No. 16-16073

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
The Honorable Edward M. Chen, Case No. 3:15-cv-03415-EMC

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF APPELLANTS AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, AND CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amicus curiae* the Association of National Advertisers, Inc., attests that it is incorporated as a nonprofit trade association, has no parent corporation, and has no stock or other interest owned by a publicly held company.

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I. INTRODUCTION

San Francisco believes that government knows best when it comes to nutrition, and that it may force others to deliver its pronouncements. Acting on this belief, it adopted Health Code Article 42, which requires ads posted for sugar-sweetened beverages ("SSBs") to add a large warning against the presumed "harmful health effects of [] such beverages." The district court's refusal to enjoin this highly intrusive law reflects a misconception that the First Amendment allows local officials to commandeer advertising space whenever they wish to send government messages. This conscription of private speech "to tilt public debate" regarding SSBs "in a preferred direction" is unsound in light of unfortunate past experience, and as a matter of constitutional principle. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011).

Although this Court had just months earlier reinforced that these legal standards are intended to "check raw paternalism, ensuring 'that the law does not seek to suppress a disfavored message,'" *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 649 (9th Cir. 2016) (quoting *Sorrell*, at 572), the District Court denied preliminary injunctive relief. *American Beverage Ass'n v. City & Cty. of San Francisco*, __ F.Supp.3d ___, 2016 WL 2865893 (N.D. Cal. May 17, 2016) ("*ABA*"). It did so by misreading precedent regarding compelled commercial speech, and by downplaying the burden that San Francisco's ordinance imposes.

Id. *8-18. This decision conflicts with numerous rulings that it is "incompatible with the First Amendment" to censor or otherwise burden speech based on fear that people will make bad decisions or to promote "'what the government perceives to be their own good.'" *Sorrell*, 564 U.S. at 577 (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1986) (plurality op.)).

Amicus curiae the Association of National Advertisers, Inc. ("ANA"), submits this brief supporting Plaintiffs-Appellants the American Beverage Association ("ABA"), California Retailers Association ("CRA"), and California State Outdoor Advertising Association given the vital constitutional principles at stake. These important issues affect not only SSBs, but *any* lawful product or service about which the government believes it knows best. Indeed, this Court already has been called upon to review such measures regarding cell phones, *see CTIA-The Wireless Ass'n v. City & Cty. of San Francisco*, 494 F. App'x 752, 754 (9th Cir. 2012), and now SSBs, while others have confronted, *e.g.*, "conflict mineral" warnings. *National Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) ("*NAM*"). If this Court were to affirm the decision below allowing the City to force advertisers to deliver its message, there is no reason San Francisco could not do the same for a multitude of other products and services, as could every one of the some 30,000 city, town, and county governments nationwide, leaving virtually no product immune to these types of disclosures.

II. INTEREST OF *AMICUS*[1]

Amicus curiae the ANA provides leadership for the advertising industry that advances marketing excellence and shapes the future of the industry. Founded in 1910, the ANA's membership includes more than 700 companies with 10,000 brands that collectively spend over $250 billion annually in marketing and advertising. The ANA also includes the Business Marketing Association and Brand Activation Association, operating as ANA divisions, and the Advertising Educational Foundation, an ANA subsidiary. The ANA advances the interests of marketers and protects the well-being of the marketing community, while also serving its members by advocating for clear and coherent legal standards for advertising.

The ANA's interest here focuses on preserving robust protections afforded to advertising by the First Amendment. It has a particularly strong interest in safeguarding the longstanding vitality of constitutional protections for commercial speech. *See Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Commercial speech doctrine has evolved steadily, and since forerunner cases like *Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S.

[1] No party's counsel authored this brief in whole or in part, and no party, its counsel, or any person other than the ANA or its members contributed money to fund the brief. All parties have consented to *amicus* briefs on this appeal.

748 (1976), the Supreme Court has greatly increased protection for such speech.[2] The ANA in the present context seeks to ensure courts remain vigilant in barring overly burdensome compelled disclosures and the co-opting of private speech for government propaganda. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986).

Any regulation of truthful advertising must directly and materially serve an important governmental interest without restricting speech more extensively than necessary. *Central Hudson*, 447 U.S. at 565-66. Supreme Court "decisions involving commercial speech are grounded in faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646. Thus, "if the

[2] Over the ensuing decades the Court invalidated: (1) prohibitions on the use of illustrations in attorney ads, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985); (2) an ordinance regulating the placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a state ban on using "CPA" and "CFP" on law firm stationery, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); (5) a restriction on listing alcohol content on beer labels, *Rubin v. Coors*, 514 U.S. 476, 491 (1995); (6) a state ban on advertising alcohol prices, *44 Liquormart*, 517 U.S. at 165; (7) a federal ban on broadcasting casino advertising, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); and (8) federal limits on advertising drug compounding practices. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 377 (2000).

Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Western States*, 535 U.S. at 371.

III. ARGUMENT

Under new Article 42 to San Francisco's Health Code, virtually all SSB advertising within City limits on any paper, poster or billboard; in any stadium, arena or transit shelter; on any wall or other surface; or in or on any train, bus, car or other vehicle, must cover at least 20% of the ad with the following:

> WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.

S.F. Health Code §§ 4202 & 4203(a)-(b) (the "Warning Mandate"). The ordinance defines SSBs as including not only sodas, but sports and energy drinks, sweetened juices, vitamin waters and teas, *id*. § 4202, and even beverages the Food and Drug Administration ("FDA") defines as "low calorie." *See* 21 C.F.R. § 101.60(i)(A). But it excludes – regardless of sugar-content or calories – beverages with "solely 100 percent Natural Fruit Juice [and/or] Natural Vegetable Juice," and all milk and milk alternatives, including certain "flavored milk."[3] Further, it exempts ads "in

[3] S.F. Health Code § 4202. It also excludes syrups, powders and base products that consumers use to mix, compound, or make SSBs, as well as products "for consumption by infants," "medical foods," and products "designed as supplemental, meal replacement, or sole-source nutrition" or "sold in liquid form designed for use as … nutritional therapy" or asserted "weight reduction." *Id*.

any newspaper, magazine, periodical, … or other publication," or "on television, the internet, or other electronic media."[4]

The ANA fully endorses the compelling reasons in Plaintiffs-Appellants' merits briefs for why the District Court's constitutional analysis is erroneous: (1) the ordinance cannot withstand heightened scrutiny, which applies equally to speech restrictions and compelled disclosures, including because it fails to advance a legitimate governmental interest,, *e.g.*, ABA/CRA Br. 25-27; (2) lesser scrutiny under *Zauderer* is inappropriate because the ordinance does not seek to remedy misleading or deceptive commercial speech, *id*. 28-34; and (3) even if *Zauderer* applied, the ordinance would still fail constitutional review, because it does not mandate purely factual or noncontroversial information, *id*. 34-45, it is "unduly burdensome" and it will "chill[] protected commercial speech." *Id*. 46-58. There is no justification for the Warning Mandate in which the government commandeers space on private parties' ads in order to control public debate and alter individual behavior – purposes foreign to the First Amendment. *See*, *e.g.*, *44 Liquormart*, 517 U.S. at 510, 516; *Sorrell*, 564 U.S. at 578-79.

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[4] *Id*. Also exempted are packaging, menus, and listings of beverages that may be served or ordered for consumption at a retail establishment, and displays or representations of, or other information about, SSBs. *Id*. § 4202. The ordinance additionally excludes existing ads other than "general advertising signs" permitted by the City prior to the ordinance's operative date. *Id*. § 4203(d).

For example, federal law already requires packaging for nearly all food and drinks – including those subject to the Warning Mandate – to display both an ingredient list and nutritional information.[5] The rules also require "common or usual names" of ingredients – including specifically "sugar" rather than terms like "sucrose" – 21 C.F.R. §§ 101.4(a)(1), (b)(20), and were recently amended to require separating out "added sugars" with their "Daily Reference Value." *See Food Labeling: Revision of the Nutrition and Supplement Facts Labels*, 81 Fed. Reg. 33,742 (May 27, 2016). This alone undermines the ordinance's rationale that "food labels do not distinguish between sugars that naturally occur … and added sugars," S.F. Health Code § 4201, and reinforces that the ordinance's only purpose is to hector consumers in an effort to prevent "bad" choices. While the City is free to elaborate on federally mandated information and common knowledge through *its own* messaging, confiscating ad space to demonize products it disfavors is unconstitutional.

A. The SSB Warning Mandate Is an Illegitimate Effort to Conscript Product Producers and Advertisers to Promote the Government's Message

Regardless whether expression is commercial or political, it is bedrock law that the government "may not burden the speech of others in order to tilt public

[5] 21 C.F.R. §§ 101.4, 101.9. *See also generally* FDA, *A Food Labeling Guide*, www.fda.gov/downloads/Food/GuidanceRegulation/UCM265446.pdf.

debate." *Sorrell*, 564 U.S. 578-79. *See also id*. at 574-75 ("[T]he State's impermissible purpose [was] to burden disfavored speech."). Thus, the Court in *Sorrell* was unmoved by state arguments that commercial speech regulation promoted public health, and found "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id*. at 571. For this reason, the San Francisco Warning Mandate cannot survive constitutional review regardless of what level of scrutiny applies.

The ordinance's findings, which include a litany of "health problems" and observations about the public's dietary habits, reveal that the government's goal is consumer behavior-modification. The law's primary purpose is *not* to "promote informed consumer choice" – reference to which appears at only two points in the last paragraph of nearly four pages of findings – but to make consumers "reduce[] caloric intake," and "improve" their diet and health as to the "consumption of drinks that are a [] source of added dietary sugar." S.F. Health Code § 4201. *Cf. id*. (touting "lifestyle intervention" as preferred approach to avoiding disease).

It is not consumer education to convey vague and misleading information. A vaguely-worded warning that certain products "contribute to" obesity, diabetes, and tooth decay is not just uninformative, but deceptive, revealing nothing about how much SSB consumption is unhealthy, and falsely suggesting the effect differs for added sugar as compared with other beverages, including natural juices. The

relative health effects attributable to sugars of these categories of beverages are largely the same, and more broadly, as the public surely knows, long-term overconsumption of *any* caloric foods facilitates weight gain or other maladies the ordinance identifies. As *Sorrell* reaffirms, such selective treatment of messages and messengers is not a valid government purpose. 564 U.S. at 574.

Forcing companies to promote the government's current position in order to "improve" public behavior is antithetical to the First Amendment, especially where "the law's express purpose and practical effect" diminish the advertiser's message. *Id*. at 565. The Warning Mandate assumes that SSB advertising is too persuasive unless the government encumbers ads with its own messages. But the Supreme Court has rejected that kind of "highly paternalistic approach," *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977), as utterly "incompatible with the First Amendment." *Sorrell*, 564 U.S. at 577. A "'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens." *Id.* (quoting *Western States*, 535 U.S. at 374). As this Court recently held, "suppressing commercial speech for fear[] it will persuade" is an impermissible government purpose. *Retail Digital Network*, 810 F.3d at 652.[6]

[6] The District Court's suggestion that *Retail Digital Network* has no application here because it involves compelled disclosure rather than a speech restriction is incorrect. *ABA*, 2016 WL 2865893, at *8. The First Amendment applies

Nothing prevents San Francisco from evangelizing about how it thinks people should live. But while the government may use its own resources to persuade the public to alter their lifestyles, it cannot target "a popular but disfavored product" by burdening truthful, non-misleading ads. As is particularly relevant here, the Court has expressly disallowed "forced association with potentially hostile views," *PG&E*, 475 U.S. at 18, which prohibits forcing purveyors of perfectly lawful, safely consumable products to spend substantial funds and sacrifice their own speech to convey government messages.

B. The Warning Mandate Unconstitutionally Compels Speech

Compelling SSB advertisers to display government warnings violates the First Amendment, which secures "both the right to speak [] and … to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion or force citizens to confess by word or act their faith therein." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Except for purely factual and noncontroversial commercial disclosures, the State may not compel private entities to publish government messages. *Wooley*, 430 U.S. at 715. Some of the Supreme Court's

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equally to those "who seek to censor *or burden* free expression." *Sorrell*, 564 U.S. at 577 (emphasis added).

"leading First Amendment precedents [] establish[] … that freedom of speech prohibits … telling people what they must say." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc*., 547 U.S. 47, 61 (2006). This is as true for "corporations as for individuals," *PG&E*, 475 U.S. at 16, and if it applies to tobacco companies as much as any other advertiser – and clearly it does, *see*, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) – it surely protects purveyors of soft drinks.

The narrow constitutional exception to the compelled speech doctrine for certain mandated marketing and labeling disclosures in commercial speech does not support the San Francisco ordinance. *See Zauderer*, 471 U.S. at 651; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010). A compelled disclosure may be permissible only if it serves a government interest in correcting potentially deceptive or misleading commercial speech, and only if it is "uncontroversial" and conveys "purely factual" information. *Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 249-50. *E.g.*, *CTIA v. San Francisco*, 494 F. App'x at 754. The District Court misapplied *Zauderer* by rejecting outright the first of these limits and by questioning whether it needed to adhere to the second.

The Supreme Court has never applied *Zauderer* outside of misleading or deceptive commercial speech, nor has it suggested such application is proper. Indeed, the very point of *Zauderer* is tied to preventing potentially misleading or

deceptive commercial speech. The Court confirmed that the First Amendment protects advertisers from compelled speech, 471 U.S. at 637-38, 650-51, while recognizing it does not shield deceptive, false, or fraudulent speech. *Id*. at 638. Accordingly, *Zauderer* allows some compelled, potentially corrective speech *in that context*.[7] Accordingly, in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Court declined to apply *Zauderer* as there was "no suggestion … the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow *necessary to make [ads] nonmisleading for consumers*." *Id*. at 416 (emphasis added).

The District Court nonetheless held "*Zauderer* applies where the government asserts an interest in, *e.g.*, public health and safety," irrespective of preventing consumer deception.[8] As authority, it cited solely decisions from other circuits that have gone beyond the Supreme Court's compelled commercial speech jurisprudence. *See ABA*, 2016 WL 2865893, at *8 (citing *AMI*, 760 F.3d 18, and

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[7] *See also American Meat Inst. v. USDA*, 760 F.3d 18, 39 (D.C. Cir. 2014) ("*AMI*") (Brown, J., dissenting) ("Crucial to the Court's analysis was not *just* the difference between disclosure and prohibition; it was also the difference between disclosure in advertising and [the ad's] outright prohibition, given the state's prerogative to prohibit misleading commercial speech.").

[8] *ABA*, 2016 WL 2865893, at *8. The District Court also purported to eliminate chilling effect from *Zauderer* analyses, because "[a]t least one circuit court" – though not this Court – "*appears to* have adopted this analysis." *Id*. at *15.

National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001)).[9] Those cases not only conflict with the Supreme Court's holdings, they are inconsistent with this Court's pronouncements regarding the "factual information *and deception prevention* standards … in *Zauderer*." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009) (emphasis added), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011). In this connection, Judge Brown's dissent in *AMI* cogently explains why the analysis of *Zauderer*, as expressed in *this* Circuit, has it right. *See generally* 760 F.3d at 37-42, 45 (Brown, J., dissenting).[10] Allowing the government to require "disclosures" to promote "nebulous interests" beyond preventing deception "permits the government to commandeer the speech of others" with "no limiting principle." *Id*. at 53.

While the District Court recognized that *Zauderer* requires "that the compelled disclosure in the commercial context is factual," *ABA*, 2016 WL 2865893, at *9, it questioned whether it needed to apply that limitation, or the requirement that

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[9] Otherwise, the court merely cited *its own* holdings as authority, including *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F.Supp.3d 1048 (N.D. Cal. 2015), which is at odds with a related decision by *this Court*, *CTIA v. San Francisco*, 494 F. App'x 752 (9th Cir. 2012). That case is now on appeal. *CTIA v. City of Berkeley*, No. 16-15141 (9th Cir. arg. scheduled Sept. 13, 2016).

[10] If the District Court's elimination of preventing deception under *Zauderer* were permissible, marketers would lose their constitutionally protected right to refrain from speaking whenever the government wants to use private-party ads to convey information, regardless whether the advertiser has factually supportable reasons for disagreeing. *Compare AMI*, 760 F.3d at 53 (Brown, J., dissenting).

the disclosure be uncontroversial, as well. In the District Court's view, "arguably," in *Zauderer* "the Court's reference to 'factual and uncontroversial' was simply a description of what the state's compelled disclosure was; it is not clear whether the Court necessarily held that a compelled disclosure must be factual and uncontroversial." This is simply inaccurate, and not how this Court applies *Zauderer*. *E.g.*, *CTIA v. San Francisco*, 494 F. App'x at 753-54; *Schwarzenegger*, 556 F.3d at 966-67. The District Court's analysis on this point is curiously similar to intervenor arguments the D.C. Circuit rejected in *NAM*, 800 F.3d 518. In that case the court held there was no way to apply controlling precedent "except as holding … *Zauderer* 'requires the disclosure to be of "purely factual and uncontroversial information."'" *Id*. at 527 (quoting *AMI*, 760 F.3d at 27).

1. The Warning Mandate is Not a Permissible Compelled Disclosure of Commercial Speech

Nothing in the Warning Mandate's findings suggests consumers have been confused, misled or deceived by the kinds of signs or display ads the ordinance regulates, nor is there reason to infer as much. *Cf. supra* 7-9. The District Court, having erred by reading this requirement completely out of *Zauderer*, did not address this point at all. But in any event, regardless whether *Zauderer* applies only to prevent potential deception, the warning that "Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay," is laden with assumptions, implications, and omissions that render it unconstitutional, because it

is neither purely informational, nor purely factual and noncontroversial. *Zauderer*, 471 U.S. at 651.

The warning presumes that SSBs cannot be consumed without inviting health risks. This is illustrated by "findings" such as the claim that "[e]ven moderate consumption of sugary drinks … increases the risk of cardiovascular disease mortality."[11] The ordinance cites sources for its findings, *see generally id*., but other expert bodies have issued contrary conclusions that SSBs can be consumed as part of a healthy lifestyle.[12]

The ordinance also misleadingly implies that "beverages with added sugar" will "contribute to" the listed maladies differently from other foods (with or without added sugars). This is highly debatable, and there is substantial scholarship indicating, *e.g.*, that the body does not metabolize added and "natural" sugars

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[11] S.F. Health Code § 4201. *See also id*. ("consumption of SSBs (SSBs) is linked to a myriad of serious health problems including but not limited to: weight gain, obesity, coronary heart disease, diabetes, tooth decay and other[s] …").

[12] *E.g.*, Jeane H. Freeland-Graves & Susan Nitzke, *Position of the academy of nutrition and dietetics: total diet approach to healthy eating*, 113 J. Acad. Nutrition & Dietetics 307, 307 (2013), www.ncbi.nlm.nih.gov/pubmed/23351634. *Cf. New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene*, 970 N.Y.S.2d 200, 211 (N.Y. App. Div. 2013) (agency did not claim soda consumption was a "health hazard" within its authority, but rather that "the hazard arises from [] consumption … in 'excess quantity'"), *aff'd*, 16 N.E.3d 538 (N.Y. 2014).

differently.[13] The warning thus does not simply report non-normative information – it states a disputed cause-and-effect relationship expressing the City's position.

In *CTIA v. San Francisco*, this Court invalidated compelled cell phone RF emission disclosures because they were not merely factual but "could … be interpreted … as expressing San Francisco's opinion that using cell phones is dangerous." 494 F. App'x at 753-54. The same viewpoint-based implication infects the Warning Mandate here, *see also NAM*, 748 F.3d 359, 370-72 (D.C. Cir. 2014), *aff'd on reh'g*, 800 F.3d 518, but the District Court erroneously sanctioned it, based in part on the normative judgment that "SSBs provide no nutritive value, which is not necessarily the case with other sources of added sugar (*e.g.*, flavored milk or even many foods with added sugar)." *ABA*, 2016 WL 2865893, at *14.

Mandated disclosures purporting to be "factual" can in this way be "so one-sided or incomplete they would not qualify as 'factual and uncontroversial'" under *Zauderer*. *AMI*, 760 F.3d at 27. Such is the case with a required disclosure that SSBs "contribute to" ill effects – where the notion of "contribution" is so imprecise, and incomplete, it cannot be "purely factual." *See NAM*, 800 F.3d at 528 ("It is easy to convert many statements of opinion into assertions of fact

[13] *E.g.*, Valerie B. Duffy, Position of the American Dietetic Association: Use of Nutritive and Nonnutritive Sweeteners, 104 J. Am. Dietetic Ass'n 255, 259 (2004), www.andjrnl.org/article/S0002-8223(03)01658-4/pdf; Food and Nutrition Service, USDA, *Dietary Guidelines for Americans 2010* at 15 (2010), www.health.gov/dietaryguidelines/dga2010/dietaryguidelines2010.pdf.

simply by removing the words 'in my opinion' or [] 'in the opinion of many scientists' or [] 'in the opinion of many experts.'").

All of this only illustrates the folly of relying on government, or "experts," to prescribe orthodoxy in dietary health, as has been repeatedly proven. Just this year, a USDA report related to dietary guidelines – on which the Warning Mandate extensively relies, *see* S.F. Health Code § 4201 – reversed longstanding guidance to limit cholesterol intake, based on new research showing, in fact, there is "no appreciable relationship between consumption of dietary cholesterol and serum cholesterol."[14] This reversal came after research the American Heart Association admitted caused a "sea change" in its thinking and recommendations.[15]

Congress realizes the potential for such change. The most recent budget bill earmarks $1 million for the National Academy of Medicine to comprehensively review the Dietary Guidelines for Americans. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 735 (2015). It is to evaluate the manner in which evidence is assembled and assessed, and whether a full range of viewpoints is

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[14] U.S. Dep't of Health and Human Services and U.S. Dep't of Agriculture, Scientific Report of the 2015 Dietary Guidelines Advisory Committee, Part D, at 17, http://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf.

[15] Nancy Brown, "Cholesterol Guidelines: Myth vs. Truth," *Huffington Post* (Dec. 2, 2013), http://www.huffingtonpost.com/nancy-brown/cholesterol-guidelines_b_4363121.html.

considered. *See* Peter Whoriskey, "Congress approves funding to review how dietary guidelines are compiled," *Wash. Post*, Dec. 19, 2015, at A13 (noting that "[n]utrition science has been in turmoil in recent years," and citing "scientific disagreements over the portions of the dietary guidelines … on salt, whole milk, saturated fat, cholesterol and the health implications of skipping breakfast"). And this is after the Dietary Guidelines were updated in ways that reversed course on entrenched recommendations. *See* Peter Whoriskey, "Dietary advice gets an update," *Wash. Post*, Jan. 8, 2016, at A1. As one observer has noted, federal nutrition guidelines "may have done more harm than good" over the last 35 years, given how drastically recommendations have changed. David A. McCarron, "The Food Cops and Their Ever-Changing Menu of Taboos." *Wall St. J.*, Nov. 27, 2015. *Cf. NAM*, 800 F.3d at 528 ("[P]ropositions once regarded as factual and uncontroversial may turn out to be something quite different.").

San Francisco's Board of Supervisors is, of course, not versed in science or nutrition, and certainly enjoys no more deference than the national health organizations on which they rely.[16] The Board can espouse its views indepen-

[16] For example, the Ordinance relies on research by the Institute of Medicine, S.F. Health Code § 4201, but IOM's advice has likewise been the subject of major recent revisions and reversals. In 2013, for example, IOM reversed its guidance on salt intake after concluding that the evidence was "insufficient" to conclude that lowering sodium intake below IOM's prior guidance would actually improve health. Indeed, the new research actually found that those whose sodium was

dently or republish whatever "finding" it likes. But *Zauderer* and its progeny do not allow the City to impose those views on others by making them their unwilling messengers.

2. The Warning Mandate Impermissibly Interferes with Advertisers' Messaging

The ordinance is unconstitutional for the additional reason that it compels overly burdensome disclosures and co-opts the message of SSB advertisers. Courts consistently have rejected such efforts to compel private entities to sponsor government propaganda. *E.g.*, *PG&E*, 475 U.S. at 15; *Wooley*, 430 U.S. at 714. Confiscating 20% of ad space for a government warning "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *PG&E*, 475 U.S. at 9. As the District Court observed – but failed to heed – *Zauderer* "recognize[d] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment." *ABA*, 2016 WL 2865893, at *8. Such requirements particularly offend the First Amendment where they require speakers to foster views contrary to their interests.

No Supreme Court decision suggests the government may require marketers to carry messages that are "themselves [] biased against or are expressly contrary

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reduced to recommended levels may actually be at *increased* risk of cardiovascular death. David Pittman, "IOM Comes Out Against Cutting Salt Intake," *MedPage Today*, May 14, 2013, http://www.medpagetoday.com/Cardiology/CHF/39115.

to" their views. *PG&E*, 475 U.S. at 16 n.12. The Court has expressly rejected that compelling such expression furthers constitutional goals of providing "more speech," as "the State cannot advance some points of view by burdening the expression of others." *Id*. at 20. "Mandating speech that a speaker would not otherwise make necessarily alters" its content. *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

Nor has the Court approved so large a disclosure as the Warning Mandate. The Seventh Circuit, meanwhile, invalidated mandatory stickers on "violent" and "sexually explicit" video games that comprised no more than a four-inch square with a number "18." *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006). It held the mandatory labeling could not be upheld for the same reason that "we would not condone a health [] requirement that half of the space on a restaurant menu be consumed by [a] raw shellfish warning." *Id*. at 652. If a stark number 18 was unduly burdensome, and an innocuous (hypothetical) shellfish warning could not stand if it was merely too big, it is impossible to see how confiscating one-fifth of SSB ads for government messages survives constitutional scrutiny.[17] A 20% occupation of a billboard, sign or other display is a considerable

[17] The warning here is also unlike cigarette warnings, where the government sought to counter perceived misinformation by tobacco companies. *See*, *e.g.*, *United States v. Philip Morris USA Inc.*, 801 F.3d 250 (D.C. Cir. 2015). There is

taking of ad space, and by its size and rectangular-border requirements is designed specifically to draw attention from the ad. *See* ABA/CRA Br. 7-8 & n.3, 21 (Warning Mandate compels "largest government warning on American consumer product advertising, ever").

In that latter respect, the warning necessarily changes the overall message, it distorts the advertiser's speech, and it thereby imposes a significant burden on the ability to freely engage in truthful communications about a lawful, unregulated product. The District Court gave no consideration to how being forced to include an all-caps "WARNING" label, and a frame around the disclosure, distract from the ad and thus factor into the burden, beyond categorically deeming uncontested SSB declarations to be "self-serving." *ABA*, 2016 WL 2865893, at *17.

But as the District Court grudgingly noted, "the burden imposed by the 20% size requirement is not insubstantial, and could raise serious questions on the merits[.]" *Id.* at *12. *See also id*. at *16 ("[T]he 20% size requirement is not insubstantial and … makes this a close question."). The court nonetheless denied injunctive relief, despite acknowledging "that Plaintiffs' constitutional argument is not without force." *Id*. at *18. It did so, seemingly, only by wholly discounting all

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nothing in the history of SSB advertising that the Board could arguably seek to counteract, nor anything outside the public's knowledge regarding the product.

the other ways – beyond the size of the confiscation – that the Warning Mandate burdens SSB advertisers.

The court rejected contentions regarding the warning's qualitative burdens because it did not become, the District Court felt, the "primary message" of the ad, and on grounds that, because the warning is "text … not pictorial," it cannot "overcome" the advertising. *Id*. at *16. The District Court cited no authority for making these the relevant criteria, and its conclusions that the warning will not "overcome" the advertiser's speech defy both logic and the underlying legal framework. As the court elsewhere found, the warning is designed to be "noticed" and "attended to." *Id*. at *12. By definition this means the warning *must* distract consumers from the ad, by design. *See* ABA/CRA Br. 14-15.

The constitutional problems of the ordinance are not diminished by adding the statement, "This is a message from the City and County of San Francisco." This merely confirms it is compelled speech. And if such a simple expedient sufficed, it would allow the government to confiscate for its own messaging a portion of any advertisement it desires, which clearly the First Amendment does not allow. No case such as *Zauderer*, *Milavetz*, *NAM*, *R.J. Reynolds*, *CTIA v. San Francisco*, or any other that invalidated government-compelled labels or warnings, suggests that simply adding a "this is a message from the government" as a tagline would have changed the outcome.

C. The SSB Warning Mandate Is Not Narrowly Tailored

Commercial speech restrictions cannot be "'more extensive than [is] necessary'" to serve the government's interests, *Western States*, 535 U.S. at 374 (quoting *Central Hudson*, 447 U.S. at 566), and existence of "numerous and obvious less-burdensome alternatives" to restricting speech bears on "whether the 'fit' between ends and means is reasonable." *City of Cincinnati*, 507 U.S. at 417 n.13. If the government can achieve its objectives without having to "restrict speech, or [by] restrict[ing] less speech, [it] must do so." *Western States*, 535 U.S. at 371. At the same time, each speech regulation must serve its asserted interest in a "direct" and "material" way, requiring "evidentiary support" that it "will significantly advance" the asserted interest. *44 Liquormart*, 517 U.S. at 505-06. *See also Rubin*, 514 U.S. at 480; *Edenfield*, 507 U.S. at 770. The ordinance fails each of these requirements.

To the extent the City's interest lies in San Franciscans bettering their health and losing weight, including moderating their intake of SSBs, *see supra* 8-9, 15, there are many alternatives at its disposal besides burdening ads with compelled speech. Most obviously, it could disseminate its own messaging to "educate" consumers or persuade them to change their consumption patterns. *See*, *e.g.*, *Santa Fe Natural Tobacco v. Spitzer*, 2001 WL 636441, at *24 n.37 (S.D.N.Y. June 8, 2001). The City could also try to more directly affect behavior without regulating

speech. It is clear the City is aware of these mechanisms. The Board of Education, for example, adopted a resolution to remove soda from all San Francisco public schools. *See* S.F. Bd. of Ed. Res. No. 211-12A8 (Jan. 14, 2003). The City also can continue to enforce Ordinance 99-15, which was concurrently enacted with the Warning Mandate to prohibit City departments from using City funds to buy SSBs, and their sale or distribution under City contracts and grants. S.F. Ord. 99-15, File No. 150243, passed July 16, 2015, approved July 26, 2015, codified at S.F. Admin. Code § 101.1, *et seq.*

This is not to suggest the City should do any of these things, or that they constitute sound public policy. The City's inordinate focus on SSBs compared to other food and drinks still suffers from a policy myopia that does not reflect uncontested nutritional information. But these examples illustrate a significant number of other measures could address the Warning Mandate's objectives, without trampling the First Amendment. The Board either ignored or refused to utilize such non-speech-related alternatives, in favor of regulating speech, a choice that directly contravenes constitutional requirements.

The SSB ordinance also fails narrow tailoring because it cannot possibly advance the City's asserted interest in a direct and material way. *44 Liquormart*, 517 U.S. at 505-06; *Rubin*, 514 U.S. at 480; *Edenfield*, 507 U.S. at 770. As an initial matter, direct and material advancement under *Zauderer* is tied to disclo-

sures being factual and uncontroversial. *See*, *e.g.*, *AMI*, 760 F.3d at 26 ("[B]y acting only through a reasonably crafted disclosure mandate, the government meets its burden of showing that the mandate advances its interest in making the 'purely factual and uncontroversial' information accessible."). The Warning Mandate flunks that for reasons stated above.

It also is incumbent on the City to produce evidentiary support to show that stamping a government warning on SSB billboards and other signs will stave off the adverse health effects outlined in the Warning Mandate's findings. While the findings list various asserted health impacts, describe some current consumption patterns for SSBs, and tabulate various asserted costs to government, S.F. Health Code § 4201, all these claims are subject to countervailing findings, *see supra* 15-19. The ordinance does not say *anything* about *how* the Warning Mandate will achieve *any* effect. The most it says is that "requiring the warnings … ***may*** result in reduced caloric intake and improved health and diet." S.F. Health Code § 4201 (emphasis added).

The Ordinance's very structure makes achieving even that attenuated effect highly doubtful, fatally undermining its constitutionality, and further cause it to fail *Central Hudson*'s tailoring requirement because of its numerous "exemptions and inconsistencies [that] bring into question [the law's] purpose." *Rubin*, 514 U.S. at 489. *See also Greater New Orleans*, 527 U.S. at 189. The City underinclusively

targeted one particular segment of sugar-sweetened consumables, and one channel for advertising them, in ways that all but ensure the Warning Mandate cannot serve its intended purpose.

The ordinance excludes most media channels in which SSB ads appear, requiring warnings on ads for SSBs on billboards, stadium displays, posters, signs, bus and train ads/shelters, etc. At the same time, the overwhelming majority of media impressions are not required to have warnings – including ads printed on circulars, in newspapers or magazines, or appearing in any electronic media, including radio, television, and online. S.F. Health Code § 4202. Nor are the warnings required on product packaging, or on menus, handwritten listings, or representations of food that may be ordered for on-premises consumption. *Id*. The Supreme Court in *Rubin* highlighted the serious failing that arises in cases where a commercial speech regulation is enacted for some communication channels while the audience sought to be protected receives the same or similar messages from a multitude of alternative channels.[18]

The Ordinance also is underinclusive in its targeting of SSBs, which are far from the only consumables that contain added sugars. The Ordinance ignores the sundry candies, baked goods, snacks, cereals, yogurts, sauces, jams and jellies, and

[18] *See* 514 U.S. at 488. This is not to suggest the ordinance should be more inclusive – expanding its scope only exacerbates the compelled speech problem.

other high calorie foods which may be regular parts of San Franciscans' diets. Even considering just beverages, while some may argue that certain "natural fruit juices" that the Ordinance exempts are more healthful in other ways, *cf. ABA*, 2016 WL 2865893, at *14, they are neither less caloric than, nor are the health effects of their "natural" sugars different from, the beverages whose advertising is regulated under the Warning Mandate. *See supra* 14-15.

Together, the unregulated products far outnumber the SSBs the ordinance targets for speech-restrictive regulation. As with New York City's invalidated Sugary Drinks Portion Cup Rule, "selective restrictions enacted by the Board of Health reveal that the health of residents of [the] City was not its sole concern" in enacting the challenged ordinance. *New York Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 210. The fact that the Warning Mandate does not outright ban speech about SSBs is beside the point – the "'distinction between laws burdening and laws banning speech is but a matter of degree.'" *Sorrell*, 564 U.S. at 565-66. The extraordinarily high likelihood that the City will realize little or no benefit from mandating a warning on ads only for SSBs, and only on a small fraction of those ads, makes clear that the ordinance violates the First Amendment.

IV. CONCLUSION

The City of San Francisco's imposition of the Warning Mandate in reaction to potential over-consumption of SSBs, whatever the merits of that concern, takes regulatory Nannyism to new levels and is wholly incompatible with First Amendment protections afforded commercial speech. Were this Court to affirm the District Court's refusal to enjoin this conscription of SSB ads to convey government views on health issues, there would be virtually no limit to similar efforts targeting other products and services, at any level of government. Every sugary, fatty, salty, processed, or other food disfavored by the science of the moment – and every other product or service regulators view as creating a "risk" – would be susceptible to having a significant portion of its advertising turned into a placard for government hectoring with which the advertiser not only disagrees, but for which there may be data controverting the government position. And advertisers could face that risk numerous times, from any city, town, county, or other municipal authority with a particular health-related hobby horse.

As Judge Brown warned, "the victors today will be the victims tomorrow, because the standard created by this case will virtually ensure the producers supporting this labeling regime will one day be saddled with objectionable disclosure requirements …. Only the fertile imaginations of activists will limit what disclosures successful efforts from … as-yet-unknown lobbies may compel."

AMI, 760 F.3d at 52 (Brown, J., dissenting). Indeed, the City of Baltimore is already eyeing following San Francisco's lead. *See* Balt. City Council, Ord. 16-0617 (Pub. Hr'g June 7, 2016) (https://baltimore.legistar.com/LegislationDetail.aspx?ID=2547410&GUID=BF49C0ED-0647-4625-B7AE-C2592FCAFD7C). And who is to say the mandated disclosures would stop with one warning per ad? Surely regulators and interest groups could envision multiple aspects of various products about which they'd like to see consumers forewarned. This Court should draw a firm line against these developments s by holding that the First Amendment bars such compelled speech mandates.

RESPECTFULLY SUBMITTED this 4th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1. The *amicus* brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 6806 words, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 4, 2016.

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