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## The "Uncontroversial" Controversy in Compelled Commercial Disclosures

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## THE “UNCONTROVERSIAL” CONTROVERSY IN COMPELLED COMMERCIAL DISCLOSURES

*Lauren Fowler\**

*Federal and state administrative agencies increasingly advance public health goals through the use of mandatory disclosures, like warning labels on cigarettes, that are intended to both inform and influence consumer decisions. However, the standard for determining whether these requirements violate a commercial speaker’s First Amendment rights is unsettled. In *Zauderer v. Office of Disciplinary Counsel*, the U.S. Supreme Court adopted a test that defers to the government’s determination that the compelled disclosure of “factual and uncontroversial information” is justified. Since *Zauderer* was decided, lower courts have disagreed about the meaning of “uncontroversial.” A recent Supreme Court case, *National Institute of Family & Life Advocates v. Becerra* (NIFLA), may have resolved the debate by treating “uncontroversial” as a requirement that a disclosure not relate to a controversial subject matter. In doing so, the Court diverged from two interpretations commonly adopted by lower courts: that “uncontroversial” refers to the factual accuracy of the disclosed information or to the underlying ideology.*

*This Note illustrates the public health implications of these various interpretations in the context of an ongoing international debate over the benefits of breastfeeding and mandatory disclosures with respect to infant formula. It argues that the Court’s position in NIFLA poses a significant obstacle to government efforts to protect public health and ignores *Zauderer*’s firm grounding in listeners’ informational interests. Factual accuracy more appropriately limits *Zauderer*’s scope. Heightened scrutiny should only apply if the government compels a commercial speaker to convey opinion. While concerns about the overuse of warnings for remote or unsubstantiated risks are well-founded, this issue may be addressed by evaluating whether a particular disclosure fails *Zauderer* review as “unjustified or unduly burdensome.” This framework for compelled disclosures is more strongly supported by the text of *Zauderer* itself, and it*

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would grant proper deference to a legislature's policy determination that potential health risks justify a disclosure.

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## INTRODUCTION

In July 2018, the *New York Times* reported that U.S. delegates to a United Nations health assembly threatened to impose trade sanctions and withdraw military aid from Ecuador to defeat a resolution promoting breastfeeding.<sup>1</sup> Despite these threats, the World Health Assembly (WHA)<sup>2</sup> passed the resolution on May 26, 2018, which urged member states to “increase investment” in measures to “protect[], promot[e], . . . and support” breastfeeding and to implement or strengthen their implementation of legal measures incorporating the International Code of Marketing of Breast-Milk Substitutes (the “Code”)<sup>3</sup> and other “evidence-based recommendations.”<sup>4</sup>

Public health officials and foreign diplomats were “stunned” by the United States’s opposition to the resolution, which they described as a “marked contrast” to President Obama’s general support of the long-established policy of the World Health Organization (WHO) in favor of promoting breastfeeding.<sup>5</sup> The *New York Times* claimed that the American delegation had “embrac[ed] the interests of infant formula manufacturers.”<sup>6</sup>

However, a spokesperson from the U.S. Department of Health and Human Services (“HHS”) characterized the American delegation’s position differently: “The issues being debated were not about whether one supports breastfeeding . . . . The United States was fighting to protect women’s

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1. Andrew Jacobs, *Opposition to Breast-Feeding Resolution by U.S. Stuns World Health Officials*, N.Y. TIMES (July 8, 2018), <https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html> [<https://perma.cc/V4RP-LNBE>]. In response to the threats, Ecuador abandoned its plan to introduce the resolution. *Id.* Russia ultimately introduced the resolution. *Id.* However, the United States successfully negotiated for the removal of language calling on the World Health Organization to provide technical support to member states trying to end the “inappropriate promotion of foods for infants and young children.” *Id.*

2. The WHA is “the decision-making body” of the World Health Organization. *World Health Assembly*, WHO, <http://www.who.int/mediacentre/events/governance/wha/en> [<https://perma.cc/XRC8-GDXX>] (last visited Feb. 12, 2019).

3. The International Code of Breast-Milk Substitutes is a “set of recommendations to regulate the marketing of breast-milk substitutes, feeding bottles and teats,” adopted by the WHA in 1981. World Health Org. [WHO], *The International Code of Marketing of Breast-Milk Substitutes: Frequently Asked Questions*, at 2 (2017) [hereinafter *Code FAQ*], <https://apps.who.int/iris/bitstream/handle/10665/254911/WHO-NMH-NHD-17.1-eng.pdf> [<https://perma.cc/E667-WEHT>]. The United States was the only country to vote against the Code in 1981, “after an intense lobbying campaign” by American infant formula manufacturers. Carolyn Y. Johnson & Amanda Erickson, *U.S. Effort to Weaken an International Breast-Feeding Resolution Has a Long History*, WASH. POST (July 9, 2018), <https://www.washingtonpost.com/news/to-your-health/wp/2018/07/09/u-s-effort-to-weaken-an-international-breast-feeding-resolution-has-a-long-history> [<http://perma.cc/jsn6-mcsw>].

4. World Health Assembly [WHA], *Infant and Young Child Feeding*, at 2, WHA71.9 (May 26, 2018), [http://apps.who.int/gb/ebwha/pdf\\_files/WHA71/A71\\_R9-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA71/A71_R9-en.pdf) [<https://perma.cc/NG2N-EZMK>].

5. Jacobs, *supra* note 1.

6. *Id.*; see also Johnson & Erickson, *supra* note 3 (reporting that the infant formula industry heavily lobbied the U.S. delegation in Switzerland, according to an anonymous source).

abilities to make the best choices for the nutrition of their babies.”<sup>7</sup> The spokesperson stated that women should not be stigmatized for being unable to breastfeed or denied information about breastfeeding alternatives.<sup>8</sup>

Often, however, women lack information about risks associated with those alternatives. For instance, studies suggest that many American mothers do not believe that formula-fed infants are more likely to get sick than breastfed infants,<sup>9</sup> despite strong consensus among public health experts to the contrary.<sup>10</sup> One legal measure urged by the WHO could address the information gap: a requirement that infant formula labels provide information about the benefits of breastfeeding and the “dangers associated with the unnecessary or improper use of infant formula.”<sup>11</sup> This particular regulatory technique of advancing public health goals through mandatory disclosures is increasingly common.<sup>12</sup> However, the constitutionality of these disclosures is unsettled.<sup>13</sup>

Mandatory disclosures implicate the First Amendment, either directly or indirectly through the Fourteenth Amendment.<sup>14</sup> And while courts usually apply strict scrutiny to compelled speech and intermediate scrutiny to restrictions on commercial speech,<sup>15</sup> the U.S. Supreme Court adopted a lower

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7. Eli Watkins, *NYT: US Threatened Nations over Breastfeeding Resolution*, CNN (July 9, 2018), <https://www.cnn.com/2018/07/08/politics/world-health-assembly-breastfeeding/index.html> [<https://perma.cc/8Q9R-A97C>].

8. *Id.* The spokesperson’s latter concern is probably tied to the Code’s prohibition against advertising breast-milk substitutes. *See infra* note 32 and accompanying text. It is also reminiscent of the primary argument for extending First Amendment protection to commercial speech: consumers’ interest in receiving information about products and services. *See infra* notes 126–27.

9. Julie Smith et al., *Health Professional Knowledge of Breastfeeding: Are the Health Risks of Infant Formula Feeding Accurately Conveyed by the Titles and Abstracts of Journal Articles?*, 25 J. HUM. LACTATION 350, 350 (2009); *see also* CDC, INFANT FEEDING PRACTICES STUDY II: RESULTS ch. 9, tbl.9.6 (2008), [https://www.cdc.gov/breastfeeding/pdf/ifps/data/ifps2\\_tables\\_ch9.pdf](https://www.cdc.gov/breastfeeding/pdf/ifps/data/ifps2_tables_ch9.pdf) [<https://perma.cc/96CP-TRSN>] (indicating that 15.5 percent of American mothers disagree that ear infections and respiratory illness are less likely in breastfed babies, and that 36 percent think infant formula is as good as breast milk).

10. *See infra* notes 26–28, 46–52, 60–62 and accompanying text.

11. *Code FAQ*, *supra* note 3, at 10–11.

12. *See* Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 563–86 (2013) (surveying recent lower court decisions on commercial speech issues, including mandatory disclosures about smoking risks, radio-frequency energy absorbed by cell phone users, and detailed nutritional information about restaurant menu items); Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 972 (2017) (listing examples of compelled commercial disclosures, like “[s]alt-shaker icons on foods deemed to be high in sodium [and] textual warnings that highlight the potential dangers of smoking,” and describing such disclosures as “a pervasive, if often unobtrusive, aspect of daily life”).

13. *See infra* Parts II.B–C.

14. The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See* *Gitlow v. New York*, 268 U.S. 652, 666–68 (1925) (“[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

15. *See infra* Part II.A. In First Amendment jurisprudence, “commercial speech is an expression related solely to the economic interests of the speaker and its audience, generally in the form of commercial advertisement for the sale of goods and services, or speech

standard for compelled commercial disclosures in *Zauderer v. Office of Disciplinary Counsel*,<sup>16</sup> where it held that a mandatory disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available” was permissible because it was “reasonably related to the State’s interest in preventing deception of consumers.”<sup>17</sup> Lower courts have frequently disagreed about when a disclosure qualifies for review under the *Zauderer* standard and the appropriate test to apply to a disclosure that is ineligible for *Zauderer* review.<sup>18</sup> While most courts consider “purely factual and uncontroversial” a prerequisite for *Zauderer* review,<sup>19</sup> they have defined the phrase differently.<sup>20</sup>

The Supreme Court may have offered some clarity with its recent decision in *National Institute of Family & Life Advocates v. Becerra (NIFLA)*.<sup>21</sup> The Court treated “uncontroversial” as a threshold requirement that the disclosure not relate to a controversial subject matter.<sup>22</sup> In doing so, the Court diverged from two interpretations commonly adopted by lower courts: that “uncontroversial” refers (1) to the factual accuracy of the disclosed information, or (2) to the implicit ideology underlying the disclosure.<sup>23</sup> However, the Court provided no explanation for its position.

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proposing a commercial transaction.” 16A AM. JUR. 2D *Constitutional Law* § 499 (2009). The exact scope of commercial speech is “not very well-explored,” but an item’s packaging, such as its label, is consistently viewed as commercial speech. Nigel Barrella, *First Amendment Limits on Compulsory Labeling*, 71 FOOD & DRUG L.J. 519, 525 (2016).

16. 471 U.S. 626 (1985).

17. *Id.* at 651. Courts have described *Zauderer*’s standard as “rational-basis review,” a “reasonable-relationship rule,” or a “rational relationship test.” See Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 FIRST AMEND. L. REV. 140, 184 (2011). This Note adopts the “reasonable relationship” terminology because the Court’s recent application of the test in *National Institute of Family & Life Advocates v. Becerra (NIFLA)*, particularly its scrutiny of the state’s justifications, seems less deferential than traditional rational basis review. 138 S. Ct. 2361, 2376–78 (2018). However, it is worth noting that Justice Breyer, in his dissenting opinion, critiqued the Court’s “searching” standard of review as “incompatible with *Zauderer*.” *Id.* at 2390 (Breyer, J., dissenting).

18. See *infra* Part II.B.2. The Supreme Court has provided relatively little guidance about how to apply *Zauderer*. Note, *supra* note 12, at 972–73.

19. See *infra* Part II.C. However, the Ninth Circuit treats “factual and uncontroversial” as part of the *Zauderer* test rather than a limit on its scope. See *Am. Beverage Ass’n v. City & County of San Francisco (Am. Beverage Ass’n II)*, Nos. 16-16072, 16-16073, 2019 WL 387114, at \*4 (9th Cir. Jan. 31, 2019) (en banc) (“The *Zauderer* test, as applied in *NIFLA*, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome. A compelled disclosure accompanying a related product or service must meet all three criteria to be constitutional. Neither *NIFLA* nor any other Supreme Court precedent requires that we apply these criteria in any particular order.”) (citing *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372). However, Judge Sandra Ikuta challenged this approach as inconsistent with the *NIFLA* Court’s analytical framework, which treats “factual and uncontroversial” as a threshold question for determining whether *Zauderer* applies. *Am. Beverage Ass’n II*, 2019 WL 387114, at \*7–9 (Ikuta, J., dissenting from most of the reasoning, concurring in the result) (citing *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372); see also *infra* note 174 and accompanying text.

20. See *infra* Part II.C.

21. 138 S. Ct. 2361 (2018).

22. *Id.* at 2366.

23. See *infra* Part II.C.

This Note illustrates the public health implications of the various interpretations of “uncontroversial” in the context of the WHO’s recommendation that member countries require infant formula labels to disclose the benefits of breastfeeding. Part I provides an introduction to the relevant public health background, first describing the current status of mandatory disclosures for infant formula, then exploring the debate about the “Breast Is Best” policy.<sup>24</sup> Part II presents a brief overview of the related First Amendment doctrines of compelled speech and commercial speech, followed by a discussion of the *Zauderer* and *NIFLA* opinions. It then explores various interpretations of “uncontroversial.” Part III considers how a mandatory disclosure about the risks of infant formula might fare under each interpretation. Finally, Part IV argues that factual accuracy, not “uncontroversial subject matter,” appropriately limits *Zauderer*’s scope.

### I. PUBLIC HEALTH EFFORTS TO PROMOTE BREASTFEEDING

Most medical organizations and public health experts consider breastfeeding to be the ideal form of infant nutrition and regard increased rates of exclusive breastfeeding as a key public health goal.<sup>25</sup> Indeed, the American Academy of Pediatrics (AAP), Centers for Disease Control and Prevention (CDC), and WHO recommend exclusive breastfeeding for an infant’s first six months, followed by continued breastfeeding for at least one year as solid foods are gradually introduced.<sup>26</sup> The AAP stated that “infant nutrition should be considered a public health issue and not only a lifestyle choice”<sup>27</sup> due to demonstrated health benefits for infants and mothers and “the health risks of not breastfeeding.”<sup>28</sup> Despite this evidence and the WHO’s repeated exhortations to member states to adopt legal provisions promoting breastfeeding, sales of breast-milk substitutes continue to grow

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24. The “Breast Is Best” adage is frequently used to describe breastfeeding-promotion efforts. See, e.g., Joan Y. Meek, Opinion, *Breast Is Best: Why Breastfeeding Is the Greatest Public Health Policy of All Time*, NEWSWEEK (July 19, 2018, 10:11 AM), <https://www.newsweek.com/breast-best-why-breastfeeding-greatest-public-health-policy-all-time-opinion-1032330> [<https://perma.cc/HZM5-94U4>]; Elissa Strauss, *The “Breast Is Best” Policy Backlash*, CNN (July 11, 2018, 1:13 PM), <https://www.cnn.com/2018/07/11/health/breastfeeding-parenting-strauss/index.html> [<https://perma.cc/4Z8P-8Y4N>].

25. See Roni Caryn Rabin, *Trump Stance on Breast-Feeding and Formula Criticized by Medical Experts*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/well/breastfeeding-trump-resolution.html> [<https://perma.cc/3NAZ-TG4B>] (“[T]he consensus of most mainstream medical organizations is that ‘breast is best’ when it comes to infant nutrition and health.”); see also Arthur I. Eidelman et al., *Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS e827, e827 (2012) (“Breastfeeding and human milk are the normative standards for infant feeding and nutrition.”).

26. *Code FAQ*, *supra* note 3, at 3; Eidelman et al., *supra* note 25, at e827–28; *Breastfeeding: Frequently Asked Questions*, CDC, <https://www.cdc.gov/breastfeeding/faq/index.htm> [<https://perma.cc/464G-QSLL>] (last visited Feb. 12, 2019).

27. Eidelman et al., *supra* note 25, at e827. The CDC has also declared that “Breastfeeding is an Investment in Health, Not Just a Lifestyle Decision.” *Breastfeeding: Why It Matters*, CDC, <http://www.cdc.gov/breastfeeding/about-breastfeeding/why-it-matters.html> [<https://perma.cc/SSJ2-F8C2>] (last updated Feb. 5, 2019).

28. Eidelman et al., *supra* note 25, at e827–28; see also *infra* notes 46–62.

rapidly worldwide, with an expected increase in the global infant formula market from \$56 billion in 2017 to \$70.6 billion by 2019.<sup>29</sup>

Part I.A discusses the WHO's recommended provisions for promoting breastfeeding, focusing on mandatory disclosures, and describes current mandatory disclosures for formula in the United States. Part I.B explores the debate about the "Breast Is Best" policy. It begins with a brief review of the reported health benefits of breastfeeding and then examines criticism of both the policy and underlying science.

#### *A. Government-Compelled Disclosures About Formula and Breastfeeding*

The WHO has long viewed the promotion of breastfeeding as an essential public health goal and considers "[t]he protection, promotion and support of breastfeeding . . . among the most effective interventions to improve child survival."<sup>30</sup> The Code, adopted by the WHA in 1981, requires that information about "artificial feeding," including information from health workers and on product labels, "explain the benefits of breastfeeding and the costs and dangers associated with the unnecessary or improper use of infant formula and other breast-milk substitutes."<sup>31</sup> Additionally, the Code prohibits advertising or otherwise promoting breast-milk substitutes to the general public.<sup>32</sup>

Since 1981, the WHA has adopted several resolutions that clarify, extend, or update the Code provisions,<sup>33</sup> most recently WHA Resolution 71.9.<sup>34</sup> The Assembly continues to urge member states to implement the Code,<sup>35</sup> and the WHO has emphasized that "[t]he Code remains as relevant and important as when it was adopted in 1981, if not more so."<sup>36</sup> As of April 2018, 136 of

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29. *Code FAQ*, *supra* note 3, at 7; *Global Infant Formula Market—Insights*, COHERENT MKT. INSIGHTS (Dec. 2018), <https://www.coherentmarketinsights.com/market-insight/infant-formula-market-2330> [<https://perma.cc/FBS2-5FQX>].

30. *Id.* at 3.

31. *Id.* at 10–11. Articles 4.2 and 7.1 of the Code address health workers' responsibility to provide "clear information on . . . the benefits and superiority of breastfeeding . . . [and] the health hazards of unnecessary or improper use of infant formula and other breast-milk substitutes." World Health Org. [WHO], *International Code of Marketing of Breast-Milk Substitutes*, at 10, 12 (1981), [http://www.who.int/nutrition/publications/code\\_english.pdf](http://www.who.int/nutrition/publications/code_english.pdf) [<https://perma.cc/N26U-ZACC>]. Article 9.2 requires formula containers or labels to have "a clear, conspicuous, and easily readable" message that includes the words "Important Notice" (or similar language), "a statement of the superiority of breastfeeding," and a statement that formula "should be used only on the advice of a health worker as to the need for its use and the proper method of use." *Id.* at 13.

32. *Code FAQ*, *supra* note 3, at 10–11; *International Code of Marketing of Breast-Milk Substitutes*, *supra* note 31, at 10–12.

33. *Code FAQ*, *supra* note 3, at 5–6. For example, WHA Resolution 54.2 increased the recommended period of exclusive breastfeeding from four to six months, to six months. *Id.* at 6.

34. *Infant and Young Child Feeding*, *supra* note 4.

35. *See, e.g., id.* at 2.

36. *Code FAQ*, *supra* note 3, at 7.



194 countries had implemented legal measures “covering all, many or few provisions of the Code.”<sup>37</sup> The United States has implemented none.<sup>38</sup>

However, the U.S. Food and Drug Administration (FDA) imposes certain disclosure requirements on infant formula labels pursuant to its authority under the Food, Drug, and Cosmetic Act (FDCA).<sup>39</sup> Specifically, labels must include designated nutrient information,<sup>40</sup> directions for use,<sup>41</sup> a warning statement about improper preparation and use,<sup>42</sup> and “[a] statement indicating that parents should consult their physicians about the use of infant formulas.”<sup>43</sup> Moreover, the AAP states that pediatricians should serve as breastfeeding advocates and “[c]ommunicat[e] with families that breastfeeding is a medical priority.”<sup>44</sup> However, studies suggest that many pediatricians are not strong advocates and do not tell parents about the risks associated with formula feeding.<sup>45</sup>

### B. The “Breast Is Best” Debate

Efforts to promote breastfeeding are based on numerous studies that report significant health benefits for both breastfed infants and their mothers.<sup>46</sup> For example, breastfed infants have lower risks of ear infections,<sup>47</sup> respiratory

37. World Health Org. [WHO], *Marketing of Breast-Milk Substitutes: National Implementation of the International Code, Status Report 2018*, at 10 (2018), <https://apps.who.int/iris/bitstream/handle/10665/272649/9789241565592-eng.pdf> [<https://perma.cc/RXA2-2NME>].

38. *Id.* at 42.

39. 21 C.F.R. § 107 (2017). The authority comes from four sections of the FDCA: 21 U.S.C. §§ 321, 343, 350a, and 371. *Id.*

40. *Id.* § 107.10.

41. *Id.* § 107.20(a)–(d).

42. *Id.* § 107.20(e).

43. *Id.* § 107.20(f).

44. Eidelman et al., *supra* note 25, at e836.

45. Sharon Radzimirski & Lynn Clark Callister, *Mother’s Beliefs, Attitudes, and Decision Making Related to Infant Feeding Choices*, 25 J. PERINATAL EDUC. 18, 26 (2016).

46. See, e.g., Cesar G. Victora et al., *Breastfeeding in the 21st Century: Epidemiology, Mechanisms, and Lifelong Effect*, 387 LANCET 475, 479–85 (2016) (listing the benefits of breastfeeding for infants and mothers). Evidence of these benefits comes mostly from studies conducted in low- or middle-income countries (LMICs). *Id.* at 476–78, 488. Data on breastfeeding in LMICs tend to be higher quality than data from high-income countries, which rarely use the standard WHO indicators of breastfeeding practices (e.g., for exclusive breastfeeding under six months and continued breastfeeding at one year). *Id.* Another important difference between LMICs and high-income countries is that in LMICs, unlike high-income countries, breastfeeding is more prevalent among the poor. BERNARDO L. HORTA & CESAR G. VICTORA, SHORT-TERM EFFECTS OF BREASTFEEDING: A SYSTEMATIC REVIEW ON THE BENEFITS OF BREASTFEEDING ON DIARRHOEA AND PNEUMONIA MORTALITY 33 (2013), [https://apps.who.int/iris/bitstream/handle/10665/95585/9789241506120\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/95585/9789241506120_eng.pdf) [<https://perma.cc/39XJ-HTR3>].

Consequently, in LMICs, confounding by socioeconomic status is likely to underestimate the benefits of breastfeeding. *Id.* For a more extensive discussion of breastfeeding research in a legal journal, see Pamela Laufer-Ukeles & Arianne Renan Barzilay, *The Health/Care Divide: Breastfeeding in the New Millennium*, 35 COLUM. J. GENDER & L. 264, 272–79 (2018).

47. See generally Gayan Bowatte et al., *Breastfeeding and Childhood Acute Otitis Media: A Systematic Review and Meta-Analysis*, ACTA PÆDIATRICA, Dec. 2015, at 85. This study found that exclusive breastfeeding for the first six months is associated with the lowest risk of

infections,<sup>48</sup> gastrointestinal infections,<sup>49</sup> sudden infant death syndrome (SIDS),<sup>50</sup> and necrotizing enterocolitis (a serious gastrointestinal disease in premature infants).<sup>51</sup> Evidence also suggests that breastfeeding may decrease the risk of a child becoming overweight or obese and developing type 2 diabetes later in life,<sup>52</sup> and it may be associated with higher intelligence.<sup>53</sup> Furthermore, breastfeeding mothers experience both short- and long-term health benefits, including decreased postpartum blood loss,<sup>54</sup> as well as lower risks of cardiovascular disease<sup>55</sup> and breast cancer.<sup>56</sup> Breastfeeding may also reduce the mother's risk of type 2 diabetes,<sup>57</sup> ovarian cancer,<sup>58</sup> and rheumatoid arthritis.<sup>59</sup> Moreover, public health officials stress

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ear infections, but longer duration of breastfeeding and any breastfeeding were also associated with reduced risk. *Id.* at 88–92.

48. HORTA & VICTORA, *supra* note 46, at 33 (suggesting that breastfeeding may reduce the risk and severity of respiratory infections). *But see* Michael S. Kramer et al., *Promotion of Breastfeeding Intervention Trial (PROBIT): A Randomized Trial in the Republic of Belarus*, 285 JAMA 413, 417 (2001) (finding that breastfeeding did not have a statistically significant effect on respiratory tract infections).

49. HORTA & VICTORA, *supra* note 46, at 15–16. This review found that “more intense breastfeeding” practices, particularly exclusive breastfeeding, were associated with a lower risk of gastrointestinal infection. *Id.* at 16–20. While most studies included in the review were observational, the authors did identify three randomized trials that suggested breastfeeding reduced the risk of diarrhea. *Id.* at 1–2, 15.

50. STANLEY IP ET AL., BREASTFEEDING AND MATERNAL AND INFANT HEALTH OUTCOMES IN DEVELOPED COUNTRIES 93–95 (2007). While studies generally focus on breastfeeding's protective effect against death in LMICs, a meta-analysis of high-quality primary studies shows that breastfeeding also reduces the risk of SIDS in developed countries. *Id.* This analysis included only studies adjusting for potential confounding variables, such as maternal age, socioeconomic status, and exposure to smoking. *Id.* at 95–97.

51. *Id.* at 98–102. This finding is supported by four randomized controlled trials. *Id.* at 98–100.

52. Victora et al., *supra* note 46, at 480–83. Most studies were from high-income countries. *Id.*

53. *Id.* at 483–84. Most studies were from high-income countries. *Id.* These studies adjusted for several confounding variables, although the authors acknowledged the possibility of residual confounding by socioeconomic status. *Id.*; *see also* Eidelman et al., *supra* note 25, at e830 (“Consistent differences in neurodevelopmental outcome between breastfed and commercial infant formula-fed infants have been reported, but the outcomes are confounded by differences in parental education, intelligence, home environment, and socioeconomic status.”).

54. Eidelman et al., *supra* note 25, at e831.

55. *See* Eleanor Bimla Schwarz et al., *Duration of Lactation and Risk Factors for Maternal Cardiovascular Disease*, 113 OBSTETRICS & GYNECOLOGY 974, 979–81 (2009) (finding that mothers who breastfed for more than twelve months total were 10 percent less likely to develop cardiovascular disease than mothers who never breastfed). This study was based on clinical trials and an observational study of postmenopausal women; the authors noted the possibility that participants misreported their breastfeeding duration. *Id.* at 980.

56. Eidelman et al., *supra* note 25, at e832; Victora et al., *supra* note 46, at 483–85.

57. Victora et al., *supra* note 46, at 484–85. Breastfeeding is not associated with a decreased risk of type 2 diabetes in mothers diagnosed with gestational diabetes. Eidelman et al., *supra* note 25, at e831.

58. Victora et al., *supra* note 46, at 483–85.

59. Elizabeth W. Karlson et al., *Do Breast-Feeding and Other Reproductive Factors Influence Future Risk of Rheumatoid Arthritis?: Results from the Nurses' Health Study*, 50 ARTHRITIS & RHEUMATISM 3458, 3461–65 (2004). The authors acknowledged that “unmeasured confounding” could account for the reduced risk. *Id.* at 3465.

the contamination risks associated with both bottles and infant formula, the latter of which “is not a sterile product and . . . may carry germs that can cause fatal illnesses.”<sup>60</sup> Furthermore, caregivers may overdilute formula, particularly when they are unable to buy enough.<sup>61</sup> Overdilution leads to malnutrition, which makes the infant extremely susceptible to starvation, disease, and death.<sup>62</sup>

However, as exemplified by the debate surrounding WHA Resolution 71.9, support for “Breast Is Best” is not universal. Opponents criticize the underlying science, pointing to methodological flaws of the studies reporting breastfeeding benefits.<sup>63</sup> In particular, most of the research consists of observational studies rather than experimental or randomized controlled trials,<sup>64</sup> which means that the studies establish only that breastfeeding is *associated* with the identified benefits, not that it *caused* them.<sup>65</sup> Additionally, the data does not clearly indicate whether breast milk, the act of breastfeeding, or a combination of the two, may provide the identified benefits.<sup>66</sup> Critics also emphasize risks associated with breastfeeding,

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60. *Code FAQ*, *supra* note 3, at 4.

61. Benjamin Mason Meier & Miriam Labbok, *From the Bottle to the Grave: Realizing a Human Right to Breastfeeding Through Global Health Policy*, 60 CASE W. RES. L. REV. 1073, 1083 (2010). This problem is particularly pervasive in developing countries, where “20 percent of mothers who used formula were found to have diluted the formula over 40 percent more than recommended.” *Id.* at 1084.

62. *Id.*

63. See Laufer-Ukeles & Barzilay, *supra* note 46, at 278 (“Breastfeeding studies are largely based on observations, associations, and correlations without being able to attribute causality. Indeed, one study that identified a correlation between breastfeeding and certain health benefits simultaneously warns against attributing causality, arguing that more cautious studies are needed to control ‘confounding factors.’”); Carolyn Y. Johnson, *The Breastfeeding Story Is More Complicated Than You Think*, WASH. POST (Feb. 23, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/23/what-youve-read-about-breastfeeding-may-not-be-true> [<https://perma.cc/XYG6-P6ZA>] (“[F]laws in some of the studies tracking long-term health effects raise questions about the magnitude—and at times the existence—of some of those advantages.”). The AAP’s Policy Statement on breastfeeding, while affirming its recommendation of exclusive breastfeeding, acknowledges these flaws: “Major methodologic issues have been raised as to the quality of some of these studies, especially as to the size of the study populations, quality of the data set, inadequate adjustment for confounders, absence of distinguishing between ‘any’ or ‘exclusive’ breastfeeding, and lack of a defined causal relationship.” Eidelman et al., *supra* note 25, at e828.

64. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO SUPPORT BREASTFEEDING 33 (2011), [https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf\\_NBK52682.pdf](https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf_NBK52682.pdf) [<https://perma.cc/AL2P-FJYG>]. Prospective randomized controlled trials in this context are typically ethically undesirable. See generally Colin Binns et al., *Ethical Challenges in Infant Feeding Research*, 9 NUTRIENTS 59 (2017) (describing ethical problems with randomly assigning infants to breastfeeding and nonbreastfeeding groups). The mere existence of these ethical concerns illustrates the strong consensus in the medical community about the benefits of breastfeeding.

65. See U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 64, at 33; see also *supra* note 63.

66. Linda C. Fentiman, *Marketing Mothers’ Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. L.J. 29, 48–49 (2009); see also Bowatte et al., *supra* note 47, at 92 (suggesting that differences in the manner of feeding, i.e., from the breast or from a bottle, may contribute to the reduced risk of ear infections in

particularly the danger of insufficient lactation and starvation—risks that are rarely communicated to new parents.<sup>67</sup>

Opponents of “Breast Is Best” also criticize the policy itself. For example, some contend that the WHA Resolution ignores “mothers’ right to informed choice and bodily autonomy.”<sup>68</sup> Others point out that some women may be physically unable to breastfeed<sup>69</sup> and also note that American employers do not routinely accommodate breastfeeding.<sup>70</sup> Thus, women should not be shamed for not providing their children with the “best” nutrition.<sup>71</sup>

Despite these criticisms of the science and the policy, “most mainstream medical organizations” agree that “breast is best,”<sup>72</sup> and the AAP, CDC, and WHO have all declared that promoting breastfeeding is a key public health goal.<sup>73</sup> While acknowledging the methodological weaknesses of the studies, the AAP still concluded that “the documented short- and long-term medical and neurodevelopmental advantages of breastfeeding” justify the organization’s recommendation for exclusive breastfeeding.<sup>74</sup> In light of this evidence, why have Congress, the FDA, and state legislatures and agencies failed to adopt the Code’s provisions? This Note suggests that recent developments in First Amendment doctrine pose a significant hurdle to compelled disclosures about the benefits of breastfeeding.

## II. ZAUDERER: THE CONTROVERSIAL COLLISION OF COMPELLED SPEECH AND COMMERCIAL SPEECH

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>75</sup> Several key theories underlie First Amendment protection.<sup>76</sup> One core principle is that a speaker—whether a

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breastfed infants). Thus, it is unclear whether infants who are bottle-fed breast milk would experience the same reported benefits as infants fed directly from the breast.

67. See Fentiman, *supra* note 66, at 50; Strauss, *supra* note 24.

68. Kavin Senapathy, *The ‘Breast Is Best’ Breastfeeding Campaign Is Misguided*, DAILY BEAST (July 23, 2018, 5:00 AM), <https://www.thedailybeast.com/the-breast-is-best-breastfeeding-campaign-is-misguided> [<https://perma.cc/99T7-NCWR>]; see also *supra* note 8 and accompanying text.

69. Laufer-Ukeles & Barzilay, *supra* note 46, at 283–84. *But see* Eidelman et al., *supra* note 25, at e827 (“Medical contraindications to breastfeeding are rare.”).

70. Laufer-Ukeles & Barzilay, *supra* note 46, at 279–82.

71. See Watkins, *supra* note 7 (quoting an HHS spokesperson who stated that “[m]any women are not able to breastfeed for a variety of reasons, these women should not be stigmatized”); see also Laufer-Ukeles & Barzilay, *supra* note 46, at 284 (“These medical guidelines have ballooned into a pervasive cultural pressure to breastfeed, which even includes shaming for those who fail to comply with the newly established norms.”).

72. Rabin, *supra* note 25.

73. See *supra* notes 25–28 and accompanying text.

74. Eidelman et al., *supra* note 25, at e827–28.

75. U.S. CONST. amend. I.

76. See Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1344–45 (2015) (identifying “autonomy, self-government, and the search for truth” as the “principal” First Amendment theories); see also Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 871 (2015) (“First Amendment jurisprudence contains distinct doctrinal regimes that apply to distinct forms of speech . . . because the Constitution values different kinds of speech for different reasons.”).

private individual or commercial entity<sup>77</sup>—“has the autonomy to choose the content of his own message.”<sup>78</sup> This autonomy is implicated both when the government restricts speech and when it compels someone to speak.<sup>79</sup> First Amendment protection is also grounded in listeners’ interests—specifically, “the public’s interest in receiving information,” which is essential to listener autonomy and effective self-government.<sup>80</sup> However, the Court has weighed these interests differently depending on context, “impos[ing] tight constraints upon government efforts to restrict, e.g., ‘core’ political speech” but “looser constraints” upon government regulation of commercial speech.<sup>81</sup>

However, growing protection for commercial speech has put the First Amendment “on a collision course” with public health.<sup>82</sup> Mandatory disclosures and warnings are widely used as a regulatory tool in public health,<sup>83</sup> but the constitutionality of these requirements is unsettled.<sup>84</sup> Lower courts have struggled to determine what types of disclosures fall within *Zauderer*’s scope, how to apply the test to those disclosures, and what level of scrutiny to apply to disclosures outside *Zauderer*’s scope.<sup>85</sup>

Part II.A provides an overview of commercial speech doctrine and compelled speech doctrine, respectively, since *Zauderer* is generally

77. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (“A company has the full panoply of protections available to its direct comments on public issues . . .”).

78. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995). The Court described this autonomy as “the fundamental rule of protection under the First Amendment.” *Id.*

79. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985) (“[I]n some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech.”); see also *infra* Part II.A.1.

80. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986) (plurality opinion); see also *infra* Parts II.A.2, II.B.1. Some scholars have also argued that First Amendment doctrine should protect a listener’s interest in not being subjected to government-mandated speech—a “right against compelled listening.” Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 980 (2009) (“[W]hen the government makes a captive audience listen against its will to a government message, it runs roughshod over individuals’ right to control their own development and decision-making processes.”); see also Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 531 (2014). In the context of private speech, restrictions to protect listeners from “intrusive or unwelcome messages” are impermissible, with limited exceptions. Goodman, *supra*, at 530.

81. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 582 (2011) (Breyer, J., dissenting).

82. Richard J. Bonnie, *The Impending Collision Between First Amendment Protection for Commercial Speech and the Public Health: The Case of Tobacco Control*, 29 J.L. & POL. 599, 600 (2014); see also Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135 (stating that while “federal and state administrative regimes have moved towards lighter-touch, often information-based, forms of governance” like mandated disclosures, these regulatory tools “appear more speech-regulating than earlier conduct regulations, thereby rendering them more susceptible to First Amendment challenge”).

83. See, e.g., Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1090 (2007) (“Mandatory disclosure has become a sort of ‘regulation-lite’ extolled even by those who would ordinarily oppose regulation.”); *supra* note 12 and accompanying text.

84. Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL’Y 53, 54–55 (2016).

85. See *id.* at 65–85 (describing various open questions about *Zauderer*).

regarded as an exception to these doctrines or a synthesis of them.<sup>86</sup> Part II.B discusses *Zauderer* itself, then examines the Court's treatment of *Zauderer* in *NIFLA*. Part II.C explores one specific area of disagreement: what it means for a disclosure to be "uncontroversial."

### A. The Doctrinal Foundations: Commercial Speech and Compelled Speech

The compelled and commercial speech doctrines address speech in disparate contexts and have accordingly been grounded in different First Amendment interests. Compelled speech doctrine arose out of government attempts to compel individuals to convey political or ideological messages, efforts that the Court has viewed primarily as violations of the speaker's autonomy interests—their "freedom of mind."<sup>87</sup> In contrast, commercial speech doctrine originated in cases where the government banned advertising to protect consumers from making bad choices and emphasizes the listener's interest in receiving factual information.<sup>88</sup> Before exploring how listeners' and speakers' interests collide in compelled commercial speech doctrine, this Note provides an overview of the two foundational doctrines.

#### 1. Compelled Speech Doctrine: Protecting Speakers' Autonomy

First Amendment protection against government-compelled speech originates from cases about "core political speech and religious objectors."<sup>89</sup> Compelled speech doctrine focuses on speaker interests in autonomy and "freedom of mind," but it also implicates listener interests, such as the right to receive genuine expression that has not been distorted by government compulsion.<sup>90</sup> This right is essential for effective self-government.<sup>91</sup> Accordingly, strict scrutiny applies when the government attempts to compel individuals or corporations to express or convey political or ideological messages.<sup>92</sup>

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86. See, e.g., Barrella, *supra* note 15, at 526 (describing *Zauderer* as a "synthesis" of the commercial speech and compelled speech doctrines); Note, *supra* note 12, at 972 (stating that *Zauderer* is an exception to the "well-settled" intermediate scrutiny standard for regulations of commercial speech). But see *infra* note 155 (explaining that some consider *Zauderer* an application of the intermediate scrutiny standard).

87. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943))); see also *infra* Part II.A.1.

88. See *infra* Part II.A.2.

89. Barrella, *supra* note 15, at 523.

90. Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 209–10 (2011).

91. *Id.* at 210–11. The public must be able to freely discuss political, religious, and economic issues to elect the best representatives and truly "consent" to being governed. See *id.* at 210 n.29 ("If listeners receive forced expression, individual judgments and the common judgment will be infected with the government's coercion.")

92. See, e.g., *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16, 19 (1986) (plurality opinion) (stating that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say," and that the government may not "compel

The Court first addressed the problem of government-compelled speech in *West Virginia State Board of Education v. Barnette*,<sup>93</sup> where it invalidated a state requirement that students in public schools salute and pledge allegiance to the American flag.<sup>94</sup> Jehovah's Witnesses children who refused to comply due to religious objections were expelled, and their parents were prosecuted or threatened with prosecution.<sup>95</sup> The Court suggested that compulsion to declare a belief might be justified "only on even more immediate and urgent grounds" than restrictions of speech and concluded that the state's asserted interest in fostering national unity was insufficient to sustain the mandatory pledge.<sup>96</sup>

The First Amendment also provides protection against compulsion to convey another's message even where the speaker is not required to express faith or agreement with the message. In *Miami Herald Publishing Co. v. Tornillo*,<sup>97</sup> the Court held unconstitutional a Florida statute requiring a newspaper to publish the replies of a political candidate it had criticized.<sup>98</sup> Proponents of the statute argued that newspaper monopolies frequently presented only one side of a political or ideological issue, thereby threatening the First Amendment interest in a "marketplace of ideas" and an informed public.<sup>99</sup> However, the Court contended that government-enforced access may actually reduce the public's ability to receive information about political issues because editors might decide "to avoid controversy" rather than criticizing a candidate and being forced to devote its limited column space to a reply.<sup>100</sup> Such a result would undermine a fundamental purpose of the First Amendment, which is "to protect the free discussion of governmental affairs," including discussion of candidates.<sup>101</sup> The Court ruled that compelling newspapers to publish material is an unconstitutional content-based regulation of the press and noted that the statute "operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."<sup>102</sup>

The Court's decision in *Tornillo* established "[t]he constitutional equivalence of compelled speech and compelled silence," a principle that

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corporate speakers to propound political messages with which they disagree" unless the regulation is "a narrowly tailored means of serving a compelling state interest"); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (noting that freedoms of speech, press, assembly, and worship "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect").

93. 319 U.S. 624 (1943).

94. *Id.* at 642.

95. *Id.* at 629–30.

96. *Id.* at 633, 641.

97. 418 U.S. 241 (1974).

98. *Id.* at 256–57.

99. *Id.* at 251–53.

100. *Id.* at 256–57. In this sense, a speech compulsion may also function as a speech restriction.

101. *Id.* at 257 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

102. *Id.* at 256.

applies beyond cases involving the press.<sup>103</sup> In *Wooley v. Maynard*,<sup>104</sup> the Court relied on *Barnette* and *Tornillo* for the proposition that the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”<sup>105</sup> New Hampshire law required noncommercial cars to bear a license plate with the state’s motto, “Live Free or Die,” and made it a misdemeanor to obscure the motto.<sup>106</sup> A Jehovah’s Witness who objected to the message on moral, religious, and political grounds was fined and jailed for covering up the motto on his and his wife’s license plates.<sup>107</sup> The Court held that the state could not force an individual to disseminate an ideological message.<sup>108</sup>

Strict scrutiny also applies to compelled disclosure of *facts* when the regulation burdens “fully protected expression” rather than “[p]urely commercial speech.”<sup>109</sup> In *Riley v. National Federation of the Blind of North Carolina*,<sup>110</sup> the Court applied strict scrutiny to a North Carolina law requiring professional fundraisers to disclose to potential donors the percentage of the charitable donation that the fundraiser would retain.<sup>111</sup> The Court stated that speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech.”<sup>112</sup> The factual disclosure required by the state, though possibly relevant to potential donors, constituted a substantial burden on that protected speech.<sup>113</sup> The Court invalidated the disclosure requirement and pointed to more narrowly tailored options for addressing donors’ misperceptions about how much of

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103. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988). Despite this “equivalence,” the Court has regarded compelled speech as less burdensome than speech restrictions; for example, it deemed mandatory disclosure of campaign contributions “the least restrictive means” to reduce “campaign ignorance and corruption.” *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). Similarly, where the government seeks to prevent or correct consumer deception, compelled commercial disclosures are preferable to advertising restrictions. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

104. 430 U.S. 705 (1977).

105. *Id.* at 714.

106. *Id.* at 707.

107. *Id.* at 707–08.

108. *Id.* at 713. The Court applied strict scrutiny and concluded that “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.” *Id.* at 717. Uncertainty remains about what qualifies as “ideological speech,” especially “in the context of abortion informed consent laws.” Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 WASH. U. J.L. & POL’Y 11, 41 (2016).

109. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796–98, 796 n.9 (1988); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) (“[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . .”).

110. 487 U.S. 781 (1988).

111. *Id.* at 786, 796–98.

112. *Id.* at 796. Charitable solicitations are fully protected. *Id.* at 795–96.

113. *Id.* at 797–98. The Court reasoned that the disclosure could impede professional fundraisers’ efforts to raise money for charities; for example, a potential donor who dislikes the disclosed percentage would probably “close[] the door or hang[] up the phone” without allowing the fundraiser to explain the amount. *Id.* at 799–800.



their donation goes to charity.<sup>114</sup> However, the Court noted that “[p]urely commercial speech is more susceptible to compelled disclosure requirements.”<sup>115</sup> While First Amendment jurisprudence has traditionally permitted greater regulation of commercial speech than ideological speech,<sup>116</sup> recent cases reflect growing protection for commercial speakers.

## 2. Commercial Speech Doctrine: Shifting Focus from Listeners to Speakers

Commercial speech jurisprudence is “unsettled and hotly disputed terrain.”<sup>117</sup> The Supreme Court denied First Amendment protection to commercial speech until 1974 and subsequently indicated that, even though such speech was entitled to protection, it occupied a “subordinate position in the scale of First Amendment values.”<sup>118</sup> However, over the past two decades, the Court has provided substantial protection to commercial speech, at least in the context of speech restrictions.<sup>119</sup> In *Sorrell v. IMS Health, Inc.*,<sup>120</sup> the Court concluded that “heightened scrutiny” applies to content-based burdens on speech, even those imposed on commercial speech.<sup>121</sup> While the extension of First Amendment protection to commercial speech was initially based on consumers’ “interest in the free flow of commercial information,”<sup>122</sup> recent decisions have been more attentive to commercial speakers’ autonomy interests.<sup>123</sup> Critics of this trend warn that because almost all human action occurs through speech, the First Amendment could become a nearly unlimited tool for commercial deregulation.<sup>124</sup>

114. *Id.* at 800–01.

115. *Id.* at 796 n.9.

116. *See infra* note 128 and accompanying text.

117. Rostron, *supra* note 12, at 553. One key disagreement is whether commercial speech merits less protection than political and ideological speech. Several justices have questioned the differential treatment of commercial speech. *See* Goodman, *supra* note 80, at 518 n.21. Justice Thomas has argued that the Court should adopt strict scrutiny for regulations of commercial speech, stating that he “do[es] not see a philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech.” *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522–23 (1996) (Thomas, J., concurring); *see also* Goodman, *supra* note 80, at 529 n.92 (describing Justice Thomas as “the leading advocate” for treating commercial and noncommercial speech equally).

118. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

119. *See* Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1182 (2013) (noting that, since 1995, the Court has repeatedly invalidated commercial speech restrictions).

120. 564 U.S. 552 (2011).

121. *Id.* at 565–66.

122. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763–64 (1976); *see also* Shanor, *supra* note 82, at 143 (“The commercial speech doctrine was forged as a tool of consumer protection to secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers.”).

123. *See* Berman, *supra* note 84, at 76.

124. *See, e.g., Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting) (“Speech is everywhere—a part of every human activity . . . . For that reason, almost all economic and regulatory policy affects or touches speech. So the majority’s road runs long. And at every stop are black-robed rulers overriding

The Supreme Court first recognized First Amendment protection for commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (Virginia Pharmacy)*.<sup>125</sup> The Court's principal justification for extending First Amendment protection to commercial speech was individual consumers' and society's "interest in the free flow of commercial information."<sup>126</sup> The Court rejected a "highly paternalistic" ban on advertising prescription drug prices, arguing that "people will perceive their own best interests if only they are well enough informed," which is better achieved by "open[ing] the channels of communication" than by "clos[ing] them."<sup>127</sup> However, commercial speech needs less protecting because of certain "commonsense differences" between commercial speech and other kinds of speech, such as the lower probability that commercial speech will be chilled by regulation.<sup>128</sup> For example, the state may restrict "deceptive or misleading" commercial speech,<sup>129</sup> or it may require a particular format or additional disclosures to prevent deception.<sup>130</sup>

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>131</sup> the Court reaffirmed that the First Amendment protects commercial speech

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citizens' choices."); *IMS Health*, 564 U.S. at 588–90 (Breyer, J., dissenting) (arguing that the Court's content-based analysis of commercial speech restrictions "threatens significant judicial interference with widely accepted regulatory activity"); Shanor, *supra* note 82, at 133 ("Because nearly all human action operates through communication or expression, the First Amendment possesses near total deregulatory potential.").

125. 425 U.S. 748 (1976). The Court described commercial speech as "speech which does 'no more than propose a commercial transaction.'" *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). Advertising constitutes commercial speech even if it "links a product to a current public debate." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980); *see also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983) (finding that a drug company's pamphlets promoting contraceptives were properly classified as commercial speech "notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning").

126. *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64. In this case, the free flow of information was essential for individual consumers—especially "the poor, the sick, and particularly the aged"—to compare drug prices; access to this information "could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.* More generally, "the free flow of commercial information is indispensable" in a free market system, as the market functions properly only if citizens make "intelligent and well-informed" economic policy decisions. *Id.* at 765.

127. *Id.* at 770.

128. *Id.* at 771 n.24. The Court's commercial speech jurisprudence over the following decades echoed this premise: "Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (alteration in original) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)); *see also* *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 n.6 ("[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977))).

129. *Va. State Bd. of Pharmacy*, 425 U.S. at 770–71.

130. *Id.* at 771 n.24.

131. 447 U.S. 557 (1980).

because of the information it provides to consumers.<sup>132</sup> The Court then articulated a four-step analysis for restrictions on commercial speech, which focuses on whether a regulation of protected commercial speech<sup>133</sup> “directly advances” a “substantial” government interest and is “not more extensive than is necessary to serve that interest.”<sup>134</sup> The *Central Hudson* analysis has traditionally been understood as establishing intermediate scrutiny.<sup>135</sup> The government must demonstrate a “reasonable” fit between the legislature’s ends and its means, which must be narrowly tailored but not necessarily the least restrictive option.<sup>136</sup> However, since 1995, the Court has repeatedly struck down government efforts to restrict nonmisleading speech about legal commercial activities, adopting a “muscular” version of *Central Hudson*’s requirement that the regulation not be unnecessarily extensive.<sup>137</sup>

This trend continued in *IMS Health*, where the Court emphasized that “heightened scrutiny” applies to content-based burdens on speech and stated that “[c]ommercial speech is no exception.”<sup>138</sup> The Vermont statute that was challenged prohibited the sale, disclosure, and use of information about individual doctors’ prescribing practices.<sup>139</sup> The prohibition expressly applied to the use of this information for marketing prescription drugs and

132. *Id.* at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”).

133. The first prong of the *Central Hudson* test asks whether the First Amendment protects the commercial expression at issue. *Id.* at 566. To receive protection, commercial speech “must concern lawful activity and not be misleading.” *Id.*

134. *Id.*

135. Post, *supra* note 76, at 881.

136. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (describing the “fit” as “not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served’” (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982))). The Court has noted that “if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

137. *Stern & Stern*, *supra* note 119, at 1182; see, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561–66 (2001) (finding that advertising regulations did not “reasonabl[y] fit” the state’s goal of reducing tobacco use by minors, where state banned smokeless tobacco or cigar advertising within a 1000-foot radius of a school or playground, and also required that any point-of-sale advertising at stores within this radius be placed higher than five feet from the floor). Professor Robert Post criticizes *Central Hudson*’s “not more extensive than is necessary” requirement as “so vague that it has sometimes functioned chiefly to provide a hunting license for judges who dislike market regulations.” Post, *supra* note 76, at 885.

138. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565–66 (2011). Justice Breyer criticized the majority’s application of a “standard yet stricter than *Central Hudson*,” pointing out that content-based regulations have never “before justified greater scrutiny when regulatory activity affects commercial speech” because “[r]egulatory programs necessarily draw distinctions on the basis of content.” *Id.* at 588–90 (Breyer, J., dissenting); see also Claudia E. Haupt, *The Limits of Professional Speech*, 128 *YALE L.J.F.* 185, 188 (2018) (“[T]he doctrine of content neutrality . . . is incompatible with professional speech . . . . [T]he regulation of professional speech, in order to achieve its aim, cannot be content-neutral; indeed, the value of professional advice depends on its content.”). Justice Breyer warned that “[i]f the Court means to create constitutional barriers to regulatory rules that might affect the *content* of a commercial message, it . . . threatens significant judicial interference with widely accepted regulatory activity.” *IMS Health*, 564 U.S. at 590 (Breyer, J., dissenting).

139. *IMS Health*, 564 U.S. at 558–59.

provided exceptions for healthcare research and educational communications to patients.<sup>140</sup> Legislative findings accompanying the statute revealed that its express purpose and effect were to “diminish the effectiveness of marketing by manufacturers of brand-name drugs,”<sup>141</sup> with the ultimate policy goals of promoting public health and decreasing health-care costs.<sup>142</sup> Because the statute disfavored particular content, the Court concluded that heightened judicial scrutiny was required.<sup>143</sup> The Court acknowledged that Vermont’s policy goals may be proper but rejected the State’s paternalistic means—restricting access to truthful information out of the fear that people would make bad decisions.<sup>144</sup> The Court emphasized that a “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue,” particularly in the public health context, “where information can save lives.”<sup>145</sup> Furthermore, the ongoing debate over the merits of doctor-specific marketing and brand-name drugs must be resolved through “free and uninhibited speech.”<sup>146</sup> The government may not advance its own position by burdening its opponents’ speech.<sup>147</sup> In striking down the Vermont statute, the *IMS Health* Court thus invoked both the speaker’s autonomy interest and consumers’ informational interest.

In restrictions on commercial speech, the autonomy interests of commercial speakers are aligned with listeners’ interests in receiving information—both are undermined when the government impedes the flow of nonmisleading commercial speech. But when the government seeks to compel commercial speech, those interests may clash.<sup>148</sup> In *Zauderer*, which drew heavily on the rationale of *Virginia Pharmacy*, listeners’ interests prevailed.<sup>149</sup>

### B. The Legal Standard for Compelled Commercial Speech

*Zauderer* established a deferential standard of review for compelled commercial disclosures, holding 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.”<sup>150</sup> Thus, compulsions

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140. *Id.* at 558–60.

141. *Id.* at 565. The state found that such marketing caused “hasty and excessive reliance” on brand-name drugs rather than safer, less expensive generic alternatives, and “increase[d] the cost of health care and health insurance.” *Id.* at 561.

142. *Id.* at 576.

143. *Id.* at 565.

144. *Id.* at 577.

145. *Id.* at 566 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977)).

146. *Id.* at 578–79.

147. *Id.*

148. However, “increasing the volume of information may not always serve the constitutional interest in the ‘free flow’ of information,” because consumers may experience “information overload.” Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* 58 ARIZ. L. REV. 421, 437 (2016). Furthermore, because “[a] product label or advertisement can only hold so much information,” a disclosure requirement may force a seller to omit “another set of information more valued by consumers.” *Id.* at 445–46.

149. *See infra* Part II.B.1.

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

of commercial speech are treated more deferentially than restrictions, unlike in the context of noncommercial speech, where compulsions and restrictions are constitutionally equivalent.<sup>151</sup>

However, controversy regarding *Zauderer*'s scope and application persists more than thirty years later, as lower courts disagree over the significance of various elements of the opinion.<sup>152</sup> The question of how much weight to give to the speaker's interests and the listeners' interests—which are not aligned as they are in speech restrictions—may further complicate the analysis. Part II.B.1 presents the language and holding of *Zauderer*, and Part II.B.2 examines *NIFLA*, the Court's most recent case discussing *Zauderer*.

### 1. *Zauderer*'s Special Treatment of a “Factual and Uncontroversial” Disclosure

In *Zauderer*, the Court upheld an Ohio State Bar requirement that any attorney advertisements “that mention[] contingent-fee rates must . . . inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful.”<sup>153</sup> An attorney who was disciplined for violating this requirement challenged the rule as a First Amendment violation.<sup>154</sup> In upholding the rule, the Court created a new test for compelled commercial disclosures distinct from *Central Hudson*'s standard for commercial speech restrictions.<sup>155</sup>

The Court reasoned that because First Amendment protection for commercial speech is largely based on consumers' interest in receiving information,<sup>156</sup> the appellant had a “minimal” First Amendment interest in not providing specific factual information.<sup>157</sup> Thus, the 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.”<sup>158</sup> The Court noted that its commercial speech precedents had emphasized that disclosures were much less burdensome than bans of advertising, and it had therefore recommended disclosures as a means to address potential consumer deception.<sup>159</sup> The Court acknowledged,

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151. Goodman, *supra* note 80, at 519–20; *see also supra* notes 102–05 and accompanying text.

152. *See infra* notes 164–69 and accompanying text.

153. *Zauderer*, 471 U.S. at 633.

154. *Id.* at 634.

155. *See id.* at 651; Royal, *supra* note 90, at 219 (“The *Zauderer* Court held *Central Hudson* inapplicable and adopted a more lenient test, a ‘reasonable relationship’ test.”). *But see* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2016) (en banc) (“[O]ne could think of *Zauderer* largely as ‘an application of *Central Hudson*, where several of *Central Hudson*'s elements have already been established” (quoting Supplemental Brief for Appellants at 9, *Am. Meat Inst.*, 760 F.3d 18 (No. 13-5281))); Adler, *supra* note 148, at 435 (characterizing *Zauderer* as “a relatively straightforward application of the *Central Hudson* framework” rather than “an alternative test for compelled commercial speech”).

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

157. *Id.*

158. *Id.*

159. *Id.*

however, that “unjustified or unduly burdensome disclosure requirements” might be unconstitutional if they “chill[ed] protected commercial speech.”<sup>160</sup>

The Court also distinguished the disclosure at issue from *Barnette*, *Tornillo*, and *Wooley*, arguing that “the interests at stake in this case are not of the same order” as the interests in those cases: “Ohio has not attempted to ‘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.’”<sup>161</sup> Instead, Ohio specified what was “orthodox in commercial advertising” by requiring advertisers to include “purely factual and uncontroversial information” about the terms of service.<sup>162</sup>

The language in *Zauderer* primarily describes why the disclosure at issue in the case was permissible and does not announce a clear test.<sup>163</sup> Consequently, lower courts have interpreted terms differently and disagreed over whether certain language in the opinion establishes a prerequisite for *Zauderer* deference or is simply descriptive.<sup>164</sup> Areas of disagreement include the meaning of “purely factual and uncontroversial,”<sup>165</sup> whether *Zauderer* is limited to regulations addressing deception,<sup>166</sup> whether *Zauderer*

160. *Id.*

161. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

162. *Id.*

163. Barrella, *supra* note 15, at 527.

164. *Id.*; see also Note, *supra* note 12, at 979 (“*Zauderer*’s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic.”). A discussion of these various interpretations is beyond the scope of this Note, which will focus on the meaning of “uncontroversial.” For a more comprehensive review, see generally Barrella, *supra* note 15; and Berman, *supra* note 84.

165. See *infra* Part II.C. This Note does not fully explore the meaning of “purely factual,” which is taken up directly in cases about graphic cigarette warnings. See *infra* note 198.

166. See Post, *supra* note 76, at 882. Professor Post argues that the Court “poorly crafted” the sentence “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.” *Id.* (quoting *Zauderer*, 471 U.S. at 651). He argues that this sentence misled some courts into thinking that *Zauderer*’s scope is limited to disclosures for preventing deception and that *Zauderer* is properly interpreted as “holding that commercial disclosure requirements for ‘purely factual and uncontroversial information’ are constitutional ‘as long as’ they ‘are reasonably related’ to an appropriate state interest.” *Id.* (quoting *Zauderer*, 471 U.S. at 651); see also *Am. Beverage Ass’n v. City & County of San Francisco* (*Am. Beverage Ass’n I*), 871 F.3d 884, 892 (9th Cir. 2017) (stating that *Zauderer*’s “we hold . . .” sentence “is best read as a specific application of *Zauderer*’s more general rule that a purely factual and uncontroversial disclosure that is not unduly burdensome will withstand First Amendment scrutiny so long as it is reasonably related to a substantial government interest”), *aff’d on other grounds on reh’g*, Nos. 16-16072, 16-16073, 2019 WL 387114 (9th Cir. Jan. 31, 2019) (en banc). The circuit courts that have addressed this issue have “unanimously concluded” that *Zauderer* applies “even in circumstances where the disclosure does not protect against deceptive speech.” *CTIA-The Wireless Ass’n v. City of Berkeley* (*CTIA v. Berkeley II*), 854 F.3d 1105, 1116 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 2708 (2018) (mem.). However, disputes remain over which state interests are sufficient. Berman, *supra* note 84, at 73–77. The Second Circuit has concluded that “consumer curiosity alone” is insufficient to justify a mandatory disclosure. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). Instead, the information must “bear[] on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern.” *Id.* Then-Judge Brett Kavanaugh agreed with the Second Circuit’s conclusion that “providing consumers with information” they are interested in is not itself a sufficient government interest. *Am. Meat Inst.*

applies outside of the context of advertising and product labeling,<sup>167</sup> whether identifying a disclosure as government speech is relevant,<sup>168</sup> and the proper standard of review if *Zauderer* does not apply.<sup>169</sup> The Supreme Court's decision in *NIFLA* may have resolved some of this confusion, but it raises questions of its own.

## 2. *NIFLA*: The Latest Word on *Zauderer*

In *NIFLA*, the Court addressed the constitutionality of a California law requiring clinics that “primarily serve pregnant women”<sup>170</sup> to provide certain government-drafted notices.<sup>171</sup> Specifically, the state required licensed clinics to disseminate a notice on-site that informed women that California provides “immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women” and instructed women to contact the county social services office to determine whether they are eligible for these services.<sup>172</sup> The state also required unlicensed clinics to provide a notice “on site and in all advertising materials,” which stated that the “facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”<sup>173</sup>

The Court stated that *Zauderer* did not apply to the licensed-clinic notice, because the notice “is not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’”<sup>174</sup>

v. U.S. Dep't of Agric., 760 F.3d 18, 31–32 (D.C. Cir. 2016) (Kavanaugh, J., concurring in the judgment).

167. Compare Nat'l Ass'n of Mfrs. v. SEC (*Nat'l Ass'n of Mfrs. II*), 800 F.3d 518, 521–24 (D.C. Cir. 2015) (holding that *Zauderer* does not apply to compelled disclosures “that are unconnected to advertising or product labeling at the point of sale”), with *id.* at 535–36 (Srinivasan, J., dissenting) (criticizing the majority's limit on *Zauderer*'s scope as without precedent and inconsistent with *Zauderer*'s rationale).

168. See Berman, *supra* note 84, at 81–84 (“One . . . open question is whether unambiguously identifying a disclosure as ‘government speech’ leads to an even more relaxed standard of review than *Zauderer* . . .”).

169. Barella, *supra* note 15, at 539; Berman, *supra* note 84, at 77–81. The D.C. Circuit and Second Circuit apply *Central Hudson*, the Sixth Circuit applies strict scrutiny, and some courts avoid the question of which standard applies because the regulation fails under either. See Barella, *supra* note 15, at 539.

170. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018). The California State Legislature sought to regulate crisis pregnancy centers, which are typically “pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services.” *Id.* (quoting CASEY WATTERS ET AL., PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 4 (2015)).

171. *Id.* at 2368.

172. *Id.* at 2369–70.

173. *Id.*

174. *Id.* at 2372 (alteration in original) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). For further support that “*Zauderer* does not apply outside of these circumstances,” the Court cited *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), a case about parade organizers' right to decide which groups to include as marchers. *Id.*

According to the Court, the notice did not relate to the services that the clinics provided<sup>175</sup> but instead “require[d] these clinics to disclose information about *state*-sponsored services—including abortion, anything but an ‘uncontroversial’ topic.”<sup>176</sup> The Court concluded that the notice would fail under strict scrutiny and even intermediate scrutiny because it was “wildly underinclusive” and a less restrictive alternative existed.<sup>177</sup> The Court did include a disclaimer, stating that “[c]ontrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”<sup>178</sup>

The Court did not decide whether *Zauderer* applied to the unlicensed-clinic notice, because it concluded that the notice failed even *Zauderer*’s deferential standard.<sup>179</sup> It emphasized that “[e]ven under *Zauderer*, a disclosure requirement cannot be ‘unjustified or unduly burdensome,’” which would risk “chilling” protected speech.<sup>180</sup> To satisfy this standard, the Court reasoned, compelled disclosures must “remedy a harm that is ‘potentially real not purely hypothetical’”<sup>181</sup> and “extend ‘no broader than reasonably necessary.’”<sup>182</sup> The Court concluded that California’s justification for the notice, “ensuring that ‘pregnant women in California know when they are getting medical care from licensed professionals,’”<sup>183</sup> was “purely hypothetical.”<sup>184</sup> Justice Breyer criticized the majority’s analysis as “incompatible” with *Zauderer*: rather than evaluating whether the notice is “reasonably related to the State’s interest,” the majority “applie[d] a searching standard of review based on our precedents that deal with speech *restrictions*, not *disclosures*.”<sup>185</sup> The Court also determined that

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175. *Id.* Justice Breyer disagreed, arguing that information about free, state-provided resources for the same services is “related” to the clinic’s services and stating that “for those interested in family planning and abortion services, information about such alternatives is relevant information to patients offered prenatal care, just as *Casey* considered information about adoption to be relevant to the abortion decision.” *Id.* at 2387 (Breyer, J., dissenting).

176. *Id.* at 2372 (majority opinion); *see also id.* at 2379 (Kennedy, J., concurring) (emphasizing that California “requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions,” which “compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these”). The Court also concluded that the licensed-clinic notice was “not an informed-consent requirement or any other regulation of professional conduct.” *Id.* at 2373–74 (majority opinion).

177. *Id.* at 2375. Thus, the Court did not resolve the debate over which level of scrutiny is appropriate when *Zauderer* does not apply. *See supra* note 169 and accompanying text.

178. *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2376 (citation omitted).

179. *Id.* at 2377–78.

180. *Id.* at 2377 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

181. *Id.* (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994)).

182. *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

183. *Id.* (quoting Assemb. 775 § 1(e), 2015–2016 Reg. Sess. (Cal. 2015)).

184. *Id.* (quoting *Ibanez*, 512 U.S. at 146).

185. *Id.* at 2390 (Breyer, J., dissenting). The *NIFLA* opinion was authored by Justice Thomas, who previously expressed “skeptic[ism] of the premise on which *Zauderer* rests,” which is that, unlike in the political speech context, the First Amendment interests implicated



the government-drafted notice “unduly burden[ed]” protected speech because it was overbroad and “require[d] covered facilities to post California’s precise notice, no matter what the facilities say on site or in their advertisements.”<sup>186</sup>

### C. What Makes a Commercial Disclosure “Factual and Uncontroversial”?

In finding that *Zauderer* did not apply to the licensed-clinic notice in *NIFLA* because the state required disclosure of information about abortion, the Court addressed one open issue: the significance of *Zauderer*’s reference to the “factual and uncontroversial information” mandated by the Ohio State Bar.<sup>187</sup> The *NIFLA* Court took the position that “uncontroversial” means a disclosure related to a controversial *topic* is ineligible for *Zauderer* review—an interpretation that no lower court had adopted, at least outside of the context of abortion.<sup>188</sup> A review of the case law and scholarship before *NIFLA* reveals two primary arguments for what type of disclosure is eligible for review under *Zauderer*: (1) the disclosure must contain accurate factual information;<sup>189</sup> or (2) the disclosure must contain accurate factual information that does not implicitly convey ideology, an inquiry that looks to whether there is controversy over the normative content or salience of the facts.<sup>190</sup> This section explores the various approaches to “factual and uncontroversial,” focusing on the doctrinal and policy justifications for each position, and then suggests possible rationales for the *NIFLA* Court’s position.

#### 1. Accurate Factual Information

Several courts and scholars have interpreted “factual and uncontroversial” to limit *Zauderer*’s scope to disclosures that contain accurate factual information.<sup>191</sup> In arriving at this conclusion, they draw on both the text of

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by compelled commercial speech are “substantially weaker” than those implicated by restrictions on speech. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 255 (2010) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Zauderer*, 471 U.S. at 652 n.14). *NIFLA* may vindicate claims that the Court has been “gradually inching towards Justice Thomas’s position.” See Goodman, *supra* note 80, at 529 n.92.

186. *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2377–78. *But see id.* at 2390 (Breyer, J., dissenting) (“[T]he Court has long held that a law is not unreasonable merely because it is overinclusive.”).

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

188. Barrella, *supra* note 15, at 534, 541 (stating that if “controversial” is defined as “dealing with controversial subject matter,” “it would be a first,” and that “even a ‘highly controversial subject matter’ definition seems unlikely in light of all the cases that have come before”). The only other case that has adopted this interpretation is *Evergreen Ass’n v. City of New York*, which involved a similar disclosure requirement for crisis pregnancy centers. 740 F.3d 233, 245 n.6 (2d Cir. 2014); see *infra* notes 259–60.

189. See *infra* Part II.C.1.

190. See *infra* Part II.C.2.

191. See, e.g., *CTIA v. Berkeley II*, 854 F.3d 1105, 1117–18 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 2708 (2018) (mem.); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012); Berman, *supra* note 84, at 65 (“[T]he ‘factual

*Zauderer* and the Court's justifications for distinguishing the compelled speech in *Zauderer* from *Wooley*, *Tornillo*, and *Barnette*.

The Sixth Circuit has concluded that a mandatory disclosure, to be eligible for *Zauderer*'s deferential review, must include accurate factual information but need not be uncontroversial.<sup>192</sup> In *Discount Tobacco City & Lottery, Inc. v. United States*,<sup>193</sup> the court emphasized that the term “noncontroversial” appears only once in *Zauderer*, and “merely describes” the disclosure at issue in the case rather than imposing an additional requirement.<sup>194</sup> As further support for its position, the court noted that elsewhere in the opinion, *Zauderer* refers only to disclosures of “factual information” and “accurate information.”<sup>195</sup> The court also argued that the 2010 Supreme Court case of *Milavetz, Gallop & Milavetz, P.A. v. United States*<sup>196</sup> clearly indicated that a disclosure need not be uncontroversial for *Zauderer* to apply because the Court never used the phrase “purely factual and noncontroversial”: “The Court instead uses the language *required factual information* and *only an accurate statement* when describing the characteristics of a disclosure that is scrutinized for a rational basis.”<sup>197</sup> Thus, the Sixth Circuit concluded that a disclosure is entitled to *Zauderer* review if it conveys factual information and not a personal or political opinion, regardless of whether the disclosure “incites controversy.”<sup>198</sup>

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and uncontroversial’ limitation is best read as a check to ensure that any mandated statement is *factually accurate* (or *factually uncontroversial*).”); Royal, *supra* note 90, at 235 & n.6 (arguing that *Zauderer* should apply when a regulation mandates “disclosure of uncontroverted facts about a specific product or service sold,” and stating that “[t]he relevant question is whether evidence supports the existence of the facts—and thus whether the facts themselves are controverted—not whether the desire to share the information is controverted”). Justice Breyer seems to adopt that position in *NIFLA*, stating that “[a]bortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth.” *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2388 (Breyer, J., dissenting).

192. *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 559 n.8.

193. 674 F.3d 509 (6th Cir. 2012).

194. *Id.* at 599 n.8 (“This language appears in *Zauderer* once and the context does not suggest that the Court is describing the characteristics that a disclosure must possess for a court to apply *Zauderer*’s rational-basis rule.”).

195. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985)). Specifically, the *Zauderer* Court stated that “appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal” and that “[t]he right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right” that “strict scrutiny must be applied.” *Zauderer*, 471 U.S. at 651 & n.14.

196. 559 U.S. 229 (2010).

197. *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 559 n.8 (citing *Milavetz*, 559 U.S. at 249–50). Indeed, neither “uncontroversial” nor “controversial” appear anywhere in the *Milavetz* opinion. See generally *Milavetz*, 559 U.S. 229.

198. *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 569. The court noted that “[f]acts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions.” *Id.* at 569. The court’s analysis centered on whether graphic warning requirements for cigarette labels were “purely factual,” a question which is beyond the scope of this Note. For contrasting views, compare *R. J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012), with *id.* at 1229–32 (Rogers, J., dissenting), and *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 558–61.

The Ninth Circuit also concluded that *Zauderer* applies to mandatory disclosures of accurate factual information.<sup>199</sup> The court stated that “‘uncontroversial’ in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience.”<sup>200</sup> The court reasoned that this interpretation was consistent with the facts of *Zauderer*: the state’s requirement that an attorney disclose a client’s potential liability for costs “may have caused controversy,” by damaging the reputation of lawyers who offered contingency-fee arrangements or discouraging potential customers, but such controversy “did not affect the constitutional analysis.”<sup>201</sup> Instead, the analysis depends on whether the disclosure provides accurate factual information.<sup>202</sup> Thus, the Ninth Circuit concluded that *Zauderer* only requires a disclosure to be “purely factual.”<sup>203</sup>

Advocates for the “accurate factual information” interpretation disagree over the requisite level of consensus about a fact’s accuracy. They have suggested at least three different standards for finding that information is not factually accurate under this approach to *Zauderer*: (1) where there is any disagreement, (2) where there is “reasonable” disagreement by scientists or

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199. *CTIA v. Berkeley II*, 854 F.3d 1105, 1117–18 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 2708 (2018) (mem.).

200. *Id.* at 1117. The Northern District of California previously adopted the same interpretation of *Zauderer*’s text, stating that “[u]ncontroversial’ should generally be equated with the term ‘accurate’; in contrast, ‘factual’ goes to the difference between a ‘fact’ and an ‘opinion.’” *CTIA-The Wireless Ass’n v. City of Berkeley (CTIA v. Berkeley I)*, 158 F. Supp. 3d 897, 904 (N.D. Cal. 2016), *aff’d*, 854 F.3d 1105 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 2708 (2018) (mem.). Judge Sri Srinivasan of the D.C. Circuit also argued for this interpretation in his dissenting opinion in *National Ass’n of Manufacturers II*, 800 F.3d 518, 538 (D.C. Cir. 2015) (Srinivasan, J., dissenting). Like the Sixth Circuit in *Discount Tobacco*, Judge Srinivasan emphasized the absence of “uncontroversial” in *Milavetz*. *Id.* at 538.

201. *CTIA v. Berkeley II*, 854 F.3d at 1118.

202. *Id.* The court noted that a compelled disclosure may not be “purely factual” if it is “literally true but nonetheless misleading and, in that sense, untrue.” *Id.* at 1119. The Ninth Circuit later struck down a San Francisco ordinance requiring advertisements for sugar-sweetened beverages to include the warning that “[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.” *Am. Beverage Ass’n I*, 871 F.3d 884, 888, 895 (9th Cir. 2017), *aff’d on other grounds on reh’g*, Nos. 16-16072, 16-16073, 2019 WL 387114 (9th Cir. Jan. 31, 2019) (en banc). The court found that the accuracy of the warning was “in reasonable dispute” because of evidence that those health conditions may not develop if sugar-sweetened beverages are consumed in moderation and the individual does not consume more calories than she uses. *Id.* at 895. Furthermore, the court said that the warning was “misleading” because it was required only in advertisements for sugar-sweetened beverages, not for other products with as much or more added sugars, which implied that sugar-sweetened beverages are “uniquely or inherently unhealthy”—an implication with insufficient evidentiary support. *Id.* at 895–96. The court concluded that *Zauderer* did not apply to a mandatory disclosure that forced advertisers “to convey San Francisco’s disputed policy views.” *Id.* at 896. After rehearing en banc, the Ninth Circuit again concluded that the lower court abused its discretion in not granting a preliminary injunction against the ordinance. *Am. Beverage Ass’n II*, Nos. 16-16072, 16-16073, 2019 WL 387114, at \*1 (9th Cir. Jan. 31, 2019) (en banc). However, the court’s reasoning was based solely on its determination that the disclosure requirement was unduly burdensome; it did not reach the question of whether the warning was factually accurate and uncontroversial. *Id.* at \*5. As noted above, the Ninth Circuit regards “factual and uncontroversial” as part of the *Zauderer* test rather than a limit on its scope. *See id.* at \*4; *supra* note 19.

203. *CTIA v. Berkeley II*, 854 F.3d at 1118.

the public, or (3) where a claim is unverified or unsupported by the weight of scientific research. One judge has implied that any dispute over accuracy places a disclosure outside of *Zauderer*'s scope.<sup>204</sup> However, scholars have not seriously considered this standard, as it would mean that safety warnings long considered legal would be ineligible for *Zauderer* review.<sup>205</sup>

Another position is that “reasonable” disagreement about the accuracy of a fact renders it “controverted.”<sup>206</sup> Consequently, *Zauderer* would not apply if “even a substantial minority of scientists or the public” challenge the accuracy of the statement.<sup>207</sup> However, this test seems inherently problematic from a policy standpoint, at least to the extent that it looks to public disagreement with the statement. It would subject factual disclosures to heightened scrutiny whenever there is widespread misinformation—a situation where factual disclosures are arguably even more necessary.

In contrast, Professor Micah Berman suggests that “factually accurate” could be interpreted similarly to “medically accurate,” which was defined in the Affordable Care Act as “verified or supported by the weight of research conducted in compliance with accepted scientific methods” and “published in peer-reviewed journals, where applicable” or recognized by “leading professional organizations and agencies with relevant expertise . . . as accurate.”<sup>208</sup> Under this interpretation, a greater number of disclosures may be “factually accurate” and therefore eligible for deferential review. The Northern District of California has argued that disagreement about the scientific basis for a disclosure does not make it “controversial.”<sup>209</sup> To hold otherwise, the court said, would mean that “*Zauderer* would never apply, especially where there are health and safety risks” because “science is almost always debatable at some level.”<sup>210</sup>

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204. See *Nat'l Ass'n of Mfrs. II*, 800 F.3d at 537–38 (Srinivasan, J., dissenting) (“To qualify as ‘purely factual and uncontroversial,’ in short, the disclosed information must in fact be ‘factual,’ and it must also be ‘uncontroversially’ so, in the sense that there could be no ‘disagree[ment] with the truth of the facts required to be disclosed.’” (alteration in original) (quoting *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2016) (en banc))).

205. But see Barrella, *supra* note 15, at 540 (stating that a literal interpretation of Judge Srinivasan's statement would lead to the incorrect conclusion that the government could not require warnings about smoking risks, inter alia, because some people dispute the accuracy of even well-established facts).

206. Royal, *supra* note 90, at 238; see also Barrella, *supra* note 15, at 541 (“The question, then, may be not only whether disagreement with the facts is possible, but *reasonable* disagreement.”). Under this standard, a fact is controverted if empirical support for the information is sufficiently mixed that it could “cause a *reasonable* consumer to choose between two competing views”; “[o]ne fringe person arguing that the moon is made of green cheese will not do.” Royal, *supra* note 90, at 238. This appears to be the standard adopted by the Ninth Circuit in *American Beverage Ass'n I*: the court stated that the accuracy of the disclosure at issue was “in reasonable dispute.” 871 F.3d at 895.

207. Royal, *supra* note 90, at 238.

208. Berman, *supra* note 84, at 66 n.57 (quoting 42 U.S.C. § 713 (2012)).

209. *CTIA v. Berkeley I*, 158 F. Supp. 3d 897, 904 (N.D. Cal. 2016), *aff'd*, 854 F.3d 1105 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 2708 (2018) (mem.).

210. *Id.*; see also Barrella, *supra* note 15, at 540 (“[A]nyone can (and many routinely do) disagree with the truth of factual matters, even ones that *should* be uncontroversial in light of all we know.”); Berman, *supra* note 84, at 66 n.57 (“[M]any well-established facts are contested by a small number of dissenters.”).

The focus on accuracy is arguably central to *Zauderer*'s rationale for extending greater deference to compelled commercial disclosures. Because commercial speech is protected primarily for its value to consumers, a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal."<sup>211</sup> However, where "the truth of information is seriously controverted," the information no longer seems factual.<sup>212</sup> Instead, the government essentially "forc[es] a speaker to endorse one or another opinion about the truth of the underlying information."<sup>213</sup> And as *Zauderer* emphasized, a state's attempt to "prescribe what shall be orthodox in . . . matters of opinion" implicates substantial First Amendment interests.<sup>214</sup> Thus, where the state compels a commercial speaker to convey another's opinion, strict scrutiny—and not *Zauderer*'s "reasonable relationship" standard—will apply.<sup>215</sup>

The interpretation of "purely factual and uncontroversial" to require only factual accuracy has been critiqued on textual, legal, and policy grounds. The interpretation arguably renders the phrase redundant: as the D.C. Circuit pointed out, "Is there such a thing as a 'purely factual' proposition that is not 'accurate'?"<sup>216</sup> Furthermore, a disclosure may advance a controversial ideology even if it conveys accurate factual information.<sup>217</sup> Compelled ideological speech implicates both the speaker's autonomy interest and the listener's interest "in a public discourse free of state compulsion."<sup>218</sup> Because of the important interests at stake, if the government attempts to

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

212. Post, *supra* note 76, at 910.

213. *See id.*

214. *See Zauderer*, 471 U.S. at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Professor Sarah Haan suggests that the *Zauderer* Court, in establishing a lower standard for "purely factual and uncontroversial" disclosures, "may have really intended to preserve strict scrutiny for disclosures that cause the speaker to affirm an ideological message." Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. (forthcoming 2019) (manuscript at 36), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3209366](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209366) [<https://perma.cc/ELS8-TB9Q>]. However, she argues that "'purely factual and uncontroversial' does not mean 'non-ideological.'" *Id.*

215. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16, 19 (1986) (plurality opinion) (stating that the government may not "compel corporate speakers to propound political messages with which they disagree" unless the regulation is "a narrowly tailored means of serving a compelling state interest").

216. *Nat'l Ass'n of Mfrs. II*, 800 F.3d 518, 529 n.28 (D.C. Cir. 2015). *But see id.* at 537 (Srinivasan, J., dissenting) (arguing that "purely factual and uncontroversial," as a phrase from a judicial opinion, "should be 'read in context,' taking into account the whole of the court's analysis" rather than "be[ing] parsed as though we were dealing with language of a statute" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979))); Barrella, *supra* note 15, at 533 n.101 ("Descriptive redundancies are common in spoken and written language, non-legal as well as legal . . ."). According to Judge Srinivasan, *Zauderer*'s purpose of "providing consumers with useful information about products and services"—which is "the reason for protecting commercial speech in the first place"—is "honored" when a commercial speaker is required to disclose "purely factual" and "accurate" information. *Nat'l Ass'n of Mfrs. II*, 800 F.3d at 537 (Srinivasan, J., dissenting).

217. Goodman, *supra* note 80, at 550; *see also infra* Part II.C.2.

218. Goodman, *supra* note 80, at 550.

force an individual or company to convey another's ideology, it must prove narrow tailoring, not simply a reasonable relationship.<sup>219</sup>

The interpretation may also be problematic from a policy standpoint, especially if a relatively low level of scientific consensus is required for a disclosure to be eligible for *Zauderer* review. Overuse of warnings, particularly those that are unsubstantiated or relate to “extremely remote” risks, may cause people to doubt the credibility of warnings and disregard them.<sup>220</sup> Furthermore, excessive disclosure requirements also raise constitutional problems, since they may not serve listeners' interests.<sup>221</sup> Thus, factual accuracy alone may not sufficiently limit *Zauderer*'s scope.

## 2. Accurate Factual Information That Does Not Implicitly Convey Ideology

An alternate interpretation is that “uncontroversial” imposes an independent legal standard that goes beyond “factual accuracy”<sup>222</sup> and, therefore, that *Zauderer* does not apply to a disclosure if there is controversy over the “normative content or relevance” of the facts.<sup>223</sup> Such disclosures arguably force a commercial speaker to implicitly convey a controversial ideology.

The D.C. Circuit and Seventh Circuit, while not defining “controversial” precisely,<sup>224</sup> have found that *Zauderer* does not apply to “opinion-based” disclosures.<sup>225</sup> For example, the Seventh Circuit invalidated a state law requiring a sticker on any video game that met the statutory definition of “sexually explicit” because “[t]he sticker ultimately communicates a subjective and highly controversial message—that the game's content is sexually explicit.”<sup>226</sup> The court distinguished the labeling mandate from a requirement that manufacturers label products containing mercury because the definition of “sexually explicit” was “far more opinion-based.”<sup>227</sup> In

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219. See *Zauderer*, 471 U.S. at 650–51; *supra* Part II.A.1.

220. *CTIA v. Berkeley II*, 854 F.3d 1105, 1126 (9th Cir. 2017) (Friedland, J., dissenting in part), *vacated and remanded*, 138 S. Ct. 2708 (2018) (mem.).

221. See *supra* note 148.

222. Under this interpretation, a disclosure would also be excluded from *Zauderer* review if it does not contain accurate factual information. See Goodman, *supra* note 80, at 554.

223. *Id.* at 552. The information's relevance may be distinct from the question of whether the disclosure provides information about the product or “about the terms under which . . . services will be available.” See *Zauderer*, 471 U.S. at 651. For example, a disclosure that a particular milk product was derived from cows treated with a synthetic growth hormone *is* information about the product, but may *not* be salient without evidence of health risks. See *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (“[C]onsumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement.”).

224. *Nat'l Ass'n of Mfrs. II*, 800 F.3d 518, 528 (D.C. Cir. 2015); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

225. *Entm't Software Ass'n*, 469 F.3d at 652.

226. *Id.*

227. *Id.*

other words, the video game disclosure conveys ideology because “the facts disclosed [were] evaluative facts<sup>228</sup> embodying a contested norm.”<sup>229</sup>

The D.C. Circuit has stated that “uncontroversial” imposes an additional legal test beyond whether the disclosure is “purely factual” and looks to whether the disclosure “communicates a message that is controversial for some reason other than [a] dispute about simple factual accuracy.”<sup>230</sup> The court suggested that “[p]erhaps the distinction is between fact and opinion.”<sup>231</sup> In support of its position, the court pointed to the Supreme Court’s warning in *Pacific Gas & Electric Co. v. Public Utilities Commission*<sup>232</sup> that “*Zauderer* does not leave the state ‘free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation’s views.’”<sup>233</sup> For example, the D.C. Circuit found that the description of a product as “conflict free” or “not conflict free,” while statutorily defined in relation to factual information about the origin of materials, was a “metaphor that conveys moral responsibility for the Congo war”—and thus was not “factual and non-ideological.”<sup>234</sup> The court has also noted “the possibility that some required factual disclosures could be so one-sided or incomplete that they would not qualify as ‘factual and uncontroversial.’”<sup>235</sup>

Furthermore, a disclosure may communicate a message that is controversial due to a disagreement about the *need* for that disclosure,<sup>236</sup> although this interpretation has not been adopted in any published opinions. It is, however, reflected in an unpublished Ninth Circuit opinion.<sup>237</sup> San

228. Evaluative facts are those that “cannot exist without judgment,” unlike “natural or empirical facts that exist with little to no judgment involved.” Goodman, *supra* note 80, at 546; see also William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 894–97 (2013) (stating that “[e]mpirical facts can be defined as facts whose truth or falsity can be tested by experience or experiment in the world,” whereas “[e]valuative facts are statements reflecting conclusions drawn from empirical facts” and “entail a mixture of empirical observation and value judgment”). For example, killing is a “natural” fact because “[i]t exists in nature as the taking of a life,” while murder is an “evaluative” fact because it “entail[s] judgments as to justified homicide or self-defense.” Goodman, *supra* note 80, at 546. Difficulty verifying an empirical fact—like “the degree to which human activity is causing climate change”—does not make it an evaluative fact. Araiza, *supra*, at 894.

229. Goodman, *supra* note 80, at 551.

230. *Nat’l Ass’n of Mfrs. II*, 800 F.3d 518, 528 (D.C. Cir. 2015) (alteration in original) (quoting *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2016) (en banc)).

231. *Id.* The court noted, however, that “it is far from clear that all opinions are controversial.” *Id.*

232. 475 U.S. 1 (1986).

233. *Am. Meat Inst.*, 760 F.3d at 27 (quoting *Pac. Gas & Elec. Co.*, 475 U.S. at 15 n.12).

234. *Nat’l Ass’n of Mfrs. v. SEC (Nat’l Ass’n of Mfrs. I)*, 748 F.3d 359, 363, 371 (D.C. Cir. 2014), *aff’d on reh’g*, 800 F.3d 518 (D.C. Cir. 2015). A manufacturer “may disagree with that assessment of its moral responsibility.” *Id.* at 371.

235. *Am. Meat Inst.*, 760 F.3d at 27.

236. See Goodman, *supra* note 80, at 553 (“The work that ‘noncontroversial’ does in the advancement of consumer-autonomy interests is to impose a germaneness requirement on the state.”).

237. See *CTIA-The Wireless Ass’n v. City & County of San Francisco (CTIA v. San Francisco II)*, 494 F. App’x 752, 753 (9th Cir. 2012).

Francisco required cell phone retailers to display a poster stating “[c]ell phones emit radiofrequency energy,” “[s]tudies continue to assess potential health effects of mobile phone use,” and the city’s recommendations for reducing exposure to radiofrequency energy.<sup>238</sup> The Ninth Circuit found that, given the scientific uncertainty about the health risks of cell phone use, the city’s recommendations could “be interpreted by consumers as expressing San Francisco’s opinion that using cell phones is dangerous.”<sup>239</sup>

The plaintiffs in *Grocery Manufacturers Ass’n v. Sorrell*<sup>240</sup> advocated for a similar interpretation.<sup>241</sup> Food manufacturers and retailers objected to a Vermont law requiring them to identify whether food was produced through genetic engineering.<sup>242</sup> Although this was factual, the plaintiffs argued that the disclosure was “controversial” because, in the midst of a political and public debate about the safety of genetically engineered foods, the mandatory label implicitly conveyed the message that such foods were unsafe.<sup>243</sup> However, the court rejected the plaintiffs’ argument and stated that “the compelled information must, itself, be ‘controversial.’”<sup>244</sup>

A factually accurate disclosure may thus imply a value judgment or suggest that a consumer should change her behavior due to potential health risks that have not been conclusively determined. Through these implicit messages, the government advances its own position. And while the government may take a side, it may not force a commercial speaker to carry its message in these “matters of opinion” without subjecting its actions to strict scrutiny, as *Zauderer* itself noted.<sup>245</sup> Professor Ellen Goodman suggests that an interpretation of “uncontroversial” that looks to the *salience* of the disclosed facts would properly focus the analysis on “the cornerstone of commercial speech law: consumer autonomy.”<sup>246</sup> If the state forces commercial speakers to convey messages irrelevant to consumer choice, it essentially uses its power to regulate commerce “to build an ideological

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238. *CTIA-The Wireless Ass’n v. City & County of San Francisco (CTIA v. San Francisco I)*, 827 F. Supp. 2d 1054, 1057–58 (N.D. Cal. 2011), *aff’d*, 494 F. App’x 752 (9th Cir. 2012). San Francisco acknowledged that research had not definitely established risks associated with cell phone use, but justified the disclosure requirement through the “Precautionary Principle, which provides that the government should not wait for scientific proof of a health or safety risk before taking steps to inform the public of the potential for harm.” *Id.*

239. *CTIA v. San Francisco II*, 494 F. App’x at 753. Indeed, the WHO classifies radiofrequency radiation as a “possible” carcinogen, a category which actually means that there is “no known statistical correlation” to cancer. *CTIA v. San Francisco I*, 827 F. Supp. 2d at 1060–61.

240. 102 F. Supp. 3d 583 (D. Vt. 2015).

241. *Id.* at 621, 628.

242. *Id.* at 594.

243. *Id.* at 621, 628.

244. *Id.* at 628.

245. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

246. Goodman, *supra* note 80, at 517.



platform.”<sup>247</sup> Such state action improperly infringes upon listeners’ interests.<sup>248</sup>

The proposition that a factual disclosure may be controversial due to disagreement over the *salience* of the facts assigns independent meanings to “purely factual” and “uncontroversial” and, thus, avoids rendering the phrase redundant. In contrast, if the meaning of uncontroversial is “not opinion-based,” as the D.C. Circuit and Seventh Circuit implied, “then the *Zauderer* test is reduced to ‘factual and not opinion-based’”—which does appear redundant.<sup>249</sup>

Interpreting “uncontroversial” as “indisputably salient” has been criticized on policy grounds. Professor Berman argues that the Ninth Circuit’s decision on San Francisco’s recommendations for reducing exposure to radio-frequency energy “is troubling from a public health perspective” because it “would force legislatures to wait for the chimera of ‘scientific certainty’ before taking any action to disclose proven or potential risks, essentially rendering them powerless.”<sup>250</sup> Legislatures may wish to “take proactive steps to avoid or mitigate potential harms, even if those harms are still speculative,” because by the time the risk is verified, it may be too late.<sup>251</sup> They may decide that the potential health risks justify the possible economic harm caused by a mandatory disclosure.<sup>252</sup>

Furthermore, the proposition that the government must objectively convey factual information and not advance its own position cannot be applied too broadly—at least, not without subjecting longstanding disclosure requirements to heightened scrutiny. The government “often seeks simultaneously to inform *and* to influence consumer purchases by mandating product disclosures,”<sup>253</sup> like warning labels on cigarette packages.<sup>254</sup> Professor Goodman suggests one limiting principle: “It is not the existence of a norm that raises constitutional concern but rather the insistence on a controversial norm.”<sup>255</sup>

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247. *Id.* at 568–69.

248. *Id.* Conversely, government interference may be warranted if the compelled messages are salient to consumers.

249. See Barrella, *supra* note 15, at 533 (characterizing the D.C. Circuit’s definition of uncontroversial as “not opinion-based,” and arguing that “if . . . ‘factual and accurate’ is a redundancy, it is hard to see how ‘factual and not opinion’ is any less so”). Perhaps “evaluative facts” are not “facts” at all, but opinions—which could mean that they are excluded from *Zauderer* review because they are not “purely factual,” not because they are controversial.

250. Berman, *supra* note 84, at 72–73. Professor Berman suggests that “warnings should be invalidated only if the government lacks a factual basis for the required statements.” *Id.* at 73.

251. *Id.* at 76; see also *supra* note 238.

252. Berman, *supra* note 84, at 76.

253. Goodman, *supra* note 80, at 515.

254. *Id.* at 540–41.

255. *Id.* at 517.

Additionally, *Pacific Gas*'s language that a corporate speaker cannot be compelled to carry a message biased against its own views<sup>256</sup> does not prohibit forcing a commercial speaker to disclose information contrary to his interests. In *Zauderer* itself, the advertiser was required to include information he may not have wanted to disclose, and that might have caused him to lose potential customers—but the disclosure was nonetheless deemed “uncontroversial.”<sup>257</sup>

### 3. Factual Information That Is Not Related to a Controversial Subject Matter

The Supreme Court and the Second Circuit have both interpreted *Zauderer*'s “uncontroversial” language to mean that a disclosure related to a controversial subject matter is not entitled to deferential review under *Zauderer*, though neither court explained its rationale.<sup>258</sup>

Like the Supreme Court in *NIFLA*, the Second Circuit addressed the constitutionality of a law requiring crisis pregnancy centers to disclose information about abortion, contraception, and prenatal care.<sup>259</sup> In a footnote, the court said that even assuming the city law regulated commercial speech, *Zauderer* did not apply because the law did not “require disclosure of ‘uncontroversial’ information” but rather required centers “to mention controversial services [opposed by] some pregnancy services centers.”<sup>260</sup>

The *NIFLA* Court distinguished California's licensed-clinic disclosure from the mandatory disclosure at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>261</sup> which it characterized as a regulation of professional conduct that incidentally burdened speech, rather than a compelled commercial disclosure.<sup>262</sup> Thus, under the *NIFLA* Court's approach, the controversial subject matter of the disclosure at issue in *Casey* was irrelevant to the constitutional analysis. Justice Breyer, in his dissenting opinion, criticized this distinction as inconsistent with “the rule of law,” which “embodies evenhandedness.”<sup>263</sup>

From a textual standpoint, the *NIFLA* Court's definition of “controversial” avoids the redundancy highlighted by critics of the factually accurate and not-opinion-based interpretations.<sup>264</sup> However, it seems unlikely that the

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256. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15 n.12 (1986) (plurality opinion).

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

258. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018); *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 245 n.6 (2d Cir. 2014).

259. See *Evergreen Ass'n*, 740 F.3d at 249–50. New York City Local Law 17 required that pregnancy services centers disclose, among other things, whether they “provide or provide referrals for abortion, emergency contraception, or prenatal care.” *Id.* at 249.

260. *Id.* at 245 n.6.

261. 505 U.S. 833 (1992).

262. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2373–74.

263. *Id.* at 2385 (2018) (Breyer, J., dissenting) (“[T]here is no convincing reason to distinguish between information about adoption and information about abortion in this context.”).

264. See *supra* notes 216, 249 and accompanying text.

*Zauderer* Court conceived of “uncontroversial” as referring to the subject matter of the disclosure because the topic of the disclosure in *Zauderer*, contingent-fee arrangements,<sup>265</sup> was itself controversial.<sup>266</sup> Furthermore, even if the Court was referring to the subject matter, it is unclear whether the Court intended to establish uncontroversial subject matter as a prerequisite for the reasonable relationship test.<sup>267</sup>

The possibility of interpreting “uncontroversial” as “uncontroversial subject matter” was widely rejected before *NIFLA*.<sup>268</sup> Some criticism of this definition is driven by a concern that it overly impedes the government’s ability to use disclosures to advance public health goals. Professor Robert Post argues that “mandated factual disclosures [should not] become constitutionally disfavored because they occur in circumstances of acrimonious political controversy,” since factual disclosures may be especially crucial “in the context of socially contested issues like tobacco or obesity.”<sup>269</sup> While the *NIFLA* Court stated that it did “not question the legality of health and safety warnings long considered permissible,”<sup>270</sup> it failed to explain what distinguished the licensed-clinic disclosure, motivated in part by the state’s concerns about women’s health, from those permissible warnings.<sup>271</sup> Justice Breyer argued that, “[i]n the absence of a reasoned explanation” for this distinction, the Court’s “test invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor.”<sup>272</sup>

The *NIFLA* standard could arguably be “highly controversial subject matter,” which would make more disclosures eligible for *Zauderer* review than merely “controversial subject matter.” However, it is unclear exactly what that standard would mean, since courts have only used subject matter as a limit on *Zauderer*’s scope in the context of abortion-related disclosures.<sup>273</sup> Perhaps “highly controversial subjects” are those that implicate an individual’s “most deeply held” ethical or religious beliefs.<sup>274</sup>

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265. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985).

266. See Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 813–16 (1989) (describing traditional arguments against contingent fees).

267. See *supra* notes 194–97 and accompanying text.

268. See, e.g., *Nat’l Ass’n of Mfrs. II*, 800 F.3d 518, 538 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (“While it might be said that the Conflict Minerals Rule’s disclosure requirement touches on a ‘controversial’ topic, that alone cannot render the disclosure ‘controversial’ in the sense meant by *Zauderer*.”); Barrella, *supra* note 15, at 534 (describing such a definition as “impracticable”).

269. Post, *supra* note 76, at 910; see also Haan, *supra* note 214 (manuscript at 37) (“[C]ontroversial information—information that sheds light on a subject people care about—has a high value to individuals and society.”).

270. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018).

271. *Id.* at 2381 (Breyer, J., dissenting).

272. *Id.*

273. See *supra* notes 174–76, 259–60 and accompanying text.

274. See *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (emphasizing that the licensed-clinic notice “compels individuals to contradict

Or perhaps the simplest explanation is that abortion-related disclosures raise unique legal concerns<sup>275</sup> and veer too close to the fact-ideology line for the Court to be comfortable with compelled disclosure.

### III. WHAT “UNCONTROVERSIAL” MEANS FOR PUBLIC HEALTH

Given the prevalence of mandatory disclosures as a regulatory tool,<sup>276</sup> how courts interpret “uncontroversial”—and thus which disclosures are eligible for *Zauderer*’s deferential “reasonable relationship” test—has serious implications for public health. This Part illustrates these implications by applying each interpretation to a hypothetical disclosure for an infant formula label:

Compared to breastfed infants, formula-fed infants have a higher risk of ear infections, respiratory infections, gastrointestinal infections, and sudden infant death syndrome.<sup>277</sup>

This disclosure reflects the breastfeeding research discussed in Part I.B and addresses a perceived information gap—the belief of many mothers that formula-fed infants are *not* more likely to get sick than breastfed infants.<sup>278</sup> It is also designed to comply with *Zauderer*’s prerequisite that the disclosed information relate to the product or service offered by the commercial speaker,<sup>279</sup> in this case infant formula.

Part III.A applies the “accurate factual information” test, Part III.B applies the “accurate factual information that does not implicitly convey ideology” test, and Part III.C applies the “controversial subject matter” test.

#### A. Outcome Under the “Accurate Factual Information” Test

The hypothetical disclosure contains factual information, but its accuracy is contested.<sup>280</sup> How the disclosure would fare depends on what level of

their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these”).

275. See, e.g., Goodman, *supra* note 80, at 531 (describing “women seeking abortions” as “a special sort of listener, with much more liberty on the line than those in the typical product disclosure context”).

276. See *supra* notes 12, 82–83 and accompanying text.

277. This disclosure was crafted by the Note author. By design, it differs significantly from a labeling mandate adopted by India in its implementation of the WHO Code. India requires an infant formula label to include a conspicuous statement that “‘mother’s milk is best for your baby’ in capital letters.” Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, No. 41 of 1992, INDIA CODE (1992). India’s disclosure seems more clearly normative—“best” is arguably an evaluative fact, if not an opinion. Furthermore, what is “best” for a baby depends on the circumstances. For example, where a mother is unable to breastfeed or pump at work, it is surely better for the mother to feed her child formula than to lose her job and be unable to pay the rent for their home.

278. See *supra* note 9 and accompanying text.

279. See *supra* note 174 and accompanying text.

280. See *supra* Part I.B. Some of the controversy over the “Breast Is Best” policy is tied to the risks associated with insufficient lactation. See *supra* text accompanying note 67. However, those risks do not bear on the factual accuracy of the disclosed benefits, and a disclosure requirement does not prevent the formula company from including additional

controversy over its accuracy excludes a disclosure from *Zauderer* review: whether it is unverified or unsupported by the weight of scientific research,<sup>281</sup> whether there is “reasonable” disagreement by scientists or the public,<sup>282</sup> or whether there is any disagreement.<sup>283</sup> The disclosure arguably satisfies a definition like “medically accurate” under the Affordable Care Act<sup>284</sup>: it is “supported by the weight of research conducted in compliance with accepted scientific methods,”<sup>285</sup> “published in peer-reviewed journals,”<sup>286</sup> and recognized as accurate “by leading professional organizations and agencies with relevant expertise,” namely the AAP, CDC, and WHO.<sup>287</sup> However, the disclosure would probably fail under the “reasonable disagreement” and “any disagreement” standards, since a controlled trial found no association between breastfeeding and the risk of respiratory infections<sup>288</sup> and over 15 percent of American mothers do not believe that ear infections and respiratory illness are less likely in breastfed babies.<sup>289</sup>

Whether the accuracy of the information is contested may also depend on whether a court or a consumer reading the label would assume it means that breastfeeding *causes* a reduced risk of the specified infections and SIDS.<sup>290</sup> As discussed in Part I.B, research on infant nutrition has established an association between breastfeeding and reduced risks of the specified conditions.<sup>291</sup> However, because of ethical barriers associated with randomized controlled trials of infant feeding, scientists have been unable to establish causation.<sup>292</sup> Thus, if the court thinks the disclosure suggests causation, it would likely fail regardless of the level of consensus required.

Furthermore, a court could find that the accuracy of the disclosure is controversial if it conveys the message that *any* amount of formula-feeding

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factual, nonmisleading information on the label. *See supra* text accompanying note 67; *supra* note 133.

281. *See supra* text accompanying note 208.

282. *See supra* notes 206–07 and accompanying text.

283. *See supra* note 204 and accompanying text.

284. *See* 42 U.S.C. § 713 (2012); *supra* text accompanying note 208.

285. *See* 42 U.S.C. § 713. The meta-analyses conducted by Dr. Victora and his colleagues show that most studies do indicate an association between breastfeeding and the designated benefits. *See supra* notes 46–50.

286. *See* 42 U.S.C. § 713. The research discussed in Part I.B was published in prestigious peer-reviewed journals, such as *Lancet* and the *Journal of the American Medical Association*. *See supra* notes 46–50.

287. *See* 42 U.S.C. § 713; *see also Code FAQ, supra* note 3, at 3–5; Eidelman et al., *supra* note 25, at e828–29; *Breastfeeding: Why It Matters, supra* note 27.

288. *See supra* note 48.

289. *See supra* note 9.

290. *See Am. Beverage Ass’n I*, 871 F.3d 884, 895 (9th Cir. 2017), *aff’d on other grounds on reh’g*, Nos. 16-16072, 16-16073, 2019 WL 387114 (9th Cir. Jan. 31, 2019) (en banc). The Ninth Circuit’s analysis of a warning statement on sugar-sweetened beverages looked not only at the text of the required disclosure, but also at the message that it suggested to consumers, and evaluated the factual support for each. *Id.*

291. *See supra* notes 46–50 and accompanying text.

292. *See supra* notes 63–65 and accompanying text.

increases the risk of the specified conditions.<sup>293</sup> The truth of that message is unknown because many studies fail to distinguish among categories of breastfeeding practices.<sup>294</sup> Existing studies indicate that exclusive breastfeeding for the first six months is associated with the lowest risk of ear infections but also suggest a correlation with longer durations of breastfeeding.<sup>295</sup> Similarly, “more intense breastfeeding” is associated with a lower risk of gastrointestinal infections.<sup>296</sup>

*B. Outcome Under the “Accurate Factual Information That Does Not Implicitly Convey Ideology” Test*

The hypothetical disclosure would probably be eligible for *Zauderer* review under this interpretation of “uncontroversial,” assuming it first passes the accuracy test.<sup>297</sup> The required information does not appear to be an evaluative fact,<sup>298</sup> and it informs a consumer’s decision to buy infant formula.

The hypothetical disclosure consists of empirical facts whose truth can be verified<sup>299</sup>—whether formula-fed infants actually do face higher risks of ear infections, respiratory infections, gastrointestinal infections, and sudden infant death syndrome. While it may be more difficult to ascertain the relationship between breastfeeding and the specified risks than it is to identify the presence of mercury in a particular product,<sup>300</sup> the practical difficulties do not transform the statement into an evaluative fact.<sup>301</sup> It does not involve a value judgment.<sup>302</sup> However, infant formula manufacturers might argue that it is a metaphor conveying moral responsibility<sup>303</sup>—that the disclosure essentially blames the companies for increased deaths and illnesses even though scientists have not shown that formula causes them.<sup>304</sup> A formula company, like the plaintiffs in *National Ass’n of Manufacturers v. SEC*,<sup>305</sup>

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293. *Cf. Am. Beverage Ass’n I*, 871 F.3d at 895. The Ninth Circuit found that the accuracy of the warning statement was “in reasonable dispute” because it “convey[ed] the message that sugar-sweetened beverages contribute to [specified] health conditions regardless of the quantity consumed,” even though evidence suggested that *overconsumption* was responsible. *Id.*

294. *See* Eidelman et al., *supra* note 25, at e828 (describing the lack of a distinction between “any” and “exclusive” breastfeeding as a “[m]ajor methodologic issue[.]”); Victora et al., *supra* note 46, at 476–78, 488.

295. *See supra* note 47 and accompanying text.

296. *See supra* note 49.

297. *See supra* note 222.

298. *See supra* notes 228–29 and accompanying text.

299. *See supra* note 228.

300. *See supra* text accompanying note 227.

301. *See supra* note 228.

302. *See supra* text accompanying notes 226–27. The hypothetical disclosure also contrasts sharply with the infant formula labeling requirement adopted by India, which asserts the value judgment that breast milk is “best.” *See* Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, No. 41 of 1992, INDIA CODE (1992).

303. *See supra* text accompanying note 234.

304. *See supra* notes 63, 65 and accompanying text.

305. 748 F.3d 359 (D.C. Cir. 2014), *aff’d on reh’g*, 800 F.3d 518 (D.C. Cir. 2015).

“may disagree with that assessment of its moral responsibility.”<sup>306</sup> Thus, the disclosure may be ineligible for *Zauderer* review under this standard.

The hypothetical disclosure, which conveys potential risks associated with infant formula, is salient to a caregiver’s decision whether to buy the product. The Ninth Circuit did not consider San Francisco’s recommendations for reducing exposure to radio-frequency energy to be salient because of scientific uncertainty about the health effects of cell phone use.<sup>307</sup> The science in that case, however, was far less settled than the science about breastfeeding; there is no known statistical correlation between radio-frequency radiation and cancer.<sup>308</sup> But a court might conclude, given the debate about causation, that the disclosure impermissibly conveys the government’s opinion that infant formula is a significant health threat.

### C. Outcome Under the “Controversial Subject Matter” Test

It is difficult to determine how the hypothetical disclosure would fare under the “controversial subject matter” test, since the *NIFLA* Court offered no explanation for its position and no guiding standard.<sup>309</sup> If *any* amount of controversy over the topic suffices to exclude a disclosure from deferential review under *Zauderer*, the hypothetical statement would fail. As discussed in Part I.B, the “Breast Is Best” policy is a controversial topic.<sup>310</sup>

However, the standard could actually be “highly controversial subject matter.”<sup>311</sup> Whether the hypothetical disclosure would survive under this standard is uncertain, since courts have only applied it in cases about abortion-related disclosures.<sup>312</sup> Perhaps a “highly controversial” topic is one that touches on only the “most deeply held” ethical or religious beliefs.<sup>313</sup> Infant feeding decisions do not seem to impact fundamental beliefs in the same way as abortion. But regulations compelling formula manufacturers to carry pro-breastfeeding labels implicate parents’ fundamental rights to decide, within reason, what is best for their children,<sup>314</sup> which might be considered “highly controversial.” However, the *NIFLA* Court did not address this question. And it is possible that the *NIFLA* Court’s decision is

306. *Id.* at 371.

307. *See CTIA v. San Francisco II*, 494 F. App’x 752, 753 (9th Cir. 2012).

308. *See CTIA v. San Francisco I*, 827 F. Supp. 2d 1054, 1060–61 (N.D. Cal. 2011), *aff’d*, 494 F. App’x 752 (9th Cir. 2012).

309. The Court merely stated that abortion was “anything but an ‘uncontroversial’ topic.” *See supra* note 176 and accompanying text.

310. *See supra* Part I.B. Indeed, even the FDA’s current labeling requirements for infant formula might fail under this standard. *See supra* text accompanying notes 39–43.

311. *See supra* notes 273–74 and accompanying text.

312. *See supra* notes 258–60 and accompanying text.

313. *See Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (emphasizing that the licensed disclosure forced anti-abortion individuals to contradict those “deeply held beliefs”).

314. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[T]he ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children . . .” (citations omitted)); *see also supra* text accompanying note 7. This label arguably tips the scales in favor of breastfeeding as parents make their infant feeding decisions.

the result of a different analysis of “controversial”—namely, that abortion is special. In any event, without a guiding standard, it is plausible that a judge who disapproves of breastfeeding or of state involvement in parenting decisions will decide that the hypothetical disclosure is not eligible for *Zauderer* review.<sup>315</sup>

#### IV. FACTUAL ACCURACY APPROPRIATELY LIMITS *ZAUDERER*

How a hypothetical disclosure would fare under each interpretation is a decidedly different question than what the appropriate standard is or should be, but it illustrates the policy implications of each standard. The “accurate factual information” test both represents the most logical application of *Zauderer* and produces the most desirable public policy outcomes. In addition, because the *NIFLA* Court’s discussion of the “uncontroversial” element was conclusory, and because the Court’s ultimate reasoning seems more focused on other considerations, future courts considering the appropriate application of the “uncontroversial” test may conclude that *NIFLA* did not decide the issue after all and that the relevant considerations support the application of the “accurate factual information” test.

While each interpretation of “factual and uncontroversial” finds some justification in the text of the *Zauderer* opinion and in the foundational doctrines, First Amendment principles and policy most strongly support “accurate factual information.” *Zauderer* was firmly grounded in listeners’ interest in receiving factual information about the speaker’s goods or services,<sup>316</sup> which enables them to make “intelligent and well informed” economic policy decisions.<sup>317</sup> Whether the information touched on a controversial topic was irrelevant to the *Zauderer* Court’s constitutional analysis.<sup>318</sup> Indeed, it may be particularly important for consumers to be well-informed about the health risks of products and services, even if those health topics are controversial.<sup>319</sup> As the *IMS Health* Court acknowledged, the consumer’s informational interest “has great relevance in the fields of medicine and public health, where information can save lives.”<sup>320</sup> And as long as the information is “factual,” the commercial speaker’s First Amendment interest in *not* providing that information is minimal.<sup>321</sup> If the disclosed information veers too far over the line from fact into opinion—for example, if it has inadequate scientific support, or it seems more like a value

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315. See *supra* text accompanying note 272.

316. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

317. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

318. As the Sixth Circuit and Judge Srinivasan argued, the absence of any reference to “uncontroversial” in *Milavetz* supports this hypothesis. See *supra* note 197 and accompanying text; *supra* note 200. Furthermore, the disclosure at issue in *Zauderer* itself related to a controversial subject matter. See *supra* notes 265–66 and accompanying text.

319. See *supra* text accompanying note 269.

320. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011).

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



judgment than an empirical fact<sup>322</sup>—it would not be eligible for deferential review under *Zauderer*.<sup>323</sup>

With regard to the level of factual accuracy required, the definition of “medically accurate” from the Affordable Care Act may provide an appropriate limit on *Zauderer*’s scope.<sup>324</sup> It enables the government to inform consumers about a probable health risk without having to wait for the “chimera of ‘scientific certainty.’”<sup>325</sup> Indeed, in the context of breastfeeding, ethical constraints on research prevent any certainty about causation.<sup>326</sup> *Zauderer*’s “reasonable relationship” test grants appropriate deference to a legislature’s determination that the potential health risks outweigh any economic harm rather than allowing judges, “who are not trained to be sophisticated reviewers of scientific literature,” to second-guess the factual basis for the disclosure.<sup>327</sup>

Concerns about the requisite level of accuracy and salience of disclosures are well-founded. The government will not achieve its public health aims if consumers ignore disclosures because the government has warned them, expressly or implicitly, about too many remote or unsubstantiated risks.<sup>328</sup> Furthermore, listeners’ interests may not be served if the inclusion of a government-mandated disclosure causes the advertiser to omit more valuable information.<sup>329</sup> However, this issue could be addressed through a different aspect of the *Zauderer* opinion—if the government lacks a reasonable basis for concluding that the information is salient to consumers’ decisions about the product or service, the disclosure requirement would fail *Zauderer*’s “reasonable relationship” test as “unjustified or unduly burdensome.”<sup>330</sup> Additionally, a disclosure requirement may impose an undue burden if the message is overly disparaging of the speaker.<sup>331</sup> However, courts should remember that commercial speech is much less likely to be chilled than political speech.<sup>332</sup>

The *NIFLA* Court’s interpretation of *Zauderer* may reflect skepticism about differential treatment of commercial speech<sup>333</sup> and *Zauderer*’s premise that compelled commercial disclosures implicate “weaker” First Amendment

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322. *See supra* notes 225–29 and accompanying text.

323. *See supra* notes 214–15 and accompanying text.

324. *See supra* text accompanying notes 208, 284–87.

325. Berman, *supra* note 84, at 72–73.

326. *See supra* notes 63–65 and accompanying text.

327. Berman, *supra* note 84, at 76.

328. *See supra* text accompanying note 220.

329. *See supra* note 148.

330. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The reason *why* the information is important to consumers may also affect a court’s analysis of whether the disclosure requirement is justified. Information about demonstrated health risks may justify mandatory disclosure. However, information about whether a dairy product was derived from hormone-treated cows may be unjustified in the absence of scientific evidence creating a “reasonable concern.” *See Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 69, 74 (2d Cir. 1996).

331. Goodman, *supra* note 80, at 538.

332. *See supra* text accompanying note 128.

333. *See supra* note 117.

interests than restrictions.<sup>334</sup> However, this approach is extremely problematic as it undermines the legislature's ability to protect public health. Because nearly all human conduct occurs through written, spoken, or symbolic "speech," the First Amendment has the potential to be a limitless deregulatory tool.<sup>335</sup> This situation becomes even more perilous when the Court fails to provide guiding standards—as in *NIFLA*. The Court claimed that it did "not question the legality" of longstanding health and safety warnings, but it did not explain how it distinguished the licensed-clinic disclosure in *NIFLA* from those warnings.<sup>336</sup> The distinction may simply be that the licensed-clinic disclosure concerned abortion, the epitome of a controversial subject. But because the Court did not explain its rationale, lower courts could use the "uncontroversial subject matter" test to strike down any disclosure they dislike.<sup>337</sup>

However, there is arguably an opening for courts to adopt the "accurate factual information" test. The Supreme Court in future cases, and lower courts as well, may conclude that *NIFLA*'s holding rested on the Court's finding that the disclosure was not about the terms of the services offered by the clinics and that its reference to abortion as "anything but an uncontroversial topic" was merely dicta.<sup>338</sup>

#### CONCLUSION

Mandatory disclosures are increasingly used as a regulatory tool,<sup>339</sup> but the constitutionality of these requirements is unsettled. Recent developments in First Amendment doctrine, including a growing attentiveness to commercial speakers' autonomy rights, pose a significant obstacle to governments seeking to promote public health through disclosures. The Court's position in *NIFLA*, that mandatory disclosures are not eligible for *Zauderer* review if they touch on a controversial subject matter, may prove particularly problematic. But if lower courts read *NIFLA* as establishing a "highly controversial subject matter" standard and then give content to that standard, the impact of *NIFLA* may be mitigated.

Factual accuracy provides an even more appropriate limit on *Zauderer*'s scope than "highly controversial subject matter." Public health issues are often the topic of intense political debate, but information about health risks is extremely important to consumers, as "information can save lives."<sup>340</sup> *Zauderer* was firmly grounded in listeners' interests in receiving factual information about a commercial speaker's goods or services. As long as the mandated information is "factual," the commercial speaker has a minimal interest in not providing it to consumers. Only if the government attempts to

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334. See *supra* note 185.

335. See *supra* note 124 and accompanying text.

336. See *supra* text accompanying notes 270–71.

337. See *supra* text accompanying note 272.

338. See *supra* text accompanying notes 175–76.

339. See *supra* note 12.

340. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011).

compel a commercial speaker to convey *opinion*—for example, where the disclosure is a value judgment or is not supported by the weight of scientific research—should heightened scrutiny apply. While concerns about the salience of disclosures are well-founded, this issue may be addressed by evaluating whether a particular disclosure fails *Zauderer* review as “unjustified or unduly burdensome.” This framework for compelled disclosures is more strongly supported by the text of *Zauderer* itself, and would grant proper deference to a legislature’s policy determination that the potential health risks justify a disclosure.