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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, AND CALIFORNIA STATE ADVERTISING ASSOCIATION,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Civil Action No. 3:15-cv-03415-EMC

AMICUS BRIEF BY THE RETAIL LITIGATION CENTER, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS

Judge: Hon. Edward M. Chen.
Courtroom: Courtroom 5, 17th floor.
Date: February 26, 2021.

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INTEREST OF AMICI CURIAE[1]

The Retail Litigation Center, Inc. (the "RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. 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. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 150 judicial proceedings of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including the Supreme Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents 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 that raise issues of concern to the Nation's business community.

Amici and their members have an interest in this case. *Amici*'s members promote their products and speak on myriad issues. Accordingly, *amici* strive to protect their 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

[1] No counsel for a party authored this brief in whole or in part. No one other than *amici*, their members, or their counsel contributed any money to fund its preparation or submission.

both false and misleading. A decision upholding San Francisco's ordinance would dramatically expand the scope of government power to compel speech by businesses, and would undermine the speech rights of *amici*'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) can cause weight gain, which increases the risk of obesity and type 2 diabetes." 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. San Francisco's warning is affirmatively misleading. It does not state that *overconsumption* of sugar-sweetened beverages causes weight gain. 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.

Indeed, San Francisco's ordinance is so misleading that a seller who voluntarily made a comparable statement would face 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 "can cause weight gain," 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 not only false statements, but also literally true statements that may mislead customers. And California state and federal courts have construed false-advertising laws expansively. The Ninth Circuit has held, for instance, that a plaintiff states a false-advertising claim if the allegedly misleading statement "could likely deceive a reasonable consumer." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008). Indeed, some federal authority holds

that the Federal Trade Commission may prevail in an enforcement action if even a "significant minority of reasonable consumers" would "likely" interpret an advertisement in a misleading manner. *See, e.g.*, *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) (quotation marks omitted).

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." *Id.* at 651. A court cannot deem a statement to be factual and uncontroversial for *Zauderer* purposes if it is simultaneously sufficiently misleading to implicate false advertising laws. Moreover, conferring the power to compel misleading statements 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, Governments Could 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: "Drinking beverages with added sugar(s) can cause weight gain, which increases the risk of obesity and type 2 diabetes." S.F. Health Code, art. 42, § 4203. This warning is misleading to consumers in two distinct respects. First, it suggests that sugar-sweetened beverages "cause" weight gain in the same sense as, for instance, peanuts cause reactions in people with peanut allergies. But that is untrue. A calorie in a sugar-sweetened beverage is no more the "cause" of weight gain than any other calorie. To the extent San Francisco is trying to convey that *overconsumption* of sugar-sweetened beverages, in conjunction with overconsumption of other foods and beverages, may in the aggregate yield weight gain, that is not what the warning states.

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Second, San Francisco's warning is required exclusively on advertisements for sugar-sweetened beverages, and not on advertisements for other products that have just as many calories. Hence, San Francisco's warning is deceptive, because it incorrectly implies that there is something uniquely dangerous about certain sugar-sweetened beverages that does not exist in other products—even other sugar-sweetened products. 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." S.F. Health Code, art. 42, § 4202. Chocolate almond milk contains 150 calories per 12 ounces—6 times the statute's 25-calorie threshold— and its second ingredient[2] is "cane sugar." *See* Dark Chocolate Almondmilk: Nutritional Facts, 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 conveying the inaccurate implication that its consumption is less likely to lead to weight gain than the products subject to the warning.

In its summary judgment motion, San Francisco does not dispute that a calorie from a sugar-sweetened beverage has the same effect as a calorie from any other source. Dkt. 171 at 9 (acknowledging FDA's statement that "excess calories from any source leads to weight gain" (quotation marks omitted)). Nor does it dispute that its law exempts foods and beverages that contain the same amount of calories or sugar than the sugar-sweetened beverages singled out in the ordinance. Instead, it argues that sugar-sweetened beverages are "associated with" weight gain, in light of the overall consumption and exercise patterns of the cohort of "typical" persons who consume such beverages. Dkt. 171 at 23-24 (arguing that sugar-sweetened beverages are "associated with weight gain under typical consumption patterns" because the "current level of added sugars consumption exceeds what can be

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

reasonably consumed within calorie limits, most people do not have room in their diets for the excess calories supplied by [sugar-sweetened beverages], and people who drink [sugar-sweetened beverages] are particularly unlikely to engage in the amount of physical activity that would be required to offset the calories from [sugar-sweetened beverages]" (internal quotation marks omitted)). And because "typical" sugar-sweetened beverage consumption patterns supposedly lead to overconsumption, San Francisco claims it is entitled to compel warnings on only sugar-sweetened beverages and not other products. *Id.* at 24 (arguing that "[sugar-sweetened beverages]—in standard serving sizes and under typical dietary patterns—are likely to lead to weight gain, while the same is not equally true of other sources of calories or added sugars"). According to San Francisco, if a consumer were to draw the incorrect inference that sugar-sweetened beverages are uniquely dangerous products, then that is simply too bad for the beverage manufacturer: "it has never been the rule that a health warning is invalid unless it leads consumers to form medically accurate estimates of the level of risk," and "it is not possible to include extensive detail and explanation without compromising the purpose of providing the warning." *Id.* at 25-26. San Francisco also claims that—regardless of whether the statements are objectively misleading—there is "no evidence" of any "misunderstandings" by consumers. *Id.* at 25.[3]

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 the warning will advance San Francisco's "purpose of providing the warning," it should be upheld, regardless of whether it is medically accurate or whether consumers will draw medically accurate inferences from it. As explained further below, that position is incompatible with the central principles animating First Amendment jurisprudence in the commercial context.

[3] For the reasons stated by Plaintiffs, San Francisco's claim is factually inaccurate: Abundant evidence establishes that the consumers misunderstand the warnings. *See* Dkt. 168 at 10-12, 19-21.

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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 voluntarily. 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 "[a]ny 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; Cal. Code Regs. tit. 17, § 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 William*, 552 F.3d at 938 (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 caloric beverages containing naturally occurring sugar (like certain fruit juices) wanted to dissuade consumers from consuming soft drinks by telling them that soft drinks "can cause weight gain, which increases the risk of obesity and type 2 diabetes," the seller could be subject to a lawsuit for implying that its product was less likely to cause weight gain because it did not have as much sugar as the soft drink. All the plaintiff would have to show to defeat 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 that "it is not possible to include extensive detail and explanation without compromising the purpose of providing the advertisement," as San Francisco claims about its compelled warning, Dkt. 171 at 26, that defendant would be unlikely to fare well in court.

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

- In *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008), the Ninth Circuit 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.* (citation omitted).
- In *Tucker v. Post Consumer Brands, LLC*, No. 19-cv-03993, 2020 WL 1929368 (N.D. Cal. Apr. 21, 2020), the court found that plaintiffs stated a claim under California false advertising law that the product name "Honey Bunches of Oats," and the images on the product's packaging, were misleading

because they "deceptively convey that honey is a primary or significant sweetener in the cereal." *Id.* at *5. There was "no dispute that the cereal contains some honey, and in that sense, certain aspects of the packaging could be considered accurate." *Id.* Moreover, "the package does not make any objective representations about the amount of honey in the cereal." *Id.* But the court nonetheless held that "a reasonable consumer could see the prominent honey-related words and imagery and be deceived into thinking the cereal contained relatively less refined sugar and more honey." *Id.*

- In *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005 (N.D. Cal. 2018), the court found that plaintiffs stated a claim under California false advertising law where the defendant advertised that its chicken was "100% [n]atural" and that "there's only chicken in our chicken," when trace amounts of antibiotics were found in some of its chicken. *Id.* at 1014-15. The court found that consumers "might purchase Sanderson's products based on a flawed understanding of how Sanderson's chickens are raised." *Id.*
- In *Lam v. General 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.

A plaintiff's lawyer could argue, based on identical reasoning, that San Francisco's warning creates a misleading impression of the alleged dangers of sugar-sweetened beverages relative to other products. San Francisco therefore seeks to *compel* speech that could be *prohibited* as misleading false advertising if made by a private party.

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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 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). First Amendment law thus recognizes that, "[t]he 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, 72 (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" (internal quotation marks omitted)). Indeed, compelling speech can "manipulate the public debate" as much as restricting speech. *Turner Broad. Sys.*, 512 U.S. at 641.

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 flow[s] 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").[4]

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; *accord NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (holding that *Zauderer* did not justify California law requiring compelled disclosure of information on state-sponsored abortion providers, "anything but an 'uncontroversial' topic."). 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. The implication of San Francisco's position is that the same statement can simultaneously be so uncontroversially *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 deli posts an advertisement for a sugar-sweetened beverage in its window, San Francisco insists it can compel the deli to state that such beverages contain added sugar and can cause adverse health conditions. 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

[4] 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.

store next door posts an advertisement in its window encouraging customers to buy its sugar-sweetened donuts by claiming that sugar-sweetened beverages contain added sugar and can cause adverse health conditions, 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 "playing video games can cause weight gain, which increases the risk of obesity and type 2 diabetes." Of course, many healthy people, who exercise regularly, also play video games—only *excessive* playing of video games that precludes exercise time, may be harmful to health. Moreover, *any* sedentary activity—including reading books or doing a jigsaw puzzle 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. 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

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Zauderer itself was premised on the need to *protect* the public from misleading commercial speech—not to *propound* 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" (internal citation omitted)).

In sum, the Court can decide this case in Plaintiffs' favor 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

Plaintiffs' motion for summary judgment should be granted.

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