LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, FEBRUARY 13, 2019
PERSPECTIVE

Judges split on First Amendment scrutiny in sugar drink case

By Andrew B. Talai and Amy P. Lally

Last month, the en banc 9th U.S. Circuit Court of Appeals issued its decision in A*merican Beverage Association v. City & County of San Francisco*, 2019 DJDAR 777. The case began over three years ago, when San Francisco enacted its "Sugar-Sweetened Beverage Warning Ordinance." The S.F. Health Code was amended to require warnings on certain advertisements for sugary drinks. For example, billboards that marketed non-alcoholic beverages containing added sweeteners (and over 25 calories per 12 fluid ounces) were required to include the following 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." Enclosed in a rectangular border, the warning also had to cover at least 20 percent of the advertising space. San Francisco's goal was to "inform the public of the presence of added sugars" in certain drinks, "promote informed consumer choice that may result in reduced caloric intake," and thus "reduc[e] illnesses to which [sugary drinks] contribute."

The American Beverage Association, California Retailers Association and California State Outdoor Advertising Association sued, alleging that the ordinance violated the First Amendment because it impermissibly compelled commercial speech. The district court denied their motion for a preliminary injunction.

9th Circuit Judge Susan P. Graber. Daily Journal photo

A three-judge panel of the 9th Circuit reversed. Writing for the majority, Judge Sandra Ikuta held that the district court abused its discretion. Because San Francisco's ordinance was a "disclosure requirement," heightened scrutiny did not apply under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Rather, under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest." Applying that lesser standard "beyond the context of preventing consumer deception," the majority held that the ordinance "chill[ed] protected commercial speech," and reversed and remanded the case.

San Francisco argued that rehearing was warranted because the panel created intra-circuit conflicts and the case presented exceptionally important questions about "the government's ability to require health warnings on risky products." The 9th Circuit granted rehearing en banc, but stayed proceedings pending the U.S. Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). After the Supreme Court decided *NIFLA* last June, the 9th Circuit ordered supplemental briefing. In its Jan. 31 en banc decision, the court unanimously favored reversal of the district court, but the judges' reasoning diverged over the applicable level of scrutiny under the First Amendment.

Judge Susan Graber, writing for the majority, first considered whether to apply *Central Hudson*'s heightened scrutiny or *Zauderer*'s lesser scrutiny. Despite acknowledging the Supreme Court's "'reluctan[ce] to mark off new categories of speech for diminished constitutional protection,'" the majority concluded that "*NIFLA* preserved the exception to heightened scrutiny for health and safety warnings." The majority therefore "reaffirm[ed]" *CTIA-The Wireless Association v. City of Berkeley* (*CTIA*), 854 F.3d 1105 (9th Cir. 2017), a panel decision that was vacated in light of *NIFLA*. The majority held 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." And "nothing in *NIFLA*," the majority said, "suggests that *CTIA* was wrongly decided."

Even applying lesser scrutiny, the majority said the associations were likely to succeed on their First Amendment claim. Although *Zauderer* "contains three inquiries" — whether the disclosure is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome — the majority explained it did not need to apply those factors "in any particular order." The majority began and ended by asking whether San Francisco met its "burden of proving that the warning is neither unjustified nor unduly burdensome." It did not. According to the majority, the "border and 20% size requirements" were "not justified when balanced against [their] likely burden on protected speech."

Evidence showed that San Francisco's "goals could be accomplished with a smaller warning" that covered "only 10% of the image." The majority also held that the remaining preliminary injunction factors weighed in the associations' favor.

Judge Morgan Christen, joined by Chief Judge Sidney Thomas, concurred in part and concurred in the judgment. She agreed with the majority that "*NIFLA* did not modify *Zauderer*," and lesser scrutiny "applie[d] to the government-compelled speech at issue." Judge Christen's analysis "differ[ed]," however, as she would have first asked "whether the government's message is objectively true." Because "[d]eciding whether a compelled message is controversial or unduly burdensome will often entail much more subjective judgments," Judge Christen would have stopped at the "threshold requirement of factual accuracy." For example, by using the generic term "diabetes," San Francisco's warning was literally false — there is no known link "between consumption of sugar-sweetened beverages and the development of type 1 diabetes." Moreover, consuming sugary drinks can be "medically indicated for a type 1 diabetic when there are signs of hypoglycemia." Although her approach may have seemed "persnickety," Judge Christen emphasized that, "[w]hen the government takes the momentous step of mandating that its message be delivered by private parties, it is exceptionally important that the compelled speech be purely factual."

Judge Ikuta dissented from most of the reasoning and concurred in the judgment. She extensively reviewed *NIFLA*, and distilled the following legal standard: "[A] government regulation that compels a disclosure ... is a content-based regulation of speech, which is subject to heightened scrutiny under the First Amendment unless the *Zauderer* exception applies." According to Judge Ikuta, the majority "fail[ed] to follow this analytic framework" and erroneously created a "standalone exception" for government-compelled health and safety warnings. Some categories of speech may be "exempt from heightened scrutiny," but only where there is a "'long (if heretofore unrecognized) tradition to that effect.'" As Judge Ikuta explained, "warnings about sugar-sweetened beverages are clearly not" part of such traditions.

Applying *NIFLA*'s framework, Judge Ikuta would have first held that San Francisco's ordinance did not qualify for the *Zauderer* exception. For example, the warning did not provide purely factual and uncontroversial information" because it was "contrary to statements by the FDA that added sugars ... 'can be a part of a healthy dietary pattern.'" The warning was also unduly burdensome because it "drowns out" advertisements and could cause manufacturers "to cease advertising." Judge Ikuta would have next "consider[ed] whether the ordinance survive[d] heightened scrutiny." Even assuming that San Francisco had a substantial interest in warning about health information concerning sugary drinks, the ordinance was not "sufficiently drawn to that interest." For instance, the requirement was "underinclusive both as to the covered products and as to the means of advertisement" and, moreover, San Francisco could have "disseminate[d] health information by other, less burdensome means."

Judge Jacqueline Nguyen concurred in the judgment. She emphasized that "regulation of commercial speech is evaluated under an intermediate scrutiny standard." Before applying that standard, however, courts must ask "whether the speech at issue 'is false, deceptive, or misleading.'" If so, then *Zauderer*'s lesser scrutiny applies. If not, then, as with most commercial-speech restrictions, *Central Hudson*'s heightened scrutiny applies. Judge Nguyen thus "disagree[d] with the majority's expansion of *Zauderer*" to "regulations requiring public health disclosures." As Judge Nguyen explained, "it is the commercial message's accuracy ... that demarcates the boundary between" *Central Hudson* and *Zauderer*. Judge Nguyen also reminded the majority that, in *CTIA*, Judge Michelle Friedland warned against "applying *Zauderer* outside the context of false and misleading speech." By treating that limitation as "non-essential," the majority was "invit[ing] reversal" by the Supreme Court.

In sum, the en banc 9th Circuit's decision is an ominous rejection of San Francisco's Sugar-Sweetened Beverage Warning Ordinance. Each judge agreed that the associations were likely to prove that the ordinance violated the First Amendment, and all but two judges reached this conclusion without applying heightened scrutiny. However, as a result, any modified San Francisco ordinance, or similar ordinance from another municipality within the 9th Circuit, also will be reviewed under *Zauderer*. As challenges to future ordinances percolate through the courts, the Supreme Court will likely have the final say on the level of scrutiny applied to public health disclosures. And given the Supreme Court's strong reluctance to exempt new categories of speech from the general prohibition on content-based restrictions, Judge Nguyen's prediction of reversal may prove prophetic.

Andrew B. Talai *is an associate and* **Amy P. Lally** *is a partner at Sidley Austin LLP.* *This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. The content therein does not reflect the views of the firm.*


TALAI


LALLY