



# COMPELLED SPEECH AND THE 1<sup>ST</sup> AMENDMENT: NEUTRAL FACT OR GOVERNMENT OPINION?

by  
Charles M. English

In the 2010 Term, the U.S. Supreme Court struck down, on First Amendment grounds, Vermont's law that prohibited the sale and use of physician prescription data for commercial purposes, especially by pharmaceutical companies wishing to use that data to market their drugs to physicians. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). In so holding, the 6-3 majority set forth a muscular view of the First Amendment in situations where government intervenes in the marketplace of ideas based on the content of the speech. Such efforts, the Court held, are subject to a form of heightened scrutiny and are "presumptively invalid."

In both the 2009 and 2010 terms, the Court struck down federal and state campaign-finance restrictions as applied to corporate political donations and laws supporting public financing of candidates who forgo private donations. These are of course major decisions relying on core First Amendment principles. One message of the *Sorrell* case is that even more may be going on in First Amendment jurisprudence when one looks beyond the headline-grabbing cases to cases dealing with commercial speech – speech not made by entities engaged in the political process but by market participants seeking to buy, sell, advertise, market, or provide information to each other and consumers.

This LEGAL BACKGROUNDER explores how the present Supreme Court's textual reading of the First Amendment affects pending governmental efforts to compel private party speech with respect to tobacco (Food and Drug Administration regulations requiring new warning labels including specific government-prescribed graphic images) and cell phones (San Francisco's new requirement that cell phone retailers provide government prescribed posters, "fact-sheets," and warning stickers on promotional literature). Both laws are presently enjoined and headed for expedited review by the U.S. Courts of Appeals for the D.C. Circuit and the Ninth Circuit, respectively.

***Evolution of Commercial Speech Treatment under the First Amendment.*** The First Amendment's protection of speech appears to be clear, uncontroversial, and absolute: Congress "shall make no law . . . abridging the freedom of speech. . ." The framers of the Constitution provided no modifiers limiting freedom of speech and the word "abridging" means as to rights "to lessen or curtail." Webster's New World Dictionary 4<sup>th</sup> Ed. (1998). Notwithstanding the unambiguous and unlimited text of the First Amendment, the Court has not regarded the text as absolute – e.g. falsely shouting "fire" in a crowded theatre is properly proscribed by government.

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**Charles M. English** is a Principal in the Washington, D.C. office of the law firm Ober | Kaler, where he chairs the Food & Agriculture Group. He successfully represented the appellants in a case discussed in this LEGAL BACKGROUNDER, *Int'l Dairy Foods Ass'n v. Boggs*, and has led teams in other First Amendment, Commerce Clause, and Preemption challenges to state and federal regulation.

The treatment of commercial speech under the First Amendment has its own unique history (even though the word “commercial” cannot be found in the text of the First Amendment). In 1942, the Court declared that commercial speech was not protected by the First Amendment at all. *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (upholding a New York statute that prohibited the distribution of any “handbill, circular . . . or other advertising matter whatsoever in or upon any street.”). Over time the Court slowly carved out exceptions or avoided the result in *Valentine*. Then, in 1976, it acknowledged reversing its course, declaring that some form of intermediate protection did exist for commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (striking down a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs).

The Court in 1980 established a multi-part test (*Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980)) (striking down a regulation that completely banned promotional advertising by a utility) for evaluating the constitutionality of commercial speech restrictions: in order to regulate non-misleading commercial speech regarding otherwise legal activity, the government must establish that there is a substantial state interest, that the regulation directly advances that state interest, and that the regulation is narrowly tailored to advance that substantial interest. Heightened, but not strict, scrutiny applies under the *Central Hudson* test, and not surprisingly the results of cases decided under this “test” are diverse and not easily reconciled.

Indeed, most observers from a wide array of the political spectrum have concluded that the results of cases decided under *Central Hudson* are unpredictable and that the test is simply unworkable. Importantly, Justice Clarence Thomas has repeatedly taken dead aim at the Court’s commercial speech jurisprudence, gaining some indirect support from others from the Court’s so-called conservative wing. According to Justice Thomas, commercial speech generally deserves protection as strong as that accorded to political speech. *See e.g. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 524-525 (1996) (Justice Thomas concurring in the judgment, but not joining the Majority’s discussion of *Central Hudson* on grounds that “such a test should [not] be applied to a ‘restriction’ of free speech.”)

***Treatment of Compelled Speech under the First Amendment.*** The right not to speak is just as paramount as the right to speak. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (striking down state school requirement that all children must salute the American flag); *Wooley v. Maynard*, 430 U.S. 705 (1977). And yet, obviously applying the pre-1976 Court precedent that permitted virtually unfettered government regulation of commercial speech and likely relying on *Central Hudson* today, the federal government has for decades required Surgeon General warning on cigarettes, drug side-effects warnings in pharmaceutical advertising, and mandated food labeling, including compliance with government-established food standards of identity. The government’s justification for these examples of compelled speech is that they convey truthful information in an unbiased format.

However, even under *Central Hudson*, some forms of government-compelled speech cannot survive when they run counter to scientific fact or impose undue, unjustified burdens on speech. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (striking down Vermont’s compelled label for milk produced from cows treated with synthetic growth hormone); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628 (6<sup>th</sup> Cir. 2010) (striking down Ohio’s requirement that a voluntary label claim that milk was not produced using synthetic growth hormones cannot use an asterisk to link to government-mandated disclaimer language thus diluting the private message).

***Strict Scrutiny or Intermediate Scrutiny for Compelled Content-Based Speech?*** The question of which test applies is obviously critical as few government mandates survive strict scrutiny. The Court’s precedents appear to lead to the following conclusions: (1) a government may, in order to correct misleading messages, require disclosure of pure, noncontroversial facts under a lower standard. *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985) (upholding required attorney disclosure of difference between “costs” and “legal fees” in advertisement for contingent fee cases); and (2) heightened scrutiny always applies where a government requires a private party to publicize the government’s opinion. *Pac. Gas & Elec. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1 (1986) (striking down requirement that utility include third-party material in

customer billing envelopes). As discussed below, courts appear to struggle with this distinction.

Into this mix comes the 2011 *Sorrell* case. While *Sorrell* is not a compelled speech case, its holding should, under *West Virginia Board of Education*, equally apply to the right not to speak. The majority in *Sorrell* certainly did not explicitly overrule *Central Hudson*. However, the majority opinion, however subtly, appears to provide a measurable shift in First Amendment analysis by carving out in commercial speech cases content or speaker-based restrictions that receive greater scrutiny greater than under *Central Hudson*. Indeed, and perhaps most tellingly, the minority opinion written by Justice Stephen Breyer accuses the majority of having created a new test for laws that regulate speech on the basis of its content or its speaker, a test that undermines the historical differentiation between so-called commercial speech and so-called core First Amendment speech. If so, the Court may have indirectly moved towards Justice Thomas' assertion that commercial speech should not be treated differently from core speech.

***New FDA Regulation of Cigarette Packaging Held (Under Strict Scrutiny) to Violate First Amendment.*** With new congressional authorization, FDA in June 2011 published a Final Rule “requiring (among other things) the display of nine new textual warnings – along with certain graphic images such as diseased lungs and a cadaver bearing chest staples on an autopsy table – on the top 50% of the front and back panels of every cigarette package manufactured and distributed in the United States on or after September 22, 2012.” *R.J. Reynolds Tobacco Co. v. U.S. Food and Drug Admin.*, \_\_\_ F. Supp. \_\_\_, 2011 WL 5307391 (D.D.C. Nov. 7, 2011). See FDA, Required Warnings for Cigarette Packages and Advertisements. 76 Fed. Reg. 36,628 (June 22, 2011).

Five tobacco companies promptly sued FDA in the U.S. District Court for the District of Columbia asserting that the new rules violated the First Amendment by impermissibly compelling speech. On November 7, Judge Leon granted a preliminary injunction against the new regulations holding that both the confiscation of panel space as to the textual warnings (as opposed to the text itself, which the plaintiffs did not challenge) and the required graphic images violated the First Amendment. The FDA has appealed this decision to the U.S. Court of Appeals for the D.C. Circuit, which will likely handle the case on an expedited basis.

The parties vigorously contested the proper standard of review. The government sought to apply the lowest (*Zauderer*) or at worst the pure intermediate (*Central Hudson*) standard and the plaintiffs aimed to apply the strict scrutiny standard. Judge Leon had no difficulty concluding that strict scrutiny should apply because the graphic images were better described as “digitally enhanced or manipulated” or “cartoons.” He also concluded that the amount of space demanded by FDA was “confiscatory.” Judge Leon also rejected as confusing and contradictory FDA’s so-called compelling interest. Having concluded that strict scrutiny applied, there is no surprise that Judge Leon then concluded that the Final Rule could not stand. FDA’s appeal thus will no doubt primarily challenge the application of strict scrutiny.

***San Francisco Requirement that Cell Phone Retailers Provide Customers with (Court modified) Fact Sheet Upheld.*** As to cell phone retailers, San Francisco enacted an ordinance in 2010, and then, after a challenge in July 2011, an amended ordinance, the purpose of which was to “improve and strengthen the disclosures required under the original Cell Phone Right-to-Know Ordinance to better achieve this public health purpose.” *CTIA – The Wireless Ass’n v. San Francisco*, \_\_\_ F.Supp. 2<sup>nd</sup> \_\_\_, 2011 WL 5117160 (N.D. CA, Oct. 27, 2011). While San Francisco acknowledged that there is no known metric for measuring the actual amount of radiofrequency energy that a user will absorb from a particular cell phone, it nonetheless sought as a precautionary measure to provide additional information to customers regarding radiofrequency energy emitted by cell phones.

The three main requirements of the amended ordinance required retailers to: (1) “display in a prominent location visible to the public, within the retail store, an informational poster developed by the Department of the Environment” (“DEP”) (§ 1103(a)); (2) provide to every purchaser and any customer who requests it a free copy of an informational factsheet developed by the DEP (§ 1103(b)); and (3) affix on phone display materials a DEP sticker that included statements that cell phones emit radiofrequency energy

absorbed by the body and methods of reducing cell phone exposure (§ 1103(c)). The fact sheet developed by DEP included graphic images showing cell phone energy directed at the head and groin.

U.S. District Judge William Alsup did not clearly articulate what level of scrutiny he applied. Nonetheless, Judge Alsup found the graphic images to be opinions and found that the display poster (confiscated retail space akin to confiscated cigarette packaging) and the DEP stickers attached to private party display materials crossed the First Amendment line. The judge then offered San Francisco the opportunity to accept language rewriting the “fact sheet” to become what he deemed to be factual. San Francisco later accepted the judge’s “suggestions” for new language which nonetheless provides, *inter alia*, a recommendation that cell phone use by children be limited even though there is no evidence that children are especially susceptible to radiofrequency energy from cell phones. CTIA, representing the wireless industry, promptly appealed and San Francisco cross-appealed.

CTIA also successfully sought (granted on November 28) an emergency injunction from the Ninth Circuit pending its appeal. In seeking emergency relief, CTIA argued that strict scrutiny should apply (citing the decision by Judge Leon in the *R.J. Reynolds* case), but also noted that even under the lowest standard (*Zauderer*) CTIA should prevail because San Francisco’s mere possibility of harm argument is insufficient under the standard set forth by the Court in *Ibanez v. Fla. Dept. of Bus. and Prof’l Reg.*, 512 U.S. 136 (1994) (striking down disclosure of “reasonable information” when the state relied on the rote invocation of the words “potentially misleading” rather than making supportable findings of fact to justify the proposed restriction).

CTIA further relied on *Ibanez* for the proposition that the District Court had improperly shifted the burden from San Francisco justifying the compelled speech to CTIA proving the negative – that cell phones caused no harm. CTIA also naturally objected to the judge’s rewriting the fact sheet and his concluding what was factually accurate given the actual lack of evidence regarding the issue. The swift grant of the emergency relief sought from the Ninth Circuit appears to be telling.

**Looking Ahead.** It is difficult, if not impossible, to reconcile the cigarette and cell phone District Court decisions. However, it appears that when the government goes beyond compelled text to compelled graphics, it has crossed an impermissible line. With expedited appeals now pending in both the D.C. and Ninth Circuits, we will likely see important decisions in 2012. Indeed these may well be the most important commercial free speech cases to watch in the near term.

Meanwhile, the Supreme Court docket does not include First Amendment cases that could likely shed light on commercial speech issues generally. The two cases presently accepted for the 2011 Term do not implicate government-compelled speech: *FCC v. Fox Television Stations*, No. 10-293 (challenge to FCC indecency rules as applied to broadcast media) and *United States v. Alvarez*, No. 11-210 (challenge to U.S. Code provision making it a crime to falsely represent oneself to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States).