

Court Rules En Banc for Injunction Against San Francisco's Health Warning Requirement for Soft Drink Ads

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- As previously covered on this [blog](#), the City of San Francisco passed legislation in June 2015 that required health warnings to be placed on advertising for sugar-sweetened beverages (i.e., nonalcoholic beverages with caloric sweeteners that contain more than 25 calories per 12 oz.). Specifically, the warning would have read: "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." Additionally, the law required that the warning occupy 20% of the ad space and be outlined with a rectangular border. On September 19, 2017, the 9th U.S. Circuit Court of Appeals in *American Beverage Assn. v. San Francisco* [enjoined](#) enforcement of the ordinance, reversing the district court and holding that requiring advertisers to include the controversial warning violates their First Amendment rights not to be compelled to convey the government's message.
- In a January 31, 2019 [opinion](#), the full court agreed that the trade association plaintiffs would likely succeed on the merits of their claim that San Francisco's warning requirement is unconstitutional and that preliminary injunction factors also weighed in the plaintiffs' favor. Recognizing that the government may compel speech that is purely factual, noncontroversial, and not unjustified or unduly burdensome, the en banc court found that the size requirement for the mandatory warning in San Francisco's ordinance was not justified and would likely chill protected commercial speech. The court did not reach the issues of whether the warning statements is factual and not controversial.
- While San Francisco's current law will not take effect, the court left open the possibility that a smaller size requirement (such as 10%) may not be unduly burdensome. Thus, it is possible that San Francisco or another U.S. jurisdiction may craft future legislation for a warning requirement on sugary beverages that will pass the constitutional test for not unduly chilling protected commercial speech.

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