Circulating Opinion

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AMERICAN BEVERAGE ASSOCIATION, ET AL., *Plaintiffs-Appellants*,

v.

CITY AND COUNTY OF SAN FRANCISCO, *Defendant-Appellee*.

No. 16-16072, Decided January 31, 2019

*U.S. Court of Appeals for the Ninth Circuit*

## *Introduction:*

A San Francisco ordinance required that all outdoor advertisements for sugar-sweetened beverages display the warning that "Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay," so that it occupies at least 20% of the ad space. An 11-judge *en banc* panel of the court, per Judge Graber, unanimously held that the ordinance violates the First Amendment. In her separate concurrence, digested below, Judge Ikuta details the majority's failure to properly apply a 2018 U.S. Supreme Court precedent and offers a compelling alternative analysis that deserves a wide audience.

## *Opinion Digest:*

IKUTA, Circuit Judge, dissenting from most of the reasoning, concurring in the result:

In *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), the Supreme Court provided a framework for analyzing First Amendment challenges to government-compelled speech. 138 S.Ct. 2361 (2018). Under this framework, a government regulation that compels a disclosure (like the San Francisco ordinance in this case) is a content-based regulation of speech, which is subject to heightened scrutiny under the First Amendment unless the *Zauderer* exception applies. The majority fails to follow this analytical framework and makes several crucial errors. I therefore dissent.

**I.** *NIFLA* broke new ground on several key issues. Although the Court has previously considered the constitutionality of government regulations requiring lawyers to disclose certain information in their advertisements, *see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650–51 (1985); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250–52 (2010); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457–59 (1978), *NIFLA* is the first Supreme Court case to apply *Zauderer* to commercial speech more generally.

*NIFLA* considered the constitutionality of a California statute that required [licensed and unlicensed] clinics that primarily served pregnant women to post government-drafted notices. *NIFLA*, 138 S.Ct. at 2368. *** *NIFLA* began by making two important contributions to First Amendment jurisprudence. First, in its consideration of the two government disclosure requirements, *NIFLA* established, for the first time, that government-compelled speech is a content-based regulation of speech. The Court explained that "[b]y compelling individuals to speak a particular message," the licensed notices "alter[ed] the content of [their] speech" and thus were content-based regulations. *Id.* at 2371. Such content-based regulations "are presumptively unconstitutional and may be justified

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**The Honorable Sandra Segal Ikuta** was confirmed to the Ninth Circuit on June 19, 2006.

*Judge Ikuta had no role in WLF's selecting or editing this opinion for our CIRCULATING OPINION feature.*

only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.*

Second, *NIFLA* made clear that governments may not "impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Id.* (cleaned up). *** Further, *NIFLA* emphasized that "[t]his Court has been reluctant to mark off new categories of speech for diminished constitutional protection." *Id.* at 2372 (internal quotation marks omitted). While the Court did not "question the legality of health and safety warnings long considered permissible," *id*. at 2376, the Court did not create a standalone exception for such content-based restrictions. Instead, *NIFLA* reiterated that a category of speech is exempt from heightened scrutiny under the First Amendment only if the state can show a "long (if heretofore unrecognized) tradition to that effect." *Id.* at 2372.

Against this backdrop, the Court established its analytic framework. A government regulation "compelling individuals to speak a particular message" is a content-based regulation that is subject to strict scrutiny, subject to two exceptions. *Id.* at 2372–73. First, the Court held that its precedents (most notably *Zauderer*, 471 U.S. at 650) afforded more deferential review to "some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *NIFLA*, 138 S.Ct. at 2372. Second, states may regulate professional conduct, even though that conduct incidentally involves speech, such as through informed consent requirements. *Id.*; *see also Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992).

To determine whether the *Zauderer* exception applies, a court must consider whether the compelled speech governs only [1] "commercial advertising" and requires the disclosure of [2] "purely factual and [3] uncontroversial information about [4] the terms under which ... services will be available." *NIFLA*, 138 S.Ct. at 2372 (internal quotation marks and citations omitted). If the government regulation meets those requirements, the regulation should be upheld unless it is [5] "unjustified or [6] unduly burdensome." *Id.*

If the regulation does not qualify for the *Zauderer* exception, the regulation must survive heightened scrutiny to avoid violating the First Amendment. *Id.* at 2372. The Court did not decide whether strict scrutiny or intermediate scrutiny applies to government-compelled commercial disclosures that do not fall under the *Zauderer* exception. *See id.*

Applying this legal framework to both the licensed and unlicensed notice requirements, the Court held that neither regulation survived First Amendment scrutiny. The Court began by considering the notices required for licensed clinics. *Id.* at 2371–72. It first determined that the *Zauderer* exception did not apply for two reasons. *Id.* at 2372. First, the licensed notice was "not limited to purely factual and uncontroversial information about the terms under which ... services w[ould] be available," because the notice "in no way relate[d] to the services that licensed clinics provide." *Id.* (internal quotation marks and citations omitted). Second, the notice was not limited to uncontroversial information, because abortion is "anything but an 'uncontroversial' topic." *Id.*

Because the *Zauderer* exception did not apply (and because the exception applicable to regulations of conduct that incidentally burdens speech, such as informed consent requirements, did not apply, *see id.* at 2373–74), the Court then considered whether the licensed notice requirement survived heightened scrutiny. The Court declined to determine whether strict scrutiny or intermediate scrutiny applied to the licensed notice, because that notice failed even under intermediate scrutiny. *Id.* at 2375. ***

Turning to the notice required for unlicensed clinics, the Court again began by considering the applicability of the *Zauderer* exception. *Id.* at 2376–77. *** The Court focused on whether the notice requirement was unjustified or unduly burdensome. *See id.* The Court concluded that California had not satisfied its burden of proving that the unlicensed notice requirement satisfied these two prongs, because "California has not demonstrated any justification for the licensed notice that is more than 'purely hypothetical,' " *id.*, and the notice unduly burdened protected speech, *id.* at 2377–78. The Court held that the notice was underinclusive because it covered "a curiously narrow subset of speakers." *Id.* at 2377. Moreover, the notice would have a chilling effect because the statute required that the government-drafted statement be in "larger text [than surrounding text] or

 

contrasting type or color" and be posted in as many as 13 different languages. *Id.* at 2378. These requirements would "drown[ ] out the facility's own message." *Id.*

In contrast to its analysis of the licensed notice, the Court did not address the question whether the unlicensed notice requirement survived heightened scrutiny; there was no need to do so, because California did "not explain how the unlicensed notice could satisfy any standard other than *Zauderer*." *Id.* at 2377 n.3. In other words, because the state did not make a colorable argument that the unlicensed notice requirement would survive heightened scrutiny, there was no dispute that the notice requirement violated the unlicensed clinics' First Amendment rights unless the *Zauderer* exception applied. Because *Zauderer* did not apply, the unlicensed notice requirement was invalid, and the Court did not have to proceed further.

**II.** Under *NIFLA*, San Francisco's ordinance requiring companies who advertise certain sugar-sweetened beverages on billboards within San Francisco to include a warning message constitutes a "content-based regulation of speech" subject to heightened scrutiny unless an exception applies.

Turning first to the *Zauderer* exception, a court should consider whether the regulation requires the disclosure of purely factual and uncontroversial information about the terms under which services will be available. The required warning states: "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." S.F. Health Code § 4203(a).

This warning does not provide "purely factual and uncontroversial information about the terms under which ... services will be available." *Cf. NIFLA*, 138 S.Ct. at 2372; *Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265. The factual accuracy of the warning is disputed in the record. Among other things, the warning is contrary to statements by the FDA that added sugars are "generally recognized as safe," 21 C.F.R. §§ 184.1, 184.1866, and "can be a part of a healthy dietary pattern" when not consumed in excess amounts, 81 Fed. Reg. 33,742, 33,760 (May 27, 2016). *** Although *NIFLA* did not define "uncontroversial," the warning here requires the advertisers to convey San Francisco's one-sided policy views about sugar-sweetened beverages. The record shows this is a controversial topic, and therefore, the ordinance does not qualify as "uncontroversial information" under the third prong of *NIFLA*. Finally, the warning does not relate to the terms on which the advertisers provide their services. ***

Even if the warning requirement provided factual and uncontroversial information about the terms of service, the requirement would fail because it is unduly burdensome. As the majority acknowledges, the warning's size, required font size, contrasting color, and other requirements contribute to the severity of the warning's burden. *NIFLA* makes clear that requiring commercial speakers, like the unlicensed clinics in *NIFLA*, to fight a government-scripted message that drowns out their own advertisements is unduly burdensome. Moreover, the record indicates that the warning label would have a chilling effect. *** Therefore, the *Zauderer* exception does not apply.

Nor does any other exception apply. The majority is wrong to the extent it suggests that "*NIFLA* preserved the exception to heightened scrutiny for health and safety warnings." *NIFLA* made clear that only "health and safety warnings long considered permissible" would be excepted. *See* 138 S.Ct. at 2376. California has made no showing that the warning here was "long considered permissible," nor could it do so. The types of speech exempt from First Amendment protection are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," from 1791 to present. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010). These limited exceptions include defamation, obscenity, and fraud, *see id.*, not newly invented classes of speech, *see NIFLA*, 138 S.Ct. at 2371–72. *NIFLA* did not specify what sorts of health and safety warnings date back to 1791, but warnings about sugar-sweetened beverages are clearly not among them. Indeed, the First Amendment applies even to products that pose more obvious threats to health and safety, such as cigarettes. In a case involving restrictions on cigarette advertisements, the Court held that the "First Amendment also constrains state efforts to limit the advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating


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information about its products and adult customers have an interest in receiving that information." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). ***

Because *Zauderer* does not apply here, *NIFLA* directs us to consider whether the ordinance survives heightened scrutiny. Under intermediate scrutiny, even assuming that there is a substantial state interest in warning the public of health dangers from drinking sugar-sweetened beverages, the warning requirement is not sufficiently drawn to that interest. First, the requirement is underinclusive both as to the covered products and as to the means of advertisement. The ordinance does not even apply to all sugar-sweetened beverages, much less all sugar-sweetened products. Moreover, it applies to posters and billboards, but not digital ads or other types of media. Like the notices in *NIFLA*, the warning requirement is "wildly underinclusive." *See* 138 S.Ct. at 2367. Second, San Francisco could disseminate health information by other, less burdensome means, such as a less intrusive notice or a public health campaign. *Cf. id.* at 2376. Because the warning requirement is not narrowly drawn, it does not survive even intermediate scrutiny. Thus, it is not necessary to determine whether strict or intermediate scrutiny applies here.

**III.** While the majority correctly concludes that the advertisers have shown a likelihood of prevailing on the merits of their First Amendment claims, the majority fails to follow the analytic framework set out in *NIFLA* and makes several crucial errors.

First, the majority errs by skipping over the threshold question regarding *Zauderer*'s applicability, namely whether the notice requirement applies to commercial advertising and requires the disclosure of purely factual and uncontroversial information about the terms under which services will be available. Despite focusing primarily on the undue burden prong, the majority fails to provide any guidance regarding when a warning is unjustified or unduly burdensome. Instead of following *NIFLA* in considering the totality of the requirements of the unlicensed notice and their effect on the speaker (there, the clinics) to conclude that the unlicensed notice was unduly burdensome, *see* 138 S.Ct. at 2378, the majority seems to suggest that the test is whether a smaller warning would accomplish San Francisco's stated goals.

Most important, the majority errs by failing to consider whether San Francisco's ordinance could be upheld under heightened scrutiny even if the *Zauderer* exception does not apply. The majority concedes that it does not "preclude [San Francisco] from arguing that the Ordinance survives heightened scrutiny." And here, San Francisco has done just that, arguing vigorously that its ordinance survives intermediate scrutiny. The majority fails to address this argument, apparently on the ground that "logically" any such argument would be futile because "if the warning does not meet a lower standard, it necessarily does not meet a higher standard." This reasoning is flawed. A government regulation, for instance, may require a commercial speaker to include images of dying cancer patients on cigarette packages. *See, e.g.*, Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,533 (Nov. 12, 2010) (proposed rule). While a court might conclude that such compelled speech is not "purely factual and uncontroversial," the court might nevertheless conclude that the regulation meets the test under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (assuming this case provides the applicable test), because the government has a substantial interest in discouraging smoking, the regulation directly and materially advances the interest, and the restriction is narrowly tailored to discourage young people from smoking (based on expert opinion). In any event, the majority is bound by *NIFLA*, which requires courts to consider such arguments: *NIFLA* applied heightened scrutiny to the licensed notice. *** *See NIFLA*, 138 S.Ct. at 2377 n.3. The majority's failure to address San Francisco's argument is therefore contrary to Supreme Court direction.

Because the Associations have shown a likelihood of prevailing on the merits and because the other factors for granting a preliminary injunction weigh in the Associations' favor, I agree with the majority's conclusion that the district court abused its discretion by denying the Associations' motion for a preliminary injunction. But because the majority fails to apply *NIFLA*'s framework for analyzing when government-compelled speech violates the First Amendment, I dissent from the majority's reasoning.

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