



TWO FIRST AMENDMENT APPEALS WILL TEST IMPACT OF *NIFLA v. BECERRA* ON COMMERCIAL SPEECH REGULATION

by Bert W. Rein and Megan L. Brown

In a 2017 WLF LEGAL OPINION LETTER offering “Precautions for Commercial-Speech Regulators,”¹ we noted “increasing constitutional sensitivity regarding the value of commercial speech” and we warned “legislators and regulators ... [to] think long and hard before using speech restraint or compelled disclosure to pursue their consumption preferences or policy goals.” The U.S. Supreme Court’s decision in *National Institute of Family and Life Adocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), coupled with the Court’s decision to vacate and remand a U.S. Court of Appeals for the Ninth Circuit decision involving compelled commercial speech in *CTIA v. Berkeley*, 854 F.3d 1105 (9th Cir. 2017), substantiate our cautionary warning. How seriously regulators ultimately take the warning will be front and center when the Ninth Circuit acts on the remand in *CTIA* and on its forthcoming *en banc* consideration of the sugar-sweetened-beverage warning at issue in *American Beverage Ass’n v. City & Cty of San Francisco*, 871 F.3d 884 (9th Cir. 2017). *Becerra* marks a substantial shift in several aspects of First Amendment protection for commercial speech, which should guide the Ninth Circuit’s review in *ABA* and *CTIA*.

***Becerra* Applied Searching Scrutiny to Speech Regulation**

The Court’s *Becerra* decision struck down, on First Amendment grounds, separate mandatory disclosure requirements applicable to licensed and unlicensed clinics in California that provided pregnancy-related services to support a pro-life goal. The licensed clinics were required to advise women on site that California provides free or low-cost pregnancy-related services, including abortions, and to give them a telephone contact number to access those services. Unlicensed clinics were required to post a notice on site and in their advertising stating that they were not licensed and had no medical provider in house to administer or supervise their services. The Court found both required notices violated the First Amendment for slightly different reasons.

California’s licensed-clinic notice, in particular, was strongly attacked on the ground of viewpoint discrimination because it seemed to target pro-life clinics and require them to foster abortion consideration against their moral principles. Viewing *Becerra* as an abortion or religious freedom case, however, would have limited its significance in the development of general First Amendment jurisprudence. The Court rejected the viewpoint-discrimination approach, explaining in a brief footnote, *Becerra*, 138 S. Ct. at 2370 n.2, that it did not need to reach that challenge because both notices were otherwise unconstitutional on general

¹ Bert W. Rein and Megan L. Brown, *Precautions for Commercial-Speech Regulators*, WLF LEGAL OPINION LETTER, June 16, 2017, http://www.wlf.org/upload/legalstudies/legalopinionletter/061617LOL_Rein.pdf.

First Amendment grounds. Four Justices, while fully joining the majority opinion, separately expressed concern about whether requiring “primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions” unconstitutionally forced them to contradict “their most deeply held beliefs, grounded in basic philosophical, ethical precepts.” In their view “Government must not be allowed to force persons to express a message contrary to their deepest convictions.” *Id.* at 2379 (Kennedy, J., Roberts, C.J., Alito, J., and Gorsuch, J. concurring).

Conversely, California sought to sustain its law on the ground that it regulated “professional speech” over which government could exercise greater regulatory control. The Court flatly rejected that contention, finding no special reason to relax First Amendment scrutiny because “professionals were speaking.” *Id.* at 2372. The Court acknowledged that “a lower level of scrutiny” had been applied to mandated disclosure of client-cost responsibility in certain contingent-fee lawyer advertisements in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), but confined that precedent to regulation “of the services” the professional provides rather than, as here, “information about state-sponsored services.” *Id.* (emphasis in original).

The Court also distinguished California’s disclosures from requirements that incidentally burden speech but fundamentally regulate the performance of professional services. It thus rejected the dissent’s reliance on *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), which upheld requiring certain state-mandated cautionary disclosures as part of the process of obtaining informed consent to an abortion. While the dissent argued that California’s disclosures were a mirror image of *Casey*’s disclosures, the Court reasoned that California’s disclosures were distinguishable as “not tied to a procedure at all” but an effort to regulate “speech as speech.” *Becerra*, 138 S. Ct. at 2373. In that situation, professionals (and by analogy participants in other regulated industries) were entitled to the same First Amendment protection against government control of their speech as any other persons.

To resolve the case on ordinary First Amendment principles, the Court first categorized the required notices as “content based” because they plainly altered the content of the regulated persons’ speech. *Id.* at 2371. This classification made the requirements “presumptively unconstitutional” and “justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Ibid.* Recognizing that this formulation invoked a strict-scrutiny standard that might not command a majority in all cases, the Court did not “foreclose the possibility that some such reason [for a more relaxed review standard] exists” but put it aside for the licensed notice “which cannot survive even intermediary scrutiny.” *Id.* at 2375.

The Court next analyzed California’s asserted interest in “educat[ing] low-income women about the services it provides.” *Ibid.* It noted that many clinics offering pregnancy-related services were exempt from the notice requirement making it wildly underinclusive. California’s exception of clinics offering a broad range of services, including but not primarily offering pregnancy-related services and federal clinics, triggered a concern that California’s interest was, in fact, imposing a burden on a disfavored, anti-abortion group of speakers. This called into question the integrity of California’s effort to assert a constitutionally compelling information interest. Moreover, the Court believed that California could satisfy any legitimate educational interest by a “public information” campaign and, with this alternative available, could not “co-opt the licensed facilities to deliver its message for it.” *Id.* at 2376.

The Court then disposed of the notice requirement for unlicensed clinics. It applied a less exacting *Zauderer* analysis, as urged by California, without deciding whether a more stringent constitutional test was required. It stated that it did “not question the legality of health and safety warnings long considered permissible or purely factual and uncontroversial disclosures about commercial products,” presumably

under *Zauderer*. *Ibid.* But in conducting its *Zauderer* analysis, the Court emphasized that the state “has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome.” *Id.* at 2377. It then found that California had failed both tests. The state had not proved that, absent the unlicensed disclosure, pregnant women would fail to understand that unlicensed centers could not provide the services of a licensed medical provider. That failure of proof made the notice unjustified under *Zauderer*.

Also, the notice applied only to facilities that primarily provide “pregnancy-related services” and, for example, did not reach unlicensed offerors of contraceptive services. California thus targeted “speakers, not speech,” further weakening its effort to justify the compelled disclosures. *Id.* at 2378. In addition, the notice imposed an extensive, unduly burdensome text on covered-facility advertising that could “drown out the facility’s own message” and make it impractical for the facility to advertise. Because the unlicensed-notice requirement was unsustainable even under the most forgiving standard of First Amendment review, the properly applicable standard did not have to be addressed.

The Ninth Circuit Will Confront *Becerra* in Two Important Cases

Becerra undoubtedly will be front and center when the Ninth Circuit hears *en banc* argument in the ABA case on September 25, 2018. The court had granted *en banc* review well before *Becerra* was decided, but this shift in First Amendment law will influence that review. The ABA, looking to defend its victory, will likely argue that *Becerra* affords multiple grounds for reaffirming the earlier panel decision that San Francisco’s sugar-sweetened-beverage (SSB) warning attributing obesity, diabetes, and tooth decay risk to SSBs violates the First Amendment.

First, the panel’s determination that the *Zauderer* standard applies now seems unsustainable. San Francisco may claim that its SSB warning was the kind of purely factual and uncontroversial health disclosure excepted from ordinary First Amendment analysis in *Becerra*. But the SSB disclosure, unlike an ingredient list, is not descriptive of SSB products. Instead, it conveys the City’s desire to persuade consumers to limit their SSB consumption. Nor is the warning an incidental aspect of a broader SSB regulatory regime. The SSB warning is an independent, content-based requirement that *Becerra* makes “presumptively unconstitutional.” *Second*, as in *Becerra*, the SSB notice applies selectively to one high-sugar source and does not reach other sources of dietary sugar such as candy bars. It disfavors one group of speakers, rather than being directed at a broader public health problem. Underinclusive selectivity raises a serious question whether the City’s objective is to meet a need for health education or to target SSB manufacturers. *Third*, the City provided no evidence why it could not advise citizens of its concerns about excess sugar consumption with its own resources rather than co-opting SSB purveyors to deliver a message contrary to their vital business interests. *Fourth*, as the earlier ABA decision held, the City’s display requirement blanketing 20% of outdoor displays with a City-dictated black-boxed warning would effectively chill lawful SSB advertising and is unduly burdensome. In short, both sections of the *Becerra* analysis could doom San Francisco’s SSB advertising regulation.

In *CTIA*, which the Supreme Court sent back to the Ninth Circuit, Berkeley’s RF-exposure notice to prospective cell-phone customers is likely to fare no better under *Becerra*. The City’s RF notice is “content based” and, as properly read by Judge Friedland’s prior dissent, is intended to convey a contentious message that carrying a cell phone close to one’s person is unsafe. Thus, under *Becerra*, Berkeley’s law should be reviewed under “ordinary constitutional principles” requiring Berkeley to overcome its presumptive unconstitutionality. Under the *Becerra* test, Berkeley is unlikely to demonstrate a “compelling” interest for requiring the RF notice. The notice, read literally, refers consumers to manufacturer-provided instructions and manuals so consumers disposed to access those sources gain nothing from it and consumers otherwise disposed not to read instructions and manuals lose nothing by its absence. In other words, the notice is

effective only if it conveys the controversial and unproven message that cell phones carried close to the body may be unsafe. But Berkeley cannot claim that message to be an accepted fact rather than an opinion. And if it is an opinion then Berkeley, rather than cell-phone sellers, should use its resources to convey the message. As to the narrow tailoring required by *Becerra*, any legitimate interest Berkeley may have in directing users to instructions and manuals could be satisfied by a factual and neutral notice simply stating that consumers should consult manufacturer manuals and instructions when using their cell phones.

Whether or not the SSB and RF laws now before the Ninth Circuit could have survived pre-*Becerra*, the Supreme Court's decision creates a sea change in First Amendment jurisprudence that should sweep them away in its tide. Most fundamentally, the Supreme Court has made clear that the First Amendment interests of commercial speakers arise from their right to speak and control their speech rather than being derived solely from the benefit of their messages to the intended audience.

***Becerra* Requires More Scrutiny of Government Interference in the Marketplace of Ideas**

The Court's cautiously evolving recognition of the value of commercial speech, notwithstanding its essential role in a free economy, had not discouraged regulation of commercial speech content. Prior cases left open a door to somewhat relaxed intermediate scrutiny of limitations on the speech of commercial actors and an even looser review of statements governments compelled them to make. *Becerra's* embrace of a presumptive strict-scrutiny framework for all review of content-related restrictions and mandates suggests that the "speech is speech" view of its author, Justice Thomas, is gaining significant traction.

As *Becerra* acknowledges, a unified strict-scrutiny framework would resolve the doctrinal, and potentially outcome-determinative, debate over the applicable standard of First Amendment review. This is often where First Amendment litigation focuses. But in a unified scrutiny framework, courts would be able to move on to evaluating the government's ability to justify its regulation based on interest and fit. Prevention of fraudulent or misleading market practices could be recognized as a compelling government interest justifying a narrowly tailored ban or corrective disclosure as in *Zauderer*. Similarly, mandating disclosures, such as ingredient labeling or use warnings directly relating to a product, if not unduly burdensome, might be justified on the basis of a compelling government interest in informing consumers about product attributes. Disclosures mandated as a means of regulating the administration of comprehensively regulated professional services, as in *Casey*, could properly be viewed as conduct regulations outside the First Amendment's purview. All of this is to say that a unified scrutiny framework would not sweep away familiar and anodyne commercial regulations, but instead would situate the First Amendment in its proper place as a check on government discretion to interfere with the marketplace of ideas.

This is the opportunity provided by *Becerra*. Justice Breyer's dissent acknowledged that *Becerra* was more than a one-off case. As he put it: "[t]he majority approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation" and "could radically change prior law." *Becerra*, 138 S. Ct. at 2380. The dissenters viewed that situation as cataclysmic, but advocates of robust First Amendment protections for commercial communications should be heartened by *Becerra*. At the very least, *Becerra* confirms that the cautions we previously urged on government speech regulators were well advised.