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Tyler Rauh

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# Regulating Sugar-Sweetened Beverages

Tyler Rauh\*

*American waistlines are an international punchline, and United States taxpayers spend hundreds of billions of dollars each year to combat medical complications resulting from obesity. The personal costs are financial, emotional, and mortal. Projections insist that it will become worse. Section I details the obesity epidemic and ponders why the United States is uniquely unhealthy.*

*The reason could be that America consumes more sugar than any other country. In recent years, some municipal policymakers have attempted to restrain America's sweet tooth by taxing sugar-sweetened beverages. Initial responses are polarizing. Chicago's tax did not last three months before its abolishment. Philadelphia's tax raised over sixty-five million dollars in its first ten months, but public opinion skews negative. The health effects, however, have been positive. Section II analyzes the benefits and concerns regarding these sugar-sweetened beverage taxes, and it*

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*will compare approaches in other countries that may be more effective at reducing obesity.*

*Mandated disclosures, including nutritional panels and warnings, are another tactic legislators have used to combat the epidemic. San Francisco took an inspired approach to battling sugar consumption by mandating a disclosure on print advertisements for sugar-sweetened beverages: “WARNING: drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.” The American Beverage Association met the ordinance with a First Amendment challenge. It convinced a Ninth Circuit panel that the message chills commercial speech by forcing its members to convey a controversial message and imposing an undue burden on beverage manufacturers because non-beverage sugar producers arbitrarily escape the ordinance’s purview. In an en banc rehearing, the Ninth Circuit confirmed reversal, but it did so only on the ground that the size of the warning was unduly burdensome. The judges disagreed on many issues in reaching that conclusion. Section III assesses the freedom of speech claim and finds that the Ninth Circuit panel may have reached its conclusion based on biased or flawed research.*

*Although the panel decision hinted that policymakers’ options for fighting the obesity epidemic are limited, sugar taxes and mandatory disclosures can still be effective if correctly implemented. Section IV concludes with a proposal for extensive sugar taxes and warnings, similar to the tobacco strategy in recent decades, so that consumers have more knowledge about what they are ingesting while being financially incentivized to choose healthier options.*

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## I. INTRODUCTION

### A. *America's Big, Unique Problem*

The United States is facing an epidemic. From coast to coast, obesity rates have reached unprecedented heights.<sup>1</sup> In 1991, obese adults made up less than fifteen percent of the population in most states.<sup>2</sup> Recent surveys, however, indicate over a third of American adults are obese.<sup>3</sup>

The trend is not confined to adults. Childhood obesity rates have climbed to over seventeen percent,<sup>4</sup> a significant increase from eleven

<sup>1</sup> See Maggie Fox, *America's Obesity Epidemic Hits a New High*, NBC NEWS (June 7, 2016, 1:40 PM), <https://www.nbcnews.com/health/health-news/america-s-obesity-epidemic-hits-new-high-n587251>.

<sup>2</sup> Obese adult is medically defined as an adult having a body mass index surpassing thirty percent. See Maggie Fox, *If you think we're fat now, wait till 2030*, NBC NEWS (Sept. 18, 2012, 10:03 AM), <https://www.nbcnews.com/health/health-news/if-you-think-were-fat-now-wait-till-2030-flB5955205>.

<sup>3</sup> See Cynthia L. Ogden et. al., *Prevalence of Obesity Among Adults and Youth: United States, 2011–2014*, 219 CTRS. FOR DISEASE CONTROL AND PREVENTION 1, 1 (2015), <https://www.cdc.gov/nchs/data/databriefs/db219.pdf>.

<sup>4</sup> *Id.* at 5.

percent in the early nineties and four percent in the early seventies.<sup>5</sup> These trends have led researchers to predict that over forty percent of American adults will be obese by 2030.<sup>6</sup>

Obesity rates over forty percent could spell disaster for the future of the United States. While obesity is often viewed through a cosmetic lens, the nature of the epidemic lies in the devastating health effects it causes. Obese people are at an increased risk for high blood pressure, stroke, coronary heart disease, gallbladder disease, osteoarthritis, anxiety, depression, liver cancer, breast cancer, colon cancer, endometrial cancer, and other harmful health problems.<sup>7</sup> The best predictor of type 2 diabetes is being overweight or obese.<sup>8</sup> Type 2 diabetes is usually diagnosed after the age of forty, but now it is found in children and adolescents.<sup>9</sup> Diabetes and its related complications are major causes of mortality in the United States, with an estimated quarter-million deaths attributed to the disease each year despite being largely preventable.<sup>10</sup>

Beyond the dire consequences at the personal level, obesity also imposes significant costs on society. Health care spending estimates for obesity are as high as \$210 billion annually.<sup>11</sup> Estimated indirect costs, which relate to morbidity and productivity, are \$450 billion each year.<sup>12</sup> The epidemic's substantial financial and mortal costs ultimately spurred three decades of research to find a solution.<sup>13</sup>

Research indicates obesity has many factors. Some factors are outside of an individual's control, such as genetics or illness.<sup>14</sup> Others are a

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<sup>5</sup> *Health, United States, 2004*, 28 CTRS. FOR DISEASE CONTROL AND PREVENTION 1, 179 (2004), <https://www.cdc.gov/nchs/data/hus/04trend.pdf>.

<sup>6</sup> Lauran Neergard, *No end to US obesity epidemic, forecast shows*, NBC NEWS (May 7, 2012, 7:20 PM), [http://www.nbcnews.com/id/47324248/ns/health-diet\\_and\\_nutrition/t/no-end-us-obesity-epidemic-forecast-shows/](http://www.nbcnews.com/id/47324248/ns/health-diet_and_nutrition/t/no-end-us-obesity-epidemic-forecast-shows/).

<sup>7</sup> *The Health Effects of Overweight and Obesity*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/healthyweight/effects/index.html> (last updated June 5, 2015) (citations omitted).

<sup>8</sup> See Michael K. Palmer & Peter P. Toth, *Trends in Lipids, Obesity, Metabolic Syndrome, and Diabetes Mellitus in the United States: An NHANES Analysis (2003-2004 to 2013-2014)*, 27 THE OBESITY SOC'Y 309, 309-14 (Feb. 2019).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Alex Brill, *The Long-Term Returns of Obesity Prevention Policies*, MATRIX GLOBAL ADVISORS 1 (Apr. 2013), <https://www.rwjf.org/content/dam/farm/reports/reports/2013/rwjf405694>.

<sup>12</sup> *Id.*

<sup>13</sup> See Fox, *supra* note 1.

<sup>14</sup> See *Adult Obesity Causes & Consequences*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/obesity/adult/causes.html> (last updated Mar. 5, 2018).

consequence of environment, including socioeconomic factors.<sup>15</sup> But policymakers and organizations have used resources to influence people to make better decisions regarding factors that are typically within an individual's control—lack of physical activity, excessive calorie consumption, and deficient nutritional education.<sup>16</sup> Organized efforts to induce Americans to lose weight have, however, failed to curtail climbing obesity rates.<sup>17</sup>

The research is not for naught, though. The United States ranks second, behind only Austria, in calorie consumption by capita, with Greece, Belgium, and Italy not far behind.<sup>18</sup> Yet the United States is the only nation of that group to appear on the list of the top-ten most obese countries in the Organisation for Economic Co-operation and Development (OECD), with the notorious distinction of being the only country with more than thirty-five percent of its population obese.<sup>19</sup> Each of those other four countries has a moderate obesity rate between nineteen and twenty-five percent.<sup>20</sup> This indicates that the obesity epidemic may not be due to the volume of calories an average American consumes but, rather, the nutritional nature of those calories. Research and legislation have thus shifted to another area where the United States leads all other countries: sugar consumption.<sup>21</sup>

### *B. Sugar's Role in the Obesity Epidemic*

The gap between the United States and Germany, second-highest on the list of countries ranked by average daily sugar intake, is larger than the gap between Germany and Saudi Arabia, which is fifteenth on the list.<sup>22</sup>

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<sup>15</sup> See Nia S. Mitchell et al., *Obesity: Overview of an Epidemic*, 2011 PSYCHIATR. CLIN. N. AM. 1, 4–5, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3228640/pdf/nihms334812.pdf>.

<sup>16</sup> See Paula Whitacre & Annina Burns, *Perspectives from the United Kingdom and United States Policy Makers on Obesity Prevention*, 2010 INST. OF MED. OF THE NAT'L ACADS. 1, 20 [https://www.ncbi.nlm.nih.gov/books/NBK220236/pdf/Bookshelf\\_NBK220236.pdf](https://www.ncbi.nlm.nih.gov/books/NBK220236/pdf/Bookshelf_NBK220236.pdf).

<sup>17</sup> See Fox, *supra* note 1.

<sup>18</sup> *Food Consumption Nutrients*, 2008 FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, [http://www.fao.org/fileadmin/templates/ess/documents/food\\_security\\_statistics/FoodConsumptionNutrients\\_en.xls](http://www.fao.org/fileadmin/templates/ess/documents/food_security_statistics/FoodConsumptionNutrients_en.xls).

<sup>19</sup> *Prevalence of Obesity Among Adults, BMI ≥ 30, Age-Standardized Estimates by Country*, WORLD HEALTH ORG., <http://apps.who.int/gho/data/view.main.CTRY2450A?lang=en> (last updated Sept. 22, 2017).

<sup>20</sup> *Id.*

<sup>21</sup> Roberto A. Ferdman, *Where people around the world eat the most sugar and fat*, THE WASH. POST (Feb. 5, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/02/05/where-people-around-the-world-eat-the-most-sugar-and-fat/?utm\\_term=.8680dc0d6005](https://www.washingtonpost.com/news/wonk/wp/2015/02/05/where-people-around-the-world-eat-the-most-sugar-and-fat/?utm_term=.8680dc0d6005) (last updated Jan. 29, 2019).

<sup>22</sup> *Id.*

At 126.4 grams of sugar per day, the average United States citizen is consuming more than double what the World Health Organization recommends for daily intake.<sup>23</sup>

Analyzing other countries produces a positive correlation between sugar consumption and elevated levels of obesity. Australia, Canada, Mexico, New Zealand, and the United Kingdom each have average daily sugar intakes between eighty-two and ninety-six grams, placing them within the fifteen countries that consume the most sugar.<sup>24</sup> Each of those nations also falls within third and eighth on the list of the most obese OECD countries.<sup>25</sup>

Vanguard policymakers addressing America's status as a gluttonous nation believe they can curtail the obesity epidemic by deterring sugar consumption.<sup>26</sup> But the question remains as to the best strategy in attacking the sweetener. Some advocate for sugar taxes, citing the revenue it could generate while potentially reducing obesity.<sup>27</sup> Part II of this paper will focus on the potential income, the initial public response, and the effectiveness of implementing an excise tax on sugar-sweetened beverages. Part II also proposes a version of the tax that is variable upon the quantity of sugar within the drink, not the quantity of liquid, to overcome the shortcomings of a traditional excise tax on sugar-sweetened beverages.

Some municipalities have taken more creative approaches than taxes. In 2012, under former mayor Michael Bloomberg, New York City's Board of Health passed a ban on selling sugary drinks in excess of sixteen ounces at movie theaters, restaurants, mobile food carts, and sports arenas.<sup>28</sup> The beverage cap was, however, struck down by the New York State Court of Appeals due to the Board of Health acting outside its scope of regulatory

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Prevalence of Obesity Among Adults, BMI ≥ 30, Age-Standardized Estimates by Country*, *supra* note 19.

<sup>26</sup> See Jennifer L. Pomeranz et. al., *Innovative Legal Approaches to Address Obesity*, 87 MILBANK QUARTERLY 185, 189 (2009), [https://www.law.berkeley.edu/sugarman/Milbank\\_published.pdf](https://www.law.berkeley.edu/sugarman/Milbank_published.pdf) (explaining that the FTC, as early as 1978, initiated rules for sugar product television advertising aimed towards children).

<sup>27</sup> See Cabrera Escobar et al., *Evidence that a tax on sugar sweetened beverages reduces the obesity rate: A Meta-Analysis*, 2016 BMC PUB. HEALTH 1, 6 <https://bmcpublikealth.biomedcentral.com/track/pdf/10.1186/1471-2458-13-1072?site=bmcpublikealth.biomedcentral.com>.

<sup>28</sup> See Nadia Arumugam, *Why Soda Ban Will Work In Fight Against Obesity; Food Regulations Have Proven Record*, 2019 FORBES MEDIA LLC, (last updated Sep. 14, 2012 1:35 PM) <https://www.forbes.com/sites/nadiaarumugam/2012/09/14/why-soda-ban-will-work-in-fight-against-obesity-food-regulations-have-a-proven-record/#2e6fda254d86>

authority.<sup>29</sup> Three years later, San Francisco unanimously passed an ordinance requiring advertisements for sugar-sweetened beverages to contain a black box warning: “drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.”<sup>30</sup> Part III analyzes the First Amendment challenge that ordinance faced from the American Beverage Association. The issue hinged upon whether the warning met the *Zauderer* standard: a compelled disclosure is required to be purely factual and uncontroversial without being unduly burdensome on the advertiser so as to chill its commercial speech.<sup>31</sup> This test necessitates an inquiry into sugar consumption science and whether the requirement creates an unfair burden on beverage companies when compared to other sugar suppliers, both of which will also be discussed in Part III.

The Ninth Circuit panel concluded the message is controversial and the warning imposed an undue burden for beverage companies, and thus the ordinance failed the *Zauderer* standard.<sup>32</sup> This decision could pose issues for future legislation that mandates disclosure requirements on beverage companies. Part IV will take measure of what the future may hold for beverage suppliers’ advertising practices and argues that, for sugar warnings to be constitutionally permissible, food manufacturers must have the same mandated disclosures as beverage manufacturers.

## II. BITTERSWEET TAXES

Proponents of a city- or county-level sugar tax believe it can kill two birds with one stone: reduce obesity and bolster budgets.<sup>33</sup> Advocates for a sugar tax have gained support in recent years with at least seven municipalities placing taxes on sugar-sweetened beverages since 2015.<sup>34</sup> Philadelphia enacted a 1.5 cent-per-ounce tax at the beginning of 2017;<sup>35</sup> and Seattle’s ordinance—at 1.75 cents-per-ounce—triggered at the

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<sup>29</sup> See *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene*, 23 N.E.3d 538, 541 (N.Y. 2014).

<sup>30</sup> *Am. Bev. Ass’n v. City and Cty. of San Francisco*, 871 F.3d 884, 888 (9th Cir. 2017).

<sup>31</sup> *Id.* at 891–92.

<sup>32</sup> *Id.* at 895–97.

<sup>33</sup> See Angelica LaVito, *Cook County’s repeal of its ‘soda tax’ may pause efforts in other cities*, CNBC NEWS, <https://www.cnbc.com/2017/12/01/cook-countys-repeal-of-its-soda-tax-may-pause-efforts-in-other-cities.html> (last updated Dec. 1, 2017, 7:17 PM).

<sup>34</sup> *Id.*

<sup>35</sup> Courtney Shupert & Scott Drenkard, *Soda Tax Experiment Failing in Philadelphia Amid Consumer Angst and Revenue Shortfalls*, TAX FOUNDATION (Aug. 3, 2017), <https://taxfoundation.org/philadelphia-soda-tax-failing/>.

beginning of 2018.<sup>36</sup> But opponents of the tax have made their voices heard. Cook County, home to Chicago, passed a sugary drink tax that lasted fewer than three months before falling to the pressure of the masses clamoring for its end.<sup>37</sup> And voters in Santa Fe rejected a similar soda tax referendum in May 2017.<sup>38</sup>

The following subsections will discuss the financial advantages and disadvantages of a tax on sugar-sweetened beverages; the potential for a tax to effectively reduce obesity in the United States; and a proposal for a variable tax referendum that charges suppliers by the level of sugar in the drink (e.g., a penny-per-teaspoon of sugar), instead of the beverage's overall volume, so as to maximize the tax's deterrence effect while minimizing arbitrary distinctions to determine if beverages will fall within the purview of a sugar tax.

*A. Uncle Sam's Sweet Tooth: Will a Tax Help the Cause or Cause a Cavity in Consumers' Wallets?*

1. Initial research results on sugar taxes are inconclusive but skew positive.

Efforts have been made, both domestically and internationally, to research the merits of a sugar tax's effect on public health.<sup>39</sup> The City of Seattle granted the University of Washington \$500,000 to study the effectiveness, implementation, and unintended consequences of the King County beverage tax that took effect at the beginning of 2018.<sup>40</sup> And Michael Bloomberg continued his advocacy of soda regulation by granting

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<sup>36</sup> See Patrick Quinn, *New Year, new tax: Seattle starts taxing sweetened drinks*, KOMO NEWS (Jan. 1, 2018), <http://komonews.com/news/local/new-year-new-tax-seattle-starts-taxing-sweetened-drinks>.

<sup>37</sup> Caitlin Dewey, *Why Chicago's soda tax fizzled after two months – and what it means for the anti-soda movement*, WASH. POST (Oct. 10, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/10/10/why-chicagos-soda-tax-fizzled-after-two-months-and-what-it-means-for-the-anti-soda-movement/?utm\\_term=.73c61fec6f2c\\_](https://www.washingtonpost.com/news/wonk/wp/2017/10/10/why-chicagos-soda-tax-fizzled-after-two-months-and-what-it-means-for-the-anti-soda-movement/?utm_term=.73c61fec6f2c_)

<sup>38</sup> *Id.*

<sup>39</sup> Jason M. Fletcher, David Frisvold & Nathan Tefft, *Can Soft Drink Taxes Reduce Population Weight?*, CONTEMPORARY ECON. POL'Y 1–2 (Jan. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2908024/pdf/nihms-151114.pdf>.

<sup>40</sup> Bernard Ellouk, *University of Washington to study Seattle soda tax*, KING 5 NEWS (Dec. 29, 2017, 4:04 AM), <http://www.king5.com/article/news/health/university-of-washington-to-study-seattle-soda-tax/281-503028380>.

the University of Illinois at Chicago \$2.5 million to study whether the sugar tax improves public health over an extended period of time.<sup>41</sup>

An initial meta-analysis covering the United States, Mexico, France, and Brazil shows that an increase in the price of sugar-sweetened beverages is associated with a decrease in sugar consumption and modest reductions in weight in the population.<sup>42</sup> As a corollary, the price increase on sugar-sweetened beverages also resulted in increased consumption of healthier beverages, such as milk.<sup>43</sup> In contrast, a systemic literature review claims the effectiveness of a taxation policy to curb obesity is doubtful.<sup>44</sup> That study bases its conclusion on the behavioral and environmental factors that result in consumers' poor substitution tendencies: if their preferred food or drink is taxed, then consumers often choose to consume even more calories from other foods or drinks instead.<sup>45</sup> Ultimately, the only universal consensus is that research regarding the impact of a tax on obesity rates is incomplete without sufficient real-life tests to determine how large the influence could be in the United States.<sup>46</sup>

Researchers claim the tax is working in Mexico, however.<sup>47</sup> The country imposed a peso-per-liter tax on sugar-sweetened beverages at the beginning of 2014 in an attempt to slim down from the second-most obese nation in the world.<sup>48</sup> Estimates claim that Mexicans consumed almost ten percent fewer sugary drinks in 2015 than they would have if the tax never took effect.<sup>49</sup> But the data from Mexico is difficult to apply to United States cities due to "leakage."<sup>50</sup> The Mexican tax is nationwide, but

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<sup>41</sup> Greg Trotter, *\$2.5 million Bloomberg grant funds UIC study on Cook County soda tax*, CHICAGO TRIBUNE (Sept. 25, 2017, 12:55 PM), <http://www.chicagotribune.com/business/ct-biz-cook-county-soda-tax-study-20170925-story.html>.

<sup>42</sup> See Escobar et al., *supra* note 27.

<sup>43</sup> *Id.*

<sup>44</sup> Nikolaos Maniatakis et al., *A systemic review of the effectiveness of taxes on nonalcoholic beverages and high-in-fat foods as a means to prevent obesity trends*, CLINICOECONOMICS AND OUTCOMES RES. 523–24 (Oct. 18, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3810203/pdf/ceor-5-519.pdf>.

<sup>45</sup> *Id.*

<sup>46</sup> Roberta R. Friedman, *A Soda Tax — Will it Change Anything?*, OBESITY ACTION COALITION, <http://www.obesityaction.org/educational-resources/resource-articles-2/nutrition/a-soda-tax-will-it-change-anything>.

<sup>47</sup> Ronnie Cohen, *Taxes trimmed Mexican soda consumption for two years*, REUTERS (Mar. 1, 2017, 3:22 PM), <https://www.reuters.com/article/us-health-soda-taxes/taxes-trimmed-mexican-soda-consumption-for-two-years-idUSKBN1685JM>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Lizzie Wade, *Mexico's Soda Tax is Working. The US Should Learn From It.*, WIRED (July 13, 2015, 10:00 AM), <https://www.wired.com/2015/07/mexicos-soda-tax-working-us-learn/>.

citizens of American localities with a beverage tax may simply cross city or county lines to stock up on their favorite soda. Such leakage makes the tax much easier to avoid.<sup>51</sup> In Seattle, local Costco stores posted signs telling shoppers where to go to avoid the tax.<sup>52</sup> Likewise, many Chicago residents near the border of Cook County made “pop runs to Indiana” during the tax’s couple months of existence, causing local businesses to lose some consumers.<sup>53</sup> Experts say the lack of leakage in Mexico could make its data more broadly applicable because it affects more people in different kinds of communities—from the poorest rural areas to the richest in Mexico City—as opposed to data that emerges from American cities where a sugar tax could have a more drastic relative impact on low-income households.<sup>54</sup>

## 2. Sugar-sweetened beverage taxes: a war on the poor?

Sugar-sweetened beverage taxes disproportionately target the poor, for better or worse. The poorer Mexican households have shown the largest drops in sugary beverage purchases with a nearly twelve percent decrease over the initial two years of the tax.<sup>55</sup> This could be an encouraging sign considering low-income neighborhoods have a higher prevalence of diabetes than wealthy neighborhoods.<sup>56</sup> But opponents of the tax, including Senator Bernie Sanders, claim that this is a cause for concern because the tax disproportionately hurts the poor.<sup>57</sup> For example, in Philadelphia the price for a 24-ounce drink that normally costs a dollar increased to \$1.35 with the 1.5 cent-per-ounce tax.<sup>58</sup> If consumed once daily, that extra thirty-five cents would amount to over one percent of the yearly earnings for the 185,000 people living on less than \$12,000 per year

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<sup>51</sup> *Id.*

<sup>52</sup> Suzanne Phan, *Seattle’s new soda tax prices making some shoppers’ eyes ‘pop’*, KOMO NEWS (Jan. 5, 2018), <http://komonews.com/news/local/seattle-soda-tax-surprising-shoppers-tax-revenue-to-go-to-food-accesseducation-programs>.

<sup>53</sup> Greg Trotter, *No tears for end of Cook County soda tax – and no more pop runs to Indiana*, CHI. TRIBUNE (Dec. 1, 2017, 12:25 PM), <http://www.chicagotribune.com/business/ct-biz-soda-tax-repeal-reaction-20171201-story.html>.

<sup>54</sup> See Wade, *supra* note 50.

<sup>55</sup> See Escobar et al., *supra* note 27.

<sup>56</sup> Doreen M Rabi et al., *Association of socio-economic status with diabetes prevalence and utilization of diabetes care services*, BMC HEALTH SERVS. RES. 5 (Oct. 3, 2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1618393/pdf/1472-6963-6-124.pdf>.

<sup>57</sup> Bernie Sanders, *A Soda Tax Would Hurt Philly’s Low-Income Families*, PHILA MAG. (Apr. 24, 2016, 5:00 PM), <http://www.phillymag.com/citified/2016/04/24/bernie-sanders-soda-tax-op-ed/>.

<sup>58</sup> Daniel Banko-Ferran, *Philly’s Soda Tax Will Disproportionately Hurt the Poor*, ECONOMICS21 (Jan. 9, 2017), <https://economics21.org/html/philly%E2%80%99s-soda-tax-will-disproportionately-hurt-poor-2186.html>.

in Philadelphia.<sup>59</sup> The extra tax could impose difficult decisions on citizens with limited financial flexibility: is a lifestyle change in order or will the extra cost come from a different part of their budget?

The tax disproportionately hurts the poor because low-income Americans drink the most soda.<sup>60</sup> While the popularity of soda has been falling over recent years within the middle and upper classes, the same has not happened among the low-income class.<sup>61</sup> More popular among the middle and upper classes are custom-made beverages from places such as Starbucks.<sup>62</sup> Beverages from these locations, however, are exempt from current versions of most sugar taxes despite often containing more sugar than soda.<sup>63</sup> For example, in Seattle, lattes and cappuccinos are considered beverages in which milk is the primary natural ingredient, placing them in an exempt category.<sup>64</sup> Other exempt categories include baby formula and cough syrup (i.e., products that do not contribute to obesity).<sup>65</sup>

Diet soda is also more popular among high-income Americans than low-income Americans.<sup>66</sup> Yet diet soda has escaped the purview of some sugar taxes,<sup>67</sup> despite research indicating daily consumption of diet soda is associated with obesity and a sixty-seven percent greater risk of type 2 diabetes when compared to non-consumption.<sup>68</sup> Some critics claim these factors indicate that the tax does not exist to promote greater public health, but rather it is an upper class war on the poor: the financially unfortunate get an extra tax on their preferred daily beverage, while the upper and

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<sup>59</sup> See *id.*

<sup>60</sup> Martha C. White, *The Paradox of the Sugar Tax: How Buying a Soda Benefits Services for the Poor*, NBC NEWS (June 19, 2017, 11:35 AM), <https://www.nbcnews.com/business/consumer/paradox-sugar-tax-how-buying-soda-benefits-services-poor-n773341>.

<sup>61</sup> *Id.*

<sup>62</sup> See Vince Dixon, *What Do Starbucks Locations Really Say About Income and Diversity in America?* EATER (Nov. 20, 2015, 11:33 AM), <https://www.eater.com/a/starbucks-income-map>.

<sup>63</sup> Compare STARBUCKS, [https://www.starbucks.com/menu/catalog/product?drink=espresso#view\\_control=nutrition](https://www.starbucks.com/menu/catalog/product?drink=espresso#view_control=nutrition), with COCA-COLA, <https://www.coca-colaproductfacts.com/en/products/>.

<sup>64</sup> See *Frequently Asked Questions (FAQs) for the Sweetened Beverage Tax*, CITY OF SEATTLE, <https://www.seattle.gov/Documents/Departments/FAS/BusinessLicenseTax/sweetened-beverage-tax-frequently-asked-questions.pdf>

<sup>65</sup> *Id.*

<sup>66</sup> Daniel Beckman, *Prices going up for sugary drinks as Seattle tax kicks in*, THE SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/politics/promoting-health-at-a-hefty-price-seattles-soda-tax-starts-jan-1/> (last updated Jan. 1, 2018, 1:15 AM).

<sup>67</sup> *Id.*

<sup>68</sup> Jennifer A. Nettleton et al., *Diet Soda Intake and Risk of Incident Metabolic Syndrome and Type 2 Diabetes in the Multi-Ethnic Study of Atherosclerosis (MESA)*, 32 DIABETES CARE 688, 691 (2009).

middle classes can enjoy their equally unhealthy choice with no upcharge.<sup>69</sup>

Advocates for the tax retort that the price increase is aimed to help the low-income population long-term, both financially and medicinally.<sup>70</sup> The primary objective is to discourage people from buying sugary drinks, not necessarily make people pay more for sustenance.<sup>71</sup> Doctors, psychologists, and economists believe people will be encouraged to make the healthier choice when forced to pay more for a sugar-sweetened beverage than water, sugarless soda, or milk.<sup>72</sup> This should be especially true for low-income consumers who have a higher sensitivity to price increases.<sup>73</sup> After consistently making healthier beverage choices by reducing the consumption of sugar-sweetened beverages, there should be a positive effect on health and obesity among low-income populations.<sup>74</sup>

### 3. The macro financial consequences of a sugar-sweetened beverage tax

A reduction in obese and overweight individuals would result in substantial health care savings at both personal and public levels.<sup>75</sup> Studies show that annual per-person medical costs for overweight individuals are \$266 and \$1,723 for obese individuals (circa 2008 American dollars).<sup>76</sup> At the public level, the costs amount to hundreds of billions of dollars.<sup>77</sup> Sugar tax proponents argue that the tax simply provides an immediate economic incentive to make a choice that will save the consumer and society immense amounts of money long-term while simultaneously preventing

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<sup>69</sup> See Chriss W. Street, *Berkeley's Soda Tax is Upper-Class War on the Poor*, BREITBART (Aug. 27, 2016), <http://www.breitbart.com/california/2016/08/27/berkeleys-soda-tax-upper-class-war-poor/>.

<sup>70</sup> See White, *supra* note 60; Gretchen Frazee, *How taxing sugary drinks affects a community's health and economy*, PBS NEWSHOUR (Oct. 4, 2018), <https://www.pbs.org/newshour/economy/making-sense/how-taxing-sugary-drinks-affects-a-communitys-health-and-economy>.

<sup>71</sup> See Beekman, *supra* note 66.

<sup>72</sup> See Alexandra Wright, Katherine E. Smith & Mark Hellowell, *Policy lessons from health taxes: a systemic review of empirical studies*, BMC PUBLIC HEALTH 12 (2017), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5477308/pdf/12889\\_2017\\_Article\\_4497.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5477308/pdf/12889_2017_Article_4497.pdf).

<sup>73</sup> M.A. Colchero et al., *Price elasticity of the demand for sugar sweetened beverages and soft drinks in Mexico*, 19 ECON. AND HUMAN BIOLOGY 129, 134 (2015).

<sup>74</sup> See *id.* at 135.

<sup>75</sup> See ADAM G. TSAI, DAVID F. WILLIAMSON & HENRY A. GLICK, *Direct medical cost of overweight and obesity in the United States: a quantitative systemic review*, 12 OBESITY REVIEW 50, 56 (2011).

<sup>76</sup> *Id.* at 59.

<sup>77</sup> See Brill, *supra* note 11.

premature mortality.<sup>78</sup> And those that forego the economic incentive will provide revenue to help offset the expenses of obesity as they drink products that contribute to the obesity epidemic, thereby mitigating their damage on society.<sup>79</sup>

The tax's economic benefits are not strictly long-term or health related.<sup>80</sup> Seattle anticipates \$14.8 million in 2018 revenues from its new tax.<sup>81</sup> The city intends to spend at least \$3 million of the proceeds on educational programs and other community-wide incentives; \$500,000 on a program designed to train workers adversely affected by the reduction in beverage sales; and millions more on providing affordable access to healthy, nutritional foods for its citizens.<sup>82</sup> In Philadelphia, the city primarily passed a sugar tax to fund free city-wide pre-kindergarten education and other community programs.<sup>83</sup> The city's total take after the first ten months was \$66.2 million.<sup>84</sup> And there are already encouraging signs of positive health benefits in Philadelphia, despite the tax being primarily focused on generating revenue.<sup>85</sup> A study of the city's sugar tax, which analyzed 109 million transactions, found bottled water sales increased nine percent and carbonated soft drink sales fell fifty-five percent in the city.<sup>86</sup> Leakage was likely responsible for some of the reduction in carbonated soft drinks because sales rose thirty-eight percent just outside of the city,<sup>87</sup> but early reports are promising on both the financial and health fronts.

Municipal sugar taxes are in an infantile stage, however, and may not survive to toddlerhood.<sup>88</sup> A public backlash promptly dispatched the Cook County tax,<sup>89</sup> and shoppers' initial shock in Seattle could spell a similar

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<sup>78</sup> See Tamar Haspel, *Is a soda tax the solution to America's obesity problem?*, WASH. POST (Mar. 23, 2015), [https://www.washingtonpost.com/lifestyle/food/is-a-soda-tax-the-solution-to-americas-obesity-problem/2015/03/23/b6216864-ccf8-11e4-a2a7-9517a3a70506\\_story.html?utm\\_term=.e918bd60b928](https://www.washingtonpost.com/lifestyle/food/is-a-soda-tax-the-solution-to-americas-obesity-problem/2015/03/23/b6216864-ccf8-11e4-a2a7-9517a3a70506_story.html?utm_term=.e918bd60b928).

<sup>79</sup> *Id.*

<sup>80</sup> See SEATTLE OFFICE OF THE MAYOR, *Sweetened Beverage Tax Proceeds*, <http://mayorburgess.seattle.gov/2017/09/sweetened-beverage-tax-proceeds/>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See Mark Dent, *Philly soda tax year one: The finances, fights and its future*, BILLY PENN (Dec. 12, 2017, 10:00 AM), <https://billypenn.com/2017/12/12/philly-soda-tax-year-one-the-finances-fights-and-its-future/>.

<sup>84</sup> *Id.*

<sup>85</sup> See Angelica LaVito, *Philadelphia's soda tax isn't the windfall some had hoped for*, CNBC, <https://www.cnbc.com/2017/08/22/philadelphias-soda-tax-isnt-the-windfall-some-had-hoped-for.html> (last updated Aug. 23, 2017, 4:37 PM).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See Trotter, supra note 53.*

fate for its tax.<sup>90</sup> The problem may be that the bulk of the tax is being felt at the retail level, resulting in bloated prices for the consumer.<sup>91</sup> An input tax in the supply chain may be more amenable to consumers and a superior public health bet.<sup>92</sup>

### B. *Taxing the Quantity of Sugar, Not the Quantity of Liquid*

If producers are taxed by the quantity of sugar in the products they supply, then there would be a financial incentive to reformulate the drinks to contain less sugar.<sup>93</sup> This would be most effective as a national tax,<sup>94</sup> but two efforts by Representative Rosa L. DeLauro (D-Conn) never advanced out of committee.<sup>95</sup> Yet municipal- and county-level taxes could still encourage healthier reformulations for regional brands and even national brands if enough cities adopt sugar taxes.<sup>96</sup> Current tax paradigms solely based on drink volume, however, ignore the diversity in sugar content and the potential health effects.<sup>97</sup> A sugar volume tax should encourage consumers to favor low-sugar products over high-sugar products.<sup>98</sup> This is based on the logic that consumers presented with a cheaper price for drinks with less sugar will likely consume less soda overall, or they will choose healthier versions of sugary drinks due to the cost efficiency.<sup>99</sup>

There are three promising ways to tax beverages based on their sugar content: a single-tier tax, a multi-tier tax, and a sugar content tax.<sup>100</sup> A sugar content tax would proportionally vary with a drink's sugar content.<sup>101</sup> The United States government already uses a similar system for alcoholic drinks.<sup>102</sup> Although a system that taxes proportionately to sugar content would inform the public of *exactly* how much sugar is in each beverage, the system could be difficult to apply in practice if the costs are

<sup>90</sup> See also Phan, *supra* note 52.

<sup>91</sup> See Haspel, *supra* note 78.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See Norton Francis et al., *The Pros and Cons of Taxing Sweetened Beverages Based on Sugar Content*, URBAN INST. (Dec. 2016), [http://www.heart.org/idc/groups/ahaec-public/@wcm/@adv/documents/downloadable/ucm\\_490771.pdf](http://www.heart.org/idc/groups/ahaec-public/@wcm/@adv/documents/downloadable/ucm_490771.pdf).

<sup>95</sup> Caitlin Dewey, *The case for taxing sugar, not soda*, WASH. POST (Dec. 13, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/12/13/the-case-for-taxing-sugar-not-soda/?utm\\_term=.7e5548ae2870](https://www.washingtonpost.com/news/wonk/wp/2016/12/13/the-case-for-taxing-sugar-not-soda/?utm_term=.7e5548ae2870).

<sup>96</sup> See Francis et al., *supra* note 94.

<sup>97</sup> See *id.* at 3.

<sup>98</sup> *Id.* at 20.

<sup>99</sup> See *id.*

<sup>100</sup> *Id.* at 7.

<sup>101</sup> Francis et al., *supra* note 94, at 19.

<sup>102</sup> *Id.*

passed directly to the customer. This is because the various levels of sugar found in soft drinks could produce a strain on inventory systems due to awkward pricing consequences at the retail level.<sup>103</sup> Tiered systems alleviate this concern.

A single-tier system sets a threshold amount of sugar and taxes any beverage with more than that amount.<sup>104</sup> Such a design was implemented in Hungary in 2011 with a threshold amount of nineteen grams per eight-ounce serving.<sup>105</sup> This was passed with a similar tax also placed on unhealthy sweets in the country.<sup>106</sup> The results have been positive: a nearly twenty percent reduction in sugar-sweetened beverages and a thirty percent reduction in pre-packaged sweets.<sup>107</sup> Hungary also reports some companies reduced the amount of sugar in their drinks to under nineteen grams per eight-ounce serving in anticipation of the tax.<sup>108</sup> And models suggest that a one-tier system is the most likely avenue to induce manufacturers to reformulate their products to fall under the tax threshold.<sup>109</sup>

The United Kingdom implemented a multi-tier system at the beginning of 2018.<sup>110</sup> Drinks with total sugar content above five grams per 100 milliliters are subject to a tax of eighteen pence (twenty-two cents) per liter, while the rate for drinks with more than eight grams will be taxed at twenty-four pence (twenty-nine cents) per liter.<sup>111</sup> The United Kingdom tax was effective eight months prior to its implementation because soda companies began reducing sugar in their products to cut tax costs.<sup>112</sup> Coca-Cola stated it has over two hundred reformulation initiatives under way

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<sup>103</sup> One can easily imagine a small convenience store being inconvenienced by having to create dozens of different prices for its sodas based on the varying sugar concentrations in each one. *See* Haspel, *supra* note 78.

<sup>104</sup> Francis et al., *supra* note 94, at 19.

<sup>105</sup> *Id.* at 25.

<sup>106</sup> Denis Campbell, *Sugar tax: financially regressive but progressive for health*, THE GUARDIAN (Mar. 17, 2016, 8:07 PM), <https://www.theguardian.com/society/2016/mar/18/sugar-tax-financially-regressive-but-progressive-for-health>.

<sup>107</sup> *Id.*

<sup>108</sup> *See* Francis et al., *supra* note 94, at 6.

<sup>109</sup> *Id.* at 20.

<sup>110</sup> Donald Marron, *Britain Builds a Better Soda Tax*, FORBES (Mar. 22, 2016, 1:14 PM), <https://www.forbes.com/sites/beltway/2016/03/22/britain-builds-a-better-soda-tax/#79e91bd7176e>.

<sup>111</sup> Ivana Kottasova, *Soda wars: The UK's tax on sugar drinks is working*, CNN (Mar. 9, 2017, 11:41 AM), <http://money.cnn.com/2017/03/09/news/economy/soda-tax-uk-sugar-revenue>.

<sup>112</sup> *Id.*

and has already cut sugar levels in Sprite and Fanta by thirty-percent in the United Kingdom.<sup>113</sup>

An input sugar tax, such as these tiered systems, is better at improving public health when compared to the taxes found in Seattle and Chicago because “an economist wants to place the tax as close to what you want to reduce as possible.”<sup>114</sup> It gives two shots at fostering healthy habits: beverage manufacturers will be persuaded to use less sugar to fall under the tax threshold, and consumers will have an economic incentive to choose minimal sugar in the store.<sup>115</sup> Tiered systems also encourage businesses to devote product development, marketing, and pricing efforts to lower-sugar options.<sup>116</sup> The current tax in major United States cities passes most of the cost to the consumer at the retail level and is thus more regressive, falling heavily on low-income families,<sup>117</sup> and the price increases have created an uproar.<sup>118</sup>

Some experts claim that the regressive nature of sugar taxes is overstated, and the progression in long-term health among low-income consumers actually diminishes the financial regression to a marginal amount.<sup>119</sup> They point to the same principal argument that cigarette regulation advocates have promulgated over the past 15–20 years: the taxes are indeed regressive, but the long-term health benefits substantially outweigh the current financial costs.<sup>120</sup> Economists and think-tankers are generally not low income, however, and tend to be easier to convince than the masses paying a premium up front for their daily beverages,<sup>121</sup> It becomes even more difficult when the American Beverage Association funds groups, such as Ax the Bev Tax, to publicly oppose the taxes.<sup>122</sup>

Sugar regulation advocates have long realized that it would be foolish to put all of their eggs into one basket.<sup>123</sup> Rather than centering the campaign around tax incentives and punishments, some advocates believe that a more effective answer to the obesity epidemic lies in educating the masses through mandatory nutrition and public health disclosures.<sup>124</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> Haspel, *supra* note 78 (quoting Helen Jensen, a professor of economics at Iowa State University).

<sup>115</sup> *Id.*

<sup>116</sup> *See* Marron, *supra* note 110.

<sup>117</sup> *Id.*

<sup>118</sup> *See* Trotter, *supra* note 53.

<sup>119</sup> *See* Campbell, *supra* note 106.

<sup>120</sup> *Id.*

<sup>121</sup> *See* Trotter, *supra* note 53.

<sup>122</sup> *See* Dent, *supra* note 83.

<sup>123</sup> *See* Pomeranz, *supra* note 26, at 194.

<sup>124</sup> *Id.* at 187.

## III. CHILLED BEVERAGE SPEECH

A. *The State of Mandatory Nutrition Disclosures*

Public health advocates have called for marketing regulations to protect consumers since substantial evidence emerged indicating food and beverage advertising has a negative impact on public health, especially when encouraging nutrient-poor and calorie-dense food.<sup>125</sup> The Nutritional Labeling and Education Act of 1990 imposed a myriad of requirements upon food and beverage suppliers, most importantly the implementation of the now iconic nutrition facts label.<sup>126</sup> And the Food and Drug Administration (FDA) is still taking steps to make people more aware of the food choices they are making by expanding the detail of disclosures food manufacturers are required to make.<sup>127</sup> The FDA now requires places such as amusement parks, chain restaurants, and movie theaters to post calorie counts on their menus.<sup>128</sup> As of mid-2018, nutrition panels for cereal boxes, candy bars, and every other packaged food item in the supermarket require disclosure of how many grams of sugar were *added* to the product.<sup>129</sup>

This is a sweet victory for soda regulation advocates. Discerning added sugars from natural sugars can be difficult,<sup>130</sup> and there are plenty of healthy products that provide natural sugar, such as milk and tomato juice.<sup>131</sup> It is counterproductive for the public health and FDA agendas to have these healthy beverages grouped with sodas and sports drinks for fear of inadequate nutrition.<sup>132</sup> Food and drink manufacturers would commonly call sugar ingredients by deceptive names, such as high-fructose corn syrup, but now those ingredients fall under the category of “added sugars” on nutrition panels.<sup>133</sup> And the numbers that appear on naturally sweetened beverages’ sugar panels are accompanied by a zero under a distinct added-

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<sup>125</sup> *Id.*

<sup>126</sup> Nutritional Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353.

<sup>127</sup> Krishnadev Calamur, *The FDA’s New Rules for Nutrition Labels*, THE ATLANTIC (May 20, 2016, 1:00 PM), <https://www.theatlantic.com/health/archive/2016/05/new-fda-rules/483653/>.

<sup>128</sup> Olga Khazan, *Who Pays Attention to Calories?*, THE ATLANTIC (Dec. 2, 2014), <https://www.theatlantic.com/health/archive/2014/12/who-looks-at-menu-labels/383320/>.

<sup>129</sup> Deena Shanker, *Sweet disclosure: You’re about to find out how much sugar is added to your food*, CHI. TRIBUNE (Aug. 10, 2016, 8:21 AM), <http://www.chicagotribune.com/business/ct-fda-nutrition-food-labels-20160810-story.html>.

<sup>130</sup> *Id.*

<sup>131</sup> Milk has approximately thirteen grams of sugar per cup and tomato juice has six. *See National Nutrient Database for Standard Reference*, USDA (April 1, 2018), <https://ndb.nal.usda.gov/ndb/nutrients/index>.

<sup>132</sup> *See* Shanker, *supra* note 129.

<sup>133</sup> *Id.*

sugar category, which reminds consumers that not all sugar is artificially added.

Nutritional labels are useful, however, only if the target audience is reading them. Polls show that people making less than \$30,000 per year view the nutrition labels on food packages less often than those who make more money, yet a still respectable sixty-eight percent of low income people say they pay a “great deal” or “fair amount” of attention to nutrition labels.<sup>134</sup> But another study indicates people do not look at nutritional labels as often as they claim.<sup>135</sup> Eye-tracking data shows only nine percent look at calorie counts nearly every time, despite a third of the study’s participants claiming they “almost always” look at a product’s caloric content.<sup>136</sup> Some public health groups believe that enhancing nutritional labels will be insufficient to curb the obesity epidemic and a more aggressive measure should be taken to provide the public with the knowledge of sugar’s long-term consequences, especially regarding sugary drinks.<sup>137</sup>

These groups have called for mandatory warning labels on advertisements for sugar-sweetened beverages like those on alcohol and tobacco ads.<sup>138</sup> Unlike sugar taxes, these warnings would not cost taxpayers a penny.<sup>139</sup> Yet the labels could provide vital knowledge for current and potential contributors to the obesity epidemic, allowing them to make more informed purchasing decisions.<sup>140</sup> Warning labels on tobacco products underwent criticism at their inception because opponents claimed that smokers were adequately informed of the health risks.<sup>141</sup> Research shows, however, that many smokers were unaware that smoking increases the risk of stroke and over half did not believe smoking causes impotence.<sup>142</sup> Yet in areas with mandatory disclosures, smokers show a significantly better understanding of smoking’s negative health

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<sup>134</sup> See Khazan, *supra* note 128.

<sup>135</sup> See generally Meredith Melnick, *Study: Why People Don’t Read Nutritional Labels*, TIME (Oct. 24, 2011), <http://healthland.time.com/2011/10/24/study-why-people-dont-read-nutrition-labels/>.

<sup>136</sup> *Id.*

<sup>137</sup> KICK THE CAN, *Science Facts SB 203: Warning Labels on Sugary Drinks*, [http://www.kickthecan.info/sites/default/files/documents/SB203\\_PressKit\\_ScienceFacts.pdf](http://www.kickthecan.info/sites/default/files/documents/SB203_PressKit_ScienceFacts.pdf).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> D. Hammond et al., *Effectiveness of cigarette warning labels in informing smokers about the risks of smoking: findings from the International Tobacco Control (ITC) Four Country Survey*, 15:3 TOBACCO CONTROL 19, 22 (2006), [http://tobaccocontrol.bmj.com/content/tobaccocontrol/15/suppl\\_3/iii19.full.pdf](http://tobaccocontrol.bmj.com/content/tobaccocontrol/15/suppl_3/iii19.full.pdf).

<sup>142</sup> *Id.*

consequences.<sup>143</sup> The effect is especially felt in low-income areas because the universal reach of mandatory disclosures are largely unaffected by barriers to information.<sup>144</sup>

The same philosophy could apply to knowledge of sugar's long-term health effects. Studies show critics were correct when they said all smokers know about lung cancer and cardiovascular disease,<sup>145</sup> and they will likely be correct if they say that almost all people understand sugar is in soda and excessive amounts of it could lead to obesity. But some regular soda consumers may not fully understand fruit juices' contributions to diabetes or the diseases that spawn from tooth decay,<sup>146</sup> just like the many smokers who did not fully comprehend the extent of smoking's effects on long-term health until they were consistently exposed to mandatory warning labels.<sup>147</sup>

In 2014, California attempted to pass a bill that would have made it the first state to experiment with the theory that mandatory warning labels, like those on tobacco advertisements, could work with sugar-sweetened beverages.<sup>148</sup> But the bill failed in the state legislature.<sup>149</sup> A year later, San Francisco City and County lawmakers ("City" or "San Francisco") unanimously voted to require all sugar-sweetened beverage print advertisements—defined as advertisements for "soda and other non-alcoholic beverages that contain one or more added sweeteners and more than twenty-five calories per twelve fluid ounces of beverage"—to bear the message: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." in a distinct black box on no less than twenty percent of the advertisement.<sup>150</sup>

### B. *ABA v. San Francisco*

The American Beverage Association, California Retailers Association, and the California State Outdoor Advertising Association ("the Associations" or "ABA") quickly filed suit for injunctive relief to prevent the implementation of the ordinance.<sup>151</sup> The crux of the

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<sup>143</sup> *Id.* at 23.

<sup>144</sup> *Id.* at 24.

<sup>145</sup> *Id.* at 22.

<sup>146</sup> See KICK THE CAN, *supra* note 137.

<sup>147</sup> See Hammond, *supra* note 141.

<sup>148</sup> Katy Steinmetz, *San Francisco Approves Warning Label for Sugary Drink Ads*, TIME (June 10, 2015), <http://time.com/3915485/san-francisco-soda-warning-label/>.

<sup>149</sup> *Id.*

<sup>150</sup> *Am. Beverage Ass'n v. City and Cty. of San Francisco*, 871 F.3d 884, 888 (9th Cir. 2017), *vacated en banc*, 916 F.3d 749 (9th Cir. 2019).

<sup>151</sup> *Id.* at 889.

Associations' claim is that the warning creates a chilling effect on the members' speech in violation of their First Amendment right to freedom of speech by requiring the Associations to bear an unjustified and undue burden of conveying a controversial claim hostile to their own products as a prerequisite to advertising them.<sup>152</sup> San Francisco countered by claiming there is a substantial government interest in informing the public about the health risks of sugar, and thus the required warning is a justified burden upon the Associations so long as the disclosure is factual, accurate, and not misleading, which the City affirmatively posited for each claim.<sup>153</sup>

### 1. The *Zauderer* Exception

The first issue presented to the court was what level of scrutiny should be applied to the warning.<sup>154</sup> By default, speech regulations must be strictly scrutinized under the First Amendment, and they are presumptively unconstitutional.<sup>155</sup> Many appellate circuits have, however, carved out an exception for regulations that merely impose a disclosure requirement: the *Zauderer* exception.<sup>156</sup> The Associations argued *Zauderer* should not apply because the Supreme Court has used *Zauderer* only after concluding the challenged regulation's purpose is to redirect *misleading* commercial speech so as to prevent consumer deception, which is not applicable to the ABA's advertisements.<sup>157</sup>

The Ninth Circuit (on *de novo* review) and its district court disagreed with the Associations and found that *Zauderer* is the appropriate standard for the beverage disclosures.<sup>158</sup> Under *Zauderer*,

a commercial speaker's constitutionally protected interest in refraining from providing consumers with additional information is minimal if a required disclosure is '[1] purely factual and [2] uncontroversial' and is not '[3] unjustified or unduly burdensome' so as to chill protected speech.<sup>159</sup>

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<sup>152</sup> See Brief for Defendant-Appellee at 6–9, *Am. Beverage Ass'n v. City and Cty. Of San Francisco*, 871 F.3d 884 (9th Cir. 2017) (Nos. 16-16072, 16-16073).

<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Am. Beverage Ass'n*, 871 F.3d at 891.

<sup>155</sup> *National Institute of Family and Life Advocates d/b/a NIFLA et al. v. Becerra*, 138 S.Ct. 2361, 2371 (2018).

<sup>156</sup> *Am. Beverage Ass'n*, 871 F.3d at 891–92.

<sup>157</sup> See Brief for Defendant-Appellee at 31–32, *Am. Beverage Ass'n v. City and Cty. of San Francisco*, 871 F.3d 884 (9th Cir. 2017) (Nos. 16-16072, 16-16073).

<sup>158</sup> See *Am. Beverage Ass'n*, 871 F.3d at 892.

<sup>159</sup> *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)) (holding that a lawyer's advertisement was factually true but created

It is the government's burden to meet this standard.<sup>160</sup> However, the Supreme Court had neither analyzed nor approved the *Zauderer* standard at the time of the initial Ninth Circuit decision for the types of cases in which courts had been applying it, namely "professional speech" limitations. That changed in mid-2018 when the Supreme Court approved *Zauderer* as an exception to strict scrutiny under certain circumstances, but it refused to treat "professional speech as a unique category that is exempt from ordinary First Amendment principles."<sup>161</sup>

The Ninth Circuit struggled to interpret the Supreme Court's opinion. In a January 2019 rehearing decision, the full Ninth Circuit split as to whether the San Francisco ordinance fell under the purview of *Zauderer* and, if it did, how to apply the standard.<sup>162</sup> But the court unanimously found the ordinance was unconstitutional.<sup>163</sup> The following subsections summarize the district court's and both of the Ninth Circuit's opinions.

## 2. District Court

The ABA claimed the warning is misleading, and thus not purely factual and uncontroversial, because

[The warning suggests that] (1) consuming beverages with added sugar is dangerous regardless of one's diet or lifestyle; (2) consuming beverages with added sugar necessarily and inevitably contributes to obesity [and] diabetes; and (3) consuming beverages with added sugar uniquely contributes to obesity and diabetes.<sup>164</sup>

Essentially, if sugar-sweetened beverage consumers were to have moderate amounts of sugar with a healthy lifestyle, then the beverages would not contribute to obesity or diabetes.<sup>165</sup> It follows that the warning San Francisco imposes should require a qualifier—*overconsumption* of sugar-sweetened beverages contributes to obesity and diabetes—and it must be imposed on all sugary products so to be fair and constitutional.<sup>166</sup>

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an unfair perception that consumers would only have to pay contingently, and thus regulation requiring full disclosure was fair because it was in the public's interest, purely factual, uncontroversial, and not unduly burdensome).

<sup>160</sup> *Id.* at 895.

<sup>161</sup> *NIFLA*, 138 S.Ct. at 2375.

<sup>162</sup> *See generally* *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749 (9th Cir. 2019).

<sup>163</sup> *Id.* at 757–58.

<sup>164</sup> *Am. Beverage Ass'n v. City and Cty. of San Francisco*, 187 F.Supp.3d 1123, 1139 (N.D. Cal 2016), *rev'd* 916 F.3d 749 (9th Cir. 2019).

<sup>165</sup> *See Am. Beverage Ass'n*, 871 F.3d at 895.

<sup>166</sup> *Id.*

Otherwise, they argue, the accuracy of the warning is in reasonable dispute.<sup>167</sup>

The Northern District of California reached the opposite conclusion and found the mandated warning is factual and accurate.<sup>168</sup> The court also dismissed the argument that the sugar warning was under-inclusive because it was not placed on all advertisements for sugary products.<sup>169</sup> The court reasoned that sugar-sweetened beverages are a significant source of calories, and overconsumption of calories contributes to the obesity epidemic, which the government has a substantial public interest in curbing.<sup>170</sup> Thus, it is a reasonable strategy to piecemeal the regulatory war on obesity first with sugar-sweetened beverage warnings, and it is unreasonable to expect the government to regulate all sugar products at the outset.<sup>171</sup>

As to the argument that the mandate is unjustified or unduly burdensome, the court was not convinced that the Associations would succeed on the merits of their claims.<sup>172</sup> The Associations claimed that the required size—no less than twenty percent of the advertisement—of the warning forces the ABA to forgo print advertising because of its breadth, and thus it is an undue burden.<sup>173</sup> The district court rejected the argument, relying on advertising experts claiming that tobacco product packaging and labeling should bear a health warning of fifty percent to be effective.<sup>174</sup> And, because the court was not without precedent for permitting the twenty percent requirement, it would permit the requirement in this instance.<sup>175</sup>

Also, the court found little credibility in claims that ABA members will stop advertising in the market altogether “because tobacco companies have still profited even with the required warnings on the tobacco products themselves.”<sup>176</sup> Throughout the analysis, the court did little to distinguish between the differences of the effects of warnings on tobacco products and warnings on sugar-sweetened beverage advertisements. But ultimately, it used the sugar-tobacco comparison to reach the conclusion that beverage advertisers are not unduly burdened by the San Francisco ordinance, although it conceded the constitutional argument has some force.<sup>177</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> *See Am. Beverage Ass’n*, 187 F.Supp.3d at 1141–42.

<sup>169</sup> *See id.* at 1140.

<sup>170</sup> *See id.*

<sup>171</sup> *See generally id.* at 1141–42.

<sup>172</sup> *See id.* at 1142–43.

<sup>173</sup> *See id.* at 1143.

<sup>174</sup> *Id.* at 1138.

<sup>175</sup> *See id.* at 1143.

<sup>176</sup> *Id.* at 1144–45.

<sup>177</sup> *See id.* at 1145.

### 3. Appellate Court Panel

The Ninth Circuit Court of Appeals gave more deference to the Associations' argument that the size of the warning will reduce ABA members' print advertisements in the San Francisco market to nearly nil.<sup>178</sup> The court further agreed that if a required disclosure effectively rules out advertising in particular media, then it is unduly burdensome.<sup>179</sup> The panel's opinion concluded that, because the black box overwhelms other visual elements in the advertisement, and it requires a conveyance of San Francisco's disputed policy views, the warning is an unconstitutional burden on the Associations.<sup>180</sup>

Further, where the lower court found factual accuracy within the *Zauderer* framework, the Ninth Circuit panel found controversy.<sup>181</sup> The court took issue that "the warning is required exclusively on advertisements for sugar-sweetened beverages, and not on advertisements for other products with equal or greater amounts of added sugars and calories."<sup>182</sup> By singling out beverages and not mentioning behavioral risks, the ordinance can potentially lead consumers to believe that there is something innate about sugar-sweetened beverages that makes them a uniquely substantial contributor to obesity, diabetes, and tooth decay as compared to something without a warning, such as candy.<sup>183</sup> The research is unsettled as to that conclusion and thus creates a deceptive message—or so said the panel.<sup>184</sup> The court also took issue that there is no mention that added sugars are generally recognized as safe when not consumed in excess amounts or when part of an otherwise healthy dietary pattern.<sup>185</sup>

Without sufficient qualifying language in the warning, the potential misleading effect of the warning led the court to conclude that the warning is, in effect, untrue and not purely factual, which accordingly chills the Associations' speech.<sup>186</sup> However, this opinion would not last because the Ninth Circuit granted an *en banc* rehearing.

### 4. The En Banc Opinions

Before the *en banc* rehearing, however, the United States Supreme Court decided a case—*National Institute of Family and Life Advocates d/b/a NIFLA et al. v. Becerra* (hereinafter "*NIFLA*")—that clarified (or

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<sup>178</sup> See *Am. Beverage Ass'n*, 871 F.3d at 897.

<sup>179</sup> *Id.* at 893.

<sup>180</sup> See *id.* at 897.

<sup>181</sup> *Id.* at 895.

<sup>182</sup> *Id.*

<sup>183</sup> See *id.* at 896.

<sup>184</sup> See *id.* at 895.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 897.

attempted to clarify) compelled commercial speech jurisprudence.<sup>187</sup> The Court affirmed *Zauderer* as an appropriate exception to the strict scrutiny requirement for some First Amendment challenges.<sup>188</sup> But the Court did not clearly delineate the circumstances in which *Zauderer* will apply or how it will apply, as evidenced by a split in the Ninth Circuit's reasoning. The Ninth Circuit unanimously decided that the ordinance is unconstitutional, but there were four different opinions used to reach that unanimity, and two of them found *Zauderer* did not apply here.<sup>189</sup>

*Majority opinion:* The court decided the case on the narrowest grounds possible. It found that the size of the warning—no less than twenty percent of the advertisement—created an undue burden on the manufacturers.<sup>190</sup> Because the state's goal could be accomplished with a smaller size, the ordinance does not pass *Zauderer*'s undue burden requirement.<sup>191</sup> The court noted that *NIFLA* did not require the *Zauderer* elements be applied in any particular order, so it began with the third element and forwent analyzing the factual accuracy of the warning.<sup>192</sup> Not every judge agreed with this process or (lack of) analysis, however.

*Ikuta's dissent in reasoning and concurrence in result:* Judge Ikuta views *Zauderer* as a rational basis standard, not intermediate scrutiny.<sup>193</sup> Ultimately, she reasoned that *Zauderer* does not apply and heightened scrutiny was the appropriate standard here.<sup>194</sup> If others agree, this would spell trouble for future laws that mandate warnings for beverage companies because the burden is on the government and it is a difficult burden to meet.

Judge Ikuta premised this logic on two of the Supreme Court's conclusions in *NIFLA*. First, these types of warnings are "content-based" compulsory disclosures, meaning they are presumptively unconstitutional.<sup>195</sup> Second, the Court refused to treat any content-based disclosures as exempt categories of speech under the First Amendment unless it is the type of warning that has a "long tradition" of permissibility.<sup>196</sup> That is where the *Zauderer* exception comes in: "laws that require professionals to disclose factual, noncontroversial information

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<sup>187</sup> *NIFLA*, 138 S.Ct. 2361 (2018).

<sup>188</sup> *Id.* at 2372–75.

<sup>189</sup> *See generally, Am. Beverage Ass'n*, 916 F.3d 749 (9th Cir. 2019).

<sup>190</sup> *Id.* at 757–58.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 756.

<sup>193</sup> *Id.* at 759 n.1.

<sup>194</sup> *Id.* at 761–62.

<sup>195</sup> *Id.* at 761.

<sup>196</sup> *Id.* at 762.

in their ‘commercial speech’” are given more deferential review because they have a long history of permissibility.<sup>197</sup>

Judge Ikuta then set forth her interpretation of how *Zauderer* functions in light of the recent *NIFLA* opinion:

To determine whether the *Zauderer* exception applies, a court must consider whether the compelled speech governs only [1] ‘commercial advertising’ and requires the disclosure of [2] ‘purely factual and [3] uncontroversial information about [4] the terms under which . . . services will be available.’ (citation omitted). If the government regulation meets those requirements, the regulation should be upheld unless it is [5] ‘unjustified or [6] unduly burdensome.’ (citation omitted). If the regulation does not qualify for the *Zauderer* exception, the regulation must survive heightened scrutiny to avoid violating the First Amendment.<sup>198</sup>

Regarding the San Francisco ordinance, the threshold inquiry—whether it is commercial advertising—is obviously satisfied. The second inquiry, however, is not met because “[t]he factual accuracy of the warning is disputed in the record.”<sup>199</sup>

Thus, the *Zauderer* exception does not apply, and the ordinance must pass heightened scrutiny.<sup>200</sup> It does not pass. The ordinance is “wildly *underinclusive*” because (1) it does not apply “to all sugar-sweetened beverages, much less all sugar-sweetened products” and (2) it does not apply to all forms of advertising, such as television or radio.<sup>201</sup> Accordingly, the ordinance must be struck down.

*Christian and Thomas’s concurrence:* This opinion argued *Zauderer* applies, but it focused on the order in which to apply the factors.<sup>202</sup> It noted that the first two factors—purely factual and uncontroversial information—were not at issue in *NIFLA*, which is why the Supreme Court did not consider them.<sup>203</sup> However, because they are the first two factors, they should be considered prior to the undue burden analysis.<sup>204</sup> Here, the

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<sup>197</sup> *Id.* at 759 (quoting *NIFLA*, 138 S.Ct. at 2372).

<sup>198</sup> *Id.* at 759–760.

<sup>199</sup> *Id.* at 761.

<sup>200</sup> *Id.* at 762.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 765.

<sup>203</sup> *Id.* at 766.

<sup>204</sup> *Id.* at 765.

message is literally false as to type 1 diabetes, so the ordinance fails the first factor and the analysis should stop there.<sup>205</sup>

*Nguyen concurrence:* Judge Nguyen, in the same fashion as Judge Ikuta, views *Zauderer* as a rational basis test, not intermediate scrutiny.<sup>206</sup> But she believes *Zauderer* applies only to laws that regulate misleading and false commercial speech, not all commercial speech.<sup>207</sup> By default, commercial speech is subject to intermediate scrutiny under the *Central Hudson* standard.<sup>208</sup> She opined that the Supreme Court had the opportunity to expand *Zauderer* beyond deceptive commercial speech, but it declined to do so.<sup>209</sup> Because this ordinance is not designed to curb false and misleading speech, the proper standard here is *Central Hudson* intermediate scrutiny, which this ordinance fails to meet.<sup>210</sup>

### C. *Is it Purely Factual and Uncontroversial that Sugar-Sweetened Beverages Contribute to the Obesity Epidemic?*

Regardless of whether *Zauderer* or heightened scrutiny applies, future warnings will need to carefully avoid statements that are not scientifically considered fact because this ordinance failed both. The Ninth Circuit panel concluded the warnings required by the San Francisco ordinance infringe on free speech rights due, in part, to conflicting scientific philosophies regarding sugar's impact on the obesity epidemic.<sup>211</sup> Likewise, some concurring opinions in the *en banc* decision noted the warning is literally false as to type 1 diabetes, and they mentioned several times that the factual accuracy of the rest of the warning is in dispute.<sup>212</sup> Much of the controversy, however, involves who is performing the research, not necessarily the findings.

#### 1. Is the research corrupted?

A systemic review of systemic reviews found that studies conducted with sponsorship or potential conflict of interest with food or beverage companies were five times more likely to report a conclusion that there is no association between sugar-sweetened beverages and obesity.<sup>213</sup> Studies

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 767.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 768.

<sup>210</sup> *See id.* at 767–69.

<sup>211</sup> *See Am. Beverage Ass'n*, 871 F.3d at 898.

<sup>212</sup> *See Am. Beverage Ass'n*, 916 F.3d at 764–69.

<sup>213</sup> Maira Bes-Rastrollo et al., *Financial Conflicts of Interest and Reporting Bias Regarding the Association between Sugar-Sweetened Beverages and Weight Gain: A*

show that Coca-Cola Company or PepsiCo sponsored ninety-six health organizations from 2011–15 and lobbied against twenty-nine proposed public health bills in that period.<sup>214</sup> Additionally, Coca-Cola Company has provided financial and logistical support to a nonprofit organization, Global Energy Balance Network, that broadcasts the argument that Americans pay too much attention to sugar in their diets and insufficient attention to their exercise habits.<sup>215</sup> All of this suggests existing conflicts of interest within the scientific community due to large beverage companies' financial influence.<sup>216</sup> If the data derived from these studies is tainted with corruption, then the scientific findings are likely not what is in controversy.

## 2. Should sugary drinks be distinguished from non-beverage sugar products?

Future beverage warnings also need to consider the court's underinclusive concerns: the warnings either need to be applied to all sugar products or it must be uncontroversial that liquified sugar is more responsible for diabetes, obesity, and tooth decay than sugar in food. Some studies suggest they should be distinguished.<sup>217</sup> Because liquified sugar is delivered to the liver quicker than sugar in solid food, there may be a higher risk of fat accumulation.<sup>218</sup> But there is insufficient evidence from sustained consumption studies to consider this uncontroversial.<sup>219</sup>

Many investigators argue that sugar-sweetened beverages are particularly harmful because of the high concentration of sugar in a single container, a low-satiety effect per calorie consumed, and the stimulation

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*Systemic Review of Systemic Reviews*, PLOS MEDICINE 1, 3 (Dec. 31, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3876974/pdf/pmed.1001578.pdf>.

<sup>214</sup> Kerry Laurerman, *Big Soda sponsored 96 health groups – a big conflict of interest, study says*, WASH. POST (Oct. 10, 2016), [https://www.washingtonpost.com/news/to-your-health/wp/2016/10/10/big-soda-sponsored-96-health-groups-a-big-conflict-of-interest-study-says/?utm\\_term=.e764eefd408a](https://www.washingtonpost.com/news/to-your-health/wp/2016/10/10/big-soda-sponsored-96-health-groups-a-big-conflict-of-interest-study-says/?utm_term=.e764eefd408a).

<sup>215</sup> See Anahad O'Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away From Bad Diets*, N.Y. TIMES (Aug. 9, 2015), <https://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/>.

<sup>216</sup> See Laurerman, *supra* note 214, at 3.

<sup>217</sup> See Kimber L. Stanhope, *Sugar consumption, metabolic disease, and obesity: The state of the controversy*, CRITICAL REV. OF CLINICAL LAB SCI. 1, 18–19 (Feb. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4822166/pdf/nihms771653.pdf>.

<sup>218</sup> See *id.*

<sup>219</sup> See *id.* at 19.

of appetite.<sup>220</sup> The results of that hypothesis, however, are conflicted.<sup>221</sup> Differences in designs and methodologies have created difficulties in sustaining consistency across experiments.<sup>222</sup> Some studies indicate that consuming beverages before meals leads to overeating, which could contribute to obesity if done regularly,<sup>223</sup> but the same is true for milk in addition to beverages with added sugars.<sup>224</sup> Two other studies that examined the effect of liquid-based sugar against solid-based sugar seemed to show no significant difference.<sup>225</sup>

### 3. Can the warnings be constitutional if they are only on beverages?

The scientific results produce two conflicting schools of thought regarding the legality of mandatory disclosures for sugar-sweetened beverages. The first school believes that sugar-sweetened beverages are especially influential on the obesity epidemic and the public requires more education on the matter.<sup>226</sup> Proponents call for mandated warnings because the public has difficulty adhering to recommended levels of sugar intake with beverage companies' current marketing and packaging practices.<sup>227</sup> They believe the insufficiency of long-term studies is outweighed by the data indicating high concentrations of added sugar leads to poor choices among consumers.<sup>228</sup> Neurological mechanisms produce addictive qualities in the brain when consuming sugar, particularly liquified sugar.<sup>229</sup> This supports the notion that the obesity epidemic is a sugar epidemic partly fueled by soda.<sup>230</sup> The first school thus concludes that the advertising disclosure mandated by San Francisco is accurate and not

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<sup>220</sup> See Richard Kohn & John L. Sievenpiper, *Dietary Sugar and Body Weight: Have We Reached a Crisis in the Epidemic of Obesity and Diabetes? We have, but the Pox on Sugar is Overwrought and Overworked*, DIABETES CARE 957, 959 (2014) <http://care.diabetesjournals.org/content/37/4/957.full-text.pdf>.

<sup>221</sup> See *id.*

<sup>222</sup> See Vasanti S. Malik et al., *Sugar Sweetened Beverages, Obesity, Type 2 Diabetes and Cardiovascular Disease risk*, 2010 CIRCULATION 1, 3 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2862465/pdf/nihms-189965.pdf>.

<sup>223</sup> See Kohn & Sievenpiper, *supra* note 220 at 959.

<sup>224</sup> See Stijn Soenen & Margriet S. Westerterp-Plantenga, *No differences in satiety or energy intake after high-fructose corn syrup, sucrose, or milk preloads*, 86 AM. J. CLINICAL NUTRITION 1586, 1590 (Dec. 2007), <http://ajcn.nutrition.org/content/86/6/1586.full.pdf+html>.

<sup>225</sup> See Kohn & Sievenpiper, *supra* note 220, at 959.

<sup>226</sup> See Brief for Defendant-Appellee at 5, *Am. Beverage Ass'n v. City and Cty. of San Francisco*, 871 F.3d 884 (9th Cir. 2017) (Nos. 16-16072, 16-16073).

<sup>227</sup> See *id.*

<sup>228</sup> See *id.* at 6.

<sup>229</sup> See Malik, *supra* note 222, at 9.

<sup>230</sup> See *id.*

misleading in the same way the statute requiring alcohol labels to warn that “consumption of alcoholic beverages . . . may cause health problems” is accurate and not misleading.<sup>231</sup>

The second school of thought disagrees that the San Francisco mandate is comparable to alcohol disclosures because the phrase “may cause health problems” tempers the effect of alcohol warnings and equivalent language is absent from the sugar disclosures.<sup>232</sup> Exponents believe the warning becomes misleading without qualifying language because moderate sugar consumption within a healthy lifestyle will not lead to obesity, diabetes, or tooth decay.<sup>233</sup> Further, because the warning would appear only on beverages with added sugar and not on all products with added sugar, the public could be misled into believing that sugar-sweetened beverages are especially dangerous, and there is evidence to contradict that notion.<sup>234</sup> Thus, the warning mandated by San Francisco places an unfair burden on beverage companies by requiring them “to convey the City’s controversial opinion.”<sup>235</sup> The warning is also unfair because it does not require the same mandate on all other sugary products that may contribute to obesity, diabetes, and tooth decay.<sup>236</sup>

#### IV. POLICYMAKERS’ BEST OPTIONS FOR REGULATING SUGAR-SWEETENED BEVERAGES

The Ninth Circuit panel decision was in accordance with the second school of thought:

[T]he warning singles out sugar-sweetened beverages without mentioning behavioral risks, and thus clearly 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.<sup>237</sup>

As a result, policymakers may resort to options other than the failed San Francisco warning for fear of a First Amendment challenge. The court, however, hinted that a qualification—“may contribute”—could suffice to

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<sup>231</sup> See Brief for Defendant-Appellee, *supra* note 226, at 8.

<sup>232</sup> See Brief for Plaintiff-Appellant at 8–9, *Am. Beverage Ass’n v. City and Cty. of San Francisco*, 871 F.3d 884 (9th Cir. 2017) (Nos. 16-16072, 16-16073).

<sup>233</sup> See *id.* at 9.

<sup>234</sup> See *id.* at 9–10.

<sup>235</sup> *Id.* at 9.

<sup>236</sup> See generally *id.*

<sup>237</sup> *Am. Beverage Ass’n*, 871 F.3d at 896.

bring the warning out of reasonable dispute.<sup>238</sup> If a simple “may” is all the court requires to pass constitutional muster, then advocates should be clamoring for their representatives to pass conforming ordinances. But the unfair burden on beverage companies would persist.

That is why requiring *all* producers of added sugar products—food and beverage alike—to implement a warning like San Francisco’s is the best option to attack the obesity epidemic. The ABA’s unfair burden argument would collapse because the warning would no longer single out any industry or producer. And the public at large would become more informed of the dangers it is ingesting with its food and beverages. Limiting the mandate to products with added sugar would spare healthy products, such as fruits. Hungary has already experienced success with a similar system.<sup>239</sup> To reduce obesity and knock the United States off its infamous perch as the most obese nation in history, advocates must continue the war against sugar on two fronts—mandatory disclosures on food and drinks.

Mandatory disclosures should not be the only weapon. Widespread taxes on added sugar would provide consumers with a financial incentive to eat and drink healthier substances, which should reduce obesity, increase life expectancy, and save taxpayers long-term costs.<sup>240</sup> Initial research indicates that a sugar tax would accomplish those goals.<sup>241</sup> Specifically, an input tax, such as the United Kingdom’s multi-tiered tax on sugar-sweetened beverages, should encourage manufacturers to use less sugar, thereby optimizing the tax’s potential to reduce obesity.<sup>242</sup> Revenue from an added sugar tax could then be used to develop programs that promote healthy choices and cheaper access to superior nutrition, like the plan in Seattle.<sup>243</sup>

In 1965, forty-two percent of adults smoked cigarettes and that number dwindled to less than seventeen percent by 2014.<sup>244</sup> It did not take many decades for cigarette taxes and warning labels to become widespread, effectively reducing tobacco’s negative health effects through education and economic incentives.<sup>245</sup> Sugar may be no different. More policymakers should take note of the United States’ position as the world’s

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<sup>238</sup> *See id.*

<sup>239</sup> *See* Campbell, *supra* note 106, at 2.

<sup>240</sup> *See* Brill, *supra* note 11.

<sup>241</sup> *See supra* Section II, Part A.

<sup>242</sup> *See* Marron, *supra* note 110, at 2.

<sup>243</sup> *See generally* SEATTLE OFFICE OF THE MAYOR, *supra* note 80.

<sup>244</sup> CTRS. FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/tobacco/data\\_statistics/tables/trends/cig\\_smoking/index.htm](https://www.cdc.gov/tobacco/data_statistics/tables/trends/cig_smoking/index.htm).

<sup>245</sup> *See* Hammond, *supra* note 141.

most obese nation and largest sugar consumer,<sup>246</sup> then enlist familiar tactics—taxes and warning labels—to combat the obesity epidemic.

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<sup>246</sup> See Ferdman, *supra* note 21.