



NOTE

Limiting *NIFLA*

Andra Lim*

Abstract. Commercial warnings and disclosures, from cigarette warnings to nutrition labels, have long been staples in the government's regulatory toolkit. But the constitutional status of such warnings and disclosures appears to be unsettled after *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*). The Supreme Court's analysis in *NIFLA* relied in part on the *Zauderer* test, which courts have used to analyze the constitutionality of commercial warnings and disclosures. Although *Zauderer* has been described as similar to a rational basis test, the Court's application of it in *NIFLA* was hardly deferential. This Note first argues that courts should distinguish *NIFLA*'s application of heightened scrutiny in the typical case involving a commercial warning or disclosure. *NIFLA*'s application of searching review should be limited to cases where there is concern that the government is regulating speech based on the speaker's identity, or to cases where the speech at issue is not commercial. This Note then considers in detail what the government should have to prove to satisfy the *Zauderer* test.

* Law Clerk, U.S. Court of Appeals for the Ninth Circuit; J.D., Stanford Law School, 2019. My deepest thanks to Dan Ho for his enthusiastic encouragement and insightful guidance. I also wish to thank Yoni Pomeranz, who improved this Note by disagreeing with me (as always), and the editors of the *Stanford Law Review*, especially Julia Fine, Nicole Collins, and Ethan Amaker. Finally, I thank Matt Villarreal, whose generosity and support makes everything possible. This Note reflects only my personal views and not the views of the U.S. Court of Appeals for the Ninth Circuit or any member thereof.

Table of Contents

Introduction	129
I. The Landscape	132
A. <i>Zauderer</i>	132
B. <i>NIFLA</i>	137
C. Recent Warnings and Disclosures	141
1. Sugar-sweetened beverage warnings	142
2. Graphic cigarette warnings	143
3. Cell phone disclosures.....	144
4. Conflict minerals disclosures.....	146
5. Country-of-origin labeling.....	146
6. GMO labeling	147
7. Restaurant sanitation grading.....	148
II. Reading 1: Heightened Scrutiny.....	148
A. Ratcheting Up <i>Zauderer</i>	149
B. Narrowing the Scope of <i>Zauderer</i>	151
C. Implications	152
III. Reading 2: Limiting <i>NIFLA</i> 's Heightened Scrutiny	156
A. The Equal Protection Analogue.....	156
B. The Commercial Speech Distinction.....	158
C. Implications	159
IV. Reading 3: Categorical Exception	161
A. The Doctrine of Content-Based Categorical Exceptions	161
B. Defining the Contours of an Exception.....	162
C. Implications	167
V. A Path Forward	170
A. The Second Reading	170
B. Fleshing Out <i>Zauderer</i>	174
1. Purely factual	175
2. Uncontroversial	186
3. Unjustified and unduly burdensome	188
Conclusion.....	192

Introduction

Ever since the 1800s, governments in the United States have used commercial warnings and disclosures to help safeguard the public interest.¹ Warnings and disclosures regarding commercial products and services are now staples in the government's regulatory toolkit—and an unremarkable aspect of daily life. From cigarette warnings to nutrition labels, warnings and disclosures are supposed to be a light-touch way to achieve the government's goals of protecting public health, safety, and welfare.² Rather than outright banning or otherwise regulating products like junk food and cigarettes, warnings and disclosures arm consumers with information in the hope of "nudging" them toward socially beneficial decisions, like selecting foods that comprise a healthy diet or quitting smoking. Whether warnings and disclosures are in fact effective at influencing consumers' decisionmaking is a hotly contested policy question.³ But traditionally, warnings and disclosures had not drawn constitutional attacks.⁴

The tide has turned in recent years. Lawsuits raising First Amendment claims have thrown into question the constitutional status of commercial warnings and disclosures.⁵ And their constitutionality is even more deeply unsettled in the wake of *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*).⁶

In a 5-4 decision, the Supreme Court held that a California law requiring crisis pregnancy centers to disclose certain information on-site and in advertisements likely violated the First Amendment.⁷ The Court's analysis of the First Amendment issue included working through the *Zauderer* test⁸—

1. See *infra* Part IV.B.

2. See STEPHEN BREYER, REGULATION AND ITS REFORM 161-64 (1982) ("[D]isclosure standards offer a less restrictive means to obtain a regulatory end than do standards governing primary conduct or outright banning of a substance.").

3. Compare, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 4-11 (2014) (arguing that mandated disclosure often fails), with, e.g., ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY, at xiii (2007) (arguing that mandated disclosure can be effective).

4. See Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 322, 330-31 (2018) (explaining that plaintiffs have only recently brought First Amendment claims about labels and disclosures); see also Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411, 1413 (2015) (noting a "recent uptick" in invalidations of "legally required communications" on First Amendment grounds).

5. See *infra* Part I.C.

6. 138 S. Ct. 2361 (2018).

7. *Id.* at 2368, 2378.

8. *Id.* at 2372, 2377-78.

which originated in a case involving a government-mandated disclaimer in attorney advertising,⁹ and which lower courts have since used to analyze commercial warnings and disclosures.¹⁰ Although *Zauderer* has been described as “a test akin to the general rational basis test,”¹¹ the Court’s application of it in *NIFLA* was hardly deferential.¹² The Court did add a disclaimer to its decision: “[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”¹³ Yet given the Court’s failure to elaborate on this disclaimer any further, Justice Breyer’s dissent warned that *NIFLA* would “invite[] courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor.”¹⁴ Indeed, many observers have expressed concern about what *NIFLA*’s searching review means for everyday warnings and disclosures about commercial products and services.¹⁵ Lower courts are beginning to confront this question as well, grappling with how to read *NIFLA* and how to apply *Zauderer* going forward.¹⁶

This Note breaks new ground by comprehensively analyzing *NIFLA*’s implications for warnings and disclosures about commercial goods and

9. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 634-36 (1985).

10. See Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 979-86 (2017) (chronicling lower courts’ application of *Zauderer*).

11. Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin & Dyk, JJ., concurring); see also *id.* at 297-98 (per curiam) (explaining that the concurrence is controlling on First Amendment issues). But see *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 26-27 (D.C. Cir. 2014) (en banc) (describing *Zauderer* as “an application of [the] *Central Hudson*” intermediate scrutiny test (quoting Supplemental Brief for Appellants at 9, *Am. Meat Inst.*, 760 F.3d 18 (No. 13-5281), 2014 WL 1600434)).

12. See *infra* Part II.

13. *NIFLA*, 138 S. Ct. at 2376.

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

15. See, e.g., Teneille R. Brown, *Crisis at the Pregnancy Center: Regulating Pseudo-Clinics and Reclaiming Informed Consent*, 30 YALE J.L. & FEMINISM 221, 241-42 (2018) (arguing that *NIFLA*’s reasoning “could invalidate many state regulations”); Wendy E. Parmet et al., *The Supreme Court’s Crisis Pregnancy Center Case—Implications for Health Law*, 379 NEW ENG. J. MED. 1489, 1490-91 (2018) (contending that “*NIFLA* could weaken states’ ability to protect public health by regulating commercial speech”); Catherine Fisk, *Compulsion and Complicity*, TAKE CARE (July 12, 2018), <https://perma.cc/B7BV-K833> (asserting that *NIFLA* “cast into constitutional doubt an enormous array of regulations of lawyers and a host of other service providers”).

16. See, e.g., *Am. Beverage Ass’n v. City & County of San Francisco (Am. Beverage Ass’n II)*, 916 F.3d 749, 754-58 (9th Cir. 2019) (en banc) (applying *Zauderer* to a mandated health warning); see also Tyler Rauh, Comment, *Regulating Sugar-Sweetened Beverages*, 27 U. MIAMI BUS. L. REV. 269, 292 (2019) (discussing *American Beverage Ass’n*’s application of *Zauderer*).

services.¹⁷ Part I lays out the “burgeoning doctrine of compelled commercial speech,”¹⁸ describes the *NIFLA* decision, and introduces several examples of recent warnings and disclosures. The following Parts consider three possible readings of the *NIFLA* opinion and their consequences for the constitutional status of commercial warnings and disclosures. Part II explains that *NIFLA* could be read as requiring some form of heightened scrutiny—which many warnings and disclosures would fail. Alternatively, Part III shows that courts could distinguish *NIFLA*—and its application of heightened scrutiny—from the typical case involving a commercial warning or disclosure. *NIFLA*’s application of searching review could be limited to cases where there is concern that the government is regulating based on the speaker’s identity, or to cases where the speech at issue is not commercial. In most cases, then, the application of *Zauderer* would be closer to rational basis review than to intermediate scrutiny, and many warnings and disclosures would survive. Part IV demonstrates that *NIFLA* could also be read as suggesting that some warnings and disclosures may fall within a historically-grounded content-based categorical exception to the First Amendment. How many warnings and disclosures would fit within this potential exception depends on how the contours of the exception are defined.

Finally, given these three readings of *NIFLA*, Part V turns to the question of which reading should prevail with respect to commercial warnings and disclosures going forward. This Part argues for the reading proposed in Part III, under which *NIFLA*’s heightened scrutiny would be limited and a rational basis version of *Zauderer* would usually apply. It then considers in detail what the government should have to prove under each *Zauderer* prong.

-
17. See Lauren Fowler, Note, *The “Uncontroversial” Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651, 1674-85, 1688-89 (2019) (discussing *NIFLA*’s implications for public health regulations and one of *Zauderer*’s three prongs); Lauren L. Sherman, Note, *A Warning for Environmental Warnings: Regulatory Uncertainty in the Face of First Amendment Litigation*, 27 N.Y.U. ENVT'L L.J. 240, 294-97 (2019) (discussing *NIFLA*’s implications for environmental regulations). Much of the scholarship to date has instead focused on what *NIFLA* means for abortion-related regulations. See, e.g., Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 66-68 (2019) (contending that *NIFLA* is “primarily about five conservative Justices’ hostility to abortion rights” and “only secondarily about speech”); Helen Norton, Essay, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 464-68 (2019) (arguing that *NIFLA*’s critical error was ignoring the First Amendment interests of pregnant women). Other scholars have taken sides on *NIFLA*’s implications for professional speech. See, e.g., Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 200 (2018) (concluding that “*NIFLA* is not the end of the professional speech doctrine; it is only the beginning”); Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2017-2018 CATO SUP. CT. REV. 197, 220-21 (concluding that *NIFLA* eliminated the professional speech doctrine).
 18. Robert Post, C. Edwin Baker Lecture for Liberty, Equality, and Democracy, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 869 (2015).

I. The Landscape

To understand *NIFLA*, it is necessary to understand the *Zauderer* test that the Court applied in analyzing the First Amendment claim. This Part therefore begins by describing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*¹⁹ and by situating it within commercial speech doctrine. With this background established, this Part next describes how the *NIFLA* Court approached the *Zauderer* test and resolved the First Amendment issue. Finally, this Part summarizes several recent government regulations requiring commercial warnings or disclosures, which will be used throughout this Note to concretely illustrate the implications of the three readings of *NIFLA*.

A. *Zauderer*

The Supreme Court first held that commercial speech falls within the First Amendment's ambit in 1976.²⁰ The protection of commercial speech is founded upon consumers' "right to hear and have access to an uncensored marketplace of ideas," rather than upon companies' right to speak.²¹ In the hierarchy of First Amendment protections, commercial speech occupies a second-tier position.²² "Core" political speech receives the highest First Amendment protection,²³ regulation of such speech based on its content is subject to strict scrutiny.²⁴ By contrast, regulation of commercial speech—which is inherently content-based—is subject to more relaxed judicial review.²⁵ Commercial speech

19. 471 U.S. 626 (1985).

20. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-70 (1976).

21. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U.L. REV. 939, 973 (2009); *see also Va. State Bd. of Pharmacy*, 425 U.S. at 763 (highlighting the "consumer's interest in the free flow of commercial information").

22. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment).

23. *See id.; see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

24. *See Amanda Shanor, The New Lochner*, 2016 WIS. L. REV. 133, 146-47. Content-based regulations are considered highly suspect because of the risk that the government is out to suppress disfavored speech. *See Genevieve Lakier, Reed v Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 243-44.

25. *See Shanor, supra* note 24, at 146-47. The Court has articulated three reasons for treating commercial speech as a distinct category of speech: (1) the accuracy of commercial speech can more easily be verified by its disseminator, who presumably knows more about the product or service offered than anyone else; (2) commercial speech is essential to profits and is therefore unlikely to be chilled; and (3) deceptive commercial speech can harm consumers. *See Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24; Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1146 (2004).

regulations are generally analyzed under the *Central Hudson* intermediate scrutiny test.²⁶ The *Central Hudson* test asks whether: (1) the commercial speech concerns lawful activity and is not misleading; (2) the government interest is substantial; (3) the regulation “directly advances” the government interest; and (4) the regulation “is not more extensive than is necessary to serve that interest.”²⁷

In *Zauderer*, the Supreme Court clarified that the *Central Hudson* test does not apply across the board: When the government *compels* commercial speech, as opposed to *suppressing* commercial speech, the First Amendment analysis is more deferential.²⁸ The speech at issue in *Zauderer* was an attorney’s newspaper advertisement targeted at women who had suffered injuries after using the Dalkon Shield Intrauterine Device.²⁹ In his advertisement, attorney Philip Zauderer declared: “The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.”³⁰ The Ohio Supreme Court found that Zauderer had violated multiple state disciplinary rules.³¹ Most of those rules restricted the content of attorney advertising.³² One rule required that advertisements disclose that clients might “be liable for costs (as opposed to fees)” if their lawsuits were unsuccessful.³³

Applying the *Central Hudson* test, the Court invalidated Ohio’s restrictions on attorney advertising.³⁴ But the Court took a different approach to the mandated disclosure, holding that it did not violate the First Amendment.³⁵ By mandating disclosure of information about costs, Ohio had “not attempted to prevent attorneys from conveying information to the public; it ha[d] only required them to provide somewhat more information than they might otherwise be inclined to present.”³⁶ Commercial speech is protected precisely because of “the value to consumers of the information such speech provides,” so

26. See Robert Post, Melville B. Nimmer Memorial Lecture, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 34 (2000).

27. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

28. See Post, *supra* note 18, at 882-83.

29. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 630 (1985).

30. *Id.* at 631.

31. See *id.* at 634-35.

32. See *id.* at 631-33.

33. See *id.* at 633.

34. See *id.* at 644, 647-49.

35. See *id.* at 650-53.

36. *Id.* at 650.

Zauderer only had a “minimal” First Amendment “interest in *not* providing any particular factual information in his advertising.”³⁷

In so holding, the Court observed that the state had merely required that Zauderer “include in his advertising purely factual and uncontroversial information about the terms under which his services [would] be available.”³⁸ Ohio had “not attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion’”;³⁹ it had “attempted only to prescribe what shall be orthodox in commercial advertising.”⁴⁰ If the state had imposed “unjustified or unduly burdensome disclosure requirements,” that might have infringed Zauderer’s First Amendment rights.⁴¹ But since the disclosure requirement was “reasonably related to the State’s interest in preventing deception of consumers,” it did not run afoul of the Constitution.⁴² From Zauderer’s language, the Court has extracted a framework with at least three prongs: To comport with the Constitution, a mandated disclosure or warning must be (1) “purely factual,” (2) “uncontroversial,” and (3) not “unjustified or unduly burdensome.”⁴³

Prior to *NIFLA*, few Supreme Court cases had elaborated in detail on Zauderer’s requirements.⁴⁴ Lower courts “struggled to determine how to interpret” Zauderer.⁴⁵ They split on Zauderer’s scope—whether Zauderer only applied to disclosures meant to cure deceptive speech, or whether it also applied to disclosures supported by other governmental interests.⁴⁶ Courts also

37. *Id.* at 651.

38. *Id.*

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

40. *Id.*

41. *Id.*

42. *Id.* at 651-52.

43. See Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2372 (2018) (quoting Zauderer, 471 U.S. at 651); see also Am. Beverage Ass'n v. City & County of San Francisco (*Am. Beverage Ass'n II*), 916 F.3d 749, 756 (9th Cir. 2019) (en banc). The *NIFLA* Court also emphasized that, under Zauderer, a required disclosure must relate to “the terms under which . . . services will be available.” 138 S. Ct. at 2372 (quoting Zauderer, 471 U.S. at 651).

44. See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249-53 (2010); Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080, 1081-82 (2002) (Thomas, J., dissenting from denial of certiorari); United States v. United Foods, Inc., 533 U.S. 405, 416 (2001); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995); Ibanez v. Fla. Dep’t of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 146-47 (1994).

45. See *Repackaging Zauderer*, *supra* note 10, at 972-73.

46. See, e.g., Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc) (reading Zauderer as applying broadly); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213-14 (D.C. Cir. 2012) (reading Zauderer as only applying when the government’s interest is preventing consumer deception), overruled by *Am. Meat Inst.*, footnote continued on next page

split on *Zauderer's* content. For instance, the two circuits that considered the constitutionality of graphic cigarette warnings took different approaches to *Zauderer's* “purely factual” requirement.⁴⁷ The cigarette warnings, proposed by the FDA in 2010, consisted of text accompanied by color images—such as the slogan “Cigarettes cause fatal lung disease” accompanied by contrasting pictures of healthy and diseased lungs.⁴⁸

The D.C. Circuit held that the proposed warnings did not communicate purely factual information; they were instead “unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”⁴⁹ The Sixth Circuit’s position: “Facts can . . . provoke an emotional response . . . , but that does not magically turn such facts into opinions.”⁵⁰

Moreover, courts differed on how to interpret *Zauderer's* “uncontroversial” prong. The Ninth Circuit held that this prong means the facts recited in a

760 F.3d 18; Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 641 (6th Cir. 2010) (holding that *Zauderer* applies when the government's interest is addressing “potentially misleading” speech in addition to “inherently misleading” speech (emphasis omitted)); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (explaining that *Zauderer* applies to “nonmisleading disclosure requirements”). Because the issue of *Zauderer's* scope has already been written about at length by judges and scholars alike, it is not a focus of this Note. See, e.g., Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 ARIZ. L. REV. 421, 436 (2016) (characterizing *Zauderer* as “an application of the underlying *Central Hudson* framework to [the] specific context” of consumer deception); Peter Bozzo, *The Treachery of Images: Reinterpreting Compelled Commercial-Speech Doctrine*, 66 DEPAUL L. REV. 965, 997 (2017) (criticizing the D.C. Circuit for holding in *R.J. Reynolds Tobacco Co.* that *Zauderer* does not apply if there is no danger of consumer deception); Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 556-57 (2012) (arguing that *Zauderer* applies when the state's interest is in not curing consumer deception).

47. See *infra* notes 49-50 and accompanying text.
48. See Gardiner Harris, *F.D.A. Unveils Proposed Graphic Warning Labels for Cigarette Packs*, N.Y. TIMES (Nov. 10, 2010), <https://perma.cc/6ELK-4462>; David Ingram & Anna Yukhananov, *U.S. Court Strikes Down Graphic Warnings on Cigarettes*, REUTERS (Aug. 24, 2012, 7:35 AM), <https://perma.cc/SDR5-KFAV>.
49. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216-17.
50. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 569 (6th Cir. 2012). The court held that graphic warnings can convey facts about the health risks of smoking cigarettes. See *id.* at 561, 569. The Sixth Circuit and D.C. Circuit opinions spawned a sizeable body of literature. See generally Hilary G. Buttrick, “*You've Come a Long Way, Baby*: Cigarettes, Graphic Warning Labels, and Balancing Consumer Protection and Commercial Free Speech, 42 STETSON L. REV. 71 (2012); Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment?*, 64 HASTINGS L.J. 1467 (2013); Bryan M. Haynes et al., *Compelled Commercial Speech: The Food and Drug Administration's Effort to Smoke Out the Tobacco Industry Through Graphic Warning Labels*, 68 FOOD & DRUG L.J. 329 (2013); Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment*, 76 ALB. L. REV. 121 (2013).

disclosure must be accurate and not the subject of controversy.⁵¹ But the D.C. Circuit determined that “controversial” refers to a disclosure that is “controversial for some reason other than [a] dispute about simple factual accuracy.”⁵² In the D.C. Circuit’s view, even a factually accurate statement could fail *Zauderer* if it implicitly conveyed an ideological message.⁵³

Finally, courts have recently split on how critically to apply *Zauderer*. Throughout much of *Zauderer*’s lifespan, courts generally applied the test deferentially.⁵⁴ For instance, the Second Circuit held that a New York City ordinance requiring the disclosure of calorie content information on restaurant menus likely did not violate the First Amendment.⁵⁵ Under *Zauderer*’s rational basis review, it was enough that the City had reasonably explained that “providing calorie information . . . would help consumers make informed, healthier food choices” and thereby reduce obesity rates.⁵⁶ Proof that consumers would in fact make better dietary choices was not necessary to comply with the Constitution. In direct contrast to the Second Circuit, the D.C. Circuit held that if *Zauderer* were to apply to an SEC disclosure requirement, the requirement would fail to satisfy the test precisely because there was no concrete evidence that the disclosures would actually achieve the government’s stated goal.⁵⁷ Such exacting review under *Zauderer* may be inspired by the Court’s recent trend toward exacting review of restrictions on commercial speech under *Central Hudson*.⁵⁸

51. See CTIA—The Wireless Ass’n v. City of Berkeley (*CTIA v. Berkeley I*), 854 F.3d 1105, 1117 (9th Cir. 2017) (“[U]ncontroversial’ in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience.”), vacated, 138 S. Ct. 2708 (2018), remanded to 928 F.3d 832 (9th Cir. 2019), cert. denied, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019).

52. Nat'l Ass'n of Mfrs. v. SEC (*Nat'l Ass'n of Mfrs. II*), 800 F.3d 518, 528 (D.C. Cir. 2015) (alteration in original) (quoting Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc)).

53. See *id.* at 529-30.

54. See *Repackaging Zauderer*, *supra* note 10, at 973.

55. See N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 117, 134-36 (2d Cir. 2009).

56. See *id.* at 134-36.

57. See *Nat'l Ass'n of Mfrs. II*, 800 F.3d at 524-27; see also Elizabeth A. Aronson, Note, *The First Amendment and Regulatory Responses to Workplace Sexual Misconduct: Clarifying the Treatment of Compelled Disclosure Regimes*, 93 N.Y.U. L. REV. 1201, 1220-22 (2018) (observing that some courts have applied heightened scrutiny to mandated disclosures). For more detail on the SEC disclosure requirement at issue in *National Ass'n of Manufacturers*, see generally Part I.C.4 below.

58. See *Repackaging Zauderer*, *supra* note 10, at 973. Over time, the Court has come to apply *Central Hudson* stringently, such that the test resembles strict scrutiny more than intermediate scrutiny. See, e.g., Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 509-13 (2015). The turning point for more rigorous application of *Central Hudson* was *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Berman, *supra*, at 510-11.

In the years before *NIFLA*, then, there were several questions percolating in the lower courts regarding how to apply the *Zauderer* test to commercial warnings and disclosures.

B. *NIFLA*

In 2015, the California legislature passed a law requiring crisis pregnancy centers to disclose certain information.⁵⁹ From the state's perspective, the law was intended to address the centers' practice of deceiving pregnant women by holding themselves out as full-service clinics, and then discouraging women who sought their services from obtaining abortions by confusing them, misleading them, or even intimidating them.⁶⁰ Licensed clinics were required to disseminate the following notice on-site: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."⁶¹ Clinics not licensed by the state and not staffed by licensed medical professionals were required to provide a notice both on-site and in advertisements: "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."⁶²

Crisis pregnancy centers sued California and sought a preliminary injunction.⁶³ The Ninth Circuit held that the plaintiffs were unlikely to succeed in showing that the notices violated the First Amendment.⁶⁴ Acknowledging that the licensed clinic notice was a content-based regulation—and that the Supreme Court's recent decision in *Reed v. Town of Gilbert*⁶⁵ had "expressly stated" that such regulations must satisfy strict scrutiny⁶⁶—the Ninth Circuit nonetheless determined that strict scrutiny was inappropriate.⁶⁷

59. Reproductive FACT Act, ch. 700, 2015 Cal. Stat. 5351 (codified at CAL. HEALTH & SAFETY CODE §§ 123470-123473 (West 2019)), *invalidated in part* by Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

60. See Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 829 (9th Cir. 2016) (discussing the legislative history of the Reproductive FACT Act), *rev'd sub nom. NIFLA*, 138 S. Ct. 2361; see also Brief for the State Respondents at 6-8, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140), 2018 WL 1027815.

61. HEALTH & SAFETY § 123472(a)(1).

62. *Id.* §§ 123471(b), 123472(b)(1)-(3).

63. *Harris*, 839 F.3d at 831-32.

64. *Id.* at 845.

65. 135 S. Ct. 2218 (2015).

66. *Harris*, 839 F.3d at 836-37.

67. *Id.* at 837.

Circuit precedent recognized “professional speech” as a distinct category of speech with a distinct set of rules.⁶⁸ The court held that the licensed clinic notice requirement regulated professional speech because licensed clinics “offer medical and clinical services”—such as ultrasounds and medical referrals—“in a professional context.”⁶⁹ The notice was therefore subject to intermediate scrutiny, which it survived.⁷⁰

With respect to the unlicensed clinic notice, it was harder to argue that the notice regulated professional speech⁷¹. Unlicensed clinics did not offer many of the medical services that licensed clinics did.⁷² For instance, two of the plaintiff crisis pregnancy centers offered nonmedical services ranging from educational programs to the provision of maternity clothes.⁷³ Ultimately, the Ninth Circuit appeared to implicitly reject the crisis pregnancy centers’ argument that, by definition, clinics without licensed medical professionals were unable to engage in professional speech.⁷⁴ But the Ninth Circuit declined to decide whether the clinics were in fact engaged in professional speech.⁷⁵ Instead, it applied strict scrutiny and concluded that the notice satisfied this test.⁷⁶ The Ninth Circuit held that the state had a compelling interest in informing pregnant women when they are visiting an unlicensed clinic that is not subject to the same regulations as clinics staffed by licensed professionals.⁷⁷ And the unlicensed clinic notice was narrowly tailored to this interest.⁷⁸ The notice helped to “fully inform[]” pregnant women and was “only one sentence long.”⁷⁹

68. *See id.* at 839 (explaining that *Pickup v. Brown* defined professional speech as “speech that occurs between professionals and their clients in the context of their professional relationship”); *see also Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018).

69. *Id.* at 839-40.

70. *Id.* at 840-42.

71. In fact, California did not argue that the unlicensed clinic notice regulated professional speech in its Ninth Circuit briefing. *See Appellees' Answering Brief* at 42-49, *Harris*, 839 F.3d 823 (No. 16-55249), 2016 WL 1619316.

72. *See Harris*, 839 F.3d at 843.

73. *See Appellees' Answering Brief*, *supra* note 71, at 12-13.

74. *See Harris*, 839 F.3d at 843 (explaining that the unlicensed clinics “offer some professional services”); *Brief for Appellants* at 51, *Harris*, 839 F.3d 823 (No. 16-55249), 2016 WL 1175481.

75. *See Harris*, 839 F.3d at 843.

76. *See id.* at 843-44.

77. *Id.* at 843.

78. *Id.*

79. *Id.*

The Supreme Court reversed.⁸⁰ It first considered the licensed clinic notice. Because the notice was a content-based regulation of speech, the Court explained, it was subject to strict scrutiny—unless either of two exceptions applied.⁸¹ First, laws may regulate conduct, “even though that conduct incidentally involves speech.”⁸² This exception did not apply because the licensed clinic notice did not regulate conduct; it “regulate[d] speech as speech.”⁸³ Second, laws that require the disclosure of “factual, noncontroversial information in . . . ‘commercial speech’” receive “more deferential review” under *Zauderer*.⁸⁴ This exception did not apply, either.⁸⁵ While the *Zauderer* Court upheld the disclosure of “information about the terms under which . . . services will be available,”⁸⁶ the licensed clinic notice required disclosure of “information about state-sponsored services” and did not “relate[] to the services that licensed clinics provide.”⁸⁷ And, the Court added, abortion is “anything but an ‘uncontroversial’ topic.”⁸⁸ With these last few words, the Court made clear for the first time that *Zauderer’s* “uncontroversial” prong at least refers to the subject matter of the disclosure—without providing any guidance to lower courts about how to determine whether a subject matter is “controversial” such that the disclosure fails constitutional scrutiny. The Court’s interpretation of “uncontroversial” left lower courts free to remove many disclosures from *Zauderer’s* sweep based solely on the fact they concern matters that are publicly debated.⁸⁹

The Court then considered the Ninth Circuit’s recognition of a third exception to strict scrutiny for professional speech. Although the Court concluded that the Ninth Circuit had failed to “[i]dentify] a persuasive reason” for exempting professional speech from strict scrutiny, it also declined to “foreclose the possibility” that there might be a good “reason for treating professional speech as a unique category.”⁹⁰ In order to have its cake and eat it

80. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2378 (2018).

81. *Id.* at 2370-72.

82. *Id.* at 2372.

83. *Id.* at 2373-74.

84. *Id.* at 2372.

85. *Id.*

86. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

87. *Id.*

88. *Id.*

89. See *The Supreme Court, 2017 Term—Leading Cases: Compelled Speech*, 132 HARV. L. REV. 347, 352-53 (2018).

90. See *NIFLA*, 138 S. Ct. at 2375; see also *Haupt, supra* note 17, at 186-87 (explaining that the Court “rejected the professional speech analysis offered by the Ninth Circuit” and “was suspicious of professional speech as a category of speech,” but nevertheless “left open footnote continued on next page

too, the Court did not hold that strict scrutiny applied to the licensed clinic notice. Instead, the Court applied intermediate scrutiny,⁹¹ apparently leaving open the possibility that a rule of intermediate scrutiny for professional speech (like the one the Ninth Circuit adopted⁹²) could apply in a future case. The California law failed intermediate scrutiny because it was “wildly underinclusive,” exempting many clinics—but not crisis pregnancy centers—from the notice requirement.⁹³ For instance, the law exempted community health clinics not primarily focused on family planning or pregnancy-related services, as well as federal clinics that were able to enroll women in California’s family planning and pregnancy services.⁹⁴ Moreover, the Court said, the State could educate pregnant women in other ways, such as by running its own public information campaign.⁹⁵

At the end of its analysis of the licensed clinic notice, the Court appended a one-sentence disclaimer: “[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”⁹⁶

The Court’s consideration of the unlicensed clinic notice involved fewer twists and turns. Holding that this notice failed even *Zauderer*’s relatively low standard, the Court declined to decide whether *Zauderer* was in fact the correct test.⁹⁷ The Court also did not decide what sort of state interest was required to satisfy *Zauderer* because California had failed to “demonstrate[] any justification” for the notice that was “more than ‘purely hypothetical.’”⁹⁸ While the Ninth Circuit had characterized California’s interest as “informing pregnant women when they are using the medical services of” an unlicensed clinic,⁹⁹ the Court characterized the government interest as informing pregnant women *who would otherwise be unaware* about the unlicensed status of

the possibility that a better justified . . . disclosure requirement may pass constitutional muster”).

91. See *NIFLA*, 138 S. Ct. at 2375-76.

92. See Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 841-42 (9th Cir. 2016), *rev'd sub nom. NIFLA*, 138 S. Ct. 2361.

93. See *NIFLA*, 138 S. Ct. at 2375-76 (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011)).

94. See *id.*

95. See *id.* at 2376.

96. *Id.*

97. See *id.* at 2376-77.

98. *Id.* at 2377 (quoting *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994)).

99. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 843 (9th Cir. 2016), *rev'd sub nom. NIFLA*, 138 S. Ct. 2361.

a clinic—and then pointed out that the state had failed to provide evidence that pregnant women were indeed unaware.¹⁰⁰

Moving on to *Zauderer*'s command that disclosures not be “unduly burdensome,” the Court concluded that the unlicensed clinic notice fell short in two ways (neither of which the Ninth Circuit’s opinion had discussed).¹⁰¹ First, the notice was both overinclusive and underinclusive. Facilities had to disseminate the notice regardless of what they “sa[id] on site or in their advertisements.”¹⁰² And the notice requirement “cover[ed] a curiously narrow subset of speakers.”¹⁰³ The notice requirement applied to clinics that primarily provide pregnancy-related services, but not to clinics that primarily provide family planning services—so a clinic that offered pregnancy tests would be covered, but a clinic that offered nonprescription contraceptives would not.¹⁰⁴ Second, the notice was unduly burdensome in the sense that it “drown[ed] out the facility’s own message.”¹⁰⁵ Because a billboard saying “Choose Life” might also have to include “a 29-word statement from the government, in as many as thirteen different languages,” the notice requirement “effectively rule[d] out’ the possibility of having such a billboard in the first place.”¹⁰⁶

Strikingly, the Court’s application of *Zauderer* to the unlicensed clinic notice largely mirrored its application of intermediate scrutiny to the licensed clinic notice.¹⁰⁷ Under both *Zauderer* and intermediate scrutiny, the Court asked whether the notice requirement at issue was overinclusive and/or underinclusive—and found both notice requirements wanting. The Court thus applied *Zauderer* critically rather than deferentially, as though it were an intermediate scrutiny test, not a rational basis test.

C. Recent Warnings and Disclosures

When it comes to assessing the constitutionality of commercial warnings and disclosures, *NIFLA* is now part of the equation. This Subpart catalogs

100. See *NIFLA*, 138 S. Ct. at 2377.

101. See *id.* at 2377-78.

102. *Id.* at 2377.

103. *Id.*

104. See *id.*

105. See *id.* at 2378.

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

107. Indeed, Justice Breyer’s dissent pointed out that the Court cited precedents applying the standard of review for speech restrictions—intermediate scrutiny—to the unlicensed clinic notice. See *id.* at 2389-90 (Breyer, J., dissenting) (criticizing the majority for “appl[ying] a searching standard of review based on our precedents that deal with speech restrictions, not disclosures”).

several recent warnings and disclosures, some of which were challenged under the First Amendment prior to *NIFLA*. The aim of this Subpart is to provide concrete examples of the sorts of regulations that occupy a constitutional gray area post-*NIFLA*, to which the following Parts will then return in fleshing out the implications of each possible reading of *NIFLA*. It is important to bear in mind, though, that it is not just recent regulations that raise constitutional questions; commercial disclosures and warnings that have been in place for decades raise the very same questions.

1. Sugar-sweetened beverage warnings

The first, and most important, post-*NIFLA* court of appeals opinion deciding a compelled commercial speech issue is *American Beverage Ass'n v. City & County of San Francisco*.¹⁰⁸

The case involved a local ordinance requiring that some sugar-sweetened beverage (SSB) advertisements contain the following: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.”¹⁰⁹ The ordinance was part of the City’s response to the obesity epidemic¹¹⁰—the dramatic increase in the proportion of Americans who are overweight or obese.¹¹¹ By requiring SSB warnings, the City hoped to “promote informed consumer choice,” which “may result in reduced caloric intake and improved diet and health” and “thereby reduc[e] illnesses to which SSBs contribute and associated economic burdens.”¹¹²

Jurisdictions other than San Francisco have considered similar warnings for similar reasons. SSB warning bills have been proposed in the California, New York, and Washington state legislatures, and the Baltimore City Council considered an SSB warning measure.¹¹³ At least one other California

108. *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (en banc). Following *American Beverage Ass'n*, a three-judge panel of the Ninth Circuit issued another decision addressing compelled commercial speech, *CTIA--The Wireless Ass'n v. City of Berkeley (CTIA v. Berkeley II)*, 928 F.3d 832 (9th Cir. 2019), which had been held pending the en banc panel’s decision in *American Beverage Ass'n*.

109. S.F., CAL., HEALTH CODE § 4203(a) (2019); *see also Am. Beverage Ass'n II*, 916 F.3d at 753.

110. *See* S.F., CAL., HEALTH CODE § 4201. The ordinance additionally notes that SSBs are linked to “other health problems.” *See id.*

111. *See* OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY, at XI (2001), <https://perma.cc/45EH-TQUN>.

112. S.F., CAL., HEALTH CODE § 4201.

113. Lucy Popova, *Sugar-Sweetened Beverage Warning Labels: Lessons Learned from the Tobacco Industry*, 44 J. CAL. DENTAL ASS'N 633, 636 (2016).

jurisdiction was interested in SSB warnings, pending the fate of San Francisco's ordinance.¹¹⁴

In 2019, an en banc panel of the Ninth Circuit issued a splintered decision on the constitutionality of the ordinance.¹¹⁵ The majority concluded on narrow grounds that the industry plaintiffs who sued San Francisco were likely to succeed on the merits of their First Amendment claim.¹¹⁶ In so holding, the majority applied *Zauderer* in a way it believed was consistent with *NIFLA*.¹¹⁷ Reasoning that *NIFLA*'s "unjustified or unduly burdensome" prong was the most "useful" prong to begin with, the majority held that the SSB warning, which would take up 20% of the physical area of the advertisement, failed this requirement.¹¹⁸ The judges who concurred would have reached the same result, but would have taken other approaches to the First Amendment issue. Judge Christen, joined by Chief Judge Thomas, thought the SSB warning failed *Zauderer*'s "threshold requirement of factual accuracy."¹¹⁹ For different reasons, Judge Ikuta and Judge Nguyen believed that heightened scrutiny applied instead of *Zauderer*.¹²⁰

Because *American Beverage Ass'n* is the first court of appeals case to meaningfully grapple with what *NIFLA* means for compelled commercial speech, this Note will return to this case and the issues it raised throughout.

2. Graphic cigarette warnings

Federal law has required warnings on cigarette packages since 1965.¹²¹ The warnings currently featured on packages, which have been in place for more than a quarter of a century, contain text such as "Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy" and "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."¹²² These

114. See SARAH H. CODY, PUB. HEALTH DEP'T, CTY. OF SANTA CLARA, SUGAR SWEETENED BEVERAGES REPORT 2 (2017), <https://perma.cc/C95L-A4DW>.

115. Am. Beverage Ass'n v. City & County of San Francisco (*Am. Beverage Ass'n II*), 916 F.3d 749 (9th Cir. 2019) (en banc).

116. See *id.* at 756-57.

117. See *id.* at 756.

118. See *id.* at 756-57.

119. See *id.* at 765-67 (Christen, J., concurring in part and concurring in the judgment).

120. See *id.* at 761-63 (Ikuta, J., dissenting from most of the reasoning, concurring in the result); *id.* at 767-69 (Nguyen, J., concurring in the judgment).

121. See Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C. § 1333 (2018)); Heikki Hiilamo et al., *The Evolution of Health Warning Labels on Cigarette Packs: The Role of Precedents, and Tobacco Industry Strategies to Block Diffusion*, TOBACCO CONTROL, Jan. 2014, at 1, 3.

122. Cigarette Labeling and Warning Statement Requirements, U.S. Food & Drug Admin., <https://perma.cc/ECK7-FMZ8> (last updated Oct. 16, 2019); see also Tobacco Control
footnote continued on next page

warnings are widely viewed as ineffective.¹²³ To strengthen cigarette warnings, the 2009 Family Smoking Prevention and Tobacco Control Act required new graphic warning labels, consisting of both text and images, that cover 50% of the front and back packaging.¹²⁴ Pursuant to the Act, the FDA initiated rulemaking proceedings and issued a final rule prescribing nine graphic warnings.¹²⁵

In 2012, the Sixth Circuit rejected a facial First Amendment challenge to the Act's requirement of graphic warnings.¹²⁶ That same year, the D.C. Circuit held that the FDA's nine warnings violated the First Amendment.¹²⁷ The federal government decided not to seek review of the D.C. Circuit opinion, and the FDA went back to the drawing board.¹²⁸ In 2018, a district court held that the FDA had "unlawfully withheld" and "unreasonably delayed" issuing a final rule on graphic cigarette warnings and ordered the FDA to expedite the process.¹²⁹ In August 2019, the FDA issued a proposed rule requiring new graphic warnings.¹³⁰

3. Cell phone disclosures

In 1996, the FCC adopted limits that cap the emission of radio-frequency energy from various electronic devices, including cell phones.¹³¹ The limits are

Legal Consortium, Tobacco Product Labeling and Advertising Warnings: Federal Regulation of Tobacco 1 (2009), <https://perma.cc/85ER-8QF7>.

123. *See, e.g.*, H.R. REP. NO. 111-58, pt. 1, at 4 (2009).

124. *See* Pub. L. No. 111-31, § 201(a), 123 Stat. 1776, 1842-45 (2009) (codified at 15 U.S.C. § 1333(a)(1)-(2) (2018)).

125. *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2019)).

126. *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 561-69 (6th Cir. 2012); *supra* note 50 and accompanying text.

127. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012); *supra* note 49 and accompanying text.

128. *See* Cigarette Health Warnings, U.S. FOOD & DRUG ADMIN., <https://perma.cc/L9NM-GG8Y> (last updated Oct. 16, 2019).

129. *See* Am. Acad. of Pediatrics v. FDA, 330 F. Supp. 3d 657, 660, 667 (D. Mass. 2018).

130. *See* Tobacco Products; Required Warnings for Cigarette Packages and Advertisements, 84 Fed. Reg. 42,754 (proposed Aug. 16, 2019) (to be codified at 21 C.F.R. pt. 1141).

131. *See* CTIA—The Wireless Ass'n v. City of Berkeley (*CTIA v. Berkeley II*), 928 F.3d 832, 838-39 (9th Cir.) (citing Guidelines for Evaluating the Environmental Effects of Radio-Frequency Radiation, 61 Fed. Reg. 41,006, 41,006-07 (Aug. 7, 1996)), *cert. denied*, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019). The FCC rejected an industry proposal to exclude cell phones from the rule. *See id.* at 839 (citing Guidelines for Evaluating the Environmental Effects of Radio-Frequency Radiation, FCC 96-326, ¶¶ 62-63 (Aug. 1, 1996)).

set well below the level where radio-frequency energy could affect the body.¹³² When testing whether cell phones comply with the limit, government protocols assume that consumers will carry cell phones ten to fifteen millimeters away from the body—in a holster or belt clip, for instance, but not in a pocket or bra.¹³³ It is therefore recommended that “cell phones be carried away from the body, or be used in conjunction with hands-free devices.”¹³⁴ To inform consumers of this recommendation, the City of Berkeley passed an ordinance in 2015 requiring cell phone retailers to provide the following notice:

To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation.¹³⁵

A cell phone trade association sued Berkeley, and the Ninth Circuit held in 2017 that the plaintiff was unlikely to succeed on the merits of its First Amendment claim.¹³⁶ The Supreme Court granted certiorari and vacated the Ninth Circuit’s judgment in light of *NIFLA*.¹³⁷ On remand, the Ninth Circuit again concluded that the plaintiff’s First Amendment claim was likely to fail.¹³⁸

San Francisco similarly passed a cell phone disclosure ordinance in 2010, which was amended the following year.¹³⁹ In an unpublished disposition issued in 2012, the Ninth Circuit concluded that the ordinance likely violated the First Amendment.¹⁴⁰ San Francisco settled the case the following year.¹⁴¹

132. See *id.* at 839-40 (citing Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies, 28 FCC Rcd. 3498, 3582 (Mar. 29, 2013)).

133. See *id.* at 837-38.

134. *Id.* (quoting BERKELEY, CAL., MUN. CODE § 9.96.010 (2015)).

135. *Id.* at 838 (quoting BERKELEY, CAL., MUN. CODE § 9.96.030(A)).

136. See CTIA—The Wireless Ass’n v. City of Berkeley (*CTIA v. Berkeley I*), 854 F.3d 1105, 1110, 1121 (9th Cir. 2017), vacated, 138 S. Ct. 2708 (2018), remanded to 928 F.3d 832 (9th Cir.), cert. denied, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019).

137. *CTIA*, 138 S. Ct. 2708.

138. See CTIA—The Wireless Ass’n v. City of Berkeley (*CTIA v. Berkeley II*), 928 F.3d 832, 849 (9th Cir. 2019).

139. CTIA—The Wireless Ass’n v. City and County of San Francisco, 827 F. Supp. 2d 1054, 1056-58 (N.D. Cal. 2011), aff’d, 494 F. App’x 752 (9th Cir. 2012).

140. See *CTIA*, 494 F. App’x 752, 754.

141. See Kent German, *San Francisco Finally Kills Cell Phone Radiation Law*, CNET (May 8, 2013, 11:30 AM PDT), <https://perma.cc/EM82-9K7N>.

4. Conflict minerals disclosures

The trade of “conflict minerals” has helped finance armed groups fighting a bloody war in the Democratic Republic of the Congo.¹⁴² The 2010 Dodd-Frank Act required the SEC to promulgate regulations under which manufacturers using conflict minerals would have to make disclosures about the minerals.¹⁴³ Congress “chose to use the securities laws disclosure requirements to bring greater public awareness” to conflict minerals, in the hope that it would “inhibit the ability of armed groups . . . to fund their activities by exploiting the trade in conflict minerals.”¹⁴⁴ One cosponsor of the legislation stated that the Act would also inform decisionmaking by consumers and investors.¹⁴⁵ The final rule required certain manufacturers to file reports with the SEC stating that their products had “not been found to be ‘DRC conflict free’” and to post the same language on their websites.¹⁴⁶ The D.C. Circuit held in 2015 that the SEC rule violated the First Amendment.¹⁴⁷

5. Country-of-origin labeling

A federal statute, originally passed in 2002, requires country-of-origin labeling on certain foods, including some meat products.¹⁴⁸ Members of Congress said the law would empower consumers to make informed choices about their purchases, such as choosing to purchase meat that had been produced under U.S. health and hygiene supervision, or choosing not to purchase food from a country with a recent disease outbreak.¹⁴⁹ The Secretary of Agriculture issued a rule requiring the disclosure of the location of each step in the meat production process.¹⁵⁰ For example, “meat derived from an animal

142. See *Nat'l Ass'n of Mfrs. v. SEC* (*Nat'l Ass'n of Mfrs. I*), 748 F.3d 359, 362-63 (D.C. Cir. 2014), overruled by *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), and aff'd on reh'g, 800 F.3d 518, 530 (D.C. Cir. 2015).

143. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(b), 124 Stat. 1376, 2213-15 (2010) (codified at 15 U.S.C. § 78m(p) (2018)); see also *Nat'l Ass'n of Mfrs. I*, 748 F.3d at 363.

144. Conflict Minerals, 77 Fed. Reg. 56,274, 56,275-76 (Sept. 12, 2012).

145. See *id.*

146. *Nat'l Ass'n of Mfrs. I*, 748 F.3d at 364, 370 (quoting Conflict Minerals, 77 Fed. Reg. at 56,322).

147. See *Nat'l Ass'n of Mfrs. v. SEC* (*Nat'l Ass'n of Mfrs. II*), 800 F.3d 518, 530 (D.C. Cir. 2015), aff'g on reh'g 748 F.3d 359 (D.C. Cir. 2014).

148. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10816, 116 Stat. 134, 533-34 (codified as amended at 7 U.S.C. §§ 1638, 1638a (2018)); see also *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc).

149. See *Am. Meat Inst.*, 760 F.3d at 24.

150. Mandatory Country of Origin Labeling, 78 Fed. Reg. 31,367 (May 24, 2013) (codified at 7 C.F.R. pts. 60, 65 (2019)); see also *Am. Meat Inst.*, 760 F.3d at 21.

born in Canada and raised and slaughtered in the United States” would be required to bear the label “Born in Canada, Raised and Slaughtered in the United States.”¹⁵¹ In 2014, the D.C. Circuit rejected the trade association plaintiffs’ motion for a preliminary injunction, holding that they were unlikely to succeed on their First Amendment claim.¹⁵²

6. GMO labeling

In 2016, Congress passed a law requiring labeling for foods that contain genetically modified organisms (GMOs).¹⁵³ The USDA’s final rule, issued in 2018, gives manufacturers, importers, and retailers several options for how to disclose the presence of GMOs, including text disclosures (saying either “bioengineered food” or “contains a bioengineered food ingredient”); graphic disclosures (featuring a circle with the word “bioengineered” and a colorful landscape); or electronic or digital link disclosures (such as QR codes that consumers can scan for more information).¹⁵⁴ The federal GMO labeling requirement has not drawn a First Amendment challenge.

But the federal law was passed in part to preempt state legislation like Vermont’s 2014 genetically engineered (GE) labeling law, which did prompt a First Amendment challenge from industry trade associations.¹⁵⁵ The Vermont law had more bite than the federal law, requiring GE foods to be labeled with “produced with genetic engineering,” “partially produced with genetic engineering,” or “may be produced with genetic engineering,” depending on the kind of food.¹⁵⁶ The district court rejected the plaintiffs’ motion for a

151. *Am. Meat Inst.*, 760 F.3d at 21.

152. *See id.* at 20, 27.

153. Act of July 29, 2016, Pub. L. No. 114-216, § 1, 130 Stat. 834, 835-38 (codified at 7 U.S.C. §§ 1639, 1639b (2018)).

154. *See* National Bioengineered Food Disclosure Standard, 83 Fed. Reg. 65,814, 65,873-74 (Dec. 21, 2018) (codified at 7 C.F.R. pt. 66.100-108 (2019)).

155. *See* Grocery Mfrs. Ass’n v. Sorrell, 102 F. Supp. 3d 583, 594 (D. Vt. 2015); *see also* Jordan James Fraboni, Note, *A Federal GMO Labeling Law: How It Creates Uniformity and Protects Consumers*, 32 BERKELEY TECH. L.J. 563, 572-74 (2017) (discussing preemption). While the Vermont labeling law referred to GE foods rather than GMOs, the two terms are often used interchangeably. *See, e.g.*, U.S. Nat’l Library of Med., Nat’l Insts. of Health, *Genetically Engineered Foods*, MEDLINEPLUS, <https://perma.cc/A42Z-5L7T> (last updated Oct. 2, 2019).

156. *See* *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 595-96 (quoting VT. STAT. ANN. tit. 9, § 3043(b) (2016)). By contrast, the federal law allows GMO food products to be labeled with only a digital link that provides consumers access to more information. *See* 7 U.S.C. § 1639b(b)(2)(D).

preliminary injunction.¹⁵⁷ After President Obama signed the federal GMO labeling bill into law, the plaintiffs withdrew their appeal.¹⁵⁸

7. Restaurant sanitation grading

In recent years, “targeted transparency” reforms have attracted attention. The idea is that effective forms of disclosure “are ‘targeted’: simplified disclosures embedded at the point” where consumers decide whether to use a particular product or service.¹⁵⁹ Examples include “[a]ge grading of children’s toys” and “star ratings for SUV rollover risk.”¹⁶⁰ And the most touted example is restaurant sanitation grading, which captures inspection results with letter grades (“A,” “B,” or “C”) that restaurants post in their entryways.¹⁶¹ The goal of grading is to reduce the risk of foodborne illness. But empirical research has demonstrated that the design of the criteria used for inspection can affect how meaningful the resulting grades are.¹⁶² In New York, which uses complex inspection criteria, grades “exhibit little substantive consistency,” such that a grade “in one year predicts little about the restaurant’s cleanliness down the road.”¹⁶³ To date, restaurant sanitation grading has not been subject to challenge under the First Amendment.

The foregoing examples illustrate what is at stake as courts grapple with applying *NIFLA* to commercial warnings and disclosures. The following Parts explore three different readings of *NIFLA* and whether the warnings and disclosures described above would likely survive or fail constitutional scrutiny under each reading.

II. Reading 1: Heightened Scrutiny

The first possible reading of *NIFLA* is that it requires heightened scrutiny for warnings and disclosures about commercial products and services. There are two ways in which *NIFLA* might be read to require heightened scrutiny—as helpfully showcased by the *American Beverage Ass’n* case.¹⁶⁴ *Zauderer* is the

157. See *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 645-48.

158. See Stipulation of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(ii) at 4, *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d 583 (No. 5:14-cv-00117), ECF No. 160.

159. Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 578 (2012).

160. *Id.* at 579.

161. *Id.* at 582.

162. See *id.* at 638-43.

163. *Id.* at 586-87.

164. Am. Beverage Ass’n v. City & County of San Francisco (*Am. Beverage Ass’n II*), 916 F.3d 749 (9th Cir. 2019) (en banc).

framework that courts have used to analyze compelled commercial speech, and *NIFLA* applied *Zauderer* as though it were a heightened scrutiny test. Furthermore, *NIFLA* seemed to indicate that there are cases where *Zauderer* does not apply—in which instance a more searching form of review would presumably apply instead. *NIFLA* suggested that *Zauderer* would not be applicable if the compelled speech was not “purely factual” and “uncontroversial” and left open the possibility that *Zauderer* only applies to warnings and disclosures meant to address consumer deception.¹⁶⁵

A. Ratcheting Up *Zauderer*

NIFLA’s application of *Zauderer* was hardly akin to rational basis review. One of the hallmarks of rational basis review is that the government’s means need not be closely tailored to its desired ends; the means need only be reasonably related to the ends.¹⁶⁶ *Zauderer* itself stated that the disclosure at issue in that case would be constitutional if it was “reasonably related” to the government’s interest.¹⁶⁷ And *Zauderer* explicitly rejected the “argument that a disclosure requirement is subject to attack if it is ‘under-inclusive’—that is, if it does not get at all facets of the problem it is designed to ameliorate.”¹⁶⁸ As the *Zauderer* Court explained, governments are generally “entitled to attack problems piecemeal.”¹⁶⁹ But when analyzing the unlicensed clinic notice under *Zauderer*, the *NIFLA* Court found that it was problematic for the precise reason that it was underinclusive (as well as overinclusive). The Court held that the notice was “unduly burdensome” in part because “a curiously narrow subset of speakers” had to comply with the notice requirement, and because clinics had to disclose that they were unlicensed regardless of what they “sa[id] on site or in their advertisements.”¹⁷⁰

During the en banc oral arguments in *American Beverage Ass’n*, some of the questions seemed to acknowledge that *NIFLA* might require applying *Zauderer* like a heightened scrutiny test. For example, Judge Hurwitz observed that the district court had determined that an underinclusiveness analysis was not part

165. See Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2372, 2377 (2018) (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

166. See, e.g., *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 562-64 (1947).

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

168. *Id.* at 651 n.14.

169. *Id.*

170. See *NIFLA*, 138 S. Ct. at 2377-78.

of *Zauderer*.¹⁷¹ Now that *NIFLA* had made clear that *Zauderer* does in fact require an underinclusiveness analysis, Judge Hurwitz asked, why should the Ninth Circuit not simply remand to the district court for a first pass at the analysis?¹⁷²

And the opinion the Ninth Circuit ultimately issued in *American Beverage Ass'n* suggests that the hint the court took from *NIFLA* was that *Zauderer* should be applied more rigorously. At the outset, the Ninth Circuit decided that none of the Court's precedents required it to apply *Zauderer*'s criteria—"(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome"—"in any particular order."¹⁷³ Beginning and ending with the third criterion, the Ninth Circuit concluded that the industry plaintiffs were likely to succeed on their First Amendment claim.¹⁷⁴ San Francisco's ordinance was unjustified "when balanced against its likely burden on protected speech" because it required the warnings to occupy 20% of SSB advertisements, even though the City's own expert had relied on a study using 10% warnings in concluding that the ordinance would be effective.¹⁷⁵ The Ninth Circuit thereby suggested that the City might have to show that its goals could not "be accomplished with a smaller warning."¹⁷⁶ Notably, the Ninth Circuit's inquiry appeared to resemble one prong of the *Central Hudson* intermediate scrutiny test, which asks whether the government regulation "is not more extensive than is necessary to serve that interest."¹⁷⁷ Reading the *NIFLA* tea leaves, the Ninth Circuit may have essentially imported part of the intermediate scrutiny test into *Zauderer*.

The Ninth Circuit also seemed to take a scrutinizing approach when applying *Zauderer*'s "not unduly burdensome" requirement. The court held that San Francisco had failed to show "that the contrasting rectangular border containing a warning that covers 20% of the advertisement does not 'drown[] out' Plaintiffs' messages and 'effectively rule[] out the possibility of having [an advertisement] in the first place.'"¹⁷⁸ Yet the Ninth Circuit admitted that the SSB warnings were not as "onerous" as the notices in *NIFLA*,¹⁷⁹ which the

171. Oral Argument at 36:16-46, Am. Beverage Ass'n v. City & County of San Francisco (*Am. Beverage Ass'n II*), 916 F.3d 749 (9th Cir. 2019) (No. 16-16072), <https://perma.cc/4EVQ-TCXU> [hereinafter *American Beverage Ass'n* Oral Argument].

172. *Id.* at 36:51-59.

173. *Am. Beverage Ass'n II*, 916 F.3d at 756.

174. *See id.* at 756-58.

175. *See id.* at 757.

176. *See id.*

177. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

178. *Am. Beverage Ass'n II*, 916 F.3d at 757 (alterations in original) (quoting Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2378 (2018)).

179. *Id.*

Supreme Court said might require “a 29-word statement from the government, in as many as 13 different languages.”¹⁸⁰

B. Narrowing the Scope of *Zauderer*

Under *NIFLA*, heightened scrutiny might also apply to warnings and disclosures about commercial products and services without being filtered through the entire *Zauderer* framework. First, the Supreme Court’s decision in *NIFLA* may indicate that *Zauderer* only applies to “purely factual” and “uncontroversial” disclosures. After concluding that the licensed clinic notice flunked this requirement—in part because abortion is “anything but an ‘uncontroversial’” topic¹⁸¹—the Court declared that “*Zauderer* has no application here.”¹⁸² If this threshold condition to *Zauderer* were applied strictly, it could exclude many warnings and disclosures from *Zauderer*’s scope. Indeed, this seems to be how Judge Ikuta would read *NIFLA*. Judge Ikuta concluded that the SSB warnings were not “purely factual” and “uncontroversial.”¹⁸³ They concerned a “controversial topic” and raised red flags about SSBs—even though the FDA deems added sugars as “generally recognized as safe” and believes they can be part of a healthy diet if consumed in moderation.¹⁸⁴ Moreover, the warning incorrectly stated that drinking SSBs “contributes to . . . diabetes.”¹⁸⁵ Although there is an association between type 2 diabetes and consuming SSBs, type 1 diabetes is more likely caused by “genetic and environmental factors.”¹⁸⁶ Because *Zauderer* did not apply, Judge Ikuta instead applied intermediate scrutiny and concluded that the SSB warning was not narrowly tailored enough to survive.¹⁸⁷

180. *NIFLA*, 138 S. Ct. at 2378. One amicus brief filed in *NIFLA* contained a purported mock-up of such an advertisement, showing that the clinic’s message would occupy a mere one-twentieth of the advertisement. *See Brief of Heartbeat International, Inc. as Amicus Curiae in Support of Petitioners at 24*, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

181. The Court also highlighted that, while *Zauderer* applies to required disclosures “about the terms under which . . . services will be available,” *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)), the licensed clinic notice “in no way relate[d] to the services that licensed clinics provide, *id.*

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

183. *Am. Beverage Ass’n II*, 916 F.3d at 761 (Ikuta, J., dissenting from most of the reasoning, concurring in the result) (quoting *NIFLA*, 138 S. Ct. at 2372).

184. *Id.* (quoting 21 C.F.R. § 184.1 (2019)).

185. *Id.* (quoting S.F., CAL., HEALTH CODE § 4203(a)) (agreeing with Judge Christen’s concurrence on this point); *see also id.* at 765-66 (Christen, J., concurring in part and concurring in the judgment).

186. *See id.* at 765-66 (Christen, J., concurring in part and concurring in the judgment).

187. *See id.* at 762 (Ikuta, J., dissenting from most of the reasoning, concurring in the result).

Second, the *NIFLA* Court declined to say “what type of state interest” would “sustain a disclosure requirement.”¹⁸⁸ *NIFLA* therefore leaves open the possibility that *Zauderer* only applies to disclosures meant to cure deceptive commercial speech—a point that Judge Nguyen emphasized. “The Supreme Court . . . had the opportunity to expand *Zauderer’s* application beyond deceptive speech [in *NIFLA*] but declined to do so,” she wrote.¹⁸⁹ Judge Nguyen’s view is that *Zauderer* only applies when a compelled disclosure addresses commercial speech that is “false, deceptive, or misleading”; otherwise, the test is *Central Hudson*’s intermediate scrutiny.¹⁹⁰

C. Implications

If heightened scrutiny is the test, many warnings and disclosures about commercial products and services—including warnings and disclosures that have long been a part of daily life—may be unconstitutional.¹⁹¹ Heightened scrutiny requires a closer fit between the government’s means and ends than does rational basis review. But, as researchers on both sides of the policy debate acknowledge, many government-mandated warnings and disclosures are ineffective.¹⁹² Take the four rotating cigarette warnings that have been in place for more than thirty years.¹⁹³ Just five years after Congress enacted the law requiring these warnings, evidence already showed that 70% of smokers “were unable to identify the specific theme of even *one* Surgeon General’s warning,” even though a “one-pack-per-day smoker is theoretically exposed to the Surgeon General’s warnings each time a cigarette is smoked, ie, 7300

188. *NIFLA*, 138 S. Ct. at 2377.

189. *Am. Beverage Ass’n II*, 916 F.3d at 768 (Nguyen, J., concurring in the judgment).

190. See *id.* at 767 (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985)).

191. See Post, *supra* note 18, at 884-85 (noting that disclosures “could be constitutionally prohibited by a bull-headed judicial application of the overbreadth prong of *Central Hudson*”).

192. Compare, e.g., BEN-SHAHAR & SCHNEIDER, *supra* note 3, at 4-13 (arguing that mandated disclosure is ineffective from an antidisclosure perspective), with, e.g., FUNG ET AL., *supra* note 3, at xi-xiii (acknowledging that mandated disclosure can be ineffective from a prodisclosure perspective). But not all warnings and disclosures are regulatory failures. See FUNG ET AL., *supra* note 3, at 50-91 (considering how to craft effective disclosures).

193. See Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2201-02 (1984) (codified as amended at 15 U.S.C. § 1333 (2018)) (amending the Federal Cigarette Labeling and Advertising Act to require cigarette packages to have one of four warning labels); *Cigarette Labeling and Warning Statement Requirements*, *supra* note 122 (explaining that cigarettes must bear health warnings in compliance with the Federal Cigarette Labeling and Advertising Act).

exposures per year from the one daily pack alone.”¹⁹⁴ Or take nutrition labels, “the simplest and most understandable case of daily disclosures.”¹⁹⁵ The evidence of their effectiveness is “mixed,” with studies showing that consumers seldom consult nutrition labels and often find it difficult to understand them.¹⁹⁶

Moreover, warnings and disclosures may not succeed in achieving the government’s ultimate goal: changing consumers’ behavior.¹⁹⁷ SSB warnings are a particularly stark example. “[C]onsumers’ behavioral limitations are difficult to overcome by disclosure,”¹⁹⁸ and it is especially hard to influence consumers’ overall dietary behavior. “When advised to eat less of one . . . individual food, the public will substitute that item with another”—a phenomenon that nutrition researchers term the “substitution effect.”¹⁹⁹ In other words, even if SSB warnings effectively educate consumers, and even if some consumers reduce their intake of SSBs, those consumers may turn around and substitute the calories they would have gotten from SSBs with calories from other unhealthy foods. And if such substitution occurs, the relationship between SSB warnings and public health would seem to be significantly weakened.

To date, there is little research on the substitution effects of SSB warnings.²⁰⁰ A similar regulatory tool, taxes on SSBs, hasn’t “yet been linked to marked health improvements.”²⁰¹ And ultimately, being healthy “is about so much more than refusing” any one item; it is also about staying away from

194. See John W. Richards et al., Letter to the Editor, *The Warnings on Cigarette Packages Are Ineffective*, 261 JAMA 45, 45 (1989).

195. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 675 (2011).

196. See *id.* at 675-77.

197. The essential purpose of disclosure requirements is not to simply inform consumers but to change their behavior. See Aronson, *supra* note 57, at 1210.

198. Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. 1021, 1041 (2015) (reviewing BEN-SHAHAR & SCHNEIDER, *supra* note 3).

199. Paolo Magni et al., *Perspective: Improving Nutritional Guidelines for Sustainable Health Policies; Current Status and Perspectives*, 8 ADVANCES IN NUTRITION 532, 541 (2017).

200. The only study my research uncovered is Bruce Y. Lee et al., *Simulating the Impact of Sugar-Sweetened Beverage Warning Labels in Three Cities*, 54 AM. J. PREVENTIVE MED. 197, 199, 202, app. tbl.3 (2018).

201. Julia Belluz & Javier Zarracina, *Sugar, Explained*, VOX (updated Dec. 24, 2017, 8:25 AM EST), <https://perma.cc/2WR6-FDT6>. But see Andrea M. Teng et al., *Impact of Sugar-Sweetened Beverage Taxes on Purchases and Dietary Intake: Systematic Review and Meta-Analysis*, 20 OBESITY REVIEWS 1187, 1201 (2019) (concluding that “SSB taxes introduced in jurisdictions around the world have been effective in reducing SSB purchases and dietary intake”).

other unhealthy foods, eating more healthy foods, and exercising.²⁰² Fighting obesity may therefore require a piecemeal strategy of “policies that can have even small but cumulative impacts” on obesity²⁰³—a strategy that feels diametrically at odds with a test that probes whether the government’s chosen means are significantly related to the ends.

One retort is that if many commercial warnings and disclosures are ineffective, then it does not matter if corporations succeed in using the First Amendment to invalidate them: Nothing is lost if courts declare such warnings and disclosures unconstitutional. But this line of reasoning misses several points. Some warnings and disclosures are in fact effective. What is more, a warning or disclosure might fail heightened scrutiny for some reason other than being proven ineffective. And even if a warning or disclosure does not have enough impact to satisfy heightened scrutiny review, it may still be an important regulatory tool meant to supplement others, with the idea being that all of the government’s efforts aggregated together will make a difference—as in the case of SSB warnings. Striking down warnings and disclosures under the First Amendment could also impede experimentation by governments that may ultimately help determine what differentiates successful warnings and disclosures from unsuccessful ones.²⁰⁴ There could additionally be collateral damage to other regulations: By finding commercial warnings and disclosures unconstitutional under the First Amendment, courts could create precedent that might be used to invalidate regulations that would not otherwise be constitutionally objectionable.²⁰⁵ Finally, and most fundamentally, whether a regulation is bad policy is an entirely different question from whether the regulation is constitutional.²⁰⁶ The point of the Constitution is to take certain options off the table, regardless of whether they are bad or good policy, because those options violate the principles set forth in the nation’s founding documents.

Another possible consequence of a heightened scrutiny test is that the underinclusiveness/overinclusiveness inquiry endorsed by *NIFLA* could expose

202. See Ferris Jabr, *Is Sugar Really Toxic? Sifting Through the Evidence*, SCI. AM.: BRAINWAVES (July 15, 2013), <https://perma.cc/V2QF-E2XW>.

203. See Belluz & Zarracina, *supra* note 201.

204. See generally Gonzales v. Raich, 545 U.S. 1, 42-43 (2005) (O’Connor, J., dissenting) (emphasizing the role of state governments as “laboratories”). Scholars have called for more research into what makes disclosures work. See, e.g., Bubb, *supra* note 198, at 1022-23 (“About disclosure, there is still a great deal more to know.”).

205. See Shanor, *supra* note 24, at 134-35 (describing a trend of corporations using the First Amendment as a deregulatory tool).

206. Compare Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (expressing “no view on the soundness of” challenged executive orders issued by the Trump Administration), with Editorial, *Whatever the Supreme Court Decides on the Law, Trump’s Muslim Ban Is Bad Policy*, L.A. TIMES (Apr. 26, 2018, 3:00 AM), <https://perma.cc/N7UU-MYF9>.

judges to criticism that they are using this inquiry to “strik[e] down disclosure laws that [they] may disfavor.”²⁰⁷ For example, Judge Ikuta thought San Francisco’s ordinance was fatally underinclusive because it did “not even apply to all sugar-sweetened beverages, much less all sugar-sweetened products” and because it required SSB warnings on “posters and billboards, but not digital ads or other types of media.”²⁰⁸ Likewise, a judge could cast Berkeley’s cell phone disclosure ordinance as underinclusive, as it does not apply to other technologies like Bluetooth headphones and Wi-Fi devices that also emit radio-frequency energy.²⁰⁹ And the battles over what foods were covered by the federal GMO labeling bill—such as foods containing highly refined ingredients made from GMOs, like high-fructose corn syrup and refined soybean oil²¹⁰—could take on a constitutional dimension.

Finally, heightened scrutiny’s requirement of a close fit could mean that some warnings and disclosures are unconstitutional because of their size or appearance. Recall the Ninth Circuit’s holding that a 20% warning was “unjustified” when San Francisco’s own expert had relied on studies with 10% warnings to conclude that the ordinance would be effective.²¹¹ If taken to an extreme, this sort of reasoning essentially asks the government to show that the warning or disclosure is not more onerous than necessary to be effective. And this is a hard showing for the government to make. For one, there are many different measures for assessing the effectiveness of a warning, including whether consumers notice a warning, whether consumers read and understand the content of the warning, and whether consumers remember the content.²¹² And there is little discussion of, much less agreement on, how well a warning must score on individual measures or collectively on multiple measures to be considered minimally effective.²¹³

-
207. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2381 (2018) (Breyer, J., dissenting).
208. Am. Beverage Ass'n v. City & County of San Francisco (*Am. Beverage Ass'n II*), 916 F.3d 749, 762 (9th Cir. 2019) (en banc) (Ikuta, J., dissenting from most of the reasoning, concurring in the result).
209. See CTIA—The Wireless Ass'n v. City of Berkeley (*CTIA v. Berkeley II*), 928 F.3d 832, 837-38 (9th Cir.) (describing the City’s ordinance), cert. denied, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019); Catherine Roberts, *Do I Need to Worry About Radiation from WiFi and Bluetooth Devices?*, CONSUMER REP. (Mar. 1, 2018), <https://perma.cc/E2BN-KX63>.
210. See Elaine Watson, *Final GMO Labeling Rule Does Not Require Labeling of Highly Refined Ingredients from GM Crops, if No Modified Genetic Material Is Detectable*, FOOD NAVIGATOR-USA, <https://perma.cc/Q39F-NFCM> (last updated Dec. 21, 2018, 3:08 GMT).
211. See *Am. Beverage Ass'n II*, 916 F.3d at 756-57.
212. Jennifer J. Argo & Kelley J. Main, *Meta-Analyses of the Effectiveness of Warning Labels*, 23 J. PUB. POL'Y & MARKETING 193, 194 (2004).
213. See David M. DeJoy, *Consumer Product Warnings: Review and Analysis of Effectiveness Research*, 1989 PROC. HUM. FACTORS SOC'Y 936, 939 (“For many widely used products a footnote continued on next page

III. Reading 2: Limiting *NIFLA*'s Heightened Scrutiny

Another possible reading of *NIFLA* is that it generally does not require heightened scrutiny for warnings and disclosures about commercial products and services. In other words, *NIFLA*'s stringent application of *Zauderer* can be limited, such that it does not apply to many commercial warnings and disclosures. After all, the *NIFLA* Court claimed that it did not “question the legality of . . . purely factual and uncontroversial disclosures about commercial products.”²¹⁴ Although the Court failed to elaborate on this disclaimer any further and instead left its meaning highly ambiguous—a fact that Justice Breyer’s dissent vigorously criticized²¹⁵—this Part shows how this disclaimer could be a hook for cabining *NIFLA*’s heightened scrutiny.

A. The Equal Protection Analogue

The disclaimer could be understood as limiting *NIFLA*’s heightened scrutiny to cases where there is concern that the government’s speech regulation is motivated by hostility toward a particular group of speakers. Looking to the Court’s equal protection jurisprudence—which employs tiers of scrutiny that largely mirror those in the First Amendment context—helps uncover this ground for limiting *NIFLA*.²¹⁶ In its equal protection and First Amendment cases, the Court employs rational basis review (equal protection) or *Zauderer* (First Amendment), intermediate scrutiny (equal protection) or *Central Hudson* (First Amendment), and strict scrutiny (both).²¹⁷

20% increase in self-protective behavior would produce important reductions in injury outcomes. But what about the 70% of people who still fail to take necessary precautions? Do we conclude that the warning was inadequate?”); Dean M. Krugman et al., *Do Cigarette Warnings Warn? Understanding What It Will Take to Develop More Effective Warnings*, 4 J. HEALTH COMM. 95, 99 (1999) (“[T]here has been little guidance and/or monitoring as to what establishes and constitutes an effective program of cigarette warning.”); Linda Truitt et al., *Recall of Health Warnings in Smokeless Tobacco Ads*, 11 TOBACCO CONTROL ii59, ii62 (Supp. II 2002) (considering the “key question” of “what proportion of those who see a magazine ad for smokeless tobacco should remember the health warning”).

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

215. *See id.* at 2381 (Breyer, J., dissenting).

216. Cf. Pamela S. Karlan, *Essay, Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 139 (2018) (“One of the problems with the way we have tried to build a more just constitutional law is our failure to see, and then to make the most of, doctrinal connections across constitutional subfields . . . ”).

217. Compare Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 107–08 (2018) (outlining standards of review in the First Amendment context), with Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2099 (2004) (outlining standards of review in the Fourteenth Amendment context).

Notably, the Court's equal protection cases have occasionally applied a level of scrutiny in between rational basis review and intermediate scrutiny, which some have termed rational basis "with bite" or "with teeth."²¹⁸ As Justice O'Connor has explained, the Court applies "a more searching form of rational basis review to strike down . . . laws under the Equal Protection Clause" in cases where the "law exhibits . . . a desire to harm a politically unpopular group."²¹⁹ For instance, in *United States Department of Agriculture v. Moreno*, the Court struck down part of the Food Stamp Act when the legislative history revealed animus toward "hippies."²²⁰ And in *City of Cleburne v. Cleburne Living Center* and *Romer v. Evans*, the Court invalidated laws that appeared motivated by hostility toward individuals with developmental disabilities and the members of the LGBTQ community, respectively.²²¹ The Court applies rational basis review with bite when the law appears to be regulating based on status—who someone is—rather than based on conduct—what someone does.

The *NIFLA* Court stated that it was not "question[ing]" the government's authority to compel "purely factual and uncontroversial disclosures *about commercial products*."²²² This disclaimer could be understood as cabining *NIFLA*'s heightened scrutiny, such that it only applies in the same set of circumstances in which rational basis with bite applies in the equal protection context. In other words, *Zauderer* with bite applies when the government appears to be regulating speech based on the identity of the speaker, rather than the commercial product or service the speaker offers. The Court certainly believed that to be the case in *NIFLA*. For example, when addressing the licensed clinic notice, the Court highlighted that the law did not apply to some speakers offering the same services as crisis pregnancy centers. The notice requirement only applied to clinics with a "primary purpose" of "providing family planning or pregnancy-related services," so general-service clinics without such a primary purpose were not covered—even if they offered a bevy

218. See Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 V.A.L.REV. 1065, 1071-72, 1072 n.43 (2013).

219. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment).

220. See 413 U.S. 528, 534-36 (1973); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("[*Moreno*] must be and generally has been viewed as [an] intermediate review decision[] masquerading in rational-basis language.").

221. See *Romer v. Evans*, 517 U.S. 620, 624, 632-36 (1996) (invalidating a state constitutional amendment prohibiting government action protecting individuals based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships") (quoting COLO. CONST. art. II, § 30b)); *City of Cleburne*, 473 U.S. at 446-50 (majority opinion) (invalidating a municipal zoning ordinance insofar as it required a special use permit for a proposed group home for people with mental disabilities).

222. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2376 (2018) (emphasis added).

of family planning and pregnancy services.²²³ And when addressing the unlicensed clinic notice, the Court found problematic that the requirement covered “a facility that advertises and provides pregnancy tests,” but not a facility “that advertises and provides nonprescription contraceptives.”²²⁴

Though the Court declined to address whether the notice requirement discriminated based on viewpoint, which would have triggered strict scrutiny, it still accused California of disfavoring a certain group of speakers. The Court emphasized that “[s]peaker-based laws,” like the California statute, “run the risk that ‘the State has left unburdened those speakers whose messages are in accord with its own views.’”²²⁵ Reading *NIFLA* to only require heightened scrutiny when the government appears to be targeting a particular subset of speakers, but not when the government is regulating a particular commercial product or service, would result in the application of less-searching scrutiny.²²⁶

B. The Commercial Speech Distinction

The disclaimer could also be understood as limiting *NIFLA*’s heightened scrutiny to cases where the speech at issue is not commercial. Indeed, the disclaimer referred to “purely factual and uncontroversial disclosures about *commercial* products.”²²⁷ The Court noted that its “precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘*commercial speech*.’”²²⁸ And the Court, again summarizing its precedents, observed that *Zauderer* recognized

223. *See id.* at 2375-76 (quoting CAL. HEALTH & SAFETY CODE § 123471(a) (West 2018)).

224. *See id.* at 2378.

225. *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011)).

226. *See Michael Kagan, Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 773-74 (2015); *see also William E. Lee, Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 771 (1986) (noting that there “may be close correlation between speaker identity and viewpoint,” such that “a restriction on a speaker or group of speakers may create viewpoint-discriminatory effects”). But some speaker-based restrictions will not facially discriminate on the basis of viewpoint. *Kagan, supra*, at 778-80. Indeed, in *NIFLA*, California argued that the Reproductive FACT Act did not facially discriminate against pro-life pregnancy centers, noting that “providing abortion services is an activity that can subject a clinic to the law.” Brief for the State Respondents, *supra* note 60, at 49. “[T]he potential contours of [the] emerging doctrine” on speaker-based regulations—including the level of scrutiny that applies to such regulations—“remain[s] unclear.” *See Recent Case, Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014), 128 HARV. L. REV. 2082, 2086-89 (2015). But reading *NIFLA* as applying heightened scrutiny to speaker-based regulations is consistent with the Court’s recent “suspicion of speaker-based laws.” *Id.* at 2089.

227. *NIFLA*, 183 S. Ct. at 2376 (emphasis added).

228. *Id.* at 2372 (emphasis added).

that such deferential review would not have applied if the lawyer's statements "were made in a context *other than advertising*."²²⁹

Although the Court never said what sort of speech was at issue in *NIFLA*, characterizing most of the crisis pregnancy centers' speech as purely commercial would have been a real stretch. Indeed, the Ninth Circuit dismissed the argument that the California law regulated commercial speech in two sentences of a footnote: "Commercial speech 'does no more than propose a commercial transaction.' The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech."²³⁰ And in its merits brief to the Court, California did not even attempt to argue that the speech was commercial.²³¹ After all, "[c]ommercial advertising comprises the core of the constitutional category of 'commercial speech.'"²³² But not all advertising is commercial speech; the paradigmatic example is the advertisement in *New York Times Co. v. Sullivan*, which was not commercial because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."²³³ Along these lines, the crisis pregnancy centers argued that their speech was noncommercial because it consisted of advocacy of childbirth.²³⁴ All this is to say that most of the speech at issue in *NIFLA* was clearly not commercial, and even the speech that appeared the most commercial (unlicensed clinics' advertisements) may not have been.

C. Implications

If either understanding of *NIFLA*'s disclaimer prevailed, then the extension of heightened scrutiny beyond *NIFLA* would be curtailed. More deferential review under *Zauderer* would apply to warnings and disclosures about commercial products and services—and many warnings and disclosures would likely survive. For instance, the district court in *American Beverage Ass'n* highlighted that "the *Zauderer* test is essentially a rational basis/rational review

229. *See id.* at 2374 (emphasis added).

230. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 834 n.5 (9th Cir. 2016) (quoting *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010)), *rev'd sub nom. NIFLA*, 138 S. Ct. 2361.

231. *See Brief for the State Respondents*, *supra* note 60.

232. Post, *supra* note 26, at 5.

233. 376 U.S. 254, 256, 266 (1964) (involving a *New York Times* advertisement that described resistance to the civil rights movement).

234. *See Brief for Petitioners* at 40-41, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140), 2018 WL 347510.

test” and upheld the SSB warnings under this test.²³⁵ Likewise, the Ninth Circuit panel in *CTIA—The Wireless Ass’n v. City of Berkeley* asked whether Berkeley’s cell phone disclosure withstood rationality review and answered in the affirmative.²³⁶ And the district court in *Grocery Manufacturers Ass’n v. Sorrell* held that Vermont’s GMO labeling law satisfied Zauderer’s “reasonable relationship test.”²³⁷ But the devil is in the details. The Court has provided scant guidance on what Zauderer’s “purely factual” and “uncontroversial” and not “unjustified and unduly burdensome” requirements mean. The implications that flow from applying *Zauderer* as a test akin to rational basis review greatly depend on the content of Zauderer’s requirements—a point this Note returns to, and considers in detail, in Part V below.

A brief coda: Justice Breyer’s *NIFLA* dissent was most concerned about the decision’s implications for warnings and disclosures that do not appear to fall neatly within the categories of speech the Court has protected. His dissent canvassed state and local statutes—such as those “requiring hospitals to tell parents about child seat belts” and “requiring property owners to inform tenants about garbage disposal procedures”—and asserted they were thrown into question by *NIFLA*.²³⁸ Another way to limit *NIFLA*’s heightened scrutiny that is directly responsive to Justice Breyer’s concerns is through generally applicable First Amendment principles that suggest that certain speech falls outside the ambit of the First Amendment altogether.²³⁹ The statutes cited by Justice Breyer do not involve speech consisting of advocacy on matters of public opinion, nor commercial speech that is protected because of its role in “disseminat[ing] information to the public at large and . . . sustaining the public communicative sphere,”²⁴⁰ nor speech by professionals whose “First Amendment rights” the Court has “long protected.”²⁴¹ The type of speech they involve may not fall within the First Amendment’s coverage at all.

235. See *Am. Beverage Ass’n v. City & County of San Francisco (Am. Beverage Ass’n I)*, 187 F. Supp. 3d 1123, 1134, 1145 (N.D. Cal. 2016), *rev’d*, 916 F.3d 749 (9th Cir. 2019) (en banc).

236. See *CTIA—The Wireless Ass’n v. City of Berkeley (CTIA v. Berkeley II)*, 928 F.3d 832, 845-49 (9th Cir.), *cert. denied*, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019).

237. See *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 632-36 (D. Vt. 2015).

238. See *NIFLA*, 138 S. Ct. at 2380-81 (Breyer, J., dissenting).

239. See *Shanor*, *supra* note 4, at 340 (explaining that, beyond the Court’s recognized content-based categorical exceptions, there is a significant “range of regulations of what is colloquially understood as speech or expression that have long not been subject to First Amendment challenge”).

240. Post, *supra* note 26, at 20-25.

241. *NIFLA*, 138 S. Ct. at 2374 (majority opinion).

IV. Reading 3: Categorical Exception

A third possible reading of *NIFLA* is not mutually exclusive with either of the readings described above. In addition to claiming that it did not question “purely factual and uncontroversial disclosures about commercial products,” the Court also said it was leaving untouched “health and safety warnings long considered permissible.”²⁴² In *American Beverage Ass’n*, Judge Ikuta read this language as raising the possibility of a historically-grounded content-based categorical exception for health and safety warnings.²⁴³ This Part takes seriously the possibility of a categorical exception, focusing on health warnings because they appear to be frequently litigated.²⁴⁴

A. The Doctrine of Content-Based Categorical Exceptions

There are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”²⁴⁵ The categories of speech excepted from First Amendment protection include: fighting words;²⁴⁶ true threats;²⁴⁷ incitement;²⁴⁸ defamation;²⁴⁹ and obscenity that “lacks serious literary, artistic, political, or scientific value.”²⁵⁰ In recent years, the Court has declined to recognize categorical exceptions for depictions of animal cruelty²⁵¹ and

242. *Id.* at 2376.

243. See *Am. Beverage Ass’n v. City & County of San Francisco (Am. Beverage Ass’n II)*, 916 F.3d 749, 762 (9th Cir. 2019) (en banc) (Ikuta, J., dissenting from most of the reasoning, concurring in the result).

244. Based on a Westlaw search for federal cases applying *Zauderer* to a health or safety warning.

245. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

246. See *Chaplinsky*, 315 U.S. at 571-72 (defining fighting words as speech that by its “very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace”).

247. See *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (per curiam).

248. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (“[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

249. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-50 (1974) (holding that “States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual” without running afoul of the First Amendment).

250. See *Miller v. California*, 413 U.S. 15, 18-20, 24 (1973).

251. See *United States v. Stevens*, 559 U.S. 460, 468-72 (2010).

offensively violent speech directed at children.²⁵² And in *NIFLA*, the Court declined to carve out an exception for professional speech.²⁵³

NIFLA affirmed that finding a new categorical exception from the First Amendment requires “persuasive evidence” that a speech regulation is part “of a long (if heretofore unrecognized) tradition.”²⁵⁴ Judge Ikuta suggested that a content-based categorical exception requires a tradition going all the way back to the ratification of the Bill of Rights: *NIFLA* did not specify what sorts of health and safety warnings date back to 1791, but warnings about sugar-sweetened beverages are clearly not among them.²⁵⁵ But the Court’s own precedent has not required the tradition supporting a categorical exception to be so deeply rooted in the nation’s history. For example, in *Roth v. United States*, the Court concluded that the history of the First Amendment had “reject[ed] . . . obscenity as utterly without redeeming social importance,” based in part on “the 20 obscenity laws enacted by the Congress from 1842 to 1956.”²⁵⁶ And as Erwin Chemerinsky has observed, “there was relatively little judicial safeguarding of speech prior to World War I,”²⁵⁷ so if 1791 is the dividing line, it is unlikely to be a very useful one.

B. Defining the Contours of an Exception

Given that the Court’s precedent requires that any categorical exception to the First Amendment be historically grounded, this Subpart traces the history of government-mandated warnings of the adverse health effects associated with commercial goods. It then considers how to define an exception based on this history.

The numerous examples of health warnings dating as far back as the early 1800s, and continuing through the next two centuries, demonstrate that such warnings have not traditionally been perceived as creating any First Amendment problem. There is one complication, though: Even well into the 1900s, it was not obvious from the Court’s precedent that either the regulation

252. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790-99 (2011).

253. See *Nat’l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2374-75 (2018).

254. *Id.* at 2372 (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion)).

255. *Am. Beverage Ass’n v. City & County of San Francisco (Am. Beverage Ass’n II)*, 916 F.3d 749, 762 (9th Cir. 2019) (en banc) (Ikuta, J., dissenting from most of the reasoning, concurring in the result).

256. 354 U.S. 476, 484-85 (1957).

257. Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 916 (1993).

of commercial speech²⁵⁸ or compelled speech²⁵⁹ raised any constitutional issue. It would therefore be surprising if the early health warnings were somehow thought to implicate the First Amendment. Still, the fact remains that, even after the Court's First Amendment doctrine shifted—unambiguously protecting both commercial speech and the right not to speak—it continued to be taken for granted that mandating health warnings was a permissible exercise of the government's regulatory power.²⁶⁰

It appears that the earliest government-mandated health warnings were various state laws that prohibited selling poisons without a warning label.²⁶¹ The New York legislature passed the first of these laws in 1829,²⁶² when it was well-established that substances like arsenic and prussic acid were poisonous.²⁶³ The New York statute read:

Every apothecary, druggist or other person, who shall sell poisons and deliver any arsenic, corrosive sublimate, prussic acid, or any other substance or liquid usually denominated poisonous, without having the word "poison" written or printed upon a label attached to the phial, box or parcel, in which the same is so sold . . . shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars.²⁶⁴

The next state to require a poison label was Ohio in 1852.²⁶⁵ From 1897 to 1912, a flurry of similar state legislation was passed. By the end of this period, forty-five states and the District of Columbia required poison warning

258. See *supra* text accompanying note 20; see also Alex Kozinski & Stuart Banner, Response, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756-58, 768-69 (1993) (responding to Ronald K.L. Collins & David M. Skover, Essay, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993)).

259. Eugene Volokh, Essay, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 355 & n.3 (2018) (dating the Court's compelled speech doctrine back to *West Virginia State Board of Education v. Barnette*); see also W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

260. See *supra* note 4 and accompanying text.

261. Based on my research of the history of health warnings, which included running searches in several databases for materials on this subject.

262. M. I. Wilbert, *The Evolution of Laws Regulating the Sale and Use of Poisons*, 1 J. AM. PHARMACEUTICAL ASS'N 1259, 1259 (1912).

263. See ROBERT CHRISTISON, A TREATISE ON POISONS: IN RELATION TO MEDICAL JURISPRUDENCE, PHYSIOLOGY, AND THE PRACTICE OF PHYSIC 172, 555 (Edinburgh, John Stark 1829).

264. 2 THE REVISED STATUTES OF THE STATE OF NEW YORK 694 (Albany, Packard & Van Benthuysen 1829).

265. See MARTIN I. WILBERT & MURRAY GALT MOTTER, DIGEST OF LAWS AND REGULATIONS IN FORCE IN THE UNITED STATES RELATING TO THE POSSESSION, USE, SALE, AND MANUFACTURE OF POISONS AND HABIT-FORMING DRUGS 14 (1912).

labels.²⁶⁶ California law mandated that the label “be printed on red paper with white letters, or red letters upon white paper, and contain the word ‘Poison’” and “a vignette representing skull and crossbones.”²⁶⁷ Wyoming law required a label “printed in red ink with ‘a cautionary emblem of the skull and crossbones’ or the words ‘Caution’ or ‘Poison.’”²⁶⁸ Colorado law was somewhat of an outlier: It went further than poisonous substances and required certain sellers to place a “caution” label on any “chemical or pharmaceutical compound the use of which . . . might be attended with injury to health or morals.”²⁶⁹

In the early twentieth century, there was a second wave of state-mandated warning labels—this time for household cleaning chemicals. Physicians had begun “to report cases of gruesome pediatric injuries from accidental ingestion” of these chemicals.²⁷⁰ One doctor described how a product “usually on the floor, or on the lower shelf of the pantry” had burned the lips of a child: “You might just as well touch tissues with a red hot soldering iron . . . That child . . . will die within a week if nothing is done.”²⁷¹ In 1923, Pennsylvania passed a law requiring that a “Poison” label “conspicuously appear [on certain household products] in capital letters, not less than twenty-four point size.”²⁷² Eleven other states enacted similar legislation.²⁷³

In 1927, Congress got involved by passing the first federal warning statute, the Federal Caustic Poison Act.²⁷⁴ The Act required packages of certain substances to carry labels that read “POISON” along with a statement prescribing an antidote.²⁷⁵ The warning had to be written in “gothic capital

266. See *id.* at 14, 20-27.

267. *Id.* at 20.

268. *Id.* at 27.

269. ALEX J. WEDDERBURN, A COMPILATION OF THE PHARMACY AND DRUG LAWS OF THE SEVERAL STATES AND TERRITORIES 19 (Washington, Gov’t Printing Office 1894).

270. Marian Moser Jones & Isidore Daniel Benrubi, *Poison Politics: A Contentious History of Consumer Protection Against Dangerous Household Chemicals in the United States*, 103 AM. J. PUB. HEALTH 801, 804 (2013).

271. *A Bill to Safeguard the Distribution and Sale of Certain Dangerous Caustic or Corrosive Acids, Alkalies, and Other Substances in Interstate and Foreign Commerce: Hearing on H.R. 8305 Before the H. Comm. on Interstate & Foreign Commerce*, 69th Cong. 14 (1926) [hereinafter *Federal Caustic Poison Act Hearing*] (statement of Dr. Chevalier Jackson, Jefferson Hospital, Philadelphia, Pennsylvania).

272. Act of May 7, 1923, No. 105, 1923 Pa. Laws 139.

273. See *Federal Caustic Poison Act Hearing*, *supra* note 271, at 12 (statement of Dr. Charles W. Richardson, Board of Trustees of the American Medical Association, Washington, D.C.).

274. Federal Caustic Poison Act, ch. 489, 44 Stat. 1406 (1927) (repealed 1960); see also David Egilman & Susanna Rankin Bohme, *A Brief History of Warnings*, in *HANDBOOK OF WARNINGS* 11, 13 (Michael S. Wogalter ed., 2006).

275. See Egilman & Bohme, *supra* note 274, at 14.

letters . . . no[] smaller than the largest type on the label or sticker,” against a “clear, plain background of a distinctly contrasting color.”²⁷⁶ About a decade later, Congress mandated a warning for another type of product. In the early 1930s, the federal government began to receive reports of “women . . . being rushed to hospitals” after using eyebrow and lash dye.²⁷⁷ “The outer coatings of their eyes were being burned off, and in some cases total blindness resulted” from the “dangerous coal-tar dye” contained in the product.²⁷⁸ The 1938 Federal Food, Drug, and Cosmetic Act required coal tar hair dye labels to state: “Caution . . . This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness.”²⁷⁹

In sum, the earliest government-mandated health warnings concerned products that were demonstrably capable of causing death or permanent, serious injury. And the same is true of some of the later health warnings.²⁸⁰ The most famous example is the 1965 legislation that required warnings on cigarette packages as a matter of federal law for the first time.²⁸¹ The 1964 advisory committee report to the Surgeon General had systematically reviewed existing studies on smoking according to predetermined criteria for finding causation, ultimately concluding that “[c]igarette smoking is causally related to lung cancer in men,” among other findings.²⁸²

In my view, the history described above would support a categorical exception for health warnings that is defined as follows: *Government-mandated disclosures of the adverse health effects associated with a consumer product are permissible when there is substantial evidence of a causal relationship between the normal use or consumption of the product and serious adverse health effects.*

Requiring in this definition that the product as *normally used or consumed* lead to serious adverse health effects is a necessary limiting principle. Otherwise, the exception would cover virtually all consumer goods. A maxim

276. Federal Caustic Poison Act §§ 2(b)(3), 3.

277. See Rexford C. Tugwell, “*The Great American Fraud*,” 3 AM. SCHOLAR 85, 89 (1934).

278. *Id.*

279. Federal Food, Drug, and Cosmetic Act, ch. 675, § 601, 52 Stat. 1040, 1054 (1938) (codified as amended at 21 U.S.C. § 361 (2018)).

280. For a comprehensive overview of later health warnings, see generally Lars Noah, *The Imperative to Warn: Disentangling the “Right to Know” from the “Need to Know” About Consumer Product Hazards*, 11 YALE J. ON REG. 293 (1994).

281. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C. § 1333 (2018)) (requiring cigarette packages to conspicuously bear the message “Caution: Cigarette Smoking May Be Hazardous to Your Health”).

282. PUB. HEALTH SERV., U.S. DEP’T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 19-20, 37 (1964), <https://perma.cc/SJ2C-APBJ>.

in the field of toxicology is that “everything is toxic; it is only the dose that separates the toxic from the non-toxic.”²⁸³ Even consuming a large amount of water in a brief period of time can cause death.²⁸⁴ The other limiting factors in the definition maintain the tie between the tradition of health warnings and the doctrinal exception. For instance, there was substantial evidence of the adverse effects of poisonous substances like arsenic and household chemicals, based on scores of instances where people were harmed after consuming the relevant substance. And the harm that occurred was serious, such as death or permanent injury.²⁸⁵

Notably, this definition of the categorical exception would not capture some of the later health warnings. Not all of the later warnings concern substances that cause health effects rising to the level of death or permanent, serious injury. For instance, federal regulations require labels for the sweeteners sorbitol and mannitol that state, “Excess consumption may have a laxative effect.”²⁸⁶ Furthermore, not all of the later health warnings have necessarily been supported by strong scientific evidence of a causal relationship between the substance and the adverse health effect. The 1986 federal law requiring smokeless tobacco packaging to state “WARNING: This product may cause mouth cancer” has been criticized for relying on a study that concerned the effects of a type of snuff used significantly less than the most popular type.²⁸⁷

As with the other categorical exceptions, if a health warning fit within the exception defined above, it would not raise any First Amendment problem; if a warning did not fit within the exception, some form of First Amendment scrutiny would apply. The categorical exception would essentially create a safe harbor for certain health warnings based on the warning’s content, the substance’s effects, and the scientific evidence supporting those effects.

283. Laurie C. Dolan et al., *Naturally Occurring Food Toxins*, 2 TOXINS 2289, 2289 (2010).

284. *See id.* at 2289-90.

285. *See* PATRICIA FRANK & M. ALICE OTTOBONI, THE DOSE MAKES THE POISON: A PLAIN LANGUAGE GUIDE TO TOXICOLOGY 37 (3d ed. 2011); Peter Bartrip, *A “Pennurth of Arsenic for Rat Poison”: The Arsenic Act, 1851 and the Prevention of Secret Poisoning*, 36 MED. HIST. 53, 53 (1992).

286. 21 C.F.R. § 180.25 (2019) (mannitol); *id.* § 184.1835 (sorbitol).

287. *See* Lynn T. Kozlowski, *Origins in the USA in the 1980s of the Warning That Smokeless Tobacco Is Not a Safe Alternative to Cigarettes: A Historical, Documents-Based Assessment with Implications for Comparative Warnings on Less Harmful Tobacco/Nicotine Products*, 15 HARM REDUCTION J., no. 21, 2018, at 1, 2-3 (discussing 1986 legislation on smokeless tobacco product warnings); *see also* Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, § 3, 100 Stat. 30, 30-31 (codified as amended at 15 U.S.C. § 4402 (2018)) (requiring certain warning labels).

C. Implications

As an initial matter, this categorical exception would not capture warnings and disclosures with content that is unrelated to adverse health effects. The content of conflict minerals disclosures is the fact that the manufacturer uses conflict minerals; the content of country-of-origin labeling is the location where the food was produced. And although restaurant letter grades are supposed to be a proxy for the risk of foodborne illness, their content—an “A,” “B,” or “C”—makes no reference to any adverse health effects.

As for warnings that *are* about adverse health effects, whether they are captured by the categorical exception depends on how the exception’s component parts are ultimately administered by courts. And some of those parts would be very difficult to administer. For example, how would courts figure out whether there was “substantial evidence” demonstrating that the product causes serious adverse effects? Many commentators have observed that judges are generally not well-equipped to make assessments about scientific evidence.²⁸⁸ One response from John Monahan and Laurens Walker is that courts should:

[E]valuate scientific research studies along four dimensions analogous to the four dimensions used to create case precedent. Courts should place confidence in a piece of scientific research to the extent that the research (1) has survived the critical review of the scientific community; (2) has employed valid research methods; (3) is generalizable to the case at issue; and (4) is supported by a body of other research.²⁸⁹

But even with these helpful guideposts, difficult line-drawing problems will arise. Not always—the Ninth Circuit acknowledged that Berkeley’s cell phone disclosure ordinance was not supported by any scientific evidence on the record demonstrating danger,²⁹⁰ and while the National Academies of Science, Engineering, and Medicine’s landmark 2016 report did not fully exonerate GMOs, it also did not find any adverse health effects associated with

288. See, e.g., Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1538-39 (1998) (summarizing critique of “nonexpert judges” evaluating scientific testimony); James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247, 250 (2018) (noting that most scholars that have considered judges’ ability to evaluate scientific evidence have concluded that “they simply cannot”). But see Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563, 1568-72, 1571 n.23 (2000) (arguing that judges can be sufficiently equipped to evaluate scientific evidence).

289. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U.PA.L.REV. 477, 499 (1986). Some of these factors overlap with the *Daubert* factors for determining the admissibility of scientific evidence. See *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579, 592-95 (1993).

290. See CTIA—The Wireless Ass’n v. City of Berkeley (*CTIA v. Berkeley II*), 928 F.3d 832, 846 (9th Cir.), cert. denied, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019).

GMOs.²⁹¹ On the other side of the line, although the scientific evidence supporting the 1965 federal law mandating cigarette warnings was hardly immune from criticism, a large body of reviewed research had established that cigarettes cause cancer.²⁹²

SSB warnings present a harder case. Generally speaking, it is notoriously difficult to study nutrition questions.²⁹³ It is often impractical to run randomized controlled trials where different groups of people stick with assigned diets for a sufficient period of time, so researchers often rely on imprecise observational studies or food surveys.²⁹⁴ And some studies are funded by industry and therefore tainted by conflicts of interest.²⁹⁵ Some researchers would likely believe that the evidence of a causal relationship between SSBs and obesity meets the four criteria proposed by Monahan and Walker. These researchers have pointed to prospective cohort studies and randomized clinical trials to conclude that “there is compelling evidence that SSB intake is causally related to increased risk of obesity.”²⁹⁶ But other researchers would not agree that the evidence satisfies Monahan and Walker’s criteria. They have concluded that the evidence so far is “equivocal.”²⁹⁷

Another difficulty: How will courts determine what counts as a “serious adverse health effect”? The earliest health warnings concerned products that

-
291. See THE NAT'L ACADS. OF SCIS., ENG'G, & MED., GENETICALLY ENGINEERED CROPS: EXPERIENCES AND PROSPECTS 16-20 (2016).
292. See PUB. HEALTH SERV., *supra* note 282, at 25-40.
293. For an easily digestible explanation of why, see Julia Belluz, *I Asked 8 Researchers Why the Science of Nutrition Is So Messy. Here's What They Said*, VOX (updated Aug. 16, 2016, 9:30 AM EDT), <https://perma.cc/5AKT-ZCA5>. See also 40 WALTER WILLETT, NUTRITIONAL EPIDEMIOLOGY 2 (3d ed. 2013).
294. See Belluz, *supra* note 293; see also Chu K. Yao et al., *Design of Clinical Trials Evaluating Dietary Interventions in Patients with Functional Gastrointestinal Disorders*, 108 AM. J. GASTROENTEROLOGY 748, 749-52 (2013).
295. See generally MARION NESTLE, UNSAVORY TRUTH: HOW FOOD COMPANIES SKEW THE SCIENCE OF WHAT WE EAT (2018) (describing how the food industry funds nutrition research to promote sales). For a particular example of industry funding research, see generally Cristin E. Kearns et al., *Sugar Industry and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents*, 176 JAMA INTERNAL MED. 1680 (2016).
296. Frank B. Hu, *Resolved: There Is Sufficient Scientific Evidence That Decreasing Sugar-Sweetened Beverage Consumption Will Reduce the Prevalence of Obesity and Obesity-Related Diseases*, 14 OBESITY REVIEWS 606, 611-12 (2013); see also Vasanti S. Malik & Frank B. Hu, *Sweeteners and Risk of Obesity and Type 2 Diabetes: The Role of Sugar-Sweetened Beverages*, 12 CURRENT DIABETES REP. 195, 200 tbl.1 (2012).
297. See K.A. Kaiser et al., *Will Reducing Sugar-Sweetened Beverage Consumption Reduce Obesity? Evidence Supporting Conjecture Is Strong, but Evidence When Testing Effect Is Weak*, 14 OBESITY REVIEWS 620, 630 (2013); see also Amélie Keller & Sophie Bucher Della Torre, *Sugar-Sweetened Beverages and Obesity Among Children and Adolescents: A Review of Systematic Literature Reviews*, 11 CHILDHOOD OBESITY 338, 344 (2015) (describing discrepancies in study results and calling for improved methodologies).

led to a risk of death (through poisoning) or permanent injury (such as blindness and physical disfigurement).²⁹⁸ But how high does the risk of death have to be? Sensible people would agree that cigarette smoking causes “serious adverse health effects.” The CDC reports that more than 480,000 deaths per year in the United States are attributable to smoking.²⁹⁹ Similarly, obesity—one of the health effects featured on San Francisco’s SSB warnings—is associated with about 112,000 preventable deaths per year.³⁰⁰ By contrast, tooth decay—another health effect featured on San Francisco’s SSB warnings—is linked to a much smaller number of deaths. Although the number of deaths is not regularly examined, one study found more than 61,000 hospitalizations for symptoms of untreated tooth decay over a period of eight years; of those hospitalizations, sixty-six people died.³⁰¹

Difficulties aside, one benefit of recognizing a categorical exception for health warnings would be to simplify the First Amendment issue in certain cases. For instance, the First Amendment analysis for graphic cigarette warnings would be straightforward. There is strong evidence that smoking causes serious adverse health effects such as cancer. And it should not matter whether cigarette warnings are in graphic or textual form. Some of the historical examples of warning regulations contained graphic elements, such as the requirement of a skull and crossbones on poison labels. Other content-based categorical exceptions apply equally to images and words. The most obvious example is obscenity, which the Court has explained can “manifest itself . . . in the pictorial representation of conduct, or in the written and oral description of conduct.”³⁰²

The categorical exception would also draw a fairly clear line when it comes to the permissible content and size of graphic cigarette warnings. Under this Note’s definition of the exception, government-mandated disclosures must be of the *adverse health effects* associated with the consumer product. While the FDA’s proposed warning depicting diseased lungs portrays the adverse health effects caused by smoking, the part of the proposed warnings including the “1-

298. See *supra* text accompanying notes 261-79.

299. *Fast Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/S6AM-NGLE> (last updated Feb. 6, 2019).

300. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL’S VISION FOR A HEALTHY AND FIT NATION 2 (2010), <https://perma.cc/YRY7-9SFY>.

301. See Joshua Gillin, *Dentists and the ADA Agree: Ignoring a Toothache Could Potentially Kill You*, POLITICO: FLA. (Jan. 26, 2016, 11:05 AM), <https://perma.cc/32BF-S9RT>.

302. *Kaplan v. California*, 413 U.S. 115, 119 (1973). Lower courts have also held that drawings can constitute “true threat[s]” which do not receive First Amendment protection. See, e.g., *Porter ex rel. LeBlanc v. Ascension Par. Sch. Bd.*, 301 F. Supp. 2d 576, 587-88 (M.D. La.), aff’d, 393 F.3d 608 (5th Cir. 2004).

800-QUIT-NOW” hotline³⁰³ does not. Although the categorical exception is silent on the size of warnings, none of the historical examples described above were warnings that dominated commercial speech. Because the graphic cigarette warnings mandated by federal law would not take up more than half of the package,³⁰⁴ they should fall within the historically rooted exception.

V. A Path Forward

The preceding Parts laid out three possible readings of *NIFLA* and their implications for warnings and disclosures regarding commercial products and services. This Part argues that the second reading of *NIFLA* should prevail. Under that reading, *NIFLA*’s heightened scrutiny would be cabined, and a rational basis version of *Zauderer* would apply. Although this reading of *NIFLA* is by no means compelled by the Court’s decision, it is fully consistent with the majority’s opinion and with constitutional doctrine more broadly. And from my perspective, such a reading of *NIFLA* is desirable—both because it accounts for and responds to the reasons why compelled commercial speech can be problematic, and because it allows the government to continue to use the longstanding regulatory tool of warnings and disclosures to improve consumers’ welfare. Finally, this Part concludes by considering what governments should be required to prove under each of *Zauderer*’s criteria—purely factual, uncontroversial, and not unjustified or unduly burdensome.

A. The Second Reading

The second reading of *NIFLA* would not extend its heightened scrutiny to commercial warnings and disclosures. The *NIFLA* Court professed not to question “purely factual and uncontroversial disclosures *about commercial products*.³⁰⁵ *NIFLA* could therefore be limited on the ground that heightened scrutiny only applies where there is concern that the government is regulating based on the speaker’s identity, rather than based on the speaker’s products or services, or where the speech at issue is not purely commercial.

One argument against this understanding of *NIFLA* is that it is not what the Court really meant. After all, the author of *NIFLA* was Justice Thomas, who has indicated that he does not believe there is such a standard as rational basis

303. See *FDA’s Graphic Cigarette Labels Rule Goes Up in Smoke After U.S. Abandons Appeal*, CBS News (Mar. 19, 2013, 4:44 PM), <https://perma.cc/38DQ-PPHD>.

304. See *supra* text accompanying note 124.

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

with bite,³⁰⁶ and that he would prefer for commercial speech to receive the same level of First Amendment protection as noncommercial speech.³⁰⁷ But this is beside the point. It is entirely plausible to read *NIFLA* as limiting the heightened scrutiny it applies—this reading is internally consistent with *NIFLA*'s own logic, and it is externally consistent with broader constitutional doctrine. Unless and until Justice Thomas convinces four other Justices to agree with his own views, lower courts and the Supreme Court alike are free to adopt this limited reading of *NIFLA*.³⁰⁸

Because *NIFLA*'s heightened scrutiny would be cabined under that limited reading, a rational basis version of *Zauderer* would typically apply to warnings and disclosures about commercial products and services. Normatively, this framework strikes the right balance of interests: It protects a commercial speaker's "minimal" constitutionally protected interest in not providing more information than it would otherwise prefer,³⁰⁹ while also preserving the government's interest in regulating for the public good.

Caroline Mala Corbin has articulated three reasons "why compelled disclosures might undermine the values and goals embodied in the Free Speech Clause."³¹⁰ First, compelled disclosures might chill speech protected by the First Amendment.³¹¹ But this concern is negligible in the context of commercial speech. As the Court has explained, commercial speech has a "greater . . . hardiness" than other types of speech: "Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."³¹² Moreover, if a compelled disclosure somehow did chill commercial speech, it would not pass muster under *Zauderer*'s not "unduly burdensome" requirement. Second, compelled speech

306. Justice Thomas joined a dissent that made this point. *See* Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

307. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.").

308. Cf. Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1984-85, 1987 (2016) (arguing that lower courts have "narrowed" Justice Thomas's *Reed v. Town of Gilbert* opinion "in a manner consistent with the majority opinion's text").

309. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

310. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291 (2014). Corbin wrote the first in-depth analysis that "draws from free speech theory to identify exactly what it is about compelled disclosures that undermines free speech principles." *See id.* at 1280 & n.5.

311. *See id.* at 1293-94.

312. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

might “distort the marketplace of ideas” if the disclosure is “false or misleading” or “forces speakers to convey an opinion they disagree with.”³¹³ But under *Zauderer*, disclosures must convey “purely factual” information in order to comport with the First Amendment. Third, compelled disclosures might intrude on the autonomy of the speaker or the audience.³¹⁴ With respect to autonomy of the speaker, there is little intrusion when the speech is commercial. That is because corporations should not be considered people with “inherent dignity,”³¹⁵ and because “commercial speech is protected primarily for the sake of audiences, not speakers.”³¹⁶ With respect to the autonomy of the audience, there is little intrusion when the speech is either meant to inform, or to persuade on an issue where there is already consensus³¹⁷—in other words, when the compelled disclosure is “purely factual” and “uncontroversial.” In sum, the requirements of the *Zauderer* framework, and the nature of the commercial speech it applies to, adequately accommodate commercial speakers’ rights. And applying a rational basis version of *Zauderer* also gives the government sufficient latitude to regulate in the public interest.

By contrast, I believe that the first reading of *NIFLA*—under which commercial warnings and disclosures would receive heightened scrutiny³¹⁸—fails to adequately protect the government’s interests. It also fails to fully capture the reasons why compelled commercial speech can be inconsistent with the First Amendment. As detailed in Part II above, a heightened scrutiny test could block the use of government-mandated warnings and disclosures that may play an important role in addressing major social problems, such as the obesity crisis or the public health threat posed by smoking. Because the Court’s recent application of *Central Hudson* has resembled the application of a strict scrutiny test,³¹⁹ analyzing compelled commercial warnings and disclosures under such precedent could lead to the invalidation of many regulations. Furthermore, unlike the *Zauderer* framework, heightened scrutiny does not require asking whether the warning or disclosure is “purely factual” or “uncontroversial.” Yet *Zauderer*’s “purely factual” and “uncontroversial”

313. See Corbin, *supra* note 310, at 1294–98.

314. See *id.* at 1298–1308.

315. See *id.* at 1314–15.

316. *Id.* at 1314.

317. See *id.* at 1301–04.

318. See, e.g., Adler, *supra* note 46, at 436 (arguing for a heightened scrutiny version of *Zauderer*); Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599, 603 (2014) (arguing that *Central Hudson* is the correct standard for analyzing disclosures “that do not implicate consumer confusion or deception”); Haynes et al., *supra* note 50, at 350–56 (arguing for the application of strict scrutiny).

319. See *supra* note 58 and accompanying text.

prongs are crucial for determining whether a warning or disclosure is constitutionally problematic, either because it distorts the marketplace of ideas or because it encroaches on autonomy interests. In this respect, heightened scrutiny is a less apt test than *Zauderer* when it comes to sussing out which warnings and disclosures contravene First Amendment values. Although judges could use the means-ends inquiry of heightened scrutiny to invalidate a disclosure that is false or misleading, such an indirect maneuver could obscure the real reason why the disclosure poses a constitutional problem.³²⁰

The third reading of *NIFLA*—which would establish a content-based categorical exception for health warnings—is not incompatible with cabining *NIFLA*'s heightened scrutiny so that a rational basis version of *Zauderer* applies. Courts could ask if a warning or disclosure falls within the content-based categorical exception for health warnings; if not, they could apply *Zauderer*. But for the following reasons, the exception discussed in Part IV above should not be part of the analysis.

There are serious questions about courts' ability to administer such a content-based categorical exception.³²¹ Courts would be charged with assessing the strength of scientific evidence and with determining what level of risk of death or serious injury is sufficient to place a warning within the exception's bounds. Moreover, one of the main benefits of the categorical exception—simplifying the First Amendment analysis and therefore shutting down burdensome lawsuits that question disclosures for clearly hazardous products—may not materialize. The lawsuit against Vermont's mercury labeling law is an outlier;³²² most other health warnings and disclosures that have been challenged in federal court would likely not fall within the categorical exception. Finally, the categorical approach's reliance on history to determine the scope of First Amendment protection is both descriptively underinclusive and normatively undesirable. Carving out an exception for health warnings would “not account for the far greater range of regulations of what is colloquially understood as speech or expression that have long not been subject to First Amendment challenge.”³²³ And “[w]hat has been done in the past cannot answer normatively what the law should be in the future.”³²⁴ Most

320. Cf. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 211 (2011) (criticizing the “Justices’ failure to provide decisions that offer clear, persuasive and transparent reasoning” and “be honest about the considerations driving their decisions”).

321. See *supra* Part IV.C.

322. See Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001).

323. See Shanor, *supra* note 4, at 340 (giving the examples of “compulsory tax returns, perjury, the rules of evidence, malpractice, contract law, and harassing and discriminatory speech in the workplace”).

324. See Chemerinsky, *supra* note 257, at 901.

health warnings and disclosures that have been challenged in federal court would likely not fall within the categorical exception.³²⁵

Finally, an important question is whether and when applying *Zauderer* should be the first and last step in the First Amendment analysis. *NIFLA* suggested (and Judge Ikuta argued) that *Zauderer* does not apply when a warning or disclosure is not “purely factual” and “uncontroversial”; instead, heightened scrutiny is the test.³²⁶ But it does not make sense to run through heightened scrutiny if a warning fails the “purely factual” and “uncontroversial” prongs. As discussed above, part of the reason why *Zauderer* is the appropriate test has to do with its “purely factual” and “uncontroversial” requirements—which *Central Hudson* does not include. In light of this, it would make more sense to hold *Zauderer* inapplicable when a warning or disclosure fails the not “unduly burdensome” requirement. In other words, a *Central Hudson* analysis should only follow a *Zauderer* analysis if the compelled speech is struck down on the ground that it is “unduly burdensome” and tantamount to a prohibition on speech. When a disclosure requirement actually does rule out the possibility of commercial speech, then it does not matter whether the disclosure is “purely factual” and “uncontroversial”—because there will be no commercial speech, there also will be no disclosure attached to that speech. *Central Hudson*, which traditionally has applied in cases where the government suppresses speech,³²⁷ should then come into play.

B. Fleshying Out *Zauderer*

Simply saying that courts would apply a rational basis version of *Zauderer* under the second reading of *NIFLA* is only halfway helpful. The question remains what exactly *Zauderer* requires for warnings and disclosures to survive its scrutiny. Thus far, the Court’s precedents have provided little guidance on what each of *Zauderer*’s criterion requires. This Subpart takes on the task of fleshing out each of these criteria in a way that comports with the balance that *Zauderer* struck between a commercial speaker’s interest and the government’s interest. In so doing, it considers some of the key and novel issues teed up by *American Beverage Ass’n*.

325. One outlier that may have fallen within the categorical exception: a Vermont law requiring labeling of mercury-containing light bulbs. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (concerning a First Amendment challenge to the law).

326. See *supra* Part II.B.

327. See *supra* text accompanying note 28.

1. Purely factual

The Court's cases indicate that "purely factual" means at least three things. First, it means that the compelled commercial speech consists of a statement of fact instead of a statement of opinion. *Zauderer* itself emphasized that the state government had not tried to "prescribe what shall be orthodox in . . . matters of opinion."³²⁸ Second, it means that the statement of fact is accurate. *Zauderer* observed that "[t]he right of a commercial speaker not to divulge *accurate* information regarding his services is not such a fundamental right."³²⁹ And *Milavetz, Gallop & Milavetz, P.A. v. United States* described the compelled disclosure in that case and in *Zauderer* as "entail[ing] only an accurate statement."³³⁰ Finally, it means that the statement of fact is not "misleading." The *Milavetz* Court entertained (but then rejected) an objection that a compelled disclosure was misleading.³³¹ Notably, these three components map onto Corbin's analysis of when compelled commercial speech might raise a First Amendment issue. According to Corbin, compelled speech can be constitutionally problematic if the required disclosures are false, misleading, or "force speakers to convey an opinion they disagree with."³³²

But the Court has not spelled out what these three terms—false, misleading, and opinion—mean in the context of compelled commercial speech. Indeed, one of the hardest questions that the Ninth Circuit confronted in *American Beverage Ass'n* was what it means for compelled commercial speech to be false or misleading. And ultimately, the Ninth Circuit en banc majority decided to say nothing at all about what "purely factual" means³³³—even though this very question consumed much of the oral argument.³³⁴

With respect to falsity, the main issue in *American Beverage Ass'n* was whether the SSB warning contained a false statement regarding the link between SSBs and diabetes. The SSB warning stated that drinking SSBs "contributes to . . . diabetes."³³⁵ The district court concluded that there was "no real dispute as to the literal accuracy of the required warning."³³⁶ As the district

328. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

329. *Id.* at 651 n.14 (emphasis added).

330. 559 U.S. 229, 250 (2010).

331. *See id.* at 251-52.

332. *See supra* Part V.A.

333. *See Am. Beverage Ass'n v. City & County of San Francisco (Am. Beverage Ass'n II)*, 916 F.3d 749, 756-57 (9th Cir. 2019) (en banc).

334. *See generally American Beverage Ass'n Oral Argument, supra* note 171.

335. S.F., CAL., HEALTH CODE § 4203(a) (2019).

336. *Am. Beverage Ass'n v. City & County of San Francisco (Am. Beverage Ass'n I)*, 187 F. Supp. 3d 1123, 1139 (N.D. Cal. 2016), *rev'd*, 916 F.3d 749.

court explained, “both sides agree that . . . SSBs can contribute to weight gain because they provide calories, and that weight gain can lead to . . . diabetes.”³³⁷ In her concurrence to the Ninth Circuit opinion, Judge Christen disagreed. Judge Christen, joined by Chief Judge Thomas, also read the SSB warning “literally,” but concluded that it was “untrue with regard to type [1] diabetes.”³³⁸ Although there is an association between consuming SSBs and type 2 diabetes, type 1 diabetes is thought to be caused by “genetic and environmental factors,” rather than dietary factors.³³⁹

At the heart of the disagreement between the district court, and Judge Christen and Chief Judge Thomas, is a tough question: *How* literally accurate does compelled commercial speech have to be? It is literally accurate, as the district court concluded, to say that drinking SSBs contributes to diabetes—but it would be even more precise to say that drinking SSBs contributes to type 2 diabetes. Drawing on a similar example Judge Fletcher raised at oral argument,³⁴⁰ it is likewise literally accurate to say “smoking causes cancer”—but it would be more precise to list the specific cancers that are caused by smoking.

Additionally, the industry plaintiffs in *American Beverage Ass’n* contended that the SSB warning was misleading in two ways. First, the industry plaintiffs argued that the warning misleadingly conveyed that drinking SSBs is “dangerous regardless of one’s diet or lifestyle” and would inevitably lead to the adverse health effects listed in the warning.³⁴¹ The district court determined that “no reasonable consumer would likely construe the warning as specific to him or her and instead would understand the warning is directed to the general public.”³⁴² But, as Judge Berzon pointed out at oral argument before the Ninth Circuit, there was no evidence in the record indicating how reasonable consumers would perceive the warning:

In some ways what bothers me the most is . . . that we are speculating about how somebody would understand this warning . . . [T]here’s a dispute about . . . how people would read this. We’re being told diametrically opposite things . . . I may have an instinct about it, I do, but it’s not provable anywhere in the record.³⁴³

337. *Id.*

338. *Am. Beverage Ass’n II*, 916 F.3d at 766 (Christen, J., concurring in part and concurring in the judgment).

339. *See id.* at 765-66.

340. *See American Beverage Ass’n Oral Argument*, *supra* note 171, at 46:38-47:08.

341. *See Am. Beverage Ass’n I*, 187 F. Supp. 3d at 1137 (quoting Notice of Motion & Motion for a Preliminary Injunction at 6, *Am. Beverage Ass’n I*, 187 F. Supp. 3d 1123 (No. 15-cv-03415), 2016 WL 6836654).

342. *Id.* at 1139.

343. *American Beverage Ass’n Oral Argument*, *supra* note 171, at 49:10-50:45.

Second, the industry plaintiffs argued that the warning misleadingly conveyed that “beverages with added sugar are especially harmful relative to other sources of calories.”³⁴⁴ The City’s response: SSBs were singled out because of their outsized role in unhealthy consumption. They “are the single largest source of added sugar in American diets,” they are empty calories with no nutritional value, and they are packaged in servings “that exceed an entire day’s allowance of added sugars.”³⁴⁵ Rather than analyzing the industry plaintiffs’ argument as a claim that the warning was not “purely factual,” the district court characterized it as a claim that the SSB warning ordinance was underinclusive because it did not apply to other sources of calories.³⁴⁶ The district court then rejected the claim of underinclusiveness, explaining both that the City had a “reasonable basis for selecting” SSBs and that *Zauderer* rejected this line of inquiry.³⁴⁷ At oral argument before the Ninth Circuit, counsel for the industry plaintiffs returned to the contention that the warning was misleading. Counsel asserted that San Francisco was wrong to think that consumers would view the SSB warning as a “behavioral warning”³⁴⁸—but again, there was nothing in the record one way or another.

In order to provide a workable standard that strikes the appropriate balance between the interests of commercial speakers and the government, this Note proposes borrowing from Lanham Act³⁴⁹ and FTC Act³⁵⁰ false advertising cases.³⁵¹ Both acts create liability for companies that engage in false or misleading commercial advertising.³⁵² And crucially, the reach of both acts is limited by the First Amendment: They cannot prohibit factual commercial

344. Brief of Plaintiffs-Appellants American Beverage Ass’n & California Retailers Ass’n at 37, *Am. Beverage Ass’n II*, 916 F.3d 749 (No. 16-16072), 2016 WL 4161852.

345. Answering Brief of Appellee City & County of San Francisco at 23, *Am. Beverage Ass’n II*, 916 F.3d 749 (Nos. 16-16072 & 16-16073), 2016 WL 5338094.

346. See *Am. Beverage Ass’n I*, 187 F. Supp. 3d at 1140.

347. See *id.* at 1140-42.

348. See *American Beverage Ass’n Oral Argument*, *supra* note 171, at 15:44-17:23 (responding to the argument that the SSB warning is a “behavioral warning about how many people consume or overconsume [SSBs] in the course of an overall diet that is consuming more calories than it takes in”).

349. 15 U.S.C. §§ 1051-1141n (2018).

350. *Id.* §§ 41-58.

351. Although there are key differences between the acts—the Lanham Act gives private competitors standing to bring claims, while the FTC Act authorizes the commission to prosecute cases—“the definition of ‘false or misleading’ consists of essentially the same elements under both statutes.” Kathryn Bi, Comment, *What Is “False or Misleading” Off-Label Promotion?*, 82 U. CHI. L. REV. 975, 992 (2015).

352. See 15 U.S.C. §§ 45, 52 (liability under the FTC Act); *id.* § 1125(a) (liability under the Lanham Act).

speech that the Constitution protects.³⁵³ The acts can thus be considered a demarcation of the boundary where commercial speech moves from being protected because of the factual information it provides, to being unprotected because it is false or misleading.

Looking to the Lanham and FTC Acts is therefore not just convenient; it also makes doctrinal sense. In his dissent from the D.C. Circuit's opinion on conflict minerals disclosures,³⁵⁴ Judge Srinivasan urged that the definition of "purely factual" should account for the reasons why *Zauderer* protected commercial speech: "its value in providing consumers with useful information about products and services."³⁵⁵ And "[t]hat purpose is honored when a disclosure mandate calls for dissemination to consumers of 'purely factual' and 'accurate' information about a product"³⁵⁶ In other words, when a compelled disclosure has informational value similar to commercial speech, it should satisfy *Zauderer's* "purely factual" requirement. Borrowing from the Lanham and FTC Acts is a way of determining when the government's compelled disclosure has informational value similar to protected commercial speech and is thereby permissible under the First Amendment.

For claims under both the Lanham and FTC Acts, the commercial speech must be literally false or misleading.³⁵⁷ The first step in determining whether speech is false or misleading is determining what the speech means.³⁵⁸ When faced with a claim that speech is literally false, the court "may determine meaning . . . without use of extrinsic evidence."³⁵⁹ Once the court determines

353. See POM Wonderful, LLC v. FTC, 777 F.3d 478, 484 (D.C. Cir. 2015) (noting that the FTC Act proscribes "deceptive and misleading advertisements" that "the First Amendment does not protect"); Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 940, 949 (3d Cir. 1993) (making the same observation with respect to the Lanham Act); Rebecca Tushnet, Paper, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737, 738 (2007) (discussing courts' view that false advertising laws "pose no constitutional problems because they regulate only false and misleading commercial speech"); Sarah Samuelson, Note, *True or False: The Expanding "False by Necessary Implication" Doctrine in Lanham Act False Advertising, and How a Revitalized Puffery Defense Can Solve This Problem*, 30 CARDOZO L. REV. 317, 339-40 (2008) (discussing the First Amendment implications of false advertising cases).

354. See generally *supra* Part I.C.4 (discussing the disclosure and the litigation over it).

355. Nat'l Ass'n of Mfrs. v. SEC (*Nat'l Ass'n of Mfrs. II*), 800 F.3d 518, 537 (D.C. Cir. 2015) (Srinivasan, J., dissenting).

356. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 & n.14 (1985)).

357. See 138 AM. JUR. TRIALS 1 *Litigation of False Advertising of Vitamin Supplements Under FTC Act* §§ 1, 11 (West 2019) (describing the FTC Act); 5 J. THOMAS McCARTHY, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 27:53 (West 2019) (describing the Lanham Act).

358. See 2 LOUIS ALTMAN & MARIA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 5:18 (West 2019).

359. *Id.*

the speech's meaning, it then considers whether that message is literally false. To be literally false, the speech must contain "an explicit representation of fact that on its face conflicts with reality."³⁶⁰ And most courts agree that speech can only be literally false if it is "unambiguous."³⁶¹ When speech "is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false."³⁶² In a Lanham Act case, the plaintiff competitor has the burden of establishing the literal falsity of the advertisement;³⁶³ in an FTC Act case, the Commission has the burden of proving falsity.³⁶⁴

By contrast, when faced with a claim that speech is misleading, courts typically "require the plaintiff to provide extrinsic evidence that the targeted material does convey the message alleged to be false."³⁶⁵ At the preliminary injunction stage, the plaintiff is not required to present a consumer survey showing the message that consumers receive. Such surveys are held in "high esteem" but can cost tens of thousands of dollars.³⁶⁶ The plaintiff may instead rely on other types of extrinsic evidence to show the message that the advertisement conveys, such as expert testimony or focus group evidence.³⁶⁷ Ultimately, though, the plaintiff will usually prevail on a claim by presenting a consumer survey detailing consumers' reaction to the advertisement.³⁶⁸ In

360. 5 MCCARTHY, *supra* note 357, at § 27:54 (quoting *Eli Lilly & Co. v. Arla Foods*, 893 F.3d 375, 382 (7th Cir. 2018)).

361. *See id.*

362. *Id.* (quoting *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007)); *see also, e.g.*, *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274-75 (4th Cir. 2002); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmas. Co.*, 290 F.3d 578, 587 (3d Cir. 2002).

363. *See, e.g.*, *BASF Corp. v. Old World Trading Co., Inc.*, 41 F.3d 1081, 1091 (7th Cir. 1994); *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 227-29 (3d Cir. 1990). *See generally* 1 CHARLES E. MCKENNEY & GEORGE F. LONG III, *FEDERAL UNFAIR COMPETITION: LANHAM ACT* 43(a), at § 6:7 (West 2019).

364. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994).

365. 2 ALTMAN & POLLACK, *supra* note 358, at § 5:21. The FTC sometimes relies on extrinsic evidence and sometimes does not. *See id.*; *Ivan L. Preston, Data-Free at the FTC? How the Federal Trade Commission Decides Whether Extrinsic Evidence of Deceptiveness Is Required*, 24 AM. BUS. L.J. 359, 361 (1986) (discussing the FTC's increasing use of extrinsic evidence); *see also Sandoz Pharm.*, 902 F.2d at 228 (explaining that the FTC is not required to present consumer testimony evidence).

366. *See Robert C. Bird & Joel H. Steckel, The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013, 1016, 1017 n.20 (2012).

367. *See Eli Lilly & Co. v. Arla Foods*, 893 F.3d 375, 379 (7th Cir. 2018) (stating that consumer surveys are not required at the preliminary injunction stage); *Scotts Co.*, 315 F.3d at 276 (same); 2 LOUIS ALTMAN & MARIA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 5:22 (describing other types of extrinsic evidence).

368. *See 5 MCCARTHY, *supra* note 357, at § 27:55.*

addition to demonstrating that the speech conveys the message that is allegedly false, the plaintiff must show that the message is indeed false.

In a compelled commercial speech case, it is not immediately clear which party should bear the burden of proof on whether the required speech is “purely factual,” that is neither false nor misleading. Under traditional rational basis analysis, it is the challenger, rather than the government, who bears the burden of proof;³⁶⁹ on the other hand, *Zauderer* is not exactly like rational basis review “[b]ecause commercial speakers retain ‘minimal’ First Amendment interests.”³⁷⁰ Still, because *Zauderer*’s standard of review is decidedly deferential, it is incompatible with setting a high threshold that makes it overly burdensome for the government to regulate through warnings and disclosures.

Colorable claims of literal falsity are relatively uncommon in compelled commercial speech litigation.³⁷¹ When such claims are brought, the government should have the burden of proving that the underlying message is true. This should not be a heavy burden on the government; any responsible government that has required commercial speakers to convey an unambiguously clear message will have ensured the truth of that message. To take a simplified example, if San Francisco had instead passed an ordinance mandating the label “Researchers have studied the health effects of SSBs,” the City would then have the burden of proving that there are in fact studies on the health effects of SSBs. What of the industry plaintiffs’ contention that the actual SSB warning was false with respect to type 1 diabetes? This statement should not be considered literally false because it is ambiguous. Consumers could read the statement in at least two ways: as saying that consuming SSBs is associated with both types of diabetes that exist, or as saying that consuming SSBs is associated with at least one type of diabetes.

369. Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 384 (2012).

370. Post, *supra* note 18, at 882-83 (observing that, because of these interests, *Zauderer* does not use the “vocabulary of ‘rational basis’ review, which would have suggested extreme judicial deference”).

371. Of all the examples of compelled commercial speech litigation in Part I.C above, only two potentially involved a judicial discussion of literal falsity. *CTIA—The Wireless Ass’n v. City of Berkeley (CTIA v. Berkeley II)*, 928 F.3d 832, 853-55 (9th Cir.) (Friedland, J., dissenting in part), *cert. denied*, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019); *Am. Beverage Ass’n v. City & County of San Francisco (Am. Beverage Ass’n II)*, 916 F.3d 749, 761 (9th Cir. 2019) (en banc) (Ikuta, J., dissenting from most of the reasoning, concurring in the result); *id.* at 765-66 (Christen, J., concurring in part and concurring in the judgment).

The issue of whether a disclosure or warning is misleading is more common.³⁷² In such cases, courts should generally require extrinsic evidence showing what message consumers understand the warning or disclosure to convey. Having extrinsic evidence provides an objective basis on which judges can resolve compelled commercial speech cases. Without this evidence, judges are left speculating about how consumers would understand the warning or disclosure. For instance, in striking down the FDA's proposed graphic cigarette warnings, the D.C. Circuit was concerned that many of the warnings were misleading: "[T]he image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking—a more logical interpretation than FDA's contention that it symbolizes 'the addictive nature of cigarettes.'"³⁷³ It is unclear why the majority thought consumers would believe that a tracheotomy hole is a *common* consequence of smoking, rather than *one possible* consequence of smoking. And Judge Rogers's dissent pointed out a critical omission by the majority: The image was accompanied by the textual statement "Cigarettes are addictive."³⁷⁴ Read together, the dissent said, the image and text "convey[ed] the tenacity of nicotine addiction."³⁷⁵

The Ninth Circuit came out the other way on Berkeley's cell phone disclosure ordinance. It held that the disclosure did not convey a message that misleadingly sounded an alarm bell about the safety of cell phones.³⁷⁶ But Judge Friedland, dissenting in part, highlighted that the disclosure "begins and ends with references to safety, plainly conveying that the intervening language describes something unsafe."³⁷⁷ And the record was devoid of any evidence indicating that carrying a cell phone close to the body is in fact unsafe.³⁷⁸

372. See *CTIA v. Berkeley II*, 928 F.3d at 847-48 (cell phone disclosures); Nat'l Ass'n of Mfrs. v. SEC (*Nat'l Ass'n of Mfrs. I*), 748 F.3d 359, 370-71 (D.C. Cir. 2014) (conflict minerals disclosures), overruled by Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc), and aff'd on reh'g, 800 F.3d 518, 530 (D.C. Cir. 2015); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (graphic cigarette warnings), overruled by *Am. Meat Inst.*, 760 F.3d 18; Am. Beverage Ass'n v. City & County of San Francisco (*Am. Beverage Ass'n I*), 187 F. Supp. 3d 1123, 1136-37, 1139 (N.D. Cal. 2016) (SSB warnings), rev'd, 916 F.3d 749; Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 628 n.33 (D. Vt. 2015) (GE labeling).

373. See *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216 (quoting Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,649 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2019))).

374. *Id.* at 1231 (Rogers, J., dissenting).

375. *Id.*

376. See *CTIA v. Berkeley II*, 928 F.3d at 847-48.

377. *Id.* at 853 (Friedland, J., dissenting in part).

378. See *id.*

For what it is worth, my own intuition is that the D.C. Circuit and the Ninth Circuit each got it backward. To me, the warning of a man smoking through a tracheotomy hole conveys the same message as the accompanying text warning that “[c]igarettes are addictive”; the cell phone warning beginning with “[t]o assure safety” and ending with “how to use your phone safely” conveys the message that failing to follow the warning’s instructions is unsafe. But, harkening back to Judge Berzon, these conclusions are based on nothing more than a gut feeling.³⁷⁹ And it is highly unsatisfactory to allow judges to decide whether a warning or disclosure is misleading by “looking it up” in their gut.³⁸⁰ It gives judges the latitude to strike down warnings and disclosures that would not be wrongly interpreted by an overwhelming majority of consumers—and would provide consumers with helpful information—and conversely to uphold warnings and disclosures from which most consumers would receive a false impression.

If courts were to require extrinsic evidence of how consumers understand a warning or disclosure, which party should have the burden of providing the evidence? At the preliminary injunction stage, and to ultimately prevail on its claim, the plaintiff should have the burden of providing reliable extrinsic evidence—such as a consumer survey, expert testimony, focus group evidence, or consumer testimony—demonstrating that the warning or disclosure is misleading. And courts, assisted by the adversarial process, should carefully scrutinize this evidence to ensure that researchers do not “ask[] highly leading questions,”³⁸¹ that experts’ testimony is supported by relevant experience and research,³⁸² and that it is appropriate to rely on individual consumer statements.³⁸³

Placing the burden on the government, rather than the plaintiff, would be problematic. It would mean requiring the government to anticipate *ex ante* all of the ways in which a plaintiff might allege that a warning or disclosure is misleading. For instance, the industry plaintiffs’ complaint in *American Beverage Ass’n* alleged that the SSB warning was misleading because it conveyed

379. See *supra* note 343 and accompanying text.

380. See *The Colbert Report, The Word—Truthiness* at 1:54-18, COMEDY CENT. (Oct. 17, 2005), <https://perma.cc/K73F-ELQ7>.

381. See *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 277-78 (4th Cir. 2002) (rejecting unreliable focus group evidence in a false advertising case).

382. See Kenneth A. Plevan, *Daubert’s Impact on Survey Experts in Lanham Act Litigation*, 95 TRADEMARK REP. 596, 600-04 (2005) (discussing the use of expert testimony in Lanham Act cases).

383. *Merck Eprova AG v. Gnosis S.P.A.*, No. 07 Civ. 5898, 2011 WL 1142929, at *4 (S.D.N.Y. Mar. 17, 2011) (explaining that deposition testimony of individual consumers could be sufficient evidence in a false advertising case if the size of the consumer audience were small).

that SSBs contribute more to obesity, diabetes, and tooth decay than beverages with natural sugar and foods with added sugar.³⁸⁴ But when the industry plaintiffs filed their motion for a preliminary injunction months later, they also suggested that the warning was misleading because it conveyed that SSBs contribute more to adverse health effects than *any other form of calories*.³⁸⁵ Or, as the industry plaintiffs suggested to the en banc panel during oral argument, the calories from broccoli and the calories from SSBs are virtually interchangeable.³⁸⁶ Assuming that this argument was properly framed as an argument that the SSB warning was misleading,³⁸⁷ requiring San Francisco to anticipate the industry plaintiffs' broccoli argument, and seek out extrinsic evidence to determine whether consumers could be misled in this particular way, would be extremely burdensome.

A final point: The disclosures that might be most subject to challenge on the ground that they are misleading are those—like restaurant sanitation grading—that reflect the aggregation and simplification of a complex information collection process.³⁸⁸ For instance, with respect to restaurant grading, one study showed that college students were deeply fractured on the meaning of a sign that said “C” followed by “Dept. of Health Services”:

27 percent of students said it was unclear; 27 percent reiterated (without explanation) that the C represented the results; 13 percent said it meant the restaurant was clean; four percent said it meant the restaurant was *not* clean; 11 percent said it meant the restaurant was not good or had problems; and 18 percent gave miscellaneous explanations....³⁸⁹

384. See Complaint for Declaratory Judgment & Injunctive Relief at 29-31, *Am. Beverage Ass'n v. City & County of San Francisco (Am. Beverage Ass'n I)*, 187 F. Supp. 3d 1123 (N.D. Cal. 2016) (No. 15-cv-03415), 2015 WL 4550250.

385. Compare *id.*, with Notice of Motion & Motion for a Preliminary Injunction at 12, *Am. Beverage Ass'n I*, 187 F. Supp. 3d 1123 (No. 15-cv-03415) (“[A]dded sugars, including sugar-sweetened beverages, are no more likely to cause weight gain in adults than any other source of energy.” (emphasis omitted) (quoting Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 79 Fed. Reg. 11,880, 11,904 (Mar. 3, 2014) (to be codified at 21 C.F.R. pt. 101))), and Notice of Motion & Motion for a Preliminary Injunction, *supra*, at 13 (“[A]dded sugar . . . is therefore indistinguishable from any other caloric food.” (emphasis omitted) (quoting Expert Report of Dr. Richard A. Kahn at 28, *Am. Beverage Ass'n I*, 187 F. Supp. 3d 1123 (No. 15-cv-03415))).

386. See *American Beverage Ass'n* Oral Argument, *supra* note 171, at 13:08:-40.

387. See *Am. Beverage Ass'n I*, 187 F. Supp. 3d at 1140.

388. For another example of this type of disclosure, see generally David Dranove et al., *Is More Information Better? The Effects of “Report Cards” on Health Care Providers*, 111 J. POL. ECON. 555 (2003).

389. Lauren Dundes & Sushama Rajapaksa, *Scores and Grades: A Sampling of How College Students and Food Safety Professionals Interpret Restaurant Inspection Results*, J. ENVTL. HEALTH, Dec. 2001, at 14, 16; see also Ho, *supra* note 159, at 593.

In New York, where grades “predict[] little about the restaurant’s cleanliness down the road,”³⁹⁰ the impression that a “C” grade conveys a meaningful message about future cleanliness, one way or the other, would be misleading. But this need not mean that restaurant sanitation grading is unconstitutional. Part of the potential constitutional problem stems from just how simple the grading system is (restaurants are given an “A,” “B,” or “C”); the solution could be to make the disclosure slightly more complex—such as by adding a disclaimer specifying that a grade reflects how health inspectors have scored the restaurant based on a standardized rubric.

In addition to not being false or misleading, a warning or disclosure must also be a statement of fact, rather than a statement of opinion, to be “purely factual.” Robert Post has written insightfully about the fact/opinion distinction,³⁹¹ so I deal with it briefly here, focusing on the narrow issue of whether the fact/opinion inquiry should be considered a question of law or a question of fact.³⁹² Formulations of the line between fact and opinion vary, but at bottom, the question is whether “it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.”³⁹³ In the defamation context, whether speech is fact or opinion is generally a question of law, but if the speech is ambiguous, it is a question for the jury.³⁹⁴ Comparing the fact/opinion inquiry to the inquiry into whether speech is misleading helps illuminate why it typically makes sense to treat the former as a question of law and the latter as a question of fact. To find speech misleading, it is necessary to first determine what consumers believe the message conveyed is. Once consumers’ understanding of the speech is established, the question then becomes whether that message is false. But to decide whether speech consists of a statement of fact or a statement of opinion, it is not always necessary to determine what consumers believe the message conveyed is. In many cases,

390. Ho, *supra* note 159, at 587.

391. Post, *supra* note 18, at 901-06 (explaining why it is important to distinguish fact from opinion in the First Amendment context and that it can be difficult to differentiate the two).

392. See *id.* at 905 & n.174 (suggesting the inquiry should be treated as a question of fact under similar circumstances as this Note proposes—when a warning or disclosure is susceptible to more than one reasonable interpretation).

393. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-21 (1990)).

394. See Post, *supra* note 18, at 905 n.174 (collecting cases); see also 4 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 35:24 (West 2019); cf. *Am. It. Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390-92 (8th Cir. 2004) (assessing whether a statement was fact or puffery as a question of law in the context of the Lanham Act); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 245-46 (9th Cir. 1990) (per curiam) (same).

each of the multiple possible meanings of the speech will clearly be factual statements, or vice versa.

Take Berkeley's cell phone disclosure ordinance:

To assure safety, the Federal Government requires that cell phones meet radio-frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation.³⁹⁵

The Ninth Circuit majority read the disclosure as not conveying that cell phones are unsafe;³⁹⁶ the dissent had the opposite view.³⁹⁷ But both the majority and the dissent viewed the disclosure as a statement of fact—although for the majority, it was a correct statement of fact; for the dissent, an incorrect statement of fact.

By contrast, in cases where one possible meaning of speech would be a statement of fact, and another possible meaning of speech would be a statement of opinion, the issue should be treated as a question of fact requiring extrinsic evidence. Indeed, in the defamation context, courts have held that “where the alleged defamatory remarks could be determined either as fact or opinion, and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.”³⁹⁸ For one example of this dynamic, consider the D.C. Circuit’s decision on graphic cigarette warnings. The D.C. Circuit invalidated the FDA’s graphic warnings in part because they were “primarily intended to evoke an emotional response” and were therefore “not ‘purely’ factual.”³⁹⁹ Among other things, the D.C. Circuit took issue with “the ‘1-800-QUIT-NOW’ number” included in the warnings.⁴⁰⁰ This warning could reasonably be interpreted as conveying the message that 1-800-QUIT-NOW is a hotline that exists to help smokers who want to quit, which feels like a statement of fact. But this warning could also reasonably be interpreted as conveying the message that quitting smoking is the right thing to do, which feels like a statement of opinion. Thus, whether this aspect of the warning is fact or opinion should be treated as a question of

395. CTIA—The Wireless Ass’n v. City of Berkeley (*CTIA v. Berkeley II*), 928 F.3d 832, 838 (9th Cir.) (quoting BERKELEY, CAL., MUN. CODE § 9.96.030(A) (2015)), cert. denied, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019).

396. *See id.* at 847.

397. *See id.* at 853 (Friedland, J., dissenting in part).

398. Bindrim v. Mitchell, 155 Cal. Rptr. 29, 39 (Ct. App. 1979); *see Post, supra* note 18, at 905 n.174 (collecting cases).

399. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012), *overruled by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

400. *See id.*

fact, dependent on extrinsic evidence showing which of these messages consumers actually understand the warning to convey.

2. Uncontroversial

Prior to *NIFLA*, the Ninth Circuit had read “uncontroversial” in conjunction with “purely factual”—that is, “purely factual” meant that the speech consisted of a statement of fact, as opposed to opinion, and “uncontroversial” meant that the statement of fact was accurate.⁴⁰¹ Other lower court opinions suggested that “uncontroversial” might instead require disclosures to consist of statements of facts that do not implicitly convey ideology.⁴⁰² But after *NIFLA*, it is clear that the “uncontroversial” prong of *Zauderer* at minimum requires that the subject of the warning or disclosure be an uncontroversial one. Because the California law required clinics to disclose information about “abortion, anything but an ‘uncontroversial’ topic,” *Zauderer* did not apply.⁴⁰³ If this holding were read broadly, *Zauderer* would be inapplicable in many cases—there is some level of public disagreement on many topics.⁴⁰⁴ Judge Ikuta, for instance, would have held San Francisco’s SSB warning unconstitutional on the ground that it concerned a “controversial topic.”⁴⁰⁵

NIFLA should be read more narrowly, to avoid placing many warnings and disclosures outside *Zauderer*’s scope. The subject matter of a warning or disclosure should only be considered “controversial”—and thereby fail *Zauderer*—if the underlying controversy is one that does not boil down to an empirical question about whether a certain state of affairs exists in the world.⁴⁰⁶ Under such a definition, abortion is clearly “controversial.” The

401. CTIA—The Wireless Ass’n v. City of Berkeley (*CTIA v. Berkeley I*), 854 F.3d 1105, 1117 (9th Cir. 2017), *vacated*, 138 S. Ct. 2708 (2018), *remanded to 928 F.3d 832 (9th Cir. 2019)*, *cert. denied*, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019).

402. *See* Fowler, *supra* note 17, at 1679-83.

403. *See* Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2372 (2018).

404. *See supra* text accompanying note 89.

405. *See* Am. Beverage Ass’n v. City & County of San Francisco (*Am. Beverage Ass’n II*), 916 F.3d 749, 761 (9th Cir. 2019) (en banc) (Ikuta, J., dissenting from most of the reasoning, concurring in the result).

406. Cf. CTIA—The Wireless Ass’n v. City of Berkeley (*CTIA v. Berkeley II*), 923 F.3d 832, 845 (9th Cir. 2019) (declining to read *NIFLA* “as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial” and instead reading *NIFLA* as holding that the compelled speech at issue there was controversial because it “took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission”), *cert. denied*, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019); Fowler, *supra* note 17, at 1688-89 (“Perhaps a ‘highly controversial’ topic is one that touches on only the ‘most deeply held’ ethical or religious beliefs.” (quoting *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., *footnote continued on next page*

controversy over whether and to what extent abortion should be legalized involves those who believe that abortion is morally wrong and those who believe a woman has a fundamental right to choose.⁴⁰⁷ By contrast, the controversy over whether sugar is “toxic”⁴⁰⁸ is at bottom a factual question: Researchers can study the effects of sugar consumption on the human body to empirically determine whether it is akin to poison.

This definition of “controversial” would not be so sweeping as to prohibit the government from regulating on a multitude of topics—and at the same time, would protect First Amendment interests. Recall that the “uncontroversial” prong of *Zauderer* is important because it recognizes that government-mandated warnings and disclosures are problematic if they try “to change the audience’s mind on a contested question” and therefore “fail to respect decisional autonomy.”⁴⁰⁹ When a controversy boils down to an empirical question, it means there is controversy over what the facts, once fully uncovered, will ultimately show—but there can be consensus over what the facts so far uncovered presently show. Whether sugar is “toxic” is still up for debate,⁴¹⁰ but even the industry plaintiffs’ counsel acknowledged at oral argument that consuming SSBs can contribute to obesity, type 2 diabetes, and tooth decay.⁴¹¹ In such a case, a “purely factual” warning can reflect a consensus—rather than the government picking sides in a contest.⁴¹² But when a controversy is not about empirics, there cannot be a temporary factual consensus on the heart of the controversy; the controversy, after all, is not really about what the facts show. Returning to abortion, imagine the following hypothetical: that Congress, instead of passing the Partial-Birth Abortion Ban

concurring))). Prior to *NIFLA*, lower courts and scholars generally did not interpret “uncontroversial” as referring to the subject matter of the disclosure. *See id.* at 1674, 1684. Consequently, there is a dearth of scholarship grappling with what constitutes an “uncontroversial” subject matter.

407. *See* Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985).

408. *See generally* Robert H. Lustig et al., *The Toxic Truth About Sugar*, 482 NATURE 27 (2012).

409. *See* Corbin, *supra* note 310, at 1303.

410. *Compare* Lustig et al., *supra* note 408 (arguing that sugar is toxic), *with* Jabr, *supra* note 202 (arguing that sugar, in the amount normally consumed, is not toxic).

411. *American Beverage Ass’n* Oral Argument, *supra* note 171, at 1:54-2:41.

412. Indeed, the trade association plaintiff in *CTIA—The Wireless Ass’n v. City of Berkeley* (*CTIA v. Berkeley II*), did not even attempt to argue that the required disclosure was “controversial” within the meaning of *Zauderer* because “there is a controversy concerning whether radio-frequency radiation from cell phones can be dangerous if the phones are kept too close to a user’s body over a sustained period.” 928 F.3d 832, 848 (9th Cir. 2019), cert. denied, No. 19-439, 2019 WL 6689680 (U.S. Dec. 9, 2019); *see also id.* (“Despite this disagreement, Berkeley’s required disclosure is uncontroversial within the meaning of *NIFLA*. It does not force cell phone retailers to take sides in a heated political controversy.”)

Act of 2003,⁴¹³ required all medical clinics to post a detailed description of the “dilation and extraction” method of abortion.⁴¹⁴ Even if this description were completely factual, it would clearly still resonate with only one side of the controversy: those who believe that abortion is morally wrong.⁴¹⁵

3. Unjustified and unduly burdensome

On the “unjustified” piece of *Zauderer*, the Court in *NIFLA* declined to decide “what type of state interest is sufficient to sustain a disclosure requirement.”⁴¹⁶ There are two dimensions to this issue. The first dimension is whether the government’s interest must be preventing consumer deception,⁴¹⁷ or whether other interests—such as protecting public health and safety—can justify warnings and disclosures.⁴¹⁸ The reasons why *Zauderer* applies outside the consumer deception context have been written about at length by judges

413. Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2018)).

414. See *Gonzales v. Carhart*, 550 U.S. 124, 137-40 (2007) (describing “dilation and extraction,” also known as “intact D&E,” in the course of upholding the Partial-Birth Abortion Ban Act).

415. Admittedly, it may not always be easy to distinguish empirical from non-empirical controversies. For example, the controversy over whether minerals are the main cause of the DRC conflict, Supplemental Brief of Appellants at 17-18, Nat'l Ass'n of Mfrs. v. SEC (*Nat'l Ass'n of Mfrs. I*), 748 F.3d 359 (D.C. Cir. 2014) (No. 13-5252), 2014 WL 7387243, could be viewed as concerning an empirical issue, albeit a knotty one. It is theoretically possible, although realistically very difficult, to track the mineral trade to determine whether it is in fact fueling the conflict. But the controversy could also be viewed as concerning the non-empirical issue of whether a manufacturer who “indirectly finance[s] armed groups” has “blood on its hands.” Nat'l Ass'n of Mfrs. v. SEC (*Nat'l Ass'n of Mfrs. II*), 800 F.3d 518, 530 (D.C. Cir. 2015). One tentative answer is that the “purely factual” prong might be a better conceptual fit for addressing such a potential constitutional problem. Continuing with the conflict minerals disclosure example, perhaps the argument that the disclosure “conveys moral responsibility,” *id.*, is more responsive to the question whether the disclosure conveys an opinion or a factual statement than it is to the question whether the disclosure concerns a controversial subject matter. And if that is the case, perhaps that argument should be analyzed under the “purely factual” disclosure concerns a controversial subject matter. And if that is the case, perhaps that argument should be analyzed under the “purely factual” requirement and not be analyzed under the “uncontroversial” requirement at all.

416. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2377 (2018).

417. See *Am. Beverage Ass'n v. City & County of San Francisco (Am. Beverage Ass'n II)*, 916 F.3d 749, 768-69 (9th Cir. 2019) (Nguyen, J., concurring in the judgment) (cataloging dissents that “disagree[] with applying *Zauderer* outside the context of false and misleading speech”).

418. See *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 21-22 (D.C. Cir. 2014) (en banc); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (per curiam); Post, *supra* note 18, 886 n.95 (discussing these cases).

and scholars alike.⁴¹⁹ And most fundamentally, the reasons Corbin has articulated for why government-mandated disclosures or warnings may be constitutionally problematic have nothing to do with whether they are furthering a state interest in preventing consumer deception or advancing some other state interest.⁴²⁰ The second dimension is how weighty the government's interest must be—whether it must rise to the level of "substantial."⁴²¹ This issue has mattered most in cases where courts have framed the government's interest as satisfying consumer curiosity and discussed the sufficiency of this interest.⁴²² But it feels somewhat dishonest to characterize the government's interest as mere consumer curiosity. Such "curiosity" only results in laws mandating commercial disclosures because there is some substantial concern behind it—such as a concern about public health, safety, or the national economy.⁴²³ And these sorts of concerns constitute legitimate and even substantial government interests that can justify a disclosure requirement.⁴²⁴

On the "unduly burdensome" piece of *Zauderer*, the *NIFLA* Court held that the required notice would "drown[] out" facilities' advertisements and

419. *See supra* note 46.

420. *See supra* notes 310-17 and accompanying text.

421. Compare Adler, *supra* note 46, at 434 (arguing for a substantial interest requirement), with Richard F. Lee, Note, *A Picture Is Worth a Thousand Words: The Marketplace of Ideas and the Constitutionality of Graphic-Image Cigarette Warning Labels and Other Commercial Disclosure Requirements*, 84 U. COLO. L. REV. 1179, 1219-1221 (2013) (arguing that *Zauderer* combined "rational basis review"—which requires only a "legitimate government interest"—"with the additional condition that disclosure requirements must not be unjustified or unduly burdensome"). For further discussion of substantial interest tests, see Post, note 18 above at 898-900.

422. See, e.g., Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69, 73-74 (2d Cir. 1996) (involving a state statute requiring disclosure of the use of synthetic growth hormone in the production of milk or milk products); Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 630-32 (D. Vt. 2015) (involving GMO labeling). *But see* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 23-25 (D.C. Cir. 2014) (en banc) (holding that country-of-origin labeling on meat products "has an historical pedigree that lifts it well above 'idle curiosity'").

423. *See Int'l Dairy Foods Ass'n*, 92 F.3d at 76 (Leval, J., dissenting) (criticizing the majority for concluding that the state's sole interest is satisfying "consumer curiosity" and highlighting consumers' "concerns about human health, cow health, biotechnology, and the survival of small dairy farms").

424. *See* Edwards v. District of Columbia, 755 F.3d 996, 1002-03 (D.C. Cir. 2014) (accepting "promoting the tourism industry and economy" as a substantial interest and citing cases from other circuits that reached similar conclusions); Samantha Rauer, Note, *When the First Amendment and Public Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations That Restrict Commercial Speech*, 38 AM. J.L. & MED. 690, 694, 703 (2012) (explaining that "public health regulations are always struck down at the third or fourth prong of the *Central Hudson* test," as the substantial interest prong is an "easily satisfied threshold requirement[] in practice").

“effectively rule[] out’ the possibility of having” an advertisement “in the first place.”⁴²⁵ The Court explained that “a billboard for an unlicensed facility that says ‘Choose Life’ would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages.”⁴²⁶ Similarly, in *Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy*⁴²⁷—where the Court also found that a disclosure requirement “effectively rule[d] out” the possibility of advertising⁴²⁸—the government-required disclosure would have taken up the overwhelming majority of the attorney’s advertisements. The attorney ran a three-line Yellow Pages ad, containing one line each for her name and professional qualifications, including a specialist designation; the fact that she spoke Spanish; and her address.⁴²⁹ Yet the state required her to include a disclaimer for the specialist designation stating “that the recognizing agency is not affiliated with or sanctioned by the state or federal government” and describing the agency’s “requirements for recognition, including, but not limited to, educatio[n], experience and testing.”⁴³⁰

Neither *NIFLA* nor *Ibanez*—both of which involved extreme examples of compelled disclosures—is particularly helpful in determining whether a warning or disclosure would “effectively rule[] out” the possibility of an advertisement in other cases. Tasking the government with proving that a regulatory warning or disclosure will not in fact chill commercial speech is a tall order. Rather, the government should have to provide a reasoned and coherent explanation for why it determined that the size and appearance of the warning or disclosure were not excessive in light of its goals.

On the facts of *American Beverage Ass’n*, San Francisco would not have satisfied this burden. The district court’s explanation, which San Francisco also used on appeal, was that the World Health Organization (WHO) has recommended that tobacco packaging have a health warning occupying at least 50% of the space of the advertisement, but no less than 30%—so the City chose the more moderate number of 20%.⁴³¹ It is not clear why San Francisco selected

425. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2378 (2018) (quoting *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994)).

426. *Id.*

427. 512 U.S. 136 (1994).

428. *Id.* at 146-47.

429. Joint Appendix at 4, *Ibanez*, 512 U.S. 136 (No. 93-639).

430. See *Ibanez*, 512 U.S. at 152 (quoting FLA. ADMIN. CODE 61H1-24.001(1)(j) (1994) (alteration in original)).

431. Am. Beverage Ass’n v. City & County of San Francisco (*Am. Beverage Ass’n I*), 187 F. Supp. 3d 1123, 1138 (N.D. Cal. 2016), *rev'd*, 916 F.3d 749 (9th Cir. 2019) (*en banc*); see also Answering Brief of Appellee City & County of San Francisco at 32, *Am. Beverage* footnote continued on next page

20% over any other number equal to or less than 50%, or why WHO's recommendation on tobacco packaging was applicable to SSB advertisements. At oral argument before the Ninth Circuit en banc panel, the City also highlighted that federal law requires 20% warnings for cigarette and smokeless tobacco product advertisements.⁴³² But the City lacked a cohesive narrative of why that same size was no more extensive than necessary in the SSB warning context.

Coming up with a reasoned and coherent explanation is hardly an insurmountable hurdle. For instance, the only studies so far that have examined the effectiveness of SSB warnings used warnings covering about 10% of SSB labels.⁴³³ The City could instead pass an ordinance requiring a 10% warning and explain that it chose that size because there is no indication in the literature that a smaller warning would be effective. The most obvious counterargument is that this standard could permit very large warnings and disclosures, so long as the government had enough support. But, based on research to date, the government will not be able to muster a reasoned and coherent explanation for such warnings and disclosures. One study of the effectiveness of warnings in tobacco advertisements found that once the warnings reached a certain size, there was "a pattern of diminishing returns" as the warnings grew larger.⁴³⁴ Another study found no significant difference between warnings covering 20%, 30%, and 50% of advertisements with respect to whether the message was recalled.⁴³⁵

If the government meets its burden of providing a reasoned and coherent explanation, commercial speakers should only be able to prevail on the "unduly burdensome" prong by showing that the warning or disclosure will nonetheless force them to forgo advertising. And *American Beverage Ass'n* indicates that this will be hard to do. By way of background, San Francisco's SSB warning ordinance did not require warnings to appear in certain

Ass'n v. City & County of San Francisco (*Am. Beverage Ass'n II*), 916 F.3d 749 (Nos. 16-16072 & 16-16073), 2016 WL 5338094.

432. See *American Beverage Ass'n* Oral Argument, *supra* note 171, at 52:00-20.

433. See Excerpts of Record of Plaintiffs-Appellants American Beverage Association & California Retailers Association at ER387 & n.57, ER388, *Am. Beverage Ass'n II*, 916 F.3d 749 (No. 16-16072) (citing Christina A. Roberto et al., *The Influence of Sugar-Sweetened Beverage Health Warning Labels on Parents' Choices*, PEDIATRICS 1 (Feb. 2016), <https://perma.cc/6LG8-AEMC>; see also Eric M. VanEpps & Christina A. Roberto, *The Influence of Sugar-Sweetened Beverage Warnings: A Randomized Trial of Adolescents' Choices and Beliefs*, 51 AM. J. PREVENTIVE MED. 664 app. fig.1 (2016).

434. See Truitt et al., *supra* note 213, at ii62.

435. See Darren Mays et al., *The Effects of Varying Electronic Cigarette Warning Label Design Features on Attention, Recall, and Product Perceptions Among Young Adults*, 34 HEALTH COMM. 317, 320-21 (2019).

advertisements, such as “periodicals; television; [and] electronic media.”⁴³⁶ The industry plaintiffs asserted that SSB companies would simply shift all advertising to these media and forgo advertising on the media covered by the SSB warning ordinance.⁴³⁷ But the district court found the companies’ evidence to be “self-serving” and non-credible, in large part because the advertising platforms covered by the SSB warning ordinance produced significant revenue for the companies.⁴³⁸

My hope is that the foregoing exploration of the *Zauderer* prongs can be of some help to both government litigants and courts in future compelled commercial speech cases. Interpreting the *Zauderer* requirements as proposed above would both permit governments to continue using commercial warnings and disclosures in response to pressing social problems—and also provide objective standards that courts are well-equipped to administer.

Conclusion

NIFLA need not sound the death toll for the government’s longstanding ability to regulate through warnings and disclosures. Instead, *NIFLA* can be limited to cases where there is concern that the government is not regulating based on the speaker’s products or services, or where the speech at issue is not purely commercial. *Zauderer*’s deferential review would then generally apply to commercial warnings and disclosures.

If *Zauderer* were applied as proposed in Part V above, many commercial warnings and disclosures would meet the test and thereby comply with the First Amendment—but at the same time, commercial speakers would have protection against the government requiring warnings that leave consumers with a false impression or that suppress commercial advertising. Although the constitutional test would be a deferential one, there are grounds outside the federal Constitution for challenging compelled commercial speech. Regulations can be attacked on the ground that they are arbitrary and capricious.⁴³⁹ And the political process can also be highly effective—for instance, intensive lobbying may have prevented California from requiring

436. *Am. Beverage Ass’n II*, 916 F.3d at 753.

437. See Brief of Plaintiffs-Appellants American Beverage Ass’n & California Retailers Ass’n, *supra* note 344, at 25; Brief of Plaintiff-Appellant California State Outdoor Advertising Ass’n at 34, *Am. Beverage Ass’n II*, 916 F.3d 749 (No. 16-16073), 2016 WL 4161853.

438. See *Am. Beverage Ass’n v. City & County of San Francisco* (*Am. Beverage Ass’n I*), 187 F. Supp. 3d 1123, 1143-45 (N.D. Cal. 2016), *rev’d*, 916 F.3d 749. The Ninth Circuit en banc opinion did not address this issue.

439. See 5 U.S.C. § 706 (2018) (requiring agency action to meet the arbitrary and capricious standard under the federal Administrative Procedural Act); 2 AM. JUR. 2D *Administrative Law* § 476 (West 2019) (stating that many states use the same or similar standard).

Limiting NIFLA
72 STAN. L. REV. 127 (2020)

SSB warning labels.⁴⁴⁰ The government has regulated through commercial warnings and disclosures since the 1800s. The First Amendment should not now get in the way.

⁴⁴⁰. See Steve Holt, *California Soda Warning Label Bill Dies as Research Suggests Efficacy*, CIV. EATS (Jan. 14, 2016), <https://perma.cc/4UB9-9A9E> (suggesting that lobbying caused an SSB warning bill to fail).