The First Amendment and Commercial Speech – Hazardous to Public Health?

May 31, 2018

Moderator:
Mark Meaney, Public Health Law Center

Presenters:
Julie Ralston Aoki, Public Health Law Center
Ted Mermin, Berkeley Center for Consumer Law & Economic Justice
Rachel Bloomekatz, Gupta Wessler PLLC

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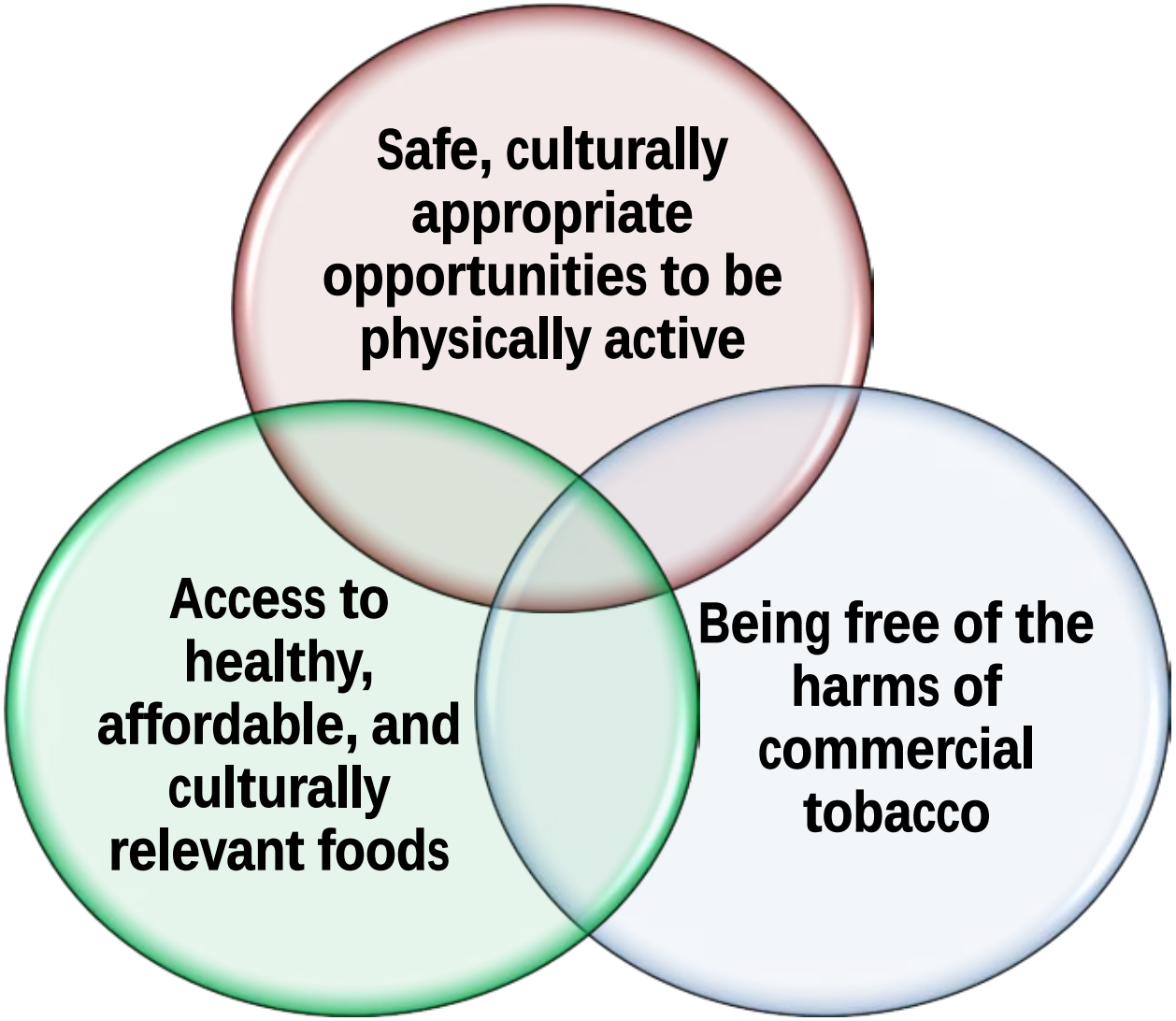

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FEATURED SPEAKER

Julie Ralston Aoki

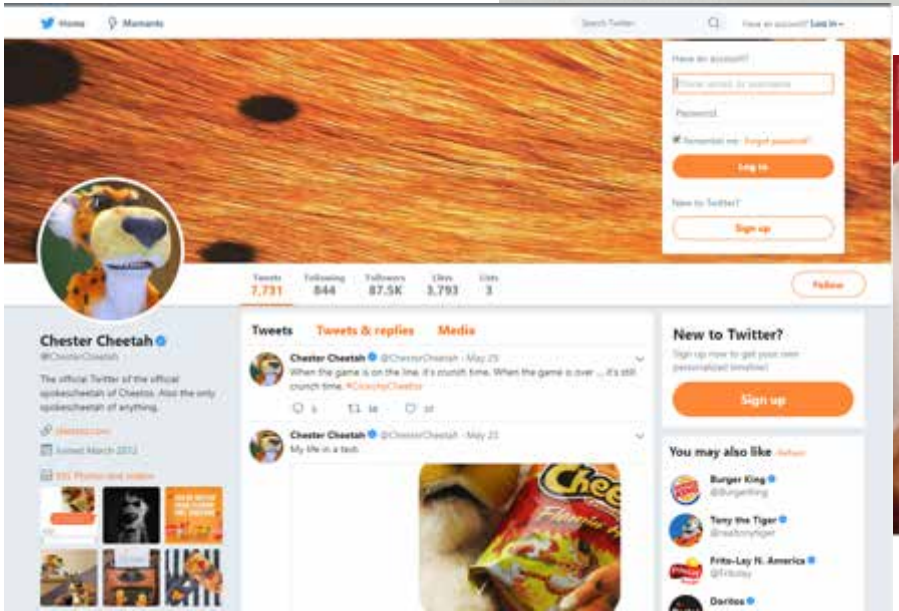
Healthy Eating & Active Living Director, Public Health Law Center

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1st Amendment – Commercial Speech

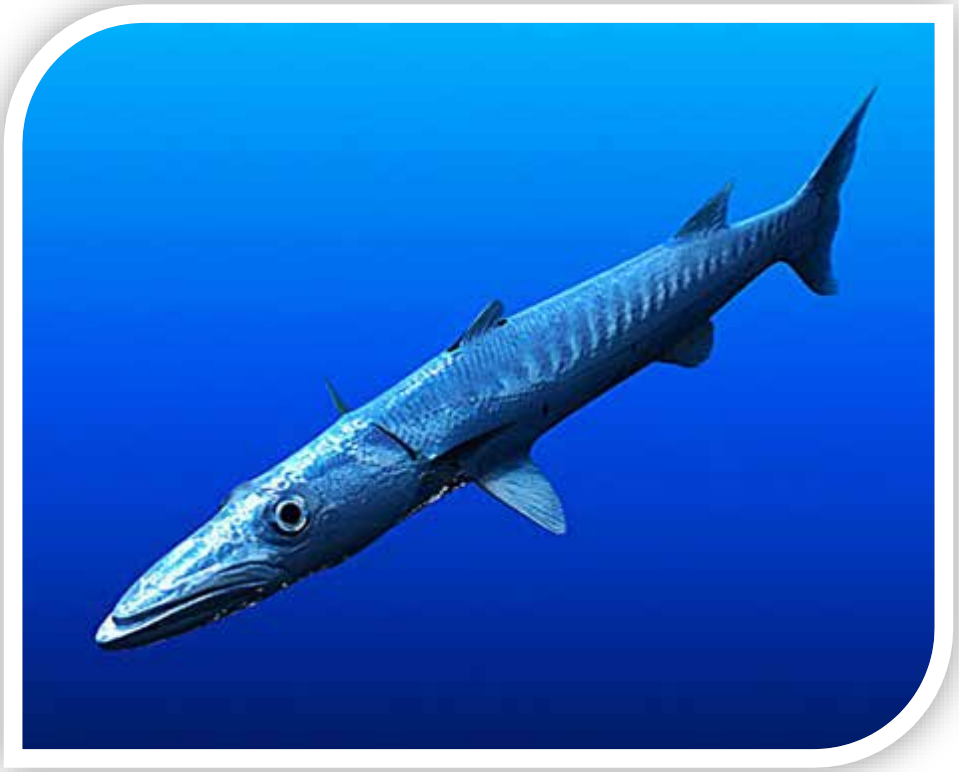
snus-news.blogspot.com



STRICT SCRUTINY

Protects
"core" speech

CENTRAL HUDSON TEST



Protects "commercial speech"

O'BRIEN TEST

Protects "expressive conduct"

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ZAUDERER TEST

Applies to factual disclosure requirements

Tests

Strict scrutiny

O 'Brien

Law likely survive

Law almost never survives

Central Hudson

Zauderer

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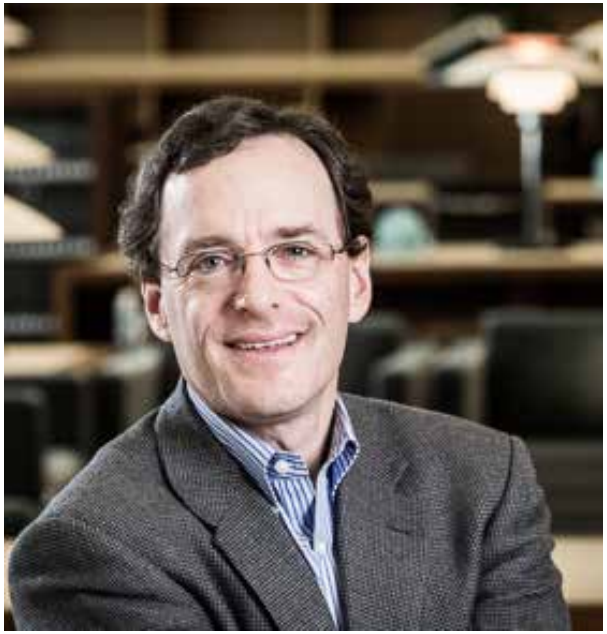
FEATURED SPEAKER

Ted Mermin

Interim Executive Director,
Center for Consumer Law and
Economic Justice at the UC
Berkeley Law School



Free Speech and Public Health: Why Can't We Be Friends?

Presented by
Ted Mermin

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… or, Commercial Tobacco Speech and the First Amendment

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LORILLARD TOBACCO CO. V. REILLY

The test makes all the difference…

Massachusetts prohibited tobacco ads and sales of tobacco within 1000 feet of schools and playgrounds. Another law prohibited self-serve tobacco displays.

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LORILLARD TOBACCO CO. V. REILLY

The test makes all the difference…

The Supreme Court held that the prohibition on advertising and tobacco sales was overbroad, struck it down.

But decided that the prohibition of self-service displays did not violate the First Amendment.

MORE RECENT FIRST AMENDMENT CHALLENGES

- Discount Tobacco v. U.S. – various provisions of the Family Smoking & Tobacco Prevention Control Act
- RJ Reynolds v. FDA – graphic cigarette warning labels selected by the FDA
- NATO v. Providence – Providence, RI's ordinance prohibiting coupon redemption and multi-pack offers
- Cigar Association v. FDA – federal "deeming" of cigars and consequent compelled speech on packaging and advertisements.
- Nicopure Labs v. FDA – federal "deeming of e-cigarettes and consequent restrictions on speech and free samples.

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DISCOUNT TOBACCO V. U.S.

First Amendment test applied:

1. Sponsorship ban

2. Ban on sampling

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DISCOUNT TOBACCO V. U.S.

First Amendment test applied:

3. “Reduced harm” claims

4. Ban on brand name merchandise

5. Ban on marketing tobacco with other products regulated by the FDA.

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DISCOUNT TOBACCO V. U.S.

First Amendment test applied:

6. New package warning labels

7. Ban on saying tobacco product is "approved by the FDA"

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DISCOUNT TOBACCO V. U.S.

First Amendment test applied:

8. "Tombstone" advertising requirements

CHOMP!!

9. Ban on promotional items with purchase ("loyalty programs")

CHOMP!!

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R.J. REYNOLDS V. F.D.A.

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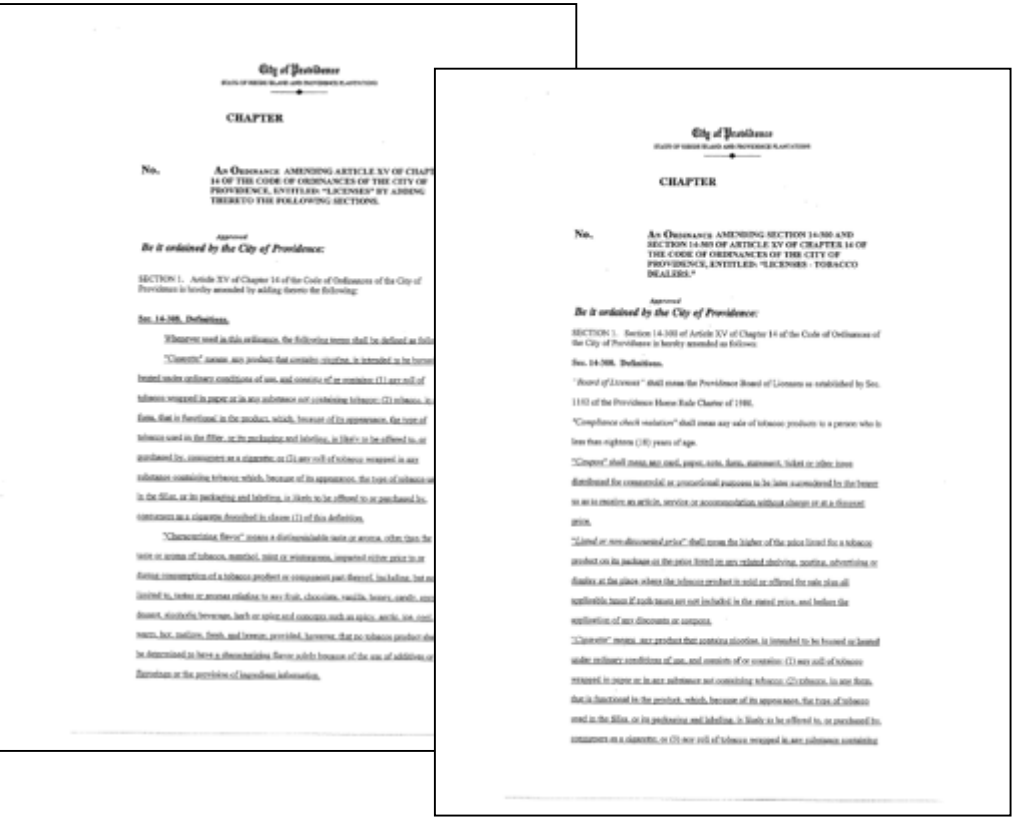
PROVIDENCE, RI'S TOBACCO PRICE ORDINANCE



City of Providence

CHAPTER

No. AN ORDINANCE AMENDING ARTICLE XV OF CHAPTER 14 OF THE CODE OF ORDINANCES OF THE CITY OF PROVIDENCE, ENTITLED: "LICENSES" BY ADDING THERETO THE FOLLOWING SECTIONS.

Be it ordained by the City of Providence:

SECTION 1. Article XV of Chapter 14 of the Code of Ordinances of the City of Providence is hereby amended by adding thereto the following:

Sec. 14-308. Definitions.

Whenever used in this ordinance, the following terms shall be defined as follo

"Cigarette" means any product that contains nicotine, is intended to be burned

heated under ordinary conditions of use, and consists of or contains: (1) any roll of

tobacco wrapped in paper or in any substance not containing tobacco; (2) tobacco, in

any form, that is functional in the product, which, because of its appearance, the type of

tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or

purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any

substance containing tobacco which, because of its appearance, the type of tobacco us

in the filler, or its packaging and labeling, is likely to be offered to or purchased by

consumers as a cigarette described in clause (1) of this definition.

"Characterizing flavor" means a distinguishable taste or aroma, other than the

taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or

during consumption of a tobacco product or component part thereof, including, but no

limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa

dessert, alcoholic beverage, herb or spice and concepts such as spicy, sweet, cool

warm, hot, mellow, fresh, and harsh; provided, however, that no tobacco product sha

be determined to have a characterizing flavor solely because of the use of additives o

flavorings or the provision of ingredient information.

City of Providence

CHAPTER

No. AN ORDINANCE AMENDING SECTION 14-300 AND SECTION 14-305 OF ARTICLE XV OF CHAPTER 14 OF THE CODE OF ORDINANCES OF THE CITY OF PROVIDENCE, ENTITLED: "LICENSES - TOBACCO DEALERS."

Be it ordained by the City of Providence:

SECTION 1. Section 14-308 of Article XV of Chapter 14 of the Code of Ordinances of the City of Providence is hereby amended as follows:

Sec. 14-308. Definitions.

"*Board of Licenses*" shall mean the Providence Board of Licenses as established by Sec. 1103 of the Providence Home Rule Charter of 1980.

"*Compliance check violation*" shall mean any sale of tobacco products to a person who is less than eighteen (18) years of age.

"*Coupon*" shall mean any card, paper, note, form, statement, ticket or other item distributed for commercial or promotional purposes to be later surrendered by the bearer so as to receive an article, service or accommodation without charge or at a discount price.

"*Listed or non-discounted price*" shall mean the higher of the price listed for a tobacco product on its package or the price listed in any related shelving, posting, advertising or display at the place where the tobacco product is sold or offered for sale plus all applicable taxes if such taxes are not included in the stated price, and before the application of any discounts or coupons.

"*Cigarette*" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing

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LAWSUIT CHALLENGING PROVIDENCE'S BAN ON COUPON REDEMPTION

NATO v. City of Providence

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LAWSUIT CHALLENGING PROVIDENCE'S LAW BANNING COUPON REDEMPTION

Communication? Or mere transaction?

CIGAR ASSOCIATION V. FDA (D.C. DIST. 2018)

Compelled commercial speech under the TCA:

FDA requires cigar makers to use health warnings that cover 30 percent of their packaging and 20 percent of their advertisements.

Decision:

> To quote *Zauderer*: What cigar makers are objecting to is that the Deeming Rule "require[s] them to provide somewhat more information"—or, as more apt here, larger text on a greater surface area—"than they might otherwise be inclined present."

NICOPURE LABS V. FDA

Restricted commercial speech under the TCA:

FDA forbids e-cigarette makers from making unproven health claims and from giving out free samples.

1. Free sample prohibition regulates conduct, not speech. ("But even if one were to conclude that the ban is a regulation of speech, the legislation also satisfies the *Central Hudson* factors.")

2. Modified risk portion of TCA is constitutional under *Discount Tobacco* reasoning, which applies to e-cigarettes equally.

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FEATURED SPEAKER

Rachel Bloomekatz

Principal, Gupta Wessler PLLC

Eating Through the First Amendment:

How the First Amendment May Impact Policies Aimed to Advance Healthy Eating and Lifestyles

Rachel Bloomekatz
Principal, Gupta Wessler
May 31, 2018

Gupta | Wessler

How Do We Promote Healthy Eating and Lifestyles?

- Change the economic environment
- Change the physical environment
- Change the informational environment
- Direct mandates and bans

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Warnings, Disclaimers, and Labels, Oh My!

WARNING:
Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.

Is this impermissible compelled speech in violation of the 1A?

- ***Zauderer*, 471 U.S. 626 (1985)**
  - **“**Purely factual and uncontroversial information”
  - “Reasonably related to the State's interest”
  - Can’t be unduly burdensome

What Are Nutritional “Facts”?

Nutrition Facts

8 servings per container

Serving size 2/3 cup (55g)

Amount per 2/3 cup

Calories 230

% DV*	
12%	**Total Fat** 8g
5%	Saturated Fat 1g
	Trans Fat 0g
0%	**Cholesterol** 0mg
7%	**Sodium** 160mg
12%	**Total Carbs** 37g
14%	Dietary Fiber 4g
	Sugars 1g
	Added Sugars 0g
	Protein 3g
10%	**Vitamin D** 2mcg
20%	**Calcium** 260mg
45%	**Iron** 8mg
5%	**Potassium** 235mg

* Footnote on Daily Values (DV) and calories reference to be inserted here.

How the Sugar Industry Shifted Blame to Fat

Home / Healthy Eating / Food & Nutrition / Nutrition Facts

Salt Shake-Up: Why Sodium Is Good for You

No need to sweat about sodium if you're healthy and fit. Here's why you should take all that expert advice about cutting back your intake with, well, a grain of salt.

Gupta / Wessler

Pass the Salt?!

National Restaurant Ass'n v. New York City Dept. of Health and Mental Hygiene, 148 A.D.3d 169 (N.Y. 2017)

- **The Problem:** "Excess consumption of sodium can increase blood pressure, and is associated with a higher risk of cardiovascular disease, congestive heart failure and kidney disease…."
- **Plaintiff:** "[T]he Rule fails to meet its goal because a customer could order items separately, each of which does not by itself exceed 2300 mg of salt, but when consumed together exceed the recommended daily salt limit."
- **The Court:** "[T]he fact that a regulation attempt[s] to address part of a perceived concern ... provides no basis for invalidating the regulation."

Taking on Big Soda

- *American Beverage Ass'n v. City & County of San Francisco*, 187 F.Supp.3d 1123 (N.D. Cal. May 17, 2016), rev'd by 187 F.Supp.3d 1123 (N.D. Cal. May 17, 2016) (VACATED à *stay tuned!*)

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Will It Pass Constitutional Muster?

Is it factual and noncontroversial?

- The District Court: Fact þ
- The Panel: Give us a red pen:

~~Drinking~~ Overconsuming beverages with added sugar(s) ^may contribute~~s~~ to obesity, diabetes, and tooth decay.

- The en banc Court: ???

Is it unduly burdensome?

- The District Court: No þ
- The Panel: 20% is WAAAAAY TOO BIG, it's distracting me from these attractive people drinking coke.
- The en banc Court: ???

What If We Don't Know Yet If Something Is Unhealthy?

***CTIA v. San Francisco*,**
494 Fed.Appx. 752 (9th Cir. 2012) (unpublished)

"[T]he revised fact sheet contains more than just facts. It also contains San Francisco's recommendations as to what consumers should do if they want to reduce exposure to radiofrequency energy emissions. This language could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous. The FCC, however, has established limits of radiofrequency energy exposure, within which it has concluded using cell phones is safe.

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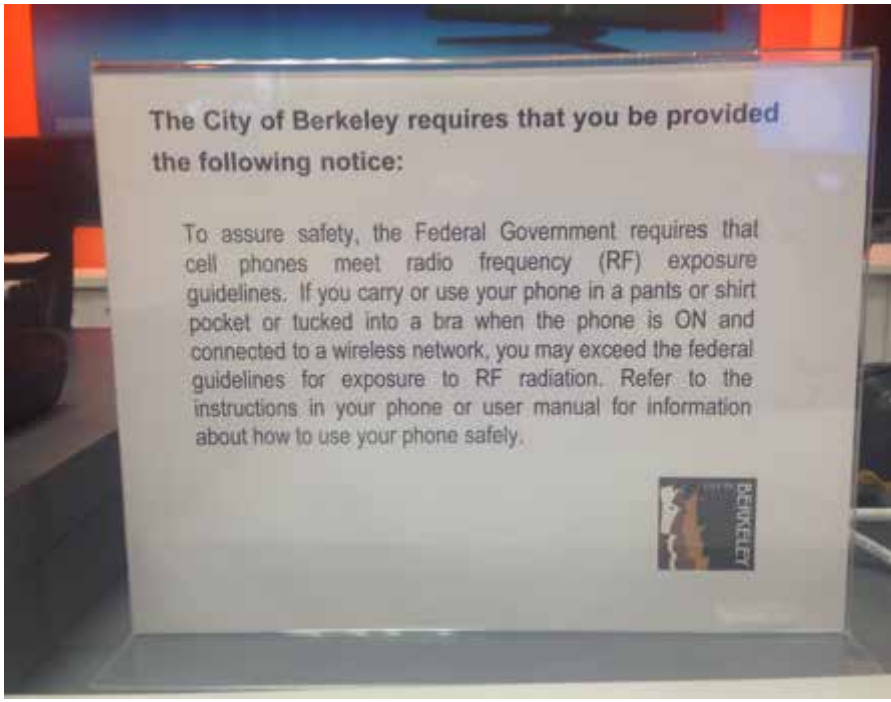
But it's OK if you just give the information?

CTIA-The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1119 (9th Cir. 2017)---petition for cert. pending.

Majority: The text of the compelled disclosure is literally true. We take it sentence by sentence…

Dissent: "But consumers would not read those sentences in isolation the way the majority does. Taken as a whole, the most natural reading of the disclosure warns that carrying a cell phone in one's pocket is unsafe. Yet Berkeley has not attempted to argue, let alone to prove, that message is true."



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What's in Our Food?!

Grocery Mfgrs Ass'n v. Sorrell,
102 F.Supp.3d 583 (D. Vt. 2015)

PLAINTIFFS: *Compels disclosure of "opinion" that whether product is GE should matter.*

DISTRICT COURT: *Nice try…*

***Int'l Dairy Foods Ass'n v. Amestoy*,**
92 F.3d 67 (2d Cir. 1996)

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Limiting or Banning Promotion of Unhealthy Products

What if instead of providing warnings about unhealthy products (compelled speech), a government entity wanted to prevent (or limit) companies from promoting their unhealthy foods?

- E.g., Restricting product placement in movies or TV.
- E.g., No cartoon characters on sugary cereals.

E.g., In Quebec, the government banned advertising junk food to kids under the age of 13 on TV and in print. UK, Norway, Sweden, Greece have followed. Now Canada is poised to adopt it nationwide. Can we?

We are not Canada…

Are we blocked by the First Amendment or the food industry?

The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce. 15 U.S.C. 57a(h).

Rachel Bloomekatz

Principal, Gupta Wessler

rachel@guptawessler.com

Gupta Wessler PLLC is a national appellate, constitutional, and complex litigation boutique. We brief and argue high-stakes cases in the U.S. Supreme Court and courts across the country. We also pursue progressive policy solutions in the nation's capital. Through all of our efforts, we aim to help shape the law in ways that enhance justice and improve people's lives.

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