No. 16-16072, 16-16073

In 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.

On 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 AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, PUBLIC HEALTH LAW CENTER, ACTION ON SMOKING & HEALTH, AFRICAN AMERICAN TOBACCO CONTROL LEADERSHIP COUNCIL, AMERICAN LUNG ASSOCIATION, AMERICAN THORACIC SOCIETY, AMERICANS FOR NONSMOKERS' RIGHTS, CAMPAIGN FOR TOBACCO-FREE KIDS, NAATPN, AND TRUTH INITIATIVE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Cancer Society Cancer Action Network, Public Health Law Center, Action on Smoking & Health, African American Tobacco Control Leadership Council, American Lung Association, American Thoracic Society, Americans for Nonsmokers' Rights, Campaign for Tobacco-Free Kids, NAATPN, and Truth Initiative Foundation have no parent corporations. They have no stock, and therefore, no publicly held company owns 10% or more of their stock.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The ink is barely dry, and the tobacco industry is already using the panel's decision in this case to challenge federal government warnings on tobacco products. *See* Mem. ISO Prelim. Inj., *Cigar Ass'n of Am. v. FDA*, No. 1:16-cv-01460-APM, at 22, 24, 29, 38, 39 (D.D.C. Oct. 3, 2017). That's not surprising. The panel's overly broad reading of the First Amendment's compelled speech doctrine, unmoored from the specific context of sugar-sweetened beverages (SSBs), could place longstanding and vital tobacco warnings in peril. The potential impact of this erroneous decision on federally mandated tobacco warnings—along with other public health warnings—calls for en banc review.

Consider a quick comparison between San Francisco's SSBs warning and the warnings Congress requires on cigarette advertisements. San Francisco's warning must constitute 20% of the advertisement space and state that drinking SSBs "contributes to obesity, diabetes, and tooth decay." S.F. Health Code § 4203(a). Similarly, Congress mandated that the Food and Drug Administration (FDA) require cigarette companies to carry warnings covering 20% of the surface of their advertisements and tell consumers that smoking "causes" lung cancer and other diseases. 15 U.S.C. § 1333.

If, as the panel majority reasoned, the "contributes" language in San Francisco's warning is factually inaccurate because it suggests that SSBs contribute

to disease in everyone "regardless of the quantity consumed" or person's lifestyle, then what of the "causes" language in cigarette warnings? Slip Op. 20. Smoking just one cigarette doesn't invariably "cause" cancer in everyone. The panel further concluded that San Francisco's warning was "unduly burdensome" because the black box warning over 20% of the ad space "overwhelms other visual elements in the advertisement." *Id.* at 24. But the tobacco advertising warnings are just as big, and the warnings on packs even bigger, and courts have already upheld their size as constitutional. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 530 (6th Cir. 2012) (Stranch, J. for majority).

Amici are national nonprofit organizations that work to protect the public from the devastating harms caused by tobacco products,[1] which are the leading cause of preventable death in America, claiming over 480,000 lives every year.[2] Having worked for decades to ensure that tobacco products and advertisements carry effective warnings, *amici* are particularly suited to explain why panel rehearing or en banc review is required here. In this brief, *amici* first provide a brief overview of tobacco warnings—from the first warnings in 1965 to the newest

[1] No party opposes the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amici* and their members, contributed money to the preparation or submission of this brief. Descriptions of each individual *amicus* are included in the Addendum.

[2] *See* Dep't of Health & Human Services, *The Health Consequences of Smoking-50 Years of Progress*, at 659 (2014), https://perma.cc/7YKD-UT6J.

warnings established in 2016—and then question how these laws might fare if subjected to the panel's version of First Amendment analysis. Viewing the panel's decision through the lens of tobacco warnings demonstrates both its flawed reasoning and the potential havoc it may wreak in other public health areas.

OVERVIEW OF FEDERAL TOBACCO WARNINGS

Warnings on tobacco products are an established fixture in American markets. Rather than take the more drastic step of prohibiting the sale of tobacco products, Congress and the FDA have decided to use warnings as a way to educate consumers about the health risks of tobacco use so that consumers can make informed choices. Over time, the federal government has changed these warnings to make them bolder, bigger, and more effective in conveying this critical health information. Today, these warnings are mandatory not just on cigarette packages, but also on smokeless tobacco and cigar packages and tobacco advertising. Because the panel's decision could be used by the tobacco industry to challenge these warnings (as the cigar industry has already done), *amici* first provide a brief overview of tobacco warnings.

1. *Cigarettes*. Congress first placed warnings on cigarette packages in 1965, following the Surgeon General's first report on tobacco and health. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965). As that report demonstrated, scientific consensus established that smoking causes lung

cancer and other diseases. *See id.* The myriad dangers of smoking were not as well-known as they are today, nor was the science as developed. And the tobacco industry—with the scientists it funded—continued to question the link between smoking and cancer and the wisdom of singling out smoking as particularly unhealthy. *See* Michaels, *Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health* 3–11 (2008). But the federal government didn't wait; it started warning the public about the dangers of smoking based on its assessment of the best available scientific evidence—and compelling cigarette companies to do the same.

In the following years, Congress strengthened the language on cigarette pack warnings three times and required warnings on cigarette advertising. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87. The Comprehensive Smoking Education Act of 1984 governs the warnings that now appear on cigarette packages and advertising. *See* Pub. L. No. 98-474, 98 Stat. 2200. The Federal Trade Commission reported to Congress that the prior warnings had too little effect on public knowledge and attitudes about smoking. So Congress responded by requiring new rotating warnings on all cigarette packages and advertisements, including: "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate

Pregnancy." *Id.* at 2202. It also doubled the size of the warnings on advertisements. *Id.*

Most recently, Congress mandated new text and larger, graphic warnings with the Family Smoking Prevention and Tobacco Control Act of 2009 (TCA)—though the FDA has not yet implemented this mandate. As Congress recognized after extensive hearings, a key "deficiency in the form of the current warnings is that they are easily overlooked." *Disc. Tobacco City*, 674 F.3d at 528 (Stranch, J. for majority); *see* Hearing on H.R. 1108, Before the H. Subcomm. on Health of the Comm. on Energy and Commerce, 110th Cong. 42 (2007) (finding that "more than 40 percent of subjects did not even view the warning," and "an additional 20 percent looked at the warning but failed to actually read it"). Congress therefore mandated that 50% of the front and back of cigarette packages, and 20% of tobacco advertising have full color graphic warnings. 15 U.S.C. §§ 1333, 4402(2)(A). The TCA further required nine rotating textual warnings, including: "Cigarettes cause fatal lung disease"; "Cigarettes cause cancer"; "Cigarettes cause strokes and heart disease"; and "Tobacco smoke causes fatal lung disease in nonsmokers." 15 U.S.C. § 1333(a)(1).

Though the tobacco companies have been fighting these graphic warnings, even they concede that the mandated text is factual and accurate. *See Disc. Tobacco City*, 674 F.3d at 558 (Stranch, J. for majority). And while a court found that the

specific graphic images first proposed by the FDA were too "inflammatory," *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) *overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014), the Sixth Circuit unanimously rejected a facial challenge against the size of the warnings. *Disc. Tobacco City*, 674 F.3d at 530.

2. *Smokeless tobacco.* Two decades after the first cigarette warnings, Congress began to focus on the harms of smokeless tobacco products, like chewing tobacco or snuff. *See* Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30. Congress sought to warn consumers that even without smoke, these tobacco products cause mouth cancer and are "not a safe alternative to cigarettes." *Id.* As with cigarette warnings, Congress followed the growing body of evidence about effective warnings and recognized that the warnings must be larger and bolder than originally envisioned to attract the attention of consumers. Accordingly, in 2009 Congress mandated that the warnings on smokeless tobacco packages comprise at least 30% of both the front and back of packages. 15 U.S.C. § 4402(a)(2)(A). Similar to San Francisco's warning, the label must have "conspicuous and legible type" in black text on a white background, or vice versa, and occupy 20% of smokeless tobacco advertising. *Id.* § 4402(b)(2)(B). Since this law came into effect in July 2010, tobacco companies

have continued to advertise their smokeless products with these 20%-sized warnings and have not challenged their constitutionality.

3. *Cigars*. Cigars are among the newest tobacco products subject to federal government warnings. In 2000, following a consent decree with the Federal Trade Commission, several major cigar manufacturers placed warnings on cigar packaging and advertisements. *See* 79 Fed. Reg. 23,141, 23,163 (April 25, 2014). But the FDA recognized that more action was necessary. By August 10, 2018, all cigar packages and advertisements must bear one of the required warnings, such as: "WARNING: Cigar smoking can cause cancers of the mouth and throat, even if you do not inhale." 21 CFR § 1143.5(a)(1). The warning must constitute at least 30% of both the front and back of the package, or cover 20% of an advertisement's space. 21 CFR § 1143.5(b). Relying on the panel's opinion in this case, the cigar manufacturers are now challenging the constitutionality of the size of these warnings as an "unduly burdensome" imposition on their speech. *See* Mem. ISO Prelim. Inj., *Cigar Ass'n of Am. v. FDA*, at 22–39.

ARGUMENT

The commercial speech doctrine is based on the value of providing information to consumers, and government warnings (like those described above) do just that. Accordingly, under the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), the First

Amendment requires less scrutiny of laws that compel commercial speakers to disclose truthful information about their products than laws that restrict commercial speech. Following *Zauderer*, courts first evaluate whether a disclosure requirement is (1) "purely factual and uncontroversial," and (2) not "unduly burdensome." *Id.* at 651.[3] If so, the First Amendment requires only that the warning be reasonably related to a substantial government interest. *Id.*; *CTIA v. Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017).

The panel opinion is misguided in its interpretation of both *Zauderer* prongs. To the extent that the panel's analysis can be applied outside the context of SSBs, and to tobacco labeling specifically, it could "expose . . . long-established programs to searching scrutiny by unelected courts." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001).

I. The panel decision mischaracterizes evidence-based warnings as "disputed policy views," jeopardizing well-established tobacco warnings.

Smoking cigarettes undoubtedly "causes" cancer. But the panel's analysis as to what constitutes a "factual and uncontroversial" disclosure under *Zauderer*

[3] There is dispute as to whether *Zauderer* requires compelled disclosures to satisfy these two prongs apart from satisfying rational basis review, as *Zauderer* uses these phrases in passing and not to articulate a legal test. *See CTIA v. Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017); *Disc. Tobacco City*, 674 F.3d at 567, 559 n.8 (Stranch, J. for majority); ER14. *Amici* assume their applicability for this brief.

threatens to transform even the most basic factual statements into "disputed policy views." Slip Op. 23.

A. Cigarette warnings are "factual and uncontroversial" without contextualizing each health risk.

In determining that San Francisco's warning failed *Zauderer*'s "factual and uncontroversial" prong, the panel in part focused on the word "contributes." Scientific analysis unequivocally demonstrates that, as the warning states, "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." *See* Br. of Am. Heart Ass'n et al. in Support of Appellee and Affirmance, at 7-15 (panel stage). It's literally true. Yet the panel majority twisted a basic factual warning about the risks of consuming SSBs into a "reasonable dispute." Slip Op. 21. According to the panel, the warning needs more context lest some consumer—certainly not a reasonable one—think that drinking SSBs leads to these conditions "regardless of the quantity consumed or other lifestyle choices." *Id.* at 20. For the warning to be "accurate," the panel would require the City to modify it with ambiguous words like "overconsumption" or "may" and then contextualize its statement with reference to quantity metrics, exercise, diet choices, and a host of other specifics. *See id.* That, in turn, just invites debate over what exactly counts as "overconsumption," what lifestyle choices one must make to safely drink SSBs, and the like. And all those details differ between people. The panel's standard for "accuracy"—assuming it could be met—mandates confusion, not clarity.

Warnings on cigarettes have long informed consumers that "Smoking Causes Lung Cancer, Heart Disease, Emphysema." *See* Pub. L. No. 98-474. The new language Congress mandated warns, "Cigarettes cause strokes and heart disease," and "Tobacco smoke causes fatal lung disease in nonsmokers." 15 U.S.C. § 1333. These facts are so well documented that the tobacco industry no longer challenges their scientific merit. Yet it would be absurd to ascribe to these warnings extreme messages that are not there: that every person who smokes get emphysema, or that smoking even one cigarette invariably "causes" lung cancer or a stroke in everyone. Certainly not everyone exposed to second-hand smoke dies of lung disease. Contrary to the panel's view, the lone word "cause"—like the softer word "contribute"—does not "convey [that extreme] message." Slip Op. 20. The court's First Amendment analysis should not hinge on the fear of such hyperbolic interpretations. Even the tobacco companies have not been so bold as to make that argument. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1211; *Disc. Tobacco City*, 674 F.3d at 558.

Requiring legislatures to qualify their warnings to avoid any subtext or potential (and unreasonable) confusion would severely limit the government's ability to provide clear, uncomplicated, and effective health warnings. Indeed, it would be impracticable. Such a long warning would not fit on a cigarette pack, and scientific evidence demonstrates that it would probably confuse consumers rather

than educate them. *See* Expert Rep. of David Hammond, PhD, ER384. While compelled speech must be truthful, lawmakers always have been (and must be) given some discretion as to how to effectively communicate basic health facts to the public.

B. Dispute over the wisdom of singling out particular products for warnings does not make the warning "factually inaccurate" or "controversial" under *Zauderer*.

Nor is San Francisco's warning "misleading" or "controversial" because it targets SSBs rather than other sources of added sugar. The panel reasoned that the City's decision to place warnings on "a single product" sent the unspoken "message that [SSBs] are less healthy than other sources of added sugars" and "more likely" to contribute to obesity, diabetes, and tooth decay. Slip. Op. 21. It further reasoned that there was "still debate over whether [SSBs] pose unique health risks," making the warning no more than a "disputed policy view[]." *Id.* at 22–23. The panel's analysis is wrong at both those steps, and looking at tobacco warnings shows why.

First, warnings are not inherently comparative. If the government decides to place a warning on one product—say cigarettes—that choice does not communicate that all other tobacco products are safe, healthier, or less addictive. Indeed, Congress placed warnings on cigarettes long before it placed warnings on other tobacco products. Since 1984, Congress has been warning consumers that cigarettes contain nicotine, are addictive, and may cause fetal injury if smoked

while pregnant. The same is true of cigars, yet the federal government did not mandate warnings on all cigars until 2016. That difference doesn't mean the *cigarette* warnings were "misleading, and in that sense, untrue" for decades, just because cigars bore no warnings. Slip. Op. 21.[4] The First Amendment doesn't require government to promulgate warnings en masse, such that every product that poses a similar risk has a label. *See Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 115–16. But the panel's opinion gives fuel to arguments that any previously acceptable warning, no matter how evidence-based, is misleading because the government has not also warned the public of all other potential sources of that same risk. It therefore threatens any number of public health disclosures, and impedes incremental regulation of products that harm public health.

Second, the City's law was based on overwhelming scientific evidence about the "unique health risks" that SSBs pose as compared to other sources of added sugars. Slip Op. 22. Relying on scientific consensus, the City recognized that there

[4] The panel adopted the plaintiffs' example: from a warning stating "Toyotas contribute to roll-over crashes,' the common-sense conclusion would be that Toyotas are more likely to cause rollovers than other vehicles." Slip Op. 21 n.8. This example is inapposite because the City's warning is not brand-specific. "A better analogy would have been a warning on *cars* that says 'WARNING: Operating the audio system while driving increases the risk of an accident.' Such a warning would not suggest that doing other things—like texting while driving—does not also pose a risk of distraction, or that engaging in other dangerous actions while driving would not also increase the risk of an accident." Berman, et al., *American Beverage Association v. San Francisco: When the First Amendment Jeopardizes Public Health*, Public Health Law Watch (Sept. 25, 2017), https://perma.cc/PU2W-QNHK.

was an evidentiary basis to "single out" SSBs; they are the single largest source of sugar in the American diet, and they supply empty calories with no nutrients. *See* S.F. Health Code § 4201. That some may "still debate" this scientific consensus is not enough to make it "controversial." Slip Op. 22.[5] If that were the standard, there would never have been warning labels on cigarettes. *See Smoking and health proposal*, Brown & Williamson Records, at 4 (1969), https://perma.cc/E5DZ-HVQJ ("Doubt is our product since it is . . . the means of establishing a controversy.").

More pertinently, a debate about which products should bear disclosures does not make the disclosure itself "nonfactual" or "controversial" under *Zauderer*. Slip Op. 21–22. Even accepting that SSBs contribute to obesity, diabetes, and tooth decay, the panel found the debate as to whether SSBs were more harmful than other products enough to make the warning itself akin to "an antagonistic ideological message." *Id.* at 23. Many products are unhealthy and cause disease, and many behaviors carry the risk of death (*e.g.*, driving a car); tobacco companies for decades debated whether their products should be singled out. *See, e.g.*, *Current Status of Studies on Smoking and Health*, Lorillard Records, at 13 (1963),

[5] "[F]or information to be considered 'factually accurate,' there does not need to be complete scientific consensus, as many well-established facts are contested by a small number of dissenters." Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 Wash. U.J.L. & Pol'y 53, 66 n.57 (2016) (citing Dure, *Flat-Earthers Are Back*, The Guardian (Jan. 20, 2016)).

https://perma.cc/8EJ8-SDSN. Deciding which products get warning labels is inherently a policy choice that is often hotly debated. But that does not mean the label itself carries a "disputed policy view." Slip. Op. 23. Again, if that were the standard, there would have never been warnings on cigarettes.

II. The Court should clarify that there is not a per-se rule that warnings covering 20% of an advertisement are unconstitutional.

To the extent that the panel opinion suggests that all warnings covering 20% or more of an advertisement are "unduly burdensome," it would severely reduce the effectiveness of many tobacco and other public health warnings. Like San Francisco's SSBs warning, tobacco warnings are a "black box, bold warning that covers 20 percent of the[] advertisements." Slip Op. 23. Indeed, tobacco warnings are an even greater percentage of the packaging (30% of cigar and smokeless packs; 50% of cigarette packs, once implemented by the FDA). Because the panel concluded that San Francisco's warning "overwhelms other visual elements in the advertisement," *id.* at 24, the tobacco industry has argued that the Ninth Circuit has a per-se rule that 20% is too big.[6] *See* Mem. ISO Prelim. Inj., *Cigar Ass'n of Am. v. FDA*, at 30. ("There is not a glimmer of daylight between the San Francisco

[6] The panel held that 20% was "unduly burdensome" in light of its conclusion that the warning was misleading because the beverage industry would have to "'tailor its speech to an opponent's agenda' and to respond to a one-sided and misleading message when it would 'prefer to be silent.'" Slip Op. 24 (quoting *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 10–11 (1986)). Tobacco warnings are not misleading, but the panel's discussion of size, taken alone, could impact tobacco warnings.

ordinance and the FDA rule. Both are health warning requirements; both take up too large a percentage of the medium; both are unconstitutional."). The Court should clarify that there is no rule that 20% is per se unconstitutional.

As research in the tobacco context demonstrates, limiting warnings to less than 20% of the advertisement could render them ineffectual. A warning must be large enough to grab the viewer's attention. Hammond, ER376–81. Congress, for instance, recognized that the existing tobacco warnings (established in 1984) were too "easily overlooked." *Disc. Tobacco City*, 674 F.3d at 528 (Stranch, J., for majority). Based on research from the Institute of Medicine, Congress concluded that a warning constituting 20% of the advertisement and 50% of cigarette packs was necessary to be effective in informing consumers. *See id.* That size is also consistent with the international consensus on the effectiveness of health warnings. Article 11 of the WHO Framework Convention on Tobacco Control suggests that health warnings on cigarette packages cover at least 30 percent of the surface and be "large, clear, visible, and legible." 2302 U.N.T.S. 166 (27 Feb. 2005). Risk perception studies demonstrate that enlarging warnings to comport with these guidelines worked; more consumers considered the risks of smoking, and thought about quitting. *See, e.g.*, Hammond, et al., *Text and Graphic Warnings on Cigarette Packages, Findings from the International Four Country Study*, 32 Am. J. of Prev. Med. 202

(2007); Yong et al., *Mediational Pathways of the Impact of Cigarette Warning Labels on Quit Attempts*, 33 Health Psychology 1410 (2014).

Other circuits have correctly concluded that disclosures covering 20% of an advertisement's space are not "unduly burdensome" because there is still room for the company's own message. The Sixth Circuit unanimously upheld the size of Congress's new 20%-sized advertisement warnings. *Disc. Tobacco City*, 674 F.3d at 530. *See also Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 54–55 (1st Cir. 2000), *rev'd on other grounds sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (warnings covering 25% of cigar packages and 20% of advertisements are constitutional under *Zauderer*).[7] These cases recognize that a warning is only "unduly burdensome" when it effectively prohibits speech in a particular medium—for instance, when the disclosure is so large it won't fit on a business card. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146–47 (1994); *Nationwide Biweekly Admin., Inc. v. Owen*, Nos. 15-16220 & 15-16253, 2017 WL 4509128, at *14 (9th Cir. Oct. 10, 2017) ("A disclosure is 'unduly burdensome' when the burden 'effectively rules out' the speech it accompanies."). But here, as in the tobacco cases, the plaintiffs "have not shown that the remaining portions of their packaging [or advertisements] are insufficient for them to market their products." *Disc. Tobacco*

[7] The D.C. Circuit ruled that the specific graphic warnings selected by the FDA violated the First Amendment. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216. This case does not involve graphic warnings.

City, 674 F.3d at 567 (Stranch, J., for majority). And research demonstrates that advertising messages—particularly brand marketing—are still effective when carrying health warnings. Hammond, ER391.

Additionally, the plaintiffs' assertion that they will choose to cease advertising in the covered media—even assuming its credibility—is not enough to show that the warning violates the First Amendment. The panel cited the declarations of some beverage companies, attesting that they will "cease using [the covered media] to speak," in concluding that the warning had an impermissible chilling effect. Slip. Op. 25. But *Zauderer* does not give commercial speakers a veto. The warning "only require[s] them to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. It hasn't precluded them from conveying their message. Just because they may prefer not to advertise than to carry a truthful message about their product's health risks does not mean the warning is itself "unduly burdensome." If the beverage industry decided it would not advertise on billboards if the warning had to be only 5% of the space—and that it would instead opt only for social media, where there is no labeling requirement—would the 5% requirement be unduly burdensome? No. And a tobacco company's assertion that it would not advertise if forced to carry a warning should likewise not preclude important health warnings. This Court should review the panel's misguided "unduly burdensome" analysis.

CONCLUSION

Amici request that the panel grant rehearing, or that the Court review the panel's decision en banc.

Respectfully submitted,

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ADDENDUM: IDENTITY OF *AMICI CURIAE*

American Cancer Society Cancer Action Network

The American Cancer Society Cancer Action Network (ACS CAN) is the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society. ACS CAN supports evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem, including effective tobacco control policies at the federal, state, and local levels.

Public Health Law Center

The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law. Located at the Mitchell Hamline School of Law in Saint Paul, Minnesota, the Center helps local, state, and national leaders improve health by strengthening public policies. The Center and its national program, the Tobacco Control Legal Consortium, works with public officials and community leaders to develop, implement, and defend effective public health laws and policies, including those that advance tobacco control. The Center has prepared 43 publications on policy options for regulating sugar drinks, worked to remove sugar drinks from hospitals, provided technical assistance and training to communities considering taxation of sugar drinks, and studied the ineffectiveness of self-regulation of food and beverage advertising. The Center has also filed more than forty briefs as amicus curiae in the highest courts of the land, including eleven briefs addressing the regulation of commercial speech harmful to public health. The Center has a strong interest in supporting the government's ability to require companies to warn consumers about the dangers of their products.

Action on Smoking and Health

Action on Smoking and Health (ASH) is the nation's oldest anti-tobacco organization. ASH is dedicated to ending the global death, disease and damage caused by tobacco consumption and nicotine addiction through public policy, litigation and public education. ASH is deeply concerned that the findings in this case could be severely detrimental to federal efforts toward warning labels on tobacco products. Such warnings have proven effective in reducing tobacco use in other countries, and could save thousands or perhaps millions of U.S. lives.

African American Tobacco Control Leadership Council

Formed in 2008, the African American Tobacco Control Leadership Council (AATCLC) partners with community stakeholders, elected officials, and public health agencies to inform the national direction of tobacco control policy, practices, and priorities, as they affect the lives of Black American and African immigrant

populations. The AATCLC has been at the forefront in elevating the regulation of mentholated and other flavored tobacco products on the national tobacco control agenda.

American Lung Association

The American Lung Association (ALA) is the nation's oldest voluntary health organization, with hundreds of thousands of volunteers in all 50 states and the District of Columbia. Because smoking is a major cause of lung cancer and chronic obstructive pulmonary disease, the ALA has long been active in research, education, and public policy advocacy regarding the adverse health effects caused by tobacco use, as well as efforts to regulate the marketing, manufacture and sale of tobacco products.

American Thoracic Society

The American Thoracic Society (ATS) is an international education and scientific organization founded in 1905 that represents more than 16,000 health care professionals. ATS works to prevent and fight respiratory disease around the globe through research, education, patient care, and advocacy. Its membership includes experts on death and disease caused by tobacco products. ATS publishes three peer-reviewed scientific journals that disseminate groundbreaking research, including studies on health effects of tobacco use.

Americans for Nonsmokers' Rights

Americans for Nonsmokers' Rights is a member-supported national advocacy organization which promotes the protection of everyone's right to breathe smoke-free air, educates the public and policy-makers regarding the dangers of secondhand smoke, works to prevent youth tobacco addiction, and tracks and reports on the adversarial effects of the tobacco industry.

The Campaign for Tobacco-Free Kids

The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco, and it works to save lives by advocating for public policies that prevent kids from smoking, help smokers quit, and protect everyone from secondhand smoke.

NAATPN, Inc.

NAATPN, Inc. works to address the health impact of tobacco products on African Americans through education and advocacy. It is the parent organization of the National African American Tobacco Prevention Network, a Centers for Disease

Control and Prevention-funded network that focuses on assessing the impact of tobacco within disparate populations, identifying gaps in data, crafting interventions, and conducting research involving African Americans and tobacco use.

Truth Initiative Foundation

The Truth Initiative envisions an America where tobacco is a thing of the past and where all youth and young adults reject tobacco use. Truth Initiative's proven-effective and nationally recognized public education programs include truth®, the national youth smoking prevention campaign that has been cited as contributing to significant declines in youth smoking; EX®, an innovative smoking cessation program; and research initiatives exploring the causes, consequences, and approaches to reducing tobacco use. Truth Initiative also develops programs to address the health effects of tobacco use, with a focus on priority populations disproportionately affected by the toll of tobacco, through alliances, youth activism, training, and technical assistance. Formerly known as the American Legacy Foundation and located in Washington, D.C., Truth Initiative was created in 1999 as a result of the Master Settlement Agreement between 46 states, five U.S. territories, and the tobacco industry.

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

/s/ Rachel Bloomekatz
Rachel Bloomekatz

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 29 and 32(g)(1) AND CIRCUIT RULE 32-1

I hereby certify that the foregoing brief was prepared in 14-point Baskerville font, and that my word processing program, Microsoft Word, counted 4,199 words in the foregoing brief, exclusive of the portions excluded by Rule 32(f).

/s/ Rachel Bloomekatz
Rachel Bloomekatz

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, I electronically filed the foregoing amicus brief with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Rachel Bloomekatz
Rachel Bloomekatz