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FAIR WARNING?: THE FIRST AMENDMENT, COMPELLED COMMERCIAL DISCLOSURES, AND CIGARETTE WARNING LABELS

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INTRODUCTION: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

The United States has required cigarette packages to display warning labels since the 1960s.[1] The first warning label stated simply, "Cigarette Smoking May Be Hazardous to Your Health."[2] In 1984, Congress passed the Comprehensive Smoking Education Act requiring tobacco companies to display on every cigarette package four periodically-rotating health warnings.[3] The Act specified language for the four warning labels,[4] and required them to "appear in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package."[5] Cigarette companies customarily printed the warnings in black and white down one side of the package. As other countries adopted more aggressive warning labels to combat smoking, the United States' regulatory structure went unchanged for twenty-five years.[6]

On June 22, 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act[7] ("Tobacco Control Act" or "Act") into law.[8] It gave the U.S. Food and Drug Administration (FDA) the authority to regulate the manufacture and sale of tobacco products. The Tobacco Control Act mandates that every cigarette package include one of nine concise phrases highlighting the deleterious effects of smoking.[9] The term "WARNING" is to be printed in all capital letters and seventeen-point font.[10] The Tobacco Control Act requires the warnings to cover the top half of both the front and back of the cigarette package.[11] Finally, the Act directed the FDA to promulgate "color graphics depicting the negative health consequences of smoking to accompany" the textual warnings.[12] The

1. Ranit Mishori, *Packing a Heavier Warning: Elsewhere, Cigarette Boxes Bear Graphic Evidence of Smoking's Ill Effects; U.S. Labels Will Soon Do the Same*, WASH. POST, Aug. 4, 2009, http://articles.washingtonpost.com/2009-08-04/news/36819543_1_cigarette-labels-pictorial-warnings-result-in-fetal-injury.

2. *Id.*

3. Pub. L. No. 98-474, 98 Stat. 2200 (1984).

4. *Id.*

5. *Id.*

6. Mishori, *supra* note 1.

7. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 15 U.S.C. §§ 1333, 4402 (2012) and 21 U.S.C. § 387a-1 (2012)).

8. *See* 21 U.S.C. § 387b (2012).

9. 15 U.S.C. § 1333(a)(1).

10. *See id.* § 1333(a)(2).

11. *See id.*

12. *See id.* § 1333(d).

FDA was to develop the new graphic warning labels within two years.[13]

A day before the two-year deadline, on June 21, 2011, the FDA unveiled the nine new warning labels,[14] and on June 22, 2011, the FDA published its Final Rule implementing them.[15] The FDA had selected the nine graphical labels from a group of thirty-six proposed images after comprehensive studies of the effectiveness of each.[16] The chosen images included photographs and illustrations depicting a comparison of a diseased lung to a healthy lung, an autopsied torso, a set of teeth and gums ravaged by smoking, a cartoon image of child in an incubator, a close-up of a tracheotomy, a woman—perhaps a mother?—blowing smoke into a child's face, a distraught woman, a man attached to a respirator, and a man posing in a t-shirt on which is printed an anti-smoking slogan.[17] One of the statute's corresponding textual warnings respectively accompanies each image.[18] Also included in the graphic warning is the text "1-800-QUIT-NOW," the phone number for an anti-smoking hotline.[19] Under the Tobacco Control Act, the new warnings become effective fifteen months after the rule's publication.[20] This meant that every new package of

13. *See id.*

14. *See* Press Release, FDA, FDA Unveils Final Cigarette Warning Labels (June 21, 2011), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm260181.htm.

15. *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011).

16. *See* FDA, *supra* note 14.

17. *See Cigarette Health Warnings*, FDA, http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/default.htm (last updated Aug. 22, 2012).

18. The nine messages are:

WARNING: Cigarettes are addictive.

WARNING: Tobacco smoke can harm your children.

WARNING: Cigarettes cause fatal lung disease.

WARNING: Cigarettes cause cancer.

WARNING: Cigarettes cause strokes and heart disease.

WARNING: Smoking during pregnancy can harm your baby.

WARNING: Smoking can kill you.

WARNING: Tobacco smoke causes fatal lung disease in nonsmokers.

WARNING: Quitting smoking now greatly reduces serious risks to your health.

15 U.S.C. § 1333(a)(1); FDA, *supra* note 17.

19. *See* FDA, *supra* note 17.

20. Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

cigarettes sold after October 22, 2012, was to bear one of the nine new graphic warning labels—absent judicial action.[21]

On August 16, 2011, shortly after FDA unveiled the new warning labels, five tobacco companies, led by R.J. Reynolds, filed suit in the District of the District of Columbia.[22] On August 19, 2011, in *R.J. Reynolds Tobacco Co. v. FDA*, the tobacco companies moved for summary judgment and requested a permanent injunction to prevent the FDA from enforcing the new warning labels.[23] The tobacco companies challenged the new warning labels, in part, on First Amendment grounds as unconstitutionally compelled speech.[24] The crux of the tobacco companies' First Amendment argument was that the new cigarette warnings do not satisfy standards articulated by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel of Ohio*,[25] in which the Court established a highly lenient standard for regulations that compel disclosures in commercial speech.[26] The tobacco companies argued that, because the standard articulated in *Zauderer* is inapplicable and the government has compelled them, private entities, to convey its ideological message, the new warning labels should be subjected to, and will fail, strict scrutiny.[27]

In the midst of the *R.J. Reynolds* litigation, the Western District of Kentucky and, subsequently, the Sixth Circuit was already considering a similar challenge to the underlying statutory provision of the Tobacco Control Act creating the graphic warning labels. The Sixth Circuit issued its opinion in *Discount Tobacco City & Liquor, Inc. v. United States* on March 19, 2012.

On February 29, 2012, the District of the District of Columbia granted the tobacco companies summary judgment,[28] thereby reinforcing its earlier decision preliminarily enjoining the graphic warning labels.[29] In doing so, the D.C. District Court ruled that *Zauderer* did not supply the appropriate standard of analysis for the

21. *See* R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 42 (D.D.C. 2011).

22. *Id.* at 39.

23. Plaintiff's Motion for Summary Judgment and Permanent Injunction, R.J. Reynolds Tobacco Co. v. FDA, No. 11-1482 (RJL) (D.D.C. Aug. 19, 2011), ECF No. 10.

24. *See id.* at 29–49.

25. 471 U.S. 626 (1985).

26. Plaintiff's Motion for Summary Judgment and Permanent Injunction at 31–36, R.J. Reynolds Tobacco Co. v. FDA, No. 11-1482 (RJL) (D.D.C. Aug. 19, 2011), ECF No. 10.

27. *Id.* at 25–30.

28. R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266 (D.D.C. 2012).

29. *See* R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36 (D.D.C. 2011).

new graphic warning labels—or, put another way, *Zauderer*'s narrow exception to Supreme Court's compelled speech jurisprudence had not been satisfied.[30] The D.C. Circuit heard oral arguments in *R.J. Reynolds* on April 10, 2012, and weighed in with its opinion on August 24, 2012.

Part I of this Note explores the development of the Supreme Court's compelled speech and commercial speech jurisprudence, the two threads of jurisprudence informing the lenient standard for compelled commercial disclosure developed in *Zauderer*.[31] Next, this Note delves into the Court's reasoning in *Zauderer*, attempting to understand its relationship within the broader context of the Court's compelled speech jurisprudence and its commercial speech jurisprudence.[32] Part I concludes by analyzing subsequent Supreme Court decisions dealing with compelled disclosures to shed light on the scope and limits of the *Zauderer* exception.[33]

Part II focuses on the two recent decisions regarding the new cigarette warning labels, *Discount Tobacco City & Lottery, Inc. v. United States*[34] and *R.J. Reynolds Tobacco Co. v. FDA*, and situates them within the constellation of approaches taken to *Zauderer*.[35]

Part III attempts to provide a coherent unifying approach to *Zauderer* that respects each strand of the Court's reasoning and—in light of that unified approach—evaluates the recent decisions regarding the graphic cigarette warning labels.[36]

I. PATHS TO *ZAUDERER*

The decision in *Zauderer* sits at the crossroads of two separate lines of First Amendment jurisprudence. The first is the presumptive invalidity of laws forcing private individuals to speak against their will. The second suggests that the First Amendment allows encroachments upon commercial speech it would not accept upon political, religious, or ideological speech. One question a court interpreting *Zauderer* must address is how that decision comports with these two broader First Amendment principles.

30. *See R.J. Reynolds*, 845 F. Supp. 2d at 272–75.
31. *See infra* notes 37–109 and accompanying text.
32. *See infra* notes 110–32 and accompanying text.
33. *See infra* notes 133–78 and accompanying text.
34. 674 F.3d 509 (6th Cir. 2012).
35. *See infra* notes 180–376 and accompanying text.
36. *See infra* notes 377–433 and accompanying text.

A. Origins of the Prohibition Against Compelled Speech

The notion that the First Amendment protects an individual's right *not* to speak just as it protects an individual's right to speak begins with the Supreme Court's decision in *West Virginia State Board of Education v. Barnette*.[37] In 1943, the Court in *Barnette* struck down a West Virginia State Board of Education resolution that mandated that school children salute the American flag with raised right hand and upturned palm.[38] Only three years earlier, the Supreme Court had upheld a Pennsylvania public school's authority to mandate that its students salute the American flag and recite the Pledge of Allegiance.[39] In the wake of that earlier decision, the West Virginia legislature directed its schools to foster and perpetuate the "ideals, principles and spirit of Americanism."[40] In response, the West Virginia Board of Education adopted the resolution at issue in *Barnette*.[41] A student who failed to conform to the state's Pledge of Allegiance mandate risked expulsion and a criminal truancy charge.[42] A group of Jehovah's Witnesses, for whom honoring the flag amounted to idolatry and conflicted with deeply held religious beliefs, challenged the resolution.[43]

The *Barnette* Court overturned its earlier decision in *Minersville* and held that a public school could not compel a student to recite the pledge or salute the flag.[44] The Court grounded its decision in the First Amendment generally, without specifying which of its clauses the law violated.[45] The case potentially implicated both the Free Exercise clause and the Free Speech clause.[46] The Court opaquely

37. 319 U.S. 624 (1943). *See generally* Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409 (Michael C. Dorf ed., 2d ed. 2009).

38. *Barnette*, 319 U.S. at 628, 642.

39. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. 624.

40. *Barnette*, 319 U.S. at 625.

41. *See id.* at 626.

42. *See id.* at 629.

43. *See id.*

44. *See id.* at 642.

45. *See id.*

46. Scholars have commented on how difficult it is to pin down the precise First Amendment foundations for the Court's reasoning in *Barnette*; the Court's language is broad, general and, at times, "aphoristic." *See* Blasi & Shiffrin, *supra* note 37 at 430–31; Abner Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 463–64 (1995); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 852 (2011).

stated, "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limits on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[47] Elsewhere the Court stated the plaintiff's challenge "[stood] on a right of self-determination in matters that touch individual opinion and personal attitude."[48] Regardless of the precise constitutional underpinnings, the Court understood the injury as one solely inflicted upon the individual compelled to speak and harmful because it implicated that speaker's core values.[49] Although *Barnette* initiated a line of jurisprudence that would establish the constitutional presumption against laws compelling speech, the Court left the roots of the doctrine unclear. This lack of clarity in turn left the extant protection and its limits vague as well.

Miami Herald Publishing v. Tornillo was the second case to recognize First Amendment protection against compelled speech. Like *Barnette*, *Tornillo* remained ambiguous about the precise constitutional underpinnings for the prohibition against compelled speech.[50] The case addressed the Miami Herald's challenge to Florida's right-of-reply statute.[51] The Court held that "[c]ompelling editors or publishers to publish that which 'reason tells them should not be published'" violated the First Amendment guarantees on Freedom of the Press.[52] The Court explicitly rejected the idea that regulations that merely compelled speech—like the Florida right-of-reply statute—were relevantly different from outright restrictions.[53] Throughout the decision, the Court wavered, at times basing protections against compelled speech in the First Amendment

47. *Barnette*, 319 U.S. at 642.

48. *Id.* at 631.

49. Laurent Sacharoff identifies three arguments, all centered around violations of what the Court in *Barnette* calls the speaker's "freedom of mind," put forth by the Court in *Barnette*. That coercion might, first, improperly change the speaker's beliefs; second, create cynicism about core beliefs; and, third, invalidate consent. *See* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 342–43 (2008).

50. 418 U.S. 241 (1974).

51. *Id.* at 245.

52. *Id.* at 256 (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1943)). Previously the Court had upheld a similar FCC rule requiring broadcasters to grant third parties airtime without charge to respond to personal criticisms of the third party by the station. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

53. *Tornillo*, 418 U.S. at 256.

generally, at others basing them in the Free Press clause specifically.[54] Following *Tornillo*, the Court had yet to conclusively establish that the First Amendment protects individuals against compelled speech even when neither religious belief nor freedom of the press is at stake.

It was not until *Wooley v. Maynard* that the Court isolated the Free Speech clause as an independently sufficient source of constitutional protection against compelled speech.[55] In *Wooley*, the Court faced another challenge by a Jehovah's Witness to a state action that the Witness found "morally, ethically, religiously and politically abhorrent," this time in the inclusion of the New Hampshire state slogan "Live Free or Die" on his license plates.[56] Due to his attempts to cover the slogan or snip it off, the plaintiff was cited multiple times under state law for obstructing the figures on his vehicle's plates.[57] The Court began its analysis by declaring, "freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[58]

Once the *Wooley* Court declared that the First Amendment protected individuals against compelled speech, it proceeded to determine whether the state had a "sufficiently compelling" countervailing interest to justify compelling speech.[59] New Hampshire offered two alternative interests in mandating that license plates bear the state motto.[60] First, the state argued that because only the plates issued to passenger vehicles displayed the motto, police officers could more readily determine if a vehicle was properly plated.[61] Aside from skepticism of the state's reasoning, the Court also criticized the state for using a means disproportionate to the goal, stating "[The state's] purpose cannot be pursued by means that

54. *Compare id.* at 254 ("If it is governmental coercion, this at once brings about a confrontation with the express provisions of *the First Amendment and the judicial gloss on that Amendment developed over the years*." (emphasis added)), *with id.* at 258 ("It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the *guarantees of a free press* as they have evolved over time." (emphasis added)).

55. 430 U.S. 705 (1977).

56. *Id.* at 713.

57. *See id.* at 712.

58. *Id.* at 714.

59. *See id.* at 715–16.

60. *Id.* at 716.

61. *Id.*

broadly stifle fundamental liberty interests when the end can be more narrowly achieved."[62]

The state proffered a second interest to justify compelling the vehicle owner's to bear its message, the communication of a "proper appreciation of history, state pride and individualism."[63] This rationale, too, was found to be lacking. Unlike *Barnette*, in which the Court judiciously had rebutted West Virginia's attempt to instill civic ideals by declaring those ideals better served by voluntary endorsement,[64] the Court in *Wooley* tersely dispensed of New Hampshire's attempt at civics, stating, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[65] Thus, *Wooley* suggests that the state's interest in fostering or advocating an ideology—any ideology—can never be "sufficiently compelling" enough to justify compelled speech, no matter how closely tailored or non-burdensome the law.[66]

Nothing in the reasoning in the *Barnette* or *Tornillo* decisions resembles any degree of systematic means-ends scrutiny.[67] In this regard, *Wooley* is the first to engage in such scrutiny. In *Wooley*, although the Court maintained its presumption that compelled speech is unconstitutional, the Court suggested that it would uphold laws compelling speech as long as the state provided a "sufficiently compelling" interest and employed proportionate and least restrictive means to achieve its goal.[68]

The Court's next compelled speech decision, *Pruneyard Shopping Center v. Robins*, dealt not with legislation compelling speech, but with a California State Supreme Court decision compelling access for pamphleteers to a privately owned shopping center.[69] The owner of the shopping center appealed the state court's decision to the U.S. Supreme Court and argued that forcing him to grant the

62. *Id.* at 716–17 ("The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)) (internal quotation marks omitted)).

63. *Id.* at 717.

64. *See* W. Va. Sch. Bd. of Educ. v. Barnette, 319 U.S. 624, 640–41 (1943).

65. *Wooley*, 430 U.S. at 717.

66. *See id.*

67. *See Barnette*, 319 U.S. 624; *see also* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 241 (1974).

68. *See Wooley*, 430 U.S. at 716–17.

69. 447 U.S. 74 (1980).

pamphleteers access compelled him "to participate in the dissemination of an ideological message," thus infringing on his right not to speak.[70] The Supreme Court rejected his challenge. It held that compelled access did not infringe the owner's First Amendment rights.[71] The Court provided two rationales to distinguish *Wooley* and *Barnette*. First, according to the Court, each of those cases involved a governmentally proscribed message.[72] Second, the Court stated that the owner was free to disavow the views of the pamphleteers, whereas, presumably in the Court's view, the Jehovah's Witnesses in *Wooley* or *Barnette* could not adequately disassociate themselves from the Pledge or New Hampshire's state motto.[73] The Court went on to distinguish *Tornillo* because the right of access sought in that case would have impinged on a newspaper's editorial prerogative.[74]

Pruneyard offers an anomalous instance in which the Court upheld a government action compelling speech. The Court's labored attempts to distinguish *Pruneyard* in later compelled speech decisions—by unconvincingly emphasizing that the *Pruneyard* plaintiff had not objected to the content of the speech nor claimed that compelled access inhibited his own right to speak—indicate how uncomfortably *Pruneyard* fits with the Court's compelled speech jurisprudence.[75]

Still, *Pruneyard* is consistent with the Court's other decisions insofar as it recognized a unique concern when the government compels a private individual to spread the government's own message to the exclusion of other messages.[76] What makes the decision in *Pruneyard* an outlier is not that it upheld a law compelling speech, but rather that it found decisive constitutional relevance in the fact that the compelled message belonged to a third party rather than the government. Like *Pruneyard*, the decision in *Tornillo* considered

70. *Id.* at 86–87.

71. *Id.* at 88.

72. *Id.*

73. *See id.* at 88.

74. *Id.* at 88.

75. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp., 515 U.S. 557, 580 (1995); Pac. Gas & Elec. v. Pub. Utils. Comm'n, 475 U.S. 1, 12 (1986).

76. *See, e.g.*, W. Va. Sch. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

whether a state could compel a private individual to convey the message of another private individual.[77]

The Court's decision in *Pacific Gas & Electric Co. v. Public Utilities Commission*, decided a few months after *Zauderer*, is more consistent than *Pruneyard* with the Court's developing compelled speech jurisprudence. As such, the Court's reasoning in *Pacific Gas* is at odds with its reasoning in *Pruneyard*.[78] In *Pacific Gas*, the Court held that the state of California could not force Pacific Gas & Electric Company (PG & E) to include opposing political views in the utility company's billing envelopes.[79] In doing so, the Court ignored the distinction crucial to its reasoning in *Pruneyard*. *Pacific Gas* suggests there is no constitutional difference between a law that compels the speaker to foster the government's view and one that compels the individual to foster a private party's message.[80] Both are constitutionally suspect. Moreover, the Court rejected the proposition that the right of a corporate speaker not to be compelled differs from an individual's right.[81] *Pacific Gas* solidified the notion that the First Amendment protects speakers, whether corporations or individuals, from being compelled to spread someone else's message, regardless of whether it is from the government or a third party.

Apart from ignoring whose message has been compelled, a second aspect by which the Court's reasoning in *Pacific Gas* is at odds with that in *Pruneyard* is the salience given to a compelled speaker's ability to disavow the compelled message. In *Pruneyard*, the Court posited the owner's ability to disavow the pamphleteers' message as a reason to view the pamphleteers' access as less problematic.[82] In contrast, in *Pacific Gas* the Court characterized PG & E's foreseeable disavowal of any opposing views carried in its envelopes as secondary compulsion that only compounded the First Amendment injury.[83] The court stated, "The danger that [PG & E] will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude . . . ."[84]

77. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974).
78. *Compare Pruneyard*, 447 U.S. 74 (1980), *with Pacific Gas*, 475 U.S. 1 (1986).
79. *Pacific Gas*, 475 U.S. at 20–22.
80. *See id.*
81. *See id.* at 8.
82. *See Pruneyard*, 447 U.S. at 88.
83. *See Pacific Gas*, 475 U.S. at 16.
84. *Id.* at 16.

Once it established that the First Amendment protected PG & E from being compelled to speak, the Court proceeded to its analysis.[85] The Court found that the state agency's ruling was not content neutral.[86] As such, the Court, as it had in *Wooley*, scrutinized the state agency's ruling to determine if it was narrowly tailored and served a compelling state interest.[87] The state proffered two interests, both of which the Court found compelling.[88] Nonetheless, those interests did not suffice. Rather, according to the Court, the state could have advanced its interests through means other than forcing PG & E to include opposing political views in its billing envelopes.[89] The Court stated, "Our cases establish that the State cannot advance some points of view by burdening the expression of others."[90] In the end, the Court held that the state would unconstitutionally infringe PG & E's right not to speak if it required the electric company to insert the political message of its opponents in its billing envelopes.[91]

Pacific Gas arguably illustrates the Court's most systematic analysis to date of a regulation compelling speech. It demonstrates the sort of analysis—strict scrutiny—that the tobacco companies advocated the Court apply to the new warning labels.[92] The FDA, in contrast, has argued that if *Zauderer* is inapplicable, courts should apply the level of scrutiny given to regulations that restrict commercial speech, a

85. *See id.* at 11.

86. *Id.* at 12. An infringement upon speech is "content neutral" if it affects all speech indiscriminately regardless of the message conveyed or speaker conveying the message. Ward v. Rock Against Racism, 491 U.S. 781, 791–92 (1989). Time, place, and manner restrictions are the paradigmatic examples of content neutral speech restrictions. *Id.* Content neutral speech restrictions are subject to intermediate scrutiny. Content-based restrictions, restrictions that single out certain messages or speakers, are subject to heightened constitutional scrutiny. *See id.*

87. *See Pacific Gas*, 475 U.S at 19.

88. The state asserted that requiring PG & E to include the material furthered the state's interest (1) in the effective proceedings to determine utility rates and (2) in promoting speech by exposing customers to a variety of perspectives. *See id.* at 19–20.

89. *Id.* at 19.

90. *Id.* at 20.

91. *See id.* at 20–21.

92. Plaintiffs' Motion for Summary Judgment and Permanent Injunction at 29, R.J. Reynolds v. FDA, No. 11-1482 (RJL) (D.D.C. Aug. 19, 2011), ECF No. 10; *see also* Clay Calvert et al., *Playing Politics or Protecting Children? Congressional Action & a First Amendment Analysis of the Family Smoking Prevention and Tobacco Control Act*, 36 J. LEGIS. 201 (2010) (analyzing the *Commonwealth Brands* litigation and similarly arguing that the warning labels should be scrutinized strictly as traditional compelled speech). Calvert et al. omit any discussion of *Zauderer*. *See id.*

more lenient standard.[93] This Note turns next to a brief background of commercial speech jurisprudence before delving into *Zauderer*.

B. Commercial Speech Jurisprudence

The decisions discussed thus far have involved the expression of fully protected speech—whether they considered a law compelling the expression of fully protected speech from a speaker who would rather remain silent or a considered law requiring an individual to foster the expression of a third party's fully protected speech. First Amendment jurisprudence, however, traditionally has not afforded commercial speech the full range of safeguards it grants other forms of speech.[94]

It was not until 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, that the Court first recognized that the First Amendment protected commercial speech.[95] The Court reasoned that speech should not lose its First Amendment protection simply because money was spent to project it.[96] The Court based its newly articulated protection of commercial speech on the interests of society and consumers in the free flow of commercial information.[97] Still, just as the Court extended First Amendment protections to commercial speech for the first time, it also cabined those newfound protections, recognizing that greater regulation of commercial speech is permissible.[98] What ultimately developed was a limited measure of protection for commercial speech, a protection "commensurate with its subordinate position in the scale of First Amendment values."[99] It could be permissible to subject commercial speech to modes of regulation that might be impermissible in the realm of noncommercial speech.[100] While interference with fully protected

93. *See* Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 25, R.J. Reynolds v. FDA, No. 11-1482 (RJL) (D.D.C Sept. 9, 2011), ECF No. 18.

94. Which level of protection the Supreme Court affords commercial speech is currently the topic of debate. *See e.g.*, Calvert et al., *supra* note 92, at 210–11. It should be sufficient for the purposes of this Note that the Court has been willing to make material distinctions based on the commercial nature of the speech involved.

95. 425 U.S. 748 (1976).

96. *Id.* at 761. The Court defined commercial speech as "speech which does no more than propose a commercial transaction." *Id.* at 762.

97. *Id.* at 763–64.

98. *See id.* at 770.

99. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

100. *Id.* at 456.

speech garnered strict scrutiny, interference with commercial speech would garner some lesser degree of scrutiny.[101]

The Court articulated that lesser degree of scrutiny in *Central Hudson Gas & Electric Co. v. Public Service Commission*.[102] In *Central Hudson*, the Court defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience."[103] Then the Court articulated a four-step test for determining whether a regulation unconstitutionally burdened such speech. First, a court should determine whether the speech was deceptive or unlawful. When speech is neither unlawful nor deceptive, the government's ability to regulate is more "circumscribed." Thus, the second step requires the government to assert a substantial interest served by the regulation.[104] Third, if the government's interest is substantial, the proposed regulation must directly advance that interest. Finally, the regulation must be no more extensive than necessary to achieve the government's goal.[105]

Although the four-step analysis articulated in *Central Hudson* became the accepted analysis when evaluating restrictions on commercial speech, a few Justices have expressed discomfort with or hostility to its analysis.[106] As with many tests that the Court has articulated, its application has not been uniform.[107] Furthermore, recent decisions have called into question whether the longstanding principle that commercial speech receives diminished First Amendment protection remains firmly entrenched.[108] Nonetheless, *Zauderer* was the product of a period in which the principle that

101. *See e.g*, *id.* at 456–57.

102. 447 U.S. 557, 563–64 (1980).

103. *Id.* at 561 (citations omitted).

104. *Id.* at 564.

105. *Id.* at 563–64.

106. Justice Thomas has consistently expressed the opinion that there is no constitutional basis to afford commercial speech lesser protection, and that *Central Hudson*'s test should be abandoned. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 255 (2010) (Thomas J., concurring); Thompson v. Western States Med. Ctr., 535 U.S. 357, 377 (2002) (Thomas J., concurring); Lorillard Tobacco Co. v Reilly, 533 U.S. 525, 572 (2001) (Thomas J., concurring); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia J., concurring).

107. *See Lorillard Tobacco*, 533 U.S. 525 (majority and dissent both applying *Central Hudson* to restrictions on tobacco advertising with opposing results).

108. Recently, four Justices dissented in *Sorrell v. IMS Health Inc.*, arguing that the majority, by strictly scrutinizing restrictions on the way pharmaceutical companies may collect customer information, neglected to recognize the distinction between commercial and non-commercial speech. 131 S. Ct. 2653, 2673 (2011) (Breyer, J., dissenting).

commercial speech did not have the same constitutional pedigree as fully protected speech was accepted. As such, when the Court in *Zauderer* considered the First Amendment implications of compelled commercial disclosure, this principle pervaded its reasoning.[109]

C. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*[110]

In *Zauderer*, the Court's compelled speech jurisprudence intersected with its commercial speech jurisprudence. The case involved an Ohio lawyer's challenge to the state's rules regulating the content of attorneys' advertisements. The lawyer argued that these regulations were an infringement of his First Amendment rights.[111] The lawyer challenged three disciplinary rules that the state bar had found that the lawyer had violated. Two of the rules restricted the content of lawyers' advertisements; the other required attorneys who advertise contingency rates to disclose whether clients remain liable for costs and expenses of unsuccessful claims.[112]

The Court straightforwardly applied *Central Hudson*'s analysis to the two challenged restrictions.[113] It found that neither restriction—one a ban on self-recommendation and unsolicited legal advice, the other a ban on the use of illustrations in advertising—advanced a substantial government interest. Thus, both failed *Central Hudson*'s third step.[114]

Although it had readily used *Central Hudson*'s analysis to strike down two of the state's disciplinary rules, the Court balked at the lawyer's suggestion that it also apply *Central Hudson* to the disclosure requirement.[115] The Court reasoned that disclosure requirements are materially different from outright prohibitions on speech.[116] According to the Court, while restrictions decrease the

109. *See, e.g.*, Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986) (applying *Central Hudson*); Pac. Gas & Elec. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986) (same); *In re* R.M.J., 455 U.S. 191 (1982) (same). As such, some of the motivation underlying the leniency toward compelled commercial disclosures established in *Zauderer* may or may not be withdrawn if the Court scraps the distinction between commercial speech and fully protected speech.

110. 471 U.S. 626 (1985).

111. *Id.* at 636.

112. *Id.*

113. *Id.* at 637–49.

114. *See id.* at 641, 647–48.

115. *See id.* at 650.

116. *Id.*

flow of information to the public, disclosures are better understood as requiring individuals to "provide somewhat more information than they might otherwise be inclined to present."[117] The Court acknowledged that First Amendment concerns arise any time a regulation compels speech.[118] The Court quickly distinguished the laws at issue in *Barnette*, *Wooley*, and *Tornillo* from Ohio's disclosure requirement, however, because the Ohio disciplinary rule only regulated commercial speech.[119] Unlike the laws at issue in those three previous decisions, Ohio had not attempted to prescribe national, political, or religious orthodoxy; that is to say, the disclosure did not infringe upon fully protected speech.[120] Instead, the Court stated, "The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which [the lawyer's] services will be available."[121] When commercial speech is at issue, the Court stated, any protection is justified principally by the value to consumers of the information that such speech provides.[122] The commercial speaker's "constitutionally protected interest in *not* providing any particular factual information" is minimal.[123] Additionally, the Court stated that the use of disclosure requirements, which "trench much more narrowly . . . than do flat prohibitions" on the commercial speaker's interests, further alleviates First Amendment concerns.[124]

Having dispensed with the traditional First Amendment concerns raised by laws that compel speech, the Court laid out a new test for commercial disclosure requirements, a test less rigorous than either *Central Hudson* or strict scrutiny.[125] The *Zauderer* Court held "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[126] Apart from asking only that laws reasonably relate to the state interest, the Court in this new test

117. *Id.*
118. *Id.*
119. *Id.* at 651.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 651–54.
126. *Id.* at 651.

also refrained from engaging in a "strict 'least restrictive' means analysis," like the one prescribed by *Central Hudson*'s final step.[127] The Court held that Ohio's rule requiring attorneys to disclose whether their advertised contingency rates include costs and expenses easily met these new standards because the potential for deception from advertisements lacking such a disclosure was self-evident.[128]

One can interpret *Zauderer*'s analysis as an alternative for commercial speech that is inherently or potentially deceptive but not unlawful or blatantly deceptive. Because such speech would fail (or would come close enough to failing) the first step of the *Central Hudson* analysis,[129] the government is justified in imposing more burdens on the speaker to offset the potential deception.[130]

A competing interpretation of the Court's justification of the more lenient analysis set forth in *Zauderer* is based on the minimal protection afforded to commercial speakers. In contrast to laws compelling fully protected speech, which are constitutionally problematic primarily because of the affront to the individual forced to spread an unwanted message, *Zauderer* might suggest that a commercial speaker's First Amendment interest in being free of intrusions is relatively inconsequential and thus easily overridden.[131] Therefore, the concerns that justify strict scrutiny when the government compels fully protected speech are absent when the government compels commercial speech. A lower standard of scrutiny for such regulations is appropriate.

Although these views are not mutually exclusive, neither view gives rise to the other. The two divergent interpretations are rooted in distinct strands of reasoning that inform the Court's decision in *Zauderer*: first, that disclosure of "purely factual and uncontroversial" information benefits consumers' interests while only minimally infringing on the commercial speaker's interest; second, that government should be granted broader discretion when it is

127. *Id.* at 651 n.14.

128. *Id.* at 652.

129. Recall that the first step in *Central Hudson*'s analysis asks whether the speech is deceptive or unlawful. *See* Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

130. The Tenth Circuit's decision in *United States v. Wenger* suggests this interpretation. 427 F.3d 840 (10th Cir. 2005).

131. *See* Kathleen M. Sullivan & Robert C. Post, *It's What's for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 367–76 (2007) (arguing that *Zauderer* has created the assumption that commercial speech is valued by the accuracy of information, not the autonomy of commercial speakers).

trying to prevent consumer deception particularly. Either of these strands might independently motivate the more lenient standard set forth in *Zauderer*.[132] Parsing each of these distinctive textual origins helps to recognize how different courts have come to broader or narrower understandings about how to analyze compelled commercial disclosures.

D. The Supreme Court and Disclosure Requirements Following *Zauderer*

In the years since *Zauderer*, the Supreme Court has decided a number of cases involving disclosure requirements. These cases help define the limits of *Zauderer*, but like *Zauderer* itself they leave many questions unsatisfactorily answered. Furthermore, some Justices' statements indicate that fundamental presumptions of *Zauderer* are not beyond reconsideration.

The first decision to consider a disclosure requirement post-*Zauderer* occurred in 1986 with *Meese v. Keene*.[133] In *Meese*, the Court rejected a challenge to a federal statute imposing disclosures on films designated "political propaganda."[134] The statute required that all films so designated carry a disclosure informing the recipient that the film was registered with the Department of Justice and identifying the distributor and the distributor's principal.[135] Although the appellee, a California state senator who wished to exhibit Canadian films about acid rain and nuclear war, primarily challenged the films' "propaganda" designation,[136] the Court cited the disclosure requirement as a reason to uphold the statute.[137] The Court found that the disclosure requirement was a laudable alternative to "prohibit[ing], edit[ing] or restrain[ing] the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit."[138] Echoing *Zauderer*'s reasoning, the Court stated, "By compelling some disclosure of information and permitting

132. Logically, this also entails a third interpretation: that *Zauderer* established two tests, one for regulations aimed to curb consumer deception and another for disclosures of purely factual, uncontroversial information. Either of these two would be sufficient to receive an exception to the Court's presumption that compelled speech is unconstitutional.

133. 481 U.S. 465 (1987).

134. *Id.* at 485.

135. *Id.* at 470–71.

136. *Id.* at 467–68.

137. *Id.* at 480–81.

138. *Id.* at 480.

more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech."[139]

The Court's reasoning in *Meese* paralleled its reasoning in *Zauderer*. In both decisions, the Court found that disclosure furthered the consumer or audience's interest in access to more information while minimally infringing on the speaker's interest in conveying her message.[140] In both decisions, the Court accepted as legitimate the government's interest in preventing deception—or at least potential deception.[141] Nonetheless, the decision in *Meese* did not invoke *Zauderer*; it did not even mention *Zauderer*.[142]

It is unclear how one should understand *Meese*'s failure to rely on *Zauderer*. Unlike the commercial disclosure in *Zauderer*, the disclosures in *Meese* were aimed at films designated as propaganda and, thus, affected core political speech. In *Meese*, the state interest was as much to prevent "conversion"[143] as it was to prevent deception.[144] What, then, is the appropriate level of scrutiny in such cases? Because the appellee challenged only the "propaganda" designation, not the disclosure requirement, the Court did not address what level of scrutiny applies to disclosures that implicate fully protected speech. Nonetheless, *Meese* suggests that, even when fully protected speech is at stake, the Court is categorically more tolerant of disclosures than restrictions.[145]

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Supreme Court considered a challenge to a North Carolina statute governing the solicitation of charitable contributions by professional fundraisers.[146] One of the challenged provisions required

139. *Id.* at 481.

140. *See supra* notes 128–35 and accompanying text.

141. *Meese* begins to illustrate, however, how nebulous the notion of "aimed at preventing deception" turns out to be. *See* supra notes 133–39 and accompanying text.

142. *See id.*

143. "Conversion," the Court's term, although it does not necessarily denote a listener risks being persuaded to a *false* belief, seems to connote that fundamental beliefs are at stake and should these beliefs be expressed, it would constitute fully protected speech. *See supra* note 138.

144. This language is reminiscent of regulations aimed at fostering national, political, and religious orthodoxy which the Court has consistently struck down if they restrict speech, like the law at issue in *Wooley* or *Barnette*. *See supra* note 65–74 and accompanying text.

145. If this is so, that also suggests that disclosures are a very specific and relatively innocuous form of compelled speech.

146. 487 U.S. 781, 784 (1988).

professional fundraisers to disclose to potential donors what percentage of contributions the represented charities actually received.[147] In contrast to the leniency that the Court afforded to compelled disclosure in *Meese*, the *Riley* Court assessed the disclosure requirement as stringently as it would restrictions placed on fundraisers. The determinative inquiry, according to the *Riley* majority, was not whether the statute required a factual disclosure, but rather the nature of the speech at issue and the burden placed on the compelled speaker.[148] Compelled disclosures in the context of fully protected, non-commercial speech would be analyzed as rigorously as the regulations in *Wooley* or *Tornillo*.[149]

The *Riley* Court acknowledged that the facts of the case required it to address how to classify speech when the speech's commercial aspects are "inextricably intertwined" with what would otherwise be classified as fully protected speech.[150] In such cases, the majority stated, the courts are not to parse speech into its separate components to assess each by a different standard.[151] Instead, if a law affects core protected speech, like when a law mandates that political fundraisers disclose their gross percentages, courts should apply the standard appropriate for fully protected speech—that is, in such cases, the courts should apply strict scrutiny.[152]

Chief Justice Rehnquist, joined by Justice O'Connor, argued in dissent that the statute was comparable to disclosures required in securities transactions and merely required the disclosure of "relevant and verifiable facts."[153] Rehnquist reasoned that the fundraising disclosures were minimally burdensome and thus did not justify the application of strict scrutiny.[154] The Chief Justice believed that the state's interest in "better inform[ing] the donating public as to where its money will go" was sufficiently strong.[155] In many ways, the Chief

147. *Id.* at 795.

148. *Id.* at 796 ("Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.").

149. *See id.* 797–98 ("[*Wooley* and *Tornillo*] cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled states of 'fact': either form of compulsion burdens protected speech.").

150. *Id.* at 796.

151. *Id.*

152. *See id.*

153. *Id.* at 811.

154. *See id.*

155. *Id.* at 810 (quoting Brief for Appellants at 17, Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781 (1988) (No. 87-328)). The majority also sympathized with

Justice's dissent was consistent with the reasoning found in both *Zauderer* and *Meese*. Like *Zauderer* and *Reese*, Rehnquist's dissent argued that factual disclosures constitute minimal infringements upon a speaker's First Amendment rights, and a sufficient state interest easily outweighs these minimal infringements.

Rehnquist's dissent did not invoke *Zauderer* for support. By contrast, the majority rebutted the Chief Justice's dissent by specifically distinguishing the context at issue from the commercial speech addressed in *Zauderer*.[156] *Riley* set a clear wedge between the tolerance the Court would grant compelled commercial disclosure requirements and the lack of tolerance it would grant compelled disclosure requirements implicating fully protected speech. "Purely commercial speech," the majority asserted, "is more susceptible to compelled disclosure requirements."[157] Simply limiting a disclosure to factual information, the Court stated, does not obviate its substantial burden on protected speech.[158]

This conclusion answered the question that remained after *Meese* as to which level of scrutiny should apply to disclosures that implicate fully protected speech. It also created tension with that decision's loose and seemingly deferential analysis.[159] The decision in *Riley* starkly delineates one limit on *Zauderer*'s exception to compelled speech jurisprudence. *Zauderer* applies to *purely* commercial compelled disclosure requirements. *Riley* also potentially calls into question reasoning in *Zauderer* that found factual disclosure to be minimally invasive, least restrictive means.

Like *Zauderer*, *Ibanez v. Florida Department of Business & Professional Regulation* dealt with a mixture of restrictions and disclosure requirements imposed by a state bar on lawyers' ads.[160] Unlike *Zauderer*, however, in *Ibanez* the Court failed to systematically separate its analysis of the restrictions from its analysis of the disclosure requirements. The disclosure at issue required attorneys who cite a "specialist" accreditation in their advertisements to disavow any state agency of that accreditation and disclose the

the state's intention despite finding the disclosures unnecessary. *See id.* at 798 ("Although we do not wish to denigrate the State's interest in full disclosure, the danger the State posits is not as great as might initially appear.").

156. *See id.* at 796 n.9.

157. *Id.*

158. *See id.* at 797–98.

159. *See supra* notes 145–47 and accompanying text.

160. 512 U.S. 136 (1994).

relevant accrediting standards.[161] The Court invalidated the rule because the state failed to prove that the regulation addressed some actual deception or confusion.[162] Moreover, the Court hinted that the disclosure requirement might have been unduly burdensome.[163] Given the brevity of the Court's analysis and the relative inattention to *Zauderer*, *Ibanez* suggests only that when commercial speech is not self-evidently deceptive or confusing, the government bears the burden of establishing that the compelled disclosure rectifies some non-hypothetical harm.[164]

The Supreme Court provided its most recent and, arguably, most instructive analysis of a commercial disclosure requirement post-*Zauderer* in *Milavetz, Gallop & Milavetz P.A. v. United States*.[165] In *Milavetz*, a law firm challenged the application of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to attorneys.[166] Among its complaints, the firm argued that provisions of the Bankruptcy Abuse Act that required legal advertisements for bankruptcy assistance to disclose information about the Act were unconstitutional.[167] The *Milavetz* Court rejected the firm's contention that *Central Hudson* should govern the Court's analysis and, instead, applied *Zauderer*.[168] The Court gave two reasons for this. First, the Court pointed out that the provision of the Bankruptcy Abuse Act in question "is directed at *misleading* commercial speech."[169] Second, the provision "impose[s] a disclosure requirement rather than an affirmative limitation on speech."[170]

The Court then offered a synopsis of *Zauderer*. The Court reiterated, first, that the primary justification for First Amendment protections for commercial speech lies in its value to consumers while the commercial speaker's interests are minimal; second, that unjustified or unduly burdensome disclosure requirements would

161. *Id.* at 146.

162. *Id.*

163. *Id.* at 146–47.

164. *But see* Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 652–53 (1985) ("When the possibility of deception is as self-evident . . . we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" (quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–92 (1965))).

165. 559 U.S. 229 (2010).

166. *Id.* at 234.

167. *Id.*

168. *Id.* at 249.

169. *Id.*

170. *Id.*

violate the First Amendment; and third, that commercial disclosure requirements need only be reasonably related to a state's interest in preventing deception.[171] Two important observations can be made about the Court's reconstruction of *Zauderer*. First, the Court seems to have implied that any disclosure requirement that otherwise conforms to the exception articulated in *Zauderer* is not "unjustified or unduly burdensome."[172] The logic of *Milavetz* seems to suggest that any disclosure requirement that is reasonably related to the government's interest in preventing consumer deception is, by that very fact, never unduly burdensome.[173] Second, *Milavetz*, like *Zauderer* before it, confined itself to disclosures aimed at rectifying potentially misleading advertising. Nonetheless, the Court removed the state's burden of proving that the commercial speech has a tendency to mislead when the possibility of deception is self-evident.[174] Still, whether the Court would allow state interests other than preventing consumer deception to garner *Zauderer*'s lenient scrutiny remained an unanswered question.

In *Milavetz*, Justice Thomas concurred to express his willingness to "reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures."[175] Thomas asserted his belief that the First Amendment did not support lowered scrutiny for any regulation of commercial speech, compelled disclosures or restrictions alike.[176] Further, he noted that the distinction between compelling speech and restricting speech had no constitutional significance when it came to protected speech.[177] Although Thomas ultimately concurred in judgment, his concurrence

171. *Id.* at 249–50.

172. *See id.* ("Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but 'an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.'" (quoting Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985))).

173. This construction is not unique to *Milavetz*. In fact, it is also present in *Zauderer*, but the Court in *Zauderer* also suggested it is not willing to do a "strict" least restrictive means analysis, leaving open the possibility that some "less than strict" least restrictive means analysis might at times be appropriate even under *Zauderer*. *See Zauderer*, 471 U.S. at 651 & n.14.

174. *Milavetz*, 559 U.S. at 251.

175. *Id.* at 256 (Thomas, J., concurring).

176. *Id.* at 255.

177. *Id.* at 255 (citing Riley v. Nat'l Fed. Of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988)).

nevertheless signaled pressure to further contract or eliminate *Zauderer*.[178]

The decisions in *Meese*, *Riley*, *Ibanez*, and *Milavetz* clarified the application of *Zauderer*'s exception to compelled speech doctrine, but major uncertainties persist. *Meese* and *Riley* suggested that *Zauderer* is limited to commercial speech; *Riley* limited it to *purely* commercial speech. Furthermore, the absence of any cases applying *Zauderer* when the state's purpose was not to prevent consumer deception suggests—although inconclusively—that the Supreme Court confines *Zauderer* to compelled disclosure requirements that address potentially deceptive commercial speech.

II. TOBACCO WARNINGS AND THE ISSUE OF INTERPRETING *ZAUDERER*

A. Conservative or Liberal *Zauderer*[179]

Many uncertainties persist about how to apply the Supreme Court's reasoning in *Zauderer*. The primary question that the courts have grappled with is whether *Zauderer*'s exception should be limited to disclosures preventing consumer deception. Commercial disclosures have become ubiquitous. Scholars emphasize the extent to which Congress, executive agencies, state legislatures, and municipalities rely on disclosure requirements to achieve a wide range of objectives.[180] In many cases their goal is not strictly to prevent consumer deception. Disclosures are used also to increase consumers' access to information to aid in their decision-making, even when there is no potential for deception.[181] In some instances,

178. Justice Thomas dissented in *Citizens United v. FEC*, arguing that the disclosure at issue should be invalidated and that limiting individuals to an "as applied" challenge insufficiently vindicated speech rights. 558 U.S. 310, 480 (2010) (Thomas, J., concurring in part and dissenting in part). Underlying Justice Thomas's position was the belief that disclaimers and disclosures, like restrictions, have a chilling effect and impose unconstitutional limitations on a speaker's rights. *See id.*

179. *See infra* notes 129–32 and accompanying text.

180. *See* Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 859 (2010); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 562–63 (2006).

181. In the context of securities disclosure requirements Post calls this the goal of "promot[ing] transparent and efficient markets," but generally it refers to disclosures of any sort that aim to provide consumers with accurate information to allow consumers to assess a product or service's true value. *See* Post, *supra* note 180, at 562–63.

the goal is a paternalistic attempt to change consumer behavior to effectuate some further state interest like public health or safety.[182] This raises the question of whether compelled commercial disclosures like nutrition labels should be subjected to *Zauderer*'s lenient scrutiny even though consumers likely are not deceived, for instance, that a bag of chocolate chip cookies has more sugar, calories, carbohydrates, and less Vitamin A than a bag of baby carrots.[183]

While much of the disagreement between courts about the limits of *Zauderer* centers on the question of which government interests can justify compelled commercial disclosures, this is not the only open question. A second question concerns how to understand the phrase "purely factual and uncontroversial" and incorporate it into *Zauderer*'s analysis.[184] These two interpretative questions are independent. While disclosing purely factual information can achieve paternalistic goals, these goals also might be achieved more effectively by compelling disclosure of information that is not strictly factual or uncontroversial. How far a court is willing to extend the category of what constitutes a purely factual disclosure need not depend on whether the court limits *Zauderer*'s analysis to disclosures aimed at preventing consumer deception.

A third question, not entirely clarified in either *Zauderer* or *Milavetz*, is how courts should assess relative burdens that the disclosure requirement imposes. Not only do both decisions suggest

182. Gielow Jacobs discusses what she labels "paternalistic" state interests in which the government regulates speech to effect changes in commercial transactions to achieve some public good. *See* Gielow Jacobs, *supra* note 180, at 879–80. Cigarette warning labels seem to provide a classic example of this sort of regulation. *Id.* at 880. *But see* Defendant's Opposition to Motion for Preliminary Injunction at 23, R.J. Reynolds v. FDA, No. 11-1482 (RJL) (D.D.C. Sept. 9, 2011), ECF No. 18 (arguing that the primary goal of the new cigarette warnings qualifies as preventing confusion or deception).

183. Circuits have taken opposing positions on this issue. The First Circuit, for instance, explicitly rejected the view that *Zauderer*'s analysis should be limited to disclosure aimed at preventing deception. *See* Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310, 310 n.8 (1st Cir. 2005). The Seventh Circuit, by contrast, has stated it would confine the application of *Zauderer*'s analysis to disclosure requirements aimed at preventing deception. *See* Commodity Trend Serv., Inc. v. CFTC, 233 F.3d 981, 995 (7th Cir. 2000).

184. *Compare* Entertainment Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (finding *Zauderer* inapplicable because the disclosed material constituted a subjective, highly controversial opinion), *with* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 966–67 (2009), *aff'd sub nom.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (finding a disclosure requirement unconstitutional under *Zauderer*'s analysis because the disclosure failed to convey factual information).

that disclosure requirements are categorically less restrictive than other forms of regulation,[185] language in both decisions also suggests that when a disclosure requirement is reasonably related to preventing consumer deception, courts need not inquire if it is unduly burdensome.[186] Still, some courts have read *Zauderer* to prescribe an assessment of burdens imposed by disclosure requirements.[187]

These three questions—the role of burdens imposed by disclosures, which state interests justify disclosure, and what "purely factual" means—are internal interpretative questions.[188] Courts seeking to apply *Zauderer* also face external interpretative questions, specifically the question of how to situate the *Zauderer* decision into broader First Amendment jurisprudence. Conceptually speaking, this question requires a court to determine if *Zauderer* is an exception to the Supreme Court's compelled speech jurisprudence, an offshoot of its commercial speech jurisprudence, or if it resides at a crossroads between the two doctrines.[189] Practically speaking, how a court addresses that question will determine which test the court should apply if it finds *Zauderer* inapplicable. A court might view *Zauderer* as providing a limited exception to strictness with which it would otherwise assess laws attempting to compel speech, or a court might view *Zauderer* as a further loosening of the already relaxed scrutiny it applies to regulations of commercial speech.[190]

Because *Zauderer* leaves many independent, open questions it may not be useful to categorize the various interpretations along a linear spectrum of broad to narrow depending on how any one question is

185. *See* Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 650 (1985).

186. *See supra* notes 172–73 and accompanying text.

187. *See e.g.*, Entm't Software Ass'n v. Blagojevich, 469 F.3d 641 (7th Cir. 2006).

188. By "internal interpretive questions," this Note refers to questions regarding the proper application of the analysis articulated in *Zauderer*.

189. *Compare Blagojevich*, 469 F.3d at 652 (aligning *Zauderer*'s analysis with compelled speech jurisprudence), *with* United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005) (describing *Zauderer*'s analysis as a modification of *Central Hudson*'s analysis).

190. This difference is not purely academic. The arguments that the parties made in *R.J. Reynolds* illustrate what is at stake. In its brief, the FDA urged the district court to apply *Central Hudson* if it found *Zauderer* inapplicable. *See* Defendant's Opposition to Motion for Preliminary Injunction at 15, R.J. Reynolds v. FDA, No. 11-1482 (RJL) (D.D.C. Sept. 9, 2011), ECF No. 18. On the other hand, the tobacco companies urged the district court to find *Zauderer* inapplicable and, subsequently, apply strict scrutiny. *See* Plaintiff's Motion for Summary Judgment and Permanent Injunction at 29, R.J. Reynolds v. FDA, No. 11-1482 (RJL) (D.D.C. Aug. 19, 2011), ECF No. 10.

answered.[191] Instead, by considering the effect that implementing a particular interpretation will have on the "vast regulatory apparatus . . . erected on the foundation of *Zauderer*,"[192] different approaches can be categorized as more liberal and more conservative.[193] A liberal interpretation allowing government greater license under the First Amendment to compel commercial disclosures would not undermine this vast regulatory regime. A more conservative interpretation using the First Amendment to more narrowly circumscribe the range of permissible compelled commercial disclosures would scale back the vast regime. The new graphic cigarette warning labels perfectly illustrate the alternative approaches. The more conservatively a court confines the scope of *Zauderer*'s exception, the more likely it is that the court will strike down the FDA's new graphic warning labels as unconstitutional compelled speech. The more liberally a court interprets *Zauderer*, the more likely the warnings will stand.

B. Litigation Over the Tobacco Control Act's Cigarette Warning Labels

1. Discount Tobacco City & Lottery Inc. v. United States

On August 31, 2009, shortly after the enactment of the Tobacco Control Act, five tobacco companies and a tobacco retailer filed suit in the Western District of Kentucky.[194] In the resulting litigation, *Commonwealth Brands, Inc. v. United States*, the companies challenged each provision of the Act that implicated the First Amendment.[195] The court ultimately enjoined enforcement of two provisions: a ban on color graphics in tobacco advertisements and a ban on claims implying tobacco products are safer as a result of FDA regulation.[196] The district court concluded that every other provision

191. Jacobs employs the "narrow" and "broad" terminology and focuses primarily on the which state purposes are acceptable under *Zauderer*. *See* Gielow Jacobs, *supra* note 180, at 863.

192. Post, *supra* note 180, at 562 (quoting Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 156 (1996)). For an example of a regulation qualifying as part of this vast regulatory apparatus, see the Federal Food, Drug, and Cosmetic Act codified at 21 C.F.R. § 101.1, which provides the guidelines for nutritional warning labels on food.

193. These terms are used without referring to political or ideological connotations.

194. Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010).

195. *Id.* at 519.

196. *Id.* at 541.

withstood the tobacco companies' challenge, including the provision requiring the cigarette packs to display the new graphic warning labels.[197]

The district court's discussion of the graphic cigarette warning labels is notable for two reasons. First, it failed to distinguish between restrictions on speech and compulsions of speech.[198] The *Commonwealth Brands* court applied *Central Hudson*'s four-step analysis to the provisions of the Act restricting tobacco advertising as well as to the inchoate cigarette label warnings.[199] Second, the FDA had not promulgated the final version of the graphics by the time the case was decided. The court stated, nonetheless, that it did not believe "the addition of a graphic image [would] alter the substance of [the government's] message[], at least as a general rule."[200]

Both the tobacco companies and the United States appealed the Western District of Kentucky's decision, and on March 19, 2012, the Sixth Circuit issued its opinion in the case, recaptioned as *Discount Tobacco City & Lottery Inc. v. United States*.[201] With the exception of the graphic warning labels, the panel agreed on the constitutionality of each challenged provision of the Tobacco Control Act.[202] Judge Eric L. Clay, who authored the otherwise unanimous opinion, split with his fellow judges on the graphic warning labels' constitutionality. He dissented, arguing that the graphic aspects of the warning labels violated the First Amendment.[203] The other judges, Judge Jane B. Stranch joined by Judge Michael R. Barrett, upheld the constitutionality of the graphic warning label provision of the Tobacco Control Act.[204]

197. *Id.*

198. *See id.* at 528–32.

199. *See id.* at 532 ("[T]he Court finds that the warning requirement is sufficiently tailored to advance the government's substantial interest under *Central Hudson*.").

200. *Id.*

201. 674 F.3d 509 (6th Cir. 2012).

202. *See id.* at 524–31. In all, the unanimous majority affirmed the district court rulings that upheld the Act's restrictions on the marketing of modified-risk tobacco products, the ban on tobacco company event sponsorship, and the ban on tobacco branding on non-tobacco merchandise, the ban on free sampling. Next, the unanimous majority affirmed the district court's determination that restricting tobacco companies to black and white advertising violated the First Amendment. Finally, the unanimous majority reversed the court below and upheld the provision of the Tobacco Control Act restricting tobacco companies' ability to imply that FDA regulation renders tobacco products safer. *See id.* at 518.

203. *See id* at 524–31; *see also supra* notes 15–20 and accompanying text.

204. *See id.* at 551–69.

At the outset, the majority emphasized that it would construe the tobacco companies' challenge facially, rather than as-applied.[205] This meant the court would consider the constitutionality of the provision generally; it would not analyze the nine images published in the FDA's June 2011 Final Rule.[206] For the tobacco companies' facial challenge to succeed, they would have to convince the court that the underlying provision of the Tobacco Control Act offended the First Amendment regardless of which images the FDA ultimately published.[207] The *Discount Tobacco City* court cited four reasons for restraining itself to a facial assessment of the act's warning label provision. First, the court refused to assess any specific image because the FDA published the Final Rule only one month prior to oral arguments and the selected warnings would not appear until well after arguments.[208] Second, there could be no appellate review of any specific images because, according to the majority, the district court had not ruled on any specific images.[209] Third, the majority emphasized that the tobacco companies' own litigation strategy sought to independently challenge the finalized warning labels in a separate suit, namely *R.J. Reynolds v. FDA*.[210] Finally, granting the relief that the tobacco companies requested—striking down the warning labels for *all* tobacco producers and sellers, not merely the parties before the court—required the court to issue a facial ruling on the challenged legislation.[211] According to the majority, "Addressing the specific images would require us to reach a constitutional question that was neither briefed nor argued and turns on facts not available, litigated, or considered by the district court, all of which would fly in the face of the restraint we should exercise during judicial review."[212]

205. *See id.* at 552.

206. *See id.*

207. *See id.* at 554 ("To succeed in a typical facial attack, [a plaintiff] would have to establish that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." (quoting United States v. Stevens, 130 S. Ct. 1557, 1587 (2010)) (internal quotation marks omitted)).

208. *See id.* at 552–53. The Sixth Circuit heard oral arguments on July 27, 2011. The FDA published its Final Rule on June 22, 2011. *Id.* The Final Rule was set to take effect on September 22, 2011. *See supra* note 202 and accompanying text.

209. *See id.* at 553 (parsing the district court's language to determine that the court below had considered the provision generally).

210. *See id.* at 553–54 (noting that tobacco companies' complaint in *R.J. Reynolds* characterized the *Discount Tobacco City* litigation as a facial challenge, and asserting that "[l]itigation strategy is unquestionably the domain of Plaintiffs").

211. *See id.* at 554 (citing John Doe #1 v. Reed, 130 S. Ct. 2811 (2010)).

212. *Id.* at 553.

The *Discount Tobacco City* court next considered the appropriate level of scrutiny for analyzing compelled commercial disclosures.[213] The majority suggested two options. First, if a commercial disclosure requirement meets the conditions outlined in *Zauderer*, it garners a lenient rational basis review.[214] Alternatively, if a disclosure requirement fails to satisfy the conditions in *Zauderer*, courts should treat it like any other law compelling speech and apply strict scrutiny.[215] The *Discount Tobacco City* majority, therefore, sided with the Seventh Circuit and posited that within the wider realm of First Amendment jurisprudence, *Zauderer*'s analysis provides an exception to the stringent scrutiny typically applied to laws that compel speech.[216]

Two cases, the Supreme Court's decision in *Milavetz*[217] and the Second Circuit's decision in *National Electrical Manufacturers Association v. Sorrell*,[218] highlighted for the majority just how leniently disclosure requirements should be assessed when a disclosure requirement meets *Zauderer*'s triggering conditions.[219] These cases emphasized three important considerations. First, they demonstrated that the government does not need to prove that the disclosure will fulfill its intended aim effectively in all or even most circumstances.[220] Rather, the government must only prove as a matter of common sense that the disclosure will advance the state's purported interest and any effect toward that end, however slight, will suffice.[221] Moreover, no more proof of the disclosure's effectiveness is

213. *See id.* at 554.

214. *Id.*

215. *Id.* (citing Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651–52 (7th Cir. 2006)).

216. *See supra* note 173 and accompanying text.

217. *See supra* note 108 and accompanying text.

218. 272 F.3d 104, 113–16 (2d Cir. 2001) (applying *Zauderer* to disclosure requirements for products containing mercury).

219. *See, e.g.*, *Discount Tobacco City*, 674 F.3d at 556–57 ("The Second Circuit case of [*Nat'l Elec. Mfrs. Ass'n*] reinforces the principles . . . that deciding whether the required disclosure satisfies the *reasonably related* requirement is all that is necessary to determine the disclosure's constitutionality, and . . . that satisfying this requirement is a simple task.").

220. *See id.* at 557–58; *see also id.* at 564 (noting with approval that the *Nat'l Elec. Mfrs. Ass'n* court found that a common sense determination that commerce might change their behavior sufficiently satisfied *Zauderer*'s scrutiny).

221. *See id.* at 557 ("[The] constitutionality [of a disclosure requirement] does not hinge upon some quantum of proof that a disclosure will realize the underlying purpose. A common sense analysis will do. And the disclosure has to advance the purpose only slightly." (citing *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 115)).

necessary.[222] When the aim is to prevent consumer deception, disclosures need only provide information that some consumers find pertinent when deciding whether to purchase goods or procure services.[223] Extrapolating from the reasoning in these earlier decisions, the *Discount Tobacco City* majority posited a very liberal interpretation of the "reasonably related" component of *Zauderer*'s analysis, one highly deferential to a government's intended purpose.

Second, for *Discount Tobacco City* all *factual* disclosures fall within the ambit of *Zauderer*'s analysis.[224] *National Electrical Manufacturers Association* particularly reinforced for the *Discount Tobacco City* majority that the critical factor in deciding whether to apply *Zauderer*'s rational basis review is whether the disclosure requirement compels factual information or opinion.[225] Thus, *Zauderer*'s "purely factual and uncontroversial" component functions as a triggering condition for its rational basis review. Moreover, the *Discount Tobacco City* court consciously simplified "purely factual and uncontroversial" to a question of whether the disclosure reveals factual information.[226] As long as the disclosed information is factual, the disclosure requirement garners the *Zauderer*'s lenient rational basis review. If the condition is not satisfied, *Zauderer* requires that

222. *See id.*

223. *See id.* at 556 (noting that the *Milavetz* Court found disclosures constitutional because they revealed facts pertinent to consumer decision-making); *see also id.* at 564 ("In concluding that *it was probable* that some consumers would change their behavior in response to disclosures, [*National Elec. Mfrs. Ass'n*] did not point to any evidence showing that some consumers would change; instead, it reasonably assumed they would based on common sense. That sufficed." (citations omitted)).

224. *See id.* at 555 ("*Zauderer* relied on the distinction between a fact and a personal or political opinion to distinguish factual, commercial-speech disclosure requirements, to which courts apply a rational-basis rule, from the type of compelled speech on matters of opinion that is 'as violative of the First Amendment as prohibitions on speech.'" (quoting *Zauderer*, 471 U.S. at 650)).

225. *See id.* at 556 ("[*Nat'l Elec. Mfrs. Ass'n*] reinforces the principle[] that distinguishing between a fact and a personal or political opinion controls whether a required rule is reviewed under *Zauderer*'s rational-basis rule or the more exacting compelled speech doctrine.").

226. Responding to the tobacco companies' argument that *Zauderer* requires disclosures to be "purely factual and noncontroversial," the majority disagreed, claiming that any such language in *Zauderer* described the disclosure at issue but did not proscribe a general standard to trigger the rational basis analysis. *See id.* at 559 n.8. The majority went on to argue that because the phrase never appears in *Milavetz*, the Supreme never intended to proscribe a triggering standard as robust as "purely factual and uncontroversial," but rather factual or accurate disclosure would suffice. *Id.*

courts, instead, strictly scrutinize the requirement as they would other forms of compelled speech.[227]

Third, according to the majority, once a court determines that a disclosure falls within *Zauderer*'s ambit, rational basis review is the sole inquiry.[228] According to the majority, *Milavetz* and *National Electrical Manufacturers* conclusively confirmed that *Zauderer* did not direct courts to weigh the burdens imposed by disclosure.[229] As long as the disclosure is reasonably related to the state's goal, any burdens on the speaker that disclosure imposes are irrelevant to the disclosure requirement's constitutionality.[230] As such, the *Discount Tobacco City* court refused to address whether the size of tobacco warning labels and the ratio of the package covered by them unduly burdened cigarette companies' own commercial speech.[231]

Once it had articulated its interpretation of *Zauderer*, the *Discount Tobacco City* court's task became a two-step process.[232] First, the court determined whether the graphic warning label provision of the Tobacco Control Act satisfied *Zauderer*'s triggering condition—that is, whether it required a disclosure of facts. Second, if so, the court would apply rational basis review to the constitutionality of the warning label provision.[233]

The court first distinguished the textual content of the warning labels from their graphic content. It then proceeded to determine whether both the textual content and graphic content were properly

227. *See id.* at 554. The majority cited *Blagojevich* for the proposition that the alternative to *Zauderer*'s analysis is strict scrutiny. *See supra* note 202 and accompanying text. In fact, the *Discount Tobacco City* majority distinguished the Seventh Circuit's decision in *Blagojevich* by emphasizing that the disclosures at issue in that case were as a matter of law nonfactual, subjective opinions. They therefore triggered strict scrutiny. *Discount Tobacco City*, 674 F.3d 561.

228. *Discount Tobacco City*, 674 F.3d at 567 ("Deciding whether a disclosure requirement is reasonably related to the purpose is all the law requires to assess constitutionality.").

229. *See id.* at 556 ("Significantly, the [*Milavetz*] Court upheld the required disclosures without separately analyzing whether they were unjustified or unduly burdensome.").

230. The majority read the failure of the *Milavetz* Court to conduct an "undue burdens" inquiry as decisive proof that the Supreme Court never intended such an inquiry to be part of *Zauderer*'s analysis. *See id.* at 555–56.

231. *See id.* at 567 ("Again, to the extent that [the tobacco companies] argue that we must separately analyze whether the warnings are unduly burdensome, they are mistaken.").

232. *See id.* at 558–61.

233. The majority found *Zauderer*'s analysis applicable. *See supra* note 202 and accompanying text.

factual and thus warranted rational basis review.[234] The textual content of warning labels, the majority stated, is undisputedly factual: "It is beyond cavil that smoking presents health risks described in the warnings, and [tobacco companies] do not contend otherwise."[235] The court summarily concluded that the textual aspect of the warning labels fell within purview *Zauderer*'s analysis.[236]

The majority more thoroughly evaluated the graphic content required by the warning label provision,[237] but did so without reference to the content in any specific image published in the FDA's Final Rule.[238] The Tobacco Control Act's graphic warning label provision would stand or fall on its own merits. Because the *Discount Tobacco City* court would not evaluate the content of specific images, the court assessed, generally, whether images could convey factual information and, in particular, whether images could factually convey the negative health consequences of smoking.[239] The court noted just how untenable a facial challenge made the tobacco companies' position.[240] Essentially, to withhold rational basis review, the companies would need to convince the court that images categorically could not convey factual information, a position the court described as "stand[ing] at odds with reason."[241] The majority proceeded to enumerate its own non-exhaustive list of imagery capable of factually conveying the negative health consequences of smoking.[242] Some

234. *Discount Tobacco City*, 674 F.3d at 558.

235. *Id.*

236. *See id.*

237. *See id.* at 559–61.

238. *See id.* at 558 ("The Act's graphic-warnings provision mandates that the FDA 'require color graphics depicting the negative health consequences of smoking' to accompany the textual warnings on cigarette packaging and advertising. Because [the tobacco companies] bring a facial challenge to the warning label requirements, our concern is not with the specific images the FDA chose . . . ." (citations omitted)).

239. The court never expressly delineates these two distinct questions, at times addressing whether images could be factual and at other times addressing the possibility of finding images that could convey factual information about the negative health consequences of smoking. *Compare id.* at 560 ("*Zauderer* itself eviscerates the argument that a picture or drawing cannot be accurate or factual."), *with id.* at 559 ("Students in biology, human-anatomy, and medical-school courses look at pictures or drawings in textbooks . . . because these pictures convey factual information about medical conditions and biological systems.").

240. *See id.* at 559.

241. *See id.*

242. "A nonexhaustive list of some that [sic] would include a picture or drawing of a nonsmoker's and a smoker's lungs displayed side by side; a picture of a doctor looking at an x-ray of either a smoker's cancerous lungs or some other part of the body presenting a smoking related condition . . . ." *Id.* at 559.

images described in the majority's list of potential, factual images were indistinguishable from images the FDA finally selected.[243]

Given the majority's reasoning, this list of potential, factual images alone sufficed to justify a rational basis review of graphic content of the warning labels as prescribed by the act. The *Discount Tobacco City* court, nevertheless, hammered its conclusion home. First, the mere fact that images are representational does not preclude their being factual; for instance, illustrations in medical textbooks pictorially depict factual information about medical conditions.[244] Moreover, textual depictions of illness and disease could be equally representational.[245] Second, the Supreme Court recognized in *Zauderer* itself that illustrations can convey information factually and accurately.[246] The majority cited the Supreme Court's reasoning in *Zauderer* to imply that the use of images for their emotional resonance and their ability to attract attention is not illegitimate, nor does it render those images nonfactual.[247] Convinced that images

243. *See supra* note 242 and accompanying text.

244. *Id.* ("And yet medical students learn valuable factual information in part by examining pictures and images of the human body and the various illnesses that may befall it. So arguing that representation of a medical condition becomes an opinion when people could have that medical condition in ways that deviate from the representation would lead to an unsupportable conclusion that textual or *pictorial descriptions* of standard medical conditions must be opinions as well." (emphasis added)).

245. *See id.*

246. *See id.* at 560. Elsewhere in *Zauderer* the Court addressed a restriction on the plaintiff attorney's use of illustrations in his advertisements. *See* Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 647–49 (1985).

247. *See Discount Tobacco City*, 674 F.3d at 560 (accusing the dissent of adopting the position the Supreme Court rejected in *Zauderer* that illustrations pose a threat because they create an unacceptable risk of consumer deception, manipulation, and confusion). According to the majority, *Zauderer* foreclosed the argument that the ability of pictures to grab attention and evoke emotion renders them nonfactual. The Supreme Court found that the images in question, an illustration of an IUD in the plaintiff's ads, "serv[ed] and important communicative function: it attract[ed] the attention of the audience to the advertiser's message." *See id.* (quoting *Zauderer*, 471 U.S. at 647) (internal quotation marks omitted). The Supreme Court also found, however, that the same image, the illustration of the IUD, was an accurate representation. *See id.* (citing *Zauderer*, 471 U.S. at 647–49). Thus, in the Supreme Court's estimation the dual benefits of images—that they attract attention and evoke emotion—do not thereby preclude their factuality.

On the issue of whether images' ability to trigger visceral reactions and spark controversy violated *Zauderer*'s framework for compelled commercial disclosures, the *Discount Tobacco City* majority expressed their disagreement with *both* their own dissent and the D.C. District Court's opinion in the *R.J. Reynolds* litigation. *See id.* at 569 n.17. This seems to be the one instance in which the *Discount Tobacco City* majority broke restraint and commented on the merits of the *R.J. Reynolds* litigation.

could be factual, the majority found that "there is no reason why a picture could not accurately represent a negative health consequence of smoking, such as a cancerous lung."[248] According to the majority, therefore, the graphic aspects of the Tobacco Control Act's warning label provision qualified for rational basis review under *Zauderer*.[249]

Once it had determined that the graphic content in the Tobacco Control Act's warning label provision triggered *Zauderer*'s analysis, the *Discount Tobacco City* court proceeded to the second stage of its inquiry: evaluating whether the warning labels reasonably related to government's goal.[250] The majority stated, "The Act's required textual and graphic warnings are constitutional if there is a rational connection between the warnings' purpose and the means used to achieve that purpose."[251] Here, the government's interest was to prevent consumer deception on the negative health consequences of smoking through use of warnings that promoted a greater understanding of smoking's true health risks.[252] The court—perhaps uncomfortable with labeling current tobacco products or advertising as inherently or self-evidently deceptive—stated that, "The genesis of the [government's] stated purpose is self evident. Tobacco manufacturers and tobacco-related trade organizations . . . knowingly and actively conspired to deceive the public about the health risks and addictiveness of smoking for decades."[253] As such, the *Discount Tobacco City* court found it unnecessary to find that tobacco products (or tobacco marketing) were self-evidently deceptive; the court, instead, could rely on prior case law attesting to systematic, industry-

Still, the majority refused to address whether FDA's finalized graphics were nonfactual because they had been selected for their emotional resonance and persuasive ability. *See id.* at 560 n.9 (rebuking the dissent for addressing the visceral reaction created by the FDA's finalized warning labels).

248. *Id.* at 560.

249. *See id.* at 561.

250. *See id.* (evaluating the Tobacco Control Act's disclosure provision under the rational basis test).

251. *Id.* Earlier, the majority clarified its view that *Zauderer* did not mandate that the government aim narrowly at preventing consumer deception "per se." *See id.* at 557 (recounting the fact that the government's aim in *National Elec. Mfrs. Ass'n* was not to prevent consumer deception). Moreover, nothing in the majority's opinion suggests that *Zauderer* imposes any limitation on the government's use of disclosures for purposes beyond preventing consumer deception. It was unnecessary, however, for the majority to opine expressly about which goals legitimately fall within the purview of *Zauderer*'s analysis, because, as the court characterized it, the purpose of the tobacco warning labels is in fact to prevent the consumer from being misled about the health affects of tobacco.

252. *Id.* at 561.

253. *Id.* at 562.

wide deceptive practices by tobacco companies in the sale and marketing of their products.[254] This case law also established substantial ignorance about the dangers of smoking, particularly among young people.[255] The *Discount Tobacco City* majority found the current black and white textual warning labels to be an inadequate response to this history of deception: the current warnings were too inconspicuous to capture consumers' attention,[256] and they were written at a reading level too advanced for the average tobacco consumer.[257] It is no surprise, the court stated, that the average smoker failed to understand the true health consequences of smoking: "A warning that is not noticed, read, or understood by consumers does not serve its function."[258] The Tobacco Control Act's graphic warning labels, the court stated, remedy these deficiencies because they are larger and include graphics.[259] For the *Discount Tobacco City* majority, the probability that the new warning labels would be proven more effective than the old labels sufficed to render the new warning labels constitutional under *Zauderer*'s rational basis test.[260] Yet the court did not rest on its own common sense assessment of the warning labels' efficacy, but rather on "abundant evidence establish[ing] that larger warnings incorporating graphics promote greater understanding of tobacco-related health risks and materially affect consumers' decisions regarding tobacco use."[261] The court cited multiple studies that indicated benefits in other countries—including Canada, Australia, and Thailand—had been achieved by

254. *See id.* at 562–63 (citing Cipollone v. Liggett Grp. Inc., 505 U.S. 504 (1992); United States v. Phillip Morris USA, Inc., 566 F.3d 1095 (D.C. Cir. 2009) (per curiam)).

255. *See id.* at 564 ("[R]esearch and expert testimony demonstrate that most youth . . . have a very inadequate understanding of the medical consequences, physical pain, and emotional suffering which results from smoking and the unlikelihood of their being able to quit at some future time." (quoting United States v. Phillip Morris, 449 F. Supp. 2d 1, 579–80 (D.D.C. 2006)) (internal quotation marks omitted)).

256. *Id.* at 563.

257. *See id.* ("The [current] warnings 'require a college reading level' and thus 'may be inappropriate for youth and Americans with poor reading abilities' and low levels of education." (quoting INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION, at C-3 (2007))).

258. *Id.* at 564.

259. *Id.* at 565.

260. *See id.* at 564 (reiterating that, pursuant to the reasoning in *Nat'l Elec. Mfrs. Ass'n*, all that *Zauderer*'s rational basis review requires is a likelihood that the disclosures affect *some* consumer behavior).

261. *Id.* at 565.

implementing similar warnings.[262] As such, the majority held "[t]he warnings are reasonably related to the purpose Congress sought to achieve—namely preventing consumer deception—and are therefore constitutional."[263]

In the end, the *Discount Tobacco City* majority interpreted *Zauderer*'s analysis to impose a low constitutional hurdle for compelled commercial disclosures. Several aspects of the court's reasoning demonstrate this conclusion. First, the court insisted that *Zauderer*'s analysis did not include any inquiry into the burdens imposed by disclosure as long as the triggering condition for *Zauderer*'s analysis was met.[264] Second, the court distilled the triggering condition for *Zauderer*'s rational basis review into a showing of mere factuality and discarded the language from *Zauderer* that suggested commercial disclosures must be purely factual and noncontroversial.[265] Third, the court did not require that the commercial speech in question, here the cigarette packages and advertising, be self-evidently misleading. It sufficed that (i) there had been prior deceptive practice by the tobacco companies and (ii) those prior deceptive practices contributed to consumer ignorance.[266] Fourth, the court seemed to be the first of *Zauderer*'s progeny to base the constitutionality of a disclosure requirement in part on the fact that the disclosure more effectively advanced the government's goal than had prior (and less burdensome) alternatives.[267] Fifth, for the majority, *Zauderer*'s rational basis review could be satisfied even if the new warnings did not actually change consumer behavior or successfully combat consumer deception.[268] For the majority, *Zauderer*'s analysis simply required the graphic warning labels to disclose information pertinent to some consumers' decision whether to purchase tobacco. Ultimately, the *Discount Tobacco City* majority's reasoning implies a highly permissive interpretation of *Zauderer*'s analysis for compelled commercial disclosures. As such, the decision falls on the far liberal end of the spectrum of how to interpret *Zauderer*.

262. *See id.* at 565–66.
263. *Id.* at 566.
264. *See supra* note 219 and accompanying text.
265. *See supra* note 226 and accompanying text.
266. *See supra* note 174 and accompanying text.
267. *See supra* notes 227–30 and accompanying text.
268. *See supra* notes 227–29 and accompanying text.

a. The Discount Tobacco City *Dissent*

Judge Eric L. Clay dissented solely on the issue of the graphic warning labels.[269] For Clay, all laws implicating commercial speech are subject to the framework outlined in one of two cases: either *Central Hudson* or *Zauderer*.[270] According to Clay, the decision of which of those two frameworks to apply rests entirely upon the outcome of the first step in *Central Hudson*'s four-step analysis, regardless of whether the law restricts speech or compels it.[271] When the government restricts commercial speech that is neither misleading nor unlawful, a court should proceed through the remaining steps in *Central Hudson*'s analysis to determine the law's constitutionality.[272] But when commercial speech is misleading or at least potentially misleading, the law's constitutionality falls within *Zauderer*'s ambit.[273] Clay seems to hold the view, which other judges on the panel criticized,[274] that *Zauderer*'s exception is not relegated to compelled commercial speech, but includes restrictions on commercial speech as well.[275] Rather, *Zauderer*, for Clay, provides an alternative level of scrutiny for commercial speech unworthy of the protection that *Central Hudson*'s framework affords because "untruthful speech, commercial or otherwise, has never been protected for its own sake."[276]

269. *See* Discount Tobacco City Inc. v. United States, 674 F.3d 509, 527–30 (6th Cir. 2012) (Clay, J., dissenting).

270. *See id.* at 522 ("We review the Act's restrictions on commercial speech, subject to the framework initially set forth in [*Central Hudson*] and [*Zauderer*]." (citations omitted)). Clay, despite urging from the tobacco companies to apply strict scrutiny to all provisions of the Tobacco Control Act, declined to outpace the Supreme Court's jurisprudence on commercial speech. *See id.*

271. *See id.* at 522–24 (differentiating the application of *Central Hudson*'s and *Zauderer*'s analyses on whether the commercial speech implicated is misleading).

272. *See id.* at 522–23.

273. "Because the *Central Hudson* test does not govern commercial speech that is false, deceptive or misleading, if commercial speech is so categorized, we apply a different test to determine whether a restriction, or a disclosure requirement is unconstitutional." *Id.* at 523.

274. *Id.* at 551–52 (Stranch, J., majority opinion).

275. *See id.* at 523. In support of his interpretation, Clay cites Justice Breyer's dissenting opinion in *Sorrell v. IMS Health Inc.*, in which Breyer states that misleading, deceptive, or aggressive sales tactics lack even the intermediate protection of *Central Hudson*'s standard. *See id.* (citing Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2674 (2011) (Breyer, J., dissenting)).

276. *Id.* at 523 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 771–72 (1976)).

Clay singled out the warnings' imagery as the sole component of the warning labels to offend the First Amendment.[277] According to Clay, the images were subjective and the "inherently persuasive character of the visual medium[] cannot be presumed neutral."[278] Clay acknowledged that the failure of consumers to appreciate the negative health consequences of smoking creates "an information deficit . . . which may render warningless tobacco products inherently deceptive."[279] He similarly recognized the inadequacies of the current warning labels.[280] The government, however, had not established that the color graphics—given Clay's view of their subjectivity—were a reasonably tailored response to that danger.[281] Clay reasoned that the color graphics would be subjective because the FDA chose images to evoke emotional and visceral responses in an attempt to illegitimately manipulate consumer decision-making.[282]

The majority criticized three flaws in the dissent's reasoning. The first was Clay's willingness to consider the constitutionality of the nine images that the FDA had selected.[283] The majority also criticized Clay for incorrectly relying on *Central Hudson*'s analysis[284] and conflating speech restrictions with compelled disclosures.[285] Finally, the majority criticized the dissent's assertion that *Zauderer*'s analysis cannot accommodate images that provoke a visceral response or incite controversy: "Facts can disconcert, displease, provoke an

277. *Id.* at 528 (Clay, J., dissenting) ("Where I part with the majority is on what I consider to be the constitutional flaw in the requirement for color graphic warning labels.").

278. *Id.* at 526.

279. *Id.* at 528.

280. *Id.*

281. *See id.* at 529.

282. *See id.* ("While it is permissible for the government to require a product manufacturer to provide truthful information, even if perhaps frightening, to the public in an effort to warn it of potential harms, it is less clearly permissible for the government to simply frighten consumers or to otherwise attempt to flagrantly manipulate the emotions of consumers as it seeks to do here."). Clay augmented his argument against the color graphics by asserting (1) that images cannot accurately convey all information about the health consequences of smoking and (2) that viewers will interpret the images differently. *Id.* As such, Clay reasoned the color graphics did not "materially advance" the state's interest to the extent that the majority asserted they did. *See id.* at 530.

283. *See id.* at 527 (expressing willingness to evaluate the graphical warning labels facially and as-applied).

284. *See id.* at 568 (Stranch, J., majority opinion) (criticizing the dissent for its reliance on *Central Hudson*).

285. *Id.*

emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions."[286]

More than the majority, Clay recognized that *Zauderer* calls for disclosures to be *purely* factual *and uncontroversial*, and this likely is the primary disagreement between Clay and the majority concerning the interpretation of *Zauderer*: How should the phrase "purely factual and uncontroversial" be employed? For the majority, the phrase triggers lenient, disclosure-friendly rational basis review.[287] If a disclosure fails to be factual, the majority would apply strict scrutiny to the disclosure requirement. By contrast, for Clay the phrase provides the essential standard at the core of *Zauderer*'s analysis. Any disclosure that fails to be purely factual and uncontroversial is thereby unconstitutional—no alternative analysis required. According to Clay,

> [t]hough the hurdle that *Zauderer* erects for the government is a relatively low one, it is still a hurdle that the government must surmount. . . . While courts have been resistant to strike down disclosure requirements under *Zauderer*, if *Zauderer* does in fact create a line, then it is clear that some types of disclosure requirements must cross that line.[288]

2. R.J. Reynolds Tobacco Co. v. FDA

In the midst of the *Commonwealth Brands*/*Discount Tobacco City* litigation, the FDA completed its assigned task under the Tobacco Control Act and issued the nine finalized graphic warning labels, complete with specific imagery and including the "1-800-QUIT-NOW" anti-smoking hotline. In response, the tobacco companies revamped their arguments and chose a new venue to challenge the FDA's promulgated warning labels as unconstitutionally compelled disclosures.[289] The stage was set for *R.J. Reynolds v. FDA*.

Arguing for summary judgment in *R.J. Reynolds*, the tobacco companies maintained that the finalized warning labels were not purely factual and uncontroversial. Thus, strict scrutiny, not *Zauderer*'s framework, should govern whether the new graphic

286. *Id.* at 569.
287. *See supra* notes 226–27 and accompanying text.
288. *Id.* at 530 (Clay, J., dissenting).
289. *See supra* notes 13–27 and accompanying text.

warnings were constitutional.[290] The tobacco companies gave five reasons why *Zauderer*'s framework should not apply.[291] First, the tobacco companies argued that the new warning labels were persuasive, not informative.[292] Second, they argued that the illustrations and staged photographs like those used in the graphic warnings could not factually or uncontroversially convey information because of their emotionally charged content.[293] Third, the anti-smoking hotline included in the warnings, "1-800-QUIT-NOW," was not a disclosure but a directive not to smoke.[294] Fourth, requiring fifty percent of the front and back of the cigarette packs to display the warning labels was unduly burdensome.[295] Fifth, the warnings were ineffective at conveying information.[296] These arguments presuppose a very conservative interpretation of *Zauderer*'s framework—one that (i) thoroughly assesses whether a disclosure is *purely* factual, (ii) includes an undue burden inquiry, and (iii) requires the government to prove the disclosure's effectiveness.

On November 7, 2011, the District of the District of Columbia granted the tobacco companies a preliminary injunction against the graphic warning labels,[297] and on February 29, 2012, the district court granted summary judgment to the tobacco companies.[298] In both instances, the district court found *Zauderer*'s framework inapplicable and instead applied strict scrutiny to the graphic warning labels.[299] For the district court, nothing about the graphic warning labels suggested that they should be analyzed pursuant to *Zauderer*: "Put

290. *See* Plaintiff's Motion for Summary Judgment and Permanent Injunction at 24–36, R.J. Reynolds v. FDA, No. 11-01482 (RJL) (D.D.C. Aug. 19, 2011), ECF No. 10.

291. *See id.* at 31–36.

292. *See id.* at 32 ("[The] FDA effectively concedes that the warnings are not intended to inform, but rather, to persuade customers not to smoke.").

293. *See id.* at 33–34 ("Such tactics are no closer to *mere informational disclosures* than any of the 'shock and awe' advocacy used in numerous ideological debates, such as when animal-rights activists display photographs of mutilated animals." (emphasis added)).

294. *Id.* at 35.

295. *Id.*

296. *Id.* at 36.

297. R.J. Reynolds v. FDA, 823 F. Supp. 2d 36 (D.D.C. 2011), *vacated*, 696 F.3d 1205 (D.C. Cir. 2012).

298. R.J. Reynolds v. FDA, 845 F. Supp. 2d 266 (D.D.C. 2012).

299. The district court situated *Zauderer* squarely within compelled speech jurisprudence, characterizing *Zauderer*'s analysis as a narrow exception of the presumptive unconstitutionality of compelled speech. *See id.* at 272 (discussing *Zauderer* and compelled speech).

simply the Government fails to convey any factual information supported by evidence about the actual health consequences of smoking through its use of these graphic images."[300] Subsequently, the FDA appealed the district court's grant of summary judgment to the tobacco companies, thus giving the D.C. Circuit its chance to consider the constitutionality of the warning labels.[301]

The D.C. Circuit issued an opinion on August 24, 2012, affirming the decision of the court below.[302] Regarding its task, the court stated, "The only question before us is whether FDA's promulgation of the graphic warning labels—which incorporate the textual warnings, a corresponding graphic image, and the '1-800-QUIT-NOW' cessation hotline number—violates the First Amendment."[303] Like the panel in *Discount Tobacco City*, the *R.J. Reynolds* court split two to one.[304] Judge Janice Rogers Brown, joined by Judge A. Raymond Randolph, applied *Central Hudson*'s four-step analysis to find the warning labels unconstitutional infringements upon commercial speech.

To summarize the significance of the issue before it, the court stated,

> [t]his case raises novel questions about the scope of the government's authority to force the manufacturer of a product to go beyond making purely factual and accurate commercial disclosures and undermine its own economic interest—in this case, by making "every single pack of cigarettes in the country [a] mini billboard" for the government's anti-smoking message.[305]

Unlike the other courts that considered the graphic warning labels, the *R.J. Reynolds* majority, in addition to recognizing the elements of compelled speech at issue, also highlighted the elements of forced subsidization.[306] Both created a presumption in favor of strict scrutiny.[307] Nonetheless, the court acknowledged two "narrow and well-understood exceptions" to strict scrutiny—*Zauderer*'s analysis

300. *See, e.g.*, *id.* at 272–73. The court's profound distaste for the labels is evidenced by its refusal even to call the labels "warnings" and making a point to refer to them only as "images" because the court viewed the labels as emotionally charged propaganda. *Id.* at 268 n.1.

301. *See supra* notes 297–300 and accompanying text.

302. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (2012).

303. *Id.* at 1211.

304. *Id.* at 1208.

305. *Id.* at 1212 (alteration in original).

306. *See id* at 1211. The court ultimately made little use of the line of cases dealing with compelled subsidization.

307. *Id.*

for compelled commercial disclosures and *Central Hudson*'s analysis for commercial restrictions more generally.[308] The *R.J. Reynolds* court's first task was to determine if either of these lower levels of scrutiny applied.[309]

The court described *Zauderer*'s analysis as "akin to rational basis review" and significantly less stringent than *Central Hudson*'s analysis.[310] Nonetheless, the *R.J. Reynolds* court tightly cabined the ambit of *Zauderer*'s analysis. First, the court insisted that as an exception to strict scrutiny, *Zauderer*'s framework only applies to disclosures aimed at preventing consumer deception.[311] Moreover, the court read *Ibanez* and Justice Thomas's concurrence in *Milavetz* to establish that before applying *Zauderer*, the government must show either that an advertisement is self-evidently deceptive or that it presents some "potentially real" danger of consumer deception.[312] Second, the court, like the *Discount Tobacco City* dissent, understood *Zauderer*'s analysis to entail a demanding inquiry into whether the disclosure is purely factual and uncontroversial.[313] Finally, the court seemed to posit that *Zauderer*'s analysis includes an inquiry into whether a disclosure is unduly burdensome.[314] Thus, the *R.J. Reynolds* court presented a version of *Zauderer* on par with the most conservative interpretations.

After laying out *Zauderer*'s framework, the D.C. Circuit concluded that *Zauderer*'s exception was inapplicable to the graphic warning labels for two reasons.[315] First, the court determined that the FDA

308. *Id.* at 1212.

309. *See id.* at 1213–17 (determining the applicability of *Zauderer* or *Central Hudson* analyses).

310. *Id.* at 1212.

311. *See id.* at 1213.

312. *See id.* at 1213–14 (discussing *Ibanez* and *Milavetz* and relying on Thomas' concurrence in *Milavetz* for support). "*Zauderer*, *Ibanez*, and *Milavetz* thus establish that a disclosure requirement is only appropriate if the government shows that, absent a warning, there is self-evident—or at least 'potentially real'—danger that an advertisement will mislead consumers." *Id.* at 1214.

313. *See, e.g.*, *id.* at 1216 ("The disclosures approved in *Zauderer* and *Milavetz* were clear statements that were both *indisputably accurate and not subject to misinterpretation by consumers*." (emphasis added)). The extent to which the court proved willing to scrutinize the factuality of disclosure is best evidenced by the reasons it gives for finding that the graphic warning labels did not constitute purely factual and uncontroversial disclosures. *See supra* notes 303–09 and accompanying text.

314. *See id.* at 1212 ("[D]isclosures are permissible . . . *provided the requirements are not 'unjustified or unduly burdensome*.'" (emphasis added) (quoting Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985))).

315. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (2012).

had failed to prove that the purpose of the warning labels was to prevent consumer deception.[316] Second, the court found that the warning labels did not fulfill *Zauderer*'s "purely factual and uncontroversial" requirement.[317]

Because it could not find any danger of consumer deception that the graphic warning labels specifically addressed, the court concluded that the graphic warning labels were outside the purview of *Zauderer*'s framework.[318] The court's reasoning was twofold. First, any potential for deception that the advertising practices of tobacco companies posed already had been adequately addressed. Restrictions in the Tobacco Control Act, like those prohibiting the use of terms like "low tar" and "light" alleviated concerns about the companies' history of misleading advertising.[319] Second, the government failed to prove that tobacco packaging itself was misleading.[320] The court stated that neither it nor the tobacco companies denied the need for some disclosure,[321] but that "none of the proposed warnings purport to address the information gaps identified by the government."[322]

The *R.J. Reynolds* court gave a litany of reasons for finding that the graphic warning labels were not purely factual and uncontroversial reminiscent of those given by the district court and the dissent in *Discount Tobacco City*.[323] First, the *R.J. Reynolds* majority claimed that the symbolic, non-literal nature of the images rendered them nonfactual.[324] Moreover, because they were symbolic, consumers could potentially misinterpret them.[325] The court also held that because the FDA selected the images primarily to elicit an emotional response, the warnings could not be *purely* factual.[326] Finally, the court found aspects of the warning labels did not convey

316. *Id.* at 1214–16.

317. *Id.* at 1216–17.

318. *See id.* at 1217 (discussing how the new warning labels fail to prevent any consumer deception).

319. *See id.* at 1215–16 ("While the Companies' representations about 'light' or 'low tar' cigarettes might have been misleading, the Act now prohibits such statements." (citations omitted)).

320. *Id.* at 1215.

321. *See id.* (referring to the tobacco companies' concession that some disclosure is appropriate).

322. *Id.* at 1215 n.8.

323. *See supra* notes 269–74 and accompanying text.

324. *R.J. Reynolds*, 696 F.3d at 1216.

325. *Id.*

326. *Id.*

any factual information but instead were intended to evoke emotion, consumer embarrassment, and "browbeat consumers into quitting."[327] These nonfactual aspects of the warning labels included an anti-smoking hotline and specific images like the image of the woman crying, the child, and the man wearing an "I Quit" t-shirt.[328] Of the images as a whole, the court stated, "While none of these images is patently false, they certainly do not impart pure factual, accurate, or uncontroversial information to consumers."[329]

Although the *R.J. Reynolds* majority found *Zauderer*'s exception inapplicable, the majority found that *Central Hudson* provided the appropriate standard of scrutiny because it found the warning labels to be a restriction on commercial speech.[330] The court assumed, but with some reluctance, that the government had a substantial interest in reducing smoking rates.[331] The government, however, failed to meet the third step of *Central Hudson*: it failed to show that the warning labels directly advanced that interest.[332] Unlike the *Discount Tobacco City* majority,[333] the *R.J. Reynolds* majority was underwhelmed with the success that other nations experienced by implementing similar warnings.[334] According to the court, the studies documenting the effects on such warnings in Australia and Canada did not establish that such warnings actually and directly reduced smoking rates.[335] Moreover, the FDA's own analysis predicted that the new warnings would reduce smoking rates by merely .088%.[336]

327. *Id.* at 1216–17.

328. *See id.* ("These inflammatory images and the provocatively-named hotline cannot rationally be viewed as pure attempts to convey information to consumers.").

329. *Id.* at 1217.

330. *See id.* Unlike the D.C. District Court, the *R.J. Reynolds* majority refused to follow the Seventh Circuit's example in *Blagojevich*, maintaining that its own precedent required it to apply the standards for commercial speech articulated in *Central Hudson* to compelled commercial disclosures. *Id.* (citing United States v. Philip Morris USA Inc., 566 F.3d 1095 (D.C. Cir. 2009)).

331. *See id.* at 1218 n.13 ("Like the district court, we are skeptical that the government can assert a substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences.").

332. *Id.* at 1222 ("FDA failed to present any data—much less the substantial evidence required under the [Administrative Procedures Act]—showing that enacting their proposed graphic warning labels will accomplish the agency's stated objective or reducing smoking rates.").

333. *See supra* notes 262–63 and accompanying text.

334. *R.J. Reynolds*, 696 F.3d at 1219.

335. *Id.*

336. *Id.* at 1220.

This evidence was hardly substantial and did not prove that the warning labels directly advanced the government's goal to a material degree as required by *Central Hudson*'s analysis.[337] As such, the court held that the FDA's promulgated graphic warning labels violated the First Amendment as unconstitutional restrictions on commercial speech, and remanded to the FDA, presumably for promulgation of new warning labels.[338]

a. The R.J. Reynolds Tobacco *Dissent*

Writing in dissent, Judge Judith W. Rogers argued that, with one caveat,[339] the FDA's promulgated warning labels did not offend the First Amendment. According to Rogers, of the two standards applicable to regulation of commercial speech, *Zauderer*'s framework should have been preferable to *Central Hudson*'s because the new warnings presented factually accurate information.[340] Regardless of which of these two levels of scrutiny it chose, however, Rogers believed that the court should have upheld the FDA promulgated graphic warning labels.[341] Rogers noted that the factual premises underpinning the need for new warning labels were not in dispute: those premises being (1) that tobacco is addicting; (2) that smoking contributes to or causes a vast array of severe health conditions including cancer, heart disease, and cerebrovascular disease; and (3) that the public, and adolescents in particular, underestimate risks of smoking.[342] Rogers emphasized that it was indisputable that tobacco companies had historically misled consumers about the true health effects of smoking and the addictiveness of nicotine.[343]

Rogers reconstructed a First Amendment framework that acknowledged the lesser protections for commercial speech but that

337. *See id.* at 1219.

338. *Id.* at 1222. However, the extent to which the FDA can promulgate new warning labels consistent with the majority's reasoning in *R.J. Reynolds* is an open question.

339. Rogers acknowledged that the 1-800-QUIT-NOW phone number violated the First Amendment. *See id.* at 1234, 1236 (Rogers, J., dissenting) (arguing that inclusion of the anti-smoking hotline number respectively violated *Zauderer*'s and *Central Hudson*'s analyses).

340. *See id.* at 1223 (arguing that *Zauderer*'s less exacting scrutiny applies, but asserting that the graphic warning labels satisfy *Central Hudson*'s four steps as well).

341. *See id.* at 1237–38 ("Because the warning label requirement . . . appears to survive the First Amendment challenge under either *Zauderer* or *Central Hudson*, I would reverse.").

342. *Id.* at 1223–24.

343. *Id.* at 1224.

also stressed the "material differences" between disclosure requirements and outright prohibitions on speech.[344] She identified two triggering conditions necessary to garner *Zauderer*'s less exacting scrutiny. *Zauderer*'s analysis applies to regulations if (1) they impose a disclosure requirement rather than an affirmative limitation on speech and (2) they are directed at potentially misleading speech.[345] If those two conditions are met, she asserted, *Zauderer* only requires that the disclosures reasonably relate to the government's interest.[346] Rogers resisted expressly limiting the class of state interests acceptable under *Zauderer*'s framework to preventing consumer deception.[347] Similarly, while she cautioned that a court should be mindful of unjustified or unduly burdensome disclosure requirements, this inquiry did not seem central to *Zauderer*'s analysis for her.[348]

Rogers argued that the likelihood of consumer deception was so great for tobacco products that it did not matter that its packaging and advertising did not contain any affirmative misstatement.[349] "Common sense, experience, and substantial scientific evidence" show that even with the existing warning labels, consumers continue to misunderstand the implicit risks of tobacco use.[350] Rogers noted that the circuit had recognized that an attempt to capitalize on prior instances of deception without disabusing consumers of any resulting misperceptions is itself deceptive.[351] The likelihood of consumer deception was hardly speculative.[352] Thus, the graphic warning labels satisfied the first of *Zauderer*'s preconditions for less exacting scrutiny.[353]

344. *See id.* at 1226 (quoting *Zauderer*, 471 U.S. at 650).

345. *See id.* at 1227 (Rogers, J., dissenting) (quoting *Milavetz*, 130 S. Ct. at 1339).

346. *See id.* at 1233 (quoting *Zauderer*, 471 U.S. at 651).

347. *Id.* at 1227 n.6 ("[T]he Supreme Court appears simply to have held that a government interest in protecting consumers from deception is *sufficient* to support a disclosure requirement—not that this particular interest is *necessary* to support such a requirement.).

348. *See id.* at 1233 (quoting *Zauderer*, 471 U.S. at 651). Rogers ultimately concluded that the size and placement of the warning labels were reasonably related to the government's goals but did not expressly couch her analysis terms of undue burdens.

349. *Id.* at 1228 ("Even absent any affirmatively misleading statements, cigarette packages and other advertisements that fail to display the final costs of smoking in a prominent manner are at least as misleading as the airline advertisements in *Spirit Airlines* [obscure the true cost of tickets]." (citations omitted)).

350. *Id.*

351. *Id.* (citing Warner-Lambert Co. v. FTC, 572 F.2d 749 (D.C. Cir. 1977)).

352. *Id.* at 1229.

353. *Id.*

The warning labels similarly satisfied the second precondition for *Zauderer*'s lenient scrutiny; they required disclosure without imposing an affirmative limitation on speech.[354] Implicit in Rogers' argument are the ideas (1) that the phrase "purely factual and uncontroversial" defines what qualifies as a disclosure and (2) to compel anything other than purely factual and uncontroversial information would qualify as an affirmative limitation on speech. For Rogers, the graphic warning labels met this definition because they were factual, accurate, and uncontroversial.

Rogers thoroughly defended the factual nature of the graphic warning labels. The majority erred, Rogers believed, in isolating the graphic content of the warning labels from their textual content. When viewed in connection with its respective textual warning, each image conveyed the textual warning more effectively without rendering the warning label inaccurate or nonfactual.[355] This was true even of specific images—like the image of the man wearing an "I QUIT" t-shirt—that the tobacco companies singled out as either nonfactual or inaccurate.[356] As the *Discount Tobacco City* court had done before her,[357] Rogers emphasized that the *Zauderer* Court had lauded illustrations for their ability to attract attention and to convey information directly.[358] Images retain the ability to effectively and efficiently convey information regardless of whether they are "digitally enhanced, illustrated, or symbolic," but that quality does not render them nonfactual.[359] Rogers further denied that the images were nonfactual or inaccurate because (1) they created a visceral reaction in consumers[360] or (2) they could dissuade consumers from

354. *See id.* at 1229–32 (discussing how the graphic warning labels qualify as purely factual disclosure under *Zauderer*).

355. *See id.* at 1231 (stating that the images must be assessed in connection with the textual warning).

356. The five images to which the tobacco companies specifically objected were: (1) the autopsied torso, (2) the man smoking from his tracheotomy hole, (3) the man in the "I QUIT" t-shirt, (4) the crying baby enveloped in smoke, and (5) the crying woman. *Id.* at 1231. Rogers elaborated on how each functioned to express the warnings' overall factual message. *Id.* at 1231–32.

357. *See supra* note 247 and accompanying text.

358. *R.J. Reynolds*, 696 F.3d at 1230 (Rogers, J., dissenting) (citing Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 647 (1985)).

359. *Id.* at 1230.

360. *Id.* ("That such images are not invariably comforting to look at does not necessarily make them inaccurate.").

smoking by evoking negative emotional reactions.[361] According to Rogers, "Factually accurate, emotive, and persuasive are not mutually exclusive descriptions; the emotive quality of the selected images does not necessarily undermine the warnings' factual accuracy."[362]

Unconvinced by arguments that the graphic warnings were neither factual nor accurate, Rogers stated that graphic warnings had met both preconditions and, thus, triggered *Zauderer*'s less exacting scrutiny.[363] It then remained only to prove that the warning labels were reasonably related to the government's interest in effectively communicating the negative health consequences of smoking.[364] To do so, Rogers summarily asserted that the graphic warning labels, their size, and their placement were reasonably related to the government's interest.[365] She concluded that the warning label requirement appeared constitutional under *Zauderer*.[366]

Judge Rogers assessed the graphic warning labels under *Central Hudson*'s intermediate scrutiny as well.[367] Under *Central Hudson*, she found that the new warning labels directly advanced the government's substantial interest in reducing smoking rates and effectively conveying the risks of smoking, and that they were no more extensive than necessary.[368] Thus, under either *Central Hudson*'s intermediate scrutiny or *Zauderer*'s less exacting scrutiny, Rogers would have found that the warning labels did not violate the First Amendment.[369]

361. *See id.* ("[T]he FDA's reliance on [emotional] salience measures [in selecting the warning labels] was in the service of—not inconsistent with—the warnings' informational purpose.").

362. *Id.* Rogers stopped just shy of claiming that there was no legally relevant distinction between fact and emotion. *See id.* at 1231 ("Unsurprisingly, the tobacco companies point neither to any case law in support of this argument nor to any legally significant distinction between fact and emotion.").

363. *See id.* at 1233 (reconstructing *Zauderer*'s framework for compelled disclosures directed at misleading commercial speech).

364. *See id.* at 1233.

365. In support of this conclusion, Rogers cited—without discussion—common sense and the evidence that the FDA provided as justification for new graphics when it first proposed them and then published the Final Rule. *See id.* (citing Proposed Rule, 75 Fed. Reg. 69,531–32; Final Rule, 76 Fed. Reg. 36,637).

366. *Id.* at 1233 (citing Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

367. *Id.* at 1234–37.

368. *Id.*

369. *See id.* at 1223 (stating that the warning labels should survive under both *Zauderer* and *Central Hudson*).

Judge Rogers did not categorically endorse the new warning labels. By including the anti-smoking hotline, she believed the FDA had gone too far.[370] She found that *Zauderer* was inapt for assessing the constitutionality of the antismoking hotline because it did not qualify as a factual disclosure.[371] Unlike the labels' images, for which Rogers insisted upon a holistic assessment to determine the warning labels' factuality under *Zauderer*,[372] Rogers suggested the "1-800-QUIT-NOW" hotline number could be severed and assessed independently.[373] The hotline ultimately failed the final step of *Central Hudson*'s intermediate scrutiny; the government had not proven that less burdensome alternatives were inadequate.[374] Presumably, such less intrusive alternatives would not mandate that cigarette packages "prominently" bear an imperative "directing consumers to 'QUIT NOW.'"[375]

Despite the great pains the *Discount Tobacco City* majority took to preempt any inconsistency between its decision and the then-forthcoming decision in *R.J. Reynolds*,[376] the two decisions cannot be reconciled readily based on the fact that the Sixth Circuit denied a facial challenge to the provision of the Tobacco Control Act mandating the new warning labels while the D.C. Circuit ruled that the specific warning labels promulgated by the FDA were unconstitutional. The two decisions are fundamentally at odds on a number of key points essential in determining the limits of compelled commercial disclosures under the First Amendment. First, the two decisions disagree on the application and ambit of *Zauderer*'s lenient

370. *Id.* at 1223 (stating that the graphic warning labels appear to be constitutional except for the inclusion of the "1-800-QUIT-NOW" number).

371. *Id.* at 1234.

372. *See supra* notes 355–56 and accompanying text.

373. Rogers's argument for this seems to be twofold. First, Rogers noted the FDA included the hotline number on the new warning labels pursuant to separate statutory authority from than the statutory authority mandating the warning labels themselves. *See id.* at 1234. Second, nothing indicated the FDA would not have promulgated a version of warning labels lacking the antismoking hotline. *Id.* at 1237 n.12.

374. *Id.* at 1236.

375. *See id.* Rogers does not make clear what less burdensome alternatives to the inclusion of the antismoking hotline the FDA might have implemented, but her tone suggests that the prominence and the imperative nature of the label was unnecessary to fulfill the statutory mandate on which the inclusion of the phone number was based.

376. *See* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 568–69 (6th Cir. 2012) (criticizing the dissent for conflating its analysis of the provision with an as-applied challenge of the nine images).

scrutiny. Second, the two decisions contain inconsistent arguments concerning the ability of images to convey factual, accurate, and uncontroversial information. The remainder of this Note attempts to provide an interpretation of the Supreme Court's decision in *Zauderer* that respects the Court's reasoning, and more importantly the First Amendment principles it espoused. In doing so, this Note will evaluate certain aspects the Sixth Circuit's and D.C. Circuit's assessment of the new graphic warning labels in the context of that understanding of *Zauderer*'s application and ambit.

III. STRIKE A MATCH: ILLUMINATING *ZAUDERER*

Zauderer should be interpreted to establish a three-step analysis for determining if a disclosure violates the First Amendment. First, a court should determine whether the disclosure is limited to purely commercial speech. If not, the disclosure should be subject to strict scrutiny.[377] Second, the content of the disclosed information must be purely factual and uncontroversial. Purely factual and uncontroversial content may be conveyed through any appropriate mode including text or illustrations, may be selective and underinclusive, and need not be emotionally sterile. A disclosure, however, cannot expressly advocate a position through nonfactual directives or include value judgments. Third, the disclosure must reasonably relate to preventing consumer deception or confusion, but this reasonable relationship need not be the government's primary or exclusive aim. This entails any government purpose meant to increase the consumers' access to purely factual and uncontroversial information as long as there is a showing that the potential for confusion is not purely speculative.

Put succinctly:

> *Step One:* Does the disclosure regulate purely commercial speech? If not, strict scrutiny applies.
>
> *Step Two:* Is the disclosure purely factual and uncontroversial? If not, *Central Hudson*'s intermediate scrutiny applies.[378]
>
> *Step Three:* Is the disclosure reasonably related to preventing potential consumer confusion or deception?

377. *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988).

378. Arguing that *Central Hudson* provides the proper alternative to *Zauderer* is beyond the scope of this Note, but the facts of *Pacific Gas* suggests as much. *See supra* notes 78–92 and accompanying text.

If all three steps are satisfied, the disclosure requirement does not offend the First Amendment.

But this framework is only the beginning of a unified, consistent understanding of *Zauderer*. In the following sections, this Note tackles three interpretive questions already articulated: first, what constitutes a purely factual and uncontroversial disclosure; second, whether a court should apply *Zauderer* if the government's purpose is not to prevent consumer deception; and finally, the role (if any) that the burdens imposed on a compelled commercial speaker by disclosures should play in a court's *Zauderer* analysis.

A. "Purely Factual and Uncontroversial"

The first limitation that *Zauderer* imposes is that the disclosure must convey only purely factual and uncontroversial information.[379] The Supreme Court did not explain, however, how the phrase "purely factual and uncontroversial" fits within *Zauderer*'s framework for compelled disclosures.[380] Since *Zauderer*, courts and judges have disagreed about the role that the phrase plays in *Zauderer*'s framework.[381] Nevertheless, what has yet to be made explicit is that the phrase served *dual* roles in the Court's analysis. Courts often conflate these two roles when they interpret *Zauderer*.[382] The first role is a limit on the content of disclosure requirements. In this role, the phrase is *definitional*. But, by limiting their content, the phrase also precludes disclosures from illegitimately becoming advocacy, and, thus, *justifies* lowered scrutiny when the government's aim is proper. This is its second role. In fact, the phrase provides the staunchest safeguard against abusive disclosure requirements.

379. *See* Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

380. The *Zauderer* Court did not refer to the factual or uncontroversial aspects of disclosure when it stated "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

381. The disagreement within the panel in *Discount Tobacco City* provides a perfect illustration. The majority interpreted *Zauderer* to require that disclosures simply be factual or accurate, while the dissent insisted that *Zauderer* proscribed the stricter standard that disclosures be purely factual and uncontroversial.

382. *See, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114 (2d Cir. 2001) ("Required disclosure of accurate factual information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self governance, or interference with an individual's right to define and express his or her own personality.").

1. The Factual Component

Both the definitional and the justificatory aspects of the phase are illuminated when the Court contrasts compelled disclosure of "purely factual and uncontroversial" information with compelled speech that "prescribe[s] what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[383] In doing so, the Court implicitly defined disclosure as the presentation of "purely factual and uncontroversial" information about a commercial product. Call this the factual component of the standard. The factual component addresses how disclosures differ from other forms of compelled speech. That is to say, the factual component of the phrase limits the *content* of disclosures. By contrast, the forced presentation of orthodox political, religious, or other opinions is not a disclosure; it is advocacy.

It is not a simple matter to articulate precisely what content satisfies the factual component. The Court did not elaborate in *Zauderer* or *Milavetz*.[384] Nevertheless, circuits have employed an intuitive notion of what content is acceptably deemed factual and used this notion to disqualify some apparent disclosures that were not appropriately factual.[385] At a minimum, the intuitive notion of factual content for disclosures includes three broad categories. The first category includes information about a product's (or service's) origin—for example, its composition, its manufacturing process, a specialist's educational credentials, etc. The second category includes information about legally accepted classifications pertinent to the product or service.[386] The third category covers information about the consequences of a product or its use, including the product's true cost[387] or the health consequences associated with the product.[388] For cigarettes, these include heart disease, lung cancer, or even, perhaps,

383. *Zauderer*, 471 U.S. at 651.

384. The only language that *Milavetz* offered that might potentially elaborate on the factual component is the term "accurate," which the court seemingly uses synonymously with "factual." *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010).

385. *See* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 966–67 (9th Cir. 2009); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

386. The disclosure at issue in *Milavetz* falls within this category. *See* 559 U.S. 229.

387. *See, e.g.*, Spirit Airlines, Inc., v. USDOT, 687 F.3d 403 (D.C. Cir. 2012) (upholding requirement that airlines conspicuously disclose total cost of airfare).

388. *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (required disclosure of calorie count on menus).

bad breath. Because warning labels alert consumers to non-apparent consequences, they fit within this category.

A number of arguments proffered against the new warning labels misunderstand how the factual component limits the content of disclosures.[389] First, both the D.C. District Court and the *Discount Tobacco City* dissent, to varying degrees, asserted that illustrations and staged photographs could never be factual.[390] An illustration (the D.C. District Court preferred the term "cartoon") is neither categorically factual nor nonfactual. Illustrations, words, photographs, symbols, and hieroglyphs account for the *mode* of disclosure. *Zauderer* did not suggest that some modes of disclosure are acceptable while others are not. The Tobacco Control Act directed the FDA to promulgate factual *imagery* because textual warnings had proven ineffective.[391] The fact that imagery differs from text as a mode of expression does not undermine its capacity to convey factual information.[392] As long as the content is factual, *Zauderer* does not restrict a disclosure's mode of expression.

Similarly, representational content does not offend *Zauderer*'s factual component. The *R.J. Reynolds* majority criticized the FDA for incorporating images designed to "symbolize" the textual content,[393] and the court below cited the fact that the warning labels

389. *See supra* note 24–27 and accompanying text (enumerating the tobacco companies' arguments that the new graphic warning labels violated the First Amendment).

390. *See* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 526 (6th Cir. 2012) (Clay, J. dissenting) (arguing that "graphic, full-color images because of the inherently persuasive character of the visual medium, cannot be presumed neutral"); R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 45 (D.D.C. 2011) ("Indeed, the fact *alone* that some of the graphic images here appear to be cartoons, and others appear to be digitally enhanced or manipulated, would seem to contravene the very definition of 'purely factual.'"). Ironically, the Court in *Zauderer* found nothing problematic in the use of illustration as a mode for conveying factual information and overturned a restriction on illustrations in advertising. *See* Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 647–48 (1985); *see also Discount Tobacco City*, 674 F.3d at 560 ("*Zauderer* itself eviscerates the argument that a picture or drawing cannot be accurate and factual.").

391. 15 U.S.C. § 1333(d) (2012).

392. The *Discount Tobacco City* majority's discussion of this topic is highly illuminating and should conclusively put this argument against the graphic warning labels to rest. *See Discount Tobacco City*, 674 F.3d at 559–61 (discussing the ability of imagery to convey factual information pursuant to the standards articulated in *Zauderer*). "We can envision many graphic warnings that would constitute factual disclosures under *Zauderer*." *Id.* at 559.

393. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012).

incorporated staged photographs and illustrations as a reason to withhold *Zauderer*'s lenient scrutiny.[394] This assessment misapprehends how images convey general factual information. An illustrated image of a diseased lung used to convey the proposition that "smoking causes cancer" is no less factual than a photograph of an actual cancerous lung used to convey the same information.[395] Both operate representationally or symbolically. It is no more convincing than arguing that a textual sentence is not factual because words are not the things they represent, nor is a sentence the proposition it symbolizes. Such arguments are premised on a muddled understanding of linguistics. If the graphic warning labels offend *Zauderer*'s factual component, it cannot be because its images are symbolic. If the graphic warning labels offend *Zauderer*'s factual component, it is because their images symbolize *nonfactual* content.[396]

A second argument that the tobacco companies advanced is that images that elicit emotion cannot be purely factual. This argument, too, is suspect. While the vast majority of facts are emotionally neutral, not every fact is without emotional appeal. Certain facts, those that implicate an individual's underlying values, will elicit emotion. One could argue that the more a value is universally shared and deeply held, the more likely a fact implicating that value will elicit emotion from the listener. Facts that implicate an individual's health unsurprisingly elicit emotion.[397] Whether the content of the warning labels elicits emotion is a separate question from whether it is factual.[398] As such, the factual component of *Zauderer*, even

394. R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 272 n.12 (D.D.C. 2012).

395. It is worth noting that text, too, is always representational. But no one would argue that text cannot represent facts.

396. *See, e.g.*, *R.J. Reynolds*, 696 F.3d at 1230 (Rogers, J., dissenting) ("Contrary to the tobacco companies' suggestion the use of graphic images even if digitally enhanced, illustrated, or symbolic, does not necessarily make the warnings nonfactual." (citations omitted)).

397. *See id.* at 1231 (arguing that the tobacco companies argument would increasingly constrain disclosures requirements as the health consequences of smoking became more dire).

398. Recall that the distinction the *Zauderer* Court correctly drew for First Amendment purposes is between "fact" and "advocacy." This argument errs in conflating "advocacy" with "persuasion." If *Zauderer*'s factual component limited the content of disclosures to non-persuasive facts, then *Zauderer* would effectively render all disclosures impotent. *See id.* at 1230 ("[F]actually accurate, emotive, and persuasive are not mutually exclusive descriptions; the emotive quality of the selected images does not necessarily undermine the warnings' factual accuracy.").

though it restricts outright advocacy, nonetheless will permit content that legitimately elicits emotion.

Insofar as the *R.J. Reynolds* majority objected to the images because the FDA selected them for their persuasive effect,[399] neither *Zauderer* nor *Milavetz* supports the claim that selective disclosure undermines the factual nature of the information presented.[400] The purpose of disclosure cannot alter the content of what is disclosed. If the *R.J. Reynolds* court's criticism, however, was that the disclosures were crafted to shock or embarrass smokers and, in turn, to "browbeat consumers into quitting,"[401] then the court is no longer strictly assessing the content of the warning labels. Rather, the court's true criticism would be that the FDA's aim violated the analysis prescribed in *Zauderer*. This criticism raises a tough question: if the selective presentation of purely factual information can have the same persuasive effect as outright advocacy, why should *Zauderer* draw a distinction between compelled factual disclosures and outright advocacy? To answer this question, it helps to understand the second function of the phrase "purely factual and uncontroversial" in the Court's reasoning in *Zauderer*.

2. The Uncontroversial Component

By limiting disclosures to purely factual and uncontroversial information, the Court in *Zauderer* did more than simply define acceptable content for disclosures. In addition to the definitional aspect, the phrase "purely factual and uncontroversial" entails a normative presumption. This normative presumption provides the primary justification for leniency toward compelled disclosure of purely factual and uncontroversial information. An individual is always justified in believing purely factual and uncontroversial information and can be presumed to believe such information *absent irrationality, mistake, or deception*. The same presumption does not hold when the government "prescribes what shall be orthodox in politics, nationalism, religion or other matters of opinion."[402] Call this

399. *See id.* at 1216 (finding that the graphic warning labels cannot be purely factual because the FDA tacitly admits they were selected for their ability to evoke emotion).

400. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010); Zauderer v. Office of Disciplinary Counsel of Ohio, 471 U.S. 626 (1985).

401. *R.J. Reynolds*, 696 F.3d at 1217.

402. *Zauderer*, 471 U.S. at 651.

the "uncontroversial" component of the standard.[403] Purely factual and uncontroversial information constitutes an epistemically benign, universally acceptable orthodoxy. Pure, uncontroversial facts are not a matter of opinion or ideology. An individual should not be assumed to be irrational, deceived, or mistaken for not holding a particular opinion or subscribing to a particular ideology, even if that opinion or ideology is widely accepted. As far back as *Wooley* and *Barnette*, the Court rebuked attempts to instill opinions and beliefs, even popular ones like patriotism[404] or state pride,[405] at the expense of an individual's own beliefs. The Court, however, has not been concerned about infringing upon an individual's right to self-determination or "freedom of mind" when purely factual and uncontroversial information is involved because such information is presumed to be epistemically benign.[406]

The First Amendment interests of the speaker have traditionally fueled the Court's compelled speech jurisprudence.[407] Once the Court in *Zauderer*—by situating disclosures within commercial speech jurisprudence—undermined the traditional rationale for holding compelled speech presumptively unconstitutional in two ways. First, it diminished the commercial speaker's interests, describing them as "minimal."[408] This, nonetheless, cannot be the full story. Professor

403. The division of the phrase into its dual components should not be understood to mean that the phrase can be cleft cleanly into a "factual" element and "uncontroversial" element. The distinction is meant to provide a framework for discussing the two separate *functions* that the phrase implicitly serves in the Court's reasoning. "Uncontroversial" and "factual" equally provide limits on the content of disclosures, even if term "factual" seems to delineate more apparently those limitations. Similarly, "factual" and "uncontroversial" equally imply the normative presumption justifying the Court's lowered scrutiny, even if the term "uncontroversial" carries the normative connotations more clearly than does "factual."

404. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating compelled participation in the Pledge of Allegiance in schools); *see also supra* notes 37–49 and accompanying text.

405. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (finding that compelled inclusion of state motto on license plates violated the First Amendment); *see also supra* notes 59–66 and accompanying text.

406. *Compare Zauderer*, 471 U.S. at 651 ("But the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*."), *with Barnette*, 319 U.S. at 633.

407. *See* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006) (enumerating the possible, primarily speaker-based justifications for the First Amendment offense of compelled speech); *see also* Greene, *supra* note 46; Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839 (2005).

408. *See Zauderer*, 471 U.S. at 651.

Laurent Sacharoff has argued that the traditional justifications underlying compelled speech jurisprudence disproportionately focus on the speaker's interests.[409] The real concern in compelled speech, Sacharoff argues, is that it can "unfairly distort what listeners hear in an effort to control the minds and thoughts of those listeners."[410] Minimizing the commercial speaker's interest does not address the concern that a consumer's interests may be infringed by a compelled commercial disclosure. Second, the Court acknowledged the First Amendment "value[s]" consumer access to information.[411] This assertion, however, is at odds with the legitimate First Amendment concern that the government should not artificially distort to what information consumers have access. Why should the Court grant the government deference when it compels disclosures but not when it compels an ideological message?

The uncontroversial component of *Zauderer*'s framework supplies the answer. Disclosure of pure, uncontroversial facts alleviates concerns that the government is infringing upon listeners' legitimate First Amendment interests. The First Amendment protects an individual from illegitimate persuasive influences that inhibit the individual's self-determination, autonomy, or freedom of mind.[412] But purely factual and uncontroversial disclosures only expose an individual to information that she would otherwise believe absent deception, mistake, or irrationality. Thus, the individual is not illegitimately persuaded. The Court uniquely favors disclosure because it rectifies deception, confusion, and mistake—factors that themselves inhibit an individual's freedom of mind, autonomy, and self-determination.

Recall the *R.J. Reynolds* court's apparent concern that selective disclosures seem functionally equivalent to advocacy.[413] If purely factual and uncontroversial information can be persuasive and still remain entirely factual, it is because that information affects values *already* widely shared. Hence, some factual information can evoke an emotional response with the sort of persuasive effect that the *R.J. Reynolds* court presumptively worried about. Nonetheless, it does

409. *See* Sacharoff, *supra* note 49, at 335; *see also* Alexander, *supra* note 407; Greene, *supra* note 46.

410. Sacharoff, *supra* note 49, at 384.

411. *Zauderer*, 471 U.S. at 651.

412. *See* Sacharoff, *supra* note 49, at 373–80.

413. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (calling the new warning labels unabashed attempts to evoke emotion and browbeat consumers into quitting).

not render the information nonfactual. Nor does it infringe upon a person's right to self-determination, freedom of mind, or autonomy, because the information is of the sort that the person is presumed to believe absent irrationality, mistake, or deception. On the other hand, nonfactual advocacy attempts to instill opinions, values, or beliefs by taking advantage of the listener's irrationality, mistake, or deception. This is the line that *Zauderer* drew. Disclosures limited to purely factual and uncontroversial information do not entail such illegitimate persuasion, because their persuasive force is the result of the factual information's affect on the audience's independently held, widely shared values.[414]

B. "Reasonably Related to the State's Interest in Preventing the Deception of Consumers"

Does *Zauderer*'s lenient scrutiny apply when the government's interest is not primarily to prevent consumer deception? *Zauderer* and *Milavetz* addressed disclosure requirements expressly aimed at preventing consumer deception. The *R.J. Reynolds* majority fixated on this fact to restrict *Zauderer*'s lenient scrutiny to disclosures specifically aimed at preventing consumer deception.[415] This interpretation, however, reads *Zauderer* too narrowly. The reasoning the Court employs in *Zauderer* and the First Amendment principles it expounds do not require courts to confine *Zauderer*'s ambit tightly to disclosures exclusively and primarily aimed at preventing consumer deception. There are three reasons for this.

First, restricting disclosures to cases of *intentionally* deceptive commercial speech does not adequately further the First Amendment values that the *Zauderer* Court invoked. In *Zauderer*, the Court was concerned primarily with alleviating the potential that a consumer might be misled, not preventing deception narrowly defined. While disclosures can effectively prevent deception, they can also *remedy* prior deception. More importantly, they can prevent or remedy consumer confusion, as well. The *Zauderer* Court recognized this when it referenced a string of decisions commending disclosures for their ability to "*dissipate the possibility of consumer confusion* or

414. This concept also illustrates a limitation on the persuasive force of factual disclosures. Independently held, widely shared values are a rarity, not the norm. An individual's concern for his or her own health and wellbeing happen to be one.

415. "By its own terms, *Zauderer*'s holding is limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers.'" *R.J. Reynolds*, 696 F.3d at 1213 (quoting *Zauderer*, 471 U.S. at 651).

deception."[416] Instead of concentrating on whether the commercial speaker knowingly aimed to deceive, the Court emphasized consumers' interest in avoiding inaccurate information or potentially drawing incorrect conclusions independent of the commercial speaker's intentions.[417]

Second, neither *Milavetz* nor *Zauderer* saddles the government with a stringent burden of proof. In *Zauderer,* the Court rejected the lawyer's contention that the State failed to show that his advertisements were actually deceptive. Instead, the court found that the potential for deception was self-evident without proof by the State of a tendency to mislead.[418] In *Milavetz*, the Court found that statements in the congressional record sufficiently established the potential to mislead was "hardly a speculative one."[419] To restrict *Zauderer*'s ambit to disclosures primarily aimed at directly preventing consumer deception is inconsistent with the deference that the Court has shown to the government's purpose when analyzing disclosure requirements under *Zauderer*.[420]

416. *Zauderer*, 471 U.S. at 651 (emphasis added) (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)) (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 565 (1980); Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977); Va. State Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748, 772 n.24 (1976)). The fact that *Zauderer* opinion is not a model of clarity on this issue should give pause to courts wishing to restrict *Zauderer*'s ambit to disclosures aimed at preventing intentionally deceptive commercial speech.

417. *Id.* at 652 (explaining how laypersons are often unaware of the technical meanings of terms such as "costs" and "fees" and could be expected to be misled because of that lack of knowledge). It is even more difficult to maintain the position that the Court prescribed *Zauderer*'s analysis strictly to disclosures aimed at preventing deception when considering the disclosures upheld in *Milavetz*. The provisions at issue in *Milavetz* required advertisements to disclose legal information about the Bankruptcy Abuse Act. *See supra* note 166–174 and accompanying text. The decision never indicated that the plaintiff law firm had an interest in deceiving its clients about the Act or the firm's services. Although the Court described the disclosures at issues as "directed at *misleading* commercial speech," only in the loosest sense can this be accurate—that is, consumers could potentially draw incorrect inferences if the advertisements lacked the disclosed factual information. *See* Milavetz, Gallop & Milavetz v. United States, 559 U.S. 229, 250–51 (2010).

418. *See Zauderer*, 471 U.S. at 652.

419. *Milavetz*, 559 U.S. at 251 (quoting *Zauderer*, 471 U.S. at 652).

420. *Compare* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213–15 (D.C. Cir. 2012) (disclosures must address specific claims of deception before *Zauderer* applies, ignoring government findings on consumer misapprehension of tobacco risks), *with Zauderer*, 471 U.S. at 652–53 (holding that where deception is self-evident the state need not conduct a public survey to prove consumer misapprehension).

Finally, tightly confining *Zauderer*'s ambit to disclosures directly or primarily aimed at preventing consumer deception ignores *Zauderer*'s position in the broader First Amendment framework. It conflates *Zauderer*'s lenient "reasonably related" analysis with the more stringent third step in *Central Hudson*, which mandates that the regulation *directly advance* the state's interest.[421] The Court did not incorporate such an inquiry in its analysis in *Zauderer*. Nor did the *Zauderer* Court suggest that preventing deception must be the State's exclusive goal. Rather, the phrase "reasonably related" suggests a liberal understanding of which state interests *Zauderer*'s analysis condones. The proper inquiry is whether there is a rational connection between the disclosure requirement and preventing deception or confusion, regardless of the State's primary purpose for disclosure.[422]

This understanding of *Zauderer*'s ambit best accounts for the ubiquitous role that commercial disclosures play in modern regulatory schemes. Consider, for example, the FDA's nutritional labels. The Federal Food, Drug, and Cosmetic Act (FDCA) requires all products classified as "food" to bear nutritional labels identifying a product's ingredients and nutritional contents.[423] Pursuant to the FDCA, the FDA has promulgated rules specifying the format and package location for the warning labels.[424] Products not labeled in compliance with the FDCA, either because the package conveys misleading statements or because the product fails to bear the correct nutritional label, are "misbranded."[425] Under a narrow interpretation of "aimed at preventing deception," the FDA would not be able to compel nutritional labels on products unless the product was intentionally misbranded with a misleading statement. A narrow interpretation would subject the most innocuous compelled commercial disclosures, nutritional labels, to a much more stringent First Amendment scrutiny. This result is not consistent with the principle that "the First Amendment protection to commercial speech

421. *See supra* notes 114–17 and accompanying text.

422. The *Discount Tobacco City* majority takes an even more lax interpretation. *See* Discount Tobacco City & Lottery v. United States, 674 F.3d 509, 556 (6th Cir. 2012) ("[*Z*]*auderer*'s framework can apply even if the required disclosure's purpose is *something other than* or in addition to preventing consumer deception." (emphasis added)).

423. *See* 21 U.S.C. § 321(f) (2012); *see generally*, Krista Hessler Carver, *A Global View of the First Amendment Constraints on FDA*, 63 FOOD & DRUG L.J. 151 (2008).

424. 21 C.F.R § 101.1 (2013).

425. 21 U.S.C. § 321(n) (2012).

is justified principally by the value to the consumers of information such speech provides."[426]

Therefore, the Court's phrase "preventing consumer deception" should be unpacked, made explicit, and made consistent with the Court's own reasoning so that it is broad enough to include government purposes *reasonably related* to preventing *potential confusion* or deception of consumers.[427] This interpretation places the emphasis equally on the commercial speech's effect on the consumer and the intent of the commercial speaker. It alleviates the burden that a strict interpretation of "preventing deception" would place on the government to prove actual deception, a burden the Court has not placed on the government. Finally, it gives courts sufficient latitude to invalidate disclosures when the government's purpose is disingenuously or too tenuously related to preventing confusion or deception.[428]

C. "Unjustified or Unduly Burdensome Disclosure Requirements"

Finally, courts should not mistakenly assess the burden imposed by purely factual and uncontroversial commercial disclosures. Once triggered, *Zauderer*'s sole inquiry is whether the disclosure reasonably relates to the aim of preventing consumer confusion or deception. The *Zauderer* Court expressly stated that it would not subject disclosures to a least restrictive means assessment.[429] Several courts have failed to appreciate this when applying *Zauderer*'s analysis. This violates the logic of the Court's reasoning in *Zauderer* and *Milavetz*:

> We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling

426. Zauderer v. Office of Disciplinary Counsel of Ohio, 471 U.S. 626, 651 (1985).

427. The analysis by the Second Circuit in *Nat'l Elec. Mfrs. Ass'n* provides a model. *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

428. It is still within a court's power to invalidate a law when the government is unable "to point to any harm that is potentially real, not purely hypothetical." Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, 512 U.S. 136, 146 (1994). The Federal Circuit Courts of Appeals have proven willing to give *Zauderer*'s analysis these teeth. *See* Int'l Dairy Foods Ass'n v Boggs, 622 F.3d 628, 643 (6th Cir. 2010) (severing a "contiguity" provision while upholding the rest of a disclosure requirement because evidence cited for the "contiguity" provision was anecdotal).

429. *Zauderer*, 471 U.S. at 651 n.14 ("We reject appellant's contention that we should subject disclosure requirements to a strict 'least restrictive means' analysis . . . [We] have recommended disclosure requirement as one of the acceptable less restrictive alternatives to actual suppression of speech.").

> *protected commercial* speech. But we hold that an advertiser's rights are adequately protected *as long as* disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.[430]

Although subtle, this language indicates that it is sufficient, first, that the compelled speech at issue is a disclosure requirement,[431] and second, that disclosure is reasonably related to that preventing consumer deception. Thus, a statement preceding the articulation of *Zauderer*'s relaxed scrutiny—i.e. "that unjustified or unduly burdensome disclosure requirements might offend the First Amendment"—is not a further step in its analysis, but is, instead, the general principle to which *Zauderer*'s relaxed scrutiny is an exception. Courts that assess the burdens imposed by disclosure or look to other less restrictive alternatives add conditions to *Zauderer*'s analysis absent from the language of the opinion.

As such, although a court is free to and should assess the relative burdens of a disclosure when applying more stringent scrutiny, *Zauderer* precludes this step. This preclusion should not be worrisome, because other aspects of *Zauderer*'s analysis safeguard against unjustified burdens on commercial speech, most prominently the "purely factual and uncontroversial" components of the analysis. Alternatively, by avoiding a least restrictive means-type analysis, the *Zauderer* court has granted the government sufficient latitude to tailor effective disclosures. As the *Discount Tobacco City* majority stated, "A warning that is not noticed, read, or understood by consumers does not serve its function."[432] An undue burden or least restrictive means analysis would require courts to weigh the effectiveness of disclosures against the burden imposed on the commercial speaker. This is inconsistent with the *Zauderer* Court's own statement that the "[commercial speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[433] Because *Zauderer*'s analysis ensures

430. *Id.* at 651 (emphasis added); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–50 (2010). Note that in *Milavetz*, the Court omitted the term "commercial" when it acknowledged that unduly burdensome disclosures have the potential to chill "protected speech." This suggests even more strongly that the Court is unconcerned with burdens imposed by accurate commercial disclosures.

431. That is to say, it compels purely factual and uncontroversial information about a product or service from a commercial speaker.

432. Discount Tobacco City & Lottery v. United States, 674 F.3d 509, 564 (6th Cir. 2012).

433. *Zauderer*, 471 U.S. at 651.

that the information disclosed is purely factual and uncontroversial and therefore benign from a First Amendment perspective, courts can defer to the legislatures to craft disclosure requirements that effectively prevent consumer deception and confusion.

CONCLUSION

On October 26, 2012, the tobacco companies petitioned the Supreme Court for a writ of certiorari in *Discount Tobacco City*, now under its third caption, *American Snuff Co. v. United States*.[434] The Court denied certiorari on April 22, 2013.[435] Meanwhile, after the D.C. Circuit denied the agency's motion for a rehearing en banc,[436] the FDA opted not to seek Supreme Court review in *R.J. Reynolds*.[437] Instead, the FDA will retry its hand at promulgating graphic warning labels consistent with the Tobacco Control Act's directive.[438] For now, the vast edifice of compelled commercial disclosures built on *Zauderer*'s lenient scrutiny will remain relatively unaffected. For now, cigarette packages will continue to bear "[the] boring, bold, black and white . . . statement that these neat little soldiers of death are, in fact, trying to kill you."[439] For now the warning on cigarette packages will remain a cold, unlit, and factual statement lacking emotionally incendiary images of diseased lungs, rotted teeth, or incubated infants.

434. See Petitioner's Petition for Writ of Certiorari, Am. Snuff Co. v. United States, No. 12-521 (U.S. Oct. 26, 2012).

435. Discount Tobacco City & Lottery v. United States, 674 F.3d 509 (6th Cir. 2012), *cert. denied sub nom.* Am. Snuff Co. LLC v. United States, 133 S. Ct. 1996 (mem.) (2013).

436. Brett Norman, *Court Blocks FDA Warning Labels Appeal*, POLITICO (Dec. 6, 2012), http://www.politico.com/story/2012/12/court-blocks-fda-tobacco-warning-labels-appeal-84656.html.

437. Steve Almasy, *FDA Change Course on Graphic Warning Labels for Cigarettes*, CNN (Mar. 20, 2013), http://www.cnn.com/2013/03/19/health/fda-graphic-tobacco-warnings.

438. *Id.*

439. ROCKNROLLA (Warner Bros. 2008).