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WESTERN DISTRICT OF TEXAS

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

BY: lad
DEPUTY

AMERICAN BEVERAGE
ASSOCIATION; CONSUMER BRANDS
ASSOCIATION; NATIONAL
CONFECTIONERS ASSOCIATION;
FMI, THE FOOD INDUSTRY
ASSOCIATION,

Plaintiffs,

v.

KEN PAXTON, in his official capacity as
ATTORNEY GENERAL OF THE
STATE OF TEXAS,

Defendant.

Civil Case No. 6:25-cv-00566

**BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND WASHINGTON LEGAL
FOUNDATION IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION**

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I. INTEREST OF *AMICI*¹

The Chamber of Commerce of the United States of America (“Chamber”) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world’s largest business federation, representing approximately 300,000 members directly and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community. As relevant to this case, Chamber members speak on many issues and promote their products and services using all manner of communications. The Chamber supports the First Amendment rights of its members to participate fully in the marketplace of ideas free from improper government regulation, including unwarranted compelled-speech mandates.

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center. WLF promotes free enterprise, individual and economic rights, limited government, and the rule of law. WLF often appears as an *amicus curiae* in important compelled-speech cases. *See, e.g., Moody v. NetChoice, LLC*, 603 U.S. 707

¹ No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Plaintiffs have consented to the filing of this brief, and Defendant is unopposed.

(2024), U.S. Sup. Ct. Dkt. 22-277; *X Corp. v. Bonta*, 116 F.4th 888 (9th Cir. 2024). And WLF's Legal Studies Division, its publishing arm, regularly distributes scholarly papers on the First Amendment's limits on government-compelled speech. *See, e.g.*, Zac Morgan, *It's Time for the Supreme Court to Fix the Zauderer Problem*, WLF Legal Pulse (Sept. 9, 2025), <https://perma.cc/4MVH-VFCY>; Jeremy Broggi, et al., *Proposed Social Media Warning Labels Raise First Amendment Concerns*, WLF Legal Pulse (Oct. 8, 2024), <https://perma.cc/75UF-LZ3C>.

The Chamber and WLF have an interest in this case because section 9 of Texas Senate Bill 25 conflicts with (*inter alia*) the U.S. Constitution's protection for freedom of speech. Section 9 compels speech in violation of the First Amendment, and a decision of this Court on the lawfulness of this mandate could have important consequences for other First Amendment cases affecting the private sector.

II. SUMMARY OF ARGUMENT

Section 9 of Texas Senate Bill 25 compels private companies to repeat government-scripted speech – via a required warning prominently displayed on the product label and retailer website – if their food product contains any one of forty-four specified ingredients. The warning is as follows:

WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom.

Tex. Health and Safety Code § 431.0815(a) & (b); *see also id.* §§ 431.0816, 431.0817. This unorthodox government-compelled warning (counsel for *amici* are not aware of

another remotely like it) is presumably designed to steer consumers away from food products containing the forty-four ingredients. But the warning – which generically calls out only “an ingredient” – doesn’t identify for the consumer the ingredient of interest, doesn’t define “not recommended,” and doesn’t provide the reason the ingredient is purportedly not recommended. What’s more, the law is internally inconsistent (e.g., it says it doesn’t apply to ingredients expressly permitted in the U.S. food supply but then includes many such ingredients) and contains significant errors (e.g., it includes ingredients that are not even permitted in food in the United States²).

Despite the lawfulness of almost all the ingredients in Texas and the United States, section 9 privileges the views (or perceived views) of a few *foreign* authorities. That puts Texas in the dubiously unique First Amendment position of compelling food companies to convey a highly questionable message to consumers that does not even reflect the view of Texas.

The mandatory warning is also confusing as to what “not recommended for human consumption” means and whether all four of the listed foreign authorities purportedly agree on the ingredient’s status. The confusion is manifested in the Texas

² For example, one of the forty-four listed ingredients is “partially hydrogenated oil (PHO).” See Tex. Health and Safety Code § 431.0815(a)(26). Ten years ago, FDA declared PHOs not Generally Recognized As Safe (GRAS) in food, and PHOs were phased out of the U.S. food supply more than four years ago. See *generally* <https://www.fda.gov/food/hfp-constituent-updates/fda-completes-final-administrative-actions-partially-hydrogenated-oils-foods>. It does not benefit consumers for Texas to require a warning about foreign authorities’ views of an ingredient in food that U.S. law prohibits being in the food in the first place.

legislature’s explanation of the law. On August 20, 2025 – two months after it was signed by the Governor (June 22, 2025) and more than two months after it was passed in the House (June 1, 2025) and Senate (May 31, 2025) – the Senate’s Bill Analysis declared that a “[k]ey [p]rovision[]” of the law is that it “[i]ncludes a set list of ingredients *banned* in Australia, the UK, the EU, *and* Canada to be used for labeling purposes.” *See* Bill Analysis, 1-2, Senate Research Center, SRC-CES S.B. 25 89(R) (emphasis added). Whatever the legislature’s belief or intent may have been, very few listed ingredients are not permitted in all four of these foreign jurisdictions, and there is little consensus among the four foreign authorities as to most of them. *See* Plaintiffs’ Motion for a Preliminary Injunction (“Plaintiffs’ Motion”), 6, 10-11, 14.

Texas presumably intends to defend section 9 on the ground “that the government may sometimes ‘requir[e] the dissemination of purely factual and uncontroversial information’ . . . in the context of ‘commercial advertising.’” 303 *Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023). But section 9’s mandated warning is not remotely “purely factual and uncontroversial,” and it compels content- and speaker-based speech that is *not* directed at unlawful conduct or false, misleading or potentially misleading advertising. The required warning is thus subject to heightened scrutiny (at least intermediate or “exacting” scrutiny), and under that test (or any test) it clearly fails First Amendment review. If Texas believes that consumers should pay more heed to what a foreign government has said (or what Texas thinks a foreign government has said) about food safety than to our own Food and Drug Administration, Texas is free to communicate that view at its own expense. But Texas

is not free to force companies to devote their own resources to communicating that view, much less to convey a confusing and misleading message that mischaracterizes what foreign governments have done.

For these and other reasons, as detailed below and in the papers presented to the Court on Plaintiffs’ preliminary injunction motion, this Court should preliminarily enjoin section 9.³

III. ARGUMENT

A. Texas Is Under A Heavy Burden To Justify Its Encroachment On First Amendment Rights.

The First Amendment protects the right to be free from government-compelled speech. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The burden is on the government to justify laws attempting to do so. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). To meet that burden, the government, at a minimum, must come forward with evidence. *Id.* at 770-71; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). The government may not rely on “mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield*, 514 U.S. at 770-71.

Because section 9 does not address any purported illegality or false, misleading, or even potentially misleading advertising, the statute – *at best* for Texas

³ *Amici* agree with Plaintiffs that section 9 is unlawful for other reasons, including preemption by federal law, but focus on Plaintiffs’ First Amendment claim in this brief.

– is assessed by this Court under intermediate or “exacting” scrutiny.⁴ That standard requires Texas to demonstrate that

- its asserted interest is substantial,
- the statute directly advances the substantial interest, *and*
- the compelled-speech solution is not more extensive than necessary.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 564-66 (1980) (“*Central Hudson*”); *Nat’l Inst. of Fam. & Life Advocs.*, 585 U.S. at 766, 773; *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 283 (5th Cir. 2024), *aff’d*, 606 U.S. 461 (2025). Moreover, a law impacting First Amendment rights must be definite and specific, not vague. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

B. *Zauderer* Does Not Help Texas Meet Its Burden.

Section 9 is *not* in the narrow category of speech assessed under the special, more deferential test announced in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), governing corrective disclosures of affirmative solicitations for professional engagements.

Zauderer involved an attorney’s affirmative written commercial advertising soliciting a professional engagement. The attorney’s solicitation said that a prospective client would not have to pay attorneys’ fees. The state of Ohio determined

⁴ To avoid repetition, this brief focuses principally on the reasons why the mandate fails intermediate scrutiny. But as Plaintiffs explain, section 9’s mandate is subject to strict scrutiny. Plaintiffs’ Motion, 9. Section 9 is a content-based regulation of speech that compels individuals to speak a particular message that alters the content of their own speech, and on a controversial topic to boot. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018). For all the reasons why intermediate scrutiny is not satisfied – and more – the mandate also fails strict scrutiny. Plaintiffs’ Motion, 10-12.

that the advertising was deceptive or potentially deceptive because a prospective client (i) wouldn't know the difference between attorneys' fees and litigation expenses, and (ii) may unwittingly be responsible for paying the latter. Therefore, Ohio required the solicitation to add a disclaimer that the prospective client may have to pay expenses. The Supreme Court permitted Ohio's compelled speech because it was a simple, straightforward, narrowly drawn, factual and uncontroversial statement specifically designed to qualify an arguably deceptive aspect of a written affirmative solicitation for professional services. 471 U.S. at 651-53.

Nothing about section 9 fits *Zauderer's* unique and limited circumstances. For example, there is no association between Texas's required warning and any affirmative potentially deceptive statements by the companies the law targets. Put another way, section 9 is not attempting to qualify anything that the food companies are saying about the ingredients; the law is not directed at a potentially confusing or deceptive statement on the label that needs correcting. Rather, the law targets the non-coercive, non-characterizing and non-solicitation-related declaration of ingredients in the legally required on-label ingredient list.⁵ The law applies to any food products that contain one or more of the enumerated forty-four ingredients.

⁵ An on-label ingredient list is required for packaged food sold in the United States. 21 U.S.C. § 343(i); 21 C.F.R. § 101.4. The form and format of the ingredient list is detailed under federal law (*id.*), which does not provide for (does not permit) any characterization of the ingredients as positive, neutral, or negative to nutrition. Any additional or different state law requirement for the ingredient list is expressly preempted. 21 U.S.C. § 343-1(a)(2). Relatedly, and as Plaintiffs point out (Plaintiffs' Motion, 3-4 & n.1), the safety of the U.S. food supply and specific ingredients, including those that the Texas law focuses on, is pervasively regulated under federal law.

Finally, *Zauderer* permitted Ohio to compel a simple, straightforward qualifying statement that was factual, non-controversial and without debate – i.e., a statement that the prospective client may have to pay litigation expenses. There is no comparison between that compelled speech and the speech that section 9 compels, which, as detailed further below and in Plaintiffs’ motion, is a vague warning flawed by serious errors and subject to major exceptions. Plaintiffs’ Motion, 6, 13-15.

The narrow test applied in *Zauderer* thus is irrelevant here. And even if *Zauderer* could be thought to be relevant, a law compelling speech fails even under *Zauderer* if the compelled speech is unjustified or unduly burdensome. *Zauderer*, 471 U.S. at 651; *see also*, *Am. Bev. Ass’n v. City & Cnty. of S.F.*, 916 F.3d 749, 757 (9th Cir. 2019) (*en banc*) (holding that district court abused discretion in denying preliminary injunction against ordinance requiring health warnings on advertisements for certain sugar-sweetened beverages).

For the reasons explained here and in Plaintiffs’ motion, the speech compelled by section 9 flunks that test. Plaintiffs’ Motion, 4, 5-6, 10-11, 14-15. The section 9 warning won’t tell consumers which ingredient in a food product is purportedly not recommended in a foreign jurisdiction. It won’t tell consumers which foreign jurisdiction does not recommend that (unidentified) ingredient. And it won’t tell consumers why that unidentified ingredient is not recommended by that unidentified foreign jurisdiction or why the consumer should be swayed by that fact when our own government has found it safe. Section 9, in short, has the predictable (and thus presumed) effect of scaring consumers away from certain food products – and cannot

be defended as a means of helping consumers make informed decisions. To sum up: because Texas's mandated warning is misleading and often false, it could not pass constitutional muster even if *Zauderer* applied.

C. Texas Cannot Meet Its Burden To Justify The Compelled Speech Under Intermediate Scrutiny.

Because *Zauderer* does not apply here, section 9's warning requirement is subject to either strict scrutiny or intermediate scrutiny. Under the latter, more government-friendly standard, Texas must demonstrate (1) that its asserted interest is substantial, (2) that the requirement directly advances that substantial interest, *and* that (3) the requirement does not restrict speech more extensively than necessary. *Central Hudson*, 447 U.S. at 564-65. Section 9 does not meet any of these requirements (and, *a fortiori*, fails strict scrutiny as well).

1. Texas does not have the required substantial interest in compelling this warning.

Texas has not attempted to ban the forty-four ingredients or declare them unsafe in food or link them to negative health outcomes, and it has failed to show a legitimate interest (compelling or otherwise) in requiring companies to repeat the speech of others – the foreign authorities – that have purportedly made assessments of the ingredients.

Moreover, the law implies that determinations (real or perceived) by four foreign authorities are of interest and relevant to Texas consumers. Assuming that is true (a rather generous assumption), the required warning runs counter to that assumption. Among other things, many of the targeted ingredients are permitted by some of the foreign authorities, and several of the ingredients are permitted by *all* of

them (Plaintiffs’ Motion, 6, 10) – a fact that Texas consumers, if they cared about what these foreign authorities think, would find to *favor* using and consuming the ingredients. And, of course, the ingredients (with limited exception) are entirely lawful in Texas and the United States. *Id.*, n.1. The required warning provides none of that information, impliedly communicates exactly the opposite, and is otherwise confusing and misleading. Such a warning cannot be justified as serving legitimate interests regarding the health and safety of Texas consumers.

To the extent the warning serves the apparent goal of making products with certain ingredients less appealing to consumers, that is not permissible, either: Disparaging a commercial product is not a legitimate purpose for government-compelled speech. *See, e.g., Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 73-74 (2d Cir. 1996). Indeed, when “divergent views” exist on an issue of public debate, “the general rule is that the speaker and the audience, not the government, assess the value of the information.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) (quoting *Edenfield*, 507 U.S. at 767).

National Association of Wheat Growers is particularly instructive. There, the Ninth Circuit upheld an injunction against the enforcement of the warning required by California’s Proposition 65 as to the chemical glyphosate. Concluding that the warning was not purely factual and uncontroversial, the court highlighted that there was “robust disagreement” in the scientific community about whether glyphosate is carcinogenic. *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1277-78 (9th Cir. 2023) (“*Wheat Growers*”), cited favorably in *Free Speech Coal.*, 95 F.4th at 283-84; see

also *Wheat Growers*, 85 F.4th at 1282-83 (concluding that mandated warning failed intermediate scrutiny under *Central Hudson*).

2. The warning does not advance a substantial interest.

Given the record detailed above and in Plaintiffs' motion, the government-compelled warning will be ineffective. At best for Texas, the warning will have an indirect, remote, and unclear impact. That is not sufficient to overcome First Amendment protections. *Central Hudson*, 447 U.S. at 564. Texas must demonstrate much more, i.e., that its compelled warning will significantly address a real problem. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-06 (1996).

The warning is also flawed by serious errors (Plaintiffs' Motion, 6, 10, 14), subject to major exceptions (*id.*, 6, 13-14), and vague (*id.*, 6, 15-16). The warning raises far more questions than it answers, including (as noted above) which "ingredient" in the product is the warning directed at, what does "not recommended" mean, why is the ingredient not recommended and what is the basis for that determination, how many of the four foreign authorities have said the ingredient is not recommended, and how many other ingredients are relevantly similar to the enumerated ingredients but are not covered in the Texas law.

3. The warning mandated by Texas is more extensive than is needed to further a substantial interest.

If Texas wishes to criticize ingredients in food, it is welcome to speak for itself. Indeed, Texas is free, if it so chooses, to advocate for the view that the European Union’s (or Australia’s, or Canada’s, or the United Kingdom’s) food-safety determinations are more reliable than those of our own government. What Texas may not do is compel others to convey this controversial, and questionable, message at great disruption and expense (*see, e.g.*, Plaintiffs’ Motion, 19). *Free Speech Coal.*, 95 F.4th at 284; *Nat’l Fed’n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 213 (5th Cir. 2011); *Wheat Growers*, 85 F.4th at 1283. Texas was required to explore less speech-burdening alternatives before imposing a compelled-speech mandate. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Section 9 obviously fails under this prong: the conspicuous warning is a highly ineffective and burdensome method of conveying Texas’s apparent view. As discussed above, the warning is so uninformative as to be incoherent, as well as often erroneous or misleading. All Texas is telling a consumer is that “an ingredient” in this product – without telling the consumer which one – is “not recommended” by at least one of these four foreign governments – without saying which foreign government or what “not recommended” means. Whatever goal might be legitimately achieved by this confusing mandate can be more effectively met by more targeted methods that would encroach less (or, indeed, not at all) on private businesses’ free speech rights.

IV. CONCLUSION

For the reasons set forth above and in Plaintiffs' motion, the Court should grant Plaintiffs' motion for preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2025, I caused to be electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system. I understand that notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Brandt Leibe
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