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Assessing Commercial Disclosure Requirements under the First Amendment

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Federal law contains a wide variety of disclosure requirements, including food labels, securities registrations, and disclosures about prescription drugs in direct-to-consumer advertising. These disclosure provisions require commercial actors to make statements that they otherwise might not, compelling speech and implicating the Free Speech Clause of the First Amendment. Nonetheless, while commercial disclosure requirements may regulate protected speech, that fact in and of itself does not render such provisions unconstitutional.

The Supreme Court has historically allowed greater regulation of commercial speech than of other types of speech. Since at least the mid-1970s, however, the Supreme Court has been increasingly protective of commercial speech. This trend, along with other developments in First Amendment law, has led some commentators to question whether the Supreme Court might apply a stricter test in assessing commercial disclosure requirements in the near future. Nonetheless, governing Supreme Court precedent provides that disclosure requirements generally receive lesser judicial scrutiny when they compel only commercial speech, as opposed to noncommercial speech. In *National Institute of Family and Life Advocates v. Becerra*, a decision released in June 2018, the Supreme Court explained that it has applied a lower level of scrutiny to compelled disclosures under two circumstances.

First, the Supreme Court has sometimes upheld laws that regulate commercial speech if the speech regulation is part of a larger regulatory scheme that is focused on conduct and only incidentally burdens speech. If a law is properly characterized as a regulation of conduct, rather than speech, then it may be subject to rational basis review, a deferential standard that asks only whether the regulation is a rational way to address the problem. However, it can be difficult to distinguish speech from conduct, and the Supreme Court has not frequently invoked this doctrine to uphold laws against First Amendment challenges.

Second, the Supreme Court has sometimes applied a lower level of scrutiny to certain commercial disclosure requirements under the authority of a 1985 case, *Zauderer v. Office of Disciplinary Counsel*. In *Zauderer*, the Court upheld a disclosure requirement after noting that the challenged provision compelled only “factual and uncontroversial information about the terms under which . . . services will be available.” The Court said that under the circumstances, the service provider’s First Amendment rights were sufficiently protected because the disclosure requirement was “reasonably related” to the government’s interest “in preventing deception of consumers.” Lower courts have generally interpreted *Zauderer* to mean that if a commercial disclosure provision requires only “factual and uncontroversial information” about the goods or services being offered, it should be analyzed under rational basis review. If a commercial disclosure requirement does not qualify for review under *Zauderer*, then it will most likely be analyzed under the intermediate standard that generally applies to government actions that regulate commercial speech.

Some legal scholars have argued that recent Supreme Court case law suggests the Court may subject commercial disclosure provisions to stricter scrutiny in the future, either by limiting the factual circumstances under which these two doctrines apply or by creating express exceptions to these doctrines. If a court applies a heightened level of scrutiny, it may require the government to present more evidence of the problem it is seeking to remedy and stronger justifications for choosing a disclosure requirement to achieve its purposes.

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Introduction

Disclosure provisions that require commercial actors to convey specified information to consumers occupy an uneasy and shifting space in First Amendment jurisprudence. The First Amendment’s Free Speech Clause¹ protects the right to speak as well as the right *not* to speak,² and at least outside the context of commercial speech, courts generally disfavor any government action that compels speech.³ Indeed, the Supreme Court in 1943 described the First Amendment’s protection against compelled speech as a “fixed star in our constitutional constellation.”⁴ Accordingly, government actions mandating speech are generally subject to strict scrutiny by courts,⁵ and will be upheld “only if the government proves that they are narrowly tailored to serve compelling state interests.”⁶ However, the Court has also long accepted a variety of laws that require commercial actors to make certain disclosures to consumers, confirming that Congress can compel certain disclosures, even those involving protected speech, without running afoul of the First Amendment.⁷

Commercial disclosure requirements have largely withstood constitutional scrutiny in part because, historically, commercial speech has received less protection under the First Amendment than other speech.⁸ The government’s ability to more freely regulate commercial speech has been linked to its general authority “to regulate commercial transactions.”⁹ Thus, notwithstanding the

¹ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). The Free Speech Clause is “among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.” *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

² *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (“[T]he 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.”).

³ *See, e.g., Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 798 (1988) (holding that state law compelling speech “is subject to exacting First Amendment scrutiny”).

⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

⁵ *See, e.g., Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) [hereinafter *NIFLA*].

⁶ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The Supreme Court has sometimes described this “narrowly tailored” standard as “*exacting* First Amendment scrutiny.” *Riley*, 487 U.S. at 798 (emphasis added) (applying narrow tailoring requirement to compelled disclosure of noncommercial speech). In a recent case involving compelled subsidization of commercial speech, however, the Court distinguished “*exacting*” scrutiny from “*strict*” scrutiny, defining “*exacting*” scrutiny as “a less demanding test than the ‘*strict*’ scrutiny that might be thought to apply outside the commercial sphere.” *Janus v. Am. Fed’n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464–65 (2018). Rather than requiring narrowly tailored means, the Court said that the “‘*exacting*’ scrutiny” standard required the government to show that its interests “cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.* at 2465 (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012) (internal quotation mark omitted)). *Cf. e.g., Davis v. FEC*, 554 U.S. 724, 744 (2008) (describing “*exacting* scrutiny,” as applied to disclosure requirements for political contributions, as requiring “a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed” (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)) (internal quotation marks omitted)). Although this report focuses on compelled disclosures rather than compelled subsidies, it will nonetheless follow *Janus*’s use of “*strict* scrutiny” to refer to the narrow tailoring required outside the context of commercial speech. The report does not discuss the possible application of a distinct “*exacting*” scrutiny standard to commercial disclosure requirements.

⁷ *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

⁸ *See, e.g., Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.”).

⁹ 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion); *see also, e.g., id.* at 501 (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or

fact that commercial disclosure requirements compel speech, courts generally have not analyzed such provisions under the strict scrutiny standard.¹⁰ Instead, courts have often employed less rigorous standards to evaluate such provisions.

The precise nature of a court’s First Amendment analysis, however, will depend on the character of the disclosure requirement at issue.¹¹ In a recent decision, the Supreme Court distilled and explained its prior cases on this subject.¹² First, the Court said that it has upheld some commercial disclosure requirements that target *conduct* and only incidentally burden speech.¹³ This rubric likely only applies if the disclosure provision is part of a larger scheme regulating commercial conduct.¹⁴ If the disclosure provision instead regulates “speech as speech,”¹⁵ it might be subject either to intermediate scrutiny, as a government regulation of commercial speech,¹⁶ or to something closer to rational basis review, if the disclosure provision qualifies for review under the Supreme Court’s decision in *Zauderer v. Office of Disciplinary Counsel*.¹⁷ Some of the Court’s recent cases, however, have suggested that in certain circumstances, disclosure requirements may be subject to heightened scrutiny.¹⁸

This report begins with a short background on how courts generally view commercial speech under the First Amendment, then reviews in more detail the possible legal frameworks for analyzing the constitutionality of commercial disclosure requirements.

First Amendment Protection of Commercial Speech

Supreme Court precedent explaining the application of the First Amendment to commercial disclosure requirements is relatively recent. The Court did not squarely hold that purely commercial speech was entitled to any protection under the First Amendment until 1976 in

requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”).

¹⁰ See, e.g., Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1283 (2014). See also, e.g., Molly Duane, *The Disclaimer Dichotomy: A First Amendment Analysis of Compelled Speech in Disclosure Ordinances Governing Crisis Pregnancy Centers and Laws Mandating Biased Physician Counseling*, 35 CARDOZO L. REV. 349, 375 (2013) (arguing that this lower level of scrutiny “is a crucial tool in consumer protection legislation because it allows the government to regulate communications for their truth, thus preventing consumers from being misled or deceived”).

¹¹ See, e.g., *NIFLA*, 138 S. Ct. 2361, 2372 (2018).

¹² *Id.*

¹³ See generally, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”); *44 Liquormart*, 517 U.S. at 512 (“[A] State’s regulation of the sale of goods differs in kind from a State’s regulation of accurate information about those goods.”).

¹⁴ See *NIFLA*, 138 S. Ct. at 2373 (holding compelled disclosure likely violates the First Amendment in part because it was not tied to a broader scheme regulating commercial conduct); *United States v. United Foods*, 533 U.S. 405, 415 (2001) (“In contrast to the program upheld in [*Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997)] . . . , there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.”).

¹⁵ *NIFLA*, 138 S. Ct. at 2374.

¹⁶ See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (setting out test generally applicable to evaluate government infringement of commercial speech) [hereinafter *Central Hudson*].

¹⁷ 471 U.S. 626, 651 (1985).

¹⁸ See *NIFLA*, 138 S. Ct. at 2375.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.¹⁹ The Court has defined commercial speech alternately as speech that “does ‘no more than propose a commercial transaction’”²⁰ and as “expression related solely to the economic interests of the speaker and its audience.”²¹ In *Virginia Board of Pharmacy*, the Court said that commercial speech was protected, but it also emphasized that the First Amendment did not prohibit all regulations of such speech.²² In particular, the Court said that it foresaw “no obstacle” to government regulation of “false” speech, or even of commercial speech that is only “deceptive or misleading.”²³

In subsequent cases, the Court has explained why “regulation to assure truthfulness” is more readily allowed in the context of commercial speech, as compared with other types of speech.²⁴ While the First Amendment usually protects even untruthful speech, in order to better encourage uninhibited and robust debate,²⁵ the Court has recognized that regulating “for truthfulness” in the commercial arena is unlikely to “undesirably inhibit spontaneity” because commercial speech is generally less likely to be spontaneous.²⁶ Instead, it is more calculated, motivated by a “commercial interest.”²⁷ In particular, if a particular advertisement concerns a subject in which “the public lacks sophistication” and cannot verify the claims, the Court has suggested that the government may have a freer hand to address such concerns.²⁸

Four years after *Virginia Board of Pharmacy*, in 1980, the Supreme Court set out the standard that generally governs a court’s analysis of government restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.²⁹ The Court first explained that commercial speech enjoys “lesser protection” than “other constitutionally guaranteed expression.”³⁰ After emphasizing that First Amendment protection for commercial speech “is based on the informational function of advertising,” the Court said that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”³¹ Accordingly, the Court held that the government may prohibit “forms of communication more likely to deceive the public than to inform it” as well as “commercial speech related to illegal activity.”³² But if the regulated “communication is neither

¹⁹ 425 U.S. 748, 762 (1976). *See also, e.g.*, Fla. Bar v. Went for It, 515 U.S. 618, 622 (1995) (“Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage.”).

²⁰ 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

²¹ *Central Hudson*, 447 U.S. at 561. Advertising is the quintessential example of commercial speech, but “not all commercial speech is advertising.” Jennifer L. Pomeranz, *Compelled Speech under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL’Y 159, 168 (2009). *Accord, e.g.*, Duane, *supra* note 10, at 375.

²² 425 U.S. at 770.

²³ *Id.* at 771. As discussed below, *infra* note 155, the Court has said that outside of the commercial context, at least some false statements are protected by the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

²⁴ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

²⁵ *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁶ *Bates*, 433 U.S. at 383.

²⁷ *Id.*

²⁸ *Id.*; *see also, e.g.*, *In re R.M.J.*, 455 U.S. 191, 202–03 (1982).

²⁹ 447 U.S. 557, 566 (1980).

³⁰ *Id.* at 563. *See also, e.g.*, *Bates*, 433 U.S. at 381 (stating that overbreadth, a speech-protective doctrine, is not applicable in the context of “advertising, a context where it is not necessary to further its intended objective”).

³¹ *Central Hudson*, 447 U.S. at 563.

³² *Id.* at 563–64.

misleading nor related to unlawful activity,” the government’s action is subject to intermediate scrutiny.³³ Under *Central Hudson*’s intermediate standard, the government must prove that the government’s interest is “substantial,” and that the regulation “directly advances” that interest and is “not more extensive than is necessary to serve that interest.”³⁴

The *Central Hudson* test continues to govern the constitutional analysis of government acts that infringe on commercial speech. However, in certain circumstances, commercial speech may lose its commercial character if “it is inextricably intertwined with otherwise fully protected speech.”³⁵ And more generally, some members of the Supreme Court have questioned whether commercial speech *should* categorically receive less protection under the First Amendment, suggesting that in at least some circumstances, infringements on commercial speech should instead be subject to strict scrutiny.³⁶ Commentators have pointed out that, as a practical matter, Supreme Court decisions have increasingly struck down, rather than upheld, restrictions on commercial speech.³⁷

Also relevant to the discussion of disclosure requirements, judges and legal scholars have noted that the Court may be adjusting the role of the content neutrality doctrine with respect to commercial speech.³⁸ As a general matter, if a law is “content-based,” in the sense that it “target[s] speech based on its communicative content,” it will be subject to strict scrutiny.³⁹ The Supreme Court stated in *Reed v. Town of Gilbert* that a regulation is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed,” if it “cannot be ‘justified without reference to the content of the regulated speech,’” or if it was “adopted by the government ‘because of disagreement with the message [the speech] conveys.’”⁴⁰ Disclosure requirements are generally considered content-based, given that they require regulated parties to speak a certain message, and outside the commercial context, ordinarily trigger the application of strict scrutiny.⁴¹ In *Central Hudson*, however, the Supreme Court explained that in the context of

³³ *Id.* at 564.

³⁴ *Id.* at 566.

³⁵ *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988). *But cf.*, e.g., *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 68 (1983) (“Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.”).

³⁶ *See*, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002) (noting that “several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases” and citing examples); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (same). More recently, reiterating his previously announced views, Justice Thomas stated that he has “never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech.” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 255 (2010) (Thomas, J., concurring).

³⁷ *See*, e.g., Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL OF RTS. J. 765, 766 (2017); *see also*, e.g., *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 43 (D.C. Cir. 2014) (Brown, J., dissenting) (“The clear trajectory of the Supreme Court’s jurisprudence is toward greater protection for commercial speech, not less.”) [hereinafter *AMI*]. *Cf.*, e.g., Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 973–74 (2017) (arguing that it is “not entirely correct” that courts have become more protective of commercial speech because “[c]ourts have been generous to legislatures in applying the standard set out in *Zauderer* to uphold disclosure obligations imposed on commercial actors,” but noting that this might be changing).

³⁸ *See*, e.g., Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine after Reed v. Town of Gilbert*, 84 U. CHI. L. REV. 955, 957–58 (2017).

³⁹ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁴⁰ *Id.* at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (alteration in original).

⁴¹ *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 798 (1988) (holding that a state disclosure requirement “is subject to exacting First Amendment scrutiny”). The government had argued in that case that the challenged provision—a requirement “that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity”—regulated

commercial speech, “regulation of its content” is permissible.⁴² And, as commentators have pointed out, “the very category of commercial speech is a content-based category.”⁴³

Nonetheless, the Court has struck down certain regulations that prohibit commercial speech solely because its content is commercial,⁴⁴ suggesting that content neutrality might be relevant in the commercial sphere.⁴⁵ In its 2011 decision in *Sorrell v. IMS Health, Inc.*, the Supreme Court considered the constitutionality of a state law prohibiting pharmacies from disclosing certain pharmacy records for marketing purposes.⁴⁶ After observing that the law included “content- and speaker-based restrictions on the sale, disclosure, and use of” covered information,⁴⁷ the Court concluded that the law was “designed to impose a specific, content-based burden on protected expression”⁴⁸ because it applied specifically to marketing, a particular type of speech. Consequently, the law was subject to “heightened judicial scrutiny,”⁴⁹ notwithstanding the fact that the “burdened speech result[ed] from an economic motive” and was therefore commercial.⁵⁰ Ultimately, however, the Court declined to say definitively whether *Central Hudson* or “a stricter form of judicial scrutiny” should apply because, in the Court’s view, the law failed to pass constitutional muster even under *Central Hudson*.⁵¹

only commercial speech. *Id.* at 795. The Court responded by saying, “even assuming, without deciding, that such speech in the abstract is indeed merely ‘commercial,’ we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.” *Id.* at 796. Accordingly, the Court “appl[ie]d [its] test for fully protected expression.” *Id.*

⁴² *Central Hudson*, 447 U.S. 557, 564 n.6 (1980) (describing the “two features of commercial speech” that “permit regulation of its content”). Even if the Court had not made such an explicit statement in *Central Hudson*, that decision does allow the government to discriminate at least against commercial speech that is misleading or unlawful. *See id.* at 566. *Cf.* *R.A.V. v. St. Paul*, 505 U.S. 377, 388–89 (1992) (“[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there.”) (citation omitted).

⁴³ Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 151 (2016). *Accord, e.g.*, *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 538 n.5 (1980).

⁴⁴ *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976). In *Discovery Network, Inc.*, the Court explained that “[n]ot only does Cincinnati’s categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city’s admittedly legitimate interests.” 507 U.S. at 424.

⁴⁵ *See, e.g.*, Mason, *supra* note 38, at 974–76.

⁴⁶ 564 U.S. 552, 557 (2011).

⁴⁷ *Id.* at 563–64.

⁴⁸ *Id.* at 565.

⁴⁹ *Id.* at 567. The Court also said that “[c]ommercial speech is no exception” to the rule that if a law has a “purpose to suppress speech” and imposes “unjustified burdens on expression,” these factors “would render it unconstitutional.” *Id.* at 566.

⁵⁰ *Id.* at 566–67. In addition, the Court said that by targeting certain speakers, this law discriminated not only on the basis of content, but also viewpoint, at least in practice. *Id.* at 565, 571. The Court has, in the past, been generally more skeptical of viewpoint-discriminatory laws than even content-based laws. *See, e.g.*, *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001); *cf. Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (stating that speech regulations may be content based and subject to strict scrutiny even if they do not “discriminate among viewpoints”). The Court has said that “[v]iewpoint discrimination is . . . an egregious form of content discrimination.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

⁵¹ *Sorrell*, 564 U.S. at 571. Specifically, the Court said that “[t]o sustain the targeted, content-based burden [that the disputed statute] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” *Id.* at 572.

As discussed in more detail below,⁵² the shifting role of content neutrality in commercial speech doctrine holds special significance for commercial disclosure requirements: these requirements are content-based because they “compel[] individuals to speak a particular message.”⁵³ At least one legal scholar has suggested that lower courts have read *Sorrell* as an expression of the Supreme Court’s increasing skepticism toward restrictions on commercial speech and, since that decision, have been more likely to strike down commercial disclosure requirements.⁵⁴ However, the Court did not expressly limit the reach of *Central Hudson* in *Sorrell* or in subsequent cases, suggesting that, at least for now, *Central Hudson*’s standard of review applies even when a challenged action would otherwise trigger strict scrutiny as a content-based regulation of speech.⁵⁵ Indeed, lower courts analyzing commercial disclosure requirements usually ask whether *Zauderer* or *Central Hudson* supplies the appropriate standard of review, contemplating at most only intermediate scrutiny⁵⁶—even in cases decided after *Sorrell*.⁵⁷

Regulation of Speech Incidental to Regulatory Scheme Targeting Conduct

In its First Amendment jurisprudence, the Supreme Court has generally distinguished between laws that regulate conduct and laws that regulate speech.⁵⁸ The Court has held that conduct-focused regulations will not violate the First Amendment by merely incidentally burdening speech.⁵⁹ For instance, while the government may regulate prices, attempts to regulate “the

⁵² See *infra*, “Heightened Standards: Central Hudson and Strict Scrutiny.”

⁵³ *NIFLA*, 138 S. Ct. 2361, 2371 (2018).

⁵⁴ See Note, *supra* note 37, at 979. See also, *e.g.*, Mason, *supra* note 38, at 983–84 (noting that commercial disclosure requirements are content-based and have been challenged in court); Shanor, *supra* note 43, at 178 (noting that some language in *Sorrell* “would invalidate all mandated commercial disclosures”). But see, *e.g.*, Enrique Armijo, Reed v. Town of Gilbert: *Relax, Everybody*, 58 B.C. L. REV. 66, 81–84 (2017) (arguing many “consumer protection-related” mandates are likely constitutional).

⁵⁵ *E.g.*, *Contest Promotions, LLC v. City & Cty. of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017) (holding that notwithstanding recent Supreme Court decisions, including *Sorrell*, a content-based restriction on commercial speech is subject only to intermediate scrutiny, rather than strict scrutiny).

⁵⁶ See, *e.g.*, *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 640 (6th Cir. 2010); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

⁵⁷ See, *e.g.*, *Contest Promotions, LLC*, 874 F.3d at 601; *United States v. Philip Morris USA Inc.*, 855 F.3d 321, 327 (D.C. Cir. 2017); *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

⁵⁸ See, *e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“[T]he Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.”). Notwithstanding the entrenched nature of the doctrine, the speech-conduct distinction has been criticized as “unprincipled and susceptible to manipulation.” *King v. Governor of New Jersey*, 767 F.3d 216, 228 (3d Cir. 2014), *overruled in part by NIFLA*, 138 S. Ct. 2361 (2018); *accord, e.g.*, *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1308 (11th Cir. 2017); see generally Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005).

⁵⁹ See, *e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (upholding law where “the compelled speech . . . is plainly incidental to the [law’s] regulation of conduct”); *Virginia v. Hicks*, 539 U.S. 113, 123 (2003) (concluding that local laws prohibiting certain trespasses do not violate the First Amendment because they punish “nonexpressive conduct” rather than speech); *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) (“[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986) (“[W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to ‘least restrictive means’ scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such

communication of prices” implicate the First Amendment.⁶⁰ To take another example, the Court has noted that pursuant to “a ban on race-based hiring,” a regulation “directed at commerce or conduct,” the government “may require employers to remove ‘White Applicants Only’ signs.”⁶¹ To differentiate a regulation targeting conduct from one targeting speech, the Court generally looks to the purpose of the law,⁶² asking whether the law appears to target certain content or certain speakers.⁶³ As part of this inquiry, the Court may also ask whether a regulation applies because of the communicative content of the regulated party’s actions.⁶⁴

This distinction between speech and conduct is especially significant in the context of commercial speech, given that such speech “occurs in an area traditionally subject to government regulation.”⁶⁵ Thus, in 1978, the Supreme Court said:

“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers’ threats of retaliation for the labor activities of employees. Each of these examples illustrates that

restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity . . .” (citations omitted)).

⁶⁰ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (emphasis added); see also *44 Liquormart v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (holding that state ban on advertising alcohol prices fails First Amendment scrutiny); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 773 (1976) (holding that state ban on advertising prescription drug prices violated the First Amendment).

⁶¹ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

⁶² See generally, e.g., Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 856–58 (2012). This inquiry is distinct from the speaker- and listener-focused test for determining whether conduct is inherently expressive and should therefore be treated as equivalent to speech, as outlined in *Texas v. Johnson*, 491 U.S. 397, 404 (1989). There, the Court said that “in deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,” it would ask “whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’” *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)) (alterations in original). By contrast, in *United States v. O’Brien*, 391 U.S. 367, 376 (1968), the Court said that it could not “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”

⁶³ E.g., *Sorrell*, 564 U.S. at 567 (“[The law] imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont’s law imposes a burden based on the content of speech and the identity of the speaker.”); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (holding that a use tax on ink and paper could not be considered a generally applicable law, and stating that this “differential treatment” of the press “suggests that the goal of the regulation is not unrelated to suppression of expression”).

⁶⁴ E.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (holding that a federal statute, which applied to both conduct and speech, was “a content-based regulation of speech” in that case, because “as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message”). See also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 491–92 (1996) (discussing *O’Brien* and articulating “the distinction between direct and incidental restrictions on speech or, otherwise phrased, the distinction between actions targeting expression alone and actions applying generally, to both nonexpressive and expressive activity”).

⁶⁵ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). See also *Sorrell*, 564 U.S. at 584 (2011) (Breyer, J., dissenting) (stating that the Court has applied a rational basis standard to evaluate “ordinary commercial or regulatory legislation that affects speech in less direct ways,” taking “account of the need in this area of law to defer significantly to legislative judgment”).

the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.⁶⁶

The Court has previously “upheld regulations of professional conduct that incidentally burden speech.”⁶⁷ For example, the Court upheld an informed consent requirement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶⁸ The *Casey* challengers argued that a law requiring doctors to inform patients seeking abortions about “the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child” compelled doctors to speak in violation of the First Amendment.⁶⁹ The Court rejected that argument, concluding that while “the physician’s First Amendment rights not to speak are implicated,” this was “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”⁷⁰

In *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, the Supreme Court emphasized that the informed consent requirement upheld in *Casey* was part of the broader regulation of professional conduct: specifically, the practice of medicine.⁷¹ By contrast, the Court held that the disclosure requirement at issue in *NIFLA*, which required certain health facilities to provide clients with information about state-sponsored services, could not be upheld as “an informed-consent requirement or any other regulation of professional conduct” because it was not tied to any medical procedure.⁷² Instead, in the Court’s view, the requirement “regulate[d] speech as speech,” as opposed to regulating speech only incidentally.⁷³

While the Court has made clear that the First Amendment does not prohibit such incidental regulation of commercial speech, it has not articulated one overarching standard for evaluating whether such provisions are constitutionally permissible.⁷⁴ Its decisions in this area have

⁶⁶ *Ohralik*, 436 U.S. at 456 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) (citations omitted). Notably, in some of the cases cited as containing “examples . . . of communications that are regulated without offending the First Amendment,” *id.*, the Court had approved of or applied the challenged regulations without even discussing the First Amendment or free speech concerns, suggesting that the Court saw the laws as conduct regulations. See *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). However, these opinions were also issued before the Court squarely held that commercial speech was protected by the First Amendment, and so it is unclear whether the decisions would be resolved in the same way today. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

⁶⁷ *NIFLA*, 138 S. Ct. 2361, 2373 (2018).

⁶⁸ 505 U.S. 833, 884 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

⁶⁹ *Id.* at 881, 884 (internal quotation marks omitted).

⁷⁰ *Id.* at 884.

⁷¹ 138 S. Ct. at 2373. Lower courts considering other disclosure requirements related to the provision of pregnancy-related services had agreed with this characterization of the Court’s decision in *Casey*. See, e.g., *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council*, 683 F.3d 539, 554 (4th Cir. 2012) (noting that in *Casey*, “the regulation of such professional speech was imposed incidental to the broader governmental regulation of a profession and was justified by this larger context”).

⁷² 138 S. Ct. at 2373.

⁷³ *Id.* at 2374.

⁷⁴ By contrast, outside the context of commercial speech, the Supreme Court has said that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). The *O’Brien* test governs analysis of incidental restrictions on *expressive conduct*. See, e.g., *Kagan, supra* note 64, at 492. Under *O’Brien*, a regulation will be upheld if “it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” 391 U.S. at 377.

considered a wide variety of government actions incidentally burdening speech, and it may be that the standard varies according to the nature of the particular speech restriction evaluated.⁷⁵ In some cases, the Court has suggested that “the First Amendment is *not implicated* by the enforcement” of a broader regulatory scheme where the regulated conduct does not have “a significant expressive element” or the statute does not inevitably single out “those engaged in expressive activity.”⁷⁶ In other cases where the Court has upheld a regulation that it characterized as focused on conduct rather than speech, the Court investigated the strength of the government’s interest and asked whether the regulation advances that interest, suggesting that the Court subjected the regulation to *some* First Amendment scrutiny—albeit using a relatively relaxed standard.⁷⁷

The Court has never explicitly held that a commercial disclosure requirement qualifies as a constitutionally permissible incidental restriction on commercial speech.⁷⁸ While *Planned Parenthood of Southeastern Pennsylvania v. Casey* did involve a disclosure requirement, the Court did not address whether the informed consent requirement involved commercial or noncommercial speech either in *Casey*⁷⁹ or when discussing that requirement in *NIFLA*.⁸⁰ In *NIFLA*, the Court held that a state law imposing disclosure requirements on clinics providing pregnancy-related services could not be characterized as a regulation that only incidentally burdened speech because the requirement was not tied to any specific medical procedures.⁸¹

⁷⁵ See *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988) (“Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.”).

⁷⁶ *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986) (emphasis added). See also, e.g., *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469–70 (1997) (holding that regulatory scheme requiring California fruit producers to fund generic advertising for California fruits does not compel speech, and therefore does not abridge First Amendment rights and should be analyzed “under the standard appropriate for the review of economic regulation”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 802 (1986) (White, J., dissenting) (1986) (“I had thought it clear that regulation of the practice of medicine, like regulation of other professions and of economic affairs generally, was a matter peculiarly within the competence of legislatures, and that such regulation was subject to review only for rationality.”), *overruled in part by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 82 (1st Cir. 2008) (Lipez, J., concurring and dissenting) (“[L]egislation whose purpose is to regulate economic conduct, and which only incidentally affects speech, typically does not raise First Amendment concerns.”), *overruled by Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); Kagan, *supra* note 64, at 492 (“Courts usually treat the application of a general law, even to activity concededly expressive, as raising no First Amendment issue whatsoever.”); *cf. id.* at 497–501 (discussing exceptions to this rule).

⁷⁷ See *Friedman v. Rogers*, 440 U.S. 1, 15–16 (1979) (upholding state law prohibiting the practice of optometry under a trade name after noting that “the State’s interest . . . is substantial and well demonstrated” and noting that the regulation does not unduly “stifl[e] commercial speech”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 463–67 (1978) (upholding attorney ethics rules prohibiting certain forms of solicitation after concluding that “the State has a strong interest” and that its “prophylactic rule” is reasonable). *Cf. Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 222 (1999) (O’Connor, J., dissenting) (“As a regulation of the electoral process with an indirect and insignificant effect on speech, the disclosure provision should be upheld so long as it advances a legitimate government interest.”).

⁷⁸ Previous government actions characterized by the Court as imposing permissible incidental restrictions on speech have involved *prohibitions* on commercial speech, see *Friedman*, 440 U.S. at 16; *Ohralik*, 436 U.S. at 463–64, and compelled *subsidies* for commercial speech, see *Glickman*, 521 U.S. at 469.

⁷⁹ 505 U.S. 833, 884 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

⁸⁰ 138 S. Ct. at 2373. Some scholars and courts have subsequently suggested that “counseling about abortion does not fall within the Supreme Court’s definition of commercial speech.” Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724, 1738 (1995); see also, e.g., *Stuart v. Huff*, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011).

⁸¹ 138 S. Ct. 2361, 2373 (2018).

However, the Court never expressly stated whether it considered the disclosures to consist of commercial or noncommercial speech.⁸²

Similarly, in *Expressions Hair Design v. Schneiderman*, the Court rejected the application of this doctrine without expressly characterizing the government action as a commercial disclosure requirement.⁸³ In that case, the Court considered the constitutionality of a state law prohibiting sellers from imposing surcharges on customers who use credit cards.⁸⁴ The Supreme Court rejected the argument that this law primarily “regulated conduct, not speech,” concluding that the law did not merely regulate pricing, but regulated the communication of prices by prohibiting merchants from posting a cash price and an additional credit card surcharge.⁸⁵ The Court then remanded the case to the lower courts to consider the First Amendment challenges in the first instance, leaving open the question of whether the provision could be characterized as a requirement for sellers to *disclose* an item’s credit card price, rather than as a prohibition of certain speech.⁸⁶

As these cases suggest, the Court has seemed reluctant in recent years to uphold government actions as conduct-focused regulations that merely incidentally burden speech, especially in the context of compelled disclosure requirements.⁸⁷ Instead, the Court has distinguished the few cases upholding government acts as incidental restrictions and subjected disclosure requirements to further scrutiny.⁸⁸ Nonetheless, the Court has left open the possibility that commercial disclosure requirements might, in the future, qualify as permissible incidental speech regulation, if they are part of a broader regulatory scheme.⁸⁹

Regulation of Speech as Speech

If the government regulates “speech as speech,” its actions will implicate the First Amendment’s protections for freedom of speech and may trigger heightened standards of scrutiny.⁹⁰ However, the First Amendment does not prescribe a single analysis for all government actions that

⁸² For more discussion of this issue, see *infra* notes 274 to 281 and accompanying text.

⁸³ 137 S. Ct. 1144, 1151 (2017).

⁸⁴ *Id.* at 1147.

⁸⁵ *Id.* at 1150–51.

⁸⁶ *Id.* at 1151.

⁸⁷ See also, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (holding that law restricting the use of pharmacy records for marketing “imposes more than an incidental burden on protected expression” because it “is directed at certain content and is aimed at particular speakers”); *United States v. United Foods*, 533 U.S. 405, 415 (2001) (holding that “compelled contributions for advertising” may not be upheld because “there is no broader regulatory system in place”); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (holding that a statute containing a “naked prohibition against disclosures is fairly characterized as a regulation of pure speech” rather than conduct).

⁸⁸ See *NIFLA*, 138 S. Ct. 2361, 2375 (2018) (analyzing the disclosure requirement under intermediate scrutiny); *Expressions Hair Design*, 137 S. Ct. at 1151 (remanding the case for the lower court to consider the application of the *Central Hudson* and *Zauderer* standards).

⁸⁹ See, e.g., *NIFLA*, 138 S. Ct. at 2373. See also *id.* at 2376 (“[W]e do not question the legality of health and safety warnings long considered permissible . . .”). Cf., e.g., *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, Nos. 17-6151/6183, 2019 U.S. App. LEXIS 9945, at *52 (6th Cir. Apr. 4, 2019) (upholding state informed consent requirement because it “incidentally burdens speech only as part of Kentucky’s regulation of professional conduct” and therefore “is not subject to any heightened scrutiny with respect to the doctors’ First Amendment rights”).

⁹⁰ *NIFLA*, 138 S. Ct. at 2374. By contrast, as discussed above, *supra* notes 76 and 77 and accompanying text, the Court has sometimes said that regulatory schemes that only incidentally burden speech do not implicate the First Amendment at all, and has sometimes said that they do implicate the First Amendment but trigger a relaxed standard of review.

potentially infringe on free speech protections.⁹¹ Instead, a court’s review will depend on the nature of both the government action and the speech itself.⁹² This section first introduces the three possible levels of scrutiny a court might use to analyze a speech regulation and then explains their application to compelled commercial disclosures in more detail.

Three Levels of Scrutiny

In the context of commercial disclosure requirements, there are three primary categories of First Amendment analysis that may be relevant. First, as a general rule, government actions that compel speech are usually subject to strict scrutiny.⁹³ To survive strict scrutiny, the government must show that the challenged action is “narrowly tailored to serve compelling state interests.”⁹⁴ Laws are unlikely to meet this “stringent standard.”⁹⁵ Second, as discussed above, government actions regulating commercial speech generally receive only intermediate scrutiny.⁹⁶ The intermediate scrutiny standard, pursuant to *Central Hudson*, requires a “substantial” state interest and requires the government to prove that the law “directly advances” that interest and “is not more extensive than is necessary to serve that interest.”⁹⁷ This standard is less demanding than strict scrutiny, but laws may still be struck down under this test.⁹⁸

The final and most lenient category—one specific to commercial disclosure requirements—comes from a 1985 case, *Zauderer v. Office of Disciplinary Counsel*.⁹⁹ In that case, the Supreme Court considered the constitutionality of state disciplinary rules regulating attorney advertising.¹⁰⁰ As relevant here, the rules required advertisements referring to contingent-fee rates to disclose how the fee would be calculated.¹⁰¹ An attorney who had been disciplined by the state for violating these provisions argued that this disclosure requirement was unconstitutional because the state failed to meet the standards set out in *Central Hudson*.¹⁰² The Court acknowledged that it had previously held that *prohibitions* on commercial speech were subject to heightened scrutiny under *Central Hudson*,¹⁰³ and that it had “held that in some instances compulsion to speak may be

⁹¹ *E.g.*, *Lowery v. Euverard*, 497 F.3d 584, 587 (6th Cir. 2007) (“The contour of First Amendment protection given to speech depends upon the context.”).

⁹² *See, e.g.*, *Sorrell v. IMS Health Inc.* 564 U.S. 552, 563–71 (2011) (considering the proper analysis to apply to a state law restricting the use of certain pharmacy records).

⁹³ *See, e.g.*, *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 798 (1988).

⁹⁴ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁹⁵ *NIFLA*, 138 S. Ct. 2361, 2371 (2018). *See also, e.g.*, Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 205 (2018) (“Only twice in our nation’s history has the Supreme Court upheld a speech restriction under strict scrutiny . . .”).

⁹⁶ *See, e.g.*, *Fla. Bar v. Went for It*, 515 U.S. 618, 623 (1995).

⁹⁷ *Central Hudson*, 447 U.S. 557, 566 (1980).

⁹⁸ *See, e.g.*, *NIFLA*, 138 S. Ct. at 2375.

⁹⁹ 471 U.S. 626, 651 (1985).

¹⁰⁰ *Id.* at 629.

¹⁰¹ *Id.* at 633.

¹⁰² *Id.* at 650.

¹⁰³ Subsequent cases in the federal courts of appeals have followed this distinction between prohibitions on commercial speech and disclosures of commercial speech. *See, e.g.*, *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 507 (D.C. Cir. 2016) (“We view disclosure rules far less skeptically than we do bans on speech.”); *Dwyer v. Cappell*, 762 F.3d 275, 280 (3d Cir. 2014) (“There are material differences between ‘outright prohibitions’ on speech . . . and ‘disclosure requirements’ Recognizing these differences, the Supreme Court has created different frameworks once it is determined whether a regulation is a restriction or a disclosure requirement.” (quoting *Zauderer*, 471 U.S. at 650)); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 640 (6th Cir. 2010) (“[T]he Supreme Court [in *Zauderer*] articulated a

as violative of the First Amendment as prohibitions on speech.”¹⁰⁴ “But,” the Court said, “[t]he interests at stake in this case are not of the same order as those” implicated in cases involving the compulsion of *noncommercial* speech.¹⁰⁵

Instead, the Court noted that the state’s provision only involved “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.”¹⁰⁶ In this commercial context, the Court said that the attorney’s “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal,” noting that in previous cases it had stated that states might “appropriately require[]” warnings or disclaimers “in order to dissipate the possibility of consumer confusion or deception.”¹⁰⁷ Rather than applying heightened scrutiny, the Court held that under these circumstances, “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.”¹⁰⁸

The *Zauderer* Court did warn, however, that commercial disclosure requirements raise First Amendment concerns, observing that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”¹⁰⁹ But the Court rejected the contention that the disclosure requirement before it was unduly burdensome.¹¹⁰ Instead, the Court concluded that “[t]he State’s position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client’s liability for costs is reasonable enough to support a requirement that information regarding the client’s liability for costs be disclosed.”¹¹¹ Although the state had not submitted evidence that clients were in fact being misled, the Court stated that “the possibility of deception” was “self-evident,” making the state’s “assumption that substantial numbers of potential clients would be . . . misled” regarding the terms of payment reasonable.¹¹²

Applying *Zauderer*

Zauderer sets out the most lenient of the three standards of review discussed above,¹¹³ and, as a result, a commercial disclosure requirement is most likely to be upheld if it is reviewed under the

more lenient standard than the *Central Hudson* test to use when disclosure requirements, as opposed to outright prohibitions on speech, are at issue.”).

¹⁰⁴ 471 U.S. at 650.

¹⁰⁵ *Id.* at 651.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)) (internal quotation mark omitted). The Court had said that while the government may regulate misleading advertising, “it seems peculiar” to address this problem through a *prohibition* on information—“to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision.” *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 (1977). Instead, the Court has observed that “the preferred remedy is more disclosure, rather than less.” *Id.* at 375. *See also*, *e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (stating that the First Amendment forbids the “highly paternalistic approach” of prohibiting “the flow of prescription drug price information”).

¹⁰⁸ 471 U.S. at 651.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 653 n.15.

¹¹¹ *Id.* at 653.

¹¹² *Id.* at 652.

¹¹³ *See* 471 U.S. at 651. Several judges, however, have concluded that “*Zauderer* is best read simply as an application

rubric of that case. However, the *Zauderer* standard of review has been interpreted to apply only to certain types of disclosure requirements.¹¹⁴ As described by the Court and discussed above, the state regulation upheld in *Zauderer* required “purely factual and uncontroversial information about the terms under which [attorneys’] services [would] be available,” and the provision was “reasonably related to the State’s interest in preventing deception of consumers.”¹¹⁵ Subsequent cases in both the Supreme Court and the lower courts have tested the extent to which this reasonableness review applies outside of the specific factual circumstances presented in *Zauderer*.

Supreme Court Precedent

The Supreme Court has decided whether to apply *Zauderer* review to government acts compelling commercial speech in three significant cases.¹¹⁶ First, in *United States v. United Foods*, decided in 2001, the Court invalidated a federal statute that compelled “handlers of fresh mushrooms to fund advertising for the product.”¹¹⁷ *United Foods* thus involved a compelled subsidy, rather than a compelled disclosure.¹¹⁸ The Court concluded that these statutorily compelled subsidies for government-favored speech implicated the First Amendment¹¹⁹ and that “mandat[ing] support” from objecting parties was “contrary to . . . First Amendment principles.”¹²⁰ The Court held that *Zauderer* was inapplicable, noting that in the case before it,

of *Central Hudson*, not a different test altogether.” *AMI*, 760 F.3d 18, 33 (D.C. Cir. 2014) (Kavanaugh, J., concurring); accord, e.g., *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005). As then-Judge Kavanaugh explained, “*Zauderer* tells us what *Central Hudson*’s ‘tailored in a reasonable manner’ standard means in the context of compelled commercial disclosures: The disclosure must be purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government’s interest.” *AMI*, 760 F.3d at 33.

¹¹⁴ See, e.g., *NIFLA*, 138 S. Ct. 2361, 2372 (2018).

¹¹⁵ *Zauderer*, 471 U.S. at 651.

¹¹⁶ In addition to the three cases discussed here, the Court also discussed *Zauderer* in *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994). The state regulation challenged in that case was treated as a prohibition on speech: the state had disciplined an attorney who held herself out as a Certified Public Accountant and Certified Financial Planner even though she did not meet state standards to use those designations. *Id.* at 139–42. The state argued that it could prohibit this misleading commercial speech. *Id.* at 143, 144. Consequently, the Court analyzed the restriction under *Central Hudson*, ultimately striking down the state regulation. *Id.* at 142–43. However, the state noted that it might have allowed the use of the designation had it been accompanied by a statutorily specified disclaimer, apparently invoking *Zauderer*. See *id.* at 146. The Court concluded that, given the state of the record on appeal, the disclaimer requirement was not constitutional, in part because it essentially acted as a prohibition. See *id.* at 146–47. It required so much “detail” that it “effectively rule[d] out” use of the specialist designations. *Id.* The Court also noted, however, that it appeared that the attorney would not have been able to use these designations even if she had included this disclaimer. *Id.* at 147 n.11.

¹¹⁷ 533 U.S. 405, 408 (2001).

¹¹⁸ See *id.* Compelled subsidies may be governed by a different line of cases than the commercial speech cases. See, e.g., *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474 n.18 (1997) (“The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech.”). See also, e.g., Pomeranz, *supra* note 21, at 178–81 (discussing how *United Foods* compares to “straightforward commercial speech cases” and arguing that *United Foods* illustrates the emergence of “a clear distinction between the government’s ability to compel facts and beliefs under the commercial speech doctrine”).

¹¹⁹ 533 U.S. at 411.

¹²⁰ *Id.* at 413. The Court, while acknowledging that it had previously upheld a federal scheme requiring California fruit producers to fund generic advertising for California fruits, in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469–70 (1997), concluded that, unlike the scheme upheld in *Glickman*, the “principal object of the regulatory scheme” in *United Foods* was the advertising itself. *United Foods*, 533 U.S. at 411–12. In *Glickman*, by contrast, “the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy.” *Id.* at 411.

there was “no suggestion . . . that the mandatory assessments . . . are somehow necessary to make voluntary advertisements nonmisleading for consumers.”¹²¹

By contrast, the Court applied *Zauderer* in a 2010 decision, *Milavetz, Gallop & Milavetz, P.A. v. United States*, another case concerning attorney advertising.¹²² In that case, the Court considered an attorney’s First Amendment challenges to a federal statute that required “debt relief agencies” to “make certain disclosures in their advertisements.”¹²³ “Debt relief agencies” was a statutorily defined term covering some attorneys who provided clients with bankruptcy assistance.¹²⁴ Among other things, agencies advertising “bankruptcy assistance services or . . . the benefits of bankruptcy” were required to disclose that they were “a debt relief agency” that “help[ed] people file for bankruptcy relief under the Bankruptcy Code.”¹²⁵ Rejecting the challenger’s contention that *Central Hudson*’s intermediate scrutiny governed the disclosure requirement, the Court held instead that “the less exacting scrutiny described in *Zauderer*” governed its review.¹²⁶

The Court concluded that the provision “share[d] the essential features of the rule at issue in *Zauderer*.”¹²⁷ The disclosure requirement was “intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs.”¹²⁸ Further, the law required the covered entities to provide “only an accurate statement identifying the advertiser’s legal status and the character of the assistance provided.”¹²⁹ As in *Zauderer*, where the “possibility of deception” was “self-evident,” the Court was not troubled by the lack of evidence that current advertisements were misleading.¹³⁰ Instead, “evidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost” was “adequate.”¹³¹ The Court ultimately upheld the disclosure requirement as “reasonably related to the [Government’s] interest in preventing deception of consumers.”¹³²

Most recently, in 2018, the Court considered the application of *Zauderer* in *NIFLA*.¹³³ That case involved two distinct disclosure requirements imposed by California’s Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act), which regulated crisis pregnancy centers.¹³⁴ First, the FACT Act required any “licensed covered facility” to notify

¹²¹ *United Foods*, 533 U.S. at 416.

¹²² 559 U.S. 229, 249 (2010).

¹²³ *Id.* at 232.

¹²⁴ *Id.*

¹²⁵ *Id.* at 233 (quoting 11 U.S.C. § 528).

¹²⁶ *Id.* at 249.

¹²⁷ *Id.* at 250.

¹²⁸ *Id.*

¹²⁹ *Id.* The Court further noted that the provision did “not prevent debt relief agencies like *Milavetz* from conveying any additional information.” *Id.*; see also *id.* at 251–52 (noting flexibility to provide more information).

¹³⁰ *Id.* at 251 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). Cf. *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 96–97 (2d Cir. 2010) (reviewing First Amendment challenges to the same law under *Zauderer* and concluding that there was “considerable record evidence” that “confusion and deception were sufficiently widespread to undermine the fairness and efficacy of the federal bankruptcy system”).

¹³¹ 559 U.S. at 251.

¹³² *Id.* at 253 (quoting *Zauderer*, 471 U.S. at 651) (internal quotation marks omitted) (alteration in original).

¹³³ 138 S. Ct. 2361, 2372, 2377 (2018).

¹³⁴ *Id.* at 2368.

clients that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women,” and give the telephone number of the local social services office.¹³⁵ Second, any “*unlicensed* covered facility” had to provide notice that the “facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”¹³⁶

The Court first held that *Zauderer*’s reasonableness review did not apply to the licensed notice.¹³⁷ In the Court’s view, the notice was “not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’”¹³⁸ The Court explained that the disclosure requirement “in no way relate[d] to the services that licensed clinics provide.”¹³⁹ The Court said that instead, the law “require[d] these clinics to disclose information about *state*-sponsored services—including abortion, anything but an ‘uncontroversial’ topic.”¹⁴⁰ The Court ultimately held that the licensed notice could not “survive even intermediate scrutiny.”¹⁴¹

Turning to the unlicensed notice, the Court determined that it did not need to “decide whether the *Zauderer* standard applies to the unlicensed notice” because the disclosure requirement failed scrutiny even under *Zauderer*.¹⁴² The Court said that “under *Zauderer*, a disclosure requirement cannot be ‘unjustified or unduly burdensome.’”¹⁴³ The Court interpreted this statement to require that the government prove it was seeking “to remedy a harm that is ‘potentially real, not purely hypothetical.’”¹⁴⁴ Based on the record on appeal, the Court found that California’s stated interest in “ensuring that pregnant women in California know when they are getting medical care from licensed professionals” was “purely hypothetical.”¹⁴⁵ Further, the Court held in the alternative that “[e]ven if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burden[ed] protected speech” by requiring a government statement to be placed in all advertisements, regardless of an advertisement’s length or content.¹⁴⁶ The Court also expressed concern that the unlicensed notice “target[ed]” certain speakers in imposing those burdens by focusing on “facilities that primarily provide ‘pregnancy-related’ services.”¹⁴⁷

Defining a *Zauderer* Disclosure

While the Supreme Court has emphasized that *Zauderer*’s reasonableness review is available only for certain types of compelled commercial disclosures, lower courts have disagreed on the precise

¹³⁵ CAL. HEALTH & SAFETY CODE § 123472(a)(1) (emphasis added). This disclosure had to be posted on site or provided directly to clients either in printed or digital form. *Id.* § 123472(a).

¹³⁶ *Id.* § 123472(b) (emphasis added). This disclosure had to be provided “on site and in any print and digital advertising materials.” *Id.*

¹³⁷ 138 S. Ct. at 2372.

¹³⁸ *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)) (alteration in original).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2375.

¹⁴² *Id.* at 2377.

¹⁴³ *Id.* (quoting *Zauderer*, 471 U.S. at 651).

¹⁴⁴ *Id.* (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994)). As discussed *supra* note 116, in *Ibanez*, the Court had evaluated a prohibition on commercial speech under *Central Hudson*. 512 U.S. at 143.

¹⁴⁵ *NIFLA*, 138 S. Ct. at 2377 (quoting *Ibanez*, 512 U.S. at 146) (quotation marks omitted).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2378 (quoting CAL. HEALTH & SAFETY CODE § 123471(b)).

circumstances required to apply *Zauderer*. A few requirements have emerged in the case law.¹⁴⁸ First, courts agree that to qualify for review under *Zauderer*, a commercial disclosure requirement must compel speech that is “factual and uncontroversial.”¹⁴⁹ Next, the disclosure must be related to the goods or services the speaker provides.¹⁵⁰ Finally, courts have disagreed on the type of government interest that may be asserted to justify a *Zauderer*-eligible regulation: while *Zauderer* itself approved of the challenged disclosure requirement after concluding that the state was permissibly seeking to “prevent[] deception of consumers,”¹⁵¹ lower courts have sometimes applied *Zauderer* review even where the regulation is not specifically intended to prevent deception.¹⁵²

Before discussing the particulars of these requirements, it is worth noting that these elements are related to the Court’s overarching justifications for affording the government more leeway to regulate commercial speech.¹⁵³ The seminal Supreme Court case establishing that commercial speech is protected by the First Amendment, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, tied commercial speech’s value to its ability to inform consumers.¹⁵⁴ Critically, the Court said that governments could continue to ban false or misleading commercial speech,¹⁵⁵ noting in another case that “the public and private benefits from commercial speech derive from confidence in its accuracy and reliability.”¹⁵⁶ It was against this background that the Court in *Zauderer* concluded that the provision requiring the disclosure of factual information about contingent fee arrangements did not involve First Amendment interests “of the same order as those” involved in other cases involving the compulsion of *noncommercial* speech.¹⁵⁷ Accordingly, the state acted reasonably by prescribing that attorneys had to include in their advertising “purely factual and uncontroversial information about the terms under which [their] services [would] be available.”¹⁵⁸

¹⁴⁸ In addition to the requirements discussed in this section, at least one federal court of appeals has additionally held that *Zauderer* applies only to disclosures that are required in the context of voluntary commercial advertising. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015).

¹⁴⁹ *Zauderer*, 471 U.S. at 651; *see also, e.g., NIFLA*, 138 S. Ct. at 2372; *AMI*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) [hereinafter *NYSRA*].

¹⁵⁰ *See NIFLA*, 138 S. Ct. at 2372.

¹⁵¹ *Zauderer*, 471 U.S. at 651.

¹⁵² *E.g., AMI*, 760 F.3d at 22; *NYSRA*, 556 F.3d at 133. Closely related to this concern is the question of whether the speech affected by the disclosure requirement must be misleading, as the Court has sometimes suggested. *See United States v. United Foods*, 533 U.S. 405, 416 (2001); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). These two issues are discussed together, *infra*, “Intended to Prevent Deception.”

¹⁵³ *See, e.g., Pomeranz, supra* note 21, at 177.

¹⁵⁴ 425 U.S. 748, 763–64, 770 (1976).

¹⁵⁵ *Id.* at 771. In the course of this discussion, the Court said that “[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake.” *Id.* The Court has subsequently clarified that, outside of the commercial context, at least some false statements are protected by the First Amendment, possibly casting doubt on this aspect of the Court’s ruling. *United States v. Alvarez*, 567 U.S. 709, 718 (2012). In particular, in *Alvarez*, the Court characterized the statements in *Virginia Board of Pharmacy* regarding the reduced value of false speech as relating to the discussion of fraud, and not to false statements unassociated with “some . . . legally cognizable harm.” *See id.* at 719, 723.

¹⁵⁶ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

¹⁵⁷ *Zauderer*, 471 U.S. at 651.

¹⁵⁸ *Id.*

Factual and Uncontroversial

The first element for a commercial disclosure requirement to be eligible for *Zauderer* review is that the government regulation must require the disclosure of “factual and uncontroversial” information.¹⁵⁹ The two parts of *Zauderer*’s initial requirement are often evaluated as one, although courts have sometimes pointed out that “factual” and “uncontroversial,” logically, connote two different things.¹⁶⁰ Viewing the two words together, some have characterized the “factual and uncontroversial” requirement as distinguishing regulations that compel the disclosure of facts from those that compel individuals to state opinions or ideologies.¹⁶¹

As discussed, the Supreme Court has said that the value of commercial speech largely lies in its ability to inform consumers.¹⁶² And in *Zauderer*, the Court emphasized that because protection for commercial speech is justified by its informational value, the attorney challenging the disclosure requirement had a “minimal” First Amendment interest “in *not* providing any particular factual information in his advertising.”¹⁶³ As the Second Circuit¹⁶⁴ has explained:

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.¹⁶⁵

In this vein, the Supreme Court upheld disclosure requirements regarding the nature of contingent fee arrangements in *Zauderer*¹⁶⁶ and statements clarifying the nature of the bankruptcy-related assistance provided by debt relief agencies in *Milavetz*.¹⁶⁷ Lower courts have approved as “factual and uncontroversial” within the meaning of *Zauderer* a variety of other commercial disclosure

¹⁵⁹ *Zauderer*, 471 U.S. at 651. Cf. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (Stranch, J.) (majority opinion) (arguing that *Zauderer* does not apply only to purely factual and noncontroversial disclosures, but applies if a disclosure includes “‘factual information’ and ‘accurate information’” (quoting *Zauderer*, 471 U.S. at 651)); *id.* at 560 (holding that pictures can be “accurate and factual” disclosures under *Zauderer*).

¹⁶⁰ *See, e.g.*, *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 528 (D.C. Cir. 2015) (“‘[U]ncontroversial,’ as a legal test, must mean something different than ‘purely factual.’”). Cf., *e.g.*, *CTIA – The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017) (“‘[U]ncontroversial’ in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience.”).

¹⁶¹ *See, e.g.*, *Corbin*, *supra* note 10, at 1287. Cf. *Nat’l Ass’n of Mfrs.*, 800 F.3d at 528 (“Perhaps the distinction is between fact and opinion. But that line is often blurred, and it is far from clear that all opinions are controversial.”); *id.* at 530 (noting that prior opinion reviewing the constitutionality of the disclosure under *Zauderer* had concluded that the disclosure “was hardly ‘factual and *non-ideological*’” (quoting *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014)) (emphasis added)).

¹⁶² *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763–64, 770 (1976).

¹⁶³ *Zauderer*, 471 U.S. at 651 (emphasis added).

¹⁶⁴ For purposes of brevity, references to a particular circuit in this memorandum (e.g., the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Second Circuit).

¹⁶⁵ *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001).

¹⁶⁶ *Zauderer*, 471 U.S. at 651.

¹⁶⁷ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (“[T]he disclosures entail only an accurate statement identifying the advertiser’s legal status and the character of the assistance provided[.]”).

requirements, including regulations requiring the disclosure of: country-of-origin information for meat;¹⁶⁸ calorie information at restaurants;¹⁶⁹ the fact that products contain mercury;¹⁷⁰ and textual and graphic warnings about the health risks of tobacco products.¹⁷¹

By contrast, in a 2015 opinion, the D.C. Circuit concluded that a federal regulation requiring firms to disclose whether their products used “conflict minerals” that originated “in the Democratic Republic of the Congo or an adjoining country”¹⁷² could *not* be characterized as factual and uncontroversial.¹⁷³ The court said that “[t]he label ‘[not] conflict free’ is a metaphor that conveys moral responsibility for the Congo war. . . . An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. . . . By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.”¹⁷⁴

Similarly, the Seventh Circuit, in a 2006 opinion, held that disclosure requirements in a state law regulating sexually explicit video games were not “factual and uncontroversial” as required for *Zauderer* to apply.¹⁷⁵ In relevant part, the law required “video game retailers to place a four square-inch label with the numerals ‘18’ on any ‘sexually explicit’ video game,” and to post signs and provide brochures “explaining the video game rating system.”¹⁷⁶ The court held first that the sticker “ultimately communicates a subjective and highly controversial message—that the game’s content is sexually explicit.”¹⁷⁷ Similarly, the panel concluded that “the message” communicated by the signs and brochures was “neither purely factual nor uncontroversial” because it was “intended to communicate that any video games in the store can be properly judged pursuant to the standards described in the . . . ratings.”¹⁷⁸

As mentioned above, some courts have treated “factual” and “uncontroversial” as two distinct requirements.¹⁷⁹ But at times, courts have struggled to define “controversial,” standing alone.¹⁸⁰ The D.C. Circuit has suggested that controversial must mean that a disclosure “communicates a message that is controversial for some reason other than dispute about simple factual accuracy.”¹⁸¹ One trial court interpreting a decision of the Second Circuit suggested that “it is the

¹⁶⁸ *AMI*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc).

¹⁶⁹ *NYSRA*, 556 F.3d 114, 134 (2d Cir. 2009).

¹⁷⁰ *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

¹⁷¹ *See, e.g., United States v. Philip Morris USA Inc.*, 855 F.3d 321, 328 (D.C. Cir. 2017); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (Stranch, J.) (majority opinion).

¹⁷² 15 U.S.C. § 78m(p)(1)(A).

¹⁷³ *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).

¹⁷⁴ *Id.* (quoting *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014)) (alteration in original).

¹⁷⁵ *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 651–53 (7th Cir. 2006).

¹⁷⁶ *Id.* at 643.

¹⁷⁷ *Id.* at 652; *see also id.* (“The State’s definition of this term is far more opinion-based than the question of whether a particular chemical is within any given product. Even if one assumes that the State’s definition of ‘sexually explicit’ is precise, it is the State’s definition—the video game manufacturer or retailer may have an entirely different definition of this term.”).

¹⁷⁸ *Id.* at 652–53. The court also noted that “the signs communicate endorsement of ESRB, a non-governmental third party whose message may be in conflict with that of any particular retailer,” concluding that this ran afoul of the Supreme Court’s decision in *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 13–17 (1986). *Entm’t Software Ass’n*, 469 F.3d at 653.

¹⁷⁹ *See, e.g., Nat’l Ass’n of Mfrs.*, 800 F.3d at 528.

¹⁸⁰ *See, e.g., id.* at 528–29 (considering and rejecting various definitions of controversial).

¹⁸¹ *AMI*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc); *accord Nat’l Ass’n of Mfrs.*, 800 F.3d at 528.

nature of the regulation of compelled speech that controls, not the nature of the legislative debate that gave rise to its enactment.”¹⁸² That court then noted that other courts had equated controversial messages with disclosures that are “opinion-based.”¹⁸³ Courts have disagreed about whether a disclosure may be characterized as “controversial” because it is “inflammatory” or “evoke[s] an emotional response.”¹⁸⁴ In *NIFLA*, the Supreme Court struck down the licensed notice after noting that the required disclosures related to “abortion, anything but an ‘uncontroversial’ topic,” although it did not further explain when a topic is “uncontroversial” for purposes of *Zauderer*.¹⁸⁵

Related to Speaker’s Services

Second, to be eligible for review under *Zauderer*, a commercial disclosure requirement must be related to the services provided by the speaker.¹⁸⁶ In *Zauderer* itself, the Court had noted that the disputed disclosure required the attorney to provide information in his advertising “about the terms under which his services will be available.”¹⁸⁷ By and large, lower courts, at least prior to *NIFLA*, had not treated this relationship to the speaker’s services as a distinct requirement.¹⁸⁸ The Court in *NIFLA*, however, said that this was a necessary prerequisite for *Zauderer* review and held in that case that the notice requirement for licensed clinics at issue was not “relate[d] to the services that licensed clinics provide” because it instead provided information “about state-sponsored services.”¹⁸⁹

Intended to Prevent Deception

Judges have disagreed on whether there exists a third requirement for *Zauderer* review. In *Zauderer* itself, the Supreme Court noted that the disclosure requirements at issue in that case were intended to “prevent[] deception of customers.”¹⁹⁰ Further, when applying *Zauderer* review to the bankruptcy-related disclosures at issue in *Milavetz*, the Court stated that the disclosures were “intended to combat the problem of inherently misleading commercial advertisements.”¹⁹¹

¹⁸² *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 629 (D. Vt. 2015) (discussing *Evergreen Ass’n v. New York City*, 740 F.3d 233 (2d Cir. 2014)).

¹⁸³ *Id.* (quoting *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006)) (internal quotation marks omitted). *See also, e.g., Pomeranz, supra* note 21, at 179 (arguing that there “is a clear distinction between the government’s ability to compel facts and beliefs under the commercial speech doctrine”).

¹⁸⁴ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012) (holding that images that “are unabashed attempts to evoke emotion” “cannot rationally be viewed as pure attempts to convey information to consumers” and “fall outside the ambit of *Zauderer*”), *overruled on other grounds by AMI*, 760 F.3d at 22–23; *but see Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) (Stranch, J.) (majority opinion) (“[W]e vigorously disagree with the underlying premise that a disclosure that provokes a visceral response must fall outside *Zauderer*’s ambit. Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions.”).

¹⁸⁵ 138 S. Ct. 2361, 2372 (2018).

¹⁸⁶ *See id.*

¹⁸⁷ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

¹⁸⁸ For example, the full D.C. Circuit acknowledged that “to match *Zauderer* logically, the disclosure mandated must relate to the good or service offered by the regulated party,” but the court declined to define “the precise scope or character of that relationship.” *AMI*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc).

¹⁸⁹ 138 S. Ct. at 2372.

¹⁹⁰ *Zauderer*, 471 U.S. at 651.

¹⁹¹ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). Similarly, in a case decided prior to *Zauderer*, the Supreme Court said that the government has greater authority to regulate commercial speech when it is

Perhaps most notably, in *United Foods*, the Court explained its decision not to apply *Zauderer* by noting that there was “no suggestion” that the compelled subsidies at issue in that case were “somehow necessary to make voluntary advertisements nonmisleading for consumers.”¹⁹²

The Supreme Court’s decisions applying *Zauderer* have thus suggested that one factor in deciding whether to apply this “reasonably related” review is whether the targeted commercial speech is misleading,¹⁹³ or whether the state’s interest in requiring the disclosure is to prevent “consumer confusion or deception.”¹⁹⁴ Nonetheless, the Court has not squarely held that this is a necessary condition for *Zauderer* review,¹⁹⁵ and several lower courts have rejected this position.¹⁹⁶ The D.C. Circuit concluded that *Zauderer*’s justification characterizing “the speaker’s interest in opposing forced disclosure of such information as ‘minimal’ seems inherently applicable beyond” the state’s “interest in remedying deception.”¹⁹⁷ The Second Circuit has also held that *Zauderer* review applies more broadly.¹⁹⁸ In rejecting a litigant’s argument that the Supreme Court’s decision in *United Foods* limited *Zauderer* only to laws intended to prevent consumer deception, the Second Circuit said that *United Foods* “simply distinguishes *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.”¹⁹⁹

***Zauderer* Review**

If a commercial disclosure requirement involves only “purely factual and uncontroversial information” about the goods or services being sold, and is therefore eligible for review under *Zauderer*, then it will be constitutional so long as the disclosure requirement is “reasonably related” to the government’s interest.²⁰⁰ This reasonableness review is relatively lenient, especially as compared with the standards that would otherwise apply to compelled speech.²⁰¹

“potentially misleading,” as compared to not misleading communications. *See In re R.M.J.*, 455 U.S. 191, 203 (1982).

¹⁹² *United States v. United Foods*, 533 U.S. 405, 416 (2001).

¹⁹³ *See id.*

¹⁹⁴ *See Zauderer*, 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. at 201) (internal quotation mark omitted).

¹⁹⁵ In this regard, it is perhaps notable that the majority opinion in *NIFLA*, 138 S. Ct. 2361, 2372, 2376–77 (2018), did *not* use this factor as an additional reason to reject the application of *Zauderer*. By contrast, the dissent argued that the state had asserted “the type of informational interest that *Zauderer* encompasses” and noted that the majority did not dispute this point. *Id.* at 2389 (Breyer, J., dissenting).

¹⁹⁶ *See, e.g.*, *CTIA – The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017); *AMI*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc); *NYSRA*, 556 F.3d 114, 132 (2d Cir. 2009); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., and Dyk, J., concurring) (majority opinion); *accord, e.g.*, Pomeranz, *supra* note 21, at 177–78; Timothy J. Straub, *Fair Warning? The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 *FORDHAM URB. L.J.* 1201, 1259 (2013). *But see* *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 490–91 (1997) (Souter, J., dissenting) (“*Zauderer* . . . reaffirmed a long-standing preference for disclosure requirements over outright bans But however long the pedigree of such mandates may be, and however broad the government’s authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.”); *AMI*, 760 F.3d at 42 (Brown, J., dissenting) (“If, when the opinion was issued, there was any doubt *Zauderer* only applied to mandates targeting deception, that doubt dissipates given the Supreme Court’s dogged adherence to this singular rationale.”).

¹⁹⁷ *AMI*, 760 F.3d at 22.

¹⁹⁸ *NYSRA*, 556 F.3d at 133; *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

¹⁹⁹ *NYSRA*, 556 F.3d at 133.

²⁰⁰ *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

²⁰¹ *See, e.g.*, Corbin, *supra* note 10, at 1291. *See also, e.g.*, *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., and Dyk, J., concurring) (majority opinion) (holding that no “extensive First Amendment analysis” is required where the challenged provision involves “simply routine disclosure of economically significant

But, as emphasized in *NIFLA*,²⁰² even under *Zauderer*, “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”²⁰³ Lower courts had previously come to different conclusions regarding whether “unjustified or unduly burdensome” presented an *additional* inquiry, to be conducted separately from the reasonableness inquiry otherwise prescribed by *Zauderer*,²⁰⁴ or whether instead this inquiry was subsumed by the “reasonably related” inquiry.²⁰⁵ *NIFLA* did not entirely resolve this issue, although it did frame its analysis using the “unjustified or unduly burdensome” language rather than the language of rational basis review.²⁰⁶

Government Interest

In *Zauderer*, the Supreme Court upheld the contingent fee disclosure after concluding that the requirement was “reasonably related to the State’s interest in preventing deception of consumers.”²⁰⁷ But as noted above, lower courts have largely concluded that *Zauderer*’s reasonableness review may govern the analysis even when the government asserts an interest other than preventing consumer deception.²⁰⁸ The D.C. Circuit has, so far, largely declined to articulate a clear standard for “what type of interest might suffice.”²⁰⁹ That court did conclude in one case that where the government’s interest was “substantial under *Central Hudson*’s standard,” that would qualify as a sufficient interest under *Zauderer*.²¹⁰ Perhaps taking a different approach, in a case upholding a disclosure requirement under *Zauderer*, the Second Circuit described the state’s interest as “legitimate and significant.”²¹¹

Other than “the interest in correcting misleading or confusing commercial speech,”²¹² the federal courts of appeals have upheld commercial disclosure requirements where the government

information designed to forward ordinary regulatory purposes”).

²⁰² 138 S. Ct. 2361, 2376–78 (2018).

²⁰³ *Zauderer*, 471 U.S. at 651.

²⁰⁴ See, e.g., *Cigar Ass’n of Am. v. FDA*, 315 F. Supp. 3d 143, 167 (D.D.C. 2018). See also, e.g., *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 734 (9th Cir. 2017) (stating that a disclosure requirement will be “‘unduly burdensome’ when [it] ‘effectively rules out’ the speech it accompanies,” and evaluating this separately from whether the disclosure is reasonably related to the state’s interest (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994))).

²⁰⁵ See, e.g., *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 566–67 (6th Cir. 2012) (Stranch, J.) (majority opinion).

²⁰⁶ See 138 S. Ct. at 2377. In addition, in evaluating whether the challenged provision was “unjustified or unduly burdensome,” the Court drew from prior cases that had applied *Central Hudson* review to restrictions on commercial speech: *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994), and *In re R.M.J.*, 455 U.S. 191, 203 (1982). The fact that the Court cited cases applying this heightened standard of review and analyzed the disputed disclosure requirement under standards that the Court had previously applied to analyze *prohibitions* on speech may provide further evidence that the “unjustified or unduly burdensome” standard is a distinct inquiry from whether a requirement is reasonably related to the government’s interests—or it may just evidence a stricter approach to the same standard. See *NIFLA*, 138 S. Ct. at 2377–78.

²⁰⁷ *Zauderer*, 471 U.S. at 651.

²⁰⁸ See *supra* note 196.

²⁰⁹ *AMI*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc).

²¹⁰ *Id.* See also *NYSRA*, 556 F.3d 114, 134 (2d Cir. 2009) (noting that the litigant had conceded that the government’s interest was “substantial” and that the government prevailed under rational basis review); *United States v. Wenger*, 427 F.3d 840, 849, 850 (10th Cir. 2005) (characterizing *Zauderer* as a special application of *Central Hudson* and approving of regulation where Congress stated a “substantial” interest).

²¹¹ *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

²¹² *AMI*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc). See also, e.g., *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628,

asserted interests in food safety,²¹³ preventing obesity,²¹⁴ “protecting human health and the environment from mercury poisoning,”²¹⁵ and in protecting health benefit providers “from questionable . . . business practices.”²¹⁶ By contrast, the Second Circuit held in *International Dairy Foods Association v. Amestoy* that “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement.”²¹⁷

In *NIFLA*, the Supreme Court indicated that under *Zauderer*, the government must assert an interest that is “more than ‘purely hypothetical.’”²¹⁸ As discussed above,²¹⁹ the State of California’s justification for the notice requiring unlicensed clinics to disclose that they were unlicensed was to “ensur[e] that pregnant women in California know when they are getting medical care from licensed professionals.”²²⁰ The Court concluded that the state had “point[ed] to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals.”²²¹ *NIFLA*’s requirement that the government provide evidence supporting an asserted interest differs from the Court’s approach in *Zauderer* itself and in *Milavetz*.²²² In both *Zauderer* and *Milavetz*, the Court rejected arguments that the government had failed to present sufficient evidence to support its interest in the disclosure requirement, concluding that in both of those cases, “the possibility of deception” in the regulated advertisements was “self-evident.”²²³ Although the standard is not entirely clear, it is possible that in future cases the Court could conclude again that a particular advertisement is so obviously

642 (6th Cir. 2010) (upholding milk labeling requirements); *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 96 (2d Cir. 2010) (upholding disclosure requirements for attorneys qualifying as “debt relief agencies”).

²¹³ *AMI*, 760 F.3d at 24–25 (upholding country-of-origin labeling).

²¹⁴ *NYSRA*, 556 F.3d at 134 (upholding disclosure of calorie information). *See also, e.g.*, *CTIA – The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1119 (9th Cir. 2017) (upholding disclosure of cell phone radiation in the interest of protecting “the health and safety of consumers”).

²¹⁵ *Nat’l Elec. Mfrs. Ass’n*, 272 F.3d at 115 (upholding labeling for products containing mercury).

²¹⁶ *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., and Dyk, J., concurring) (majority opinion) (upholding requirements that pharmacy benefit managers must disclose conflicts of interest and certain financial arrangements).

²¹⁷ 92 F.3d 67, 73 (2d Cir. 1996). Notwithstanding the fact that this language seems to invoke *Zauderer*, by referring to factual disclosures, the court in this case in fact reviewed the commercial speech disclosure under *Central Hudson*, without explaining why it did not apply *Zauderer*. *See id.* at 72.

²¹⁸ 138 S. Ct. 2361, 2377 (2018) (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994)).

²¹⁹ *See supra* notes 142 to 145 and accompanying discussion.

²²⁰ 138 S. Ct. at 2377 (internal quotation marks omitted).

²²¹ *Id.*

²²² These decisions may also be contrasted with the D.C. Circuit’s decision in *AMI*, in which that court concluded, based on “historical pedigree” and evidence in the provision’s legislative history, that the government’s interest in food safety was a substantial one. 760 F.3d 18, 23–25 (D.C. Cir. 2014) (en banc). *Cf. also* *Dwyer v. Cappell*, 762 F.3d 275, 282 n.5 (3d Cir. 2014) (“Unlike the advertisements targeted by the disclosure requirements in *Zauderer* and *Milavetz*, which had the obvious propensity to deceive laypersons, the deceptiveness of accurately transcribed statements made by judges in judicial opinion excerpts is far from ‘self-evident.’”).

²²³ *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (“*Milavetz* makes much of the fact that the Government . . . has adduced no evidence that its advertisements are misleading. *Zauderer* forecloses that argument: ‘When the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.’” (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652–53 (1985) (alterations in original)); *see also Zauderer*, 471 U.S. at 652 (“The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as ‘fees’ and ‘costs’—terms that, in ordinary usage, might well be virtually interchangeable.”).

deceptive that the government does not need to submit significant evidence proving that the advertisements are misleading.

“Reasonably Related”

If the government has asserted a sufficient interest, then under *Zauderer*, it needs to show only that the disputed disclosure requirement is “reasonably related” to that interest.²²⁴ Describing the Supreme Court’s decision in *Zauderer*, the D.C. Circuit has said that the “evidentiary parsing” required by more rigorous First Amendment tests “is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest.”²²⁵ That court further elaborated that “[t]he self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality.”²²⁶ Similarly, the Second Circuit has observed in one case that “while the First Amendment precludes the government from restricting commercial speech without showing that ‘the harms it recites are real and that its restriction will in fact alleviate them to a material degree,’”²²⁷ the First Amendment “does not demand ‘evidence or empirical data’ to demonstrate the rationality of mandated disclosures in the commercial context.”²²⁸

Notwithstanding the suggestion that little evidence is required to show that a disclosure requirement is reasonably related to an appropriate government interest, lower courts have often relied on the government’s evidence supporting the disputed requirement when they uphold the provision.²²⁹ This showing may be easiest where the government asserts an interest in preventing misleading speech, given “the self-evident tendency of a disclosure mandate to assure that recipients get the mandated information.”²³⁰ Additionally, courts have sometimes held that commercial disclosure requirements fail even this lenient test for rationality,²³¹ particularly where the government has asserted an interest other than preventing consumer confusion. For example, in *National Association of Manufacturers v. SEC*, the D.C. Circuit held²³² that a provision requiring companies to disclose whether their products were “conflict free” violated the First Amendment.²³³ In defending this rule, the government asserted an interest in “ameliorat[ing] the humanitarian crisis in the [Democratic Republic of the Congo (DRC)].”²³⁴ In the court’s view,

²²⁴ See *Zauderer*, 471 U.S. at 651.

²²⁵ *AMI*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc). See also, e.g., *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 97 (2d Cir. 2010) (“[O]nce the government demonstrated that ignorance, confusion, and deception infected the bankruptcy process in the late 1990s, the persistence of such problems was sufficiently evident that no subsequent surveys were required to support congressional action in 2005 mandating information disclosure to consumer debtors.”).

²²⁶ *AMI*, 760 F.3d at 26.

²²⁷ *Conn. Bar Ass’n*, 620 F.3d at 97 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

²²⁸ *Id.* at 97–98 (quoting *NYSRA*, 556 F.3d 114, 134 n.23 (2d Cir. 2009)).

²²⁹ See, e.g., *AMI*, 760 F.3d at 26–27; *Conn. Bar Ass’n*, 620 F.3d at 97–98, 101; *NYSRA*, 556 F.3d. at 134–36.

²³⁰ *AMI*, 760 F.3d at 26.

²³¹ See, e.g., *Dwyer v. Cappell*, 762 F.3d 275, 282 (3d Cir. 2014) (holding that the challenged provision “is unconstitutional even under the less-stringent *Zauderer* standard of scrutiny” because it “is not reasonably related to preventing consumer deception and is unduly burdensome”).

²³² This holding was an “alternative ground” for its decision; the panel held first that *Zauderer* review did not apply and that the rule failed review under *Central Hudson*. 800 F.3d 518, 524 (2015).

²³³ *Id.* at 530.

²³⁴ *Id.* at 524 (first alteration in original).

however, the government had failed to demonstrate that its measure would achieve this interest.²³⁵ The D.C. Circuit observed that the government had “offered little substance beyond” statements by political officials to support “the effectiveness of the measure.”²³⁶ The court assumed that the government’s theory “must be that the forced disclosure regime will [lead to boycotts that] decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there.”²³⁷ But in the view of the court, this theory could not justify the regulation, as the idea was “entirely unproven and rest[ed] on pure speculation.”²³⁸

To take another example, the Third Circuit struck down a commercial disclosure requirement concerning attorney advertising in *Dwyer v. Cappell*.²³⁹ In that case, an attorney challenged a state regulation that prohibited attorneys from using quotations from judicial opinions in their advertising unless they presented “the full text” of those opinions.²⁴⁰ The state argued that such quotations were “inherently misleading because laypersons . . . would understand them to be judicial endorsements.”²⁴¹ The court, however, said that even assuming “that excerpts of judicial opinions are potentially misleading to some persons,” the state had failed “to explain how [an attorney’s] providing a complete judicial opinion somehow dispels this assumed threat of deception.”²⁴² The court reasoned that “providing a full judicial opinion does not reveal to a potential client that an excerpt of the same opinion is not an endorsement.”²⁴³ Additionally, the court held that the disputed requirement was “unduly burdensome,”²⁴⁴ as it “effectively rules out the possibility that [an attorney] can advertise with even an accurately quoted excerpt of a judicial statement about his abilities.”²⁴⁵ And in the view of the Third Circuit, “that type of restriction—an outright ban on advertising with judicial excerpts—would properly be analyzed under the heightened *Central Hudson* standard of scrutiny.”²⁴⁶

As *Dwyer* suggests, courts may strike down disclosure requirements under *Zauderer* if the requirement is “unduly burdensome.”²⁴⁷ In *NIFLA*, the Supreme Court held that the unlicensed notice was likely unconstitutional because it “unduly burden[ed] protected speech,” noting that it applied to all advertisements for these licensed facilities, regardless of their content.²⁴⁸ In

²³⁵ See *id.* at 525.

²³⁶ *Id.* at 524–25.

²³⁷ *Id.* at 525.

²³⁸ *Id.*

²³⁹ 762 F.3d 275, 282 (3d Cir. 2014).

²⁴⁰ *Id.* at 278.

²⁴¹ *Id.* at 282.

²⁴² *Id.*

²⁴³ *Id.* at 283; see also *id.* (“A reasonable attempt at a disclosure requirement might mandate a statement such as ‘This is an excerpt of a judicial opinion from a specific legal dispute. It is not an endorsement of my abilities.’”).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 284.

²⁴⁶ *Id.*

²⁴⁷ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). See also *Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011) (concluding disclosure requirements for attorney advertising were unduly burdensome under *Zauderer* because they “effectively rule out the ability of Louisiana lawyers to employ short advertisements of any kind”).

²⁴⁸ *NIFLA*, 138 S. Ct. 2361, 2377 (2018). Cf. e.g., *Cigar Ass’n of Am. v. FDA*, 315 F. Supp. 3d 143, 173–74 (D.D.C. 2018) (upholding warning statement requirements for tobacco products because they “are not so lengthy or cumbersome as to effectively rule out speech or ‘nullify’ the message meant to be communicated” or as to “dampen the industry’s enthusiasm to engage in commercial speech or cause manufacturers or importers to pull products from the marketplace”).

particular, the majority opinion highlighted one hypothetical discussed at oral argument, noting that “a billboard for an unlicensed facility that says ‘Choose Life’ would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages.”²⁴⁹ In this instance, the Court said, the notice would “drown[] out the facility’s own message,” and therefore be unduly burdensome.²⁵⁰

Heightened Standards: *Central Hudson* and Strict Scrutiny

If a commercial disclosure requirement is not a factual and uncontroversial disclosure related to the speaker’s goods or services under *Zauderer*, courts will likely apply a heightened standard of review.²⁵¹ Under prevailing Supreme Court precedent, if a provision does not qualify for *Zauderer*’s reasonableness review, a court may review the challenged regulation under *Central Hudson*.²⁵² As discussed above,²⁵³ *Central Hudson* established the general standard of review for government restrictions on commercial speech. The Supreme Court described “a four-part analysis:”

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.²⁵⁴

The Court has described the *Central Hudson* test as “intermediate” scrutiny.²⁵⁵ If a disclosure requirement affects commercial speech but does not qualify for *Zauderer* review, courts have generally held that *Central Hudson*’s intermediate scrutiny applies.²⁵⁶

However, courts have sometimes suggested that some higher standard of review, more stringent than *Central Hudson*’s intermediate scrutiny, should apply to commercial disclosure requirements that do not qualify for review under *Zauderer*.²⁵⁷ Some lower court judges have concluded that because such disclosures compel particular speech and are by definition not content-neutral,²⁵⁸

²⁴⁹ *NIFLA*, 138 S. Ct. at 2378. The notice had to be listed in “the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services” for each county. CAL. HEALTH & SAFETY CODE § 123472. In Los Angeles County, this would have required advertisers to give this notice in 13 languages. *NIFLA*, 138 S. Ct. at 2369.

²⁵⁰ *NIFLA*, 138 S. Ct. at 2378.

²⁵¹ See, e.g., *NIFLA*, 138 S. Ct. at 2371.

²⁵² See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (considering whether *Central Hudson* or *Zauderer* governs analysis of commercial disclosure requirement); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732–33 (9th Cir. 2017) (same); *AMI*, 760 F.3d 18, 21–22 (D.C. Cir. 2014) (en banc) (same); *NYSRA*, 556 F.3d 114, 133 (2d Cir. 2009) (same). Cf. *NIFLA*, 138 S. Ct. at 2375 (concluding that *Zauderer* does not apply and declining to rule on whether strict scrutiny or intermediate scrutiny applies, because regulation fails intermediate scrutiny); *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (same).

²⁵³ See *supra* “First Amendment Protection of Commercial Speech.”

²⁵⁴ *Central Hudson*, 447 U.S. 557, 566 (1980).

²⁵⁵ See, e.g., *Milavetz*, 559 U.S. at 250; *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

²⁵⁶ See, e.g., *United States v. Philip Morris USA Inc.*, 855 F.3d 321, 327 (D.C. Cir. 2017) (considering whether *Zauderer* or *Central Hudson* applied); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 640 (6th Cir. 2010) (same); *NYSRA*, 556 F.3d at 133 (same).

²⁵⁷ See, e.g., *NIFLA*, 138 S. Ct. at 2375; *Nat’l Ass’n of Mfrs.*, 800 F.3d at 524.

²⁵⁸ See, e.g., *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795 (1988).

they should be evaluated under strict scrutiny.²⁵⁹ In contrast to *Central Hudson* review, which requires the government to show that a law is “not more extensive than is necessary to serve” a “substantial” interest,²⁶⁰ strict scrutiny “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”²⁶¹

The Supreme Court has suggested—but not squarely held—that at least some types of commercial disclosure requirements might be subject to some form of scrutiny more strict than *Central Hudson*. In *NIFLA*, the Supreme Court considered the constitutionality of state provisions requiring crisis pregnancy centers to make certain disclosures to clients and in their advertising.²⁶² The Court suggested that the provision requiring licensed facilities to disseminate notices about state-provided services might be subject to strict scrutiny as a content-based regulation of speech, but concluded that it did not need to resolve that question because the notice could not “survive even intermediate scrutiny.”²⁶³

Significantly, however, the *NIFLA* Court never described the licensed notice as involving commercial speech. In the decision below, the Ninth Circuit had held that the notice should not be subject to strict scrutiny because it regulated “professional speech.”²⁶⁴ That court, like other federal courts of appeals,²⁶⁵ had recognized “speech that occurs between professionals and their clients in the context of their professional relationship”²⁶⁶ “as a separate category of speech that is subject to different rules.”²⁶⁷ The Ninth Circuit had concluded that speech that was part of the practice of a profession could be regulated by the state, subject only to intermediate scrutiny.²⁶⁸ The Court rejected this idea, saying that the First Amendment does not encompass a tradition of lower scrutiny “for a category called ‘professional speech.’”²⁶⁹

Ultimately, the Court said that it saw no “persuasive reason” to treat “professional speech as a unique category that is exempt from ordinary First Amendment principles.”²⁷⁰ To the extent that “professional speech” could be seen to overlap with commercial speech, this sentence could be read to suggest that commercial speech should also be subject to “ordinary First Amendment

²⁵⁹ See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554 (6th Cir. 2012) (Stranch, J.) (majority opinion) (noting that either *Zauderer* or strict scrutiny would apply but ultimately applying *Zauderer*); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (“As the State concedes, the [disclosure requirement] is a content-based restriction on speech, and we must employ strict scrutiny in assessing its constitutionality.”).

²⁶⁰ *Central Hudson*, 447 U.S. 557, 566 (1980).

²⁶¹ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)) (internal quotation mark omitted).

²⁶² 138 S. Ct. at 2369–70.

²⁶³ *Id.* at 2375.

²⁶⁴ *Id.* at 2371.

²⁶⁵ See *id.*

²⁶⁶ *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016).

²⁶⁷ *NIFLA*, 138 S. Ct. at 2371. See generally, e.g., Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1314 (2015) (arguing that “professional speech regulations . . . regulate a special kind of relationship and operate in a distinctive sphere”)

²⁶⁸ *Nat’l Inst. of Family & Life Advocates*, 839 F.3d at 839, 840. See also, e.g., *King v. Governor of New Jersey*, 767 F.3d 216, 234–35 (3d Cir. 2014) (concluding that professional speech regulations, like commercial speech regulations, should be subject only to intermediate scrutiny, so long as the regulation of professional speech is justified by the state’s interest “in protecting clients from ineffective or harmful professional services”), *overruled in part by NIFLA*, 138 S. Ct. 2361 (2018).

²⁶⁹ *NIFLA*, 138 S. Ct. at 2372.

²⁷⁰ *Id.* at 2375.

principles.²⁷¹ This suggestion would seem to conflict with prior cases saying that commercial speech occupies a “subordinate position in the scale of First Amendment values.”²⁷² Although the *NIFLA* Court implicitly suggested that disclosure requirements for professionals might constitute commercial speech by evaluating the FACT Act’s requirements under *Zauderer* and *Central Hudson*, it never expressly clarified whether “professional speech” overlaps with commercial speech.²⁷³

Because the FACT Act’s requirements applied outside of the advertising context, it may be open to some debate whether these licensed notices involved commercial speech.²⁷⁴ The *unlicensed* notice challenged in *NIFLA* was required to be included in advertising,²⁷⁵ and advertisements are “classic examples of commercial speech.”²⁷⁶ But the *unlicensed* notice was also required to be posted on-site, and the state required *licensed* facilities to post disclosures on-site or to otherwise distribute the notice to clients directly.²⁷⁷ Further, in a similar context, at least one federal court of appeals concluded that a Baltimore ordinance requiring certain pregnancy centers to make specified disclosures regulated noncommercial speech.²⁷⁸ That court said the pregnancy centers were not motivated by economic interest or proposing a commercial transaction, but were instead “provid[ing] free information about pregnancy, abortion, and birth control as informed by a religious and political belief.”²⁷⁹ If the licensed disclosures in *NIFLA* did not regulate commercial speech, then it would be unsurprising that the Court would consider applying strict scrutiny rather than *Central Hudson*.

Others, however, have pointed out that crisis pregnancy centers, even if they do not charge fees, operate “in a marketplace where other providers generally charge fees,” and argued that these centers “are engaged in commercial activity by providing physical and mental health services to pregnant women.”²⁸⁰ And more generally, some have pointed out the similarities between “professional” and commercial speech.²⁸¹ The fact that the *NIFLA* Court did not directly address

²⁷¹ *See id.*

²⁷² *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

²⁷³ *See NIFLA*, 138 S. Ct. at 2375. Further, the Court also seemed to implicitly suggest that the two categories intersect by describing *Zauderer* as one specific circumstance where it “has afforded less protection for professional speech.” *Id.* at 2372.

²⁷⁴ *Compare, e.g., Duane, supra* note 10, at 380 (arguing generally that crisis pregnancy center disclosure requirements “should be deemed commercial” because they require “only . . . that where [crisis pregnancy centers] are involved in the marketplace of reproductive services . . . they must provide bare-bones disclosures about their services to help pregnant women make informed choices about where to obtain medical assistance and to prevent consumer deception”), *with, e.g., Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council*, 683 F.3d 539, 553–54 (4th Cir. 2012) (holding crisis pregnancy center’s speech was not commercial but was the “kind of ideologically driven speech [that] has routinely been afforded the highest levels of First Amendment protection, even when accompanied by offers of commercially valuable services”).

²⁷⁵ *See* CAL. HEALTH & SAFETY CODE § 123472.

²⁷⁶ *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 759 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)) (internal quotation marks omitted).

²⁷⁷ CAL. HEALTH & SAFETY CODE § 123472.

²⁷⁸ Specifically, the law required the centers to disclose that they did “not provide or make referral for abortion or birth control services.” *Greater Balt. Ctr. for Pregnancy Concerns*, 683 F.3d at 548 (quoting *BALTIMORE, MD., ORD. 09-252* (2009)) (internal quotation marks and alteration omitted).

²⁷⁹ *Id.* at 553–54.

²⁸⁰ *Duane, supra* note 10, at 379.

²⁸¹ *See, e.g., King v. Governor of New Jersey*, 767 F.3d 216, 233–35 (3d Cir. 2014), *overruled in part by NIFLA*, 138 S. Ct. 2361 (2018); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 850–51 (1999).

the relationship between professional and commercial speech may suggest that heightened scrutiny may be necessary with respect to some commercial disclosure requirements.²⁸² Specifically, the Court did not cite the commercial speech doctrine as “a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.”²⁸³ At least one commentator has argued that the Court’s failure to mention *Central Hudson*—“not even to dismiss it as . . . another inapposite exception to *Reed*’s general rule [of strict scrutiny]”—may suggest that the Court is seeking to limit *Central Hudson*’s holding that commercial speech may be more freely regulated than other speech under the First Amendment.²⁸⁴

Although *NIFLA* may not have expressly altered the framework used to evaluate commercial disclosure requirements, it may nonetheless signal that the Supreme Court will view them with more skepticism in the future.²⁸⁵ The majority opinion, authored by Justice Thomas,²⁸⁶ emphasized that “[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech.”²⁸⁷ Even if “professional speech” is not coterminous with “commercial speech,” this statement does seem to suggest that the Court believes content neutrality principles are relevant in the commercial sphere.²⁸⁸ In dissent, Justice Breyer, viewing the majority opinion as adopting such a view, argued that the majority’s approach, “if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk.”²⁸⁹ He pointed out that “[v]irtually every disclosure law could be considered ‘content based,’ for virtually every disclosure law requires individuals ‘to speak a particular message.’”²⁹⁰

In response to Justice Breyer, the *NIFLA* majority stated that it did not “question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”²⁹¹ This view echoed the Court’s prior statement that “[p]urely commercial speech is more susceptible to compelled disclosure requirements.”²⁹² Following the Court’s 2010 decision in *Reed*, in which the Court articulated a more “precise test to determine whether speech regulations are content based,”²⁹³ many lower courts had rejected the idea that content-based requirements affecting only commercial speech should be subject to strict

²⁸² See, e.g., *National Institute of Family & Life Advocates v. Becerra*, 132 HARV. L. REV. 347, 351 (2018) (“*NIFLA* marks a profound shift in the Court’s treatment of compelled commercial disclosures. The Court fundamentally undermined its previous commercial speech doctrine . . .”).

²⁸³ See *NIFLA*, 138 S. Ct. 2361, 2375 (2018).

²⁸⁴ Cory L. Andrews, *The Dog That Didn’t Bark in the Night: SCOTUS’s NIFLA v. Becerra and the Future of Commercial Speech*, FORBES (July 5, 2018, 11:02 AM), <https://www.forbes.com/sites/wlf/2018/07/05/the-dog-that-didnt-bark-in-the-night-scotuss-nifla-v-becerra-and-the-future-of-commercial-speech/#2e3b0ab43ddc>.

²⁸⁵ This view is perhaps most clearly evidenced by the fact that when the *NIFLA* Court did apply *Zauderer*, it nonetheless held that the unlicensed notice failed even this deferential standard of review. See *NIFLA*, 138 S. Ct. at 2376–78.

²⁸⁶ Notably, Justice Thomas had previously argued in *Milavetz* that the Court should “reexamine *Zauderer* and its progeny in an appropriate case.” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 256 (2010) (Thomas, J., concurring).

²⁸⁷ *NIFLA*, 138 S. Ct. at 2374.

²⁸⁸ See *id.*

²⁸⁹ See *id.* at 2380 (Breyer, J., dissenting).

²⁹⁰ See *id.* (quoting *id.* at 2371 (majority opinion)).

²⁹¹ *Id.* at 2376 (majority opinion).

²⁹² *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 n.9 (1988).

²⁹³ *Mason*, *supra* note 38, at 965.

scrutiny, even if they otherwise discriminated based on content under *Reed*.²⁹⁴ But because *NIFLA* appeared to suggest that content neutrality is relevant in the commercial sphere, it seems reasonable to think that lower courts may now be more likely to conclude that strict scrutiny could apply to content-based commercial disclosure requirements.²⁹⁵ This would be consistent with what some commentators have described as the Court’s increasingly heightened scrutiny of restrictions on commercial speech.²⁹⁶

For now, though, *Central Hudson* generally continues to govern the analysis of government actions affecting lawful, non-misleading commercial speech,²⁹⁷ including commercial disclosure requirements that do not qualify for *Zauderer* review.²⁹⁸ As discussed, *Central Hudson* requires that the government prove that its interest is “substantial,” and that the regulation “directly advances” that interest and is “not more extensive than is necessary to serve that interest.”²⁹⁹ Government regulations are more likely to fail this more rigorous standard than the *Zauderer* reasonableness standard,³⁰⁰ often because a court believes there is some less restrictive means

²⁹⁴ See, e.g., *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, No. 17-6151, 2017 U.S. App. LEXIS 24931, at *7–8 (6th Cir. Dec. 8, 2017) (order) (noting that under *Reed*, “[s]trict scrutiny generally applies to content-based restrictions on speech,” but stating that “commercial speech and professional conduct . . . are typically scrutinized at a lower level of review”); *Contest Promotions, LLC v. City & Cty. of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017) (rejecting argument that under *Reed*, restriction on commercial speech should be subject to strict rather than intermediate scrutiny); *Free Speech Coal., Inc. v. Attorney General*, 825 F.3d 149, 176 n.7 (3d Cir. 2016) (Rendell, J., dissenting) (“Notably, because the Court in *Reed* never even mentioned *Central Hudson*, at least two district courts in California have concluded that *Reed* does not compel strict scrutiny for laws affecting commercial speech.”). Cf., e.g., *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1234 n.7 (11th Cir. 2017) (“There is some question as to whether under the Supreme Court’s decisions in [*Sorrell*] and [*Reed*] an analysis to determine if the restriction is content based or speaker focused must precede any evaluation of the regulation based on traditional commercial speech jurisprudence, and if so, whether this would alter the *Central Hudson* framework.”).

²⁹⁵ See *Andrews*, *supra* note 284. Cf. *Am. Bev. Ass’n v. City & Cty. of San Francisco*, 916 F.3d 749, 759 (9th Cir. 2019) (Ikuta, J., dissenting from most of the reasoning, concurring in the result) (describing *NIFLA* as holding that “[a] government regulation ‘compelling individuals to speak a particular message’ is a content-based regulation that is subject to strict scrutiny, subject to two exceptions” (quoting *NIFLA*, 138 S. Ct. 2361, 2371 (2018))); *Doe v. Marshall*, No. 2:15-CV-606-WKW, 2019 U.S. Dist. LEXIS 21578, at *24–25 (M.D. Ala. Feb. 11, 2019) (holding that a state law requiring drivers licenses to identify criminal sex offenders was subject to strict scrutiny under *NIFLA* because it was a disclosure requirement, and ultimately concluding that the requirement was unconstitutional because it was not “the least restrictive means of advancing its interest”).

²⁹⁶ See, e.g., *Mason*, *supra* note 38, at 986 (stating that in *Reed*, the Court may have “intended to implicitly overrule much of its old doctrine distinguishing commercial speech by making *Reed*’s test broadly applicable,” noting that “recent cases have taken increasingly tough looks at restrictions on commercial speech despite nominally sticking to the *Central Hudson* framework”); Carl Wiersum, *No Longer Business as Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 *FOOD DRUG L.J.* 486, 488 (2018) (“[R]estrictions on commercial speech are currently subject to what is essentially a *de facto* strict scrutiny applied under the *Central Hudson* name.”).

²⁹⁷ See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (applying *Central Hudson* to “targeted, content-based burden” imposed by disputed statute on protected commercial speech).

²⁹⁸ See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (considering whether *Central Hudson* or *Zauderer* governs analysis of commercial disclosure requirement).

²⁹⁹ *Central Hudson*, 447 U.S. 557, 566 (1980).

³⁰⁰ See, e.g., *NIFLA*, 138 S. Ct. 2361, 2375 (2018) (striking down notice for licensed facilities); *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (striking down conflict mineral disclosures); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) (striking down milk labeling requirement).

available for the government to achieve its goals.³⁰¹ Courts will require more “evidence of a measure’s effectiveness” under *Central Hudson*, as compared to *Zauderer*.³⁰²

However, *Central Hudson* is more forgiving than strict scrutiny, and courts do uphold government actions infringing on commercial speech under *Central Hudson*.³⁰³ For example, in *Spirit Airlines v. Department of Transportation*, the D.C. Circuit concluded that a federal regulation governing the way that airlines must display flight prices “satisfie[d] . . . the *Central Hudson* test.”³⁰⁴ In the court’s view, “[t]he government interest—ensuring the accuracy of commercial information in the marketplace—[was] clearly and directly advanced by a regulation requiring that the total, final price be the most prominent” price displayed.³⁰⁵ And the regulation was “reasonably tailored to accomplish that end” because the rule “simply regulate[d] the manner of disclosure.”³⁰⁶

Government actions are unlikely to be upheld if a court applies strict scrutiny.³⁰⁷ Nonetheless, some scholars have argued that many disclosure requirements might survive strict scrutiny,³⁰⁸ and the Supreme Court has, in rare instances, said that the government may “directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.”³⁰⁹ It is possible that a court could hold that the government has a compelling interest in protecting consumers, for example, and that particular disclosures are narrowly tailored to meet that interest.³¹⁰ The Supreme Court has long emphasized that the government can regulate commercial activity “deemed harmful to the public.”³¹¹ But a court would likely require more proof from the

³⁰¹ See, e.g., *NIFLA*, 138 S. Ct. at 2376. In *NIFLA*, the Supreme Court explained that not only were there less burdensome means available, the licensed notice requirement was also *underinclusive*. *Id.* at 2375–76. In the Court’s view, if the state’s “goal [was] to maximize women’s awareness of” state-sponsored medical services, then the disclosure requirement should have applied to more clinics. *Id.* at 2376. This limited application raised concerns for the Court that the state was targeting disfavored speakers. *Id.* But regardless, the Court held that the state could not “co-opt the licensed facilities to deliver its message for it.” *Id.*

³⁰² *Cigar Ass’n of Am. v. FDA*, 315 F. Supp. 3d 143, 171 (D.D.C. 2018).

³⁰³ See, e.g., *Fla. Bar v. Went for It*, 515 U.S. 618, 635 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418, 436 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344 (1986).

³⁰⁴ 687 F.3d 403, 415 (D.C. Cir. 2012). This conclusion was an alternate holding; the court had previously concluded that *Zauderer* applied and that the rule was reasonably related to the government’s interest, *id.* at 414, but in response to the dissent, the court also said that the rule satisfied *Central Hudson*, *id.* at 415.

³⁰⁵ *Id.* at 415.

³⁰⁶ *Id.*

³⁰⁷ See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (noting that content-based laws “are presumptively unconstitutional”). Cf. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1313–14 (2007) (discussing development of strict scrutiny standard and its modern application to free speech); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 844 (2006) (arguing that empirically, “strict scrutiny is . . . most fatal in the area of free speech,” as compared to other constitutional areas in which the standard is applied).

³⁰⁸ E.g., Armijo, *supra* note 54, at 83; Mason, *supra* note 38, at 985.

³⁰⁹ *Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion); see also, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015); *Burson v. Freeman*, 504 U.S. 191, 198–200 (1992) (plurality opinion); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

³¹⁰ See Armijo, *supra* note 54, at 83–84.

³¹¹ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978); see also, e.g., *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 n.9 (1988) (“Purely commercial speech is more susceptible to compelled disclosure requirements.”) Cf., e.g., Duane, *supra* note 10, at 375 (arguing that “commercial speech doctrine . . . is a crucial tool in consumer protection legislation because it allows the government to regulate communications for their truth, thus preventing

government under strict scrutiny³¹² and likely would not simply accept the government's allegations as "self-evident"³¹³ under such review.

Considerations for Congress

Congress has enacted a wide variety of disclosure requirements, many of which arguably compel commercial speech.³¹⁴ For example, the Securities and Exchange Act of 1934 sets out disclosure requirements for registering securities.³¹⁵ Federal law, among a host of other food labeling requirements,³¹⁶ requires "bioengineered food" to bear a label disclosing that the food is bioengineered.³¹⁷ Direct-to-consumer advertisements for prescription drugs must contain a series of disclosures, including the drug's name and side effects.³¹⁸ Certain appliances must contain labels disclosing information about their energy efficiency.³¹⁹ Bills in the 115th and 116th Congresses have proposed additional disclosure requirements, including a bill that would require large online platforms to disclose any studies conducted on users for the purposes of promoting engagement,³²⁰ and a bill that would require public companies to disclose climate-related risks.³²¹

Recent Supreme Court precedent suggests that the Court is more closely reviewing commercial disclosure requirements, perhaps moving away from a more deferential treatment of such provisions. In *NIFLA*, the Court held that a disclosure requirement was likely unconstitutional under *Zauderer* because the government had not presented sufficient evidence to justify the measure³²²—even though in other cases, the Court had rejected similar challenges to commercial disclosure requirements, saying that the government did not need to present more evidence because the harm it sought to remedy was "self-evident."³²³ Further, the Court has recently suggested that if a law regulating commercial speech discriminates on the basis of content—as all disclosure requirements seemingly do³²⁴—then this content discrimination might subject the law to heightened scrutiny.³²⁵ If the Court further embraces this view, it could be a marked departure

consumers from being misled or deceived").

³¹² Armijo, *supra* note 54, at 84.

³¹³ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652–53 (1985).

³¹⁴ See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring).

³¹⁵ 15 U.S.C. § 78l.

³¹⁶ See, e.g., *Basics of Labeling*, U.S. Dep't of Agric. (last updated June 22, 2018), <https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/labeling-policies/basics-of-labeling/basics-labeling>; 21 U.S.C. §§ 453 (defining when poultry will be considered misbranded), 601 (defining when meat will be considered misbranded).

³¹⁷ 7 U.S.C. § 1639b(a); 7 C.F.R. § 66.3.

³¹⁸ 21 U.S.C. § 352(n).

³¹⁹ 42 U.S.C. § 6294; 16 C.F.R. pt. 305.

³²⁰ *Deceptive Experiences To Online Users Reduction Act*, S. 1084, 116th Cong. (2019).

³²¹ *Climate Risk Disclosure Act of 2018*, S. 3481, 115th Cong. (2018).

³²² *NIFLA*, 138 S. Ct. 2361, 2377 (2018).

³²³ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652–53 (1985).

³²⁴ *NIFLA*, 138 S. Ct. at 2371.

³²⁵ See *id.* at 2374–75; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). *But see, e.g., Hamilton v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1255–56 (S.D. Fla. 2019) ("Taken collectively, these cases [*NIFLA* and *Casey*] instruct that this case [involving local prohibitions on "conversion therapy"] may fall outside of *Reed*'s onerous edict that all content-based laws must be subject to strict scrutiny.").

from its opinions holding that commercial speech could be regulated on the basis of its content,³²⁶ so long as the government’s justification for the content discrimination were sufficiently related to its legitimate interests in regulating the speech.³²⁷

In concurring and dissenting opinions that have been joined by other Justices, Justice Breyer has argued that insofar as the Court’s recent decisions suggest that commercial disclosure requirements should be subject to heightened scrutiny, they are inconsistent with prior case law and are not a proper application of the First Amendment.³²⁸ The Supreme Court said in *NIFLA* that it was “not question[ing] the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”³²⁹ And lower courts have frequently upheld commercial disclosure requirements,³³⁰ perhaps suggesting that disclosures of the kind cited by Justice Breyer are not in danger of wholesale invalidation under the First Amendment. However, the majority opinion in *NIFLA* did not clarify what kind of disclosures it would consider permissible,³³¹ and its opinion made clear that disclosure requirements should be scrutinized in light of the speakers they cover and the burdens they pose.³³² Moreover, although the *NIFLA* Court said that it was not questioning these disclosures’ “legality,” it left open the possibility that these disclosure should nonetheless be subject to heightened scrutiny.³³³ This statement may mean only that the Court believes that many commercial disclosure requirements would *meet* a higher standard of scrutiny.

At least one federal appellate court seems to have taken *NIFLA* as a signal that lower courts should more closely scrutinize commercial disclosure requirements.³³⁴ In *American Beverage Association v. City & County of San Francisco*, the Ninth Circuit, sitting *en banc*, relied on *NIFLA* to reverse a prior decision that had upheld an ordinance requiring “health warnings on advertisements for certain sugar-sweetened beverages.”³³⁵ While a panel of judges had previously concluded that the disclosure requirement was constitutional under *Zauderer*, the full Ninth Circuit, reviewing that decision, said: “*NIFLA* requires us to reexamine how we approach a First Amendment claim concerning compelled speech.”³³⁶ Namely, the court held that, in light of *NIFLA*, the health warnings were likely unjustified and unduly burdensome under *Zauderer*, noting that the regulation required the warnings to “occupy at least 20% of those products’ labels or advertisements”—but that the record showed that “a smaller warning—half the size—would

³²⁶ *Central Hudson*, 447 U.S. 557, 564 n.6 (1980).

³²⁷ *Cf.*, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993).

³²⁸ *See NIFLA*, 138 S. Ct. at 2380–81 (Breyer, J., dissenting); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring); *Sorrell*, 564 U.S. at 584–85 (Breyer, J., dissenting).

³²⁹ *NIFLA*, 138 S. Ct. at 2376 (majority opinion).

³³⁰ *See*, e.g., Note, *supra* note 37, at 973.

³³¹ *See NIFLA*, 138 S. Ct. at 2376. For one thing, it is not clear whether, by referencing “warnings long considered permissible,” *id.*, the majority opinion was referring to laws that courts had previously approved, or laws that have been in place and unchallenged for a significant period of time.

³³² *See id.* at 2378.

³³³ *See id.* at 2376.

³³⁴ *Am. Bev. Ass’n v. City & Cty. of San Francisco*, 916 F.3d 749, 753 (9th Cir. 2019) (*en banc*).

³³⁵ *Id.*

³³⁶ *Id.* at 756.

accomplish [the government’s] stated goals.”³³⁷ As such, the court held that the warnings violated the First Amendment “by chilling protected speech.”³³⁸

Accordingly, when Congress and federal agencies consider adopting new commercial disclosure requirements, or reauthorizing old ones, it may be wise to develop a record with more evidence demonstrating a need for the regulation. Under any level of scrutiny, courts will examine the government’s asserted purpose for the legislation, as well as how closely tailored the disclosure requirement is to achieve that purpose. Under *Zauderer*, particularly in light of *NIFLA*, courts may ask for evidence to support the government’s claim that the regulated speech is misleading or that the government has some other interest in regulating that speech, and will likely scrutinize the disclosure requirement to make sure it is not unduly burdensome.³³⁹ Under intermediate scrutiny or strict scrutiny, a court may also ask whether the government considered alternative policies that would be less restrictive of speech,³⁴⁰ examining more closely the government’s justifications for choosing a disclosure requirement.

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³³⁷ *Id.* at 757.

³³⁸ *Id.*

³³⁹ See *NIFLA*, 138 S. Ct. 2361, 2377–78 (2018). *Cf., e.g.,* Loan Payment Admin. LLC v. Hubanks, No. 14-CV-04420-LHK, 2018 U.S. Dist. LEXIS 207286, at *30–35 (N.D. Cal. Dec. 7, 2018) (concluding that *NIFLA* was merely “a straightforward application of [the Court’s] *Zauderer* precedents” and upholding a state disclosure requirement in light of the government’s evidence showing that the regulated speech was deceptive and that the disclosure requirement was not unduly burdensome).

³⁴⁰ The Court has rejected application of the least-restrictive means test in the commercial speech arena, meaning that a regulation affecting commercial speech need not be the *least* restrictive alternative available, see, e.g., *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989), but has sometimes struck down commercial speech regulations where there are *less* restrictive means available, viewing this as evidence that the government action is more extensive than reasonably necessary, see, e.g., *In re R.M.J.*, 455 U.S. 191, 206–07 (1982).

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