

## VIEWPOINT

# Can the Government Require Health Warnings on Sugar-Sweetened Beverage Advertisements?

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In September 2017, the Ninth Circuit ordered a district court to issue a preliminary injunction enjoining enforcement of San Francisco's requirement that sugar-sweetened beverage (SSB) advertisements display a health warning statement, finding that it likely violated the First Amendment rights of advertisers of SSBs.<sup>1</sup> Given the health harms of SSB consumption<sup>2</sup> and the ubiquity of warnings on other consumer goods, the findings of the court are of interest from both public health and legal perspectives. San Francisco requested a rehearing and this decision is under consideration.

The First Amendment protects against government restrictions and compulsions of speech, including in the commercial context. Advertising is considered protected commercial speech, which is speech that proposes a commercial transaction. Yet, governments may still require advertisers to disclose factual information, including warnings, about their goods.<sup>3</sup> Product warnings are appropriate to disclose the existence and nature of risks and inform consumers of risks that are not generally known, allowing consumers to reduce harm through appropriate use or avoid risks by making an informed decision to abstain. When challenged under the First Amendment, government warning requirements are analyzed under the Supreme Court's *Zauderer* test.<sup>3</sup> Under this test, warnings and disclosures are constitutional if they provide "purely factual and uncontroversial information," are "reasonably related to the state's interest," and do not "chill" (discourage) protected advertising by being "unjustified or unduly burdensome."<sup>1,3</sup>

In San Francisco, the law required SSB advertisers to display: "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," enclosed within a rectangular border and encompassing 20% of the area of advertisements (eg, billboards).<sup>4</sup> Although the Ninth Circuit found that San Francisco's interest in its citizens' health was constitutional, the court found the requirement likely violated other aspects of *Zauderer* (Table).<sup>1</sup>

First, the Ninth Circuit disagreed that the warning was purely factual, accurate, and uncontroversial.<sup>1</sup> This opinion reflected San Francisco's emphasis on added sugars. Although the preamble to the law mentioned health harms of SSBs, the primary rationale focused on added sugar: "to inform the public of the presence of added sugars" to promote informed choice.<sup>4</sup> The court noted that San Francisco did not argue that SSBs are uniquely harmful, and thus it found the evidence did not support singling out SSBs compared with other sources of added sugars.<sup>1</sup> Although SSB intake has declined over the past 10 years, its consumption remains high<sup>6</sup> and the obesity epidemic remains a public health problem. In addition, SSB consumption exerts

health harms beyond weight gain and their contribution to added sugar intake. A clearer emphasis in the law on the special harms of SSBs, rather than added sugars in general, would have strengthened the government's case. In addition to being a major source of added sugar in the US diet, the liquid form of SSBs could enable rapid consumption and digestion without the same satiety cues as solid foods.<sup>7</sup> SSBs also contain no relevant ingredients to provide offsetting health benefits, in comparison with sweetened whole grain cereals, nut bars, yogurt, or other foods with added sugars, which can have healthful components. Furthermore, the associations of SSBs with weight gain, obesity, type 2 diabetes, and heart disease are each stronger and more consistent than for added sugars in solid foods.<sup>2</sup> In addition, compared with other foods containing added sugars, SSBs are the only source for which randomized controlled trials have confirmed the observational link to weight gain.<sup>8</sup> Thus, health warnings for SSBs are appropriate to inform the public of SSBs' special health risks so individuals can make an informed choice whether to consume the product. Governments seeking to require warnings for SSBs should clearly state the evidence of the particular health harms of SSBs in the preamble to the law.

Second, the Ninth Circuit objected to the message in the warning that SSBs contribute to health harms regardless of quantity consumed or other choices and suggested that including the words "overconsumption" or "may" would increase accuracy.<sup>1</sup> However, based on the scientific evidence, health risks of SSBs increase monotonically.<sup>2</sup> Thus, use of the word "overconsumption" would not be scientifically accurate because there is no clear threshold effect between SSB consumption and harm. Yet, due to potential individual variation in responses, incorporating the word "may" or "can" would be scientifically accurate and are used in alcohol and smokeless tobacco warnings. This does not render San Francisco's original warning non-factual, inaccurate, or controversial.

Third, the Ninth Circuit found the size and rectangular border requirements unduly burdensome. This decision reflects the imprecise requirements of *Zauderer*, which leads to subjective determinations by courts.<sup>5</sup> Unless the burden is obvious (eg, it would be infeasible to include a disclosure requirement within the space of the advertisement), courts have arrived at varying conclusions for different cases. San Francisco's formatting requirements found questionable by the Ninth Circuit are identical to the Tobacco Control Act's cigarette advertisement warnings upheld by the Sixth Circuit: 20% of the advertisement enclosed within a rectangular border the width of the "W" in "WARNING."<sup>4</sup> Circuit courts can differ on their interpretation of Supreme Court tests when the Court has not set forth parameters for permissible mandates.<sup>5</sup> Given these differing judgments,

Table. Legal Considerations in the Context of Government-Mandated Sugar-Sweetened Beverage Health Warnings

Legal Considerations <sup>3</sup>	Description and Examples in Previous Cases <sup>a</sup>	Ninth Circuit's Holding as Applied to the San Francisco SSB Warning <sup>1</sup>	Recommendations
Purely factual and uncontroversial information	Warnings and disclosures are required to be factual, accurate, and uncontroversial; controversial refers to the factual nature of the language (eg, courts have upheld sodium warnings on restaurant menus and cancer warnings on tobacco products as meeting this standard)	The "factual accuracy of the warning is, at a minimum, controversial"; the warning failed to include words such as "overconsumption" or "may"; therefore, it is "misleading and, in that sense, untrue"; the warning singles out SSBs and conveys the message that they are less healthy than food with added sugars	Governments should base warning language on the special health harms of SSBs and present this evidence in the law's preamble; San Francisco's warning language meets this standard and is similar to cigarette warnings; the terms "may" and "can" are also factually accurate and used in alcohol and smokeless tobacco warnings, respectively; the word "overconsumption" is not scientifically accurate in the context of SSBs
Reasonably related to the state's interest in preventing deception of consumers	All federal appellate courts that have expressly considered this requirement have found valid interests beyond preventing deception of consumers <sup>5</sup> (eg, health, informed decision-making); this question is outstanding in the Supreme Court	There is "no dispute that San Francisco has a substantial government interest in the health of its citizens"	Government has a valid interest in health, informed decision making related to SSB consumption, and reducing consumer confusion about the special health harms associated with SSB consumption
Unjustified disclosure requirements might offend the First Amendment by "chilling" protected commercial speech	This indicates a need for evidence, but not all courts have separately analyzed this or required specific evidence to support the disclosure; nonetheless, most courts review the evidentiary record used to justify the disclosure	The court did not separately analyze whether the warning was unjustified, but challenged the factual basis of San Francisco's warning by finding it (1) improperly singled out SSBs, contrary to (unrelated) statements by the American Dental Association and FDA that added sugars in both foods and beverages lead to health problems, and (2) contrary to the FDA categorization of added sugars as GRAS	Governments should set forth the scientific evidence of the special health harms of SSB consumption and not focus on added sugar; the FDA's GRAS determination is not dispositive, as salt is GRAS but New York City has a sodium warning label for its restaurants' menus upheld under <i>Zauderer</i> ; if the government focuses on SSBs, the GRAS determination is not relevant because the warning is for the category of SSB products, not an ingredient in the products
Unduly burdensome disclosure requirements might offend the First Amendment by "chilling" protected commercial speech	The primary case used to determine if a disclosure requirement is unduly burdensome is <i>Ibanez v Fla Dep't of Bus &amp; Prof'l Regulation</i> (512 US 136 [1994]); in which the Supreme Court struck down a requirement that was so long and detailed that it ruled out the ability of lawyers to note their specialization on business cards or letterhead; courts have struck down other disclosure requirements as being unduly burdensome (eg, the font size must be as large as the largest print in the advertisement); in contrast, courts upheld font size as large as the statement it clarified and the requirement that health warnings take up 50% of cigarette packages, 30% of smokeless tobacco packages, and 20% of tobacco advertising	The 20% "warning requirement in this case unduly burdens and chills protected commercial speech" because the font size is "so large that an advertisement can no longer convey its message"; "The black box warning overwhelms other visual elements in the advertisement"; the concurring opinion likewise found 20% to be "so large that it probably will chill commercial speech"	The Sixth Circuit upheld identical health warning format requirements for tobacco advertisements, including the 20% size and rectangular border; unless the Ninth Circuit agrees to rehear the case and reverses the original decision, there will be disagreement between the Ninth Circuit and Sixth Circuit on the burdensome nature of these requirements; such a question could go to the Supreme Court; governments could wait for a subsequent court decision or aim to move forward with the 20% size and rectangular requirement and bolster arguments that it is not burdensome; governments alternatively might modestly reduce the size of an SSB health warning requirement and have the border set out with thinner lines

Abbreviations: FDA, US Food and Drug Administration; SSB, sugar-sweetened beverage; GRAS, generally recognized as safe.

<sup>a</sup> Based on cases subsequent to *Zauderer v Office of Disciplinary Counsel*<sup>3</sup> that rely on the test set forth therein.

policy makers considering similar warnings may move forward with the formatting requirement while bolstering arguments that it is not burdensome or wait for future court determinations on this issue. Alternatively, governments can modify formatting requirements by slightly reducing size, permitting "hairline" borders, or using other methods to ensure prominence and conspicuousness.

The Ninth Circuit found the SSB warning to be reasonably related to the government's interest, with "no dispute that San Francisco has a substantial government interest in the health of its citizens."<sup>1</sup> SSB

warnings are an emerging policy option to support healthful diets and reduce diet-related chronic disease. The scientific evidence affirms the special health harms of SSBs, upon which policy makers should set forth a clear rationale. Thus, the scientific evidence and First Amendment case law support an SSB health warning that aligns with the recommendations above, with the following suggested language:

[GOVERNMENT ENTITY] WARNING: Drinking beverages with added sugar(s) can contribute to tooth decay, weight gain, diabetes, and heart disease.

#### ARTICLE INFORMATION

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