Pages 1 - 33

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

CTIA - THE WIRELESS ASSOCIATION®, Plaintiff, VS. THE CITY OF BERKELEY, CALIFORNIA, and CHRISTINE DANIEL, CITY MANAGER OF BERKELEY, CALIFORNIA, in her official capacity, Defendants.	)	**No. C 15-2529 EMC** San Francisco, California Thursday, January 21, 2016

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, California 94105-0921
BY: JOSHUA S. LIPSHUTZ, ATTORNEY AT LAW
JOSHUA D. DICK, ATTORNEY AT LAW

For Defendants:

City of Berkeley
Office of the City Attorney
2180 Milvia Street, 4th Floor
Berkeley, California 94704
BY: ZACHARY COWAN, CITY ATTORNEY
SAVITH IYENGAR, DEPUTY CITY ATTORNEY

AMANDA SHANOR, ATTORNEY AT LAW
Yale Law School
127 Wall Street
New Haven, Connecticut 06510

Reported By: Katherine Powell Sullivan, CSR No. 5812, RMR, CRR
Official Reporter

Thursday - January 21, 2016 **2:07 p.m.**

P R O C E E D I N G S

---000---

THE CLERK: Calling case C 15-2529, CTIA versus City of Berkeley.

Counsel, please come to the podium and state your name for the record.

MR. LIPSHUTZ: Good afternoon, Your Honor. Joshua Lipshutz from Gibson Dunn on behalf of plaintiff CTIA - The Wireless Association.

THE COURT: All right.

MS. SHANOR: Amanda Shanor from Yale Law School on behalf of the defendant City of Berkeley. And with me are City Attorney Zachary Cowan and Savith Iyengar of the City Attorney's Office.

THE COURT: All right. Thank you, Ms. Shanor.

So this is a prescribed procedure that we talked about. Defendants have moved to dissolve the preliminary injunction based on the amendment to the Berkeley ordinance. So it does, of course, require us to revisit the full question. At least technically.

And so the question is whether there has been something that would persuade the Court that its conclusion in granting in part and denying in part the preliminary injunction in the first place was an error.

And, I mean, I'll give you a chance to say your piece, but it does seem to me, number one, that I'm hard-pressed to find a case which discusses the appropriate level of scrutiny where you have, number one, commercial speech versus noncommercial speech; number two, compelled disclosure versus suppression or restriction; and, number three, where it's clear that the speech is that of the government and not one to be attributed to the displayer, the store, or the purveyor of cell phones.

I understand you can piece together language from various cases that talk about compelled speech and speech of others and carrying others. But I have yet to see anything that is persuasive on point that changes my analysis. But that, in any event, even if we go the traditional route -- which I think I did as the main analysis, the question of whether *Zauderer* applies here, I do think -- and you've all cited the *Sorrell* case, Second Circuit's decision. And I think it's a pretty good analysis. At the end of the day, we look to whether or not what's being compelled or disclosed is factual.

And I understand the term "uncontroversial" is somewhat vague, and there's some dispute about what that means. But I think what *Sorrell* says is that it's got to be truthful and non-misleading commercial speech. Accurate factual commercial information. Quote-unquote.

And so I've looked at the ordinance again, stripped of the one provision that I found that was problematic. And I don't

see anything that is factually inaccurate. And I take it that, you know, it's a factually correct statement that if you wear the phone in your shirt pocket you may exceed the federal guidelines for exposure to radiation. I think that is true based on those guidelines and the distance and everything. It does say "To assure safety, the federal government requires cell phones meet radiofrequency exposure guidelines."

As I understand CTIA's argument is that it is more of a misleading nature. Not that it's inaccurate, but it suggests to the consumer that if you exceed the guidelines you're going to be in danger, health -- danger to your health, when, in fact, there's a large margin of error here that the guidelines, at least for thermal radiation, is set very far below where actual danger exists; there's great room by multitudes of margin; and that this somehow doesn't disclose that, and, therefore, that's what's misleading about it.

It seems to me that's the gist of your argument. Because had it disclosed all the other conditions, you wouldn't say this was misleading.

MR. LIPSHUTZ: Well, our argument, Your Honor, with respect to our argument is both that it's factually inaccurate but, more to your point, misleading.

And so if the standard that's set forth in *Zauderer* is factual and uncontroversial, then uncontroversial cannot simply mean factual or accurate as this Court determined. It has to

mean something else.

And, in our opinion, "uncontroversial" means that it's not misleading and not -- and not going to raise the kind of fear and enter our clients into this debate that's currently ongoing over RF energy.

THE COURT: How is that different -- every kind of warning, whether it's a health warning about side effects on a prescription or any kind of medication, a warning on cigarettes, a warning on alcohol, a warning on anything else, there's always going to be some debate, some margin. Like, this side effect X is so unlikely, it's only one in a thousand. Why list it? Why do you need to list these three things? Or the chances of cancer from this amounts of use of X are so small.

It seems to me that -- are you saying that anytime there's a debate, even a reasonable debate about the science, about the accuracy, about the magnitude of the risk, which is never clear-cut, there's always new studies coming out, that that implicates the First Amendment and invokes strict scrutiny every time the government sets some kind of limit and compels disclosure of some risk?

MR. LIPSHUTZ: If the government is entering a debate and a real and a substantial debate then yes, Your Honor, that does invoke the First Amendment. And if --

THE COURT: So every time -- and call it a debate.

What does it take that the manufacturer says no, I don't agree that the chances of this side effect are one in a billion, not one in a million; or one in a million, not one in a thousand? That makes it a debate and that makes it controversial and takes it out of *Zauderer*?

MR. LIPSHUTZ: No, but, Your Honor, in those cases -- in the cigarette case that Your Honor pointed to in your opinion, there's at least science behind that.

There is no science behind this. The FCC flatly disagrees with the statements that are in this disclosure.

The City of Berkeley is requiring my clients to say that, "In order to assure safety..." and then it goes on to say that when you carry or use your phone in a pants or shirt pocket or tucked in a bra when the phone is on, you may exceed the federal guidelines. That's simply -- there's no science behind that. There's no science that there's any safety concern behind that.

THE COURT: Wait a minute. First of all, that is what the guidelines say. "You may exceed." Right? Isn't that true, if you don't have that distance under which the testing was done, that you could exceed? I mean, that's not --

MR. LIPSHUTZ: -- certain limited conditions under which you may exceed. But that's not a safety concern. The reason it's not a safety concern is because there's no science at all suggesting that the level of RF energy --

THE COURT: So why does the FCC even have guidelines? If there's no safety concerns at all, what's the purpose of the FCC guidelines about exposure?

MR. LIPSHUTZ: The FCC conducted testing to determine whether there is a safety risk with respect to RF energy from cell phones and determined that there's not.

THE WITNESS: So why do they even require -- why can't there be infinite exposure? Why can't there be -- why set any kind of limits as all?

MR. LIPSHUTZ: Because there is a limit above which RF energy may cause a health exposure. But it's not a cumulative risk, more RF energy versus less RF energy, as long as they are below the safety threshold, which is far, far, far -- 50 times the regulatory threshold does not pose any safety --

THE COURT: Well, why did the FCC set the limits as they did and conduct prescribed testing limits as it did with respect to distance from the body and everything else?

MR. LIPSHUTZ: Well, the FCC left a wide margin below the level at which there possibly --

THE COURT: Shouldn't your beef be with the FCC and the way they set up the testing and guidelines?

MR. LIPSHUTZ: No, Your Honor. The beef is with -- to use Your Honor's language -- is with the way that the ordinance is drafted: "to assure safety."

This is not to assure safety. This is -- this is, quite

frankly, fear-mongering on the part of Berkeley that's trying to get consumers to change their behavior in a way that is not necessary --

THE COURT: Forget the rest of the sentence, the paragraph.

But it says: "To assure safety, the federal government requires that cell phones meet radiofrequency exposure guidelines." That statement, in and of itself, is false?

MR. LIPSHUTZ: That statement is: "To assure safety, the federal government requires that cell phones meet radiofrequency exposure guidelines."

The federal government does require that cellphones meet radiofrequency exposure guidelines. That's true. And the tests were conducted to determine whether safety is a concern. But the FCC determined that -- that safety is not a concern. So that statement is, at best, misleading.

And then if you continue on, the next sentence says: "If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is on and connected to a wireless network, you may exceed the federal guidelines."

Well, that is theoretically possible, but it does not pose any kind of safety risk. So the juxtaposition of those two sentences together is certainly misleading if not outright false.

THE COURT: What's your response to that?

MS. SHANOR: So, Your Honor, the ordinance -- opposing counsel's reading of the ordinance, I think, is manifestly false.

The ordinance no more suggests that cell phones are unsafe than a nutrition label mandating the required amount of sodium be disclosed suggests that salt is unsafe.

No one contests, including opposing counsel, that RF energy is unsafe at some level, and that the FCC's regulations are targeted -- are safety and health regulations, and that they require mandating a disclosure of the safe distance within the manuals of CTIA's members.

But to the larger point --

THE COURT: What about his argument that saying when you exceed the federal guidelines for exposure to RF radiation, because there's such a wide margin of safety here, that it does not implicate safety, and to juxtapose the two sentences, the first sentence is to assure safety, blah blah blah, and then it goes on to talk about you may exceed the guidelines, that implies that -- his argument, as I understand it, that implies a potential jeopardy to safety. What's your response to that?

MS. SHANOR: The upshot of his argument, Your Honor, is that at any point where there is a safety margin, as in this case, where with elevators or with cancer and drug regulation, as you said, at that point then the First Amendment comes into play if the government mandates a disclosure. That can't be

the rule. That would constitutionalize all consumer regulations, all risk regulations.

And in our system those sorts of discretionary judgments about what risks are tolerable, which ones are not, are left to the political branches and are reviewed under the deferential principles of administrative law, not questions of constitutional law.

THE COURT: So what does "uncontroversial" mean as that term is used in *Zauderer*?

MS. SHANOR: We fully agree with this Court's analysis that uncontroversial, like the Sixth Circuit has said, is the same as factual and accurate.

And that's for many reasons. One is that in *Zauderer, Zauderer* only used the word "uncontroversial" a single time and to describe the disclosure at issue in that case. But when it articulated its rule, it used the word "factual." And in *Milavetz* the Court did not use the word "uncontroversial" a single time; but, instead, used the words "factual" and "accurate."

Again, as your opinion explained, the Sixth Circuit has also come to a similar conclusion.

THE COURT: So you would agree that, at least if we're within the framework of *Zauderer*, everybody agrees it's got to be factual and, for instance, not subjective like the violence rating of video games?

MS. SHANOR: Sure.

THE COURT: But you say that uncontroversial really either adds nothing or only means it's accurate?

MS. SHANOR: Yes.

THE COURT: And accuracy can depend on -- what if this said that there is an X percent chance of cancer if you wear the phone tucked in your shirt pocket for long periods of time? That's factual. And if the other side -- if the manufacturers contest the accuracy of that, what would a court do under those circumstances? If they actually say that there is no such risk and take issues with --

MS. SHANOR: It would analyze, essentially, under rational basis principles whether or not there was a sufficient reason to conclude that the government's regulation was irrational.

THE COURT: So if there's a contest as to the degree of risk or the margin of safety, then you would look at it under rational basis review?

MS. SHANOR: Right.

THE COURT: And if there's some rational basis like there's some scientific support for it, that would be sufficient? Or what would be the test?

MS. SHANOR: As this Court noted in its earlier opinion, the courts of appeals have generally concluded that *Zauderer* is essentially the rational basis test. And under

rational basis principles the burden of proof would be on the plaintiff, in the main, to disprove -- to demonstrate not only that the government's actual interest was irrational but also that any conceivable interest was irrational.

As a rational-basis-type test, the burden is on the plaintiff to demonstrate that --

THE COURT: That would be the toothless branch of rational base, not the rational basis with a bite.

MS. SHANOR: And I'm not saying that that's necessarily what it is, but that analogously the burden will be on the plaintiff. And I'll say, too, that both *Zauderer* and *Milavetz* support this view because in those cases the Court expressly accepted that even -- that the government's interest could be, quote-unquote, self-evident, and that the government had -- the plaintiff -- sorry, the government didn't have any evidence whatsoever as to its -- as to its interest.

THE COURT: Well, those cases are a little different because they don't involve questions of, sort of, science and scientific debate. Either you've got to disclose a certain thing because of the ethical risk, or whatever. But where there is -- where a lot of the warning stuff comes up, there's going to be some scientific debate about how much mercury does it take before there's a danger to health.

And so that's the question. At what point does it become constitutionalized? And if it becomes constitutionalized,

what's the standard of review? What's the Court supposed to do? Delve into the science and figure out who's right or wrong? Or does it only determine whether there's some reasonable scientific assertion by the government? Or does it -- what does it do?

MS. SHANOR: So say again this conversation stresses why, in fact, these sorts of questions should be running under the deferential principles of administrative law and not as constitutional First Amendment questions.

The Constitution will only come into play at a much higher level of concern. That is, again, when a disclosure is either so unduly burdensome or unjustified as to chill a commercial speaker's speech.

And so these sorts of questions, again, should be questions of administrative law are, not questions that are constitutional.

MR. LIPSHUTZ: That simply turns *Zauderer* and *Central Hudson* and many other cases on their heads.

First of all, the problem here, I think, stems largely from the fact that *Zauderer*, by its own terms, does not even apply unless there's something deceptive or misleading in the first place.

THE COURT: Well, not all courts have agreed that *Zauderer* is so limited.

MR. LIPSHUTZ: That's true. Not all courts have

agreed. But some courts have. And the D.C. Circuit *en banc* was divided 8 to 3 on that question. Judges Kavanaugh and others found that that was the standard.

And I think that would solve, frankly, a lot of this Court's questions because we know from many other aspects of law, including securities law and other areas of law, that if there's misleading speech courts know how to order disclosures. And the government can order disclosures --

THE COURT: But is the government's sole interest in these commercial disclosure cases limited to deception? Is there not a health area, safety area, or other kinds of areas that they might be concerned about? Ethics and other things.

MR. LIPSHUTZ: With respect, Your Honor, that's a red herring because the Court doesn't have to decide that -- the government has to have, under *Zauderer* and *Central Hudson* the government has to have a substantial interest in regulating the speech.

Combating misleading commercial speech is a substantial interest. So that's one possible substantial government interest. And that's what *Zauderer* actually held, that combating misleading speech by companies is --

THE COURT: So would safeguarding health be a substantial governmental interest?

MR. LIPSHUTZ: It could, Your Honor. But that's not what we have here. In fact, the City of Berkeley has expressly

disclaimed that this is a safety-related ordinance.

They have said specifically and explicitly in the legislation itself that this is simply a right to know. They think that the public has a right to know and that, therefore, my clients have an obligation to tell the public about the RF exposure. It's not a safety measure.

So I agree with Your Honor that it certainly could be the case that health and safety could be a substantial government interest. I'm not denying that. But we know that that's not what's happening here because the City has told us that.

MS. SHANOR: With --

MR. LIPSHUTZ: So they need another substantial justification. And they have never even attempted to come up with one.

MS. SHANOR: With respect, Your Honor, that's not the case.

The City of Berkeley has an interest, legitimate governmental interest, as you found in your earlier opinion, in ensuring that its residents know federal regulations, federal health and safety regulations, so that they can comply with them if they so choose.

That is, first and foremost, an interest in ensuring that the public knows the federal laws and federal health and safety regulations. But, also, there's a subsidiary interest, a predicated subsidiary interest in health and safety based upon

the FCC's health and safety interests in the RF --

THE COURT: So it's a safety interest by incorporation? Is that what you're saying?

MS. SHANOR: Exactly, Your Honor. To the degree that the federal government has a health and safety interest, so does the City of Berkeley.

THE COURT: There's an implicit safety interest even though the -- what about the notion that Berkeley has disclaimed a safety interest?

MS. SHANOR: I do not believe, Your Honor, that we've disclaimed a health and safety interest, at least to the degree that the FCC has expressed one.

But more to the point, *Zauderer* is manifestly not limited to cases in which the governmental interest is in -- is in deception. As the D.C. Circuit held *en banc*, the animating basis of *Zauderer* sweeps far more broadly.

And that is why a host of Circuits -- the D.C. Circuit, the Second Circuit, the First Circuit, the Sixth Circuit -- have held that *Zauderer* is not limited to cases of deception.

Again, this is based upon the reason that commercial speech is protected by the First Amendment at all. That is because of its value to consumers, the information that it provides, so that they can make informed judgments about marketplace decisions and, also, how they want their government to regulate the marketplace.

This is the reason why there's a difference between restrictions on commercial speech and mandated disclosures, because mandated factual disclosures increase the amount of information to consumers; whereas, restrictions on speech, which we have more constitutional concern, limit that information to consumers.

That has nothing-- that animating logic has nothing to do with deception. Nor does it, with respect, have anything to do with voluntary advertising. Those two limiting principles that my opposing counsel has found somewhere, in fact, do not lie in *Zauderer*.

MR. LIPSHUTZ: They're in *Zauderer* directly.

Your Honor, the City keeps pointing to the public's right to know. Court after court after court has held that the public's right to know is, quote, insufficient to justify compromising protected constitutional rights.

That's *International Dairy Foods* in the Second Circuit. *American Made Institute* in the D.C. Circuit, the case that my opposing counsel keeps relying on, said that satisfying customers' idle curiosity is not a legitimate government interest. They said it again in *R.J. Reynolds vs. FDA*, that the government's interest in providing information is unconvincing.

Court after court has disagreed with this rationale.

THE COURT: What about providing information about the

law? It's a little more specific. It's not just generic providing information. It's informing the public about particular regulations.

MR. LIPSHUTZ: The government has every right to inform the public about the law. But it cannot conscript other companies -- first of all, this ordinance --

THE COURT: I'm just asking whether that is a substantial governmental interest, to make sure that the public is aware of certain laws.

MR. LIPSHUTZ: Your Honor, to be honest, I don't know that any court -- I have never seen a Court that's held that that's a substantial government interest. I don't --

THE COURT: Has any court held to the contrary?

MR. LIPSHUTZ: I don't, frankly, know. But we know that's not what's happening here. This ordinance does not simply inform the public about the law.

THE COURT: Well, it certainly informs it about one aspect of the law, or at least of federal policy.

MR. LIPSHUTZ: But it juxtaposes a statement that's not included in the law by two statements that include the word "safety."

And by the City's own admission, it is designed to change consumer behavior. This is not an ordinance that's designed to simply inform the public about the law. It's designed to change consumer behavior.

THE COURT: Let me ask you a couple of hypotheticals. If the first sentence were not there, about to ensure safety, it simply said if you carry your phone in your pants while it's on, et cetera, et cetera, you may exceed federal guidelines for exposure to RF radiation, refer to your instructions, what if it just said that? Would that be problematic?

MR. LIPSHUTZ: Let me make sure I have the Court's question. First sentence is no longer there?

THE COURT: Right.

MR. LIPSHUTZ: The second sentences reads, "If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is on and connected to a wireless network you may exceed the federal guidelines for exposure to RF radiation. Refer to the instructions in your user manual."

THE COURT: Yeah.

MR. LIPSHUTZ: That would be still unconstitutional under the First Amendment, certainly, because it is drawing the public's -- it is forcing my clients to draw the public's attention to an issue that is controversial, number one. It is not a purely factual statement. It is now a highly misleading statement by omitting many other aspects that the public presumably has a right to know.

THE COURT: And it's misleading because, in fact, the guidelines' margin for error or safety margin is so low that

they're meaningless?

MR. LIPSHUTZ: That's right.

THE COURT: So let me ask you this question: If the guidelines had been set and the science were to demonstrate that the guidelines were set without that 50 times margin but much closer, would that be unconstitutional?

MR. LIPSHUTZ: If it were a purely factual statement that carrying or using your phone in a pants or shirt pocket or tucked into a bra causes safety problems, because the FCC has found that to be the case, and the -- and the ordinance did not use various inflammatory language like the word "safety" itself -- although, in that case there wouldn't be a safety issue if it didn't use the word "radiation" and other inflammatory terms that the FCC has decided that should not be used, then maybe this would be a different case. I don't know. It might be.

THE COURT: So part of this is the problem that it uses the term "RF radiation"?

MR. LIPSHUTZ: Yes, Your Honor. That's part of the preemption problem, if you'll recall.

THE COURT: I'm talking about the constitutional issue.

MR. LIPSHUTZ: Well, again, it is part of the constitutional problem because it's forcing my clients to enter into this debate over whether RF radiation -- it's an

inflammatory term that would need to be explained in order to --

THE COURT: So if the word were "exposure" -- no. Exposure to RF -- what other word would there be? Waves?

MR. LIPSHUTZ: Well, it could have simply said -- and I'm not saying that this would be constitutional, but it could have simply said, for example, "You may exceed the federal guidelines for radiofrequency exposure," which is actually what it says in the first sentence.

There's no word "radiation" in the first sentence, but yet they chose to throw the word "radiation" there into the second sentence, which is a term that the FCC itself has found to be likely to mislead consumers because consumers associate radiation with cancer.

THE COURT: Where does the FCC say that?

MR. LIPSHUTZ: I will have to find that, Your Honor. I will find it for you.

THE COURT: Is that in your original brief?

MR. LIPSHUTZ: Yes, it is, Your Honor.

THE COURT: What's your response to that?

It's misleading because the verbiage that is used again underscores a safety risk that really does not exist.

MS. SHANOR: So I'll say, again, that the gravamen of opposing counsel's argument is that anytime that there is a safety factor, essentially, this ties the hands of the

government in its ability to provide any type of informative disclosure. And, frankly, that can't be the First Amendment rule.

And, again, the burden is on the plaintiff to show, in fact, that there is any kind of harm.

THE COURT: Seems to me what we're debating now goes to the question of how narrowly tailored it must be. If you apply a heightened scrutiny, the more narrowly tailored it is, the more you look at the wording of this to see if it could have been more narrowly fashioned. If you use the more loose branch of rational basis, all it's got to do is further the interest in some way --

MS. SHANOR: Under *Zauderer* the test is "reasonably related." And, certainly, this ordinance is reasonably related to Berkeley's interest in ensuring that its citizens know the federal regulations and what those federal regulations are.

MR. LIPSHUTZ: But you have to get to *Zauderer* first. And *Zauderer* also requires factual and uncontroversial.

And I find it hard to believe, as my opposing counsel argues, that when the Supreme Court said "factual and uncontroversial" it actually just meant factual and factual.

THE COURT: Factual and accurate, and not misleading.

MR. LIPSHUTZ: Well, factual and accurate, with respect, Your Honor, are synonyms.

I don't -- I think -- and, again, many courts have found

that -- for example, the Second Circuit, in ***Evergreen Association***, found that the word "controversial" has meaning apart from factual, and that the government cannot require companies to make statements that implicate matters of public controversy.

In the ***Evergreen*** case the Second Circuit held that the government may not require a company to even mention controversial services that some providers opposed. In that case it was abortion and certain contraception. Those were purely factual statements that were controversial. And the Second Circuit said that that runs afoul.

So it simply is not the case that factual and uncontroversial just means factual and accurate. There are factual statements that are controversial, such as --

THE COURT: So if there's any debate in the field about the risk of some either alleged toxin or environmental factor or radio waves, or whatever, and the science is not settled, that is automatically deemed, quote, controversial, and, therefore, disqualifies the application of ***Zauderer***?

MR. LIPSHUTZ: Well, I don't think that we need to define, necessarily, the outer bounds of ***Zauderer*** here. We --

THE COURT: Well, then how would you define it, so we don't get into that slippery slope?

MR. LIPSHUTZ: If we have to define the outer bounds then, yes, I would agree. If there is a debate, a debate that

is not -- where one side is not clearly correct from a scientific standpoint, and where the terms are inflammatory and where -- where, by the way, the law is designed to invoke that very consumer fear that is part of the controversy. And that is what this law is. I don't know why we're dancing around the issue.

The law says right there that it's designed to change consumer behavior. How was it designed to change consumer behavior? By stoking consumer fears of nonexistent safety risks.

And, by the way, Your Honor, you asked about the FCC. The FCC has a website: Radiofrequency Safety Frequently Asked Questions. I can provide Your Honor with the URL, if you'd like.

But the FCC explicitly has warned that the term radiation, quote, is used, colloquially, to imply that ionizing radiation (radioactivity), such as that associated with nuclear power plants, is present. That's on the FCC's Frequently Asked Questions. And, yet, that's the very word that they chose to use in their ordinance.

So I think, you know, we keep -- this is not a purely academic discussion.

I know my colleague has some very esteemed articles about the First Amendment. But this law seeks to impose real harm on my clients who are being conscripted to say things and take a

side of the debate they do not wish to take. They will be forced to engage in counter-speech to correct the misleading statements and inflammatory terms that are used in the ordinance.

I would ask Your Honor also to take a look at -- we submitted -- two weeks ago, we submitted to this Court the Ninth Circuit's recent decision, from two weeks ago, in *Retail Digital*.

THE COURT: I read it.

MR. LIPSHUTZ: Now, that case, the Ninth Circuit explicitly stated that it was changing circuit law to reflect the standard set forth by the U.S. Supreme Court in *Sorrell*.

And if you read page 20 of the slip opinion, the Ninth Circuit says, quote:

> *Sorrell* requires a more demanding form of scrutiny of content- or speaker-based regulations on commercial speech than we have previously applied.

And then on page 16 the Court says:

> Under *Sorrell*, courts must first determine -- first determine whether a challenged law burdening non-misleading commercial speech about legal goods or services is content or speaker based. If so, heightened judicial scrutiny is required. End quote.

And there's no question that the regulation at issue here is both content based and speaker based. It modifies --

THE COURT: It's not a restriction, quote-unquote.

MR. LIPSHUTZ: Well --

THE COURT: There's a difference between restriction and disclosure.

MR. LIPSHUTZ: But the Ninth Circuit did not use the word "restriction."

MS. SHANOR: Your Honor, slip op page 1.

THE COURT: Throughout this whole thing it talks about restrictions.

MR. LIPSHUTZ: Of course it is. But it also uses the words "regulation." It also uses the word "burden." To say that this is --

THE COURT: That case involved a restriction.

MR. LIPSHUTZ: It did involve a restriction, yes.

THE COURT: Not a disclosure.

MR. LIPSHUTZ: That's correct.

But the question when -- where commercial speech is at issue, the Ninth Circuit now says that you have to look to see whether it's content or speaker based.

And, by the way, this distinction between compulsion and restriction is, you know, frankly, fabricated as well.

Just last week, at oral argument in the United States Supreme Court, in the ***Friedrichs*** case Justice Kagan stated from the bench, quote:

I had always thought that these were two sides of the

same coin; that compelled speech is no less and no greater an offense than compelled silence.

MS. SHANOR: Your Honor, that's a case in the realm of political speech but not in the context of commercial speech.

It is a very well-established principle articulated in *Zauderer*. And based upon the fundamental reason that commercial speech is protected, at all, which is articulated in *Virginia Board of Pharmacy* in the 1970s --

THE COURT: I'm aware of that. And if you're arguing that *Zauderer* has been unofficially overruled by comments made in oral argument --

MR. LIPSHUTZ: No, Your Honor.

THE COURT: *Zauderer* is still there.

MR. LIPSHUTZ: But *Zauderer* satisfies the exact type of heightened test that *Sorrell* requires because of what we discussed earlier. Because the substantial government interest in *Zauderer*, just like in *Milavetz*, was the correction of misleading consumer speech, misleading advertising. Correcting and combating misleading advertising is a substantial government interest.

THE COURT: So all the cases that have interpreted *Zauderer* as applying less than strict scrutiny, and its own language about, quote, reasonably related, which is not strict scrutiny language --

MR. LIPSHUTZ: No, it's not --

THE COURT: -- substantially further or narrowly tailored.

MR. LIPSHUTZ: It's essentially the *Central Hudson* test where certain factors have been met, have de facto been met.

THE COURT: All right. Well, I suspect some other court is going to be looking at this issue as to exactly what *Zauderer* means; how viable it is; and whether it really is just a simple different formulaic articulation of the *Central Hudson* test and all that.

MR. LIPSHUTZ: Well, Your Honor, if I might, that brings me to the other reason that I wanted to -- the other argument I wanted to raise before Your Honor, which was, at a minimum, we would ask this Court grant an injunction pending appeal.

As you can imagine, this case is headed to the Ninth Circuit. That's the whole reason we're here for this procedural motion on dissolution.

I think there really can be no question, in light of this discussion and other discussions, that there are serious questions at issue in this case.

The United States Supreme Court has never decided, as Your Honor is aware, what the extent of *Zauderer* is. Circuit courts are divided on the question --

THE COURT: What's the great burden? What's the

irreparable harm?

Yes, your compelled speech. But in terms of real-world effect, the ordinance expressly provides that nothing prohibits the retailer from adding its own two cents if it wants to add, "By the way, the safety margin here is, like, by 50 times over. And the only way you can even get past these exposure limits is if you're in a certain mode and you're searching for the station, or whatever it is, and it's at high levels of energy, after some prolonged period of time you might exceed that. And if you do, you're 50 times below the limit. So don't worry about it."

MR. LIPSHUTZ: Well, Your Honor just laid out the burden, I think pretty well, frankly.

First of all, the Ninth Circuit has held that, quote, the loss of First Amendment freedoms for even minimal periods of time unquestioningly constitutes irreparable injury. So we really don't need to go any further than that.

By the way, under that same *Sammartano* standard, all that we would need to show is a, quote, colorable First Amendment claim. I think there's no question that we have a colorable First Amendment claim. Your Honor disagreed with it in the prior order. But it is a claim that, as Your Honor pointed out, is headed to a higher court.

MS. SHANOR: Your Honor, for the same reasons that your Honor found that the CTIA failed to establish either a

likelihood of success on the merits or to its questions going to the merits, so it's not for preliminary injunction, those same reasons, as anticipated by the end of your order, that "The Berkeley ordinance is enjoined unless and until the sentence in the City notice regarding children's safety is excised from the notice," that sentence has been excised from the notice. And so for the same reason a preliminary instruction would not -- it's not justified.

MR. LIPSHUTZ: This part of my argument is not asking for a preliminary injunction. I'm just asking for a stay pending appeal.

MS. SHANOR: An injunction pending appeal is also not justified.

I'll also say that it's manifestly unnecessary here because we have agreed with CTIA to stay enforcement of the order until March 21st, so as opposing counsel can seek an order from the Ninth Circuit.

THE COURT: Well, it doesn't obviate -- you're stipulating to a temporary stay in order to allow the Ninth Circuit to address the issue of a stay.

But if I were to grant the stay, the Ninth Circuit wouldn't have to -- they may hear your appeal of that, but they wouldn't hear their appeal of that.

MR. LIPSHUTZ: That's right. And it, frankly, shows exactly why we should get a stay pending appeal. The other

side has stipulated that we should be seeking a stay; that we have time to seek a stay.

There's no harm, whatsoever, to the City in staying this injunction. Or to the public.

The CTIA -- Your Honor asked about tangible ways in which my clients would be harmed. You know, first of all, they would be forced to engage in the very kind of counter-speech that Your Honor described. That is a First Amendment violation, to be forced to engage in that speech in order to correct Berkeley's misleading and incomplete statements.

Secondly, they would be forced to disparage their own products. There's lots of cases saying that companies should not be forced to disparage their own products to their customers. And they would be forced to --

THE COURT: Okay. This is not like the other case, where you're saying that these phones are inherently dangerous, particularly if you use them in a particular way. I mean, at most, this suggests to people not to wear your phone in a certain way. It's not saying --

MR. LIPSHUTZ: It suggests that the product has the potential to pose a health risk, and that it emits radiation; and that, therefore, you need to take action.

If that's not disparagement of the product -- if I were selling the product, I wouldn't want to have to tell that to my customers, because it's not true.

THE COURT: No, I'm just saying the degree of disparagement is not the same as saying a product is inherently dangerous regardless of how you use it or if you use at it all, as opposed to the way you carry it or where you place it.

MS. SHANOR: I'd also like to emphasize, Your Honor, that the only commercial interest under the First Amendment that CTIA has against a factual disclosure is, quote-unquote, minimal under *Zauderer*. And it's only the potential of its protected commercial speech being chilled because the ordinance is either unduly burdensome or unjustified.

These types of concerns that CTIA is expressing do not sound in the chilling of speech but in things altogether different; which is why, again, what -- the harm that could be to CTIA, it's not economic harms, it's these sorts of First Amendment harms, which again are only sound in chilling under *Zauderer*.

THE COURT: I'm going to take the matter under submission. Thank you.

MR. LIPSHUTZ: Thank you, Your Honor.

THE COURT: In terms of the CMC in this matter, obviously, I would have to resolve this question. And I take it once this case is on appeal, stay or not stay, there's really not going to be much here -- it doesn't make sense to do anything further. Is that --

MR. LIPSHUTZ: That's what the parties have agreed to,

Your Honor.

MS. SHANOR: Yes, Your Honor.

THE COURT: All right. Thank you.

MR. LIPSHUTZ: Thank you.

(At 2:46 p.m. the proceedings were adjourned.)

- - - -

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, January 22, 2016

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter