

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

AMERICAN BEVERAGE ASSOCIATION, )  
CALIFORNIA RETAILERS )  
ASSOCIATION, CALIFORNIA STATE )  
OUTDOOR ADVERTISING )  
ASSOCIATION, )

Plaintiffs, )

VS. )

NO. C 15-03415 EMC

CITY AND COUNTY OF SAN )  
FRANCISCO, )

Defendant. )

San Francisco, California  
Thursday, April 7, 2016

TRANSCRIPT OF PROCEEDINGS

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25

1 Thursday - April 7, 2016

3:36 p.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Court is resumed. Please remain seated.  
5 Please be seated. Calling Case C. 15-3415, American Beverage  
6 Association versus CCSF. Counsel, please come to the podium  
7 and state your name for the record.

8 **MR. BRESS:** Richard Bress, for the American Beverage  
9 Association.

10 **THE COURT:** All right. Thank you.

11 **MR. WALKER:** Helgi Walker, for the California State  
12 Outdoor Advertisers Association.

13 **THE COURT:** All right. Good afternoon.

14 **MR. KNOX:** Tom Knox, for the California Retailers  
15 Association.

16 **THE COURT:** All right. Thank you.

17 **MR. BERN:** Michael Bern, also for the American  
18 Beverage Association.

19 **THE COURT:** All right. Thank you.

20 **MR. LYNCH:** Good afternoon, Your Honor. James Lynch,  
21 for the American Beverage Association.

22 **THE COURT:** All right. Good afternoon, Mr. Lynch.

23 **MR. GOLDMAN:** Good afternoon. Jeremy Goldman, on  
24 behalf the City and County of San Francisco.

25 **MS. VAN AKEN:** And Christine Van Aken, on behalf the

1 City.

2 **THE COURT:** Thank you, Ms. Van Aken.

3 Okay. We are on for the plaintiffs' motion for  
4 preliminary injunction in this matter. And obviously the first  
5 question that we have to address is what is the proper legal  
6 framework here, and what's the appropriate scope of review.  
7 And obviously there's some debate as to -- well, let me first  
8 address the question about noncommercial speech, and some of  
9 the examples that have been given about how there's been an  
10 intertwining of advertising, not commercial speech.

11 And one could look through many of these ads and reach  
12 varying conclusions about whether this constitutes inextricable  
13 noncommercial speech, which -- is that therefore entitled to  
14 heightened scrutiny? But this is a facial challenge. Right?

15 **MR. BRESS:** It is.

16 **THE COURT:** And so in order to find a facial  
17 challenge under the First Amendment, we have to find that the  
18 amount of infringement on First Amendment rights is substantial  
19 in relationship to the whole.

20 And when I look through these ads, I mean, frankly, some  
21 of them look like there's a decent argument that they are  
22 noncommercial speech; that, itself, is somewhat a complicated  
23 factor. If you look at the *Michael Jordan* case, you look at a  
24 bunch of factors. What was the interest? And did they get the  
25 anything out of it? And what was the size of the logo compared

1 to the rest of the message? Et cetera, et cetera. Was there  
2 an obvious -- was there something to be gained from it?  
3 Something to be lost from it?

4 And one could come out with varying opinions on some of  
5 these examples, but it's not been demonstrated to me that at  
6 least on a facial challenge, one could say that the scope of  
7 the ordinance impinges on a substantial amount of protected  
8 noncommercial speech in relationship to the sweep as a whole.  
9 So that's not to preclude individual challenges, and as-applied  
10 cases; but that seems to me, at least for today's purposes, not  
11 the main --

12 I mean, I understand the argument. And there may be  
13 problems on the margins, but I don't see this as the major  
14 threshold question.

15 I think the major threshold question is: What is the  
16 scope of the standard of review here? And I'll let you comment  
17 on that first.

18 **MR. BRESS:** Thank you, Your Honor. I appreciate  
19 that.

20 The Court has, of course, correctly ascertained what the  
21 standard is here for a facial challenge. It is, of course,  
22 substantial amounts of noncommercial speech. And we believe  
23 that we've put forward substantial amounts of noncommercial  
24 speech that would be affected. And the question that this  
25 Court, I think, is addressing is: As compared to what?

1 In other words: What's the denominator?

2 If this case were a ban on speech, if it were just a pure  
3 preclusion of speech, we'd agree that the denominator here --  
4 the full denominator -- would be the total amount of commercial  
5 speech that it purports to reach; but what we're faced with  
6 here is the circumstance where, in fact, what's going to  
7 happen -- and the record supports this, and indeed the City has  
8 acknowledged -- there will be a shift here from covered fora to  
9 noncovered fora.

10 So ultimately the amount of speech that will be reached,  
11 if you will, by the ordinance -- the amount of commercial  
12 speech that would be reached by the ordinance will be very  
13 small. And in comparison to -- and so there will be a  
14 substantial amount of noncommercial speech that is reached in  
15 comparison to the amount of commercial speech that ends up  
16 being regulated here, which would be *de minimis* amount of  
17 speech.

18 **THE COURT:** Well, the fact that the denominator is  
19 small would suggest that there's not a huge balance of  
20 hardships that tips in your favor in that case.

21 **MR. BRESS:** No, Your Honor. I don't believe that's  
22 right, because the denominator will be small because we will be  
23 forced essentially to take our speech from the covered fora  
24 into uncovered fora.

25 In other words, we'll be denied our opportunity to

1 advertise on the fora of our choice, which include the outdoor  
2 ads; which includes the signs; in the -- and the stores, et  
3 cetera. That is speech that's important speech. It's  
4 protected by the First Amendment. And certainly there are  
5 plentiful cases, as this Court knows, including *Discovery*  
6 *Network*, and *Bolger*, and *Reno*, that suggest that you can't okay  
7 a state's shutdown of speech in one particular forum because  
8 they've got other forums that they're able to speak in.

9           **THE COURT:** Well, I was only talking about the  
10 magnitude of the size. And, I mean, you suggested that the  
11 denominator is not so huge, because there's so much speech  
12 that's not affected by the ordinance. I thought that's what  
13 you were saying. Did I misunderstand?

14           **MR. BRESS:** No, Your Honor. What I was saying is; of  
15 the speech that is covered by the regulation, ultimately much  
16 of that speech will exit the stage and will go to the  
17 noncovered fora, because we'll be forced out of the covered  
18 fora. So the amount of speech that will remain and be subject  
19 to regulation and a warning will be a de minimis amount of  
20 speech. And the amount of noncommercial speech that will be  
21 affected will be substantial in relation to that.

22           **THE COURT:** It seems to me anything touched -- the  
23 denominator's defined by anything that is regulated by this  
24 ordinance; not by the advertisers' and merchants' response.  
25 It's whatever is going to be regulated by this.

1           And if you're saying that that universe is relatively  
2 small, thereby making the fraction a larger number because the  
3 denominator is smaller, that suggests to me that there's not a  
4 whole lot of speech being affected.

5           **MR. BRESS:** Well, Your Honor, as I've suggested,  
6 that's not my argument, at all.

7           **THE COURT:** I didn't think so.

8           **MR. BRESS:** My argument, well --

9           **THE COURT:** You have a comment?

10          **MR. GOLDMAN:** Well, I think that the question under  
11 *Virginia versus Hicks* is: What portion of the speech -- of the  
12 total speech that's being regulated by the ordinance -- is  
13 noncommercial?

14          And clearly the vast, vast, vast majority of ads put out  
15 by the sugar-sweetened beverage industry is clearly, obviously  
16 commercial speech. So we're talking about something that's  
17 very marginal in terms of the total amount of advertising put  
18 out by the industry.

19          And now the question that the Court is going to decide is  
20 whether the disclosure requirement -- the warning  
21 requirement -- is constitutional. Now, if the Court upholds  
22 the warning requirement, the fact that SSB manufacturers may  
23 decide to shift from one medium to another to avoid the  
24 disclosure requirement has absolutely no constitutional  
25 significance whatsoever if the Court has already determined

1 that the warning requirement is valid under the First  
2 Amendment. So I don't see what Mr. Bress is trying to  
3 accomplish by talking about what decision advertisers may make,  
4 if the question that the Court is going to decide is whether  
5 the warning requirement is constitutional.

6 **THE COURT:** Well, let's get to the core issue here,  
7 which is: Which test applies here? Which mode of analysis,  
8 given that there are arguable First Amendment interests here?  
9 Are we governed by the *Zauderer* tests? Are we governed by a  
10 more general rational-basis tests? Are we governed by a higher  
11 standard of stricter scrutiny here?

12 And my first question is, I mean, there's a lot of debate  
13 and briefing about the applicability of *Zauderer* or not, and  
14 the whole question of, you know, factual uncontroversial  
15 criteria here. And maybe that is the framework that the  
16 courts -- at least, the appellate courts -- have employed so  
17 far.

18 But it does seem to me -- and I think I alluded to it in  
19 the *CTIA* case -- is that it's not clear to me why the *Zauderer*  
20 case, which involved deception -- deceptive, you know,  
21 statements, arguably, or misleading speech, commercial speech,  
22 and where one could understand why you look at factual and  
23 noncontroversial as sort of the -- I don't know how to call  
24 it -- the safe harbor, or at least the predicate to applying a  
25 lesser standard of scrutiny. But when you're dealing with

1 issues of public health and safety, I'm not sure it makes all  
2 that much sense.

3       And I think, as I pointed out in the *CTIA* case, I mean,  
4 virtually every statement about public health -- every warning  
5 about something -- is not a matter of absolute scientific  
6 certainty. There's always going to be some scientific  
7 uncertainty; some debate about anything.

8       And it not clear to me why, for instance, uncontroversial  
9 should be the linchpin.

10           **MR. BRESS:** If I may, Your Honor.

11           **THE COURT:** Yeah.

12           **MR. BRESS:** With due respect -- and I mean that -- I  
13 think the Court has it backwards.

14       I think that *Zauderer* was actually the case where the  
15 argument -- I think the best argument here is that *Zauderer* is  
16 a case where the standard would be the lowest, because we're  
17 talking about speech that is deceptive or misleading to start  
18 with, or potentially misleading. And the question is: What  
19 can the Government do that would affect that sort of speech?

20       And as this Court realizes, under heightened scrutiny you  
21 don't even, as a plaintiff, get into heightened scrutiny if  
22 your speech is deceptive, misleading, or untrue. So we're  
23 talking about speech in that case that is the least level of  
24 protection. And the Court there was dealing with: Well, what  
25 can you do, short of banning it, if you're not going to ban it?

1           And the answer was essentially: Correct it, with factual  
2 statements that are going to deal with the -- to prevent it  
3 from being misleading.

4           Well, that made all of the sense in the world.

5           As this Court realizes, we don't believe the *Zauderer* test  
6 fairly applies outside of that sphere; but we understand that  
7 the Court has ruled on that in *CTIA*. We're not going to press  
8 that further before you.

9           But the idea that if your speech is not misleading, is not  
10 deceptive, but is true and lawful commercial speech, you're  
11 going to get less of a shake under the First Amendment; your  
12 speech is going to be held -- held to be somehow less valuable  
13 than that speech -- we think it would be an abomination of the  
14 First Amendment.

15           Now, what we thought this Court was saying in *CTIA* was  
16 there was an argument that *PG&E* might not apply to a case like  
17 that, because *PG&E*, after all, was about a circumstance where  
18 compelled speech could chill the underlying speech that was in  
19 question, and could potentially require counter speech.

20           **THE COURT:** In a noncommercial context.

21           **MR. BRESS:** I understand *PG&E* was a noncommercial  
22 case; but of course, cases like *Evergreen* in the Second Circuit  
23 and cases like *CTIA versus San Francisco*, of course, were  
24 commercial, and they applied *Zauderer*.

25           So the point being, though -- and this is -- this is your

1 own words, Your Honor -- you suggested that in those cases when  
2 you're dealing -- in a case like *PG&E*, you had chilling  
3 effects, et cetera. That wasn't at issue in the *CTIA* case that  
4 was before you. There was no argument about a chill.

5 In this kind of a case where we're talking about the  
6 Government making speech that's going to fundamentally  
7 undermine and distort the speech that we're making, and chill  
8 us from making it, we're talking about a Government regulation  
9 that is burdening our speech.

10 That wasn't at issue in *CTIA*. It's very much at issue  
11 here.

12 And the idea that a Court would apply a standard lower  
13 than *Zauderer* to a Government regulation that is burdening  
14 protected speech, we think, would never be upheld by any court,  
15 Your Honor. And we don't think that this Court should go down  
16 that road.

17 **THE COURT:** So the Surgeon General's warning under  
18 cigarette -- subject to strict scrutiny?

19 **MR. BRESS:** No, no, no, Your Honor. Let me make  
20 clear what my argument is. We believe that this Court should  
21 analyze -- given where this Court is on misleading speech  
22 versus nonmisleading speech, that all of this is subject to  
23 *Zauderer*. We believe this Court should go under the road of  
24 analyzing this warning under *Zauderer* standards.

25 If this warning doesn't satisfy *Zauderer*, we believe we

1 win. At the very least, this Court would then go on and apply  
2 intermediate scrutiny, which is now called "heightened  
3 scrutiny," under *Retail Digital Networks*, and analyze it there.  
4 We're absolutely not arguing for strict scrutiny, Your Honor.

5 **THE COURT:** What's your take with alcohol warnings,  
6 tobacco warnings, with respect to *Zauderer*? Do you believe  
7 that because the scientific -- it's uncontroverted that smoking  
8 causes lung cancer, or that alcohol presents a risk of birth  
9 defects?

10 **MR. BRESS:** We absolutely do, Your Honor. And we  
11 don't think that those warnings either are misleading on their  
12 face, nor do we believe in context they're misleading. We  
13 believe that the general public will understand those warnings  
14 to say what -- to mean what they say. When they say that  
15 cigarettes cause lung cancer, I think the general public will  
16 clearly understand. It doesn't mean every single person who  
17 smokes will get lung cancer, but what it means is that the  
18 cigarette, itself, is a causal agent for lung cancer,  
19 regardless of what other factors are around.

20 The same with drinking and problems during pregnancy.  
21 It's the same issue.

22 **THE COURT:** Can't similar arguments be made that  
23 there are many causal factors to lung cancer? It's not just  
24 smoking. It depends on environmental issues. It depends on,  
25 you know, perhaps inherited-ness and genetic issues. And it

1 turns on lots of other things.

2           **MR. BRESS:** Your Honor, I think the biggest  
3 difference is this. There's no known safe level of smoking  
4 tobacco. If you smoke any tobacco, and you risk getting lung  
5 cancer.

6           **THE COURT:** What about alcohol?

7           **MR. BRESS:** With alcohol?

8           **THE COURT:** Yeah.

9           **MR. BRESS:** Again, with regard to birth defects, the  
10 same issue is true. And, Your Honor --

11           **THE COURT:** There's no known level. So one drop of  
12 alcohol has been found to be inherently dangerous to women who  
13 are pregnant?

14           **MR. BRESS:** Your Honor, I'm not an expert in the  
15 field, but that's my understanding.

16           But the difference here --

17           **THE COURT:** And if your understanding is not correct,  
18 then you would flunk the *Zauderer* test?

19           **MR. BRESS:** Not necessarily, Your Honor, no.

20           **THE COURT:** Why not?

21           **MR. BRESS:** It depends what -- because, Your Honor,  
22 it depends what the actual warnings say.

23           And so if we move to what the warnings say for alcohol,  
24 let me start with one premise to start with, because this is  
25 true with regard to alcohol. There is no warning requirement

1 on advertisements. Unlike this case, the alcohol warnings are  
2 not triggered by affirmative speech and do not burden  
3 affirmative speech. The alcohol warnings are on the label.  
4 When you sell a bottle of beer, you've got to have the warnings  
5 on it, but it's not triggered by speech. You'll never see it  
6 on the posters. You'll never see it on the billboards.

7 It's a very different situation in this case.

8 The same is true, of course, of Prop. 65. It's not  
9 triggered by speech. It doesn't burden speech.

10 The only -- the only warning that is remotely comparable  
11 to this case, because, of course, the warning here was written  
12 copying that -- that model, is the warning that the Federal  
13 Government has now legislated to be required for cigarettes.  
14 That's not even in effect yet, but that's a quirk of that law.  
15 It will go into effect, but that's the only warning that's  
16 remotely like this one, Your Honor.

17 And if the general question that Your Honor is asking is,  
18 *Do we believe that when the Government compels speech in the*  
19 *commercial context, it's subject to the Zauderer test?*, the  
20 answer is "Yes."

21 But if the question is, *What will be the results of those*  
22 *cases?*, well, obviously it's going to depend on the case.

23 And Your Honor talked about Prop. 65 earlier in the *CTIA*  
24 context. Now, we don't see these kinds of challenges often  
25 under Prop. 65, although I know I saw one filed earlier this

1 year. One of the reasons we don't see it is Prop. 65 has its  
2 own mechanism whereby, you know, an owner of a business who  
3 doesn't believe that the exposure limits the State has set for  
4 when it says it's known to cause cancer are the right limits  
5 can take a different path; can litigate that directly with the  
6 State under that law. And if it wins, it obviously isn't  
7 subject -- it is not subject to any damages or any penalties;  
8 if it loses, it is.

9 But there is a mechanism built into that law. And, of  
10 course, that law also references findings of major federal  
11 agencies in terms of how it comes to its knowledge component.

12 This case, again, is the opposite in that sense,  
13 Your Honor, because in this case the FDA found that added sugar  
14 does not contribute to weight gain any more than any other  
15 caloric product. And it found that at 79 Federal Register 1 --  
16 I'll give you the correct cite. It's at 11904. We've cited  
17 that in our reply brief.

18 At any rate, so far from a case like *CTIA*, where this  
19 Court relied on the -- on the fact that the warning was simply,  
20 in this Court's view, referencing an existing FCC instruction  
21 that had remained unchallenged, in this case, the warning is  
22 saying something -- telling something to consumers that is  
23 contrary to what the FDA has found to be true. It's a very  
24 different case.

25 It's very different, of course, in other respects, too,

1 Your Honor. In the *CTIA* case, they were covering with this  
2 warning requirement all of the products that they claimed would  
3 cause -- you know, were relevant in the universe, if you will,  
4 as to which the FCC had issued similar instructions.

5 In this case, they're now telling us -- the City's  
6 argument now is: Well, all this warning really means is that  
7 calories, if you have too many of them as compared to how many  
8 you expend, will lead -- you know, will contribute to obesity.  
9 We agree with that, of course. So they're saying all this  
10 warning is telling you is that if you drink sugar-sweetened  
11 beverages as part of a diet that has too many calories, it'll  
12 contribute to obesity.

13 We don't have any argument with that statement as such,  
14 but it's not the argument that's actually being -- it's not the  
15 warning that's actually being given. The warning that's being  
16 given says nothing about overconsumption. It says nothing  
17 about calories, generally. It tells us that drinking beverages  
18 with added sugar contributes.

19 There are two problems that come out of it. There are two  
20 messages that are being sent. One is that merely drinking  
21 these beverages, regardless of whether you are otherwise  
22 overconsuming calories generally, contributes to these  
23 problems. And I know the Government argues otherwise in this  
24 case, but it's kind of like saying, "Crossing the street is  
25 against the law." And the answer to that is, "Well, that's

1 true if the light is red, but not if the light is green."

2 Here, drinking beverages with added sugar does not contribute  
3 to diabetes or to obesity, unless you're doing that as part of  
4 an overall diet that overconsumes calories compared to what you  
5 expend. So that's one problem with it.

6 The second problem, Your Honor, is that by calling out  
7 drinking beverages with added sugar contributes to diabetes and  
8 obesity, and requiring the warning only on advertisements for  
9 beverages with added sugar, it's sending a message as clear as  
10 day to consumers that there's something special about beverages  
11 with added sugar; something more dangerous and worse about  
12 beverages with added sugar than about other things that they  
13 eat and drink.

14 Both of those statements that they're making with this  
15 warning -- that beverages with added sugar contribute in a way  
16 to obesity and diabetes, in ways aside from calories, and that  
17 they do so worse and in more dangerous ways than other  
18 products -- are statements that the City has acknowledged in  
19 its -- at paragraph 49 of its Answer, and pages 3 and 9 of its  
20 brief, and by its experts, as well. These are statements that  
21 they acknowledged are subjects of legitimate scientific debate.  
22 They don't argue otherwise, Your Honor. And so they're forcing  
23 us to make statements of their views on matters that are of  
24 legitimate scientific debate.

25 **THE COURT:** How is one to -- I mean, when you say

1 this is the fair inference -- contextual inference to be drawn,  
2 is that measured by, like, a reasonable-consumer standard?  
3 What's the guideline here?

4           **MR. BRESS:** Your Honor, the courts have not defined  
5 it that clearly. The guidelines that we've seen from courts  
6 include the *CTIA*. I know it's unpublished, but if we're just  
7 asking for references as opposed to precedent, perhaps the *CTIA*  
8 Ninth Circuit Decision said -- could prove to be interpreted by  
9 consumers.

10           This Court, in its Decision in the *CTIA* Berkeley case -- I  
11 should maybe call them "*CTIA* Berkeley" and "*CTIA*  
12 San Francisco," for your ease. But in the Berkeley case this  
13 Court looked at a very similar issue. And what this Court  
14 looked at was a statement that said the potential risk is  
15 greater for children. And that was contrary -- if you read  
16 that as a statement of biological susceptibility, that was  
17 contrary to the FCC's views.

18           And Berkeley argued to this Court, *Well, no. The risk*  
19 *actually is potentially greater for children, because children*  
20 *carry cell phones closer to their bodies.* And this Court said,  
21 *Well, the statement suggests* -- without that kind of a  
22 qualification in it -- *the statement suggests that you're*  
23 *talking about a biological susceptibility, and not a behavioral*  
24 *risk.*

25           Well, the same thing is true here, Your Honor. If you

1 just, "Say drinking beverages with added sugar contributes to  
2 obesity and diabetes," without qualifying it by saying, "if you  
3 are doing so as part of a diet that overall is overconsuming  
4 calories" -- without that qualification, you're making a  
5 metabolic statement. With that qualification, you're making a  
6 behavioral statement. And without the qualification, it's  
7 misleading.

8       As to the other part, Your Honor, you don't even have to  
9 rely purely on your common sense, although I think that ought  
10 to take you most of the way. I mean, if you're calling out one  
11 product as contributing to dread diseases, and no other  
12 products calling out to the dread diseases, the public is going  
13 to get a message, loud and clear.

14       Examples that one can think about to make that clearer  
15 would be if you had an ad on Toyota that said, "Toyotas cause  
16 fatal car crashes," and you didn't have that on other cars, and  
17 you claimed, "Well, we're just talking about general vehicular  
18 dangers." Well, no. Someone's going to get the message that  
19 it's Toyotas that you're talking about.

20       With the alcohol warnings that this Court referenced, they  
21 say "alcoholic beverages." And then they say what -- what  
22 they'll lead to, you know: Problems, again, with women  
23 drinking when they're pregnant; drinking when you're driving.  
24 People recognize when they say that, that they mean alcoholic  
25 beverages. In other words, the alcohol in the beverage; not

1 that they're just talking about liquids, Your Honor.

2 So in this case, similarly, beverages with added sugar --  
3 they're not going to think you're talking about calories. But  
4 you don't have to go with that, either, as your pure way of  
5 thinking about it. That was the intent -- the very intent --  
6 behind the law here.

7 **THE COURT:** Is there a dispute that SSBs are the  
8 greatest contributor to the intake of added sugar in the U.S.  
9 diet?

10 **MR. BRESS:** There absolutely is a dispute,  
11 Your Honor, on that, because --

12 I don't know if giggling in the courtroom is normally  
13 admitted.

14 **THE COURT:** No, no. I'm not going to consider it, so  
15 go on.

16 **MR. BRESS:** Thank you.

17 It absolutely is, Your Honor, because the statistics that  
18 is cited is essentially that 39 percent of the added sugar that  
19 is in the diet is sugar-sweetened beverages.

20 The problem with that, of course, is it's a game of  
21 aggregation, because what we know from that, for example, is  
22 that 61 percent therefore of added sugar is foods with added  
23 sugar; not beverages with added sugar. And even within -- so  
24 if you played the disaggregation game, Your Honor, you would no  
25 longer have that same argument.

1 But in many ways, Your Honor, I do believe this is all  
2 besides the point, because the Government is no longer arguing  
3 that there's a consensus that this Court could take as fact  
4 that sugar or added sugar is any different from any other  
5 calories.

6 And so while they've suggested that this warning will be  
7 taken by consumers as just saying, *Well, sugar-sweetened*  
8 *beverages have calories in them, and calories contribute to*  
9 *obesity*, a consumer wouldn't get this out of this -- that for a  
10 couple of reasons.

11 First of all, this regulation treats, as sugar-sweetened  
12 beverages, beverages with as few as 25 calories; beverages that  
13 are considered low-calorie beverages by the FDA. It excludes,  
14 of course, beverages like flavored milks and soys and the like  
15 and, frankly, natural fruit juice that have far more calories  
16 in them. So on that basis, a consumer wouldn't look at this  
17 and say it's about calories.

18 But there's another point here. When this was passed,  
19 when this was enacted, Supervisor Wiener said -- who was the  
20 sponsor -- said quite plainly, *The warning is not about*  
21 *calories in and out. It's not about calories. It's about*  
22 *sugar. Liquid sugar is a unique health problem.* That's why  
23 the City referenced beverages with added sugar; not just  
24 calories. It's why it's triggered only by ads for beverages  
25 with added sugar, not all caloric foods.

1           It's also why, of course, it's in an all-caps warning with  
2 a big warning label in front of it, rather than just providing  
3 information. The whole intent here was to stigmatize beverages  
4 with added sugar, because they were believed to be dangerous.

5           The City knows this. It argues affirmative at pages 9 and  
6 19 of its brief that the warning will likely be effective at  
7 changing attitudes about SSBs; not changing attitudes about  
8 calories generally, but about SSBs.

9           The City's expert agrees. He says at paragraph 62 that  
10 the warning will enhance consumer awareness of the unhealthy  
11 effects of added sugar, and that consumers will be more likely  
12 to avoid foods with added sugar.

13           The City can't, on the one side, design a warning that's  
14 intended specifically to stigmatize and to dissuade people from  
15 drinking beverages with added sugar, and on the other hand,  
16 claim no our warning is true, because it's about calories  
17 generally. That just doesn't wash. If the City had intended  
18 to warn about excess calories generally, it would have created  
19 a warning that talked about excess calories, and would have  
20 required them on all foods that have excess calories.

21           **THE COURT:** But what if --

22           You're saying the City can't make any judgment if it is  
23 about excess calories; but those excess calories seem to be  
24 more accessible, more in use, or, quote, "the single largest  
25 source of added sugar." And then there's the argument about

1 satiability, as opposed to other foods. And there's the  
2 argument about, *Well, at least other drinks, even flavored*  
3 *milks, have vitamin D and other nutrients.*

4 You're saying that the City can only make an equation of  
5 calories, base a warning solely on calories, and can't make any  
6 distinction between the value of sources of those calories?

7 **MR. BRESS:** Your Honor, I think the City can make all  
8 sorts of value judgments. We're not challenging, for example,  
9 its ability, under the Equal Protection Clause, to pick its  
10 priorities and to pass piecemeal legislation. Obviously, it  
11 can.

12 What it can't do is to construct a message that sends out  
13 a misleading or at least controversial, in this case, message  
14 to consumers about the good to which it's attaching the  
15 message. And by calling out only sugar-sweetened beverages as  
16 the only item that contributes to these diseases, by requiring  
17 the warning only on sugar-sweetened beverage ads, and by,  
18 frankly, creating a warning that is a huge box warning with a  
19 big black warning label on it for what -- it now says all it's  
20 really talking about is that calories generally -- that all  
21 foods have these problems -- consumers aren't going to get that  
22 latter message that they claim.

23 Consumers are going to see this and say, "The City's  
24 telling us to stay away from these goods. The City's telling  
25 us these are worse." And it's the -- "these are worse,"

1 Your Honor. And, by the way, "worse" is specific. "Worse" in  
2 the sense of contributing to obesity and diabetes; not "worse"  
3 in terms of having less nutrition, but "worse" in the sense of  
4 contributing to diabetes and obesity than other products.

5 The satiety thing.

6 (Reporter requests clarification.)

7 **MR. BRESS:** S-a-t-i-e-t-y. I'm a lousy speller, but  
8 there it is.

9 **THE COURT:** Let me just make sure I understand your  
10 argument. You're not taking issue -- or are you? -- with the  
11 actual literal words being accurate. It's the inference that  
12 one can draw or was implied here?

13 **MR. BRESS:** Well, Your Honor, yes and no.

14 And if I may explain further than that, because "Yes and  
15 no" doesn't tell you much, it's as if you were to say to me,  
16 "Mr. Bress, is it illegal to cross the street? True, or  
17 false?"

18 And I'd say, "Well, it depends if the light is green."

19 Here, saying that sugar-sweetened beverages contribute --  
20 and you're saying it to an individual consumer. And  
21 Dr. Hammond's clear that's what warnings are based on. You're  
22 saying it to that consumer: Sugar-sweetened beverages  
23 contribute to diabetes and obesity.

24 The answer is: It depends. If you have them as part of a  
25 diet where you are consuming more calories than you are

1 expending, then the answer is "Yes," and it's true.

2 On the other hand, if you're drinking them as part of a  
3 balanced diet where your overall calories don't exceed your  
4 expenditures, then it's false.

5 **THE COURT:** What if we look at this in the aggregate;  
6 not just at individual consumer? Because when you look at  
7 general warnings, it's not necessarily to you, the individual;  
8 that you're going to get lung cancer. It could be read as a  
9 general statement. And in the aggregate, there is a heightened  
10 risk of lung cancer.

11 **MR. BRESS:** Well, Your Honor, two points on that.  
12 First of all, the Surgeon General is not telling you that. And  
13 Dr. Hammond has explained it. I think it's page 28 of his --  
14 paragraph 28 of his opinion. That warnings are constructed to  
15 talk to the consumer about a harm to them. And they point out  
16 very specifically what conduct causes that harm to them.

17 And so when the Surgeon General warning is written, to be  
18 read to a consumer, it's telling that consumer, *Yes, if you*  
19 *smoke a cigarette, you risk getting lung disease, regardless of*  
20 *anything else you're doing. That's a risk you're taking on*  
21 *yourself.*

22 Here, similarly -- and again, Dr. Hammond says this at  
23 paragraph 28; that consumers will clearly interpret this  
24 warning to tell them that the conduct here -- drinking  
25 beverages without added sugar -- will contribute to diabetes

1 and obesity. And, of course, it's not true for the vast --  
2 actually, for the majority of consumers, Your Honor, who are  
3 drinking sugar-sweetened beverages.

4 **THE COURT:** That's my question. If I don't buy  
5 Dr. Hammond's construct, and say, "This is to be viewed in the  
6 aggregate," do you take issue with the statement that drinking  
7 beverages with added sugar contributes?

8 It doesn't say how much.

9 It doesn't say "uniquely."

10 It doesn't say "only."

11 It doesn't specify --

12 **MR. BRESS:** Your Honor, only in the sense that  
13 everything we eat contributes to diabetes and obesity;  
14 everything we eat that is caloric. So cheeseburgers do.  
15 Milkshakes do. Apples do. Apple juice does. Everything that  
16 people in general are eating, if they are eating more than they  
17 are expending in terms of their energy, will contribute to that  
18 aggregate, and lead to diabetes and obesity, or mainly to  
19 diabetes and obesity.

20 But that's not the message that anyone's going to get out  
21 of this warning, Your Honor.

22 **THE COURT:** All right. Let me hear from you. You've  
23 been patiently waiting.

24 **MR. GOLDMAN:** Yes.

25 **THE COURT:** Let me ask you about the first standard

1 of review, and then the question: Why shouldn't this be viewed  
2 in context, and what it fairly implies, for all of the reasons  
3 that --

4 If you're saying just calories, that's true with anything  
5 you eat, anything you drink, et cetera, et cetera.

6 So -- but why don't you talk to me about the standard?

7 **MR. GOLDMAN:** Okay. Let me start with the standard  
8 of review.

9 Your Honor is right that the framework that the appellate  
10 courts have given us for this question is *Zauderer*. And that  
11 is the standard that we've used because we're following the  
12 guidance that the appellate courts have given us.

13 **THE COURT:** So this rises and falls -- at least the  
14 question of intermediate versus more rational-based review --  
15 rises and falls with the application of *Zauderer*?

16 **MR. GOLDMAN:** We do believe that it easily survives  
17 *Zauderer*. And, in fact, plaintiffs concede that it survives  
18 *Zauderer*. He just did it in his remarks.

19 Now, every court to consider the question has held that  
20 *Zauderer* is not limited to an interest in preventing --

21 **THE COURT:** And I've already held that.

22 So the question is: If you're going to use *Zauderer* as a  
23 construct, then you've got to address the question about  
24 whether *Zauderer* applies here.

25 **MR. GOLDMAN:** That's right. And so the question is:

1 Is it factual and is it accurate that drinking beverages with  
2 added sugar contributes to obesity, diabetes, and tooth decay?

3 The answer is "Yes."

4 And, in fact, plaintiffs don't dispute that the answer is  
5 "Yes." And the reason we know that they don't dispute that the  
6 answer is "Yes" is because when they attack the warning, they  
7 insert additional words. Their claim is that the warning is  
8 inaccurate because it conveys that SSBs uniquely contribute or  
9 are inherently worse than anything else or will inevitably lead  
10 to these health outcomes. So that's the argument plaintiffs  
11 are making.

12 So if we focus on the actual words of the warning, there's  
13 no dispute that it satisfies *Zauderer*. And the question is:  
14 What does the warning convey?

15 **THE COURT:** Well, what if the warning doesn't  
16 necessarily convey that it is uniquely -- uniquely contributes  
17 because of some medical or some biological mechanism; but that  
18 it implies that it is worse than other things?

19 I mean, what's the reason why this warning talks about  
20 drinking beverages with added sugars, as opposed to milk --

21 **MR. GOLDMAN:** Well, I think it's --

22 **THE COURT:** -- or natural fruit juices?

23 **MR. GOLDMAN:** Starting with consumption, it's not  
24 just the case that it's the largest source of added sugars in  
25 the American diet. That's in the Dietary Guidelines. And

1 that's true. But it's not just that. It's also the case that  
2 these drinks are aggressively marketed, and packaged and  
3 consumed in quantities that cause people to exceed the Dietary  
4 Guidelines' recommendation. One single serving -- a 20-ounce  
5 bottle -- exceeds the recommended amount of added sugar from  
6 all sources. And that's the way they are packaging and selling  
7 these drinks. One 12-ounce can contains almost all of the  
8 added sugar from all sources.

9 And so those are --

10 **THE COURT:** That's goes to the justification, it  
11 seems to me, and the rational basis or the substantial  
12 governmental interests; but how does that inform the gateway --  
13 the threshold question of whether this is factual? Of course,  
14 *Zauderer* used the word "uncontroversial."

15 And the plaintiffs say that almost all of this is -- when  
16 you look at what is fairly implied by this, it is controverted.  
17 It is not necessarily accurate that somehow there's something  
18 special about SSBs.

19 **MR. GOLDMAN:** Well, I think it's important to  
20 distinguish between two things that plaintiffs try to collapse.

21 One: Is the text of the warning accurate?

22 Two: What reasons does the City have to focus on  
23 sugar-sweetened beverages?

24 Those are different questions.

25 **THE COURT:** Does the he second question inform the

1 application of *Zauderer*?

2 **MR. GOLDMAN:** No.

3 **THE COURT:** Whether *Zauderer* applies or not?

4 **MR. GOLDMAN:** It is relevant to *Zauderer* only in  
5 terms of what the Government's interest is in whether the  
6 warning has a reasonable relationship to it.

7 **THE COURT:** Once you frame the legal test, it is --

8 **MR. GOLDMAN:** It's not relevant to the question of  
9 whether the compelled disclosure --

10 **THE COURT:** Right.

11 **MR. GOLDMAN:** -- is factual and accurate.

12 Now, the City could choose to focus on sugar-sweetened  
13 beverages for any number of reasons. One, the overall patterns  
14 of consumption. Two, the sizes in which they are marketed and  
15 typically consumed. Three, the evidence that it blunts  
16 satiety. When people consume SSBs --

17 **THE COURT:** You can go through ten different things.  
18 Okay? I'm not there yet.

19 **MR. GOLDMAN:** Well, some of these are disputed, and  
20 some of these are not. Right? Whether --

21 **THE COURT:** I thought you said that goes to the  
22 question of application of *Zauderer* once you're in *Zauderer*.

23 My question is: How do you get to *Zauderer*?

24 Whether something's factual inaccurate does not turn on  
25 the City's reasons; does it?

1           **MR. GOLDMAN:** Exactly. Exactly. They are putting  
2 those things together. They are saying because the City --

3           **THE COURT:** Yeah. Well, I want you to disaggregate  
4 that. I want you to disaggregate that, and tell me why this is  
5 factual and accurate --

6           **MR. GOLDMAN:** Because --

7           **THE COURT:** -- when their argument is that, *Well,*  
8 *there's a lot implied here. You have to look at what is*  
9 *reasonably implied or suggested -- whether it's a reasonable*  
10 *consumer test, or something else -- and then you measure*  
11 *whether that's factual or accurate.*

12           And whether -- for instance, this implies that drinking  
13 beverages with added sugar contributes perhaps more than other  
14 forms of beverages or food to obesity. Then that's -- they say  
15 that's not accurate.

16           **MR. GOLDMAN:** Well, two things in response to that.

17           First of all, it doesn't imply that. It doesn't take a  
18 position on biological mechanisms one way or the other.

19           And in their reply brief -- Mr. Bress just said it now,  
20 too -- they say that the City is now arguing that the warning  
21 only conveys an overconsumption of calories is a problem.

22           That's not our position. Our position is that the warning  
23 conveys what it says. And what it says is drinking beverages  
24 with added sugar contributes to obesity, diabetes, and tooth  
25 decay.

1           It doesn't say it does it because of the calories they  
2 contain.

3           It doesn't say because of something apart from calories.

4           It doesn't say because of calories and something else.

5           I doesn't take a position on biological mechanisms, at  
6 all.

7           And, in fact, it would be highly unusual for public-health  
8 warnings to get into a long discussion of the underlying  
9 biological mechanisms. And, in fact, if you consider the  
10 example of health warnings -- of drug warnings, which is one  
11 that their expert brought up, he said, *Well, the evidence shows*  
12 *that people read drug warning and they overestimate the risks*  
13 *associated with that.*

14           Well, if that's the case and we apply the standard that  
15 plaintiffs want the Court to apply, then drug warnings are  
16 unconstitutional because people don't understand them. They  
17 don't understand the scientific nuance of the nature of the  
18 risk that is presented.

19           That is simply not what is required in public-health  
20 warnings.

21           Now, the other thing I wanted --

22           **THE COURT:** How is this supposed to be judged, then?  
23 Just its literal words? I'm confined to its literal words, and  
24 not any asserted inference therefrom?

25           **MR. GOLDMAN:** Well, even if -- the thing is: Even if

1 the warning conveys that sugar-sweetened beverages are worth  
2 singling out, it doesn't convey that they are worth singling  
3 out for a reason that is subject to scientific debate. They  
4 may be worth singling out because they sell them in bottles  
5 where one serving causes you to exceed the maximum recommended  
6 intake for added sugars from all sources. They may be worth  
7 singling out because people drink so many of them. There are  
8 so many significant segments of the population that are  
9 consuming these beverages in the intended serving sizes.

10 So even if you accept that the presence of the warning  
11 somehow implies that there's a reason to single them out, it  
12 doesn't mean that the reason is one that's subject to  
13 scientific debate.

14 And *Zauderer*, itself, said that underinclusivity is not a  
15 basis to challenge a required disclosure.

16 And what they are doing is eliminating that holding  
17 through the back door by saying, "Well, no. You're requiring  
18 it on these drinks, and not on anything else. And therefore,  
19 you're suggesting that these are worth singling out. And  
20 you're suggesting they're worth singling them out because  
21 there's something biologically different about them."

22 But that's just not -- that's inconsistent with *Zauderer's*  
23 holding. And that's inconsistent with public-health warnings.  
24 And it is not enough -- it cannot be enough -- for this Court  
25 to say, *Well, it's possible that someone might read the warning*

1 *this way.*

2 **MR. BRESS:** Your Honor, if I may.

3 **THE COURT:** Well, no. Hold on.

4 So I guess you still haven't answered my question: How am  
5 I supposed to look at this?

6 I'm supposed to look at this just literally? Just literal  
7 words?

8 You don't want them to be able to imply any of the words:  
9 "uniquely," and things like that? Is there any room for  
10 implication here?

11 Or the Court is just supposed to judge this, regardless of  
12 how the average or reasonable consumer might look at it or what  
13 they might infer from this to determine whether or not it's  
14 factual/not factual; whether it's accurate or not accurate?

15 **MR. GOLDMAN:** I think that the Court could look at  
16 what it would convey to a reasonable consumer; not "might,"  
17 "may," "might convey", but "would convey to a reasonable  
18 consumer"; but framing it all at the same time with the  
19 question: Is this beneficial information for the consumer to  
20 have?

21 Because that's the reason, after all, behind the *Zauderer*  
22 standard to begin with.

23 **THE COURT:** But that's conflating the *Zauderer* test  
24 with whether -- the threshold question of whether *Zauderer*  
25 applies.

1           You're saying whether there's sufficient justification  
2 under *Zauderer*.

3           **MR. GOLDMAN:** No, I'm trying not to say that.

4           What I'm saying is that the question I think that you're  
5 asking is: How do I tell? At what point does the warning  
6 become unconstitutionally misleading?

7           **THE COURT:** No. At what point does it become  
8 nonfactual and inaccurate, or contra accurate? You use the  
9 word "controversial," and that's questionable exactly what that  
10 means here, but that's what I'm talking about.

11           **MR. GOLDMAN:** And I think it has to be that it would  
12 convey this to a reasonable consumer -- not that it might; not  
13 that could; not that it may; not that it would convey it to  
14 some and not others -- because we're talking about a  
15 public-health warning.

16           **THE COURT:** And you think that the warning here does  
17 not imply to a reasonable consumer that there's something  
18 particularly dangerous about beverages with added sugar?

19           **MR. GOLDMAN:** It doesn't convey that there is  
20 something dangerous; that it is worth singling out  
21 sugar-sweetened beverages because they have some intrinsic  
22 properties; that there are unique metabolic effects associated  
23 with beverages with added sugars.

24           There is no problem, though. I mean, even if it conveys  
25 that sugar-sweetened beverages are worth singling out, that's

1 not a problem. Plaintiffs need to go farther than that. They  
2 have to say it implies that they're worth singling out because  
3 of some unique metabolic property that these drinks have, as  
4 opposed to anything else, and as opposed to any of the other  
5 reasons that the City might have chosen to target  
6 sugar-sweetened beverages.

7 **THE COURT:** Why? Why is that the only reason why  
8 these would be problematic? I mean, what if it applies it just  
9 as a matter of general behavior, that SSBs are more highly  
10 correlated or associated with obesity, which I think is  
11 contested here?

12 **MR. GOLDMAN:** It's not contested. They have not  
13 contested that. They have not --

14 **THE COURT:** Is that true?

15 **MR. BRESS:** You're --

16 **MR. GOLDMAN:** There is nothing in their Complaint  
17 about patterns of consumption. There is nothing in their  
18 papers about a 20-ounce serving, and what that means.

19 **THE COURT:** In the aggregate, they cite studies that  
20 suggest there is no real correlation. I mean, they show that  
21 obesity -- I mean, there's been no historic correlation between  
22 SSBs -- at least, in the last ten years, between the  
23 consumption of SSBs and diabetes, for instance. There's an  
24 explanation for that, as your expert says. But I mean that  
25 seems to be an issue in controversy: Whether there is a real

1 causal relationship in the aggregate.

2           **MR. BRESS:** That's what we dispute, Your Honor, just  
3 to be very clear. And I think Mr. Goldman understands this.  
4 We dispute that there is a causal relationship, other than, of  
5 course, calories, between SSBs and obesity and diabetes. I  
6 think the confusion probably was Mr. Goldman was referring to  
7 association, and that, of course, is, far from causation.

8           In other words, there are studies that associate some  
9 people who, you know, drink a lot of soda also don't get a lot  
10 of exercise, et cetera, et cetera; but that's far from  
11 causation. We very much dispute that.

12           If I may, Mr. Goldman actually is misreading -- and I  
13 think this one's important -- *Zauderer*. There's a footnote in  
14 *Zauderer* that does make the point that the Government can act  
15 in a piecemeal way. It's kind of obscure, because it doesn't  
16 explain what it's talking about. So we went back and read the  
17 Supreme Court brief that made the argument that the Court was  
18 responding to. And, as you'll recall, *Zauderer* involved a  
19 lawyer's contingent fee arrangements, where the lawyer was not  
20 disclosing that you have to pay your costs even if you lose.

21           And the lawyer argued, *Well, if you think I have to*  
22 *disclose that in my advertisements, why aren't you also making*  
23 *me disclose them in, for example, the contingent fee agreement,*  
24 *itself? Why aren't you regulating every way I could make this*  
25 *statement?*

1           And the Court said, well, they don't have to deal with  
2 every problem essentially with your potential misstatements to  
3 deal with one of them.

4           That's a very, very, very different thing than what we're  
5 arguing here, which I think Your Honor appreciates, which is:  
6 By focusing only on sugar-sweetened beverages and not others,  
7 they're causing a speech effect, which is that they're --  
8 reasonable consumers will appreciate -- will take from this --  
9 that the State and the City -- and believe me. When it's in a  
10 box -- and Hammond supports this, too. When it's in a box and  
11 says the Government says it, they take it as fact. And what a  
12 consumer will take as fact is that sugar-sweetened beverages  
13 are more causal with respect to obesity and diabetes for them.

14           **THE COURT:** Well, that's the question. See, you're  
15 inserting the words "more causal" as opposed to, quote,  
16 "contributes."

17           **MR. BRESS:** Well, and the reason, Your Honor, is that  
18 when you pick one thing out and talk about it to the exception  
19 or elimination of all other like, competitive products, the  
20 very reasonable and, I would say, intuitive message that comes  
21 from that is that it's different. I mean, it's almost the  
22 Sesame Street rhyme, but --

23           **THE COURT:** So no matter -- is there any wording that  
24 would satisfy --

25           **MR. BRESS:** Yes.

1           **THE COURT:** -- the Constitution? If you were to  
2 single out, if you were to name -- not name every food under  
3 the sun, is there anything the City could do if it believed  
4 that, because of size of the packaging, the susceptibility of  
5 at least certain populations within the general population who  
6 are particularly susceptible, behavioral wise or other, to  
7 SSBs, which leads to higher intake of calories, which can lead  
8 to these diseases -- is there anything the City could say in a  
9 warning by qualifying "contributes," using other words, more --  
10 more or less certain words?

11           **MR. BRESS:** Yes, Your Honor, I believe there is. I  
12 think it would fail the other part of the *Zauderer* test. And  
13 we can get to that in a moment.

14           **THE COURT:** So what would that be?

15           **MR. BRESS:** I think the City could simply say,  
16 "Overconsumption of calories or consuming a greater number of  
17 calories than are expended may lead to obesity and diabetes."  
18 Now, they could say that.

19           **THE COURT:** Okay, but my question is whether they  
20 could single out SSBs. And I guess from your answer, unless  
21 they just talk about calories generally, the answer is "No."

22           **MR. BRESS:** Well, they could say, "And if part of a  
23 diet -- if, as part of a diet where you are overconsuming  
24 calories generally, you are drinking sugar-sweetened beverages,  
25 that those sugar-sweetened beverages along with everything else

1 you're eating in that diet is contributing, too." So they  
2 could. They could talk about it that way.

3 Now, we don't think it would pass the undue-burden and  
4 justifiable-burden tests in that order, but they could say  
5 that.

6 The reason why it has to get so contorted, Your Honor, is  
7 that the City has admitted -- and I'll use the word "admitted,"  
8 because it's clear in their answer, their opposition brief, and  
9 their experts' reports -- that any other way that they may  
10 believe that sugar-sweetened beverages contribute to obesity  
11 and diabetes is hotly debated in the scientific community.

12 So the only aspect -- the only way in which they believe  
13 it contributes that is not scientifically debatable is caloric  
14 contribution. In that respect, it's no different from anything  
15 else.

16 And, by the way, satiety is --

17 **THE COURT:** Well, maybe not caloric. It may or may  
18 not be different than anything else.

19 But it is different in terms of, certainly, if you take  
20 certain subpopulations where there's a high rate of consumption  
21 of soda, I mean, there, you know, it presents a risk; a  
22 heightened risk compared to other foods.

23 **MR. BRESS:** And so what Your Honor is pointing to is  
24 in certain subpopulations there are behavioral risks. Certain  
25 subpopulations will eat or drink more of certain items -- in

1 some cases, it's sugar-sweetened beverages -- that will  
2 contribute to health issues: Diabetes and obesity.

3       The problem is what they're saying here is nothing like  
4 that. The consumer that goes to the store and sees this sign  
5 that says *Sugar-sweetened beverages with added sugar contribute*  
6 *to diabetes and obesity* will look at the grapefruit juice  
7 that's sitting in front of them that has that kind of a sign on  
8 it, because it's got a little bit of sugar in it to sweeten it  
9 because unsweetened grapefruit juice often is too sour, and  
10 they'll look at the apple juice next to it, and they'll say,  
11 *Aha! The grapefruit juice contributes to diabetes and obesity.*  
12 *There's no similar sign on the apple drink.*

13       They'll look at the light soda, only 40 calories, that has  
14 that sort of a line in it, and they'll say, *Aha! That*  
15 *contributes to obesity and diabetes. I'm going to have this*  
16 *milk drink that actually has far more calories.*

17       They're being given a message that we believe is  
18 misleading; at the very least, is controversial.

19       And it really doesn't matter what the City's reasons for  
20 wanting to do that are. The City has a lot of other levers it  
21 can pull, Your Honor, to try to convince the population of  
22 San Francisco, if that's its goal. And we believe it's a  
23 completely misguided goal, but if its goal is to convince  
24 people not to drink sugar-sweetened beverages, it can, first of  
25 all, use the power of the pulpit to say that. It can try again

1 to pass a tax, which it tried before. It can go on the road  
2 and educate people. It can do all of that.

3 But the one thing under the First Amendment it can't do is  
4 to plaster over top of our speech and chill our speech with a  
5 message with which we vigorously disagree and they've  
6 acknowledged is hotly disputed in the scientific community.

7 And, no, by the way, this won't be a risk for the FDA  
8 area; for the drug area. And I did want to respond to that.

9 All drugs, as Your Honor knows, come with warnings. So  
10 it's not as though somebody sees a drug with certain warnings  
11 on them and says, *Oh, my gosh. The FDA's telling me this drug*  
12 *has certain potential problems with it, or, you know, may cause*  
13 *certain --*

14 **THE COURT:** Well, it has other problems. It may  
15 deter people from taking a drug in the first place, if they see  
16 all of these warnings. Now we know every time you see a  
17 pharmaceutical ad on TV, that 80 percent of time is spent on  
18 reading the fine print.

19 **MR. BRESS:** Yeah. If Your Honor's trying to convince  
20 me that we're an over-warned society to some degree, I think I  
21 would agree with you; but what I'm saying, I guess, is that it  
22 doesn't have the same relatively problem, in the sense that --

23 **THE COURT:** That's not the sole basis of your First  
24 Amendment challenge. It's more of an Equal Protection  
25 challenge.

1           **MR. BRESS:** Of course, it's not.

2           **THE COURT:** Your challenge is that it's misleading  
3 because it misleads the consumer, and leads the consumer to  
4 think that something is more dangerous -- whether it's  
5 absolutely or relatively -- than something else.

6           **MR. BRESS:** That's what I was going to, Your Honor.  
7 In other words --

8           **THE COURT:** And the same thing can be said of drug  
9 warnings. They overdo it so much, it scares people half to  
10 death.

11           **MR. BRESS:** Not as compared to other drugs,  
12 Your Honor.

13           My point is, again, if you're looking at things that  
14 consumers are going to say, you know, they -- you know, Vioxx  
15 has a certain warning on -- a certain set of warnings.

16           If the FDA was just picking and choosing, in other words,  
17 based on products that it thought people overused or shouldn't  
18 be using, and those it's going to put a warning on, but other  
19 like products that actually have the same effects, or at least  
20 scientifically there's -- there's no proof that they don't have  
21 the exact same effects -- it's not putting a warning.

22           **THE COURT:** As a fundamental First Amendment problem,  
23 relatively or not -- relative or not, you are compelling Vioxx,  
24 when it advertises on television, to carry a message  
25 antithetical to its views, its economic interests, and, in a

1 way, that arguably misleads consumers so they think they're  
2 going to get a heart attack as soon as they take it.

3 **MR. BRESS:** Oh, okay. All right. Your Honor, I  
4 don't think we're connecting here on this.

5 My only relativity point is that when you see a message on  
6 one, you're going to think it's worse than the other. It's a  
7 First Amendment point, not an Equal Protection point.

8 But as to your point about Vioxx, look. I'm no expert on  
9 Vioxx, Your Honor. I don't have a clue as to whether the  
10 particular warnings on Vioxx are correct. I take it as a  
11 matter of faith in my Government that they are.

12 But if the question under *Zauderer* were, you know, "Are  
13 Government statements, because they're about health, somehow  
14 held to a different standard?" the answer's "No."

15 With the FDA I do think, by the way, they may even pass  
16 heightened scrutiny on these warnings if it were challenged  
17 under that. So even if you weren't under *Zauderer*, when you're  
18 talking about an agency that's been assigned a job by the  
19 Federal Government, in law, by the people, to not allow a  
20 product to be sold unless it is safe for its intended use, and  
21 that agency decides that this particular product will not be  
22 safe for its intended use unless it provides certain warnings  
23 that -- *Do not take if you're doing this or that*, we think that  
24 raises entirely different issues, and may well pass scrutiny  
25 under *Central Hudson* derived scrutiny.

1 (Reporter requests clarification.)

2 **MR. BRESS:** Sorry. *Central Hudson*. H-u-d-s-o-n.  
3 I'm sorry. I speak too fast.

4 **THE COURT:** All right.

5 **MR. GOLDMAN:** I think the fact --

6 First of all, the warning uses the word "contributes,"  
7 your Honor pointed out.

8 **THE COURT:** Uses what?

9 **MR. GOLDMAN:** Uses the word "contributes."

10 **THE COURT:** Which implies causation?

11 **MR. GOLDMAN:** It also implies other things  
12 contribute.

13 **THE COURT:** Oh. It's not the unique, not the sole  
14 cause.

15 **MR. GOLDMAN:** It's not unique. The use of the word  
16 "contributes" is significant there.

17 And then now Mr. Bress keeps saying that the warning is  
18 misleading if, as a result of reading it, people think that  
19 they should be especially wary of sugar-sweetened beverages.

20 I have to disagree with that. It's not misleading. They  
21 are easy to overconsume. They are marketed to be overconsumed.  
22 They supply no nutrition. That's certainly not disputed by  
23 plaintiffs. If consumers take away a message that there are  
24 risks associated with SSBs, that's not misleading.

25 **MR. BRESS:** Your Honor, our statement was not that

1 consumers -- it's misleading because consumers will think they  
2 should stay away.

3 It's: It's misleading because consumers will take away  
4 that sugar-sweetened beverages contribute to diabetes and  
5 obesity in a way different from other products that are not  
6 receiving a similar warning. That's what we're saying. And  
7 that's --

8 **THE COURT:** But the way to be -- other than a  
9 biological mechanism, it could be based on availability. Based  
10 on susceptibility of certain populations. It could be based on  
11 packaging. It could be based on just plain availability. It  
12 could be based on popularity.

13 **MR. BRESS:** And, Your Honor, if they were making a  
14 general statement of fact to the public, that might be right.  
15 It -- I don't think it is, but they could make it that way.

16 What they're doing here is warning. It's warning the  
17 consumer that's buying it that buying this, consuming this  
18 product will -- it will contribute to this.

19 It's not telling them something general about society. In  
20 fact, if it was, if it was making some sort of general societal  
21 statement, it wouldn't be a disclosure or a warning, at all.  
22 It would be a general statement.

23 Dr. Hammond -- and again, he's their expert; not ours.  
24 But he made quite clear that when you're talking about warning  
25 design, that's what warnings are about. It's about telling the

1 consumer about a danger to them.

2 All of the factors that Your Honor just mentioned are not  
3 factors to that particular consumer.

4 And, by the way, as we're getting the statics, they're  
5 getting all fouled up by the City, as well. Just to correct  
6 the record for a moment, you know, three-quarters of  
7 San Franciscans drink -- these are statistics from CDC.  
8 Three-quarters of San Franciscans drink sugar-sweetened  
9 beverages with some regularity. Of those 75 percent, 50 of the  
10 75 drink one 12-ounce or less per day.

11 Now, that's, you know, 140 calories, let's say, per day.

12 The FDA's proposed limitation -- it's really not a  
13 limitation; it's a recommendation for added sugars -- is about  
14 10 percent of a 200-calorie [sic] diet -- a 2,000-calorie diet.  
15 So 200 calories. So what we're talking about is two-thirds of  
16 the people that are drinking beverages with added sugar are  
17 drinking them -- are having the added sugar from that source  
18 well within the FDA's recommendations.

19 And, of course, those recommendations are just average  
20 recommendations for people that expend average numbers of  
21 calories. If you're a runner and you come back from your run,  
22 and you have a Gatorade, you know, you don't need a sign  
23 telling you it's going to contribute to diabetes and obesity.

24 The point is, you know, this all has to do with how many  
25 calories people are expending and how many calories they're

1 taking in. And that's the only thing that there's scientific  
2 consensus on. And the rest -- whether it's satiety, whether  
3 it's glycemc index, what-have-you -- are disputed scientific  
4 theories, and the Government has acknowledged that.

5 **THE COURT:** What do you do with the fact that the FDA  
6 has noted that there's inadequate evidence to suggest that  
7 added sugars directly contribute to obesity or heart disease;  
8 that sugars do not contribute to weight any more than any other  
9 sources of calories?

10 **MR. GOLDMAN:** Well, the warning is not making a claim  
11 that they do, Your Honor.

12 **THE COURT:** You don't think that's fairly implied --

13 **MR. GOLDMAN:** No.

14 **THE COURT:** -- in the warning?

15 **MR. GOLDMAN:** I don't think it's the case that a  
16 person -- a reasonable person reading the warning would  
17 necessarily come to that conclusion, because it doesn't make  
18 any claim about that.

19 And there are other reasons, as the court has noted, that  
20 SSBs may make a particular contribution to these health  
21 outcomes. And, of course, nobody's talked about tooth decay in  
22 any of this.

23 **MR. BRESS:** I'm happy to talk about tooth decay,  
24 Your Honor. On page 14 of our brief we cite the American  
25 Dental Association, which has said that while it's become

1 fashionable to target sugar-sweetened beverages as a leading  
2 cause of dental caries, there's no evidence to support that.  
3 That's the American Dental Association. It was in its comments  
4 to the FDA as part of the recent nutrition-box proceedings.

5 **THE COURT:** All right. Well, why don't you respond  
6 to that?

7 **MR. GOLDMAN:** The evidence tying sugar to tooth decay  
8 has been established for decades.

9 **THE COURT:** What about this last statement by the  
10 American Dental Association?

11 **MR. GOLDMAN:** I don't have that one in front of me.

12 **MR. BRESS:** It's cited in our brief, on page 14 of  
13 our brief. I can actually bring up -- I did bring the letter  
14 with me, Your Honor, so I can share it with my opposing  
15 counsel.

16 **THE COURT:** This is your opening brief?

17 **MR. BRESS:** Your Honor, this is page 14 of our  
18 opening brief. You'll see a citation there to the American  
19 Dental Association statement.

20 **THE COURT:** Well, it says "evidence is not yet  
21 sufficient to single out any one food other beverage product as  
22 a key driver."

23 **MR. BRESS:** Yes. And what the full quote is -- and  
24 I've got it here -- is, "We recognize the growing popularity of  
25 singling out sugar-sweetened beverages as a key driver of

1 dental caries. Advocates postulate that lowering  
2 sugar-sweetened beverage consumption rates will lower the  
3 prevalence of dental caries. Unfortunately, the evidence is  
4 not yet sufficient to single out any one food or beverage  
5 product as a key driver of dental caries."

6       They go on, by the way, and say, "From an oral-health  
7 perspective, our recommendation is to emphasize reducing  
8 consumption of preventable carbohydrates overall, rather than  
9 singling out individual foods and beverages for regulation.  
10 This would address our concerns about satisfying a sugar  
11 craving by switching from one sugary product to another." And  
12 the one was sugar-sweetened beverages as an example, to -- the  
13 other of the examples it gives are natural fruit juices, hard  
14 candies, sugary cereals, et cetera. The American Dental  
15 Association is making exactly our point.

16           **THE COURT:** Well, except they're saying it's not  
17 sufficient to single out any one beverage product as a, quote,  
18 "key driver."

19       This warning doesn't say "key driver." It says  
20 "contributes," which is pretty general.

21           **MR. BRESS:** Their point, Your Honor, is that by  
22 singling out the one, you're causing people to think that  
23 others -- in this case, for example, natural fruit juices, hard  
24 candies, and sugary cereals -- are better for them than the  
25 sugar-sweetened beverages. And what they're telling you is

1 they're not.

2           **THE COURT:** Well, that gets back to your relativity  
3 point, which -- you know, I understand.

4           The problem with that is that that suggests that, unless  
5 you are never underinclusive -- that you include everything  
6 else -- that it's always going to be implied that whatever you  
7 have singled out is more dangerous or more hazardous than  
8 something else.

9           **MR. BRESS:** Your Honor, the Government normally  
10 doesn't single out when it comes to forcing you to make speech.  
11 So when you have warnings on alcoholic beverages, they're on  
12 beers, wines, hard liquors. They don't pick and choose.  
13 They're not just putting it on -- they don't way, *Well, in some*  
14 *lower-income communities where malt liquor or other beverages*  
15 *are drunk, we're going to require them to have this warning on*  
16 *them; but in other communities where people supposedly are more*  
17 *educated and more aware of their diet -- so if they're drinking*  
18 *Chardonnay -- we're not going to put that warning on it.*

19           That's not what they do. They find out what the risk is  
20 that they're warning about, and they warn about that risk  
21 across the board. And if they didn't do that, they'd be  
22 sending a message to consumers that one product causes those  
23 problems more than the others do. It's not what the Government  
24 does.

25           **THE COURT:** Well, it's just like a definitional

1 problem here. You can define alcohol. If you're going to give  
2 alcohol warnings, seems to me that's easier to define by  
3 content of alcohol; whereas SSBs -- I guess your objection is  
4 *Because they've excluded fruit juice*, for instance.

5 **MR. BRESS:** No, no, no, no, no, Your Honor. That's  
6 not my -- they have excluded fruit juice. They've excluded, of  
7 course, everything else with added sugar; but beyond that, the  
8 only thing that there is a scientific consensus on is calories.  
9 They've excluded all caloric foods. If they're really  
10 interested in obesity and diabetes caused from obesity,  
11 cheeseburgers and French fries and fried chicken and  
12 what-have-you would be things that they'd be looking at, as  
13 well.

14 So my point is not that I'm somehow picking alcohol. And  
15 that's an unusual example. What the Government's done with  
16 alcohol is said, *There's a common issue here. It's -- it is*  
17 *presented by all of the these products. We're going to warn on*  
18 *all of them.*

19 If the common issue here that they want to warn about is  
20 overconsumption of calories leading to diabetes and obesity,  
21 they've got to address that common issue, and not pick and  
22 choose, because by picking and choosing, consumers are  
23 obviously --

24 **THE COURT:** Well, that's not fair. You're saying  
25 that as long as calories are calories, you should only warn

1 about calories.

2 Well, there are certain things that people are more  
3 susceptible to. And I'm not saying that that's not scientific,  
4 or whether that's scientific or not; but there's an argument  
5 here that certain forms of caloric consumption are more  
6 enticing, more easily available, sold in packages that are more  
7 likely to carry more calorie content than others. It's  
8 consumed more often or consumed in a way that often might  
9 exceed the daily allowance the recommended allowance.

10 **MR. BRESS:** Your Honor, if what they're concerned  
11 about are --

12 And, by the way, lots of other things -- Ho Hos and other  
13 things -- are sold in large packages. So are small doughnuts.

14 But if their concern is behavioral -- and that's really  
15 what Your Honor is getting at right now. If their concern is  
16 that certain products are sold in larger quantities, or  
17 people tend to consume them more -- and we're not getting to  
18 science now. We're getting to behavior of people. The  
19 Government's going to then warn about that.

20 What they can't do is scare you off from buying certain  
21 products with a warning that is relaying to you that that  
22 product is more dangerous in particular ways; here, with  
23 diabetes and tooth decay.

24 And it doesn't say, by the way, "overconsuming."

25 It doesn't say, "buying them in large quantities."

1 It simply says, "drinking beverages with added sugar."

2 **THE COURT:** So if it said "drinking excessive," or  
3 some other qualifier, "of beverages with added sugar."

4 If they added a qualifier that suggests, you know -- I  
5 don't know what the word is; whether it's "excessive" or "large  
6 amounts of" or "more than two" --

7 If it said, "more than," you know, "X ounces a day," or  
8 something, you would not have a problem with that?

9 **MR. BRESS:** I still think you'd have the problem that  
10 you're telling people that it's -- that somehow that's  
11 different for them than eating, you know, a large pizza or a  
12 large cheeseburger, Your Honor.

13 And the other problem, of course, is it all depends on  
14 your diet. So again, taking -- I'm not talking about your  
15 Olympic runner. Take your runner that goes out and runs the  
16 Bridge, you know; does, you know, four miles a day. That  
17 person comes back has a 20-ounce Gatorade. All right? There's  
18 no reason that -- it would be inaccurate to say that that  
19 person's having a Gatorade after their run contributes to  
20 diabetes.

21 **THE COURT:** Well, the problem with that is if you can  
22 individualize it and say, *Well, we can always find some*  
23 *individual where this is not going to be a contributing factor,*  
24 *a causal factor.* That's going to be true of smoking. Some  
25 people smoke, and live to 110.

1           **MR. BRESS:** It's not behavioral. The risk they're  
2 warning people of is a behavioral risk. And the behavior is  
3 taking in more calories than they expend.

4           **THE COURT:** It's more your construct. Your construct  
5 is: Let's look at each individual. This is only addressing an  
6 individual. And if it is inaccurate or misleading with respect  
7 to any one individual, it's problematic.

8           **MR. BRESS:** My point is not that everybody has to get  
9 cancer in order to tell people that lung cancer causes cancer  
10 [sic]. You know, we've been through this. But when you smoke  
11 a cigarette, smoking that cigarette or smoking cigarettes  
12 generally creates a risk that you will get that, regardless of  
13 your behavior. It doesn't say it will create a risk of getting  
14 lung disease if you also eat a cheeseburger that day, or if you  
15 also do X or Y.

16           Here it's a huge qualification.

17           And I appreciate Your Honor's reasoning, by the way, in  
18 *CTIA* where Your Honor said, *Look. You can't require that*  
19 *warnings have to be absolutely perfect with precision about,*  
20 *you know, exactly what the magnitude of each risk is.* Of  
21 course, as a matter of common sense that's true.

22           But here what they're leaving out in the warning is the  
23 big determinative factor; not a small, you know, niggling thing  
24 on the side, but the big determinative factor. That is: Are  
25 you consuming overall more calories than you're expending? If

1 you are, then drinking your sugar-sweetened beverages as part  
2 of that diet is contributing or may contribute. But if you're  
3 not, it won't or doesn't.

4 So it's completely false for the vast majority of  
5 San Franciscans, because it's warning about a behavior in which  
6 they're not engaging.

7 **MR. GOLDMAN:** The Government, when it regulates in a  
8 field of nutrition, has to be able to take into account  
9 patterns of consumption. It has to be able to do that. And  
10 the position that they are advocating is one that would mean no  
11 warnings or no effective warnings, at all, because he just  
12 said, "Well, no excessive" -- that wouldn't be enough, either.

13 So you'd have a very long debate, a very long warning with  
14 lots of footnotes which no one would read or no one would  
15 understand. Or if it's calories, well, you have to put it on  
16 everything. So you have to have it on the Coke, and you have  
17 to have it on the bag of carrots. Or you have to put in all of  
18 these qualifiers and disclaimers, to make sure that people  
19 understand the biological mechanisms behind it.

20 The rule they are advocating is one where there are no  
21 warnings. There is no effective communication to consumers  
22 about the real health risks that actually exist based on  
23 patterns of consumption.

24 **MR. BRESS:** Your Honor, that -- the scare tactic that  
25 this would take down all warnings is completely untrue. It

1 would not. Most warnings, we think, would pass muster  
2 perfectly.

3 But let me be clear that there is a slippery slope on the  
4 other side that the Government doesn't want to recognize; and  
5 that's that every time you've got a state or locality that  
6 doesn't like a particular activity that people engage in or a  
7 particular product that they are imbibing, for good or bad  
8 reasons, it can load that one up with special warnings that  
9 scare the consumer to believe that that product is worse than  
10 other products, or has certain attributes to it that are going  
11 to cause them problems.

12 Let me give you an example. You could get a town, for  
13 instance, that is extraordinarily pro life, and requires that  
14 everyone who comes in for an abortion procedure at four months  
15 be told that a fetus feels pain at fore months. Suppose, for  
16 purposes of my hypothetical here, that it's completely  
17 controversial scientifically whether a fetus does feel pain at  
18 four months or not. The City believes it does in that case;  
19 and others believe it doesn't.

20 In that instance, requiring that kind of a warning on that  
21 kind of a product, if courts would allow cities to go forward  
22 whenever they think something is crucially important -- in that  
23 case, you know, to a cause that they believe is important --  
24 without a rigorous analysis of whether what they're saying is  
25 true, we could have warnings all over the place based on,

1 again, the political proclivities that exist in various cities  
2 and towns across the country.

3 I'd like to switch, if I may for a moment, to burden,  
4 Your Honor, because we haven't touched on it. And that's that  
5 even if -- and again, for all of the reasons we've stated, we  
6 don't think it's true. Even if this were, even if they could  
7 get past this first part of *Zauderer*, it would be an  
8 unjustifiable burden in this case, because what they would end  
9 up doing is chilling an enormous amount of speech; all of the  
10 speech that we've got on -- you know, whether it's billboards,  
11 whether it's general signs, et cetera.

12 And for that, by the way, you can take -- the record is  
13 uniform on this. You've got the companies, themselves, coming  
14 to this Court, saying, *We will shift to other -- if we're*  
15 *forced to make that warning, we will shift to other forms of*  
16 *advertising*. You have got the California CSOAA telling you  
17 that the companies are already moving in that direction.

18 You will have a chilling effect on speech. Very few de  
19 minimis number of warnings will be out there at that point.  
20 And, by the way, it would be the Government's burden to  
21 demonstrate, of course, you know, that they've -- what they've  
22 got that would still serve their purpose. But the point is  
23 you'd have a de minimis number of product signs that would  
24 carry their warning. And you'd be chilling an enormous amount  
25 of speech.

1           **THE COURT:** All right. Let me get your response to  
2 that, because there is a record now. Whether you believe it or  
3 not, there is a substantial record of behavioral consequences  
4 and chilling.

5           **MR. GOLDMAN:** The chilling in *Zauderer* means that  
6 it's an undue burden. And chilling does not mean you would  
7 prefer not to speak if you have to make the disclosure. That  
8 cannot be what chilling means under *Zauderer*, because the Court  
9 said there is no fundamental rights not to disclose factual  
10 information. The First Amendment interest is minimal.

11           And so if an advertiser would prefer to remain silent than  
12 make a required disclosure, that's not a First Amendment  
13 problem. They don't have a First Amendment interest not to  
14 make it.

15           **THE COURT:** But they're not engaging in misleading  
16 speech. They're just advertising.

17           **MR. GOLDMAN:** But *Zauderer* is not limited to  
18 misleading speech.

19           **THE COURT:** No, but your rationale for why there is  
20 no First Amendment interest, no burden, is that, well, you have  
21 no interest in making misleading speech in the first place. So  
22 your being chilled from making misleading speech doesn't count  
23 for anything on the constitutional scoreboard.

24           That's not true here. There's just straight-on  
25 advertising. It may be commercial speech. It may not be quite

1 entitled to the same protection as political speech, but  
2 there's evidence here that it's being chilled.

3           **MR. GOLDMAN:** I'm not saying that they don't have an  
4 interest in not making misleading speech. I'm saying they have  
5 no interest in not making a factual disclosure. They have no  
6 constitutional interest in not making a factual disclosure.

7           So if they decide I don't want --

8           **THE COURT:** That eliminates the second prong of  
9 *Zauderer*. You're saying so long as it's factual,  
10 uncontroverted, or whatever -- factual and accurate, however  
11 you interpret that in this context, that's the end of the game,  
12 no matter how much speech it chills, because it's factual and  
13 accurate, and you have no interest in not disclosing factual  
14 and accurate information.

15           **MR. GOLDMAN:** There are a few constraints on the  
16 Government. The first is the factual one.

17           The second: The reasonable relationship. It has to be a  
18 reasonable relationship.

19           So -- and that -- we have advised if you effectively make  
20 speech impossible, that's an undue burden. That's chilling.  
21 So if the requirement were -- covered 99 percent of the act,  
22 the 1 percent to the soda companies for their advertising  
23 message, well, that would be an undue burden.

24           But the 20 percent threshold is reasonable, because it  
25 complies with federal and international standards, and it was

1 upheld in the Sixth Circuit Decision, and in *Consolidated*  
2 *Cigar*. So the 20 percent -- it bears a reasonable relationship  
3 to the City's interest in communicating an effective warning.  
4 As long as the information is factual and the relationship is  
5 reasonable, it doesn't make speech impossible, then there is no  
6 chilling.

7       There -- if it makes speech undesirable because the  
8 advertiser would prefer not to disclose factual information,  
9 that is not First Amendment chilling. That is not a  
10 constitutional problem. That is the advertiser saying, *Well, I*  
11 *don't want to make -- I don't want to give the public this*  
12 *factual information that you're requiring me to give, so I'm*  
13 *not going to speak at all.* I think --

14       **THE COURT:** So you have to look at the justification  
15 for the reasons for the "chill." If it is because the  
16 advertiser simply doesn't want to disclose factually accurate  
17 speech, that's their own problem. It's only because of their  
18 own choice; and therefore, it doesn't count on a constitutional  
19 scale. Is that your argument?

20       **MR. GOLDMAN:** They have told us that that's the  
21 reason. They will shift to noncovered media because they don't  
22 want to make the warning.

23       **MR. BRESS:** Your Honor, if I could speak from the  
24 horse's mouth on what we've actually told the Court on this,  
25 what we've told the Court is that if you put a 20 percent lock

1 warning on our advertisements -- and we've got examples of them  
2 in Dr. Golder's report to this Court -- you will completely and  
3 utterly undermine the message that we are trying to send with  
4 that ad.

5 This is not a matter of us saying we prefer for the people  
6 not to have factual information. This is that our speech is  
7 sent out for our purpose. We're trying to promote a message.  
8 We are trying to make certain statements to consumers. And if  
9 you're requiring these kind of block warnings on them, it's  
10 going to change the nature of the overall experience.

11 That's something, by the way, again, Dr. Hammond agrees  
12 with in his opinion. He says the whole point to requiring  
13 20 percent, a border, contrasting colors, the big sign that  
14 says "Warning," is to get through the noise so that the  
15 consumers see this. And what Dr. Golder tells us is, *Yes,*  
16 *that's what consumers are going to see.*

17 Now they may see some other things; but, for example,  
18 Dr. Hammond says, well, he relies on this study that said that  
19 people still recognize branding information, despite a warning.

20 Well, as Dr. Hammond explains in his rebuttal, the study  
21 that was cited shows no such thing. First of all, the warning  
22 there was only 3 and a half percent of the total size, not 20.  
23 But secondly what the study showed was people still recognize  
24 the brand of the product that was being advertised, but they  
25 didn't recognize anything else that the ad was trying to tell

1 them, because they were focused in on the warning.

2       So the reason that this is chilling, Your Honor, is not  
3 just some sort of capricious desire not to share facts with  
4 consumers, but that our point as an advertiser is to get our  
5 speech out. And if we're not going to be able to get it out  
6 effectively, we're going to shift to forms that we can.

7       And, in fact, the City acknowledges that a rational  
8 advertiser will always shift away from the kind of advertising  
9 that is covered by disclosure requirement. And that's because  
10 it's stopping you from getting your speech out.

11       The other thing is that the case law doesn't support the  
12 City's argument that the only thing that works for burden is if  
13 it's physically impossible to get your words out. That's not  
14 what the cases say.

15       In fact, if you look at *Tillman* as an example -- it's an  
16 Eleventh Circuit case -- the Government was taking five seconds  
17 out of a thirty-two-second advertisement, and the Court found  
18 that that was an undue burden.

19       If you look at the *CTIA* San Francisco case, that was one  
20 where stickers were being required over the top of displays in  
21 stores. And the Court recognized that would distort the  
22 advertisement that was being given, and therefore would be too  
23 great a burden.

24       The courts have always looked, when they look at undue  
25 burden and chilling in particular -- chilling is a concept that

1 transcends physical impossibility. It goes to whether your  
2 speech is being burdened in such a way that you're going to  
3 cease to engage in it in the way that you were.

4 That we've demonstrated in spades here, Your Honor.

5 And on the other side of the scale -- and you've got to  
6 look at it, because the word is "undue burden." We've shown  
7 it's going to be a very substantial one, but it's also going to  
8 be an undue one, since it's going to cause us to move to less  
9 favorable forums for us.

10 The Government's not going to get its message out that it  
11 wants to get out that way. All it's going to do is succeed in  
12 forcing us from advertising in many ways that we advertise  
13 today. Now, maybe that's their goal, because, of course, there  
14 are other ordinances they enacted at the same time that would  
15 have completely prohibited us from advertising these products  
16 in any Government forum. So maybe the Government is happy in  
17 the end, if we're also forced out of billboards and out of  
18 signs and out of stores, but that's not something that the  
19 First Amendment permits. And it certainly is not their  
20 interest that they've stated in this case.

21 In fact, the only interest they've stated in their case,  
22 if you go to their actual statement of interest, is teaching;  
23 is telling consumers that there is added sugar in a certain  
24 product. Their warning doesn't even do that.

25 **THE COURT:** All right. I'll give you the last word.

1 I want you to address the burden question. And surely you must  
2 not mean only physical impossibility constitutes burden.

3 **MR. GOLDMAN:** The point of *Zauderer* is to include  
4 more information. It cannot be the case that more information  
5 is permissible only if it doesn't create a negative impression  
6 of the product; if it doesn't cause consumers to view the  
7 product differently.

8 If that's --

9 **THE COURT:** Well, so you could say then there's never  
10 a burden. So long as you satisfy the first prong of *Zauderer*,  
11 there's never a burden, unless it's physically impossible.

12 **MR. GOLDMAN:** No. You're giving -- you're giving  
13 more people information about a product.

14 **THE COURT:** Right, and so there's never a burden.

15 **MR. GOLDMAN:** If the requirement is unconstitutional  
16 because it causes them to view the product differently than  
17 they viewed it in the absence of a warning, then what is the  
18 point of any warning?

19 **THE COURT:** So what does the burden prong of *Zauderer*  
20 mean?

21 **MR. GOLDMAN:** It has to -- it has to prevent them  
22 from making their message --

23 **THE COURT:** Physically prevent them?

24 **MR. GOLDMAN:** I mean, maybe there are other ways, but  
25 if what they are saying is, *If you leave us only 80 percent, we*

1 *cannot get our message out. And if that's their argument, then*  
2 *many, many regulations which use a 20 percent threshold,*  
3 *including tobacco, are unconstitutional, because what they're*  
4 *saying is, If you have a bold text warning on 20 percent, that*  
5 *prevents the advertiser from communicating their message --*

6 **MR. BRESS:** Your Honor, there is only one --

7 **MR. GOLDMAN:** -- and everything else follows with it.

8 **MR. BRESS:** There's only one regulation that has a  
9 20 percent. Let me correct the record on that. Tobacco's the  
10 only one. And by putting us in the same box as tobacco, that  
11 is a chilling effect, Your Honor. This is unlike any other  
12 warning on any other consumer product, except tobacco.

13 **THE COURT:** All right. I'll take the matter under  
14 submission. Thank you.

15 **MR. BRESS:** Thank you, Your Honor, for the time and  
16 attention. Much appreciate it.

17 **THE COURT:** We have a status --

18 (Discussion off the record.)

19 **THE COURT:** We should set a future date as a control  
20 date. Why don't we set something out in 60 days, Betty, for  
21 status, and see where we're at?

22 **THE CLERK:** June 16th at 10:30.

23 **MR. GOLDMAN:** Thank you, Your Honor.

24 **MR. BRESS:** Thank you, Your Honor.

25 (At 5:06 p.m. the proceedings were adjourned.)

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

3

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*Lydia Zinn*

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April 11, 2016

Signature of Court Reporter/Transcriber

Date

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Lydia Zinn

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