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S.F.'s Fight With Cellphone Industry Tests Compelled Speech

Vince Chhabria, a deputy city attorney, faces arguments that requiring retailers to disclose potential health risks violates their First Amendment rights.

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The wireless industry is trying to block San Francisco's novel cellphone "right to know" law on grounds it forces, not hinders, speech. The law would require retailers of cellphones to post signs and distribute information advising consumers of their potential health effects.

The suit is part of a new wave of litigation playing out in federal courts around the country in which corporations are using the compelled-speech doctrine to fight back as cities increasingly turn to health and safety disclosure laws, as opposed to piecemeal enforcement actions. The challenges come to disclosure laws aimed at anti-abortion pregnancy clinics, stores selling cigarettes and fast-food chains.

The cities face aggressive challenges and the cellphone suit is no exception. Even after the city amended its ordinance to eliminate the charged "radiation" language from the materials it wants stores to disclose to consumers, the wireless industry retooled its suit and levied the First Amendment challenge, along with other arguments.

Their lawyers will ask U.S. District Judge William Alsup for an injunction Oct. 20, just days before the ordinance is set to take effect. Alsup's ruling could foreshadow how disclosure laws here and elsewhere hold up to First Amendment challenges. And with the Supreme Court's signals in recent years that it may be open to re-evaluating commercial-speech jurisprudence, lawyers suspect one of the compelled-speech cases could be high court bound.

"The arguments that these companies are making are important arguments because the principles they're seeking to vindicate aren't just principles that apply to companies," says Cory Andrews, senior litigation counsel at the Washington Legal Foundation, *amicus curiae* in a New York tobacco disclosure case. "They're principles that apply to all Americans — that the government cannot compel you to speak against your will or commandeer your private property."

San Francisco's law is the first in the country to require retailers to post warnings about "radio-frequency energy" and tips on avoiding exposure.

CTIA-The Wireless Association, an industry group represented by Jones Day, Alston & Bird; Wiley Rein; Kirkland & Ellis; and Drinker Biddle & Reath, calls the materials "alarmist" and the health claims "highly controversial." It argues that the city bears a heavy burden of justifying its "deep intrusion" into cellphone companies' freedom of speech. The materials cannot survive any level of scrutiny, it argues.

"First Amendment law is clear that the government cannot compel speech to further a 'right to know' because, if it could, there would be no end to the information speakers could be forced to convey," San Francisco Jones Day partner Robert Mittelstaedt wrote in a

newly filed amended complaint. Plus, the ordinance isn't narrowly tailored enough because the city could, and has, published the same warnings on its website. It could disseminate such "factsheets" directly to consumers.

The city says the ordinance is immunized from First Amendment scrutiny because it doesn't hinder retailers' ability to add their own message, and because it's clear that it's the government's message. However, if it were subjected to any level of scrutiny, the city says, it would be the relaxed standard under Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).

"A very key point in these compelled speech cases that CTIA disregards in its brief is that any First Amendment problems are greatly mitigated when a company remains free to disseminate its own message," Chhabria says. And under San Francisco's law, "they can say whatever they want."

ON THE MENU

First Amendment challenges against disclosure ordinances are finding varied success. A key case for cities is the Second Circuit U.S. Court of Appeals' 2009 holding in a menu-labeling challenge, New York State Restaurant Association v. New York City Board of Health, 556 F. 3d 114, in which the court found that requiring the disclosure of nutritional information at fast-food chains was reasonably related to the city's goal of combating obesity.

A New York district judge, however, recently dealt a blow to New York's ordinance requiring pregnancy crisis centers to disclose that they don't offer contraceptive or abortion services.

In The Evergreen Association v. City of New York, U.S. District Judge William Pauley sided with the centers, rejecting the city's argument that they engage in commercial speech by providing goods and services — such as diapers and pregnancy tests — in exchange for the opportunity to push their message. Adoption of the city's arguments would represent a "breathtaking expansion" of the commercial speech doctrine, Pauley said in granting an injunction. And the city's assertion that centers can be treated, for First Amendment purposes, as engaging in commercial speech simply because their audience is in part a commercial one "is particularly offensive to free speech principles," the judge said.

A similar ordinance in Baltimore was struck down and is before the Fourth Circuit. That case drew an *amicus curiae* brief from 25 law professors, many of them constitutional scholars considered experts in First Amendment jurisprudence, who argue that disclosure requirements "actually promote First Amendment values while addressing the government's legitimate interest in preventing consumer deception." The requirement to post a sign is analogous to labeling requirements that have been upheld by courts, their brief says.

San Francisco is weighing its own crisis pregnancy center disclosure ordinance. Supervisor Malia Cohen introduced legislation in August, the first of its kind in California. City Attorney Dennis Herrera at the same time launched an enforcement action against one center, demanding it change its advertising to make it more clear that it does not offer abortion services.

SPEAKING OF TOBACCO

One of the most contentious cases involving a city disclosure law is in New York, which wants to require tobacco retailers to display anti-smoking signs, including graphic images depicting smoking-related ailments.

While the district court there didn't weigh in on the First Amendment arguments, the Second Circuit may. Local governments, including San Francisco, joined in an *amicus curiae* brief, arguing the signs withstand First Amendment review because they are "directly related to the government's objective of informing consumers about the dangers of tobacco use and the availability of assistance in quitting." And the images that will be on packages of cigarettes once new federal regulations take effect under the Family Smoking Prevention and Tobacco Act are "factually uncontroversial," the brief asserts.

While San Francisco hasn't proposed its own tobacco disclosure law, Chhabria, who worked on the *amicus* brief, notes that it would not be surprising if someone was "cooking that up."

Andrews, of the Washington Legal Foundation, argues in an *amicus* brief that the "Quit Smoking Today" signs required under the act and "gory" photos are ideological messages that have nothing to do with protecting consumers from being misled. He notes that one Supreme Court justice, Clarence Thomas, has said he would like to reconsider the *Zauderer* standard, which permits forced disclosure of factual information in commercial advertising if it's reasonably related to a substantial government interest.

"I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this court applies to laws that suppress nonmisleading commercial speech," Thomas wrote in a concurrence in 2009's *Milavetz, Gallop & Milavetz v. U.S.*, 130 S. Ct. 1324.

Andrews says the tobacco cases bring the issues into focus. "If the government can force ... tobacco retailers to tell their own customers to stop smoking, there's no telling where that sort of thing will stop," he said.

Of course, San Francisco has already had one major victory in that arena. The city's ban on tobacco sales in drugstores was upheld by the Ninth Circuit. Philip Morris had asserted a commercial speech argument, saying the law prevented it from communicating with customers. A related suit by Walgreens in state court asserting equal protection claims led the city to expand the law to ban

sales at all stores with pharmacies, including grocery stores. The city then prevailed in a district court challenge by Safeway.

University of Virginia law professor Richard Schragger, who focuses on local government law, says new disclosure laws — like the cellphone ordinance and others — mark a new exercise of local power. But he says it's a justifiable use of "inherent powers to regulate health and safety."

And corporate America's aggressive opposition is unsurprising, he says. "The First Amendment has become a tool that corporations have decided is a valuable one and it hadn't been seen in that way before," Schragger says, "and it may be the expansion of commercial speech has fed into that."



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