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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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| THE AMERICAN BEVERAGE ASSOCIATION, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION,<br><br>Plaintiffs,<br><br>vs.<br><br>THE CITY AND COUNTY OF SAN FRANCISCO,<br><br>Defendant. | Case No. **3:15-cv-03415-EMC**<br>Assigned to the Hon. Edward M. Chen<br><br>***AMICUS CURIAE* BRIEF OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**<br><br>Hearing Date: April 7, 2016<br>Time: 1:30 p.m.<br>Judge: Edward M. Chen<br>Place: Courtroom 5 |

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## INTRODUCTION

The San Francisco Board of Supervisors adopted new health code provisions based on the dubious proposition that the government knows best when it comes to advising people about nutrition. They predicated their highly restrictive action on the dangerous theory that local officials may constitutionally commandeer space on certain types of advertisements whenever they feel like sending a government message. The false premise on which the ordinance is based is belied by repeated examples of governmentally-generated bad health advice that ultimately had to be withdrawn or "modified."

The resulting law conflicts with decades of judicial decisions holding it is "incompatible with the First Amendment" to censor or otherwise burden speech based on fear that people will make bad decisions, or to promote "'what the government perceives to be their own good.'" *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2671 (2011) (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1986) (plurality op.)); *Retail Digital Network, LLC v. Applesmith*, __ F.3d ___, 2016 WL 142610, at *8 (9th Cir. Jan. 7, 2016) ("*RDN*"). San Francisco's conscription of private speech in an attempt "to tilt public debate" regarding sugar-sweetened beverages "in a preferred direction" is unsound in light of unfortunate past experience and as a matter of constitutional principle. *Sorrell*, 131 S. Ct. at 2671-72.

*Amicus curiae* the Association of National Advertisers, Inc. ("ANA"), hereby submits this brief in support of Plaintiffs' motion for a preliminary injunction because of the fundamental constitutional principles at stake. The important issues in this case affect not only sugar-sweetened beverages, but *any* lawful product or service about which the government believes it knows best. If this Court were to approve the legal basis underlying this Ordinance to conscript sugar-sweetened beverage advertisers to deliver the City's message, there is no reason the San Francisco Board of Supervisors could not do so for a multitude of other products, as could every one of the some 30,000 city, town, and county governments in the United States.

## INTEREST OF *AMICUS*

*Amicus curiae* the ANA provides leadership for the advertising industry that advances marketing excellence and shapes the future of the industry. Founded in 1910, the ANA's membership includes more than 700 companies with 10,000 brands that collectively spend over $250 billion annually in marketing and advertising. The ANA also includes the Business Marketing Association and Brand Activation Association, which operate as divisions of the ANA, and the Advertising Educational Foundation, which is an ANA subsidiary. The ANA advances the interests of marketers and protects the well-being of the marketing community. The ANA also serves its members by advocating for clear and coherent legal standards for advertising.

The ANA's interest here focuses on preserving the robust protections afforded to advertising by the First Amendment. In particular, it has a strong interest in safeguarding the longstanding vitality of constitutional protections for commercial speech. *See Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The Supreme Court has recognized that "[a] consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell*, 131 S. Ct. at 2664 (internal quotation marks and citation omitted). The commercial speech doctrine has steadily evolved, and since the forerunner cases of *Bigelow v. Virginia*, 421 U.S. 809, 818-20 (1975), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Supreme Court has significantly increased the extent of protection it affords such expression.[1]

[1] Over the ensuing decades the Court invalidated: (1) prohibitions on the use of illustrations in attorney ads, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985); (2) an ordinance regulating the placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a state ban on using "CPA" and "CFP" on law firm stationery, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994); (5) a restriction on listing alcohol content on beer labels, *Rubin v. Coors*, 514 U.S. 476, 491 (1995); (6) a state ban on advertising alcohol prices, *44 Liquormart*, 517 U.S. at 165; (7) a federal ban on broadcasting casino advertising, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); and (8) federal limits on advertising drug compounding practices. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 377 (2000).

Any regulation of truthful advertising must directly and materially serve an important governmental interest without restricting speech more extensively than necessary to serve that interest. *Central Hudson*, 447 U.S. at 565-66. The Court's "decisions involving commercial speech are grounded in faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646. Thus, the First Amendment requires that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Western States*, 535 U.S. at 371. Additionally, the ANA seeks to ensure that courts remain vigilant in barring the government from compelling overly burdensome disclosures or co-opting private speakers to deliver government propaganda. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986).

## BACKGROUND

San Francisco Ordinance 100-15 amends the City Health Code to require, as of July 25, 2016, that posted ads for "sugar-sweetened beverages" carry a "warning" – covering a significant portion of ad space – against presumed "harmful health effects of consuming such beverages." S.F. Ord. 100-15, File No. 150245, passed July 16, 2015, approved July 26, 2015, codified at S.F. Health Code § 4201, *et seq.*, preamble. Specifically, this "Warning Mandate" requires sugar-sweetened beverage ads within City limits on any paper, posters or billboards; in stadiums, arenas and transit shelters; in or on any train, bus, car or other vehicle; or on any wall or other surface; to include the following text:

> WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.

*Id.* § 4203(a); *see also id.* § 4202. The warning must cover at least 20% of the advertisement, and be enclosed in a rectangular border the same color as the warning. *Id.* § 4203(b). The Director of Health is authorized to increase the proportional size of the warning. *Id.* § 4203(c).

Ordinance 100-15 defines "sugar-sweetened beverages" as any "Nonalcoholic Beverage sold for human consumption that has one or more added Caloric Sweeteners and contains more than 25 calories per 12 ounces of beverage, or any powder or syrup with added Caloric Sweetener … used for mixing, compounding or making Sugar-Sweetened Beverages." *Id.* § 4202. This definition encompasses not only sodas, but also sports and energy drinks, sweetened juices, vitamin waters and iced teas, and even beverages that federal Food and Drug Administration ("FDA") rules define as "low calorie." 21 C.F.R. § 101.60(i)(A)

At the same time, the Warning Mandate excludes – regardless of sugar-content or calories – beverages with "solely 100 percent Natural Fruit Juice, Natural Vegetable Juice, or a combined Natural Fruit Juice and Natural Vegetable Juice." S.F. Health Code § 4202. It also excludes syrups, powders and base products sold and intended for individual consumers to mix, compound, or make sugar-sweetened beverages. *Id.* The sugar-sweetened beverage definition also excludes "milk" – including some "flavored milk" – as well as "milk alternatives."[2]

The Warning Mandate exempts not only various types of beverages, but also "any advertisement … in any newspaper, magazine, periodical, advertisement circular or other publication," or that is "on television, the internet, or other electronic media." *Id.* It also excludes all existing ads other than "general advertising signs" permitted by the City prior to the Ordinance's Operative Date, thus exempting all point-of-sale advertisements permitted before July 25, 2016. *Id.* § 4203(d). There are also exemptions for all ads on sugar-sweetened beverage packaging, for any menus or handwritten listings or representations of beverages that may be served or ordered for consumption at a retailer's establishment, and for any display or representation of, or other information about, sugar-sweetened beverages. *Id.* § 4202.

[2] *Id.* It also excludes products "for consumption by infants," "medical foods," and products "designed as supplemental, meal replacement, or sole-source nutrition" or "sold in liquid form designed for use as … nutritional therapy" or for asserted "weight reduction." *Id.*

## ARGUMENT

In enacting Ordinance 100-15, the Board of Supervisors clearly paid no heed to the core limit imposed by the First Amendment that, when the government seeks to further its interests in the commercial arena, "regulating speech must be a last – not first – resort." *Western States*, 535 U.S. at 373. By going directly to targeting speech about sugar-sweetened beverages rather than utilizing government-funded information campaigns or attempting to regulate conduct in some way, the Board flaunted Supreme Court decisions that stress how "speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the ... listener's opportunity to obtain information about products." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001).

There is no justification for the Warning Mandate in which the government commandeers space on private parties' ads in order to control public debate and alter individual behavior – purposes foreign to the First Amendment. *See, e.g.*, *44 Liquormart*, 517 U.S. at 510, 516; *Sorrell*, 131 S. Ct. at 2671-72. Federal law already requires nearly all packaged food and drinks – including those subject to the Warning Mandate – to display both nutritional information, including calorie information, and an ingredient list on the package. *See* 21 C.F.R. §§ 101.4, 101.9. *See also generally* FDA, *A Food Labeling Guide*, www.fda.gov/downloads/Food/GuidanceRegulation/UCM265446.pdf. These rules also require use of each ingredient's "common or usual name," including specifically using "sugar" in place of industry names such as "sucrose." 21 C.F.R. §§ 101.4(a)(1), (b)(20).[3]

The Board asserts that "U.S. food labels do not distinguish between sugars that naturally occur in foods and added sugars, making it difficult for consumers to know the amount of added sugars that are in food or beverages." S.F. Health Code § 4201. But the distinction between natural and added sugars is elusive, if not outright illusory, when it comes to the various con-

[3] Proposed rules would go even further by requiring labels to separate out "added sugars" and setting a "Daily Reference Value" for them. *See Food Labeling: Revision of the Nutrition and Supplement Facts Labels*, 80 Fed. Reg. 44,303 (July 27, 2015).

ditions listed in the Warning Mandate. The relative health effects of natural fruit juices and beverages with added sugar are pretty much the same. *See infra* notes 5, 7. The point is, the long-term overconsumption of any food with calories can contribute to weight gain or the kinds of adverse health effects listed in San Francisco's Warning.

In any event, current food labels provide consumers with full information about both "natural" and "added" sugars. U.S. food labels require listing not only caloric and sugar content, but also the actual ingredients, in descending order of predominance by weight. 21 C.F.R. § 101.4(a)(1). Given the stated sugar content, and based on whether and where "sugar" or its equivalents appear in the ingredient list, and the nature of the product itself as either "natural juice" or something else, the presence of added sugars already is quite clear to consumers.

Accordingly, the Warning Mandate's only purpose is to hector consumers in an effort to prevent them from making "bad" choices. While the City is free to elaborate on federally mandated information and common knowledge through *its own* messaging regarding sugar-sweetened beverages, confiscating ad space to demonize products it disfavors is simply untenable under the First Amendment.

## I. THE SUGAR-SWEETENED BEVERAGE WARNING MANDATE IS AN ILLEGITIMATE EFFORT TO CONSCRIPT PRODUCT PRODUCERS AND ADVERTISERS TO PROMOTE THE GOVERNMENT'S MESSAGE

The Supreme Court has long deemed it "incompatible with the First Amendment" to censor or otherwise burden speech based on fear that people will make bad decisions, or to promote "'what the government perceives to be their own good.'" *Sorrell*, 131 S. Ct. at 2671 (quoting *44 Liquormart*, 517 U.S. at 503); *RDN*, 2016 WL 142610, at *8. Regardless whether expression is commercial or political, it is bedrock law that the government "may not burden the speech of others in order to tilt public debate." *Sorrell*, 131 S. Ct. at 2671. Any such attempt is subject to "heightened scrutiny," although the stricter standard may not be necessary where a law seeks to advance an illegitimate goal. *Id*. at 2664. Thus, the Court in *Sorrell* was unmoved by state arguments that commercial speech regulation promoted public health, and found "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial

scrutiny is applied." *Id*. at 2667. *See also id*. at 2669 ("[T]he State's impermissible purpose [was] to burden disfavored speech.").[4] "[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to … regulate speech" about it. *Greater New Orleans*, 527 U.S. at 193. Therefore, the San Francisco Warning Mandate cannot survive constitutional review regardless of what level of scrutiny applies.

**A. The Warning Mandate's Purpose is Illegitimate**

The Ordinance has nothing to do with consumer education. Its "findings" make clear that the Board's intention in the Warning Mandate is consumer behavior-modification. This is plain from the litany of "health problems" set out in the findings, coupled with numerous observations about the public's dietary habits, which the Board appears to suggest are addressable in only one way – changes in consumption habits. S.F. Health Code § 4201. Other than the lip service paid to "informed choice" (which appears at only two points in the last paragraph of nearly four pages of findings), every single "finding" is geared toward modifying behavior. This emphasis shows that the Warning Mandate's primary purpose, via scare tactics in mandated billboard and related warnings, is *not* to "promote informed consumer choice," *id*., but to make consumers "reduce[] caloric intake" and to "improve" their diet and health with regard to "consumption of drinks that are a [] source of added dietary sugar." *Id*. *Cf. id*. (touting benefits of "lifestyle intervention" as preferred approach to preventing disease).

It is not consumer education to convey vague and misleading information. The government's vaguely-worded warning – that certain products "contribute to" obesity, diabetes, and tooth decay – is not just uninformative, but deceptive. It says nothing about how much consumption of the products "contribute[s] to" those unhealthy conditions. And it falsely suggests that the health effects are different for beverages with added sugar as compared with others. The

[4] As the U.S. Court of Appeals for the Federal Circuit recently made clear, strict scrutiny may apply even to restrictions on commercial speech where the regulations are not focused on the "commercial component" of the information. *In re Tam*, __ F.3d ___, 2015 WL 9287035, at *11 (Fed. Cir. Dec. 22, 2015) (*en banc*).

government's required messaging on only certain advertisements threatens to mislead consumers into the false assumption that products not covered by the Warning Mandate – including natural juices – do not have the same health effects when consumed in excess.[5] But as the Supreme Court reaffirmed in *Sorrell*, this type of selective treatment of different speakers is not a legitimate government purpose. 131 S. Ct. at 2669.

Likewise, forcing companies to carry a government message to prompt people into "improving" their behavior is antithetical to the First Amendment. *Sorrell* rejected an analogous effort to "balance" the marketplace of ideas where "the law's express purpose and practical effect are to diminish the effectiveness of marketing." 131 S. Ct. at 2663. Here, the Warning Mandate is founded on a premise that marketing by sugar-sweetened beverage purveyors is too persuasive unless the government restricts commercial appeals and encumbers them with its own messages. The Supreme Court repeatedly has rejected that kind of "highly paternalistic approach," *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 770), as utterly "incompatible with the First Amendment." *Sorrell*, 131 S. Ct. at 2671. *See also Virginia Bd. of Pharmacy*, 425 U.S. at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."). Those "who seek to censor *or burden* free expression often assert disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens." *Sorrell*,

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[5] Eliza Barclay, "Fruit Juice vs. Soda? Both Beverages Pack In Sugar, Health Risks," *National Public Radio*, June 9, 2014, www.npr.org/sections/thesalt/2014/06/09/319230765/fruit-juice-vs-soda-both-beverages-pack-in-sugar-and-health-risk (discussing recent study in journal *Nutrition* and the belief of one leading researcher that "100 percent fruit juice is as bad as sugar-sweetened beverages for its effects on our health."). *See also* Catharine Paddock, "Fruit Juice 'As Bad' As Sugary Drinks, Say Researchers," Medical News Today, Feb. 11, 2014, www.medicalnewstoday.com/articles/272438.php (discussing research from *The Lancet Diabetes & Endocrinology* journal finding that fruit juice had similar sugar content and calories to soda and proposing better labeling for fruit juice); *Shocking New Report: Fruit Juice Makes You Fat*, www.independentlivingnews.com/health/sugar-conspiracy/20725-shocking-new-report-fruit-juice-makes-you-fat.stml#.VngAdtQo5oI ("long-term studies show that regular juice drinkers have a higher risk of gaining weight and developing diabetes").

131 S. Ct. at 2670-71 (quoting *Western States*, 535 U.S. at 374) (emphasis added). *See also Linmark*, 431 U.S. at 96-97 (constitutional defect "is far more basic" for commercial speech regulations steeped in belief people will act "irrationally" unless municipality intervenes).

The government lacks any valid interest in regulating speech "to reverse a disfavored trend in public opinion." *Sorrell*, 131 S. Ct. at 2671. *See also RDN*, 2016 WL 142610, at *11 (citing "impermissible goal of suppressing commercial speech for fear that it will persuade"). While it may use its own resources to persuade the public to choose a different course of action, the government cannot target "a popular but disfavored product" by burdening truthful, non-misleading ads. As is particularly relevant here, the government may not require private parties to vilify their own products. The Court has expressly disallowed such "forced association with potentially hostile views." *PG&E*, 475 U.S. at 18. Regulators have no authority "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). This prohibits forcing purveyors of perfectly lawful products – which it has been shown may be consumed safely and differ little from other, non-targeted products, *see infra* 11-13 – to spend substantial funds and sacrifice their own speech to convey a government message.

**B. The Warning Mandate Unconstitutionally Compels Speech**

By compelling beverage advertisers to display government-prescribed warnings, Ordinance 100-15 violates the First Amendment, which secures "both the right to speak [] and … to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Except for purely factual and non-controversial disclosures, the government may not compel private entities to publish messages selected or dictated by the government. *Id*. at 715. Where regulations operate by "[m]andating speech that a speaker would not otherwise make," they "necessarily alter[] the content of the speech." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Supreme Court has noted that some of its "leading First Amendment precedents have established … that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 61 (2006).

This is as true for "corporations as for individuals," *PG&E*, 475 U.S. at 16, and if that principle applies to tobacco companies as much as it does to any other advertiser or company – and it clearly does, *see, e.g.*, *Lorillard*, 533 U.S. at 571; *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) – it surely protects the purveyors of sugar-sweetened beverages. Whatever narrow precedential grounds may exist for certain government mandated marketing and labeling disclosures, none of them support the Warning Mandate that the challenged Ordinance imposes here.

### 1. The Warning Mandate is Not a Permissible Compelled Disclosure of Commercial Speech

The constitutional exception that permits the government to require certain commercial disclosures for factual, non-controversial information is quite limited, and cannot justify the sugar-sweetened beverage ad warning in Ordinance 100-15. Under *Zauderer*, compelled disclosure may be permissible only to convey "purely factual" information. *Zauderer*, 471 U.S. at 651. *E.g.*, *CTIA-The Wireless Ass'n v. City & Cnty. of San Francisco*, 494 F. App'x 752, 754 (9th Cir. 2012). Even with this limitation, such disclosures may be required only if they are "uncontroversial" and when they relate to a governmental interest in preventing consumer deception or confusion. *E.g.*, *Zauderer*, 471 U.S. at 651. *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 249-50 (2010).

Nothing in Ordinance 100-15's findings suggests that consumers have been confused, misled, or deceived by the kinds of signs or display ads to which the Warning Mandate may apply. Nor is there any reason to infer such confusion or deception. *Cf. supra* 5-7. In this regard, the Supreme Court has never applied the allowance that *Zauderer* created outside the context of misleading or deceptive commercial speech, nor has it suggested that such application is appropriate. But whether or not *Zauderer* applies only to prevent potential deception, Ordinance 100-15's prescribed warning cannot withstand constitutional scrutiny because the compelled disclosure is neither purely informational, nor purely factual and noncontroversial. *Zauderer*, 471 U.S. at 651. The amorphous statement that "Drinking beverages with added

sugar(s) contributes to obesity, diabetes, and tooth decay," is laden with assumptions, implications, and omissions that preclude it from satisfying this *Zauderer* requirement.

San Francisco's required "disclosure" statement is pregnant with the strong implication that sugar-sweetened beverages cannot be consumed without inviting obesity or diabetes. This is illustrated by "findings" such as the claim that "[e]ven moderate consumption of sugary drinks … increases the risk of cardiovascular disease mortality." S.F. Health Code § 4201. *See also id.* ("consumption of Sugar-Sweetened Beverages (SSBs) is linked to a myriad of serious health problems including but not limited to: weight gain, obesity, coronary heart disease, diabetes, tooth decay and other health problems"). Although the Board cites statistics from various sources in reaching its findings, *see generally id.*, other expert bodies have issued contrary dietary recommendations concluding that sugar-sweetened beverages can be consumed as part of a healthy lifestyle.[6]

The Warning Mandate also misleadingly implies that "beverages with added sugar" will "contribute to" the Ordinance's identified maladies differently from other foods with added sugars, or even other foods and beverages generally. This view is highly debatable, and there is substantial scholarship indicating, for example, that the body does not even metabolize added sugar differently from "natural" sugars.[7] In fact, Plaintiffs' Complaint is rife with examples of

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[6] *See, e.g.*, Compl. ¶ 139.a. For example, other studies show that beverages with added sugar need not contribute to obesity or diabetes when consumed as part of a balanced diet and active lifestyle. *E.g.*, Jeane H. Freeland-Graves & Susan Nitzke, *Position of the academy of nutrition and dietetics: total diet approach to healthy eating*, 113 J. Acad. Nutrition & Dietetics 307, 307 (2013), www.ncbi.nlm.nih.gov/pubmed/23351634. *Cf. New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene*, 970 N.Y.S.2d 200, 211 (N.Y. App. Div. 2013) (Board of Health did not claim soda consumption was a "health hazard" within its regulatory authority, but rather that "the hazard arises from [] consumption … in 'excess quantity'"), *aff'd*, 16 N.E.3d 538 (N.Y. 2014).

[7] *E.g.*, *id.* ¶ 56. *See* Valerie B. Duffy, Position of the American Dietetic Association: Use of Nutritive and Nonnutritive Sweeteners, 104 J. Am. Dietetic Ass'n 255, 259 (2004), www.andjrnl.org/article/S0002-8223(03)01658-4/pdf; Food and Nutrition Service, USDA, *Dietary Guidelines for Americans 2010* at 15 (2010), www.health.gov/dietaryguidelines/dga2010/dietaryguidelines2010.pdf (if total calorie intake is constant there is little evidence individual food groups or beverages have a unique impact on body weight).

research and positions evidencing that the health impact of added sugar is a subject of heated scientific dispute, and the many reasons why the City's positions – and its mandated warning – are "controversial, incomplete, and misleading." *Id*. ¶¶ 46-72, 138-141. Indeed, there is substantial scientific evidence that the health effects are no different for natural fruit juices. *See supra* note 5.

It would thus be false to say that Ordinance 100-15's required warning "do[es] not communicate any opinion or viewpoint" within the meaning of *Zauderer*. *San Francisco Apt. Ass'n v. City & Cnty. San Francisco*, __ F.Supp.3d ___, 2015 WL 6747489, at *11 (N.D. Cal. Nov. 5, 2015), *appeal docketed*, No. 15-17381 (9th Cir. Dec. 3, 2015). The required warning does not simply require a non-normative statement, such as the fact that a beverage is "produced with" added sugar. *Compare, e.g., Grocery Mfrs. Ass'n v. Sorrell*, 102 F.Supp.3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015). *See also* 21 C.F.R. §§ 101.4, 101.9. To the contrary, it imparts a disputed cause-and-effect message expressing the City's position. In *CTIA v. San Francisco*, the Ninth Circuit invalidated compelled disclosures regarding RF emissions from cell phones because the prescribed language was not merely factual but "could … be interpreted … as expressing San Francisco's opinion that using cell phones is dangerous." 494 F. App'x at 753-54. The same kind of viewpoint-based implication infects the Warning Mandate here. *See also National Ass'n of Manufacturers v. SEC*, 748 F.3d 359, 370-72 (D.C. Cir. 2014), *aff'd on reh'g*, 800 F.3d 518 (D.C. Cir. 2015).

Compelled labeling is permissible when imposed "only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about attributes *of the product*." *American Meat Inst. v. USDA*, 760 F.3d 18, 26 (D.C. Cir. 2014) (quoting *Zauderer*) (emphasis added). Here, the fact that a beverage contains added sugar is an "attribute" of the product; the health effects to which it may – or may not – "contribute" is the City's *opinion*. *See id*. at 27 ("We [] do not understand country-of-origin labeling to be controversial in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy.").

As the D.C. Circuit explained, some required disclosures that purport to be "factual" can be "so one-sided or incomplete that they would not qualify as 'factual and uncontroversial'" under *Zauderer*. *Id.* This is particularly true of mandated disclosures such as those which compel stating that beverages with added sugar(s) "contribute to" certain ill effects – where the notion of "contribution" is so imprecise, and so incomplete, that it cannot qualify as "purely factual." *National Association of Manufacturers* recognized precisely this point on rehearing *en banc* with its hypothetical disclosure for internal combustion engine marketers that "Use of this Product Contributes to Global Warming," which was used to illustrate that "[i]t is easy to convert many statements of opinion into assertions of fact simply by removing the words 'in my opinion' or [] 'in the opinion of many scientists' or [] 'in the opinion of many experts.'" 800 F.3d at 528. That is precisely what the City has done here.

All of these examples serve only to underscore the folly of relying on the government, or "experts," to prescribe orthodoxy in the arena of dietary health, as has been proven time and again. Just this year, a USDA report related to dietary guidelines – on which the Warning Mandate extensively relies, *see* S.F. Health Code § 4201 – reversed longstanding guidance to limit cholesterol intake, based on new American Heart Association research showing that, in fact, there is "no appreciable relationship between consumption of dietary cholesterol and serum cholesterol."[8] This major reversal came after research that the American Heart Association admitted caused a "sea change" in its thinking and recommendations.[9]

Congress seems to agree, or at the very least, appears concerned that that assessment could well be accurate. The most recent budget bill earmarks $1 million for comprehensive review by the National Academy of Medicine of the development of the Dietary Guidelines

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[8] U.S. Dep't of Health and Human Services and U.S. Dep't of Agriculture, Scientific Report of the 2015 Dietary Guidelines Advisory Committee, Part D, at 17, http://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf.

[9] Nancy Brown, "Cholesterol Guidelines: Myth vs. Truth," *Huffington Post* (Dec. 2, 2013), http://www.huffingtonpost.com/nancy-brown/cholesterol-guidelines_b_4363121.html.

for Americans. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 735 (2015). The review is to include the manner in which evidence is assembled and evaluated, and whether a full range of viewpoints is considered. *See* Peter Whoriskey, "Congress approves funding to review how dietary guidelines are compiled," *Wash. Post*, Dec. 19, 2015, at A13 (noting that "[n]utrition science has been in turmoil in recent years," and citing "scientific disagreements over the portions of the dietary guidelines … on salt, whole milk, saturated fat, cholesterol and the health implications of skipping breakfast").

And even in advance of the forthcoming review, the federal government's Dietary Guidelines for Americans was updated just this month in ways that reversed course on entrenched recommendations. *See* Peter Whoriskey, "Dietary advice gets an update," *Wash. Post*, Jan. 8, 2016, at A1 ("The federal government … told Americans not to worry so much about cholesterol in their diets, that lots of coffee is fine and that skipping breakfast is no longer considered a health hazard."); *see also id*. at A8 ("new version seems inconsistent in places, or torn between new science and past recommendations"). As one observer has noted, federal nutrition guidelines "may have done more harm than good" over the last 35 years, given how drastically recommendations have changed. David A. McCarron, "The Food Cops and Their Ever-Changing Menu of Taboos," *Wall St. J.*, Nov. 27, 2015.

The Ordinance here also relies on research by the Institute of Medicine, S.F. Health Code § 4201, but IOM's advice has likewise been the subject of major recent revisions and reversals. In 2013, for example, IOM reversed its guidance on salt intake after concluding that the evidence was "insufficient" to conclude that lowering sodium intake below IOM's prior guidance would actually improve health. Indeed, the new research actually found that those whose sodium was reduced to recommended levels may actually be at *increased* risk of cardiovascular death. David Pittman, "IOM Comes Out Against Cutting Salt Intake," *MedPage Today*, May 14, 2013, http://www.medpagetoday.com/Cardiology/CHF/39115.

The San Francisco Board of Supervisors, of course, is not itself expert in science or nutrition, and should receive no more deference than the national health organizations on which

they rely. Clearly, the Board attempted to carefully curate government and expert data and insights that support the City's view on sugar-sweetened beverages. *See* S.F. Health Code § 4201. But Plaintiffs have proven fully able to advance an equal or superior justification for their position. *See, e.g.*, Compl. ¶¶ 46-72, 138-141. While the Board, again, can espouse its views independently, *Zauderer* and its progeny do not allow the City's perspective to override Plaintiffs' views by compelling speech that confiscates a significant portion of sugar-sweetened beverage marketers' ads. In addition, the Board enjoys no greater latitude to regulate speech on the basis that consumables might be viewed as properly limited to being a treat, or a guilty pleasure, or even characterized as a "vice." *44 Liquormart*, 517 U.S. at 513-14; *Lorillard*, 533 U.S. at 589 (Thomas, J., concurring).

### 2. The Warning Mandate Cannot Be Salvaged as "Government Speech"

The constitutional problems of the Warning Mandate are not diminished by requiring the additional disclosure that "This is a message from the City and County of San Francisco." To begin with, if that simple expedient could suffice, it would allow the government to confiscate for its own messaging a portion of any advertisement it desires, which clearly the First Amendment does not allow. Also, such a "warning," as Ordinance 100-15 itself labels it, *see* S.F. Health Code § 4203(a), is likely to be *presumed* to be government-required rather than the advertiser's own view, so the "message from the government" disclaimer adds nothing of any informational value. No case such as *Zauderer*, *Milavetz*, *National Association of Manufacturers*, *R.J. Reynolds*, *CTIA v. San Francisco*, nor any other that has struck down government-compelled labels or warnings, suggests that simply adding "this is a message from" the government as a tagline would have changed the outcome.[10]

[10] Even in *CTIA-The Wireless Ass'n v. City of Berkeley*, __ F.Supp.3d __, 2015 WL 5569072, at *15 (N.D. Cal. Sept. 21, 2015), the ordinance required cell phone retailers to furnish a notice that was entirely separate from any of a retailer's own marketing, signs, or other speech. Here, the compelled disclosure is grafted directly onto the marketer's *own* speech.

This added disclosure requirement cannot be justified under the government speech doctrine. The Supreme Court's decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), made clear that the government speech doctrine applies only in limited circumstances which are not present here. In *Walker*, the Court found Texas specialty license plates to be "government speech" based on the facts that (1) license plates long have communicated state messages, (2) license plate designs are often closely identified in the public mind with the issuing state, and (3) the state maintains direct control over the messages on its specialty plates. *Id.* at 2248-49. *See also, e.g., Rideout v. Gardner*, 2015 WL 4743731, at *10 (D.N.H. Aug. 11, 2015), *appeal docketed*, No. 15-2021 (1st Cir. Sept. 9, 2015). The government speech doctrine has no application in this case, where it is a government warning that must be incorporated into sugar-sweetened beverage ads, and not a beverage ad that must be embedded into a government medium. Indeed, display advertising like that subject to the Warning Mandate – even signs visible from public streets and byways – finds no parallel in methods for disseminating the government's own message in which it may permit some to include content of their own, such as a specialty license plate, *Walker, supra*, or a park or property owned or maintained by the government. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). An "intent to speak" by a government body may be a hallmark of government speech, but such a purpose has never been held to convert display advertising for commercial messages into government speech. *Cf. Walker*, 135 S. Ct. at 2247; *In re Tam*, 2015 WL 9287035, at *18 ("use of the ® symbol, being listed in a database of registered marks, and having been issued a registration certificate … do not convert private speech into government speech").

Even where *government property* provides the medium for the display of advertising, that fact does not make the ad itself government speech. *See Walker*, 135 S. Ct. at 2252 ("advertising space on city buses" bears "no indicia that the speech was owned or conveyed by the government"). *Accord Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 499 (9th Cir. 2015). *See also, e.g., Knights of Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085, 1095 (8th Cir. 2000) ("public transit and airport ads … communicate[] the speech of private indivi-

duals and groups"). In any event, the sugar-sweetened beverage ads that the Warning Mandate regulates are found on private property. In short, the billboards, signs, and other display ads at issue in this case are far from any kind of "government-mandated, government-controlled, and government-issued" platform that has "traditionally been used as a medium for government speech." *Walker*, 135 S. Ct. at 2250.

The warning required by Ordinance 100-15 also lacks one of the hallmarks of government speech: the ability of those affected to disassociate themselves from it. Where the Court has upheld compelled speech requirements those burdened by them "remained free to disassociate" from objectionable views. *E.g.*, *Rumsfeld*, 547 U.S. at 65. Such cases reflect the "right to decline to foster" causes with which one disagrees, as "concomitant" to the right to speak freely. *Wooley*, 430 U.S. at 714. Here, there is no way for sugar-sweetened beverage marketers to disassociate themselves from the warning that must appear on their ads per the Board's mandate. This flies in the face of long-standing precedent such as, *e.g.*, *Wooley*, 430 U.S. 705, which affirmed the First Amendment right of New Hampshire citizens to disassociate themselves with the state's "Live Free or Die" motto on their government-required license plates, and *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995), which affirmed the right of speakers not to be forced to comingle their expression with that of another with whom they disagree, as doing so "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* The Warning Mandate strips away that right from sugar-sweetened beverage marketers and only underscores that their billboards, signs and similar advertisements are not "government speech."

### 3. The Warning Mandate Impermissibly Interferes with Advertisers' Messaging

The Warning Mandate is unconstitutional for the additional reason that it seeks to compel overly burdensome disclosures, and co-opts the message of sugar-sweetened beverage advertisers. Courts consistently have rejected such efforts to compel private entities to sponsor government propaganda. *E.g.*, *PG&E*, 475 U.S. at 15; *Wooley*, 430 U.S. at 714. Compelling

sugar-sweetened beverage marketers to devote 20 percent of ad space to a prescribed government warning "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *PG&E*, 475 U.S. at 9. Such requirements are particularly offensive constitutionally where they require speakers to foster views contrary to their interests.

No Supreme Court decision suggests the government may require marketers to carry messages "where the messages themselves are biased against or are expressly contrary to the corporation's views." *Id*. at 16 n.12. The Court has expressly rejected the argument that compelling such expression furthers the constitutional goal of providing "more speech," as "the State cannot advance some points of view by burdening the expression of others." *Id*. at 20. Rather, "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Id*. at 16. Additionally, the Court has stressed that even if a product "poses some threat to public health or public morals" that cannot justify commercial speech regulation "by the simple expedient of placing the 'vice' label on [] lawful activities." *44 Liquormart*, 517 U.S. at 514. *See also Rubin*, 514 U.S. at 478.

The decision in *Entertainment Software Association v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006), well illustrates this point. In that case, the Seventh Circuit invalidated mandatory stickers on "violent" and "sexually explicit" video games – even though they comprised no more than a four-inch square sticker with the number "18," indicating that the games could not be sold to minors. The court explained that the mandatory labeling requirement could not be upheld for the same reason that "we would not condone a health [] requirement that half of the space on a restaurant menu be consumed by [a] raw shellfish warning." *Id*. at 652. If a stark number 18 qualified as unduly burdensome, and an innocuous (hypothetical) shellfish warning could not stand if it was merely too big, it is impossible to see how confiscating one-fifth of a sugar-sweetened beverage ad for government messaging survives constitutional scrutiny.[11]

[11] The warning mandated by Ordinance 100-15 is also unlike the matter of cigarette warnings, where the government sought to counter perceived misinformation by tobacco

In this connection, "*Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech." *American Meat Inst.*, 760 F.3d at 27. The 20 percent confiscation of sugar-sweetened beverage marketers' advertising does precisely that. A 20 percent occupation of a billboard, sign or other display is a considerable taking of ad space, and by its size and rectangular-border requirements is designed specifically to draw attention from the advertising to which the warning is affixed. This necessarily changes the overall message, distorts the advertiser's speech, and imposes in its full impact a significant burden on the ability to freely engage in truthful communications about a lawful, unregulated product.

## II. THE SUGAR-SWEETENED BEVERAGE WARNING MANDATE IS NOT NARROWLY TAILORED AND LACKS A RATIONAL BASIS

Commercial speech restrictions cannot be "'more extensive than is necessary'" to serve the government's interests, *Western States*, 535 U.S. at 374 (quoting *Central Hudson*, 447 U.S. at 566), and the existence of "numerous and obvious less-burdensome alternatives" to restricting speech bears on "whether the 'fit' between ends and means is reasonable." *City of Cincinnati*, 507 U.S. at 417 n.13. If the government can achieve its objectives without having to "restrict speech, or [by] restrict[ing] less speech, [it] *must* do so." *Western States*, 535 U.S. at 371 (emphasis added). At the same time, each speech regulation must serve its asserted interest in a "direct and material way," requiring "evidentiary support" that it "will significantly advance" the asserted interest. *44 Liquormart*, 517 U.S. at 505-06. *See also Rubin*, 514 U.S. at 480; *Edenfield*, 507 U.S. at 770. The Warning Mandate fails each of these requirements.

companies. *See, e.g.*, *United States v. Philip Morris USA Inc.*, 801 F.3d 250 (D.C. Cir. 2015). Here, there is nothing in the history of sugar-sweetened beverage advertising that the Board could arguably be seeking to counteract, nor anything outside the public's common knowledge regarding the product.

### A. There Are Obvious Less-Restrictive Alternatives to Conscripting Space on Sugar-Sweetened Beverage Ads to Carry a Compelled Government Message

To the extent the Board's interest lies in San Franciscans bettering their health and losing weight, including by moderating their intake of sugar-sweetened beverages, *see supra* 7 (quoting S.F. Health Code § 4201), there are many alternatives at its disposal, besides burdening ads with compelled speech. Most obviously, the Board could engage in its own messaging to "educate" consumers or persuade them to change their consumption patterns. *See, e.g.*, *Santa Fe Natural Tobacco v. Spitzer*, 2001 WL 636441, at *24 n.37 (S.D.N.Y. June 8, 2001). The City could also try to more directly affect behavior without regulating speech. It is clear the City is aware of these mechanisms. The Board of Education, for example, adopted a resolution to remove soda from all San Francisco public schools. *See* S.F. Bd. of Ed. Res. No. 211-12A8 (Jan. 14, 2003). The Board of Supervisors could also continue its pursuit of a "soda tax," such as that enacted in nearby Berkeley, or require restaurants to serve with children's meals beverages that are not sugar-sweetened, as does the City of Davis.[12] The City also can continue to enforce Ordinance 99-15, which was concurrently enacted with the Warning Mandate to prohibit City departments from using City funds to buy sugar-sweetened beverages, and their sale or distribution under City contracts and grants. S.F. Ord. 99-15, File No. 150243, passed July 16, 2015, approved July 26, 2015, codified at S.F. Admin. Code § 101.1, *et seq.*

This is not to suggest that the City should do any of these things, or that they would constitute sound public policy. The City's inordinate focus on sugar-sweetened beverages compared to other drinks still suffers from a policy myopia that is not based on sound nutritional information. But these examples illustrate that a significant number of other measures could address the objectives pursued by the City here, without trampling the First Amendment. However,

[12] "San Francisco cracks down on sodas, approves health warning on sugary drink ads in U.S. first," *N.Y. Daily News*, June 9, 2015, http://www.nydailynews.com/news/national/san-francisco-approves-health-warning-sugary-drink-ads-article-1.2252756. The government could also continue with its plans to persuade voters to impose a "soda tax" as a general tax as is planned for the 2016 ballot, after prior efforts to push through a special tax failed. *Id*. *See also*, *e.g.*, H.R. 1687, 114th Cong. (2015) (bill proposing to tax sugary drinks).

the Board either ignored, or refused to utilize, such non-speech-related alternatives, in favor of speech restrictions. That choice directly contravenes constitutional requirements.

### B. The Warning Mandate's Wholesale Exclusions and Exemptions Render It Fatally Underinclusive

Ordinance 100-15 also fails the narrow tailoring requirement because it cannot possibly advance San Francisco's asserted interest in a direct and material way. *44 Liquormart*, 517 U.S. at 505-06; *Rubin*, 514 U.S. at 480; *Edenfield*, 507 U.S. at 770. One way a regulation will fail to meet that *Central Hudson* requirement is where it has numerous "exemptions and inconsistencies [that] bring into question [the law's] purpose." *Rubin*, 514 U.S. at 489. *See also Greater New Orleans*, 527 U.S. at 189. Here, the City has underinclusively targeted one particular segment of sugar-sweetened consumables, and one particular channel for advertising them, in ways that all but ensure the Warning Mandate cannot serve its intended purpose. This would be true even if the Ordinance were based on sound policy, which it is not.

It is incumbent upon the City to produce "evidentiary support" to show that stamping a government warning on sugar-sweetened beverage billboards and other signs will stave off the adverse health effects outlined in Ordinance 100-15's findings. *See* S.F. Health Code § 4201. The City faces a considerable challenge doing so. *See supra* 11-12 (citing competing studies). Significantly, while the findings list various asserted health impacts, describe some current consumption patterns for sugar-sweetened beverages, and tabulate various asserted costs to government, it does not say *anything* about ***how*** the Warning Mandate will achieve *any* effect. The most the Board says is that "requiring the warnings … ***may*** result in reduced caloric intake and improved health and diet." S.F. Health Code § 4201 (emphasis added). But the Ordinance's very structure makes achieving even that attenuated effect highly doubtful, and it in any event fatally undermines the Warning Mandate from a constitutional perspective.

The first way the Warning Mandate's "exemptions and inconsistencies" prevent it from significantly advancing the City's interest, *Rubin*, 514 U.S. at 489; *Greater New Orleans*, 527 U.S. at 189, lies in how it excludes most media channels in which sugar-sweetened beverage ads

appear. Here, Ordinance 100-15 requires warnings on ads for sugar-sweetened beverages on billboards, stadium displays, posters, signs, bus and train ads/shelters, etc. At the same time, the overwhelming majority of media impressions are not required to have warnings – including ads printed on circulars, in newspapers or magazines, or appearing in any electronic media, including radio, television, and online. S.F. Health Code § 4202. Nor are the warnings required on product packaging, or on menus, handwritten listings, or representations of food that may be ordered for on-premises consumption. *Id*. The Supreme Court in *Rubin* highlighted the serious failing that arises in cases where a commercial speech regulation is enacted for some communication channels while the audience sought to be protected receives the same or similar messages from a multitude of alternative channels. *See* 514 U.S. at 488. The same problem plagues the Warning Mandate here.[13]

The Ordinance also is underinclusive in its targeting of sugar-sweetened beverages. As an initial, obvious matter, sugar-sweetened beverages are far from the only consumable that contain added sugars. Yet the Ordinance ignores the sundry candies, baked goods, snacks, cereals, yogurts, sauces, jams and jellies, and other sugar-laden foods which may be regular parts of San Franciscans' diets. Even considering just beverages, while it may be, for example, that some may argue that some "natural fruit juices" that the Ordinance exempts are more healthful in other ways, they are neither less caloric than, nor are the health effects of their "natural" sugars different from, the beverages whose advertising is regulated under the Warning Mandate. *See, e.g.*, Compl. ¶ 140.

Together, these unregulated products far outnumber the sugar-sweetened beverages that the Warning Mandate targets for speech-restrictive regulation. As with New York City's Sugary Drinks Portion Cup Rule struck down in *New York Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d 200, *aff'd*, 16 N.E.3d 538, "selective restrictions enacted by the Board

[13] This is not intended to suggest that the Ordinance should be more inclusive. Expanding its scope would only exacerbate the compelled speech problem.

of Health reveal that the health of residents of [the] City was not its sole concern" in enacting the challenged Ordinance. *Id*. at 210. The fact that the Warning Mandate does not outright ban any speech about sugar-sweetened beverages is beside the point – the "'distinction between laws burdening and laws banning speech is but a matter of degree.'" *Sorrell*, 131 S. Ct. at 2664 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000)). The extraordinarily high likelihood that the City will realize little or no benefit from mandating a warning on ads only for sugar-sweetened beverages, and only on a small fraction of those ads, makes clear that Ordinance 100-15 violates the First Amendment.

### C. The Warning Mandate Cannot Even Withstand Rational Basis Review Due to its Sweeping Exclusions, Exemptions and Limits on Application

Ordinance 100-15 cannot even survive rational basis review given the arbitrary nature of the exceptions and exclusions outlined in § II.B, whatever may be said of the City's objectives. Indeed, as this Court framed it, even that lower level of review requires "examination of actual state interests and whether the challenged law actually furthers that interest." *CTIA v. Berkeley*, 2015 WL 5569072, at *16. The Warning Mandate falls woefully short of even that mark.

This is well illustrated by the *New York Statewide Coalition* cases, which at each level of judicial review invalidated New York City's "Sugary Drinks Portion Cup Rule" that banned certain New York City restaurants, movie theaters, and other food service establishments from serving certain sugary drinks in sizes larger than 16 ounces.[14] The trial court invalidated the Rule even though the government was "only required to demonstrate a reasonable basis for th[e] Rule" and received "every degree of judicial deference" – *i.e.*, the most forgiving level of scrutiny – because the Rule was "laden with exceptions based on economic and political concerns." *New York Statewide Coalition*, 2013 WL 1343607, at *19. *See also id*. at *6, *8,

[14] While the challenge in that case was not constitutional, the ordinance was struck down on, among other bases, administrative law "arbitrary and capricious" review, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene*, 2013 WL 1343607, at *19-20 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd*, 970 N.Y.S.2d 200, *aff'd*, 16 N.E.3d 538, and such laws also fail under constitutional rational basis review. *Cf. San Francisco Apt. Ass'n*, 2015 WL 6747489, at *15 (same, as to equal protection).

*20. Specifically, the court cited how the government's "decision to target only certain sugary sweetened drinks [was] nonsensical as a host of other drinks contain substantially more calories and sugar than the drinks targeted [], including alcoholic beverages, lattes, milk shakes, frozen coffees, and a myriad of others." *Id*. at *6. The court also noted how "the Rule exempts soy based milk substitutes, but other milk substitutes such as almond, hemp and rice milk are not exempt." *Id*. at *8. This is exactly the same kind of selectivity that plagues the Warning Mandate in this case, making it just as arbitrary as New York's Rule. *See* S.F. Health Code § 4202. *See also supra* 3-4, 21-23.

The *New York Statewide Coalition* court also found an absence of reasonable basis for the rule insofar as it excluded sugary beverages in food processing establishments, retail food stores, and convenience stores. 2013 WL 1343607, at *8. Many of the same establishments, and others like them, are exempted under the Warning Mandate. *See* S.F. Health Code § 4202. The court in the *New York* case further noted how, under the Rule's place-of-purchase exclusions, "a person is unable to buy a drink larger than 16 oz. at one establishment but may be able to buy it at another [] that may be located right next door." *Id*. at *6 (also noting "no restrictions exist on refills"). This kind of arbitrary application is directly akin to how, under Ordinance 100-15, a sugar-sweetened beverage ad on, *e.g.*, a bus shelter must bear the mandated warning, but in the convenience store at that bus stop, all ads in the magazines, newspapers, and playing on the TV over the counter would not be required to have a health warning. S.F. Health Code § 4202.

Ultimately, *New York Statewide Coalition* held that "the loopholes in this Rule effectively defeat the stated purpose of the Rule" rendering it "arbitrary and capricious because it applies to some but not all food establishments in the City [and] excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds."[15] *See also*

[15] 2013 WL 1343607, at *20. On review, though affirming on different grounds, the Appellate Division agreed "the regulatory scheme is not an all-encompassing regulation" in that it did not apply to all food service establishments or sugary beverages, leading that court to conclude "[t]he Board of Health's explanations for these exemptions do not convince us that the limitations are based solely on health-related concerns." *N.Y. Statewide Coalition*, 970 N.Y.S.2d at 209.

*RDN*, 2016 WL 142610, at *12 ("[T]he increasing number of statutory exceptions … call into doubt whether the statute materially advances [its] aims."). The Board of Supervisors here took the same arbitrary and capricious approach to the Warning Mandate, wholly eviscerating its ability to survive even rational basis review. In doing so, it created an even worse situation than in *New York*, insofar as the law violates not merely tenets of administrative law, but the First Amendment's guarantee of free speech.

## CONCLUSION

The City of San Francisco's imposition of the Warning Mandate in reaction to potential over-consumption of sugar-sweetened beverages by its citizens, whatever the merits of that concern, takes regulatory Nannyism to new levels and is wholly incompatible with First Amendment protections afforded to commercial speech. If this Court were to uphold the Board of Supervisors' conscription of sugar-sweetened beverage ads to convey government views on health issues there would be virtually no limit to similar efforts targeting other products, at any level of government. Every sugary, fatty, salty, processed, or other food disfavored by the science of the moment would be susceptible to having a significant portion of its advertising turned into a placard for government hectoring with which the advertiser not only disagrees, but for which there may be data controverting the government position. The same goes for any other product that regulators view as presenting a "risk" to their constituents' well-being. Advertisers would face that risk tens of thousands of times over, from any city, town, county, or other municipal authority with a particular health-related hobby horse. This Court should hold such compelled speech mandates are barred by the First Amendment, and enjoin San Francisco Ordinance 100-15.

DATED: This 22nd day of January, 2016 DAVIS WRIGHT TREMAINE LLP

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