Obesity and the First Amendment

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"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."

I. Introduction

Obesity had been declared a chronic disease by the American Medical Association, the American Association of Clinical Endocrinologists, the American College of Endocrinology, the Endocrine Society, the Obesity Society, the American Society of Bariatric Physicians, and the National Institutes of Health.[1] Childhood obesity in the United States has imposed a particular burden on society, both in terms of healthcare costs and children's physical and mental health.[2] A major contributing factor to the epidemic has been the food industry's marketing directly to children and young adults.

Research shows that children under eight years of age lack the necessary cognitive skills to understand neither the intent of advertising, nor that advertising often presents a biased point of view.[3] Despite such a lack of understanding, food advertising and marketing has been shown to influence food preferences in children[4]— preferences which continue into adulthood. Thus, it is paramount that children develop good eating habits in their formative years. Studies have

[1] Obesity in America: A Growing Concern, ENDOCRINEWEB, https://www.endocrineweb.com/conditions/obesity/obesity-america-growing-concern (last visited Dec 14, 2018).
[2] Jennifer Harris & Samantha K. Graff, *Protecting Children from Harmful Food Marketing: Options for Local Government to Make a Difference*, THE CHILDHOOD OBESITY EPIDEMIC 145–156 (2015); AMERICAN PSYCHOLOGICAL ASSOCIATION, https://www.apa.org/topics/kids-media/food.aspx (last visited Nov 14, 2018).
[3] Jennifer L. Harris & Samantha K. Graff, *Protecting Young People From Junk Food Advertising: Implications of Psychological Research for First Amendment Law*, 102 AMERICAN JOURNAL OF PUBLIC HEALTH 214–222 (2012).
[4] NOTE: Advertising and Childhood Obesity: The Role of the Federal Government in Limiting Children's Exposure to Unhealthy Food Advertisements, 66 Fed. Comm. L.J. 327.

shown that adults do not deviate from eating habits developed in childhood.[5] Additionally, obesity in children can also lead to early on-set of co-morbidities such as high blood pressure, asthma, cardiovascular disease, and type-2 diabetes.[6]

Despite the urgent need for action, the federal government as well as state and local governments have been unable to meaningfully impact rising obesity rates. Current obesity rates are still too high, with rates as high as 18.5 percent for children and 39.5 percent for adults in 2015-2016.[7]

In an effort to combat obesity, San Francisco County passed an ordinance in 2015 requiring warning labels, such as the one written above, on specific sugar-sweetened beverages for certain types of fixed advertising within San Francisco.[8] The ordinance requires the warnings to cover 20 percent of the advertising space of the advertisements on billboards, posters, walls, bus shelters, and buses.[9] The stated purpose of the San Francisco ordinance is to "inform the public of the presence of added sugars and thus promote informed consumer choice that may result in reduced caloric intake and improved diet and health, thereby reducing illnesses to which [sugar-sweetened beverages] contribute."[10]

In pure American fashion, the American Beverage Association (ABA), the California Retailers Association (CRA), and the California State Outdoor Advertising Association

[5] Advertising and Childhood Obesity, *supra* note 4; Roseann B. Termini, Thomas A. Roberto & Shelby G. Hostetter, *Food Advertising and Childhood Obesity: A Call to Action for Proactive Solutions*, 12 MINN. J.L. SCI. & TECH. 619 (2011).
[6] Harris & Graff, *supra* note 2.
[7] Molly Warren, et al, *The State of Obesity: Better Policies for a Healthier America*, THE STATE OF OBESITY, https://stateofobesity.org/wp-content/uploads/2018/09/stateofobesity2018.pdf (last visited Nov 14, 2018).
[8] S.F. Health Code § 4201 (stating the purpose in requiring warnings for SSBs is to "inform the public of the presence of added sugars" because consumption of SSBs is linked to serious health problems such as weight gain, obesity, heart disease, diabetes, tooth decay).
[9] S.F. Health Code §4203; S.F. Health Code §4202.
[10] *Id*. at §4203, *supra* note 9.

(CSOAA), sought their day in court and filed suit against the County in July 2015.[11] The Plaintiffs challenged the ordinance as conflicting with their First Amendment rights, stating the ordinance "violates their and/or their members' free speech rights by forcing them to include a warning that they would not otherwise give."[12]

II. The U.S. Supreme Court, First Amendment, & Commercial Speech

Commercial speech first received protected status under the First Amendment in 1976.[13] The U.S. Supreme Court believed consumers have a particular interest in the free flow of commercial information, suggesting, "that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[14] Though the commercial speech doctrine began as a method to protect the listeners' freedom, the doctrine has transformed over time to protect the speaker as well.[15]

In 1980, the *Central Hudson* framework was established by the U.S. Supreme Court to protect commercial speech and consists of four elements.[16] The first element is a threshold question, asking if the commercial speech in question promotes illegal activity or is false or inherently misleading.[17] If the activity is not illegal or inherently misleading, the ordinance then needs to meet the remaining three parts of *Central Hudson*.[18] The ordinance must: involve a

[11] Complaint. Am. Bev. Ass'n et. al. v. City & County of S.F., 187 F. Supp. 3d 1123, 1126 (N.D. Cal. 2016).
[12] *Id*.; *See also* Am. Bev. Ass'n v. City & Cty. of S.F., 187 F. Supp. 3d 1123, 1126 (N.D. Cal. 2016).
[13] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 758 (1976).
[14] *Id*. at 763.
[15] Symposium: *Nike v. Kasky and the Modern Commercial Free Speech Doctrine*: A*fterword: Free the Fortune 500! The Debate Over Corporate Speech and the First Amendment*, 54 CASE W. RES. 1277.
[16] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564-66 (1980).
[17] *Id*. at 564.
[18] *Id*. at 566.

substantial government interest[19]; directly advance that substantial interest[20]; and do so in a manner that is not more extensive than is necessary to serve that interest.[21]

Then, in 1985, the U.S. Supreme Court developed a separate standard for mandatory disclosures on advertising.[22] In *Zauderer*, the Court stated a somewhat more lax standard for compelled disclosures in commercial advertising. The Court rationalized the need for a lower standard than *Central Hudson*, stating "extension of First Amendment protection to commercial speech is justified principally by the value to *consumers* of the information such speech provides, [and a] constitutionally protected interest in *not* providing any particular factual information in … advertising is minimal."[23] The Court stressed a more lenient standard was appropriate to protect against consumer deception "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," while recognizing that "unjustified or unduly burdensome disclosure requirements might offend the *First Amendment* by chilling protected commercial speech."[24] Consequently, the Court 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 to consumers."[25]

III. Lack of Uniformity in the Application of the *Zauderer* Standard

Since the U.S. Supreme Court developed the *Zauderer* standard back in 1985, various courts and circuits have interpreted and applied this framework somewhat differently creating more than a little confusion in the Ninth Circuit specifically.[26] *American Beverage* has been

[19] *Id*. at 565.
[20] *Id*. at 566.
[21] *Id*.
[22] Zauderer v. Off. of Disciplinary Counsel of Sup. Ct., 471 U.S. 626 (1985).
[23] *Id*. at 651 (first emphasis added).
[24] *Id*.
[25] *Id*.
[26] *See* Am. Bev. Ass'n v. City & Cty. of S.F., 871 F.3d 884 (9th Cir. 2018); *American Beverage*, 187 F. Supp. 3d *supra* note 12; Am. Bev. Ass'n v. City & Cty. of S.F., 916 F.3d 749 (9th Cir. 2019).

analyzed by the District Court for the Northern District of California, and by the Court of Appeals for the Ninth Circuit—under a three-judge panel and *en banc*—and each time, a slightly different version of the *Zauderer* framework has been applied.[27]

In analyzing the warning promulgated by the San Francisco County ordinance, the District Court concluded that the *Zauderer* framework would apply since "the challenged ordinance requires disclosure rather than suppression of speech."[28] It described the *Zauderer* standard as a rational basis/rational review test where the "compelled disclosure does not violate the *First Amendment* so long as the disclosure requirement *is reasonably related to the state's interest*."[29] The District Court went on to state that the only element it considers relevant in analyzing the warning promulgated by the City of San Francisco under the *Zauderer* standard is whether the state's interest is "reasonably related to the state's interest".[30]

The District Court pointed out that the Ninth Circuit, in *Videosoftware Dealers Ass'n v. Schwarzenegger*, might have imposed an additional analytical element on the *Zauderer* framework—specifically that the disclosure be shown to be factual before the analysis proceeds to the relatedness of the state's interest.[31] The District Court continued by stating, "it is not clear whether *Zauderer* itself imposed a factual predicate requirement—or, for that matter, a 'factual and uncontroversial' one."[32] The District Court opined that the "purely factual and uncontroversial" statement is—at most—a description of the state's compelled disclosure.[33] The District Court did not believe the U.S. Supreme Court imposed factual and uncontroversial

[27] *Id*.
[28] *American Beverage*, 187 F. Supp. 3d at 1126.
[29] *Id*. at 1134.
[30] *Id*. at 1135.
[31] *American Beverage*, 187 F. Supp. 3d at 1135; Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009).
[32] *American Beverage*, 187 F. Supp. 3d at 1135.
[33] *Id*.

predicate requirements on compelled disclosures before the statement can be analyzed under *Zauderer*.[34]

The District Court, for the purposes of analyzing the San Francisco ordinance, proceeded with the assumption that there is a factual and uncontroversial requirement before rational review is to be applied to the compelled disclosure. At the same time, the District Court reaffirmed its analysis in *CTIA*, in which the court held the factual and uncontroversial requirement of *Zauderer* establishes that the compelled disclosure must convey a fact rather than opinion and, generally speaking, the disclosure must be accurate.[35]

However, the Ninth Circuit Court of Appeals came to a different construction of the *Zauderer* framework contrary to the District Court's application. Whereas the District Court believed the *Zauderer* analysis only needed to show a reasonable relation between the disclosure and the governmental interest, the Ninth Circuit transformed the *Zauderer* framework by analyzing the burden imposed by the disclosure separate and ahead of the reasonable relation of the government interest analyses.[36] In every element, the Ninth Circuit agreed with petitioners' arguments; holding that the disclosure required by the ordinance was in violation of petitioners' First Amendment rights.[37] The Ninth Circuit then clarified the applicable analysis under *Zauderer* for a compelled disclosure to survive First Amendment scrutiny by analyzing if the particular disclosure is (1) purely factual and uncontroversial, (2) not unduly burdensome and, (3) reasonably related to a substantial government interest.[38]

[34] *Id.*
[35] CTIA - Wireless Ass'n v. Berkeley, 854 F.3d 1105 (9th Cir. 2017); *Zauderer*, 471 U.S. at 626.
[36] *American Beverage*, 871 F.3d at 898.
[37] *Id*. at 892-8.
[38] *Id*. at 892.

Lastly, while agreeing that the *Zauderer* standard is the correct standard to apply, the decision by the Ninth Circuit sitting *en banc,* articulated a slightly different inquiry, requiring only that the compelled notice or warning be (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.[39] With this new understanding of the *Zauderer* standard, the Ninth Circuit *en banc* shifted the focus from the substantiality of the governmental interest to solely on the notices' purely factual and noncontroversial predicates and the burden it places on the advertiser. By requiring a separate analysis of the burden imposed by the disclosure, the Ninth Circuit transformed the *Zauderer* framework from rational review scrutiny to something akin to the intermediate scrutiny imposed by the *Central Hudson* test.

IV. Conclusion

The disparate treatment of the ordinance under the *Zauderer* analysis highlights the need for additional guidance and clarification in how this analysis should be applied. In any commercial speech framework, the first step in the analysis should be to determine if the speaker is being required to speak where he would prefer to be silent or if he is being regulated in the content of his speech. If it is the former, a policy rationale that allows for mandatory disclosures should be encouraged, not restricted.

The question of when *Zauderer* should be applied and if it should only be applied in cases seeking to prevent consumer deception has been raised in lower courts and absent a ruling from the U.S. Supreme Court, the courts are free to apply the *Zauderer* standard to governmental interests beyond preventing consumer deception. In *Zauderer*, the Court stated, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception."[40] The Court used a new framework because the

[39] *American Beverage*, 916 F.3d at 756.
[40] Zauderer v. Off. of Disciplinary Counsel of Sup. Ct., 471 U.S. 626 (1985).

government had an interest in preventing deception caused "inherently misleading" advertisements. However, the Court did not state if anything other than an interest in preventing deception could be appropriate in deciding to apply the *Zauderer* standard. It could be argued that only "inherently misleading" advertisements—advertisements which would fail the first prong of the *Central Hudson* test—are entitled to a less exacting standard. But what would be the purpose of such a standard when *Central Hudson* could have easily disposed of the "inherently misleading" advertising. Thus, it stands to reason that there must be some other instances in which *Zauderer* should apply.

The U.S. Supreme Court should clarify the *Zauderer* standard—if *Zauderer* applies at all. Since the Court has yet to state which standard governs when restrictions on commercial speech are under review, it has become increasingly difficult to know which standard would be applied in advance of litigation or if the standard stated is the one actually used. It is plausible that the Court could find that other governmental interests beyond preventing deception can and should be analyzed under the *Zauderer* standard. Even if the Court were to hold that preventing deception is the only governmental interest that triggers *Zauderer*, the government could still achieve its goals by showing that certain advertising undertaken by companies and industry-funded research aimed at weakening the link between sodas and obesity are a type of policy campaign that actually constitutes deception that would need to be countered with a warning label. In the absence of review by the U.S. Supreme Court, courts should apply a laxer standard for compelled disclosures that concern the public health such as the one originally crafted in *Zauderer*, as applied by the District Court of the Northern District of California.

Legislators must be allowed to utilize compelled disclosures in their efforts to combat obesity rates, especially childhood obesity rates. The marketing of unhealthy foods to children

has contributed to a public health crisis and government intervention is sorely needed. Food advertising is exceedingly out of balance with what a healthy diet should be and needs to be curtailed and regulated.