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Hot Issues Under the Commercial Speech Doctrine

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Hot Issues Under the Commercial Speech Doctrine

- Compelled commercial speech and evolution of doctrine under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)
- Public nuisance suits targeting past advertising
- Implications for advertisers from new privacy laws

Quick Review: Commercial Speech Doctrine

- Commercial speech is not "wholly outside the protection of the First Amendment." *Va. State Bd. Of Pharmacy v. Va. Citizens Consumers Council* (1976).
- Speech is entitled to protection if it concerns lawful activity and is not misleading;
- Regulation is allowed where: (1) the asserted interest is substantial; (2) the regulation directly advances the interest; and (3) the regulation is no more extensive than necessary. *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980).

Evolution of Protection

- It is "incompatible with the First Amendment" to censor or otherwise burden speech based on fear that people will make bad decisions, or to promote "what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1986).
- "[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2000).
- When the government seeks to further its interests in the commercial arena, "regulating speech must be a last – not first – resort."

Multiple levels of scrutiny

- Strict scrutiny
- Heightened scrutiny
- Intermediate scrutiny
- Rational basis

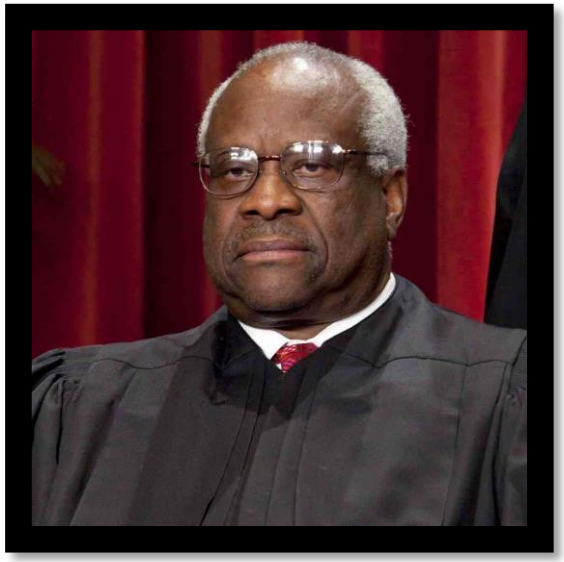
Strict Scrutiny:
Reed v. Town of Gilbert, 135 S. Ct. (2015)

Does mere assertion of lack of discriminatory motive render Gilbert's facially content-based sign code content-neutral and justify its differential treatment of Petitioners' religious signs?

Reed v. Town of Gilbert, 135 S. Ct. (2015)

"An innocuous justification cannot transform a facially content-based law into one that is content neutral"

"A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech."



Justice Clarence Thomas

Heightened Scrutiny: Sorrell v. IMS Health Inc., 564 U.S. 552 (2011)

- State's acknowledged objective was to correct what it called an "imbalance" in the marketplace of ideas. But the government cannot restrict commercial speech on the theory it is "too persuasive."
- Such restrictions on speech are subject to "heightened scrutiny."

Justice Anthony Kennedy

Matal v. Tam, 137 S.Ct. 2012 (2017)

May the U.S. Trademark Office deny registration if the proposed mark "[c]onsists of ... matter which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute?

Matal v. Tam, 137 S.Ct. 2012 (2017)

"Speech may not be banned on the ground that it expresses ideas that offend." "Giving offense is a viewpoint."

Court rejects three theories that would eliminate First Amendment protection or result in rational basis review:

- ✓ Trademarks as government speech;
- ✓ Trademarks as a government subsidy; or
- ✓ Trademarks as part of a "government program."

Matal v. Tam, 137 S.Ct. 2012 (2017)

Court rejects argument that Section 2(a) must be upheld under *Central Hudson*.

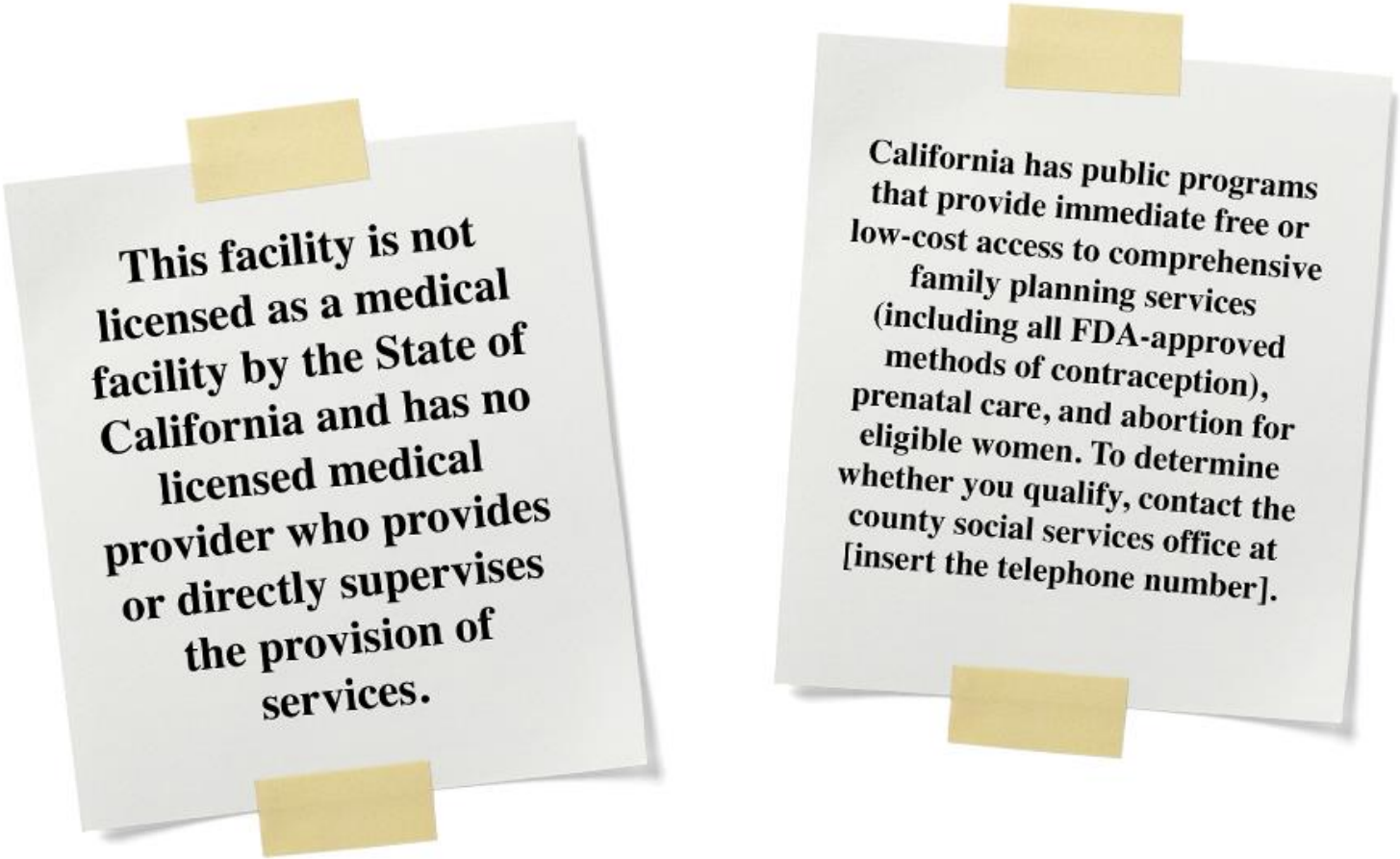
- ✓ Court declines to resolve the level of scrutiny required because "the disparagement clause cannot withstand even *Central Hudson* review."
- ✓ The government has no legitimate interest in "preventing speech expressing ideas that offend."
- ✓ Section 2(a) "is not an anti-discrimination clause; it is a happy-talk clause."

Compelled Commercial Speech: *Zauderer*

- Warnings or disclosures might be required "in order to dissipate the possibility of consumer confusion or deception." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).
- Such disclosure may be permissible to convey "purely factual" and "uncontroversial" information.
- Rational basis test: Information need only be "reasonably related" to preventing potential deception.
- Unduly burdensome disclosure requirements might offend the First Amendment.
- Reaffirmed in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 249 (2010).

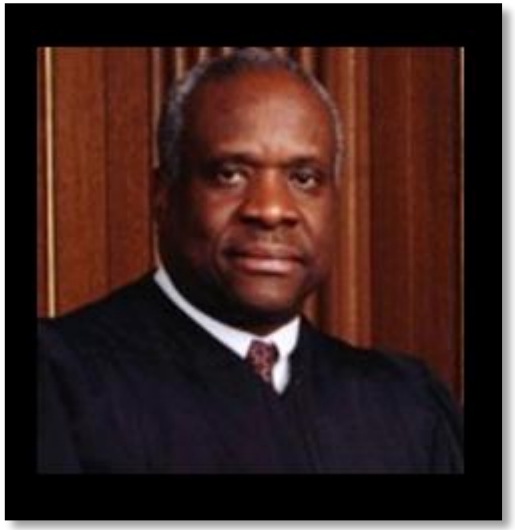
Compelled Speech in the Supreme Court

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)



California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act")

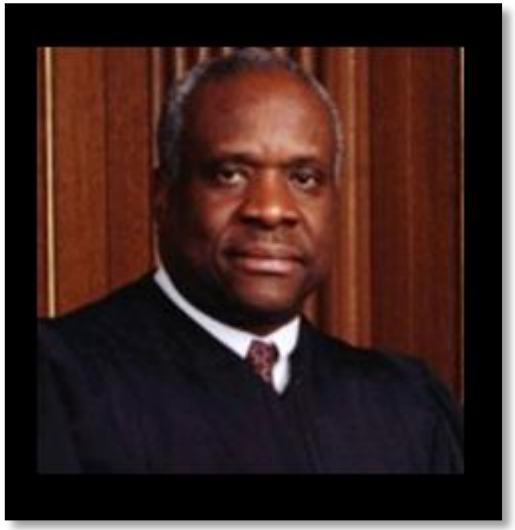
Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)



Licensed Facilities Notice Requirement:

- *Zauderer* does not apply:
  - ✓ Notice does not apply to services the licensed clinics provide;
  - ✓ It is not limited to purely factual and noncontroversial information—government script promotes services for the very practice petitioner opposes;
  - ✓ It is not an incidental restriction on professional conduct.
- "The licensed notice regulates speech as speech." Strict scrutiny applies.
- Rejects use of "professional speech doctrine."

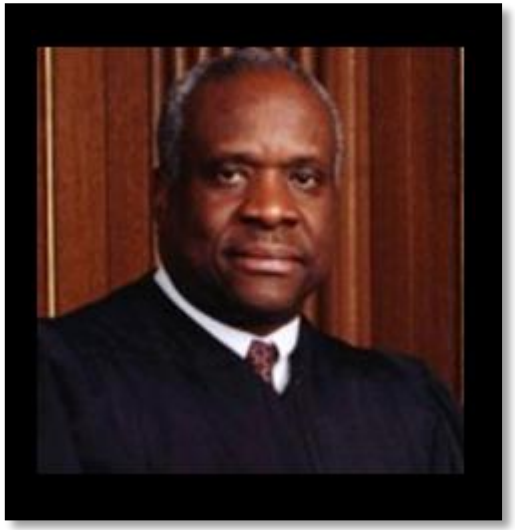
Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)



"Professional speech" is not "a unique category that is exempt from ordinary First Amendment principles," and "the licensed notice cannot survive even intermediate scrutiny."

- ✓ Difficult category to define with precision.
- ✓ "All that is required to make something a 'profession,' … is that it involves personalized services and requires a professional license …."
- ✓ "States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects."

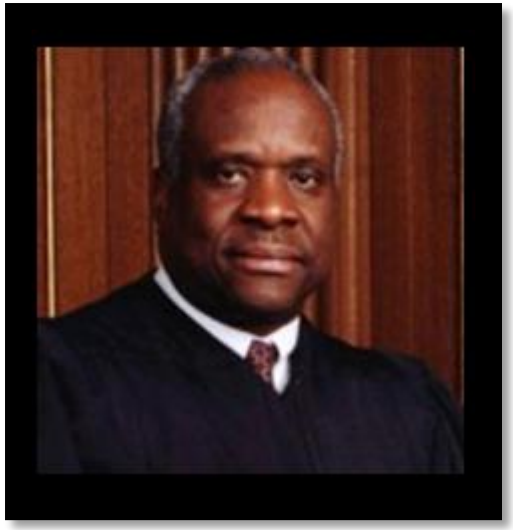
Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)



Licensed notice requirement is over and under-inclusive:

- ✓ "If goal is to educate low-income women about services provided, notice is wildly underinclusive" because most community clinics are excluded, as are federal clinics.
- ✓ California could inform low-income women about its services by "inform[ing] the women itself" or "post[ing] the information on public property near crisis emergency centers."

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)



Unlicensed Facilities Notice Requirement:

- ✓ Court need not decide whether *Zauderer applies*, for it would fail even under that test.
- ✓ Even under *Zauderer* a notice requirement cannot be "unjustified or unduly burdensome," and State has not shown women don't know that unlicensed facilities do not provide medical services. Problem is "purely hypothetical."
- ✓ Even if justified, it is too burdensome. Government-scripted message, speaker-based message is not connected to State's informational interest and covers a "curiously narrow subset of speakers."
- ✓ Two-word statement of clinic ("choose life") must be surrounded by 29-word government statement in up to 13 different languages.

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)

Justice Anthony Kennedy, concurring:

"This separate writing seeks to underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern."

"This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression."

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)

Justice Stephen Breyer, dissenting:

"Weaponizing" the First Amendment?

- ✓ "Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions [of holding a medical license]."
- ✓ "Ever since the Court departed from the approach set forth in *Lochner v. New York*, 198 U.S. 45 (1905), ordinary economic and social legislation has been thought to raise little constitutional concern."

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)

Justice Stephen Breyer, dissenting:

"Weaponizing" the First Amendment?

- ✓ Majority's approach "threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."
- ✓ "Virtually every disclosure law could be considered 'content based,' for virtually every disclosure law requires individuals to 'speak a particular message.'"

Expressions Hair Designs v. Schneiderman, 137 S.Ct. 1144 (2017)

Do state no-surcharge laws unconstitutionally restrict speech conveying price information, or do they regulate economic conduct?

We impose a surcharge on credit cards that is not greater than our cost of acceptance

Reinterpreting *Zauderer* in the Circuits

***American Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*).**

- *Zauderer* "sweeps far more broadly than the interest in remedying deception."
- Overruled other cases limiting the government's interest.
- *Zauderer* does not require proof that disclosure "directly advances" the government's interest. Means-ends fit is "self-evidently satisfied" unless unduly burdensome.

. . . like an application of *Central Hudson* "where several of [the] elements have already been established . . ."

National Association of Manufacturers v. SEC, 800 F.3d 518 (D.C. Cir. 2015) (*aff'd on rehearing*)

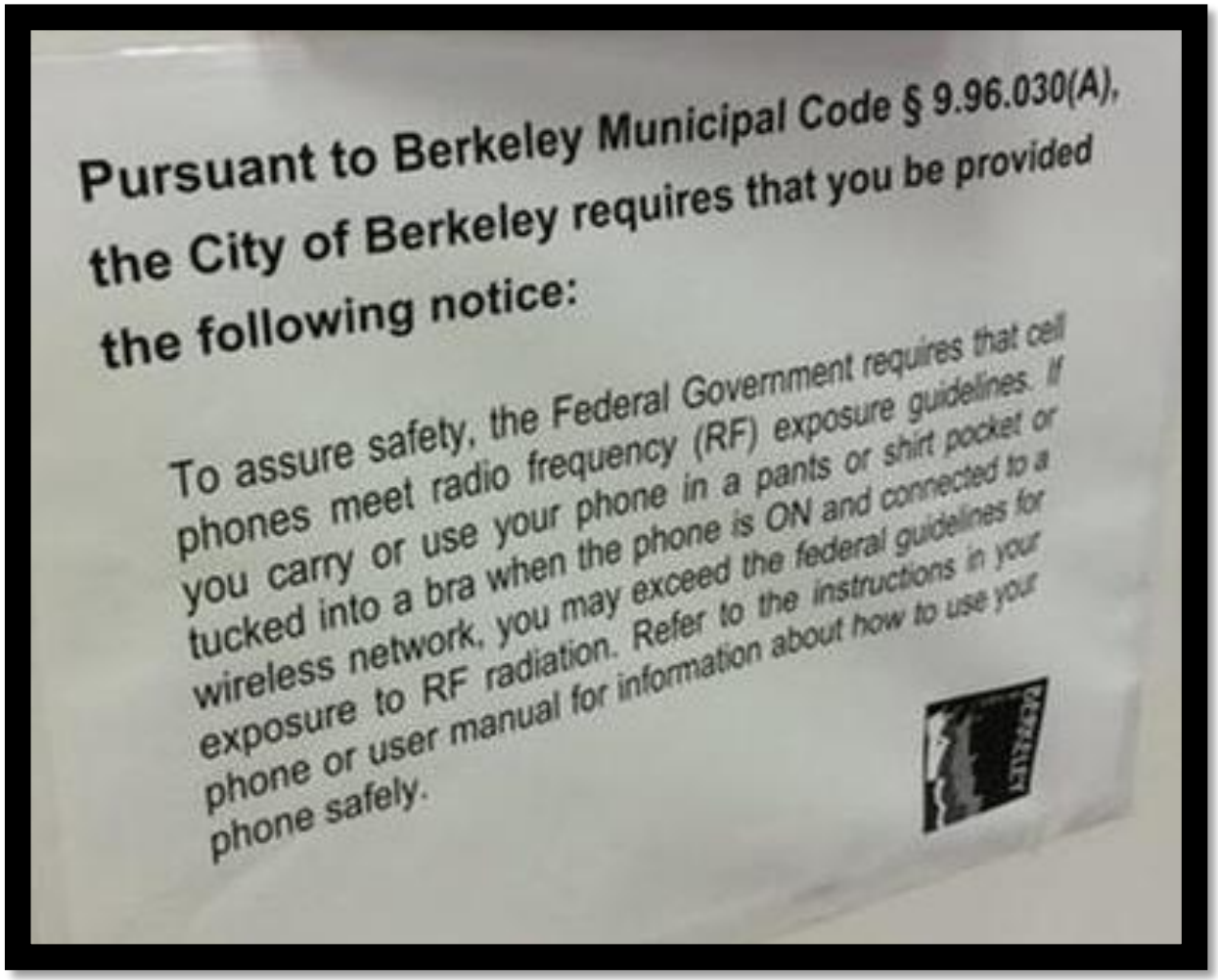
- SEC rule requiring issuers using minerals from the Democratic Republic of the Congo to state in reports and on websites that products were not "DRC conflict free" violates the First Amendment.
- *Zauderer* is limited to advertising messages.
- SEC presented no evidence to show that the asserted goal – promoting peace and security in the Congo – would be advanced by the disclosure requirement.
- SEC had burden to prove its rule would alleviate harms "to a material degree."
- Required disclosure was not purely factual and uncontroversial.

What's going on in the Ninth Circuit?

Until recently, a traditional understanding of *Zauderer*:

- ***Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009)** (disclosures must target consumer deception and be purely factual and noncontroversial, and cannot even "arguably ... convey a false statement"), *aff'd*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).
- ***CTIA-The Wireless Ass'n v. City & Cnty. of San Francisco*, 494 F. App'x 752 (9th Cir. 2012)** (requiring cell phone retailers to provide RF radiation fact sheet violates First Amendment).

Berkeley Cell Phone Disclosure Requirement



CTIA-The Wireless Assn. v. City of Berkeley, 854 F.3d 1105 (9th Cir. 2017), *cert. granted, vacated, and remanded* (2018).

- Ninth Circuit upheld denial of preliminary injunction of Berkeley ordinance requiring disclosures by retailers of cell phones.
- Panel had concluded that "any governmental interest will suffice so long as it is substantial" to support disclosure requirements.
- Disclosures are acceptable so long as they are "purely factual," dispensing with the inquiry into whether they may be "controversial."
- Court denied rehearing, saying "[o]ur opinion largely speaks for itself," and reaffirming expanded scope of *Zauderer*.

American Beverage Assn. v. City and County of San Francisco

- San Francisco ordinance requires ads for "sugar-sweetened beverages" carry a "warning" – covering 20% of ad space – against presumed "harmful health effects of consuming such beverages."
- Applies to ads on any paper, posters or billboards; in stadiums, arenas and transit shelters; in or on any train, bus, car or other vehicle; or on any wall or other surface.
- Applies to sodas, sports and energy drinks, sweetened juices, vitamin waters and iced teas, and even beverages that FDA rules define as "low calorie."

American Beverage Assn. v. City and County of San Francisco, 871 F.3d 884 (9th Cir. 2017), *cert. granted*, *vacated*, *and remanded* (2018).

- Compelled message is "misleading and, in that sense, untrue" because it singled out only certain sugar-sweetened products.
- City was trying to force advertisers to convey city's "disputed policy views" and Supreme Court precedent does not allow government to require corporations "to use their own property to convey an antagonistic ideological message."
- Size and format of required "overwhelms other visual elements in the advertisement" and turns ads "into a vehicle for a debate about the health effects of sugar-sweetened beverages."

American Beverage Assn. v. City and County of San Francisco, 916 F.3d 749 (9th Cir. 2019) (*en banc*).

- The *Zauderer* test, as applied in *NIFLA*, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.
- "[T]he record here shows that a smaller warning—half the size—would accomplish Defendant's stated goals."
- Defendants have not shown that the contrasting rectangular border containing a warning that covers 20% of the advertisement does not "drown[ ] out" Plaintiffs' messages and "effectively rule[ ] out the possibility of having [an advertisement] in the first place."

To be ***clear*** ?

- "To be clear, we do not hold that a warning occupying 10% of product labels or advertisements necessarily is valid, nor do we hold that a warning occupying more than 10% of product labels or advertisements necessarily is invalid."
- "[W]e hold only that, *on this record*, Defendant has not carried its burden to demonstrate that the Ordinance's requirement is not 'unjustified or unduly burdensome.'"
- "We need not, and therefore do not, decide whether the warning here is factually accurate and noncontroversial"

Notable Dissent/Concurrences

Judge Sandra Ikuta
Author of panel decision

- ***Zauderer*** **governs only [1] commercial advertising and requires disclosure of [2] purely factual and [3] uncontroversial information about [4] the terms under which services will be available. If regulation meets those requirements, the regulation should be upheld unless it is [5] unjustified or [6] unduly burdensome.**
- **If regulation does not qualify for** *Zauderer*, **it must survive heightened scrutiny.**
- Majority failed to analyze threshold questions for applying *Zauderer*, and failed to consider whether ordinance met test under heightened scrutiny.
- Also: Judges Thomas and Christen—would reverse **because San Francisco cannot show that the speech it seeks to compel is purely factual."**
- Judge Nguyen: **I disagree with the majority's expansion of** *Zauderer* **to commercial speech that is not false, deceptive, or misleading.**

Implications for rehearing in *CTIA-The Wireless Assn. v. City of Berkeley*

- "[N]othing in *NIFLA* suggests that *CTIA* was wrongly decided. To the contrary, *NIFLA* preserved the exception to heightened scrutiny for health and safety warnings."
- *"NIFLA* did not address, and *a fortiori* did not disapprove, the circuits' precedents, including *CTIA*, which have unanimously held that *Zauderer* applies outside the context of misleading advertisements."
- "[W]e reaffirm our reasoning and conclusion in *CTIA* 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."

Meanwhile . . .
Proposed HHS-CMS DTC Pharma Ad Disclosures

pyraflufen-ethyl, ethyl 2-[2-chloro-5-(4-chloro-5-difluoromethoxy)-1-methyl-1H-pyrazol-3-yl]-4-fluorophenoxy] acetate, and its acid metabolite, E–1, 2-chloro-5-(4-chloro-5-difluoromethoxy-1-methyl-1H-pyrazol-3-yl)-4-fluorophenoxyacetic acid, calculated as the stoichiometric equivalent of pyraflufen-ethyl in or on the following RACs: Cottonseed subgroup 20C at 0.04 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.01 ppm; fruit, stone, group 12–12 at 0.01 ppm; hop, dried cones at 0.02 ppm; nut, tree, group 14–12 at 0.01 ppm; tropical and subtropical, small fruit, edible peel, subgroup 23A at 0.01 ppm; and vegetable, tuberous and corm, subgroup 1C at 0.02 ppm. Available analytical methodology involves multiple-step extractions of the chemical residues from plants and using Gas

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 403

[CMS–4187–P]

RIN 0938–AT87

Medicare and Medicaid Programs; Regulation To Require Drug Pricing Transparency

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the Federal Health Insurance Programs for the Aged and Disabled by amending the Medicare Parts A, B, C

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4187–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Cheri Rice, (410) 786–6499.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in

Nuisance Liability for Commercial Speech

- Supreme Court in October 2018 denied cert. in *The Sherwin-Williams Company v. California* and *ConAgra Grocery Products v. California*.
- This let stand a California Court of Appeals decision upholding a decision that Sherwin-Williams and two other companies had created a "public nuisance" by promoting lead-based paint products.
- Companies found joint and severally liable for nuisance abatement for pre-1951 housing. Court ordered abatement fund of $409-730 million.
- Sherwin-Williams was found liable for a 1905 ad in the *Los Angeles Times* and *San Diego Union* and for $5,000 contribution to a trade organization between 1937-1941.
- California court denied First Amendment protection for speech, claiming it was "inherently misleading."

California Consumer Privacy Act of 2018

- Lauded by advocacy groups as the "strictest" in the country
- "Under this law, the attorney general of California will become the chief privacy officer of the United States of America." (Alistair Mactaggart, sponsor of predecessor ballot initiative)
- 5 new consumer rights and a new private right of action for data breaches, with statutory damages and penalties
- Most expansive definition of "personal information" to date:
  - ✓ all "information that identifies, *relates to*, describes, is *capable of being associated with*, or could reasonably be linked, directly *or indirectly*, with a particular consumer or household." Includes, among other things, biometric information, IP addresses, browsing history, customer profiles, and "any inferences" drawn from such information

California Consumer Privacy Act of 2018

- *Right to Know*. Companies must affirmatively disclose all categories of PI collected
- *Right to Access*. Companies must turn over, upon request, all specific pieces of PI collected
- *Right to Delete*. Companies must, upon request, delete all PI collected, subject to vaguely defined exceptions
- *Right to Opt Out of "Sale."* Companies must not "sell" any PI to third parties where consumer has opted out
  - ✓ "Sale" is broadly defined to include all transfers or disclosures (including orally or in writing) to a third party "for monetary or other valuable consideration," subject to a "business purpose" exception
  - ✓ Special opt-in rules for minors
- *Right to Equal Service*. Companies generally cannot charge different prices or offer benefits to customers who don't opt out (*e.g.*, loyalty programs; PI-subsidized services)

California Consumer Privacy Act of 2018

Some potential First Amendment issues:

- Extraordinarily broad and vague definition of PI
- Other burdens on speech:
  - ✓ Forced disclosures, including obligations to (a) produce copies of all PI collected upon request, (b) proactively disclose categories of PI collected, (c) and post on website homepage a "Do Not Sell My Personal Information" opt-out mechanism
  - ✓ Restrictions on customer re-engagement for purposes of opting back in
  - ✓ Restrictions on "sale" of PI following opt-out
  - ✓ Obligation to delete – similar to EU "right to be forgotten"