United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 16-16072, 16-16073

AMERICAN BEVERAGE ASSOCIATION; CALIFORNIA RETAILERS ASSOCIATION,
Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Appellee.

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

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

CORPORATE DISCLOSURE STATEMENT

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae.*

/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this *amicus* brief.[1]

STATEMENT OF INTEREST

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files amicus briefs on behalf of the retail industry.

Amicus and its members have an interest in this case. The RLC's members promote their products and speak on myriad issues. Accordingly, *amicus* strives to protect its members' First Amendment rights to participate fully in the marketplace of ideas. San Francisco's ordinance seeks to compel from retailers and other businesses speech that is both false and misleading. A decision by this Court

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

upholding San Francisco's ordinance would dramatically expand the scope of government power to compel speech by businesses, and would correspondingly undermine the speech rights of *amicus*'s members and other private speakers.

SUMMARY OF ARGUMENT

San Francisco seeks to compel businesses to warn consumers that "Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." S.F. Health Code, art. 42, § 4203. Although the statute purports to apply to any beverage with 25 or more calories per 12 ounces, it expressly excludes certain types of beverages, such as natural fruit juice and milk alternatives (regardless of sugar content), and does not apply to any foods that people eat rather than drink. S.F. Health Code, art. 42, § 4202. As the three-judge panel pointed out, that warning is affirmatively misleading. It "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." Slip Op. at 21. And it conveys the false implication that beverages subject to the statutory warning requirement are uniquely dangerous, even though plenty of foods, as well as some of the exempted beverages, are higher in sugar and calories than the sugar-sweetened beverages singled out in San Francisco's ordinance. San Francisco nonetheless defends its

warning on the ground that *one* possible interpretation of the warning is true, even though other likely interpretations are not.

San Francisco's theory would surely not save a seller who voluntarily made a comparable statement from facing false advertising claims. If a seller of a sugar-sweetened drink exempted from the ordinance, such as chocolate almond milk, attempted to persuade the public to purchase its products by emphasizing that other sugar-sweetened beverages "contribute to" obesity, diabetes, and tooth decay, class-action lawyers would rush to the courthouse door to file a false-advertising suit. An array of federal, state, and local false advertising laws prohibit even literally true statements that may mislead customers. And California state and federal courts have construed false-advertising laws expansively. This Court has held, for instance, that a plaintiff states a false-advertising claim if the allegedly misleading statement "could likely deceive a reasonable consumer"—and has emphasized that motions to dismiss in such cases should be granted only in "rare situation[s]." *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008).

Whatever the scope of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), it does not permit governments to compel speech that, if made by a private seller, could be subject to false advertising claims. *Zauderer* permits forced disclosure of true statements that are "purely factual and uncontroversial," 471 U.S. 626, 651 (1985). A court cannot

deem a statement to be purely factual and uncontroversial for *Zauderer* purposes if it is simultaneously sufficiently misleading to implicate false advertising laws. Moreover, conferring the power *both* to compel misleading statements *and* to ban misleading statements via false-advertising laws would give governments unprecedented power to manipulate private speech in order to "tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011).

ARGUMENT

I. Under San Francisco's Proposed Legal Standard, the First Amendment Would Permit Governments to Compel Misleading Speech From Commercial Actors.

San Francisco seeks to compel retailers and other businesses to append the following statement to advertisements for certain sugar-sweetened beverages: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." Slip Op., at 6. The three-judge panel concluded that San Francisco's ordinance violated the First Amendment both because "the accuracy of the warning [was] in reasonable dispute," and because the warning had the potential to mislead consumers. *Id.* at 21. San Francisco does not seriously dispute this holding. Instead, as explained below, San Francisco takes the far-reaching position that the First Amendment *permits* governments to compel potentially misleading speech, so long as the speech has one possible interpretation that is truthful and would be useful in achieving the government's policy goals.

The three-judge panel concluded that the required warning was potentially misleading in two distinct respects. First, San Francisco's warning "provides the unqualified statement that '[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.'" *Id.* at 20. Yet the FDA has recognized that added sugars "can be a part of a healthy dietary pattern when not consumed in excess amounts." *Id.* (quoting 81 Fed. Reg. 33, 742, 33,760 (May 27, 2016)). "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." *Id.* at 21. Second, San Francisco's 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." *Id.* This renders the message "deceptive," because it "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." *Id.* at 21-22. Indeed, not only does San Francisco's ordinance exclude all foods, but it even excludes certain beverages with higher sugar and calorie content than beverages covered by the ordinance. For instance, the ordinance does not apply to any "almond milk products," "regardless of sugar content." Chocolate almond milk

contains 150 calories per 12 ounces—6 times the statute's 25-calorie threshold—and the second ingredient on its ingredient line[2] is "cane sugar.". *See* https://silk.com/products/dark-chocolate-almondmilk (ingredients and nutritional information for Silk chocolate almond milk). Yet San Francisco excludes that product from its ordinance—thus potentially conveying the inaccurate implication that it is lower in calories than the products subject to the warning.

In its petition for rehearing en banc, San Francisco does not meaningfully challenge the Ninth Circuit's conclusion that the warning, as it will be understood by many reasonable consumers, is "deceptive." *Id.* at 21. Instead, it argues that governments should be *entitled* to compel speech that may mislead consumers. In San Francisco's view, a warning that *overconsumption* of sugar-sweetened beverages may cause harm in some circumstances, though truthful and accurate, would pack insufficient rhetorical punch: "The majority's view that the warning would be more accurate if it used the word 'overconsumption' … fails to recognize that many people underestimate the health risks of their own consumption, which is precisely why a warning is warranted." Rehearing Pet. at 8 n.4. San Francisco also shrugs off the majority's holding that the warning is deceptive by observing that not *everyone* will be deceived. As San Francisco sees it, the panel's refusal to

[2] The FDA's regulations require ingredients to be listed in descending order of predominance. 21 C.F.R. § 101.4.

uphold a "disclosure that may deceive consumers" "erect[s] an unrealistically high standard for the accuracy of consumer warnings." *Id.* at 8. It contends that a warning is deceptive if it "would" deceive consumers, not if it merely "might" deceive consumers. *Id.* at 8-9. San Francisco also argues that forcing businesses to append knowingly deceptive warnings to their advertisements is constitutional so long as those businesses can append their own statements to mitigate that deception: "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." *Id.* at 9.

Thus, under San Francisco's proposed legal standard, governments could compel speech that may be false as understood by many reasonable consumers, and speech that may be literally true but potentially deceptive to consumers. So long as there is no certainty that the compelled speech will mislead, and the compelled speech serves goals that the government deems socially useful, San Francisco would hold that the government has free rein to compel speech from commercial actors. As explained further below, that position is fundamentally incompatible with the central principles animating First Amendment jurisprudence in the commercial context.

II. San Francisco Would Permit Governments To Compel Speech That, If Made By a Private Actor, Would Constitute False Advertising.

San Francisco's argument is particularly striking because, in addition to disregarding the central principles animating First Amendment jurisprudence, it would allow governments to *compel* statements that commercial actors themselves would likely not be allowed to make. That is, San Francisco would force private businesses to put potentially deceptive statements on advertisements; yet if a private business puts a potentially deceptive statement on an advertisement of its own accord, that private business risks being held liable for false advertising.

Sellers of any product—including sugar-sweetened beverages—are subject to an array of false-advertising statutes under federal law, state law, and local law. Under federal law, the Lanham Act, 15 U.S.C. § 1125(a)(1), creates a private right of action against "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any … false or misleading description of fact, or false or misleading representation of fact, which (A) is likely to cause confusion, or to cause mistake," or (B) "misrepresents the nature, characteristics, [or] qualities" of its product. Similarly, the Federal Trade Commission Act makes it "unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement … for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food," or "to induce, directly or indirectly, the purchase in or having an effect

upon commerce, of food." 15 U.S.C. § 52; *see id.* § 55(b) (defining "food" to include "drink"); *see also* 21 U.S.C. § 343(a)(1) and 21 C.F.R. § 101 *et seq.* (provisions of Food, Drug, and Cosmetic Act prohibiting misleading beverage labels).

Similar provisions exist in state and local law. California makes it "unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the product's effectiveness or safety to that of other brands or products, or (3) purport to be based on any fact." Cal. Bus. & Prof. Code § 17508; *see also id.* § 17500 (making it "unlawful" to "disseminate" any "untrue or misleading" statement regarding any "real or personal property or … services."). California also specifically bans false advertising of food products. Cal. Health & Safety Code § 110390. California's Unfair Competition Law defines "unfair competition" to include "unfair, deceptive, untrue or misleading advertising and any act prohibited by" state false advertising law. Cal. Bus. & Prof. Code § 17200. And California's Consumer Legal Remedies Act prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. San Francisco, too, prohibits advertisements that are "calculated to mislead or misinform," S.F. Police

Code, art. 6, § 456, and prohibits the sale of any food or drink with a "misleading" label. S.F. Health Code, art. 8, § 428(a), (d).

These laws do not merely prohibit literally false statements. They also prohibit literally true statements that may have a misleading implication. Under federal law, "[t]o demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the statement was literally false, either on its face or by necessary implication, or that the statement was literally true but likely to mislead or confuse consumers." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *see also Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984) (under the Federal Trade Commission Act, "[t]he failure to disclose material information may cause an advertisement to be deceptive, even if it does not state false facts"). Similarly, the Food, Drug, and Cosmetic Act's implementing regulations prohibit sellers from characterizing their products as "free" of or "low" in a particular nutrient (for instance, "sodium-free" or "low sodium") unless the food has "been specially processed, altered, formulated, or reformulated so as to lower the amount of the nutrient in the food, remove the nutrient from the food, or not include the nutrient in the food." 21 C.F.R. § 101.13(e)(1). For any food that "has not been specially processed, altered, formulated, or reformulated to qualify for that claim," the label must "indicate that the food inherently meets the criteria and shall clearly refer to all foods of that type

and not merely to the particular brand to which the labeling attaches (e.g., 'corn oil, a sodium-free food')." *Id.* § 101.13(e)(2). In other words, although a label saying "sodium-free corn oil" is literally accurate, it nonetheless violates federal regulations because it may implicitly convey the impression that other corn oil brands are not sodium-free.

California false advertising law includes similar provisions making it unlawful to convey a literally true statement that may have a misleading implication. California's Food, Drug and Cosmetic Law states that in determining whether an advertisement is misleading, "all representations made or suggested by statement, word, design, device, sound, or any combination of these, shall be taken into account." Cal. Health & Safety Code § 110290. In addition, "[t]he extent that the labeling or advertising fails to reveal facts concerning the food … or consequences of customary use of the food … shall also be considered." *Id.* California law also incorporates all federal food labeling regulations. Cal. Health & Safety Code § 110100; 17 C.C.R. § 10862.

Cases construing these statutes confirm that they proscribe advertising that is literally true, but may nonetheless convey a misleading impression. California state law similarly prohibits "not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Kasky v. Nike,*

Inc., 45 P.3d 243, 250 (Cal. 2002) (quotation marks omitted); *see also Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Kasky*). California's false-advertising and unfair competition statutes encompass "not only those advertisements which have deceived or misled because they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive." *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332-34 (1st Dist. 1998). Under California law, "it is immaterial under [those] statutes … whether a consumer has been actually misled by an advertiser's representations. It is enough that the language used is likely to deceive, mislead or confuse." *Id.*

Pursuant to the principles set forth above, San Francisco's warning—if made by a private speaker—would likely elicit false advertising claims. For example, if a seller of donuts or chocolate almond milk wanted to dissuade consumers from drinking soft drinks by telling them that soft drinks "contribute to obesity and diabetes," it could be subject to a lawsuit for implying that its product was healthier because it didn't have as much or more sugar than the soft drink. All the plaintiff would have to show to surpass a motion to dismiss is that the statement is "likely to deceive," *Day*, 63 Cal. App. 4th at 332-34. And if the defendant responded only that the statement "might" deceive, as San Francisco claims about its ordinance, that defendant would be unlikely to fare well in court—particularly at the motion to dismiss or summary judgment stage.

Indeed, numerous companies have been subjected to lawsuits in this circuit for far less. For example:

- In *Williams v. Gerber Prod. Co.*, 552 F.3d 934 (9th Cir. 2008), this Court concluded that a plaintiff had stated a claim under California law for false advertising because a product package was ostensibly misleading, even though the listed ingredients were accurate. The panel explained: "[T]he statement that Fruit Juice Snacks was made with 'fruit juice and other all natural ingredients' could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false." *Id.* at 939. Further, "the claim that Snacks is 'just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy' adds to the potential deception." *Id.*
- In *Lam v. Gen. Mills, Inc.*, 859 F. Supp. 2d 1097 (N.D. Cal. 2012), the court found the plaintiff had stated a claim that the phrase "made with real fruit" was misleading under California law even though the product actually contained real fruit. The court observed that "a reasonable consumer might be surprised to learn that a substantial

portion of each serving of the Fruit Snacks consists of partially hydrogenated oil and sugars." *Id.* at 1104.

- In *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, No. 17–cv–03592–RS, 2018 WL 922247, at *5 (N.D. Cal. Feb. 9, 2018), the Court found that plaintiffs stated a claim under California false advertising law where the defendant advertised that its chicken was "100% natural" and that "there's only chicken in our chicken," when trace amounts of antibiotics were found in some of its chicken. Emphasizing that "courts grant motions to dismiss under the reasonable consumer test only in rare situations," the court found that consumers "might purchase Sanderson's products based on a flawed understanding of how Sanderson's chickens are raised." *Id.* at *5-6.

San Francisco's defense of its ordinance in its rehearing petition—that the warnings *might* be deceptive, but need not *necessarily* be deceptive—would not be a defense to a false-advertising claim. Under California false-advertising law, "it is immaterial under the statutes pursuant to which appellants have sued whether a consumer has been actually misled by an advertiser's representations." *Day*, 63 Cal. App. 4th at 332-34. San Francisco therefore seeks to *compel* speech that could be *prohibited* as misleading false advertising if made by a private party.

III. Whatever the Scope of *Zauderer*, It Does Not Permit The Government to Compel False Advertising.

This Court need not make any grand pronouncements about *Zauderer*'s scope in order to resolve this case. Instead, it can resolve this case on a narrow and straightforward ground: whatever the scope of *Zauderer*, it does not authorize governments to compel speech that, if made voluntarily, would give rise to a claim for false advertising. Conversely, accepting San Francisco's argument would fundamentally alter the *Zauderer* doctrine. By its terms, *Zauderer* authorizes compulsion only of true and uncontroversial statements; but San Francisco would transform *Zauderer* into a doctrine that allows governments to compel misleading and controversial statements so long as the government deemed those statements to be in the public interest.

It is beyond dispute that the First Amendment provides vigorous protection to speech in the commercial sphere. "It is a matter of public interest that economic decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366 (2002) (quotation marks and brackets omitted). Indeed, "a particular consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 366-67 (quotation marks and ellipses omitted). Thus, it is ordinarily businesses and consumers—not the government—who decide what to

say in commercial settings. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* at 367 (quotation marks omitted).

Even if the government believes that people may make poor decisions in the marketplace, the First Amendment bars the government from manipulating those decisions by restricting speech. The government may not "prevent[] the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Id.* at 374.

The freedom to decide what to say includes the freedom to decide what not to say. Thus, the First Amendment restricts the government not only from restricting speech, but also from compelling speech. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("Government action … that requires the utterance of a particular message favored by the Government" poses "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion"); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (statute requiring dairy manufacturers to label products from cows treated with growth hormone required manufacturers "to speak when they would

rather not" and thus "contravene[d] core First Amendment values" (quotation marks omitted)). Indeed, compelling speech can be just as harmful to the free flow of ideas as restricting speech. Forcing a seller to convey unflattering information at the point of sale serves the same purpose as banning a seller from portraying the product positively at the point of sale: it shields the public from commercial speech that, in the government's view, makes products appear excessively appealing to would-be buyers.

The Supreme Court has held that under certain circumstances, governments may restrict speech—and compel speech—in commercial settings. But those circumstances are narrow. For instance, governments may restrict commercial speech when it is false and misleading, and thus so valueless and harmful that the interest in banning it outweighs the First Amendment injury in muzzling speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) ("[M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment … does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely" (footnote omitted)). Likewise, governments may sometimes compel product or professional disclosures when the disclosures are true and uncontroversial, and the interest in disclosure outweighs the First Amendment

injury in compelling speech. *Zauderer*, 471 U.S. at 651 (upholding "a requirement that [a lawyer] include in his advertising purely factual and uncontroversial information about the terms under which his services will be available" on the ground that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides").[3]

Of course, most speech lies between these two poles—that is, the government can neither compel it nor restrict it. The speaker does not have to say it, but the speaker can if it wants to. This is clear from *Zauderer*, which authorizes compelled disclosure of only "uncontroversial information," 471 U.S. at 651. The First Amendment plainly would not permit a State to *restrict* all commercial speech that is not "uncontroversial information." Making controversial statements is what the First Amendment is all about.

San Francisco seeks to turn these principles upside down. In San Francisco's view, the same statement can simultaneously be so uncontroversially

[3] Indeed, these holdings are two sides of the same coin. A law compelling the disclosure of a warning can just as easily be conceptualized as restricting speech that lacks the warning. In *Zauderer*, for instance, the Supreme Court framed Ohio's law as a requirement to disclose that clients might be liable for costs, but that law could just as easily be framed as a ban on the unadorned statement that a consumer would not be liable for fees. Likewise here, San Francisco's ordinance can be conceptualized as a bar on businesses communicating positive messages about sugar-sweetened drinks unless those messages are encumbered by the government's chosen warning.

accurate that the government may constitutionally compel it from a seller, and so uncontroversially *inaccurate* that the government may constitutionally ban it if it was made by any other private speaker—including the seller's direct competitor. Thus, if a 7-11 posts a soft drink advertisement in its window, San Francisco insists it can compel 7-11 to state that soft drinks have high sugar content and may contribute to ill health. In San Francisco's view, the warning is so *valuable* that the First Amendment's ordinary prohibition on compelled speech does not apply. But if the grocery store next door posts an advertisement in its window encouraging its customers to buy its chocolate-flavored almond milk by telling customers that soft drinks have high sugar content and contribute to ill health, it would be exposed to false-advertising liability, on the ground that it is so *misleading* that the First Amendment's ordinary prohibition on restricting speech does not apply. That cannot be right.

Or consider this example. Suppose San Francisco decided that it did not want people playing video games because it would be healthier if people exercised instead. In San Francisco's view, the government could force video game manufacturers or retailers to put stickers on video game boxes, instructing consumers that "video games contribute to obesity and heart disease." Of course, many healthy people, who exercise regularly, also play video games—only *excessive* consumption of video games, in a manner that precludes exercise time,

may be harmful to health. Moreover, *any* sedentary activity—including watching television or reading books or working at a desk—also takes away from exercise time. Yet, in San Francisco's view, the First Amendment would allow the government to target video games alone. Even worse, those same video game sellers could be barred by false advertising laws from disclosing *positive* information about video games in a manner that a plaintiff deemed misleading. For instance, if a video game seller touted the educational benefits of a video game, or that video games improve hand-eye coordination, a plaintiff might attempt to bring suit asserting that the seller was also obligated to disclose that the same educational benefits could be attained through other means. The result is that the government could ensure a drumbeat of negative messages about video games in an effort to distort people's view of them—and persuade people not to play them. The First Amendment does not permit this sort of manipulation of the free flow of truthful information.

Not only does San Francisco's position conflict with bedrock First Amendment law, but it is also dangerous. A broad power to *compel* speech, coupled with a broad power to *restrict* speech, would give the government unprecedented power to dictate the content of commercial speech. Not only could the government force commercial speakers to convey the government's preferred messages—even if those messages may be deceptive—but it could simultaneously

muzzle counter-speech. The result would give the government the power to achieve its preferred policy goals by skewing the marketplace of ideas—a power antithetical to the First Amendment. And the result would be deeply ironic, given that *Zauderer* itself was premised on the need to *protect* the public from misleading commercial speech—not to expose the public to it. *See Zauderer*, 471 U.S. 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, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal") (citation omitted)).

For instance, one of San Francisco's own *amici*—the Center for Science in the Public Interest—is simultaneously prosecuting a false-advertising lawsuit in D.C. Superior Court seeking to restrict the speech of the American Beverage Association (ABA), as well as Coca-Cola, while also asking this Court to compel speech. *Praxis Project v. Coca-Cola Co.*, No. 2017 CA 004801 B (D.C. Sup.). In D.C., the plaintiff accuses ABA of engaging in a "pattern of deception," based on statements such as: "There's nothing unique about beverage calories when it comes to obesity or any other health condition." *See id.*, Complaint ¶ 106. These statements are ostensibly deceptive because they omit the fact that the link between "sugar sweetened beverages" and "obesity and diabetes" is "documented." *Id.*, Complaint ¶ 105. Thus, in one jurisdiction, San Francisco's amicus seeks to

compel beverage sellers to make misleading statements, while in a different jurisdiction, that amicus is attempting to prevent those same beverage sellers from making factual statements to correct the record. The effect of these two positions is not to ensure the provision of accurate information to consumers that would assist them in making informed decisions, but rather to skew sellers' speech in order to advance a policy agenda of reducing soft drink consumption. Regardless of whether this lawsuit succeeds, it illustrates the risk of coupling aggressive false-advertising laws with aggressive compelled-speech laws: it would allow States to dictate the content of commercial speech in an effort to manipulate consumption decisions over a high percentage of the products that consumers eat and drink on a daily basis.

In sum, the Court can decide this case narrowly. Whatever the scope of *Zauderer*, it does not authorize governments to compel speech that the government would have the power to ban if made voluntarily. This modest position would provide important protection to the free flow of ideas in the commercial sphere.

CONCLUSION

The judgment of the District Court should be reversed.

March 5, 2018

Respectfully submitted,

/s/ Adam G. Unikowsky

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 5,110 words.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2018, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

/s/ Adam G. Unikowsky