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Ninth Circuit Narrowly Vindicates First Amendment in Bellwether Compelled Speech Case

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The tide may be turning on commercial free speech in the context of forced disclosures and warnings, as parties wait for further clarification from the Supreme Court on the level of protection due private speech. The Ninth Circuit's recent *en banc* decision in *American Beverage Association v. City and County of San Francisco*, No. 16-16072 (9th Cir. Jan. 31, 2019), is a limited step in the right direction, though as concurring opinions make clear, much more needs to be done to fix the doctrinal confusion about compelled speech and properly limit the power of government.

The Big Picture: Erosion of First Amendment Protection

In recent years, government has taken an increasingly broad view of its authority to force private parties to engage in speech. These regulations occur at all levels of government and may require private parties to issue disclosures, warnings, or public messages on topics the government entity thinks are important. Recent examples include messages about the environment, food, and even international conflicts. Some government officials have even claimed that the First Amendment is irrelevant in these instances.

There is confusion in the courts about the level of First Amendment review applicable to certain forms of compelled speech. Ordinarily, regulations that compel speech are subject to "strict scrutiny," and several recent Supreme Court precedents suggest that this rigorous standard should apply to any content-based regulation of speech. Older precedents, however, make exceptions for speech on some "lower value" topics.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court upheld a disclosure requirement aimed at correcting a misleading commercial advertisement because the requirement was "purely factual," "uncontroversial," not "unduly burdensome" or "unjustified," and was "reasonably related to" the Government's interest in preventing deception. Since then, litigants and government officials have tangled about the level of review applied in *Zauderer*, and the situations in which it should apply.

Proponents of commercial speech regulation frequently argue that *Zauderer* permits courts to apply mere "rational basis" review to a wide-range of forced disclosures, and have been successful in having intrusive speech mandates upheld in some circumstances. The issues and legal principles are far from settled, and Justices Ginsburg and Thomas have observed that lower courts need guidance

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on these issues. *See Borgner v. Fla. Bd. Of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari).

San Francisco's Beverage Warning Mandated Controversial City Messaging

The speech mandate at issue in *American Beverage Association v. City and County of San Francisco* required sellers of certain sugar-sweetened drinks to including in their advertising a mandatory warning:

> **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.**

Under the Ordinance, this warning was to occupy 20 percent of the advertisement and be set off with a rectangular border.

The American Beverage Association sued to enjoin San Francisco's warning regime. The association argued that the regime was unconstitutional because it compelled sellers to disparage their own products with the controversial message that drinking sweetened beverages contributes uniquely to obesity, diabetes, and tooth decay as compared to other sources of sugar and calories. Relying on the principle that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say," *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 (1986) (plurality); *see also Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 964 (9th Cir. 2012) (noting pursuit of financial gain by corporations "does not make them any less entitled to protection under the First Amendment"), the American Beverage Association and its *amici* (which included Washington Legal Foundation) argued that sellers should not be forced to carry the City's message against their will.

The association and its *amici* argued that that San Francisco was free to run its own public information campaign targeting sugar-sweetened beverages, making it unnecessary and unjust to require private parties to disparage their own products. In the commercial context as well as politics, "[t]he State can express [its] view through its own speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011). "But a State's failure to persuade does not allow it to hamstring the opposition." *Id.* "The State may not burden the speech of others in order to tilt public debate in a preferred direction." *Id.*

The Ninth Circuit Narrowly Rebukes San Francisco, But Controversially Preserves Limited Rational Basis Review of Government Speech Mandates

A three-judge panel of the Ninth Circuit found the beverage industry was likely to succeed in showing that the warning was incompatible with the First Amendment because it was burdensome, but took a broad view of the government's general power to mandate disclosures.

The Ninth Circuit had already granted rehearing *en banc* when the Supreme Court decided another important compelled speech case, *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). In *NIFLA*, the Supreme Court held that two speech mandates contained in a California statute violated the First Amendment. *Id.* at 2368.

The Supreme Court's analysis in *NIFLA* was significant. The Court confirmed that speech mandates are by definition content-based regulations that ordinarily must be reviewed under strict scrutiny. *See id.* at 2371. However, the Court acknowledged that its "precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts," including in "'commercial advertising'" discussing "'the terms under which . . . services will be available.'" *See id.* 2372 (quoting *Zauderer*, 471 U.S. at 651).

With regard to the first speech mandate at issue, the Court held that *Zauderer* could not possibly apply because the mandate "in no way relates to the services that" the targeted entities provide. *Id.* With regard to the second speech mandate, the Court held that it "need not decide whether the *Zauderer* standard applies" because the mandate failed even that more "deferential" standard. *Id.* at 2376-77. The Court also rather pointedly questioned whether *Zauderer* had any application beyond the correction of deception, but did not resolve that question. *See id.* at 2377.

Following *NIFLA*, the *en banc* Ninth Circuit had the opportunity to embrace heightened scrutiny of compelled speech, and to return to a principled and appropriately narrow view of *Zauderer*. It did not.

The Ninth Circuit began its analysis by reiterat[ing] the broad and non-rigorous view of *Zauderer* it had taken in past cases: "[T]he government may compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial governmental interest." Slip op. at 13 (quoting *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1115 (9th Cir. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2708 (2018)). The court also "reaffirm[ed]" its prior view "that *Zauderer* provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech—even when the government requires health and safety warnings, rather than warnings to prevent the deception of consumers." *Id.* at 14. Finally, the Ninth Circuit declined to confine *Zauderer* to commercial advertising that discusses the terms under which services will be available. *See id.*

Notwithstanding its efforts to both weaken the *Zauderer* standard of review and broaden the application of that standard, the Ninth Circuit reviewed the compelled warning and found that it failed *Zauderer*. The court held that "the 20% requirement is not justified when balanced against its likely burden on protected speech" and that "on this record, Defendant has not carried its burden to demonstrate that the Ordinance's requirement is not "'unjustified or unduly burdensome.'" Slip op. at 15-16. The court acknowledged that the mandate unduly chilled speech and was impermissible. The decision thus provided a significant albeit narrow win for free-speech advocates.

Other members of the court thought the decision should have approached the question differently. These disagreements illustrate many of the doctrinal and practical issues that underlay so much First Amendment uncertainty and litigation.

Judge Ikuta took the majority to task for seeking to rehabilitate *Zauderer*. "[T]he majority fails to follow the analytic framework set out in *NIFLA* and makes several crucial errors." Slip op. at 27 (Ikuta, J., dissenting from most of the reasoning, concurring in the result). "Under *NIFLA*," she wrote, "San Francisco's ordinance requiring companies who advertise certain sugar-sweetened beverages on billboards within San Francisco to include a warning message constitutes a 'content-based regulation of speech' subject to heightened scrutiny unless an exception applies." *Id.* at 24.

Judge Ikuta would have held that "the *Zauderer* exception does not apply" because San Francisco's "warning does not provide 'purely factual and uncontroversial information about the terms under which . . . services will be available.'" *Id.* at 24-25. She also stated her view that "[t]he majority is wrong to the extent it suggests that "*NIFLA* preserved the exception to heightened scrutiny for health and safety warnings." *Id.* at 25.

Judge Christen, joined by Chief Judge Thomas, also wrote separately. Although Judge Christen agreed with the majority that *Zauderer* applied, she would have held that "San Francisco cannot show that the speech it seeks to compel is 'purely factual[.]'" Slip op. at 29-30 (Christen, J., concurring in part and concurring in the judgment).

Judge Nguyen concurred only in the result. She "disagree[d] with the majority's expansion of *Zauderer*'s rational basis review to commercial speech that is not false, deceptive, or misleading." Slip op. at 38 (Nguyen, J., concurring in the judgment). Judge Nguyen noted that in *NIFLA*, the Supreme Court "had the opportunity to expand *Zauderer*'s application beyond deceptive speech but declined to do so." *Id.* at 39. She also voiced "concerns that our current case law will lead to 'a proliferation of warnings and disclosures compelled by local municipal authorities' that have 'only a tenuous link to a more than trivial government interest." *Id.* at 40 (citation omitted).

Key Takeaways

- The Ninth Circuit majority takes an expansive view of *Zauderer*'s rational basis review, which empowers government. This view remains controversial.
- The Ninth Circuit recognizes companies' core speech right in advertising and determining their message, providing opportunities for challenging burdensome mandates.
- Notwithstanding the Ninth Circuit majority's broad view of government power, the decision properly places the burden of justification on the state, providing key win for opponents of speech mandates.