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The Controversial Demise of Zauderer: Revitalizing Zauderer Post-NIFLA Note

Aaron Stenz

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INTRODUCTION

All too often, the law is arcane, confusing, and fundamentally divorced from the day-to-day lives of average Americans. Few, if any, average Americans have a tangible reason to care about something as deeply separated from their lives as standing doctrine.[1] Even some aspects of the Bill of Rights likely fall beyond the scope of what the average American cares about on a day-to-day basis.[2] However, every American has seen a billboard, watched a commercial on TV, or endured a pop-up advertisement online.[3] Nearly every American has bought something or paid for a service.[4] And it is here that the divide between the law and daily life is closed.

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1. Standing essentially involves a requirement that a party must have suffered an actual injury to a protected interest. *Standing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. For instance, consider the doctrine of incitement under the First Amendment. *See generally* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (describing the incitement exception to First Amendment protections). Unless someone is considering egging another on to do some illegal activity, they likely have little interest in the legal doctrine surrounding incitement. *See id.*

3. *See* Louise Story, *Anywhere the Eye Can See, It's Likely to See an Ad*, N.Y. TIMES (Jan. 15, 2007), https://www.nytimes.com/2007/01/15/business/media/15everywhere.html [https://perma.cc/6SBG-CDU8] (noting that consumers see thousands of advertisements and brand messages every day).

4. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-18-1450, CONSUMER EXPENDITURES–2017, at 1 (2017) (defining "consumer units" as "families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who

For the most part, Americans choose which products or services they use by evaluating the information available to them.[5] Indeed, there is an industry dedicated to this very idea: websites and magazines provide consumers with the facts they need in order to make an informed decision.[6] While much of this information is readily available, either from the advertiser or seller itself or third parties such as Yelp, sometimes the law steps in. Despite its normal role as a restriction on government power and excess, the First Amendment allows the government to compel commercial speakers—anyone advertising or proposing a commercial transaction for profit—to provide consumers with additional information, especially when the commercial speaker may be hesitant to disclose such information to consumers.[7] In fact, most consumers have likely seen information from some such disclosure requirement, on anything ranging from lawyer fee arrangements to country-of-origin labels on meat packages.[8] Given the prominence of commercial disclosure laws and the importance of information to making informed commercial decisions, consumers should pay close attention to developments in the law which may limit their access to information.

In *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), the Supreme Court fundamentally shifted how commercial disclosures are treated. In *NIFLA*, the Court struck down a California law requiring crisis pregnancy centers to display notices regarding the availability of state facilities that provided abortions and other family planning services.[9] Prior precedent allowed for governments to compel commercial actors to disclose "purely factual and uncontroversial" information.[10] The *NIFLA* majority, however, determined that the notice required

share major expenses" and detailing the ubiquity of spending among consumer units).

5. *See* Peter Dizikes, *How Do We Decide Which Products To Buy?*, WORLD ECON. F. (Apr. 2, 2015), https://www.weforum.org/agenda/2015/04/how-do-we-decide-which-products-buy/ [https://perma.cc/9Y7C-V8PB] (providing research on consumer purchasing trends and decisions).

6. *See, e.g.*, CONSUMER REP. (Mar. 21, 2019) https://www.consumerreports.org/cro/index.htm [https://perma.cc/9KA4-H45B]; YELP, https://www.yelp.com/ [https://perma.cc/W73Y-WA5J].

7. *See infra* Part I.C.

8. *See infra* Part I.C.

9. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2368–78 (2018).

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

by California law was not sufficiently factual and uncontroversial to fit within this precedent because abortion is "anything but an 'uncontroversial' topic."[11] While other courts implementing the "purely factual and uncontroversial" standard relied only on the veracity of the information in determining whether a compelled disclosure was constitutional,[12] the *NIFLA* majority took a markedly different approach by holding that even indisputably factual disclosures could fall outside the standard if the underlying topic is controversial.[13] In effect, *NIFLA* fundamentally reshapes the law governing the flow of information to consumers in the form of compelled commercial disclosures in a concerning way.

While others have already flagged deeply problematic aspects of *NIFLA*,[14] this Note focuses on the case's engagement with the "purely factual and uncontroversial" standard. Part I briefly explains compelled and commercial speech doctrines and surveys the nexus of the two: the doctrine of compelled factual disclosures in commercial speech contexts. Part I also explores the importance of commercial disclosure requirements and why they are worth protecting, as well as summarizing the road to *NIFLA*. Part II examines the "purely factual and uncontroversial" standard initially established in *Zauderer v. Office of Disciplinary Counsel* (*Zauderer*) as a confusing and problematic doctrine, particularly following its implementation in *NIFLA*.[15] In Part II, this Note argues that the "purely factual and uncontroversial" standard requires reconsideration and revision because: (1) the standard is (and has been since its inception) unclear and confusing; (2) the post-*NIFLA* version of the standard subjects commercial disclosure requirements to an impermissible potential for judicial bias; and (3) the standard as implemented in *NIFLA* separates the current doctrine from the consumer protection interests that it is supposed to serve.[16] Part III builds upon the discussion in Part II by proposing that wiping the *Zauderer* slate clean and returning to the "unduly burdensome" test that *Zauderer* espoused is the best way to address the problems raised in Part II because the "unduly burdensome" test is far

11. *NIFLA*, 138 S. Ct. at 2372.

12. *See infra* Part I.C.3.

13. *See NIFLA*, 138 S. Ct. at 2372.

14. *See id.* at 2380–83 (Breyer, J., dissenting) (criticizing the majority's characterization of the regulation at issue as content-based).

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

16. *See id.*

more clear, less prone to judicial bias, and better serves the consumer protection interests that underlie commercial speech doctrine.[17] Ultimately, this Note shows that the *NIFLA* holding's implementation of the "purely factual and uncontroversial" standard requires stringent reevaluation going forward.

I. COMMERCIAL SPEECH, COMPELLED SPEECH, AND COMPELLED FACTUAL DISCLOSURES IN COMMERCIAL SPEECH

Although the First Amendment's general protection of speech is foundational to American democracy and has been vigorously defended in the courts, not all speech receives the same level of protection. Cases involving First Amendment protections of speech generally involve two distinct determinations: (1) what the relevant test or standard is based on the facts at hand; and (2) determining the outcome of applying the standard.[18] Typically, restrictions on or regulations of speech based on content are subject to strict scrutiny, a rigorous review that reflects a high degree of skepticism with regard to government justifications and regulation of speech.[19] However, in certain contexts, the bar which the government must clear in order to constitutionally regulate speech is lowered, with courts being more receptive and less skeptical of government justifications and rationales and less concerned about the consequences of such regulations.[20] This Part discusses compelled and commercial speech doctrines and the intersection of the two in the form of compelled commercial disclosure doctrine, before examining the California statute challenged in *NIFLA* and the *NIFLA* holding. Sections A and B explore the Court's compelled and commercial speech jurisprudences respectively. Section C examines compelled commercial disclosure doctrine as the nexus of compelled and commercial speech jurisprudence. Section D sets forth the facts and legal outcome of *NIFLA*.

A. COMPELLED SPEECH DOCTRINE: PROTECTING THE RIGHT NOT TO SPEAK

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

17. *See infra* Part III.
18. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2371–78.
19. *See id.*
20. *See infra* Parts I.B–C.

orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[21] Justice Jackson's words in *West Virginia State Board of Education v. Barnette* are the cornerstone upon which the Court's compelled speech jurisprudence is founded. Jackson encapsulated the core of compelled speech doctrine in one sentence: Speech compelled by the state usually poses a grave constitutional threat and should be viewed with extreme distrust.[22] The Court expanded on this principle in *Wooley v. Maynard*, declaring "[t]he right to speak and the right to refrain from speaking are complementary components" of the freedom of speech.[23]

In summary, two important points deserve emphasis. First, the Court's compelled speech jurisprudence strongly disfavors government attempts to compel speech on the basis of its content.[24] Second, although the exact analysis courts have used in compelled speech cases has been inconsistent, the general approach is akin to strict scrutiny.[25] For instance, *Barnette* and *Miami Herald Publishing Co. v. Tornillo*—finding unconstitutional a West Virginia Board of Education resolution requiring students to stand for the Pledge of Allegiance and a Florida statute

21. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). In *Barnette*, the Supreme Court heard a challenge to a West Virginia Board of Education resolution requiring all students and teachers to stand, salute the flag, and recite the Pledge of Allegiance. *Id.* at 626. A group of students expelled from school for noncompliance with the resolution due to their religious beliefs as Jehovah's Witnesses challenged that it violated their First and Fourteenth Amendment rights. *Id.* at 629–30. Justice Jackson agreed, penning the now-famous quote above in his majority opinion. *Id.* at 642. Interestingly, *Barnette* explicitly overruled the Courts holding in *Minersville School District v. Gobitis*, decided only three years earlier and involving facts virtually identical to those in *Barnette*. *Id.*; *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591, 595, 599–600 (1940) (upholding a requirement that students participate in the pledge and relying on the importance of the educational system for inculcating values, particularly that of national unity). The *Barnette* court overruled *Gobitis* by holding that the individual free speech interest in not being compelled to speak a message with which one fundamentally disagrees trumped the state interest in cultivating values of national unity. *Barnette*, 319 U.S. at 640–42.

22. *See Barnette*, 319 U.S. at 692.

23. Wooley v. Maynard, 430 U.S. 705, 707–08, 714–17 (1977).

24. *See, e.g.*, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459 (2018).

25. Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 FORDHAM URB. L.J. 1201, 1206–13 (2013) (detailing the Court's compelled speech jurisprudence and the analysis the Court has undertaken in reaching its conclusions).

creating an affirmative duty for newspapers to publish the replies of political candidates criticized by the paper respectively—appear to have relied only on a presumption against the constitutionality of compelled speech rather than conducting means-ends analysis.[26] In contrast, even though the Court ultimately determined that requiring religious individuals to display New Hampshire's "Live Free or Die" motto on their license plates was unconstitutional compelled speech, *Wooley* opened the door to upholding laws compelling speech if the state could show a sufficiently compelling interest and employed proportionate and least restrictive means to achieve its goal.[27] Cases such as *Pacific Gas & Electric Co. v. Public Utilities Commission*, in which the Court rejected a California Public Utilities Commission order requiring utility companies to include political messages from other speakers in the extra space of their billing envelopes, seem to exemplify this trend towards strict scrutiny.[28] In conclusion, despite minor inconsistencies in approach, compelled speech doctrine is unified by a deep distrust of compelled speech requirements.

B. HARDIER SPEECH: WHY COMMERCIAL SPEECH IS LESS PROTECTED

The unifying thread of compelled speech doctrine is that compelling speech is presumptively unconstitutional, or at least that speakers have a typically insurmountable right under the First Amendment both to speak and not to speak.[29] In contrast, the core of the Supreme Court's current commercial speech doctrine suggests that commercial speech deserves a lesser degree of protection than other kinds of speech.[30] This Section explores the shifts within the Court's commercial speech doctrine and explains the current state of the doctrine.

26. *See id.* at 1209; *see generally* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that Florida statute that required newspaper to dedicate space for a political candidate to respond to attacks as an unconstitutional infraction upon the freedom of the press and speech); *Barnette*, 319 U.S. at 624.

27. *See Wooley*, 430 U.S. at 716–17; Straub, *supra* note 25, at 1209.

28. *See* Straub, *supra* note 25, at 1212 (noting the *Pacific Gas* Court's implementation of strict scrutiny); *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 19 (1986).

29. *See supra* Part I.A.

30. *See* Nicole B. Cásarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 932 (1998).

Initially, in *Valentine v. Chrestensen*, commercial speech was treated as commerce rather than speech and thus could be regulated in ways that did not need to meet standards for regulation under the First Amendment.[31] For instance, because passing out advertising handbills in the street or using nude dancing to promote the sale of alcohol was commercial speech and thus not within the purview of the First Amendment, courts were much more deferential to their prohibition or regulation by local governments.[32] In 1976, the Court overruled *Valentine* and ushered in a new era for commercial speech doctrine.[33] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court heard a challenge to a Virginia statute forbidding pharmacists from advertising prescription drug prices.[34] Justice Blackmun's majority opinion rejected *Valentine*'s holding that commercial speech was less deserving of First Amendment protection than other types of speech.[35] Justice Blackmun did, however, explicitly leave open the door to some regulation of commercial speech, saying that "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow [sic] cleanly as well as freely."[36]

31. *See id.* at 932–33; *see also* Valentine v. Chrestensen, 316 U.S. 52, 53–55 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). It is worth noting that the advertisement in *Valentine* did contain non-commercial speech, but the court noted that the distributor had obviously included that material in a revised version of the advertisement in an attempt to avoid the ordinance rather than actually disseminate ideas, and thus upheld the ordinance's prohibition of the advertisement as wholly commercial speech. *Id.*

32. *See Valentine*, 316 U.S. at 53–55 (upholding an ordinance prohibiting the distribution of advertisements in the streets); Hodges v. Fitle, 332 F. Supp. 504, 509 (D. Neb. 1971) (holding that *Valentine's* test should be applied to an ordinance prohibiting the use of nude dancing to promote the sale of alcohol).

33. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court defined commercial speech as that "which does no more than propose a commercial transaction[.]" *Id.* at 776 (Stewart, J., concurring).

34. *Id.* at 749–50.

35. *Id.* at 770–73 (holding that commercial speech is entitled to protection, at least where the state is attempting to suppress the dissemination of "truthful information about entirely lawful activity").

36. *Id.* at 771–72. The Court distinguished the facts in the case from other potential scenarios, suggesting states would have the authority to regulate commercial speech where the speech is false, deceptive, or misleading, or where the speech advocates for illegal conduct. *Id.* at 770–73.

In determining that commercial speech deserves protection, albeit less protection than other forms of protected speech, the Court pointed to "commonsense differences" between commercial and other kinds of speech for justification.[37] First, the Court suggested that commercial speakers are in a unique position which allows them to verify the content of their speech.[38] Second, the Court asserted that commercial speech is more "durable" than other types of protected speech and is thus less easily discouraged or chilled by regulation.[39]

Underlying this shift in doctrine from *Valentine* to *Virginia State Board of Pharmacy* was an implicit recognition that commercial speech should be afforded First Amendment protection because of the vital role it plays in informing and protecting consumers. Justice Blackmun's opinion hinted at this recognition by justifying the decision in part on the public's interest in the free flow of commercial information in order to allow consumers to make the best decisions for themselves.[40] The examples Blackmun suggested as instances where the state could permissibly curtail commercial speech—namely commercial speech that is untruthful, misleading, or proposes illegal transactions—further hint at this recognition: untruthful or misleading speech prevents consumers from exercising informed judgment, while proposing illegal transactions may jeopardize the freedom of an ignorant but participating consumer.[41] Decreasing the broad ability of the state to regulate what and when commercial information flows to consumers as a means of better aiding consumers may seem counterintuitive—many average Americans would likely rejoice at the prospect of their lives being less inundated with advertisements.[42] However, decreasing the latitude for government regulation as a means of serving consumers is justified

37. *Id.* at 771 n.24.

38. *Id.* at 777 (Stewart, J., concurring). The Court assumed that since advertisers have a unique knowledge of and ability to access their own products, they are well situated to check the veracity of their claims. *Id.*

39. This rationale assumes that since commercial speakers must advertise in order to sell their products, they are less likely to be dissuaded from speaking in the face of regulation. *Id.* at 772 n.24.

40. *Id.* at 763–65.

41. *See id.* at 771–72.

42. *See* Christopher Elliott, *Yes, There Are Too Many Ads Online. Yes, You Can Stop Them. Here's How.*, HUFFPOST (Feb. 09, 2017), https://www.huffpost.com/entry/yes-there-are-too-many-ads-online-yes-you-canstop_b_589b888de4b02bbb1816c297 [https://perma.cc/MG6V-D46K] (providing resources to combat against unwanted advertisements).

by considering two very important theoretical points: (1) there is a fundamental and justified concern at the very core of First Amendment protections for speech that the government, no matter how good its intentions, may be too heavy-handed in curtailing in speech;[43] and (2) relying on the state to determine what information is good for its citizens reeks of the paternalism that has been viewed as disturbing since Plato's *Republic* and that has ultimately largely been rejected in the First Amendment context.[44] Ultimately, this recognition that protecting and informing consumers should be the primary justification for protecting commercial speech serves as the foundation for today's commercial speech doctrine.

In 1980, the Court modified its approach to commercial speech again, but built on the same conception of commercial speech as valuable primarily for its role in informing and protecting consumers.[45] In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Court both extended the lesser degree of protection mentioned in *Virginia State Board of Pharmacy* and implemented a new four-part test to determine the constitutionality of advertising restrictions.[46] *Central Hudson* involved a challenge to an order from the New York utilities commission to utilities in the state to refrain from promotional advertising in an attempt to reduce power usage

43. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (striking down a law against flag-burning despite the government's justifications regarding protecting the flag's inherent symbolic value because the law trenched too broadly on freedoms of expression).

44. *See infra* note 45 and accompanying text. *See generally* PLATO, REPUBLIC 170–73 (C.D.C. Reeve trans., Hackett Publ'g Co. 2004) (c. 380 B.C.E.).

45. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–64 (1980) (noting that commercial speech's value is created by its ability to, but also limited by the extent to which it can, inform consumers). Some have suggested that *Central Hudson* and the shift in doctrine it created came as the result of an attempt to balance the competing concerns of paternalism and consumer protection. *See* Cásarez, *supra* note 30, at 935–36. Indeed, the *Central Hudson* opinion directly addresses this dichotomy by heavily emphasizing the value of commercial speech as arising from its informative value to consumers while simultaneously dismissing a paternalistic approach. *See Cent. Hudson*, 447 U.S. at 561–62. Two cases preceding *Central Hudson* generally represent these concerns as deployed by the Court. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a state bar regulation prohibiting in-person self-promotion and solicitation by lawyers on consumer protection grounds); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (using anti-paternalistic arguments to justify holding that attorneys have the right to advertise their services and prices under the First Amendment).

46. *See Cent. Hudson*, 447 U.S. at 562–63, 566.

during the energy crisis of the mid-1970's.[47] The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience" before implementing the new four-part test.[48]

The *Central Hudson* test requires courts to consider four factors in assessing the constitutionality of restrictions on commercial speech. First, a court must consider whether the expression in question falls within the purview of First Amendment protection, which requires that it "at least must concern lawful activity and not be misleading."[49] Second, the court considers whether the asserted government interest is substantial.[50] If the court decides in the affirmative with respect to both of these factors, it then considers "whether the regulation directly advances the governmental interest asserted" and "whether it is not more extensive than is necessary to serve that interest."[51] While the order in question in *Central Hudson* satisfied the first three factors, the Court held that it was an impermissible infringement on protected speech due to overbreadth under the fourth factor.[52]

In sum, whereas the courts have vigorously defended the right not to speak as fully protected by the First Amendment,[53] courts have given commercial speech less protection because it is more "durable" or "hardy."[54] The protection that is extended to commercial speech is justified by commercial speech's value in informing and protecting consumers.[55] The constitutionality of restrictions on commercial speech is assessed by using the four-factor *Central Hudson* test.[56] Although the test has been interpreted quite deferentially to state interests and justifications in

47. *Id.* at 558–59; *see also* Cásarez, *supra* note 30, at 936–37.

48. *Cent. Hudson*, 447 U.S. at 561.

49. *Id.* at 566.

50. *Id.*

51. *Id.*

52. *Id.* at 569–70 (holding that although the state's interest was substantial, the order in question would have also applied to advertisements advocating reduced energy usage, and thus was too broad to effectively accomplish the state's interest).

53. *See supra* Part I.A.

54. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976); *see also Cent. Hudson*, 447 U.S. at 564 n.6.

55. *See supra* notes 40–41 and accompanying text.

56. The standard of review in these commercial speech cases is generally considered to be intermediate scrutiny. *See* Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 530 (2013).

the past,[57] more recently the Supreme Court has been less deferential, instead implementing the test in a way which potentially expands protections for commercial speech and views paternalistic state interests with greater skepticism.[58]

C. *ZAUDERER* AND BEYOND: COMPELLED FACTUAL DISCLOSURES BY COMMERCIAL SPEAKERS

The Supreme Court's compelled commercial disclosure doctrine, initially implemented in *Zauderer*,[59] represents the confluence of the compelled and commercial speech doctrines discussed in Sections A and B. This Section outlines the importance of compelled commercial disclosures and examines *Zauderer* in detail as the foundational case for compelled factual disclosures before exploring other pre-*NIFLA* implementations of the *Zauderer* standard.

1. Compelled Commercial Disclosures: A Conceptual Background

Commercial disclosure requirements are justified by the idea that consumers will be able to make better decisions when purchasing products and services if they have more information.[60] This reasoning mirrors Justice Blackmun's reasoning in *Virginia State Board of Pharmacy* that curtailments on commercial speech deprive consumers of information necessary to make informed commercial decisions.[61] Because sellers have

57. *See, e.g.*, Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 332, 340–46 (1986), *abrogated by* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

58. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417–28 (1993).

59. 471 U.S. 626 (1985).

60. *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001). The court stated:

> [M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.

Id. (citation omitted).

61. *See supra* notes 33–41.

more knowledge about their wares than consumers, and that information would aid consumers in making informed decisions, governments have a strong interest in maintaining the marketplace of ideas and requiring sellers to disclose that information, particularly when the speech is misleading.[62] Commercial disclosure requirements serve important purposes, both for the government and consumers.

Commercial disclosure requirements inform consumers about products and services they use daily. They inform consumers of toxic substances in their products.[63] They protect from undisclosed costs,[64] identify the origins of our food,[65] disclose whether minerals are conflict free,[66] inform of calorie amounts at restaurants,[67] and generally serve the interests of consumers in a myriad of other fashions. They provide information that consumers are deeply interested in: what consumer wants to buy a potentially toxic light bulb?[68] Thus, in situations like these, the scales become tipped against the fundamental right to not speak described above: although all of the commercial speakers described in this paragraph likely had some interest in nondisclosure—such as lower costs or avoiding reduced interest in their product—the interest of consumers in making informed decisions about their purchases simply outweighs that of commercial speakers. While not all of these requirements passed judicial

62. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (describing public access to information regarding products and services in a free enterprise economy as "indispensable"); *see also id.* at 777 (Stewart, J., concurring) (assuming that since advertisers have unique knowledge of their own products, they are well situated to check the veracity of their claims). *Zauderer* also notes that sellers have a minimal interest in not providing such factual information. 471 U.S. 626, 651 (1985). Courts have recognized maintaining the marketplace of ideas as important. *See Nat'l Elec.*, 272 F.3d at 113–14; *see generally* JOHN STUART MILL, ON LIBERTY (Gerald Dworkin ed., Rowan & Littlefield Publishers, Inc. 1997) (1859) (setting forth Mill's conception of the "marketplace of ideas").

63. *See Nat'l Elec.*, 272 F.3d at 107; *see also* Robin A. Bernhoft, *Mercury Toxicity and Treatment: A Review of the Literature*, 2012 J. ENVTL. & PUB. HEALTH 1 (2012).

64. *See Zauderer*, 471 U.S. at 636, 650–53.

65. *See* Am. Meat Inst. v. U.S. Dep't of Agric. (*AMI*), 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc).

66. *See* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 363 (D.C. Cir. 2014), *overruled by AMI*, 760 F.3d at 18.

67. *See* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *1 (S.D.N.Y. Apr. 16, 2008).

68. *See, e.g.*, *Nat'l Elec.*, 272 F.3d at 107.

muster, they collectively demonstrate the importance of commercial disclosure requirements as a means of informing, and thus to some extent protecting, consumers.[69]

2. *Zauderer*: The Origin of Lesser Protections for Compelled Commercial Disclosures

In *Zauderer*, the Supreme Court heard a challenge to three Ohio state rules regulating the content of attorneys' advertisements.[70] An Ohio attorney ran several advertisements: one advertising that the attorney would represent drunk driving defendants and refund all legal fees if they were convicted, and one advertising counsel in the Dalkon Shield litigation on a contingent fee basis, with no "legal fees" unless they recovered.[71] The Ohio Office of Disciplinary Counsel argued that the advertisements were misleading and violated Ohio professional responsibility rules regarding contingent fees.[72] The rules in question generally prohibited certain types of advertisements deemed misleading or otherwise problematic.[73] In analyzing the first two rules, the Supreme Court applied the *Central Hudson* test.[74] The Court's analysis of the third rule, however, which required attorneys advertising contingency fee rates to disclose whether clients would still owe costs and other expenses for ultimately unsuccessful claims, is far more interesting.[75]

69. *See Leading Cases: Constitutional Law, National Institute of Family & Life Advocates v. Becerra*, 132 HARV. L. REV. 347, 354 (2018) [hereinafter *Leading Cases:* NIFLA] for additional examples of other commercial disclosure requirements; *see also NIFLA*, 138 S. Ct. 2361, 2380–81 (2018) (Breyer, J., dissenting).

70. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 629–36 (1985). The plaintiff, a lawyer whose advertisements had been deemed illegal under several different rules, challenged three separate rules. *Id.* Two of these rules restricted the content of advertisements by lawyers, while the third rule required advertisements including contingency rates to disclose whether potential clients would remain liable for the costs and expenses of unsuccessful claims. *Id.* at 636.

71. *Id.* at 626.

72. *Id.*

73. *Id.*

74. *See id.* at 641, 647–48. One rule was a ban on self-recommendation and unsolicited legal advice, while the other was a ban on the use of illustrations in advertising. *Id.* at 639–41, 647–48.

75. *See id.* at 636, 650–53.

With respect to the third rule, the Court rejected the plaintiff's contention that the state would need to show that his advertisements were false or deceptive regarding potential costs or that the rule served some substantial state interest other than deception.[76] Instead, the Court pointed to fundamental differences between the compelled factual disclosure at issue and compelled speech jurisprudence generally, declaring that the rule only prescribed "what shall be orthodox in commercial advertising" and that it took "the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available."[77] The Court reasoned further that since the primary justification for extending First Amendment protection to commercial speech lay in the value it provided to consumers, the plaintiff had only a minimal constitutionally protected interest "in *not* providing any particular factual information in his advertising[.]"[78] The implicit rationalization was that, akin to Justice Blackmun's reasoning in *Virginia State Board of Pharmacy*,[79] the disclosures had a significant value to consumers.[80] Based on this logic, the Court held that the third rule did not infringe upon the plaintiff's First Amendment rights.[81]

In essence, the *Zauderer* court rejected the *Central Hudson* test (the test governing when the government can regulate commercial speech generally)[82] in the context of compelled factual disclosures by commercial speakers and instead implemented a new test that is less stringent than both the *Central Hudson* test and strict scrutiny.[83] The Court held that the First Amendment

76. *Id.* at 650.

77. *Id.* at 651. The Court also noted that compelled commercial disclosures were less concerning than restrictions on commercial speech. *See id.* at 650.

78. *Id.* (emphasis in original). The Court was, however, careful to note that disclosure requirements could infringe upon the First Amendment rights of advertisers, particularly if the disclosure requirements are "unjustified or unduly burdensome[.]" *Id.* at 651 (holding also 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"). The Court declined to require a least-restrictive means analysis or that disclosure requirements not be underinclusive. *See id.* at 651 n.14.

79. *See supra* notes 40–41 and accompanying text.

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

81. *Id.* at 652–53.

82. *See supra* notes 45–52 and accompanying text.

83. *See Zauderer*, 471 U.S. at 651–54; *see also* Straub, *supra* note 25, at 1216. It is unclear, however, whether the *Zauderer* Court intended its language

rights of an advertiser are protected adequately so long as the disclosure requirement is reasonably related to the state's interest in preventing consumer deception and declined to engage in a strict least-restrictive means analysis.[84]

It is important to note that although *Zauderer* revolutionized the way in which courts consider compelled commercial disclosures under the First Amendment as it did not provide a clear roadmap for how the new doctrine was to be implemented. Indeed, the *Zauderer* majority, whether through omission or design, did not indicate exactly how future courts should determine when to apply the new and deferential approach.[85] At face value, the language of *Zauderer* suggests that the majority intended for future courts to give deference[86] to all compelled commercial disclosure requirements so long as (1) the requirements were ". . . reasonably related to the State's interest in preventing deception of consumers . . ." and (2) not unjustified or unduly burdensome.[87] Similarly, the Court's other language, namely that the requirement prescribed "what shall be orthodox in commercial advertising" and that it took "the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available[,]" seems intended to distinguish the disclosure requirement from presumptively unconstitutional compulsions

justifying its use of less stringent scrutiny on the facts before it to be a "test," or even anything more than an explanation of one set of circumstances where such deference might be warranted. *See infra* notes 86–90 and accompanying text.

84. *Zauderer*, 471 U.S. at 651, 651 n.14.

85. *See id.* at 650–51.

86. Although *Zauderer* itself did not term its approach as one of deference, subsequent cases, such as *NIFLA*, have referred to the departure from strict scrutiny or the *Central Hudson* test as *Zauderer* deference. *See NIFLA*, 138 S. Ct. 2361, 2376–77 (2018) (referring to *Zauderer*'s deferential review). Within the broader First Amendment context, this terminology makes sense: typically, government actions affecting speech are viewed with the utmost suspicion and vigorously reviewed under strict scrutiny. Under *Zauderer*, government actions compelling commercial speech are viewed as less problematic, meaning courts are more willing to listen to, or defer to, government rationales. *Id.* at 651.

87. *Zauderer*, 471 U.S. at 651. This interpretation of when the *Zauderer* majority intended for *Zauderer* deference to apply is supported by the *Zauderer* opinion's analysis of whether the disclosure requirement at issue survived under the new deference (as opposed to the Court's analysis of how the disclosure requirement was different from compelled non-commercial speech). *See id.* at 651–53 (determining that the disclosure requirement at issue was constitutional because it was reasonably related to the state's interest in preventing consumer deception); *cf. id.* at 651 (distinguishing the disclosure from the Court's compelled non-commercial speech jurisprudence).

of non-commercial speech rather than be indicative of a threshold requirement for *Zauderer* deference to be applied.[88] Despite the support for this interpretation, it remains unclear exactly how the *Zauderer* Court intended later courts to apply *Zauderer* deference. As this Note shows, this lack of clarity has led to a variety of interpretations of *Zauderer* in different cases, including—and perhaps especially—*NIFLA*.[89]

3. Pre-*NIFLA* Implementations of *Zauderer*: A Survey

To begin, *Zauderer* has not been applied to disclosure requirements unless the speech at issue is purely commercial. In *Meese v. Keene*, the Court did not even reference *Zauderer* because of an implicit recognition that the facts of the case did not suggest commercial speech even though it involved a disclosure requirement.[90] In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Court applied strict scrutiny instead of *Zauderer* deference to a disclosure requirement on speech that had "inextricably intertwined" aspects of both commercial and fully protected speech.[91] In essence, *Meese* and *Riley* indicate that *Zauderer* is not applied to disclosure requirements unless the speech at issue is purely commercial.[92]

When applying *Zauderer*, courts have varied in how broadly they interpret its scope.[93] For instance, courts have diverged as to what degree of potential to mislead there must be[94] and what

88. *See id.* at 651; *see also supra* Part I.A.

89. *See infra* Part I.C.3–D.

90. 481 U.S. 465, 471–72, 485 (1987) (involving a challenge to a federal disclosure requirement requiring denotations on films deemed to be "political propaganda" as defined by statute). The case involved a plaintiff who wanted to show three foreign films but did not want be referred to as a disseminator of "foreign political propaganda" as defined by the statute. *Id.* at 467. Despite the non-application of *Zauderer*, the Court's reasoning in upholding the disclosure requirement was analogous to the consumer protection rationales invoked by the *Zauderer* Court. *See id.* at 480–81; *see also supra* notes 76–81 and accompanying text.

91. 487 U.S. 781, 784, 795–98 (1988) (involving a North Carolina statute requiring professional fundraisers soliciting charitable donations to disclose to donors the actual percentage of contributions the represented charities would receive in order to prevent contributors from being misled as to the impact of their donations).

92. *See* Straub, *supra* note 25, at 1221 (summarizing *Meese* and *Riley*).

93. *See* Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972, 979–83 (2017).

94. This refers to how misleading the speech must be in order for the disclosure requirement to receive *Zauderer* deference. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 234, 249 (2010); Ibanez v. Fla.

governmental interests[95] are permissible under *Zauderer*. While many cases prior to *NIFLA*—such as *R.J. Reynolds Tobacco Co. v. FDA* and *Grocery Manufacturers Ass'n v. Sorrell*—interpreted *Zauderer* expansively in both respects, a number of cases began to push back on the trend towards expansion, leading to inconsistent approaches across jurisdictions.

As part of this push back against expansive interpretations of *Zauderer*, some courts have responded by implementing a threshold requirement that must be cleared before *Zauderer* deference is due.[96] In *Zauderer*, the Court justified upholding the disclosure requirement at issue in part because the compelled disclosure was of "purely factual and uncontroversial information[.]"[97] Recently, some courts have begun using this phrase

Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1214 (D.C. Cir. 2012), *overruled by AMI*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *cf.* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 558 (6th Cir. 2012); Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 218 (5th Cir. 2011) (quoting *Zauderer*, 471 U.S. at 651) ("A regulation that imposes a disclosure obligation on a potentially misleading form of advertising will survive First Amendment review if the required disclosure is 'reasonably related to the State's interest in preventing deception of consumers.'"); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 641 (6th Cir. 2010); Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 796 (8th Cir. 2008), *aff'd in part*, *rev'd in part*, *and remanded*, 559 U.S. 229 (2010). Some courts have also applied *Zauderer* where there is no potential to mislead. *See AMI*, 760 F.3d at 22; *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1214; N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009).

95. For instance, courts have differed over whether "consumer interest" (meaning the level of interest expressed by consumers in receiving additional information on a topic) alone is a permissible government interest. *See Repackaging* Zauderer, *supra* note 93, at 982–83; *see also* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 73 (2d Cir. 1996) (holding that although Vermont's asserted interest in "the demand of its citizenry for . . . information" was genuine, it was inadequate to justify a disclosure requirement); *cf.* Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 597–98 (D. Vt. 2015) (upholding a compelled disclosure requirement regarding the use of genetic engineering in food products because it provided consumers with information they could use in deciding whether to purchase products), *appeal filed*, No. 15-1504-cv (2d Cir. May 6, 2015).

96. *See Repackaging* Zauderer, *supra* note 93, at 983–86.

97. 471 U.S. 626, 651 (1985). Until relatively recently, implementing this phrase from *Zauderer* in the analysis of whether a compelled disclosure fell within the purview of the *Zauderer* test was uncommon. *See* Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173, 206 (D. Mass. 2016) ("[F]ew courts have considered the constitutionality of disclosure regulations that fail the 'factual' or 'uncontroversial' prerequisites of *Zauderer*.").

as a means of rejecting compelled disclosures that might otherwise be permissible under expansive interpretations of *Zauderer*.[98] For instance, the court in *Massachusetts Ass'n of Private Career Schools v. Healey* ruled one compelled disclosure "sufficiently controversial" to preclude the application of *Zauderer* deference.[99] Similarly, courts in other cases have declined to apply the *Zauderer* test where the information was not sufficiently factual.[100] In *R.J. Reynolds Tobacco Co. v. FDA*, for example, the D.C. Circuit held that regulations compelling the inclusion of graphic messages on cigarette packaging were not compelling purely factual disclosures and thus were not subject to the *Zauderer* test.[101] The Ninth Circuit used similar reasoning in holding the *Zauderer* test was inapplicable to a regulation requiring the disclosure of information on how to avoid radiation exposure from cell phones.[102] However, such deployments of the purely factual and uncontroversial prongs as a prerequisite for applying the *Zauderer* test were not the norm.

98. *See Repackaging* Zauderer, *supra* note 93, at 984 (noting also that there is "[n]o consistent understanding of what either 'factual' or 'controversial' means" in the context of compelled disclosures). Courts have apparently implemented these as two separate elements, rejecting as impermissible disclosure requirements that were either controversial or not factual. *See id.*

99. 159 F. Supp. 3d at 207. The regulation challenged in the case characterized representations by schools that their credits "are or may be transferable" as "unfair or deceptive" unless the school identified other schools with which it had transfer agreements and indicated it was unaware of other schools which would accept the transfer of its credits. *Id.* at 206–07. The court reasoned that because this might force schools which had informal knowledge of the transferability of their credits to refrain from speaking at all and avoid the risk of making a false statement, the requirement was sufficiently controversial to preclude the application of the *Zauderer* test. *Id.* at 207.

100. *See Repackaging* Zauderer *supra* note 93, at 985.

101. 696 F.3d 1205, 1216 (D.C. Cir. 2012). Some of the graphic warnings (intended to warn of the dangers of smoking) required under the regulations in the case included "images of a woman crying, a small child, and [a] man wearing a T-shirt emblazoned with the words 'I QUIT,'" which the court concluded were "primarily intended to evoke an emotional response[.]" *Id.* This is not the only time that the D.C. Circuit has declined to use the *Zauderer* standard based on a characterization of the disclosure as not purely factual. *See* Nat'l Ass'n of Mfrs. v. SEC, (*NAM*) 748 F.3d 359 (D.C. Cir. 2014), *aff'd on reh'g*, (*NAM II*), 800 F.3d 518 (D.C. Cir. 2015).

102. CTIA—The Wireless Ass'n v. City & Cty. of San Francisco, 494 Fed. App'x 752, 753 (9th Cir. 2012). The court reasoned that since the regulation could "be interpreted by consumers as expressing . . . [the] opinion that using cell phones is dangerous[,]" it was not purely factual and thus *Zauderer* did not apply. *Id.*

In brief, while *Zauderer* articulated that compelled disclosures of factual information in the commercial speech context are subject to a lower standard of review than even normal commercial speech, subsequent cases have struggled to conclusively interpret *Zauderer*. Many courts have interpreted *Zauderer* expansively, particularly with respect to the types of disclosures subject to its deferential test and the justifications governments may use in compelling factual disclosures. However, other courts have pushed back on this trend with more narrow interpretations of *Zauderer* and its test, typically invoking the "purely factual and uncontroversial" language from *Zauderer* as a prerequisite to applying *Zauderer* scrutiny. In essence, then, little was truly clear about the *Zauderer* test prior to *NIFLA* other than that the state of the law was unclear.

D. *NIFLA*: A NEW CHAPTER IN COMPELLED COMMERCIAL DISCLOSURE DOCTRINE

The *NIFLA* holding has the potential to create a seismic shift in compelled commercial disclosure doctrine because of the Court's interpretation of when and how *Zauderer* scrutiny is to be applied. This Section delves into the *NIFLA* holding to explore its impact, beginning by examining the statute at issue in *NIFLA* and providing a detailed factual background to the Supreme Court's decision before analyzing the decision and outlining its legal import.

1. The Facts and the FACT Act

Abortion has been at the center of a particularly heated debate in the U.S. for decades. While protests outside of abortion clinics[103] are well-recognized expressions of anti-abortion sentiment, other abortion opponents have opened facilities called crisis pregnancy centers (CPCs), which attempt to draw in women considering an abortion and convince them to rear the child or

103. *See, e.g.*, *U.S. Abortion Clinics Face Surge of "Emboldened" Protesters, Survey Shows*, CBS NEWS (May 7, 2018), https://www.cbsnews.com/news/us-abortion-clinics-face-surge-of-trespassing-and-blockades/ [https://perma.cc/B2U2-UV24]. Some abortion opponents opt for more violent means. *See* Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html?mtrref=www.google.com&gwh=999F61F060A787D9722C2967F238BBAA&gwt=pay&assetType=REGIWALL.

put it up for adoption.[104] CPCs are more widely known for deceptive and misleading practices than the services they provide.[105] As a result, a number of government entities, including California, began to regulate CPCs.[106]

California passed the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) in 2015 to regulate CPCs.[107] The FACT Act required licensed facilities providing ultrasounds, contraception, pregnancy tests, and abortions to post notices informing patients of California's free and low-cost family planning services, prenatal care, and abortion.[108] Unlicensed facilities providing pregnancy tests, prenatal care, or ultrasounds were required to include the following notice in advertisements and display it on-site: "This 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."[109]

A group of pro-life pregnancy centers challenged the FACT Act, alleging the Act violated the rights of free exercise of religion and free speech.[110] The district court rejected the claims, finding

104. *See* Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 AMA J. ETHICS 269, 269 (2018) (arguing that CPCs do not live up to the standards of medical care by and to which actual doctors and other medical professionals live and aspire).

105. *Id.* at 270–71 (noting deceptive practices and medically false advice). In addition to criticisms by legitimate medical providers, CPCs have also drawn negative media attention for their practices and lack of accountability. *See, e.g.*, LastWeekTonight, *Crisis Pregnancy Centers: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 8, 2018), https://www.youtube.com/watch?v=4NNpkv3Us1I [https://perma.cc/CZB4-KDTT].

106. *See* S.F., CAL. ADMIN. CODE ch. 93, §§ 93.1–.5 (2011); BALT., MD., HEALTH CODE §§ 3-501 to 3-505 (2009); MONTGOMERY CTY., MD., COUNCIL RES. NO. 16-1252 (2010); N.Y.C., N.Y. ADMIN. CODE §§ 20.815–16 (2011); AUSTIN, TEX., CITY CODE ch. 10-10 (2012). For a detailed discussion of each of these ordinances, see Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive FACT Act*, 12 NW. J.L. & SOC. POL'Y 78, 88–95 (2017). However, most of these provisions faced legal challenges and were struck down, at least in part. *See id.*

107. CAL. HEALTH & SAFETY CODE §§ 123470–73 (West 2018); *see also NIFLA*, 138 S. Ct. 2361, 2368 (2018).

108. CAL. HEALTH & SAFETY §§ 123471(a), 123472(a). Facilities had the option to distribute the notice in a number of different ways, including by posting it conspicuously or distributing it digitally on the patient's arrival. *Id.* § 123472(a)(2), *invalidated by NIFLA*, 138 S. Ct. at 2361.

109. *Id.* § 123472(b)(1), *invalidated by NIFLA*, 138 S. Ct. at 2361.

110. Nat'l Inst. of Family & Life Advocates v. Harris, No. 15-CV-2277 JAH(DHB), 2016 WL 3627327, at *1 (S.D. Cal. Feb. 9, 2016).

that the law with respect to the licensed clinics survived both rational-basis and intermediate scrutiny.[111] The court found that the law with respect to the unlicensed clinics would survive any level of scrutiny.[112]

A Ninth Circuit panel affirmed, relying on Circuit precedent which detailed a spectrum of professional behavior ranging from highly protected public dialogue to more lowly protected professional conduct.[113] The Ninth Circuit found that the FACT Act resided in the middle of the spectrum.[114] The court upheld the licensed clinic notice, citing the state's compelling interest in ensuring women could access state-provided reproductive care and noting the notice was narrowly drawn.[115] The unlicensed clinic notice was also upheld, with the court holding that it would survive even strict scrutiny.[116] The case then proceeded to the Supreme Court.[117]

2. The *NIFLA* Holding

The Supreme Court overturned the Ninth Circuit's decision, with Justice Thomas writing for a 5-4 majority and finding both requirements of the FACT Act to be unconstitutional content-based regulations of speech.[118] First, the Court rejected the Ninth Circuit's professional speech continuum, declaring that the only exceptions to strict scrutiny for content-based regulations were laws requiring the disclosure of factual, noncontroversial information under *Zauderer* and laws regulating professional conduct under *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[119] Second, the Court held that the licensed notice requirement did not fall into either the *Zauderer*

111. *Id.* at *7–8.

112. *Id.* at *9 (reasoning that the state had a compelling interest in ensuring patients knew whether a provider was licensed and determining the law was narrowly tailored to that interest).

113. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 839 (9th Cir. 2016).

114. *Id.*

115. *Id.* at 841–42.

116. *Id.* at 843.

117. *See NIFLA*, 138 S. Ct. 2361 (2018).

118. *Id.* at 2371, 2375, 2378. The majority characterized the FACT Act as content-based because compelled disclosures, which force a speaker to convey a particular message, alter the content of the speaker's speech. *Id.* at 2371.

119. *Id.* at 2372. In *Casey*, the Supreme Court heard a challenge by abortion clinics and physicians to a series of Pennsylvania statutes imposing informed consent requirements for abortions and other similar abortion restrictions. 505

or *Casey* exceptions.[120] The Court rejected application of *Zauderer* to the licensed notice requirement because the notice requirement applied to state, not clinic services, and included "abortion, anything but an 'uncontroversial' topic."[121]

Third, the Court held that the unlicensed notice requirements would fail even if *Zauderer* was applied, as California failed to prove that they were not "unjustified and unduly burdensome."[122] In determining that the unlicensed requirement was unjustified, the Court asserted that California's justification for the notice requirement, namely in "ensuring that 'pregnant women in California know when they are getting medical care from licensed professionals[,]'" was no more than "purely hypothetical."[123] The Court concluded that the regulation was unduly burdensome on two primary grounds. The Court reasoned that the requirement was under-inclusive, and thus unduly burdensome, because it applied only to CPCs rather than all facilities where there might also be confusion over whether the facility

U.S. 833, 844–45 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). While the majority of the case involved consideration of abortion rights generally, the case has had significant First Amendment implications. *See generally id.* One of the statutory sections challenged was an informed consent requirement, requiring that a physician provide certain information regarding "risks" of abortion (specified by the state) to any woman seeking an abortion at least 24 hours before the abortion was performed. *Id.* at 844. The plaintiffs argued that this was a violation of doctors' First Amendment rights and amounted to unconstitutional compelled speech. *Id.* at 884. The Court rejected this challenge, however, noting that "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]" *Id.* In First Amendment doctrine, therefore, *Casey* has come to stand for the idea that government can permissibly regulate professional (licensed) conduct, such as that of physicians, even though the First Amendment speech rights of the professional are "incidentally" infringed upon. *See NIFLA*, 138 S. Ct. at 2372.

120. *NIFLA*, 138 S. Ct. at 2372–74. Justice Thomas reasoned that the licensed notice requirement was distinguishable from the permissible regulation in *Casey* because the requirement was not one of informed consent (i.e. providing a list of risks and benefits) and was held out to anyone who entered the facility rather than to a specific patient seeking a specific procedure. *Id.* at 2373–74. Thus, he determined that the requirement directly regulated speech rather than professional conduct. *Id.* at 2374.

121. *Id.* at 2372 (distinguishing the notice requirement from the purely factual and uncontroversial language of *Zauderer*).

122. *Id.* at 2378.

123. *Id.* at 2377.

was licensed.[124] Next, the Court opined that because the requirement that the notice be prominently included in all print and digital advertisements in as many languages as California deemed necessary was unduly burdensome because it effectively drowned out the speaker's message.[125]

In essence, Justice Thomas's majority opinion requires that a compelled commercial disclosure requirement pass a series of separate tests in order to qualify for *Zauderer* deference. First, the disclosure must be (a) of purely factual information, (b) about the terms under which the commercial actor will provide service, and (c) not be about a controversial topic.[126] By way of example, Justice Thomas reasoned that the licensed notice requirement in *NIFLA* failed the first test because it was about services offered by the state, not the speaker—thus failing (b)—and because the underlying topic of abortion was controversial.[127] In particular, this decision interpreting "uncontroversial" as applying to the topic underlying the message rather than its factual veracity represents a seismic shift from prior interpretations of the "purely factual and uncontroversial" test.

Second, if a compelled commercial disclosure survives the first part of the test, it is permissible only if it is not unjustified and unduly burdensome.[128] While the licensed notice requirement failed to survive the first part of Thomas's version of the *Zauderer* test,[129] the unlicensed notice requirement seems to have passed it, primarily because Thomas proceeded straight to the "unjustified or unduly burdensome" prong of the test in considering it.[130] The nature of the unlicensed notice requirement supports this inference, as the required notice was a factual statement about what services the facilities could provide and did not refer to abortion.[131] Thomas concluded that the unlicensed notice requirement failed this prong, largely relying on (somewhat contrived) divides between the scope of the notice and the cited justification, and the burden of forcing unwanted

124. *Id.* at 2377–78.

125. *Id.* at 2378.

126. *See id.* at 2372.

127. *Id.* Justice Thomas did not address the factuality of the licensed notice requirement, likely because he deemed it to unnecessary to do so. *See id.*

128. *See id.* at 2377.

129. *Id.*

130. *See id.* at 2377.

131. *See id.* at 2369–70.

speech on speakers.[132] It seems unlikely that the licensed notice requirement would survive Justice Thomas's interpretation of the second prong. Requiring a CPC to post information about how to get an abortion would likely constitute an undue burden on the CPC's speech based on Thomas's characterization of the unlicensed notice requirement as being unduly burdensome.

Justice Kennedy, joined by Chief Justice Roberts and Justices Alito and Gorsuch, wrote a separate concurrence regarding what he believed to be the viewpoint discrimination[133] inherent to the FACT Act.[134] Kennedy viewed the FACT Act as forcing a particular group of speakers—CPCs and the abortion opponents behind them—to speak the government's message regarding abortion.[135] In his eyes, doing so forced "individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these."[136] Because the FACT Act in practice targeted CPCs and the official legislative history of the Act seemed to espouse pro-choice ideology, Kennedy decided that the Act was problematic due to viewpoint discrimination, in addition to the reasoning found in Justice Thomas's majority opinion.[137]

132. *Id.* at 2375–76.

133. As an aside, it is worth noting that viewpoint discrimination is a particularly nebulous concept in practice, even among the numerous imprecise aspects of First Amendment doctrine. Indeed, despite the immense theoretical justification for a doctrine preventing against discrimination between and against particular viewpoints, the practical application of the doctrine leaves much to be desired in large part because it is easily manipulable: there is evidence to suggest that applications of the doctrine are often outcome driven and, at least in part, a function of the viewpoints held by individual judges. *See* James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 474–77 (1996) (noting the differing invocations of the doctrine in two protest cases that were highly similar factually but involved different judicial viewpoints). This problem seems to be exemplified by the differing treatments of the two highly similar abortion cases, *NIFLA* and *Casey*: although the facts in each were only modestly different, the conservative majority in each case only mentioned viewpoint discrimination when the act in question was motivated by pro-choice, rather than pro-life, concerns. *See supra* notes 119–20. *See generally* Weinstein, *supra* (discussing the context of the abortion debate as one that could be particularly problematic for the intrusion of judicial bias into determinations of viewpoint discrimination).

134. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

135. *Id.*

136. *Id.*

137. *Id.*

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan vigorously dissented, noting with distaste the wide-reaching negative impacts the majority ruling would have for disclosure regimes.[138] The dissenters sharply criticized the majority's characterization of the FACT Act as content-based.[139] The dissenters argued that deeming regulations to be content-based in this way threatens a host of consumer protection regulations and "virtually every disclosure law" in a way that has been unparalleled since *Lochner v. New York* was good law.[140] In *Lochner*, the Supreme Court struck down a New York law designed to protect against horrific working conditions in bakeries by concluding that the Fourteenth Amendment created a fundamental right to freely contract, regardless of the consequences.[141] The decision in *Lochner* crippled labor laws for decades and is widely condemned as one of the Supreme Court's worst decisions, both with respect to legal reasoning and outcome.[142] After finishing its analysis of the potential for the majority's reasoning to be a new *Lochner*, the dissent applied both *Casey* and *Zauderer* to the FACT Act. First, the dissent in effect stressed the similarities between the disclosures in *Casey* and the FACT Act, while rejecting the majority's assertion that the two were so dissimilar as to preclude application of *Casey*.[143]

After concluding its analysis of the FACT Act under *Casey*, the dissent argued that the majority's application of *Zauderer* to

138. *Id.* at 2380–81 (Breyer, J., dissenting) (noting that the majority's rationale jeopardized the continued viability of virtually any disclosure law).

139. *See supra* note 118 and discussion therein; *see also NIFLA*, 138 S. Ct. at 2380–83 (Breyer, J., dissenting) (arguing that the FACT Act is erroneously considered "content-based" by the majority, and thus the majority erroneously applies heightened scrutiny).

140. *Id. Lochner v. New York* was widely disparaged for its hamstringing of labor protection regulations and effectively overruled since. *Id.* at 2381; *see also* Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that a New York state statute setting maximum working hours was unconstitutional because it infringed upon the freedom of contract).

141. *See Lochner*, 198 U.S. at 64.

142. Joshua Waimberg, Lochner v. New York: *Fundamental Rights and Economic Liberty*, NAT'L CONST. CTR.: CONST. DAILY (Oct. 26, 2015), https://constitutioncenter.org/blog/lochner-v-new-york-fundamental-rights-and-economic-liberty [https://perma.cc/UJ2Q-L2CN] (discussing the legacy of the *Lochner* decision).

143. *NIFLA*, 138 S. Ct at 2380–87 (Breyer, J., dissenting) ("I find it impossible to drive any meaningful legal wedge between the law, as interpreted in *Casey*, and the law as it should be applied in this case."). The dissent reasoned that both cases involved medical matters and some type of informed consent. *Id.*

the FACT Act was also flawed.[144] First, Justice Breyer opined that licensed disclosure requirements did in fact relate to the services those consumers provided: by providing information about state resources offering the same services, which would allow the patient to make an informed choice as to which services to use.[145] Second, Breyer asserted that even if the disclosure were not related to the services provided by CPCs, *Zauderer* does not require such a relationship.[146] Third, Breyer rejected the majority's interpretation of the disclosure as controversial because of the general controversiality of abortion, noting that the actual information contained in the disclosure was purely factual and not normative.[147] Fourth, Breyer argued that the majority's approach results in unequal treatment under the law for pro-choice and anti-abortion groups.[148] Breyer's dissent also investigated the absence of consideration of viewpoint discrimination by the majority.[149] Finally, the dissent examined the unlicensed disclosure requirement, rejecting the majority's conclusion that the state interest was purely hypothetical and that the requirement was unduly burdensome.[150]

II. THE "PURELY FACTUAL AND UNCONTROVERSIAL" STANDARD IS DEEPLY FLAWED

Nearly thirty-five years after *Zauderer*, it is still unclear when commercial disclosure requirements receive *Zauderer* deference. Courts prior to *NIFLA* differed widely in their interpretations of *Zauderer*.[151] Similarly, the piecemeal implementation

144. *See id.* at 2386–88.

145. *Id.* at 2387.

146. *Id.*

147. *Id.* at 2388 ("Abortion 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. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other."). While not doing so explicitly, Justice Breyer takes an approach to controversiality that recognizes that something cannot be purely factual and also be controversial. *See id.*

148. *Id.* (noting the differential treatment of First Amendment rights of anti-abortion medical service providers in *NIFLA* as opposed to pro-choice medical service providers in *Casey*).

149. *Id.* at 2388–89.

150. *Id.* at 2389–92.

151. *See supra* Part I.C.3.

of the "purely factual and uncontroversial" language from *Zauderer* as a threshold requirement led to confusing jurisdictional splits regarding the new standard.[152] As confusing and problematic as *Zauderer* doctrine was prior to *NIFLA*, however, the majority opinion in *NIFLA* made it far worse. This Part focuses on the seismic shift in how the "uncontroversial" prong of the "purely factual and uncontroversial" standard is apparently to be considered that the *NIFLA* majority implements.[153]

This Part demonstrates that the doctrine governing when and how *Zauderer* deference should be granted needs fundamental revision for three main reasons. Section A argues that *Zauderer* was unclear, leaving open an interpretive vacuum. Courts attempted to fill this vacuum, but created an even more tortured and confusing body of law. Thus, Section A shows that even before *NIFLA*, clarification as to when *Zauderer* applied was necessary. Sections B and C demonstrate that *NIFLA* was not the clarifying change shown necessary by Section A. Section B argues that the *NIFLA* majority's interpretation of the "uncontroversial" prong is problematic due to the disturbing inherent subjectivity of determining which topics are controversial, allowing judges' personal opinions to operate as factual determinations. Section C asserts that the *NIFLA* majority's interpretation of the "uncontroversial" prong is concerning because it undermines the consumer protection interests at the heart of both *Zauderer* and the Court's entire commercial speech jurisprudence. Section D briefly rebuts counterarguments to Sections A, B, and C.

A. THE PURELY FACTUAL AND UNCONTROVERSIAL STANDARD WAS PROBLEMATIC PRIOR TO *NIFLA*

Even before *NIFLA*, it was unclear when compelled commercial disclosures would receive *Zauderer* deference. As it was gradually implemented, the "purely factual and uncontroversial" standard was particularly confusing, with numerous different interpretations of the standard and when it was to be applied.[154]

152. *See supra* Part I.C.3; *see also infra* Part II.A.2 (giving background on how courts interpret the *Zauderer* standard).

153. *See supra* notes 121, 126–31 and accompanying text.

154. *See* Lyle Denniston, *After Three Decades, Does* Zauderer *Need Updating?*, SCOTUSBLOG (Nov. 18, 2014, 5:28PM), https://www.scotusblog.com/2014/11/after-three-decades-does-zauderer-need-updating/ [https://perma.cc/5R4U-TLXR]; *see also supra* Part I.C.3 (outlining the varied interpretations of *Zauderer* pre-*NIFLA*).

First, this Section notes *Zauderer* was unclear as to which compelled commercial disclosure requirements receive *Zauderer* deference. Next, this Section describes how the rise of the "purely factual and uncontroversial" threshold requirement exacerbated the confusion surrounding *Zauderer*. Ultimately, this Section demonstrates that the question of when to implement *Zauderer* deference needs fundamental reconsideration.

1. *Zauderer* Failed to Create a Clear Template for How to Apply the New Level of Deference It Created

Zauderer was unclear as to exactly how to evaluate commercial disclosure requirements.[155] The *Zauderer* Court only noted that the regulation at issue had "attempted only to prescribe what shall be orthodox in commercial advertising" in the form of requiring the inclusion of "purely factual and uncontroversial information about the terms under which . . . services will be available[,]" and that the speaker had a minimal constitutionally protected interest in not disclosing that information except to the extent the disclosure requirement was "unjustified or unduly burdensome."[156] While the language of *Zauderer* seems to suggest the Court intended compelled commercial disclosure requirements to be evaluated on the basis of whether they were reasonably related to state interests in preventing consumer deception and whether they were unjustified or unduly burdensome, this interpretation is hardly conclusive.[157] In addition, it is not clear that the *Zauderer* Court intended the "purely factual and uncontroversial" standard to be a prerequisite standard for *Zauderer* scrutiny.[158] In brief, *Zauderer* is not entirely clear as to when *Zauderer* deference should be applied, but does seem to suggest that the "purely factual and uncontroversial" language should not have been implemented as a standard.

2. Purely Factual and Uncontroversial: One New Standard, Two Confusing and Problematic Prongs

Despite the apparent views of the *Zauderer* Court discussed above, much of the subsequent case law has invoked *Zauderer*'s "purely factual and uncontroversial" language as a prerequisite

155. *See supra* notes 85–89 and accompanying text.

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

157. *See supra* notes 85–89 and accompanying text.

158. *See supra* notes 85–89 and accompanying text.

to applying *Zauderer*.[159] As a result of this trend, courts grappled with how to implement the new "standard."[160] While the "standard" is recited as a unit, decisions following *Zauderer* turned it into two separate requirements—a disclosure requirement must be both (1) purely factual and (2) uncontroversial.[161] These decisions reached different conclusions as to the meaning of both prongs of the standard.[162] In effect, the piecemeal development of the new standard led to confusing implementations, as various courts struck down a variety of disclosure requirements for failing to meet one prong or the other of the new standard.

The "purely factual" prong has been engaged with extensively, particularly in the context of compelled image "disclosures." The Sixth Circuit upheld graphic cigarette label warnings alongside textual warnings under *Zauderer* because the textual warnings were factual and accurate even if the graphics were nonliteral and emotionally provocative.[163] In a separate opinion, the Court noted that facts, including those presented graphically, could "disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions."[164] While many scholars agreed with the Sixth Circuit's conclusion,[165] the D.C. Circuit refused to apply *Zauderer* scrutiny to graphic cigarette warning labels, finding that they were not purely factual because they were primarily intended to evoke an emotional response.[166] Other courts have differentiated what is "purely factual" from what is subjective or opinion-based. Several circuits

159. *See, e.g.*, Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173, 206 (D. Mass. 2016).

160. *See infra* notes 163–73 and accompanying text.

161. *See infra* notes 163–73 and accompanying text.

162. *See infra* notes 163–73 and accompanying text.

163. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 524–27, 559, 569 (6th Cir. 2012).

164. *Id.* at 569 (Stranch, J., separate opinion).

165. *See, e.g.*, Caroline Mala Corbin, *Emotional Compelled Disclosures*, 127 HARV. L. REV. F. 357, 361 (2014); Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2406–07 (2014).

166. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1209–22 (D.C. Cir. 2012), *overruled by AMI*, 760 F.3d 18 (2014) (en banc). Some writers have described *Reynolds*' approach as ironic, noting that the informative power of disclosures increases as they evoke emotions, particularly important are the potential consequences of failing to ignore health warnings in the smoking context. *See, e.g.*, Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 537–38 (2014); *see also* R. George Wright, *Are There First Amendment "Vacuums":*

declined to find mandated disclosure labels to be purely factual, despite explicit statutory definitions of the label content, where the statutory definition itself was subjective.[167] While this particular approach is less confusing than its counterpart discussed above, the "purely factual" prong as a whole is still mired in confusion, which may be further exacerbated going forward by the rise of alternative facts.[168]

Despite the differing interpretations of the "purely factual" prong of the *Zauderer* standard discussed above, the "uncontroversial" prong prior to *NIFLA* was mired in even more controversy.[169] Several circuits arrived at dramatically different conclusions regarding the meaning of uncontroversial. First, courts in the Ninth Circuit interpreted "uncontroversial" as being effectively the same as "purely factual," meaning that the facts themselves are truthful.[170] Conversely, the D.C. Circuit explicitly

The Case of the Free Speech Challenge to Tobacco Package Labeling Requirements, 76 ALB. L. REV. 613, 625 (2012) (noting that some points may need to be made in an "inflammatory" fashion in order to be effective). Others, however, have written in apparent support of the *Reynolds* approach, noting that fear-based appeals such as the graphic warning labels are in essence conveying a normative message from the government discouraging use of the product in question rather than purely factual information intended to help consumers decide for themselves whether to use a product. *See* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 578–85 (2012). For a general discussion critiquing the *Reynolds* majority's approach to images, see Peter Bozzo, *The Treachery of Images: Reinterpreting Compelled Commercial-Speech Doctrine*, 66 DEPAUL L. REV. 965 (2017).

167. *See, e.g.*, *NAM II*, 800 F.3d 518, 529–30 (D.C. Cir. 2015) (quoting *NAM*, 748 F.3d 359, 363 (D.C. Cir. 2014)) (holding that a statutory definition of "conflict free" with respect to imported minerals was "hardly 'factual and non-ideological'"). Other circuits have implemented similar reasoning with respect to labels affixed to video game packaging in accordance with state definitions of material that they deemed inappropriate for children under the age of 18 (both circuits deemed the statutory definition to be too subjective to be purely factual). *See* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 965–67 (9th Cir. 2009); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

168. *See Leading Cases:* NIFLA *supra* note 69, at 353 (noting that even "scientific or historical facts [have] become controversial").

169. *See AMI*, 760 F.3d at 34 (Kavanaugh, J., concurring in the judgment) ("[I]t is unclear how [courts] should assess . . . whether a mandatory disclosure is controversial.").

170. CTIA—The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117–18 (9th Cir. 2017) (declaring that "'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the

noted that "uncontroversial" must mean something other than "purely factual."[171] In *AMI,* controversial was defined as something that "communicates a message that is controversial for some reason other than dispute about simple factual accuracy."[172] This conception of "uncontroversial" as something different than "purely factual" was reiterated in *NAM*, with the Court declaring that the two prongs must have some separate meaning.[173] In brief, courts prior to *NIFLA* disagreed on what "uncontroversial" meant.

In conclusion, it is readily apparent that *Zauderer* deference—specifically the question of when and how it is to be applied—needs fundamental reconsideration. *Zauderer* was unclear as to when commercial disclosure requirements receive deference,[174] but the "purely factual and uncontroversial" standard that arose in the interpretive vacuum left by *Zauderer* is far more confusing and inconsistent.[175] Thus, courts need to consider updating the doctrine.

audience."). The Ninth Circuit implemented this interpretation again in *American Beverage Ass'n v. City & County of San Francisco*, finding that a disclosure regarding the health risks of sugary beverages was controversial because of the contested accuracy of the facts in the disclosure. 871 F.3d 884, 892–93, 895 (9th Cir. 2017), *rev'd en banc*, 916 F.3d 749 (9th Cir. 2019); *see also infra* note 182 (explaining the *en banc* holding). Some authors have supported this interpretation. *See* Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 236–37 (2011) ("[W]hether the fact is controverted . . . asks whether there is disagreement over the fact's truth, not whether there is disagreement over disclosing the fact."). *But see Repackaging* Zauderer, *supra* note 93, at 984 n.73 (characterizing this approach as a "relatively banal understanding" of *Zauderer*). However, some other courts, including some in the D.C. Circuit, seem to also subscribe to this interpretation, at least partially. *See infra* note 173.

171. *See AMI*, 760 F.3d at 23, 27; *see also NAM II*, 800 F.3d at 528–29 (conducting an analysis based on the assumption that "uncontroversial" and "purely factual" have different meanings).

172. *AMI*, 760 F.3d at 27.

173. *NAM II*, 800 F.3d at 528–29 (defining "controversy" as "a dispute, especially a public one"). It is worth noting that *Reynolds* also put forth a definition of "controversial," declaring a disclosure to be controversial when it would be "subject to misinterpretation by consumers." *Reynolds*, 696 F.3d at 1217, *overruled by AMI*, 760 F.3d at 18.

174. *See supra* Part II.A.1.

175. *See supra* notes 159–73 and accompanying text.

B. *NIFLA'S* VERSION OF THE "UNCONTROVERSIAL" PRONG RENDERS IT IMPERMISSIBLY PRONE TO SUBSTITUTIONS OF JUDICIAL OPINION FOR FACT

The "purely factual and uncontroversial" standard was unclear before *NIFLA,*[176] but the majority opinion in *NIFLA* made it worse. There can be little doubt that both the notices in *NIFLA* were purely factual.[177] The FACT Act merely stated the services that the state provided for low-income women.[178] However, Justice Thomas and the majority ignored the factuality of the disclosures and implemented an interpretation of the "uncontroversial" prong of the *Zauderer* standard that no circuit court (and few district courts) had even considered.[179] Rather than determining controversiality based on the information in the disclosure, the majority instead focused on the controversiality of the underlying topic—abortion.[180] Even before *NIFLA,* writers noted that the "uncontroversial" prong of the *Zauderer* standard left open an uncomfortably large window for the subjective beliefs of judges to influence their decision making.[181] Following the *NIFLA* decision, that window is opened even further.[182] Judges now

176. *See supra* Part II.A.2.

177. *See NIFLA*, 138 S. Ct. 2361, 2368–70 (2018).

178. *See Leading Cases:* NIFLA *supra* note 69, at 353.

179. *See NIFLA*, 138 S. Ct. at 2372.

180. *Id.* It is worth noting that *NIFLA* is not the first decision to approach the "purely factual and uncontroversial" standard in this way. *See* Evergreen Ass'n Inc. v. City of New York, 740 F.3d 233, 245 n.6 (2d Cir. 2014). This approach is in marked contrast to that of a court hearing a challenge to a GMO labeling requirement in Vermont. Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 628–29 (D. Vt. 2015) (noting that the compelled information must itself be controversial). On appeal, the plaintiffs argued the requirement failed *Zauderer* because the topic of GMOs was controversial, but the appeal was never heard. *See* Nigel Barrella, *First Amendment Limits on Compulsory Labeling*, 71 FOOD & DRUG L.J. 519, 534 (2016).

181. *See Repackaging* Zauderer, *supra* note 93, at 989.

182. Given that *NIFLA*'s recency has given little time for many examples of this to develop, perhaps the best example to develop thus far comes from an en banc rehearing of *American Beverage Ass'n v. City and Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019) (en banc). *See also supra* note 170 (providing background information on the case). The majority rejected the notice regarding the health risks of sugary foods and drinks as being unduly burdensome because the notice was required to take up 20% of the space of the advertisement. *Am. Beverage*, 916 F.3d at 757. In a separate concurrence, however, Judge Ikuta argued that the notice was not permissible under *Zauderer* because the health risks of sugar were a controversial topic. *See id.* at 761 (Ikuta, J., concurring). Although this determination was not entirely outlandish (namely because statements by the

not only have the leeway to interpret whether a message itself is controversial under the "purely factual and uncontroversial" standard, but also which topics are controversial.[183] This Section argues that the alarming potential for the replacement of fact with opinion in deciding what topics are permissible under the "uncontroversial" prong mandates a fundamental reconsideration and revision of *Zauderer* deference and its application post-*NIFLA*.

The *NIFLA* majority's new approach to the "uncontroversial" prong poses a grave threat to the commercial disclosure regime. Increasing partisanship and politicization of facts could render virtually any topic controversial, precluding *Zauderer* deference.[184] For instance, take the commercial disclosure requirements in Section C.1 of Part I.[185] should attorneys be forced to disclose in advertisements that clients may have to pay otherwise undisclosed costs?[186] Those with heated opinions on lawyers and legal billing would find the underlying topic controversial. Similarly, if one subscribes to *laissez faire* economics, such a requirement could be controversial because the underlying topic—regulation—is controversial. Should meat packages be required to bear country of origin labels?[187] The debate over domestic production and globalization is controversial to many. Alternatively, what if a pro-choice court heard a case with a disclosure requirement similar to that in *Casey*[188] but in a commercial speech context that would put it within *Zauderer*'s purview? That court could easily reject such a requirement under the *NIFLA* majority's interpretation of "uncontroversial" as applying to

FDA indicated that sugar consumption was safe at certain levels), generally accepted norms suggest that the idea of health risks posed by added sugars is far from controversial. *See id.*; *see also* Goodman, *supra* note 166, at 553 (noting that reducing sugar is almost universally perceived as a positive health benefit). While this is not nearly as bad an example of substituting a judicial opinion regarding the controversiality of a topic, it is the closest actual example given the recency of *NIFLA*. Still, given the only slight deviations in severity between the FDA statements and the required notice, rejecting the requirement on controversiality grounds seems to fit within the dangers of the *NIFLA* approach discussed above.

183. *See NIFLA*, 138 S. Ct. at 2372; *Am. Beverage*, 916 F.3d at 749.

184. *See Leading Cases:* NIFLA *supra* note 69, at 353.

185. *See supra* notes 63–69 and accompanying text.

186. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 625, 636, 650–53 (1985).

187. *See AMI*, 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc).

188. *See supra* note 119 (providing a discussion and brief analysis of the facts in *Casey*).

the underlying topic because curtailing a woman's right to abortion is almost certainly as controversial as abortion generally. Even the topic of compelled commercial speech generally could be deemed highly controversial.[189] Perhaps most importantly, even scientifically verifiable information—such as climate science—could be controversial because some small subset of the population disagrees with it. Thus, the potential for the subjective beliefs of judges to dictate what topics are controversial jeopardizes the commercial disclosure regime and mandates revision of the *Zauderer* doctrine.

C. *NIFLA'S* VERSION OF THE "UNCONTROVERSIAL" PRONG UNDERMINES CONSUMER PROTECTION INTERESTS

Zauderer and *Virginia State Board of Pharmacy* recognize that commercial speech derives its value from its ability to inform consumers by helping them make informed decisions and forcing speakers to provide additional information when their message is otherwise misleading.[190] This Section demonstrates that the *NIFLA* majority's interpretation of the "uncontroversial" prong undermines consumer interests by affording commercial speakers with a level of protection that prior precedent does not justify.

First, obstacles reducing the flow of information to consumers almost always reduce their ability to make informed decisions. By interpreting the meaning of the "uncontroversial" prong so broadly,[191] the *NIFLA* majority created a precedent which dramatically reduces the number of viable compelled commercial disclosure regulations and thus the flow of information to consumers. Since commercial speech directly derives its value from its ability to inform consumers, altering the requirements for *Zauderer* deference directly undermines that value.

Second, the consumer interest in information about products or services pertaining to a controversial underlying topic is even greater than normal. This seems self-evident: consumers put more thought and research into decisions that are more costly or otherwise worth more to them. This is why, for most

189. *See, e.g.*, Brief for the Cato Institute as Amicus Curiae in Support of Petitioners at 14, Nationwide Biweekly Admin. v. Hubanks, No. 17-1161 (Mar. 21, 2018).

190. *See supra* notes 40–41, 76–81 and accompanying text.

191. *See supra* Part II.B. The *NIFLA* Court's interpretation of the "uncontroversial" prong was broad because it effectively rendered any disclosure to be controversial, since virtually any underlying topic can be controversial.

consumers, deciding which car to buy requires significantly more thought and information than deciding which napkins to buy. Take, for instance, the debate surrounding GMOs. Many consumers desire the labels of their food products to provide them with information about whether the product includes GMO ingredients precisely because GMOs are a matter of some controversy.[192] Similarly, although climate change is also quite likely a controversial topic, many consumers are particularly interested in the fuel efficiency of their cars precisely because they desire to know the car's environmental impact. In sum, consumers rely on information the most when they are forced to make a decision regarding a controversial topic.

D. THE NEW INTERPRETATION OF THE CONTROVERSIALITY STANDARD IS NOT NECESSARY TO PROTECT RELIGIOUS OR MISSION-DRIVEN COMMERCIAL SPEAKERS

In *Zauderer*, the Court explicitly stated that a commercial speaker had a minimal interest in *not* saying or disclosing factual information.[193] What if, for one reason or another, a commercial speaker did have some heightened interest in non-disclosure? There is a plausible argument to be made that speakers that are religious or are otherwise mission-driven have a higher interest than the average advertiser or commercial speaker. For instance, Justice Kennedy's *NIFLA* concurrence implicitly seems to suggest that the anti-abortion advocates in *NIFLA*—but potentially also other faith-based advocates outside of the abortion context—had a particularly high interest in non-disclosure.[194] Even accepting this premise, there remains the question of what types of mission-driven speakers could argue such a heightened interest in non-disclosure. For example, physicians are mission-driven: their mission is to provide scientifically validated treatment and counsel that adheres to strict standards of care.[195] As

192. Disclosure requirements regarding GMOs have already been challenged and upheld. *See, e.g.*, Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 628–29 (D. Vt. 2015).

193. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); *see also supra* Part I.C.3 (explaining the reduced free speech protections provided to commercial disclosures under *Zauderer*).

194. Kennedy noted that the FACT Act forced "individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts . . . [.]" *NIFLA*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring). From this perspective, CPCs may have a higher interest in non-disclosure than other commercial speakers. *See Zauderer*, 471 U.S. at 650–53.

195. *See* Bryant & Swartz, *supra* note 104, at 271.

persuasive as the argument of the potential for a commercial speaker's heightened interest in non-disclosure may be—especially if one regards religiously motivated speakers in a special light—it is no justification for interpreting the "uncontroversial" prong so broadly as to jeopardize disclosure requirements whenever the speaker can contrive an argument for a controversial topic.

Instead, religious or mission-driven speakers can be protected by other aspects of commercial speech jurisprudence. *Zauderer* itself provides a better option for protection than the new interpretation of the "uncontroversial" prong. Arguably, requiring a speaker to make a commercial disclosure with a message to which it is diametrically opposed is an undue burden.[196] Indeed, Justice Kennedy's portrayal of the hardships CPC operators faced due to the FACT Act credibly suggests an undue burden.[197]

In addition, the Court has already recognized that where commercial speech is inextricably intertwined with fully protected speech (such as advocacy for mission-driven charities), both the commercial and fully protected speech are reviewed under strict scrutiny as any content-based curtailment of entirely fully protected speech would be.[198] Thus, in *NIFLA* for instance, regulation of an advertisement for an unlicensed facility attempting to draw women to the CPC but also advocating against abortion in some inextricable way would be subject to strict scrutiny even without the *NIFLA* majority's interpretation of the "uncontroversial prong."

III. THE ROAD AHEAD: SOLUTIONS FOR *ZAUDERER* DEFERENCE POST-*NIFLA*

As established in the previous part, the question of when and how *Zauderer* deference should be applied is fraught and problematic, largely because *Zauderer* did not clarify how subsequent courts should apply the doctrine it created. Any modifications to the standard going forward must take into account three primary concerns in order to effectively revitalize and clarify the doctrine.[199] First, a good solution must mitigate the linguistic incoherence and lack of clarity inherent to *Zauderer* deference

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

197. *See NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

198. *See supra* note 91 and accompanying text.

199. *See supra* Part II.

prior to *NIFLA*. Second, any solution must correct the way in which the *NIFLA* majority rewrote the "uncontroversial" prong to be ripe for exploitation by judicial bias. Third, such a solution must remedy the fundamental divorce from the consumer protection and information interests at the very core of all commercial speech doctrine since *Virginia State Board of Pharmacy* that the *NIFLA* majority perpetuated.[200] This part argues that wiping the *Zauderer* slate clean—and returning to the "unduly burdensome" test that the *Zauderer* Court arguably intended—is the best way to address all three of those concerns.

A. WIPING THE *ZAUDERER* SLATE CLEAN: WHY THE SUPREME COURT SHOULD RETURN TO THE ORIGINAL TEST ARGUABLY POSED BY *ZAUDERER*

First, the best option would likely be for the Supreme Court to overrule much of the post-*Zauderer* jurisprudence of the last roughly thirty-five years and start anew with a clean slate and a clarification and revitalization of the original *Zauderer* test. As discussed above, it seems unlikely that the *Zauderer* Court intended the "purely factual and uncontroversial language" in its opinion to be more than a characterization of a sufficient set of facts to justify the use of deferential *Zauderer* scrutiny.[201] The fact that the Court in *Milavetz, Gallop & Milavetz P.A. v. United States* declined to use the standard as a threshold requirement, or even repeat the language less than ten years ago suggests this is still a viable option despite the *NIFLA* holding.[202] Instead, the "unjustified or unduly burdensome" language of *Zauderer* could replace the "purely factual and uncontroversial" standard as used in *NIFLA*.[203] Indeed, this seems to be the approach that the

200. *See supra* notes 33–41 and accompanying text.

201. *See supra* Part II.A.1.

202. *See* Milavetz, Gallop, and Milavetz, P.A. v. United States, 559 U.S. 229, 249–51 (2010).

203. This Section focuses exclusively on the "unduly burdensome" prong of the "unjustified or unduly burdensome" standard for several reasons (including brevity). First, this Section seeks to analyze the "unduly burdensome" prong in particular as a substitute for what the *NIFLA* Court seemed to be trying to accomplish through its new understanding of "uncontroversial." *See NIFLA*, 138 S. Ct. 2361, 2372 (2018). Second, scholars have suggested that the "unjustified" prong—sometimes considered as a requirement that a disclosure requirement be "rationally related" to a permissible government interest—is more permissive than the second prong, reducing its efficacy in accomplishing the apparent goals of the *NIFLA* majority. *See* Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech*

Zauderer Court took in analyzing the facts before it.[204] This section briefly considers how courts have implemented the "unjustified or unduly burdensome" test before arguing that a slightly more expansive version of the "unduly burdensome" prong could achieve the apparent goal of the *NIFLA* majority in approaching controversiality at the topic level while also addressing the concerns about the *NIFLA* approach raised in Part II.

1. Courts So Far Have Primarily Found Disclosures "Unduly Burdensome" Under *Zauderer* Due to Size

Thus far, courts have invoked the "unduly burdensome" test largely when striking down mandated disclosures based on their size. In *NIFLA*, for instance, the majority reasoned that the unlicensed notice was unduly burdensome in part because it could require a two word message—"Choose Life"—to be surrounded by California's required message under the FACT Act in as many as thirteen different languages.[205] Similarly, in an en banc rehearing of *American Beverage Ass'n v. City and County of San Francisco* before the Ninth Circuit, the majority reasoned that the disclosure requirement at issue was unjustified and unduly burdensome in part because expert testimony showed that similar warnings had demanded a significantly smaller percentage of space of the total advertisement.[206] Numerous other cases have also followed this approach.[207]

At the heart of this effectively size-based approach is a reliance on the same consumer protection justifications the Supreme Court cited in both *Virginia State Board of Pharmacy*[208]

Regulation, 47 U. RICH. L. REV. 1171, 1189 (2013) ("A compelled disclosure that is reasonably related to preventing deception can hardly be unjustified, and so scrutiny should be focused on its burden."); *see also Repackaging* Zauderer, *supra* note 93, at 989 (highlighting a set of cases that suggest a disclosure must be "rationally related" to the government interest, otherwise it poses an "undue burden" on the commercial speaker).

204. *See supra* notes 85–89.

205. *NIFLA*, 138 S. Ct. at 2378; *see also supra* Part I.D (summarizing *NIFLA*'s holding and impact).

206. 916 F.3d 749, 757 (9th Cir. 2019) (en banc); *see also supra* note 168 (providing background information on the case).

207. *See, e.g.*, Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, 512 U.S. 136, 146–47 (1994); *see also* Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 31 (2015) (detailing why the Country of Origin Law was not an undue burden because of its high government interest); *Repackaging* Zauderer, *supra* note 93, at 989–93.

208. *See supra* notes 40–41 and accompanying text.

and *Zauderer*:[209] protections for commercial speech and disclosure requirements on commercial speech are both justified because they increase vital flows of information to consumers. In cases rejecting disclosures as unduly burdensome based on size, courts have made the rational assumption that excessively long disclosures have a high risk of "effectively rul[ing] out" certain types of speech, thus decreasing the flow of information to consumers.[210] Because such disclosure requirements impermissibly intrude upon the flow of information to consumers rather than supplementing it, they do not receive *Zauderer* deference under this approach.

Before moving on to the changes to the "unduly burdensome" standard that this Note suggests, however, it is worth noting that a simple substitution of the size-focused version of the "unduly burdensome standard" for the "purely factual and uncontroversial" standard would at the very least mitigate, if not remove entirely, the issues raised in Part II. First, although the *Zauderer* Court did not specifically address what an "unduly burdensome" disclosure requirement might be,[211] there has been no subsequent piecemeal development of the standard in divergent and confusing directions.[212] This lack of divergent interpretations, coupled with the fact that it is far easier to determine the size of a disclosure relative to the speech it accompanies than it is to determine the controversiality of a disclosure, renders this version of the standard far less confusing. Second, this version of the standard permits very little room for judicial bias. If the metric is truly one of how much space a mandated disclosure would take up, or whether some similar consideration would effectively rule out some types of speech, there is much less leeway for a judge to decide based on bias than there is in deciding

209. *See supra* Part I.C.2.

210. *See Ibanez*, 512 U.S. at 146 (reasoning that a requirement that specialists disclose a great deal of information regarding their specialist designation "effectively rule[d] out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing"); *see also* Robert Post, Lecture, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 900 (2015) (noting that unduly burdensome disclosure requirements can chill the flow of information to consumers in a manner that is inconsistent with the primary justifications for commercial speech doctrine).

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

212. *Cf. supra* Part II.A (explaining why the "purely factual and uncontroversial" standard is problematic in general).

whether the underlying topic is controversial.[213] Finally, as discussed in the preceding paragraph, this approach is aligned with the consumer protection and information interests at the heart of commercial speech doctrine, and does not need wholesale reconsideration and revision in order to address these concerns.[214]

2. A More Expansive Interpretation of the "Unduly Burdensome" Test Could Be the Best Path Forward for *Zauderer* Deference Post-*NIFLA*

While interpreting the "unduly burdensome" standard simply as a limit on the size of disclosures has its advantages, implementing a more expansive interpretation represents the best path forward for protecting commercial disclosure regimes post-*NIFLA*.[215] At first glance, it might seem counterintuitive to suggest that effectively raising the bar that a disclosure requirement must clear is a good option for protecting disclosure requirements. However, courts of late have begun to interpret the First Amendment in ways that show an increasing solicitude for commercial speakers, particularly where speakers have certain religious or political views.[216] Because of this trend, the best likely approach of implementing the "unduly burdensome" standard in place of the "purely factual and uncontroversial" standard is simply to strike a middle course: articulate a version of the "unduly burdensome" standard that gives courts some leeway to strike down disclosure requirements that are unduly burdensome for reasons beyond the size of the disclosure, but still protects commercial disclosure regimes from the broad version of the "purely factual and uncontroversial" standard articulated in *NIFLA*.

213. *See supra* Part II.B.

214. *Cf. supra* Part II.C (outlining why *NIFLA*'s interpretation of the purely factual and uncontroversial standard undermines consumer protections).

215. For the sake of clarity, interpreting the standard more expansively—as this subsection suggests—would still be inclusive of the sizing considerations discussed in Part III.A.1.

216. *See generally NIFLA*, 138 S. Ct. 2361, 2368–78 (2018) (finding that the FACT Act disclosure was content-based, and subject to strict scrutiny under the First Amendment); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (holding that a cake shop owner can refuse to make a cake for a same sex wedding); Citizens United v. FEC, 558 U.S. 310 (2010) (allowing corporations to advocate directly for their political preferences).

This approach has several key merits. First, it mitigates concerns regarding the overexpansion of *Zauderer* scrutiny[217] without also jeopardizing otherwise meritorious and purely factual disclosure requirements due to subjective interpretations of controversy. For instance, disclosures requiring a commercial speaker to guide consumers to a *competing* business[218] or state service could be unduly burdensome,[219] while still protecting, for example, requirements that casinos include information on how to get help for gambling addictions in their advertisements.[220] This approach could also protect commercial speakers motivated by religious or mission-based concerns rather than just profit.[221] Intuitively, it does make sense that forcing a deeply religious individual who happens to be a commercial speaker in one context to convey a message that directly controverts her faith is far more burdensome than requiring a restaurant to disclose the caloric content of its foods.[222] In essence, by providing courts with an avenue to strike down disclosure requirements that may have been deemed controversial under the broad "uncontroversial" standard in the past—but eliminating the incredibly problematic "purely factual and uncontroversial" standard—this approach limits the potential damage to commercial disclosure regimes that *NIFLA* and the "purely factual and uncontroversial" standard pose.

While similar approaches were suggested even prior to *NIFLA*,[223] the adoption of this approach is of particular importance post-*NIFLA*.[224] As discussed in Part II, the part of *Zauderer* doctrine that *NIFLA* most directly problematized was the use of the "purely factual and uncontroversial" standard, particularly the "uncontroversial" prong.[225] Generally, the "purely factual and

217. *See, e.g.*, Brief for the Cato Institute as Amicus Curiae, *supra* note 189, at 6–7 (arguing against the *Zauderer* majority opinion analysis).

218. *See* Safelite Grp., Inc. v. Jepsen, 764 F.3d 258, 264 (2d Cir. 2014).

219. *See NIFLA*, 138 S. Ct. at 2372.

220. *See Leading Cases:* NIFLA *supra* note 69, at 354.

221. *See supra* Part II.D.

222. *See* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08 Civ. 1000 (RJH), 2008 WL 1752455, at *1 (S.D.N.Y. Apr. 16, 2008).

223. *See Repackaging* Zauderer, *supra* note 93, at 989.

224. This Note does not pretend to offer the only solution to the problems it identifies, or to definitively outline the exact contours of the new, expanded version of the "unduly burdensome" test it proposes. Instead, this Note intends to serve as the starting point to a debate over how to best shape the law going forward.

225. *See supra* Part II.

uncontroversial" standard was problematic for three primary reasons: (1) the standard was poorly defined and confusing even prior to *NIFLA*; (2) the *NIFLA* majority's interpretation of the "uncontroversial" prong rendered the standard particularly susceptible to impermissible judicial bias; and (3) interpreting the "uncontroversial" prong to apply to the topic level effectively undermined the consumer protection interests at the heart of all commercial speech doctrine.[226] This approach significantly mitigates, if not removes, all of these problems.

First, this approach would eliminate the use of the "purely factual and uncontroversial" language of *Zauderer* as a *standard* entirely, which would be hugely beneficial. To begin with, the standard and its prongs were developed piecemeal, leading to confusing and irregular implementation and definition of the test even prior to *NIFLA*.[227] Although there were other jurisdictional differences in interpretations of when and how to apply *Zauderer* deference prior to *NIFLA*,[228] the majority of the differences focused on the implementation of the standard as a prerequisite to *Zauderer* deference, rather than on what constituted an undue burden. In essence, this approach would eliminate the confusion of when and how *Zauderer* deference applies caused by the inconsistent and confusing "purely factual and uncontroversial" standard.

Second, this approach would not be plagued by judicial bias to the same degree as the *NIFLA* majority's approach for several reasons. To begin, determining whether a disclosure requirement is unduly burdensome is a far narrower determination than deciding whether the underlying topic of a disclosure is a controversial, which essentially requires two incredibly subjective determinations: (1) what the underlying topic is; and (2) whether the topic chosen is in fact controversial in the eyes of the judge.[229] By dramatically narrowing the scope of what questions must be decided by the judge, this approach significantly mitigates concerns over judicial bias. In addition, in contrast to the "uncontroversial" standard following *NIFLA*, there is already existing precedent across other bodies of law that can help give indications of what an unduly burdensome requirement might look like. For instance, the Supreme Court has used tests of undue burden in the context of the dormant commerce clause

226. *See supra* Part II.

227. *See supra* Part II.A.

228. *See supra* Part I.C.3.

229. *See infra* Part III.B (noting the similarities between *Casey* and *NIFLA*).

and access to abortion.[230] While the contexts are not identical to that of compelled commercial disclosures, the guiding factors and general approach to the standard in each are sufficiently analogous to give enough guidance to judges to greatly mitigate concerns over bias, particularly in comparison to the "uncontroversial" standard.[231] In conclusion, although room for judicial interpretation and thus bias remains, the dramatic narrowing of the scope of the necessary determinations and analogous precedent interpreting similar standards significantly mitigates concerns over judicial bias.

Finally, this approach is consistent with the consumer protection interests underlying all commercial speech doctrine, unlike the "uncontroversial" standard following *NIFLA*.[232] This is largely due to the same rationales discussed above in precedent implementing the narrower version of the unduly burdensome test: a disclosure that is unduly burdensome effectively chills speech, and thus runs contrary to consumer interests in information.[233] In the same way that a mandated disclosure which effectively rules out advertisements in a phone book or on business cards chills those kinds of speech, it seems reasonable to conclude that a disclosure requirement which requires an anti-abortion activist to share a message on abortion in direct opposition to his faith or a small-business owner to effectively advertise for her competitors could easily lead either of those parties not to speak.[234] In addition, because this approach is justifiable in serving consumer interests, it does not require the same effective sublimation of consumer interests to those of commercial speakers in not speaking on controversial topics that *NIFLA* seems to require. Indeed, rather than requiring a recognition that mission-driven speakers may have a heightened interest in non-disclosure, this approach could achieve the same result without shifting the focus of and justifications for commercial speech doctrine.

230. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 579–80 (1995); Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992).

231. *See supra* Part II.B.

232. *See supra* Part II.C.

233. *See supra* notes 208–10 and accompanying text.

234. *See supra* notes 217–22 and accompanying text.

3. Addressing Counterarguments to Expanding the "Unduly Burdensome" Test

There are, however, three primary counterarguments to this approach. The first, already largely addressed in this section, argues that expanding the "unduly burdensome" standard renders it subject to the same concerns over judicial bias as the "uncontroversial" standard following *NIFLA*. This Note does not intend to suggest that there is any potential expansion of the "unduly burdensome" standard which will not, to some degree, make the standard more prone to judicial bias than it is as merely a size restriction. Instead, this Note argues that this potential increase is justified, but also narrower than some might think. First, as discussed above, this approach seeks to be a middle ground that protects the majority of commercial disclosure requirements by granting courts some—albeit significantly narrower—avenues to do what they were likely to do anyway. Second, the scope of the determinations required (and thus the window for judicial bias) is significantly narrower than one might think, and particularly so in comparison to the "uncontroversial" standard: determining whether a disclosure is "unduly burdensome" is a significantly narrower determination than deciding what the underlying topic of a disclosure is and then whether that topic is controversial.[235] In addition, the window is further narrowed when one considers this expansion as a mere extension of the same rationales as used under the current version of the standard: a disclosure is unduly burdensome to the extent it will actually chill speech. Thus, concerns over judicial bias under this approach are largely overwrought and unwarranted.

Second, at the end of Part III.A.1, this Note argued that substituting the current version of the "unduly burdensome" standard as primarily a size restriction for the "purely factual and uncontroversial" standard already mitigates the problems addressed in Part II. If this is truly the case, then why expand the standard in a way that could make it harder for disclosure requirements to survive in court? This is a tough question to answer, and this Note recognizes the merits of the current approach. Rather this Note relies on the assumption that there may be a different era in First Amendment doctrine right around

235. The narrowness of the determination matters for one simple reason: it limits the scope of potential bias. For instance, imagine being asked to pick a color. You have a much greater ability to pick your preferred color in this instance, than when being asked to pick a shade of blue.

the corner—one which places greater value on the speaker's interests in commercial speech and may represent a new *Lochner* era[236]—and that the best way to protect commercial disclosures may be to meet the new trend halfway. Although the current state of the "unduly burdensome" standard may be the best for commercial disclosures in the short term, if the standard is truly to displace the "purely factual and uncontroversial" standard, it must grant courts leeway to accomplish some of the things they could under the "uncontroversial" standard in order to mitigate the temptation to articulate a wholly new standard which is even more dangerous to commercial disclosure regimes.

Finally, the discerning reader by this point may have seized upon one hitherto unaddressed argument: how can *Zauderer* deference truly move on from, and effectively remove the idea that a disclosure must be "purely factual and uncontroversial" to receive *Zauderer* deference? The answer is simple: this approach does not mandate banishing consideration of the phrase from all subsequent cases. Instead, this approach recognizes that this language from *Zauderer* is deeply problematic as a standard and should thus not be a prerequisite to receiving *Zauderer* deference. By replacing the "purely factual and uncontroversial" standard with the "unduly burdensome" standard, courts could determine whether a disclosure was "unduly burdensome" and could then weigh the facts before them and compare those facts to the facts in *Zauderer*, where the disclosure was "purely factual and uncontroversial." In this sense, then, this approach recognizes the "purely factual and uncontroversial" language of *Zauderer* for what it was—a characterization of the facts before the *Zauderer* Court—and would use the phrase merely as grounds for a factual comparison between cases.

* * *

In sum, although it is highly unlikely that the Court will overturn roughly thirty-five years of precedent, replacing the "purely factual and uncontroversial" standard with an expanded version of the "unduly burdensome" standard mitigates the current most problematic aspects of when and how to apply *Zauderer* deference, and would represent a significant upgrade over the "purely factual and uncontroversial" test. While this expansion could face problems of its own, particularly concerns over the intrusion of judicial bias, the fact that this approach would

236. *See NIFLA*, 138 S. Ct. 2361, 2380–83 (2018) (Breyer, J., dissenting); *see also supra* note 216 and accompanying text (explaining that courts are giving increasing deference to commercial speakers).

at least mitigate, if not also satisfy, all of the concerns raised in Part II relatively easily make an expansion of the "unduly burdensome" standard as a substitution for the "purely factual and uncontroversial" standard the best option for *Zauderer* deference following *NIFLA*.

B. ADDRESSING OTHER OPTIONS

While replacing the "purely factual and uncontroversial" standard with some version of the "unduly burdensome" test seen in *Zauderer* is the best approach to fixing *Zauderer* deference post-*NIFLA*, it is certainly not the only one. This Section briefly explores two other approaches: limiting what topics are controversial and simply ignoring *NIFLA*. This Section, while acknowledging the merits of these approaches, argues that they do not address the problematic aspects of the "purely factual and uncontroversial" standard identified in Part II to the same degree as the solution above.

1. Limiting Which Topics Are Controversial

Specifically limiting which topics would be impermissibly controversial under *NIFLA's* interpretation of how to implement the "uncontroversial" prong of *Zauderer* in future cases is the better of the two options raised in this Section. The Court could, for instance, limit the application of the underlying topic analysis for the "uncontroversial" prong to the abortion debate, or a narrow list of similar topics. This could protect some disclosure requirements in less controversial contexts, such as requirements to disclose calorie counts at restaurants.[237]

However, deciding which topics would qualify would be subject to the same concerns over judicial bias discussed in Part II.B. For instance, *NIFLA* and *Casey* were highly similar factually, but received markedly different interpretations which were arguably due to their positions on different sides of the abortion debate.[238] While the risk of bias leading to inconsistent results and unequal treatment under the law is particularly notable in the abortion context, it could easily extend to other topics. Some of this risk could arguably be mitigated by having a specific body,

237. *See NIFLA*, 138 S. Ct. at 2380–83 (Breyer, J., dissenting); *see also supra* notes 120, 143 and accompanying text (explaining the majority and minority opinions relating to controversiality in *NIFLA*).

238. For a more detailed discussion and background of *Casey*, see *supra* note 119.

likely the Supreme Court, establishing one specified set of categories deemed too controversial rather than determining those categories piecemeal by numerous different judges and courts.[239]

Despite concerns over bias, the Court has implemented potentially problematic doctrines before and limited them to specific facts or applications. For example, secondary effects doctrine, another part of the Court's First Amendment Jurisprudence,[240] permits regulations of speech so long as they target the harmful secondary effects of speech, not the speech itself.[241] While this doctrine has been characterized as problematic, it has survived,[242] likely due to the fact that it has primarily been implemented in support of zoning restrictions[243] on adult-oriented businesses.[244] The Supreme Court's reticence to implement secondary effects doctrine outside of the context of adult oriented businesses reflects a marked level of judicial restraint in limiting a doctrine that many have characterized as problematic and suggests such an approach might be possible following *NIFLA*.[245]

However, this approach would still be problematic. First, it does not properly recognize consumer protection interests. As shown above, consumers have a heightened interest in disclosures of information on controversial topics.[246] While limiting

239. *See supra* Part II.A.2 (describing the problems arising from piecemeal adoption of the "purely factual and uncontroversial" threshold).

240. *See* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 299–305 (2009) (detailing the development of secondary effects doctrine). *See generally* Daniel R. Aaronson et al., *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741 (2009) (examining the application of secondary effects doctrine both by the Supreme Court and at the circuit court level and concluding that the state of the doctrine is highly confusing).

241. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 438 (2002); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976).

242. *See* Fee, *supra* note 240, at 293–95; *see also* Aaronson et al., *supra* note 240, at 741, 744 (criticizing secondary effects doctrine as "a mess" suffering from "seemingly random development of the law").

243. The doctrine's foundational cases involve zoning restrictions. *See* cases cited *supra* note 241.

244. The Supreme Court has not, however, explicitly limited the doctrine's application to sexually explicit speakers or adult-oriented businesses. *See* Fee, *supra* note 240, at 304–05.

245. *See id.* at 293–95.

246. *See supra* Part II.C.

the scope of topics covered under the new version of the "uncontroversial" prong limits the new test's damage to some consumers, doing so would do nothing to help consumers harmed by prohibitions on disclosures on whatever topics the Court would decide to limit the *NIFLA* approach to. Second, as much restraint as the Supreme Court might show in limiting the scope of a problematic doctrine, lower courts are often much less reticent to implement that doctrine in different concerning ways.[247] Finally, this approach continues use of the "purely factual and uncontroversial" standard without mitigating or eliminating the confusion that plagued the standard even before *NIFLA*.[248]

In conclusion, limiting the scope of the *NIFLA* majority's implementation of the "uncontroversial" prong of the "purely factual and uncontroversial" test by restricting the topics deemed controversial is a viable option. It would, however, be a difficult one to implement and still be subject to many of the same concerns raised in Part II.

2. Ignoring or Rejecting *NIFLA*

Finally, the Supreme Court could reject the *NIFLA* version of the *Zauderer* test and look back to either of the two diverging implementations of the standard in cases prior to *NIFLA*.[249] While the Ninth Circuit's approach[250] would be better at addressing the problems flagged in Part II, neither does so to the same extent as the solution this Note proposes.

The Ninth Circuit treated the "uncontroversial" prong of the "purely factual and uncontroversial" standard as a measure of the veracity of the facts in the disclosure requirement.[251] Although criticized,[252] this approach closely mirrors *Zauderer's* employment of the phrase as a singular unit rather than a two-

247. *See* Aaronson et al., *supra* note 240, at 743 (noting such a trend in secondary effects doctrine).

248. *See supra* Part II.A.2.

249. *See supra* notes 169–73 and accompanying text.

250. *See supra* Part II.A.2.

251. *See, e.g.*, Am. Beverage Ass'n v. City & County of San Francisco., 871 F.3d 884, 892–93, 895 (9th Cir. 2017) (finding that a disclosure regarding the health risks of sugary beverages was controversial because of the contested accuracy of the facts in the disclosure); CTIA–The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117–18 (9th Cir. 2017) (declaring that "'uncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience").

252. *See Repackaging* Zauderer, *supra* note 93, at 984 (criticizing this approach as banal); *see also AMI*, 760 F.3d 18, 23, 27 (D.C. Cir. 2014) (en banc)

pronged test and could mitigate most of the concerns raised in Part II.[253] First, conflating "uncontroversial" with veracity would reduce the confusion surrounding the "purely factual and uncontroversial" standard.[254] Second, this approach would dramatically reduce the potential for judicial bias because determining the factual truth of a disclosure is significantly less subjective than determining whether an entire topic is controversial.[255] Third, this approach is consistent with the consumer protection interests at the heart of commercial speech doctrine because it excels at providing truthful information to consumers, including instances where consumers have a heightened interest in that information.[256]

On the other hand, there are two significant drawbacks. First, this approach would significantly lower the bar that commercial disclosure requirements must clear, a move inconsistent with the apparent shift in First Amendment doctrine in favor of the rights of commercial speakers.[257] Rather than taking an approach of compromise and recognizing this trend (as the solution proposed in Part II.A.2 does), this approach would leave courts with fewer options to strike down disclosure requirements and invite subsequent changes that could be even more subversive to commercial disclosure requirements. Second, adoption of this approach seems somewhat unlikely because a majority of the *NIFLA* Court already apparently subscribed to Justice Thomas's reasoning even prior to the addition of Justice Kavanaugh to the bench.

Courts could also follow the D.C. Circuit in interpreting the "uncontroversial" prong of the "purely factual and uncontrover-

(implicitly critiquing this approach by concluding that "uncontroversial" must mean something different than purely factual).

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

254. *Id.*; *see also AMI*, 760 F.3d at 34 (Kavanaugh, J., concurring) ("[I]t is unclear how [courts] should assess . . . whether a mandatory disclosure is controversial.").

255. For instance, in *Casey* the Court seemed to accept the state's arguments regarding the potential health risks of abortion, when those arguments have been debunked. *See* Planned Parenthood v. Casey, 505 U.S. 833, 881–87 (1992); *see also* Bryant & Swartz, *supra* note 104, at 271 (noting that many anti-abortion arguments similar to those risks cited in *Casey* are not scientifically validated).

256. *See supra* Part II.C.

257. *See supra* Part III.A.

sial" as meaning that something about the message being compelled is controversial.[258] However, this approach fails to address the lack of clarity surrounding the "purely factual and uncontroversial" standard.[259] In addition, it only slightly narrows the window for judicial bias: determining whether a message is controversial is not that much narrower or less subjective of a determination than determining whether a topic is controversial.[260] Finally, this approach is also contrary to consumer protection interests for the same reasons identified in Part II which drive commercial speech doctrine.

CONCLUSION

Far more than many other bodies of law, *Zauderer* deference and the doctrine surrounding compelled factual disclosures in the commercial speech context are highly relevant to consumers. Despite the importance of compelled commercial disclosures to consumers, *NIFLA* reinterpreted *Zauderer* deference—particularly the "uncontroversial" prong of the "purely factual and uncontroversial" standard adopted following *Zauderer*—in a way that this Note has shown to fundamentally jeopardize commercial disclosure regimes. This Note has demonstrated three primary problems with the "purely factual and uncontroversial standard": (1) the standard is (and has been since its inception) unclear and confusing; (2) the standard post-*NIFLA* subjects commercial disclosure requirements to an impermissible potential for judicial bias; and (3) the standard as implemented in *NIFLA* separates the current doctrine from the consumer protection interests that it is supposed to serve. Ultimately, this Note shows that the best way to address all of these issues—and revitalize *Zauderer* deference as a potent tool that governments can rely on in serving consumers—is likely to replace the "purely factual and uncontroversial" standard with an expanded version of the "unduly burdensome" standard. The "unduly burdensome" standard is clearer than the "purely factual and uncontroversial" standard (aided by precedent interpreting what the standard

258. *See AMI*, 760 F.3d at 27.

259. *See supra* notes 171–73 and accompanying text; *see also NAM II*, 800 F.3d 518, 528–30 (D.C. Cir. 2015) (implying that disclosures which forced a speaker to "confess blood on its hands" or that were the subject of WTO proceedings were controversial); Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173, 206–07 (D. Mass. 2016) (seeming to suggest that a disclosure is "controversial" when the message it conveys would chill speech).

260. *See supra* Part II.B.

means in analogous First Amendment contexts), less prone to judicial bias because of its narrower scope, and returns *Zauderer* deference to its crucial focus on consumer protection. While not the only possible path forward, replacing the "purely factual and uncontroversial" standard with an expanded version of the "unduly burdensome" standard is preferable to other options—such as maintaining the post-*NIFLA* status quo or returning to one of several conflicting pre-*NIFLA* circuit court interpretations of *Zauderer*—because it addresses, if not remedies, all of the most deeply problematic aspects of the *NIFLA* majority's interpretation of *Zauderer*.