Nos. 16-16072, 16-16073

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION, ET AL.,
Plaintiffs-Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellee.

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

Appeal from the United States District Court for the Northern District of California
Case No. 3:15-cv-3415-EMC, Hon. Edward M. Chen

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the National Association of Manufacturers states that it is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states.[1] Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM has an abiding interest in the issue of compelled speech by commercial entities, and has been involved in litigation concerning compelled speech by its members and others, including *CTIA-The Wireless Ass'n v. Cnty. of San Francisco*, 494 F. App'x 752 (9th Cir. 2012), *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), and *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

[1] Pursuant to Fed. R. App. P. 29, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. Cir. Rule 29-2(a).

SUMMARY OF ARGUMENT

The First Amendment protects the right to speak freely and, just as important, the right *not* to speak. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court made clear that the government cannot compel a private party to broadcast misleading, controversial information as the price for speaking. Yet that is just want the district court authorized here. The district court upheld a city ordinance that requires private companies to issue a warning about sugar-sweetened beverages that (1) contradicts FDA conclusions that such beverages are generally recognized as safe; (2) singles out sugar-sweetened beverages as uniquely likely to cause health problems; and (3) implies that there is something inherently dangerous about these products regardless of the level of consumption. Neither *Zauderer* nor general principles of First Amendment jurisprudence countenance this result.

If the City's Ordinance is found to be constitutional the result will be predictable: there will be less speech, not more. Facing the Ordinance's lose-lose options—speak publicly and denounce their products or say nothing at all—it is no surprise that beverage companies have said they will do the latter. Companies care deeply about protecting the reputation and image of their products, and so it is highly unlikely that a company would *voluntarily pay* to publicly denigrate its products. Indeed, the City itself admits it would be "rational" for companies to "shift away

from the kind of advertising that is covered by a disclosure requirement." ER185 n.11.

Unfortunately, the suppression of speech from sugar-sweetened beverage manufacturers appears consistent with the City's goals. After all, the City has avenues for promoting its agenda—for example, conducting its own ad campaign—that do not require compelling private actors to promote the City's controversial views on their advertisements. That it chose otherwise shows that the City's true goal is to silence unwanted speech. The Ordinance violates the First Amendment.

ARGUMENT

I. The Ordinance Violates the First Amendment Because It Compels Speech That Is Not "Purely Factual and Uncontroversial."

A. Reduced Scrutiny Under *Zauderer* Is Improper Unless the Compelled Disclosure Is "Purely Factual and Uncontroversial."

The First Amendment guarantees "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Indeed, "[s]ome of the [Supreme] Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); *see, e.g., Wooley*, 430 U.S. at 714 (finding a state law unconstitutional that required New Hampshire motorists to display the state motto—"Live Free or Die"—on their license plates). Compelled speech laws like the City's ordinance implicate the First Amendment not only

because they attempt to force the expression of unwanted speech, but also because they threaten to chill private speakers from speaking at all. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (forcing newspapers to provide a right of response would cause editors to take "the safe course [and] avoid controversy," and so "political and electoral coverage would be blunted or reduced"); *Talley v. California*, 362 U.S. 60, 64 (1960) (identification requirements for pamphleteers can "restrict freedom to distribute information and thereby freedom of expression").

The First Amendment does not cease to apply merely because it is a corporation's speech that is being compelled. To the contrary, the Supreme Court has made clear that "compelling a private corporation to provide a forum for views other than its own may infringe the corporation's freedom of speech." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 9 (1986); *see, e.g., Miami Herald Pub. Co*., 418 U.S. at 257. "The right not to speak inheres in political and commercial speech alike and extends to statements of fact as well as statements of opinion." *Int'l Dairy Foods Ass'n v. Amestory*, 92 F.3d 67, 71 (2d Cir. 1996).

In *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985), the Supreme Court examined the circumstances under which a compelled disclosure law would withstand scrutiny under the First Amendment. There, the State of Ohio disciplined an attorney because his advertisement about free legal services—which

said "[i]f there is no recovery, no legal fees are owed by our clients"—misleadingly implied that clients would pay nothing at all, when in fact "clients might be liable for significant litigation costs even if their lawsuits were unsuccessful." *Id*. at 631, 650. The Supreme Court upheld the State's disclosure requirement because, among other reasons, the State required only "purely factual and uncontroversial information" to be disclosed, it was not "unjustified or unduly burdensome," and the disclosure was "reasonably related to the State's interest in preventing deception of consumers." *Id*. at 651 & n.14.

B. The District Court Upheld the Ordinance Only by Rendering *Zauderer*'s "Purely Factual and Uncontroversial" Requirement Toothless.

Despite this precedent, the City seeks to render *Zauderer*'s "purely factual and uncontroversial" requirement toothless. Like the district court, which found it unclear "whether the Court [in *Zauderer*] necessarily held that a compelled disclosure must be factual and uncontroversial before rational review can be applied," *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 187 F. Supp. 3d 1123, 1135 (N.D. Cal. 2016), the City seeks to dilute the "purely factual and uncontroversial" requirements from *Zauderer*. Indeed, the City's opening brief contains not a single statement as to whether its law compels only "purely factual and uncontroversial" information. The City instead argues that *Zauderer* authorizes the government to compel disclosures as long as they are "factual and accurate" and

"reasonably related to the government's interest." City Br. 18. Doubtless the City frames *Zauderer* in this manner because it has no serious argument that the speech compelled by its ordinance is "purely factual and uncontroversial."

But this is not the law. Not only does it ignore the plain reading of *Zauderer*, but it is in fundamental tension with "the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld*, 547 U.S. at 61. *Zauderer* must be enforced rigorously to ensure that private actors cannot be forced to broadcast inaccurate, one-sided, or misleading messages. *See American Meat Institute v. U.S. Dep't of Agriculture*, 760 F.3d 18, 27 (2014) (*Zauderer* prohibits "one-sided or incomplete" messages); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) ("[W]e must conclude that the [the law's] signage and brochure requirements are unconstitutional. Careful consideration of what the signs and brochures are in fact communicating reveals that the message is neither purely factual nor uncontroversial.") (citing *Zauderer*, 471 U.S. at 651); *see also Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (compelled disclosure is unconstitutional if it "explicitly promotes" an ideological message "by demanding the provision of facts that all fall on one side of the … debate"). The district court improperly glossed over these requirements, and the City's argument that *Zauderer* can be read otherwise is mistaken.

Under a proper application of *Zauderer*, the Ordinance is clearly unconstitutional, as it compels speech that is neither "purely factual" nor "uncontroversial." The compelled speech is not "purely factual" because it is "'misleading and, in that sense, untrue.'" Panel Op. 21 (quoting *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1119 (9th Cir. 2017)). By focusing on a single product, the warning deceptively "conveys the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute to obesity, diabetes, and tooth decay than other foods," and it "implies that there is something inherent about sugar-sweetened beverages that contributes to these health risks in a way that other sugar-sweetened products do not, regardless of consumer behavior." *Id*. at 21-22. The compelled speech also is not "uncontroversial" because it conveys the message that sugar-sweetened beverages contribute to obesity, diabetes, and tooth decay regardless of the quantity consumed or other lifestyle choices, a statement that is contrary to the FDA's conclusion that added sugars are "generally recognized as safe," 21 C.F.R. § 184.1866, and "can be a part of a healthy dietary pattern when not consumed in excess amounts," 81 Fed. Reg. 33,742, 33760 (May 27, 2016); *see* Panel Op. 20-21. The district court erred in not finding the Ordinance unconstitutional under *Zauderer*.

C. Allowing the Government to Compel Speech That Is Not "Purely Factual" and "Uncontroversial" Would Raise Serious First Amendment Concerns.

Allowing the government to force private actors to broadcast statements that are neither "purely factual" nor "uncontroversial" would raise serious First Amendment concerns. First, if the government can compel speech that is not "purely factual," it might seek to compel *misleading* messages. As the advertisement in *Zauderer* makes clear, speech might be "factual" yet still misleading. *See Zauderer*, 471 U.S. at 652 (concluding that a literally truthful advertisement would be deceptive as written "to a layman not aware of the meaning of … terms of art"). "Advertising must tell the truth *and* not mislead consumers. A claim can be misleading if relevant information is left out or if the claim implies something that's not true." *Advertising and Marketing on the Internet*, Federal Trade Commission (Sept. 2000), https://goo.gl/H8EYth (emphasis added). *Zauderer*'s focus on "purely factual" information prevents the government from compelling speech that might be misleading, even if factual.

Under the City's reading, however, there would be "no end to [the] government's ability to skew public debate," *Nat'l Ass'n of Mfrs. v. SEC.*, 800 F.3d 518, 530 (D.C. Cir. 2015), as long as the government's language was literally "factual and accurate," City Br. 18. For example, a State law could require all margarine manufacturers to prominently state on their advertisements:

"WARNING: THIS PRODUCT CONTAINS MONOUNSATURATED AND POLYUNSATURATED FATS." This might be factually true, yet clearly misleading, as the message would indicate to consumers that this product and its ingredients are dangerous. *See* Katherine Zeratsky, R.D., L.D., *Which Spread Is Better for My Heart—Butter or Margarine?*, Mayo Clinic, https://goo.gl/NctcX7 ("Margarine … contains unsaturated 'good' fats—polyunsaturated and monounsaturated fats, [which] help reduce low-density lipoprotein (LDL), or 'bad,' cholesterol when substituted for saturated fat."). Whether driven by a belief that a product is harmful or a desire to promote an alternative product,[2] government-compelled speech of this nature would raise serious First Amendment concerns. *See Nat'l Ass'n of Wheat Growers v. Zeise*, 2018 WL 1071168, at *5 (E.D. Cal. Feb. 26, 2018) ("'[A] statement may be literally true but nonetheless misleading and, in that sense, untrue' and therefore unconstitutionally compelled private speech under *Zauderer*.") (quoting *CTIA-The Wireless Ass'n*, 854 F.3d at 1119).

Similarly, the government might also force companies to promote junk science, thereby giving the false impression that an issue is open for debate. For

[2] *See, e.g.,* Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 Calif. L. Rev. 83, 121-25 (1989) ("State dairy associations … first pressed for antimargarine protection in the form of labelling statutes sometime in 1877…. Some statutes required hotels, restaurants, and boarding houses to post public notices if they served margarine to guests.").

example, a handful of studies have suggested that wearing underwire bras increases the risk of breast cancer. *See, e.g.,* Sydney Ross Singer, Soma Grismaijer, *Dressed to Kill: The Link Between Breast Cancer and Bras* (1995). These studies have been roundly debunked. *See, e.g., Disproven or Controversial Breast Cancer Risk Factors*, American Cancer Society, https://goo.gl/fB2erV ("[A] 2014 study of more than 1,500 women found no association between wearing a bra and breast cancer risk."); *Common Fears With No Evidence: Antiperspirants and Bras*, BreastCancer.org, https://goo.gl/tfpT4w ("Underwire bras do not cause breast cancer."). Yet given the existence of such studies, a government might feel empowered to require all bra advertisements to state "WARNING: STUDIES HAVE SHOWN THAT WEARING BRAS INCREASES THE RISK OF CANCER." Similar controversial warnings might be mandated for other products and procedures, such as antiperspirants, induced abortions, and breast implants. *See Disproven or Controversial Breast Cancer Risk Factors*, American Cancer Society, *supra*. The First Amendment would never countenance a government compelling companies to promote such statements. *See, e.g., Nat'l Ass'n of Wheat Growers*, 2018 WL 1071168, at *7 (a compelled warning that a chemical is "known to the state of California to cause cancer" is unconstitutional under *Zauderer* because it "conveys the message that [the chemical's] carcinogenicity is an undisputed fact,

when almost all other regulators have concluded that there is insufficient evidence that [it] causes cancer").

Second, if the government can compel speech that is not "uncontroversial," it might seek to force disclosures to further ideological agendas. For example, in recent years there has been a "transformation in consumer activism and advocacy" as consumers increasingly seek to boycott or support a company through purchase decisions, with the goal of "changing the way a company or brand does business" or "harming the reputation of the boycott target." *Rising Consumer Activist Movement Emerges to Support Companies and Their Reputations*, Business Insider (Jan. 31, 2018), https://goo.gl/SQSxbZ. Pointing to consumer interest in this area, a city might seek to force companies to disclose on their advertisements controversial information that the city believes would be "useful for consumers." City Br. 2. Such laws might compel a company to disclose, for example, whether it hires refugees,[3] whether it has sponsored the events of certain organizations,[4] whether its workers

[3] John Kell, *Starbucks Faces Boycott After Pledging to Hire Refugees*, Fortune Magazine (Jan. 30, 2017), https://goo.gl/HwriiR.

[4] Edgar Sandoval, *NRA-linked Amazon, Apple and FedEx Targeted in Twitter Campaign for One-Day Boycott of the Companies*, New York Daily News (Feb. 27, 2018), https://goo.gl/GtyEob.

are unionized,[5] or whether its CEO has supported or donated to unpopular causes.[6] That these messages might be "factual and accurate" would not change the fact that the messages convey *opinions* that are "infused with political content." Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 Ariz. L. Rev. 421, 450 (2016). Such speech is not *purely* factual and uncontroversial under *Zauderer*. *See United States v. Philip Morris USA Inc*., 855 F.3d 321, 328 (D.C. Cir. 2017) (messages that "convey a certain innuendo … or moral responsibility" are not "purely factual and uncontroversial").

At a minimum, *Zauderer*'s "uncontroversial" requirement prohibits the government from forcing a private actor to convey as fact a statement whose factual accuracy is debatable or controversial. For example, the City's *amici* argue that the City can single out sugar-sweetened beverages for special punishment because "sugar drinks, unlike solid food, do not impart a sense of fullness or satiety that leads to reduced caloric consumption." Center for Science in the Public Interest Br. 5. But the City acknowledged that "there is some debate about whether [sugar-sweetened beverages] pose 'unique' health risks," ER182, and "[t]he City's health experts

[5] Michael DeMasi, *Union Workers Continue Urging Boycott of Hilton Albany*, Albany Business Review (Nov. 3, 2017), https://goo.gl/7hvVG1.

[6] Sarah Aarthun, *Chick-fil-A Wades Into a Fast-Food Fight Over Same-Sex Marriage Rights*, CNN (July 28, 2012), https://goo.gl/w4sZ2J.

likewise admitted that whether beverages with added sugar contribute to obesity or diabetes differently from any other source of calories is debated," ABA Br. 11. Forcing a private actor to choose sides in this type of bona fide scientific controversy is exactly what *Zauderer* prohibits.

II. Compelled Disclosure Laws Chill and Suppress the Very Type of Public Debate that the First Amendment is Designed to Promote.

The Ordinance puts sugar-sweetened beverage manufacturers to a Hobson's choice: continue to advertise while publicly denigrating their products through speech compelled by the government or stop speaking entirely. Given the serious harm such laws do to a company's brand and products, it is no surprise that beverage manufacturers have said they will do the latter.

It is important to remember *why* companies advertise in the first place. Companies seek to reinforce their brands through the use of "powerful, meaningful, inspirational messages delivered in ways that touch their audiences." Michelle Greenwald, *Secrets of 7 of the Most Effective Ad Campaigns*, Forbes (July 10, 2014), https://goo.gl/Xi94AN. Companies care deeply about their brands because "[a] brand is much like a reputation. It is a surrogate measure of quality built over many years and many contacts with the products, services, and people associated with the brand." Randal Wilson, *The Operations Management Complete Toolbox* (2013).

While it can take years to build up a brand, a company's reputation can be torn down overnight. Companies are constantly warned that "[y]ou must protect your

own brand at all costs…. [P]rotecting your company's reputation in the court of world opinion [is a] critical mission. If you don't take care of your brand and its reputation, not much else matters." Tom Travis, *Doing Business Anywhere: The Essential Guide to Going Global* 3 (2007). Indeed, companies today are in a constant battle to protect their brands from false information online. *See, e.g., Companies Scramble to Combat "Fake News,"* Financial Times (Aug. 22, 2017), https://goo.gl/5Wdb3W ("From Starbucks to Costco, brands have come under attack from hoaxers."); Rob Barry, *Russian Trolls Tweeted Disinformation Long Before U.S. Election*, Wall Street Journal (Feb. 20, 2018) (describing an online misinformation campaign claiming that 200 people were in critical condition after eating tainted turkeys from Wal-Mart). These types of misinformation-campaigns can be incredibly damaging and take years to overcome.

Given the paramount importance that companies place on protecting their brand—both promoting the company's image and guarding against harmful misinformation—it is highly unlikely that a company would *purposefully* choose to *pay* for advertisements in which it must denigrate its own products with a warning it reasonably believes is untrue. Few companies are willing to risk damaging their brand by associating it with misleading, controversial information. *See supra* 8-12. As the declarations in this case make clear, companies are more likely to stop

speaking entirely, rather than pay for marketing campaigns that shame their own product. *See* ABA Br. 54.

Indeed, the alternative to staying silent is not inviting. The whole purpose of many new compelled disclosure laws is to "stigmatize products in the marketplace" so that customers are dissuaded from buying the products. Lars Noah, *Genetic Modification and Food Irradiation: Are Those Strictly on A Need-to-Know Basis?*, 118 Penn St. L. Rev. 759, 787 (2014). Indeed, activists are not shy about these goals, publicly advocating that the implementation of "disclosure-based schemes" can "discourage bad behavior" through "public shame." J. Clarence Davies, *EPA and Nanotechnology: Oversight for the 21st Century*, Project on Emergency Nanotechnologies 34 (2007), https://goo.gl/WNB2gs.

The result of compelled-disclosure laws like the City's is less speech, not more. This does not further the purpose of the First Amendment, which seeks to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *Mulligan v. Nichols*, 835 F.3d 983, 989 (9th Cir. 2016) (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014)). That marketplace is deeply undermined if the government can use compelled-disclosure laws to shut down one side of a public debate. *See id*.

The City attempts to justify its actions by arguing that "providing the listener with truthful disclosures furthers, rather than hinders, the First Amendment goal of

the discovery of truth" because providing consumers with more information "contributes to the efficiency of the 'marketplace of ideas.'" City Br. 18 (citation omitted). But the opposite is true, as the City itself has recognized. *See* ABA Br. 16. The City adopted the Ordinance because more speech is not the City's true goal. If it were, the City has an obvious—and lawful—alternative to compelling private speech. The City is always free to "express [its] view through its own speech." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011). Indeed, government-sponsored media campaigns frequently address health-related issues, such as tobacco use, heart-disease prevention, alcohol, illicit drug use, cancer screening and prevention, and sex-related behaviors. *See* Melanie A. Wakefield, et al., *Use of Mass Media Campaigns to Change Health Behaviour*, National Institute of Health (Oct. 2010). For example, in recent years, New York City has launched high-profile ad campaigns targeting or raising awareness about soda and juice,[7] alcohol,[8] sexually-

[7] Sewell Chan, *New Targets in the Fat Fight: Soda and Juice*, N.Y. Times (Aug. 31, 2009), https://goo.gl/6ZPGmt.

[8] Jennifer Glickel, *Health Department Launches Graphic Campaign Against Holiday Binge Drinking*, DNA info (Nov. 30, 2010), https://goo.gl/ouhfCN.

transmitted diseases,[9] cigarettes,[10] and mental health problems,[11] just to name a few. Such speech "communicate[s] the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988). The fact that the City has not chosen this obvious (and lawful) alternative confirms that its purpose is to suppress not promote speech.

The City also contends that companies are "free to engage in counter-speech to prevent the alleged harm" and will have "ample space" to do so. City Br. 33, 54. But that defies reality. After all, "time and space are limited…. A product label or advertisement can only hold so much information. Mandating that a producer disclose one use of information may come at the expense of another set of information more valued by consumers. Further, the consumer's attention span and willingness to digest and consider product-related information is limited." Adler, *supra*, 445. Indeed, companies are counseled that advertisements should be *specific* and *focused*: effective advertising "intelligibly and simply states a single message,"

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[9] *Health Department Unveils Digital Ad Campaign in Recognition of STD Awareness Month*, NYC Health (Apr. 27, 2016), https://goo.gl/XnGQCi.

[10] *Four Public Health Ads That Frighten, Disgust, and Stigmatize (And One That Doesn't)*, Columbia University Mailman School of Public Health (May 12, 2015), https://goo.gl/vSLRFN.

[11] Chirlane McCray, *New York City Launches $2 Million Mental Health Ad Campaign*, CBS New York (Apr. 11, 2016), https://goo.gl/kzj2Rx.

"evokes a specific, acute emotion," and has an "overriding message [that] is clearly evident." *The ABCs of Effective Advertising*, N.Y. Times (May 13, 2008), https://goo.gl/nCFKva. Counter-speech is especially impractical here because the Ordinance already covers 20% of the advertisement; the City's warning and the company's counter-speech thus would overwhelm the intended promotional speech. Few, if any, companies will be interested in purchasing advertisements to promote a jumbled, convoluted debate over the safety of their products or other controversial issues.

Finally, the City argues that action is needed because it is faced with a "health crisis of obesity, diabetes, and tooth decay," where "[f]or the first time in our history … a generation of American children will die younger and sicker than their parents on average." City Br. 4. Even if sugar-sweetened beverage consumption were responsible for this state of affairs, *but see* ABA Br. 11-14, the City has ample, *constitutional* avenues for broadcasting its controversial message. *See supra* 15-16. What it *cannot* do is compel private companies to either deliver its misleading, controversial messages for it or stop speaking entirely. Suppressing private companies' speech does not further the truth-seeking function of the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 728 (2012) ("The theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market…. [S]uppression of speech by the

government can make exposure of falsity more difficult, not less so.") (citation omitted).

It is not surprising that the City declined the options that were available to it, as some of them likely would be deeply unpopular. But that does not excuse its failure to comply with the First Amendment. "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The Ordinance violates the First Amendment.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the *Amicus Curiae* Brief of the National Association of Manufacturers is proportionately spaced, has a typeface of 14 point, and contains 4,206 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

March 5, 2018

/s/ William S. Consovoy
William S. Consovoy

CERTIFICATE OF SERVICE

I, William S. Consovoy, hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of the National Association of Manufacturers with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 5, 2018, which will send notice of such filing to all registered CM/ECF users.

March 5, 2018

/s/ William S. Consovoy
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