IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

CITY & COUNTY OF SAN FRANCISCO'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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INTRODUCTION AND RULE 35 STATEMENT

Obesity and diabetes are epidemic in America. More than a third of adults in this country are obese, and nearly one in seven have Type II diabetes. These epidemics are deadly, and they cost billions of dollars every year in medical expenses and the loss of human potential. Research continues to identify all of the causes of obesity and diabetes, but there is widespread consensus that increased consumption of sodas and other sugary drinks have played an outsize role in these conditions. Indeed, a recent study in the American Heart Association's journal found that there are 25,000 deaths annually in the United States that are attributable to sugary drink consumption. ER 485.

To address the role of sugary drinks in causing health harms, San Francisco enacted an ordinance requiring soda and other sugary drink sellers to warn consumers prominently on their ads of the fact that "drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." S.F. Health Code § 4203(a).

The warning is both accurate and vitally important. There is no factual or scientific dispute that sodas and other sugary drinks are the single largest source of added sugar in the American diet, supplying empty calories but no nutrition, and that many Americans consume them on a regular basis. In the words of the beverage industry's own expert witness, reducing added sugars should "head the list" of the steps people should take to reduce obesity.[1] Even the consumption of a single soda a day raises the risk of obesity and diabetes significantly. Yet many people do not recognize ordinary and moderate-seeming levels of soda

[1] R. Kahn & J.L. Sievenpiper, "Dietary Sugar and Body Weight: Have We Reached a Crisis in the Epidemic of Obesity and Diabetes?" Diabetes Care 2014; 37:961.

consumption to be hazardous—a lack of awareness that is especially common among those who consume soda regularly. San Francisco's warning thus provides consumers with valuable health information that many lack.

Nonetheless a divided panel of this Court held that San Francisco's warning was misleading. In the panel majority's view, despite the literal truth of its words, the warning conveys the implicit and controversial messages that sugary beverages cannot be safely consumed in any amount, and that sugary beverages are less healthy than other sources of added sugar. By subjecting San Francisco's warning to intensive scrutiny for implicit, subtextual messages, the divided panel has set a new and unrealistic bar for health and safety warnings that jeopardizes the government's ability to protect public health.

En banc review is warranted here pursuant to Rule 35(a)(1)(A) because the panel decision conflicts with this Circuit's recent decision concerning First Amendment standards for compelled disclosures, *CTIA v. City of Berkeley*, 854 F.3d 1105 (9th Circ. 2017), *en banc review denied*, -- F.3d --, 2017 WL 4532465, which rejected a subjective or subtextual analysis of a compelled disclosure, and which upheld a disclosure that the cell phone industry contended misleadingly impugned its products. Moreover, the exceptional importance of First Amendment questions about the government's ability to require health warnings on risky products warrants review under Rule 35(b)(1)(B).

STATEMENT OF THE CASE

There is wide consensus in the medical and public health communities that Americans should drink less soda and other sugary drinks to reduce their risks of obesity, diabetes, and cavities. ER 488-89. The FDA, for example, says that "Americans are consuming too many calories from added sugars," and that "the

evidence on sugar-sweetened beverages and body weight . . . is strong and consistent." 81 Fed. Reg. 33742, 33802-03 (May 27, 2016). The American Diabetes Association has endorsed a health warning for soda ads that is nearly identical to San Francisco's. SER 62-63. The beverage industry itself has announced that in order to "address obesity" it will try to get people to reduce their consumption of calories from their products by 20%. SER 54.

Even modest-seeming amounts of soda have serious health impacts—one serving of sugary drinks per day is associated with at least 22% increased risk for diabetes, ER 211, and with steadily increasing body weight over time, ER 201-02. And these serious health impacts should be unsurprising in light of just how much sugar is in these drinks. A single-serving 12-ounce can of soda contains about ten teaspoons of sugar. ER 215. This is about three-quarters of the daily allowance of added sugars for most adults, and it exceeds the daily allowance for many children. ER 215; ER 490-91.[2]

But many people are not aware of just how much sugar sodas contain, or what the health consequences of consuming it regularly are. Many parents mistakenly believe that at least some sugary beverages are healthy for kids, ER 392, and more than a third of Americans lack basic knowledge about how to protect their health. ER 493. A lack of knowledge about health risks is one of the strongest predictors of whether someone consumes sugary beverages. ER 493.

San Francisco's legislators have determined that the health consequences of regular soda consumption for its residents are too great to ignore. With nearly a

[2] The daily allowance is like a calorie budget. According to the FDA, consuming more than 10% of one's daily calories in added sugar or solid fats means that there is not enough room left in the budget to meet one's need for nutrients with nutritious foods. If sugar is more than 10% of daily calories, then people are either not getting enough nutrition or are overeating, or both.

third of its children and teens obese or overweight, and nearly half of its adults so, ER 480, San Francisco enacted an ordinance in June 2015 requiring sugary beverage advertisements on fixed media[3] within San Francisco to include the statement, "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." S.F. Health Code § 4203(a). The warning must cover at least 20% of the ad space and be set off with a rectangular border. *Id.* The purpose of the ordinance is to help people make better food and drink choices by informing them about the health risks of sugary drinks. *Id.* § 4201.

Plaintiffs the American Beverage Association, the California Retailers Association, and the California State Outdoor Advertising Association sued San Francisco, ER 762, and subsequently sought a preliminary injunction. The district court denied injunctive relief pending trial, finding that the City's warning was a factual and accurate disclosure that was reasonably related to its substantial interest in public health. The court noted that the Plaintiffs had conceded the literal truth of the warning, and it rejected their claims that consumers would read into the warning misleading messages that sugary beverages alone cause obesity and diabetes, regardless of lifestyle or amount consumed. ER 20-23.

The district court also rejected Plaintiffs' claims that the warning was unduly burdensome or would chill them from speaking. ER 24-25. It accepted the view of the City's risk communications expert that soda advertising would still be persuasive and effective even if it were accompanied by a warning, just as the experience of the tobacco industry demonstrated, ER 25, and it rejected as

[3] The warning requirement applies to billboards and signs on bus shelters and in stores, but does not apply to media distributed beyond San Francisco's borders, like newspapers and electronic media. SF. Health Code § 4202.

unconvincing and internally contradictory Plaintiffs' declarations that soda companies would simply stop advertising on media subject to the warning requirement, ER 26-28. While the district court believed that the size of the City's required warning—20% of advertising space—presented a "close question," it ultimately determined that Plaintiffs could convey their advertising message in the remaining 80% of the ad. ER 26.

Subsequently, the district court granted Plaintiffs' motion for an injunction pending appeal, in light of its observation that the size of the warning was substantial and the paucity of cases in this Circuit applying *Zauderer*. ER 81-84.

On September 19, 2017, a divided panel of this Court reversed the district court's order, finding that Plaintiffs had shown a likelihood of success on their claims of First Amendment injury. Judge Ikuta, writing for herself and for Judge Seabright (D. Haw.), held that the required warning was not factual and uncontroversial because consumers could read it to convey that sugary beverages inherently resulted in health harms, regardless of the amount consumed or other lifestyle factors like exercise, and that sugary beverages contributed uniquely to health risks in a way that other sugary foods do not. Slip op. 22. The majority also held that the warning imposed on undue burden on commercial speech because its size was so large that sugary beverage ads would no longer be effective, especially if advertisers felt they had to engage in unwanted counterspeech. *Id.* at 24. Finally, the majority credited the declarations of soda company executives contending that they would not advertise in media that were covered by the warning requirement. *Id.* at 25. Judge Nelson concurred in the judgment. In her view, the City had not carried its burden of showing that the size of the warning was warranted, but she found the majority's conclusion that the warning language was misleading to be "tenuous." *Id.* at 28 (Nelson, J., concurring in the judgment).

REASONS FOR GRANTING REHEARING

I. The En Banc Court Should Resolve The Conflict Within This Circuit Concerning When A Compelled Disclosure Is Factual And Accurate.

Commercial speech is protected under the First Amendment not for its inherent or expressive value but because consumers have an interest in the free flow of information about goods and services. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). On this view, more information is better, and the Supreme Court so held in *Zauderer v. Office of Disciplinary Counsel*, when it upheld a state mandate that attorneys who advertise no-fee contingency arrangements must disclose that their clients might have to pay costs. 471 U.S. 626 (1985). The Court reasoned that, because commercial speech protection is focused on the interests of the listener, a commercial speaker has only a "minimal" First Amendment interest in not providing any particular piece of information to the listener. *Id.* at 651. In view of advertisers' "minimal" interest, the Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related" to the government's interest in requiring the disclosure. *Id.*

Zauderer's reasonable-relationship test applies only to mandatory disclosures of "factual information" in the context of commercial speech. 471 U.S. at 651. The Court should rehear this case en banc because of a conflict within this Circuit concerning the threshold question of when a disclosure is factually accurate, and therefore subject to *Zauderer* review.

In *CTIA*, two judges of this Court upheld Berkeley's requirement that cell phone retailers disclose to consumers information about how to avoid exceeding the Federal Communications Commission's guidelines for radiofrequency emissions while using a cell phone. 854 F.3d 1105. *CTIA* expressly determined

that *Zauderer* review is appropriate so long as a compelled disclosure is "factually accurate," even if it is controversial, and regardless of "its subjective impact on the audience" that hears it. *Id.* at 1118. The *CTIA* majority was unconvinced by the cell phone industry's fears that customers would mistake Berkeley's warning for an admonition that cell phones are unsafe. Instead, it held, the text of Berkeley's warning was accurate and not misleading because it adhered to the FCC's establishment of a radiofrequency exposure limit for cell phones, notwithstanding the FCC's conclusion that cell phones are safe even when users exceed the exposure limit. *Id.* at 1119-20; *id.* at 1125 (Friedland, J., dissenting). And if the cell phone industry genuinely feared consumers would be misled, *CTIA* reasoned, then retailers could "add to the compelled disclosure any further statement" that would explain or contextualize it. *Id.* at 1120.

The more-information-is-better approach adopted by *CTIA* is faithful to *Zauderer* and to the rationale underlying First Amendment protection for commercial speech. But it is irreconcilable with the divided panel decision in this case. While the panel majority acknowledged *CTIA*'s holding that "the term 'uncontroversial' in this context [i.e., the threshold question of whether the court applies *Zauderer* review] 'refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience,'" slip op. 15 n.5 (quoting *CTIA*, 854 F.3d at 1117), it disregarded that holding by resting its rejection of the beverage warning's accuracy on unsubstantiated predictions about what message consumers would take from the warning.

For example, the panel determined that the warning "conveys the message that sugar-sweetened beverages contribute to . . . health conditions regardless of the quantity consumed or other lifestyle choices" because it does not quantify how much consumption leads to harm. Slip op. 20; *id.* at 22. (But in fact, even typical

and innocuous-seeming amounts, like a can per day, contribute to health harms. *See supra* at 3.)[4]

Similarly, the panel held that it was "deceptive" for San Francisco to require a warning only on sugary drinks, *id.* at 22, because consumers would subjectively understand the message to mean that other sugary foods are not as unhealthy—despite the overwhelming nutritional consensus that Americans overconsume sugary drinks in particular, and that these drinks are causing harm. *See, e.g.*, 81 Fed. Reg. at 33802-03 (FDA statement that "the evidence on sugar-sweetened beverages and body weight . . . is strong and consistent"); Scientific Report of the 2015 Dietary Guidelines Advisory Committee (Feb. 2015), Part D, Ch. 6, at 20 ("Strong evidence shows that higher consumption of added sugars, especially sugar-sweetened beverages, increases the risk of type 2 diabetes").

In addition to relying on the purported subtext of the City's disclosure rather than on its text, the panel in this case contravened *CTIA* when it erected an unrealistically high standard for the accuracy of consumer warnings. While the *CTIA* majority eschewed any analysis of consumers' subjective understanding of a warning, the panel here held that "[a] disclosure that ***may*** deceive consumers" does not qualify for *Zauderer* review. Slip op. 16 (emphasis added). That is a step farther than the dissenting judge in *CTIA* would have taken; Judge Friedland's dissent reflected her view that consumers "would" read Berkeley's warning to

[4] The majority's view that the warning would be more accurate if it used the word "overconsumption," slip op. 21, fails to recognize that many people underestimate the health risks of their own consumption, which is precisely why a warning is warranted. And since it is modest-seeming consumption that is a problem for many people, a warning against "overconsumption" could be ineffective or even dangerous by leading people to believe that typical consumption levels do not pose health risks.

mean that cell phones are unsafe, not merely that they might. 854 F.3d at 1124 (Friedland, J., dissenting).

The panel majority's standard—that to receive deferential *Zauderer* review a required disclosure must have no potential for misunderstanding—also conflicts with *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the Supreme Court's most recent compelled-disclosure case. *Milavetz* upheld a disclosure that bankruptcy attorneys were required to append to their advertisements about helping consumers with debt, informing consumers that they are "a debt relief agency." *Id.* at 249-53. The Court rejected the plaintiff's argument that the required disclosure was "confusing and misleading," finding no actual evidence of confusion and noting that the advertiser could simply explain or contextualize the term to counteract any confusion. *Id.* at 251-52. Under *Milavetz*'s reasoning, then, beverage companies who believe that it is unfair to single out soda for a warning are free to say in their ads that other foods also contribute to obesity and diabetes, and no constitutional harm occurs. Not so under the panel decision, under which hypothesized harm is enough to invalidate the disclosure, slip op. 22, and any pressure to counterspeak is in itself a First Amendment injury, *id.* at 24.

II. The Panel Decision Erroneously Holds That Mandating A Disputed Disclosure In Commercial Speech Is Equivalent To Compelling A Statement Of Opinion.

Because it concluded that San Francisco's required warning was potentially misleading, the panel majority treated it as "an antagonistic ideological message." Slip op. 23 (internal quotation marks omitted, citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (plurality), and *Wooley v. Maynard*, 430 U.S. 705 (1977)); slip op. 19. This holding imports an idea from noncommercial speech

cases—that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)—that no prior decision of this Circuit has recognized in a commercial speech case. If requiring a commercial speaker to include a disputed factual disclosure in an advertisement is equivalent to compelling schoolchildren to recite the Pledge of Allegiance, it is hard to imagine a government interest that could justify such a burden.

The panel's holding warrants en banc review because it contravenes this Circuit's recent reaffirmation that the familiar four-part test of *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557 (1980), applies to commercial speech restrictions. *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 846 (9th Cir. 2017) (en banc). Under *Retail Digital*, the proper test for restrictions on commercial speech continues to be an intermediate-scrutiny test that asks whether the government has tailored its restriction appropriately and has a good enough reason for the restriction.

Given its conclusion that the warning did not qualify for *Zauderer* review, the panel should have applied intermediate scrutiny, as the D.C. Circuit has done in these circumstances. *See Natl. Assn. of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015). The decision here tersely states that because the warning requirement fails the *Zauderer* test, then it also necessarily fails the more demanding *Central Hudson* test. Slip op. 26 n.13. But that conclusion does not follow. Taking the panel majority's view that a warning cannot be "factual" if there is a risk of misunderstanding or some degree of scientific disagreement, *Zauderer* simply provides no framework for analyzing whether the warning may nonetheless be justified by its ability to mitigate a grave public health harm. The *Central Hudson* factors do.

Proper application of those factors would uphold the City's warning. The crisis of obesity and diabetes in public health is profound, and indeed the obesity epidemic has recently surpassed tobacco use as the leading preventable cause of death in the United States.[5] There is wide scientific consensus that drinking sugary beverages contributes to this crisis, and there is a substantial and growing body of research that drinking liquid sugar ***uniquely*** causes obesity and diabetes through metabolic effects. ER 485 ¶ 21; ER 215-16, 218-19. Thus, even if the panel majority was correct that the City's warning implies a unique relationship between sodas and these diseases, it should have evaluated whether the City's evidence was strong enough to support this contested but nonetheless factual claim, and it should have considered whether the City carried its burden of showing that the warning requirement was closely tailored to its goal of helping people make informed choices about drinking sodas in light of emerging evidence about the unique harms of sugary drinks. At a minimum it should have remanded the case to the district court for a determination in light of the parties' extensive evidence and expert reports on the subject. The panel's failure to apply *Central Hudson*, coupled with its unprecedented treatment of a factual warning as the equivalent of a loyalty oath, essentially erects a new strict-scrutiny standard for compelled disclosure of contested facts, and warrants this Court's en banc consideration.

[5] See "Cleveland Clinic Study Finds Obesity as Top Cause of Preventable Life-Years Lost," Apr. 22, 2017 (available at https://newsroom.clevelandclinic.org/2017/04/22/cleveland-clinic-study-finds-obesity-top-cause-preventable-life-years-lost/).

III. The En Banc Court Should Resolve Conflicts Concerning Whether The Warning Is Unduly Burdensome.

Independently, the panel created conflicts in the law with its holding that the City unduly burdened the speech of advertisers by requiring the warning to cover 20% of an ad. The panel majority reasoned that the City's warning "overwhelms other visual elements in the advertisement" and is therefore "analogous" to required disclosures that were struck down because they were so large or so detailed that they were physically impossible to include in certain ads, slip op. 24 (citing, e.g., *Ibanez v. Fla. Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 146 (1994)), and Judge Nelson agreed that the 20% requirement was unduly burdensome, slip op. 28. That holding is in tension with a subsequent decision by this Court that "[a] disclosure is 'unduly burdensome' when the burden 'effectively rules out' the speech it accompanies." *Nationwide Biweekly Admin., Inc. v. Owen*, No. 15-16220, 2017 WL 4509128, at *14 (9th Cir. Oct. 10, 2017) (citing *Ibanez*).

Moreover, the full panel's determination that a disclosure covering 20% of a soda advertisement is too burdensome conflicts with decisions from the First and Sixth Circuits that tobacco warnings covering 20% of ad space were not unduly burdensome because there was still room for tobacco advertisers to speak. *See Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 567 (6th Cir. 2012); *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 55 (1st Cir. 2000), *rev'd in part on other grounds sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

Finally, the panel majority erred in giving dispositive weight to the declarations of soda advertisers that they would remove advertising from covered media in San Francisco if the warning requirement went into effect. Slip op. 25. *CTIA* and *Nationwide Biweekly* hold that it is irrelevant to the *Zauderer* analysis that a factual disclosure "disturbs the party being compelled to make the disclosure

or disturbs its customers," or deters people from purchasing it, or even "harms the reputation" of the advertiser. *Nationwide Biweekly*, 2017 WL 4509128, at *11 (internal quotation marks and brackets omitted); *see also CTIA*, 854 F.3d at 1005; *id.* at 1118. But the decision here gives an effective veto to an advertiser by treating an avowed preference to abandon the advertisement rather than make the disclosure as proof that the disclosure requirement is unconstitutionally burdensome. That circular approach is entirely foreign to *Zauderer* and to other decisions of this circuit. This Court should sit en banc to resolve the conflicts among these holdings.

IV. The Issues Presented Here Are Exceptionally Important Because They Impact Broad And Ongoing Efforts To Protect Public Health.

Whether and when the judiciary can override legislative risk assessments and choices about how best to protect public health through compelled disclosures are exceptionally important questions that warrant the en banc Court's consideration. That is clear from the effect of the panel's holding on soda disclosure requirements alone: The States of New York, California, Washington, and Hawaii have considered bills that would require on soda cans warnings that are nearly identical to San Francisco's.[6] The panel decision forecloses at least the latter three States from enacting any such requirement in the future.

[6] N.Y. Assembly Bill A02320 (2015-16) (http://assembly.state.ny.us/leg/?default_fld=&bn=A02320&term=2015&Memo=Y&Text=Y); N.Y. Sen. Bill S06435 (2015-16) (http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=S06435&term=2015&Memo=Y&Text=Y); Cal. Sen. Bill SB-300 (2017-18) (https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB300); Wash. House Bill HB2798 (2016) (http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/2798.pdf); Haw. House Bill HB1438 (2016) (http://www.capitol.hawaii.gov/session2016/bills/HB1438_.HTM); Haw. Sen. Bill SB1270 (http://www.capitol.hawaii.gov/session2016/bills/SB1270_.HTM);

Beyond obesity, the proper First Amendment standard for compelled health and safety warnings has overriding importance. The tobacco industry continues to litigate the constitutionality of new, larger warnings that Congress mandated for cigarette packages and ads in 2009. *See Discount Tobacco*, 674 F.3d 509; *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). The FDA has not yet issued a final rule implementing the 2009 statute, but when it does so its rule will likely be challenged on First Amendment grounds. Indeed, the cigar industry has already cited the panel's decision in its effort to strike down a 2016 FDA rule regulating cigar and pipe tobacco advertisements and packages. *See* Mem. ISO Prelim. Inj., *Cigar Ass'n of America v. United States FDA*, No. 16-1460, at 24, 27-29 (D.D.C. Oct. 3, 2017). And the amicus brief submitted by Public Citizen on the merits in this case describes a number of other health and safety warnings whose constitutionality may now be questioned under the panel's decision. ECF No. 40 at 30-34. In light of *Zauderer*'s admonition that advertisers have only a "minimal" interest in not disclosing any particular facts about their products, and *Milavetz*'s recent reaffirmation of the more-information-is-better approach to commercial speech, this Circuit should rehear this case to ensure that the limited rights of commercial speakers do not prevent the government from protecting public health through disclosures.

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/ / /

CONCLUSION

For the reasons offered above, the City submits that this Court should grant panel or en banc rehearing.

Dated: October 17, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,194 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 17, 2017.

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CERTIFICATE OF SERVICE

I, Pamela Cheeseborough, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on October 17, 2017.

PETITION FOR REHEARING OR REHEARING EN BANC

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.

Executed October 17, 2017, at San Francisco, California.

/s/Pamela Cheeseborough
Pamela Cheeseborough

ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION; CALIFORNIA RETAILERS ASSOCIATION, *Plaintiffs-Appellants*, and CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION, *Plaintiff*, v. CITY AND COUNTY OF SAN FRANCISCO, *Defendant-Appellee*.	No. 16-16072 D.C. No. 3:15-cv-03415-EMC

AMERICAN BEVERAGE ASSOCIATION; CALIFORNIA RETAILERS ASSOCIATION, *Plaintiffs*, and CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION, *Plaintiff-Appellant*, v. CITY AND COUNTY OF SAN FRANCISCO, *Defendant-Appellee.*	No. 16-16073 D.C. No. 3:15-cv-03415-EMC OPINION

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted April 17, 2017
San Francisco, California

Filed September 19, 2017

Before: Dorothy W. Nelson and Sandra S. Ikuta, Circuit Judges, and J. Michael Seabright,* Chief District Judge.

* The Honorable J. Michael Seabright, Chief United States District Judge for the District of Hawaii, sitting by designation.

Opinion by Judge Ikuta;
Concurrence by Judge D.W. Nelson

SUMMARY**

First Amendment / Preliminary Injunction

The panel reversed the district court's denial of the plaintiff Associations' motion for a preliminary injunction, seeking to enjoin the implementation of the City and County of San Francisco's ordinance that would require warnings about the health effects of certain sugar-sweetened beverages on specific types of fixed advertising within San Francisco.

The plaintiffs – the American Beverage Association, the California Retailers Association, and the California State Outdoor Advertising Association – alleged that the ordinance violated their First Amendment right to freedom of speech.

The panel held that the plaintiffs were likely to succeed on the merits of their claim that the ordinance was an "unjustified or unduly burdensome disclosure requirement[] [that] might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Specifically, the panel joined other circuits in holding that the *Zauderer* framework applied beyond the context of preventing consumer deception. The panel held that because the required warning was not purely factual and

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

uncontroversial, San Francisco had not established that the plaintiffs' constitutionally protected interest in not providing the warning was minimal under *Zauderer*. The panel agreed with the plaintiffs that the warning requirements – a black box warning that overwhelmed other visual elements of the ads – unduly burdened and chilled protected speech.

The panel held that the remaining preliminary injunction factors also weighed in the plaintiffs' favor. The panel concluded that the district court abused its discretion in denying the plaintiffs' motion for a preliminary injunction, and reversed and remanded.

Judge Nelson concurred in the judgment because she believed that the ordinance, in its current form, likely violated the First Amendment by mandating a warning requirement so large that it would probably chill protected commercial speech. Judge Nelson would reverse and remand without also making the conclusion that the warning's language was controversial and misleading.

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Theodore B. Olson, Andrew S. Tulumello, and Helgi C. Walker, Gibson Dunn & Crutcher LLP, Washington, D.C.; Charles J. Stevens and Joshua D. Dick, Gibson Dunn & Crutcher LLP, San Francisco, California; for Plaintiff-Appellant California State Outdoor Advertising Association.

Christine Van Aken (argued), Jeremy M. Goldman, and Wayne Snodgrass, Deputy City Attorneys; Dennis J. Herrera, City Attorney; Office of the City Attorney, San Francisco, California; for Defendant-Appellee.

OPINION

IKUTA, Circuit Judge:

American Beverage Association, California Retailers Association, and the California State Outdoor Advertising Association (we refer to these organizations and their members collectively as "the Associations"), filed suit against the City and County of San Francisco challenging a city ordinance that would require warnings about the health effects of certain sugar-sweetened beverages on specific types of fixed advertising within San Francisco. The Associations argue that the ordinance violates their First Amendment right to freedom of speech. After the district court denied the Associations' motion for a preliminary injunction, the Associations filed this interlocutory appeal. We conclude that the Associations are likely to succeed on the merits of their claim that the ordinance is an "unjustified or unduly burdensome disclosure requirement[] [that] might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). The remaining

preliminary injunction factors also weigh in the Associations' favor. We hold that the district court abused its discretion in denying the Associations' motion for a preliminary injunction, and we reverse and remand.

I

San Francisco enacted an ordinance in June 2015 requiring advertisers who post advertisements for sugar-sweetened beverages within San Francisco to include the following statement:

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

S.F. Health Code § 4203(a). The ordinance applies to a certain type of advertisement for sugar-sweetened beverages, termed an "SSB Ad." *Id.* As defined, an "SSB Ad" includes any advertisement or logo that "identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use" that is posted on billboards, structures, or vehicles, among other things. *Id.* § 4202.[1] The term "Sugar-Sweetened Beverage"

[1] Section 4202 provides in relevant part:

> "SSB Ad" means any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use that is any of the following: (a) on paper, poster, or a billboard;· (b) in or on a stadium, arena, transit shelter, or any other structure;· (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material.

is defined to include soda and other non-alcoholic beverages that contain one or more added sweeteners and more than twenty-five calories per twelve fluid ounces of beverage.[2] *Id.* The ordinance provides detailed instructions regarding the form, content, and placement of the warning on SSB Ads, including the requirement that it occupy 20 percent of the advertisement and be set off with a rectangular border. *Id.* § 4203. Failure to comply with the ordinance's warning requirement results in administrative penalties imposed by San Francisco's Director of Health. *Id.* § 4204. According to the ordinance, San Francisco's purpose in requiring the warning for certain sugar-sweetened beverages is, among other things, to "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 [sugar-sweetened

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S.F. Health Code § 4202. This section also provides that "SSB Ad" does not include advertising in periodicals, television, electronic media, SSB containers or packaging, menus, shelf tags, vehicles, or logos that occupy an area less than thirty-six square inches, among other things. *Id*.

[2] Section 4202 provides in relevant part:

> "Sugar Sweetened Beverage" means any Nonalcoholic Beverage sold for human consumption, including, without limitation, beverages produced from Concentrate, that has one or more added Caloric Sweeteners and contains more than 25 calories per 12 ounces of beverage.

S.F. Health Code § 4202. The definition also provides that "Sugar Sweetened Beverage" does not include Milk, Milk alternatives primarily consisting of plant-based ingredients, 100% Natural Fruit Juice, Natural Vegetable Juice, infant formula, Medical Food, supplements, and certain other products. Each of the capitalized terms is defined separately in the ordinance.

beverages] contribute and associated economic burdens." *Id.* § 4201.

The Associations sued San Francisco in July 2015, seeking injunctive relief to prevent the implementation of the ordinance, which was set to go into effect on July 25, 2016. S.F. Health Code § 4203(a). The district court denied the Associations' motion for a preliminary injunction in May 2016. In concluding that the Associations were not likely to succeed on the merits of their First Amendment challenge, the district court held that the warning was not misleading, would not place an undue burden on the Associations' commercial speech, and was rationally related to a government interest. Nevertheless, the court granted the Associations' motion for an injunction pending appeal. The Associations filed a timely interlocutory appeal.

II

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). We review the district court's denial of a preliminary injunction for an abuse of discretion. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc.*, 725 F.3d 940, 944 (9th Cir. 2013). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (citation and internal quotation marks omitted). When we consider First Amendment claims, "[h]istorical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error, while constitutional questions of fact (such as whether certain restrictions create a severe burden on an individual's First Amendment rights) are reviewed *de novo*." *Prete v. Bradbury*, 438 F.3d 949, 960

(9th Cir. 2006) (internal quotation marks omitted). This "requirement of independent appellate review . . . is a rule of federal constitutional law, which does not limit our deference to a trial court on matters of witness credibility, but which generally requires us to review the finding of facts by a [trial court] . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995) (citations and internal quotation marks omitted). "This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* Because the questions whether a compelled disclosure is purely factual and uncontroversial and whether it unduly burdens commercial speech are "so intermingled" with the conclusion of law as to whether a commercial speaker's First Amendment rights are violated, these are constitutional questions of fact that we review de novo. *See id.*; *cf. Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review.").

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable

harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

The "burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). At trial, San Francisco would carry the burden "of demonstrating the legitimacy of its commercial-speech regulations," and of showing that its regulation "directly and proportionally" addresses San Francisco's interest. *Zauderer*, 471 U.S. at 658–59; *see also Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 n.7 (1994) ("It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." (citations and internal quotation marks omitted)). Therefore, at the preliminary injunction stage, once the Associations have demonstrated that the ordinance burdens protected speech, they "must be deemed likely to prevail" unless San Francisco demonstrates that the requirements imposed by the ordinance pass constitutional muster. *Ashcroft*, 542 U.S. at 666.

III

With these principles in mind, we turn to our review of the district court's order denying the Associations' motion for a preliminary injunction. At the first step of the preliminary injunction analysis, we consider the Associations' likelihood of success on the merits of their First Amendment challenge.

A

We begin by setting forth the legal framework applicable to the Associations' First Amendment challenge. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[3] U.S. Const. amend. I. Even commercial speech, defined as "expression related solely to the economic interests of the speaker and its audience," enjoys some First Amendment protection. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976). In reaching this conclusion, the Supreme Court reasoned that "even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy," the free flow of commercial information serves that end because it is indispensable to ensuring that economic decisions "in the aggregate, be intelligent and well informed." *Va. State Bd. of Pharmacy*, 425 U.S. at 765; *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366 (2002). Indeed, a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (internal quotation marks omitted).

Because "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," *Zauderer*, 471 U.S. at 651, and the government has a

[3] The First Amendment is incorporated against the states via the Due Process Clause of the Fourteenth Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 n.1 (1976).

"legitimate interest in protecting consumers from commercial harms," commercial speech "can be subject to greater governmental regulation than noncommercial speech," *Sorrell*, 564 U.S. at 579; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993). While content-based regulations of noncommercial speech are subject to strict scrutiny, *see, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), regulations of commercial speech are subject to lesser review.

The level of scrutiny for burdens placed on commercial speech depends on the nature of the regulation at issue. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court established a standard of review for restrictions that limit commercial speech. 447 U.S. at 566. Such restrictions "on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny—that is, they must 'directly advanc[e]' a substantial governmental interest and be 'n[o] more extensive than is necessary to serve that interest.'" *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (quoting *Central Hudson*, 447 U.S. at 566). By contrast, regulations that "impose a disclosure requirement rather than an affirmative limitation on speech" are governed by the lesser standard set forth in *Zauderer*. *Id.*

In *Zauderer*, the Supreme Court considered the constitutionality of an Ohio State Bar rule requiring "that any advertisement that mentions contingent-fee rates must . . . inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful." 471 U.S. at 633 (internal quotation marks omitted). An attorney was disciplined under this rule for publishing an

advertisement stating that "cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients." 471 U.S. at 631. In assessing the attorney's constitutional challenge to this rule, the Court first determined that the intermediate scrutiny standard developed in *Central Hudson* was not applicable, because "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* at 651; *see also id.* at 651 n.14 (noting that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed"). The disciplinary rule required only the inclusion of "purely factual and uncontroversial information about the terms under which [the attorney's] services will be available," and therefore the attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651 (emphasis in original). Despite the lesser First Amendment interest in compelled commercial speech, the Court recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* Nevertheless, disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers" generally do not offend a commercial speaker's First Amendment rights. *Id.*

Applying this framework, the Court upheld the disciplinary rule, reasoning that the required disclosures were "purely factual and uncontroversial," and were not unduly burdensome. *Id.* at 651 & 653 n.15. Although the attorney's advertisement was not technically false—it accurately stated that clients would not be responsible for legal fees if there was no recovery—the Court concluded that it would mislead

"substantial numbers of potential clients," and that the disclosure requirements were "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651–52.

Subsequent Supreme Court cases have applied *Zauderer*'s analytic framework only to government-mandated disclosures aimed at preventing consumer deception. *See, e.g.*, *Milavetz, Gallop & Milavetz*, 559 U.S. at 249. The Supreme Court has not yet considered whether the *Zauderer* framework applies when a state requires disclosures for a different state interest, such as to promote public health. Nevertheless, the Supreme Court's reasoning in *Zauderer* "seems inherently applicable beyond the problem of deception, as other circuits have found." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014). *Zauderer* observed that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." 471 U.S. at 651. Accordingly, a commercial speaker's constitutionally protected interest in refraining from providing consumers with additional information is minimal if a required disclosure is "purely factual and uncontroversial" and is not "unjustified or unduly burdensome" so as to chill protected speech. *Id*. These principles seem applicable to evaluating the constitutionality of compelled disclosures regardless of the government's purpose. Therefore, *Zauderer*'s conclusion 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, is best read as a specific application of *Zauderer*'s more general rule that a purely factual and uncontroversial disclosure that is not unduly burdensome will withstand First Amendment scrutiny so long as it is reasonably related to a

substantial government interest.[4] Accordingly, we have joined our sister circuits in holding that the *Zauderer* framework applies beyond the context of preventing consumer deception. *See CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017); *see also Am. Meat Inst.*, 760 F.3d at 22; *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554–55 (6th Cir. 2012); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005).

Applying the *Zauderer* framework, we first consider whether there is any controversy regarding the factual accuracy of the disclosure. *CTIA-The Wireless Ass'n*, 854 F.3d at 1117–18.[5] This is a key inquiry, because *Zauderer* justified the lower standard of scrutiny based on its conclusion that an advertiser's First Amendment interest in not providing "purely factual and uncontroversial information" was low. *Zauderer*, 471 U.S. at 651. Therefore, a required disclosure cannot be upheld under the *Zauderer*

[4] We also recognize that "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001), including requirements for tobacco labeling, nutritional labeling, disclosures in prescription drug advertising, and reporting of releases of toxic substances, none of which are aimed directly at preventing consumer deception. *Id.* To hold that the *Zauderer* framework applies only when the state interest is in preventing consumer deception "would expose these long-established programs to searching scrutiny by unelected courts." *Id.*

[5] As we have clarified, the term "uncontroversial" in this context "refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience." *CTIA-The Wireless Ass'n*, 854 F.3d at 1117.

framework if the disclosure is not purely factual and uncontroversial. *CTIA-The Wireless Ass'n*, 854 F.3d at 1117–18; *see also Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011) (holding that a state's "labeling requirement is unconstitutionally compelled speech under the First Amendment because it does not require the disclosure of purely factual information; but compels the carrying of the State's controversial opinion"). Generally, a disclosure requirement is purely factual and uncontroversial under *Zauderer* so long as it "provide[s] accurate factual information to the consumer." *CTIA-The Wireless Ass'n*, 854 F.3d at 1118. However, if a compelled disclosure is "literally true but nonetheless misleading and, in that sense, untrue," then it is not purely factual under *Zauderer*. *Id.* at 1119. *Zauderer* illustrates this point. In *Zauderer*, the attorney advertisement at issue was literally true; everything included in the advertisement was factual. Nonetheless, the Supreme Court concluded that the "possibility of deception" from the technically truthful advertisement was "self-evident" because it omitted key information about the meaning of the terms "legal fees" and "costs." 471 U.S. at 652–53. Applying this principle to disclosure requirements, a literally true but misleading disclosure creates the possibility of consumer deception. A disclosure that may deceive consumers does not further the free flow of accurate information or add to the "value to consumers of the information [commercial] speech provides." *Id.* at 651; *see also Am. Meat Inst.*, 760 F.3d at 22 (stating that a required disclosure "could be so one-sided or incomplete that [it] would not qualify as 'factual and uncontroversial'" under *Zauderer*).

We must also determine whether the compelled disclosure is an "unjustified or unduly burdensome" regulation that may chill protected commercial speech. *Zauderer*, 471 U.S. at 651*; see also Ibanez*, 512 U.S. at 146–47.[6] A required disclosure may be unduly burdensome if it "effectively rules out" advertising in particular media. *Ibanez*, 512 U.S. at 146. In *Ibanez*, for instance, the Supreme Court considered a Florida Board of Accountancy rule prohibiting the "use of any 'specialist' designation unless accompanied by a [detailed and lengthy] disclaimer, made 'in the immediate proximity of the statement that implies formal recognition as a specialist.'" *Id.* at 146. The Board had disciplined an attorney who had placed "Certified Public Accountant" and "Certified Financial Planner" next to her name in her yellow pages listing and on her business cards and law office stationery. *Id.* at 138. The Court concluded that under those facts, and given "the failure of the Board to point to any harm that is potentially real, not purely hypothetical," the rule was both unjustified and unduly burdensome. *Id.* at 146. The Court reasoned that "[t]he detail required in the disclaimer currently described by the Board effectively rules out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing." *Id.* at 146–47.

A number of our sister circuits have recognized that "*Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally

[6] This issue did not arise in *CTIA-The Wireless Association* because in that case the ordinance at issue required a retailer to provide specified information to cell phone purchasers at the point of sale. 854 F.3d at 1110. Because the disclosure requirement was triggered by a sale, not by an advertiser's speech, the requirement did not burden or chill any protected speech.

protected speech . . . [n]or can it sustain mandates that chill protected commercial speech." *Am. Meat Inst.*, 760 F.3d at 27 (citations and internal quotation marks omitted). In *Dwyer v. Cappell*, for example, the Third Circuit considered the constitutionality of a New Jersey Bar Committee requirement that attorneys who chose to quote a judicial opinion in their advertising also include the full-length opinion. 762 F.3d 275, 283–85 (3d Cir. 2014). The Third Circuit concluded that the disclosure requirement was unduly burdensome because it "necessarily prevent[ed] any form of advertisement with simply a judicial excerpt," and made advertising in most mediums unrealistic. *Id.* at 284. As such, the restriction infringed on the attorney's First Amendment rights. *Id.*[7] Similarly, in *Public Citizen Inc. v. Louisiana Attorney Disciplinary Board*, the Fifth Circuit held that a Louisiana State Bar Association rule dictating the font size and speed of speech attorneys must use in written and spoken disclaimers in advertisements was unduly burdensome because it "effectively rule[d] out the ability of Louisiana lawyers to employ short advertisements of any kind." 632 F.3d 212, 229 (5th Cir. 2011); *see also Tillman v. Miller*, 133 F.3d 1402, 1404 n.4 (11th Cir. 1998) (concluding that a requirement that plaintiff devote five seconds of his thirty second television ad to a disclosure imposed an undue burden on plaintiff's commercial speech).

[7] The Third Circuit noted that the onerous nature of the disclosure requirement indicated that its purpose was "to make it so burdensome to quote judicial opinions that attorneys will cease doing so." 762 F.3d at 284. For this reason, the requirement was effectively a restriction rather than a disclosure, and would be subject to the higher level of scrutiny set forth in *Central Hudson*. *Id.* Because the restriction failed under the lesser *Zauderer* standard, it would necessarily fail under intermediate scrutiny. *Id.*

A disclosure requirement may also be unduly burdensome and chill commercial speech if the disclosure promotes policies or views that are one-sided or "are biased against or are expressly contrary to the corporation's views." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 15 n.12 (1986) (plurality opinion). A compelled disclosure that requires speakers "to use their own property to convey an antagonistic ideological message," or "to respond to a hostile message when they 'would prefer to remain silent,'" or "to be publicly identified or associated with another's message," cannot withstand First Amendment scrutiny. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471 (1997) (citations omitted).

If the required disclosure is not factually inaccurate or unduly burdensome, then it will pass constitutional muster so long as it is reasonably related to a government interest of sufficient weight. *Zauderer*, 471 U.S. at 651. Like other circuits, we have concluded that the government must identify a "substantial—that is, more than trivial—governmental interest," such as "protecting the health and safety of consumers." *CTIA-The Wireless Ass'n*, 854 F.3d at 1117–18 (quoting *NEMA*, 272 F.3d at 115 n.6). Further, the government must demonstrate that there is a "rational relationship" between the disclosure requirement and the government interest. *See Video Software Dealers Ass'n*, 556 F.3d at 967. In the context of commercial speech, this means that the required disclosure "must relate to the good or service offered by the regulated party." *Am. Meat Inst.*, 760 F.3d at 26; *see also NEMA*, 272 F.3d at 115 (holding that there must be a "rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose").

The government must carry the burden of demonstrating that its disclosure requirement is purely factual and uncontroversial, not unduly burdensome, and reasonably related to a substantial government interest. *See Zauderer*, 471 U.S. at 658–59; *Ibanez*, 512 U.S. at 146.

B

Because San Francisco's ordinance imposes a disclosure requirement on commercial speech, we first consider whether the "inherent character," *Peel*, 496 U.S. at 108, of the compelled disclosure is "purely factual and uncontroversial" under *Zauderer* such that it imposes a lesser burden on commercial speech. *Zauderer*, 471 U.S. at 651; *see also CTIA-The Wireless Ass'n*, 854 F.3d at 1118. Because this is a constitutional question of fact, we review this issue de novo. *See Prete*, 438 F.3d at 960; *see also Hurley*, 515 U.S. at 567.

We conclude that the factual accuracy of the warning is, at a minimum, controversial as that term is used in the *Zauderer* framework. The warning provides the unqualified statement that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay," S.F. Health Code § 4203(a), and therefore conveys the message that sugar-sweetened beverages contribute to these health conditions regardless of the quantity consumed or other lifestyle choices. This is contrary to statements by the FDA that added sugars are "generally recognized as safe," 21 C.F.R. § 184.1866, and "can be a part of a healthy dietary pattern when not consumed in excess amounts," 81 Fed. Reg. 33,742, 33,760 (May 27, 2016). Although San Francisco's experts state that "there is a clear scientific consensus" that sugar-sweetened beverages contribute to obesity and diabetes through "excessive caloric intake" and "by adding extra

calories to the diet," the experts do not directly challenge the conclusion of the Associations' expert that "when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to obesity or diabetes." Because San Francisco's warning does not state that *overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay, the accuracy of the warning is in reasonable dispute.

Moreover, the warning is "misleading and, in that sense, untrue." *CTIA-The Wireless Ass'n*, 854 F.3d at 1119. The warning is required exclusively on advertisements for sugar-sweetened beverages, and not on advertisements for other products with equal or greater amounts of added sugars and calories. By focusing on a single product, the warning conveys the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute to obesity, diabetes, and tooth decay than other foods.[8] This message is deceptive in light of the current state of research on this issue. According to the FDA, "added sugars, including sugar-sweetened beverages, are no more likely to cause weight gain in adults than any other source of energy." 79 Fed. Reg. 11880, 11904 (Mar. 3, 2014). The American Dental Association has similarly cautioned against the "growing popularity of singling-out sugar-sweetened beverages" because " the evidence is not yet

[8] The Associations provide a pertinent example. If car dealers were required to post a warning only on Toyota vehicles that said: "WARNING: Toyotas contribute to roll-over crashes," the common-sense conclusion would be that Toyotas are more likely to cause rollovers than other vehicles.

sufficient to single out any one food or beverage product as a key driver of dental caries." American Dental Association, Technical Comments of the American Dental Association on the Scientific Advisory Report of the 2015 Dietary Guidelines Advisory Committee at 6 (May 8, 2015). Acknowledging that there is still debate over whether sugar-sweetened beverages pose unique health risks, San Francisco also argues that sugar-sweetened beverages uniquely contribute to obesity, diabetes, and tooth decay because people are more likely to over-consume sugar-sweetened beverages than other foods. But even if it were undisputed that consumption of sugar-sweetened beverages gives rise to unique behavioral risks, the warning does not communicate that information. Rather, the warning singles out sugar-sweetened beverages without mentioning behavioral risks, and thus clearly implies that there is something inherent about sugar-sweetened beverages that contributes to these health risks in a way that other sugar-sweetened products do not, regardless of consumer behavior.[9] Therefore, the district court erred in concluding that it would be unreasonable to interpret the warning to mean that sugar-sweetened beverages are uniquely or inherently unhealthy. Because the warning is not purely factual and uncontroversial, we conclude that San Francisco has not established that the Associations' constitutionally protected interest in not providing the warning is minimal under *Zauderer*, 471 U.S. at 165.

[9] San Francisco argues that even if its warning is under-inclusive because it singles out only sugar-sweetened beverages, it is entitled "to attack problems piecemeal." *Zauderer*, 471 U.S. at 651 n.14. This argument misapprehends *Zauderer*. San Francisco's warning requirement here is problematic because it is potentially misleading, not because it "does not get at all facets of the problem it is designed to ameliorate." *Id*.

In short, rather than being "purely factual and uncontroversial," the warning requires the Associations to convey San Francisco's disputed policy views. While the government "has substantial leeway in determining appropriate information disclosure requirements for business corporations," *Pacific Gas & Electric Co*., 475 U.S. at 15 n.12, *Zauderer* does not allow the state to require corporations to provide one-sided or misleading messages, *cf. id.*, or "to use their own property to convey an antagonistic ideological message," *Glickman*, 521 U.S. at 471 (*citing Wooley v. Maynard*, 430 U.S. 705 (1977)).

We next turn to the question whether San Francisco's ordinance imposes an undue burden that may chill protected speech. *Zauderer*, 471 U.S. at 651; *Ibanez*, 512 U.S. at 146. We review this issue de novo. *Prete*, 438 F.3d at 960.

The Associations argue that the warning unduly burdens their protected commercial speech because a warning that satisfies the ordinance—a black box, bold warning that covers 20 percent of their advertisements—effectively takes over their message.[10] Moreover, the Associations argue that the ordinance forces them to carry San Francisco's message about the health effects of sugar-sweetened beverages, which the Associations claim is misleading and one-sided. Accordingly, the Associations argue that the ordinance chills their protected speech because it renders their speech on covered media so ineffective as to make it impractical to advertise on covered media.

[10] The Associations' sample advertisements containing the warnings in the form required by the ordinance are set forth in Appendix A.

We agree with the Associations that the warning requirement in this case unduly burdens and chills protected commercial speech. As the sample advertisements show, the black box warning overwhelms other visual elements in the advertisement. As such, it is analogous to other requirements that courts have struck down as imposing an undue burden on commercial speech, such as laws requiring advertisers to provide a detailed disclosure in every advertisement, *Ibanez*, 512 U.S. at 146, to use a font size "that is so large that an advertisement can no longer convey its message," *Public Citizen Inc.*, 632 F.3d at 228, or to devote one-sixth of the broadcast time of a television advertisement to the government's message, *Tillman*, 133 F.3d at 1404 n.4.

The district court recognized that the burden imposed by the warning requirement was substantial, but concluded that it was not unduly burdensome. It noted that a commercial speaker could use the remaining 80 percent of its advertising space to engage in counter-speech. In reaching this conclusion, the court failed to recognize that forcing a speaker "to tailor its speech to an opponent's agenda," and to respond to a one-sided and misleading message when it would "prefer to be silent," *Pacific Gas & Electric Co.*, 475 U.S. at 10–11, burdens the First Amendment right to be silent, a right which "serves the same ultimate end as freedom of speech in its affirmative aspect," *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985). Moreover, even though advertisers would be free to engage in counter-speech, countering San Francisco's misleading message would leave them little room to communicate their intended message. This would defeat the purpose of the advertisement, turning it into a vehicle for a debate about the health effects of sugar-sweetened beverages.

Because the ordinance is not purely factual and uncontroversial and is unduly burdensome, it offends the Associations' First Amendment rights by chilling protected commercial speech. Indeed, the Associations submitted unrefuted declarations from major companies manufacturing sugar-sweetened beverages stating that they will remove advertising from covered media if San Francisco's ordinance goes into effect. This evidence supports the Associations' position that the disclosure requirement is unduly burdensome because it effectively rules out advertising in a particular medium, *see Ibanez*, 512 U.S. at 146, and will cause advertisers to cease using that medium to speak, *see Dwyer*, 762 F.3d 283–85. The district court erred in rejecting this evidence on the ground that the Associations' declarations were "self-serving." "[D]eclarations are often self-serving, and this is properly so because the party submitting it would use the declaration to support his or her position." *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015). A district court cannot disregard an affidavit "solely based on its self-serving nature." *Id.*[11]

[11] In determining that the Associations' declarations were not credible, the district court reasoned that tobacco and pharmaceutical companies continued to advertise despite being compelled to provide similar warnings. We do not find this reasoning persuasive. Sugar-sweetened beverages do not have the same physiologically addictive qualities as tobacco, nor are they prescribed by doctors to treat health conditions like pharmaceutical products. There is no evidence in the record that advertisers have continued advertising products analogous to sugar-sweetened beverages in the face of compelled disclosures of the sort required here.

Although there is no dispute that San Francisco has a substantial government interest in the health of its citizens,[12] *see CTIA-The Wireless Ass'n*, 854 F.3d at 1118, San Francisco has not carried its burden "of demonstrating the legitimacy of its commercial-speech regulations," *Zauderer*, 471 U.S. at 659, because of substantial evidence in the record that the regulation is misleading and would chill the Associations' protected commercial speech.[13] We conclude that the Associations have shown a likelihood of success on the merits of their First Amendment claim. The district court's conclusion to the contrary was based on legal errors and was accordingly an abuse of discretion.

IV

We now turn to the remaining steps of the preliminary injunction test. At the second step of the preliminary injunction test, we consider whether Associations have demonstrated that they are "likely to suffer irreparable harm

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[12] It is less clear, however, whether San Francisco can establish that providing misleading information through an unduly burdensome disclosure is reasonably related to its substantial interest in the health of its citizens. Indeed, San Francisco "has no legitimate reason to force retailers to affix false information on their products." *Video Software Dealers Ass'n*, 556 F.3d at 967.

[13] Because we conclude that the ordinance fails "under the less stringent *Zauderer* standard," because it is not purely factual and uncontroversial and unduly burdens protected speech, it necessarily follows that the ordinance would also fail under *Central Hudson*. *See Dwyer*, 762 F.3d at 284; *see also Video Software Dealers Ass'n*, 556 F.3d at 966 (holding that the court need not decide whether a heightened level of scrutiny applies because the required disclosure was not purely factual and uncontroversial and therefore "fails even under the factual information and deception prevention standards set forth in *Zauderer*").

in the absence of preliminary relief." *Winter*, 555 U.S. at 22. The Supreme Court has made clear that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Accordingly, "[a] colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (internal quotation marks omitted). Because the Associations have made a colorable First Amendment claim, they have demonstrated a likelihood of suffering irreparable harm if the ordinance is allowed to go into effect.

At the third step of the preliminary injunction test, we consider the balance of hardships. *Winter*, 555 U.S. at 22. Once again, our conclusion at this step is dictated by the Associations' likelihood of success on their First Amendment claim. "The fact that the [Associations] have raised serious First Amendment questions compels a finding that . . . the balance of hardships tips sharply in [the Associations'] favor." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007).

Finally, we must consider whether an injunction is in the public interest. *Winter*, 555 U.S. at 22. We have "consistently recognized the significant public interest in upholding First Amendment principles." *Doe*, 772 F.3d at 583 (internal quotation marks omitted). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted). Accordingly, a preliminary injunction is in the public interest here.

Because the Associations have met each of the requirements for a preliminary injunction, we conclude that the district court abused its discretion in denying the Associations' motion for a preliminary injunction.

REVERSED AND REMANDED.

NELSON, Senior Circuit Judge, concurring in judgment:

I concur in the judgment of this case because I believe that the ordinance, in its current form, likely violates the First Amendment by mandating a warning requirement so large that it will probably chill protected commercial speech. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."). While I do not understand the majority's opinion to state that no properly worded warning would pass constitutional muster, I agree that the City has not carried its burden in demonstrating that the twenty percent requirement at issue here would not deter certain entities from advertising in their medium of choice. Because this case can be disposed of on this question alone, I would reverse and remand without making the tenuous conclusion that the warning's language is controversial and misleading.

APPENDIX A


Always
One of
a Kind™
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.
Dr Pepper
Est. 1885


REFRESH YOUR WORLD
pepsi
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.


Coca-Cola
#openhappiness
happiness.
coca-cola.
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.

Case Nos. 16-16072, 16-16073

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

THE CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellee.

CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,
Plaintiff-Appellant,

v.

THE CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellee.

On Appeals from an Order of the United States District Court
for the Northern District of California
(No. 15-cv-3415-EMC)

BRIEF OF AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, AND CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION IN OPPOSITION TO THE PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Dated: November 21, 2017

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INTRODUCTION

Although the City and its amici disagree with the panel's decision, they do not contest the core legal principles the panel applied. They do not dispute that the City had the burden to "demonstrat[e] that its disclosure requirement is purely factual and uncontroversial [and] not unduly burdensome." Op. 20. They do not dispute that a compelled statement is not "purely factual" as required by *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), where it conveys information that is "misleading and, in that sense, untrue." *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1119 (9th Cir. 2017). And they do not dispute that a warning that is so unduly burdensome as to chill non-misleading commercial speech—and in practice restrict that speech—fails even *Zauderer*'s more limited scrutiny. Faithfully applying those legal principles, the panel *unanimously* agreed San Francisco's warning likely violates the First Amendment—and a majority held it likely fails on multiple independent grounds. That fact-bound decision was correct, creates no split of authority, and does not warrant further review.

The City principally claims the panel's decision conflicts with *CTIA*, but there is no conflict. The two cases applied the same legal framework to very different facts. *CTIA* declined to enjoin a disclosure that (1) mirrored unchallenged disclosures already required by the FCC; (2) undisputedly was technically

accurate; and (3) "did not burden or chill any protected speech" because it required a separate notice that "was triggered by a sale, not by an advertiser's speech." Op. 16-17 & n.6. By contrast, the panel here enjoined a warning that (1) conveys a message that is "contrary to statements by the FDA," (2) is misleading (and literally false for anyone whose overall diet "'balances caloric intake with energy output'"), and (3) would be appended directly to and overwhelm and chill Plaintiffs' promotional speech about their products. *Id.* at 20-25. The difference between the two cases is one of fact, not of law.

The City is also wrong to suggest that the panel's decision somehow threatens all health warnings. Nothing in the panel's treatment of the City's particularly flawed warning jeopardizes the government's ability to share its views directly (no matter how factually controversial) or compel private parties to convey standard factual disclosures that do not unduly burden or chill speech. As illustrated by *CTIA* and *Nationwide Biweekly Administration, Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017) (a case decided after *ABA* that upheld a compelled disclosure), San Francisco's failure to meet its First Amendment burden in this case will not prevent the government from meeting its burden in many others.

At bottom, the City's real complaint is not with the panel's legal framework, but its case-specific conclusions. Those conclusions, however, are well supported

by a substantial record, and the City's disagreement with them does not warrant rehearing.

ARGUMENT

A. The Panel's Determination That San Francisco's Warning Is Not Purely Factual Does Not Warrant Rehearing

Contrary to what the City contends, the panel's approach to determining whether the warning is purely factual and uncontroversial does not conflict with *CTIA* or any other precedent. The panel faithfully applied the legal standards articulated in *CTIA* to the distinct record of this case, and nothing about the panel's analysis warrants rehearing.

1. The City first argues the panel deviated from *CTIA*, and "erected an unrealistically high standard for the accuracy of consumer warnings," by looking beyond the literal text of San Francisco's warning and considering what it conveys to reasonable consumers. Pet. 6-8. That argument fails for several reasons.

To begin with, the City conceded below that courts may appropriately consider what messages a compelled warning "would convey to a reasonable consumer." FER4. It did not argue otherwise on appeal. *See* SF Br. 24-25; ABA-CRA Reply Br. 14-17. The City's waiver makes this case a particularly unsuitable vehicle for further review.

In any event, the City was right to concede that what a warning conveys to reasonable consumers matters. *Zauderer* compels as much. As the panel noted,

"[i]n *Zauderer*, the attorney advertisement at issue was literally true; everything included in the advertisement was factual. Nonetheless, the Supreme Court concluded that the 'possibility of deception' … was 'self-evident.'" Op. 16 (quoting *Zauderer*, 471 U.S. at 652); *see also* 471 U.S. at 652 (finding consumers would be misled because "the advertisement would *suggest*" something not true (emphasis added)). Permitting the government to compel private parties engaged in commercial speech to make statements that would violate the Lanham Act if made by them voluntarily would frustrate rather than "further the free flow of accurate information." Op. 16.

Circuit precedent likewise required the panel to consider what message the City's compelled disclosure conveys to consumers.[1] In *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), this Court specifically examined how a mandated sticker on video games simply stating "18" would be understood in context. *CTIA* also rejected a literalist approach, observing that "a statement may be literally true but nonetheless misleading and, in that sense,

[1] The other courts of appeals also consider how a disclosure will be understood in practice. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (hereafter "*NAM*") ("not conflict free" label not "factual and non-ideological" because it "conveys ... [to] consumers that [labeled] products are ethically tainted" (citation omitted)); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652-53 (7th Cir. 2006) ("18" sticker on video games communicated "that the game's content is sexually explicit").

untrue." 854 F.3d at 1119. The panel expressly applied that precedent. *See* Op. 16.

The panel's approach was also fully consistent with *CTIA*'s additional recognition that a message is not "controversial" under *Zauderer* simply because it may have a "subjective impact on the audience." *CTIA*, 854 F.3d at 1117. That observation addressed an entirely different point, directing courts to focus their analysis on the *accuracy* of the message conveyed rather than whether its "disclosure may have *caused controversy*." *Id.* at 1118 (emphasis added). As *CTIA* observed, *Zauderer* held that the disclosure of a "client's potential liability for costs" was purely factual and uncontroversial because it conveyed indisputably accurate information, even though "the disclosure may have caused controversy, by discouraging customers from hiring lawyers who offered [such] fee arrangements." *Id*. at 1117-18.

Consistent with that principle, Op. 15 n.5, the panel found the City's warning controversial because it "conveys … [a] message … [that] is deceptive in light of the current state of research," *i.e.*, because it conveys a message that is not factually accurate. *Id.* at 21-22; *accord Nationwide*, 873 F.3d at 733 & n.16 (recognizing the panel held San Francisco's warning "controversial" not because it carried a "negative connotation" but because its message was "'contrary to statements by the FDA'" (citation omitted)). The City may disagree with the

FDA's view and the panel's conclusions, but that fact-bound dispute does not warrant review.

Further review is particularly unwarranted because the panel correctly held that even the *literal text* of the City's warning is inaccurate.[2] As the panel noted, "[t]he warning provides the unqualified statement that '[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.'" Op. 20 (alteration in original). Yet not even the City's own experts disputed that "when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar *does not* contribute to obesity or diabetes." *Id.* at 20-21 (emphasis added). Indeed, the City itself conceded these beverages "can safely be consumed in moderation." ER182.

2. The City next argues the panel contravened *CTIA* by purportedly holding that courts should examine whether a compelled disclosure "may" rather than "would" deceive consumers. Pet. 8. Under such a standard, the City asserts a warning will not survive if even a small minority might misunderstand it. Pet. 8-9.

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[2] The City claims that Plaintiffs conceded the City's warning was literally true. Pet. 4. That is inaccurate. Plaintiffs have consistently argued the opposite. ABA-CRA Reply Br. 18-19; ABA N.D. Cal. P.I. Mem. 12-13, Dkt. 50.

The panel held no such thing. It did not engage in far-fetched hypotheticals,[3] but instead analyzed what messages the warning *actually* "conveys" to consumers and determined that those messages are "deceptive in light of the current state of research" and "contrary to statements by the FDA." Op. 20-21. The City acknowledges this elsewhere in its petition, when it notes that the panel held the warning inaccurate based on ""what message consumers *would* take" from it. Pet. 7-8 (emphasis added); *see also id.* at 8 ("[T]he panel held … consumers would … understand the message to mean other sugary foods are not as unhealthy").

The City and its amici argue that reasonable consumers would not understand the warning to mean that drinking sugar-sweetened beverages contributes to obesity and diabetes regardless of the consumer's overall caloric

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[3] The panel did not hold, as the City contends, that to pass muster a compelled warning "must have *no potential* for misunderstanding." Pet. 9 (emphasis added). Nor did Plaintiffs ever advocate that extreme position. It is the City that goes to unreasonable extremes when it insists that compelled speech is misleading only if *all* reasonable consumers would be misled. *Zauderer* held speech to be misleading where "the *possibility* of deception [was] … self-evident" so as to support "the *assumption* that substantial numbers of" consumers "would be … misled." 471 U.S. at 652 (emphasis added); *see also id.* at 651 (government may compel speech "to dissipate the *possibility* of consumer confusion or deception" (emphasis added) (citation omitted)). The City's contrary reliance on *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), is off-point. In *Milavetz*, there was "no evidence" that anyone was confused by the required disclosure that a company was a "debt-relief agency." Nor was any confusion likely, since the required disclosure explained in simple terms what a debt relief agency was. *See id.* at 234.

intake and expenditure or that it contributes more so than consuming other foods and beverages. Pet. 7; Public Citizen ("PC") Br. 9. But those are precisely the messages the City intended the warning to convey and the City's expert conceded the warning would convey. ABA-CRA Opening Br. 1, 10-11; Pet. 4. It is also what the City and its amici still believe. *See* Pet. 7-8 ("[I]nnocuous-seeming amounts … contribute to health harms."); *see also* American Heart Ass'n ("AHA") Br. 7 (claiming there is "some truth" to inference that sugar-sweetened beverages are "inherently unhealthful" and worse than other foods with sugar).

3. The City's amici conjure a parade of horribles that purportedly will result from the panel's conclusion that San Francisco's warning is not factual and uncontroversial, such as the end of all tobacco warnings. Those concerns are unfounded. *Zauderer* contemplates a careful case-by-case inquiry into whether each particular compelled speech requirement is factual and uncontroversial. As *CTIA* and *Nationwide* underscore, courts are more than capable of engaging faithfully in that inquiry and upholding as purely factual disclosures that are accurate and non-misleading.

Nothing in the panel's decision endangers the government's ability to require factual and uncontroversial disclosures in service of public health or other substantial government interests. As *Nationwide* explained when distinguishing this case, the warning here was extraordinary because it "'convey[ed] [a] message'

… 'contrary to statements by the FDA.'" 873 F.3d at 733 n.16 (second alteration in original). The contrast could not be more stark between tobacco warnings (which present the unanimous view of regulators worldwide, about products for which there is "*no safe level*" of use and relate to latent risks of cancer and death, ABA-CRA Reply Br. 30 n.17 (emphasis added) (citation omitted), conveying information the "scientific merit" of which "the tobacco industry no longer challenges," *see* American Cancer Soc'y ("ACS") Br. 10) and San Francisco's warning (which *contradicts* the view of federal regulators, and conveys messages that are "deceptive in light of the current state of research" about products that may be consumed as part of a "healthy dietary pattern," Op. 20-22 (citations omitted)). The panel's conclusion that San Francisco's beverage warning likely fails First Amendment scrutiny does not remotely threaten tobacco warnings.

While the panel's decision faithfully applied *Zauderer*'s requirements, upholding the City's warning would have seriously undermined them. If the panel had upheld the Ordinance despite "substantial evidence in the record that the regulation is misleading and would chill the Associations' protected commercial speech," Op. 26, its decision would have given government free rein to conscript commercial advertisers to broadcast factually dubious government views about abortion, guns, climate change, and the like, overwhelming associated private

speech or silencing it altogether, *id.* at 24-25. The panel rightly rejected that vision.

4. Finally, several amici disagree with the panel's finding that the City's conspicuous warning, cautioning consumers solely about risks posed by "drinking beverages with added sugar," placed only on advertisements for beverages with added sugar, would convey to consumers that drinking beverages with added sugar poses more severe health risks than consuming other foods and beverages for which no warning is required. ACS Br. 11-12; PC Br. 7-8. But that common-sense understanding was shared by both sides' experts, ER708 (Golder ¶ 47); ER396, 398 (Hammond ¶¶ 62, 66), and the Ordinance's sponsor intended that the warning convey exactly that message, *see* ABA-CRA Br. 1 (Ordinance's sponsor acknowledging City's message "warns people that drinking" beverages with added sugar increases health risks "in a way that other products do not" (citation omitted)).

While many product-specific warnings do not convey a similar message of heightened comparative risk, the City's amici agree in principle that some would. *See* ACS Br. 12 n.4 (conceding that a warning placed only on Toyotas would convey they are riskier than other brands). And the City itself admits the warning here is designed to communicate that drinking sugar-sweetened beverages is particularly dangerous, and thereby persuade consumers that other "food and drink

choices" are "*better*." Pet. 4 (emphasis added). The City's amici may disagree with the panel's conclusion that the warning succeeds in communicating that message, but that disagreement is case-specific and fact-bound.

B. The Panel's Finding That The City's Ordinance Would Unduly Burden And Chill Plaintiffs' Speech Does Not Warrant Rehearing

The panel majority found, based on a well-developed record, that the City failed to show that the Ordinance would not unduly burden and chill Plaintiffs' speech. *See* Op. 23-25. Judge Nelson concurred on this point, agreeing that the City's warning likely would violate the First Amendment even if it were purely factual, because it would "probably chill protected commercial speech." *Id.* at 28 (Nelson, J., concurring in judgment). That unanimous conclusion—an independent basis for the panel's decision—does not warrant rehearing.

As even the City's amici acknowledge, "whether a particular requirement is *unduly* burdensome requires" a "contextual analysis," considering "the warning's size," "the characteristics of the particular industry," the "urgency of the message conveyed," and numerous other factors. AHA Br. 14; *see also* ABA-CRA Br. 50-53. The panel performed that analysis, concluding the Ordinance was unduly burdensome and chilled speech because it mandated a large "black box warning," containing a "one-sided and misleading message," that would "overwhelm[]" Plaintiffs' intended speech, and leave insufficient space to "counter[] San Francisco's misleading message" without "defeat[ing] the purpose of the

advertisement." Op. 24. That intensely fact-bound conclusion does not conflict with any decision within or outside this Circuit.

The City's purported conflicts are illusory. The City first posits "tension" with *Nationwide*'s later acknowledgement that "[a] disclosure is 'unduly burdensome' when the burden 'effectively rules out' the speech it accompanies." 873 F.3d at 734 (citing *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994)). But the panel here highlighted the very same quote, *see* Op. 17, and this case and *Nationwide* engaged in the same contextual analysis. In *Nationwide*, the Court found the required inclusion of "relatively brief disclosures" that were "purely factual and uncontroversial," placed in offer letters "span[ning] one to two full pages of text," and intended to cure consumer deception, to be "reasonable and not disproportionate." 873 F.3d at 733-34. There, the plaintiff "offer[ed] little more than conclusory statements" to support its contrary view. *Id.* at 734. Here, by contrast, the panel drew upon sample advertisements, expert testimony, and unrefuted declarations to conclude that requiring Plaintiffs to convey a much larger,[4] "black box warning" spreading a "one-sided and misleading message" about the health effects of its products would unduly burden and chill Plaintiffs' speech. Op. 23-24. That the panel reached a different result

[4] Aside from tobacco, no other consumer product—and certainly no other food or beverage—is required to bear a warning remotely as large, with such attention-grabbing features.

than the panel in *Nationwide* reflects nothing more than the application of one legal standard to different facts. Indeed, *Nationwide* cited *ABA* as informing its analysis.

The City is wrong, moreover, to suggest that physical crowding-out is the only way a disclosure requirement can unduly burden speech. *Ibanez* did not say that. *See* 512 U.S. at 146 (holding particular disclosure "unjustified" and "unduly burdensome" "[g]iven the state of th[e] record" (citation omitted)). And other circuits too have found certain compelled speech requirements unduly burdensome even when they did not displace the targeted speech in its entirety. *See, e.g.*, *Tillman v. Miller*, 133 F.3d 1402, 1403-04 & n.4 (11th Cir. 1998) (per curiam) (striking down as unduly burdensome regulation requiring advertiser to devote five seconds of thirty second advertisement to disclosure); *Dwyer v. Cappell*, 762 F.3d 275, 283-85 (3d Cir. 2014) (disclosure requirement was unduly burdensome even if included on "a website, with its theoretically endless capacity").

The City next argues the panel's decision conflicts with *CTIA* and *Nationwide* by "giving dispositive weight to the declarations of soda advertisers" attesting that they would cease advertising on covered media if the Ordinance took effect. Pet. 12. But, again, that is not what the panel did. It appropriately considered the declarations as one piece of evidence among many, but did not treat them as dispositive. *See* Op. 25 (stating only that declarations "support[] the Associations' position"). Indeed, before discussing the declarations, the panel

determined based on the size, nature, content, and sample renditions of the City's misleading warning that it would "overwhelm[] other visual elements in the advertisement" and render counter-speech impracticable. *Id.* at 23-24. The City itself had acknowledged that "rational" advertisers would "shift away from the kind of advertising that is covered by a disclosure requirement" to some extent. ER185 n.11. All the more so given the size and misleading nature of the warning here. ER716 (Golder ¶ 67).

That panel's finding that this warning would impermissibly chill speech breaks no new ground and does not "give[] an effective veto to an advertiser." Pet. 13. It is common sense that requiring a warning that conveys a misleading, factually questionable, and antagonistic message about advertised products will "deter [the advertisers] from speaking out in the first instance." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 10 (1986); *cf. Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (regulation "'chill[s]' constitutionally protected speech" when it leads speakers to "choose simply to abstain from protected speech").[5]

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[5] That common-sense conclusion does not conflict with *Nationwide*'s observation that a disclosure can be purely factual even if it "disturbs the party being compelled to make the disclosure." Pet. 12-13 (quoting 873 F.3d at 732). That statement, like similar language in *CTIA*, does not address when a disclosure *unduly burdens* speech. Instead, that statement rejects the proposition that negative reactions elicited by a truthful disclosure can alone render it impermissibly "controversial" (*i.e.*, not purely factual). *See* 873 F.3d at 732; *see also CTIA*, 854 F.3d at 1118; *supra* at 5.

The City next insists the panel's decision conflicts with decisions of the First and Sixth Circuits upholding required warnings covering 20% of tobacco advertisements. But what burden is *undue* in the context of truthful warnings about tobacco products (which are addictive, can cause cancer even when used in moderation,[6] uniquely and inherently increase users' risk of death, and implicate hidden hazards) does not establish what burden is *undue* with respect to a one-sided, misleading, and inaccurate warning about beverages with added sugar (which indisputably "*do*[] *not* contribute to obesity or diabetes" "when consumed as part of a diet that balances caloric intake with energy output," Op. 21, and which the FDA has concluded can be consumed as part of a "healthy dietary pattern," 81 Fed. Reg. 33,742, 33,760 (May 27, 2016)). On these grounds, the panel explicitly distinguished the City's warning from similarly sized disclosures required on tobacco advertisements. *See* Op. 25 n.11. Given the vast differences between tobacco products and beverages with added sugar (a category encompassing drinks with as few as twenty-five calories, *see id.* at 7 n.2), and between warnings relaying and conflicting with the views of federal regulators, the panel's injunction here does not remotely threaten the tobacco warnings that concern amici.

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[6] The Surgeon General has concluded that "even a single cigarette can cause immediate harm and raise the risk of diseases like cancer and heart disease." Meredith Melnick, *A Single Cigarette Can Raise the Risk of Cancer and Heart Disease*, Time (Dec. 9, 2010).

C. The Panel's Conclusion That San Francisco's Ordinance Would Fail Intermediate Scrutiny Does Not Warrant Rehearing

The City argues that, "[g]iven its conclusion that the warning did not qualify for *Zauderer* review, the panel should have applied intermediate scrutiny." Pet. 10. But as the City ultimately concedes, *see id.*, the panel not only found the warning likely fails both prongs of *Zauderer*, it went on to hold that it "would also fail under *Central Hudson*," *i.e.*, intermediate scrutiny, "because it is not purely factual and uncontroversial and unduly burdens protected speech." Op. 26 n.13.

That holding does not conflict with any other decision. The City cannot point to a single case that has ever upheld under *Central Hudson* compelled speech that (1) is deceptive, misleading, and factually controversial *and* (2) would unduly burden and chill non-misleading commercial speech.

That there is no such precedent is unsurprising. As the panel noted, it is doubtful that "providing misleading information through an unduly burdensome disclosure is [even] reasonably related to [the government's] substantial interest in the health of its citizens." *Id.* at 26 n.12. Certainly such a requirement does not "directly advance" a "substantial" governmental interest, and is "more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *see, e.g.*, ABA-CRA Br. 25-27; ABA-CRA Reply Br. 20-26. The government has "no legitimate reason to force retailers to affix false information on their products." *Video Software Dealers*, 556

F.3d at 967. And because companies would forego advertising on covered media altogether rather than convey that false information, the Ordinance would do nothing to advance the City's avowed purpose to "inform the public" of its chosen message. S.F. Health Code § 4201; Pet. 4.

Other cases likewise have concluded that compelled falsehoods and unduly burdensome disclosures cannot be upheld under any standard of review. In *Video Software Dealers*, this Court struck down a labeling requirement that "would arguably … convey a false statement that certain conduct is illegal when it is not," finding it unnecessary to analyze the question under heightened scrutiny because the required disclosure flunked even under *Zauderer*. 556 F.3d at 966-67; *see also* Op. 26 n.13. Similarly, in *Dwyer*, the Third Circuit found a disclosure requirement would "fail" the "heightened *Central Hudson* standard of scrutiny" given the court's "holding under the less stringent *Zauderer* standard" that the disclosure was unduly burdensome. 762 F.3d at 284.

To be sure, the panel's decision in this case does not foreclose the possibility that, on other facts, a warning that is factually controversial might nonetheless survive intermediate scrutiny. The panel was not required to address that issue here because it found the City's warning not only controversial, but misleading,

deceptive, and unduly burdensome.[7] Its determination that this particular warning cannot survive intermediate scrutiny does not warrant rehearing.

D. The City's Petition Raises No Issues Of Extraordinary Importance

The panel's conclusion that the City is unlikely to carry the burden necessary to prove its warning lawful is, given the record, unremarkable and in harmony with *CTIA*. Its recognition of this particular warning's constitutional flaws does not remotely portend the general demise of health warnings any more than *Ibanez* and *NAM* foreclosed disclosures concerning legal services and product characteristics. Courts are more than capable of distinguishing between proper and improper disclosures, and case-by-case application of the relevant law will further define the contours of how *Zauderer* applies to different public health warnings.

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[7] The City separately takes issue with the panel's observation that *Zauderer*'s more limited scrutiny does not authorize the government to compel private speakers to convey an "antagonistic ideological message." Pet. 9 (quoting Op. 23). But the Supreme Court has said the same. *See PG&E*, 475 U.S. at 15 n.12 ("Nothing in *Zauderer* suggests … that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: November 21, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to the Court's Order, ECF No. 86, this Brief of American Beverage Association, California Retailers Association, and California State Outdoor Advertising Association in Opposition to the Petition for Panel Rehearing or Rehearing En Banc, contains 4,198 words.

s/ Richard P. Bress
Richard P. Bress

CERTIFICATE OF SERVICE

I, Richard P. Bress, hereby certify that I electronically filed the foregoing Brief of American Beverage Association, California Retailers Association, and California State Outdoor Advertising Association in Opposition to the Petition for Panel Rehearing or Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 21, 2017, which will send notice of such filing to all registered CM/ECF users.

s/ Richard P. Bress
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