

## **CAN YOU HANDLE THE TRUTH? COMPELLED COMMERCIAL SPEECH AND THE FIRST AMENDMENT**

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### **ABSTRACT**

*As information disclosure policies become a more popular and widespread regulatory tool, speakers are increasingly challenging such policies as a violation of their freedom of speech. The First Amendment limits on compelled commercial speech, however, have received little elaboration since the Supreme Court's 1985 decision in Zauderer v. Office of Disciplinary Council. The new challenges to information disclosure policies threaten to unsettle the compelled commercial speech doctrine without appropriate recognition of the First Amendment values at stake, and to impose significant limits on the state's ability to compel the inclusion of factual information in commercial speech in the service of the substantial state interests. While Zauderer indicates that compelled commercial disclosures are subject to rational basis review, questions remain about what interests can justify such disclosures, the types of disclosures that can be compelled, and what forms of speech qualify as commercial speech. I conclude that compelled factual disclosures affecting speech whose context and content is commercial should be subject to rational basis scrutiny as long as (1) the disclosure serves the state's interest in an informed public, and (2) the disclosure informs the audience instead of spreading the government's normative message. I will develop this conclusion by looking to recent First Amendment challenges to (1) the FDA's Final Rule requiring tobacco packages and advertisements to include warning labels that have graphic images of the consequences of tobacco addition, and (2) city laws requiring organizations providing services to pregnant women to disclose the scope of their services. These recent legal challenges illustrate the need for a new test for compelled commercial speech that adequately protects speakers' First Amendment rights, as well as the audience's informational interests.*

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## TABLE OF CONTENTS

INTRODUCTION.....	541
I. THE FIRST AMENDMENT LIMITS ON COMPELLED SPEECH:	
THE ORIGINS OF THE DOCTRINE .....	544
A. Distinguishing Compelled Commercial Speech .....	546
B. Compelled Factual Disclosures in Public Discourse ....	548
II. THEORIES OF THE FIRST AMENDMENT: FACTUAL DISCLOSURES IMPOSED ON COMMERCIAL SPEECH SERVE FIRST AMENDMENT VALUES .....	
A. Marketplace of Ideas and Democratic Self-Governance .....	550
B. Autonomy Interests.....	553
C. Applying First Amendment Theories to Compelled Commercial Speech.....	555
III. THE SCOPE OF THE STATE INTERESTS JUSTIFYING COMMERCIAL DISCLOSURE LAWS.....	
A. Lower Court Interpretations of the State's Interest in Compelling Commercial Speech .....	559
B. The Prevalence of Disclosures Serving the State's Interest in an Informed Public.....	563
C. Limitations on the State's Interest.....	566
IV. THE CONTENT OF THE DISCLOSURE: WHAT ARE THE LIMITS ON THE TYPES OF DISCLOSURE THAT CAN BE REQUIRED? .....	
A. Overview of Tobacco Warning Laws .....	575
B. Drawing the Line Between Factual Disclosures and Normative Messages.....	578
C. Applying <i>Central Hudson</i> to the Visual Tobacco Laws ..	586
D. Implications for Other Commercial Disclosure Policies .....	588
V. ZAUDERER'S SCOPE: WHAT TYPE OF SPEECH CAN BE REQUIRED TO INCLUDE A FACTUAL DISCLOSURE?.....	
A. The Current Doctrine's Confused Definition of Commercial Speech.....	589
B. Disclosure Laws Targeting Pregnancy Service Centers .....	595
1. The Background Behind Pregnancy Service Center Disclosure Laws.....	596

2.	Baltimore and New York City's Disclosure Laws ...	599
3.	The Courts' Commercial Speech Analysis.....	601
4.	A More In-Depth Commercial Speech Analysis ....	605
a.	The Content of the Speech .....	606
b.	The Context of the Speech .....	609
5.	Zauderer's Rational Basis Test .....	613
CONCLUSION.....		615

## INTRODUCTION

Government-compelled commercial speech is ubiquitous. The government requires that cigarette and alcohol packaging display health warnings, corporations file financial disclosure reports, new cars' showroom stickers include vehicles' safety ratings, and food labels display ingredients and nutritional content.<sup>1</sup> These are but a few examples of the ways in which the government requires private actors to 'speak' in order to give the public more information about products and services in the commercial marketplace. Despite the prevalence and widespread acceptance of disclosure policies as an important regulatory tool, recent First Amendment challenges threaten to impose significant limits on the state's ability to compel commercial disclosures that serve substantial state goals.

The First Amendment "guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."<sup>2</sup> However, very little doctrine analyzes the First Amendment implications of compelled commercial disclosures. Instead, the constitutionality of government-mandated commercial disclosures rests on the Supreme Court's twenty-seven-year-old decision in *Zauderer v. Office of Disciplinary Counsel*.<sup>3</sup> In *Zauderer*, the Court held that the state can require commercial speech to include "purely factual and uncontroversial information" without violating the First Amendment "as long as the [State's] disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."<sup>4</sup> Even as mandated disclosures have become an increasingly popular form

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<sup>1</sup> See ARCHON FUNG, MARY GRAHAM, & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 3–7 (2007).

<sup>2</sup> Riley v. Nat'l Fed. of the Blind, 487 U.S. 781, 797 (1988) (emphasis omitted).

<sup>3</sup> 471 U.S. 626 (1985).

<sup>4</sup> *Id.* at 651.

of government regulation, there has been little elaboration on the scope of *Zauderer's* holding.

One of the reasons that so little doctrine and academic writing explores the First Amendment implications of compelled commercial disclosures is because so few of these policies have actually been challenged in the courts on First Amendment grounds.<sup>5</sup> In recent years, however, a number of legal challenges to disclosure policies have forced the lower courts to consider the scope and applicability of *Zauderer's* holding. Given these new legal challenges to compelled disclosure policies, courts have the opportunity to clarify the questions left open by *Zauderer* and to articulate a coherent doctrine that analyzes the First Amendment implications of government-mandated commercial speech. With this opportunity, however, also comes the danger that courts will either limit or expand *Zauderer's* holding without recognizing the pertinent First Amendment values at stake.

There are three important questions facing the courts as they analyze First Amendment challenges to compelled factual disclosures. First, the courts must decide whether disclosure policies that serve state interests other than curing consumer deception qualify for *Zauderer's* rational basis review. While some circuits have read *Zauderer* as condoning disclosure policies that serve other valid state interests,<sup>6</sup> the D.C. Circuit recently limited *Zauderer* to disclosure policies curing consumer deception.<sup>7</sup> The Supreme Court, however, has yet to confront this question, and *Zauderer's* language is less than clear. Second, the courts must evaluate what types of speech can be compelled under *Zauderer* by deciding when a disclosure ceases to provide "purely factual and uncontroversial information," and instead requires the speaker to recite a government message. Third, since *Zauderer* only applies to commercial speech, the courts must confront the First Amendment doctrine's confused definition of commercial

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<sup>5</sup> Justice Thomas noted the lack of clarity in the compelled commercial speech doctrine in his dissent from the denial of certiorari in *Borgner v. Florida Board of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., dissenting from denial of certiorari), when stating that: "Our decisions have not presumptively endorsed government-scripted disclaimers or sufficiently clarified the nature and the quality of the evidence a State must present to show that the challenged legislation directly advances the governmental interest asserted." *Id.*

<sup>6</sup> Most notably, the Second Circuit has adopted this expansive reading of *Zauderer*. See *Nat'l Elec. Mfg. Assoc. v. Sorrell*, 272 F.3d 104, 115 (2nd Cir. 2001) (applying *Zauderer* to a disclosure policy designed to raise consumer awareness of the presence of mercury in certain products).

<sup>7</sup> *R.J. Reynolds Tobacco Co. v. FDA*, Nos. 11-5332, 12-5063, 2012 WL 3632003, at \*8 (D.C. Cir. Aug. 24, 2012) ("[B]y its own terms, *Zauderer's* holding is limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers.'" (quoting *Zauderer*, 471 U.S. at 651)).

speech in deciding what types of speech can be required to include factual disclosures. Courts must decide whether *Zauderer's* rational basis test should be strictly limited to laws that require disclosures in the context of commercial transactions, and if not so limited, what other types of speech fall within the definition of commercial speech.

This Article begins with an analysis of the current compelled commercial speech doctrine and its underlying First Amendment theories. I then address the three questions discussed above in order to articulate a workable test for when disclosure requirements should be subject to *Zauderer's* rational basis review given the First Amendment interests at stake. Under my proposed test, compelled factual disclosures affecting speech whose context and content is commercial should be subject to rational basis scrutiny as long as: (1) the disclosure serves the state's interest in an informed public, and (2) the disclosure informs the audience for the commercial speech instead of spreading the government's normative message.

First, I analyze whether *Zauderer* should apply to disclosures serving a broader range of state interests by looking to *Zauderer's* reasoning itself, lower court doctrine addressing this question, and the policy reasons supporting a broad reading of the scope of state interests. I conclude that *Zauderer* should apply to commercial disclosure laws that serve the state's interest in an informed public, even if the speaker has not engaged in deceptive or misleading speech.

Second, in order to develop a better understanding of what should qualify as a "factual" disclosure, I look to recent laws requiring that tobacco products be accompanied by graphic warnings that provide visual depictions of the negative health consequences of smoking. I conclude that *Zauderer* does not apply when the government compels normative speech that tells consumers how they should behave, and that for compelled visual disclosures, courts will need to look to the government's purpose for mandating the disclosure in order to decide whether the graphic displays factual information or a normative message. I conclude that the graphic tobacco warnings do not merely display factual information because the government's purpose in mandating the warnings is not to inform consumers, but rather to advance the government's normative message "do not smoke" through shock and disgust. While this conclusion does not mean that the graphic warning law is *per se* unconstitutional, it does mean that the law should be subject to more than rational basis scrutiny.

Third, given that *Zauderer* only applies to commercial speech, the final section addresses how to determine whether a given speech act qualifies as commercial speech. I analyze recent laws requiring facili-

ties that provide women with pregnancy-related services to disclose whether a medical provider is on staff and/or the scope of services provided at the facility. Because these facilities often provide services free-of-charge, lower federal courts have concluded that the facilities' speech falls outside the commercial speech doctrine and that *Zauderer*, consequently, does not apply. However, I conclude that such a narrow definition of commercial speech fails to appreciate that the purpose of the commercial speech doctrine is to protect the informational interests of the listener-audience, and that a more contextual, multi-factor analysis is needed. From the perspective of the speech's audience, women who are or may be pregnant, these facilities are service-providers competing with other market participants that provide pregnancy-related services. While *Zauderer* should not be applied to ideological speech that forms part of the public discourse,<sup>8</sup> I conclude that compelled disclosures applied to speech whose context and content is of a commercial nature should be subject to rational basis review, regardless of whether the speaker has an economic motivation for engaging in the speech.

As courts consider the proper scope of *Zauderer* in a variety of factual contexts, there is the possibility that the doctrine may become even more confused. By taking a step back and evaluating *Zauderer*'s scope in light of the origins and purposes of the compelled commercial speech doctrine, this Article will articulate a coherent test that both recognizes the First Amendment values at stake while also giving appropriate weight to the substantial interests served by such disclosure policies.

## I. THE FIRST AMENDMENT LIMITS ON COMPELLED SPEECH: THE ORIGINS OF THE DOCTRINE

The Supreme Court's compelled speech doctrine began with the 1943 case *West Virginia State Board of Education v. Barnette*.<sup>9</sup> This case "is seen as enshrining the principle of First Amendment protection against compelled speech."<sup>10</sup> In *Barnette*, a family of Jehovah's Witnesses challenged the West Virginia State Board of Education's re-

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<sup>8</sup> For example, lesser scrutiny would not apply if the state passed a law requiring disclosures to be given during religious sermons. This type of law would impermissibly interfere with ideological speech. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988) ("[W]here . . . the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase.").

<sup>9</sup> 319 U.S. 624 (1943).

<sup>10</sup> Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 851 (2011).

quirement that all schoolchildren begin the school day by reciting the pledge of allegiance and saluting the American flag. Students who refused to participate in this compulsory ceremony were expelled, and their parents faced criminal prosecution.<sup>11</sup> The Court struck down this requirement as interfering with “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”<sup>12</sup> The Court justified its conclusion that the First Amendment prohibited this form of compelled speech by pointing to the Amendment’s applicability to restrictions on speech—to uphold the compelled pledge and salute would mean that “a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”<sup>13</sup> The Court rejected such a narrow reading of the First Amendment and made the following oft-cited pronouncement: “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.”<sup>14</sup> The compelled speech doctrine’s origins can be traced back to *Barnette*’s prohibition on mandating private individuals to engage in “public declarations of ideological positions.”<sup>15</sup>

The Court extended *Barnette*’s reasoning in the 1977 case *Wooley v. Maynard*.<sup>16</sup> In *Wooley*, the plaintiff, who was also a follower of the Jehovah’s Witness faith, sought to invalidate New Hampshire’s requirement that all noncommercial vehicles bear a license plate embossed with the state’s motto: “Live Free or Die.” The plaintiff argued that the state law coerced him into “advertising a slogan which I find morally, ethically, religiously and politically abhorrent.”<sup>17</sup> The Court, citing *Barnette*, began with a broad pronouncement about the First Amendment’s protection against compelled speech:

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from

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11 See *Barnette*, 319 U.S. at 629.

12 *Id.* at 642.

13 *Id.* at 634.

14 *Id.* at 642.

15 Stern, *supra* note 10, at 900.

16 430 U.S. 705, 706 (1977).

17 *Id.* at 713 (internal quotation marks omitted).

speaking are complementary components of the broader concept of “individual freedom of mind.”<sup>18</sup>

While recognizing that *Barnette* “involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate,”<sup>19</sup> the Court overturned New Hampshire’s license plate law after concluding that the difference was merely a matter of degree. In both cases, the Court was “faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”<sup>20</sup>

#### A. Distinguishing Compelled Commercial Speech

Despite the Court’s broad pronouncements about the First Amendment’s protection against compelled speech, *Zauderer* reduces the level of scrutiny for compulsory factual disclosure laws targeting commercial speech. In *Zauderer*, an Ohio attorney challenged the state’s rule requiring advertisements offering legal services on a contingency-fee basis to include a statement indicating whether a client is liable for costs if his claim is unsuccessful.<sup>21</sup> The Court first noted the “material differences between disclosure requirements and outright prohibitions on speech.”<sup>22</sup> While recognizing prior holdings that “in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech,” the Court rejected the plaintiff’s argument that Ohio’s rule imposed compelled speech of the type considered in *Barnette* and *Wooley* because “the interests at stake in this case are not of the same order.”<sup>23</sup> Instead of forcing Ohio attorneys to express the state’s ideological position, the State “has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.”<sup>24</sup>

The Court’s analysis in *Zauderer* was directly tied to its classification of the type of speech that was affected by Ohio’s law. Attorney advertisements qualified as commercial speech, a type of speech that

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<sup>18</sup> *Id.* at 714 (citations omitted) (quoting *Barnette*, 319 U.S. at 637).

<sup>19</sup> *Id.* at 715.

<sup>20</sup> *Id.*

<sup>21</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 650–51.

<sup>24</sup> *Id.* at 651.

received little, if any, First Amendment protection until the Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>25</sup> In *Virginia Pharmacy*, the Court evaluated the constitutionality of a Virginia statute prohibiting pharmacists from advertising the prices of prescription drugs. The Court was confronted squarely with the question of whether commercial speech, described in *Virginia Pharmacy* as "speech which does no more than propose a commercial transaction,"<sup>26</sup> was devoid of First Amendment protection. Noting that an individual's economic motivation for speaking does not "disqualif[y] him from protection under the First Amendment,"<sup>27</sup> and that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate,"<sup>28</sup> the Court extended the First Amendment's protections to commercial speech. In doing so, the Court recognized that society's interest in the free flow of commercial information serves the First Amendment's goal of "enlighten[ed] public decisionmaking in a democracy."<sup>29</sup>

The Court recognized, however, that commercial speech warrants "a different degree of protection" than other speech, and, foreshadowing *Zauderer*, noted that it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."<sup>30</sup> The Court later clarified in another seminal commercial speech decision, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>31</sup> that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regula-

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25 425 U.S. 748 (1976). While the Court had not squarely held that commercial speech received no First Amendment protection, cases before *Virginia Pharmacy* strongly suggested such a result. See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 642–43 (1951) (upholding conviction of ordinance prohibiting door-to-door magazine subscription solicitation and distinguishing religious solicitation, which involves "no element of the commercial"); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that while the First Amendment would prohibit the State from banning handbills in public spaces, it imposes "no such restraint on government as respects purely commercial advertising").

26 425 U.S. at 762 (internal quotation marks omitted).

27 *Id.*

28 *Id.* at 763.

29 *Id.* at 765.

30 *Id.* at 771 n.24.

31 447 U.S. 557 (1980).

tion.”<sup>32</sup> The *Central Hudson* Court outlined a four-part test for analyzing commercial speech regulations:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>33</sup>

It was against the backdrop of the new, and yet reduced, level of protection for commercial speech that *Zauderer* was decided. The Court cites to *Virginia Pharmacy* in recognizing that “[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”<sup>34</sup> And instead of applying *Central Hudson*’s four-part test, the Court adopts rational basis review, recognizing that:

[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”<sup>35</sup>

The Court holds that a compelled disclosure law imposed on commercial speech is constitutional so long as it is “reasonably related to the State’s interest in preventing deception of consumers.”<sup>36</sup> While the Court places a limit on disclosures by cautioning that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech,”<sup>37</sup> the Court’s language suggests that the only First Amendment interest implicated by compelled commercial disclosures of purely factual information is the potential that the disclosure will prevent the speaker from engaging in protected, truthful commercial speech.

#### B. Compelled Factual Disclosures in Public Discourse

As this Article makes clear, *Zauderer* leaves open many questions about the applicability of its rational basis test to other types of factual

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<sup>32</sup> *Id.* at 563.

<sup>33</sup> *Id.* at 566.

<sup>34</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (citation omitted).

<sup>35</sup> *Id.* (alteration in original) (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

<sup>36</sup> *Id.* (footnote omitted).

<sup>37</sup> *Id.*

disclosure laws. Very soon after *Zauderer*, however, the Court was presented with an opportunity to clarify the First Amendment implications of factual disclosure laws that interfere with fully-protected speech. *Riley v. National Federation of the Blind of North Carolina, Inc.*<sup>38</sup> includes broad language indicating that compelled factual disclosures are impermissible outside of the commercial speech context: “[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”<sup>39</sup> While there has been much criticism of the Court’s broad language,<sup>40</sup> given that the Court’s reasoning was closely tied to the effect of *Riley*’s factual disclosure on fully-protected, ideological speech,<sup>41</sup> it is possible to read *Riley* as suggesting that full First Amendment protection applies to factual disclosures imposed on any speech that does not qualify as “commercial speech” under the Court’s precedents.<sup>42</sup>

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38 487 U.S. 781 (1988).

39 *Id.* at 796–97.

40 See David W. Ogden, *Is There a First Amendment “Right to Remain Silent”? The Supreme Court’s “compelled speech” doctrine*, 40 FED. B. NEWS & J. 368, 370–71 (1993) (discussing how *Riley*’s language “appears to be overbroad” and goes “far beyond the prior case law”).

41 In *Riley*, the Court considered a North Carolina law requiring professional fundraisers soliciting charitable donations to disclose the percentage of the donation that they would retain as their fee. The Court concluded that the commercial speech doctrine did not apply because the commercial elements of the speech were “inextricably intertwined” with the fundraisers’ ideological advocacy. *Riley*, 487 U.S. at 796. Although the fundraisers were assuredly soliciting money, the Court was concerned with “the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech” and that “without solicitation the flow of such information and advocacy would likely cease.” *Id.* Thus, it is important to read the language in *Riley* in light of the Court’s concern about the effect that the disclosure would have on the fundraisers’ ideological, and thus fully-protected, speech—the Court was very concerned with the possibility that the disclosure would “hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent.” *Id.* at 799. The disclosure would make solicitation more difficult, as potential donors would be less likely to give funds if informed that the fundraiser was retaining a high percentage of the donation. The Court believed that the disclosure would thereby make it more difficult for charities, particularly smaller and more unpopular charities, to engage in their ideological advocacy. *Id.* at 799–800.

42 But see Stern, *supra* note 10, at 914–15 (discussing *Riley* and concluding that “negative speech rights appear to draw strength largely from combination with separate constitutionally cognizable interests”). Moreover, it is worth noting that, alongside its broad language, *Riley* also suggests that more limited factual disclosures are permissible under the First Amendment, even when imposed on fully-protected speech. For example, the Court speaks favorably of an unchallenged provision of the law requiring the fundraisers to disclose their professional status to potential donors, and explicitly cautions that “nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status.” *Riley*, 487 U.S. at 799 n.11. The

Though this Article will focus on the scope of *Zauderer*, the Court's language in *Riley* serves as an important reminder of the constitutional stakes of extending complete First Amendment protection to compelled factual disclosures, and the significance of the boundary between commercial and non-commercial speech. If *Riley* applied to disclosures in commercial speech, the government would be severely restricted in its ability to compel factual disclosures. The importance of articulating a coherent definition of commercial speech becomes all the more clear when one considers the alternative strict First Amendment scrutiny presented by a broad reading of *Riley*.

## II. THEORIES OF THE FIRST AMENDMENT: FACTUAL DISCLOSURES IMPOSED ON COMMERCIAL SPEECH SERVE FIRST AMENDMENT VALUES

Now that I have provided a brief overview of the state of the compelled speech doctrine, it is worth exploring the theoretical justifications underlying the Court's decision to give lesser scrutiny to regulations compelling factual commercial speech. The First Amendment theories supporting *Zauderer* help to illustrate the values at stake in deciding whether and how to extend *Zauderer* to new types of disclosure laws.

### A. *Marketplace of Ideas and Democratic Self-Governance*

The concept of the First Amendment as protecting a "marketplace of ideas" in which robust debate will ultimately lead to discovery of truth was injected into Supreme Court jurisprudence by Justice Holmes in his 1919 dissent in *Abrams v. United States*.<sup>43</sup> Rooted in the philosophies of John Milton and John Stuart Mill, the "marketplace of ideas" has come to be viewed as "essential to effective popular participation in government . . . [since] the quality of the public exchange of ideas promoted by the marketplace advances the quality of democratic government."<sup>44</sup> The values underlying the marketplace of ideas theory of the First Amendment have been cited by the Court in

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Court's recent application of less than strict scrutiny to disclosure requirements imposed on political speech, a form of speech that is at the core of the First Amendment's protections, suggests that some of *Riley*'s language goes too far. *See Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) ("[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech.").

<sup>43</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

<sup>44</sup> Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 3-4 (1984).

a wide variety of opinions,<sup>45</sup> making clear that “more speech and a better informed citizenry are among the central goals of the Free Speech Clause.”<sup>46</sup> As Justice Kennedy recently observed in his plurality opinion in *United States v. Alvarez*,<sup>47</sup> the marketplace of ideas theory of the First Amendment dictates that “[t]he remedy for speech that is false is speech that is true.”<sup>48</sup> When false speech is injected into the marketplace of ideas, robust debate will ensure that the truth will ultimately prevail.

Under this theory, factual disclosure laws, which inject more information in the marketplace of ideas, further First Amendment goals.<sup>49</sup> In fact, “it is often the very purpose of ‘compelled speech’ requirements to correct market flaws in the ‘marketplace of ideas’ and further the First Amendment’s goal of maximizing communication and discovery of truth.”<sup>50</sup> Compelled speech requirements merely enhance the information that is being circulated, thus contributing to and improving the marketplace of ideas by providing citizens with more information than would otherwise be available.

A related theory of the First Amendment focuses on the Amendment’s ultimate goal: a better informed citizenry that can make wise voting decisions, thus ensuring the success of democratic self-government. Professor Alexander Meiklejohn, who focused on the

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45 See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion) (describing Justice Holmes’ quote from *Abrams* as “the theory of our Constitution,” and concluding that our “[s]ociety has the right and civic duty to engage in open, dynamic, rational discourse”); Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (“Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.” (internal quotation marks omitted)); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) (“The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted.”); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .”).

46 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring).

47 132 S. Ct. 2537 (2012).

48 *Id.* at 2550.

49 *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

50 Ogden, *supra* note 40, at 370. But see Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 333 (2008) (arguing that compelled speech means the government “artificially amplifies its own message through the mouths of unwilling citizens, giving listeners a mix of information skewed to the government viewpoint” and thus distorts the marketplace of ideas).

social values served by free speech, championed the “democratic self-government” theory of the First Amendment. In his view:

Legislation which abridges . . . freedom [of speech] is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information . . . And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence<sup>51</sup> upon which the success of self-government so obviously depends.

For Meiklejohn, and other proponents of the democratic self-government theory, “the ‘best’ decisions can only be reached in a democracy if the citizenry is fully aware of the issues involved, the options available, and the interests or values affected.”<sup>52</sup> As a consequence, this theory of the First Amendment focuses “on the rights of citizens to receive information, rather than on the rights of speakers to express themselves.”<sup>53</sup>

Just as compelled factual disclosures contribute to the marketplace of ideas and the search for truth, compelled disclosures also further the goal of democratic self-government. Since an uninformed citizenry poses a risk to citizenship and participation in a deliberative democracy, compelled factual disclosures further First Amendment goals. As Professor Cass Sunstein argues, “[w]ithout better information, neither deliberation nor democracy is possible. Legal reforms designed to remedy the situation are a precondition for democratic politics.”<sup>54</sup> Such reforms are particularly necessary when there is a market failure in the provision of information, demonstrating that citizens will remain uninformed unless the government intervenes. Since information is a public good with non-rival consumption, “private incentives lead to the dissemination of too little information.”<sup>55</sup> In particular, information about risk and harm is often underproduced, necessitating some type of government interven-

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<sup>51</sup> ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–17 (1948); *see also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1948) (“What is essential is not that everyone shall speak, but that everything worth saying shall be said.”).

<sup>52</sup> Ingber, *supra* note 44, at 9.

<sup>53</sup> Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 13 (2000) [*hereinafter Post, The Constitutional Status of Commercial Speech*].

<sup>54</sup> Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 658 (1993).

<sup>55</sup> FUNG ET AL., *supra* note 1, at 31.

tion to require its disclosure if the public is to be adequately informed.<sup>56</sup>

### B. Autonomy Interests

If the First Amendment were only governed by the marketplace of ideas and democratic self-governance theories, non-commercial speakers might also be compelled to speak in ways that enhance the informational value of their speech. After all, one could argue that the marketplace and democratic self-governance would be benefited if the government required factual disclosures that improved the quality of all speech, even ideological or political speech. The important distinction, however, is that the First Amendment also provides robust protection for the autonomy interests of non-commercial speakers. As the Court articulated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,<sup>57</sup> the First Amendment protects against compelling speech in public discourse because of the “fundamental rule . . . that a speaker has the autonomy to choose the content of his own message.”<sup>58</sup> If the state were to impose its view of what qualifies as “the truth” on religious or political speech, this would undermine democratic legitimization.<sup>59</sup> We tolerate false ideas in the public discourse because the First Amendment protects the right of self-expression: “Such falsehoods are tolerated because we are freer as a society when individuals are permitted to engage in unhindered self-expression.”<sup>60</sup> Freedom of speech entails more than just increasing the amount of true information in the marketplace; freedom of speech also secures the rights of individuals to express their own beliefs, no matter their truth, without fear of government censorship. The Court has made clear that at the “heart of the First Amendment

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<sup>56</sup> See *id.* at 6 (“A generation of research by economists and political scientists has shown that markets and deliberative processes do not automatically produce all the information people need to make informed choices among goods and services. When hidden risks or service flaws create serious problems for the public at large, the government can help reduce those risks or improve services by stepping in to require the disclosure of missing information.”); see also Sunstein, *supra* note 54, at 656 (“[T]here is frequently a market failure in the provision of information. At least as a presumptive matter, government remedies are an appropriate response. These remedies should ordinarily take the form of governmentally provided information, education campaigns, or disclosure requirements imposed on private firms.”).

<sup>57</sup> 515 U.S. 557 (1995).

<sup>58</sup> *Id.* at 573.

<sup>59</sup> See ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 59 (2012) [herein-after POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM].

<sup>60</sup> Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 257 (1990).

[is the] notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.”<sup>61</sup> Thus, compelling speakers to include even purely factual information in their non-commercial speech threatens the speaker’s constitutionally protected autonomy interests.

In contrast, the First Amendment provides minimal protection for the autonomy interests of a speaker who is engaged in commercial speech. Such speakers do not engage in a form of self-expression when they provide the public with information about their products and services. “Since the advertiser is not engaged in an expression of its views or any other revelation of its personality, forcing the advertisement to carry a message not its own does not violate the integrity of the expressive, thinking self as did the regulations struck down in *Barnette*, and *Wooley*.<sup>62</sup> The First Amendment protects commercial speech because of its informational value to consumers, not because the commercial speaker has a right to promote his products in whatever manner he sees fit. “[W]hereas ordinary First Amendment doctrine preserves the freedom of a speaker to participate in public discourse in the manner of her choosing, commercial speech doctrine focuses instead on preserving the flow of commercial information to the public.”<sup>63</sup> The Court’s most recent application of *Zauderer* illustrates this distinction: in *Milavetz, Gallop & Milavetz v. United States*,<sup>64</sup> the plaintiff objected to the disclosure requirements of the Bankruptcy Abuse Prevention and Consumer Protection Act. In rejecting the plaintiff’s challenge to the Act’s requirement that advertisements for bankruptcy assistance include the term “debt relief agency,” the Court characterized its argument that the term was confusing as “amount[ing] to little more than [the plaintiff’s] preference . . . for referring to itself as something other than a ‘debt relief agency’ . . . [T]his preference lacks any constitutional basis.”<sup>65</sup> Given that the Act only restricted the plaintiff’s commercial speech, it lacked any autonomy interest in defining itself by some other label.

61 Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 472 (1997) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977)).

62 Estreicher, *supra* note 60, at 271 n.200 (citations omitted).

63 Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 975 (2007) [hereinafter Post, *Informed Consent to Abortion*]; see also Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 27 (“Disclosure requirements are permissible within the domain of commercial speech, however, because the autonomy of speakers is not at stake, only the conveyance of information.”).

64 130 S. Ct. 1324 (2010).

65 *Id.* at 1340.

### C. Applying First Amendment Theories to Compelled Commercial Speech

The Court has drawn on the marketplace of ideas and democratic self-government theories of the First Amendment in extending the Amendment's protection to commercial speech. In *Virginia Pharmacy*, the Court described "free flow of information," even information on commercial subjects, as serving the First Amendment's goal of "enlighten[ed] public decisionmaking in a democracy."<sup>66</sup> Dean Robert Post has described the Court's analysis in *Virginia Pharmacy* as "closely track[ing] Meiklejohn's analysis"<sup>67</sup> of the societal values served by free speech: "The Court has been quite explicit that commercial speech should be constitutionally protected so as to safeguard the circulation of information."<sup>68</sup> And the Court continues to justify the First Amendment's protection for commercial speech based on the audience's informational interests.<sup>69</sup>

Since commercial speech is protected mainly for its informational function, compelled factual disclosures that merely enhance the amount and quality of information being circulated align with the reason commercial speech is protected at all. "[B]ecause commercial speech is not protected in order to promote democratic legitimization, but instead to serve democratic competence, it is constitutionally permissible to compel commercial speech. Such compulsion can augment the flow of accurate information to the public and so actually advance the constitutional purpose of public education."<sup>70</sup> The Court was quite explicit that this was its rationale in upholding *Zauderer*'s disclosure requirement, reasoning that since protection of commercial speech is "justified principally by the value to consumers of the information such speech provides," *Zauderer*'s First Amendment interest "in *not* providing any particular factual information in

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<sup>66</sup> Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976).

<sup>67</sup> Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 14.

<sup>68</sup> *Id.*

<sup>69</sup> See *Milavetz*, 130 S. Ct. at 1340–41 (upholding a commercial speech disclosure law that "provides interested observers with pertinent information about the advertiser's services and client obligations"); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) ("First Amendment coverage of commercial speech is designed to safeguard" society's "interests in broad access to complete and accurate commercial information . . . ."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (noting that commercial advertisement is protected "because it furthers the societal interest in the free flow of commercial information" (internal quotation marks omitted)); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (noting that commercial "speech serves individual and societal interests in assuring informed and reliable decisionmaking").

<sup>70</sup> POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 59, at 42 (footnote omitted).

his advertising is minimal.”<sup>71</sup> The compelled disclosure had minimal impact on Zauderer’s autonomy<sup>72</sup>—the regulation merely required him to provide additional factual information that he otherwise would not have disclosed.

### III. THE SCOPE OF THE STATE INTERESTS JUSTIFYING COMMERCIAL DISCLOSURE LAWS

*Zauderer*’s language is unclear whether its rational basis test applies if the state’s interest in mandating the commercial disclosure is something other than curing consumer deception. The Court’s explicit holding is as follows: “[W]e hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”<sup>73</sup> While this language could be read as limiting the scope of state interests justifying commercial disclosure laws,<sup>74</sup> the Court may have simply been recognizing that the state’s purpose in enacting the law at issue in *Zauderer* was to cure consumer deception. The Court’s later applications of *Zauderer* have not clarified the confusion over what types of interests can justify compelled commercial speech. In the 2010 case *Milavetz, Gallop & Milavetz*,<sup>75</sup> the Court upheld a commercial disclosure law under *Zauderer*, but since the law’s purpose was also to cure consumer deception, there was no need for the Court to address whether other types of state interests can justify compelled commercial disclosures.<sup>76</sup>

However, a close reading of *Zauderer* suggests that compelled commercial speech should be subject to rational basis scrutiny even if other interests motivated the state regulation. The Court’s lack of any extensive discussion of *Central Hudson*’s more restrictive test sug-

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<sup>71</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>72</sup> See, e.g., Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 562 (2006) [hereinafter Post, *Transparent and Efficient Markets*] (“The Court would surely not characterize as ‘minimal’ the constitutional interests of participants in public discourse, like the *New York Times*, to refuse to publish accurate factual information to supplement what the government might regard as a potentially misleading editorial.”).

<sup>73</sup> *Zauderer*, 471 U.S. at 651 (footnote omitted).

<sup>74</sup> See, e.g., *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (“*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.”).

<sup>75</sup> *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340–41 (2010).

<sup>76</sup> See also *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (distinguishing *Zauderer* on the grounds that *Zauderer*’s disclosure was required to cure consumer deception, but not holding that this is the only state interest justifying compelled disclosures).

gests that its rationale for applying lesser scrutiny to compelled commercial speech lay in the difference between compelling additional factual speech and restricting speech, not on the particular state interest motivating the disclosure under consideration. Importantly, under *Central Hudson*, misleading commercial speech can be banned by the state—such speech is not even protected by the First Amendment, and *Central Hudson's* requirements consequently do not apply.<sup>77</sup> Given the *Zauderer* Court's conclusion that the attorney advertisements were deceptive and misleading because of their omission of any information about the client's liability for costs, the Court could have simply concluded that since deceptive commercial speech is not even protected under *Central Hudson*, the state could compel additional factual speech that cures this deception without violating the First Amendment. If the key consideration justifying the application of rational basis scrutiny was the misleading nature of the underlying speech, the Court surely would have mentioned *Central Hudson's* holding that misleading commercial speech lies outside the First Amendment.

The Court did not take this route—instead, the Court focuses on the “material differences between disclosure requirements and outright prohibitions on speech.”<sup>78</sup> The Court notes its strong preference for disclosure laws as a general method of regulating commercial speech: “[A]ll our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech.”<sup>79</sup> And the Court rejects *Zauderer's* argument that compelled commercial speech should be subject to a “least restrictive means” test under *Central Hudson* “[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.”<sup>80</sup> The reason that *Central Hudson's* intermediate scrutiny did not apply was *not* because the particular speech at issue was misleading and deceptive—it was because the state was compelling the inclusion of additional, factual information in commercial speech, and “appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”<sup>81</sup> Dean Post has also read *Zauderer* as condoning disclosure policies serving a wider range of state interests,

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<sup>77</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

<sup>78</sup> *Zauderer*, 471 U.S. at 650.

<sup>79</sup> *Id.* at 651 n.14.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 651.

noting that the Court does not minimize a commercial speaker's First Amendment interests because of the state's "powerful interest in averting potential deception. Instead [the Court] held that because the constitutional value of commercial speech lies in the circulation of information, commercial speakers do not possess more than residual interests in deciding what kinds of advertisements to promulgate."<sup>82</sup>

If we look to the Court's analysis of regulations that restrict commercial speech, rather than simply compelling disclosures, the Court has made clear that other valid interests justify restrictions on commercial speech.<sup>83</sup> As just a few examples, the Court has recognized the state's interest in protecting the reputation of attorneys,<sup>84</sup> discouraging participation in lotteries,<sup>85</sup> and reducing alcoholism by preventing strength wars between alcohol producers<sup>86</sup> as valid state interests under *Central Hudson*. Thus, while prevention of commercial harm may be "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech,"<sup>87</sup> it is not the only reason. And if commercial speech can be restricted for purposes other than the prevention of consumer deception and confusion, it would make little sense to limit the state's interests when the form of regulation raises fewer First Amendment concerns.

Rather than listing the various ultimate goals besides curing consumer deception that should qualify for rational basis review, the test can in fact be reduced to a much simpler inquiry into the state's immediate purpose in compelling the speech. Whether the state's ultimate goal is to encourage healthier eating habits or to discourage use of a dangerous product, if the state's immediate purpose is to inform consumers, the disclosure law furthers the goals of the commercial speech doctrine by increasing consumers' access to information without offending the speaker's autonomy interests. Accordingly,

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82 Post, *Transparent and Efficient Markets*, *supra* note 72, at 577; see also Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 178 (2009) (arguing that a narrow reading of *Zauderer* as permitting only disclosure laws that serve the state's interest in curing deception is both "incorrect" and "unfeasible").

83 Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 784 (1999) ("The *Central Hudson* standard . . . does not limit the justifications for restrictions on commercial speech to the prevention of deception.").

84 Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995).

85 United States v. Edge Broad. Co., 509 U.S. 418, 437 (1993).

86 Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995).

87 City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993).

*Zauderer's* rational basis scrutiny should apply whenever the state compels commercial disclosures that serve the state's interest in an informed public.

A. *Lower Court Interpretations of the State's Interest in Compelling Commercial Speech*

In fact, both the Second and First Circuits have read *Zauderer* as permitting compelled commercial speech that serves interests other than curing consumer deception. In *Pharmaceutical Care Management Ass'n v. Rowe*,<sup>88</sup> the First Circuit applied *Zauderer* to Maine's requirement that middlemen in the distribution of pharmaceuticals disclose information about their finances and business practices to the state, rejecting the argument that *Zauderer* is limited to curing deceptive commercial advertising.<sup>89</sup> And in *National Electrical Manufacturers Ass'n v. Sorrell*,<sup>90</sup> the Second Circuit held that commercial disclosure laws satisfy the First Amendment as long as there is a "rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose."<sup>91</sup> Since *Sorrell* provides a thorough analysis of the reason for permitting disclosures that serve other state interests, it is worth considering this decision in some detail.

In *Sorrell*, the Second Circuit evaluated a Vermont law requiring producers of products containing mercury to label their products to inform consumers that the products contained mercury and should be recycled or disposed of as hazardous waste, in accordance with a separate Vermont statute requiring these products to be recycled or disposed of as such.<sup>92</sup> The court recognized that the disclosure law "was not intended to prevent consumer confusion or deception per se, but rather to better inform consumers about the products they purchase."<sup>93</sup> But the court concluded that *Zauderer's* rational basis test still applied: "Vermont's interest in protecting human health and the environment from mercury poisoning [was] a legitimate and significant public goal,"<sup>94</sup> that was reasonably related to the state's disclosure requirement.

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88 429 F.3d 294 (1st Cir. 2005).

89 *Id.* at 310 n.8.

90 272 F.3d 104 (2d Cir. 2001).

91 *Id.* at 115.

92 *Id.* at 107 n.1.

93 *Id.* at 115 (citation omitted) (internal quotation marks omitted).

94 *Id.*

The Second Circuit's rationale for reading *Zauderer* broadly was tied to its recognition of the First Amendment interests at stake:

Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.<sup>95</sup>

The court recognized that *Zauderer*'s reduced level of scrutiny had little to do with the particular state interest served by the disclosure at issue in that case. Instead, the rationale was much broader: mandated factual information increases the amount of accurate information circulated in the marketplace, without offending any autonomy interests.

When the Second Circuit was subsequently confronted with a challenge to New York City's law requiring certain restaurants to disclose on their menu and menu boards the number of calories in each dish, the court reiterated the validity of *Sorrell*'s broad reading of the state interests justifying compelled commercial speech. The court upheld New York City's menu-labeling regime, recognizing the applicability of *Zauderer* given the state's compelling interest in combatting the public health crisis of obesity.<sup>96</sup> The Second Circuit's decision in *New York State Restaurant Ass'n v. New York City Board of Health* further illustrates the rationale behind extending *Zauderer* to laws that serve valid state purposes beyond curing consumer deception.

The clear ultimate goal of New York City's menu disclosure law was to promote public health. The City's Department of Health and Mental Hygiene described the law's purpose as permitting "individuals to make more informed choices that can decrease their risk for the negative health effects of overweight and obesity associated with excessive calorie intake."<sup>97</sup> The evidence relied upon by the City in *New York Restaurant Ass'n* demonstrated that 54% of the City's adults

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<sup>95</sup> *Id.* at 113–14 (footnote omitted).

<sup>96</sup> N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 136 (2d Cir. 2009).

<sup>97</sup> DEP'T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.50) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (Dec. 5, 2006), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf>.

and 43% of the City's elementary school children were either overweight or obese, and that obesity was a contributing factor to the diseases that caused 70% of deaths in New York City in 2005.<sup>98</sup> The evidence also demonstrated that individuals often consume an excess of calories when dining outside the home, and that excess calorie consumption was the main cause of the obesity epidemic.<sup>99</sup>

In upholding New York City's law, the Second Circuit rejected the plaintiff's argument that *Zauderer* should be limited to disclosure requirements that cure deceptive and misleading speech.<sup>100</sup> Reaffirming the validity of *Sorrell*,<sup>101</sup> the court reiterated "that *Zauderer*'s holding was broad enough to encompass nonmisleading disclosure requirements."<sup>102</sup> In so doing, the court rejected the argument that the Supreme Court's post-*Sorrell* decision in *United States v. United Foods, Inc.*<sup>103</sup> had in any way limited the types of disclosure laws subject to rational basis review under *Zauderer*. The Second Circuit concluded that *United Foods* had merely "distingushe[d] *Zauderer* on the basis that the compelled speech in *Zauderer* was necessary to prevent deception of consumers; it does not provide that all other disclosure requirements are subject to heightened scrutiny."<sup>104</sup> The court also rejected the plaintiff's argument that more recent Supreme Court decisions recognizing the general value of commercial speech meant that *Central Hudson*'s test, rather than rational basis scrutiny under *Zauderer*, should be applied to compelled commercial speech regulations.<sup>105</sup>

In explaining why commercial disclosure requirements are subject to lesser scrutiny, the court quoted extensively from *Sorrell*'s recognition of the pertinent First Amendment values at stake. The court made clear that "laws mandating factual disclosures are subject to the

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98     *N.Y. State Rest. Ass'n*, 556 F.3d at 134–35.

99     *Id.* at 135.

100    During the litigation, the city asserted that it had two purposes for enacting the law: "(1) [to] reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it." *Id.* at 134. The court, however, did not address this first purpose in light of its holding that the city's public health rationale provided sufficient justification for the law. *See id.* at 133 n.21. The city's attempted re-characterization of its interest as reducing deception and confusion for the purposes of the litigation shows how many disclosure laws can fit within a narrow reading of *Zauderer*, even though the real state interest is broader than curing deception.

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

102    *N.Y. State Rest. Ass'n*, 556 F.3d at 133.

103    533 U.S. 405 (2001).

104    *N.Y. State Rest. Ass'n*, 556 F.3d at 133.

105    See Brief for Plaintiff-Appellant at 45–46, *N.Y. State Rest. Ass'n*, 556 F.3d 114 (No. 08-1892-cv).

rational basis test even if they address non-deceptive speech.”<sup>106</sup> Given the findings that consumers would be able to make more informed and healthier food choices if given calorie information, the court concluded that the City’s menu disclosure law was “clearly reasonably related to its goal of reducing obesity.”<sup>107</sup>

The D.C. Circuit, however, has taken the contrary view. The D.C. Circuit recently adopted a restricted view of the breadth of state interests justifying commercial disclosures, holding that *Zauderer*’s rational basis test is in fact limited to disclosure laws curing consumer deception.<sup>108</sup> The majority reasons that *Zauderer* does not provide any explicit authority for disclosures serving other state interests, and that subsequent Supreme Court cases have not endorsed broader applications of *Zauderer*’s rational basis review.<sup>109</sup> In contrast to the Second Circuit’s extensive analysis of the First Amendment values implicated by commercial disclosures, the D.C. Circuit’s majority opinion provides no First Amendment rationale for limiting *Zauderer*’s holding to laws curing consumer deception. Moreover, the D.C. Circuit is the *only* circuit that has adopted such a narrow view of *Zauderer*’s applicability.<sup>110</sup>

The Supreme Court has yet to address whether commercial disclosure laws serving state interests other than curing consumer deception should be subject to rational basis review. Given the circuit split, the Court may very well address this question in the near future. The Second Circuit’s reasoning<sup>111</sup> on this point demonstrates the lack of any First Amendment rationale for limiting *Zauderer* to laws curing consumer deception, and the importance of recognizing other valid state interests justifying compelled commercial speech.<sup>112</sup> As long as the state has a substantial interest in informing the public, rational

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106 *N.Y. State Rest. Ass’n*, 556 F.3d at 133 n.21.

107 *Id.* at 136.

108 See R.J. Reynolds Tobacco Co. v. FDA, Nos. 11-5332, 12-5063, 2012 WL 3632003, at \*5–6 (D.C. Cir. Aug. 24, 2012).

109 *Id.*

110 In addition, it is worth noting that Judge Rogers questions the majority’s analysis on this point in her dissent, noting that “[a]s other circuits have recognized, in *Zauderer* the Supreme Court appears simply to have held that a government interest in protecting consumers from possible deception is *sufficient* to support a disclosure requirement—not that this particular interest is *necessary* to support such a requirement.” *Id.* at \*16 n.6 (Rogers, J., dissenting). Judge Rogers ultimately does not reach a conclusion on this point, as she finds that the law at issue cures consumer deception and confusion. *Id.*

111 It is worth noting that Justice Sotomayor was on the Second Circuit panel in both *Sorrell* and *New York State Restaurant Ass’n* before her elevation to the Supreme Court.

112 For instance, looking to *N.Y. State Restaurant Ass’n*, the state’s important efforts to combat a serious public health crisis would have been subject to a higher level of scrutiny if *Zauderer* were limited to disclosures curing deception and confusion.

basis scrutiny should apply, regardless of whether the state's ultimate goal is to cure deception, to promote public health, or to protect the environment.

#### B. *The Prevalence of Disclosures Serving the State's Interest in an Informed Public*

If *Zauderer* were limited to disclosure laws curing consumer deception and confusion, a wide variety of disclosure policies would be subject to searching judicial review. Innumerable laws and regulations compel commercial disclosures for reasons other than curing deception.<sup>113</sup> And given the current support for information disclosure policies as an important regulatory tool to improve decision-making,<sup>114</sup> the number of such laws is very likely to increase. Thus, while there are arguments based on case law that support a broad reading of the state interests justifying compelled disclosures, there is also an independent policy argument supporting this interpretation.

The government mandates commercial disclosures that serve a wide range of interests other than curing consumer deception. These laws serve the state's interest in protecting the environment, promoting public health, and reducing safety risks posed by hazardous products and behaviors, to name just a few of the most common goals motivating compelled disclosures. Packaged food products must include nutritional data<sup>115</sup> and information about the presence of common allergens,<sup>116</sup> hazardous substances must be labeled with their safety risks,<sup>117</sup> tobacco products and advertisements must be labeled with health risks,<sup>118</sup> appliances must be labeled with their energy consumption levels,<sup>119</sup> pesticides must be labeled with their ingredients and directions for proper use,<sup>120</sup> alcoholic beverages must be labeled with information about safety and health risks,<sup>121</sup> restaurants must dis-

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<sup>113</sup> See Post, *Transparent and Efficient Markets*, *supra* note 72, at 584 ("[C]ommercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception.").

<sup>114</sup> See Exec. Order No. 13563, 76 Fed. Reg. 3821 § 4 (Jan. 18, 2011).

<sup>115</sup> 21 U.S.C. § 343(q) (2006) (requiring label to list the calories, calories from fat, total fat, cholesterol, sodium, carbohydrates, and sugars in a single serving of the food product).

<sup>116</sup> *Id.* at § 343(w).

<sup>117</sup> 15 U.S.C. § 1261(p) (2006).

<sup>118</sup> 76 Fed. Reg. 36628–29 (June 22, 2011).

<sup>119</sup> 16 C.F.R. § 305.11 (2011).

<sup>120</sup> 40 C.F.R. § 156.10 (2011).

<sup>121</sup> 27 U.S.C. § 215 (2006).

close the calories in menu items,<sup>122</sup> new cars must be labeled with their estimated mileage per gallon<sup>123</sup> and the car's risk-rating for rolling over in a crash,<sup>124</sup> children's toys must be labeled with the toy's appropriate age-group for use,<sup>125</sup> and restaurants in some cities must be labeled with their health inspection grades.<sup>126</sup> As perhaps the most prominent example, our entire system of securities regulation is based on disclosure laws.<sup>127</sup> Are consumers confused and deceived if they buy a car without knowing its safety ratings, or eat at a restaurant without knowing how it performed in its latest health inspection?<sup>128</sup>

What all of these disclosure policies have in common is that they are all motivated by the state's interest in a more informed public. The state's immediate purpose in enacting these policies is to inform consumers, with the hopes that consumers will use the information to make more informed decisions that will promote the state's broader goals. Given that the rationale for *Zauderer's* reduced scrutiny is that First Amendment values are served by increasing consumers' access to commercial information, disclosure policies that are motivated by

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122 See Ctr. for Sci. in the Pub. Interest, *Nutrition Labeling in Chain Restaurants: State and Local Laws/Bills/Regulations: 2009–2010*, CSPI.ORG (Feb. 16, 2010), [http://cspinet.org/new/pdf/ml\\_bill\\_summaries\\_09.pdf](http://cspinet.org/new/pdf/ml_bill_summaries_09.pdf) (listing state and local menu labeling laws as of 2009–2010); see also Ctr. for Sci. in the Pub. Interest, *State and Local Menu Labeling Policies*, CSPI.ORG (Apr. 2011), [http://cspinet.org/new/pdf/ml\\_map.pdf](http://cspinet.org/new/pdf/ml_map.pdf) (displaying map showing the implementation status of menu labeling laws across the country). As part of the Patient Protection and Affordable Care Act, menu-labeling requirements will soon be imposed across the country. Pub. L. No. 111-148, § 4205, 124 Stat. 119 (2010). This Act requires all restaurant chains with twenty or more locations doing business under the same name to disclose the number of calories in regular menu items on the restaurant's menu board and written menus. The law also requires the affected restaurants to include, on their menu or menu boards, a "succinct statement concerning suggested daily caloric intake" that is "designed to enable the public to understand, in the context of a total daily diet, the significance of the caloric information that is provided on the menu." *Id.*

123 16 C.F.R. § 259.1 (2011).

124 Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act, Pub. L. No. 106-414, § 12, 114 Stat. 1800 (2000) (codified as amended in scattered sections of 49 U.S.C. (2006)).

125 16 C.F.R. § 1501.2(b) (2011).

126 See 24 R.N.Y.C. § 23-03 (2010); see also Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 214 n.97 (2005) [hereinafter Post, *Compelled Subsidization of Speech*] (listing a variety of consumer labeling requirements enforced by the Federal Trade Commission).

127 NICHOLAS WOLFSON, *CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC* 28–29 (1990) (noting that *Zauderer's* distinction between bans on speech and mandatory disclosures "serves as a basis for the mandatory disclosure system of the SEC. The structure of securities regulation relies heavily on required disclosure in the sale of securities, shareholder meetings, and takeover transactions").

128 See FUNG ET AL., *supra* note 1, at 12–13 (listing different disclosure laws and their purposes).

the state's interest in an informed public, regardless of the further goals the disclosure policy is designed to achieve, should fall within the doctrine.

It is worth considering the policy implications that would result if *Central Hudson*'s intermediate level of scrutiny applied to these types of compelled speech policies rather than *Zauderer*'s rational basis test. There is no guarantee that these disclosure policies would meet *Central Hudson*'s requirement that the regulation directly advance the state interest and be no more extensive than necessary. The *Central Hudson* test has been widely criticized for being difficult to apply in a consistent and predictable manner, with a significant divergence of opinion as to how much protection the test affords to commercial speech.<sup>129</sup> Given the widespread acceptance of compelled risk labeling as an appropriate regulatory strategy,<sup>130</sup> there are strong policy arguments for interpreting *Zauderer* broadly to recognize the validity of other state interests.

Looking, for example, to compelled speech requirements that serve the state's interest in informing the public in order to promote public health and safety, it is largely assumed that the wide range of disclosures serving this substantial state goal do not violate the First Amendment.<sup>131</sup> And given the Court's recognition that the government "has a significant interest in protecting the health, safety, and

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<sup>129</sup> See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630–31 (1990) ("[J]udges and Justices have filled quite a bit of space in the case reporters trying to figure out precisely what forms of regulation the [*Central Hudson*] test permits. . . . [T]he cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not."); Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 42 ("The bland, generic quality of [the *Central Hudson* test elements] is unconnected to any particular First Amendment theory, which is no doubt why they have proved susceptible to such wide swings of application.").

<sup>130</sup> See Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651 (7th Cir. 2006) (listing product warnings and nutritional informational labels as the "most prominent examples" of constitutionally permissible compelled speech).

<sup>131</sup> Estreicher, *supra* note 60, at 272 ("Even where there is no history of misleading advertisements, the state may compel advertisers to warn that their products' intended uses pose dangers to public health or safety. This is routine in the case of poisons and hazardous chemicals. The state has a compelling interest in ensuring that the public is aware of the known dangers attendant to the lawful decisions the advertising seeks to promote." (footnote omitted)). Despite this assumption, the Court has never actually addressed this issue. See Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 423 (2006) ("Although both the common law and state and federal regulations have long compelled warnings and disclosures, the Supreme Court has never squarely considered whether or when such public health mandates violate the First Amendment.").

welfare of its citizens”<sup>132</sup> that may justify commercial speech regulations,<sup>133</sup> there seems little rationale for limiting *Zauderer* to disclosure laws that cure consumer deception. If *Zauderer* were limited in this way, widely accepted disclosure policies like mandated nutrition labeling of packaged foods would be subject to *Central Hudson*’s requirement that the speech required be no more extensive than necessary. Nutrition panel labeling, which has been mandated since 1990,<sup>134</sup> serves the state’s important interest in informing the public in order to protect health<sup>135</sup>—an interest that is equally, if not more important, than the state’s interest in curing deceptive or misleading commercial speech. Mandated nutrition labels provide just one example of the type of compelled commercial speech serving the state’s public health goals that would be subject to searching judicial review were *Zauderer*’s rational basis test inapplicable.

### C. Limitations on the State’s Interest

Recognizing that rational basis scrutiny should apply to disclosure policies that serve the state’s interest in an informed public does not mean, however, that all informational disclosures applied to commercial speech are *per se* legitimate under the First Amendment. First, *Zauderer* itself explicitly cautions that “unjustified or unduly burdensome disclosure requirements might offend the First

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<sup>132</sup> Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995).

<sup>133</sup> See also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (recognizing the state’s substantial interest in preventing underage tobacco use in applying the *Central Hudson* test).

<sup>134</sup> In 1990, Congress enacted the first comprehensive food labeling law, the Nutrition Labeling and Education Act, which requires the labels on packaged food products to contain detailed information about the item’s nutritional content. Pub. L. No. 101-535, § 2, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.). See, e.g., 21 U.S.C. § 343(q) (2006) (requiring label to list the calories, calories from fat, total fat, cholesterol, sodium, carbohydrates, and sugars in a single serving of the food product).

<sup>135</sup> H.R. Rep. 101-538, at 9–10 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3339 (“The Surgeon General has advised Americans that diets low in fats, low in salt and high in fiber can reduce the risk of chronic diseases such as cancer and heart disease. . . . [S]tatements regarding the level of these nutrients in foods will assist Americans in following the Surgeon General’s guidelines.”); see also 58 Fed. Reg. 2302, 2396 (Jan. 6, 1993) (“Standardizing the nutrition information that appears in food labeling, including nutrient content claims, will make it easier for consumers to find, understand, and compare the information they need to make healthy eating choices.”). The Act’s inclusion of a provision permitting the Secretary of the Food and Drug Administration (“FDA”) to mandate the inclusion of additional nutritional information that is not otherwise specified in the Act if he determines that such information will “assist consumers in maintaining healthy dietary practices,” 21 U.S.C. § 343(q)(2)(A), further illustrates the underlying public health goals.

Amendment by chilling protected commercial speech.”<sup>136</sup> Thus, if the disclosure requirement is so extensive that it serves to restrict or chill the speaker’s ability to engage in commercial speech, such a disclosure interferes with the speaker’s First Amendment rights. Second, in order for *Zauderer* to apply, the state must have an interest in providing the public with more information germane to the particular commercial speech at issue: there must be a legitimate nexus between the information compelled and the commercial speech.<sup>137</sup> The state could not, for example, require all packaged food products to bear the warning “smoking causes cancer,” because such a disclosure bears no legitimate nexus to the food products being sold. And the third limitation on *Zauderer* requires that the state have an actual *interest* in informing the public—there must be some legitimate reason why the compelled information is of value to consumers. For instance, if the state were to compel all toys to have a label displaying the names of the individuals who designed the toy, with absolutely no rationale for why that information was of interest or value to consumers, such a disclosure would not serve the state’s interest in an informed public.

This third limitation is similar to the reading of *Zauderer* adopted by the Second Circuit, which while applying rational basis scrutiny to disclosures motivated by purposes beyond curing deception, does not apply rational basis review to a commercial disclosure law whose sole purpose is to gratify “consumer curiosity.” In *International Dairy Foods Ass’n v. Amestoy*,<sup>138</sup> the Second Circuit applied *Central Hudson* to Vermont’s law compelling dairy manufacturers to disclose whether their products were derived from herds treated with recombinant Bovine Somatotropin (“rBST”). Importantly, Vermont took no position on whether rBST had any health effects, and justified the law solely on the grounds that some consumers were interested in learning whether rBST had been used. The panel majority struck down the law, concluding that “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual

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<sup>136</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>137</sup> Although *Zauderer* does not make this limitation explicit, the Court’s analysis is tied to the commercial speaker’s lack of autonomy interest in not providing accurate information about *his particular products and services*. See *id.* at 651 n.14 (“The right of a commercial speaker not to divulge accurate information regarding *his services* is not . . . a fundamental right.” (emphasis added)). A commercial speaker *does*, however, have an autonomy interest in not being required to provide information, even if purely factual, about something that is irrelevant to the speaker’s commercial endeavors.

<sup>138</sup> 92 F.3d 67, 72–74 (2d Cir. 1996).

statement.”<sup>139</sup> While the panel majority’s analysis in *International Dairy Foods* can be criticized for failing to recognize the ways in which the disclosure at issue was relevant to both public health and ethical concerns about the hormone’s effect on cows,<sup>140</sup> subsequent cases have made clear that its holding is confined to disclosure laws whose sole purpose is to satisfy consumer curiosity. In *New York State Restaurant Ass’n*, the Second Circuit reiterated that *International Dairy Foods*’ use of *Central Hudson* is “expressly limited to cases in which a state disclosure requirement is supported by no other interest other than the gratification of ‘consumer curiosity.’”<sup>141</sup>

Thus, the Second Circuit’s subsequent reading of *Amestoy* supports the conclusion that a compelled speech law that fails to convey information of any worth does not serve the commercial speech doctrine’s goal of furthering consumers’ informational interests and should not be subject to rational basis review. The state’s interest in an informed public must be tied to some sort of ultimate goal that the information will serve: to encourage healthier eating habits, to increase consumers’ knowledge of a product’s safety risks, to protect against deception, or another motivation for the disclosure that goes beyond mere satisfaction of curiosity.

Moreover, as discussed throughout this section, the state must always have a substantial interest in *informing* the audience. Regardless of the state’s overall motivation for compelling speech, the state must seek to achieve this ultimate goal by providing the audience with information. The calorie disclosures, for example, are motivated by the state’s interest in preventing and combatting obesity, but the state’s immediate goal is to inform consumers. It is this informational goal

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<sup>139</sup> *Id.* at 74. One of the panel’s clear worries was the inability to place any limit on what types of disclosures might be required, were consumer curiosity alone a sufficient state interest. *See id.*

<sup>140</sup> *See id.* at 75–77 (Leval, J., dissenting). Judge Leval notes that the long-term health effects of rBST are unknown, and that the disclosure therefore *does* serve the state’s interest in public health even if short-term studies have not established deleterious health effects. Moreover, Judge Leval notes other interests served by the disclosure, which include health risks to cows, the economic effects of the hormone’s use on smaller dairy farmers, and moral objections to genetically modified food. *Id.* *See also* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 572–73 (2004). However, as Professor Kysar argues, Judge Leval’s “stinging dissent” fails “to distinguish between the interests that consumers might espouse in favor of a state disclosure law and the interests that the state actually invokes.” *Id.* at 572. Vermont did not advance other state interests as justification for the law, and Judge Leval’s dissent “was an attempt to resolve a different case than the one before the court.” *Id.* at 573.

<sup>141</sup> N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009) (quoting Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 n.6 (2d Cir. 2001)).

that justifies treating compelled commercial speech differently from outright restrictions on commercial speech. As the following section will illustrate, when the state no longer seeks to inform consumers, and instead compels speech that spreads a normative message, *Zauderer's* rational basis scrutiny should no longer apply.

#### IV. THE CONTENT OF THE DISCLOSURE: WHAT ARE THE LIMITS ON THE TYPES OF DISCLOSURE THAT CAN BE REQUIRED?

Commercial disclosures must provide “purely factual and uncontroversial information”<sup>142</sup> to be subject to *Zauderer's* rational basis test. The purely factual nature of a disclosure law was one of the reasons for distinguishing *Zauderer* from the compelled ideological speech at issue in *Barnette* and *Wooley*.<sup>143</sup> While a speaker may have an autonomy interest in not being required to recite the pledge of allegiance or display the state motto on his vehicle, a commercial speaker’s constitutionally protected autonomy interest is minimal when he refuses to provide additional factual information about his products or services. Some forms of compelled speech, such as the aforementioned restaurant menu disclosures, clearly qualify as mandating purely factual, uncontroversial information.<sup>144</sup> However, when the government moves beyond compelled speech that provides descriptive information about a given product or service, to compelled speech that urges the audience to take a certain course of action, the government no longer compels the provision of factual and uncontroversial information. Instead, the government compels “normative speech,” and such compelled speech should not be subject to rational basis review.

The term “normative speech,” as used in this Article, describes speech that expresses the government’s beliefs about how an individual should behave. Thus, when the government compels speech that tells the audience what it “ought” to do,<sup>145</sup> this speech conveys the government’s normative message, even if this message is based on factual information about a product or service. It is the difference between compelling a restaurant owner to post a sign stating that a

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<sup>142</sup> *Zauderer*, 471 U.S. at 651.

<sup>143</sup> *Id.*

<sup>144</sup> *N.Y. State Rest. Ass’n*, 556 F.3d at 134 (noting that the plaintiffs do not “contend that disclosure of calorie information is not ‘factual’”).

<sup>145</sup> See DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 2d ed. 1978) (1739) (drawing distinction between statements that describe the world, and statements that describe what one “ought” or “ought not” do).

hamburger has 800 calories, and a sign stating “you should not eat this hamburger if you are overweight.” While compelled speech raises fewer First Amendment concerns when it injects more information into the marketplace of ideas for the benefit of consumers, this distinction disappears if the compelled speech conveys the government’s normative message. This conclusion, however, does not mean that compelled normative speech *per se* violates the First Amendment. Instead, what this conclusion means is that *Central Hudson*, rather than *Zauderer*, sets forth the proper level of scrutiny for these kinds of commercial speech regulations.<sup>146</sup>

The line between factual and normative disclosures may seem somewhat arbitrary: after all, factual disclosures also serve the government’s normative agenda. The government’s goal in posting a sign stating that a hamburger has 800 calories is to discourage individuals, particularly those who are overweight, from eating the hamburger, so why should we treat a sign stating “you should not eat this hamburger if you are overweight” differently from a sign stating the hamburger’s caloric content? While there is assuredly a normative component to the calorie disclosure, the actual speech being compelled does not contain the government’s normative message. In contrast, when the speaker is being forced to repeat the government’s normative judgments, her autonomy is being compromised: she is being forced to be a billboard for the government’s message.<sup>147</sup> Compelled normative speech, even if based on factual information about a product’s risks, raises similar concerns as *Wooley* and *Barnette* by forcing the speaker to express the government’s opinions and beliefs.<sup>148</sup>

While a speaker’s constitutionally protected autonomy interests are minimal when she is being required to include more information in her commercial speech, the Court has made clear that a speaker does have an autonomy interest in not being required to spread the government’s normative message, even when engaging in commercial speech. In *United States v. United Foods, Inc.*,<sup>149</sup> the Court evaluated

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<sup>146</sup> This conclusion will be discussed further, *infra* Part IV.

<sup>147</sup> See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (“New Hampshire’s statute in effect requires that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message—or suffer a penalty . . .”).

<sup>148</sup> See *id.* at 715 (“Here, as in *Barnette*, we are faced with a state measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.”).

<sup>149</sup> 533 U.S. 405 (2001).

a First Amendment challenge to a statute requiring mushroom producers to subsidize commercial speech promoting a message with which they disagreed.<sup>150</sup> The mushroom producer challenging the law disagreed with the message that all mushrooms are worthy of consuming, and wished to spread its own message that its brand of mushrooms were of superior quality. Though recognizing that the mushroom producer's disagreement with the message at issue could be characterized as "minor," the Court found that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors."<sup>151</sup>

As Dean Post argues, *United Foods* can be read as standing for the following proposition: while commercial speech is protected because of the First Amendment interests of its audience, speakers engaged in commercial speech retain independent First Amendment interests that can be violated by certain forms of compelled speech.<sup>152</sup> In *United Foods*, the Court makes clear that a speaker's First Amendment rights are violated by a compelled message, even if (1) the speech at issue is commercial, and (2) the compelled message merely advocates the use of a product, rather than compelling adherence to ideological beliefs. The message at issue did not provide purely factual information about the health benefits of eating mushrooms—it was a normative and viewpoint-based<sup>153</sup> message urging consumers to eat any brand of mushrooms. The Court's reasoning in *United Foods* makes clear that the rational basis test set forth in *Zauderer* should not apply if the state compels the inclusion of a normative message in commercial speech.<sup>154</sup>

The key question, however, is how to identify when a commercial disclosure law no longer conveys pure facts and crosses the line into normative speech. As discussed above, the government's ultimate objective of changing consumer behavior does not mean that the

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150 *Id.* at 410–11.

151 *Id.* at 411.

152 Post, *Transparent and Efficient Markets*, *supra* note 72, at 577 ("The holding of *United Foods* can be explained only on the assumption that commercial speakers retain significant constitutional interests that are not fully captured by the constitutional values inherent in the circulation of information. . . . *United Foods* must break with the Court's traditional explanation of its commercial speech doctrine and move from constitutional values that are audience-centered to those that are speaker-centered.").

153 *United Foods*, 533 U.S. at 411.

154 See Estreicher, *supra* note 60, at 272 (arguing that compelling commercial speakers to "serve as a medium for another person's ideological communications" violates their First Amendment right not to speak).

speech is normative. In fact, many commercial disclosure laws have the express purpose of changing behavior through information. Nutritional disclosures on packaged products seek to encourage healthier food choices, warnings on alcohol packages seek to discourage pregnant women from drinking, and written warning labels on cigarette packages seek to curb smoking rates. The fact that a given disclosure has a “consumer . . . modification objective”<sup>155</sup> does not mean that the disclosure requires the commercial actor to adopt the government’s normative message. After all, if the information were irrelevant to consumers’ decisions, it would be impossible to argue that the state had an interest in mandating the provision of this information. The objective of any information disclosure policy is to “provide new information that can potentially alter individual decisions.”<sup>156</sup>

The distinction, however, is that the *immediate* purpose of these disclosure policies is to convey uncontroversial factual information about a given product, even if the ultimate motive is to change behavior.<sup>157</sup> None of these disclosures require commercial actors to express the government’s message that a given product is good or bad. The state seeks to persuade individuals to make certain choices by providing them with relevant factual information, which is a valid goal given that the purpose of the commercial speech doctrine is to protect the audience’s informational interests.<sup>158</sup> As the Ninth Circuit recently observed, albeit in a case that was reheard en banc:

[M]ost disclosure requirements, from nutritional facts on packaged foods to the financial details of publicly traded companies, are designed to remedy information asymmetries and potentially alter individuals’ behavior as they become more well-informed market participants. As long as those who are compelled to disclose are not required to *endorse* the possible result of a better-informed market . . . the fact that legislators may desire the resulting behavior is irrelevant. In such cases, the disclos-

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155 See Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 880–81 (2010) (“Many existing labeling requirements depend upon government authority to require disclosure of information because of the ‘reactions’ it presumes consumers will have to un-supplemented information and for the purpose of modifying consumer behavior to serve the government’s determination of the public interest.”).

156 WESLEY A. MAGAT & W. KIP VISCUSI, INFORMATIONAL APPROACHES TO REGULATION 5 (1992).

157 See Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 794 (2001) (distinguishing between the “further purpose” or “motive” behind a law, and the law’s “immediate purpose,” and concluding that courts should focus on the law’s immediate purpose).

158 See MAGAT & VISCUSI, *supra* note 156, at 6 (“[T]he objective of such efforts is informed choice, not simply altered choice.”).

ing party is required only to provide the raw facts that others may use to make their own decisions.<sup>159</sup>

In contrast, if the mandated disclosure expresses the government's normative message about the product, such a law crosses the line set by *Wooley*, *Barnette*, and *United Foods*. This kind of disclosure law does not seek to change behavior through information, but rather to change behavior by spreading the government's message that a certain product should or should not be used.

It will often be easy to determine whether a written or oral disclosure expresses a normative message, because the normative content will be evident based on the disclosure's face. For example, the aforementioned hypothetical disclosure "you should not eat this hamburger if you are overweight" explicitly spreads a normative message. Compelled graphic or visual disclosures, however, may be more difficult to evaluate—it is not easy to evaluate whether a visual graphic conveys factual information or instead spreads a normative message. What if the state were to require all menu items over 1000 calories to be accompanied by a picture of an obese person surrounded by empty food containers? Does this image just convey factual information, or does it disgust viewers and spread the government's message that you should not order that particular item? As Professor Rebecca Tushnet has persuasively argued, "[t]he power of images comes not just from the emotions they evoke but also from the linked feature that they are hard to see as arguments: they persuade without overt appeals to rhetoric."<sup>160</sup> An image may contain factual information, but it may also appeal to the audience's emotions:<sup>161</sup> images can "persuade without seeming to persuade."<sup>162</sup> One needs only con-

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<sup>159</sup> Jerry Beeman & Pharm. Servs. Inc. v. Anthem Prescription Mgmt., LLC, 652 F.3d 1085, 1101 n.16 (9th Cir. 2011) (emphasis in original), *reh'g en banc granted*, 661 F.3d 1199 (9th Cir. 2011), *question certified* by 682 F.3d 779 (9th Cir. 2012).

<sup>160</sup> Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 692 (2012).

<sup>161</sup> *Id.* at 696 ("Images, by not making their appeal to emotion explicit, provide a way to bring emotion to law despite law's expressed discomfort with emotions."); *see also* Christina O. Spiesel et al., *Law in the Age of Images: The Challenge of Visual Literacy*, in CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW 231, 237 (Anne Wagner et al. eds., 2005) (arguing that visual stories are "rich in emotional appeal, which is deeply tied to the communicative power of imagery. This power stems in part from the impression that visual images are unmediated. They seem to be caused by the reality they depict"); Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 213 (2000) ("[B]y bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.").

<sup>162</sup> Tushnet, *supra* note 160, at 696. *See also* Costas Douzinas & Lynda Nead, *Introduction to LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* 7 (Costas Douzinas & Lynda Nead eds., 1999) ("Images are sensual and fleshy; they address the la-

sider the government's recent refusal to release photos of Osama Bin Laden's dead body to illustrate the point that images convey more than just factual information, and can elicit strong emotional reactions from viewers.<sup>163</sup> It can be very difficult to conclude based on the face of an image whether the image just conveys factual information.

Because of the difficulty in evaluating whether visual disclosures mandate normative speech, courts should look to the government's actual purpose in mandating the visual disclosure when determining whether rational basis scrutiny is warranted. Courts have ample experience smoking out illegitimate government purposes, particularly within the First Amendment doctrine,<sup>164</sup> and a purpose inquiry is the most reliable way of ensuring that the state does not use visual commercial disclosure laws to spread normative messages that are disguised as factual speech. In order to determine whether rational basis scrutiny applies to a visual disclosure law, courts should evaluate the government's purpose in mandating the disclosure: if the government's actual purpose is not to inform consumers, but rather to spread the government's normative message, then the disclosure falls outside of *Zauderer*.

This section will look to laws requiring compelled speech in the sale of tobacco in an effort to identify the line separating disclosures designed to inform consumers from disclosures designed to spread a normative message. I will consider new species of tobacco warning laws that do not just provide written warnings about the product's health consequences, and instead accompany these written warnings with visual depictions of the consequences of tobacco use. I conclude that the state intends for these disclosures to spread a normative message that individuals should not smoke, and that the disclosures

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bile elements of the self, they speak to the emotions . . . . They have the power to short-circuit reason and enter the soul . . . ."); David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183 (2006) (showing that jurors often have an emotional response to gruesome photographs).

<sup>163</sup> Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment at 10, Judicial Watch, Inc. v. U.S. Dept. of Def., 2012 WL 1438688 (D.D.C. Apr. 26, 2012) (No. 11-890) ("The release of images showing the bullet wound to bin Laden's head plausibly and logically pose a particularly grave threat of inflaming anti-American sentiment and resulting in retaliatory harm."). The district court accepted the government's argument, concluding that the government's testimony "that the release of images of his body could reasonably be expected to pose a risk of grave harm to our future national security is more than mere speculation." *Judicial Watch*, 2012 WL 1438688, at \*15.

<sup>164</sup> For a discussion of the role of legislative purpose in the First Amendment doctrine, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996). See also Rubenfeld, *supra* note 157, at 794.

should be subject to intermediate scrutiny under *Central Hudson* rather than *Zauderer*'s rational basis test.

#### A. Overview of Tobacco Warning Laws

The federal government has mandated warning labels on cigarette packages since 1965. The labels carried on cigarette packages, which have been modified over the years, are “the most familiar example”<sup>165</sup> of mandatory informational disclosures, and provide yet another example of a disclosure policy that serves interests beyond curing consumer deception and confusion.

The first iteration of tobacco labeling, the Federal Cigarette Labeling and Advertising Act of 1965,<sup>166</sup> required cigarette packages to carry the following warning: “Caution: Cigarette Smoking May Be Hazardous to Your Health.”<sup>167</sup> In 1984, the text of the warning label was modified, and cigarette advertisements were also required to carry health warnings. The Comprehensive Smoking Education Act<sup>168</sup> amended the 1965 act to require the rotation of four different warning labels on packaging and advertising. Congress’s stated purpose in adopting the new labeling requirements was to make “Americans more aware of any adverse health effects of smoking . . . and to enable individuals to make informed decisions about smoking.”<sup>169</sup> These warning labels have never been challenged by the tobacco industry as unconstitutionally compelling speech.<sup>170</sup> While cigar companies did challenge similar warning requirements imposed on cigar packaging and advertising by the state of Massachusetts, the First Circuit rejected their challenge, relying on *Zauderer*.<sup>171</sup>

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<sup>165</sup> Sunstein, *supra* note 54, at 661.

<sup>166</sup> Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965). The stated purpose of the 1965 Act was to enact a uniform cigarette labeling requirement that would ensure that the public was “adequately informed that cigarette smoking may be hazardous to health . . . .” *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4(a), 98 Stat. 2201 (codified as amended at 15 U.S.C. § 1333(a)(1) (2006)).

<sup>169</sup> *Id.*

<sup>170</sup> R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 40 n.4 (D.D.C. 2011).

<sup>171</sup> Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 54–55 (1st Cir. 2000), *overruled on other grounds by* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). More specifically, the cigar companies argued that the requirement that the warnings cover 25% of the main panel of the packaging and 20% of the advertisements unduly burdened their commercial speech. The First Circuit rejected this argument, given that *Zauderer* does not require a least restrictive means analysis, and the compelled warnings were “reasonably related to a substantial state interest.” *Id.* at 55.

The most recent federal legislation, the Family Smoking Prevention and Tobacco Control Act,<sup>172</sup> adopts nine different warning labels to be rotated on cigarette packages:

WARNING: Cigarettes are addictive. WARNING: Tobacco smoke can harm your children. WARNING: Cigarettes cause fatal lung disease. WARNING: Cigarettes cause cancer. WARNING: Cigarettes cause strokes and heart disease. WARNING: Smoking during pregnancy can harm your baby. WARNING: Smoking can kill you. WARNING: Tobacco smoke causes fatal lung disease in nonsmokers. WARNING: Quitting smoking now greatly reduces serious risks to your health.<sup>173</sup>

The warning label must take up 50% of the front and rear of the cigarette package, and 20% of any print advertisement.<sup>174</sup> The Act also requires the Secretary of the Food and Drug Administration (“FDA”) to “issue regulations that require color graphics depicting the negative health consequences of smoking to accompany the label statements . . .”<sup>175</sup>

In accordance with the Act, the FDA issued a Proposed Rule setting forth thirty-six potential graphic images to be displayed on tobacco packaging and advertisements.<sup>176</sup> The Proposed Rule also required the warning labels to include “a reference to a smoking cessation assistance resource.”<sup>177</sup> After a period of notice and comment, the FDA published a Final Rule (“the Rule”) on June 22, 2011.<sup>178</sup> The Rule selected nine graphic warning labels. The selected images have been described as follows:

[A] man exhaling cigarette smoke through a tracheotomy hole in his throat; a plume of cigarette smoke enveloping an infant receiving a kiss from his or her mother; a pair of diseased lungs next to a pair of healthy lungs; a diseased mouth afflicted with what appears to be cancerous lesions; a man breathing into an oxygen mask; a bare-chested male cadaver lying on a table, and featuring what appears to be post-autopsy chest staples down the middle of his torso; a woman weeping uncontrollably; and a man wearing a t-shirt that features a “no smoking” symbol and the words “I Quit.” An additional graphic image appears to be a stylized car-

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<sup>172</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776 (2009).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* The Act permits the Secretary to modify the precise formatting stipulations mandated by the Act to permit for the graphic labeling.

<sup>176</sup> Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,534–35 (Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141).

<sup>177</sup> *Id.* at 69,564.

<sup>178</sup> Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

toon (as opposed to a staged photograph) of a premature baby in an incubator.<sup>179</sup>

Each of the graphic images matches with one of the written warnings.<sup>180</sup> In addition, all of the labels must include the phone number “1-800-QUIT-NOW,”<sup>181</sup> which will connect smokers with smoking cessation resources.<sup>182</sup>

The tobacco industry has successfully challenged the FDA’s Rule on First Amendment grounds: the D.C. Circuit recently affirmed the United States District Court of the District of Columbia’s permanent injunction of the FDA’s Final Rule as unconstitutional compelled speech.<sup>183</sup> The district court concluded that the Rule did not fit within “the *Zauderer paradigm*”<sup>184</sup> because “the graphic images here were neither designed to protect the consumer from confusion or deception, nor to increase consumer awareness of smoking risks; rather, they were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking.”<sup>185</sup> The district court conceded that “the line between the constitutionally permissi-

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179 R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 41–42 (D.D.C. 2011) (citation omitted). The images can be accessed online. See *Overview: Cigarette Health Warnings*, FDA, <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/ucm259214.htm> (follow link under “High Resolution Image Formats”) (last visited Oct. 4, 2012) [hereinafter “Final Images”].

180 For example, the written warning “WARNING: Cigarettes are addictive” pairs with the image of a hole in a man’s throat. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,649 (June 22, 2011).

181 Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,686–87, 36,754–55 (June 22, 2011).

182 New York City has also adopted graphic labeling requirements. In the fall of 2009, New York City’s Board of Health adopted Article 181.19, which required all of the city’s tobacco retailers to “prominently display” a sign with written information about tobacco’s adverse health effects and how to get help quitting the use of tobacco, as well as “a pictorial image illustrating the effects of tobacco use.” N.Y., N.Y.C., Bd. OF HEALTH art. 181.19(a)(b) (2009). Tobacco retailers challenged New York’s signage regime as both being preempted by federal law, as well as violating the retailers’ First Amendment rights by unconstitutionally compelling speech. The Southern District of New York granted summary judgment to the retailers on their preemption claim, without addressing the First Amendment implications of the compelled imagery. 23-34 94th Street Grocery Corp. v. N.Y.C. Bd. of Health, 757 F. Supp. 2d 407, 413 (S.D.N.Y. 2010). The Second Circuit recently affirmed the district court’s ruling. 23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health, No. 11-91-cv, 2012 WL 2819423 (2d Cir. July 10, 2012). Thus while the courts have not addressed the First Amendment issues raised by New York City’s signage, the signs raise much of the same issues as the federal graphic labels. This Article, however, will focus on the federal labels.

183 R.J. Reynolds Tobacco Co. v. FDA, Nos. 11-5332, 12-5063, 2012 WL 3632003, (D.C. Cir. Aug. 24, 2012), *affirming* 845 F. Supp. 2d 266 (D.D.C. 2012).

184 *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 274.

185 *Id.* at 272.

ble dissemination of factual information and the impermissible expropriation of a company's advertising space for Government advocacy can be frustratingly blurry,”<sup>186</sup> but concluded that “here the line seems quite clear.”<sup>187</sup> The D.C. Circuit affirmed the district court, concluding that *Zauderer* was inapplicable both because the graphic labels did not cure consumer deception,<sup>188</sup> and because the graphic images were “not ‘purely’ factual because—as FDA tacitly admits—they are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning.”<sup>189</sup> According to the D.C. Circuit majority, the Final Rule’s “inflammatory images and the provocatively-named hotline cannot rationally be viewed as pure attempts to convey information to consumers,”<sup>190</sup> and thus fell outside of the ambit of *Zauderer*.

### B. Drawing the Line Between Factual Disclosures and Normative Messages

As discussed earlier in this section, the mere fact that the government’s ultimate goal is to change behavior by reducing smoking rates does little to distinguish the graphic labeling requirements from written tobacco warnings. And while a technologically manipulated graphic that did not accurately depict the health consequences of smoking would assuredly raise different concerns, there is no evidence that the graphics are enhanced in an unrealistic manner.<sup>191</sup> However, as the district court and the D.C. Circuit concluded, the evidence of the state’s purpose in mandating the graphic labels suggests that these images are designed to shock and disgust viewers, not just to inform them about the dangers of tobacco use.

When the state’s purpose in mandating a given disclosure is to shock and disgust the audience, the disclosure forces the speaker to spread the state’s normative message that a given product should not be used. By intentionally appealing to the audience’s emotions rather than their reasoned judgment, this type of compelled speech can no longer be justified based on the audience’s informational in-

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<sup>186</sup> *Id.* at 274.

<sup>187</sup> *Id.*

<sup>188</sup> See *supra* text accompanying notes 206–14.

<sup>189</sup> R.J. Reynolds Tobacco Co. v. FDA, Nos. 11-5332, 12-5063, 2012 WL 3632003, at \*7 (D.C. Cir. Aug. 24, 2012).

<sup>190</sup> *Id.* at \*8.

<sup>191</sup> The FDA conceded to the district court that some of the images had been technologically modified, but maintained that “the effects shown in the photographs are, in fact, accurate depictions of the effects of sickness and disease caused by smoking.” *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 270 n.8 (internal quotation marks omitted).

terests. While so-called “fear appeals,” a term that psychologists have used to describe “fear-arousing persuasive message[s]” that are “designed to scare people by describing the terrible things that will happen to them if they do not do what the message recommends,”<sup>192</sup> have become a regular feature of public-health campaigns for the past fifty years,<sup>193</sup> this type of speech admittedly does not just convey pure factual information. The psychological literature evaluating the persuasiveness of different types of fear appeals demonstrates the complexity of the emotional and cognitive processing of these types of messages, and illustrates that the key goal in implementing fear appeals is not to inform the audience, but to appeal to the audience’s emotions.<sup>194</sup>

When the state intentionally compels shocking and disgusting images that capitalize on the audience’s emotional reactions, the state’s goal is altered choice, instead of informed choice. Mandating speech that appeals to emotion “does not improve rational decision-making or encourage autonomy-affirming choices . . . .”<sup>195</sup> Instead, “[t]he substantial literature on fear appeals and the influence of negative emotions such as fear and anxiety induced by a particular communication shows the potential for a change in an individual’s decision away from what it might have been in a non-emotional state.”<sup>196</sup> When the government designs a disclosure law that makes use of a fear appeal, the government’s goal is not to provide consumers with information, but rather to spread the government’s normative mes-

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<sup>192</sup> Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 16 (2008). See, e.g., Natascha de Hoog, Wolfgang Stroebe, & John B. F. de Wit, *The Impact of Vulnerability to and Severity of a Health Risk on Processing and Acceptance of Fear-Arousing Communications: A Meta-Analysis*, 11 REV. OF GEN. PSYCHOL. 258, 258 (2007) (“Fear-arousing communications emphasize the negative consequences of health-impairing behaviors to motivate individuals to change these behaviors.”).

<sup>193</sup> de Hoog et al., *supra* note 192, at 258.

<sup>194</sup> See, e.g., *id.*; Glenn Leshner, Paul Bolls & Kevin Wise, *Motivated Processing of Fear Appeal and Disgust Images in Televised Anti-Tobacco Ads*, 23 J. MEDIA PSYCHOL. 77 (2011); Kim Witte & Mike Allen, *A Meta-Analysis of Fear Appeals: Implications for Effective Public Health Campaigns*, 27 HEALTH EDUC. & BEHAV. 591 (2000). Under the “drive-reduction model” of fear appeals, the communication creates emotional tension that motivates or “drives” individuals to change their behavior in order to reduce the salience of the perceived threat. de Hoog et al., *supra* note 192, at 259. The “drive reduction” theory of fear appeals was first articulated in 1953. See CARL I. HOVLAND, IRVING L. JANIS, & HAROLD H. KELLEY, *COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE* (1953); Irving L. Janis & Seymour Feshbach, *Effects of Fear-Arousing Communication*, 48 J. ABNORMAL & SOC. PSYCHOL. 78 (1953).

<sup>195</sup> Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 989 (2009).

<sup>196</sup> Blumenthal, *supra* note 192, at 32.

sage that a given product should not be used. While speakers have minimal autonomy interests in not disclosing factual information about their products, speakers do have a constitutionally protected interest in not being forced to shock and disgust consumers about the dangers of a particular product.

The FDA's selection criterion for choosing which tobacco graphics to impose suggests that the government's purpose in requiring the graphic labels was not to provide tobacco users with information about health risks, but rather to shock and disgust them into not using tobacco. A 2007 Institute of Medicine ("IOM") Report that is cited throughout the FDA's regulations in support of the new graphic labels<sup>197</sup> makes clear that, going forward, the "primary objective of tobacco regulation is not to promote informed choice, but rather to discourage consumption of tobacco products, especially by children and youths."<sup>198</sup> In designing the graphic images, the FDA was very clear that it sought to reduce smoking rates by using graphic images that were "frightening or visually disturbing."<sup>199</sup> When deciding which graphic warnings to adopt in the Final Rule, the FDA measured several effects of the visual warnings as compared to text-only warnings. One of the most important measures relied upon during the selection process was the "salience" of the graphic image, which included an "emotional reaction scale" that measured "how the warning made the respondent feel, such as 'depressed,' 'discouraged,' and 'afraid.'"<sup>200</sup> The FDA cited to research literature that "suggests that warnings that generate an immediate emotional response from viewers can result in viewers attaching a negative affect to smoking (i.e., feel bad about smoking), thus undermining the appeal and attractiveness of smoking."<sup>201</sup>

The graphic images were designed to evoke an emotional reaction that would convince tobacco users to stop using the product. The

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197 See, e.g., Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,529–33 (Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141); Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,632–40 (Jun. 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

198 INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION 291 (2007) (quoting INST. OF MED., GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 236–37 (1994)). The IOM report then advocates graphic tobacco labels as a means of discouraging tobacco consumption. *Id.* at 296.

199 Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,534 (Nov. 12, 2010) (internal quotation marks omitted) (to be codified at 21 C.F.R. pt. 1141).

200 Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,638 (Jun. 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

201 *Id.* at 36,639.

message the government sought to convey was not just that tobacco has specific health risks, but that individuals should also not use tobacco because tobacco is dangerous, unappealing, and depressing. Although the FDA also cited to literature demonstrating that the images were also designed to serve informational goals by increasing the likelihood that smokers would read and think about the warning labels,<sup>202</sup> the government also had a completely non-informational goal: to spread the government's normative message that individuals should not smoke.<sup>203</sup>

Moreover, even if such explicit evidence of the government's purpose were not available, such a legislative purpose can be inferred. Courts have ample experience with the task of inferring legislative purpose by looking to evidence such as the actual content of the law, the law's effects, its social context, and the common understanding of the law's purpose.<sup>204</sup> When evaluating the actual purposes behind a disclosure law that compels imagery, the images themselves can be useful in this process. While attempting to infer legislative purpose based on the face of the images raises the same concerns discussed above about the difficulty of analyzing the persuasive effects of images,<sup>205</sup> sometimes courts may need to consider the images themselves in order to get at the government's real purpose. However, by using the actual content of the images as just one piece of evidence in the court's broader task of isolating the government's purpose, the concerns about how to analyze the true effects of visual imagery are somewhat reduced. Moreover, when the compelled images are accompanied by text, as they are in the case of the graphic tobacco la-

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<sup>202</sup> *Id.* The FDA argues that "health warnings that evoke strong emotional responses enhance an individual's ability to process the warning information, leading to increased knowledge and thoughts about the harms of cigarettes and the extent to which the individual could personally experience a smoking-related disease." *Id.* at 36,641. By increasing the likelihood that an individual will read a written warning and will contemplate the negative health effects of smoking, the graphic images do serve informational interests. But they do so by using the audience's emotions, arguably in a manipulative manner.

<sup>203</sup> Another informational goal served by the visual disclosures might be to convey risk information to individuals with low literacy rates. In the proposed rule, the FDA cited to literature demonstrating that individuals with low literacy rates have difficulty recalling text-only warnings in order to justify the need for the visual warnings. Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,531 (Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141). However, as discussed above, the FDA's focus in selecting which graphic images to adopt was on the emotional salience of the images, not on whether the images better conveyed health risks to consumers with low literacy rates.

<sup>204</sup> Rubenfeld, *supra* note 157, at 794–95 (indicating that the judiciary has a familiar set of tools to interpret legislative purpose by looking to the law's language, its effect, its legislative history, the circumstances surrounding its enactment, and common knowledge).

<sup>205</sup> See *supra* text accompanying notes 234–49.

bels, the accompanying text can also inform the court's analysis of the government's purpose.

Here, the graphic warnings themselves, displaying images such as a dead body on an autopsy table and a plume of smoke next to a newborn baby,<sup>206</sup> strongly suggest that the government's purpose was not to inform tobacco users about smoking's health risks, but rather to discourage individuals from smoking by displaying shocking and disgusting images. First, the informational content of many of the graphic images is incredibly low: the body on the autopsy table, for example, conveys little information beyond the accompanying textual warning that "smoking can kill you."<sup>207</sup> The picture of the dead body does not add any informational content to the warning label. Second, all of the graphic warnings include the phone number "1-800-QUIT-NOW."<sup>208</sup> This number explicitly conveys the government's normative message that individuals should quit smoking, which gives a strong indication of the government's purpose in compelling the graphic images. Third, the common reaction to these images is disgust and shock—while it may be difficult, on the margins, to evaluate whether an image is factual or normative, courts can look to the common understanding of these images as one piece of evidence that sheds light on the government's purpose. Thus, even though it may be difficult to infer legislative purpose based on the face of these images, courts have ample experience with this task, and applying these tools to the tobacco images suggests that the government sought to compel normative speech.

Although some of us may have fewer objections to the government's attempt to use tobacco producers to spread a normative message that discourages an "inherently dangerous activity"<sup>209</sup> with serious

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206 See Final Images, *supra* note 179, at 2, 7.

207 *Id.* at 7. As another example, one of the graphics in the final rule shows a man exhaling smoke through what appears to be a hole in his throat, with the text "Warning: Cigarettes are addictive." *Id.* at 1. While the graphic likely depicts a tracheotomy hole, the warning label does not convey any information about what a tracheotomy is or when the procedure is necessary. Instead, the label just shows a man holding a cigarette, and smoke expelling through a hole in his throat. Another graphic conveys even less information about smoking's health effects, showing a woman crying and the caption: "Warning: Tobacco smoke causes fatal lung disease in nonsmokers." *Id.* at 8. While the FDA claims that this image portrays "the emotional suffering experienced as a result of disease caused by secondhand smoke exposure," Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,696 (Jun. 22, 2011) (to be codified at 21 C.F.R. pt. 1141), this graphic provides little information about the specific health consequences of smoking.

208 Final Images, *supra* note 179.

209 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2, 123 Stat. 1776, 1777 (2009).

health consequences, this is merely because we agree with the government's objective of reducing rates of tobacco usage. Agreeing with the government's overall objective, however, is not a reason for ignoring the First Amendment rights of tobacco manufacturers.<sup>210</sup> While the negative health consequences of smoking are undisputed facts, the method of presenting these facts matters. The Court has made clear that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented"<sup>211</sup> in the commercial marketplace. With the visual tobacco images, however, the government has decided the value of the information. The government has decided that information about the health risks of tobacco is incredibly valuable, and that tobacco manufacturers must present this information in a shocking manner that will force the audience to react to it.

Returning to a hypothetical proposed earlier, consider if a state decided that calorie information was not sufficiently deterring overweight consumers from ordering high-calorie items from restaurants. As a consequence, the state decides that menus and menu boards must include, alongside any food item containing more than 1000 calories, a picture of an obese person next to multiple empty food containers and wrappers, along with the phone number 1-800-LOSE-W8T.<sup>212</sup> This type of visual display requirement arguably provides additional factual information about the consequences of eating high-calorie foods in service of the state's public health goals. But the state's purpose would clearly not be to inform consumers—the calorie disclosure already informs individuals about the high number of calories in those menu items. Instead, the state's likely goal in this hypothetical scenario would be to shock or disgust viewers and thereby persuade them to order something with fewer calories. While the picture may also serve to highlight the calorie information for those

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<sup>210</sup> *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

<sup>211</sup> *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (discussing the value of unrestricted speech in the commercial marketplace).

<sup>212</sup> This hypothetical is not *that* far from reality: New York City has recently promulgated a public health advertisement that features a picture of an overweight amputee, along with the caption: "Portions have grown. So has Type 2 diabetes, which can lead to amputations." Patrick McGeehan, *Blame Photoshop, Not Diabetes, for This Amputation*, N.Y. TIMES, Jan. 25, 2012, at A22. The city was criticized for using a photo of an actor with fully intact legs, and digitally removing one of his legs to make its point. *Id.* While the city's use of fear appeals in its own advertising does not raise any First Amendment issues, requiring restaurants or food producers to display such an image would be analogous to the visual tobacco warnings.

who would otherwise ignore it, the state cannot force restaurant owners to convey shocking, value-laden images to their customers in order to achieve the state's informational goals.<sup>213</sup> Consider, as an alternative example, if a state required all abortion clinics to place a picture of a dead fetus on their signage and advertisements, along with the phone number 1-800-LUV-LIFE.<sup>214</sup> Again, the state's real purpose would be to shock women visiting the clinics, presumably in the service of the state's interest in protecting prenatal life, and to spread the state's normative message that women should carry their pregnancies to term.<sup>215</sup> While the visual information displayed may be based on facts, its method of presentation cannot be ignored. Such an attempt to spread a normative message by shocking the audience does not qualify for *Zauderer*'s rational basis review.

This is not to say that the state can never use emotion-based fear appeals: as mentioned above, fear appeals have a long history in public health campaigns and the state's use of shocking imagery in its own public health advertisements does not raise any First Amendment concerns. Nor is the state prohibited from compelling imagery—not all visual graphics are designed to spread a normative message, and the state's attempts to use imagery that is designed to inform consumers should still be subject to rational basis review.<sup>216</sup>

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<sup>213</sup> See John P. Strouss III, *Medical Pornography or Fair Warning: Should the United States Adopt Canada's Gruesome New Tobacco Labels?*, 27 J. CORP. L. 315, 331 (2002) ("The government could cover fast food packages with pictures of clogged arteries and obese people. It could cover alcoholic beverage containers with pictures of cirrhotic livers and mangled drunk driving victims. In a paternalistic attempt to protect us from our own decisions by putting disgusting images on products, the government could make the world a nauseating place.").

<sup>214</sup> While the speech of an abortion clinic's staff members to its individual patients during the course of the patient's care would not qualify as commercial speech, the clinic's signage and advertisements are forms of commercial speech because they concern the offer of services.

<sup>215</sup> In the Second Circuit appeal of New York City's signage law, the plaintiffs analogize to the "factual" imagery used by anti-abortion groups to demonstrate how factual images can be used to play on the audience's emotions in the service of an ideological position. *See* Brief for Plaintiffs-Appellees at 45, 23-34 94th St. Grocery, Corp. v. N.Y.C. Bd. of Health, 685 F.3d 174 (2d Cir. 2012) (No. 11-0091) ("[T]he City's position ignores the numerous examples of images that, though 'factual' renditions of events in one sense, seek to play on emotions or fears to convey a highly subjective message. One need only consider the 'factual' pictures of aborted fetuses utilized by anti-abortion groups or the controversy over whether to release the graphic death photographs of Osama bin Laden to understand this point.").

<sup>216</sup> A majority of the Sixth Circuit recently came to this conclusion in reviewing a facial challenge to the graphic tobacco labeling requirements. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559–60 (6th Cir. 2012). Importantly, the panel was not reviewing the actual images promulgated by the FDA. Instead, the panel reviewed the statute's requirement that the FDA set forth color graphics, and the panel concluded

*Zauderer* itself recognizes that images in commercial advertisements can “attract[] the attention of the audience to the advertiser’s message” as well as “impart[ing] information directly.”<sup>217</sup> For example, the nutritional labeling laws that apply to packaged products have been criticized for not providing information in a clear and easily understandable form.<sup>218</sup> As a consequence, the FDA is currently considering adopting a front of package labeling scheme that will convey nutritional information in a more user-friendly format. The front of package labeling scheme will likely employ graphics like checkmarks or stars that will highlight a food product’s negative or positive attributes.<sup>219</sup> Importantly, however, the goal behind the use of these symbols is simply to make information more easily understandable and accessible, especially given the evidence that busy consumers cannot always take the time to read the full nutritional label, and that low literacy consumers do not always understand the significance of the information provided on it.<sup>220</sup> These symbols are not designed to evoke emotional reactions: a “healthy choice checkmark” on a box of cereal is a far cry from a picture of a diseased lung on a cigarette package. Thus, if the government compels the use of a picture or graphic whose sole purpose is to convey information, this type of commercial disclosure law falls within the *Zauderer* paradigm.<sup>221</sup> But if the state seeks to compel speakers to act as a billboard for the state’s normative message, rational basis review should not apply.

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that the plaintiffs had failed to show that color graphics were per se unable to convey factual information about smoking’s health consequences. *Id.* at 524, 531.

217 *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

218 FUNG ET AL., *supra* note 1, at 84–85.

219 See Jennifer L. Pomeranz, *Front-of-Package Food and Beverage Labeling: New Directions for Research and Regulation*, 40 AM. J. PREVENTATIVE MED. 382, 383 (2011). Some food companies have voluntarily adopted front of package nutritional labeling using graphics, but the FDA has expressed concern that these voluntary labels may represent certain food products as being healthier than warranted. *Id.* The FDA hopes that a uniform graphic labeling scheme with set criterion will ensure that the labels accurately convey a product’s nutritional benefits, or lack thereof. *Id.*

220 *Background Information on Point of Purchase Labeling*, FDA (Oct. 2009), [www.fda.gov/Food/LabelingNutrition/LabelClaims/ucm187320.htm](http://www.fda.gov/Food/LabelingNutrition/LabelClaims/ucm187320.htm).

221 In some instances pictures or graphics may be the best way to convey a certain fact given our understanding of how individuals actually process information. See CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 195 (2005) (“[I]t is hopelessly inadequate to say that when people lack relevant information the best response is to provide it . . . [I]f people lack information, a great deal of attention needs to be paid to information processing . . .”). Thus, refusing to extend *Zauderer* to situations where the government plays on the audience’s emotions does not restrict the government from conveying information in an easily understandable format: it simply prohibits the government from using emotional appeals that do not promote autonomy and freedom of choice.

### C. Applying Central Hudson to the Visual Tobacco Laws

Nor does my conclusion mean that all compelled normative speech is *per se* unconstitutional. It simply means that this type of compelled speech should not be subject to rational basis review. It remains possible that the graphic tobacco warnings would be able to meet a higher level of scrutiny.

Since the visual tobacco warnings apply to commercial speech, the government must meet *Central Hudson*'s intermediate level of scrutiny. The D.C. Circuit recently reached this same conclusion in evaluating the graphic tobacco labels, disagreeing with the district court's holding that strict scrutiny should apply, and instead applying *Central Hudson*'s intermediate scrutiny.<sup>222</sup> Given that there is no question that the warnings on tobacco packages affect tobacco manufacturers' commercial speech, the government must satisfy *Central Hudson*: the regulation must be in the service of a substantial state interest, the

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<sup>222</sup> R.J. Reynolds Tobacco Co. v. FDA, Nos. 11-5332, 12-5063, 2012 WL 3632003, at \*8 (D.C. Cir. Aug. 24, 2012). The district court did not provide any explanation for why *Central Hudson*, which sets forth the general test for commercial speech regulations, would not apply to the graphic tobacco labels. See R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 272 (D.D.C. 2012). The district court also failed to provide any Supreme Court precedent to support its conclusion that strict scrutiny should apply. *Id.* at 274. Although the district court cited to the Seventh Circuit's recent application of strict scrutiny to a state law that required games deemed "sexually explicit" to be labeled with a sticker indicating that the games were for those over age eighteen, *id.* (citing Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006)), the Seventh Circuit also did not provide any rationale for why strict scrutiny, rather than *Central Hudson*, was the proper test. *Entm't Software Ass'n*, 469 F.3d at 652. Looking to Supreme Court precedent on point, while the Court applied strict scrutiny to the compelled speech at issue in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Court was explicit that the law under review affected the electric company's fully-protected, non-commercial speech. See *id.* at 8 (holding that the company's newsletter received full First Amendment protection because its contents are "no different from a small newspaper . . . [ranging] from energy-saving tips to stories about wildlife conservation"). Similarly, while the Court applied strict scrutiny to the compelled speech requirement at issue in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), the Court did so after concluding that the disclosure affected fully-protected, non-commercial speech. *Id.* at 795–96. Looking to the Court's application of strict scrutiny when evaluating a regulation affecting commercial speech, while the Court applied strict scrutiny to the compelled subsidy at issue in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) this was because the government had not argued that *Central Hudson* should apply. *United Foods, Inc.*, 533 U.S. at 410 ("[T]he Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test." (citation omitted)). In sum, there is no Supreme Court precedent that supports the D.C. District Court's statement that the Supreme Court applies strict scrutiny to regulations that compel commercial speech. The D.C. Circuit correctly held that *Central Hudson*'s intermediate level of scrutiny sets forth the proper test.

regulation must directly serve that state interest, and it must be no more extensive than necessary.<sup>223</sup>

While a thorough analysis of the *Central Hudson* test is beyond the scope of this article,<sup>224</sup> the state may well be able to show that the visual tobacco warnings meet *Central Hudson*'s test given the serious health risks of tobacco usage and the inability of current textual warnings to convey these health risks to consumers. First, given the public health consequences of smoking, the graphic warnings clearly serve a substantial state interest in reducing smoking rates and effectively communicating the health risks of smoking to consumers.<sup>225</sup> Second, the visual tobacco warnings directly serve this interest by conveying shocking and disgusting images that convey this risk information and discourage individuals from starting or continuing to smoke.<sup>226</sup>

The dispositive question is whether the government would be able to meet *Central Hudson*'s final requirement that the regulation is no more extensive than necessary in order for the government to achieve its goal. Given the evidence that text-only tobacco warnings are often ignored or quickly forgotten,<sup>227</sup> the fact that shocking graphic warnings may lead to greater recall of the warning and to a higher likelihood of cessation behavior<sup>228</sup> helps to demonstrate that the graphic warnings are no more extensive than necessary. Here, the strong emotional reactions caused by the graphic images actually

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223 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

224 The D.C. Circuit's opinion provides further analysis of this point, with the majority concluding that the labels do not meet the *Central Hudson* test. See *R.J. Reynolds Tobacco Co.*, 2012 WL 3632003, at \*9–12. The dissent comes to the opposite conclusion. See *id.* at \*23–26 (Rogers, J., dissenting).

225 See *id.* at \*23–24 (Rogers, J. dissenting) (discussing the substantial government interests at stake).

226 See *id.* at \*24.

227 Paul M. Fischer et al., *Recall and Eye Tracking Study of Adolescents Viewing Tobacco Advertisements*, 261 JAMA 84, 88 (1989) (finding that almost two-thirds of adolescents surveyed ignored the textual warnings or did not look at the warning for long enough to recall any words); Thomas N. Robinson & Joel D. Killen, *Do Cigarette Warning Labels Reduce Smoking? Paradoxical Effects Among Adolescents*, 151 ARCHIVES PEDIATRICS & ADOLESCENT MED. 267, 270 (1997) (finding that as little as one third of surveyed regular teenage smokers recalled seeing a textual warning).

228 Geoffrey T. Fong et al., *The impact of pictures on the effectiveness of tobacco warnings*, 87 BULL. WORLD HEALTH ORG. 640, 640–42 (2009); David Hammond et al., *Showing leads to doing: graphic cigarette warning labels are an effective public health policy*, 16 EUR. J. PUB. HEALTH 223, 223–24 (2006); David Hammond et al., *Text and Graphic Warnings on Cigarette Packages: Findings from the International Tobacco Control Four Country Study*, 32 AM. J. PREVENTATIVE MED. 202, 207 (2007); Michelle O'Hegarty et al., *Reactions of Young Smokers to Warning Labels on Cigarette Packages*, 30 AM. J. PREVENTATIVE MED. 467, 467 (2006).

support their constitutionality by strengthening the government's case for the need to go beyond text-only warnings in order to achieve its goal of reducing smoking rates. The application of *Central Hudson*'s intermediate level of scrutiny, however, will ensure that the government can only seek to compel normative speech that shocks and disgusts in narrow circumstances where bare factual information fails to adequately serve the substantial state interests at stake.<sup>229</sup>

#### D. Implications for Other Commercial Disclosure Policies

The new tobacco warning laws are not the only circumstance in which the government compels normative disclosures. Thus, it is worth noting the implications of applying *Central Hudson* to normative disclosure policies outside of the tobacco context. Consider, for example, the federal requirements that hazardous pesticides be labeled with precautionary statements such as "wear goggles or face shield and rubber gloves when handling,"<sup>230</sup> or "do not breathe vapors."<sup>231</sup> These are normative statements that explicitly direct individuals how to behave, instead of simply providing information about the hazards associated with these products. As a consequence, were such labeling requirements to be challenged on First Amendment grounds, the distinction between normative and factual speech would mean that these labels would have to meet *Central Hudson*'s test. Given that these pesticides pose serious and immediate health consequences, however, the government would very likely be able to show that these types of labeling requirements directly advance the state's interest and are no more extensive than necessary. Poisonous chemicals that pose immediate risks to life are precisely the type of situation where a normative government message can be justified on First Amendment grounds. Thus, while the distinction between normative

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<sup>229</sup> Though *Central Hudson* sets forth the general test for compelled commercial speech that spreads a normative message, it is important to caution that *Central Hudson*'s intermediate scrutiny would *not* apply if the state were to compel commercial speakers to include political or ideological messages in their commercial speech. For example, if the state were to require tobacco packages and advertisements to include a message supporting health care reform, strict scrutiny should apply. The state cannot use commercial speech as a vehicle for spreading its own political and ideological messages, even if these messages have some marginal relationship to the particular product being sold. For a discussion of the First Amendment issues raised by compelled ideological speech, albeit in a non-commercial context, see Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limits on Compelled Ideological Speech*, 34 CARDOZO L. REV. (forthcoming 2013).

<sup>230</sup> 40 C.F.R. § 156.70.

<sup>231</sup> *Id.*

and factual disclosures may make it more difficult to establish the constitutionality of certain disclosure policies, it is very likely that such disclosure policies would withstand any First Amendment challenges.<sup>232</sup>

#### V. ZAUDERER'S SCOPE: WHAT TYPE OF SPEECH CAN BE REQUIRED TO INCLUDE A FACTUAL DISCLOSURE?

Perhaps the most fundamental limit on *Zauderer's* scope is the type of speech at issue: *Zauderer's* rational basis test only applies if the compelled disclosure is attached to commercial speech. What *Zauderer* fails to articulate, and indeed what the Court has yet to articulate, is a coherent definition of what qualifies as commercial speech.<sup>233</sup> The increasing use of disclosure laws as a regulatory strategy in realms outside the classic definition of commercial speech will challenge the courts to develop a more workable definition of commercial speech. This section will look to a new species of disclosure laws, those targeting pregnancy service centers, in an effort to develop a flexible test for identifying commercial speech that takes into account the purposes of the commercial speech doctrine and the consumer's informational interests.

##### A. *The Current Doctrine's Confused Definition of Commercial Speech*

In the Supreme Court's first extension of First Amendment protections to commercial speech, *Virginia Pharmacy*, the Court characterized commercial speech as "speech which does no more than propose a commercial transaction."<sup>234</sup> For the statute at issue in that case, which restricted pharmacists from advertising the price of pre-

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<sup>232</sup> Moreover, were producers of hazardous chemicals to challenge these types of labeling requirements on First Amendment grounds, their argument that these disclosures violate their autonomy seems shaky at best. The government's normative message merely informs the audience how to use the product properly in order to minimize risks to health. While tobacco manufacturers assuredly disagree with the government's message "do not smoke," pesticide producers likely do not disagree with the government's message that individuals should wear goggles when using their product.

<sup>233</sup> See, e.g., Kozinski & Banner, *supra* note 129, at 638–39 (arguing that the Court's definition of commercial speech "starts breaking down" when the commercial nature of more complicated speech acts are analyzed); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1184–85 (1988) ("[T]he Supreme Court, for all it *has* said about commercial speech, has conspicuously avoided saying just what it is.").

<sup>234</sup> Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973) (internal quotation marks omitted)).

scription drugs, such a narrow definition sufficed. The Court later described speech proposing a commercial transaction as “the core notion of commercial speech.”<sup>235</sup> *Central Hudson* provides little elaboration on the definition of commercial speech that falls outside of this core, describing commercial speech as speech “related solely to the economic interests of the speaker and its audience.”<sup>236</sup> While the Court has characterized the *Central Hudson* definition as encompassing a “somewhat larger category”<sup>237</sup> of speech than that articulated in *Virginia Pharmacy*, this definition has been criticized for failing to set forth a workable test for identifying commercial speech.<sup>238</sup> The Court, however, does not pretend that there is a clear-cut definition of commercial speech: the Court has recognized the “difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.”<sup>239</sup>

The Court’s most extensive discussion of the boundaries of commercial speech is in a case where the commercial nature of the speech at issue required closer analysis: *Bolger v. Youngs Drug Products Corp.*<sup>240</sup> In *Bolger*, the plaintiff challenged a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives. The plaintiff, who manufactured, sold, and distributed contraceptives, sought to mail a variety of materials to the general public. Some of these materials directly promoted the plaintiff’s products, and other materials were “informational pamphlets discussing the desirability and availability of prophylactics in general.”<sup>241</sup> While the Court found the materials that explicitly advertised the plaintiff’s products to qualify as commercial speech without much discussion, the informational pamphlets “present[ed] a closer question.”<sup>242</sup>

In evaluating the commercial nature of the informational pamphlets, the Court considered a number of factors: whether the speech was an advertisement, whether the speech referred to a specific product, and whether the speakers had an economic motivation

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235 *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

236 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

237 *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993).

238 *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (criticizing the Court’s definition of commercial speech in *Central Hudson*: “[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged”).

239 *Discovery Network*, 507 U.S. at 419.

240 463 U.S. 60 (1983).

241 *Id.* at 62.

242 *Id.* at 66.

for engaging in the speech.<sup>243</sup> The Court ultimately concluded that since the informational pamphlets combined all three of these characteristics, they fell within the definition of commercial speech, even though the pamphlets also contained “discussions of important public issues such as venereal disease and family planning.”<sup>244</sup> The Court cautioned, however, that the presence of any one of these factors alone would be insufficient to render a particular speech act into commercial speech, and that none of these factors are essential to the definition.<sup>245</sup> The *Bolger* factors, thus, are neither sufficient nor necessary to the definition of commercial speech. They do, however, at least articulate a starting place for the analysis.

The Court ultimately appears to be convinced that there is a “common-sense distinction”<sup>246</sup> between commercial speech and fully protected speech that the courts will be able to recognize on a case-by-case basis. Dean Post argues that this simplistic definition is, in fact, just the opposite:

The evaluations of “commonsense” are complex, contextual, and ultimately inarticulate; the Court’s appeal to common sense acknowledges that the achievement of constitutional purposes cannot be reduced to any simple rule or determinate criteria. The judgments of common sense ultimately revolve around questions of social meaning; they turn on whether the utterance of a particular speaker should be understood as an effort to engage public opinion or instead simply to sell products.<sup>247</sup>

This contextual inquiry into the social meaning of a particular speech act goes beyond the factors articulated in *Bolger* and requires analyzing the speech act as a whole.

Various scholars have attempted to identify a common thread uniting the Court’s common-sense inquiry into what qualifies for protection under the commercial speech doctrine. Daniel Halberstam argues that the Court’s definition of commercial speech depends upon the speech being part of a “predefined communicative project” rather than “unbounded public discourse.”<sup>248</sup> He believes that the definition of commercial speech ultimately turns on the relationship between the speaker and audience. When commercial speech is at issue, “the relationship between speaker and audience is transformed from an exploration of each other’s opinions and beliefs into a strat-

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<sup>243</sup> *Id.* at 66–67.

<sup>244</sup> *Id.* at 67–68 (footnote omitted).

<sup>245</sup> *Id.* at 66–67 & n.14.

<sup>246</sup> *Id.* at 64 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)) (internal quotation marks omitted).

<sup>247</sup> Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 18.

<sup>248</sup> Halberstam, *supra* note 83, at 832.

egy of striking a bargain that is ultimately objectified in a material transaction.”<sup>249</sup> He also believes, however, that this relationship should be evaluated from the perspective of “the reasonable person receiving the communication . . . . The question would be whether a person, knowing all the relevant facts, would reasonably understand the communication to be directed at the audience as potential consumers.”<sup>250</sup> Thus, Halberstam’s formulation evaluates the social context of the relationship between the speaker and his audience, with a focus on the audience’s perspective.

Others have argued that the commercial speech definition should focus on the content of the communication:

If the message communicates a point of view or espouses something other than a commercial transaction, it is irrelevant that the speaker hopes to generate corporate good-will (that may someday lead to sales) in addition to imparting information. If, on the other hand, the message seeks directly to induce consumption of a particular product or service, it is a nonexpressive communication entitled to constitutional protection only to the extent it furthers audience interests, even if the advertiser is passionately committed to his product or service.<sup>251</sup>

This formulation, however, again focuses on the audience’s perspective: if the audience would understand the speech to be about the use of a particular product or service, the speech is commercial speech. The speaker’s ultimate motivations for engaging in the speech are irrelevant.

Dean Post argues that the Court ultimately defines commercial speech as those forms of speech that are protected because of their informational function. Characterizing commercial speech as “speech which is not itself public discourse, but which disseminates information to the public sphere that is useful for the conduct of public discourse,”<sup>252</sup> he argues that the commercial speech doctrine applies to more than conventional advertising. The doctrine also applies “to state regulations seeking to control the circulation of non-advertising commercial information outside of public discourse.”<sup>253</sup> For Post, an integral component of commercial speech is its placement outside of public discourse, defined as “those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained.”<sup>254</sup> Under this for-

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249 *Id.* at 832–33.

250 *Id.* at 853.

251 Estreicher, *supra* note 60, at 258–59.

252 Post, *Informed Consent to Abortion*, *supra* note 63, at 974.

253 POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, *supra* note 59, at 41.

254 Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 7.

mulation, speech that does not explicitly promote the use of a particular product or service can qualify as commercial speech. Here, again, the focus is not on the speaker's motivations, but on the content of the particular speech act and the sphere in which it is communicated.

The Ninth Circuit's discussion in *Environmental Defense Center v. EPA*<sup>255</sup> illustrates how some courts have dealt with First Amendment challenges to compelled speech regulations affecting speech that does not fit within the Court's narrow definition of commercial speech.<sup>256</sup> In upholding Environmental Protection Agency ("EPA") rules under the Clean Water Act that required small municipal storm sewer providers to "distribute educational materials to the community . . . about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm-water runoff,"<sup>257</sup> and to "[i]nform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste,"<sup>258</sup> the court first analyzed the applicability of the compelled commercial speech doctrine. The Ninth Circuit looked to *Zauderer*, concluding that the EPA rules, similar to *Zauderer*'s attorney disclosure requirement, did not raise the same interests at stake in *Wooley* and *Barnette*.<sup>259</sup> The EPA rules did not interfere with public discourse, nor require municipal storm sewer providers to adopt any ideological positions with which they disagreed.<sup>260</sup> In fact, the rules left it up to the municipal storm sewer provider to develop the specific contents of their informational message: the rules merely required "appropriate educational and public information activities that need not include any specific speech at all."<sup>261</sup>

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255 344 F.3d 832 (9th Cir. 2003).

256 For an early Seventh Circuit decision interpreting the definition of commercial speech, see *FTC v. Nat'l Comm'n on Egg Nutrition*, 570 F.2d 157 (7th Cir. 1977). In this case, the Seventh Circuit held that a campaign by the National Commission on Egg Nutrition that denied the existence of scientific evidence between consumption of eggs and heart disease qualified as commercial speech, even though the Commission was a non-profit, and the campaign was not connected to any specific brand of eggs.

257 40 C.F.R. § 122.34(b)(1)(i) (2011).

258 *Id.* at § 122.34(b)(3)(ii)(D).

259 *Env'tl. Def. Ctr.*, 344 F.3d at 849.

260 *Id.* at 850 ("Informing the public about safe toxin disposal is non-ideological; it involves no 'compelled recitation of a message' and no 'affirmation of belief.' " (quoting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980))).

261 *Id.* at 849. Since the rules did not specify the content of the compelled speech, there is no suggestion that the government required the storm sewer providers to spread a normative message about how the public should behave. Instead, the rules require the providers to give the public information about the impact of storm water discharge, how to reduce pollutants, and the hazards of illegal discharge.

The court found additional support for its conclusion in *National Electrical Manufacturers Ass'n v. Sorrell*,<sup>262</sup> the Second Circuit case upholding Vermont's statute requiring manufacturers to label products containing mercury. The panel concluded that while the municipal storm sewer providers' speech was "not . . . 'commercial' in the same sense that manufacturer labeling is . . . it will be similar in substance to *Sorrell* to the extent that it informs the public how to dispose safely of toxins."<sup>263</sup> The court focused on the informational value of the speech at issue, and its non-ideological nature, in concluding that the same principles of the commercial speech doctrine should apply: "the policy considerations underlying the commercial speech treatment of labeling requirements. . . apply similarly in the context of the market-participant municipal storm sewer provider."<sup>264</sup> Ultimately the court's analysis of the First Amendment rights at stake looks to the context and content of the speech being compelled—while the court stopped short of classifying the public information requirement as compelled commercial speech, it recognized that the principles of the doctrine should apply in light of the informational interests being served by the EPA rule.<sup>265</sup>

*Environmental Defense Center* illustrates the problem with a narrow definition of commercial speech: the government often compels factual disclosures in areas beyond mere proposals of commercial transactions, yet there is no First Amendment doctrine addressing these types of regulations. So the courts are either required to recognize the interests of the commercial speech doctrine in applying some form of reduced First Amendment scrutiny, as the Ninth Circuit did in *Environmental Defense Center*, or the courts are forced to fit the regulation within the Court's confused definition of commercial speech. A commercial speech definition that focuses on the exchange of money for the purchase of a product or service fails to recognize that many of our regulatory policies have goals completely disconnected from economic harm.<sup>266</sup> A broader definition of commercial speech

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262 272 F.3d 104 (2001).

263 *Env'tl. Def. Ctr.*, 344 F.3d at 851 n.27.

264 *Id.* (citation omitted).

265 The Ninth Circuit recently relied on *Environmental Defense Center* in holding that a statute compelling non-ideological speech by drug claims processors to third-party insurers on the average fees pharmacies charge for drugs does not trigger any First Amendment scrutiny. *Jerry Beeman & Pharm. Servs., Inc. v. Anthem Prescription Mgmt. LLC*, 652 F.3d 1085, 1102–03 (9th Cir. 2011), *reh'g en banc granted*, 661 F.3d 1199 (9th Cir. 2011), *question certified* by 682 F.3d 779 (9th Cir. 2012).

266 See, e.g., FUNG ET AL., *supra* note 1, at 12–13 (listing the purposes of workplace hazard disclosures, toxic releases disclosure, patient safety disclosures, drinking water contaminant

that looks to the context and content of the speech, and that analyzes the nature of the speech from the audience's perspective, would permit courts to apply the appropriate level of scrutiny to regulations that compel non-ideological, informational speech outside of the confines of a buyer-seller relationship.<sup>267</sup>

### B. Disclosure Laws Targeting Pregnancy Service Centers

New laws requiring "pregnancy service centers,"<sup>268</sup> or facilities that provide services to women who are or may be pregnant, to disclose the scope and nature of their services present the courts with an opportunity to reconsider the definition of commercial speech. These laws require the centers to provide factual information to women seeking pregnancy-related care about the services they provide and/or the presence of medically trained staff. As will be discussed further below, the laws were adopted in response to evidence showing that women visiting the centers are often confused about what types of services the centers provide, and that this confusion can delay their access to time-sensitive medical care. While these disclosures are designed to provide information that will prevent the deception and confusion of women seeking pregnancy-related medical care, courts that have considered First Amendment challenges to the laws have concluded that the commercial speech doctrine is inapplicable based

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disclosures, restaurant hygiene disclosures, nutritional labeling disclosures, and automobile rollover disclosures).

267 Before turning to an application of the proposed definition, it is important to distinguish the commercial speech doctrine from the First Amendment right of corporations and other commercial actors to participate in public discourse. The commercial speech definition focuses on the characteristics of a particular speech act, not the commercial status of its speaker. *See Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (concluding that individuals seeking charitable contributions are engaged in fully protected speech, even though they are soliciting money). Thus, while the government may not suppress political speech based on the speaker's corporate identity under *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010), this holding in no way limits the government's ability to regulate a corporation's speech promoting its products and services.

268 These centers are commonly referred to in the media and by pro-choice advocates as "crisis pregnancy centers." Although the centers used to refer to themselves as "crisis pregnancy centers," they now avoid using the term, and some prefer the term "pregnancy resource center." MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 109TH CONG., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 1 (2006), available at <http://www.chsourcebook.com/articles/waxman2.pdf> [hereinafter WAXMAN REPORT]. For the sake of simplicity, I will refer to the centers as "pregnancy service centers," which is the term used in the New York City Local Law. N.Y.C., N.Y., ADMIN. CODE § 20-815. The Baltimore Ordinance refers to these types of facilities as "limited-service pregnancy centers." BALT., Md., HEALTH CODE § 3-501 (2012).

on a single characteristic: the centers do not charge money for their services.

### 1. *The Background Behind Pregnancy Service Center Disclosure Laws*

Pregnancy service centers, as the term is used in this Article, are facilities that provide women who are or may be pregnant with certain services, such as free pregnancy tests, ultrasounds, counseling, maternity education, and free non-financial assistance (such as diapers, formula, clothes, and toys).<sup>269</sup> The centers often do not have any licensed medical providers on staff, and are not licensed as medical clinics.<sup>270</sup> Most of the centers are affiliated with pro-life organizations,<sup>271</sup> and they do not provide referrals for emergency contraception or abortions. Their explicit goal is to persuade pregnant women and teenagers to choose motherhood or adoption over abortion.<sup>272</sup>

These types of centers are neither a new nor a limited phenomenon; it was estimated that there were approximately 2100 pregnancy service centers in the mid-1980s,<sup>273</sup> and it is estimated that there are currently 2500 to 4000 such centers across the country.<sup>274</sup> These types of centers have long been criticized for misrepresenting themselves as abortion clinics and engaging in deceptive advertising that leads women to believe that the centers provide a more full-range of medical services.<sup>275</sup> And both governmental and private actors have previously attempted to curb the centers' deceptive tactics. As just a few examples: New York State's Attorney General charged centers with

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269 See, e.g., Evergreen Ass'n v. City of New York, 801 F. Supp. 2d 197, 202–03 (S.D.N.Y. 2011) (listing the types of services provided by centers in New York City).

270 NARAL PRO-CHOICE N.Y. FOUND., “SHE SAID ABORTION COULD CAUSE BREAST CANCER,” A REPORT ON: THE LIES, MANIPULATIONS, AND PRIVACY VIOLATIONS OF CRISIS PREGNANCY CENTERS IN NEW YORK CITY 2 (Oct. 2010), available at <http://www.prochoiceny.org/assets/bin/pdfs/cpcreport2010.pdf> [hereinafter NARAL REPORT] (noting that most pregnancy service centers are not medical clinics and that most have staff without any medical training).

271 WAXMAN REPORT, *supra* note 268, at 1. Two of the largest of such national umbrella organizations are Heartbeat International and Care Net. Both organizations describe themselves as pro-life networks that promote the work of pregnancy service centers providing alternatives to abortion. See HEARTBEAT INTERNATIONAL, <http://www.heartbeatinternational.org> (last visited Sept. 20, 2012); About Us, CARE NET, <http://www.care-net.org/aboutus/mission.html> (last visited Sept. 20, 2012).

272 WAXMAN REPORT, *supra* note 268, at 1.

273 See Joseph Berger, *Centers' Abortion Ads Called 'Bogus,'* N.Y. TIMES, July 16, 1986, at B2.

274 Joanne Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 PERSP. ON SEXUAL & REPROD. HEALTH 201 (2012).

275 See Jane Gross, *Pregnancy Centers: Anti-Abortion Role Challenged*, N.Y. TIMES, Jan. 23, 1987, at B1.

deceptive advertising in the 1980s<sup>276</sup> and investigated their deceptive tactics again in 2002, entering into a settlement agreement;<sup>277</sup> in the mid-1980s, a North Dakota women's medical clinic sued a pregnancy service center for damages and injunctive relief on account of the center's false and deceptive advertising;<sup>278</sup> in the late 1980s, the State of Texas charged a center with violating the state's deceptive trade practices act;<sup>279</sup> in the late 1980s, a private plaintiff in Missouri sued a center under Section 1983 for participating in a conspiracy to deprive her of her fundamental right to an abortion;<sup>280</sup> and in the mid-1990s, Planned Parenthood filed suit against a San Diego clinic for deceptive advertising.<sup>281</sup>

Criticism of the centers' deceptive tactics, however, has continued, culminating in a 2006 report by the Minority Staff of the Committee on Government Reform in the U.S. House of Representatives entitled "False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers."<sup>282</sup> This report, requested by U.S. Representative Henry Waxman, found that 87% of the centers investigated "provided false or misleading information about the health effects of abortion," and that the centers often "grossly misrepresented the medical risks of abortion."<sup>283</sup> The report also describes how the centers "often mask their pro-life mission in order to attract abortion-vulnerable clients," and that their tactics include "obscuring the fact that the center does provide referrals to abortions" in their advertisements, and misrepresenting that the center will "provide pregnant teenagers and women with an understanding of all of their options."<sup>284</sup>

A host of other reports<sup>285</sup> have provided further documentation of continued deception by crisis pregnancy centers.<sup>286</sup> First, the centers

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276 *Id.*

277 Nancy Tilghman, *Anti-Abortion Centers Get Spitzer Reprieve*, N.Y. TIMES, Mar. 10, 2002, at 7.

278 Fargo Women's Health Org. v. Larson, 381 N.W.2d 176 (N.D. 1986).

279 Mother & Unborn Baby Care of N. Tex. v. Texas, 749 S.W.2d 533 (Tex. App. 1988).

280 Lewis v. Pearson Found., 908 F.2d 318, 319 (8th Cir. 1990).

281 Tamar Lewin, *Anti-Abortion Center's Ads Ruled Misleading*, N.Y. TIMES, Apr. 22, 1994, at A15.

282 WAXMAN REPORT, *supra* note 268.

283 *Id.* at i.

284 *Id.* at 1-2.

285 PLANNED PARENTHOOD OF N.Y.C., CRISIS PREGNANCY CENTER SURVEYING SUMMARY (2011) [hereinafter PPNYC REPORT]; NARAL REPORT, *supra* note 270; NAT'L ABORTION FED'N, CRISIS PREGNANCY CTRS.: AN AFFRONT TO CHOICE 3 (2006), available at [http://www.prochoice.org/pubs\\_research/publications/downloads/public\\_policy/cpc\\_report.pdf](http://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf).

286 See Rosen, *supra* note 274, at 201 (concluding that "the centers often provide inaccurate information that may delay or interfere with women's access to abortion and contracep-

disguise the true nature of the services they will provide in order to lure women to the clinic. Second, once women are at the clinic, the centers provide them with false and misleading information. For example, the reports indicate that centers often have ambiguous names that confuse women about the nature of their services,<sup>287</sup> locate next to abortion providers in the hopes that women seeking an abortion will accidentally go into the pregnancy services center,<sup>288</sup> and even go so far as to intercept women on their way to abortion clinics to direct them to the pregnancy service center instead.<sup>289</sup> Once women are at the clinic, the reports document that some centers have inaccurately diagnosed the stage of women's pregnancies,<sup>290</sup> given women false information about how long they could wait before deciding whether to have an abortion,<sup>291</sup> and informed women that they will be able to obtain an abortion at the pregnancy service center, without any intention of ever providing them with such a service.<sup>292</sup>

In recent years, local governments have used a new tactic: disclosure laws that require pregnancy service centers to post signs and/or include written disclosures in their advertisements informing women about which services the centers will not provide, and/or whether the center is a licensed medical provider. Laws requiring pregnancy services centers to make some type of disclosure have been enacted in Baltimore, Maryland;<sup>293</sup> Montgomery County, Maryland;<sup>294</sup> New York City;<sup>295</sup> and Austin, Texas.<sup>296</sup>

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tion, improperly influence women's reproductive health decisions, and potentially increase the number of unintended births").

287 NARAL REPORT, *supra* note 270, at 6 (giving the example of "neutral sounding names like Pregnancy Help, Inc., Pregnancy Resources Services, and Center for Pregnant Women").

288 *Id.* at 7–8.

289 PPNYC REPORT, *supra* note 285, at 6–7.

290 *Id.* at 5.

291 NARAL REPORT, *supra* note 270, at 10–11.

292 PPNYC REPORT, *supra* note 285, at 1 (reporting that 60% of respondents indicated that the pregnancy service center visited did not make clear whether the center provided abortions, and that "[a]t least two women reported being told that the CPC could perform an abortion, thereafter being made to wait for numerous weeks to find out that the CPC did not perform abortions").

293 BALT., MD., HEALTH CODE § 3-502 (2012).

294 MONTGOMERY CNTY. COUNCIL, MD., RES. 16-1252 (2010). This resolution requires "limited service pregnancy resource centers" to post a sign disclosing that the center does not have a licensed medical professional on staff, and that the Montgomery County health officer encourages women who are or may be pregnant to consult with a licensed health care provider. *Id.*

295 N.Y.C., N.Y., ADMIN. CODE § 20-816.

296 AUSTIN, TEX., CODE § 10-9-2 (2010). In April of 2010, the Austin City Council adopted this law, which requires "limited service pregnancy centers" to post a sign at their entrance informing visitors that the center does not provide for or refer for abortions or

## 2. Baltimore and New York City's Disclosure Laws

This Article will focus on the disclosure laws enacted in two cities: Baltimore and New York. Pregnancy service centers challenged both cities' laws on First Amendment grounds as impermissibly infringing on the centers' right to free speech. And in both cases, the district courts enjoined the laws, applying strict scrutiny after concluding that the commercial speech doctrine was inapplicable.<sup>297</sup> While the New York City law is currently before the Second Circuit, the Fourth Circuit recently affirmed the district court's grant of a preliminary in-

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FDA-approved birth control drugs and medical devices. In January of 2012, in response to a legal challenge to the ordinance, the City Council repealed this ordinance and replaced it with a new law that requires the centers to post a sign that indicates whether the center has a licensed health care practitioner that provides or supervises the provision of services, and whether the center is licensed to provide medical services. AUSTIN, TEX., CODE § 10-10-2 (2011). San Francisco has also adopted a law targeting pregnancy service centers, but San Francisco's ordinance does not compel any speech. Instead, San Francisco's ordinance prohibits "limited services pregnancy centers" from engaging in untruthful or misleading advertising, and permits the San Francisco City Attorney to enforce its terms. S.F., CAL., ADMIN. CODE § 93.4–5 (2011). While not compelling any speech, San Francisco's ordinance is still being challenged as an unconstitutional restriction of pregnancy service centers' First Amendment rights. *See* Complaint for Declaratory and Injunctive Relief at 2, First Resort, Inc. v. Herrera, No. 11-5534 (N.D. Cal. Nov. 16, 2011). Evergreen Ass'n Inc. v. New York, 801 F. Supp. 2d 197, 207 (S.D.N.Y. 2011); O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 813 (D. Md. 2011). Montgomery County's resolution was also challenged and preliminarily enjoined on First Amendment grounds. *See* Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 472 (D. Md. 2011). In *Tepeyac* the County defendants did not take a definitive position in the litigation as to whether the resolution applied to commercial speech. The district court's commercial speech analysis in *Tepeyac* is similar to the analysis in the Baltimore and New York decisions, and will not be discussed at length. The court applied strict scrutiny after concluding that the centers were not engaged in commercial speech. Importantly, while applying strict scrutiny, the district court did not preliminarily enjoin the resolution's requirement that the centers post a sign indicating that the center does not have a licensed medical professional on staff, but did enjoin the requirement that the centers post a sign informing women that the County Health Officer recommends that pregnant women contact a licensed medical professional. The court concluded that the plaintiffs had failed to show that the first disclosure requirement violated strict scrutiny. *Id.* at 471–72. On appeal, the Fourth Circuit affirmed in part, and reversed in part. *Tepeyac* v. Montgomery Cnty., 683 F.3d 591 (4th Cir. 2012). The majority of the Fourth Circuit panel concluded that both parts of the Montgomery County resolution should have been preliminarily enjoined, as even the statement about the presence of a medical professional violated strict scrutiny. In the majority's view, this disclaimer "suggests to potential clients that the center is not to be trusted and that a pregnancy center's services, like religious counseling or job placement assistance, will usually be inferior to those offered by medical professionals." *Id.* at 594.

junction, over a vigorous dissent by Judge King.<sup>298</sup> The Fourth Circuit's decision will be reheard en banc later this year.<sup>299</sup>

First, a brief summary of each law. Baltimore's law applies to "limited-service pregnancy centers," defined as "any person . . . whose primary purpose is to provide pregnancy-related services,"<sup>300</sup> and who provides information about pregnancy-related services but does not provide or refer for (1) abortions, or (2) nondirective and comprehensive birth control services.<sup>301</sup> The city requires all centers meeting this definition to post a sign in their waiting room that informs clients that "the center does not provide or make referral for abortion or birth-control services."<sup>302</sup>

New York City's ordinance applies to facilities that have a primary purpose of providing services to women who are or may be pregnant, and that either (1) offer obstetric ultrasounds, sonograms, or prenatal care,<sup>303</sup> or (2) have the appearance of being a licensed medical facility.<sup>304</sup> The ordinance lists six factors that courts should consider in evaluating whether a pregnancy service center has the appearance of a licensed medical facility. The factors to be considered are whether the pregnancy service center:

- (a) offers pregnancy testing and/or pregnancy diagnosis;
- (b) has staff or volunteers who wear medical attire or uniforms;
- (c) contains one or more examination tables;
- (d) contains a private or semi-private room or area containing medical supplies and/or medical instruments;
- (e) has staff or volunteers who collect health insurance information from clients; and
- (f) is located on the same premises as a licensed medical facility or provider or shares facility space with a licensed medical provider.<sup>305</sup>

If a given facility meets two or more of these factors, the ordinance declares this to be *prima facie* evidence that the center has the appearance of a licensed medical facility. The ordinance explicitly does not apply to any facility that is actually licensed to provide medical

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298 Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539, 560 (4th Cir. 2012).

299 Court Order, *Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 683 F.3d 543 (Nos. 11-1111, 11-1185) (Dkt. No. 120) (4th Cir. Aug. 15, 2012) (granting rehearing en banc and scheduling oral argument for Dec. of 2012).

300 BALT., MD., HEALTH CODE § 3-501 (2012).

301 *Id.*

302 *Id.* at § 3-502(A).

303 Prenatal care is defined in explicitly medical terms: "services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy." N.Y.C., N.Y., ADMIN. CODE § 20-815(i).

304 *Id.* at § 20-815(g).

305 *Id.*

care, or that has a licensed medical provider present to provide or supervise the provision of services.<sup>306</sup>

A facility meeting the New York city ordinance's definition must disclose whether the center has a licensed medical provider on staff; whether the center provides or refers for abortions, emergency contraception and prenatal care; and that the NYC Department of Health recommends that women who are or may be pregnant contact a licensed medical professional.<sup>307</sup> These disclosures must be made: (1) on a sign in the entranceway and waiting room of the center; (2) in any of the center's advertisements; and (3) orally to any woman who requests an abortion, emergency contraception, or prenatal care.<sup>308</sup>

Thus, while Baltimore's law imposes a more modest disclosure requirement, both in its content and format, New York City's applies to a more limited set of centers, those that provide medical-type services or otherwise have the appearance of being a licensed medical facility, but that are not actually licensed as medical clinics.

### 3. The Courts' Commercial Speech Analysis

In determining whether the centers were engaged in commercial speech, both district courts and the majority of the Fourth Circuit panel cited to *Bolger v. Youngs Drug Products Corp.* as holding that commercial speech is speech that "does no more than propose a commercial transaction,"<sup>309</sup> and to *Central Hudson Gas & Electric Corp. v. Public Service Commission's*<sup>310</sup> definition of commercial speech as "expression related solely to the economic interests of the speaker and its audience."<sup>311</sup>

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306 *Id.*

307 *Id.* at § 20-816.

308 *Id.*

309 Evergreen Ass'n, Inc. v. City of New York, 801 F. Supp. 2d 197, 204 (S.D.N.Y. 2011) (quoting Conn. Bar Ass'n v. United States, 620 F.3d 81, 93 (2d Cir. 2010)) (internal quotation marks omitted). See also Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539, 553 (4th Cir. 2012) (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983)) (stating that the "hallmark" of commercial speech is that it does "no more than propose a commercial transaction"); O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 813 (D. Md. 2011) (citing *Bolger*, 463 U.S. at 64–68) ("The Supreme Court has defined commercial speech as speech that proposes a commercial transaction.").

310 447 U.S. 557 (1980).

311 *Evergreen Ass'n*, 801 F. Supp. 2d at 204 (quoting *Conn. Bar Ass'n*, 620 F.3d at 94) (internal quotation marks omitted). See also *Greater Balt. Ctr. for Pregnancy Concerns*, 683 F.3d at 553 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n, 447 U.S. 557, 561 (1980)); *O'Brien*, 768 F. Supp. 2d at 813 (quoting *Central Hudson Gas*, 447 U.S. at 561).

These courts, however, completely ignored the Supreme Court's discussion in *Bolger* of the factors bearing on whether a certain speech act qualifies as commercial speech: whether the speech is an advertisement, whether the speech refers to a specific product, and whether the speakers have an economic motivation for engaging in the speech.<sup>312</sup> Instead, the courts focused their analysis on one fact: the centers' lack of financial interest or motivation. As the *O'Brien* District Court said in evaluating Baltimore's law:

The overall purpose of the advertisements, services, and information offered by the CENTER is not to propose a commercial transaction, nor is it related to the CENTER's economic interest. The CENTER engages in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives.<sup>313</sup>

The majority of the Fourth Circuit panel in *Greater Baltimore* agreed with the district court's analysis, concluding that while the fact that the centers provide free services is not necessarily dispositive:

[I]t becomes so in this case because there is no indication that the Pregnancy Center is motivated by any economic interest or that it is proposing any commercial transaction. The Pregnancy Center seeks to provide free information about pregnancy, abortion, and birth control as informed by a religious and political belief. This kind of ideologically driven speech has routinely been afforded the highest levels of First Amendment protection . . . .<sup>314</sup>

The district court drew a similar conclusion in analyzing New York's law: "the offer of free services such as pregnancy tests in furtherance of a religious belief does not propose a commercial transaction . . . [n]or do Plaintiffs offer pregnancy-related services in furtherance of their economic interests."<sup>315</sup> According to these courts, since the operators of the pregnancy service centers intend and believe themselves to be engaging in religious speech, their speech is *per se* non-commercial.

By solely focusing on the underlying religious and ideological motivations of the pregnancy service centers, the courts have failed to appreciate, or even consider, the perspective of the audience for the centers' speech: women who are or may be pregnant. For women seeking pregnancy-related services, the centers are a service-provider competing with other organizations, including full-service medical clinics, that very likely do charge a fee for their services. These courts

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<sup>312</sup> *Bolger*, 463 U.S. at 66–67.

<sup>313</sup> *O'Brien*, 768 F. Supp. 2d at 813.

<sup>314</sup> *Greater Balt. Ctr. for Pregnancy Concerns*, 683 F.3d at 553–54.

<sup>315</sup> *Evergreen Ass'n*, 801 F. Supp. 2d at 205.

dismissed the relevance of the fact that the services provided by the centers “have value in the commercial marketplace,”<sup>316</sup> concluding that such reasoning would mean that “any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection.”<sup>317</sup> However, there is an important distinction between churches offering their congregants items that have a commercial value during religious services and pregnancy service centers offering to provide women with pregnancy tests, ultrasounds, and options counseling: individuals do not go to church to get wine, and if they do, they are well-aware that the wine will be served alongside a heavy dose of religious speech. In contrast, women who visit pregnancy service centers are, in many cases, unaware of the centers’ religious motivations and are visiting the centers in order to receive the services advertised.

The fact that speech is religiously motivated does not mean that such speech should be completely immunized from state regulation or judicial review. While the First Amendment prohibits the state from regulating one’s religious beliefs, it does not protect fraudulent or criminal speech,<sup>318</sup> even if it is religiously motivated.<sup>319</sup> Looking to the Court’s jurisprudence under the Free Exercise Clause, “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>320</sup> An organization’s religious motivations do not mean that it can engage in fraud or violate valid laws prohibiting fraudulent and criminal conduct. Nor should a group’s religious motivations mean that all of its speech, even speech promoting the use of a product

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<sup>316</sup> *O'Brien*, 768 F. Supp. 2d at 813. *See also Evergreen Ass'n*, 801 F. Supp. 2d at 205 (citing *Bolger*, 463 U.S. at 67) (“[A]n organization does not propose a ‘commercial transaction’ simply by offering a good or service that has economic value.”).

<sup>317</sup> *O'Brien*, 768 F. Supp. 2d at 814. *See also Greater Baltimore Ctr. for Pregnancy Concerns*, 683 F.3d at 554; *Evergreen Ass'n*, 801 F. Supp. 2d at 205 (quoting *O'Brien*, 768 F. Supp. 2d at 814).

<sup>318</sup> *See United States v. Alvarez*, 132 S. Ct. 2537, 2547–48 (2012) (discussing historical exclusions of First Amendment protection for fraudulent or criminal speech that results in a legally cognizable harm); *United States v. Stevens*, 130 S. Ct. 1577, 1580 (2010) (“Since its enactment, the First Amendment has permitted restrictions on a few historic categories of speech—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . . .”) (citations omitted); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) (“[T]he First Amendment does not shield fraud.”).

<sup>319</sup> *See, e.g., Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 762 P.2d 46, 57–58 (Cal. 1988) (collecting cases imposing tort liability for religiously motivated conduct).

<sup>320</sup> *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990).

with commercial value, is *per se* religious speech that lies outside the commercial speech doctrine.

Consider the following hypotheticals: A religious group that seeks to convert vegetarians into meat-eaters as part of the group's religious mission opens a non-profit organization, next to a vegetarian supermarket, called "Just Like Meat" and gives away free "hot dogs" that are advertised on its signs as tasting "Just Like the Real Thing!" However, the hot dogs taste just like the real thing because they are made with beef. Suppose a state had evidence that many vegetarians were misled into thinking that the free hot dogs were made with an imitation meat product and were deeply distraught and angered when they found out that the group was giving out hot dogs made with beef. Or, to take the analogy even further, suppose the state also had evidence that individuals who were allergic to beef had ingested the hot dogs and had suffered severe allergic reactions as a consequence. Should the state be prohibited from requiring the store to post a sign indicating that the store serves products made with real meat merely because the group's conduct is religiously motivated and the hot dogs are given away for free?

What if a religious group opposed to blood transfusions set up a non-profit organization called the "Sickle Cell Anemia Treatments Options Center" that advertised itself as providing counseling, support, and medical services to those with sickle cell anemia, and that appeared to most visitors to be a medical clinic? Suppose this organization did not have any actual medical providers on staff, counseled all clients that blood transfusions would only harm their health, and showed clients shocking photos and videos of death and disease caused by blood transfusions. Suppose that some visitors to the organization believed that they had visited a medical clinic and delayed in getting necessary medical treatment as a result. Does the fact that the organization does not charge for its services mean that its speech is *per se* non-commercial? Should the state be prohibited from requiring the "Sickle Cell Anemia Treatments Options Center" to post a sign informing potential visitors that the center is not a licensed medical clinic, and does not provide blood transfusions? In both of these hypotheticals, the audience for the speech is unaware of the underlying religious motivations and believes that the organization provides goods and services like any other commercial service provider.

#### 4. A More In-Depth Commercial Speech Analysis

As discussed previously, the Court has not given a clear method for analyzing whether a particular speech act qualifies as commercial speech. The pregnancy service center disclosure laws, which assuredly affect speech that lies outside the range of the “core notion of commercial speech,”<sup>321</sup> challenge the courts to grapple with this doctrine and its nuances. Unfortunately, the courts discussed above engaged in a cursory and superficial analysis of whether the centers’ speech met the Court’s definition. By undertaking a more in-depth analysis of whether the commercial speech doctrine applies to the pregnancy service center disclosure laws, I hope, in this section, to identify a workable method of identifying commercial speech that can be applied in a wide variety of contexts.

This is not to say that a precise set of finite characteristics must be present in order for something to qualify as commercial speech. As Dean Post notes, “the impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship,”<sup>322</sup> and I do not suggest that commercial speech has easily identifiable attributes. Instead, I believe that a multi-factor approach, such as that advocated in *Bolger*, is necessary in order to ensure that the doctrine targets the appropriate speech acts. I propose a test that incorporates the *Bolger* factors and asks the courts to analyze the speech’s context and content, as well as the perspective of the reasonable person receiving the communication. Such a test recognizes that since the First Amendment values and protects the informational interests of the audience of commercial speech, the definition of what qualifies as commercial speech should take the audience’s perspective into account. In order to determine whether a particular speech act qualifies as commercial speech, the courts should analyze: (1) the content of the speech: whether the speech proposes a commercial transaction, and/or refers to the use of a particular product or service; and (2) the context of the speech: whether the speech is in the commercial marketplace or is instead part of public discourse, the commercial interests of the speaker, the relationship between the speaker and the audience, and the reasonable audience member’s perspective on the speech’s context.<sup>323</sup> An organization that desires to spread a religious or political message should

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321 *Bolger*, 463 U.S. at 66.

322 Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 7.

323 This proposed test for how to define commercial speech is not limited to laws that compel commercial speech, although that will be my focus in this article.

not be able to disguise the social meaning of its speech by pretending to be a commercial actor while simultaneously claiming that this speech rests outside the commercial speech doctrine.

This approach aligns with that taken by Judge King in his dissenting opinion in the Fourth Circuit's review of the Baltimore ordinance. Judge King noted the Court's historical difficulty in defining commercial speech,<sup>324</sup> and looked specifically to the Court's discussion in *Bolger* of the multiple factors that must be considered when evaluating whether a given speech act qualifies as commercial speech.<sup>325</sup> Importantly, Judge King made clear that "context matters"<sup>326</sup> when engaging in this inquiry, and that "[f]rom a First Amendment free speech perspective, that context includes the viewpoint of the listener, for '[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.'"<sup>327</sup> In short, Judge King advocated the exact kind of contextual inquiry presented in this Article, and the Fourth Circuit may well adopt Judge King's preferred approach when it rehears the case en banc.<sup>328</sup>

Applying this kind of contextual inquiry to the pregnancy service center disclosure laws illustrates the inadequacy of relying on a single factor, the speaker's economic motivation, in defining what constitutes commercial speech. The commercial nature of the pregnancy service centers' speech becomes much more complicated when one engages in a more three-dimensional inquiry.

#### *a. The Content of the Speech*

By first evaluating the actual content of the speech at issue, we can focus in on the speech act, as opposed to the motivations of the speaker. Speech that proposes a commercial transaction, rather than expressing the speaker's ideological beliefs, evokes the Court's conception of core commercial speech.<sup>329</sup> In *Zauderer*, the Court notes

<sup>324</sup> Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539, 567 (4th Cir. 2012) (King, J., dissenting) ("The Supreme Court has long grappled with the concept of commercial speech.").

<sup>325</sup> *Id.* at 568.

<sup>326</sup> *Id.* at 569.

<sup>327</sup> *Id.* (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–62 (1980)).

<sup>328</sup> See Court Order, *Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 683 F.3d 543 (Nos. 11-1111, 11-1185) (Dkt. No. 120) (4th Cir. Aug. 15, 2012) (granting rehearing en banc and scheduling oral argument for Dec. of 2012).

<sup>329</sup> *Bolger* v. Youngs Drug Prod. Corp., 463 U.S. 60, 66 (1983).

that while it is difficult to identify the precise boundaries of the commercial speech definition, “it is clear enough that the speech at issue in this case—advertising pure and simple—falls within those bounds.”<sup>330</sup> But speech need not take the form of a traditional commercial advertisement in order for it to qualify as commercial speech. In *Bolger*, the Court held that the “reference to a specific product”<sup>331</sup> was one of the factors weighing in favor of classifying the speech at issue as commercial speech.<sup>332</sup> Thus, while the mere reference to a given product clearly does not commercialize a given speech act, this is still relevant to the analysis. And by focusing on the content of the speech, we can determine how the reasonable audience member would interpret the speech regardless of the speaker’s motivations for engaging in the speech.

Looking to the content of the pregnancy service centers’ speech, we must first determine whether the compelled speech requirements impact the centers’ ideological speech, or just their offer of services. The content of the centers’ speech when meeting with women is often overtly ideological: the center staff and volunteers engage in advocacy expressing their opposition to abortion and birth control. However, the disclosure laws apply to a more limited aspect of the centers’ speech. Both Baltimore’s and New York’s laws require disclosures, in the form of signs, to be placed in the centers’ waiting rooms.<sup>333</sup> New York’s law goes further, requiring the disclosures to be included in the centers’ advertisements, and requiring a second sign outside the pregnancy service center.<sup>334</sup> All of these requirements impact the centers’ speech offering services, not the centers’ speech once a woman is meeting with a staff member.<sup>335</sup> The disclosure requirement does not affect the centers’ ability to engage in ideological

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330 *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court describes commercial advertising as the “dissemination of information as to who is producing and selling what product, for what reason, and at what price.” 425 U.S. 748, 765 (1976).

331 *Bolger*, 463 U.S. at 66.

332 *See id.* (noting that the reference to a specific product was one of the “characteristics” supporting the classification of the speech at issue as commercial speech); *see also Va. Bd. of Pharmacy*, 425 U.S. at 771 n.24 (stating that ordinarily in commercial speech, “the advertiser seeks to disseminate information about a specific product or service”).

333 BALT., MD., HEALTH CODE § 3-502(a) (2012); N.Y.C., N.Y., ADMIN. CODE § 20-816 (f)(1)(ii).

334 *Id.* at (f)(1)(i), (f)(1)(iii).

335 New York’s law has one additional requirement that goes further, requiring the disclosures to be made if a woman requests birth control, an abortion, or prenatal care. N.Y.C., N.Y., ADMIN. CODE § 20-816 (f)(2). This particular requirement will be discussed *infra* pp. 612–13.

advocacy. Thus, in evaluating the content of the centers' speech, the analysis should focus on the centers' speech offering services to women who are or may be pregnant.

Looking to New York's requirement that the centers include the disclosure in their advertisements, it is clear that the content of the centers' advertisements falls within the 'core notion' of commercial speech: the advertisements offer the availability of particular services. Although these services may be provided free of charge, the advertisements are otherwise indistinguishable from an advertisement by any service-provider. The advertisements do not spread the centers' ideological or religious messages, nor do the advertisements discuss a matter of public concern:<sup>336</sup> the advertisements inform women who are or may be pregnant of the availability of certain services at the pregnancy service center. The content of the advertisements weighs in favor of classifying the centers' speech as commercial speech.

A more complicated question is posed by the signage disclosure requirements, which affect the centers' general offer of services, without targeting a specific speech act per se. The signage requirements are somewhat analogous to compelled labeling on product packaging: the pregnancy service center is being required to carry a label informing potential clients of the services provided. Moreover, the signage disclosure requirements can be tied to the centers' own signage, which informs women of the name and location of the pregnancy service center. To the extent that the centers' name and signage represent the center as a medical service-provider, rather than an entity with an ideological mission, the content of this speech is also commercial. The Court has previously held that a trade name qualifies as commercial speech,<sup>337</sup> and the evidence suggests that many centers use ambiguous names that do not convey the limited nature of their services.<sup>338</sup> Although New York contains the additional requirement that disclosures be made orally upon the request of certain services, again the content of the speech that is being affected is the request and offer of services, not the centers' ideological speech.

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336 *Cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that an advertisement that "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" did not qualify as a commercial advertisement).

337 *Friedman v. Rogers*, 440 U.S. 1, 13 (1979) (holding that optometrists' use of trade names qualified as commercial speech and could be regulated by the state because of the "significant possibility that trade names will be used to mislead the public").

338 NARAL REPORT, *supra* note 270, at 6.

*b. The Context of the Speech*

The format and forum of a particular speech act matters, as does the identity of the speaker and his audience, and the nature of their relationship. In fact, the Court has given us an example of how to evaluate whether a given speech act's context indicates that it is commercial speech. In *Murdock v. Pennsylvania*,<sup>339</sup> a case that predates the commercial speech doctrine, the Court engaged in a contextual inquiry in evaluating whether Jehovah's Witnesses were engaged in commercial speech when they went door-to-door explaining their religious views and soliciting people to purchase religious books and pamphlets for less than twenty-five cents:<sup>340</sup>

[T]he mere fact that the religious literature is "sold" by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books . . . On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture.<sup>341</sup>

As Dean Post notes, the Court's analysis in *Murdock* "does not focus on the narrow communicative act of selling a Bible, but rather on the larger 'venture' or 'activity' within which the particular communicative act is embedded."<sup>342</sup> The Court looks to the social meaning of the type of speech at issue: "The hand distribution of religious tracts is an age-old form of missionary evangelism. . . . It is more than preaching. It is more than distribution of religious literature. It is a combination of both."<sup>343</sup> The speech at issue was deeply tied to religious practices—it would be clear to any listener that the solicitation was part of the Jehovah's Witnesses' religious mission. Importantly, the Court does not simply conclude that the speech is religious because the Jehovah's Witnesses themselves intend to engage in religious speech. Instead, the Court's language evokes its later characterization of the "commonsense" distinctions between commercial speech and other speech.<sup>344</sup> In *Murdock*, a commonsense analysis of the

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339 319 U.S. 105 (1943).

340 The books were twenty-five cents each, and the pamphlets were five cents each. *Id.* at 107.

341 *Id.* at 110–11.

342 Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 16.

343 *Murdock*, 319 U.S. at 108–09.

344 See, e.g., *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) ("We have not discarded the 'commonsense' distinction between speech proposing a commercial transac-

speech, given its context and format, indicated that the speech was fundamentally different from a door-to-door salesman advocating the purchase of a particular book.

Consider, for example, if the Jehovah's Witnesses had instead concealed their religion from their listeners and simply offered to sell them "self-help" books for twenty-five cents. While the Jehovah's Witnesses' ultimate motivation for speaking might still be religious in this hypothetical scenario, the alteration of the circumstances surrounding their speech would assuredly have affected the Court's analysis of whether the Jehovah's Witnesses were engaged in religious speech. The Court's reasoning in *Murdock* makes clear that "[c]onstitutional characterization of the act of solicitation depends on its context."<sup>345</sup>

If we evaluate the context and social meaning of the pregnancy service centers' speech, instead of simply focusing on the centers' lack of financial motivation, the analysis looks much different from that undertaken by both district courts and the Fourth Circuit panel majority. The offer of pregnancy testing, ultrasounds, or pregnancy counseling is not, in *Murdock*'s terms, a "clearly religious activity."<sup>346</sup> The context of this speech, irrespective of whether any money is charged, is one of service-provision. Many other institutions, such as full-service medical clinics, provide the same services.<sup>347</sup> In fact, some medical clinics also provide pregnancy tests free of charge.<sup>348</sup> The pregnancy service centers are acting like any other service provider: their speech targets a specific audience, women who are or may be pregnant, and offers the availability of certain services that have an economic value in the marketplace. The evidence suggests that women visiting the centers often believe that they are visiting a medical clinic, and are unaware that the centers have ideological motivations for providing women with pregnancy-related services.<sup>349</sup> While the pregnancy service centers' lack of economic motivation is rele-

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tion, which occurs in an area traditionally subject to government regulation, and other varieties of speech.").

<sup>345</sup> Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 16.

<sup>346</sup> *Murdock*, 319 U.S. at 111.

<sup>347</sup> See, e.g., *Health Info & Services*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-center/> (last visited Aug. 15, 2012) (describing services provided by Planned Parenthood).

<sup>348</sup> See *Health Info & Services: Boro Hall Center—Brooklyn, NY*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-center/centerDetails.asp?f=2522&a=0&v=details> (last visited Aug. 15, 2012) ("Free pregnancy tests by walk-in or appointment . . .").

<sup>349</sup> See, e.g., PPNYC REPORT, *supra* note 285, at 3–6 (reporting stories of women who mistakenly went to pregnancy service centers).

vant,<sup>350</sup> the overall context of the speech is still the offer of services in the commercial marketplace, not ideological speech in public discourse.

If the pregnancy service centers, however, did actually make clear in their advertisements and signage that their central goal is to engage in religious and ideological advocacy about the sanctity of human life, this would assuredly affect the contextual analysis of their speech, as this would affect the audience's perspective on whether the centers are just another service provider. If pregnancy service centers were clear about their motivations, the audience for their speech would be aware that the pregnancy service centers are not just providing services to pregnant women, and that the centers intend to advocate their ideological beliefs. Thus, in the contextual analysis, the visibility of the centers' ideological motivations to its audience matters, not just what the centers claim their motivations to be. It is the disguising of the centers' religious and ideological motivations that weighs in favor of classifying their speech as commercial speech.

The centers' efforts to engage in religious and ideological speech are certainly relevant to the commercial speech analysis. As the Court said in *Riley*, "[o]ur lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon."<sup>351</sup> Here, however, the disclosures do not impact the centers' ability to engage in ideological advocacy.<sup>352</sup> The disclosures merely in-

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350 For example, the Court has made clear that a speaker who does have economic motivations for engaging in speech cannot immunize his speech from the commercial speech doctrine by "including reference to public issues." *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 68 (1983).

351 *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

352 The District of Maryland, without much analysis, concluded that the mandated signage meant that "[c]ontemporaneous with the center's initial communication is the presence of a stark and immediate statement about abortion and birth control," and that this statement "alters the course of a center's communications with a client or prospective client about abortion and birth-control." *O'Brien v. Mayor of Balt.*, 768 F. Supp. 2d 804, 814 (D. Md. 2011). It is unclear how the statement that these services are not provided in any way alters the centers' ability to convey their ideological message. In fact, one study has found that informing women about the ideology of a pro-life center, which goes much further than the New York and Baltimore requirements that the centers inform women about the scope of their services, had no effect on women's decision-making. Kathryn Mardirosian et al., *The Effects of Enhanced Informed Consent in a Pro-Life Pregnancy Counseling Center*, 69 J. COUNSELING & DEV. 39, 40 (1990). This study examined the effects of telling women that the center they were visiting was pro-life, that the counselors and staff advocated a pro-life philosophy, that they might be shown a graphic videotape of an abortion, and that staff members were trained volunteers and not professional counselors. A control group was not told any of this information. The study found no signifi-

form women what services they will be unable to receive at the center, curing any misconceptions they may have had about the types of services provided.<sup>353</sup> In contrast, in *Riley*, the Court concluded that the law requiring professional fundraisers to disclose the percentage they retained as a fee was inextricably intertwined with the fundraiser's ideological advocacy because of the "reality that without solicitation the flow of such information and advocacy would likely cease."<sup>354</sup> The collection and solicitation of money at issue in *Riley* was integral to the charitable organizations' ability to engage in advocacy, and the Court concluded that the ordinance would "almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent."<sup>355</sup> Here, however, the disclosures only prevent the centers from engaging in illegitimate efforts: the centers cannot mislead women into thinking that they are visiting a medical clinic that provides abortions or emergency contraception. There is nothing inextricable about the centers' offer to provide pregnancy-related services and their ideological advocacy.<sup>356</sup> Thus, analyzing the effect of the compelled statements on the centers' speech as a whole suggests that the laws only impact the commercial aspect of the centers' speech.

New York's law, however, contains an additional requirement that impacts the centers' one-on-one conversations with individual wom-

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cant difference between the groups in their intent to abort after the meeting with the pro-life counselors.

<sup>353</sup> This discussion is limited to the Baltimore ordinance and the first two disclosures required by New York City's ordinance. The third disclosure required by the New York ordinance, that the New York City Department of Health recommends that women who are or may be pregnant contact a licensed medical professional, goes beyond merely correcting misconceptions about the services the centers provide. I will discuss New York City's third disclosure in more detail in the next section. Building off of the analysis of the graphic tobacco labels, I conclude that the third disclosure requires the centers to repeat the state's normative message, and thus falls outside of "factual and uncontroversial information." N.Y.C., N.Y., ADMIN. CODE § 20-816.

<sup>354</sup> *Riley*, 487 U.S. at 796.

<sup>355</sup> *Id.* at 799.

<sup>356</sup> The Court reached a similar conclusion in analyzing whether Tupperware parties that included discussions of home economics and financial responsibility qualified as commercial speech. The Court rejected the plaintiffs' argument, based on *Riley*, that the noncommercial aspects of the presentations were intertwined with the commercial aspects: "there is nothing whatever 'inextricable' about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989).

en: the centers must also make the mandated disclosures orally if a woman requests an abortion, emergency contraception, or prenatal care.<sup>357</sup> The ordinance makes clear that the disclosure must be made whenever a client or prospective client makes such an oral request for these services, whether in person or on the phone.<sup>358</sup> While the oral disclosures, in the context of a telephone conversation with a prospective client, target the same “offer of services” discussed previously, a staff member will also be required to make these disclosures if a woman requests these services during her appointment. The oral disclosure, therefore, may have to be said alongside the centers’ ideological speech, and while the content of this speech is commercial, the context of the speech is much more ideological once a woman is meeting with the centers’ staff. While this requirement poses a closer question, analyzing the impact of the compelled statement on the centers’ ideological speech leads to the same conclusion reached above: the compelled speech prevents the centers from lying about which services are provided and whether a medical provider is on staff. Presumably, any woman who requests these services during her appointment is under the mistaken impression that she is in the office of a non-ideologically motivated medical service provider. The disclosure still targets the centers’ offer of services by requiring staff members to provide additional information about which services are provided—the disclosure in no way impacts the content of the centers’ ideological speech.

In summary, a more nuanced analysis of the pregnancy service centers’ speech leads to the conclusion that the New York City and Baltimore disclosure laws apply to commercial speech.

##### 5. Zauderer’s Rational Basis Test

Before considering how Zauderer’s rational basis test would apply to Baltimore’s and New York City’s laws, it is necessary to consider the requirement discussed in Part IV that the disclosure compel factual rather than normative speech. Although the disclosures informing women whether a medical professional is on staff and whether certain services are provided compel purely factual statements, the third disclosure required by New York City’s ordinance compels normative speech. The third disclosure, which requires the centers to disclose that the New York City Department of Health recommends that

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<sup>357</sup> See N.Y.C., N.Y., ADMIN. CODE § 20-816.

<sup>358</sup> *Id.*

women who are or may be pregnant consult a licensed medical provider,<sup>359</sup> requires pregnancy service centers to act as a billboard for the city's normative message about how pregnant women should behave.<sup>360</sup> While the disclosure explicitly indicates that the recommendation comes from the New York City Department of Health, and thus does not require the centers to present the recommendation as though it is their own opinion, this disclosure still interferes with the centers' autonomy interests by forcing the centers to spread the government's message.<sup>361</sup> As a consequence, New York City's third disclosure falls outside of *Zauderer*, and should be subject to *Central Hudson*'s intermediate level of scrutiny.

Rational basis review does apply, however, to the ordinances' remaining disclosure requirements. In contrast to the visual tobacco labels, these compelled disclosures are purely factual: they require the centers to disclose which services are provided, and in the case of New York City, whether a medical provider is on staff. Informing women what services are provided at a pregnancy service center does not require the centers to spread any type of normative government message as their own.<sup>362</sup> Both New York City's and Baltimore's laws are rationally related to each city's interest in curing consumer deception and confusion about the scope of services that these centers provide, thus meeting even a narrow reading of the permissible state interests under *Zauderer*.<sup>363</sup> The Southern District of New York, in

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359 *Id.*

360 Here, the normative nature of this speech is evident on the face of the disclosure. Accordingly, there is no need to look to the government's purpose in mandating the disclosure.

361 For example, in *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), it was equally clear that the state motto on New Hampshire's license plates was a mandated state message, and not the opinion of individual drivers. *Id.* at 721 (Rehnquist, J., dissenting) (noting that the format of state license plates is "known to all as having been prescribed by the State"). The requirement that the plaintiffs display the license plate, however, still offended their autonomy interests by requiring them to "use their private property as a 'mobile billboard' for the State's ideological message . . . [and] display 'Live Free or Die' to hundreds of people each day." *Id.* at 715. Cf. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 576 (1995) ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

362 *Evergreen Ass'n, Inc. v. New York*, 801 F. Supp. 2d 197, 206 (S.D.N.Y. 2011) (characterizing New York City's law as mandating "only factual disclosures").

363 Moreover, as the Southern District of New York recognized, deception is not the only value at stake. The disclosures serve the city's significant interest in protecting public health: "the prevention of deception related to reproductive health care is of paramount importance. Lack of transparency and delay in prenatal care can gravely impact a woman's health." *Id.* at 207. Thus, given the discussion in Part III of the broad range of state interests justifying compelled disclosures, the city's interest in informing women in the

fact, recognized the extent of the centers' deceptive practices: "[p]laintiff's categorical denial of the existence of any such deception—and refusal to acknowledge the potential misleading nature of certain conduct—feigns ignorance of the obvious."<sup>364</sup> Once the principles of the compelled commercial speech doctrine are applied to the pregnancy service center disclosure laws, the laws' constitutionality is easily established.

Given that the commercial speech doctrine seeks to protect the informational interests of its audience, the definition of commercial speech should not rely solely on the intentions and motivations of the speaker. The analysis of the context and content of the pregnancy service centers' speech demonstrates the need to engage in a more searching inquiry in determining what qualifies as commercial speech in order to ensure that the pertinent interests are being served.

#### CONCLUSION

Although information disclosure policies have proliferated over the past twenty-seven years, the Court has given little consideration to the scope of *Zauderer*. If rational basis scrutiny only applied to compelled commercial speech that (1) proposes a commercial transaction, and (2) cures consumer deception, a large number of disclosures would violate the First Amendment. My proposed test, which requires a more nuanced analysis of what qualifies as commercial speech, and which recognizes the breadth of state interests justifying compelled speech as well as the distinction between factual and normative speech, sets forth a more workable method for analyzing the First Amendment implications of compelled commercial speech.

The recent developments in the case law illustrate the inability of the current doctrine to provide the lower courts with the tools to balance speakers' First Amendment rights against the state's substantial interests. On one side of the spectrum, we see completely factual disclosures informing women about the types of services provided at a clinic targeting pregnant women being enjoined simply because the clinics do not charge a fee for their services. If these clinics were for-profit institutions charging a fee, the disclosures would raise few First Amendment concerns. On the other side, we have gruesome images of the consequences of tobacco addiction being injected into the very

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interest of public health could serve as an independent basis for the disclosure requirements.

364 *Id.* at 208.

essence of commercial speech: the sale of a commercial product. And in the middle, we have factual disclosures about the presence of mercury and the number of calories in restaurant foods being challenged because the disclosures do not target deceptive and misleading speech. As disclosure laws become an increasingly popular regulatory tool, courts will be forced to evaluate the First Amendment values implicated by compelled commercial speech, with little direction from the Supreme Court. Although rational basis scrutiny assuredly is not always the appropriate level of scrutiny, this Article has demonstrated that First Amendment values are in fact protected and served by an extension of *Zauderer's* framework to other factual scenarios.

There are important limits to this doctrine, and this Article has highlighted one such limit on the type of speech that can be compelled. Another limit is the type of speech that can be required to carry such disclosures. *Zauderer* only applies to commercial speech—while this Article has argued for a more contextual, multi-factored definition of what constitutes commercial speech, the rational basis test assuredly does not apply to state laws compelling a doctor to give certain information to his patient during the course of medical treatment,<sup>365</sup> or to laws that impose disclosure requirements on religious or political speech. The limits on compelled speech outside of the commercial speech arena are beyond the scope of this Article, but further analysis is certainly warranted given the increasing proliferation of state laws mandating physicians to give certain information, arguably ideological information, to women getting abortions.<sup>366</sup> Such compelled speech requirements, which affect the actual practice of the profession rather than just the offer of professional services, raise different First Amendment concerns beyond those protected by the commercial speech doctrine.<sup>367</sup>

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365 See Post, *The Constitutional Status of Commercial Speech*, *supra* note 53, at 23 (“Although the communication between a professional and her client might concern commercial matters, its regulation would almost certainly not be conceptualized as an issue of First Amendment commercial speech doctrine. This suggests that we should distinguish between ‘impersonal’ communications that sustain a public of independent strangers, and ‘personalized communications’ that constitute particular relationships of dependence.”).

366 See Post, *Informed Consent to Abortion*, *supra* note 63 (discussing the First Amendment issues raised by a South Dakota statute requiring physicians to inform women contemplating an abortion that the abortion will terminate the life of a whole, separate, unique, living human being, and that an increased risk of suicide and suicide ideation is a known medical risk of abortion).

367 See, e.g., Halberstam, *supra* note 83, at 784 (“The *Central Hudson* standard . . . does not limit the justifications for restrictions on commercial speech to the prevention of deception.”). I evaluate the First Amendment issues raised by compelling physicians to engage

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in the state's ideological speech in another academic project. *See* Keighley, *supra* note 229.