CA Nos. 16-16072, 16-16073

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION,
and CALIFORNIA RETAILERS ASSOCIATION,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellee.

CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,
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 Division
No. 3:15-cv-03415-EMC (Honorable Edward M. Chen)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center headquartered in Washington, DC, with supporters in all 50 States, including many in California.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has litigated frequently in support of the speech rights of market participants, appearing in numerous federal courts in cases raising commercial-speech issues. *See, e.g., IMS Health, Inc. v. Sorrell*, 564 U.S. 552 (2011); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). In particular, WLF has litigated regularly in opposition to government efforts to compel speech. *See, e.g., Grocery Mfrs. Ass'n v. Sorrell*, No. 15-1504 (2d Cir., dec. pending); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

WLF is concerned that, unless the decision below is overturned, state and local governments will possess largely unchecked authority to require speech by

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[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

commercial entities without regard to whether the compelled speech serves a substantial government interest, whether the speech is designed to prevent deception of consumers, or whether it qualifies as uncontroversial. No decision from this Court or the Supreme Court has ever condoned such expansive authority.

This brief focuses on the district court's application of inappropriate legal standards to Appellants' First Amendment claims and on why Appellants are likely to prevail on the merits of those claims if the appropriate standards are applied. WLF concurs with each of the other arguments raised by Appellants in their briefs but does not address them separately.

STATEMENT OF THE CASE

S.F. Ordinance No. 100-15 compels (subject to certain limited exceptions) "any advertisement" for sugar-sweetened beverages displayed within San Francisco (the "City") to include a prominent warning regarding the alleged dangers of "drinking beverages with added sugar(s)." The warning must: (1) be enclosed in a rectangular border: (2) occupy at least 20% of the area of the advertisement; and (3) capitalize the word "WARNING" (the first word in the prescribed warning message). The warning must end with the following sentence: "This is a message from the City and County of San Francisco." Sugar-sweetened beverages (SSBs) are the sole focus of the Ordinance; the City does not impose a

similar requirement on advertisements for other foods containing sugar.

The district court identified the City's purpose in requiring the warning as follows:

> [T]o inform the public of the presence of added sugars and thus promote informed consumer choice that may result in reduced caloric intake and improved diet and health, thereby reducing illnesses to which SSBs contribute and associated economic burdens. Posting warnings that beverages are sugar-sweetened will inform the public before purchases, which will help ensure that San Franciscans make a more informed choice about the consumption of drinks that are a primary source of added dietary sugar.

Slip op. 6 (quoting S.F. Health Code § 4201). The court concluded that this purpose implicated public health and safety and that the City has a "legitimate interest" in promoting public health and safety. *Id.* at 18, 23. The City has never contended that SSB advertisements (a term defined to include the mere display of a product logo) are misleading if they do not contain the mandated health warning.

Appellants filed a facial challenge to the Ordinance, asserting that the warning requirement violates their First Amendment rights by compelling them to utter statements that they do not wish to make and that they do not believe to be true. While conceding that their constitutional argument "was not without force," the district court held that they were "not likely to succeed on their First Amendment claim" and thus that they were not entitled to a preliminary injunction

against enforcement of the Ordinance. Slip op. 28.

The district court concluded that Appellants' claims focused largely on infringement of *commercial* speech rights and should be judged under First Amendment standards established by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). *Id.* at 11-13. According to the court, "the *Zauderer* test is essentially a rational basis/rational review test" governing government-compelled disclosures in the context of commercial speech: "the compelled disclosure does not violate the First Amendment so long as the disclosure requirement is reasonably related to the state's interest." *Id.* at 13. While conceding that language in *Zauderer* suggests that any compelled speech must be "factual and uncontroversial," the court held that that language requires "at most, that the compelled disclosure must convey a fact rather than an opinion and that, generally speaking, it must be accurate." *Ibid*.

The court rejected Appellants' assertion that "*Zauderer* is not applicable because *Zauderer* governs only where the governmental interest is the prevention of consumer deception." *Id.* at 12. Rather, the court held, *Zauderer* is broadly applicable to any requirement that a commercial entity include prescribed language in its advertisements: "*Zauderer* applies where the government asserts an interest in, *e.g.*, public health and safety." *Id.* at 13.

The court held that the City's mandated warning survived *Zauderer* First Amendment scrutiny because its statement that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" was accurate. *Id*. at 15-23. It concluded that the warning requirement was "reasonably related" to the City's health and safety interests and that whatever "chilling effects" the requirement would likely have on commercial speech were sufficiently minor that they did not undermine that conclusion. *Id.* at 23-28.

SUMMARY OF ARGUMENT

No party to these proceedings disputes that the government is entitled to adopt broadly applicable laws that require sellers to disclose truthful, uncontroversial information about their goods and services so that consumers are not misled by a seller's advertisement. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). But the information that the City is requiring SSB advertisers to convey cannot plausibly be viewed as information designed to prevent deception of consumers. As both the Supreme Court and this Court have recognized, the somewhat-relaxed review standard articulated by *Zauderer* for government-imposed disclaimer requirements is wholly inapplicable when, as here, the disclaimer is not aimed at preventing consumer deception.

This is not to say that the government is barred from compelling commercial

speech for the purpose of promoting public health and safety. Rather, the point is that any such compelled speech must pass constitutional muster under a review standard at least as stringent as the intermediate standard articulated in *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. 557 (1980).[2] The speech compelled by the Ordinance cannot survive *Central Hudson* scrutiny—let alone the heightened scrutiny mandated by *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016), whenever (as here) the burdens on speech are content-based.

Review under the *Zauderer* standard is unwarranted for the additional reason that the warning mandated by the Ordinance does not qualify as both "purely factual and uncontroversial," as those terms have been understood by the Supreme Court, this Court, and most other federal appeals courts. The district court interpreted *Zauderer*'s "factual and uncontroversial" requirement as meaning "at most, that the compelled disclosure must convey a fact rather than an opinion and that, generally speaking, it must be accurate." Slip op. 14. But that interpretation

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[2] Under *Central Hudson*, the government may regulate commercial speech that is neither inherently misleading nor related to an unlawful activity only upon a showing that: (1) the government has a substantial interest that it seeks to achieve; (2) the regulation directly advances the asserted interest; and (3) the regulation serves that interest in a narrowly tailored manner. *Central Hudson*, 447 U.S. at 566.

writes the word "uncontroversial" out of the equation.

As Appellants ably demonstrate, the assertion that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" is highly controversial. All agree that drinking *excessive amounts* of beverages with added sugars is bad for one's health, as is consuming excessive amounts of any food containing sugar (or for that matter, consuming excess calories period). But there is *no* scientific evidence that moderate consumption of SSBs is bad for one's health, a point that the district court did not dispute. Because the warning could reasonably be construed by some consumers as asserting (*counterfactually*) that *any* consumption of SSBs is dangerous and/or that consuming the sugar contained in SSBs poses greater health risks than consuming sugar contained in other food, it cannot plausibly be described as uncontroversial. Accordingly, it is not the sort of compelled speech that *Zauderer* subjects to relaxed First Amendment scrutiny.

Nor has the City met its burden of proof under either the second or third prong of the intermediate *Central Hudson* test. That is, it has: (1) failed to demonstrate that the warning will "directly advance" its substantial interest in improving the health and safety of San Franciscans by assisting them in making more informed dietary choices; and (2) failed to demonstrate that it has pursued that substantial interest in a narrowly tailored manner. Indeed, if the City desires to

ensure that its citizens are better informed regarding sugar consumption, it could do so in a manner that would impose *no* burden on others' First Amendment rights: it could provide that information by speaking on its own behalf.

Finally, the City cannot plausibly claim that it is, in fact, doing the speaking—*i.e.*, that the mandated warning is "government speech" to which First Amendment restrictions do not apply. The warning concludes with the sentence, "This is a message from the City and County of San Francisco." Even if that sentence diminishes the likelihood that readers might reasonably conclude that SSB advertisers agree with the viewpoint contained in the warning, it still impermissibly burdens their First Amendment rights by forcing them, at their own expense, to convey an objectionable message and by interfering with their ability to convey their own message. Nor does that attribution suffice to transform the City's compelled speech into "government speech." If the rule were otherwise, the Supreme Court's longstanding prohibition on compelled speech could be easily circumvented by government officials.

ARGUMENT

I. THE DISTRICT COURT'S DEFERENTIAL REVIEW OF THE BURDENS IMPOSED ON APPELLANTS' SPEECH RIGHTS IS INCONSISTENT WITH *ZAUDERER* AND CIRCUIT LAW

The district court held that *Zauderer* mandated application of a "rational basis" standard of review to the burdens imposed on Appellants' commercial speech. Slip op. 13. That clear error of law requires reversal. Properly understood, *Zauderer* is merely a special application of the *Central Hudson* test, applied as a means of directing governments to prefer disclaimer requirements as a more-narrowly-tailored alternative to outright speech bans when seeking to guard against consumer deception. It is fully consistent with the broad constitutional protection afforded to all commercial speech by *Central Hudson* and a long line of Supreme Court decisions.

A. *Zauderer* Does Not, as the District Court Held, Strip Advertisers of Virtually All First Amendment Protections Against Compelled Speech

The First Amendment protects not only freedom of speech, but also the freedom not to speak. *Wooley v. Maynard*, 430 U.S. 705, 713-715 (1977) (upholding right to refuse to display state motto, "Live Free or Die," on automobile license plate); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (upholding right to refuse to recite Pledge of Allegiance). The right not to speak

extends to businesses too, even when the compelled speech focuses explicitly on their commercial dealings. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (barring compelled support of mushroom advertising campaign).

The district court's holding that the First Amendment provides virtually no protection against compelled commercial speech finds no support in the *Zauderer* decision. The district court misinterpreted *Zauderer* by ignoring the context within which it arose. The case was a largely successful First Amendment challenge to Ohio's efforts to impose significant restrictions on truthful attorney advertising. Applying the three-part *Central Hudson* test, the Supreme Court struck down prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems, *Zauderer*, 471 U.S. at 639-47, and restrictions on the use of illustrations in attorney advertising. *Id*. at 647-49.

The district court relied on *Zauderer*'s final section, which upheld Ohio's decision to discipline an attorney because he ran an advertisement that offered services on a contingency-fee basis without simultaneously disclosing that clients could be liable for litigation costs should they lose their case. *Id.* at 650-52. The Supreme Court concluded that by imposing discipline on the attorney, Ohio was directly advancing its "substantial interest" in preventing consumer misunderstandings; it noted that in the absence of a disclaimer regarding court costs, it was

"self-evident" that consumers might erroneously conclude that retaining an attorney to file a lawsuit on a contingency-fee basis could never cost the consumer any money. *Ibid.*

Zauderer recognized that requiring an attorney to include a disclaimer in his advertising is a form of compelled speech that is subject to First Amendment protection without regard to whether the speech is commercial or noncommercial.[3] But in the commercial-speech context, the Court concluded that requiring a company to include in its advertisement a government-mandated disclaimer designed to prevent consumer deception is preferable to prohibiting the advertisement altogether:

> In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

Id. at 650.

Having concluded that Ohio was warranted in requiring a disclaimer as a

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[3] Indeed, the Court noted that government orders directing one to speak against one's will are often subject to more exacting First Amendment review than speech restrictions. *Id.* at 650 ("involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.") (quoting *Barnette*, 319 U.S. at 633).

more-narrowly-tailored alternative to an outright speech ban, the Court cautioned against close scrutiny of the disclaimer's precise wording, so long as it was not "overly burdensome": "[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to *the State's interest in preventing deception of consumers*." *Id.* at 651 (emphasis added).

That limited "hold[ing]" cannot be understood as an endorsement of the district court's wider view that government *compulsion* of commercial speech deserves less First Amendment scrutiny than *restrictions* on commercial speech. Ohio was only compelling speech in the limited sense that it required attorneys wishing to advertise their services to include additional language "to dissipate the possibility of consumer confusion or deception." *Id*. at 651. In other words, *Zauderer* explained, it is preferable for the government to require speech to be accompanied by disclaimers rather than to ban speech altogether. *Zauderer* provides no support for the district court's conclusion that the City is entitled to require advertisers to append virtually any "factual" speech to their advertisements, provided only that the speech is "reasonably related to the government's interest." Slip op. 14, 28. The district court's standard imposes virtually no limits on the City's power to compel advertisers to convey its messages. For example, the City would be permitted to require *all* advertisements to include the following

statement: "Regular exercise improves one's health." That statement is "factual" and is undoubtedly "reasonably related" to the City's interest in public health and safety.

B. Subsequent Case Law Confirms that the *Zauderer* Standard Applies Only to Compelled Speech Designed to Prevent Deception of Consumers

In the 30 years since *Zauderer*, neither the Supreme Court nor this Court has suggested that the standard of review described above applies outside the context of compelled speech designed to prevent consumer deception. Indeed, applying that standard broadly and thereby depriving advertisers of virtually all protection against compelled commercial speech is inconsistent with the Supreme Court's rationale for granting commercial speech somewhat reduced (but still considerable) First Amendment protection.

Thus, in *Milavetz*, the Supreme Court considered a First Amendment challenge to a federal statute that requires attorneys and other professionals providing debt-relief and bankruptcy assistance to include in any advertisements disclosures designed to prevent consumers from being misled regarding the nature of services being offered. The Court upheld the statute, finding that *Zauderer* set forth the appropriate standard of review—a standard it described as follows: "[A]n advertiser's rights are adequately protected as long as disclosure requirements are

reasonably related to *the State's interest in preventing deception of consumers*." *Milavetz*, 559 U.S. at 250 (emphasis added) (quoting *Zauderer*, 471 U.S. at 651).

In *Ibanez v. Fla. Dep't of Bus. & Professional Reg.*, 512 U.S. 136, 146 (1994), the Court relied on *Zauderer* to invalidate Florida's efforts to require an attorney to attach a disclaimer to an advertisement announcing her status as a Certified Financial Planner (CFP). The Court held that a disclaimer requirement does not pass First Amendment muster when, as in *Ibanez*, the government can point to no evidence of consumer deception that is "potentially real, not purely hypothetical." *Ibid*. Had the Court in *Ibanez* shared the district court's understanding of *Zauderer*, the Court would have upheld the disclaimer Florida sought to mandate (a truthful statement that CFP status was not sanctioned by Florida or the federal government) even in the absence of evidence of consumer deception.

The district court's interpretation of *Zauderer* also conflicts with the Supreme Court's decision in *United Foods*. In that case, the Court held that the federal government, by compelling commercial mushroom growers to finance a mushroom-promotion campaign to whose content they objected, violated the growers' First Amendment protections against compelled commercial speech. 533 U.S. at 413-16. The Court distinguished *Zauderer* solely on the ground that the

compelled speech in *Zauderer* was designed to prevent consumer deception, while "[t]here is no suggestion in the case before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers." *Id.* at 416.

This Court has similarly recognized that the *Zauderer* standard applies only to compelled commercial speech designed to prevent consumer deception. In *Video Software Dealers Ass'n v. Schwarzenegger*, 556 U.S. 950 (9th Cir. 2009), *aff'd*, 564 U.S. 786 (2011), the Court struck down a California statute that required retailers to affix warnings to violent video games sold to consumers, finding that the requirement violated retailers' First Amendment protections against compelled speech. Noting that "[g]enerally, freedom of speech prohibits the government from telling people what they must say," the Court held that the mandated labeling failed the "deception prevention standard set forth in *Zauderer*" because it was not designed to prevent consumer deception. *Id.* at 966. In describing the "deception prevention standard," the Court quoted directly from *Zauderer*:

> Compelled disclosures, justified by the need to "dissipate the possibility of consumer confusion or deception," are permissible if the "disclosure requirements are reasonably related to *the State's interest in preventing deception of customers*."

Ibid (quoting *Zauderer*, 471 U.S. at 651) (emphasis added).

The district court's conclusion that advertisers enjoy virtually no protection against *compelled* commercial speech is inconsistent with the rationale articulated by the Supreme Court over the past 40 years regarding why commercial speech is entitled to somewhat reduced (but still considerable) First Amendment protection. In explaining its decision to afford the government more leeway in its regulation of commercial speech, the Court has stated that "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499-500 (1996) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976)). That justification has very limited relevance to government efforts to *compel* speech, except in those instances in which the government contends that the compelled speech is necessary to prevent consumer deception. When, as here, the government is seeking to compel speech for reasons unrelated to preventing consumer deception, "the greater objectivity of commercial speech" does not provide a logical basis for distinguishing between constitutional protections afforded to commercial and noncommercial speech.

In justifying reduced judicial scrutiny for burdens on commercial speech, the Court has also stated 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." *Ibid.* That justification makes sense in the context of speech *restrictions*, but not with respect to the chilling effects of unwanted disclaimers. The existence of "the profit motive" likely *exacerbates* the potential chill—commercial speakers will be quick to cease their advertising rather than run ads that include disclaimers that they fear will lead to reduced sales or profits.[4] More importantly, the "hardiness" rationale focuses only on the likelihood that government regulation will chill voluntary speech; it does not account for the significant First Amendment burden imposed on *any* speaker—commercial or noncommercial—who is forced to convey the government's message.

In sum, applying "rational basis" review to all compelled commercial speech is supported neither by Supreme Court and Ninth Circuit case law nor by the rationales underlying commercial-speech doctrine. Instead, outside the limited *Zauderer* context, compelled speech must pass constitutional muster under a review standard at least as stringent as the intermediate standard articulated in *Central Hudson.* A large number of disclosure requirements routinely imposed on the business community (*e.g.*, requirements that consumer product labels list all

[4] Indeed, reducing sales of SSBs appears to be the City's principal motivation in requiring the warning. *See, e.g.*, S.F. Health Code § 4201.

ingredients) can meet that standard with no difficulty. But the same cannot be said for the Ordinance, for which the City lacks evidence sufficient to meet the "directly advance" and "narrowly tailored" prongs of the three-part *Central Hudson* test.

C. The *Zauderer* Standard Only Applies to Compelled Commercial Speech that Is Both Factual and Uncontroversial

Although the district judge recognized that *Zauderer* upheld a disclaimer requirement in attorney advertising based on the understanding that the disclaimer was limited to "purely factual and uncontroversial information about the terms under which his services [would] be available," *Zauderer*, 471 U.S. at 651, he concluded that meeting the "purely factual and uncontroversial information" requirement entails no more than a showing that "the compelled disclosure must convey a fact rather than an opinion and that, generally speaking, it must be accurate." Slip op. 14.[5] Indeed, the district court called into question whether *Zauderer* actually adopted a "factual and uncontroversial information" requirement. *Ibid*.

While the district court may have some doubts about the scope of the holding in *Zauderer*, those doubts are not shared by this Court. The Court adopted

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[5] Expressly refusing to adopt a standard definition of the word "uncontroversial," the district judge stated, "the 'uncontroversial' requirement should not be read expansively to mean something beyond accuracy, especially as the term 'uncontroversial' appeared only once in *Zauderer*." *Id* at 14-15.

Zauderer's "factual and uncontroversial" requirement in its unpublished opinion in *CTIA—The Wireless Ass'n v. City and County of San Francisco*, 494 Fed. Appx. 752 (9th Cir. 2012). The Court invoked the First Amendment to strike down yet another effort by San Francisco to compel commercial speech. The Court held that "under the standard established in *Zauderer*, ... any governmentally compelled disclosures to consumers must be purely factual and uncontroversial." 494 Fed. Appx. at 753 (citation omitted). The Court concluded that the City was violating the plaintiffs' First Amendment rights because the Court "[could] not say on the basis of this record that [the compelled speech] is both purely factual and uncontroversial." *Ibid*.

Similarly, in *Video Software*, the Court struck down a California statute that required retailers to affix warnings to violent video games, expressly rejecting the State's assertion that "the labeling provision only require[d] that video game retailers carry 'purely factual and uncontroversial information' in advertising." 556 F.3d at 966 (quoting *Zauderer*, 471 U.S. at 651).[6]

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[6] The Court concluded that the mandated warnings were not even "factual," and thus it had no need to consider whether the warnings were also "uncontroversial." *Ibid*. But the Court's reliance on *Zauderer*'s "factual and uncontroversial" language as grounds for striking down the statute demonstrates that it did not share the district court's doubts about whether application of the *Zauderer* standard is, in fact, limited to compelled speech that qualifies as both "factual" and "uncontroversial."

Virtually every other federal appeals court that has considered the question agrees that a prerequisite to application of the *Zauderer* standard is a showing that the challenged compelled speech is both factual and uncontroversial. *See, e.g.*, *Nat'l Assoc. of Mfrs. v. SEC*, 800 F.3d 518, 527 (D.C. Cir. 2015); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001).

By interpreting *Zauderer*'s "factual and uncontroversial" requirement as meaning "at most, that the compelled disclosure must convey a fact rather than an opinion and that, generally speaking, it must be accurate," slip op. 14, the district court has eviscerated the "uncontroversial" requirement. Courts that decline to apply the *Zauderer* standard unless speech is both factual *and* uncontroversial implicitly recognize that compelled speech can be "controversial"—and thus not subject to a relaxed standard of review—even when it is entirely accurate.[7]

The words "controversial" and "controversy" have well-understood

[7] Thus, in *Safelife Group, Inc. v. Jepson*, 764 F.3d 258, 263 (2d Cir. 2014), the Second Circuit struck down a Connecticut statute that required insurance claims management companies to provide potential customers with wholly accurate information regarding services offered by their competitors, because the compelled speech was controversial—it required the plaintiff to assist a competitor.

definitions that are not limited simply to statements of opinion, and encompass factual statements that are arguably "accurate" (but also arguably inaccurate). *See, e.g.*, *Webster's New Collegiate Dictionary*, (G. & C. Merriam Co. 1981) (defining "controversy" as "a discussion marked especially by the expression of opposing views: dispute."). Appellants have explained at length why the speech required by the Ordinance is "controversial" under any commonly accepted definition of that term. WLF will not repeat that explanation here. It suffices to say that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" cannot qualify as uncontroversial given the substantial disagreement as to its accuracy. The controversial nature of the compelled speech is an additional reason for concluding that the district court erred as a matter of law in applying the relaxed *Zauderer* standard to Appellants' compelled-speech claims.

D. Even if the *Zauderer* Standard Were Applicable, the Ordinance Cannot Survive that Standard Because It Will Significantly Chill Commercial Speech

Zauderer held that when government seeks to compel advertisers to include "factual and uncontroversial" disclaimers in their advertisements for the purpose of preventing deception of consumers, the requirement violates the First Amendment if it is "unduly burdensome" and thereby "chill[s] protected commercial speech." *Zauderer*, 471 U.S. at 651. In other words, a disclaimer requirement is

unconstitutional if advertisers are likely to curtail their advertisements rather than be forced to run otherwise permissible ads that include a disclaimer that they deem unduly burdensome. Because the evidence is overwhelming that the warning mandated by the Ordinance is extremely burdensome and thus will chill significant amounts of advertising, the Ordinance cannot survive First Amendment scrutiny even under the relaxed *Zauderer* standard.

In declarations submitted to the district court in support of the preliminary injunction motion, representatives of major SSB manufacturers declared that they will cease running advertisements on covered media in San Francisco rather than include the warning mandated by the Ordinance. Those declarations noted the unprecedented size of the mandated warning (it must encompass at least 20% of the advertising space) and concluded that such a massive warning would overwhelm the advertiser's own message. At the very least, they concluded, the effectiveness of such advertisements would be reduced to the point that their costs would exceed the ads' message-enhancing value.

The City introduced virtually no evidence to contest the accuracy of those declarations. The district court nonetheless refused to accept the sworn declarations as an accurate prediction of how advertisers would respond if forced to comply with the Ordinance. Slip op. 26-28.

Appellants have demonstrated why the district court's "not unduly burdensome" holding is incorrect. *See, e.g.*, Am. Bev. Assoc. Br. 46-57. WLF will not repeat that showing here. We note in particular, however, that *Zauderer* imposes the burden of proof on the City to demonstrate that the Ordinance will *not* unduly chill commercial speech, not on Appellants (as the district court stated) to demonstrate that their speech would be unduly chilled. Moreover, the district court apparently concluded that the Ordinance satisfied the *Zauderer* test so long as advertisers would be willing to display *any* advertising subject to the warning requirement. Slip op. 28 (indicating that unconstitutional chilling would not exist so long as beverage companies were still willing to "run test advertising" in the covered media). Nothing in *Zauderer* suggests that compelled commercial speech should not be deemed "unduly burdensome" simply because the "chill" does not result in the cessation of *all* affected advertising.

Finally, the First Amendment analysis is unaffected by the fact that beverage manufacturers and retailers would still be permitted to run warning-free advertisements in media not covered by the Ordinance (*e.g.*, newspapers and television). The First Amendment does not permit government to ban speech from one significant forum simply because speech rights "may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997). For example, the Supreme

Court held that the First Amendment barred Massachusetts from prohibiting virtually all outdoor advertising of tobacco products, even though Massachusetts law authorized such advertising in other forums. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564-66 (2001).

In sum, even if the Ordinance were subject to scrutiny under the relaxed *Zauderer* standard (which it is not), the Ordinance would still violate Appellants' commercial First Amendment rights because it would unduly burden those rights.

II. THE CITY HAS NOT MET ITS BURDEN OF PROOF UNDER EITHER THE SECOND OR THIRD PRONGS OF THE *CENTRAL HUDSON* TEST

Because the relaxed standard of review articulated in *Zauderer* is inapplicable to the burdens on commercial speech imposed by the Ordinance, those burdens must pass constitutional muster under a review standard at least as stringent as the intermediate standard articulated in *Central Hudson*.[8] The City has failed to demonstrate that it has satisfied either the second prong of the *Central Hudson* test (its warning requirement "directly advances" the government's

[8] WLF agrees with Appellants that because the Ordinance imposes *content-based* burdens on Appellants' speech, those burdens should be subject to a heightened standard of review—even more stringent than the *Central Hudson* standard. *See, e.g.*, *Retail Digital*, 810 F.3d at 648. However, the Court need not address that issue, because the Ordinance so clearly is constitutionally objectionable even under the *Central Hudson* standard.

interests in promoting "informed consumer choice") or the third prong (the warning achieves those interests in a narrowly tailored manner).

Central Hudson imposes a not-insubstantial evidentiary burden on the City; its second prong requires the City to demonstrate that the Ordinance will advance its asserted interests "to a material degree." *Ibanez*, 512 U.S. at 136. The City has made no such showing. Indeed, if (as Appellants demonstrate) the Ordinance will cause SSB manufacturers to cease advertising in covered media, the Ordinance will have accomplished nothing—the City's desired warning will not be conveyed to any consumers.

More importantly, the Ordinance cannot possibly "directly advance" its goals because it is wildly underinclusive—it addresses the consumption of only a very minor portion of the sugars and calories consumed by a typical consumer. The district court erred in concluding that either *Zauderer* or the First Amendment grants a free pass to such underinclusiveness. Slip op. 17. Burdening speech in an underinclusive manner serves to "diminish the credibility of the government's rationale" for burdening speech in the first place. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 824 (9th Cir. 2013). Having singled out SSB advertising, and no other advertising, for special First Amendment burdens, the City cannot possibly demonstrate that the Ordinance will advance "to a material degree" its goal of

improving the dietary habits of its residents. Indeed, the possibility that the Ordinance would advance the City's goal to *any* degree is eliminated by Appellants' strong evidence that the compelled speech ("[d]rinking beverages with added sugar contributes to obesity, diabetes, and tooth decay") is actually likely to *mislead* numerous consumers.

Nor has the City demonstrated that the Ordinance satisfies *Central Hudson*'s narrow-tailoring requirement. If the City desires to ensure that its citizens are better informed regarding sugar consumption, it could do so in a manner that would impose *no* burden on others' First Amendment rights: it could provide that information by speaking on its own behalf. The Supreme Court has explained that commercial speech burdens do not qualify as narrowly tailored if the government could achieve its goals without burdening any speech. *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 371 (2002).

III. THE CITY CANNOT AVAIL ITSELF OF THE "GOVERNMENT SPEECH" DEFENSE IN THIS CASE

A. The Ordinance's Mandated Warning Does Not Qualify as Government Speech

The Ordinance's First Amendment deficiencies cannot be salvaged by the City's inclusion of the additional, mandatory disclosure that "This is a message from the City and County of San Francisco." Indeed, the City has never defended

the Ordinance on this basis, and even the district court did not cite it as a basis for upholding the Ordinance. Although a governmental body's desire to speak may be an essential attribute of "government speech," such a purpose, standing alone, cannot convert private commercial advertising into government speech. If merely placing the government's imprimatur on compulsory speech sufficed to invoke the government-speech defense, then little would remain of the Supreme Court's prohibition against the government's requiring citizens to "use their private property as a 'mobile billboard' for the State's ideological message." *Wooley*, 430 U.S. at 715. Given the importance the Supreme Court has placed on the right both to speak *and to refrain from* speaking, the First Amendment's longstanding prohibition on compelled speech cannot be so easily defeated.

In *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), the Supreme Court recognized, under certain narrowly defined circumstances, "government speech" as a defense to a compelled *subsidy* challenge. Under the federal law at issue in *Johanns*, beef producers were charged a fee to fund the Beef Council, which then used the money to buy advertisements promoting beef, including the "Beef, It's What's For Dinner" national advertising campaign. 544 U.S. at 554-55. Emphasizing the continued viability of its longstanding compelled speech jurisprudence, the Court acknowledged that "[w]e have not heretofore considered

the First Amendment consequences of government-compelled *subsidy* of the government's own speech." *Id.* at 557. The Court then went on to vacate a judgment that had overturned the federal subsidy law, explaining that "compelled *funding* of *government* speech does not alone raise First Amendment concerns." *Id.* at 559 (emphasis added).

The marked contrast between the facts of *Johanns* and those of this case could not be starker. Indeed, there is a difference not simply of degree, but of material kind, between the compulsion at issue here and the compulsion considered in *Johanns.* Unlike a modest assessment to pay for advertising that actually *promotes* Appellants' products, the City's Ordinance requires Appellants "to repeat an objectionable message out of their own mouths, require[s] them to use their own property to convey an antagonistic ideological message, force[s] them to respond to a hostile message when they 'would prefer to be silent,' [and] require[s] them to be publicly identified or associated with another's message." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470-71 (1997). The City's Ordinance is the First Amendment equivalent of requiring a condemned man to load the bullet in his executioner's gun before being shot.

Applied to this case, *Johanns* might conceivably allow the City to compel SSB manufacturers and retailers to subsidize a "Sugary Beverage Council," which

would then purchase, produce, and disseminate advertisements *promoting* such beverages to the public. As the Supreme Court has explained, constitutional objections to such favorable generic advertising are simply not "comparable to those [cases] in which an objection rested on political or ideological disagreement with the content of the message." *Glickman*, 521 U.S. at 471-72. If anything, *Johanns* reaffirms that First Amendment scrutiny should be stricter when a private speaker is forced to subsidize or convey a message with which it disagrees, instead of one that it supports.[9]

Here, it is all well and good that the City wants consumers to know that the words contained in the mandated warning were chosen by the government, but *Johanns* instructs that "the correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights." 544 U.S. at 564 n.7. Otherwise, every governmental body in the country could easily avoid the Supreme

[9] The Supreme Court's recent decision in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), further clarifies that the government-speech defense applies only in very limited circumstances. *Walker* concluded that Texas's specialty license plate designs constituted government speech because (1) States have a long history of using State-issued license plates to convey government messages, (2) Texas license plate designs "are often closely identified in the public mind with the [State]," and (3) Texas exercises final approval over the design of each specialty license plate. 135 S. Ct. at 2248-49. *None* of those circumstances is present in this case.

Court's pesky compelled-speech jurisprudence merely by claiming authorship over the message it wishes to impose on private speakers.

Of course, the City is perfectly free to convey its "don't-drink-sugar-sweetened-beverages" viewpoint on its own property, utilizing its own resources. But the First Amendment does not permit the City to regulate *others*' lawful speech based on a bare desire to determine which viewpoints reach the general public and which do not—not even for the well-intentioned purpose of preventing consumers from "making bad decisions." *Thompson*, 535 U.S. at 374 (rejecting a "highly paternalistic approach" on the basis that "people will perceive their own best interests"). Here, as in other settings, the right not to speak "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

B. The Underlying Purpose of the Government-Speech Doctrine—Ensuring that Dissident Taxpayers Cannot Silence the Government—Is Wholly Inapplicable Here

Any suggestion that the City's mandated warning qualifies as government speech is further undermined by the very policy justification that gave rise to the government-speech doctrine in the first place. The Supreme Court first had occasion to discuss "government speech" (as it relates to compelled speech claims)

in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), in which the plaintiffs objected to being forced to subsidize the State Bar of California's expressive activities (*i.e.*, the State Bar was spending a portion of attorneys' bar dues on ideological and political activities). Despite California's determination, as a matter of state law, that the State Bar was a "governmental agency," the Supreme Court ultimately concluded that the State Bar was not an entity qualified to invoke the government-speech defense under the facts of the case. *See* 496 U.S. at 11-12.

Keller explained that a government-speech exception to the compelled-speech doctrine may sometimes be necessary to help ensure that dissenting citizens cannot invoke the First Amendment in an effort to silence the government altogether:

> With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making government decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid with public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Id. at 12-13. In other words, there is no taxpayer's veto over what the government is permitted to say in its own right.

Keller's rationale for exempting government speech from the Supreme Court's compelled-speech doctrine further confirms that the government-speech

defense is wholly inapplicable to this case. Appellants here do not contend that the First Amendment somehow bars the City's anti-sugar crusade; rather, Appellants merely contend that the City should not be able to implement its public-health campaign in a way that commandeers the private property of beverage manufacturers and retailers, who must then convey an ideological message with which they disagree.

There is no suggestion that this suit threatens the City's ability to speak out on matters of public importance (including obesity, diabetes, and tooth decay). If Appellants' First Amendment challenge is successful, the City will remain free to disseminate *its own* messaging regarding SSBs; it simply may not force private speakers to pay for and carry that message against their will. In the absence of any chilling effect on the City's ability to speak out precisely as it chooses on SSBs, no reason exists to abandon long-recognized constitutional constraints on compelled speech.

CONCLUSION

The Court should reverse the district court's denial of Appellants' motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify:

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because: this brief contains 6,991 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2.This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
Richard A. Samp

Attorney for Washington Legal Foundation

Dated: August 4, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2016 I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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