IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| AMERICAN BEVERAGE ASSOCIATION and CALIFORNIA RETAILERS ASSOCIATION,<br><br>Plaintiffs/Appellants,<br><br>vs.<br><br>CITY AND COUNTY OF SAN FRANCISCO<br><br>Defendant/Appellee. | No. 16-16072<br><br>U.S. District Court No. 3:15-cv-03415 EMC |
| CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>CITY AND COUNTY OF SAN FRANCISCO<br><br>Defendant/Appellee. | No. 16-16073<br><br>U.S. District Court No. 3:15-cv-03415 EMC |

# BRIEF OF *AMICI CURIAE* AMERICAN HEART ASSOCIATION, AMERICAN ACADEMY OF PEDIATRICS, CALIFORNIA, CALIFORNIA MEDICAL ASSOCIATION, CHANGELAB SOLUTIONS, HEALTHY FOOD AMERICA, NATIONAL ASSOCIATION OF CHRONIC DISEASE DIRECTORS, NETWORK OF ETHNIC PHYSICIAN ORGANIZATIONS, NICOS CHINESE HEALTH COALITION, PREVENTION INSTITUTE, PUBLIC HEALTH ADVOCATES, SAN FRANCISCO BAY AREA CHAPTER - PHYSICIANS FOR SOCIAL RESPONSIBILITY, SAN FRANCISCO MARIN MEDICAL SOCIETY

***IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC***

On Appeal from the United States District Court
for the Northern District of California
The Honorable Edward M. Chen


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## CORPORATE DISCLOSURE STATEMENT

No party to this filing has a for-profit parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici curiae* are national, state, and local public health and medical organizations. They seek to share their expertise with the Court to explain the difficulties that the panel opinion, if it stands, may pose for the dissemination of important health information to the public. *Amici* also wish to convey that the warnings challenged are not controversial statements of opinion, but factual statements reflecting the broad consensus of the public health and medical communities.[1]

Specific information about each *amicus* appears in the Appendix.

[1] The parties have consented to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amici* and their members, contributed money to the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The American Heart Association and other public health and medical organizations appearing as *amici curiae* ask the full Court to consider the consequences of the panel majority's opinion, both in preventing the dissemination of crucial health information to the public during an epidemic of obesity and diabetes, and in creating potentially serious obstacles to any future efforts to enact warning or disclosure standards to address similar public health crises.

*En banc* review of this case is necessary to resolve conflicts between the majority opinion and at least two other recent decisions of this Circuit, and to answer a question of exceptional importance: the discrepancy between the majority opinion and authoritative decisions of the Supreme Court and other Courts of Appeals that have addressed the proper standard to apply in reviewing compelled speech in the commercial context. Fed. R. App. P. 35(b).

The panel decision departs from recent decisions of this Circuit addressing when a disclosure is subject to lenient First Amendment review under *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 650-52 (1985). In particular, it differs from those cases in importing subjectivity and implication into the otherwise straightforward inquiry whether a statement is "factual and uncontroversial." *Compare* Slip Op. at 21-24 *with Nationwide Biweekly Admin. v. Owen*, – F.3d –, No. 15-16220, 2017 WL 4509128 (9th Cir. Oct. 10, 2017), at *11,

*13; *CTIA-The Wireless Ass'n v. City of Berkeley,* 854 F.3d 1105, 1117 (9th Cir. 2017). The panel decision also conflicts with Circuit precedent in declining to give any deference to the district court's findings of credibility concerning the companies' claim that the warning ordinance would lead them to cease advertising in the regulated media. *Compare* Slip Op. at 25 *with Prete v. Bradbury*, 438 F.3d 949, 960-61 (9th Cir. 2006).

In addition, the case presents "question[s] of exceptional importance" in that the majority opinion "conflicts with the authoritative decisions of other United States Courts of Appeals," Fed. R. App. P. 35(b)(1)(B), on at least four crucial points: (1) When other Circuits assess warnings, they do not examine whether similar warnings were imposed on potentially comparable hazards, as the panel majority did here; (2) In the Supreme Court and in other Circuits, a commercial speaker's interest in *not* imparting certain information is minimal, a point directly at odds with the panel majority's elevation of that interest; (3) The Supreme Court and other Circuits have found disclosure requirements to be "unduly burdensome" only when complying with the requirement would effectively preclude advertising in a particular medium, whereas the panel here applied a much broader standard that could result in challenges to almost any disclosure; and (4) In other Circuits, the inquiry whether a commercial disclosure is "factual and uncontroversial" is a threshold question that determines whether to apply the lenient *Zauderer* standard

or the more robust scrutiny of *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557, 566 (1980), whereas the panel majority treated the inquiry as a substantive part of the *Zauderer* test – an approach that would automatically strike down any requirement that goes beyond a simply factual recital (even one as innocuous as "Keep out of reach of children.")

If the panel decision stands, it could upend First Amendment doctrine in this Circuit concerning compelled commercial disclosures. If government cannot mandate a warning about one product without requiring warnings on all products posing comparable risks, or before any possibility of misunderstanding is completely eliminated, then how many safety warnings – current or future – would survive constitutional review? A major evidence-based tool for protecting public health could be shelved.

Research has firmly established that obesity and diabetes present an urgent health risk to San Francisco and to the nation – *see, e.g.,* Brief of Am. Heart Ass'n et al. as Amici Curiae, *Am. Beverage Ass'n v. City & County of San Francisco*, 871 F.3d 884 (9th Cir. 2017) (hereinafter "AHA Br.") at 4-5 (almost half of all Americans are expected to develop diabetes in their lifetime) – and that consumption of added sugars increases the risk of those diseases. *Id*. at 21-24. Even one can of a sugar-sweetened beverage can exceed the recommended daily allowance for sugar in children. *Id*. Yet the majority opinion deviates from

precedent, in this Circuit and beyond, to prevent the public from hearing a straightforward message that might have helped educate hundreds of thousands of consumers about the risks they face.

*Amici* believe that the district court's well-reasoned decision should be upheld. However, if this Court has concerns about the size, *see* Slip Op. at 28 (Nelson, J., conc.), or wording of the required warnings, it can issue a narrow ruling focusing on those issues and give the City a chance to bring the ordinance into compliance.

In sum, *amici* urge this Court to grant rehearing to restore uniformity to Ninth Circuit law and to the law of the Courts of Appeals nationwide, and not to let stand a precedent that could be used to challenge virtually any required warning or disclosure, no matter how vital for protecting public health and safety.

## ARGUMENT

### I. THE MAJORITY OPINION'S CONSTRAINED READING OF "FACTUAL AND UNCONTROVERSIAL" CONFLICTS WITH THE PRECEDENT OF THIS AND OTHER CIRCUITS.

The panel opinion injects subjective meaning into San Francisco's warning, an interpretation which fatally conflicts with recent Circuit precedent concerning "factually uncontroversial" statements. This speculative reading creates an overly broad and obtrusive rule that diverges from precedent in this Circuit and beyond.

### A. The Majority Departs From Precedent In Opining About The Subjective Effect of Disclosures Rather Than Focusing On Whether They Are Accurate.

As this Court established in *CTIA,* analysis of the term "uncontroversial" for the purposes of determining the proper First Amendment standard to be applied to a required disclosure is limited to the factual accuracy of the disclosure, not to its subjective impact on the audience. *CTIA*, 854 F.3d at 1117; *see also Nationwide Biweekly*, 2017 WL 4509128, at *29 (upholding disclosure even if it may disturb consumers). In *CTIA*, the Court upheld a "purely factual" disclosure about radiofrequency radiation, even though the disclosure reflected the FCC's decision to incorporate a large margin of safety above the level at which scientific studies had observed health harms in animals. 854 F. 3d at 1112-13. The Court specifically declined to read an "implicit" message into the disclosure. *Id*. at 1113, *reh'g denied*, 2017 WL 4532465 (Oct. 11, 2017).

In contrast, the panel majority here read various implicit meanings into the sugary beverages warning. According to the panel, the disclosure "Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay," S.F. Health Code § 4203(a) (2015), implies the unqualified statement that sugary beverages contribute to health harms regardless of the quantity consumed or other lifestyle choices. Slip Op. at 20-21. The panel's reading overstates the message of the disclosure – even the warning "Cigarettes cause fatal lung disease," 15 U.S.C.

§ 1333(a)(1), does not reasonably imply that each cigarette is itself a death sentence or indeed that a majority of the people who smoke will die of the practice, U.S. Dep't. of Health & Human Servs., *The Health Consequences of Smoking: 50 Years of Progress* 666-67 (2014). But the truth of San Francisco's warning is still startling: as little as one sugar-sweetened beverage a day increases the risk of developing diabetes by 80% in women and increases the risk of obesity by 55% in children. AHA Br. at 24.

Similarly, the panel majority held that the fact that the warning focuses on a single product implies that only sugary beverages contribute to obesity, diabetes, and tooth decay. Slip Op. at 21. Again, the *ad absurdum* inference is unjustified – though, again, it is also true that sugary beverages account for more than 50 percent of the added sugars in the American diet. AHA Br. at 5.

Finally, the panel majority found that singling out sugary beverages suggests that consumer behavior is irrelevant to personal health and that sugary beverages are inherently unhealthful. Slip Op. at 22. Once again, that interpretation reads far too much into a straightforward factual warning – and, once again, there would be some truth to the inference if it were in fact drawn: sugar-sweetened beverages actually do not satiate like other sources of added sugar and do stimulate many consumers' cravings to eat more. AHA Br. at 11.

A commonsense interpretation of the sugary beverages disclosure accords with courts', and the public's, interpretation of other public health warnings. For example, over three decades, no published decision has even entertained a First Amendment challenge to California's Proposition 65, despite a warning – "This product contains a chemical known . . . to cause cancer" – that contains a significantly stronger causal claim than San Francisco's. *See* Cal. Code Regs. tit. 11 § 3202(b) (using phrase "*may* cause cancer" prohibited because it renders warning unclear) (emph. added). And as noted, the Sixth Circuit has upheld similarly declarative statements like "Cigarettes cause strokes and heart disease," *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 526 n.3, 558 (6th Cir. 2012).

Further, as this Court recently affirmed, the mere possibility that an industry can conjure a negative connotation from a disclosure does not make the disclosure nonfactual. *Nationwide Biweekly*, 2017 WL 4509128 at *32; *see also CTIA*, 854 F.3d at 1120.

In any event, a court taking issue with the specific language of a disclosure – here, proposing "overconsumption" for "consumption" and "may contribute" for "contributes," Slip Op. at 21 – can direct its analysis to that specific infirmity, which San Francisco could then choose to remedy or not, *see* Slip Op. at 28,

(Nelson, J., conc.), rather than creating new doctrine that broadly implicates other extant disclosure regimes.

### B. The Majority's Novel Rule That A Warning Is Misleading If It Is Not Required For All Comparable Products Conflicts Starkly With Decisions In This Circuit And Beyond.

The panel majority's newly derived universal disclosure standard – holding that no risk warning may be required for one product unless it is required for all products posing similar risks, Slip Op. at 21-22 – has no precedent in any opinion issued by this or any other Circuit.

The panel majority not only converted a wholly accurate statement about sugary beverages' contribution to obesity, diabetes, and teeth decay from fact to "false" information, Slip Op. at 26, n.12, but also determined that the statement implies that other foods and beverages do not contribute to obesity. *Id*. at 21. By that logic, to pass constitutional muster San Francisco's disclosure would have to be applied to every food or beverage that contains added sugar, and presumably to every retailer of those products. That is a recipe for either ineffective over-warning, *see DiPirro v. Bondo Corp.*, 153 Cal.App.4th 150, 198 (2007) (less meaningful warnings may crowd out necessary warnings), or, more likely, no warnings at all.

It is also an approach in direct conflict with that previously adopted by this Court. The panel majority's reasoning, if applied in *CTIA*, presumably would have

required a determination that cell phone disclosures are misleading because they imply that other devices that emit radiofrequency radiation – cordless telephones, Wi-Fi routers, televisions, radios – do *not* meet the FCC's safety guidelines or do *not* contribute to an individual's cumulative radiation exposure. *CTIA*, 854 F.3d at 1112-13, 1118-20. The blanket rule would apparently require warnings on these products because they expose humans to the same general form of radiation, even though the actual exposure may be much lower than cell phones because of the way each device is used.[2]

Of course, with good reason, that is not what *CTIA* held, and it is not the law of this Circuit anywhere other than in the panel opinion. *See, e.g.*, *Nationwide Biweekly*, 2017 WL 4509128, at *11 (upholding requirement that mortgage refinance company disclose lack of authorization from lenders, without examining whether other companies not authorized by lenders are subject to a similar requirement); *Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 849 (9th Cir. 2003) (sustaining requirement that public be informed of impacts of stormwater discharge, without requiring similar communications about the hazards of other types of improper waste disposal).

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[2] International Agency for Research on Cancer, *Nonionizing Radiation, Part 2: Radiofrequency Electromagnetic Fields*, 102 IARC Monographs 1, 46 (2013) (showing graph of devices that may contribute to radiofrequency radiation exposure), http://monographs.iarc.fr/ENG/Monographs/vol102/mono102.pdf

The majority opinion's novel rule is also not the law of any other Circuit. For example, in upholding New York City's calorie labeling requirements for large chain restaurants, the Second Circuit did not hold or even contemplate that imposing the requirements on restaurant chains with more than fifteen outlets creates a misleading impression that only large chain restaurants provide food that contributes to obesity. *New York State Rest. Ass'n (NYSRA) v. New York City Bd. of Health*, 556 F.3d 114, 134-136 (2d Cir. 2009); *see also Nat'l Rest. Ass'n v. N.Y.C. Dep't of Health & Mental Hygiene*, 49 N.Y.S.3d 18, 25-26 (N.Y. App. Div. 2017) (upholding City's requirement that chain restaurants post warnings on high-sodium menu items, without considering any potential message conveyed about high-sodium items in individual restaurants or grocery stores). Further, the prioritization of calorie information as opposed to other nutrient disclosures did not create a misleading impression that only calories contribute to chronic disease. *NYSRA*, 556 F.3d at 134. As explicitly permitted in *Zauderer*, the City could attack the problem of obesity in an incremental manner – without imposing an across-the-board disclosure requirement. 556 F.3d at 136; 471 U.S. at 651 n.14.

Other decisions reinforce the conclusion that the First Amendment does not require that a disclosure mandate apply universally in order not to be misleading. *See, e.g., Zauderer*, 471 U.S. at 651 n.14, 652 (upholding requirement that attorneys reveal potential costs to client of contingent representation, without

finding it misleading that no other providers of allegedly free services were similarly compelled); *Am. Meat Inst. v. U.S. Dep't of Agric*., 760 F.3d 18 (D.C. Cir. 2014) (en banc) (upholding country-of-origin labeling measure that applied only to certain products); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 408 (D.C. Cir. 2012) (upholding requirement that the most prominent figure displayed in airline advertisements be the total price, without exploring whether the disclosure requirement also applied to other industries); *Disc. Tobacco City*, 674 F.3d 509 (6th Cir. 2012) (sustaining graphic warning labels on cigarette packaging, without examining lack of similar warnings for cigars); *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002) (upholding requirement that dentists provide disclaimers when advertising specialty areas, without inquiring whether state law required the same of other professionals); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001) (upholding labeling requirement that applied to only "*some* mercury-containing products").

The panel majority's rule would, indeed, threaten countless disclosure regimes that currently provide useful and sometimes critical information to the public. Not every product containing alcohol bears the admonition that women should not consume alcohol during pregnancy or that consumption impairs the ability to drive or operate machinery. 27 U.S.C. § 215(c). The Food, Drug, and Cosmetic Act exempts butter, cheese, and ice cream from its requirement that

foods containing artificial flavors or coloring disclose that fact on the label. 21 U.S.C. § 343(k). Choking hazard disclosures focus on toys and games intended for young children, even though numerous other common household items fit the requisite dimensions. 15 U.S.C § 1278(a)(1); 16 C.F.R. § 1500.82.

The panel majority's unprecedented and unworkable universal disclosure standard calls for *en banc* review.

## II. THE PANEL'S ANALYSIS OF "UNDULY BURDENSOME" ENGENDERS A FURTHER SPLIT OF AUTHORITY.

The panel decision also creates conflicts with this and other Courts' precedent in its interpretation of what constitutes an "unduly burdensome" disclosure. The majority's expansive reading transforms the Supreme Court's narrowly drawn exception into a broadly applicable impediment.

### A. An "Unduly Burdensome" Disclosure Is One That Makes Advertising In Certain Media Impossible, Not One That An Advertiser Would Simply Prefer Not to Make.

Prior cases finding a disclosure unduly burdensome have turned on the physical impossibility of advertising in particular media. *See, e.g., Ibañez v. Bd. of Accountancy*, 512 U.S. 136, 146-47 (1994) (impracticable to print necessary disclaimers on business card or Yellow Pages ad); *Pub. Citizen v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011) (font size, speech speed, and the multiplicity of disclosures – including all jurisdictions in which an attorney was licensed – physically ruled out short advertisements in print and

elsewhere); *Dwyer v. Cappell*, 762 F.3d 275, 284 n.7 (3d Cir. 2014) (requirement to publish full judicial opinion placed stark physical burden on advertising judicial praise of attorneys in print).

The panel here did not explain why a disclosure that occupies 20 percent of a billboard makes it physically impossible for companies to continue advertising. Slip Op. at 18, 24. As the panel acknowledged, sugary beverage companies remain free to use 80 percent of a billboard as they see fit. *Id*. at 24; *see also Disc. Tobacco City*, 674 F.3d at 564 (upholding warnings that took up between 50 and 60 percent of the front and back packaging on a cigarette packet); AHA Br. at 29-30 (discussing cases upholding larger disclosures even in noncommercial context).

There is likely no bright-line size rule applicable in all situations. To determine whether a particular requirement is *unduly* burdensome requires a district court to assess not only the warning's size but also the medium in question, the availability of other media, the characteristics of the particular industry and, crucially, the urgency of the message conveyed. That kind of detailed contextual analysis is best suited to a court which can take evidence, weigh expert testimony, determine the credibility of witnesses, and examine different sides' mockups of potential ads. If the full Court here determines that questions remain about whether the ordinance unduly burdens advertisers, it may charge the district court to perform that analysis on remand.

### B. The Panel Majority Elevates Advertisers' Interest in Concealing Information Over Consumers' Interest In Receiving It.

The majority opinion's unusual analysis of the burden on commercial speakers also diverges from established precedent by privileging companies' preference to remain silent over a strong consumer interest in receiving critical health information about sugar-sweetened beverages. According to the Supreme Court and other decisions of this Court, a retailer's constitutional interest in *not* disclosing factual information in its advertising is minimal compared to a consumer's interest in the free flow of information. *CTIA*, 854 F.3d at 1115 (citing *Zauderer*, and upholding radiation level disclosures that retailers did not want to provide); *see also Envtl. Def. Ctr., Inc.,* 344 F.3d at 849 (upholding required disclosures).

Apparently finding no support for its position within commercial speech jurisprudence, the panel opinion relies instead on cases involving core, ideological speech. Slip Op. at 23 (citing *PG&E v. PUC*, 475 U.S. 1, 15 n.12 (1986) (utility could not be required to carry noncommercial speech from a third party advocacy group in its newsletter), and *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997) (distinguishing ideological speech of *Wooley v. Maynard*, 430 U.S. 705 (1977) ('Live Free or Die' on license plates), while *upholding* required advertising subsidy as non-ideological).

The evidence suggests that the vast majority of consumers want more information about the potential harms of consuming sugary beverages. AHA Br. at 28 (citing polls finding 78 percent of consumers favor warnings on sugary drinks).

To prevent those consumers from receiving crucial health information runs directly counter to the information-fostering principles of the First Amendment. *Zauderer*, 471 U.S. at 651 ("the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides").

### C. The Panel's Unorthodox De Novo Review Of The District Court's Credibility Determinations Deviates From This Court's Precedent..

By giving no deference to the district court's credibility findings about the likelihood that beverage companies would cease advertising on fixed media as a result of the San Francisco ordinance, Slip Op. at 25; *Am. Beverage Ass'n v. City & County of San Francisco*, 187 F. Supp. 3d 1123, 1144-45 (N.D. Cal. 2016), the panel creates another conflict with existing Circuit law. *See Prete v. Bradbury*, 438 F.3d 949, 960–61 (9th Cir. 2006) (reviewing for clear factual error and deferring to trial court's findings on credibility of affidavits and weight of conflicting evidence).

It is difficult to square the panel's dismissal of Judge Chen's assessment of the advertisers' affidavits with this Court's application in *Prete* of a clear error standard and associated deference. *Id*. at 964 (reviewing for clear error the district

court's finding that affidavits from businesses alleging that restriction would cause firms to withdraw from market was "unsupported speculation"). Judge Chen also expressly relied on expert testimony stating that brand advertising continues to be effective even with health warnings. 187 F. Supp. 3d at 1143.

If the panel believed the district court should have looked beyond the affidavits and held live testimony before determining the credibility of the advertisers' evidence, then that is a task to which it could have set that court on remand. But to disregard the district court's determination – and to substitute its own judgment – creates a conflict that calls for *en banc* review.

## III. THE PANEL OPINION CONFLICTS WITH PRECEDENT BY TREATING THE QUESTION WHETHER SPEECH IS "FACTUAL AND UNCONTROVERSIAL" NOT AS A THRESHOLD INQUIRY BUT AS A SUBSTANTIVE CONSTITUTIONAL STANDARD.

The question whether a required disclosure is "factual and uncontroversial" is a threshold inquiry that determines which test – *Zauderer* or *Central Hudson* – applies. Having decided (appropriately or not) that the disclosures were not uncontroversial, the panel majority should have applied *Central Hudson*. Instead it departed from precedent by proceeding simply to strike the ordinance down, *see* Slip Op. at 26, n.13 – a rule that if followed would automatically prohibit any warning, like "If pain persists, consult a physician immediately," *see, e.g.,* 21 C.F.R. § 369.21, that contains anything other than unadorned facts.

As courts across the nation have determined, if a disclosure is not factually uncontroversial (or otherwise subject to the *Zauderer* standard, *see Disc. Tobacco City*, 674 F.3d 509, 559 n.8 (6th Cir. 2010)), then *Central Hudson* provides the appropriate test. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012) (applying *Central Hudson* test to imperative "1-800-QUIT-NOW" hotline); *accord Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014); *United States v. Phillip Morris*, 566 F.3d 1095, 1143 (D.C. Cir. 2009); *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 95–96 (2d Cir. 2010); *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 133-34 (2d Cir. 2009); *United States v. Wenger*, 427 F.3d 840, 849–50 (10th Cir. 2005); *Novartis Corp. v. FTC,* 223 F.3d 783, 789 (D.C. Cir. 2000).

That conclusion follows from the overall symmetry of First Amendment architecture. The standards for restriction of speech and compulsion of speech are generally the same. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797 (1988) (noting "[t]he constitutional equivalence of compelled speech and compelled silence"). Strict scrutiny applies both to *restrictions* on core political speech, *see Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015); *United States v. Alvarez,* 567 U.S. 709 (2012), and to *compulsion* of ideological speech. *See Wooley v. Maynard*, 430 U.S. 705, 715-716 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-634 (1943). The lenient standard for compelled factual commercial speech set

out in *Zauderer* is, explicitly, a particular exception to this rule of symmetry. *See CTIA*, 845 F.3d at 1115 (noting "*Zauderer* exception to the general rule of *Central Hudson*"). Therefore, when a required statement constitutes opinion rather than uncontroversial fact, the proper next step is not to automatically strike the measure down, but rather to apply a more stringent test: *Central Hudson*.

*En banc* review is required to bring Circuit law back into accord with the rest of the nation.

## CONCLUSION

The panel majority opinion conflicts sharply with decisions of this Court, the United States Supreme Court, and other Courts of Appeals. It threatens the validity not just of crucial health warnings about sugar-sweetened beverages, but also a host of other disclosure regimes providing vital information to consumers.

The case should be reheard by the full Court.

DATED: October 27, 2017 Respectfully submitted,

/s/ *Seth E.Mermin*

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## APPENDIX

### Statements of Interest of Amici Curiae

1. The **American Heart Association** (AHA) is a voluntary health organization that, since 1924, has been devoted to saving people from heart disease and stroke – the two leading causes of death in the world. AHA teams with millions of volunteers to fund innovative research, fight for stronger public health policies, and provide lifesaving tools and information to prevent and treat these diseases. The Dallas-based association with local offices in all 50 states, as well as in Washington DC and Puerto Rico, is the nation's oldest and largest voluntary organization dedicated to fighting heart disease and stroke.

2. The **American Academy of Pediatrics, California** (AAP-CA) is an incorporated nonprofit member association comprising the four AAP California chapters statewide and representing approximately 5,000 board-certified primary care and subspecialty pediatricians. The mission of AAP-CA is to promote the health and well-being of all children and youth living in California. One of the organization's top goals is the prevention of childhood obesity. Pediatricians see first-hand in their practices the devastating effects obesity can have on children, too often resulting in serious and life-long health problems, and even reducing life expectancy. Type 2 diabetes is increasingly being diagnosed in youth, and now accounts for 20% to 50% of new-onset diabetes case patients, disproportionately

affecting minority racial/ethnic groups. AAP-CA is active in activities and advocacy to educate patients, families and the public regarding the growing evidence that links the prevalent consumption of sugar sweetened beverages to the devastating obesity epidemic in children. Further, pediatricians are committed to supporting strategies that reduce the incidence of dental caries (cavities), the most common infectious disease of early childhood, which has been strongly linked to sugar sweetened beverage consumption.

3. The **California Medical Association** (CMA) is a not-for-profit, incorporated professional association for physicians with more than 42,000 members. CMA physician members practice medicine in all specialties and modes of practice throughout California. For more than 150 years, CMA has promoted the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA policy supports the adoption of sugar-sweetened beverage regulations that require warning labels on product advertising.

4. **ChangeLab Solutions** is a national nonprofit organization that creates innovative laws and policies to ensure everyday health for all, whether that's providing access to affordable, healthy food and beverages, creating safe opportunities for physical activity, or ensuring the freedom to enjoy smoke-free air and clean water. Our solutions address all aspects of a just, vital and thriving

community, such as food, housing, child care, schools, transportation, public safety, jobs, and the environment. ChangeLab Solutions creates and helps implement legal and policy solutions designed to increase access to nutritious food while reducing consumption of unhealthy foods, including sugar-sweetened beverages and other foods that include large amounts of added sugars.

5. **Healthy Food America** is a national nonprofit that works to prevent obesity, diabetes and other chronic diseases by promoting healthy eating. We aim to reduce exposure to and consumption of unhealthy foods while promoting the increased availability and consumption of healthy, unprocessed foods. Healthy Food America works to reduce the unacceptable prevalence of added sugars in the American diet, including those found in sugary drinks, by promoting policy and changing industry practice.

6. The **National Association of Chronic Disease Directors** (NACDD) is a non-profit public health organization committed to serving the chronic disease directors of each state and U.S. jurisdiction. Founded in 1988, NACDD connects more than 6,000 chronic disease practitioners to advocate for preventive policies and programs, encourage knowledge sharing, and develop partnerships for health promotion. NACDD agrees with the position taken by the World Health Organization, American Heart Association, and other leading medical groups, and endorses limiting sugar intake, including sugar-sweetened beverages.

7. The **Network of Ethnic Physician Organizations** (NEPO) is a coalition of more than 50 ethnic physician organizations in California. NEPO and its physicians work to reduce health disparities, improve access to health care, and advocate for public health issues that affect their communities.

8. **NICOS Chinese Health Coalition** is a public-private-community partnership of more than 30 health and human service organizations and concerned individuals. The mission of NICOS is to enhance the health and well-being of San Francisco's Chinese community. Since 1985, NICOS has been engaged in advocacy, research, training, coalition-building and program implementation for the benefit of this population and the organizations that serve it. NICOS strongly supports policy efforts that warn and educate families about the connections between sugary drinks and type 2 diabetes and tooth decay, two pressing public health concerns in our community. Asian Americans are almost twice as likely to develop diabetes as the general US population, and of those who develop the disease, more than 95% are diagnosed with type 2 diabetes. In San Francisco, Asian American children entering kindergarten have the highest rate of dental caries and highest rate of untreated dental caries.

9. **Prevention Institute** is a national nonprofit dedicated to advancing community health and well-being by building momentum for effective primary prevention and health equity. Prevention Institute brings cutting-edge research,

practice, and analysis to today's pressing health and safety concerns. Included among its focus areas, Prevention Institute works to advance strategies and policies that increase access to healthful food and limit the impact of harmful marketing of unhealthy food, including sugar-sweetened beverages.

10. **Public Health Advocates** is an independent, nonpartisan, nonprofit organization that believes that neighborhoods and schools should and can be places where physical, social, and economic conditions help make health a reality for all people. Since our inception in 1999 as the California Center for Public Health Advocacy, Public Health Advocates has been at the forefront of solving the obesity and diabetes epidemics by advocating for ground-breaking programs and policies that build healthier communities. Through simultaneous state and local advocacy, Public Health Advocates has led successful campaigns to remove sugary drinks and unhealthy food from public schools, requiring chain restaurants to provide calorie information on their menus, and establishing California’s Human Right to Water Law. Public Health Advocates also sponsored legislation in 2014 and 2015 that would have required health warnings on sugary drinks in California.

11. **San Francisco Bay Area Physicians for Social Responsibility** (SF Bay Area PSR), representing over 2,500 SF Bay Area health professionals and supporters, is the local chapter of Physicians for Social Responsibility (PSR), a non-profit advocacy and educational organization that, guided by the expertise of

medicine and public health, works to protect human life from the gravest threats to health and survival. A key part of our ongoing programmatic work includes promoting ecologically-sound health care by working with healthcare professionals and institutions to promote "green" energy choices, safer chemicals, and healthy food produced in an environmentally and socially responsible way. As part of our "healthy food" work, we continue to support the implementation of public policy solutions created to increase access to nutritious food while reducing consumption of unhealthy foods, including beverages that include excessive amounts of sugar, and which have been strongly implicated in the development of childhood diabetes, obesity and tooth decay, with associated serious and negative lifelong health impacts.

12. The **San Francisco Marin Medical Society** (SFMMS) is the professional association for physicians in San Francisco, and has been active since 1868, working for the betterment of health for everyone in our city. With more than 1,800 members—including practicing physicians, residents, and medical students—SFMMS champions quality health care and innovation for our patients and community and serves the professional needs of all San Francisco physicians. We have spearheaded many community health issues in San Francisco including the co-sponsorship of Hep B Free, anti-tobacco legislation and education, formation and continuation of the Healthy San Francisco program, advocacy on

reproductive and end-of-life issues, in addition to advocacy for the California Soda Warning Label Bill (SB 203) and the 2014 San Francisco soda tax initiative. The local ordinance for warnings on sugary drink ads is thus very much in support of our goals of a healthier San Francisco.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief contains 4,179 words, according to Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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).
The brief has been prepared in a proportionally spaced 14-point typeface including serifs. The typeface is Times New Roman.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: October 27, 2017 /s/ *Seth E. Mermin*
Seth E. Mermin

## CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, I caused to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel, a true and correct copy of this Brief of *Amici Curiae* American Heart Association, *et al.*

DATED: October 27, 2017

/s/ *Vanessa Buffington*
Vanessa Buffington