



Western States Petroleum Association
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Catherine H. Reheis-Boyd
President

June 11, 2014

Via E-Mail (NAIHadithy@CityofBerkeley.info; NALHadithy@ci.berkeley.ca.us)

Mr. Nabil Al-Hadithy
HazMat Manager
City of Berkeley, Planning & Development
2118 Milvia Street
Toxics Management, 3rd Floor
Berkeley, CA 94704

Re: Proposed Berkeley Municipal Code Section G11.64 (Gasoline Pump Labels)

Dear Mr. Al-Hadithy:

The Western States Petroleum Association (“WSPA”) appreciates this opportunity to provide comments on the City of Berkeley’s (City) proposed ordinance (Proposed Berkeley Municipal Code Section 11.64) to require gasoline pump “warning” labels disclosing the State’s of California’s position on the impacts of climate change. We have reviewed the draft legislation proposed to the City Council on March 11, 2014, and believe the City’s proposal compels speech in violation of the First Amendment of the United States Constitution. The City has not shown a compelling interest in forcing gasoline service stations to make statements advancing the political opinions of the City and State regarding the alleged impacts of greenhouse gases. Even if the City had a compelling interest in the widespread disclosure of the State’s opinions about greenhouse gas effects (which it does not), the City has not narrowly tailored its proposal to fulfilling that interest. Far less restrictive means exist to disseminate this information to the general public without imposing onerous restrictions on businesses and forcing unwanted speech in violation of the First Amendment.

Perhaps no city in our nation has as rich a tradition in the exercise of the First Amendment right to freedom of speech as the City of Berkeley. Throughout times of tremendous civil upheaval in this country, citizens of this City have exercised great courage in resisting efforts by those at all levels of state and federal government to force them to agree with or advance government opinions. Citizens of Berkeley well know that, in America, “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795 (1988). Accordingly, the United States Supreme Court has found that the First Amendment prohibits the state from “requir[ing] an individual to participate in the dissemination of an ideological message

by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the state] commands, an idea they find morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977).

Though commercial speech generally receives less protection than other forms of expression under the First Amendment, “[t]he fact that the speech is in aid of a commercial purpose does not deprive [a business] of all First Amendment protection . . . those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.” *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Thus, courts have refused to uphold state laws that compel businesses to make forced disclosures on their products that do not convey “purely factual and uncontroversial information.” *See Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 965-67 (9th Cir. 2009). Such forced disclosures may be permissible only if justified by a need to prevent consumer deception or confusion, and even then, the forced speech requirement still must be “reasonably related to the State’s interest in preventing deception of customers.” *Id.* at 966 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

The City’s proposal directly violates the First Amendment of the Constitution by forcing businesses to advance the State of California’s policy position (evidently shared by the City) that “global warming caused by greenhouse gases poses a serious threat to the economic well-being, public health, natural resources, and the environment of California.” *See* proposed Berkeley Municipal Code § 11.64.030A. Though the proposed ordinance calls these messages “warnings,” they are, in reality, forced reproductions of the State’s and City’s policy opinions. Notifying consumers of the State’s “determin[ation]” that climate change represents a “serious threat” to California resources is no more than an advertisement for the State’s opinion, and to call such messages “warnings” is to imply that such opinions should be accorded the status of “fact.” But the messages are not “purely factual and uncontroversial information” – they touch on issues that represent some of the most contentious issues in existence today, and they do not convey “fact” but instead convey a policy determination by the State of California.

Nor are the gasoline station messages designed to prevent any “deception of consumers.” Indeed, gasoline retailers make no statement *whatsoever* at the gasoline pump regarding the alleged impacts, reasons, or extent of climate change. The City has not contended, nor can it show, that retailers are engaging in any sort of consumer deception that can only be addressed with labels on gas pumps advancing the State’s policy position on climate change. This is the type of forced speech that the United States Supreme Court has ruled is absolutely unconstitutional.

Mr. Nabil Al-Hadithy

June 11, 2014

Page 3

WSPA believes consumers can and should educate themselves about the various political positions and science surrounding climate change. Fortunately, this information is widely available and may be read on demand through literally thousands of websites, blogs, newspapers, periodicals, books and other publicly accessible materials. The City itself is certainly not prohibited from posting this material to its own website, or from advertising to the public websites and resources the public may access to view the positions the City wishes to advance, in an attempt to persuade citizens to the City's preferred policies and points of view. Indeed, the proposed ordinance notes that the City's own "Climate Action Plan" describes "numerous ways that citizens can reduce their gas use." *See* proposed Berkeley Municipal Code § 11.64.010C.

All of these resources and methods represent constitutional and far less restrictive means to advance the opinions the City wishes to advance. WSPA urges the City to consider further supporting and funding these avenues of promoting its viewpoints, rather than adopting unconstitutional mandatory labels forcing gasoline retailers to convey the State's and the City's views on climate change.

WSPA thanks you again for the opportunity to comment on the proposed ordinance, and we look forward to working with you in developing more effective, legal ways to ensure that City residents have access to the full range of information about fuel choice in California, the importance of gasoline and refined petroleum products in present-day society, and the relative costs and benefits of other fuel choices in today's economy.

Very truly yours,



Catherine Reheis-Boyd
President