countervailing interest possessed by the commercial speaker, the speaker's First Amendment interest is adequately protected by *Zauderer*'s deferential test. 471 U.S. at 651. That is true regardless of whether the government's interest is in preventing deception, as it was in *Zauderer* and *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), or in informing the public about safe toxin disposal, *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 850 (9th Cir. 2003); promoting consumer choice on food safety issues, *American Meat Institute v. U.S. Dept. of Ag.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc); promoting cost-effective health care, *Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005); informing consumers of the calories contained in their food, *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d

114, 133 (2d Cir. 2009) ("*NYSRA*"); or promoting awareness of the risks of smoking, *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556 (6th Cir. 2012). Indeed, every Circuit to have considered this question has held that *Zauderer* applies to any legitimate government interest, not merely to the interest in preventing deception.[10]

Plaintiffs nonetheless urge this Court to adopt the outlier view that *Zauderer* applies exclusively to disclosures to correct potentially misleading speech. They are correct that the Supreme Court has never had the occasion to apply *Zauderer* to disclosures serving interests other than preventing deception, but neither has it foreclosed those applications. And the rationale that Plaintiffs offer for this narrow view of *Zauderer*—that it is grounded in the lack of First Amendment protection for potentially misleading commercial speech—is incomplete and inaccurate. Commercial speech may be prohibited in keeping with the test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), where necessary to prevent deception ***or to prevent other harms***. *See, e.g., Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995) (prohibition on unsolicited commercial faxes was a reasonable measure to prohibit advertisers from shifting costs to customers who received faxes). The limited protection

[10] A panel of the D.C. Circuit initially held that *Zauderer*'s rational basis test extended only to preventing deception. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213-14 (D.C. Cir. 2012). The en banc court subsequently overruled that holding. *Am. Meat Inst.*, 760 F.3d at 22-23. Plaintiffs also cite *Dwyer v. Cappell*, 762 F.3d 275 (3d Cir. 2014), as a case supporting a restrictive view of *Zauderer*'s applicability. ABA Br. at 28 n.10. But *Dwyer* concerned only a disclosure requirement applicable to potentially misleading attorney speech and had no occasion to explore *Zauderer*'s full reach. *See Dwyer*, 72 F.3d at 277-78. The same is true for the cases of this Court that Plaintiffs cite. *See United States v. Schiff*, 379 F.3d 621, 630-31 (9th Cir. 2004) (promoter of tax scheme could be required to post injunction on his website to warn potential customers "of the hazards of the product"—*i.e.*, potential exposure to criminal prosecution); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009) (deceptive effect of age ratings that already appear on video game packaging).

commercial speech receives under the First Amendment does not turn on whether it has the potential to deceive; rather, that is one of many reasons that may serve to justify restriction. Likewise it makes no sense for the protection commercial speech receives from compelled disclosures to turn solely on its deceptive potential. "The language with which *Zauderer* justified its approach … sweeps far more broadly than the interest in remedying deception." *Am. Meat Inst.*, 760 F.3d at 22.

Even if *Zauderer* and *Milavetz* were applicable only where commercial speech is potentially misleading, however, they impose only a light standard for what is "potentially misleading." In *Milavetz*, the Supreme Court approved a mandatory disclosure on the advertisements of law firms that offered to assist consumers with debt. The disclosure was required to include the statement, or its equivalent, "We are a debt relief agency. We help people file for bankruptcy." 559 U.S. at 233. Advertisements that did not contain such disclosures, the Court held, could mislead consumers by "hold[ing] out the promise of debt relief without alerting consumers to its potential cost." *Id.* at 251. If omitting important information about a product or service is potentially misleading, then the sugary beverage advertisements at issue in this case meet that test. The ABA's brief reproduces a full page of Coca-Cola and Pepsi ads promising happiness and refreshment that, without the City's warning, would not alert consumers to the potential health harms of these drinks. ABA Br. 49. The City offered unrebutted evidence to demonstrate that a significant share of the public is unaware of the health risks of sugary beverages, and that sugary beverage consumption is highest among people who are considered "health illiterate." ER 392, 493-94; *see also* ER 549-51. Under *Milavetz*, that is enough to justify the warning.

B. The District Court Correctly Applied *Zauderer* To The Facts Here, And Its Resolution Of Factual Disputes Is Owed Deference

Because *Zauderer* applies here, the City's warning must be upheld if it is factual and accurate, and if it is reasonably related to the City's interest in public health. The district court, on a contested factual record, answered both questions affirmatively. Its determinations that the City's warning is accurate, and that the industry failed to show that the warning would cause advertisers to refrain from speaking, are entitled to this Court's deference. *See Thalheimer*, 645 F.3d at 1115; *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 825 (9th Cir. 2013) (deferring to district court factual findings even where district court relied on "weak" declaration evidence). Plaintiffs fail to show that the district court clearly erred.

1. The City's Warning Is Factual And Accurate

As the district court determined, there is no colorable dispute that sugary beverages contribute to obesity, which in turn contributes to diabetes. ER 20 ("There is no real dispute as to the literal accuracy of the required warning.") Regardless of whether unique properties of liquid sugar make it more likely to cause obesity than equal amounts of calories from other foods, the facts remain that levels of consumption of sodas and other sugary beverages set them apart from other foods. They are the single largest source of added sugar in American diets, are largely or entirely excess calories because they supply no nutrition, and are commonly marketed and consumed in single servings that exceed an entire day's allowance of added sugars. These undisputed facts make the City's warning accurate.

That is all that is required under *Zauderer*. Plaintiffs, however, contend that the City must show not only that its warning is accurate but that no reasonable consumer could take from it inaccurate information. In their view, they need only raise the specter that a reasonable person could misunderstand the warning, and to

that end they argue that a reasonable consumer ***could*** take from the warning a message that beverages containing added sugar are inherently and uniquely harmful, or will inevitably cause obesity, diabetes, and tooth decay in anyone who consumes them. *E.g.*, ABA Br. 38, 45; CSOAA Br. 45-46. Plaintiffs' source for this standard is *CTIA-Wireless Association v. City & County of San Francisco*, 494 Fed. Appx. 752 (9th Cir. 2012), an unpublished decision that this Court designated as nonprecedential. *See id.*

Plaintiffs' claims about the *Zauderer* standard are foreclosed by *Milavetz*, which approved a requirement that law firms offering to assist consumers with debt must identify themselves as "debt relief agencies" in advertisements. 559 U.S. at 233. *Milavetz* rejected the claim that the term "debt relief agency" would be confusing or misleading to consumers, because the term had a fixed statutory meaning (although the statutory definition was not included in the required disclosure) and because the law firm could explain its meaning or give other context in the ad, such as by also identifying itself as a law firm. *Id.* at 251-52. Certainly a reasonable person viewing an ad containing only the required disclosure in *Milavetz* ***could*** believe that a "debt relief agency" was many things other than a law firm whose services included bankruptcy filings; that was not enough to invalidate the disclosure. And the soda companies here, just like the law firm in *Milavetz*, are free to provide whatever additional information they choose to further explain or respond to the warning.

The Second Circuit has also rejected the prospect that potential misunderstandings invalidate compelled disclosures. In *New York State Restaurant Association v. New York City Board of Health*, restaurants subject to a requirement that they disclose calorie amounts in their foods argued that it was misleading to communicate that caloric content was the most important aspect of

nutrition that consumers should consider in ordering. 556 F.3d at 134. The Second Circuit nonetheless held that because the calorie amounts were factual, the requirement to disclose them was governed by *Zauderer* notwithstanding the plaintiffs' claim that the disclosure was "under-inclusive." *Id.* (quoting *Zauderer*, 471 U.S. at 651 n.14).

Moreover, the logical implications of Plaintiffs' position are enough to rebut it. Plaintiffs themselves presented evidence below that "consumers overestimate the risks that they derive from warning messages," such as warnings on pharmaceutical ads about possible side effects. ER 712-13. On their view, then, drug warnings violate the First Amendment because they are often misunderstood. The same is likely true of the federally-mandated warning on alcoholic beverage labels that "[c]onsumption of alcoholic beverages . . . may cause health problems" or conveying the Surgeon General's view that "women should not drink alcoholic beverages during pregnancy because of the risk of birth defects." 27 U.S.C. § 215(a). If the possibility that consumers would over- or underestimate the risks conveyed by a required warning were enough to invalidate it, health and safety warnings would be nigh impossible.

2. There Is No Support For Plaintiffs' Claims That Consumers Will Misunderstand The Warning

To the extent that consumers read the warning and conclude either that drinking sugary beverages contributes to obesity, diabetes, and tooth decay; or that drinking sugary beverages contributes to these health harms to a greater extent than other foods and drinks, they are correct and are not misled. As the district court determined, there is no dispute that the literal language of the City's warning is true. ER 15, 20. And the district court further credited the City's factual showing that sugary beverages are a more problematic source of calories than other foods

and beverages: they "provide no nutritive value," ER 22; people consume them in significant amounts, ER 21; many people overconsume them, ER 22-23; and they are marketed and sold in single-serving amounts that approach or "exceed[] [the FDA's] 10% recommended daily limit [for added sugar] . . . . [T]he situation is even worse for young children" whose daily caloric intake is lower than adults'. ER 22. These factual findings are entitled to deference, and on the basis of the record below the district court did not clearly err in finding that the City singled out sugary beverages for warning with ample reason. People who read the warning and take from it that sugary beverages are of special concern, and should be consumed with caution, are correct. Nor is the City required to address all sources of obesity with a warning before it can address any sources; *Zauderer* itself rejects an underinclusivity challenge, finding that "governments are entitled to attack problems piecemeal" where commercial speech is concerned. 471 U.S. at 651 n.14.

Plaintiffs go further, however, and advance two supposed misinterpretations in particular. They argue that consumers reading the warning will be deceived that (1) there is something uniquely harmful about sodas and other sugary beverages compared to products with naturally occurring sugar or other sources of calories, or (2) beverages with added sugar are always dangerous and must be avoided entirely. ABA Br. 37. These exaggerated claims were correctly rejected by the district court.

As for the first proposition, the district court did not credit Plaintiffs' experts' views that people would read the warning message as conveying that added sugar is intrinsically worse than natural sugar or than other kinds of foods. ER 651, 654 (Kahn opinion); 711 (Golder opinion). As Hammond explained, neither Golder nor Kahn has expertise in risk communication or public health

warnings, and neither offered any support in their reports for this view. ER 398, 400. In its briefs here, the soda industry does not rely on its experts' opinions but instead claims that it is simply "common sense" that the warning conveys the message that there is something worse about soda and other sugary beverages. ABA Br. 37. That is true as far as it goes: In light of real-world patterns of marketing and consumption, sodas are worse, and there is no other food whose contribution to obesity and diabetes has been so well documented. *See, e.g.*, 81 Fed. Reg. at 33803 (noting that the majority of evidence about added sugar and obesity comes from sugary beverage studies and that "the evidence on sugar-sweetened beverages and body weight/adiposity is strong and consistent"). But there is nothing commonsensical in claiming that consumers will believe the warning to take a position in the ongoing scientific discussion about exactly why it is that sodas contribute so much to obesity. ER 399.[11]

The same is true for Plaintiffs' second supposed misinterpretation, that people will believe the warning to claim that beverages with added sugar are always dangerous and should not be consumed, even in moderation. As Hammond explained, the warning's use of the term "contributes" indicates that there are also other factors—in this case, lifestyle and exercise—that help determine those health outcomes. ER 396. Hammond also found Plaintiffs' claim to be inconsistent with the empirical evidence about other health warnings, and with the only study of a sugary beverage warning, which found that many consumers shifted away from

[11] Plaintiffs also rely on media statements by San Francisco Supervisor Scott Wiener, and on comments by public health groups who supporting public health campaigns, that they claim take sides in ongoing scientific debates. ABA Br. 1, 11; CSOAA Br. 8-9. They offer no evidence that consumers will view the warning to adopt one or another of these statements. In any event, this Court has previously held that allegations about the subjective motives of a legislator in enacting a law have no place in the First Amendment analysis of that law. *See City of Las Vegas v. Foley*, 747 F.2d 1294, 1298, 1299 (9th Cir. 1984).

sugary beverages after reading the warning but some continued to choose them. ER 398. Moreover, if the City's warning leads consumers to believe there is no safe level of sodas to consume, then the federally mandated alcohol warning does the same for alcohol. That warning says that "[c]onsumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems" but does not disclaim that there are safe levels that can be consumed before driving is dangerous or health problems are likely. 27 U.S.C. § 215(a). Also fatally overbroad, on Plaintiffs' view, is California's Prop 65, which requires consumer products containing State-identified carcinogens, or places where carcinogens are present, to include a warning stating: "WARNING: This product [or area] contains a chemical known to the State of California to cause cancer." Cal. Health & Safety Code § 25603.2(a) (product warning), § 25604.2(b) (area warning). Reasonable consumers do not take this to mean that limited use of a product will necessarily lead to cancer. Nor will they take an exaggerated view of the risks of soda from the City's warning.

3. The Warning Is Reasonably Related To The City's Legitimate Ends, And Does Not Unduly Burden Or Chill Plaintiffs' Speech

For factual and accurate disclosure requirements, *Zauderer* articulates a deferential test:

> We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest . . . .

471 U.S. at 651. The First, Second, and Sixth Circuits have held that the operative test here is whether the disclosure requirements are "reasonably related to the State's interest." *NEMA*, 272 F.3d at 115 ("The Amendment is satisfied . . . by a rational connection between the purpose of a commercial disclosure requirement

and the means employed to realize that purpose."); *see also Pharmaceutical Care Mgmt. Ass'n*, 429 F.3d at 310; *Discount Tobacco*, 674 F.3d at 566-67 (finding that the reference to "unduly burdensome" requirements or "chilling" should not be read as independent tests for whether a warning is permissible under *Zauderer*). By contrast, the D.C. Circuit and the Third Circuit have treated *Zauderer*'s reference to "unduly burdensome" or "chilling" disclosure requirements as setting out an operative test. *Am. Meat Inst.*, 760 F.3d at 27; *Dwyer*, 762 F.3d at 283. Under this test, the question is whether the disclosure requirement is "so burdensome that it essentially operates as a restriction on constitutionally protected speech." *Am. Meat Inst.*, 760 F.3d at 27 (citing *Ibanez v. Florida Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 146-47 (1994)).

The Court need not resolve any tension between these contrasting articulations of the test, because the City's warning passes muster under either approach. A factual disclosure of health risks on advertising is an effective public health measure to improve consumer awareness of risk and to persuade consumers to make healthier choices, and thus the City's evidence demonstrates a reasonable relationship between the warning requirement and its public health aims. ER 18.

Nor have Plaintiffs shown that the warning requirement will unduly burden or chill their speech. With regard to chilling, Plaintiffs presented conclusory declarations from distributors of Coca-Cola, Pepsi, and Dr. Pepper stating that if the warning requirement were upheld, they would shift their advertising away from billboards, transit stops, and other media covered by the ordinance. ER 557, 590, 605. Hammond, by contrast, noted that tobacco companies continued to pursue print advertising as an important form of marketing even after they were required to disclose the health effects of tobacco in those ads, and opined that soda companies would continue to find advertising valuable even with the required

warning. ER 391. The City also noted that Plaintiffs themselves had averred that they used billboards and other covered media "because they believe that is the most effective way to spread their messages," arguing that it was unlikely that soda companies would forego the "most effective" kinds of advertising even with the warning. ER 185 n.11 (citing SER 93 n.13). And the City presented evidence that sugary beverage advertising is ubiquitous in some convenience stores, especially in minority communities like the Tenderloin and Mission neighborhoods of San Francisco, where people tend to drink more soda. ER 483, SER 23-43. This point-of-purchase advertising would be difficult to replace with TV, internet, or newspaper ads that are not subject to the warning requirement. ER 385-86 ("point-of-purchase is a critical environment for influencing consumer decision making").

The district court ultimately did not credit Plaintiffs' evidence. ER 26-28. To the extent the declarations could be read to mean that soda companies would find no benefit whatsoever in advertising with the warning appended, the district court found that claim unpersuasive in light of the experience of tobacco companies, which have continued to advertise. ER 26 (citing *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 55 (1st Cir. 2000) (rejecting the "difficult-to-believe proposition" that cigar companies would stop advertising if they had to display health warning) *rev'd in part on other grounds sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)). And to the extent that the declarations could be read to mean that the burden of displaying the warning outweighs the benefit of advertising on covered media, the district court noted that the declarants offered no specific information, such as the extent to which they expected advertising to be less effective with the warning appended, especially in light of their testimony that advertising on the covered media was very valuable. ER 27-28. Ultimately, the court concluded that this evidence was "of questionable credibility." ER 28.

The district court's considered factual findings are entitled to deference. While Plaintiffs reargue the points made by the soda company declarants, they never satisfactorily respond to the district court's concerns about the declarations: that they were inconsistent with experience in the tobacco context, that Plaintiffs themselves attested that advertising on the covered media had significant value, and that they provided no specific information that would persuade the court that they actually had concrete plans to abandon certain forms of advertising. ABA Br. 56-58. This is a far cry from demonstrating an abuse of discretion by the district court.

But even if the court had credited Plaintiffs' evidence, that evidence would not demonstrate impermissible chilling, for two reasons. First, Plaintiffs never claimed that they would advertise less overall, or that consumers would get less information about sugary beverages if the City's warning were enacted, but only that they would no longer use covered media, shifting their advertising from some kinds of media to others. ER 589-590, 615, 577, 605; SER 91, 94. Since the basis for First Amendment protection of commercial speech is the informational value the speech has for consumers, *see supra* at 19, there cannot be a First Amendment harm if consumers receive just as much advertising about sugary beverages after the warning is imposed as before it.

Second, even if soda companies advertised less overall as a result of the warning requirement, that in itself would not create chilling because it is the product of the companies' own choices. While a company might choose not to advertise if it is required to confess that its product contributes to chronic diseases, that choice does not establish the existence of a constitutional issue because, as *Zauderer* holds, the First Amendment interest in *not* disclosing accurate information is "minimal." The First Amendment guarantees commercial speakers

the right to speak about their products but does not insulate them from hard choices. To hold the contrary would be to give commercial speakers a veto over disclosure requirements no matter how accurate or important: Advertisers could simply claim that they would choose not to advertise in order to invalidate a disclosure. Such an approach would also likely foreclose all required disclosures except those imposed by the federal government, since the Commerce Clause prevents states and localities from imposing disclosure requirements in some media, such as national magazines. *See Consol. Cigar Corp.*, 218 F.3d at 56.[12] It would be perverse indeed if the only valid disclosure requirements were those that affected the most media and the most speech, and it would be inconsistent with *Zauderer*'s description of an undemanding reasonable-relationship standard. 471 U.S. at 651.

Independently, Plaintiffs contend that the City's requirement is unduly burdensome because the ordinance requires the warning to cover 20% of advertising space. The district court rejected this claim, finding that the City "had a reasonable basis for requiring that the warning constitute 20% of the advertisement" in light of the evidence before it. ER 18 (citing the Hammond report and World Health Organization studies). Other courts concur; the Sixth and First Circuits have both held that a requirement to devote 20% of advertising space to a health warning is not unduly burdensome. *Discount Tobacco*, 674 F.3d at 567; *Consolidated Cigar*, 218 F.3d at 55. Indeed, even in circuits that have articulated "undue burdens" as an independent test for the validity of a disclosure requirement, a warning is unconstitutional only where it is so burdensome that it is tantamount to a restriction on speech. *Am. Meat Inst.*, 760 F.3d at 27; *Dwyer*, 762 F.3d at 283.

[12] California cities are prohibited from regulating extraterritorially by the California Constitution. Cal. Const. art. XI, § 7.

Since Plaintiffs are not prevented from speaking, and have ample space to counter-speak, they have not shown a burden of this magnitude. Nor do they fare better in contending that they will be effectively prevented from speaking because consumers will notice only the warning and not the messages of their ads. The City's evidence demonstrated that consumers viewing ads with warnings notice and retain information about both the ad and the warning. ER 390-92. While Golder disputed this evidence, the district court was "not persuaded," ER 25, and merely rehashing Golder's arguments does not demonstrate that the court abused its discretion.

C. CSOAA's Additional First Amendment Claims Are Waived and Meritless

CSOAA argues that the district court "failed to consider" CSOAA's "additional First Amendment interests." CSOAA Br. 29-30. But the briefs CSOAA filed in the district court never mentioned those interests. SER 64-95, 1-21. CSOAA's brief on appeal cites several paragraphs in a declaration filed by its Assistant Executive Director, but a declaration is not the place for legal argument. *Silver v. Exec. Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 732 n.2 (9th Cir. 2006); *King Cty. v. Rasmussen*, 299 F.3d 1077, 1082 (9th Cir. 2002); Civ. L.R. 7-5(b). If CSOAA wanted the district court to consider other First Amendment claims, then it was required to identify them in its memorandum and provide relevant argument and authority. *See Special Devices, Inc. v. OEA, Inc.*, 131 F. Supp. 2d 1171, 1175 (C.D. Cal. 2001); Civ. L.R. 7-4(a). Because it failed to do so, those claims are waived on appeal, and CSOAA offers no argument in its opening brief to excuse this waiver. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (arguments not raised in the district court are waived, as are arguments not made in the opening brief on appeal).

These waived claims are meritless in any event. First, CSOAA contends that the warning requirement interferes with its right to exercise editorial control over the content and aesthetic attributes of the advertisements it carries, citing the "principle of autonomy to control one's own speech." CSOAA Br. 30 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995).) But *Hurley* was not a commercial speech case, and as discussed above, commercial speech receives (limited) First Amendment protection not because of the speaker's autonomy interest, but because of the listener's interest in the free flow of commercial information. *Supra* at 18-19. CSOAA also cites *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), but that case involved an advertiser's request for an injunction forcing a newspaper to accept an advertisement in precisely the form in which it was tendered. The court simply held that the district court properly declined to order the newspaper to print the advertisement without alteration. It did not hold—and never considered a claim—that the newspaper's right to editorial control over the advertisements it printed trumped otherwise applicable governmental disclosure requirements. The standard applicable to required disclosures is set forth in *Zauderer* and *Milavetz*. No case holds that a disclosure requirement that satisfies that standard nonetheless violates a putative "right to editorial control" over the content and form of advertisements.

The same is true of CSOAA's second argument—that the disclosure requirement violates the "right to be free from compelled association." CSOAA Br. 31. Again, no case holds that a disclosure requirement that satisfies *Zauderer* nonetheless violates the freedom of association of the media owner. Such a holding would invalidate mandatory disclosures on tobacco, alcohol, and drug advertisements, as well as the disclosure upheld in *Zauderer* itself. CSOAA relies on cases that did not concern commercial speech. *See Roberts v. U.S. Jaycees*, 468

U.S. 609 (1984) (state could lawfully require private organization to accept women as full voting members); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (use of union fees to support ideological causes not germane to union's duties as collective bargaining agent); *Pac. Gas & Elec. Co.*, 475 U.S. 1 (law requiring utility company to distribute material from advocacy organization). Moreover, the claim that people would associate the billboard owner with a required disclosure, attributed to the government, on a product advertisement is absurd on its face.

Finally, CSOAA contends that the warning requirement is unconstitutional because it forces CSOAA to subsidize speech to which it objects, citing *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). This argument is meritless, first, because this is not a compelled subsidization case.[13] Second, even if the warning requirement were construed that way, it would not help CSOAA. *United Foods* involved a compelled subsidy for speech by a private speaker, and CSOAA fails to cite *Johanns v. Livestock Marketing Association*, in which the Supreme Court held that a compelled subsidy of ***government*** speech does not violate the First Amendment. 544 U.S. 550, 559-67 (2005). Here, the disclosure is clearly identified as "a message from the City and County of San Francisco"; indeed, the declaration CSOAA submitted itself claimed that the Ordinance would require its members to subsidize ***the City's*** speech, not that of a private party. CSOAA ER 36

[13] No case holds that a mandatory ***disclosure*** on a product advertisement that satisfies *Zauderer* impermissibly compels subsidization of speech—a proposition that, like CSOAA's other arguments, would invalidate disclosure requirements of any kind. Moreover, there is no evidence that the "subsidy" exists or would be borne by CSOAA's members in any event. The declaration that CSOAA submitted in the trial court contains a conclusory assertion that a "decrease in the size of space that is usable for the customer's advertisement would adversely affect the price and/or demand for outdoor advertising," CSOAA ER 34, but neither of those things have been shown to exist, and neither of them constitute a subsidy. And the same declaration asserts that CSOAA's members could simply pass the "cost" on to their SSB customers, CSOAA ER 36.

¶ 21. Thus, even if construed as a subsidy, the warning requirement passes constitutional muster.

D. Even If Heightened Scrutiny Were To Apply, the Ordinance Should Be Upheld

Zauderer's deferential test, and not heightened scrutiny, supplies the standard here because the City is not restricting the flow of commercial information but instead is augmenting it. Plaintiffs nonetheless borrow from cases concerning ***restrictions*** on commercial speech to argue that the warning requirement should be invalidated under heightened scrutiny. ABA Br. 25-27; CSOAA Br. 32-36. The warning requirement would pass muster even under that standard.

This Court recently held that content- or speaker-based restrictions on non-misleading commercial speech are subject to heightened judicial scrutiny. *Retail Digital Network LLC v. Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016) (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011)).[14] But it emphasized that this standard does not rise to the level of strict scrutiny, and that it "may be applied using the familiar framework of the four-factor *Central Hudson* test." *Id.* & n.3. Those factors are: "(1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest justifying the regulation is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest." *Id.* at 643 (citing *Central Hudson*, 447 U.S. at 566).

[14] At the time of this writing, there is a pending motion for panel and en banc rehearing in *Retail Digital*.

1. The City's Interests Are Substantial

In the district court, Plaintiffs did not dispute that the City's interests in enacting the Ordinance are substantial. SER 90-92 (addressing only the last two *Central Hudson* factors), 13-16 (same). For the first time on appeal, CSOAA argues that providing information to consumers is not a substantial governmental interest, and that whether such information would lead to improved diet and health is only speculation and conjecture. CSOAA Br. 33-34. Like its arguments about other First Amendment interests, this argument is waived because it was not raised in the district court.

In any event, the City plainly has a substantial interest in providing San Franciscans with information relating to their health. CSOAA cites *International Dairy Foods Association v. Amestoy*, 92 F.3d 67, 73-74 (2d Cir. 1996), for the proposition that "consumer interest" in receiving information is an insufficient basis to compel speech, but omits the rest of the court's holding—"absent some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern." *Id.* at 74.[15] San Francisco's concern about chronic diseases with immense public health impacts—and the relationship between lack of health information and sugary beverage consumption—is substantial by any measure. *See, e.g.*, *NYSRA*, 556 F.3d at 134 (law requiring calorie disclosures on certain restaurant menus did not serve simply to gratify consumer curiosity but was related to New York's substantial interest in preventing obesity).

[15] The Second Circuit has repeatedly limited this case to its facts. *See, e.g.*, *NEMA*, 272 F.3d at 115 n.6 ("our decision was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'"); *NYSRA*, 556 F.3d at 134.

2. The Warning Requirement Directly And Materially Advances The City's Interests

The evidence presented to the district court showed that the warning will be effective. Its language and design complies with best practices for health warnings, ER 374-85, and a recent study testing the same language found that the presence of the health warning made parents significantly less likely to choose a sugary beverage for their child, ER 387-88. More recently still, a study of teenagers demonstrated that viewing the warning informed them of the health risks of sodas and made them less likely to choose sodas.[16]

Plaintiffs argue that the warning ordinance contains too many exceptions to advance the City's interests—specifically, that it is unconstitutionally underinclusive with respect both to covered media (applying, for example, to billboards but not television or internet advertisements), and to covered products (excluding beverages such as 100% fruit juice and flavored milk). ABA Br. 25-26; CSOAA Br. 34-35. Underinclusiveness, however, is not a "freestanding" First Amendment test. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015). Instead, an underinclusive law is fatally flawed only when its exceptions are arbitrary or ensure that it will fail to achieve its aim. *Metro Lights L.L.C. v. City of Los Angeles*, 551 F.3d 898, 905-06 (9th Cir. 2009). But underinclusivity does not pose concern where "policymakers . . . focus on their most pressing concerns" first, even if they "conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee*, 135 S. Ct. at 1668; *accord*, *Wolfson v. Concannon*, 811 F.3d 1176, 1183-84 (9th Cir. 2016).

[16] ; VanEpps EM, Roberto CA, "The Influence of Sugar-Sweetened Beverage Warnings," *American Journal of Preventive Medicine*, 2016, available at <http://www.ajpmonline.org/article/S0749-3797(16)30258-6/pdf>.

With respect to covered and exempted media, there is an obvious difference between geographically fixed signs (like billboards, storefront signage, and vending machines), and media that reach San Francisco but simultaneously other localities as well (like the internet, radio, television, and newspapers). In the case of the latter, placing the warning only on ads viewed in San Francisco would likely pose technological, logistical, or economic burdens that do not exist with fixed signs. By exempting those media from the warning requirement, the City avoids feasibility objections and potential litigation asserting that the City is effectively seeking to regulate outside of its jurisdiction—challenges that could jeopardize the Ordinance altogether or delay its implementation. The exceptions for these media thus support the City's interest in having the Ordinance take effect. *Cf. World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 685 (9th Cir. 2010) (exceptions to freeway-facing sign ban served city's interest in removing blight by allowing some freeway improvement projects to go forward that otherwise might not). Moreover, it is reasonable for the City to conclude that, in view of the logistical burdens it would impose to require the warning on multi-jurisdictional media, "its interests should yield" in those instances. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981); *accord*, *Metro Lights*, 551 F.3d at 908, 910-11.

Plaintiffs offered declarations from industry executives stating that they would avoid the warning requirement by moving their advertisements to non-covered media, but as discussed *supra* at 29-31, the district court found their assertions about the extent to which they would withdraw their advertising from covered media unconvincing and unsubstantiated. ER 26-28.[17] Moreover, even if

[17] Plaintiffs assert that the City's brief in the trial court stated that "rational" advertisers would "cease advertising on the covered media and switch to the exempted media." CSOAA Br. at 34; *see also* ABA Br. at 25. In fact, the cited

significant portions of advertising were redirected to non-covered media, the warning would still appear on signs throughout the City, such as on vending machines and storefronts. *See* SER 27-43. And Golder asserted that consumers will associate the warning with beverage companies' brands even where the warning does not appear. ER 714-15. Thus, even a warning requirement that is limited to fixed signs promotes the City's interest in public health. *See Metromedia*, 453 U.S. at 511 and *Metro Lights*, 551 F.3d at 910-11 (both explaining that, while city could have banned more advertising, more limited ban nonetheless advanced its interest).

With respect to the City's decision to focus on sugary beverages, Plaintiffs' argument ignores the rule that even where heightened scrutiny applies, "policymakers may focus on their most pressing concerns." *Williams-Yulee*, 135 S. Ct. at 1668. As set out *supra* at 5-11, there is ample reason for the City to target sugary beverages for a warning, and this focus is fully consistent with the City's interest in public health.

For these reasons, Plaintiffs' reliance on cases in which a law's "exemptions defeated its purpose," *Metro Lights*, 551 F.3d at 905, is misplaced. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999). Nor is this a case where the exemptions "bear[] no relationship ***whatsoever*** to" the City's asserted interests. *Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410, 424 (1993) (emphasis in

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footnote pointed out that there is "ample reason to doubt" industry assertions that they will withdraw from covered media in light of their own argument that covered media are the most effective way to spread their messages and provide benefits not offered by other forms of media. ER 185 n.11; *see* SER 93. The quoted statement acknowledged that a rational advertiser will shift away from covered media "at least to some extent"—a qualification that Plaintiffs omit—but pointed out that, if any such shift constitutes "chilling," then any disclosure requirement other than a federal one would be constitutionally objectionable. ER 185.

original). Here the City has valid public health reasons to focus on sugary beverages, *see id.* at 425 n.20 (distinguishing *Metromedia*, 453 U.S. at 511, on the ground that there the city could believe that offsite advertising presented "a more acute problem"), as well as to exclude certain media from the warning requirement, *see Metro Lights*, 551 F.3d at 911 (distinguishing *Discovery Network* by noting that, in the present case, the city has "some basis for distinguishing" between different types of commercial signage and the exception "does not work at inexorable cross-purposes" to the city's interest).

Plaintiffs also argue that, because product labels are already required to include sugar content, San Francisco's warning "will do nothing meaningful to advance consumer education." ABA Br. 26. But the City's evidence demonstrated that health information that is not prominent often goes unnoticed by consumers and is not effective at communicating risk, ER 377-82, and the warning conveys information that the product label does not.[18]

Plaintiffs also state that the FDA has declined to require what they characterize as "similar" warnings, quoting the FDA's statement that those warnings "are not consistent with our review of the evidence." ABA Br. 26, (quoting 81 Fed. Reg. at 33829). As discussed *supra* at 6-7, Plaintiffs misstate the FDA's position; the FDA rejected the suggestion that a warning should be applied to ***all*** foods containing added sugar, in part because the majority of evidence about the health risks of added sugar comes from sugary beverage studies, and the FDA was concerned about the validity of extrapolating health concerns about sugary

[18] Moreover, recent research has demonstrated that the warning is more effective in communicating health risks than is a label that simply identifies the calorie content. *See* Roberto CA, Wong D, Musicus A, Hammond D, "The Influence of Sugar-Sweetened Beverage Health Warning Labels on Parents' Choices," *Pediatrics*, 2016;137(2):e20153185.

beverages to all sugary foods. *See* 81 Fed. Reg. at 33829 (citing response to comments 136 and 137 in rejecting warning proposal); *id.* at 33803 (in comment 136, explaining that most research about the effects of added sugar comes from sugary beverages).[19]

Plaintiffs and their *amici* also rely heavily on *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), to claim that a law targeting a particular message is subject to heightened scrutiny, but it is a reliance based on snippets of text taken out of context. *Sorrell* concerned Vermont's prohibition on the sale, disclosure, and use of certain pharmacy records in order to prevent drug companies from crafting marketing messages tailored to the prescribing practices of individual doctors. *Id.* at 557-58. The Court held that a restriction on the disclosure of truthful commercial information by pharmacies could not be justified by the State's contested view that such marketing distorted doctors' prescribing practices—a view the Court characterized as "nothing more than a difference of opinion" about whether those practices were in fact harmful. *Id.* at 579.

There are two dispositive differences between this case and *Sorrell*. The first is that the City's warning ordinance does not suppress or restrict consumer information but instead augments it—a "fundamental[] differen[ce]" under the First Amendment. *Discount Tobacco*, 674 F.3d at 552; *see also supra* at 18-19. It

[19] Comment 137 addressed an objection to distinguishing added sugars from natural sugars and the requirement of disclosing the former. In response, the FDA explained that its basis for requiring the disclosure was not related to "an independent relationship between added sugars and a risk of chronic disease, but rather on the contribution of added sugars to an overall dietary pattern. Added sugars consumption among the general U.S. population exceeds what can reasonably be consumed within calorie limits and can have a negative impact on health." 81 Fed. Reg. at 33804. This explanation supports the view that patterns of consumption are important when identifying and addressing public health problems, contrary to Plaintiffs' position that only "intrinsic" properties are relevant.

is Plaintiffs, not the City, who are resisting providing the public with truthful information about the products they are selling. The second difference is that the health risks of sugary beverages are no mere opinion. As discussed *supra* at 8-11, there is no credible dispute that sugary beverages contribute to obesity, diabetes, and tooth decay. The industry's focus on the remaining scientific discussion about the precise mechanics of that contribution is simply a straw man.

3. The Warning Requirement Is Not More Extensive Than Necessary

The last prong of *Central Hudson* does not impose a least-restrictive-means test, but requires only a "fit between the legislature's ends and the means chosen to accomplish those ends,—a fit that is not necessarily perfect, but reasonable . . . ." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks and citations omitted); *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 609 (9th Cir. 2010). Appellants contend that the warning requirement is not narrowly tailored because San Francisco could simply convey the warning in its own advertisements. ABA Br. 27; CSOAA Br. 35-36. But that argument—which would invalidate any disclosure requirement under *Central Hudson*—assumes that the effectiveness of a warning is the same whether it accompanies an advertisement for the product or appears on separate media somewhere else. The evidence is squarely to the contrary: There is independent value to a disclosure or warning that accompanies the advertisement for the product to which it applies. ER 386. While the City has conducted its own sugary beverage warning campaign, by itself this campaign is unlikely to have the effectiveness or reach of a multi-channel approach that includes a warning message on sugary beverage ads as well. Beyond the increased effectiveness when the warning accompanies the advertisement, there is the additional reality that government spending could never

hope to approach the billions of dollars that soda companies devote to advertising their products. *See* SER 24; ER 386; Marion Nestle, *Soda Politics: Taking on Big Soda & Winning* (2015), at 117. In view of the importance of the government's interest in public health—and the fact that warnings are more effective when they accompany product advertising—the fit between the ends and the means chosen to achieve them is plainly a reasonable one.

The cases Plaintiffs cite are not to the contrary. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977), not only predated *Central Hudson*, but involved a speech ***restriction***—a ban on real estate signs—rather than a compelled disclosure. It did not concern a public health warning about a product's consumption. The same is true of *Sorrell*: The challenged law sought to prevent a particular marketing practice—drug "detailing"—by prohibiting the dissemination of information that revealed individual doctors' prescribing practices. 564 U.S. at 557-58. It did not concern a required disclosure, let alone a disclosure about a particular product. Finally, in *Evergreen Association v. City of New York*, the basis for the court's ruling was its finding that the law "mandates discussion of controversial political topics"—the morality of abortion. 740 F.3d 233, 250-51 (2d Cir. 2014). Here, it is scientifically beyond dispute that sugary beverages contribute to obesity and diabetes at least through the calories they contain—and that consumption rates of these products, which have no nutritional value, are far too high. And while the warning does not convey a message about the "inherent" or "unique" health risks of SSBs (as Plaintiffs would have it), even such a message would not be an expression of moral or political ideology, but would be consistent with the views of many scientists about what the best research shows, notwithstanding the absence of conclusive proof or the persistence of some debate. *Cf. CTIA I*, 139 F.Supp.3d 1048, 1070 n.10 (N.D. Cal. 2015) ("To require the

government to prove a particular quantum of danger before issuing safety warnings would jeopardize an immeasurable number of laws, regulations, and directives.").

Accordingly, even if heightened scrutiny applies, this Court should uphold the warning requirement.

II. The Remaining Preliminary Injunction Factors Favor The City

A. Plaintiffs Fail To Establish Irreparable Harm

Plaintiffs argue that a loss of First Amendment freedoms by itself constitutes irreparable injury. But as the district court pointed out, ER 29, that argument does not support the issuance of a preliminary injunction where, as here, Plaintiffs have failed to establish that they are likely to succeed on the merits. *See, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Plaintiffs' claim of irreparable harm is also undermined by their own contention that there are other media in which they can and will communicate their message without being subject to the warning requirement. That is especially true in a case involving commercial speech, which does not implicate the speaker's autonomy interests. *See supra* at 18-19.

Plaintiffs further contend that they will suffer a loss of reputation and goodwill if they are required to display the warning. In the first place, the district court found that claim unpersuasive insofar as it was predicated on the Golder declaration. ER 29. But the argument depends on Plaintiffs' First Amendment claim in any event: If a factual warning about sugary beverage consumption undermines the reputation and goodwill that Plaintiffs have cultivated, that result is not a cognizable injury, but a legitimate consequence of the free flow of information—precisely the value that the First Amendment seeks to protect in the

commercial context. Moreover, as the district court pointed out, Plaintiffs are free to engage in counter-speech to prevent the alleged harm. *Id.*

CSOAA's contention that its members will lose business from soda companies that move their advertising to other media likewise does not establish irreparable harm. First, CSOAA did not submit evidence that advertisers of other products and services will not be able and willing to take soda companies' place. Second, a loss of revenue—assuming it would occur—is not considered irreparable harm. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 676 (9th Cir. 1988).

B. The Remaining Factors Also Support the District Court's Denial of the Injunction

In "balanc[ing] the hardships of the public interest against a private interest, the public interest should receive greater weight." *F.T.C. v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999); *Fund For Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (if injunction would implicate public interest, plaintiffs must show the "public interest favors [them]"). The public has an interest in the implementation of laws enacted by its duly elected representatives, *see Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997), and also, of course, a strong interest in the health of the City's residents and the communication of health and safety information, *see, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). Plaintiffs argue that there is a no public interest in upholding an unconstitutional law, but that argument depends entirely on the merits of their First Amendment claim, and falls with it.

Plaintiffs argue that the harm to the City must be slight because the City chose to "voluntarily defer enforcement," by which they mean that the Ordinance provided that it would become operative one year after enactment. But a decision

to give advertisers lead time to comply with the warning requirement—Plaintiffs themselves assert that there is ordinarily a months-long process before placing an advertisement, *e.g.*, ER 577, 606, 612—does not mean that the City and its residents are not harmed by a stay of the Ordinance that extends months beyond its July 25, 2016 operative date.[20]

Plaintiffs also argue that, because soda companies will withdraw their advertising from covered media as soon as the law goes into effect, the public will not reap the benefits of the warning. Yet the soda companies themselves asserted that, even if they were to withdraw their advertising from covered media, retailers carrying sugary beverages would be required to display the warning on advertisements they choose to display for those products. ER 578, 590, 606. Because significant advertising is likely to remain on covered media, *see supra* at 29-30, the public will see the health warning. Plaintiffs also claim that the public will be harmed by any reduction in soda advertising that occurs as a result of beverage companies' efforts to avoid the warning requirement, because people will "lose access to information about the beverage choices available to them…." ABA Br. 61. Putting aside the fact that Plaintiffs did not submit evidence that there will be less advertising overall, their argument is backward in any event. Because an advertiser's constitutionally protected interest in ***not*** disclosing factual information is minimal, to the extent sugary beverage companies choose silence in order to avoid disclosing accurate information about their products, that choice stands as

[20] The fact that Plaintiffs had a year within which to challenge the Ordinance before it became operative, yet waited six months after the filing of their complaint before moving for a preliminary injunction, is a factor that supports the district court's decision to deny the motion. *See, e.g.*, *Capital Associated Indus., Inc. v. Cooper*, No. 1:15-CV-83, 2015 WL 5178057, at *11 (M.D.N.C. Sept. 4, 2015) ("Courts must be vigilant to ensure that this extraordinary remedy is not used to manufacture a sense of urgency where none exists so as to allow the case to leapfrog earlier filed actions that may be of equal or greater urgency.").

their own condemnation of the informational value of their advertising, and does not establish harm to the public interest.

C. Plaintiffs Also Fail Under the Sliding Scale Approach

Finally, as the district court found, ER 29, Plaintiffs fare no better under the sliding scale approach, because they cannot show that "the balance of hardships tips ***sharply*** in [their] favor." *Alliance for the Wild Rockies*, 632 F.3d at 1134-35 (emphasis added). The toll exacted by obesity, diabetes, and tooth decay on individuals' lives, and the costs those conditions impose on public resources, make them public health priorities of the highest order. By contrast, the district court found that Plaintiffs' claims of a chilling effect and severe hardship were unpersuasive. As a result, Plaintiffs failed to show that the balance of hardships falls sharply in their favor.

CONCLUSION

For the foregoing reasons, the district court's order denying Plaintiffs' motion for a preliminary injunction should be affirmed.

Dated: September 14, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court. *CTIA v. City of Berkeley*, No. 16-15141, argued September 13, 2016, presents some overlapping issues.

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).

According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 14,991 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and is filed by APPELLEE CITY AND COUNTY OF SAN FRANCISCO, a party filing a single brief in response to multiple briefs under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6); and as such, is proportionately double-spaced 14 point Times New Roman typeface.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 14, 2016.

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CERTIFICATE OF SERVICE

I, Pamela Cheeseborough, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on September 14, 2016.

ANSWERING BRIEF OF APPELLEE CITY AND COUNTY OF SAN FRANCISCO

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed September 14, 2016, at San Francisco, California.

/s/Pamela Cheeseborough
Pamela Cheeseborough