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# Compelled Commercial Disclosures: *Zauderer's* Application to Non-Misleading Commercial Speech

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## NOTES & COMMENTS

### **Compelled Commercial Disclosures: Zauderer’s Application to Non-Misleading Commercial Speech**

ALEXIS MASON\*

*In 1980, the Supreme Court held that a prohibition on commercial speech is subject to intermediate scrutiny. Roughly five years later, in Zauderer, the Court provided guidance on specific instances in which the government may compel commercial speech. The Court held that a requirement that goods or services disclose “factual and uncontroversial” information is constitutional so long as the requirement is not unduly burdensome, and the requirement is “reasonably related to the State’s interest in preventing deception of consumers.” This holding applied a rational basis standard of review to compelled commercial speech aimed at curing deception of consumers.*

*Despite this guidance, since the Zauderer decision, federal appellate courts have applied the holding inconsistently—some courts have limited Zauderer’s rational basis application to compelled commercial speech disclosures*

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\* J.D. 2018, University of Miami Law School; Articles and Comments Editor of the University of Miami Law Review. I would like to thank my advisor, Professor Caroline Mala Corbin, for her support, insight, and helpful feedback throughout the drafting of this Comment. Thank you to the University of Miami Law Review for selecting this Comment for publication. An additional thank you to all the members of the law review who provided comments and edits throughout the review process. Most of all, thank you to my family for your unwavering support of my aspirations and endless celebration of my achievements. I am humbled to be on the receiving end of your love.

that are “factual and uncontroversial” and cure deception of consumers; while other courts have applied it to all compelled commercial speech disclosures that are “factual and uncontroversial” regardless of whether the speech cures deception of consumers. This Comment advocates to limit the rational basis standard of review to compelled commercial speech disclosures that are “factual and uncontroversial” and cure deception of consumers. The alternative, applying rational basis to large swaths of disclosures, may lead to drowning out important information or bolstering ideological beliefs because there will always be a legitimate government interest to compel, i.e. the consumer “right to know.” Commercial speech is protected speech, and the First Amendment protects against speech compulsions just as it protects against speech prohibitions. Limiting the application of *Zauderer* would ensure that only legitimate and beneficial disclosures are compelled, and that First Amendment protections are not abridged.

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## I. INTRODUCTION

“*WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.*”<sup>1</sup>

“*If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation.*”<sup>2</sup>

“*The products in this case that contain or may contain milk from rBST-treated cows either (1) state on the package that rBST has been or may have been used, or (2) are identified by a blue shelf label . . . or (3) a blue sticker on the package . . . .*”<sup>3</sup>

These three statements are examples of government mandated *compelled* commercial speech disclosures. Currently, *compelled* commercial speech jurisprudence is unclear, at best. The Supreme Court has given clearer guidance, however, on the constitutionality of *prohibited* commercial speech.

In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, the Supreme Court held that a regulation that completely *bans* an electric utility company from advertising to promote the use of electricity violated the First Amendment after failing to satisfy a four-part analysis.<sup>4</sup> In its four-part analysis, the Court asked (1) whether the expression is protected by the First Amendment, noting that it “at least must concern lawful activity and not be misleading”; (2) “whether the asserted governmental interest is substantial”; (3) “whether the regulation directly advances the governmental interest asserted”; and (4) “whether it is not more extensive than is necessary to serve that interest.”<sup>5</sup> Thereby, a *prohibition* on commercial

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<sup>1</sup> Am. Beverage Ass’n v. City & Cty. of S.F., 871 F.3d 884, 888 (9th Cir. 2017).

<sup>2</sup> CTIA-The Wireless Ass’n v. City of Berkeley, 854 F.3d 1105, 1111 (9th Cir. 2017).

<sup>3</sup> Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996).

<sup>4</sup> Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566–71 (1980).

<sup>5</sup> *Id.* at 566 (“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that

speech is subject to intermediate scrutiny, and, accordingly, any curtailment of speech must be justified by a substantial government interest.<sup>6</sup>

Roughly five years later, in *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court provided guidance on specific instances in which the government may *compel* commercial speech. The Court held that a requirement that the purveyor of a good or service disclose “factual and uncontroversial” information is constitutional so long as the requirement is not unduly burdensome, and the requirement is “reasonably related to the State’s interest in *preventing deception of consumers*.”<sup>7</sup> This holding applied a more lenient rational basis test, as opposed to *Central Hudson*’s intermediate scrutiny test, when “factual and uncontroversial” information was compelled to cure deception of consumers.<sup>8</sup>

Since *Zauderer*, the Court has upheld *compelled* commercial speech under the *Zauderer* rational basis test, when the speech is curing deception of consumers, and struck down *compelled* commercial speech under the *Central Hudson* intermediate scrutiny test, when the speech is not curing deception of consumers. In *Milavetz, Gallop & Milavetz, P.A. v. United States*,<sup>9</sup> the Supreme Court upheld a regulation that required certain debt-relief assistance professionals to disclose in their advertising that their services were related to bankruptcy relief and to further identify themselves as “debt-relief agencies.”<sup>10</sup> The Supreme Court explained that the advertising was misleading because it offered “debt relief without any reference

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provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”)

<sup>6</sup> See *id.* at 573 (Blackmun, J., concurring).

<sup>7</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis added).

<sup>8</sup> See *id.* at 638 (citing *Cent. Hudson Gas*, 447 U.S. at 566) (noting that “[c]ommercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.”); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554 (6th Cir. 2012).

<sup>9</sup> 559 U.S. 229, 232 (2010).

<sup>10</sup> *Milavetz*, 559 U.S. at 232.

to the possibility of filing for bankruptcy, which has inherent costs.”<sup>11</sup> The Court noted, however, that the “same characteristics of [the *Milavetz* regulation] that make it analogous to the rule in *Zauderer* serve to distinguish it from those at issue in *In re R.M.J.*,<sup>12</sup> to which the Court applied the intermediate scrutiny of *Central Hudson*.”<sup>13</sup> According to the *Milavetz* Court, the *R.M.J.* regulations, which required that attorneys advertise their practice in terms prescribed by the State Supreme Court, were improper.<sup>14</sup> The State had failed to show that the advertisements were themselves likely to mislead consumers.<sup>15</sup> In contrast with *R.M.J.*, the *Milavetz* Court concluded that “[e]vidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost . . . is adequate to establish that the likelihood of deception in this case ‘is hardly a speculative one.’”<sup>16</sup>

Despite this guidance, since the Supreme Court’s decision in *Zauderer*, federal appellate courts have applied the holding inconsistently—some courts have limited *Zauderer*’s rational basis application to compelled commercial speech disclosures that are “factual and uncontroversial” and cure deception of consumers;<sup>17</sup> while

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<sup>11</sup> *Id.* at 250.

<sup>12</sup> 455 U.S. 191 (1982).

<sup>13</sup> *Milavetz*, 559 U.S. at 250.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 251 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985)).

<sup>17</sup> See *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1235–36 (11th Cir. 2017) (noting that a speech *restriction* that neither concerns unlawful activity nor is inherently misleading may only be regulated if it satisfies intermediate scrutiny); *Dwyer v. Cappell*, 762 F.3d 275, 281–83 (3d Cir. 2014) (holding that a guideline could not compel commercial speech on legal advertisements when the guideline did not require disclosing anything that could reasonably remedy consumer deception); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 283 (4th Cir. 2013) (noting that “[d]isclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny, by being ‘reasonably related to the State’s interest in preventing deception of consumers.’”); *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) (holding that a regulation that imposes a disclosure obligation on a potentially misleading legal advertisement will survive First Amendment review if the required disclosure (1) passes intermediate scrutiny or (2), if the ad is related to preventing consumer deception and passes rational basis); *Milavetz, Gallop &*

other courts have applied it to all compelled commercial speech disclosures that are “factual and uncontroversial” regardless of whether the speech cures deception of consumers.<sup>18</sup> The latter courts note that the Supreme Court’s reasoning in *Zauderer* “seems inherently applicable beyond the problem of deception, as other circuits have found.”<sup>19</sup>

Compelled commercial speech should be subject to *Central Hudson*’s intermediate scrutiny test unless the speech falls within *Zauderer*’s ambit because commercial speech is protected speech, and “the First Amendment protects against speech compulsions just

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Milavetz, P.A. v. United States, 541 F.3d 785, 796 (8th Cir. 2008) (holding that a requirement that professionals assisting consumers with bankruptcy must state that they are a debt relief agency in their ads is constitutional because the speech in question was directed at misleading commercial speech); Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005) (upholding, under rational basis review, mandated disclosures by pharmacy benefit managers (PBM) of economically significant information designed to protect covered entities from questionable PBM business practices); Cent. Ill. Light Co. v. Citizens Util. Bd., 827 F.2d 1169, 1173 (7th Cir. 1987) (holding that a mandatory commercial disclosure was unconstitutional when it was not justified by consumer deception, but by a legitimate state police power interest).

<sup>18</sup> See *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 891–92 (9th Cir. 2017) (holding that *Zauderer*’s “framework applies when a state requires disclosures for a different state interest, such as to promote public health” by requiring warnings about health effects of certain sugar-sweetened beverages); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (holding that compelling “country of origin labeling,” while not necessary to cure deception, is subject to rational basis scrutiny); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263–66 (2d Cir. 2014) (holding that a requirement that a corporation disclose the name of a competitor’s repair shop to customers fell outside *Zauderer*’s “factual and uncontroversial” bounds); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554–55 (6th Cir. 2012) (noting that *Zauderer* allows mandated disclosures that serve “some substantial interest”); *N.Y. State Rest. v. N.Y. City Bd. of Health*, 556 F.3d 114, 117–18, 132 (2d Cir. 2009) (upholding a New York City regulation that required certain restaurants to post calorie content information on menus and menu boards that were not previously deceptive under rational basis review); *United States v. Wenger*, 427 F.3d 840, 844, 849–50 (10th Cir. 2005) (noting that despite being upheld as part of the federal government’s broad powers to regulate securities, section 17(b)’s disclosure requirements would have been upheld as a regulation on commercial speech; even when the government has not shown that absent the required disclosure the speech would be false or deceptive, and even when the disclosure requirement serves some substantial government interest other than preventing deception, such as fraud prevention).

<sup>19</sup> *Am. Meat Inst.*, 760 F.3d at 22.

as it protects against speech limitations.”<sup>20</sup> Accordingly, *compelled* commercial speech is a subset of commercial speech generally and should receive the same constitutional protection.<sup>21</sup> It is not a separate category of speech under the First Amendment.<sup>22</sup> This protection of commercial speech, which upholds compulsions under rational basis review when speech is misleading, will allow government efforts to protect consumers, when necessary, and will allow consumers to obtain information they desire about products and services.<sup>23</sup> “A dynamic market discovery process, with only limited and targeted government interventions, is a more effective way to serve the consumer interest in obtaining more complete information about goods and services.”<sup>24</sup>

To that end, *Zauderer* should be narrowly interpreted in that rational basis should apply only if the advertisement is misleading or deceptive because (1) the alternative—applying rational basis when the compelled disclosure is “factual and uncontroversial”—is unworkable and leads to inconsistent court rulings; (2) moreover, applying rational basis to such large swaths of disclosures may lead to compelling too much information, compelling the wrong kind of information, or bolstering the government’s ideological beliefs because there will always be a legitimate government interest to compel, i.e. the consumer “right to know.”

This Comment argues that the proper application of *Zauderer* rational basis is a two-step inquiry. First, the court must ask if the commercial speech is deceptive or misleading.<sup>25</sup> If the commercial

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<sup>20</sup> Jonathan H. Adler, Opinion, “*Compelled Commercial Speech and the Consumer ‘Right to Know’*”, WASH. POST: VOLOKH CONSPIRACY (May 1, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/01/compelled-commercial-speech-and-the-consumer-right-to-know/?utm\\_term=.9e979632b5ad](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/01/compelled-commercial-speech-and-the-consumer-right-to-know/?utm_term=.9e979632b5ad).

<sup>21</sup> Jonathan H. Adler, *Compelled Commercial Speech and the Consumer ‘Right to Know’*, 58 ARIZ. L. REV. 421, 421 (2016) [hereinafter Adler, *Compelled Commercial Speech*].

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

<sup>23</sup> *Id.*

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

<sup>25</sup> “There are three general categories of commercial speech: non-misleading, potentially misleading, and misleading. The more misleading the advertisement, the more constitutional leeway is granted the States in restricting it.” Dwyer v. Cappell, 762 F.3d 275, 280 (3d Cir. 2014). In this context, “[c]ommercial speech that is not false, deceptive, or misleading” may only be restricted if the regulation

speech is not deceptive or misleading, intermediate scrutiny should be applied. If the commercial speech is deceptive or misleading, the court must ask if the compelled commercial speech is “factual and uncontroversial” speech intended to cure the deception. If so, rational basis should apply. Otherwise, intermediate scrutiny should apply.

The second part of this Comment will discuss the background of the commercial speech doctrine—detailing the three eras of commercial speech, why commercial speech is protected, and how the First Amendment core values are affected by commercial and compelled commercial speech, respectively. It will also detail the seminal case *Zauderer* and the circuit splits that exist in *Zauderer*’s application. The third part of this Comment will advocate for narrowing *Zauderer*’s application to “factual and uncontroversial” speech that aims to cure deception. And finally, the fourth part will offer concluding thoughts.

## II. BACKGROUND

### A. Doctrine

The First Amendment to the United States Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>26</sup> This amendment prohibits laws abridging the free-

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withstands intermediate scrutiny under *Central Hudson*. *Ibanez v. Fla. Dep’t of Bus. & Prof’l Reg.*, 512 U.S. 136, 142 (1994). States may prohibit potentially misleading ads, but only if the information cannot be presented in a way that is not deceptive (such as through adding a disclosure requirement). *In re R.M.J.*, 455 U.S. 191, 203 (1982). Advertising that is inherently misleading or has proven to be misleading in practice “may be prohibited entirely.” *Id.* To repeat in another way, restrictions on speech get protection under the Constitution inversely proportional to the deceptiveness of the target advertisement. This note covers misleading speech, inherently misleading speech, and potentially misleading speech that cannot be presented in a way that is not deceptive when it references speech that is “deceptive” or “misleading.”

<sup>26</sup> U.S. CONST. amend. I.

dom of speech, which, “as a general matter[,] means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>27</sup>

The Supreme Court has held, generally, that when the speech in question is protected, it is held to the same standard of review regardless of whether it is compelled or prohibited.<sup>28</sup> Therefore, the First Amendment guaranty of free speech “includes the right to refrain from speaking,” subject only to the warranted level of state interest required to support the restriction or regulation in the particular context.<sup>29</sup> Commercial speech is generally held to an intermediate scrutiny standard of review.<sup>30</sup> Nonetheless, compelled commercial speech *may* be held to a rational basis standard of review when it cures deception of consumers.<sup>31</sup>

### 1. THREE ERAS OF COMMERCIAL SPEECH

There are arguably three eras of Supreme Court jurisprudence on commercial speech; demonstrating that, historically, the Supreme Court has disfavored protecting commercial speech.<sup>32</sup>

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<sup>27</sup> *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

<sup>28</sup> *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)) (“[T]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 657–58 (1985) (Brennan, J., concurring in part and dissenting in part).

<sup>29</sup> *Wooley v. Maynard*, 430 U.S. 705, 714, 716 (1977).

<sup>30</sup> *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563, 584, 596, 598 (1980).

<sup>31</sup> *Zauderer*, 471 U.S. at 652.

<sup>32</sup> *See generally Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564 (2011) (explaining that because the law at issue regulated speech based on its content, heightened scrutiny was appropriate, irrespective of whether the law involved commercial speech); *Cent. Hudson Gas*, 447 U.S. at 568–71 (1980) (upholding some protection for commercial speech—essentially intermediate protection); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976) (holding that as long as the advertisement was truthful and not advertising anything illegal, the First Amendment should protect it); *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (holding that commercial speech was not entitled to First Amendment protection).

Initially, the Supreme Court provided commercial speech with no First Amendment protections.<sup>33</sup> The Court reasoned that the broad commerce clause powers of the government must reasonably include the power to regulate speech concerning articles of commerce.<sup>34</sup> In *Valentine v. Chrestensen*, the Court officially held that commercial speech was not entitled to First Amendment protections.<sup>35</sup> In its decision, the Court distinguished speech that is of public interest and speech that is for private profit.<sup>36</sup> The Court kept this prohibition on protection in place in large part until 1976's *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>37</sup> which overturned *Valentine*.

The second era of commercial speech jurisprudence, which can be considered the *Central Hudson* era, was ushered in with *Virginia State Board of Pharmacy*. In *Virginia State Board of Pharmacy*, the Commonwealth of Virginia passed a law making it illegal for pharmacists to advertise prices of prescription medicine, as doing so could promote aggressive advertising that would ultimately hurt consumers by diminishing the service pharmacists could provide.<sup>38</sup> A consumer group challenged the law, saying that citizens had a right to the price information.<sup>39</sup> In a 7–1 ruling, the Court overturned the law, noting that the distinction between regular speech and commercial speech was “simplistic.”<sup>40</sup> The real issue, the Court said, was that the speech itself satisfied the public interest by preserving the free flow of information:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in

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<sup>33</sup> See Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 213 (2011) (citing *Valentine*, 316 U.S. at 54).

<sup>34</sup> See *Valentine*, 316 U.S. at 53–55.

<sup>35</sup> *Id.* at 54–55.

<sup>36</sup> See *id.* at 54–55. Subsequently, the Court's rationale for affording commercial speech more protection continued to center on satisfying the public interest by preserving free flow of information. See *Va. State Bd. of Pharmacy*, 425 U.S. at 763–65.

<sup>37</sup> 425 U.S. 748 (1976).

<sup>38</sup> See *id.* at 748–49, 754–56.

<sup>39</sup> See *id.* at 748, 756.

<sup>40</sup> *Id.* at 758–60.

large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>41</sup>

The Court held that as long as the advertisement was truthful and not advertising something illegal, the First Amendment should protect it.<sup>42</sup> The court noted that although commercial speech should receive some First Amendment protection, it should not receive the same level of protection as other speech.<sup>43</sup> “Less explicit in the Court’s decision . . . was the recognition that commercial speech can also serve to advance the broader interests of democratic self-governance” and self-expression or autonomy.<sup>44</sup> In this second era of commercial speech, the Court provided some commercial speech protection—essentially intermediate protection—on the basis that this speech may help further consumer’s interest in the free flow of

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<sup>41</sup> *Id.* at 763–65.

<sup>42</sup> *See id.* at 771–72.

<sup>43</sup> *See id.* at 771–73, 771 n.24.

<sup>44</sup> Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & POL’Y 289, 295, 295 n.28 (2016) [hereinafter *Persistent Threats*]; accord Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2372 (2000) [hereinafter *Reconciling Theory*] (recognizing the relationship between commercial information and democratic self-governance); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 81 (2007) (“[S]peech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government.”); Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 100, 100 n.73 (1999) (challenging the notion that commercial information or advertising is less valuable than other forms of speech).

commercial information.<sup>45</sup> The free flow of commercial information, in turn, guarantees the capacity for democratic self-governance and self-expression or autonomy.<sup>46</sup>

The third era of commercial speech has been ushered in over the past two decades, as the Court has ratcheted up the level of protection for commercial speech under the First Amendment, while nonetheless disagreeing about the level of protection that it should be afforded.<sup>47</sup> Commercial speech jurisprudence in this third era acknowledges the consumer interests that justify the preservation of a diverse marketplace of ideas about goods and services.<sup>48</sup> Justice Thomas has stated that commercial speech should be protected to the same extent as other forms of speech<sup>49</sup>: “I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech. Indeed, some historical materials suggest to the contrary.”<sup>50</sup> Additionally, he has stated,

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<sup>45</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563, 584, 596, 598 (1980) (“The free flow of information is important in this context not because it will lead to the discovery of any objective ‘truth,’ but because it is essential to our system of self-government.”); *Va. State Bd. of Pharmacy*, 425 U.S. at 760 (noting that speech has value in the marketplace of ideas).

<sup>46</sup> See *Va. State Bd. of Pharmacy*, 425 U.S. at 765, 777; see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

<sup>47</sup> See *Royal*, *supra* note 33, at 214–15; *Persistent Threats*, *supra* note 44, at 291, 291 n.9 (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002)) (affording more protection for commercial speech by invalidating prohibitions on pharmacy advertising for drug compounding and noting that “[n]ot all commentators see this as a positive development”).

<sup>48</sup> *Persistent Threats*, *supra* note 44, at 291, 291 n.10; accord *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 579 (2011) (“The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.”).

<sup>49</sup> *Cf. Sorrell*, 546 U.S. at 564–66, 572, 593 (explaining that because the law at issue regulated speech based on its content, heightened scrutiny was appropriate, irrespective of whether the law involved commercial speech. In the end, the Court applied the more lenient *Central Hudson* test that it frequently applies to commercial speech, reasoning that because the regulation could not withstand even *Central Hudson* scrutiny, it was unnecessary to apply heightened scrutiny.)

<sup>50</sup> 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522, 522–23 n.4 (1996) (Thomas, J., concurring) (citing, among other sources, 19th and 20th century

“[i]n my view, an asserted government interest in keeping people ignorant by suppressing expression ‘is *per se* illegitimate and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial speech.’”<sup>51</sup> It is possible that the Court may adopt his view.

A majority of the Court recently entertained Justice Thomas’ position when, in dicta, it explained that heightened scrutiny was appropriate, irrespective of whether the law involved commercial speech.<sup>52</sup> The Court noted that the law at issue regulated speech based on its content.<sup>53</sup> Nonetheless, “[i]n the end, . . . the Court applied the more lenient *Central Hudson* test,” reasoning that it was unnecessary to apply heightened scrutiny “because the regulation could not withstand even *Central Hudson* scrutiny.”<sup>54</sup>

## 2. WHY PROTECT COMMERCIAL SPEECH AND PREVENT COMPELLED COMMERCIAL SPEECH?

Commercial speech should be protected because doing so is consistent with three core First Amendment values: “(1) . . . encourag[ing] a diverse marketplace of ideas” and the free flow of information; “(2) . . . facilitat[ing] participatory democracy; and (3) . . . promot[ing] individual autonomy, self-expression, and self-realization.”<sup>55</sup> The rationales for protecting commercial speech are similar to the rationales for curtailing compelled commercial speech.<sup>56</sup> These three core First Amendment values, however, are jeopardized in additional ways when compelling commercial speech, as discussed below.

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cases in which freedom of the press was cited to preclude Congress from preventing the circulation of lottery advertising through methods other than the United States mail).

<sup>51</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (quoting *44 Liquormart Inc.*, 517 U.S. at 487).

<sup>52</sup> *Royal*, *supra* note 33, at 215 (citing *Sorrell*, 546 U.S. at 564–67).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (citing *Sorrell*, 546 U.S. at 564–67, 588–89).

<sup>55</sup> Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291–92 (2014); accord Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 11 (2000) [hereinafter *Constitutional Status of Commercial Speech*].

<sup>56</sup> See Corbin, *supra* note 55, at 1291–92; see also *Constitutional Status of Commercial Speech*, *supra* note 55, at 10–11.

a. Encourage a Diverse Marketplace of Ideas

The value of a diverse “marketplace of ideas” is in the advancement of truth through the free flow of information and opinions.<sup>57</sup> The First Amendment aims to “preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail” by ensuring the “right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences.”<sup>58</sup> This may not be constitutionally abridged.<sup>59</sup>

1. *Commercial Speech*

Commercial speech should be protected to cure asymmetry of information.<sup>60</sup> Commercial speakers are in the best position to communicate important information to consumers that they would not ordinarily know in making consumption decisions.<sup>61</sup> In providing important commercial information, commercial speakers contribute to the market place of ideas.<sup>62</sup> While some commercial information may be of slight worth, “the general rule is that the speaker and the audience, not the government, assess the value of the information presented.”<sup>63</sup> People will perceive their own best interests only if they are sufficiently well informed.<sup>64</sup> “[T]he best means to that end

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<sup>57</sup> Vernon R. Pearson & Michael O’Neill, *The First Amendment, Commercial Speech, and the Advertising Lawyer*, 9 U. PUGET SOUND L. REV. 293, 296 (1986).

<sup>58</sup> *Id.* at 296 n.16.

<sup>59</sup> *Id.*

<sup>60</sup> See Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1165 (2012).

<sup>61</sup> Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1113 (1991).

<sup>62</sup> See Brudney, note 60, at 1202–04, 1211; see also *Constitutional Status of Commercial Speech*, *supra* note 55, at 14–15.

<sup>63</sup> *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (“The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth . . . [E]ven a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.”).

<sup>64</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–65, 770 (1976); *Edenfield*, 507 U.S. at 766 (noting that a ban on commercial speech “threatens societal interests in broad access to complete and accurate commercial information”). See also Bianca Nunes, Note, *The Future*

is to open the channels of communication rather than to close them.”<sup>65</sup>

## 2. *Compelled Commercial Speech*

Compelled commercial speech should be curtailed because it forces commercial speech participation, thereby distorting the marketplace of ideas. Distortion does not mean “under-representation” or “over-representation” of particular viewpoints.<sup>66</sup> Instead, it refers to the introduction of error into the marketplace of ideas.<sup>67</sup> “Compelled speech can lead to error if its content is inaccurate or misleading or if its context fails to make clear whether the message is the government’s or the compelled speaker’s.”<sup>68</sup> Audiences, too, will suffer as distortion in the marketplace of ideas hinders the capacity for effective and accurate democratic self-governance and self-expression or autonomy.<sup>69</sup>

Compelled commercial speech also distorts the market place of ideas by chilling speech and causing a deprivation to the market place of ideas.<sup>70</sup> “[F]or example, a speaker may decide not to speak at all if her speech must include the state’s compelled message.”<sup>71</sup> Audiences, too, will suffer as a result of never hearing what that

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*of Government-Mandated Health Warnings After R.J. Reynolds and American Meat Institute*, 163 U. PA. L. REV. 177, 181–82 (2014).

<sup>65</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

<sup>66</sup> Corbin, *supra* note 55, at 1294. “Compelled speech does not inevitably distort the discourse. Quite the contrary: a compelled disclosure may clarify otherwise misleading speech.” *Id.*

<sup>67</sup> *Id.*

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

<sup>69</sup> *See Va. State Bd. of Pharmacy*, 425 U.S. at 765, 777; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964).

<sup>70</sup> Corbin, *supra* note 55, at 1344. Compelled commercial speech does not inevitably deprive the marketplace of ideas. In the context of centers that are forced to espouse pro-life views, Corbin has stated, “[i]t is possible that some Centers may decide to curtail their advertisements if forced to disclose their pro-life point of view. However, since they had not highlighted these pro-life beliefs in their advertisements in the first place, no viewpoint will disappear from the marketplace of ideas.” *Id.*

<sup>71</sup> *Id.* at 1293–94.

speaker might have said.<sup>72</sup> This will hinder public debate and “unintentionally undermine rather than advance the free speech goal of [providing] more information, opinions, and views.”<sup>73</sup>

b. Facilitate Participatory Democracy

“Participatory democracy” is a two-prong American free speech value that (1) assures “an informed electorate” by “allow[ing] citizens to learn about the public affairs of the day” in order to make well-informed decisions<sup>74</sup> and (2) assures “the opportunity for individuals to participate in the speech by which [they] govern themselves.”<sup>75</sup>

1. *Commercial Speech*

Commercial speech should be protected “because it circulates information necessary for the education of those who participate in

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<sup>72</sup> *Id.* at 1294 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking right to reply statute on free press grounds)).

<sup>73</sup> *Id.* In *Miami Herald Publ’g Co. v. Tornillo*, the potential loss of speech led the Supreme Court to invalidate a right of reply law. *See generally Miami Herald Publ’g*, 418 U.S. at 241. A Florida statute, which aimed to ensure balanced coverage, required “that after a newspaper attacked a political candidate, it must allow the criticized candidate to respond.” Corbin, *supra* note 55, at 1294; *accord Miami Herald Publ’g*, 418 U.S. at 244. “The Court worried that rather than be forced to let others use their pages, the newspapers might temper their political criticisms, thereby [hindering] the vigor of public debate.” Corbin, *supra* note 55, at 1294; *accord Miami Herald Publ’g*, 418 U.S. at 257.

<sup>74</sup> Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 969–70 (2009); *accord* Rodney A. Smolla, *Freedom of Speech for Libraries and Librarians*, 85 LAW LIBR. J. 71, 77 (1993) (“[T]he First Amendment protects not only individual self-expression, but also the right to receive information and ideas. The right to receive inures in the right to send, for without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping.”).

<sup>75</sup> James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491, 498 (2011); *accord* Corbin, *supra* note 55 at 1293–94 (quoting *Reconciling Theory*, *supra* note 44, at 2368) (“[C]rucial to democratic self-determination is ‘the ability of individual citizens to participate in the formation of public opinion.’”); *Constitutional Status of Commercial Speech*, *supra* note 55, at 12–13.

public discourse.”<sup>76</sup> Any information contributes to what is necessary for participatory democracy, regardless of whether the speaker is a company or individual.<sup>77</sup>

## 2. *Compelled Commercial Speech*

Compelled commercial speech should be curtailed because it does not facilitate a participatory democracy in that the speaker is not participating out of desire. It is forced participation, conveying forced content.<sup>78</sup> “[I]n order for our democracy ‘of the people, by the people, for the people’ to work, the people need the ability to shape political debate . . . .”<sup>79</sup> If the speaker is not the origin of the message, the political debate is distorted. Additionally, compelled commercial speech may chill speech, as stated above, thereby limiting people’s ability to participate in political discourse and undermining what makes this nation a democracy—the ability of all citizens to vote for policymakers and voice their opinions on what those policies should be.<sup>80</sup>

As stated above, audiences, too, will suffer as the speaker’s forced participation, or lack thereof, may lead to distortion or deprivation in the public debate, thereby hindering its vigor.<sup>81</sup>

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<sup>76</sup> Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 874–75 (2015) [hereinafter Post, *Compelled Commercial Speech*].

<sup>77</sup> See *id.*; Brudney, *supra* note 60, at 1157–58 (noting that “commercial speech . . . is ‘enriched,’ in that it does more than simply articulate the terms of the proposed transaction”); see also *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

<sup>78</sup> See Corbin, *supra* note 55, at 1295 (noting that compelled speech misrepresents true views of speakers and may lead an audience to credit it more than they would have otherwise).

<sup>79</sup> *Id.* at 1292.

<sup>80</sup> See *id.* at 1292–95 (noting that compelled commercial speech chills speech and stifles self-expression of the speaker). “It also limits people’s ability to participate in political discourse, and what makes the nation a democracy is not just that everyone gets to vote for policymakers, but that everyone gets to put in their two cents worth on what those policies should be.” *Id.* at 1293.

<sup>81</sup> *Id.* at 1293–95 (“The government could also distort the discourse by misrepresenting the true views of speakers. For example, if the government forces speakers to convey an opinion they disagree with, and if an audience believes that the message is the private speakers’ rather than the government’s, the audience may erroneously conclude that the message is more widespread than it really is. This mistaken view will make audiences credit it more than they would have otherwise, as studies show that the perceived popularity of a message can increase its persuasiveness.”).

c. To Promote Individual Autonomy, Self-Expression, and Self-Realization

“At the most basic level, free speech autonomy means being able to decide what one says: compelled speech ‘violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.’”<sup>82</sup>

1. *Speaker*

A. COMMERCIAL SPEECH

The justifications for affording First Amendment protection to commercial speakers on the basis of “promot[ing] individual autonomy, self-expression, and self-realization” are weak,<sup>83</sup> but have been upheld by courts.<sup>84</sup> It is undisputed that companies have free speech rights, but the rationale varies.<sup>85</sup>

Free speech rights for companies have been rationalized a variety of ways. One rationale is the company’s inherent autonomy and ability to determine the content of its speech.<sup>86</sup> “A corporation speaks by hiring someone to create speech or to write for it.”<sup>87</sup> The notion that the individual controls what she says and what she thinks “does not lose its protection because of the corporate identity of the speaker.”<sup>88</sup> Another rationale for companies’ free speech rights is that “corporations are sometimes legally recognized as ‘persons’—

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<sup>82</sup> *Id.* at 1299 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995)).

<sup>83</sup> *Id.* at 1285, 1291 (noting that commercial speech is economically motivated). *But see Constitutional Status of Commercial Speech*, *supra* note 55, at 6–7, 10–12.

<sup>84</sup> *See Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310, 342–43 (2010) (holding that the First Amendment does not allow prohibitions of speech based on the identity of the speaker); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759, 2768 (2014). For an overview on Supreme Court case law on corporate speech, see John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT 223, 248–54 (2015).

<sup>85</sup> Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1000–01 (1998).

<sup>86</sup> *See Burwell*, 134 S. Ct. at 2768; *see also Corbin*, *supra* note 55, at 1299.

<sup>87</sup> Greenwood, *supra* note 85, at 1056.

<sup>88</sup> *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16 (1986).

such as a ‘person’ with a right to contract<sup>89</sup>—when ‘personhood’ enables them to fulfill their economic purpose.”<sup>90</sup> A third rationale is that the individual people that make-up companies have autonomy rights.<sup>91</sup> In *Burwell v. Hobby Lobby Stores, Inc.*, the Court, in reference to the First Amendment Free Exercise Clause, held that when rights are extended to corporations, the purpose is to protect the rights of people, including shareholders, officers, and employees associated with the corporation in one way or another.<sup>92</sup>

#### B. COMPELLED COMMERCIAL SPEECH

Compelled commercial speech should be curtailed, under the three aforementioned autonomy rationales for protecting commercial speech, to promote speaker autonomy by ensuring that the speaker rather than the government controls what she says and what she thinks. A person is not autonomous in body or thought if forced to speak, and state a belief with which she disagrees, when she would prefer to remain silent.<sup>93</sup> Additionally, speakers may suffer the harm of misattribution if listeners regard the government’s opinion as the speaker’s opinion.<sup>94</sup> Free speech autonomy calls for the ability to decide what one says: “compelled speech ‘violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.’”<sup>95</sup> The choice to speak encompasses the choice of what not to say for both individuals and corporations.<sup>96</sup>

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<sup>89</sup> Corbin, *supra* note 55, at 1315 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819)) (recognizing corporations’ right to contract); *see also* *Cty. of Santa Clara v. S. Pac. R. Co.*, 118 U.S. 394, 409 (1886) (recognizing corporations’ right to protection under the Fourteenth Amendment).

<sup>90</sup> Corbin, *supra* note 55, at 1315 (quoting Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 221–22 (2011)).

<sup>91</sup> *See Burwell*, 134 S. Ct. at 2768.

<sup>92</sup> *Id.*

<sup>93</sup> *See* Corbin, *supra* note 55, at 1298–99 (citing *Hurley v. Irish-Am. Gay Grp. of Bos.*, 515 U.S. 557, 573 (1995)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16 (1986) (“For corporations[,] as for individuals, the choice to speak includes within it the

## 2. *Listener*

### A. COMMERCIAL SPEECH

Commercial speech should be protected because democratic self-governance and knowledge of commercial affairs is integral to “promot[ing] individual autonomy, self-expression, and self-realization” for the listener.<sup>97</sup> The listener should be able to receive any information that will contribute to her ability to make well-informed consumer decisions.<sup>98</sup>

If the government curtails the available information, it is influencing the individual’s ability to decide and create his or her own self-identity/governance. The First Amendment protects “speech that more directly engages an individual’s autonomy interest in personal self-realization by protecting utterances and receipt of expression that serve any and all personal interests.”<sup>99</sup> It is strongly argued that the experience in uttering, receiving, and considering commercial speech has such value.<sup>100</sup>

Accordingly, commercial speech may be enriched, “in that it does more than simply articulate the terms of the proposed transaction or describe the identified products or services.”<sup>101</sup> Commercial

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choice of what not to say.”); *see also* *Constitutional Status of Commercial Speech*, *supra* note 55, at 26.

<sup>97</sup> Corbin, *supra* note 55, at 1291, 1300–08, 1347.

<sup>98</sup> *See id.* at 1292; *Compelled Commercial Speech*, *supra* note 76, at 874–75; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763–65 (1976).

<sup>99</sup> *See* Brudney, *supra* note 60, at 1164 n.32.

<sup>100</sup> *See Persistent Threats*, *supra* note 44, at 298–99; Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1272–73 (1995) [hereinafter *Recuperating First Amendment Doctrine*]; *see also* Martin H. Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591, 606–07 (1982); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 76–77 (1974); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 345 (1991).

<sup>101</sup> *Persistent Threats*, *supra* note 44, at 298–99; Brudney, *supra* note 60, at 1157–59, 1211–13; *see also* *Recuperating First Amendment Doctrine*, *supra* note 100, at 1272–73; Redish, *supra* note 100, at 606–07; Strauss, *supra* note 100, at 345; Richards, *supra* note 100, at 76–77. For example, purchasing a product can be an ethical or political act. Consider the consumer who buys a Prius or insists upon shopping at a “socially reasonable” store. *See Persistent Threats*, *supra* note 44, at 299.

speech may also communicate supplementary expressions about personal or social preferences.<sup>102</sup> These supplementary expressions reflect “matters of collective or public interest to society and engage . . . the interest of . . . the audience in considering such matters in addition to . . . making the purchase.”<sup>103</sup>

The First Amendment aims to protect this persuasive or informative speech from government regulation in order to facilitate society’s collective actions and nurture social attitudes and values. Despite the fact that commercial speech persuades or informs mainly to prompt the purchase of a service or product for a consumer’s own consumption or enjoyment,<sup>104</sup> “individual choices driven by conceptions of self-benefit may result in imitative, or even aggregate, communal choices by individuals.”<sup>105</sup>

## B. COMPELLED COMMERCIAL SPEECH

Compelled commercial speech should be curtailed because anti-paternalism—the idea that the government should not decide what information audiences can or cannot access—underlies our free speech jurisprudence.<sup>106</sup> “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”<sup>107</sup>

While compelled speech seems to escape this particular concern since the government is not restricting information but providing

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<sup>102</sup> *Persistent Threats*, *supra* note 44, at 298–99; Brudney, *supra* note 60, at 1157–59, 1211–13 (“[I]t may promote the seller’s products or services by highlighting their health and safety benefits, or ego-enhancing features, or public policy benefits for society.”); *see also Recuperating First Amendment Doctrine*, *supra* note 100, at 1272–73; Redish, *supra* note 100, at 606–07; Richards, *supra* note 100, at 76–77; Strauss, *supra* note 100, at 345. For example, purchasing a product can be an ethical or political act. Consider the consumer who buys a Prius or insists upon shopping at a “socially reasonable” store. *See Persistent Threats*, *supra* note 44, at 299.

<sup>103</sup> Brudney, *supra* note 60, at 1176.

<sup>104</sup> *Id.* at 1185.

<sup>105</sup> *See id.* at 1185 n.100. Returning to the Prius example mentioned above, Prius’ are common in Los Angeles where environment sustainability is a concern among many. An individual buying a Prius could communicate a message about his or her environmental and possibly political affiliations. Others may imitate that behavior to convey a similar message.

<sup>106</sup> *See Corbin*, *supra* note 55, at 1300.

<sup>107</sup> *Id.* (quoting *Sorrell v. IMS Health, Inc.*, 546 U.S. 552, 577 (2011)).

more of it,<sup>108</sup> government-compelled commercial speech may threaten listener autonomy through paternalistic ends and manipulative means.<sup>109</sup> Distrust of the government, while not a First Amendment core value, is an underlying principle relevant to this inquiry.<sup>110</sup>

d. Distrust of Government

As Justice Scalia stated, “it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.”<sup>111</sup>

Paternalistic ends in government-mandated disclosures are evident when the government “crosses the line when it compels disclosures not to inform, but to persuade.”<sup>112</sup> It is less concerning when the state uses its coercive power to provide information that clarifies or information that is in the exclusive possession of the speaker and more concerning when the state uses its coercive power to compel disclosures in order to convince the audience to do what the state thinks is right.<sup>113</sup>

However, interference may be acceptable in certain situations. “Even those possessing [a] strong sense of autonomy . . . would probably agree that compelling additional information that correct[s] the speaker’s false or misleading speech does not illegitimately interfere with the intended beneficiary’s autonomy.”<sup>114</sup>

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<sup>108</sup> *Id.* at 1301 (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994)) (noting that compelled disclosures are preferable to censorship as “disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information”).

<sup>109</sup> *Id.* at 1301.

<sup>110</sup> *Id.* at 1292, 1301–04.

<sup>111</sup> *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 804 (1988) (Scalia, J., concurring).

<sup>112</sup> Corbin, *supra* note 55, at 1302.

<sup>113</sup> *See id.* Admittedly, “not every state attempt to persuade sufficiently respects the audience’s autonomy. The government’s goal makes a difference. Most suspect is when the state urges a course of action that actually detracts from the audience’s autonomy.” *Id.* at 1303. As an example, “[u]rging people not to vote . . . would seem to undermine rather than enhance people’s autonomy.” *Id.*

<sup>114</sup> *Id.* at 1302 (noting that the government compelled warnings would not be paternalistic if the mandated information consisted of accurate facts meant to in-

Compelled speech might undermine the free speech goal of autonomous decision-making even when the government's end is justified by relying on illegitimate and manipulative means. "The . . . question is whether and when appeals . . . rise to the level of 'manipulation.'"<sup>115</sup> The government may manipulate audiences (1) intentionally, when it compels false or misleading speech, or (2) through misattribution, when it fails to make clear that the information represents the government's opinion and not the speaker's opinion.<sup>116</sup> This form of "deception amounts to a 'denial of autonomy' because it 'interfere[s] with a person's control over her own reasoning processes.'"<sup>117</sup>

Accordingly, an audience may erroneously conclude that a message is more widespread than it really is if it believes that the message is the private speakers' rather than the government's.<sup>118</sup> This may lead an audience to credit the opinion more than they would have otherwise.<sup>119</sup> "In such cases, the government uses its coercive power to persuade not by virtue of the underlying worthiness of its message, but by taking advantage of misattribution and a heuristic."<sup>120</sup>

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form, rather than influence, the audience's decision making; especially if the information cured a potentially misleading or deceptive advertisement, or if the information were not otherwise available).

<sup>115</sup> *Id.* at 1304.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (quoting Strauss, *supra* note 100, at 354).

<sup>118</sup> *Id.* at 1295.

<sup>119</sup> *See id.* (noting that as studies show that the perceived popularity of a message can increase its persuasiveness); *see also* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1010 (2004) ("The phenomenon of popular influence is well-established in the social science literature, which shows that ideas perceived to have achieved broad acceptance are generally more persuasive.").

<sup>120</sup> *See* Corbin, *supra* note 55, at 1295. Professor Caroline Corbin of the University of Miami School of Law stated the following on this issue: "[O]ur minds have developed a . . . faster, easier method to help process information. This cognitive process relies on heuristics—rules of thumb—and 'more accessible information such as the source's identity or other non-content cues.' Heuristics . . . can lead to errors in some predictable ways . . . [R]esearch shows that . . . our decision making is riddled with cognitive shortcuts that regularly distort how we gather and process information. Just as compelled speech that attempts to exploit factual errors is distorting, compelled speech that intentionally exploits predictable cog-

B. *Zauderer v. Office of Disciplinary Counsel*

Subsequent to *Central Hudson*, in which the Supreme Court set out the intermediate scrutiny standard for commercial speech,<sup>121</sup> *Zauderer* was decided.<sup>122</sup>

1. THE CASE

In 1982, attorney Zauderer took out advertisements in thirty-six Ohio newspapers announcing that his firm represented women on a contingent-fee basis in cases related to injuries caused by the Dalkon Shield Intrauterine Device (IUD).<sup>123</sup> The advertisements provided a telephone number that individuals could call for “free information.”<sup>124</sup> Zauderer acquired clients as a result of the ads.<sup>125</sup>

The Supreme Court took issue with the advertisement, which informed the public that “if there is no recovery, no legal fees are owed by our clients.”<sup>126</sup> The Court noted that the advertisement did not distinguish “legal fees” from “costs” for the “layman not aware of the meaning of these terms of art” and that the advertisement suggested a “no-lose proposition” in that Zauderer’s representation would “come entirely free of charge.”<sup>127</sup> The Court found the likelihood that potential clients would be misled was “hardly a speculative one: it is 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.”<sup>128</sup> When the possibility of deception is as self-evident as it was in this case, the Court held that it would “not require the State to ‘conduct a survey of the . . . public before it [may] determine

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nitive errors can be considered distortion of the discourse. Speaker confusion invites exploitation of another common heuristic: the ‘defer-to-trusted-expert’ heuristic. By compelling an authority figure to speak its message, the government can ‘add a patina of trustworthiness and expertise to its message.’” *Id.* at 1295–97.

<sup>121</sup> See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

<sup>122</sup> See generally *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

<sup>123</sup> *Id.* at 630–31.

<sup>124</sup> *Id.* at 631.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 652.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

that the [advertisement] had a tendency to mislead.”<sup>129</sup> The Court found that a speech compulsion clarifying that clients will have to pay costs even if their lawsuits are unsuccessful was proper.<sup>130</sup> In finding so, the Court noted that the attorney’s interest in not providing such purely factual and uncontroversial information was “minimal” and that the compulsion need be judged only by an easy-to-satisfy rational basis test.<sup>131</sup> That test was satisfied here, the Court held, because the disclosure requirement was “*reasonably related to the State’s interest in preventing deception of consumers.*”<sup>132</sup>

## 2. CIRCUIT SPLITS ON ZAUDERER’S APPLICATION

### a. Split in the Requirement of “Curing Consumer Deception”

This circuit split concerns whether compelled commercial speech disclosures should be subjected to a rational basis analysis *only* when the government is compelling “factual and uncontroversial” information to prevent “deception of consumers” or *also* when the government is compelling “factual and uncontroversial” information with other policy objectives in mind. Thus, the overarching question is whether the government must meet a more rigorous standard when the government is not seeking to prevent deception.<sup>133</sup> The circuits have split and follow one of two rules stated below.<sup>134</sup>

Some circuits—the Second,<sup>135</sup> D.C.,<sup>136</sup> the Ninth,<sup>137</sup> and the Tenth<sup>138</sup>—have found that the government can compel any “factual and uncontroversial” disclosure on an ad, label, or other commercial

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<sup>129</sup> *Id.* at 652–53 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965)).

<sup>130</sup> *Id.* at 653.

<sup>131</sup> *Id.* at 651–53.

<sup>132</sup> *Id.* at 651 (emphasis added).

<sup>133</sup> See Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 972–73 (2017).

<sup>134</sup> See *id.*

<sup>135</sup> See *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113–14 (2d. Cir. 2001).

<sup>136</sup> See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014).

<sup>137</sup> See *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 891–92 (9th Cir. 2017).

<sup>138</sup> See *United States v. Wenger*, 427 F.3d 840, 844, 849–50 (10th Cir. 2005).

speech.<sup>139</sup> These circuits have held that *Zauderer* applies because the rules at issue only require the disclosure of “factual and uncontroversial information” that is rationally related to a state’s legitimate interest.<sup>140</sup> This is a broad reading of *Zauderer*. As Judge Stephen Williams explained in *AMI*, “*Zauderer* is best read as applying not only to mandates aimed at curing deception but also to ones for other purposes.”<sup>141</sup> Although this conclusion is arguably consistent with the conclusions reached by other circuits, it represents a misreading of *Zauderer* and effectively eliminates meaningful constitutional protection for compelled commercial speech.<sup>142</sup>

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<sup>139</sup> See *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 891–92 (9th Cir. 2017) (holding that *Zauderer*’s “framework applies when a state requires disclosures for a different state interest, such as to promote public health” by requiring warnings about health effects of certain sugar-sweetened beverages); *Am. Meat Inst.*, 760 F.3d at 27 (holding that compelling “country of origin labeling,” while not necessary to cure deception, is subject to rational basis scrutiny); *Safe-lite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263–66 (2d Cir. 2014) (holding that a requirement that a corporation disclose the name of a competitor’s repair shop to customers fell outside *Zauderer*’s “factual and uncontroversial” bounds); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554–55 (6th Cir. 2012) (noting that *Zauderer* allows mandated disclosures that serve “some substantial interest.”); *N.Y. State Rest. V. N.Y. City Bd.*, 556 F.3d 114, 117–18 132 (2d Cir. 2009) (upholding a New York City regulation that required certain restaurants to post calorie content information on menus and menu boards that were not previously deceptive under rational basis review); *United States v. Wenger*, 427 F.3d 840, 844, 849–50 (10th Cir. 2005) (noting that despite being upheld as part of the federal government’s broad powers to regulate securities, section 17(b)’s disclosure requirements would have been upheld as a regulation on commercial speech; even when the government has not shown that absent the required disclosure the speech would be false or deceptive, and even when the disclosure requirement serves some substantial government interest other than preventing deception, such as fraud prevention).

<sup>140</sup> See, e.g., *Nat’l Elec. Mfrs Ass’n*, 272 F.3d at 113–15 (holding that statute imposing labeling requirements upon mercury-containing lamps as to their content and proper method of disposal did not violate manufacturers’ free speech rights, as required disclosure of such factual commercial information was rationally related to state’s legitimate goals of protecting human health and environment and increasing consumer awareness of mercury presence in certain products); *Am. Beverage Ass’n*, 871 F.3d at 891–92.

<sup>141</sup> *Am. Meat Inst.*, 760 F.3d at 36 (Henderson, J., dissenting) (quoting *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065, 1073 (D.C. Cir. 2014)).

<sup>142</sup> See Note, *supra* note 133, at 973–75.

Other circuits have found that the proper rule is that the government can only compel a “factual and uncontroversial” disclosure on an ad, label, or other form of commercial speech if it is curing an otherwise deceptive ad, label, or other form of commercial speech.<sup>143</sup> This is a narrow reading of *Zauderer*. As explained below, the argument here is that there is no conflict between *Central Hudson* and *Zauderer*, so the two are best understood as two aspects of the same underlying doctrine and not as alternatives.<sup>144</sup> The courts do not have to choose between them.<sup>145</sup>

b. Split in the Requirement of “Factual and Uncontroversial”

The federal courts of appeal have also been inconsistent in determining what kinds of disclosures are “purely factual and uncontroversial,” in the words of the *Zauderer* opinion.<sup>146</sup> For that reason,

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<sup>143</sup> See e.g., *Ocheese Creamery, LLC v. Putnam*, 851 F.3d 1228, 1235–36 (11th Cir. 2017) (noting that a speech restriction that neither concerns unlawful activity nor is inherently misleading may only be regulated if it satisfies intermediate scrutiny); *Dwyer v. Cappell*, 762 F.3d 275, 281–83 (3d Cir. 2014) (holding that a guideline could not compel commercial speech on legal advertisements when the guideline did not require disclosing anything that could reasonably remedy consumer deception); *Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 283 (4th Cir. 2013) (noting that “[d]isclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny, by being ‘reasonably related to the State’s interest in preventing deception of consumers.’”) (citations omitted); *Pub. Citizen, Inc. v. La. Att’y Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) (holding that a regulation that imposes a disclosure obligation on a potentially misleading legal advertisement will survive First Amendment review if the required disclosure (1) passes intermediate scrutiny or (2), if the ad is related to preventing consumer deception, and it passes rational basis); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248–52 (2010) (holding that a requirement that professionals assisting consumers with bankruptcy must state that they are a debt relief agency in their ads is constitutional because the speech in question was directed at misleading commercial speech); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (upholding, under rational basis review, mandated disclosures by pharmacy benefit managers (PBM) of economically significant information designed to protect covered entities from questionable PBM business practices); *Cent. Ill. Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987) (holding that a mandatory commercial disclosure was unconstitutional when it was not justified by consumer deception, but by a legitimate state police power interest).

<sup>144</sup> Post, *Compelled Commercial Speech*, *supra* note 76, at 436.

<sup>145</sup> See *id.*

<sup>146</sup> See *infra* pp. 32–36.

the next part of this Comment will advocate for a narrow reading of *Zauderer*, in which the “factual and uncontroversial” analysis is done only after a finding that the compelled commercial speech cures deception.

### III. FOR NARROW *ZAUDERER*

“*Zauderer*, properly understood, fits comfortably within the *Central Hudson* framework.”<sup>147</sup> The First Amendment provides equivalent protection for both the right to speak and the right not to speak, and there is no reason to assume that mandatory disclosures get a pass in the commercial context.<sup>148</sup> Under *Central Hudson*, commercial speech is only eligible for heightened protection if the speech concerns lawful activity and is not misleading.<sup>149</sup> *Zauderer*’s holding that mandatory disclosures will be readily upheld so long as they are reasonably related to the state’s interest in preventing deception of consumers was not novel—it was a straightforward application of *Central Hudson*.<sup>150</sup> Accordingly, commercial speech is not protected if it is deceptive, and compelled commercial speech is not curtailed if it prevents deception.

#### A. *The Test*

This Comment argues that the proper application of *Zauderer* rational basis is a two-step inquiry. First, the court must ask if the commercial speech is deceptive or misleading. If the commercial speech is not deceptive or misleading, intermediate scrutiny should be applied. If the commercial speech is deceptive or misleading, the court must ask if the compelled commercial speech is “factual and

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<sup>147</sup> Jonathan H. Adler, *What are the Constitutional Limits on Compelled Commercial Speech?*, WASH. POST: VOLOKH CONSPIRACY (April 7, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/07/what-are-the-constitutional-limits-on-compelled-commercial-speech/?utm\\_term=.7c84521a6ca2](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/07/what-are-the-constitutional-limits-on-compelled-commercial-speech/?utm_term=.7c84521a6ca2) [hereinafter *Constitutional Limits*].

<sup>148</sup> See *id.*; Adler, *Compelled Commercial Speech*, *supra* note 21, at 432.

<sup>149</sup> 447 U.S. 557, 557 (1980).

<sup>150</sup> Adler, *Compelled Commercial Speech*, *supra* note 21, at 435.

uncontroversial” speech intended to cure the deception. If so, rational basis should apply.<sup>151</sup> Otherwise, intermediate scrutiny should apply.

### B. *Unworkable*

As stated above, in theory, compelled disclosures are a good idea.<sup>152</sup> Factual disclosure laws, which inject more information into the marketplace of ideas, further First Amendment goals.<sup>153</sup> “In fact, ‘it is often the very purpose of compelled speech requirements to correct market flaws in the marketplace of ideas and further the First Amendment’s goal of maximizing communication and discovery of truth.’”<sup>154</sup> Nonetheless, broad *Zauderer* has subjected too many mandated disclosures to rational basis review and eliminated meaningful protection for commercial speech.

This Comment advocates for the application of narrow *Zauderer* because passing mandated commercial speech disclosures pursuant to *any* legitimate state interest on the basis that the compelled speech is “factual and uncontroversial” is unworkable in that it leads to inconsistent court rulings. For that reason, the solution is to not begin the inquiry with “factual and uncontroversial.” Instead, the “factual and uncontroversial” requirement should be considered in the context of *Zauderer*’s full-holding. It should be linked to correcting deception. In essence, this two-step inquiry requires deception in the commercial speech before asking if the compelled commercial

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<sup>151</sup> Surgeon General Warnings are required on tobacco products despite the fact that the products are not deceptive. See U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL (May 27, 2004), available at [https://www.cdc.gov/tobacco/data\\_statistics/sgr/2004/complete\\_report/index.htm](https://www.cdc.gov/tobacco/data_statistics/sgr/2004/complete_report/index.htm). This Note advocates for surgeon general warnings on the basis of the history of deception with these advertisements. See *Pub. Citizen v. La. Att’y Disciplinary*, 632 F.3d 212, 218 (5th Cir. 2011) (“Advertising that ‘is inherently likely to deceive or where the record indicates that a particular form or method . . . of advertising has in fact been deceptive’ receives no protection and the State may prohibit it entirely.”) (citation omitted).

<sup>152</sup> See *supra* pp. 22–23.

<sup>153</sup> See Corbin, *supra* note 55, at 1302.

<sup>154</sup> Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 551 (2012) (quoting David W. Ogden, *Is There a First Amendment “Right to Remain Silent”?: The Supreme Court’s “Compelled Speech” Doctrine*, 40 FED. B. NEWS & J. 368, 370 (1993)).

speech is “factual and uncontroversial.” This should alleviate some of the consequences of applying the unworkable “factual and uncontroversial” test.

### 1. DEFINING A WORKABLE STANDARD

A workable test or standard “allows one to distinguish the relevant limitations from the irrelevant [limitations].”<sup>155</sup> It is a test that clearly distinguishes between two possibilities and clarifies where theory and practice meet.<sup>156</sup> A test or standard is unworkable when it is too hard to actually apply, and if, from the viewpoint of judicial discretion, it is subjective.<sup>157</sup>

### 2. UNWORKABLE BROAD ZAUDERER

The broad *Zauderer* test is unworkable as evidenced by inconsistent appellate court rulings.<sup>158</sup>

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<sup>155</sup> Mattias Derlén & Johan Lindholm, *Article 28 E.C. and Rules on Use: A Step Towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions*, 16 COLUM. J. EUR. L. 191, 200 (2010).

<sup>156</sup> See *id.* at 224; see also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 917 (1963) (noting that “rules must be workable in terms of the realities of maintaining a system in the everyday world” and that “judicial administration . . . is a critical factor.”); Jacy T. Jasmer, *ETW Corp. v. Jireh Publishing, Inc.: A Workable Standard, an Unworkable Decision*, 5 MINN. INTEL. PROP. REV. 293, 313–14 (2004) (noting that “[d]espite the criticism of the ‘transformative elements’ test established in *Comedy III*, the test is essentially workable for three reasons: (1) it strikes the correct balance between the right of publicity and First Amendment rights; (2) it allows courts to make necessary fact specific determinations; and (3) other alternative approaches do not offer any improvements; on the contrary, they may be even more faulty.”).

<sup>157</sup> See Jasmer, *supra* note 156, at 313–14; see also Emily Michele Papp, Note, *Just Take My Word for It: Creating a Workable Test to Ensure Reliability in Overseas Document Verification Reports for Asylum Proceedings*, 101 IOWA L. REV. 2141, 2165–66 (2016); see e.g., *Lin v. U.S. Dept. of Justice*, 459 F.3d 255, 258–59, 270 (2d Cir. 2006) (distinguishing between a workable and unworkable test used to determine the authenticity of documentary evidence submitted to support an application for asylum by holding that one test was unworkable because it was not succinct and made compliance overly burdensome).

<sup>158</sup> See *Persistent Threats*, *supra* note 44, at 314.

a. Defining “Factual and Uncontroversial”

“Factual and uncontroversial” is a term of art that is not readily understood. Consequently, courts rule inconsistently because it is unclear what makes a mandated disclosure “factual and uncontroversial.”<sup>159</sup> The difficulty in classifying “factual and uncontroversial” is exemplified in the subsequent court rulings.

In 2012, the D.C. Circuit in *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, was asked to determine whether the Food and Drug Administration’s rule requiring display of new textual and graphic images on cigarette packaging was unconstitutional.<sup>160</sup> While acknowledging that none of the images were “patently false,” the court wrote that the images were “not ‘purely’ factual because . . . they are primarily intended to evoke an emotional response.”<sup>161</sup> The court linked “factual and uncontroversial” communications with “pure attempts to convey information.”<sup>162</sup> As noted by compelled commer-

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<sup>159</sup> See Timothy J. Straub, Comment, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 *FORDHAM URB. L.J.* 1201, 1252–53, 1252 n.381 (2013); see also *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 893 (9th Cir. 2017) (stating that factual accuracy is, at a minimum, controversial when a warning provides an unqualified statement); *CTIA-The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017) (“Given that the purpose of the compelled disclosure is to provide accurate factual information to the consumer, we agree that any compelled disclosure must be ‘purely factual.’ However, ‘uncontroversial’ in this context refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience.”); *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 529 (D.C. Cir. 2015) (looking to the dictionary for the definition of “controversial”); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263 (2d Cir. 2014) (“On a cursory review, our precedent arguably supports the district court’s conclusion that this law simply requires disclosure of accurate, factual information.”); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (stating that a required disclosure “could be so one-sided or incomplete that [it] would not qualify as ‘factual and uncontroversial’” under *Zauderer*); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (holding that a disclosure was not purely factual because it “intended to evoke an emotional response.”) *overruled by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

<sup>160</sup> *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1208.

<sup>161</sup> *Id.* at 1216–17.

<sup>162</sup> *Id.*

cial speech scholars, “what are ‘pure attempts to convey information’?”<sup>163</sup> “[T]he opinion suggests that the D.C. Circuit would require the government to limit compelled disclosures to ‘just the facts,’ presented in black and white, if [rational basis review] is to apply.”<sup>164</sup>

Subsequently, in *American Meat Institute v. Dept. of Agriculture*,<sup>165</sup> the D.C. circuit revisited and overturned *R.J Reynolds*, now defining “factual” and “uncontroversial” as a two-step independent inquiry.<sup>166</sup> “Controversial” was interpreted as something that “communicates a message that is controversial for some reason other than dispute about simple factual accuracy.”<sup>167</sup> The concurrence in *American Meat Institute v. Dept. of Agriculture* noted that it is unclear how judges should assess and determine if a disclosure is “controversial.”<sup>168</sup>

Courts have continued to define “factual and uncontroversial” differently. A year after *American Meat Institute*, in *National Association of Manufacturers*, the D.C. Circuit once again detailed the lack of clarity in defining this standard and stated that “uncontroversial” must mean something different than “purely factual.”<sup>169</sup> It looked to the dictionary definition of “controversy” to find that it “is a dispute, especially a public one.”<sup>170</sup> The Sixth Circuit, by contrast, held that the “purely factual and uncontroversial” phrase from *Zauderer* was merely descriptive and not a legal standard.<sup>171</sup> That court

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<sup>163</sup> Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U.J.L. & POL’Y 53, 62 (2016). “The phrase presumably refers to one (or both) of the following distinctions: (1) text-only, factual disclosures are ‘pure’, while pictorial images are, at least potentially, ‘inflammatory’ and therefore non-factual; and/or (2) the straightforward, nonjudgmental conveyance of factual information is ‘pure,’ while efforts to influence consumer behavior are not.” *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 23, 27 (D.C. Cir. 2014).

<sup>166</sup> *Id.*; see also Berman, *supra* note 163, at 70.

<sup>167</sup> *Am. Meat Inst.*, 760 F.3d at 27.

<sup>168</sup> *Id.* at 34 (Kavanaugh, J., concurring).

<sup>169</sup> *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 528–29 (D.C. Cir. 2015).

<sup>170</sup> *Id.* at 529.

<sup>171</sup> *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554–55 (6th Cir. 2012).

held that textual warnings requiring disclosure of factual information rather than opinions is subject to rational basis scrutiny.<sup>172</sup> Most recently, the Ninth Circuit has stated, “[g]enerally, a disclosure requirement is purely factual and uncontroversial under *Zauderer* so long as it ‘provide[s] accurate factual information to the consumer.’”<sup>173</sup>

A few courts, including the D.C. Circuit Court of Appeals in *R.J. Reynolds*, have insinuated that “disclosures that ‘persuade’ are less factual than [*sic*] those that merely ‘inform.’”<sup>174</sup> But how does one tell the difference? The issue here is that seemingly every informative or factual disclosure also aims to persuade.<sup>175</sup> For example, a disclosure requirement that states, “Smoking [c]auses Lung Cancer, Heart Disease, Emphysema, [a]nd May Complicate Pregnancy” is both factual and persuasive.<sup>176</sup> Therefore, it may be unworkable to distinguish fact from opinion.<sup>177</sup> Further, if courts were to deem unenforceable disclosures that are an expression of opinion or that evoke an emotional response, instead of fact, “[o]pponents of mandated warnings will nearly always be able to point to some scientific studies questioning the government’s position.”<sup>178</sup>

#### b. Consequences of an Unenforceable Test

When applying an unworkable standard, court holdings seem nonsensical. For example, in 2017, the Ninth Circuit decided two cases applying the same “factual and uncontroversial” test in both: “[g]enerally, a disclosure requirement is purely factual and uncontroversial under *Zauderer* so long as it ‘provide[s] accurate factual

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<sup>172</sup> *Id.* at 561–62.

<sup>173</sup> *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 893 (9th Cir. 2017) (quoting *CTIA-The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1118 (9th Cir. 2017)).

<sup>174</sup> *Berman*, *supra* note 163, at 67.

<sup>175</sup> *See id.* at 67–68; Post, *Compelled Commercial Speech*, *supra* note 76, at 907 (“The boundary between fact and opinion is an intrinsically troubled area.”).

<sup>176</sup> Comprehensive Smoking Education Act, Pub. L. No. 98–474, § 4(a)(1), 98 Stat. 2200, 2201 (1984) (codified as amended at 15 U.S.C. § 1333). This Note advocates for surgeon general warnings. *See supra* note 151.

<sup>177</sup> Post, *Compelled Commercial Speech*, *supra* note 76, at 907–08.

<sup>178</sup> *Berman*, *supra* note 163, at 72.

information to the consumer.”<sup>179</sup> Nonetheless, the holdings are difficult to reconcile.

In *CTIA-The Wireless Ass’n v. City of Berkeley*, the Ninth Circuit upheld the city of Berkeley’s requirement that cell-phone retailers warn customers about possible safety risks of carrying a cell phone too close to one’s body and thereby exposing oneself to excessive levels of “RF radiation.”<sup>180</sup> The court upheld the compelled disclosure pursuant to the federal government’s interest in “protecting [consumer] health and safety.”<sup>181</sup> The court found that this disclosure requirement was “reasonably related to [protection of the health and safety of consumers]” despite conceding that the FCC “lack[ed] . . . proof of dangerousness . . . .”<sup>182</sup> To justify this decision, the court noted that the compelled disclosure was “purely factual” because each sentence was “literally true.”<sup>183</sup> This holding contradicted a similar case decided by the Ninth Circuit a few years earlier.<sup>184</sup>

Subsequent to *CTIA-Wireless*, in *American Beverage Association*, the court struck down San Francisco’s requirement that advertisements for sugar-sweetened beverages within San Francisco include the following statement: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.”<sup>185</sup> The court seemed to distinguish this case from *CTIA-Wireless* because this case involved a “literally true but misleading disclosure [that] creates the possibility of consumer deception.”<sup>186</sup> In this case, as in *CTIA-Wireless*, the court upheld the “protect[ion]

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<sup>179</sup> *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 893 (quoting *CTIA-The Wireless Ass’n v. City of Berkeley*, 854 F.3d 1105, 1118 (9th Cir. 2017)).

<sup>180</sup> *CTIA-The Wireless Ass’n*, 854 F.3d at 1111–12.

<sup>181</sup> *Id.* at 1118–19.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See Berman, *supra* note 163, at 70–72 (noting that in 2012 the Ninth circuit decided a case that involved a mandated disclaimer similar to the one in *CTIA-Wireless*. In that case, the court stated that because “[t]here is a debate in the scientific community about the health effects of cell phones, this was an expression of [] ‘opinion,’ rather than an expression of fact.”).

<sup>185</sup> *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 888, 897–98 (9th Cir. 2017).

<sup>186</sup> *Id.* at 893.

of [consumer] health and safety” as a valid government interest.”<sup>187</sup> In deciding whether the mandated disclosure was “purely factual and uncontroversial,” the court noted that

[t]he warning provides the unqualified statement that “[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay,” S.F. Health Code § 4203(a), and therefore conveys the message that sugar-sweetened beverages contribute to these health conditions regardless of the quantity consumed or other lifestyle choices. This is contrary to statements by the FDA that added sugars are “generally recognized as safe.”<sup>188</sup>

In this case, the court found the language of the disclosure was misleading in that it did not qualify that “*overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay.”<sup>189</sup> Additionally, the court noted that the “message [was] deceptive in light of the current state of research on [the] issue.”<sup>190</sup>

The differing outcomes in these cases are nonsensical. The statement “drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay” is no more misleading than the statement on radiation exposure’s dangerousness.<sup>191</sup> Both statements, as admitted by the Ninth Circuit of Appeals, are scientifically unproven

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<sup>187</sup> *Id.* at 894.

<sup>188</sup> *Id.* at 895.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *See id.*; CTIA-The Wireless Ass’n v. City of Berkeley, 854 F.3d 1105, 1118–19 (9th Cir. 2017) (“[T]here was nothing before the district court showing that such radiation had been proven dangerous. But this is beside the point. The fact that RF radiation from cell phones had not been proven dangerous was well known to the FCC in 1996 when it adopted SAR limits to RF radiation; was well known in 2013 when it refused to exclude cell phones from its rule adopting SAR limits; and was well known in 2015 when it required cell phone manufacturers to tell consumers how to avoid exceeding SAR limits. After extensive consultation with federal agencies with expertise about the health effects of radio-frequency radiation, the FCC decided, despite the lack of proof of dangerousness, that the best policy was to adopt SAR limits with a large margin of safety.”).

or unqualified.<sup>192</sup> The only notable distinction between the disclosure mandated in *CTIA-Wireless* and *American Beverage Company* is that the former used qualifying language, such as “may exceed the federal guidelines for exposure to RF radiation,” and the latter failed to use qualifying language.<sup>193</sup>

In these cases, the Ninth Circuit has articulated yet another seemingly arbitrary guideline for “factual and uncontroversial”—one that hinges on whether the language is “literally true,” yet admittedly, unproven or unqualified. The problem here is not that the Supreme Court has failed to give guidance on what is “factual and uncontroversial,” but that it is almost impossible to formulate a workable guideline.

This could not have been what the *Zauderer* Court had in mind when it held that a “purely factual and uncontroversial” disclosure that is not unduly burdensome will withstand First Amendment scrutiny so long as it is reasonably related to curing deception of consumers.<sup>194</sup> First, the Ninth Circuit makes its decision pursuant to the government’s interest in protecting consumer health and safety.<sup>195</sup> Second, the Ninth Circuit, in conceding that the health warnings mentioned in the mandated disclosures were not scientifically qualified, fails to delineate a link between the mandated disclosure and the government’s interest in protecting consumer health and safety.<sup>196</sup> Allowing mandated disclosures that satisfy an arbi-

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<sup>192</sup> *Id.*

<sup>193</sup> *Am. Beverage Ass’n*, 871 F.3d at 895–96.

<sup>194</sup> See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>195</sup> *Am. Beverage Ass’n*, 871 F.3d at 894; *CTIA-The Wireless Ass’n*, 854 F.3d at 1119.

<sup>196</sup> *CTIA-The Wireless Ass’n*, 854 F.3d at 1118–19 (“[T]here was nothing before the district court showing that such radiation had been proven dangerous. But this is beside the point. The fact that RF radiation from cell phones had not been proven dangerous was well known to the FCC in 1996 when it adopted SAR limits to RF radiation; was well known in 2013 when it refused to exclude cell phones from its rule adopting SAR limits; and was well known in 2015 when it required cell phone manufacturers to tell consumers how to avoid exceeding SAR limits. After extensive consultation with federal agencies with expertise about the health effects of radio-frequency radiation, the FCC decided, despite the lack of proof of dangerousness, that the best policy was to adopt SAR limits with a large margin of safety.”); see also *Am. Beverage Ass’n*, 871 F.3d at 895 (“Although San Fran-

trary “factual and uncontroversial” threshold will effectively eliminate any meaningful First Amendment protection for commercial speech.

This Comment argues that “factual and uncontroversial” is an unworkable standard and therefore advocates for a rational basis level of review only when the “factual and uncontroversial” mandated disclosure cures a finding of consumer deception.

### C. *Undermine the Government Goal of Helping Consumers*

By contrast, the broad “factual and uncontroversial” standard is so malleable that it might make it too easy to uphold disclosures that are inefficient. Governments, with increasing frequency, have been applying rational basis, under the unworkable standard of “factual and uncontroversial,” and requiring sellers to convey information that cannot plausibly be deemed the sort of truthful, uncontroversial information that consumers expect to see on product labeling. This Comment advocates for the narrow application of *Zauderer* because mandating commercial speech disclosures pursuant to any legitimate state interest on the basis that the disclosures are “factual and uncontroversial” undermines the government’s goal of helping consumers. The cacophony of speech will (1) drown out the important speech<sup>197</sup> and (2) make it too easy for the government to mandate ideological speech.<sup>198</sup>

#### 1. DROWNING OUT IMPORTANT SPEECH

Applying rational basis review to mandate commercial speech disclosures that serve any legitimate state interest on the basis that the disclosures are “factual and uncontroversial” will allow all mandated disclosures to survive free speech scrutiny since the consumer

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cisco’s experts state that ‘there is a clear scientific consensus’ that sugar-sweetened beverages contribute to obesity and diabetes through “excessive caloric intake” and ‘by adding extra calories to the diet,’ the experts do not directly challenge the conclusion of the Associations’ expert that ‘when consumed as part of a diet that balances caloric intake with energy output, consuming beverages with added sugar does not contribute to obesity or diabetes.’”); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) (noting that where there is no scientific evidence, a disclosure requirement can’t be justified on the basis of “real harms.”); Berman, *supra* note 163, at 70–72.

<sup>197</sup> See *supra* pp. 27–35.

<sup>198</sup> *Id.*

“right to know” justification is legitimate.<sup>199</sup> This is problematic because allowing all mandated disclosures will lead to the loss or drowning out of the important information.<sup>200</sup>

Disclosure requirements have prompted legal challenges when justified by an alleged consumer “right to know.”<sup>201</sup> “[G]overnments have imposed . . . disclosure requirements extending beyond product characteristics to” product history, production processes, and information about the product or service provider.<sup>202</sup> For example, in *International Dairy Foods Association v. Amestoy*, the Second Circuit struck down Vermont’s mandatory labeling requirements for milk from cows that were administered rBST.<sup>203</sup> The FDA had found that milk produced from cows treated with rBST was indistinguishable from milk from untreated cows, and no less safe.<sup>204</sup> In fact, “the FDA declared that any suggestion that there is a meaningful difference would be ‘false and misleading.’”<sup>205</sup>

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<sup>199</sup> Adler, *Compelled Commercial Speech*, *supra* note 21 at 458. The consumer right to know is the “right to know information that could influence consumer decisions.” *Id.* at 442.

<sup>200</sup> *Persistent Threats*, *supra* note 44, at 311–312 (“[M]andating excessive information disclosure may actually result in the communication of less substantive content to consumers and reduced consumer understanding.”); *see also* Svetlana E. Bialkova et al., *Standing Out in the Crowd: The Effect of Information Clutter on Consumer Attention for Front-of Pack Nutrition Labels*, 41 *FOOD POL’Y* 65, 69 *tbl. 2* (2013) (recognizing that increases in information can reduce consumer attention and discernment); Elise Golan et al., *Economics of Food Labeling*, 24 *J. CONSUMER POL’Y* 117, 139 (2001) (noting that increased disclosure requirements can result in less consumer understanding); Mario F. Teisl & Brian Roe, *The Economics of Labeling: An Overview of Issues for Health and Environmental Disclosure*, 27 *AGRIC. & RESOURCE ECON. REV.* 141, 148 (1998) (“[S]imply increasing the amount of information on a label may actually make any given amount of information harder to extract.”).

<sup>201</sup> Adler, *Compelled Commercial Speech*, *supra* note 21 at 442–44, 458.

<sup>202</sup> *Id.* at 424.

<sup>203</sup> *See Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996).

<sup>204</sup> *See id.* at 70, 75–76, 80; *see also Bovine Somatotropin (BST)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm055435.htm> (last updated Oct. 19, 2016, 1:22 PM).

<sup>205</sup> *See Persistent Threats*, *supra* note 44, at 304 (quoting Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows that Have Not Been Treated with Recombinant Bovine Somatotropin, 59 *Fed. Reg.* 6279-04, 6279-80 (Feb. 10, 1994)).

Consumers may or may not prefer milk from cows that were administered rBST, and producers should be free to use their labels to identify their products as potentially desirable to consumers with particular preferences, but should not be forced to do so . . . . The government's role is to ensure that whatever information is disclosed is truthful and not misleading, not to mandate disclosure of product characteristics important to some consumers but not others.<sup>206</sup>

Allowing all mandated disclosures cuts against First Amendment values and undermines the robust protection of commercial speech more generally because it can lead to these inaccuracies, overstatements, and misleading disclosures.<sup>207</sup> “When the government requires a seller or producer to disclose specific information about a product or service, the requirement itself communicates a message.”<sup>208</sup> It communicates that this is a factor consumers should consider,<sup>209</sup> “and may even suggest to some consumers that there is something ‘wrong’ or unsafe about products bearing such a label.”<sup>210</sup> Accordingly, allowing the cellphone disclosure requirement in *CTIA-Wireless* may be counterproductive because it can mislead a consumer into thinking radiation from cellphones is dangerous when no scientific data indicates that is the case. Similarly, the rBST disclosure communicates that rBST is a factor consumers should consider despite the fact that milk produced from cows treated with rBST was indistinguishable from milk from untreated cows.

“[T]he consumer right to know is a rationale without discernible limits. If such an interest is a substantial interest then there is, quite literally, no end to the disclosures that can be mandated,” as rational basis review will be easy to meet.<sup>211</sup> A dynamic market discovery process, with only limited and targeted government interventions, is a more effective way to serve the consumer interest in obtaining more complete information about goods and services.<sup>212</sup>

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<sup>206</sup> See Adler, *Compelled Commercial Speech*, *supra* note 21, at 472–73.

<sup>207</sup> See Corbin *supra* note 55, at 1292–95, 1300–04.

<sup>208</sup> Adler, *Compelled Commercial Speech*, *supra* note 21, at 447.

<sup>209</sup> See *id.*

<sup>210</sup> *Id.* at 449.

<sup>211</sup> Adler, *Compelled Commercial Speech*, *supra* note 21, at 444.

<sup>212</sup> *Id.* at 426.

“The question . . . should not be whether the [government] gets to avail itself of an easier constitutional test but whether the government has any interests that are substantial enough to justify this compelled speech requirement . . . .”<sup>213</sup> These interests would have to go beyond simply satisfying consumer curiosity or “right to know.”<sup>214</sup>

## 2. OPEN TO ABUSE AND IMPOSITION OF GOVERNMENT IDEOLOGY

Allowing all mandated disclosures to survive free speech scrutiny under the consumer “right to know” justification is problematic because the cacophony of speech will undermine the government’s goal of efficiently informing consumers. Among the confusing or counterproductive information that may be compelled when passing mandated commercial speech disclosures pursuant to *any* legitimate state interest on the basis that the compelled speech is “factual and uncontroversial” is the government’s ideology.<sup>215</sup> This happens because allowing a rational basis standard of review for any disclosure that can qualify as “factual and uncontroversial,” where rational basis is easy to pass given the consumer “right to know” justification, makes it too easy to uphold disclosures that are actually ideological. The “factual and uncontroversial” broad approach does “not provide . . . a principled way to discern, in any given case, whether a regulation mandates providing additional factual information (relatively innocuous) or compels espousing beliefs and ideology (pernicious).”<sup>216</sup> At least with the narrow approach, the compelled disclosure must be attempting to cure deception, which makes it less likely to be motivated by ideology.

### a. Harm to Speaker

Compelling a commercial speaker to articulate the government’s ideological message is anathema in free speech because it can effectively force producers and sellers to stigmatize their own products,

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<sup>213</sup> *Constitutional Limits*, *supra* note 147.

<sup>214</sup> *Id.*

<sup>215</sup> *See* *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 894 (9th Cir. 2017).

<sup>216</sup> *Royal*, *supra* note 33, at 207.

production methods, and beliefs by giving voice to a politically determined set of values.<sup>217</sup>

#### 1. FORCED TO CRITICIZE OWN PRODUCTS OR PRODUCTION METHODS

These disclosures effectively force a producer or seller to stigmatize their own otherwise legal products and production methods by forcing the speaker to testify against its own product and implicitly endorse the notion that the disclosure of a given fact should be relevant to a consumer's decision about whether to purchase the product.<sup>218</sup> "Such requirements may be used to pursue ideological agendas or to place burdens upon competitors."<sup>219</sup> RBST labeling illustrates this point.

As stated above, when producers adorn their product with an "rBST free" label, they are communicating to consumers that this is a product characteristic that they believe should influence consumer choices, even though the FDA maintains that rBST does not alter the content of the resulting food product.<sup>220</sup> "The producer is required to give voice to the idea that a product that may contain [rBST] is meaningfully different—normatively if not physically—than a product that does not, even if the producer does not agree with the message."<sup>221</sup>

#### 2. ACTING AS A MOUTHPIECE FOR THE GOVERNMENT

Mandating such disclosures can effectively force producers and sellers to give voice to a politically determined set of values that the speaker may not agree with.<sup>222</sup> The government-compelled message may be misattributed to the speaker.<sup>223</sup> This amplifies messages of government preferences over the speaker's preferences, which

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<sup>217</sup> See Adler, *Compelled Commercial Speech*, *supra* note 21, at 444.

<sup>218</sup> See *id.* at 448–49.

<sup>219</sup> *Id.*

<sup>220</sup> *Cf. id.* at 447–48 (making the same observation in regard to GMO labeling).

<sup>221</sup> *Id.* at 448.

<sup>222</sup> *Id.* at 444.

<sup>223</sup> Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W.L. REV. 329, 384–86 (2008).

skews public opinion in the marketplace of ideas.<sup>224</sup> The repetitive exposure to the message may lead to a soft form of mind control over listeners,<sup>225</sup> which gives the government message a better chance of prevailing in the “marketplace of ideas” than the speaker’s message.<sup>226</sup>

Consider *Planned Parenthood v. Rounds*, in which the Eighth Circuit Court of Appeals upheld South Dakota’s requirement that physicians provide their patients with a written statement informing women contemplating abortions that “the abortion will terminate the life of a whole, separate, unique, living human being.”<sup>227</sup> The Ninth Circuit has expressed that this compelled commercial speech disclosure is particularly concerning because it is highly politicized and represents the government’s policy views.<sup>228</sup> In compelling the speech, the government adopts a specific viewpoint and forces the speaker to express it.<sup>229</sup> As stated above, the speaker risks the additional harm of listeners attributing the compelled statement to the speaker.

#### b. Harm to Listener

Compelling a commercial speaker to bolster the government’s ideological beliefs is problematic because it can effectively distort the marketplace of ideas, thereby insulting the listener or consumer autonomy by allowing ideology to masquerade as fact.

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<sup>224</sup> See *id.*; Corbin, *supra* note 55, at 1295, 1300–04.

<sup>225</sup> See Sacharoff, *supra* note 223; Corbin, *supra* note 55, at 1307.

<sup>226</sup> Corbin, *supra* note 55, at 1297 (“Speaker confusion invites exploitation of another common heuristic: the ‘defer-to-trusted-expert’ heuristic. By compelling an authority figure to speak its message, the government can ‘add a patina of trustworthiness and expertise to its message.’ Thus, the government can manipulate the discourse by, for example, forcing a scientist to claim that the evidence of global warming is inconclusive or compelling doctors to convey to patients the state’s ideological viewpoint about a contested moral issue, instead of making the same points through its own less trusted and less prestigious communications.”).

<sup>227</sup> 653 F.3d 662, 665 (8th Cir. 2011).

<sup>228</sup> *Am. Beverage Ass’n v. City & Cty. of S.F.*, 871 F.3d 884, 894, 896 (9th Cir. 2017) (“A compelled disclosure that requires speakers ‘to use their own property to convey an antagonistic ideological message,’ or ‘to respond to a hostile message when they would prefer to remain silent,’ or ‘to be publicly identified or associated with another’s message,’ cannot withstand First Amendment scrutiny.”).

<sup>229</sup> Sacharoff, *supra* note 223, at 384–86.

### 1. DISTORTED MARKETPLACE AS AN INSULT TO AUTONOMY

“Listeners are harmed by [misattribution of government speech to the commercial speaker] because it compromises two important methods listeners use to decide whether to be persuaded by a message: the popularity of the message and the speaker’s level of authority.”<sup>230</sup> The repetitive exposure to the message may lead listeners to adopt the government-mandated speech simply because it is more popular.<sup>231</sup> Further, because this speech is linked to the speaker, who is the producer of the product and expected to have expertise or authority, the listeners will be more likely to adopt the speech.<sup>232</sup> As previously stated, in allowing the government to dictate the information injected into the “marketplace of ideas,” there will be distortion in what consumers should consider important.<sup>233</sup>

### 2. IDEOLOGY MASQUERADING AS FACT AS AN INSULT TO AUTONOMY

The relaxed “factual and uncontroversial” standard, coupled with the consumer “right to know,” allows the government to deceive audiences by masquerading ideology as a fact. The government may use its coercive power for illegitimately paternalistic ends in compelling protective speech that aims to persuade.<sup>234</sup>

However, every state attempt to compel speech does not disrespect audience autonomy.<sup>235</sup> “The government’s goal makes a difference. Most suspect is when the state urges a course of action that actually detracts from the audience’s autonomy. Urging people not to vote, for example, would seem to undermine rather than enhance people’s autonomy.”<sup>236</sup>

Less obviously, decisional autonomy is disrespected by “government attempts to change the audience’s mind on a contested

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<sup>230</sup> *Id.* at 385.

<sup>231</sup> *See id.* at 385–86.

<sup>232</sup> *See id.*

<sup>233</sup> *See supra* pp. 14–16.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Corbin, *supra* note 55, at 1303.

question.”<sup>237</sup> The goal might be contested<sup>238</sup> or the action endorsed to attain that goal might be contested.<sup>239</sup> “However acceptable it might be for the government to urge a scientifically supported path (e.g., eat vegetables) to a universally recognized goal (e.g., good health), the government’s persuasion becomes problematic when it takes sides on a controversial issue (e.g., prayer) and presumes to know better than the individual what is best.”<sup>240</sup>

Additionally, when the government uses fear appeals, it is more likely that the disclosure is ideological rather than an uncontroversial disclosure of a fact.<sup>241</sup> The literature evaluating the persuasiveness of different types of fear appeals demonstrates the complexity of the emotional and cognitive processing of these types of messages, and it illustrates that the key goal in implementing fear appeals is to appeal to the audience’s emotions and not to inform.<sup>242</sup>

The fear appeals means of compelling speech was utilized in *Planned Parenthood*. The mandated disclosure aimed to appeal to the fear and guilt of pregnant patients by warning them of the life-ending consequences of abortion. Ideology is too easily masqueraded as fact and compelled by means of the relaxed “factual and uncontroversial” test and the consumer “right to know” justification. The listener is deceived and may make decisions based on a distorted marketplace of ideas.

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (noting that “while it is hard to imagine that people would not support voting or good health, the same cannot be said about, for example, prayer.”).

<sup>239</sup> *Id.* (“[E]ven assuming consensus about the ultimate goal (e.g., good health), there’s a difference between the government trying to persuade people to improve their health by eating vegetables (for which there is voluminous scientific support) and trying to persuade people to improve their health by fasting (for which there is not). Consequently, attempting to persuade you to eat more vegetables is not troublesome in the way a don’t-eat-at-all government campaign is.”).

<sup>240</sup> *Id.*

<sup>241</sup> See Caroline Mala Corbin, *Emotional Compelled Disclosures*, 127 HARV. L. REV. FORUM 357, 359–61 (2014).

<sup>242</sup> See Glenn Leshner et al., *Motivated Processing of Fear Appeal and Disgust Images in Televised Anti-Tobacco Ads*, 23 J. MEDIA PSYCHOL. 77, 77, 82 (2011).

## VI. CONCLUSION

Commercial speech is protected speech, and the First Amendment protects against speech compulsions just as it protects against speech limitations. Compelled commercial speech has the ability to undermine free speech goals and values by distorting discourse, chilling speech, or intruding upon the autonomy of speakers or audiences. In order to avoid these issues, courts should subject compelled commercial disclosures to rational basis scrutiny only when the compelled commercial speech is “factual and uncontroversial” speech aimed at curing deception because the alternative—applying rational basis when the compelled commercial disclosure is “factual and uncontroversial” speech aimed at any legitimate state interest—is unworkable and leads to inconsistent court rulings. Moreover, applying rational basis to such large swaths of disclosures may lead to compelling too much information, the wrong kind of information or bolstering ideological beliefs because there will always be a legitimate government interest to compel, i.e. the consumer “right to know.” This would ensure that only legitimate and beneficial disclosures are compelled, and that First Amendment protections are not abridged.