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., IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING EN BANC

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae
Public Citizen, Inc.

October 26, 2017

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a non-profit, non-stock organization. No publicly traded entity holds any form of ownership interest in Public Citizen, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes and Regulations:

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 been involved in the development of commercial speech doctrine. It has defended commercial-speech regulations that are important to protecting public health or serve other important public interests. *See*, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *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. *See*, *e.g.*, *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

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

[1] All parties have consented to the filing of this brief. This brief was not authored in whole or part by counsel for a party. No party or counsel for a party, and no person other than the amicus curiae or its members, contributed money intended to fund preparing or submitting it.

commercial products. This case, and the panel's decision striking down San Francisco's requirement that advertisements for sugar-sweetened beverages warn of health risks associated with consuming them, implicates that concern.

Although the panel recognized that, under binding circuit precedent, requirements that commercial advertisers disclose factual information about their products are subject to relaxed scrutiny under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the panel applied *Zauderer* in a way inconsistent with this Court's recent decision in *CTIA—The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017), as well as decisions of other circuits. The panel's conclusion that the disclosure in this case does not qualify for review under *Zauderer*'s rational-basis standard because it is misleading and unduly burdensome reflects a restrictive approach at odds with this Court's recognition 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." *Id.* at 1116 (brackets and citation omitted). The panel's analysis unnecessarily calls into doubt the constitutionality of a wide range of requirements that consumers receive relevant information that advertisers would prefer they not hear.

Public Citizen filed an amicus brief before the panel, and believes that a brief addressing the panel's decision may assist the Court in determining whether to grant rehearing.

ARGUMENT

I. The panel majority's holding that San Francisco's warning requirement does not qualify for relaxed First Amendment scrutiny under *Zauderer*'s reasonable-relationship standard because it is misleading merits en banc review.

In this case, the industry plaintiffs challenge San Francisco's requirement that advertisers of soft drinks and other sugar-sweetened beverages include in some advertisements the warning that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay"—a warning that states an undoubted fact. In *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court held that a commercial advertiser's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal," and is "adequately protected" if a disclosure is "reasonably related" to a state interest. 471 U.S. at 651. A straightforward application of *Zauderer* compels the conclusion that San Francisco's warning is constitutional because it is reasonably related to the substantial government interest in informing consumers of health consequences of their dietary choices. "There is no question that protecting

the health and safety of consumers is a substantial government interest." *CTIA*, 854 F.3d at 1118.

Before the panel, industry organizations challenging San Francisco's disclosure requirement attempted to handcuff governmental efforts to provide health information to consumers by seeking to limit application of *Zauderer* to disclosure requirements aimed at consumer deception. More sweepingly, the challengers insisted that disclosure requirements should be viewed as content- and speaker-based restrictions subject to some "heightened" scrutiny, perhaps even strict scrutiny, rather than *Zauderer*'s reasonable-relationship standard.

The panel rejected these broadest iterations of the industry assault on disclosure. It recognized that the strict scrutiny applicable to content-based non-commercial speech restrictions is inapplicable to commercial speech regulations, and that commercial speech "regulations that 'impose a disclosure requirement rather than an affirmative limitation on speech' are governed by the lesser standard set forth in *Zauderer*." Slip op. 12 (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010)). And, following the recently established circuit precedent of *CTIA*, 854 F.3d at 1117, the panel recognized that *Zauderer*'s reasonable-relationship standard

"applies beyond the context of preventing consumer deception," and extends to disclosures reasonably related to any "substantial government interest." Slip op. 15.

What the panel gave with one hand, however, it took away with the other. The panel majority refused to grant San Francisco's warning the benefit of review under *Zauderer*'s reasonable-relationship standard because it concluded that the warning's "factual accuracy" was "controversial." Slip op. 20. The majority held that the warning misleadingly suggests that "sugar-sweetened beverages contribute to these health conditions regardless of the quantity consumed or other lifestyle choices," *id.* at 20, and that sugar-sweetened beverages are "uniquely" unhealthy as compared with other sources of dietary sugar, *id.* at 22.

As the concurring judge stated, the majority's "conclusion that the warning's language is controversial and misleading" is "tenuous." *Id.* at 28 (Nelson, J., concurring in the judgment). The panel majority's conclusion, moreover, is not just a "tenuous" interpretation of a specific warning. It merits en banc review because it reflects legal principles that conflict with those applied in *CTIA* and decisions of other circuits, and because its approach would call into question many other disclosure requirements that serve substantial

interests in supplying factual information to consumers about advertisers' products and services.

A. The panel majority's "tenuous" conclusion that the San Francisco warning is misleading reflects a view of *Zauderer* that conflicts with the Court's binding precedent in *CTIA*.

The panel's conclusion that San Francisco's warning misleadingly suggests that sugar-sweetened beverages cannot be safely consumed in any quantity rests on an approach *CTIA* explicitly rejected. As *CTIA* held, the *Zauderer* standard requires that "any compelled disclosure must be 'purely factual.'" 854 F.3d at 1117. Language in *Zauderer* referring to the "uncontroversial" nature of the disclosure in that case, *CTIA* held, is not part of *Zauderer*'s "constitutional test" and only "refers to the factual accuracy of the compelled disclosure." *Id.* Moreover, *CTIA* sharply distinguished between a disclosure's factual accuracy and its "subjective impact on the audience." *Id.* Thus, in upholding a requirement that consumers be given safety information about exposure to radiofrequency radiation from cell phones, *CTIA* began by focusing on the "literal[] tru[th]" of the "text of the compelled disclosure," taken "sentence by sentence." *Id.* at 1119. The Court acknowledged that "a statement may be literally true but nonetheless misleading and, in that sense, untrue." *Id.* But in considering whether the cell-phone disclosure was

misleading, the court again focused on the absence of language in the disclosure that had misleading implications and declined to speculate that readers would interpret it in a way that would "stoke consumer anxiety." *Id.* at 1120.

The panel here took the opposite approach. Although quoting *CTIA*'s holding that "subjective impact on the audience" does not determine whether there is controversy over a disclosure's factual accuracy, slip op. 15 n.5, the panel majority proceeded to base its conclusion that the disclosure is misleading on speculation about its subjective impact on its audience, rather than on the language of the disclosure. Thus, although the disclosure accurately states that drinking sugar-sweetened beverages "contributes to obesity, diabetes, and tooth decay," the panel majority assumed that consumers would interpret it to mean that these health conditions will follow regardless of how little soda they drink and their other dietary and lifestyle choices. *See* slip op. 20–21. Likewise, although nothing in the text suggests that *only* beverages with added sugar contribute to obesity, diabetes and tooth decay, the majority posited that consumers would infer that sugar-sweetened beverages "contribute[] to these health risks in a way that other sugar-

sweetened products do not, regardless of consumer behavior," *id.* at 22—merely because the disclosure "focus[es] on a single product," *id.* at 21.

The panel majority's mode of analysis would have led to the opposite result in *CTIA*. There, the Court considered the City of Berkeley's requirement that cell-phone retailers disclose that the federal government has required cell phones to comply with radiofrequency radiation guidelines "[t]o assure safety" and that carrying a phone in a pocket or tucked into a bra "may exceed the federal guidelines for exposure to RF radiation." *See* 854 F.3d at 1111. Under the approach of the panel majority in this case, the Berkeley disclosure, although entirely accurate, would fall outside of *Zauderer* because of the possibility that consumers would understand it to mean that "carrying a cellphone in one's pocket is unsafe," as the dissent in *CTIA* argued. 854 F.3d at 1124 (Friedland, J., dissenting). The approach of the panel here would also have condemned Berkeley's disclosure as misleading because it applied only to cell phones and not to other sources of radiofrequency radiation (or other products that pose comparable degrees of risk). With *CTIA*'s status as binding precedent now firmly established by the Court's denial of en banc rehearing in the case, *see* 2017 WL 4532465 (Oct. 11, 2017), en banc review is warranted

here to address the non-uniformity in precedent created by the panel majority's decision in this case.

The panel majority's deviation from *CTIA*, and the resulting need for en banc review, is highlighted by the degree to which the result here rests on particularly unrealistic suppositions about the way consumers are likely to react to San Francisco's warning. Given the extent to which consumers accept foods and beverages containing sugar as large parts of their diets, the possibility that they will interpret this disclosure as a warning that beverages with added sugar cannot be consumed in any quantity without dire health consequences is remote. The panel majority's suggestion that San Francisco could avoid any such misleading implication by rephrasing the warning to state that "*overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay," slip op. 21, does nothing to help matters. A major part of the problem the disclosure seeks to address is that consumption of sugar-sweetened beverages at levels consumers perceive to be *normal and moderate*—for example, a single average-sized serving daily—exceeds recommended levels for total added dietary sugar and contributes substantially to the excess caloric intake that leads to obesity and diabetes. *See* SF Merits Br. 5-6. Qualifying the disclosure to warn only against

overconsumption would, therefore, mislead many consumers into believing that *their* levels of consumption are perfectly safe. This case thus strikingly illustrates how the panel majority's approach of searching factual disclosures to find misleading implications threatens to interfere with the most effective means of conveying needed information to consumers about consequences of their marketplace choices.

B. The panel majority's holding that San Francisco's warning is misleading because it is under-inclusive conflicts with *Zauderer* and decisions of other circuits.

The panel's conclusion that San Francisco's disclosure is misleading because it applies only to "a single product," slip op. 21, also threatens to place this Circuit's precedent out of step with that of the Supreme Court and other circuits. *Zauderer* itself emphasizes that a commercial disclosure requirement is not "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. The Court reasoned that "governments are entitled to attack problems piecemeal" except when such policies implicate "rights so fundamental that strict scrutiny must be applied." *Id.* "The right of a commercial speaker not to divulge accurate information," however, "is not such a fundamental right." *Id.*

Following *Zauderer*, the Second Circuit has rejected arguments that disclosure requirements may be challenged because they address only some aspects of a problem—even when the products singled out for disclosure may contribute *less* to the problem than other causes that are not subject to similar requirements. In *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), the Second Circuit upheld a requirement that labels for fluorescent lamps containing mercury disclose that fact and provide information about safe disposal. The court rejected the manufacturers' argument that the disclosure requirement could not be sustained under *Zauderer* because it might "ultimately fail to eliminate all or even most mercury pollution in the state" in view of the fact that "the largest source of mercury in the environment does not come from lamps." *Id.* at 115–16. Citing *Zauderer*'s rejection of under-inclusiveness challenges to disclosure requirements, the court held that the government was free to use disclosure to address even a "subsidiary cause of a problem rather than its primary cause." *Id.* at 116.

Similarly, in *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009), the Second Circuit upheld New York City's requirement that chain restaurants post calorie information on

menus and menu boards to increase consumer awareness of the impact of dietary choices. The restaurants objected in part because the requirement applied only to ten percent of New York City restaurants, *see id.* at 133 n.22, and because, by singling out calorie information for disclosure, it supposedly "communicate[d] to … customer that calorie amounts should be prioritized among other nutrient amounts," *id.* at 134. The Second Circuit again rejected such "under-inclusiveness" attacks under *Zauderer*, and held that the government was entitled to make "rational" choices to "focus its attention" on particular aspects of the problem addressed by a disclosure requirement. *Id.*[2]

By contrast, the panel majority here found San Francisco's disclosure misleading because of its under-inclusiveness—its failure to apply to "advertisements for other products with equal or greater amounts of added sugars and calories." Slip op. 21. In a footnote, the panel asserted that its holding was not inconsistent with *Zauderer*'s recognition that the government may "attack problems piecemeal" because "San Francisco's warning requirement here is problematic because it is potentially misleading, not

[2] In *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), the Sixth Circuit similarly held that federally required tobacco warnings were not inaccurate because they selectively focused on particular risks and did not discuss all health risks associated with tobacco use. *See id.* at 568 n.16 (Stranch, J., for the majority).

because it 'does not get at all facets of the problem it is designed to ameliorate.'" *Id.* at 22 n.9.

In this way, the panel majority's opinion allows an under-inclusiveness challenge to be recast as a claim that a disclosure is "misleading" whenever the government has chosen to attack a problem selectively by applying a disclosure requirement to one source or aspect of that problem but not others. In such circumstances, the holding allows a challenger to claim that the disclosure requirement is misleading in suggesting that the product or activity to which the disclosure requirement applies is somehow uniquely a source of the problem—a claim that would have been just as applicable to the mercury-disclosure requirement in *Sorrell* or the chain-restaurant calorie-disclosure requirement in *New York State Restaurant Association*. By smuggling under-inclusiveness in through the back door, the panel majority's decision inhibits the government's ability to make rational choices about which facets of a problem should be prioritized and are most amenable to being addressed by factual disclosures.

Here, San Francisco's decision to require warnings on ads for sugar-sweetened beverages reflects a rational choice to focus on a single type of product because of the prevalence of consumption of that product in amounts

that contribute substantially to the excessive levels of dietary sugar that lead to obesity, diabetes and tooth decay. The choice does not reasonably imply that *only* sugar-sweetened beverages contribute to those conditions, just that San Francisco has drawn the reasonable conclusion that a warning attached to advertising of such beverages will help inform consumers of their role in a major public health problem. *Zauderer* holds that such selective uses of disclosure requirements are legitimate, and the panel majority's conclusion that selectivity makes disclosures misleading is incompatible with that holding.

II. The panel's burden analysis also merits en banc review.

The panel held that San Francisco's requirement that the warning occupy 20 percent of an advertisement's area makes the disclosure unduly burdensome and "chills protected commercial speech." Slip op. 24. The panel's analysis, however, cannot be squared with the decisions of the Supreme Court and other circuits that limit the circumstances in which a disclosure requirement can be found to pose an undue burden.

In *Zauderer*, the Supreme Court briefly alluded to the possibility that "unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." 471 U.S. at 651.

Zauderer did not address what might make a disclosure requirement "unduly burdensome." In a subsequent opinion, however, *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), the Court held that a disclosure requirement is unduly burdensome when 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. Subsequent decisions of courts of appeals have similarly held that disclosure requirements are unduly burdensome when they effectively make it impossible for an advertiser to convey its commercial message in the medium to which the disclosure requirement applies. *See*, *e.g.*, *Dwyer v. Cappell*, 762 F.3d 275, 283–84 (3d Cir. 2014); *Public Citizen, Inc. v. La. Atty. Disc. Bd.*, 632 F.3d 212, 229 (5th Cir. 2011); *Tillman v. Miller*, 133 F.3d 1402, 1404 n.4 (11th Cir. 1998).

The panel acknowledged the precedents, including *Ibanez*, holding that a disclosure requirement is unduly burdensome when it is so intrusive or extensive that "an advertisement can no longer convey its message," slip op. 24 (citation omitted), but then failed to apply that standard. Instead, the panel held, on the basis of mock-ups of ads submitted by the challengers, that San Francisco's warning is unduly burdensome because it "overwhelms other

visual elements in the advertisement." *Id.* That standard is precisely the one the Sixth Circuit rejected in *Discount Tobacco City & Lottery, Inc. v. United States*, when it answered tobacco manufacturers' claim that the required size of warnings on cigarette packages and advertisements "drowns out their speech" by pointing out that they had "not shown that the remaining portions of their packaging are insufficient for them to market their products." 674 F.3d at 567 (Stranch, J., for majority). Likewise, here, as the examples attached to the panel's opinion make plain, the disclosure requirement does not prevent beverage advertisers from conveying their "message"—which consists in each case of nothing more than the name and image of their product (or of people enjoying it), a slogan, and a colored background. Slip op. 20–30. The "visual elements" obscured by the warning are only the colored backgrounds, and even with respect to the backgrounds, the mock-ups appear designed to make the warning more intrusive than it would need to be to comply with the ordinance if, for example, it were positioned at the top, bottom, or side of the advertising image.

Although the warning is not unduly burdensome in the relevant sense—that is, the warning does not make it impossible or impractical for the advertiser to convey its message in its chosen medium—the panel held that

the warning would chill speech because advertisers would choose not to advertise in covered media if the requirement went into effect. *Id.* at 25. The panel thus equated a government warning that an advertiser would *choose* not to convey alongside its own message with a disclosure requirement that "effectively *rules out* advertising in a particular medium," *id.* at 25 (emphasis added)—a leap not supported by the precedent the panel cited. Nothing in *Zauderer* or its progeny suggests that the chilling effects over which *Zauderer* briefly expressed 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.

The panel's holding not only departs from precedent, but also disregards a telling indication that its prediction of chill is overstated: Tobacco and pharmaceutical companies have continued to advertise despite comparably "burdensome" warning requirements. The panel gave its reason for rejecting this historical precedent in a footnote: "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." Slip op. 25 n.11. Those distinctions, however, only suggest that beverage-makers will be *more* likely to continue advertising in the face of a disclosure

requirement: Lacking products that are as addictive as cigarettes, or that doctors can prescribe, soda manufacturers have more need to advertise to maintain demand for their products and differentiate them from their many similar competitors. As with the panel majority's view that the San Francisco warning is misleading, the dubiousness of the panel's reasoning in finding a chilling effect combines with its departure from precedent to underscore the appropriateness of en banc review.

III. The decision broadly threatens the efficacy of commercial disclosure requirements.

The Supreme Court has emphasized that disclosure requirements are a preferred method for regulating commercial speech, *see Zauderer*, 471 U.S. at 651, and this Court has endorsed their use to further any "substantial—that is, more than trivial—government interest," *CTIA*, 854 F.3d at 1117. The panel opinion's view that disclosure requirements fail the test of accuracy when they can be characterized as "misleading" based on speculation about inferences consumers may draw from their failure to include qualifying statements or their focus on specific products or services, together with its conclusion that they have an undue chilling effect when advertisers express unwillingness to continue advertising if they must make required disclosures, threatens a broad

swath of desirable requirements that serve substantial interests in informing consumers.

Consider the statutory requirement that cigarette packages and advertisements carry warnings, including that "[c]igarettes cause strokes and heart disease." 15 U.S.C. § 1333(a)(1). Surely this warning is not misleading because it does not also disclose that not everyone who smokes will fall victim to stroke or heart disease and that other lifestyle choices may increase or decrease the likelihood of that result. Nor is it misleading because other products that are highly correlated with strokes and heart disease, such as foods high in fats and sodium, carry no similar warning. Yet the panel majority's opinion suggests that such theories would present viable bases for arguing that the cigarette warning falls outside *Zauderer*'s standard. Although that warning might well be sustained even under a more stringent level of scrutiny, the possibility that even such a common-sense, factual disclosure, serving an undoubtedly substantial government interest, would be subject to challenge under the panel majority's holding is reason to reconsider that holding.

This example, while particularly striking, is by no means alone. Warnings and disclosures on advertising and packaging, by their very nature,

generally cannot provide exhaustive information and extensive qualifiers about the subjects they address, and they tend to focus on particular products and services, or particular features of those products and services, while omitting others that arguably raise comparably important concerns. In both respects, such disclosures, however accurate, are inevitably vulnerable to challenge as misleading under the panel majority's approach. A few additional examples illustrate the point:

- Federal law directs vehicle manufacturers to label vehicles with their fuel economy. 49 U.S.C. § 32908(b). That disclosure does not mislead consumers into thinking that fuel economy is the only relevant consideration in buying a car.
- Food products containing artificial coloring or flavoring must bear labels so stating. 21 U.S.C. § 343(k). The disclosure does not mislead consumers into thinking that such foods are unsafe to eat in any quantity.
- The Securities and Exchange Commission compels a securities issuer to disclose information about certain officers' executive compensation. 17 C.F.R. § 229.402. The disclosure does not mislead investors into thinking that this information is uniquely relevant to

investment choices, as compared to other information not required to be disclosed.

- Federal law requires that foods be labeled with, among other things, sodium content. *See* 21 U.S.C. § 343(q)(1)(D). The requirement does not apply to food sold in restaurants, *see id.* § 343(q)(5)(A)(i). That disparity does not mislead consumers into thinking that restaurant meals do not contain sodium.

These examples only scratch the surface of disclosures that could be challenged based on the panel majority's expansion of the realm of "misleading" disclosures not entitled to *Zauderer*'s reasonable-relationship scrutiny. When that aspect of the decision is combined with the panel's suggestion that even disclosures that permit advertisers to convey their own messages fully are unduly burdensome if the advertisers object to them strenuously enough, the panel's decision threatens litigation over and, more importantly, potential invalidation of many disclosure requirements whose constitutionality should be secure under *Zauderer*.

CONCLUSION

For the foregoing reasons, this Court should grant panel or en banc rehearing.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

October 26, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and Circuit Rule 29-2(c)(1), I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2). The brief is 4,197 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Scott L. Nelson
Scott L. Nelson

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 October 26, 2017, that all participants in the case are registered CM/EFC users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott L. Nelson
Scott L. Nelson