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Compelled Disclosure and the First Amendment; The FCC Changes Course on Net Neutrality

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What's hot?

- Three cases are pending in the Ninth Circuit that probe the limits of the compelled commercial speech doctrine of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).
- Why does this matter? Permissive application of doctrine allows state and local governments to append politically trendy "public interest" messages to ads.

The 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." *Id.* at 373.

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

- 6-3 decision; opinion by Justice Kennedy.
- Dissent by Justice Breyer, joined by Justices Ginsburg and Kagan.

Justice Anthony Kennedy

Key principles affirmed

- 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."
- The "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech.
- Data is protected. Facts, after all, "are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."
- Such restrictions on speech are subject to "heightened scrutiny" and it is unnecessary to decide whether to apply the traditional test for regulating commercial speech.

No thumb on the scale . . .

Justice Anthony Kennedy

"In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime.

Likewise, the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles.

That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."

Breyer: Apply Proportionality

Justice Breyer dissenting, joined by Justices Ginsburg and Kagan

"I would ask whether Vermont's regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives."

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).

Multiple levels of scrutiny

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

Commercial Speech in the Supreme Court

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 trademarks are commercial speech and that Section 2(a) must be upheld under *Central Hudson* intermediate scrutiny.

- 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."

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 Circuit Courts

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 . . ."

Reinterpreting *Zauderer*

Judge Brett Kavanaugh, concurring

Zauderer applied and elaborated on *Central Hudson's* narrow tailoring requirements. This is "far more stringent than mere rational basis review."

"The court now invents a First Amendment standard that provides even less protection than rational basis review."

Judge Janice Rogers Brown, dissenting

"Seriously? With reasoning like this, who needs the Ministry of Truth?"

"Only the fertile imaginations of activists will limit what disclosures successful efforts from vegetarian, animal rights, environmental protection, or other as-yet-unknown lobbies may compel."

Judge Janice Rogers Brown

"The court's analysis in this case can best be described as delirium on a pogo stick."

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?

- *Nationwide Biweekly Administration, Inc. v. Owen*, No. 15-1620 (Oct. 10, 2017).
- *CTIA-The Wireless Assn. v. City of Berkeley*, No. 16-15141 (Oct. 11, 2017) (denial of rehearing).
- *American Beverage Assn. v. City and County of San Francisco*, No. 16-16072 (Sept. 19, 2017).

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).

CTIA-The Wireless Assn. v. City of Berkeley

- 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."

Impacted Beverages

INCLUDES

Any non-alcoholic beverage that has added caloric sweeteners and contains 25 calories per 12 oz.

Flavored milk containing more than 40 grams of total sugar per 12 oz.

EXCLUDES

- Milk
- Milk and Milk alternatives
- 100% Fruit Juice
- 100% Vegetable Juice
- Infant Formula
- Medical Food
- Weight Reduction Liquids
- Meal Replacement Beverages

Warning Label Mockup

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

- 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."

Nationwide Biweekly Administration, Inc. v. Owen

- California bars advertisers of competitive financial services from using the name of a prospective customer's current lender, or loan number or amount, without multiple prescribed disclosures, including that the competitor is not sponsored by or affiliated with the lender, and its solicitation is "not authorized" by the lender.
- Court could not discern "any meaningful difference between not being 'approved' by a lender and not being 'authorized' that would make the former accurate and the latter misleading."
- Citing *CTIA v. Berkeley*, panel held the "mere fact" that Nationwide "can conjure up a possible negative connotation of a work in the disclosure does not make the disclosure nonfactual."
- Distinguished *ABA* in a footnote, saying "the required disclosures here are not contrary to any established facts or governmental policies."

Regulatory Whiplash

The FCC and
Network Neutrality

In the Matter of Restoring Internet Freedom

May 2017 NPRM proposes to roll back the "net neutrality" rules that were adopted by the Obama-era FCC.

NPRM does two things:

- Proposes reclassifying Internet providers as "information services" under Title I of the Communications Act; and
- Suggests removing some or all of the existing rules prohibiting ISPs from blocking, throttling, or prioritizing paid traffic.

FCC Chairman Ajit Pai

Decades of Debate Over Regulatory Classifications

- Beginning in the 1960s – the Computer inquiries – basic versus enhanced service.
- The MFJ and AT&T – telecommunications versus information services.
- Telecommunications Act of 1996 – Congress distringuished information services and telecommunications services.
- 2002 Cable Modem Order – FCC classified broadband Internet access service as information service.
- FCC tried to impose blocking and discrimination rules, but courts struck down effort as "common carrier" regulation.
- November 2014 – Obama calls for reclassification of broadband under Title II.
- February 2015 – FCC adopts Open Internet Order.

Net Neutrality and Privacy

- Title II reclassification divested FTC of authority to impose privacy regulations on broadband service providers.
- October 2016, FCC adopted rules governing ISP privacy practices.
- March 2017, Congress voted under the Congressional Review Act to disapprove the FCC's privacy order.
- Current NPRM proposes restoring FTC jurisdiction over privacy to draw on that agency's "decades or experience and expertise in this area."


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