No. 16-16073

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION;
CALIFORNIA RETAILERS ASSOCIATION,

Plaintiffs - Appellants and Plaintiffs,

and

CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,

Plaintiff and Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant - Appellee.

On Appeal from the United States District Court
for the Northern District of California, San Francisco
Honorable Edward M. Chen, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AMERICAN BEVERAGE ASSOCIATION, et al., AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public, and that no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellants American Beverage Association, California Retailers Association, and California State Outdoor Advertising Association. PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise.

PLF has participated as amicus curiae in multiple cases dealing with compelled speech. *See, e.g.*, *Spirit Airlines, Inc. v. Dep't of Transp.*, 133 S. Ct. 1723 (2013); *CTIA-The Wireless Ass'n v. City & Cnty. of San Francisco*, 494 F. App'x 752, 753 (9th Cir. 2012). PLF submits this brief because it believes that its public policy perspective and litigation experience will provide an additional viewpoint with respect to the issues presented, which will be helpful to this Court.

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[1] All parties, through their attorneys, have consented to the filing of this brief. In accordance with Fed. R. App. P. 29(c)(5), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amicus, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

San Francisco Soda Ordinance No. 100-15 (ordinance or speech mandate) forces advertisers of "sugar-sweetened beverages" to broadcast the government's opinion that such beverages uniquely contribute to health problems. Specifically, the ordinance commandeers 20% of every advertisement on posters, billboards, and vehicles for the following government proclamation: "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." *See* S.F. Health Code §§ 4202, 4303(a).

A group of trade associations brought a First Amendment challenge to the ordinance. The district court rejected that challenge, holding that ordinance is subject to, and survives, rational basis review under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). *See American Beverage Ass'n v. City & Cnty. of San Francisco*, No. 15-cv-03415, 2016 WL 2865893, at *6-15 (N.D. Cal. May 17, 2016).

The district court erred in reviewing the Ordinance under the rational basis standard articulated by the Supreme Court in *Zauderer*. *See American Beverage Ass'n*, 2016 WL 2865893, at *8. *Zauderer*, by its own terms, applies only to cases in which the government espouses an interest in "preventing deception of consumers." *Zauderer*, 471 U.S. at 651. San Francisco has not asserted that interest.

See Opposition to Plaintiffs' Motion for a Preliminary Injunction at 1 (P.I. Opp.) (City's asserted interest is "public health"). Therefore, neither law nor sound public policy supports rational basis review of San Francisco's speech mandate.

Rather, the ordinance should be subject to the regular standard of review for analyzing content-based regulations of commercial speech: intermediate scrutiny.[2] *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Intermediate scrutiny does not preclude San Francisco from imposing speech mandates, but it requires the City to show that the mandate directly advances a legitimate governmental interest, and is no more extensive than necessary to serve that interest. *See id.* at 566. San Francisco cannot meet that burden here.

The ordinance fails under intermediate scrutiny because its exemptions undermine the City's argument that it is seeking to further public health, and instead imply that the mandate is a thinly veiled attempt to silence disfavored speakers. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."). Additionally,

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[2] There is no principled basis for applying different First Amendment standards for commercial and non-commercial speech. *See generally* Deborah J. La Fetra, *Kick it Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004). Nonetheless, the issue of whether intermediate or strict scrutiny should apply is inconsequential in this case because the ordinance cannot survive either standard of review.

the City can communicate its message through its own advertisements, rather than compelling others to "advertise on behalf of the government." *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014). For that reason, San Francisco's speech mandate fails intermediate scrutiny, because it burdens far more speech than is necessary to advance the City's interests.

ARGUMENT

I

THE SAN FRANCISCO SODA ORDINANCE IS SUBJECT TO INTERMEDIATE SCRUTINY

A. Intermediate Scrutiny Is the Appropriate Standard by Which To Review Speech Mandates That Serve an Interest Other Than Preventing Consumer Deception

San Francisco's ordinance should be analyzed under intermediate scrutiny, not rational basis. The ordinance applies only to advertisements that promote certain sugar-sweetened beverages. *See* S.F. Health Code §§ 4201-02. "Restrictions on [non-commercial] speech based on its content are presumptively invalid and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (internal quotation marks omitted); *see also Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed."). Nonetheless, a court may apply intermediate scrutiny to speech "which

does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Although intermediate scrutiny is more deferential than strict scrutiny, it still requires meaningful review of the speech regulation at issue and places the "burden on the government to show that the elements of the test are satisfied." *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 647 (9th Cir. 2016) (government must show that the speech mandate directly furthers a substantial governmental interest, and burdens no more speech than necessary to further that interest).

The standard of review does not change depending upon whether the ordinance restricts speech or, as here, compels speech from those who wish to remain silent. The right to speak and the right to refrain from speaking are "complementary components of the broader concept of individual freedom of mind" protected by the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Just as an individual has a First Amendment freedom to speak, "there is necessarily . . . a concomitant freedom *not* to speak." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) (internal quotation marks omitted); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."). Accordingly, an ordinance

that *requires* advertisements to include text about the potential health effects of added sugar is subject to the same standard as an ordinance that *forbids* advertisements from including this text: intermediate scrutiny.

The Supreme Court permits only one limited exception to the rule that compelled commercial speech must be analyzed under intermediate scrutiny: When compelled speech is necessary to further the "State's interest in preventing deception of consumers," *Zauderer*, 471 U.S. at 651, such speech is reviewed under rational basis. This Court should not expand rational basis review beyond the narrow exception carefully crafted by the Supreme Court.

Indeed, both of the leading Supreme Court cases applying rational basis review to speech mandates dealt squarely with an interest in correcting deception. In *Zauderer*, the Court upheld a disciplinary ruling against an attorney for fraudulent advertising. 471 U.S. at 633-35. Specifically, the attorney promised clients that they would owe no legal fees in cases without a recovery, and failed to disclose that clients may still be liable for costs in unsuccessful claims. *See id.* at 630-34. But *Zauderer* was based on the fact that the First Amendment does not protect the deceptive advertisement: allowing a curative statement is presumptively permissible where the government could otherwise ban the speech. *See id.* at 638.

The Court clarified the narrowness of the *Zauderer* exception in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). The compelled

speech at issue there required professionals providing debt relief assistance to disclose "that the assistance may involve bankruptcy relief." *Id.* at 233-34. The Court upheld the provisions, finding that the challenged requirements "share the essential feature[] of the rule at issue in *Zauderer*," in that they "are intended to combat the problem of *inherently misleading* commercial advertisement." *Id.* at 250 (emphasis added).

Numerous other Supreme Court cases and opinions confirm that *Zauderer*'s lenient standard only applies to speech mandates that target deception. *See, e.g.*, *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 (1990) ("To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider . . . requiring a disclaimer about the certifying organization or the standards of a specialty."); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 490-91 (1997) (Souter, J., dissenting) ("*Zauderer* thereby reaffirmed a longstanding preference for disclosure requirements over outright bans, as more narrowly tailored cures for the potential of commercial messages to mislead by saying too little. But however long the pedigree of such mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages." (citations omitted)); *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., dissenting to denial of certiorari,

joined by Ginsburg, J.) ("If the disclaimer creates confusion rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated."). Because the interest in preventing deception is plainly inapplicable here, *see* PI Opp. at 1, so is *Zauderer*.

B. The Adverse Practical Consequences of the San Francisco Soda Ordinance Demonstrate the Reasons Compelled Speech Mandates Must Be Subject to Intermediate Scrutiny

As this case highlights, there are several reasons why the Supreme Court has not expanded *Zauderer*'s lenient standard to cases in which the speech mandate is not aimed at preventing deception. First, the constitutional prohibition against compelled speech is "[t]he poster child of autonomy theory." C. Edwin Baker, *Autonomy and Free Speech*, 27 Const. Comment. 251, 270 (2011). Speech mandates violate individual autonomy by forcing speakers to broadcast government messages, which necessarily "alters the content" of what the speaker's message would have been without government interference. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Here, San Francisco is requiring private businesses to overlay one-fifth of their print advertisements with the City's message, regardless of whether the business wishes to promote its product or publicize acts of community service. *Cf. Dr. Pepper and Walmart Kick-off Tuition Giveaway*, PR Newswire, Sept. 16,

2015 ("Historically, Dr. Pepper has awarded more than $7 million in tuition prizes since 2008 to students across the country.").[3]

Second, a law that stigmatizes individuals for speaking will necessarily stop some individuals from speaking at all. *See Riley*, 487 U.S. at 794 (the "chill and uncertainty" of disclosure requirements for fundraisers might well "encourage them to cease engaging in certain types" of First Amendment activity). Indeed, San Francisco's speech mandate is, by all accounts, an effort to show the country that "[i]f California is leading the charge against Big Soda, San Francisco is now standing on the front lines." Lydia O'Connor, *San Francisco Wants to be the City that Takes Down Big Soda*, Huffington Post, Mar. 10, 2015[4] (detailing the rollout of the San Francisco Ordinance).

The ordinance is thus designed not just to communicate the nutritional content of certain beverages, "but also ideas of disgrace, shame, and guilt." Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 909 (2015). The First Amendment is implicated because the intended stigmatic harm of compelled speech will ultimately stifle speech. Businesses may well decide that the positive benefits of advertising are not worth the costs if their intended positive message would be

[3] http://www.prnewswire.com/news-releases/dr-pepper-and-walmart-kick-off-tuition-giveaway-300144317.html

[4] http://www.huffingtonpost.com/2015/03/10/san-francisco-anti-soda-legislation_n_6842044.html

overwhelmed by the message foisted upon the advertisement by government regulations. *See Zauderer*, 471 U.S. 626 ("[U]njustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.").

Third, government speech mandates may themselves mislead consumers. For example, labeling certain brands of packaged broccoli as being "cholesterol-free" may ultimately hoodwink consumers into thinking that other brands contain cholesterol (they do not). Likewise, San Francisco's vague warning that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" runs the risk of misleading the public. That statement implies that added sugar is more dangerous than naturally occurring sugar, even though the federal government acknowledges that the two types of sugar "are not chemically different." 79 Fed. Reg. 11880, 11903 (2014). By singling out advertisements that feature products with added sugars, the ordinance lulls consumers into thinking that products with exponentially higher amounts of naturally occurring sugars are safe. *Cf.* Meredith K. Schuh, *California's Proposition 37: Will Its Failure Forecast the Fate of the GM Food Labeling Movement in the United States Once and For All?*, 6 Ky. J. Equine, Agric. & Nat. Resources L. 181, 196 (2014) (observing that mandatory labeling of bioengineered foods "may mislead consumers into thinking that bioengineered foods are less safe than their conventional counterparts"); *Cf.* Stephanie Barnes, *Labeling*

Our Way to a Leaner America, 12 J. L. Society 116, 132 (2011) ("A common misperception is that low fat means fewer calories, [but] this can many times be quite the contrary.").

II

THE SAN FRANCISCO SODA ORDINANCE FAILS UNDER INTERMEDIATE SCRUTINY

Intermediate scrutiny requires San Francisco to prove that the speech mandate "directly advance[s] the state interest involved" and is "not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566; *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 684 (9th Cir. 2010).[5] San Francisco cannot satisfy either requirement.

The San Francisco speech mandate does not directly advance the City's interests because it contains a multitude of exceptions that undermine the City's asserted interest in improving public health. *See* S.F. Health Code §§ 4201-02. For all of its talk about nutrition, the San Francisco ordinance exempts beverages with naturally occurring sugar (no matter how many calories they contain), milk alternatives, food, and even flavored milk that contain over 50% *more* added sugar

[5] *Central Hudson* also requires a court to analyze whether the speech mandate deals with misleading speech and whether the government has asserted a substantial interest. *See Central Hudson*, 477 U.S. at 566. Those factors are not in dispute in this case.

than grapefruit juice, soda, and vitamin water. *See id.* That means the San Francisco ordinance exempts advertisements from Chipotle, even though a single barbacoa burrito contains over 1,000 calories, 78% of a person's saturated fat intake, and 109% of a person's recommended daily intake of sodium. *See* Kevin Quealy et al., *At Chipotle, How Many Calories Do People Really Eat?*, N.Y. Times, Feb. 17, 2015.[6] And the ordinance exempts chocolate milk that contains 27 grams of sugar and 220 calories. TruMoo, Nutrition Facts.[7] But it compels a disclaimer of an advertisement for an eight-ounce coke bottle, which contains 26 grams of sugar and 100 calories. Coca Cola, Product Facts.[8]

The vast exceptions contained in San Francisco's ordinance "raise serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entm't Merchs. Ass'n*, 564 U.S. at 802; *see also Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 905 (9th Cir. 2009) ("[S]elf-defeating speech [mandates] will violate the First Amendment."). It is plain that "government may not privilege certain ideas it favors" by exempting them "from a general prohibition." Elena Kagan, *Private Speech, Public Purpose:*

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[6] http://www.nytimes.com/interactive/2015/02/17/upshot/what-do-people-actually-order-at-chipotle.html?_r=0

[7] http://trumoo.com/products

[8] http://www.coca-colaproductfacts.com/en/coca-cola-products/coca-cola/

The Role of Government Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 429 (1996). The same rule applies when the government attempts to privilege certain *speakers*. Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 Miss. L.J. 677, 729 (2014) ("First Amendment jurisprudence has for many years coalesced around a principle that places primary importance on the prevention of content and viewpoint discrimination, as well as discrimination against particular speakers.").

The San Francisco speech mandate also withers under intermediate scrutiny because it is more extensive than necessary to serve the City's asserted interest. Here, San Francisco could serve its interest in publicizing its viewpoint that added sugars "contribute" to health issues by broadcasting that message itself. *Cf.* United States Department of Agriculture, The Food Pyramid Guide[9] (colorful 30-page brochure containing health advice along with the popular food pyramid). Nothing in the First Amendment prevents the government from taking sides on social issues and disseminating those views to the public. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). But it is repugnant to the First Amendment for the government to force private companies to broadcast those views on its behalf. *See Pac. Gas*, 475 U.S. at 9 (plurality opinion).

[9] http://www.cnpp.usda.gov/sites/default/files/archived_projects/FGPPamphlet.pdf

CONCLUSION

The First Amendment protects an "open marketplace" of ideas, which relies on different speakers to bring forth different viewpoints. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). San Francisco's speech mandate threatens to shut down that marketplace. Because individuals subject to the speech mandate will have to broadcast the government's message every time they disseminate their own, some "might simply not speak at all." Caroline Mala Corbin, *Compelled Disclosures*, 65 Ala. L. Rev. 1277, 1331 (2014). This is inconsistent with the First Amendment, which promotes speech that is "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Accordingly, the decision below should be reversed.

DATED: August 3, 2016.

Respectfully submitted,

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s/ Wencong Fa
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