Nos. 16-16072, 16-16073

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION, *et al.*,
Plaintiffs/Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Defendant/Appellee.

CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,
Plaintiff/Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Defendant/Appellee.

On Interlocutory Appeals from the Denial of a Preliminary Injunction by the United States District Court for the Northern District of California, No. 15-cv-3415-EMC, Hon. Edward M. Chen, U.S.D.J.

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING DEFENDANT/APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. No publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long played a role in the development of commercial-speech doctrine. Public Citizen has defended commercial-speech regulations in cases where those regulations were important to protecting public health or served other important public interests, such as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). Its attorneys have also represented parties seeking to invalidate overbroad commercial-speech restraints that harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

Public Citizen has become increasingly concerned that corporate interests are promoting stringent applications of commercial-speech doctrine to stifle legitimate economic regulatory measures and protections for consumers, including disclosure requirements that reasonably promote interests in

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[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

informing consumers about commercial products. This case implicates that concern. The position of the beverage, retail and advertising industry plaintiffs that factual disclosure requirements applicable to their commercial advertising are subject to heightened First Amendment scrutiny would, if accepted by this Court, dramatically alter the First Amendment balance established by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Under *Zauderer*, commercial-speech disclosure requirements are permissible if reasonably related to legitimate government interests in providing information to consumers. *Id.* at 651. San Francisco's ordinance satisfies that standard.

All parties have consented to the filing of this brief.

ARGUMENT

I. The First Amendment permits the government to require factual disclosures in commercial advertising if the disclosures are reasonably related to legitimate interests in providing information to consumers.

A. This case implicates a fundamental principle governing First Amendment review of commercial-speech regulations: The constitutionally protected interests implicated by regulations that require commercial speakers to disclose information are much less substantial than those affected by regulations that prohibit particular commercial messages. Thus, while prohi-

bitions on commercial speech are subject to a form of "heightened scrutiny"—under the intermediate scrutiny framework articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)—commercial disclosure requirements are subject to rational-basis review, under which they may be sustained if they are "reasonably related" to a legitimate government interest. *Zauderer*, 471 U.S. at 651.

The Supreme Court explained in *Zauderer* that this distinction between the review of commercial-speech prohibitions and that of commercial disclosure requirements rests on "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. *Zauderer* recognized that, outside the realm of commercial speech, laws compelling individuals to profess views on "politics, nationalism, religion, or other matters of opinion" raise the most fundamental First Amendment concerns. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). But when commercial speakers are required to disclose information about their products or businesses, "the interests at stake … are not of the same order." *Id.* at 651. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, … [a commercial speaker's] constitutionally protected

interest in *not* providing any particular factual information in his advertising is minimal." *Id.* Disclosure requirements are a *preferred* form of regulating commercial speech precisely because they "trench more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* These considerations led the Court in *Zauderer* to hold heightened scrutiny in any form—even *Central Hudson*'s intermediate scrutiny—inapplicable to requirements of factual disclosures in advertising, and to limit its review to the most deferential level of constitutional scrutiny: whether a restriction has a "reasonable relationship" to a governmental interest in disclosure. *Id.*

In *Zauderer*, and in the Supreme Court's later decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), which reaffirmed *Zauderer*'s analysis, the legitimate interest that sufficed to justify disclosure was the "interest in preventing deception of consumers." *See id.* at 253; *Zauderer*, 471 U.S. at 651. But *Zauderer*'s standard of review is not limited to cases where the interest justifying a disclosure standard is related to consumer deception. The Court selected rational basis as the appropriate level of review in light of the minimal interest of commercial speakers in not disclosing factual information about their products, services or businesses, not because of the assertedly deceptive nature of the particular advertising

at issue. *Zauderer*'s reasoning thus suggests broader application because whenever a law "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech[.]" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality).

B. In light of *Zauderer*'s analysis, those circuits that have addressed the question have agreed that commercial-speech disclosure requirements are constitutional if reasonably related to legitimate interests in providing information to consumers, including but not limited to the interest in preventing consumer deception.

In *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001), the Second Circuit upheld a requirement that labels for electrical products containing mercury disclose that fact and provide information about safe disposal. The court emphasized that "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests" because disclosure "furthers, rather than hinders," First Amendment goals. *Id.* at 114. Accordingly, the Court held that "a rational connection between the purpose of a commercial disclosure

requirement and the means employed to realize that purpose" suffices under the First Amendment regardless of whether the purpose is prevention of consumer deception. *Id.* at 115. Thus, the mercury disclosure requirement was constitutional because it was "rationally related" to the interest in "increasing consumer awareness of the presence of mercury in a variety of products" to help foster environmental protection goals. *Id.*

The Second Circuit reiterated that *Zauderer*'s "rational basis test" is applicable to commercial-speech disclosure requirements regardless of whether they are aimed at preventing consumer deception in *New York State Restaurant Ass'n v. New York City Board of Health*, 556 F.3d 114, 132 (2d Cir. 2009). There, the court upheld a regulation requiring chain restaurants to post calorie information on menus and menu boards because such information is reasonably related to the interest in combating obesity by increasing consumer awareness of the impact of dietary choices—an interest directly comparable to the one at issue here. The court again stressed that *Zauderer*'s reasoning about the interests affected by disclosure requirements was "broad enough to encompass" requirements not aimed at misleading or deceptive commercial speech. *Id.* at 133.

The Sixth Circuit concurs with the Second. In *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), the court upheld compelled disclosure of information about health effects of tobacco products under what it referred to as *Zauderer*'s "rational-basis standard." *Id.* at 554 (Stranch, J., for the majority). The court endorsed the Second Circuit's view that "*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception." *Id.* at 556. Although the court found that tobacco health warnings serve anti-deception interests, it also held that a reasonable relationship to the objective of "promoting greater public understanding" of tobacco's health effects "alone is enough to satisfy the rational-basis rule." *Id.* at 564.

The First Circuit also holds that rational-basis review is the standard for commercial-speech disclosure requirements applicable to "economically significant information" regardless of whether they specifically target consumer deception. *See Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 315 (1st Cir. 2005) (Boudin, J., for majority).

Most recently, the D.C. Circuit held in *American Meat Institute v. United States Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), that "*Zauderer* in fact does reach beyond problems of deception." *Id.*

at 20. The court in *Meat Institute* held that allowing consumers to make "informed choices" about the sources of meat products (an issue of "demonstrated consumer interest") was sufficient reason to justify requiring disclosure of the country of origin of meat. *Id.* at 24, 23. The court determined that *Zauderer*'s reasoning was incompatible with limiting it to disclosure requirements aimed at "remedying deception." *Id.* at 22. *Zauderer*'s focus on the minimal First Amendment interest in "opposing forced disclosure" of commercial information, the court held, was "inherently applicable beyond the problem of deception." *Id.*[2]

C. In urging this Court to create an intercircuit conflict by holding that *Zauderer*'s rational-basis review applies only when the government invokes an anti-deception interest, the industry associations challenging San Francisco's disclosure rule for sugar-sweetened beverages misstate the hold-

[2] The California Supreme Court, in a case referred to it by this Court to address a question of California constitutional law, has also canvassed the federal constitutional precedents and concluded that "[l]aws requiring a commercial speaker to make purely factual disclosures related to its business affairs, whether to prevent deception or simply to promote informational transparency, have a 'purpose … consistent with the reasons for according constitutional protection to commercial speech'" and warrant only "rational basis review" under California's constitution, whose speech protections exceed the First Amendment's. *Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 89 (Cal. 2013) (quoting *44 Liquormart*, 517 U.S. at 501).

ings of *Zauderer* and *Milavetz*, as well as of this Court's precedents. The industry briefs, relying heavily on *Milavetz*, repeatedly assert that the *Zauderer* standard applies "only" when a restriction is aimed at consumer deception. CSOAA Br. 37; ABA/CRA Br. 30–31. The word "only," however, comes from the appellants' briefs, not the Supreme Court's decisions.

Zauderer and *Milavetz* hold that a rational connection to the interest in preventing consumer deception is sufficient to justify disclosure, not that that interest is the *only* interest that could suffice. The same is true of this Court's observation in *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009), *aff'd on other grounds sub nom. Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011). The industry appellants' reliance on these decisions confuses *sufficiency* of an interest with *necessity*. They cite no Supreme Court decision holding that preventing deception is the only interest that can satisfy *Zauderer*, nor do they identify any circuit that maintains that view.

Both *Milavetz* and *Zauderer* specified preventing deception as the interest justifying the disclosure requirements at issue for an obvious reason: Preventing deception was the sole government interest advanced to justify disclosure. As the D.C. Circuit pointed out in *Meat Institute*, "[g]iven the

subject of both cases, it was natural for the Court to express the rule in such terms." 760 F.3d at 22. But because *Zauderer*'s reasoning was based on the minimal degree to which disclosure requirements interfere with legitimate interests of commercial speakers rather than on the nature of the government's countervailing interest, the court in *Meat Institute* held that neither *Zauderer* nor *Milavetz* limits disclosure requirements to preventing deception. *Id.* Likewise, in *Discount Tobacco*, the Sixth Circuit extensively analyzed both *Zauderer* and *Milavetz* before concluding that interests other than preventing deception suffice under their analysis. 674 F.3d at 556.[3]

D. Beneath the industry appellants' exaggerated assertions about the holdings of *Zauderer* and *Milavetz* lies a fundamental misunderstanding of *Zauderer*'s conceptual basis. According to the appellants, *Zauderer* permits disclosure requirements only where a commercial speaker's statements are already outside First Amendment protection because they are false or inherently deceptive. In their view, *Zauderer*'s "foundational principle" is that a commercial speaker's interest in not providing "*corrective* disclosures

[3] Similarly, the Second Circuit concluded in *New York State Restaurant Ass'n* that a brief mention of *Zauderer* in *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001), another decision appellants cite (ABA/CRA Br.32–33, CSOAA Br. 38), does not limit *Zauderer* to cases involving deception. *See* 556 F.3d at 133.

is 'minimal' because the speaker has no right to disseminate deceptive advertising in the first place." CSOAA Br. 36 (emphasis added); *see* ABA/CRA Br. 30. On that view, *Zauderer* holds only that a greater power (banning deceptive speech altogether) includes a lesser one (requiring corrective disclosure).

But *Zauderer*'s holding that commercial speakers have a minimal interest in not disclosing facts about their goods and services was not limited to "corrective" disclosures, nor was it based on the absence of First Amendment protection for false or misleading commercial speech. Rather, *Zauderer*'s analysis was premised on the very different proposition that commercial speech, by its nature, derives its First Amendment protection from consumers' interest in information, 471 U.S. at 651, not from a commercial speaker's expressive interests or, as appellants argue, its "individual freedom of mind." ABA/CRA Br. 31 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). *Zauderer* specifically rejected the invocation of *Wooley* and like cases in the realm of commercial speech. 471 U.S. at 651. Given the commercial-speech doctrine's foundation in *consumers'* interest in information relevant to market transactions, even a commercial speaker who has engaged in no prevarication has little or no legitimate constitutional interest in withholding additional information that could reasonably be considered beneficial to consum-

ers. *Id.* The appellants' contrary account has no foundation in what *Zauderer* actually said.

If the appellants' view of *Zauderer* were correct, a disclosure requirement would be permissible only where the government could also prevent speech altogether. But *Zauderer*'s holding is that disclosure is a permissible alternative where an outright ban would fail. *See id.* (citing *In re R.M.J.*, 455 U.S. 191, 201 (1982)). Because *Zauderer*'s premise is *not* that disclosure may be required only where commercial speech is false and deceptive and therefore unprotected, the decision provides no support for limiting disclosure requirements to "correcting" deception.

E. To be sure, the Supreme Court has not squarely *held* that interests other than preventing deception suffice under *Zauderer*, and it may be true that this Court, unlike other circuits, has not done so either. *See* ABA/CRA Br. 33. But in a decision not cited by the appellants, this Court has, at least, come very close to doing so. In *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), this Court rejected a First Amendment challenge to a requirement that stormwater dischargers inform the public of hazards associated with illegal waste disposal. Rejecting the argument that the requirement unconstitutionally compelled speech, the Court cited both

Zauderer and the Second Circuit's decision in *Electrical Manufacturers* for the proposition that the interest in informing the public about environmental protection justified the requirement. *See* 344 F.3d at 849–51 & n.27.[4]

Environmental Defense Center is not this Court's only decision to favorably cite *Electrical Manufacturers*' holding that non-deception interests can justify commercial disclosure requirements. The industry appellants wrongly tout this Court's decision in *Schwarzenegger* as holding that only preventing consumer deception can justify a disclosure requirement under *Zauderer*. In fact, *Schwarzenegger* cites *Electrical Manufacturers* as a decision exemplifying the circumstances in which commercial disclosure requirements are permissible. *See* 556 F.3d at 966. Consistency with this Court's precedents, as well as decisions of other circuits and *Zauderer*'s analytic foundation, thus supports applying rational-basis review to a commercial disclosure standard regardless of whether it is aimed solely at preventing consumer deception.

[4] The Court noted that the speech at issue was not "'commercial' in the same sense" as that in *Electrical Manufacturers*. *See id.* at 81 n.27 (citing *Elec. Mfrs.*, 272 F.3d at 114). But if a non-deception interest justifies a disclosure requirement as to speech *more* protected than commercial speech, it follows *a fortiori* that it suffices for commercial speech.

II. The disclosure requirement at issue falls within *Zauderer*'s scope because it is accurate and factual in nature.

The industry groups challenging San Francisco's disclosure requirement contend that it falls outside the scope of *Zauderer* because it requires more than disclosure of "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. The challengers err by elevating a descriptive phrase in *Zauderer* to a restrictive legal standard. To the extent the phrase has precedential value, it stands for the proposition that commercial disclosure requirements must compel truthful, accurate information, not opinions—a standard San Francisco's disclosure requirement easily meets. That the factual disclosure may relate to a controversial *topic* is irrelevant in determining whether *Zauderer* applies. Likewise irrelevant is the challengers' position that the statement is "controversial" because it conveys an implicit message with which they disagree or because consumers advised of that information may choose to limit consumption of sweetened beverages, contrary to advertisers' wishes. Taken at face value, that position could require heightened First Amendment scrutiny for any disclosure requirement, no matter how well supported by science, history, or common sense.

A. *Zauderer* uses the phrase "purely factual and uncontroversial information" to characterize the particular information subject to disclosure in

that case, not to articulate a legal test. 471 U.S. at 651. *Zauderer* upheld a state mandate requiring an attorney who advertised contingent-fee services to disclose that clients might be responsible for expenses if they lost. *Id.* at 650. The Court described that mandate as requiring an attorney to "include in his advertising purely factual and uncontroversial information about the terms under which his services [would] be available." *Id.* at 651. In a separate, later paragraph, the Court "h[e]ld that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest," which in that case was preventing consumer deception. *Id.* The Court determined that the disclosure requirement "easily passe[d] muster under *this standard*." *Id.* at 652 (emphasis added).

As the Sixth Circuit has concluded, the context of the phrase "purely factual and uncontroversial information" does not suggest that the phrase "describ[es] the characteristics that a disclosure must possess for a court to apply *Zauderer*'s rational-basis rule." *Discount Tobacco*, 674 F.3d at 559 n.8 (6th Cir. 2012) (Stranch, J., for majority). Rather, it "merely describes the disclosure the Court faced in that specific instance." *Id.*

The Supreme Court's subsequent decision in *Milavetz*, 559 U.S. 229, provides further evidence that *Zauderer*'s language in this respect was de-

scriptive. *Milavetz* applied *Zauderer*'s rational-basis review without ever using the phrase "purely factual and uncontroversial information." *Milavetz* serves as "clear[]" evidence that the phrase is not a rigid test defining the circumstances in which *Zauderer* applies. *Discount Tobacco*, 674 F.3d at 559 n.8 (Stranch, J., for majority).

B. To the extent that *Zauderer*'s reference to "purely factual and uncontroversial information" informs the legal analysis, it suggests only that a commercial disclosure requirement subject to *Zauderer* should be factual in nature (as opposed to a statement of opinion) and that the disclosure should be *accurate* and hence not "controversial" in the sense that its *truth* is open to substantial dispute.

In *Zauderer*, the Court used the phrase "purely factual and uncontroversial" to contrast the disclosures at issue with unconstitutional speech-compulsion requirements that "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 471 U.S. at 651 (quoting *Barnette*, 319 U.S. at 642). The contrast posits a distinction between, on the one hand, requirements that commercial speakers disclose accurate, factual information and, on the other, requirements that individuals subscribe to disputed mat-

ters of political, religious, or other forms of opinion. As the Sixth Circuit observed in *Discount Tobacco*, *see* 674 F.3d at 559 n.8, this reading is confirmed by other language in *Zauderer* referring to the disclosure requirement as applying to "factual information" and "accurate information," 471 U.S. at 651 & n.14, as well as by *Milavetz*, where the Court's affirmance of a commercial disclosure requirement rested on the disclosure's "factual" and "accurate" nature. 559 U.S. at 250.

Other leading precedents are consistent with this reading. *Electrical Manufacturers*, relying on *Zauderer*, held that lenient First Amendment review applies to the disclosure of "accurate, factual, commercial information." 272 F.3d at 114; *see also id.* ("To the extent commercial speakers have a legally cognizable interest in withholding accurate, factual information, that interest is typically accommodated by the common law of property and its constitutional guarantors."). And the Second Circuit's decision in *New York State Restaurant Ass'n* asked only whether a compelled commercial disclosure of calorie information was "factual" and bore a rational relationship to the government's interest. 556 F.3d at 133–34.

This Court's nonprecedential decisions reflect the same approach. In *CTIA—The Wireless Ass'n v. City & County of San Francisco*, 494 F. App'x

752 (9th Cir. 2012), the court held that a disclosure requirement that was not confined to facts but expressed the government's recommendations about what consumers should do, and that involved a subject of substantial factual debate, was not sufficiently factual to be sustained under *Zauderer*. By contrast, in *Southern California Institute of Law v. Biggers*, 613 F. App'x 665, 666 (9th Cir. 2015), the court upheld a requirement that a law school disclose bar examination results because the information was factual notwithstanding whatever "*implications*" readers might attach to it. *See also Crazy Ely Western Village, LLC v. City of Las Vegas*, 618 F. App'x 904, 906 (9th Cir. 2015) (upholding as factual a requirement that liquor stores post notices that opening or consuming alcohol on a pedestrian mall is prohibited).

The disclosure required here easily satisfies the criteria of being factual in nature and accurate. The briefs of the City and of amici curiae American Heart Association, *et al.*, demonstrate abundant scientific support for the statement that consuming high-calorie beverages with added sugar contributes to obesity, diabetes, and tooth decay. Importantly, the industry challengers themselves do not actually contest the truth of the disclosure statement itself: Even if their view that all sugars, or all calories, are fungible in terms of health effects were correct, that view does not contradict the point

that consuming sugary beverages contributes to the pervasive problems of obesity, diabetes and tooth decay that San Francisco seeks to address.

C. The challengers nonetheless assert that San Francisco's ordinance is "controversial" and therefore subject to heightened First Amendment scrutiny. To the extent "controversy" is part of the standard, the challengers' assertions that the San Francisco disclosure is "controversial" in some *relevant* sense are unpersuasive.

1. Even under the broadest possible reading of *Zauderer*'s reference to "purely factual and uncontroversial information," the relevant question cannot be whether the *topic* to which a disclosure relates is controversial. That there may be disagreement over how much soda people should consume, or over exactly which sources of calories or sugars they ideally should cut in order to avoid obesity, diabetes, or tooth decay, or even over whether the government ought to play a role in addressing these issues, does not make the *facts* advertisers must disclose impermissibly controversial.

"Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions. … [W]hether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opin-

ion, not on whether the disclosure emotionally affects its audience or incites controversy." *Discount Tobacco*, 674 F.3d at 569 (Stranch, J., for the majority); *see also Conn. Bar Ass'n v. United States*, 620 F.3d 81, 95 (2d Cir. 2010) (upholding mandatory disclosures about bankruptcy services as constitutional under *Zauderer* despite recognizing that "bankruptcy and the process attending it are frequent subjects of public debate" (internal quotation marks omitted)); *Meat Inst.*, 760 F.3d at 27 (finding country-of-origin labels "uncontroversial" without regard to their relationship to controversial issues of trade policy); *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 529 (D.C. Cir. 2015) (noting that the court in *Meat Institute* held country-of-origin labels uncontroversial despite the existence of public disputes over the appropriateness of such labels and their consistency with international trade agreements).

Much of the value of factual information in a commercial setting is that it enables market participants to act on their *own* opinions about whether, how, and to what extent that information is relevant to marketplace decisions. Commercial speakers may have legitimate objections to being required to espouse opinions they do not share, but not to providing the factual information on which others who may disagree with their opinions may legitimately act. *See Zauderer*, 471 U.S. at 651; *see also Elec. Mfrs.*, 272 F.3d at

114 (stating that disclosure of "accurate, factual, commercial information" "contributes to the efficiency of the marketplace of ideas" (internal quotation marks omitted)). Just as companies cannot "immunize false or misleading product information from government regulation simply by including references to public issues," *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983), they cannot avoid government disclosure requirements by demonstrating that non-controversial, factual disclosures have some relationship to a matter of controversy.

2. The industry challengers to San Francisco's ordinance contend that requiring companies to disclose that their products contribute to obesity, diabetes, and tooth decay is "controversial" because it implicitly forces companies to convey "the City's hostile, ideological, and hotly debated view that [sugar-sweetened beverages] are inherently and uniquely dangerous products that consumers should not purchase or consume." CROAA Br. 45. But reporting information to comply with a government requirement is not the same as being forced to adopt an ideological viewpoint, nor does it require companies to admit that the information is important or that consumers should consider it to be material in making particular choices.

Thus, *New York State Restaurant Association* applied *Zauderer* to uphold the constitutionality of a calorie count disclosure, even though the plaintiff disputed that "disclosing calorie information would reduce obesity"—that is, it disputed "the significance of the facts" to be disclosed, and objected "to cram[ming] calorie information down the throats of [restaurant] customers." 556 F.3d at 133 (internal quotation marks omitted). Similarly, *Electrical Manufacturers* upheld a mercury disclosure requirement applicable only to certain products, such as lamps, 272 F.3d at 107 n.1, despite assuming that lamps were not the largest source of mercury contamination, *id.* at 115–16. In neither case did the courts view debate over the significance of the disclosures as determining whether the disclosures were "controversial," as *Zauderer* used that term. *See also Conn. Bar Ass'n*, 620 F.3d at 95 (holding that a requirement that a debt relief agency make mandatory disclosures about its bankruptcy services did not force the company "to communicate its own views on public issues associated with the bankruptcy system").

Consumers understand that companies do not provide disclosures because they want to do so or because the disclosures reflect the companies' views, but because the companies are required to do so. Indeed, the disclosure here explicitly informs consumers that its source is the City and County

of San Francisco. And nothing stops companies from stating their own opinions that their products can be safely consumed in moderation or that drinking too much soda pop is no worse than eating too much pie and ice cream.

The industry plaintiffs' contention that a disclosure requirement compels a company to adopt a point of view as to the relevance of the disclosure has significant implications. One could always say that disclosing a fact—whether it be a client's responsibility for costs in litigation, the calorie count of a hamburger, the mercury content of a lightbulb, or the propensity of sugary drinks to cause obesity—suggests that the fact is important or relevant in some way. If that alone were sufficient to convey an implicit message precluding *Zauderer*'s application, there could be no distinction in the standard of review between, on the one hand, compelled commercial disclosures and, on the other, restrictions on commercial speech (and likely even compelled disclosures in the context of fully protected speech). That, of course, is not the law. *See* pp. 3–14, *supra*.

3. The D.C. Circuit's recent decision in *National Ass'n of Manufacturers v. SEC*, 800 F.3d 518, provides a telling contrast to the disclosure required in this case. There, the panel majority concluded—in a tertiary alternative holding and over a strong dissent—that a requirement that companies

characterize their products as containing "conflict minerals" could not be sustained under *Zauderer* because the disclosure was not "purely factual and uncontroversial." *Id.* at. 527–30. Although the panel expressed puzzlement about what "uncontroversial" means, *id.* at 528–29, it held that the disclosure at issue required a company to subscribe to a value-laden political and moral judgment of its products as contributing to armed conflict in Africa, and it concluded that requiring a company to "convey[] moral responsibility for the Congo war" and "confess blood on its hands" was not uncontroversial. *Id.* at 530 (internal quotation marks omitted). Regardless of the correctness of the court's holding, *but see id.* at 531–41 (Srinivasan, J., dissenting), no similar complaint could be leveled at San Francisco's disclosure requirement. It does not require advertisers to accept or use any pejorative moral or political characterization of their products, but only to state facts: The products contribute to obesity, diabetes, and tooth decay.

4. The industry challengers' disagreement with San Francisco's judgment that an accurate disclosure should be attached to their products rather than to others that they think also contribute to the same health problems does not make the required disclosure "controversial." *Zauderer* explicitly recognizes that when governmental decisions to require commercial dis-

closures are at issue, one implication of adopting a rational-basis standard of review is that a disclosure requirement should not be "subject to attack if it is 'under-inclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate." 471 U.S. at 651 n.14. Rather, in determining what information should be made available to consumers, as in tackling other social and economic issues not implicating fundamental rights, "governments are entitled to attack problems piecemeal." *Id.*

Here, San Francisco has made a rational judgment that the over-consumption of soda and similar beverages contributes significantly enough to health problems to justify an informational warning on advertising for those products. If the industry challengers' disagreement with San Francisco's prioritization of the social ills it seeks to address were enough to render the disclosure requirement "controversial" and thus outside the scope of *Zauderer*, under-inclusiveness analysis of disclosure requirements, which *Zauderer* rejected, would be reintroduced through the back door.

III. The claimed "chilling effect" of the disclosures does not take them outside *Zauderer*'s rational-basis standard.

The assertion of the industry challengers that they would prefer to cease advertising rather than use San Francisco's required warning does not allow them to escape *Zauderer* on the ground that the law has an impermis-

sible "chilling" effect. Nothing in *Zauderer* suggests that the chilling effects over which the Court's opinion briefly expresses concern include those resulting from commercial speakers' preference not to provide factual disclosures that are reasonably related to legitimate interests in providing information in consumers. Rather, *Zauderer* says only that "*unjustified* or *unduly burdensome* disclosure requirements might offend the First Amendment by chilling protected commercial speech." 471 U.S. at 651 (emphasis added).

As to justification, *Zauderer* immediately goes on to explain that a disclosure requirement reasonably related to a legitimate interest is not unjustified. *See id. Zauderer* does not address what might make a disclosure requirement "unduly burdensome," but a subsequent opinion does: *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), finds a disclosure requirement unduly burdensome because it "effectively rules out" protected speech by requiring disclosure at such a level of detail that it cannot practically be conveyed in an advertisement. *Id.* at 146; *see also Dwyer v. Cappell*, 762 F.3d 275, 283–84 (3d Cir. 2014).

The challengers' "mock-ups" of ads that comply with San Francisco's requirement (ABA/CRA Br. 49–49) demonstrate that it does not effectively rule out using forms of advertising that must include the warning. And even

those mock-ups exaggerate the warning's intrusiveness by including it within the advertising image rather than as a black box of the required size at the top, bottom or side of the image, which would obscure no part of their own advertising. That the information in the warning may be more memorable than the vacuous content of the ads themselves (ABA/CRA Br. 50–51) does not mean that it effectively prevents the advertisers from conveying their messages, which consist almost solely of their brand names and slogans.

IV. The industry challengers' invocation of the heightened scrutiny applicable to content-based speech restrictions is meritless.

Because *Zauderer* is such unfavorable terrain on which to challenge a disclosure requirement, the industry associations who seek to enjoin San Francisco's ordinance argue that it is subject to "heightened scrutiny" because it is a "content- and speaker-based restriction." ABA/CRA Br. 3; *see also* CROAA Br. 16. They invoke the Supreme Court's decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), as well as the opinion of a panel of this Court in *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (2016), *pet. for reh'g en banc pending*, No. 13-56069, Doc. 44 (filed March 21, 2016). Neither *Sorrell* nor *Retail Digital*, however, addresses the scrutiny applicable to commercial-speech disclosure requirements, much less requires heightened scrutiny for them if they are "content-based."

As explained in Public Citizen's amicus brief in support of the petition for rehearing in *Retail Digital* (No. 13-56069, Doc. 49 (submitted March 31, 2016, filed Aug. 12, 2016)), *Sorrell*'s statements about heightened scrutiny of content-based speech restrictions, as applied to restrictions on commercial speech, do no more than indicate that the form of heightened scrutiny appropriate for commercial speech—the intermediate scrutiny of *Central Hudson*, 447 U.S. 557—must be applied to content-based commercial-speech prohibitions. *Sorrell* itself reaffirmed the application of the *Central Hudson* standard to commercial speech and applied it to the law at issue. *See* 564 U.S. at 570–79. Moreover, understanding *Sorrell*'s references to heightened scrutiny to include *Central Hudson* intermediate scrutiny is consistent with the Supreme Court's other decisions, in which "heightened scrutiny" is used generally to refer to any level of scrutiny higher than rational basis scrutiny. *See*, *e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984). Thus, to the extent the opinion in *Retail Digital* holds that *Sorrell* now requires a more "intensive" version of intermediate scrutiny for content-based commercial speech prohibitions, ABA Br. 25, that holding is mistaken.

Regardless of the proper resolution of that question, however, neither *Sorrell* nor *Retail Digital* contains the slightest suggestion that *Zauderer*'s reasonable-relation test for commercial speech disclosure requirements has now been displaced by some form of heightened scrutiny. Neither case involved disclosure requirements, and neither opinion mentions *Zauderer*, let alone addresses the standard of review for disclosure requirements.

Disclosure requirements are necessarily content- and speaker-based in the broad sense in which the industry challengers here use those terms. That is, they are triggered by advertisements or other commercial speech with specific content, made by particular types of speakers. In *Zauderer*, for example, the disclosure requirement applied only to particular speakers (attorneys) and only to speech with particular content (advertisements mentioning contingent-fee representation). A moment's reflection reveals that such content- and speaker-specificity is an inherent feature of commercial-speech disclosure requirements. It would make no sense, for example, to require companies advertising shoes to warn that smoking cigarettes causes cancer. Likewise, cigarette companies are not required to include warnings about the dangers of sugary drinks in their advertisements, and soft-drink advertisements need not disclose EPA-estimated miles-per-gallon figures for cars

Thus, if content- and speaker-based commercial disclosure requirements were subject to heightened scrutiny, all disclosure requirements would have to face such scrutiny, and *Zauderer* would be a dead letter. But *Sorrell* and *Retail Digital* plainly did not silently overrule *Zauderer*.

V. Singly or collectively, the industry arguments in this case would gut disclosure requirements that protect consumers.

The arguments that the appellants challenging San Francisco's ordinance advance are breathtaking in their consequences. At their broadest, those arguments would subject all disclosure requirements (except, perhaps, those attached to commercial speech so false and misleading that it could be prohibited altogether) to heightened scrutiny because such requirements are content- and speaker-based. As Judge Boudin of the First Circuit has noted, such arguments would threaten "routine disclosure of economically significant information designed to forward ordinary regulatory purposes …. There are literally thousands of similar regulations on the books—such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses…." *Rowe*, 429 F.3d at 316 (majority opinion on issue). "The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken." *Id.* The challengers here champion exactly that mistaken idea.

Only a step removed in breadth is the contention that all disclosure requirements not aimed at correcting deception of consumers are subject to heightened scrutiny. To mention but a few examples, that argument would require searching scrutiny (including review for under-inclusiveness) of all disclosures aimed at protecting consumer health and safety, such as warnings on prescription and over-the-counter drugs and alcoholic beverages, nutritional labeling requirements, labels on hazardous chemicals, and warnings about the safe use of various products. It would also call into doubt regulations requiring commercial speakers to disclose a wealth of information beneficial to consumers, such what various products are made of, how energy-efficient they are, and where they were made. And it would call for heightened scrutiny of requirements that employers post notices about the legal rights of their workers.

The impact of the challengers' view that factual disclosure requirements are impermissibly "controversial" if an advertiser disagrees with some message the disclosure might be thought to imply, or with choices consumers might make based on it, would be nearly as great. The potential effects are best illustrated with reference to existing disclosure requirements.

- Federal law directs vehicle manufacturers to label each vehicle with its fuel economy, in accordance with regulations issued by the Environmental Protection Agency. 49 U.S.C. § 32908(b). Is such a label impermissibly controversial because it suggests that a manufacturer believes fuel economy is important for the environment, that the cost of fuel should be more material to consumers than the vehicle's other attributes, or that the consumer should consider a competitor's car with better gas mileage?
- With limited exceptions, the Food, Drug, and Cosmetic Act requires that a food product containing artificial coloring or flavoring bear a label so stating. 21 U.S.C. § 343(k). Does this requirement force manufacturers to voice opinions about whether the presence of food additives is an important fact about a product, or to agree, for example, that a natural food coloring is superior to an artificial one?
- The Securities and Exchange Commission compels a securities issuer to state whether it has a code of ethics, 17 C.F.R. § 229.406, and disclose information about certain officers' executive compensation, *id.* § 229.402. Do these disclosures convey to investors that issuers believe these factors are relevant to investment decisions or that is-

suers endorse the opinion that, for example, high executive compensation is a reason not to invest in a company?

- California requires facilities that advertise special care for residents with dementia to disclose the "experience and education" and "required training" for staff members who provide such care. 22 Cal. Code Regs. § 87706(a)(2)(F)–(G). Does this requirement force companies to espouse an opinion that a particular kind of training is a critical factor in selecting a nursing home or that other nursing homes with differently trained and educated staff are better?
- Federal law requires that foods be labeled with, among other things, sodium content. *See* 21 U.S.C. § 343(q)(1)(D). May a ramen noodle manufacturer object to disclosing that its package contains more than 900 milligrams of sodium because people may hold strong, conflicting opinions about how much sodium a healthy diet should contain, whether other considerations outweigh sodium content in determining whether ramen noodles are good for them, or whether it is morally repugnant to market products containing added sodium?
- Federal law requires that items of fur apparel bear a label identifying the type of animal that produced the fur and the country of

origin of imported fur and stating that the apparel contains used fur (if it does). 15 U.S.C. § 69b. Does providing this information impermissibly require manufacturers to endorse the views of some consumers who prefer faux fur because they believe real fur products are immoral (or alternatively, the views of others that real furs are superior to fakes)? Does the controversy over fur products, or the singling out of fur as opposed to other materials used in garments, place the disclosure of this factual information outside the scope of *Zauderer*'s rational basis review?

In each case, the answer is surely no. Yet the industry challengers' position in this case would call all these disclosure requirements into question on the theory that they compel "controversial" disclosures. San Francisco's requirement that advertisers disclose health consequences of consuming sugar-sweetened beverages is very important in its own right, but the implications of this case extend far beyond its potential impact on the beverage market in one city and the benefits the disclosure at issue confers on the people of that city by providing them useful information about products they consume.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's denial of preliminary injunctive relief.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court. *CTIA v. City of Berkeley*, No. 16-15141, argued September 13, 2016, presents some overlapping issues.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C), I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 6,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14-point font, Century Expanded BT.

/s/ Scott L. Nelson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief 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 September 21, 2016, that all participants in the case are registered CM/EFC users and that service will be accomplished by the appellate CM/ECF system.

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