Nos. 16-16073

The United States Court of Appeals
For The Ninth Circuit

THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA OUTDOOR ADVERTISING ASSOCIATION,

Plaintiffs - Appellants,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant - Appellee.

Appeals From The United States District Court For The Northern District of California, San Francisco Division
Civil Case No. 3:15-cv-03415 (Honorable Edward M. Chen)

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Chamber of Commerce of the United States of America ("Chamber") states that it is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every geographic region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

Chamber members speak on myriad issues and promote products, services, and brand awareness using all manner of communications. The Chamber zealously protects the First Amendment rights of its members to participate fully in the marketplace of ideas, free from improper government regulation. The Chamber and its members have an interest in this case because the decision below fails to properly scrutinize the law enacted by the City and County of San Francisco ("San Francisco" or "City"). The law compels businesses to distribute

[1] Pursuant to Fed. R. App. P. 29, the amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

San Francisco's advocacy message, which discourages consumers from purchasing their products.

SUMMARY OF ARGUMENT

The First Amendment strongly disfavors government efforts to conscript private actors in advocacy campaigns advancing the government's preferred personal choices of individuals. In the commercial context as well as politics, "[t]he State can express [its] view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) (citation omitted); *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 7 (1986) (plurality opinion).

San Francisco Ordinance No. 100-15 (the "Warning Mandate" or "Ordinance") violates these strictures by requiring companies to promote San Francisco's "message" disparaging sugar sweetened beverages. S.F. Health Code § 4203(a). The City wants to steer consumers away from certain drinks, and does so by conscripting advertisers to include a large WARNING in their advertising. But the promotion, sale, and use of sugar sweetened beverages are lawful. The First Amendment does not allow the government to compel businesses to discourage the use of their own lawful products.

Because San Francisco's novel regime is content and speaker based, it is properly subject to heightened scrutiny. But the Ordinance in fact fails any level of First Amendment review: it is not a purely factual and uncontroversial disclosure, and it is not remotely tailored to advance a substantial interest.

By failing to recognize the fundamental First Amendment interest in protecting non-misleading advertising from unjustified government impositions, the decision under review flips the First Amendment on its head. It misreads *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), a narrow application of intermediate First Amendment scrutiny to sustain corrective disclosures, into a virtually limitless authorization for government to burden private advertising with government messages. If allowed to stand, the decision below will open the door for governments to burden commercial speech with an array of unwanted and controversial messages. The First Amendment forecloses such paternalistic regulation.[2]

[2] The Chamber focuses on the merits of Plaintiffs' First Amendment arguments and not the District Court's cursory analysis of irreparable injury. However, because First Amendment injuries are per se irreparable, *e.g.*, *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014), the fact that Plaintiffs are correct on the merits likewise entitles them to preliminary relief. Indeed, even "[a] 'colorable First Amendment claim' is 'irreparable injury sufficient to merit the grant of relief.'" *Id.* (citation omitted).

ARGUMENT

I. THE GOVERNMENT FACES A CHALLENGING FIRST AMENDMENT BURDEN WHEN IT ATTEMPTS TO COMPEL PRIVATE ACTORS TO DISTRIBUTE GOVERNMENT ADVOCACY.

The common thread running throughout the Supreme Court's First Amendment jurisprudence is that the government may not impose speech regulations—whether mandating speech or prohibiting it—designed to shape citizens' personal views on matters of policy or personal choice to government preferences. As the Supreme Court held in *Sorrell*, "[t]he State can express [its] view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction." 564 U.S. at 578-79 (citation omitted); *see also Pacific Gas*, 475 U.S. at 13-14.

This principle applies in the context of economically motivated speech just as surely as in the context of political speech. *Sorrell* involved an attempt by Vermont to restrict the sale of prescriber-identifying information because this information permitted drug companies to be "effective in promoting brand-name drugs." 564 U.S. at 578. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pacific Gas*, 475 U.S. at 16; *see also Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 964 (9th Cir. 2012) (noting that the pursuit of financial gain by corporations "does not make them any

less entitled to protection under the First Amendment"). "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pacific Gas*, 475 U.S. at 16 (1986) (plurality opinion).

In the commercial context, there are two "narrow and well-understood exceptions" to the Constitution's ban on content-based speech regulations. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). *First*, in certain circumstances, the government may require "purely factual and uncontroversial" commercial disclosures, provided they are not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651. As the Court explained in *Zauderer*, lesser scrutiny is appropriate when such requirements do not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," but instead "dissipate the possibility of consumer confusion or deception." *Id.* In other words, instead of "tilt[ing] public debate in [the government's] preferred direction," *Sorrell*, 564 U.S. at 578, proper disclosure requirements merely ensure that consumers have full information when they "decide for [themselves] the ideas and beliefs deserving of . . . adherence." *Turner*, 512 U.S. at 641. Thus, while "[t]he State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. . . . [n]othing in *Zauderer* suggests . . . that the State is equally free to require corporations to carry the message of third parties, where the

messages themselves are biased against or are expressly contrary to the corporation's views." *Pacific Gas*, 475 U.S. at 15 n.12 (citation omitted).

Second, in contrast to compelling disclosure, the government may restrict non-misleading commercial speech, but only if it can prove that (1) its asserted interest is substantial, (2) the restriction directly and materially advances that interest, and (3) the restriction is narrowly tailored. *See Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)*; see also Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (2016) (interpreting *Sorrel* to require heightened scrutiny of content and speaker based regulations of commercial speech).

The Court has made clear, however, that whether it applies heightened scrutiny or *Central Hudson*, "the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." *Sorrell*, 564 U.S. at 577 (internal quotation marks and citation omitted). As the Court summarized in *Sorrell*:

> In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.

Id. at 577-78. Thus, the Court has invalidated speech restrictions "whenever the government creates a regulation of speech because of disagreement with the message it conveys. . . . Commercial speech is no exception." *Id.* at 566 (internal quotation marks and citation omitted). Paternalistic speech regulations aimed at manipulating consumer choice are "just as unacceptable in a commercial context as in any other." *Rubin v. Coors Brewing Co*., 514 U.S. 476, 492-93 (1995) (Stevens J., concurring); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion) (there is no "vice" exception to the First Amendment).

In addition to vindicating rights personal to the speaker, preventing the government from manipulating economic choices of consumers reflects the fact that, in our "predominantly free enterprise economy," *Virginia State Board of Pharmacy. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976), the First Amendment relies on "the free flow of commercial information," not the government, to ensure that "economic decisions, in the aggregate, [are] intelligent and well-informed," *Thompson v. W States Med. Ctr.*, 535 U.S. 357, 366 (2002) (quotations and alteration omitted). In "[t]he commercial marketplace," as in "other spheres of our social and cultural life, . . . the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Sorrell*, 564 U.S. at 579 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)); *see also Thompson*, 535 U.S. at 367 (same).

In sum, laws that regulate speech as part of a neutral attempt to inform consumers and protect the integrity of the commercial marketplace may be subject to lesser scrutiny when they do not reflect an attempt "to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-79. But speech regulations that paternalistically urge consumers to adopt the government's preferred behavior trigger the core concern of the First Amendment—keeping the government from manipulating the marketplace of ideas, whether political or economic. Such regulations have therefore been uniformly invalidated regardless of whether they are adjudged under heightened scrutiny, or *Central Hudson*.

II. SAN FRANCISCO'S MANDATE COMPELS COMPANIES TO DISCOURAGE USE OF THEIR OWN PRODUCTS IN THEIR ADVERTISING AND BRAND PROMOTION AND IS THEREFORE SUBJECT TO HEIGHTENED SCRUTINY.

In both purpose and effect, the San Francisco's Warning Mandate does not dispassionately promote informed choice but, rather, compels businesses to steer consumers away from their own products as part of San Francisco's "war" on "sugary drinks." City and County of San Francisco, Board of Supervisors Regular Meeting (Dec. 1, 2015) (1:06:05 - 1:08:31) *available via SFGovTV at* http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=24208.

Specifically, the Warning Mandate states that "any Advertiser who posts an SSB Ad, or causes an SSB Ad to be posted, in San Francisco shall place on the

SSB Ad the following warning"[3] "enclosed in a rectangular border" and "occupy[ing] at least 20% of the area of each SSB Ad": "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." S.F. Health Code § 4203(a)-(b). The record provides illustrations of the Warning Mandate's intrusive effect on advertisers' messages:

[3] An SSB Ad is, subject to several exceptions, defined as "any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use that is any of the following: (a) on paper, poster, or a billboard; (b) in or on a stadium, arena, transit shelter, or any other structure; (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material." S.F. Health Code § 4202.

ER734, 736, 738.

Particularly when viewed in context, the unique size, placement, and content of the compelled warnings clearly convey to the reader the City's view that she should avoid purchasing the advertised product. Countless consumer products can pose a health risk when not consumed or used safely and in moderation. Yet San

Francisco does not require similar warnings on advertisements for other products with comparable sugar content or calories. Rather, the City has singled out one category of products and required that any attempt to promote such products must be accompanied by large, stark, and dire warnings of health risks. Given this context, any objective observer is receiving a message that sugar-added beverages are uniquely unhealthy and should be avoided.[4]

That the warnings would have such an effect should not be surprising given that this was the specific purpose for which they were imposed. Spurred on by local food activists, *see, e.g.*, Local Food Lab*, San Francisco's War On Big Soda*, (June 10, 2015), http://localfoodlab.com/blog/2015/6/10/san-franciscos-war-on-big-soda, the Board of Supervisors unanimously adopted the Warning Mandate to compel manufacturers, retailers, and advertisers of sodas, sports drinks, vitamin waters, and sweetened juices to advance the City's controversial opinion that consuming these products contributes uniquely to obesity, diabetes, and tooth decay as compared to other sources of sugar and calories.

[4] That is particularly true given that the warnings appear, not on product packaging, where facts about a product normally appear, but rather, appear on advertisements. Because the primary message of many advertisements is to "buy this product," the attachment of a warning can naturally be seen as a contradiction of that message.

Indeed, the Warning Mandate is intended to "take the big soda industry down." City and County of San Francisco, Board of Supervisors Regular Meeting (1:08:05 - 1:08:20). To that end, the Warning Mandate is designed to persuade the public to abandon sweetened beverages by forcing those who sell and promote these lawful drinks to disparage them. The sponsors of the Ordinance made no secret of their intent. They explained that the Warning Mandate "makes clear . . . that the puppies, unicorns, and rainbows depicted in soda ads aren't reality." Ben Rooney, *San Francisco strikes a blow against sugary sodas*, CNN Money (June 10, 2015) (quoting Supervisor Scott Weiner), http://money.cnn.com/2015/06/10/news/san-francisco-soda-warning/. The City's antipathy to advertisers' free speech rights is clear. At a Regular Meeting of the Board of Supervisors, a Supervisor vowed to "move forward" with policies to diminish the effectiveness of these advertisements despite Supreme Court decisions that "fetishized commercial and corporate speech." City and County of San Francisco, Board of Supervisors Regular Meeting (1:07:30 - 1:08:31).

The Warning Mandate requires private industry to become spokespersons for the City's public health campaign against sugar-added drinks. It does not merely "inform the public of the presence of added sugars" or "promote informed decisionmaking." S.F. Health Code § 4201. If that were the goal, then the Warning Mandate would be unnecessary: under Federal law "[t]he Nutrition Facts

Panel on carbonated soft drinks" catalogs "[a]ll the ingredients, listed in order of predominance by weight,"[5] including "added sugars."[6] In other words, the Warning Mandate is not providing consumers with product attribute information otherwise unavailable; it is seeking to persuade consumers to act on San Francisco's point of view by counteracting the speech of private companies.

These purposes distinguish the Warning Mandate from informational disclosures common in the commercial marketplace. Those disclosures are designed to enhance informed economic transactions through uncontroversial means such as guaranteeing "honest weights" and measures, *Armour & Co. v. State of N. Dakota*, 240 U.S. 510, 516 (1916), correcting deceptive descriptions, *Zauderer*, 471 U.S. at 650-51, and providing "adequate directions for use" of "dangerous products," *United States v. Sullivan*, 332 U.S. 689, 692, 696 (1948).

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[5] U.S. Food and Drug Administration, *Carbonated Soft Drinks: What You Should Know* (rev. Mar. 24, 2016), http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm232528.htm

[6] U.S. Food and Drug Administration, *Changes to the Nutrition Facts Label* (rev. July 17, 2016), http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm

The Warning Mandate is nothing like this. It disparages products that "are safe,"[7] because San Francisco wants people not to buy them.

San Francisco's approach is impermissible. "The fact '[t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.'" *Retail Digital*, 810 F.3d at 649 (quoting *Sorrell*, 564 U.S. at 578) (alteration in original). To be sure, San Francisco may urge its citizens not to consume sweetened beverages.[8] "[W]hen the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). What San Francisco may not do is "compel private persons to convey [its] speech," *id.*, with which the speaker disagrees or on controversies they do not want to address. When the government attempts to conscript private commercial actors to

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[7] U.S. Food and Drug Administration, *Carbonated Soft Drinks: What You Should Know* (rev. Mar. 24, 2016), http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm232528.htm

[8] San Francisco uses public funds for awareness campaigns on various issues. *See, e.g.*, San Francisco Dep't of Public Health, *Promoting Travelers' Health* (last visited July 18, 2016), http://www.sfcdcp.org/campaign.html (describing "local public awareness campaign" using humor to communicate international travel and health risks); Joseph Erbentraut, *San Francisco Is Using Sex to Sell Water Conservation*, Huffington Post (June 18, 2015), http://www.huffingtonpost.com/2015/06/18/san-francisco-water-conservation-ads_n_7606948.html (describing "racy" City "ad blitz" on "billboards, buses and social media, plus television spots" to promote water conservation).

manipulate the personal choices of consumers, such regulations are subject to heightened First Amendment scrutiny, which the City cannot possibly satisfy.

The District Court refused to apply heightened scrutiny. It instead applied rational basis review to strip the First Amendment of its role in limiting the government's power to manipulate consumer choice by burdening private advertising. As described above, that ignores the fundamental distinction in First Amendment case law between regulations that promote informed consumer choice and impositions that manipulate consumer choice. This lax approach would allow federal, state, and local governments to improperly burden advertising with messages advancing various government agendas. Under the District Court's approach, governments could presumably require a vast array of messages, from warnings about climate change to discourage air travel, to warnings about a sedentary lifestyle to discourage the purchase of video games, to warnings about fat and cholesterol to discourage the purchase of some fast foods. These examples are troubling because our "history and tradition provide no support for that kind of free-wheeling government power to mandate compelled commercial disclosures." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J, concurring).

San Francisco's approach is antithetical to the First Amendment. If the government only has to satisfy mere rational basis review to make a speaker insert

government-mandated speech into promotional material, there would be "no end to the information that states could require manufacturers to disclose." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). The First Amendment is designed to keep such impulses in check in order to preserve a truly free marketplace of ideas. *See, e.g.*, *Retail Digital*, 810 F.3d at 649; *Sorrell*, 564 U.S. at 579; *Thompson*, 535 U.S. at 367. The District Court did not apply meaningful First Amendment review. Had it, the City's regime would fail.

III. SAN FRANCISCO'S WARNING MANDATE CANNOT WITHSTAND ANY LEVEL OF FIRST AMENDMENT SCRUTINY.

The District Court took the view that the required warnings passed First Amendment scrutiny because they conveyed a factual and generally accurate message. That conclusion was incorrect for the reasons described above. However, even accepting the court's characterization of the warnings *arguendo*, the mandate *still* fails to satisfy First Amendment scrutiny.

A. The Warning Regime Is Content-Based And Fails Strict Scrutiny.

Because San Francisco's warning requirement is content-based, it should be subject to strict scrutiny: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015).

This includes mandatory content-based disclosures such as "labeling requirements." *Free Speech Coal., Inc. v. Attorney Gen. United States*, No. 13-3681, -- F.3d --, 2016 WL 3191474 (3d Cir. June 8, 2016); *accord Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring in the judgment) ("Nor can the majority avoid the application of strict scrutiny to" "requirements for content that must be included on labels[.]").

San Francisco's Warning Mandate "is content based" because it "singles out specific subject matter for differential treatment." *Reed*, 135 S. Ct. at 2230; *accord Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015) ("*Reed* effectively abolishes any distinction between content regulation and subject-matter regulation."). It targets speech about "sugar-sweetened beverages," *see* S.F. Health Code § 4203(a), and it singles out promotional material and "marketing, that is, speech with a particular content," *Sorrell*, 564 U.S. at 564. Thus, "[d]espite the very commendable purpose of seeking to prevent" obesity, diabetes, and tooth decay, the Warning Mandate is "subject to strict scrutiny." *Free Speech*, 2016 WL 3191474, at *9; *accord Pacific Gas*, 475 U.S. at 9-17 (applying strict scrutiny to invalidate law forcing utility company to carry third party messages in billing envelopes).

This Court has not had opportunity to squarely address *Reed's* teaching that *all* content-based regulations are subject to strict scrutiny.[9] But it need not do so to resolve this case, because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Sorrell*, 564 U.S. at 571.

B. The Warnings Fail Even Lesser First Amendment Scrutiny.

Even under something less than strict scrutiny, a regulation compelling speech must survive far more demanding scrutiny than mere "rational basis" review. The District Court erred when it seized on *Zauderer*'s use of the word "reasonable" to repeatedly equate *Zauderer* with rational basis review "and nothing more." ER23-24; *see also* ER13, 14, 17, 18, 21, 23. "[T]he reasonable fit" required by the Supreme Court in *Zauderer* is "far different, of course, from the 'rational basis' test used for Fourteenth Amendment equal protection analysis." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *see also Am. Meat Inst.*, 760 F.3d at 33 (Kavanaugh, J., concurring in the judgment) ("[T]hose *Zauderer* fit requirements are far more stringent than mere rational basis review.").

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[9] Dictum in a footnote of a recent panel decision of this Court suggests that restrictions on commercial speech "need only withstand intermediate scrutiny" notwithstanding *Reed*. *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, No. 14-55014, 2016 WL 3632375, at *4 (9th Cir. July 7, 2016). That case did not itself involve a commercial speech challenge, *id.*, and in any event, here the District Court failed to afford even intermediate scrutiny to the Warning Mandate.

Even a cursory review of the case law shows that the Supreme Court and this Court often use the word "reasonable" in the course of applying heightened scrutiny. *See, e.g.*, *Ibanez v. Florida Dept. of Bus. and Prof'l Regulation*, 512 U.S. 136, 143 (1994) (holding compelled disclosure was not "in 'reasonable proportion to the interests served'"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (invalidating Massachusetts statute "target[ing] tobacco advertisements" because its restrictions were not "a reasonable fit with" their alleged goal); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (holding "the city did not establish the reasonable fit we require" because ban on news racks applied to racks containing "commercial handbills" but not those containing "newspapers" (citation omitted)); *Edenfield*, 507 U.S. at 769 (invalidating Florida prohibition on solicitation by certified public accountants for lack of a "reasonable" fit); *44 Liquormart*, 517 U.S. at 507 (invalidating Rhode Island statute because "the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal"); *Retail Digital Network*, 810 F.3d at 649, 654 (remanding for application of "heightened scrutiny" and explaining that a "reasonable" fit is required); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 950 (9th Cir. 2011) (invalidating sidewalk solicitation ordinance because it was not a "reasonable" time, place, and manner restriction and collecting cases).

These uses of "reasonable" cannot be read to suggest that First Amendment

interests are subject to mere rational basis review. The District Court's decision to apply a rational basis standard to the Warning Mandate is reversible error.

The District Court likewise ignored *Zauderer's* context. *Zauderer* involved a remedial disclosure intended to prevent consumers being misled into retaining counsel on the belief that litigation would be risk free when they would, in fact, be liable for costs. The Supreme Court found that the "possibility of deception" was "self-evident." 471 U.S. at 652. Although this finding arguably rendered the speech unworthy of any First Amendment protection,[10] the *Zauderer* Court applied *Central Hudson* to uphold the disclosure as an "acceptable less restrictive alternative[] to actual suppression of speech." *Id.* at 651 n.14. In light of the deceptive—and unprotected—nature of the speech, the Court explained:

> [I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."

Id. at 651 (citation omitted).

Zauderer's context is critical because the Supreme Court has never approved a required disclosure except as a corrective for deception. *Compare Milavetz,*

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[10] *See Central Hudson*, 447 U.S. at 563-64 ("The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." (citations omitted)).

Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 253 (2010) (upholding disclosure requirement "'reasonably related to the Government's interest in preventing deception'" (brackets omitted)) *with Ibanez*, 512 U.S. at 147 (invalidating advertising mandate where Florida failed "to back up its alleged concern that the designation CFP would mislead rather than inform"). As this Court has explained, *Zauderer* asks "if the 'disclosure requirements are reasonably related to the State's interest in preventing *deception*.'" *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (2009) (quoting *Zauderer*, 471 U.S. at 651) (emphasis added); *see also United States v. Schiff*, 379 F.3d 621, 631 (9th Cir. 2004) (recognizing *Zauderer* allows government to regulate speech "to prevent the deception of customers."). Unmoored from that corrective purpose, forced "disclosures" become messages that improperly intrude on advertisers' free speech rights.

Nor did *Zauderer* do away with *Central Hudson's* requirement that the State demonstrate pursuit of a substantial interest.[11] The District Court barely acknowledged the substantial interest requirement, asserting that "*Zauderer* applies

[11] In granting an injunction pending appeal, the District Court acknowledged that "the Ninth Circuit has not squarely decided whether and how *Zauderer* applies to the context of this case: i.e., a compelled disclosure in the context of commercial speech where the government interest is not consumer deception, but public health and safety." ER83.

where the government asserts an interest in, *e.g.*, public health and safety." ER13. The First Amendment requires more than an "assert[ion]" of "an interest," *id.*; it demands that a court carefully probe the claimed governmental interest. Not all public health and safety "interests" are equal; "the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez*, 512 U.S. at 143 (invalidating advertising mandate) (citation omitted).

Zauderer is not an unrestricted license to burden corporate speech. This Court must "remind the City that '[t]he First Amendment is a limitation on government, not a grant of power.'" *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1133 (10th Cir. 2002) (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in judgment)). *Zauderer* does not authorize the City to condition the right to advertise on carrying government messages; *Zauderer* requires careful scrutiny through demanding prerequisites and meaningful tailoring requirements,[12] and does not support mere rational basis review of all required disclosures.

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[12] Thus, even if a *Zauderer*-type analysis properly applies to interests other than preventing deception, the City cannot satisfy either the substantial interest or tailoring requirements that attend *Zauderer* and other commercial speech cases. As explained below, the City's WARNING is not adequately tailored, not factual and uncontroversial, is unduly burdensome, and will chill substantial protected speech.

"Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment." *Sorrell*, 564 U.S. at 571-72. "[T]he State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Id.* at 572 (citing *Central Hudson*, 447 U.S. at 566).[13] It also must show that its mandatory disclosures are "purely factual," "uncontroversial," not "unduly burdensome," not likely to "chill[] protected commercial speech." *Zauderer*, 471 U.S. at 651.

The Warning Mandate cannot meet these requirements. Assuming that San Francisco's interest in public health is substantial, the Warning Mandate is not properly tailored. Disfavored treatment of speech concerning sweetened beverages does not directly advance the City's claimed public health goal. Nor does it comply with the teaching of *Zauderer*. The message conveyed by the WARNING is not a purely factual and uncontroversial corrective. It is unduly burdensome and will chill commercial and noncommercial speech.

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[13] This Court has stated that heightened scrutiny applies where, as here, "a challenged law burdening non-misleading commercial speech about legal goods or services is content-or speaker-based." *Retail Digital Network*, 810 F.3d at 648 (citing *Sorrell*, 564 U.S. 565-66).

1. Because The City Eschews Legitimate Ways To Advance Its Interest, The Mandate Is Not Reasonably Tailored.

The Warning Mandate is not reasonably tailored to advance San Francisco's stated public health goals of combatting obesity, diabetes, and tooth decay. Numerous products unaffected by San Francisco's regulation have similar amounts of sugar or calories. The record shows that sweetened beverages are not uniquely or even primarily responsible for the maladies cited. *See* ER640-650 (Expert Report of Dr. Kahn). If the beverages themselves are not unique contributors to disease, *a fortiori, speech about these beverages* is not a unique contributor to obesity or diabetes. Yet, the Warning Mandate attacks particular speech, *contra 44 Liquormart*, 517 U.S. at 503, made by certain speakers, *contra Sorrell*, 564 U.S. at 564. Instead of banning the allegedly offending products, the City seeks to undermine advertising and promotion—even brand promotion far from the point of sale—a particularly round-about approach.

Moreover, the Ordinance is riddled with so many exceptions it is hard to see it advancing the City's objectives in a meaningful way. For example, companies may advertise without the WARNING in "in any newspaper, magazine, periodical, advertisement circular or other publication," on "containers or packages" and "shelf tag[s] or shelf label[s]" on "menus or handwritten listings or representations of foods and/or beverages that may be served or ordered for consumption in a Retailer's establishment," on certain specified "display[s] or representation[s]," as

well as "on television, the internet, or other electronic media." S.F. Health Code § 4202(a)-(f). The Ordinance makes no attempt to distinguish its selective application to certain mediums "on the basis of the harms they would inflict." *Carey v. Brown*, 447 U.S. 455, 465 (1980). This omission "would seem largely to undermine" San Francisco's claim that its Warning Mandate advances any "substantial" governmental interest. *Id.*

Finally, the City has chosen not to use its own funds or police power to increase public awareness, as it has done for other health issues.[14] In the "commercial speech context, 'if there are numerous and obvious less-burdensome alternatives . . . that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.'" *Redondo Beach*, 657 F.3d at 950 (quoting *City of Cincinnati*, 507 U.S. at 417 n. 13).

There are many such less burdensome alternative here. For example, San Francisco can purchase billboards and signs, build a website, distribute pamphlets to the public, and educate its public school children and employees. *Cf. Sorrell,* 564 U.S. at 578-79 (observing Vermont could "establish[] a prescription drug educational program" rather than regulate speech). Or, if it believed these drinks were a public health menace, it could use its police power to limit or ban their sale.

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[14] *See supra*, n.8 (identifying public health campaigns by San Francisco).

Cf. 44 Liquormart, 517 U.S. at 508 (observing Rhode Island could "use financial incentives or counter-speech" rather than regulate speech).

The City's failure to pursue these options is not surprising; offloading regulatory costs onto private parties and conscripting their advertising space provides politicians a costless, feel-good soundbite. However, the City's failure to pursue these avenues should be fatal under the First Amendment, because "regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373.

2. The Warning Mandate Is Not "Purely Factual" Or "Uncontroversial."

Neither is the Warning Mandate the sort of purely factual and uncontroversial additional information contemplated by *Zauderer*.[15] It is unlike calorie counts,[16] product origin,[17] or instructions for safe product use and disposal,[18] because it reflects and promotes San Francisco's charged agenda on a

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[15] Remarkably, after questioning "whether *Zauderer* itself imposed a factual predicate requirement" at all, the District Court further relaxed it to mean, "at most, that the compelled disclosure must convey a fact rather than an opinion and that, generally speaking, it must be accurate." ER14. This minimization cannot be squared with *Zauderer* and its progeny, or common sense. *See generally* Opening Brief of Plaintiff-Appellants American Beverage Association and California Retailers Association at 34-45, ECF No. 10 (July 28, 2016) (discussing *Zauderer*'s application to government messages and matters of scientific debate).

[16] *See New York State Restaurant Ass'n v. N.Y.C. Board of Health*, 556 F.3d 114 (2d Cir. 2009).

[17] *See Am. Meat Inst*, 760 F.3d at 27 (D.C. Cir. 2014) (en banc).

[18] *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).

public health controversy.[19] Indeed, the WARNING itself acknowledges that it is a "message" from San Francisco. S.F. Health Code § 4203(a). But, "*Zauderer* does not leave the state 'free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.'" *Am. Meat Inst*, 760 F.3d at 27 (en banc) (quoting *Pacific Gas*, 475 U.S. at 15-16 n. 12). This is precisely what San Francisco seeks to do and is ample ground to reverse.

3. The Warning Mandate Is Unduly Burdensome.

The City's WARNING also fails because "unduly burdensome disclosure requirements offend the First Amendment." *Zauderer*, 471 U.S. at 651. The Supreme Court has held compelled commercial speech unduly burdensome where a required long-winded disquisition—under the guise of a compelled commercial "disclosure"—infringes a speaker's ability to convey her own message. *Ibanez*, 512 U.S. at 146, 140-41. Like the "disclosure" at issue in *Ibanez*, the WARNING fundamentally changes the nature of private speech, and further burdens speech to the extent it provokes a response.[20]

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[19] As noted above, the record reveals expert disagreement over its accuracy and propriety as a matter of science and public policy.

[20] It is no response to say, as the District Court did, that "80% of the space [is] available" for counterspeech. ER26. Though a compelled speaker may "feel compelled to respond," "[t]hat kind of forced response is antithetical to the free

The District Court gave the burdensomeness inquiry short shrift. *Zauderer* does not bless WARNINGS that "constitute 20% of the advertisement," ER18.[21] This Court has previously affirmed the finding of the same District Court that "forc[ing] retailers to paste [] stickers over their own promotional literature . . . . would unduly interfere with the retailers' own right to speak to customers." *CTIA–The Wireless Ass'n v. City & Cty. of San Francisco, Cal.*, 827 F. Supp. 2d 1054, 1064 (N.D. Cal. 2011) (citing *Entm't Software Ass'n v. Blagojevich,* 469 F.3d 641, 652 (7th Cir. 2006)), *aff'd* 494 F. App'x 752 (9th Cir. 2012)). A wordy WARNING that takes up 20% of billboards, bus stop signage, and other promotional messaging is excessive.

4. The Warning Mandate Interferes With Protected Commercial And Noncommercial Communication.

The mandate to devote 20% of promotional material to a derogatory City message will impact companies' decisions about whether, how and where to

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discussion that the First Amendment seeks to foster." *Pacific Gas*, 475 U.S. at 9, 15.

[21] The District Court noted that "there is at least a close question as to whether Plaintiffs have raised serious questions on the merits, particularly because the compelled disclosure has a 20% size requirement which is 'not insubstantial.'" ER83 (granting injunction pending appeal). What an understatement. This degree of intrusion into non-misleading, lawful, and diverse private speech is incompatible with the First Amendment.

engage in promotional activities, interfering with protected commercial and noncommercial speech.

The District Court avoided a careful inquiry by asserting that "*Zauderer* simply requires that a disclosure requirement be reasonably related to the government's interest, and nothing more." ER24. That is incorrect. Although the Supreme Court has acknowledged that "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation," *44 Liquormart*, 517 U.S. at 499 (citation omitted), it has never held that a chilling effect may be ignored in favor of rational basis review. This error alone is enough to reverse.

The District Court also ignored that speech by businesses is not so easily divided into "commercial" and "non-commercial" speech. Companies use speech to sell products directly but also to promote brand loyalty and awareness of corporate responsibility. They speak out on issues of policy and public concern, which may help their brand and in turn lead consumers to buy their products.[22]

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[22] *See, e.g.*, AT&T Inc., *It Can Wait,* http://www.itcanwait.com/all (last visited Aug. 3, 2016) (anti-texting, safe driving campaign); Whole Foods, *Caring For Communities*, http://www.wholefoodsmarket.com/mission-values/caring-communities (last visited Aug. 3, 2016) (describing Whole Planet, Whole Kids, Whole Cities efforts); NFL, *Crucial Catch*, http://www.nfl.com/pink (last visited Aug. 3, 2016) (breast cancer awareness); Disney Citizenship, *Be Inspired* http://citizenship.disney.com/ (last visited Aug. 3, 2016) (various environmental, anti-bulling and innovation efforts); Procter & Gamble Co., Pampers, *One Pack* =

The City's WARNINGS would presumably have to appear in a variety of such protected messages:

One Vaccine, http://news.pampers.com/fact-sheet/about-one-pack-one-vaccine (last visited Aug. 3, 2016) (effort with UNICEF to address maternal and neonatal tetanus in developing nations). These and countless other efforts to communicate are important to the speakers and fully protected by the Constitution.

The requirement to devote 20% of these non-product related communicative activities to a WARNING about obesity and other maladies necessarily alters the speech. It promises to dilute desired messaging and risks an unwanted "association

between the Warning Message and the company's brand names and logos." ER711 (Expert Report of Peter N. Golder).

The District Court demeaned the importance of corporate speech, finding it "highly debatable" whether a "substantial amount" of noncommercial corporate speech "will be affect [sic] judged in relation to the amount of commercial speech regulated." ER10. But even if not a single advertisement would be abandoned as a result of the Warning Mandate, the warning would still burden every advertisement on which it appears by distracting from and diluting the companies' preferred message.

CONCLUSION

For the forgoing reasons, the District Court should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 29(d) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, and with Circuit Rule 32, because this brief contains 6,498 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, 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.

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