

No. 16-16072, 16-16073

**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 CENTER FOR SCIENCE IN THE PUBLIC INTEREST AS
AMICUS CURIAE IN SUPPORT OF APPELLEE CITY AND COUNTY OF
SAN FRANCISCO**

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Center for Science in the Public Interest (“CSPI”) does not have a parent corporation and no publicly held corporation owns 10 percent or more of its stock.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Center for Science in the Public Interest (“CSPI”) is a 501(c)(3) nonprofit, nonpartisan organization with longstanding interests in the issues presented by this case—namely, whether the warning required by the City and County of San Francisco (“San Francisco”) on certain sugar-sweetened beverage (“sugar drink”) advertisements is factual and accurate.¹ CSPI is particularly well-suited to address this issue, given its scientific expertise and experience in public health.

Since 1971, CSPI has been a strong advocate for nutrition and health, food safety, and sound science. CSPI is well-recognized for its work, having received numerous awards and accolades. The Food and Drug Administration (“FDA”), for example, has bestowed on CSPI the Harvey W. Wiley Special Citation, the highest award given to outside organizations or individuals, the Centers for Disease Control and Prevention (“CDC”) awarded it the CDC Foundation Hero Award, and the Harvard T.H. Chan School of Public Health gave CSPI the Leadership Award in Public Health Practice.

¹ The parties have consented to 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 *Amicus* and its members, contributed money to the preparation or submission of this brief.

As part of CSPI’s advocacy on behalf of public health, CSPI’s Litigation Team is lead counsel in an ongoing consumer deception lawsuit in District of Columbia Superior Court against the Coca-Cola Company (“Coke”) and the Appellant in this case, the American Beverage Association (“ABA”), in which plaintiffs alleged that ABA and Coke have misled consumers with false and deceptive statements regarding the science of sugar drinks. *See* Complaint, *Lamar v. Coca-Cola Co.*, Case No. 2017 CA 004801 B (D.C. Super., filed July 13, 2017), <https://goo.gl/4AFXBo>. CSPI recently concluded another false advertising litigation against Coke for deceptive advertising of vitaminwater, a sugar drink. That litigation successfully resolved with CSPI obtaining material marketing changes on behalf of consumers.²

As a health and nutrition consumer advocacy organization with particular expertise in the health and marketing impact of sugar drinks, and the litigation strategies of the sugar drink industry, CSPI has an important interest and a valuable perspective on the issues presented in this case.

INTRODUCTION

The panel’s decision in this case—that San Francisco’s ordinance requiring a warning on certain sugar drink advertisements violates the First Amendment

² Settlement Agreement and Release, *Ackerman v. Coca-Cola Co.*, Case No. 09 Civ. 00395 (DLI) (RML) (E.D.N.Y.), <https://goo.gl/t9TKxM>.

because, in principal part, the required warning is not factual and accurate—is premised on an overly broad reading of the First Amendment’s compelled speech doctrine and a misunderstanding of the science on sugar drinks.

Obesity and type 2 diabetes have reached epidemic levels in the United States. Today, roughly two-thirds of adults are overweight or obese and nearly 50 percent have pre-diabetes or diabetes. ER480–81 (Schillinger Rep. ¶¶ 8, 12); CDC, *New CDC Report: More than 100 Million Americans have Diabetes or Prediabetes* (July 18, 2017), <https://goo.gl/i7oiPL>. The impact of these diseases on both life quality and expectancy cannot be overstated. Type 2 diabetes commonly leads to life altering complications, including amputations and vision loss, and then to premature mortality. ER482 (Schillinger Rep. ¶ 16). During the ten-year war in Iraq and Afghanistan, nearly 500 times more Americans (730,000) lost a limb due to type 2 diabetes than to combat wounds (1,572). *Id.* The economic impact of *diagnosed* diabetes is also acute, with estimated costs in the United States of \$245 billion annually in medical expenses and lost wages, excluding other costs associated with premature death. CDC, *Diabetes Quick Facts* (last updated July 24, 2017), <https://goo.gl/fX3zPa>. *See also* ER480–84 (Schillinger Rep. ¶¶ 10, 19).

Given this, scientists have extensively studied obesity and type 2 diabetes, including their association with sugar drinks. Both scientists and leading health authorities have concluded that sugar drinks are linked to excess body weight and

diabetes, among other health harms. The CDC bluntly warns that “[f]requently drinking sugar-sweetened beverages *is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis. Limiting the amount of SSB intake can help individuals maintain a healthy weight and have a healthy diet.*” CDC, *Get the Facts: Sugar-Sweetened Beverages and Consumption* (last updated April 7, 2017), <https://goo.gl/uevB8N> (emphasis added). And the FDA has adopted the conclusion of the Dietary Guidelines Advisory Committee (“DGAC”) that “*strong and consistent evidence*” links sugar drinks to excessive body weight. The DGAC also found that “*strong evidence*” links them to type 2 diabetes. *See* 81 Fed. Reg. 33,742, 33,803 (May 27, 2016) (emphasis added); U.S. Dep’t of Agric. & U.S. Dep’t of Health & Human Serv., *Scientific Report of the 2015 DGAC*, pt. D, ch. 6, p. 20 (2015), <http://goo.gl/2rc9v3> (emphasis added). In many studies, people who drink even a single serving per day have a higher risk of these health conditions. ER208–209, 211 (Willett Rep. ¶¶ 43, 51).³ A staggering 70% of boys between the ages of 2 and 19 consume sugar drinks daily. ER196 (Willett Rep. ¶ 17).

³ *See also, e.g.,* Ravi Dhingra et al., *Soft Drink Consumption and Risk of Developing Cardiometabolic Risk Factors and the Metabolic Syndrome in Middle-Aged Adults in the Community*, 116 CIRCULATION 480 (2007), <https://goo.gl/e994T5> (compared with “infrequent” consumers, participants who consumed at least one soft drink per day had a 31% higher risk of obesity).

Confronted with these debilitating epidemics, skyrocketing health care costs, and generally excessive rates of sugar drink consumption, San Francisco enacted a public health ordinance in 2015 requiring that certain advertisements for sugar drinks contain the following warning (the “Warning”): “Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.” S.F. Health Code § 4203(a). San Francisco’s goal—to mitigate the health harms linked to sugar drinks—and the mechanism by which it sought to achieve it—by requiring sugar drink advertisers to place a factually accurate warning on certain large-scale advertisements—should be applauded.

Instead of supporting this important public health initiative, however, Appellants assert that the Warning offends the First Amendment because it is not factual and accurate. But the fact that sugar drinks contribute to obesity, type 2 diabetes, and other health problems is simply beyond scientific dispute. More, they do so materially because sugar drinks, unlike solid food, do not impart a sense of fullness or satiety that leads to reduced caloric consumption. Furthermore, sugar drinks are the greatest source of added sugar in the American diet.⁴

⁴ Adam Drewnowski & Colin D. Rehm, *Consumption of Added Sugars Among US Children and Adults by Food Purchase Location and Food Source*, 100 AM. J. CLINICAL NUTRITION 901, 904 (2014), <https://goo.gl/KLGpPa> (sugar drinks provide nearly three times the amount of added sugar in American diet compared to next leading source (grain deserts)).

Given this, the panel majority’s determination that the Warning is not factual and accurate is erroneous. More, it imperils not only a critical health initiative by San Francisco but various other important public health initiatives nationally and internationally. It has also emboldened an industry that reports “obesity concerns” as the leading threat to its continued prosperity⁵ to act with even greater disregard for the public health than before, including by way of asserting the panel’s decision in other litigation as settled authority for the proposition that the link between sugar drinks and health harms has been rejected by the Ninth Circuit.

ARGUMENT

I. THE WARNING IS FACTUAL AND ACCURATE AS A MATTER OF SCIENCE

To pass First Amendment scrutiny, the Warning must be (1) factual and accurate;⁶ (2) “not unduly burdensome”; and (3) “reasonably related to a substantial

⁵ See Coca-Cola Company, SEC Form 10-K Report, Fiscal Year Ending December 31, 2016 at 10, 17, <https://goo.gl/h6TddJ> (listing obesity concerns as Coke’s first corporate risk factor, stating “concern about obesity . . . may reduce demand for . . . our [products]”).

⁶ Although the panel articulated the standard as “factual and uncontroversial,” Slip Op. at 20 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)), it held that the word “uncontroversial” “refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience,” Slip Op. at 15 n.5 (quoting *CTIA-The Wireless Ass’n v. City of Berkeley, California*, 854 F.3d 1105, 1117 (9th Cir. 2017)). See also *CTIA*, 854 F.3d at 1118 (“We therefore conclude that *Zauderer* requires only that the information be ‘purely factual.’”); Pet. of San Francisco for Reh’g or Reh’g En Banc at 6–7, ECF No. 77 (“CTIA expressly determined that *Zauderer* review is appropriate so long as a compelled disclosure is factually accurate, even if it is controversial, and regardless

government interest.” Slip Op. at 20. Consistent with the scientific expertise of CSPI in the area of health and nutrition, this brief focuses on whether the ordinance is factual and accurate. The answer is a resounding yes.

Appellants argue that the Warning cannot withstand First Amendment scrutiny because disagreement among scientific experts precludes a determination that it is factual. They are wrong. Much like the tobacco context, industry-fabricated disagreement cannot change facts; nor can misleading citations as to the positions of various health authorities obscure them indefinitely. It is beyond serious contention that science has demonstrated the link between sugar drinks and obesity, type 2 diabetes, and tooth decay. That link is a reality, and one that leading health authorities with expertise in the field acknowledge.

A. The Science Is Clear: Sugar Drinks Contribute to Obesity and Disease

A plethora of peer-reviewed scientific research has established a link between sugar drink consumption and harmful health and nutritional effects, including, but not limited to, obesity, type 2 diabetes, and tooth decay. *See generally* ER190–224 (Willett Rep.); ER477–94 (Schillinger Rep.).

Their overwhelming conclusion—that sugar drinks contribute to obesity, type 2 diabetes, other related chronic diseases, and dental caries—has been adopted by

of its subjective impact on the audience that hears it.” (internal quotation marks omitted)).

the leading health authorities with relevant expertise. Like San Francisco, to mitigate the deleterious impact on health of such consumption, these health authorities call for a reduction of sugar drinks in the diet. The following is a sampling of their very clear statements:

- FDA: “[S]trong and consistent evidence” shows an *association between sugar drinks and excess body weight* in children and adults. 81 Fed. Reg. at 33,803 (emphasis added) (citing the findings of the 2015 DGAC).
- CDC: “Frequently drinking sugar-sweetened beverages *is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis. Limiting the amount of SSB intake can help individuals maintain a healthy weight* and have a healthy diet.” CDC, *Get the Facts: Sugar-Sweetened Beverages and Consumption* (last updated April 7, 2017) (emphasis added). See also CDC, *Beverage Consumption Among High School Students—United States, 2010* (June 17, 2011), <https://goo.gl/aAD5ba> (*sugar drinks are a “factor contributing to the prevalence of obesity among adolescents* in the United States” (emphasis added)).
- World Health Organization (“WHO”): “Current evidence suggests that increasing consumption of sugar-sweetened beverages is associated with overweight and obesity in children. Therefore, *reducing consumption of sugar-sweetened beverages would also reduce the risk of childhood overweight and obesity.*” WHO, *Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Childhood Overweight and Obesity*, <https://goo.gl/5pDE9K> (last visited Feb. 8, 2018) (emphasis added). See also WHO, *Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Unhealthy Weight Gain in Adults*, <https://goo.gl/Pn46gt> (last visited Feb. 8, 2018) (same, for adults).
- 2015 DGAC: “*Strong and consistent evidence shows that intake of added sugars from food and/or sugar sweetened beverages are associated with excess body weight in children and adults*”; “[s]trong evidence shows that higher consumption of added sugars, *especially sugar sweetened beverages*, increases the risk of *type 2 diabetes* among adults and this relationship is not fully explained by body weight.” U.S. Dep’t of Agric. & U.S. Dep’t of Health

& Human Serv., Scientific Report of the 2015 DGAC, pt. D, ch. 6, p. 20 (2015) (emphasis added). *See also id.* (recommending that added sugar not exceed 10% of total caloric intake).

- American Medical Association (“AMA”): AMA, the largest association of physicians and medical students in the United States, recently adopted a ***resolution supporting “warning labels to educate consumers on the health harms of SSBs.”*** AMA also backs a ***“comprehensive approach targeting sugary drinks,”*** which includes policies to: encourage “hospitals and medical facilities to offer healthier beverages, such as water, unflavored milk, coffee and unsweetened tea, for purchase in place of SSBs”; request “outlets to display ‘calorie counts for beverages in vending machines to be visible next to the price’”; encourage “physicians to suggest their patients ***‘replace SSBs with healthier beverage choices,*** as recommended by professional society clinical guidelines”; and encourage physicians to “work with ‘local school districts to ***promote healthy beverage choices*** for students.” Sara Berg, ***AMA Backs Comprehensive Approach Targeting Sugary Drinks***, AMA WIRE (June 14, 2017), <https://goo.gl/tyAgGf> (emphasis added).
- Institute of Medicine (“IOM”)⁷: “[R]esearchers have found ***strong associations between intake of sugar-sweetened beverages and weight gain***”; ***“their link to obesity is stronger than that observed for any other food or beverage”*** IOM, *Accelerating Progress in Obesity Prevention: Solving the Weight of the Nation* at ch. 6, p. 169 (2012), <https://goo.gl/pZRas8> (emphasis added).
- Amicus Curiae, American Heart Association (“AHA”): ***“There is a robust body of evidence that SSB consumption is detrimental to health and has been associated with increased risk of CVD mortality, hypertension, liver lipogenesis, [type 2 diabetes], obesity, and kidney disease.”*** Linda Van Horn et al., *Recommended Dietary Pattern to Achieve Adherence to the American Heart Association/American College of Cardiology (AHA/ACC) Guidelines: A Scientific Statement from the American Heart Association*, 134 CIRCULATION e1, e8 (2016), <https://goo.gl/rr9or6> (emphasis added). “Therefore, it is recommended that children and adolescents limit their intake of SSBs to 1 or fewer 8-oz beverages per week (Class I; Level of Evidence

⁷ In 2015, the IOM became the National Academy of Medicine. Molly Galvin, *Press Release: Institute of Medicine to Become National Academy of Medicine*, NATIONAL ACADEMIES OF SCIENCES (April 28, 2015), <https://goo.gl/ecmq6z>.

A).” Miriam B. Vos et al., *Added Sugars and Cardiovascular Disease Risk in Children: A Scientific Statement from the American Heart Association*, 135 CIRCULATION e1017, e1033 (2017), <https://goo.gl/3So4H1>.

- American Public Health Association (“APHA”): “***Consumption of [sugar] drinks is a significant contributor to the obesity epidemic and increases the risk of type 2 diabetes, heart disease, and dental decay.***” APHA, *Taxes on Sugar-Sweetened Beverages* (Oct. 30, 2012), <https://goo.gl/XGdrMZ> (emphasis added).
- American Diabetes Association (“ADA”): “***The American Diabetes Association recommends that people should avoid intake of sugar-sweetened beverages to help prevent diabetes.***” ADA, *Diabetes Myths* (last edited July 5, 2017), <https://goo.gl/DUxU2u> (emphasis added).

As the pronouncements of these leading health authorities show, there can be no serious debate about whether the Warning is factual and accurate. Sugar drinks clearly “contribute to obesity, diabetes, and tooth decay.”

B. Industry Efforts to Manufacture Scientific Dispute Cannot Alter the Facts

Faced with an avalanche of research linking sugar drinks to disease,⁸ Appellees and their industry cohorts have set out to manufacture scientific

⁸ Ravi Dhingra et al., *Soft Drink Consumption and Risk of Developing Cardiometabolic Risk Factors and the Metabolic Syndrome in Middle-Aged Adults in the Community*, 116 CIRCULATION 480 (2007), <https://goo.gl/fm24zY>; Frank B. Hu & Vasanti S. Malik, *Sugar-Sweetened Beverages and Risk of Obesity and Type 2 Diabetes: Epidemiologic Evidence*, 100 PHYSIOLOGY & BEHAV. 47 (2010), <https://goo.gl/e93JBg>; Vasanti S. Malik et al., *Sugar Sweetened Beverages and Weight Gain in Children and Adults: A Systematic Review and Meta-Analysis*, 98 AM. J. CLINICAL NUTRITION 1084 (2013), <https://goo.gl/AVxt4U>; Julie R. Palmer et al., *Sugar-Sweetened Beverages and Incidence of Type 2 Diabetes Mellitus in African American Women*, 168 ARCHIVES INTERNAL MED. 1487 (2008), <https://goo.gl/ceVqCD>; Qibin Qi et al., *Sugar-Sweetened Beverages and Genetic*

Risk of Obesity, 367 NEW ENG. J. MED. 1387 (2012), <https://goo.gl/tZAxJJ>; Matthias B. Schulze et al., *Sugar-Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women*, 292 JAMA 927 (2004), <https://goo.gl/abFNpr>; Jiantao Ma, *Sugar-Sweetened Beverage but Not Diet Soda Consumption is Positively Associated with Progression of Insulin Resistance*, 146 J. NUTRITION 2544 (Nov. 9, 2016), <https://goo.gl/W1mmqN>; Janne C. de Ruyter et al., *A Trial of Sugar-Free or Sugar-Sweetened Beverages and Body Weight in Children*, 367 NEW ENG. J. MED. 1397 (2012), <https://goo.gl/DFBmR4>; Cara B. Ebbeling et al., *A Randomized Trial of Sugar-Sweetened Beverages and Adolescent Body Weight*, 367 NEW ENG. J. MED. 1407 (2012), <https://goo.gl/2ANroi>; Cara B. Ebbeling et al., *Effects of Decreasing Sugar-Sweetened Beverage Consumption on Body Weight in Adolescents: A Randomized Controlled Pilot Study*, 117 PEDIATRICS 673 (2006), <https://goo.gl/XT2qsn>; Janet James et al., *Preventing Childhood Obesity by Reducing Consumption of Carbonated Drinks: Cluster Randomized Controlled Trial*, 328 BMJ 1237 (2004), <https://goo.gl/Xdwivd>; Anne Raben et al., *Increased Postprandial Glycaemia, Insulinemia, and Lipidemia After 10 Weeks' Sucrose-Rich Diet Compared to an Artificially Sweetened Diet: A Randomised Controlled Trial*, 55 FOOD NUTRITION RES. 5961 (2011), <https://goo.gl/QHnTmF>; Anne Raben et al., *Sucrose Compared with Artificial Sweeteners: Different Effects on Ad Libitum Food Intake and Body Weight After 10 Wk of Supplementation in Overweight Subjects*, 76 AM. J. CLINICAL NUTRITION 721 (2002), <https://goo.gl/g3zXbn>; Michael G. Tordoff & Anne M. Alleva, *Effect of Drinking Soda Sweetened with Aspartame or High-Fructose Corn Syrup on Food Intake and Body Weight*, 51 AM. J. CLINICAL NUTRITION 963 (1990), <https://goo.gl/dcUVXU>; Darren C. Greenwood et al., *Association Between Sugar-Sweetened and Artificially Sweetened Soft Drinks and Type 2 Diabetes: Systematic Review and Dose-Response Meta-Analysis of Prospective Studies*, 112 BRIT. J. NUTRITION 725 (2014), <https://goo.gl/znQFg4>; Fumiaki Imamura et al., *Consumption of Sugar Sweetened Beverages, Artificially Sweetened Beverages, and Fruit Juice and Incidence of Type 2 Diabetes: Systematic Review, Meta-Analysis, and Estimation of Population Attributable Fraction*, 351 BMJ h3576 (2015), <https://goo.gl/mqRBWB>; Lawrence de Koning et al., *Sugar-Sweetened and Artificially Sweetened Beverage Consumption and Risk of Type 2 Diabetes in Men*, 93 AM. J. CLINICAL NUTRITION 1321 (2011), <https://goo.gl/mwFkNX>; Vasanti S. Malik et al., *Sugar-Sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes: A Meta-Analysis*, 33 DIABETES CARE 2477 (2010), <https://goo.gl/wz8h9R>; Andrew O. Odegaard et al., *Soft Drink and Juice Consumption and Risk of Physician-Diagnosed Incident Type 2 Diabetes*, 171 AM. J. EPIDEMIOLOGY 701 (2010), <https://goo.gl/W89iwy>; The InterAct Consortium, *Consumption of Sweet Beverages and Type 2 Diabetes Incidence in*

controversy. Their efforts parallel the tobacco industry’s response to public health initiatives, which was to flood the conversation with countervailing representations in an effort to hide the truth. *See, e.g., U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 208 (D.D.C. 2006), *aff’d in part and vacated in part on other grounds*, 566 F.3d 109 (D.C. Cir. 2009) (“Defendants . . . mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an ‘open question.’”). So too here, as analyses of industry-funded scientific research on sugar drinks shows. A recent study by Dr. Schillinger, for example, determined that ***100% of scientific studies that found no association between sugar drinks and obesity and diabetic outcomes had financial ties to industry***; whereas only one of the 34 studies finding such an association had industry

European Adults: Results from EPIC-InterAct, 56 DIABETOLOGIA 1520 (2013), <https://goo.gl/3pv6Xo>; Adam M. Bernstein et al., *Soda Consumption and the Risk of Stroke in Men and Women*, 95 AM. J. CLINICAL NUTRITION 1190 (2012), <https://goo.gl/ZrQTmS>; Lawrence de Koning et al., *Sweetened Beverage Consumption, Incident Coronary Heart Disease, and Biomarkers of Risk in Men*, 125 CIRCULATION 1735 (2012), <https://goo.gl/2b1Xrx>; Teresa T. Fung et al., *Sweetened Beverage Consumption and Risk of Coronary Heart Disease in Women*, 89 AM. J. CLINICAL NUTRITION 1037 (2009), <https://goo.gl/sZmXNV>; Te Morenga LA et al., *Dietary Sugars and Cardiometabolic Risk: Systematic Review and Meta-analyses of Randomized Controlled Trials of the Effects on Blood Pressure and Lipids*, AM. J. CLINICAL NUTRITION 65 (2014), <https://goo.gl/GWkUcf>; Sonia Caprio, *Calories from Soft Drinks—Do They Matter?*, 367 NEW ENG. J. MED. 1462,1463 (2012), <https://goo.gl/RrVzDM>; Vasanti S. Malik & Frank B. Hu, *Fructose and Cardiometabolic Health: What the Evidence from Sugar-Sweetened Beverages Tells Us*, 66 J. AM. C. CARDIOLOGY 1615 (2015), <https://goo.gl/kphN7G>.

ties. Dean Schillinger et al., *Do Sugar-Sweetened Beverages Cause Obesity and Diabetes? Industry and the Manufacture of Scientific Controversy*, 165 ANNALS INTERNAL MEDICINE 895 (2016), <https://goo.gl/WeficN>. See also Lenard I. Lesser et al., *Relationship Between Funding Source and Conclusion Among Nutrition-related Scientific Articles*, 4 PLOS MEDICINE e5 (2007), <https://goo.gl/kVVSQ5> (showing decisive effect of financial ties to industry on research outcomes).⁹

By corollary, in order to undercut the conclusions of credible authorities, Appellants and those industry interests they represent obfuscate those conclusions. By way of example, plucking a clause out of context, Appellants assert that the FDA found that sugar drinks “are no more likely to cause weight gain in adults than any other source of energy.” Br. of ABA and California Retailers Ass’n to Panel at 12, ECF No. 10 (quoting 79 Fed. Reg. 11,880, 11,904 (Mar. 3, 2014)). However, this reference misleadingly omits the FDA’s crucial qualifier that this is true *only* “under isocaloric controlled conditions.” 79 Fed. Reg. at 11,904. The FDA inserts this qualifier to make a distinction between normal, non-isocaloric conditions (where calorie intake is not artificially controlled) and isocaloric conditions (where the study

⁹ The sugar drink industry’s funding of scientists to promote their commercial interest has been well-documented. See, e.g., Anahad O’Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES (Aug. 9, 2015), <http://goo.gl/tpfrg7>; Candice Choi, *Emails Reveal Coke’s Role in Anti-Obesity Group*, ASSOCIATED PRESS (Nov. 24, 2015), <https://goo.gl/PEzGft> (quoting emails between industry executives and scientific grantee coordinating funding with defined pro-industry parameters).

controls all intake of food and drinks). Under normal conditions, the FDA stated that **“strong evidence shows that children who consume more sugar-sweetened beverages have greater adiposity (body fat).”** *Id.* at 11,903 (emphasis added) (citing the findings of the 2010 DGAC). By omitting this key point, Appellants wholly distort the meaning of the FDA’s words. Appellants’ argument also flouts the FDA’s subsequent embrace of the 2015 DGAC finding that **“strong and consistent evidence” shows an association between sugar drinks and excess body weight in children and adults.** 81 Fed. Reg. at 33,803 (emphasis added). It flouts also the IOM’s conclusion that sugar drinks’ **“link to obesity is stronger than that observed for any other food or beverage.”** See IOM, Accelerating Progress in Obesity Prevention at ch. 6, p. 169 (emphasis added).

Yet another example of Appellants’ efforts to cloud the scientific consensus relating to sugar drinks concerns Appellants’ routine conflation of the scientific evidence on added sugars with the evidence on sugar drinks—**despite the FDA’s clear instruction that added sugars and sugar drinks are not suitable proxies for each other.** *E.g.*, 81 Fed. Reg. at 33,803 (rejecting “proxy” and noting that science linking sugar drinks to body weight/adiposity is “strong and consistent” whereas the evidence on added sugars “continues to emerge”). For example, Appellants impermissibly extrapolate from the FDA’s finding that added sugars are generally recognized as safe (“GRAS”) to a finding that warning that sugar drinks contribute

to obesity is not factual and accurate. *See, e.g.*, Br. of ABA and California Retailers Ass'n to Panel at 13, ECF No. 10. This scientifically flawed reasoning was then picked up by the panel when it cited the GRAS determination as a basis for its decision. *See* Slip Op. at 20. This too is contrary to not only the FDA's statements about sugar drinks but to the established scientific consensus.

II. THE WARNING IS NOT MISLEADING

A divided panel of this Court also determined that the Warning, even if technically accurate, was deceptive. Specifically, the panel majority held that the Warning implied that: (1) sugar drinks cannot be safely consumed in any amount and (2) sugar drinks are “less healthy than other sources of added sugars and calories.” Slip Op. 20–22.¹⁰ San Francisco, as well as *amici*, have convincingly argued that the panel erred in “subjecting [the Warning] to intensive scrutiny for implicit, subtextual messages.”¹¹ They also rightfully challenged the “hyperbolic” messages the panel read into the Warning.¹²

¹⁰ Judge Nelson, concurring in judgment, found the majority's conclusion that the Warning was misleading “tenuous.” Slip Op. at 28 (Nelson, J., concurring in judgment).

¹¹ *See, e.g.*, Pet. of City for Reh'g or Reh'g En Banc at 2, 6–9, ECF No. 77; Br. of Am. Heart Ass'n et al. as Amici Curiae in Supp. of Reh'g or Reh'g En Banc at 5–13, ECF No. 80.

¹² *See, e.g.*, Br. of American Cancer Society Cancer Action Network et al. as Amici Curiae in Supp. of Reh'g or Reh'g En Banc at 10, ECF No. 82 (noting that the panel's “hyperbolic” interpretation of the Warning would doom even well-established tobacco warnings because “smoking . . . one cigarette [does not] invariably ‘cause[]’ lung cancer . . .”).

Science is relevant here too. It demonstrates that even commonly consumed levels of sugar drinks link to obesity and diabetes, undermining the panel’s presumption about patterns of consumption and its finding on safety. Indeed, consumption of a single sugar drink a day is associated with a higher risk of disease. ER208–209, 211 (Willett Rep. ¶¶ 43, 51). And while one serving of sugar drinks a day may appear like “overconsumption” to some, it does not signal overconsumption to the public. Indeed, on average, adults who ingest sugar drinks intake the equivalent of 13 ounces per day. ER196, 215 (Willett Rep. ¶¶ 17, 60).

Equally, sugar drinks *are* less healthful than other sources of calories or added sugars. First, sugar drinks have *no* inherent nutritional value. This is even in contrast with sweetened yogurt or whole-grain cereals, or with other drinks that contain sugar, including “100% fruit juice [which] contains a number of healthful vitamins and nutrients,” and “[m]ilk [which] also contains a number of important vitamins and minerals, including calcium, vitamin D and magnesium, as well as protein” ER193 (Willett Report ¶ 13 n.2). *See also* 81 Fed. Reg. at 33,766 (FDA, noting that consumers need information on added sugars in foods in order to “avoid the excess contribution of empty calories”).¹³ Second, sugar drinks encourage excess

¹³ Not only are sugar drinks empty calories, a single serving of sugar drinks provides most of or greater than the 2015–2020 Dietary Guidelines for American’s and WHO’s daily recommended limit on added sugar. ER192, 195, 215 (Willett Report ¶¶ 9, 15, 60). Children and adolescents who consume sugar drinks average about 19 ounces or 16 teaspoons of added sugar. ER196, 215 (Willett Rep. ¶¶ 17, 60). Not

consumption because they don't impart a sense of fullness (satiety) compared to solid food and are often quickly, effortlessly, and thoughtlessly consumed. *See* ER193, 215–216 (Willett Rep. ¶¶ 13 n.2, 61–62). And third, sugar drinks are marketed and sold in ways that facilitate consumption at levels that are associated with an increased risk of disease. This marketing is impactful and ubiquitous and includes, for example, industry-sponsored dietitians who blog, without disclosing their industry ties, that a can of Coke can be suitably substituted for a bag of almonds as a daily snack,¹⁴ or a Coke spokesperson who advertised that “[i]f my son has lacrosse practice for three hours, we go straight to McDonald’s and buy a 32-ounce Powerade [a sugar drink with 76 grams, or approximately 19 teaspoons, of added sugar] In the middle of the afternoon, I may have an 8-ounce Coke.”¹⁵

In sum, it is beyond contention that San Francisco’s Warning satisfies the factual and accurate prong of analysis under the First Amendment because science has clearly shown that sugar drinks contribute to the health harms enumerated in the Warning.

only do these levels match or exceed recommended limits of the Dietary Guidelines and WHO, they are also nearly triple the AHA’s recommended daily limit for added sugars for woman and children. Linda Van Horn et al., *Recommended Dietary Pattern to Achieve Adherence to the American Heart Association/American College of Cardiology (AHA/ACC) Guidelines*, 134 CIRCULATION at e8.

¹⁴ Candice Choi, *Coca-Cola Teams up with Nutritionists to Push Coke as Healthy Treat*, FOOD MANUFACTURING (Mar. 16, 2015), <http://goo.gl/CnWLgA>.

¹⁵ *Coke Executive Answers Questions About Sugary Drinks*, USA TODAY (June 7, 2012), <http://goo.gl/z1SPqh>.

III. THE PANEL'S DECISION CASTS A LONG SHADOW

The briefs of San Francisco and *amici* demonstrate how the panel's decision could endanger critical consumer public health warnings regarding unhealthy (and in some cases, lethal) products other than sugar drinks. For example, as the brief of American Cancer Society Cancer Action Network and others attests, “[t]he panel’s overly broad reading of the First Amendment’s compelled speech doctrine . . . could place longstanding and vital tobacco warnings in peril.” *See* Br. of American Cancer Society Cancer Action Network et al. at 1, ECF No. 82. And of course, the panel’s “tenuous” conclusion regarding the health impact of sugar drinks, Slip Op. at 28 (Nelson, J., concurring in judgment), threatens to undermine public health efforts across the country and globe to address those products.

CSPI speaks from experience. As noted above, CSPI’s Litigation Team is lead counsel for several plaintiffs in an ongoing lawsuit against Coke and ABA, alleging that they have engaged in an unlawful campaign to obfuscate the health risks associated with consuming sugar drinks in violation of the District of Columbia’s consumer protection laws. As part of that campaign, Coke and ABA have made representations that no established science shows a link between sugar drinks and chronic diseases, that all calories have an equal effect on the body, that sugar drinks provide essential hydration, that the key to battling the obesity crisis is moderate exercise, and that the scientific research showing otherwise is unsound. *See*

Complaint, *Lamar*, Case No. 2017 CA 004801 B.¹⁶ Despite the widely disparate standards and questions at issue in these two cases, Appellant ABA and Coke invoked the panel’s decision in support of their motions to dismiss, arguing that the decision affirms that sugar drinks “do *not* have these effects,” and *a fortiori*, that the defendants’ statements are not deceptive as a matter of law.¹⁷ In other words, the panel’s invalidation of the Warning casts a long shadow, providing unwarranted ammunition to the beverage industry’s efforts to dismiss scientifically compelling concerns about the health impact of their products by flooding the conversation with misleading counter representations.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court’s order denying a preliminary injunction.

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¹⁶ For example, Coke’s Senior Vice President, Katie Bayne, has repeatedly been quoted for her blanket denial, stating that “[t]here is *no scientific evidence* that connects sugary beverages to obesity.” *Id.* ¶ 75 (emphasis added).

¹⁷ See Coke Mem. Supp. Mot. to Dism. at 4, 11, 27, *Lamar*, Case No. 2017 CA 004801 B, <https://goo.gl/vPwURx>; ABA Mem. Supp. Mot. to Dism. at 8–9, *Lamar*, Case No. 2017 CA 004801 B, <https://goo.gl/kckuYF>.

Date: February 20, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. Proc. 32(a) and Circuit Rule 29-2(c)(3) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 5,169 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)), as counted by the Microsoft Word processing system used to produce this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, I caused this brief to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel, a true and correct copy of this brief.

Respectfully submitted,

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