08-1892-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE RESTAURANT ASSOCIATION,
Plaintiffs-Appellants,

v.

NEW YORK CITY BOARD OF HEALTH, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, THOMAS R. FRIEDEN, In His Official Capacity As Commissioner Of The New York City Department Of Health And Mental Hygiene,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* RUDD CENTER FOR FOOD POLICY & OBESITY AT YALE UNIVERSITY IN SUPPORT OF DEFENDANTS-APPELLEES AND ARGUING FOR AFFIRMATION

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STATEMENT OF INTEREST

Robert Post, J.D., Ph.D., the David Boies Professor of Law at Yale University Law School and advisor to the Rudd Center for Food Policy and Obesity at Yale University ("Rudd Center"), Jennifer L. Pomeranz, J.D., M.P.H., the Coordinator of Legal Initiatives at the Rudd Center, and Kelly D. Brownell, Ph.D., the Director of the Rudd Center (collectively, "Rudd Center") submit this brief in support of defendants-appellees New York City Board of Health, New York City Department of Health and Mental Hygiene, and Thomas R. Frieden ("New York City") and against plaintiff-appellant's appeal. We write separately on the First Amendment issues.

The mission of the Rudd Center is to improve the world's diet, prevent obesity, and reduce weight stigma by connecting sound science with public policy. The Rudd Center strives to improve laws, practices, and policies related to nutrition and obesity. It seeks to inform and empower the public while encouraging global changes to allow individuals to maximize their own health. New York City's adoption of Health Code § 81.50 directly furthers the Rudd Center's mission. Based on the best scientific evidence available, the Rudd Center supports menu labeling legislations in cities and states across the country as an effective method of combating the current epidemic of obesity.

BACKGROUND

In New York City, more than half of adults are overweight or obese (54%). *See* Notice of Adoption of A Resolution to Repeal and Reenact § 81.50 of the New York City Health Code (January 22, 2008) ("Notice of Adoption"), at 3. In 2005, 70% of all deaths in New York City were due to diseases highly correlated with obesity: heart disease, diabetes, stroke and cancer. *See id*. In an effort to address these public health issues, New York City adopted Amendment § 81.50 Calorie Labeling to Article 81 of the New York City Health Code. The New York State Restaurant Association ("NYSRA") filed suit in the Southern District of New York to prevent enforcement of Health Code § 81.50, alleging that the amendment was preempted by the Nutrition Labeling and Education Act of 1990 ("NLEA") and that it violated the First Amendment rights of its members. The district court found that certain aspects of the amendment were preempted by the NLEA. *See NYSRA v. NYC Board of Health et al*., 1:07-cv-05710-RJH (9/11/07). It did not reach NYSRA's First Amendment claims. *See id.*

New York City revised § 81.50 to comply with the reasoning of the district court. The amended ordinance was adopted on January 22, 2008. NYSRA again brought suit in the Southern District of New York to prevent enforcement of the ordinance, alleging that the amendment was still preempted by the NLEA and that it violated the First Amendment rights of its members.

The district court ruled in favor of New York City on both claims and accordingly denied NYSRA's motions for preliminary injunction, declaratory relief, and summary judgment. *See* Memorandum Opinion and Order of the United States District Court for the Southern District of New York (Holwell, U.S.D.J.) filed April 16, 2008 ("Opinion"). The district court held that Health Code § 81.50 is not preempted by the NLEA and that it does not violate the First Amendment rights of NYSRA's members. With regard to NYSRA's First Amendment claims, the district court specifically found that Health Code § 81.50 regulates only commercial speech, (*see* Opinion at 12) and that it compels only "the disclosure of 'purely factual and uncontroversial' commercial information." Opinion at 16. The court held that "*Zauderer* and *Sorrell* supply the proper standard of review in this case." Opinion at 16. Under this standard, the district court found that Health Code § 81.50 was reasonably related to New York City's interest in reducing obesity. *See* Opinion at 24-27.

On appeal, NYSRA again argues that Health Code § 81.50 is preempted by the NLEA and that it compels speech in violation of the First Amendment. *See* Brief in Support of NYSRA's Appeal (May 7, 2008) ("NYSRA Brief"). If NYSRA's First Amendment arguments are accepted, innumerable federal and state regulations requiring commercial actors to disclose uncontroversial factual information will be rendered constitutionally suspect. The regulatory structure of

consumer protection in the United States, which relies heavily on promoting information transparency to encourage informed consumer decision-making, will be thrown into jeopardy, as will the government's ability to combat the obesity epidemic through regulations promoting knowledgeable consumer choice and personal responsibility.

ARGUMENT

I. Health Code § 81.50 Requires the Disclosure of Factual and Uncontroversial Commercial Information

The New York City ordinance requires that covered food service establishments post "the total number of calories derived from any source for each menu item … adjacent or in close proximity" to the item on the menu or menu board. Health Code §81.50(c); *see* Notice of Adoption at 13. The ordinance also requires that when food items are "displayed for sale with a food item tag," the tag "shall include the calorie content value for that food item." Health Code §81.50(c)(2); *see* Notice of Adoption at 13. Finally, the ordinance applies to drive-through windows, requiring that the calorie content be "displayed on either the drive through menu board, or on an adjacent stanchion visible at or prior to the point of ordering." Health Code §81.50(c)(3); *see* Notice of Adoption at 13. The ordinance expressly allows food service establishments to provide "additional nutritional information" as well as disclaimers "stating that there may be variations

in calorie content values across servings based on slight variations in serving size, quantity of ingredients, or special ordering." *See* Notice of Adoption at 14.

Health Code § 81.50 does not require covered food service establishments to state an opinion or belief. *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977). It does not require them to subsidize advertisements. *Cf. United States Department of Agriculture v. United Foods*, 533 U.S. 405 (2001). It does not require them to disclose controversial facts. *Cf. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). It "does not force any NYSRA member to take a position in any ongoing debate." Opinion at 17; *cf. Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 14 (1986). It does not prevent covered food service establishments from announcing that they are disclosing calorie content under legal compulsion. Indeed, it does not preclude covered food service establishments from expressing whatever additional information or opinions they wish. Appellant is simply incorrect to imply that Health Code § 81.50 compels disclosures that customers could "confuse as the vendor's own speech." NYSRA Brief at 21.

As the district court below found, the ordinance "compels only the disclosure of 'purely factual and uncontroversial' commercial information—the calorie content of restaurant menu items." Opinion at 16. A calorie is "a unit of measure for energy obtained from food and beverages." Institute of Medicine,

Preventing childhood obesity health in the balance, National Academies Press, Washington DC (2005) at 332. The calorie content of food is a scientific fact. It is the amount of "energy needed to raise the temperature of 1 kilogram of water 1 ºC." The Concise Oxford Dictionary, Oxford University Press, 10th Edition. New York (2001). It is not a matter of opinion or controversy. Health Code § 81.50 requires that covered food service establishments disclose the calorie content of their food to consumers at the point of purchase, which is to say as part of the transaction of purchasing food. Courts have uniformly held that the regulation of uncontroversial factual information in such circumstances is for First Amendment purposes the regulation of commercial speech. *See e.g., Rubin v. Coors Brewing Co*., 514 U.S. 476, 483 (1995); *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001). Such regulation does not reach, as appellant inaccurately implies in its brief, communication that entangles commercial and noncommercial speech. NYSRA Brief at 41-43.

Health Code § 81.50 is a commercial disclosure regulation indistinguishable from thousands of analogous regulations that are routinely applied to transactions in the commercial marketplace. As this Court recently affirmed: "Innumerable federal and state regulatory programs require the disclosure of product and other commercial information." *Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001). Federal law, for example, requires that textile and wool products must be labeled with their

fiber content, country of origin, and the identity of the business responsible for marketing or handling the item. *See* Textile Fiber Products Identification Act (15 U.S.C. § 70, et seq.) and Wool Products Labeling Act of 1939 (15 U.S.C. § 68, et seq.). It requires that articles of apparel made of fur be labeled, and that invoices and advertising for furs and fur products specify the true English name of the animal from which the fur was taken, and whether the fur is dyed or previously used. *See* Fur Products Labeling Act (15 U.S.C. §§ 69-69j). It requires that for personal property leases that exceed 4 months and that are made to consumers for personal, family, or household purposes, a written disclosure of lease costs, taxes, fees and terms be disclosed; and it also requires certain disclosures be made in the lease advertising. *See* Consumer Leasing Act (15 U.S.C. §§ 1667-1667f, *as amended*). It requires that cosmetic products display an information panel which lists ingredients. *See* 21 CFR 701.3. It requires that packaged food and beverages disclose their ingredients, 21 U.S.C. §343(i), the net weight of their contents, 21 U.S.C. §343(e), and their percentage of alcohol by volume, 27 U.S.C. § 205(e)(2). Foods regulated by the Food and Drug Administration ("FDA") must be labeled with all ingredients that are derived from the eight most common food allergens (milk**,** eggs, fish, crustacean shellfish, tree nuts, peanuts, wheat, soybeans). *See* Food Allergen Labeling and Consumer Protection Act of 2004 (Title II of Public Law 108-282) (August 2, 2004). Contrary to NYSRA assertions, *see* NYSRA

Brief at 47, disclosure requirements are commonly mandated for reasons other than the prevention of consumer deception or for warning consumers about "inherently dangerous" products.

Consumer protection law is routinely based on the belief that the disclosure of factual and uncontroversial information will promote knowledgeable consumer decision-making. *See e.g.*, 15 U.S.C. 1451 (Congressional declaration of the policy for the Fair Packaging and Labeling Act: "Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons."). Compelled disclosures frequently reduce information costs and thereby increase market efficiency. *See* Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics. Why Markets Fail: Incomplete Information 612 (Prentice Hall 1998) (1992). They reduce potential consumer confusion. *See e.g., In re Matter of Policies and Rules Concerning Interstate 900 Telecommunications Services*, 6 FCC Rcd 6166, 6168 (September 26, 1991) ("The preamble [requirement] is designed to prevent deception and confusion by providing the consumer 'purely factual and uncontroversial information about the terms under which [the] services will be available,' thereby enabling the consumer to make an informed purchasing decision."). They enable consumers to make decisions that will best serve their own interests, including

their own interests in health and safety. *See* 137 Congressional Record E 1165 (April 9, 1991) Representative John Moakley (The NLEA authorizes the FDA to regulate food labels "to help consumers choose healthful foods in the context of a total daily diet without the confusing and all-too-often misleading information currently on many food labels."). Compelled disclosures of this kind empower consumers to make informed decisions about their own interests. This would not be possible if the First Amendment were interpreted to disallow regulations like Health Code § 81.50 and force government to intervene directly to regulate consumer choices by prohibiting the actual purchase and sale of consumer products.

II. The First Amendment Standard for Commercial Disclosure Requirements of Factual and Uncontroversial Commercial Information is the Reasonable Relationship Test, Not the Intermediate Scrutiny of Central Hudson

Courts have uniformly held that the compelled disclosure of factual and uncontroversial commercial information is constitutional under the First Amendment if it is reasonably related to an appropriate state interest. Although the general standard for *restrictions* on commercial speech is the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), "regulations that *compel* 'purely factual and uncontroversial' commercial speech are subject to more lenient review than

regulations that restrict accurate commercial speech." *Sorrell*, 272 F.3d at 113 (*quoting Zauderer*, 471 U.S. 626, 651 (1985)) (emphasis added).

This asymmetry between the constitutional test applied to restrictions on commercial speech and the constitutional test applied to compelled disclosure of factual and uncontroversial commercial information follows directly from the justification announced by the Court for extending First Amendment protections to commercial speech. Repudiating its longstanding conclusion that "the Constitution imposes no . . . restraint on government" regulation of "purely commercial advertising," *Valentine v. Christensen*, 316 U.S. 52, 54 (1942), the Supreme Court held in 1976 that:

> Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

The Court ruled that commercial speech merits constitutional protection because it conveys information necessary for "public decisionmaking." The Court has repeatedly reaffirmed this conclusion: "The First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557, 563 (1980). "A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'" *First National Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (quoting *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc*., 425 U.S. 748, 764 (1976)).

Restrictions on commercial speech *interrupt* the flow of commercial information to the public and thus interfere with the constitutional value of commercial speech. They are therefore subject to the intermediate scrutiny of the *Central Hudson* test. By contrast, legislation that requires commercial vendors to disclose factual and uncontroversial information *increases* the flow of commercial information to consumers and thus serves the same constitutional purpose as does the commercial speech doctrine itself. NYSRA does not argue, and it could not argue, that § 81.50 restricts the ability of its members to speak. Because § 81.50

does not suppress expression, it is not encompassed within the rationale of *Central Hudson* and its progeny.[1]

That is why the Supreme Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), explicitly held that compelled disclosure of factual and uncontroversial commercial information is constitutional if it bears a reasonable relationship to an appropriate state interest. 471 U.S. at 651. In *Zauderer*, the Court considered a state requirement that attorney advertisements for contingent-fee representation must disclose "whether percentages are computed before or after deduction of court costs and expenses." 471 U.S. at 633. The Ohio Office of Disciplinary Counsel filed a complaint against an attorney named Philip Q. Zauderer for not complying with this disclosure requirement.

Zauderer argued that the Ohio disclosure requirement violated his First Amendment right not speak. The Court disagreed:

> The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.

[1] NYSRA relies on the case of *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996) ("IDFA"). *See* NYSRA Brief at 42-43. IDFA was decided under the *Central Hudson* test and this Court explained that IDFA's holding was limited to a requirement supported by no state interest beyond "consumer curiosity." *Sorrell*, 272 F.3d 104, 115, n.6. NYSRA conceded in the district court that New York City has a substantial interest in passing §81.50. See Memorandum of Law in Support of Plaintiff's Motion for Declaratory Relief and a Preliminary Injunction filed in the Southern District of New York (January 31, 2008), at 34. IDFA is inapplicable to the New York City ordinance.

Id. at 651. The Court explained that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides" and therefore "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer*, 471 U.S. at 651 (emphasis in the original) (citing see *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (1976)). Noting the "material differences between disclosure requirements and outright prohibitions on speech," *id.* at 650, the Court explicitly ruled that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 651 n.14.

In *Zauderer*, Ohio had sought to compel the disclosure of factual and uncontroversial commercial information in order to prevent potential consumer deception. The Court accordingly held "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. Nothing in the Court's reasoning, however, limited the application of the "reasonable relationship" test to the particular state interest of preventing consumer deception. The logic of the Court's opinion in *Zauderer* instead rested on the idea that the constitutional values served by commercial speech doctrine require that constitutional review be

differently applied to "disclosure requirements" than to "outright prohibitions on speech." *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 26-28 (2000).

This is the interpretation of *Zauderer* adopted by this Court in *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). In *Sorrell*, this Court considered a First Amendment challenge by the National Electrical Manufacturers Association to a Vermont statute requiring "manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste." *Id.* at 107. This Court flatly held that the compelled disclosure of factual and uncontroversial commercial information is constitutional if there is "a rational connection between the purpose of" the disclosure requirement and "the means employed to realize that purpose." *Id.* at 115. It declared that "*Zauderer*, not *Central Hudson Gas & Electric Corp.* . . . describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases." *Id.* (internal citations omitted).

This Court explained that the reasonable relationship test was the appropriate standard of review for compelled disclosure of factual and uncontroversial commercial information because such disclosure:

> [D]oes not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.' Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.

Id. at 114.

The interest of Vermont in enacting the statute at issue in *Sorrell* was that of "protecting human health and the environment from mercury poisoning." *Id.* at 115. Vermont expected that by "increasing consumer awareness of the presence of mercury in a variety of products" it could "reduce the amount of mercury released into the environment." *Id.* This goal has nothing to do with preventing consumer deception. It is instead connected to the hope that better informing "consumers about the products they purchase" will lead to more intelligent decision-making that will serve to protect human health. *Id.* This Court squarely held that the constitutionality of the Vermont statute was to be determined "by the reasonable-relationship rule in *Zauderer*." *Id.*

Appellant is incorrect to assert that "*Zauderer* . . . has been expressly limited to misleading speech in *United Foods*." NYSRA Brief at 21. The contrary conclusion has been accepted not merely by this Circuit, but also by other Circuits as well. In *Pharmaceutical Care Management Association v. Rowe*, for example, the First Circuit considered a challenge to a Maine statute requiring that pharmacy

benefit managers ("PBMs"), who act as intermediaries between pharmaceutical manufacturers and health benefit providers, disclose to providers conflicts of interest and certain financial arrangements with third parties. 429 F.3d 294, 299 (1st Cir. 2005) (Opinion of Torruella, J.). The purpose of these disclosure requirements was to place "Maine health benefit providers in a better position to determine whether PBMs are acting against their interests, and correspondingly, to help control prescription drug costs and increase access to prescription drugs." *Id.* at 298-99. The legislation did not primarily serve the purpose of preventing consumer deception. Yet the First Circuit applied *Zauderer* to dismiss a First Amendment challenge to the statute:

> [The] First Amendment claim is completely without merit. So-called 'compelled speech' may under modern Supreme Court jurisprudence raise a serious First Amendment concern where it effects a forced association between the speaker and a particular viewpoint. . . .
>
> What is at stake here, by contrast, is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes-in this case, protecting covered entities from questionable PBM business practices. There are literally thousands of similar regulations on the books-such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer.
>
> The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), makes clear 'that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of

> consumers.' *Id.* at 651. This is a test akin to the general rational basis test governing all government regulations under the Due Process Clause. The test is so obviously met in this case as to make elaboration pointless.

429 F.3d 294, 316 (1st Cir. 2005) (Opinion of Boudin, C.J.). *See* id. at 297-98 (Per Curiam holding that the joint concurring opinion of Chief Justice Boudin and Judge Dyk represents the opinion of the court with respect to the First Amendment issues).

Similarly, in *Environmental Defense Center v. EPA*, the Ninth Circuit responded to challenges to certain regulations promulgated by the Environmental Protection Agency ("EPA") under sections of the Clean Water Act dealing with pollution from stormwater runoff. 344 F.3d 832 (9th Cir. 2003). One such regulation compelled municipalities ("MS4s") to "distribute educational materials to the community" about the impact of stormwater discharges and to "inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste." 344 F.3d 832, 848 (9th Cir. 2003). The purpose of the disclosure requirement was not to prevent consumer deception, yet the Ninth Circuit specifically invoked *Sorrell* in holding that the requirement ought not to be subject to elevated First Amendment scrutiny. 344 F.3d 832, 851 n.27 (9th Cir. 2003). The Ninth Circuit concluded:

> The State may not constitutionally require an individual to disseminate an ideological message, *Wooley v. Maynard*, 430 U.S. 705, 713 (1977), but requiring a provider of storm sewers that discharge into national

> waters to educate the public about the impacts of stormwater discharge on water bodies and to inform affected parties, including the public, about the hazards of improper waste disposal falls short of compelling such speech. These broad requirements do not dictate a specific message. They require appropriate educational and public information activities that need not include any specific speech at all.. . .
>
> As in *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985), where the Supreme Court upheld certain disclosure requirements in attorney advertising, '[t]he interests at stake in this case are not of the same order as those discussed in *Wooley* . . . and *Barnette* . . . . ' *Id.* at 651. EPA has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).
>
> Informing the public about safe toxin disposal is non-ideological; it involves no 'compelled recitation of a message' and no 'affirmation of belief.' *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). . . . It does not prohibit the MS4 from stating its own views about the proper means of managing toxic materials, or even about the Phase II Rule itself. Nor is the MS4 prevented from identifying its dissemination of public information as required by federal law, or from making available federally produced informational materials on the subject and identifying them as such.

Id. at 849-50.

NYSRA mistakenly cites three Circuit Court cases for the proposition that disclosure requirements like "the NLEA itself have repeatedly been scrutinized under *Central Hudson*." NYSRA Brief at 46. But all three of these cases address regulations that *restrict* speech. *See Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004) (upholding regulation about which plaintiff argued "that the FDA's refusal to allow marketing of saw palmetto extract under the proposed label

… violates the *First Amendment's* limits on restrictions of commercial speech"); *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) (invalidating regulation "barring any health claims not approved by the FDA," under the First Amendment because its purpose was to keep "'people in the dark for what the government perceives to be their own good'"); *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225 (2d Cir. 1998) (analyzing regulation under *Central Hudson* that "impose[d] an impermissible ban on truthful, non-misleading commercial speech").

III. Health Code § 81.50 Meets the Reasonable Relationship Test

The New York City's ordinance meets the reasonable relationship test of *Zauderer* and *Sorrell*. New York City enacted Health Code § 81.50 to (1) reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it.

A. Health Code § 81.50 Reduces Consumer Confusion

New York City relied on studies and polls to conclude that "consumers neither know nor estimate accurately the calorie content of food purchased in restaurants." *See* Notice of Adoption at 5-6. Because the price differential for increased portion size often does not reflect the associated increase in calories, current trends towards larger portion sizes distort consumers' perceptions of calorie content. *Id.* at 5-6. In enacting Health Code § 81.50, New York City

sought to counteract "the systematic underestimation of calories" by consumers. *Id.* at 5.

Even Appellant NYRSRA concedes that the reasonable relationship test of *Zauderer* is appropriately applied to regulations that compel disclosure of factual and uncontroversial commercial information in order to prevent potential consumer deception. NYSRA Brief at 44-45, 49. It is uncontroverted that Health Code § 81.50 was enacted in part in order to serve this purpose. The evidentiary record supporting the potential for consumer confusion and deception is unimpeached. It would follow that Health Code § 81.50 should be upheld against First Amendment challenge.

In enacting Health Code § 81.50 New York City specifically found that "consumers notice and use nutrition information when it is made available at the point of purchase." Notice of Adoption at 6. That the provision of factual and uncontroversial commercial information like caloric content will inform consumer decision-making, and thus reduce the likelihood of consumer deception, is the premise of federal legislation like the Nutrition and Labeling and Education Act ("NLEA"). Congress specifically recognized the elimination of consumer confusion as one of the purposes behind enacting the NLEA:

> The purpose of those amendments, known collectively as the NLEA, was: (1) To make available nutrition information that can assist consumers in selecting foods that can lead to healthier diets, (2) *to eliminate consumer confusion* by establishing definitions for nutrient content claims that are

> consistent with the terms defined by the Secretary [of Health and Human Services], and (3) to encourage product innovation through the development and marketing of nutritionally improved foods.

Final Rule, 58 Fed. Reg. 2066, 2302 (Jan. 6, 1993). *See* H.R. REP. No. 538, 101st Cong., 2d Sess. 8-10, *reprinted in* 1990 U.S.C.C.A.A.N. 3336, 3337-38 (emphasis added). If this purpose suffices to establish the constitutionality of the compelled disclosure required by NLEA, a constitutionality upon which appellant expressly relies in its preemption argument, it equally suffices to establish the constitutionality of the disclosure required by Health Code § 81.50.

Empirical work suggests that about 48% of Americans "report that nutrition information on food labels has caused them to change their food purchasing habits." Notice of Adoption at 6. Seventy-three percent of consumers report "that they look at calorie information on the Nutrition Facts Panel" required by the NLEA. *Id.* Because there is no reason to suppose that the calorie information which Health Code § 81.50 requires to be disclosed will be any less effective in reducing the likelihood of consumer confusion and deception than the calorie information which the NLEA requires to be disclosed, it follows that Health Code § 81.50 is reasonably related to a proper state interest and that it therefore passes the test of *Zauderer*. This is true regardless of whether Health Code § 81.50 also serves the additional state interest of promoting the kind of informed consumer decision-making that would combat the current epidemic of obesity.

B. Health Code § 81.50 Improves Public Health by Reducing Obesity through Promoting Informed Consumer Decision-Making

In *Sorrell*, this Court considered a statute that sought to protect "human health and the environment from mercury poisoning" by "better inform[ing] consumers about the products they purchase." *Sorrell*, 272 F.3d at 115. In an exactly analogous way, Health Code § 81.50 seeks to promote public health by better informing consumers about the caloric content of the food that they eat. New York City specifically found that changing "the trajectory of the obesity epidemic . . . requires small, permanent calorie reductions across the population. If, as can reasonably be suggested," patrons of covered food establishments "reduce their caloric intake by even 5-10% after seeing calorie information, there would be substantial reductions in obesity, diabetes, and obesity-and diabetes-related illnesses as a result of" Health Code § 81.50. Notice of Adoption at 7.

New York City's findings are supported by independent scientific research, which demonstrates that consumers routinely consult food labels[2] with resulting positive changes to their food purchasing habits.[3] Economists from the National Bureau of Economic Research have estimated that the information required by the NLEA to be set forth in food labels has produced a decrease in body weight that

[2] US Department of Health and Human Services (US DHHS), Centers for Disease Control and Prevention, National Center for Health Statistics. *Healthy People 2000 Final Review.* 2001.
[3] Levy AS. Derby BM. The Impact of NLEA on Consumers: Recent Findings from FDA's Food Label and Nutrition Tracking System. Washington DC: Center for Food Safety and Applied Nutrition. Food and Drug Administration. 1996.

over a 20-year period has generated a total monetary benefit of about $63-166 billion (in 1991 dollars).[4] This benefit flowed from the fact that two-thirds of adults at least sometimes read nutrition information about calories, fat, or cholesterol listed on a label when they buy a food item for the first time. In another recent study, consumers presented with calorie information on a restaurant menu chose high-calorie items one-third less frequently.[5] New York City conducted its own study to examine the impact of point of purchase calorie information at one restaurant chain in the City. *See* Notice of Adoption at 6. It found that patrons reported that the calorie information influenced them to purchase lower-calorie items. *See* Notice of Adoption at 7.

This record suffices to establish the rationality of Health Code § 81.50 under the reasonableness test of *Zauderer*. In its brief, appellant NYRSRA strongly suggests that Health Code § 81.50 may not in fact succeed in reducing obesity. This argument may have been significant in the constitutional universe of *Lochner v. New York*, 198 U.S. 45 (1905), but in the Twenty-First Century it is recognized that courts cannot prohibit all government regulations that are uncertain to succeed, or they would allow no government legislation at all. Under modern constitutional

[4] Variyam JN, Cawley J. Nutrition Labels and Obesity. National Bureau of Economic Research (NBER) working paper 11956 January 2006.

[5] Burton S, Creyer EH, Kees J, Huggins K. Attacking the obesity epidemic: the potential health benefits of providing nutrition information in restaurants. Am J Public Health. 2006; 96:1669-1675; *see also*, Milich R, Anderson J, Mills M. Effects of visual presentation of caloric values on food buying by normal and obese persons. *Perceptual Motor Skills*, 1976; 42(1): 155-62 (finding that calorie labels decreased the total number of calories purchased by a sample of 450 women in a cafeteria setting).

standards like those contained in *Zauderer*, 471 U.S. at 652-653, and even *Central Hudson*, 447 U.S. at 570, it is sufficient for the state to advance regulations that are supported by rational and relevant evidence. *See also, Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). Health Code § 81.50 easily passes this test.

Health Code § 81.50 is consistent with the recommendations of leading public health authorities. The FDA, for example, has concluded that, "a focus on total calories is the most useful single piece of information in relation to managing weight." *Counting Calories, Report of the Working Group on Obesity*, FDA, Center for Food Safety and Applied Nutrition (March 12, 2004) at 24. There is virtual unanimity that requiring the effective communication of factual nutritional information for food consumed away from home is necessary if consumers are to make informed decisions about caloric intake.[6] *See* Notice of Adoption at 8-9.

Health Code § 81.50 provides this information to consumers in a manner that public health professionals regard as most effective in promoting informed consumer decision-making--at the point of purchase.[7] Requiring calorie disclosure

[6] *See* The Surgeon General's *Call to Action to Prevent and Decrease Overweight and Obesity* U.S. Department of Health and Human Services, Public Health Service, Office of the Surgeon General, Rockville MD (2001) (Recommending "increasing the availability of nutrition information for foods eaten and prepared away from home."); The FDA's Working Group on Obesity, *Counting Calories* at 24 ("The pervasiveness of the obesity epidemic means that more nutrition information must be presented to consumers in restaurant settings.").; *see also* n.7.

[7] *See* The Institute of Medicine, *Preventing childhood obesity health in the balance*, National Academies Press, Washington DC (2005) at 165-166 (Recommending that "[f]ull-service and fast food restaurants should expand healthier food options and provide calorie content and general nutrition information at point of purchase."); The AMA's Resolution of 2007 at 2 ("Our American Medical Association support federal, state, and local policies to require fast-food and other chain restaurants … to provide consumers with nutrition information on menus and menu boards.").

at the point of purchase ensures that consumers can utilize this information prior to purchase and during decision-making. New York City found that current methods used by restaurants to communicate nutrition information to customers are inadequate. *See* Notice of Adoption at 7-8. In its brief, appellant suggests that New York City could have required restaurants to disclose calorie content in locations other than menus-- on placemats, food wrappers, brochures, the internet or elsewhere. *See* NYSRA Brief at 38. But New York City specifically found that consumers saw this information only 0.0% to 6.9% of the time when it was made available in these alternative formats. *See* Notice of Adoption at 7-8. By contrast, customers reported seeing the data 31.3% of the time when it was made available on a menu board. *See id*. The alternative methods of disclosure suggested by appellant are plainly inadequate. This conclusion is supported by independent studies.[8]

The majority of restaurants subject to Health Code § 81.50 serve what is commonly referred to as "fast food." Fast food consumption is associated with a higher intake of calories, saturated fat, carbohydrates and added sugars.[9] Consuming fast-food is positively associated with weight gain, insulin resistance

[8] *See e.g.*, Wootan MG, Osbord M. Availability of nutrition information from chain restaurants in the United States. *American Journal of Preventative Medicine*. 2006; 30(2):266-268; Wootan MG, Osborn M, Malloy CJ. Availability of point-of-purchase nutrition information at a fast-food restaurant. *American Journal of Preventative Medicine*. 2006; 43: 458-459.

[9] Bowman SA, Vinyard BT. Fast food consumption of U.S. adults: impact on energy and nutrient intakes and overweight status. *J Am College Nutr*. 2004;23(2): 163-168.

and increased risk for obesity and type two diabetes.[10] One study found that most consumers of fast food visited fast food service establishments two times a week.[11] Because a single meal consumed at a fast food establishment can contain "enough calories to satisfy a person's caloric requirement for an entire day,"[12] it is reasonable to conclude that Health Code § 81.50 reaches the purchase of a great many excess calories and can therefore contribute to the reduction of excess body weight.

To the extent NYSRA's position can be read to allege that New York City's plan to focus on the caloric content of foods and beverages is constitutionally suspect because it is under-inclusive, *see* NYSRA Brief at 37, *Zauderer* holds directly to the contrary: "[W]e are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is 'under-inclusive' -- that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." 471 U.S. at 651. By any standard, Health Code § 81.50 is reasonably related to the

[10] Bowman SA, Gortmaker SL, Ebbeling CB, Pereira MA, Ludwig DS. Effects of fast-food consumption on energy intake and diet quality among children in a national household survey. *Pediatrics*. 2004;113(1):112-118; French SA, Harnack L, Jeffery RW. Fast food restaurant use among women in the Pound of Prevention study: dietary, behavioral and demographic correlates. *Int J Obes Relat Metab Disord*. 2000;24(10):1353-9; Pereia MA, Kartashov AI, Ebbeling CB, Van Horn L, Slattery ML, Jacobs DR Jr., Ludwig DS. Fast-food habits, weight gain, and insulin resistance (the CARDIA study): 15-year prospective analysis. *Lancet*. 2005;365:36-42.

[11] Pereia MA, Kartashov AI, Ebbeling CB, Van Horn L, Slattery ML, Jacobs DR Jr., Ludwig DS. Fast-food habits, weight gain, and insulin resistance (the CARDIA study): 15-year prospective analysis. *Lancet*. 2005;365:36-42.

[12] National Institute of Health News. December 30, 2004. Accessible at http://www.nih.gov/news/pr/dec2004/nhlbi-30.htm.

New York City's interest in reducing obesity by promoting informed consumer decision-making. It is accordingly constitutional under the test of *Zauderer* and *Sorrell.*

IV. The Holding of *United Foods* is Inapplicable to Health Code § 81.50

Appellant characterizes Health Code § 81.50 as forcing "restaurant owners to espouse a controversial view about whether their customers should be required to look at calorie counts before buying a meal." NYSRA Brief at 48. This is a constitutionally untenable characterization. It implies that a compelled factual disclosure like that mandated by the NELA would be constitutionally suspect because it would require manufacturers to espouse a "controversial view about whether their customers should be required to look at calorie counts before buying" a food product. Of course no court has ever interpreted the NELA as requiring any such thing. No court has ever interpreted the mandated disclosure of factual and noncontroversial commercial information as requiring manufacturers "to espouse the government's view that it is appropriate to force their customers to look at certain information before buying" a product.

Mandated disclosures of factual and noncontroversial commercial information are routine, and they are always understood as requiring merely the publication of relevant factual information. If appellant's argument was accepted, every such statute would be transformed into compelled ideological speech that is

constitutionally suspect. Fortunately, appellant's position misstates the nature of our constitutional law.

Appellant's argument rests on a misunderstanding of *United States Department of Agriculture v. United Foods*, 533 U.S. 405 (2001). *United Foods* involved a Congressional Act authorizing the Mushroom Council to impose mandatory assessments upon handlers of mushrooms for generic advertising. 533 U.S. 405 (2001). One mushroom handler contended that the "forced subsidy for generic advertising" violated its First Amendment right not to be "charged for a message … that mushrooms are worth consuming whether or not they are branded," because it wanted to "convey the message that its brand of mushrooms [were] superior to those grown by other producers." *Id*. at 411. The Court held that the First Amendment was implicated because the Act required "producers to subsidize speech with which they disagree." *Id*. at 411.

Health Code § 81.50, in contrast to the statute at issue in *United Foods*, does not require commercial speakers to subsidize speech with which they disagree. Health Code § 81.50 requires only the disclosure of factual and noncontroversial commercial information about the calorie content of meals. Calories are units of measure for energy obtained from food and beverages. There is nothing subjective or ideological about this unit of measurement. The accuracy of calorie content can be disputed, but it is not otherwise information about which there can be any

disagreement. Health Code § 81.50 does not require restaurants to disclose a point of view about the meaning or significance of calorie content; to the contrary, it permits restaurants to say about this calorie content whatever they wish to communicate.

Appellant does not here contend that the disclosures required by Health Code § 81.50 are inaccurate; they thus do not disagree with the content of the information required to be displayed by Health Code § 81.50. At most, appellant objects to the requirement that this factual information be disclosed. But this same objection can be made to all legislation that requires that factual and noncontroversial commercial information be disclosed. This objection has nothing to do with the constitutional concern of *United Foods*, which extended First Amendment protection to commercial speakers who were compelled to subsidize messages that contained content with which they disagreed.

CONCLUSION

For the foregoing reasons, we urge the Court to find for defendants-appellees and sustain the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for *Amicus Curiae* Rudd Center for Food Policy and Obesity at Yale University, complies with the Federal Rule of Appellate Procedure 32(a)(7)(B). It uses 14-point typeface, Times New Roman and is less than 7,000 words.

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