
NOTES

REPACKAGING ZAUDERER

In 1942, following an enterprising individual's arrest for his attempts to advertise a submarine tour, commercial speech surfaced for the first time as a unique category of speech in First Amendment doctrine.¹ While it would be several more years until commercial speech was found to be deserving of First Amendment protection, and the contours of this doctrine — and the distinction between commercial and noncommercial speech — remain somewhat fluid,² it is now well-settled that restrictions on commercial speech are generally subject to intermediate scrutiny.³

In 1985, however, the Supreme Court created an exception to this standard, holding in *Zauderer v. Office of Disciplinary Counsel*⁴ that regulators can require a commercial actor to divulge information so long as it is “reasonably related to the State’s interest in preventing deception of consumers.”⁵ Such disclosures are frequently referred to as “compelled commercial speech,” and they are a pervasive, if often unobtrusive, aspect of daily life. Salt-shaker icons on foods deemed to be high in sodium,⁶ textual warnings that highlight the potential dangers of smoking,⁷ and requirements that lawyers “disclose in their advertisements that a losing client might still be responsible for certain litigation fees and costs,”⁸ to take but a few examples, are all regulations governed by the more permissive compelled-commercial-disclosure standard created by *Zauderer*.

Yet courts have consistently struggled to determine how to interpret *Zauderer*'s more lenient test.⁹ The Supreme Court has discussed

¹ *Valentine v. Chrestensen*, 316 U.S. 52 (1942); see Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627–28 (1990).

² The distinction between commercial and noncommercial speech is frequently referred to as a “common-sense’ distinction,” e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)), a characterization that many scholars reject, see, e.g., Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 590–91 (2012).

³ See Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 530 (2013).

⁴ 471 U.S. 626 (1985).

⁵ *Id.* at 651.

⁶ See *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 131–34 (2d Cir. 2009).

⁷ See, e.g., *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

⁸ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010); see also *id.* at 249–50 (describing the holding of *Zauderer*).

⁹ Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 FIRST AMEND. L. REV. 140, 184 (2011) (“This standard has been variously described as a reasonable-relationship rule, a rational relationship test, and rational-basis review.” (footnotes omitted)).

Zauderer's disclosure requirements in only a handful of cases since 1985,¹⁰ and in the wake of this relative silence, circuits have split on both *Zauderer's* reach (what types of disclosures it covers)¹¹ and its form (how it applies to disclosures within its bounds).¹² Some of this confusion is likely attributable to the ambiguity with which this standard was first defined — neither a government interest in “preventing deception” nor a requirement that disclosures be factual and uncontroversial (later additions to this test) is a model of clarity for judges.¹³

However, a significant, and often unremarked, factor contributing to this uncertainty is the increasingly divergent treatment of commercial speakers' rights by courts evaluating restrictions on commercial speech and compelled commercial disclosures.¹⁴ While a number of commentators have suggested that the First Amendment has become progressively more solicitous of commercial interests,¹⁵ this claim is not entirely correct. Courts have been generous to legislatures in applying the standard set out in *Zauderer* to uphold disclosure obligations imposed on commercial actors. Indeed, the past decade has arguably seen a steady expansion both in the scope of this more lenient review and in the extent to which consumer interest is considered when determining the permissibility of compelled disclosures.

Nonetheless, in recent years the increasing deference shown to commercial actors in the context of restrictions on commercial speech has begun to make its presence felt in this area of the law. In a number of cases, courts have either excluded otherwise-permissible disclosures from *Zauderer's* reach for fear that they would encroach too significantly on commercial actors' speech, or else relied on the hitherto relatively unused requirement that a disclosure be “factual and uncontroversial” to strike these regulations down. This disconnect between

¹⁰ See, e.g., *Milavetz, Gallop & Milavetz, P.A.*, 559 U.S. at 249–50; *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146–47 (1994); *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 116–17 (1990) (Marshall, J., concurring in the judgment).

¹¹ See Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 521–22 (2014).

¹² *Compare Disc. Tobacco City & Lottery, Inc.*, 674 F.3d 509, with *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

¹³ Goodman, *supra* note 11, at 521 (discussing ambiguity of test). Indeed, the Supreme Court in *Zauderer* itself acknowledged that “distinguishing deceptive from nondeceptive advertising . . . may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics.” 471 U.S. 626, 645 (1985).

¹⁴ Others have proposed alternative theories. See, e.g., Robert Post, Lecture, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 915 (2015) (citing the “connection between compelled commercial speech and public discourse” as a potential cause of the “doctrinal turbulence presently enveloping compelled commercial speech doctrine”).

¹⁵ See, e.g., John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134.

the broader trend toward expanding *Zauderer*'s reach — which necessarily results in a greater encroachment on commercial actors' speech — and recent attempts to rely on relatively novel aspects of *Zauderer*'s test to shield commercial actors from certain regulations has deepened courts' and litigants' uncertainty regarding this area of the law.

This Note will explore the tension between these conflicting impulses within courts' analysis of compelled commercial disclosures and propose a path forward to minimize doctrinal confusion. Part I will describe the evolution of commercial speech doctrine and some of the factors that have begun to drive a wedge between courts' treatment of compelled commercial speech and commercial speech more broadly. Part II will discuss how several recent developments in courts' application of *Zauderer* highlight the division between commercial speech's shift toward greater solicitude for commercial speakers and compelled commercial disclosures' increased emphasis on the rights of consumers. Finally, Part III will propose disentangling these competing interests by placing greater emphasis on *Zauderer*'s requirement that disclosures not impose an undue burden on commercial actors. Such a shift would permit courts torn between *Zauderer*'s increasing emphasis on consumers' rights and concerns for the interests of commercial speakers to more explicitly and rationally balance these competing concerns.

I. COMMERCIAL SPEECH DOCTRINE AND *ZAUDERER*

A. Virginia State Board of Pharmacy *and* Central Hudson: *The Creation of First Amendment Protections for Commercial Speech*

It was not until 1976 that the Supreme Court first held that commercial speech fell within the ambit of the First Amendment.¹⁶ Even after that decision, however, the Court was unwilling to accord commercial speech protection commensurate with political speech. Instead, commercial speech received only a “limited measure of protection” in light of its “subordinate position in the scale of First Amendment values.”¹⁷ Thus, in contrast to the often more stringent review accorded other forms of protected speech, the most frequently invoked standard to determine the constitutionality of restrictions placed on commercial speech is that laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁸ which is traditionally

¹⁶ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976); Kozinski & Banner, *supra* note 1, at 628.

¹⁷ Post, *supra* note 14, at 872 (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989)).

¹⁸ 447 U.S. 557 (1980).

understood to require that any such regulations must be subjected to intermediate scrutiny.¹⁹

Over the years, various explanations for the divergence between the protections afforded commercial and noncommercial speech have been proposed.²⁰ The crux of this distinction, however, has long been understood to be the fact that, while many of the justifications for the First Amendment's protection of noncommercial speech focus on the importance of preserving the rights of individual speakers, commercial speech is afforded constitutional protection primarily because of the benefits that redound to its audience.²¹ Indeed, the Supreme Court emphasized that a "*consumer's* interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate" when explaining its rationale for finally extending the First Amendment's protections to commercial speech.²²

B. Zauderer and Compelled Commercial Speech

Several years after commercial speech was first afforded First Amendment protection, the Supreme Court created a division within this category of speech between general commercial speech restrictions and compelled commercial disclosures. In *Zauderer* the Court rejected an attorney's claim that a requirement that the advertisements he placed in local newspapers informing potential clients they "might be liable for significant litigation costs" violated his First Amendment rights.²³ In so doing, it noted that the attorney's argument "overlook[ed] material differences between disclosure requirements and outright prohibitions on speech."²⁴ "Ohio ha[d] not attempted to prevent attorneys from conveying information to the public; it ha[d] only required them to provide somewhat more information than they might otherwise be inclined to present."²⁵ In such a situation, the Court held, "an advertiser's rights are adequately protected as long as disclosure

¹⁹ See Post, *supra* note 14, at 881 (quoting *Cent. Hudson*, 447 U.S. at 566).

²⁰ Commentators have, for example, noted the perceived difficulty of chilling commercial speech in light of "the strong profit motive behind" this kind of speech. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1284 (2014). Others have highlighted the Court's heightened wariness of governmental paternalism in the context of commercial speech. See Rostron, *supra* note 3, at 544.

²¹ See Robert Post & Amanda Shanor, Commentary, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015); see also Goodman, *supra* note 11, at 519; Shanor, *supra* note 15, at 142.

²² *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (emphasis added).

²³ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985).

²⁴ *Id.*

²⁵ *Id.*

requirements are reasonably related to the State's interest in preventing deception of consumers."²⁶ Subsequent courts have interpreted this test to extend only to disclosures of "factual and uncontroversial information."²⁷

The Supreme Court was careful to frame *Zauderer* as a natural extension of the concern for consumers' informational interests animating the First Amendment's protection of commercial speech more broadly. Indeed it held that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [Zauderer's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."²⁸ Yet in *Zauderer*, the Court arguably pressed further the subordination of commercial actors' interests to those of consumers implicit in its treatment of restrictions on commercial speech.²⁹ It posited that there are certain types of factual information that legislatures believe commercial actors have no legitimate (or at most a minimal) interest in withholding from the public. Moreover, the Court presumed that this is true even when a commercial speaker might logically view such information (say, the fact that a product contains carcinogens) as more detrimental to its own interests — that is, its ability to relay a commercial message intended to induce consumers to purchase its product — than many commercial speech restrictions.³⁰

C. *The Growing Rift: Sorrell v. IMS Health*

A survey of the origins of commercial speech, and the emergence of compelled commercial speech, makes clear that this area has long been focused on the importance of ensuring that consumers receive relevant information about products in the market. Indeed, this motivation can, at least in part, explain why governmental attempts to restrict information from entering the marketplace have traditionally been sub-

²⁶ *Id.* at 651.

²⁷ See, e.g., *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263 (2d Cir. 2014) (quoting *Safelite Grp., Inc. v. Jepsen*, 988 F. Supp. 2d 199, 207 (D. Conn. 2013)). But see *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012).

²⁸ *Zauderer*, 471 U.S. at 651 (citation omitted).

²⁹ See *Goodman*, *supra* note 11, at 519 ("Th[e] distinctive emphasis on listener interests is particularly evident in the treatment of compelled commercial speech."); Kathleen M. Sullivan & Robert C. Post, Transcript, *It's What's for Lunch: Nectarines, Mushrooms, and Beef — The First Amendment and Compelled Commercial Speech*, 41 *LOY. L.A. L. REV.* 359, 373–74 (2007) ("If the state compels commercial speakers to divulge more information, the state increases the First Amendment value of commercial speech by communicating more information to the public." (emphasis omitted)).

³⁰ See Sullivan & Post, *supra* note 29, at 374 (suggesting that an alternative rationale for *Zauderer*'s more permissive standard is that "[s]tate regulation compels disclosure not merely to prevent deception, but to make markets more efficient").

jected to *Central Hudson*'s more demanding standard, whereas disclosures intended to force commercial actors to provide more data to customers have been evaluated pursuant to *Zauderer*'s rational basis review.³¹ Yet recent developments in courts' treatment of restrictions on commercial speech suggest that the Court may have injected a greater solicitude for the rights of commercial speakers into this area of the law.³² The extent to which this shift can, or should, lead to heightened scrutiny of compelled commercial disclosures remains uncertain. However, as litigants increasingly turn to the First Amendment as a means of combating speech-forcing or speech-restricting regulations,³³ courts have found themselves grappling with the extent to which *Zauderer* provides appropriate protections for commercial speakers.

The relative stability of commercial speech doctrine, and its reliance on intermediate scrutiny for restrictions on commercial speech, suffered a considerable shock with the Court's 2011 decision in *Sorrell v. IMS Health Inc.*³⁴ In *Sorrell*, the Court held that a Vermont law restricting "sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors"³⁵ without their consent enacted "content- and speaker-based restrictions," thereby triggering heightened scrutiny.³⁶ In justifying its application of this test — which is traditionally used in the context of *noncommercial* speech — the Court focused in particular on legislative findings accompanying the passage of the statute in question, which "confirm[ed] that the law's express purpose and practical effect [we]re to diminish the effectiveness of marketing by manufacturers of brand-name drugs."³⁷ The fact that this regulation appeared to be designed to target the speech of a particular type of commercial actor — "detailers" promoting brand-name drugs³⁸ — the Court held, warranted a more stringent level of review than the intermediate scrutiny traditionally accorded restrictions on commercial speech.³⁹

In the years following the Court's decision, many have argued that *Sorrell* — and the newfound possibility of the heightened scrutiny of

³¹ See Goodman, *supra* note 11, at 520; Robert Post, Lecture, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 561 (2006).

³² But see generally Coates, *supra* note 15 (suggesting the shift toward a greater solicitude for commercial speakers has been occurring for quite some time).

³³ Shanor, *supra* note 15, at 134.

³⁴ 564 U.S. 552 (2011).

³⁵ *Id.* at 557.

³⁶ *Id.* at 563.

³⁷ *Id.* at 565.

³⁸ *Id.*

³⁹ *Id.* at 571. Justice Breyer penned a dissent noting that neither the categories "content-based" nor "speaker-based" "ha[d] ever before justified greater scrutiny when regulatory activity affects commercial speech." *Id.* at 588 (Breyer, J., dissenting).

regulations involving commercial speech it represents — has had a significant impact on First Amendment doctrine. Some commentators have claimed that *Sorrell* could dramatically reshape commercial speech jurisprudence and the government’s ability to regulate the market.⁴⁰ Others have accused it of “chipping away the initial architecture of the commercial speech doctrine and . . . undermining the features that the Court . . . put in place to ensure that the First Amendment would not be the undoing of the regulatory state.”⁴¹

While it is important not to overstate *Sorrell*’s impact, this decision does seem to have played a role in ratcheting up the scrutiny applied to regulations restricting commercial speech.⁴² Courts have, for example, relied on *Sorrell* to overturn “restrictions on advertising by alcoholic-beverage retailers”⁴³ and question other commercial speech–restricting regulations.⁴⁴ Yet perhaps a more telling testament to *Sorrell*’s impact on the protections accorded commercial speakers is the fact that it is now common for litigants to raise in good faith, and courts to consider in due course, the possibility that a regulation restricting commercial speech should be subject to *Sorrell*’s heightened scrutiny.⁴⁵ This type of inquiry necessarily requires courts to more carefully consider the deference owed to commercial speakers’ rights, tilting the gravamen of their focus toward the rights of commercial actors, as opposed to the interests of consumers.

It was by no means preordained that *Sorrell*, which could have been either cabined to its facts or applied only to the most stringent of

⁴⁰ See Post, *supra* note 14, at 868 (noting the “increasing number of recent Supreme Court decisions using commercial speech doctrine to invalidate perfectly ordinary regulations of the marketplace”); Samantha Rauer, Note, *When the First Amendment and Public Health Collide: The Court’s Increasingly Strict Constitutional Scrutiny of Health Regulations that Restrict Commercial Speech*, 38 AM. J.L. & MED. 690, 706 (2012) (“If *Sorrell* controls future decisions, the traditional intermediate commercial speech doctrine may disappear entirely.”).

⁴¹ Shanor, *supra* note 15, at 150.

⁴² This development is both in keeping with and an acceleration of what many commentators view to be the First Amendment’s increasing solicitude toward commercial speakers’ rights. See Coates, *supra* note 15, at 248–54, 262–63; Shanor, *supra* note 15, at 134; Jacob Alderdice, Note, *The Informed Student-Consumer: Regulating For-Profit Colleges by Disclosure*, 50 HARV. C.R.-C.L. L. REV. 215, 236 (2015).

⁴³ Rich Stamp, Opinion, *Supreme Court’s ‘Sorrel v. IMS Health’ Ruling Gains Traction in the Federal Appeals Courts*, FORBES (Jan. 21, 2016, 9:00 AM), <http://www.forbes.com/sites/wlf/2016/01/21/supreme-courts-sorrell-v-ims-health-ruling-gains-traction-in-the-federal-appeals-courts/#4bee6a354209> [<https://perma.cc/F8NJ-TBEB>] (discussing Retail Dig. Network, LLC v. Appelsmith, 810 F.3d 638 (9th Cir. 2016)).

⁴⁴ See, e.g., *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1055, 1061 (D. Ariz. 2012) (finding that plaintiffs were likely to succeed in their challenge to a statute making it unlawful for “an occupant of a motor vehicle that is stopped on a street, roadway, or highway and is impeding traffic to attempt to hire a person for work at another location,” *id.* at 1055).

⁴⁵ See, e.g., *CTIA — The Wireless Ass’n v. City of Berkeley*, 158 F. Supp. 3d 897, 900–01 (N.D. Cal. 2016); *1-800-411-Pain Referral Serv., LLC v. Tollefson*, 915 F. Supp. 2d 1032, 1048 (D. Minn. 2012).

regulations, would reach beyond the bounds of restrictions on commercial speech.⁴⁶ Yet a close examination of *Zauderer*'s application in recent years, as discussed in more depth in section III.C, reveals that *Sorrell* has cast a long shadow over courts' treatment of compelled commercial disclosures as well.

II. COURTS REACT: DIFFERING INTERPRETATIONS OF *ZAUDERER* IN RESPONSE TO UNCERTAINTY

Zauderer has always been a difficult case for lower courts to interpret. The Supreme Court has provided some guidance regarding both the formulation of the more lenient standard of scrutiny to be applied to compelled commercial disclosures as well as the policy justifications underlying the creation of this exception to *Central Hudson*'s intermediate scrutiny. Yet *Zauderer*'s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic. *Sorrell* — and the greater solicitude toward corporate actors' speech it represents — has only served to deepen this confusion.⁴⁷ In the past few years, a number of courts appear to have embraced an interpretation of *Zauderer* that more explicitly benefits consumers, expanding the reach of its more lenient review and suggesting that consumer interest is relevant when determining the permissibility of compelled commercial disclosures. Yet courts have also recently begun to breathe new life into *Zauderer*'s requirement that a disclosure be both “factual and uncontroversial,” often seemingly as a means of protecting commercial actors from regulations that may trench too significantly on their speech, or have ruled that certain regulations fall outside its bounds. These conflicting impulses, which serve to increase the bounds of *Zauderer*'s scope while at the same time providing courts with a novel, and powerful, mechanism for protecting commercial actors, have only deepened the confusion in this area of the law.

A. *Zauderer*'s Scope

One of the most pervasive differences between courts' analysis of compelled disclosures over the years has been their treatment of the question of *Zauderer*'s scope — the types of disclosures that should be

⁴⁶ *But cf.* Amelia B. Larsen, Note, *Smoking Out a Compromise: Splitting the Difference Through a Public Policy Approach to Resolving the Graphic Cigarette Warning Label Circuit Split*, 62 CLEV. ST. L. REV. 535, 553 (2014) (speculating that the Supreme Court's greater solicitude toward commercial actors as evinced by its decisions in *Sorrell* and *Citizens United* could result in more stringent review of certain compelled commercial disclosures).

⁴⁷ *See* Leslie Gielow Jacobs, *Compelled Commercial Speech as Compelled Consent Speech*, 29 J.L. & POL. 517, 518–19 (2014) (noting that the Supreme Court's increasing protection of commercial speakers from speech restraints has caused confusion in lower courts' treatment of compelled commercial disclosures).

subject to rational basis review rather than a more stringent level of scrutiny.⁴⁸ While a few courts have interpreted *Zauderer* as potentially extending only to disclosures that are “likely” to mislead consumers,⁴⁹ others have embraced, or reaffirmed their commitment to, a more expansive understanding of its scope. The Sixth Circuit has held that *Zauderer* governs where the speech that disclosures are intended to remedy “is *potentially* misleading,”⁵⁰ invoking the importance of “protecting the flow of accurate information, which is furthered by factual disclosures” to consumers.⁵¹ The Fifth⁵² and Eighth⁵³ Circuits have echoed this sentiment. Indeed, few circuit courts appear to have explicitly considered the question of whether *Zauderer* should be confined to regulations intended to address inherently deceptive speech and answered in the affirmative in the past ten years.

A number of courts have also begun to expand *Zauderer*’s scope beyond disclosures intended to address either deceptive or potentially deceptive speech.⁵⁴ The Second Circuit, for example, has adopted a

⁴⁸ See Goodman, *supra* note 11, at 521–22 (describing “considerable confusion in the lower courts about what sorts of commercial speech disclosure requirements are covered by *Zauderer*’s rational basis standard of review,” *id.* at 521).

⁴⁹ R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1214 (D.C. Cir. 2012) (attributing this understanding of *Zauderer*’s scope in part to the Supreme Court’s recent decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010)). See also Mass. Ass’n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173, 196 (D. Mass. 2016) (discussing *Zauderer*’s ambiguity). For a critique of this understanding of *Zauderer*’s scope, see Recent Case, R.J. Reynolds Tobacco Co. v. Food & Drug Administration, 696 F.3d 1205 (D.C. Cir. 2012), 126 HARV. L. REV. 818, 824–25 (2013).

⁵⁰ Int’l Dairy Foods Ass’n v. Boggs, 622 F.3d 628, 641 (6th Cir. 2010). While potentially misleading speech is of course *actually* misleading to those it leads astray, it is not “speech that ‘inevitably will be misleading’ to consumers.” 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1056 (8th Cir. 2014) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977)).

⁵¹ *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 558 (6th Cir. 2012).

⁵² See *Pub. Citizen, Inc. v. La. Att’y Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) (“A regulation that imposes a disclosure obligation on a potentially misleading form of advertising will survive First Amendment review if the required disclosure is ‘reasonably related to the State’s interest in preventing deception of consumers.’” (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985))).

⁵³ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 796 (8th Cir. 2008), *aff’d in part, rev’d in part, and remanded*, 559 U.S. 229 (holding that disclosure requirements “intended to avoid potentially deceptive advertising” also fell within *Zauderer*’s scope).

⁵⁴ See Rostron, *supra* note 3, at 571; Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL’Y & L. 205, 219 n.114 (2011); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 MD. L. REV. 458, 491 (2014). Several authors have argued in favor of this more expansive approach to *Zauderer*’s scope. See Keighley, *supra* note 2, at 556–63; Post, *supra* note 14, at 882; Andrew C. Budzinski, Note, *A Disclosure-Focused Approach to Compelled Commercial Speech*, 112 MICH. L. REV. 1305, 1316–25 (2014) (noting that the Ninth Circuit’s decision in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), also “refused to read *Zauderer*’s deception language as an exclusive intent requirement,” Budzinski, *supra*, at 1318 (citing *Envtl. Def. Ctr., Inc.*, 344 F.3d at 849)); Richard F. Lee, Note, *A Picture Is Worth a Thousand Words: The Marketplace*

quite permissive stance on this issue, holding that *Zauderer* is “broad enough to encompass nonmisleading disclosure requirements.”⁵⁵ This statement has been interpreted by at least one district court as standing for the proposition that “disclosures intended ‘to better inform consumers about the products they purchase’” should be subject to *Zauderer*’s more forgiving standard.⁵⁶ Similarly, the D.C. Circuit, which maintained for several years that “*Zauderer*’s holding is limited to cases in which disclosure requirements are ‘reasonably related to the State’s interest in preventing deception,’”⁵⁷ recently rejected this view, noting that *Zauderer* “seems inherently applicable beyond the problem of deception.”⁵⁸

A thornier issue, still slowly being teased out by courts, is whether *Zauderer* applies where commercial actors are required to disclose information to third parties that is not otherwise available to the public. In *Pharmaceutical Care Management Ass’n v. Rowe*,⁵⁹ the First Circuit held that *Zauderer* should be used to evaluate provisions requiring pharmacy-benefit managers (PBMs) to disclose information that was “protected by confidentiality”⁶⁰ (and thus unavailable to the public) to health-benefit providers.⁶¹ Reasoning that the disclosures would help these providers “ensure that they and their customers are not adversely affected by the abuses and self-dealing of certain PBMs,”⁶² the court upheld the required disclosures. Admittedly, it seems difficult to square *Zauderer*’s apparent emphasis on providing information to consumers directly with this holding. Yet the First Circuit noted that it had found “no cases limiting *Zauderer*” to public-facing disclosures at the time of its decision.⁶³

of Ideas and the Constitutionality of Graphic-Image Cigarette Warning Labels and Other Commercial Disclosure Requirements, 84 U. COLO. L. REV. 1179, 1213–14 (2013).

⁵⁵ N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009).

⁵⁶ Grocery Mfrs. Ass’n v. Sorrell, 102 F. Supp. 3d 583, 632–33 (D. Vt. 2015) (quoting Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001)).

⁵⁷ R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213 (D.C. Cir. 2012) (quoting *Zauderer*, 471 U.S. at 651); see also Keighley, *supra* note 2, at 542.

⁵⁸ Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc). The D.C. Circuit suggested that the First Circuit had embraced a similarly broad view of *Zauderer*’s scope. See *id.* (citing Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, C.J., and Dyk, J., concurring)).

⁵⁹ 429 F.3d 294.

⁶⁰ *Id.* at 299.

⁶¹ See *id.* at 310.

⁶² *Id.* The First Circuit approvingly quoted the trial court, which argued that these disclosures — even though not intended to provide additional information to consumers — were beneficial because they were “designed to create incentives within the market” that would benefit consumers. *Id.* (quoting Pharm. Care Mgmt. Ass’n v. Rowe, No. Civ. 03-153-B-H, 2005 WL 757608, at *23 (D. Me. Feb. 2, 2005)).

⁶³ See *id.* at 310 n.8. In the intervening years, few courts appear to have addressed this issue, though the D.C. Circuit has applied *Zauderer* to disclosures to government entities, rather than

It thus appears that a number of courts applying *Zauderer* have shifted their focus away from inherently deceptive speech to the more nebulous realm of speech that is only potentially deceptive, and possibly even nonpublic compelled disclosures or disclosures unrelated to curing deception. In doing so, they have begun to move toward a vision of compelled commercial speech increasingly focused on ensuring that consumers receive *more* information, often at commercial actors' expense. This expansion necessarily results in a corresponding reduction in commercial speakers' protections, as regulations that would otherwise be subject to a greater degree of scrutiny now need pass only *Zauderer's* rational basis review. This trend runs counter to *Sorrell's* efforts to ratchet up, not down, the protections afforded to commercial speakers.

B. Permissible Interests Under *Zauderer*

Another axis along which *Zauderer* appears to be growing more responsive to consumers' informational needs is the type and gravity of interest that legislators must assert when mandating a particular disclosure. Courts have historically held that "consumer interest" alone cannot justify the imposition of a commercial disclosure. The most frequently invoked case discussing this issue is *International Dairy Foods Ass'n v. Amestoy*,⁶⁴ in which the Second Circuit held that, while it "d[id] not doubt that Vermont's asserted interest, the demand of its citizenry for . . . information" whether milk contained the synthetic growth hormone rBST, was "genuine," such interest was "inadequate."⁶⁵

Yet this admonition appears to have lost some of its bite in recent years, as several courts have noted that consumer interest or awareness can be considered when determining if a particular disclosure is permissible. For example, one court found that promoting consumer awareness of governmental procedures and guidelines was a legitimate governmental interest.⁶⁶ Similarly, another court was willing to sustain compelled commercial disclosures informing consumers that a product was produced via genetic engineering due to evidence of scientific uncertainty regarding the safety of genetically modified foods when paired with the government's assertion that "[l]abeling gives

other marketplace actors. See *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1109 (D.C. Cir. 2011) (upholding disclosure requirements where information would be provided "to the [Securities and Exchange] Commission alone"). However, such disclosures, particularly those involving securities regulation, are traditionally treated differently than the consumer-focused compelled commercial disclosures discussed in this Note. See *id.*

⁶⁴ 92 F.3d 67 (2d Cir. 1996).

⁶⁵ *Id.* at 73.

⁶⁶ *CTIA — The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1069–70 (N.D. Cal. 2015).

consumers information they can use to make decisions about what products they would prefer to purchase,' [and] . . . public opinion polls indicat[ing] labeling is relevant to consumers."⁶⁷ Indeed, the court upheld this disclosure in spite of the fact that "some of the State's interests arguably border on the appeasement of consumer curiosity," reasoning that "the Second Circuit has recently observed that commercial disclosure requirements that enhance consumer decision-making further First Amendment interests."⁶⁸ Likewise, the D.C. Circuit, when evaluating the governmental interest at play in requiring corporations to provide country-of-origin labels, considered, amongst other factors, the fact that there was "demonstrated consumer interest in extending country-of-origin labeling to food products."⁶⁹

It is unclear if this move by some courts to more explicitly embrace consumer interest as a justification for the imposition of compelled commercial disclosures is a positive development. The Second Circuit noted in *Amestoy* that if "consumer interest alone [is] sufficient" to satisfy *Zauderer*, "there is no end to the information that states could require manufacturers to disclose about their production methods."⁷⁰ Moreover, in large part due to courts' general hesitance to incorporate this factor into their compelled commercial disclosure analysis, few courts have attempted to sift through or evaluate the different types of consumer interests to which disclosures could or should respond. Nonetheless, this shift toward more expressly considering consumer interest when determining the presence of a legitimate governmental interest appears to be a doubling down on the view that consumers, not commercial speakers, are the intended beneficiaries of compelled commercial speech protections.

C. *Pushing Back on Zauderer's Expansion*

As courts have increasingly subordinated commercial actors' interests to consumers' desire for commercial information when interpret-

⁶⁷ *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 597–98 (D. Vt. 2015) (noting that the legislative findings showed "conflicting studies assessing the health consequences of food produced from genetic engineering" and the potential for these products to "cause unintended consequences," *id.* at 597 (quoting 2014 Vt. Acts & Resolves No. 120, 1(5))).

⁶⁸ *Id.* at 631 (emphasis omitted) (citing *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001)).

⁶⁹ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc); see also Post, *supra* note 14, at 882–91 ("The state's interest in meeting 'demonstrated consumer interest in extending country-of-origin labeling to food products' sounds very close to satisfying the curiosity of consumers." *Id.* at 890 (quoting *Am. Meat Inst.*, 760 F.3d at 23)).

⁷⁰ *Amestoy*, 92 F.3d at 74. For a discussion of the potential drawbacks of more explicitly embracing consumers' right to know as a justification for compelling speech, see Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 442–51 (2016); Post, *supra* note 14, at 892–98.

ing *Zauderer*, something of a backlash has occurred. In the wake of *Sorrell* — and in reaction to the trend of greater deference to commercial actors — a number of courts either have relied on the hitherto relatively unused⁷¹ requirement that a disclosure be factual and uncontroversial⁷² to strike down regulations or have excluded otherwise-permissible disclosures from *Zauderer*'s scope because they encroached too significantly on a commercial actor's ability to speak. These decisions suggest that the greater solicitude for commercial actors evident in many courts' treatment of restrictions on commercial speech has begun to play a role in courts' analysis of compelled commercial disclosures.

No consistent understanding of what either "factual" or "controversial" means for the purposes of evaluating compelled commercial disclosures has emerged among commentators or circuit courts that have attempted to flesh out this prong of *Zauderer*'s test.⁷³ Following the Supreme Court's decision in *Sorrell*, however, some courts have increasingly been willing to rely on this aspect of *Zauderer* to question the constitutionality of disclosures.⁷⁴ In *Massachusetts Ass'n of Private Career Schools v. Healey*,⁷⁵ for example, a district court examined a regulation that stated that it was "unfair or deceptive" for a school to represent that its credits "are or may be transferable" without identifying those schools with which it had written transfer agreements and "indicating it [was] aware of no other schools that accept the transfer of its credits."⁷⁶ The court held that this requirement, which might force schools that knew that other institutions frequently accepted their credits on a "more informal or case-by-case basis" to elect not to

⁷¹ See *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 206 (D. Mass. 2016) ("[F]ew courts have considered the constitutionality of disclosure regulations that fail the 'factual' or 'uncontroversial' prerequisites of *Zauderer*."). There have, however, been a few notable exceptions. See *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651–53 (7th Cir. 2006); *Cent. Ill. Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169 (7th Cir. 1987).

⁷² Though, as with all aspects of the *Zauderer* test, some courts dispute that this is the relevant standard. See, e.g., *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012).

⁷³ One court, for example, has adopted the relatively banal understanding that "[u]ncontroversial" should generally be equated with the term "accurate" . . . [and] "factual" goes to the difference between a "fact" and an "opinion." *CTIA — The Wireless Ass'n v. City of Berkeley*, 158 F. Supp. 3d 897, 904 (N.D. Cal. 2016); see also Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL'Y 53, 65–73 (2016) (discussing ambiguity); Goodman, *supra* note 11, at 550–55 (proposing new definitions for factual and uncontroversial); Post, *supra* note 14, at 910 (suggesting an alternative definition of uncontroversial).

⁷⁴ This discussion excludes a number of cases regarding compelled speech pertaining to the provision of abortion services, as these cases often look to, but do not rely on, *Zauderer*'s case law. See, e.g., *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 245 n.6 (2d Cir. 2014).

⁷⁵ 159 F. Supp. 3d 173.

⁷⁶ *Id.* at 206 (quoting 940 MASS. CODE REGS. § 31.05(7) (2014)).

speak at all rather than broadcast a “false statement,” was “sufficiently controversial” that *Zauderer*’s rational basis review was inapplicable.⁷⁷

Courts have also turned to *Zauderer*’s “factual” requirement to strike down disclosure requirements. In *R.J. Reynolds Tobacco Co. v. FDA*,⁷⁸ the D.C. Circuit held that regulations requiring cigarette companies to include graphic warnings regarding the dangers of smoking, including “images of a woman crying, a small child, and [a] man wearing a T-shirt emblazoned with the words ‘I QUIT,’” should not be analyzed under *Zauderer*.⁷⁹ Such disclosures, the court found, were not “‘purely’ factual,” as “they [we]re primarily intended to evoke an emotional response”⁸⁰ and constituted “unabashed attempts to evoke emotion . . . and browbeat consumers into quitting.”⁸¹ Similarly, in *CTIA — The Wireless Ass’n v. City & County of San Francisco*,⁸² the Ninth Circuit held that a disclosure that provided information regarding how to avoid exposure to cell phone radiation “contain[ed] more than just facts” because it could “be interpreted by consumers as expressing . . . [the] opinion that using cell phones is dangerous”⁸³ and thus ran afoul of *Zauderer*’s requirements.⁸⁴

Zauderer’s factual and uncontroversial prong is not the only basis on which courts have relied to overturn regulations that seem too restrictive of commercial speakers’ rights. For example, the Second Circuit held that a requirement that a corporation disclose the name of a competitor’s repair shop to customers fell outside *Zauderer*’s bounds.⁸⁵ At least one court has characterized this decision as an example of the Second Circuit’s finding such a disclosure to be impermissibly contro-

⁷⁷ *Id.* at 207.

⁷⁸ 696 F.3d 1205 (D.C. Cir. 2012).

⁷⁹ *Id.* at 1216.

⁸⁰ *Id.*

⁸¹ *Id.* at 1216–17. Two years later, the D.C. Circuit again invoked the “purely factual” requirement. While examining a disclosure compelling companies to state that their products might include minerals whose sale and manufacture helped to finance armed groups in the Democratic Republic of Congo, it opined that “[t]he label ‘conflict free’ is a metaphor that conveys moral responsibility for the Congo war” and is thus not “clear[ly] . . . factual and non-ideological.” *Nat’l Ass’n of Mfrs. v. SEC (NAM)*, 748 F.3d 359, 371 (D.C. Cir. 2014), *aff’d on reh’g*, 800 F.3d 518 (D.C. Cir. 2015). *But see* Post, *supra* note 14, 902–06 (arguing that the disclosure in *NAM* is better understood as purely factual and that the D.C. Circuit “may have objected to the impact that the use of the label ‘not found to be conflict free’ might be expected to have on an audience,” *id.* at 904).

⁸² 494 F. App’x 752 (9th Cir. 2012).

⁸³ *Id.* at 753.

⁸⁴ *Id.* at 753–54. *But see* *Am. Beverage Ass’n v. City & County of San Francisco*, No. 15-cv-03416, 2016 WL 2865893, at *9 n.11 (N.D. Cal. May 17, 2016) (“[T]he Ninth Circuit has not closely examined in a published decision [whether] *Zauderer* requires anything other than focusing on the factual nature of the compelled disclosure . . .”).

⁸⁵ *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263–64 (2d Cir. 2014).

versial.⁸⁶ However, a better reading of this decision is that the Second Circuit elected to remove this disclosure, which otherwise met all of *Zauderer's* requirements, from its more lenient review because “[p]rohibiting a business from promoting its own product on the condition that it also promote the product of a competitor is a very serious deterrent to commercial speech.”⁸⁷

This trend is by no means universal.⁸⁸ Yet courts’ increasing willingness to restrict *Zauderer's* applicability in the wake of *Sorrell*, particularly by invoking *Zauderer's* factual and uncontroversial requirement, is in considerable tension with the renewed focus on the interests of consumers evident elsewhere in courts’ evaluations of compelled commercial disclosures.

III. REPACKAGING *ZAUDERER*

As described in Part II, a close examination of courts’ treatment of *Zauderer* reveals a doctrine at odds with itself. On the one hand, courts have moved to expand *Zauderer's* scope, thereby increasing compelled commercial disclosure doctrine’s emphasis on the rights of consumers. On the other, some courts, potentially influenced by *Sorrell's* increased solicitude toward commercial speakers, have begun relying on the hitherto largely unused factual and uncontroversial prong of *Zauderer's* test to strike down regulations that appear to encroach too significantly on commercial actors’ speech. These conflicting impulses have only served to deepen courts’ uncertainty regarding how best to apply *Zauderer* to compelled commercial disclosures. This Part argues that courts concerned with disclosures that appear too restrictive of commercial speakers’ rights should draw more heavily on *Zauderer's* requirement that a disclosure not impose an undue burden on commercial speakers as a means of protecting these interests.⁸⁹ This shift in emphasis would be more in keeping with both the philosophical tenets underpinning *Zauderer* and the general trend in courts’ treatment of compelled commercial disclosures thus far.

⁸⁶ See *Mass. Ass’n of Private Career Sch. v. Healy*, 159 F. Supp. 3d 173, 206–07 (D. Mass. 2016).

⁸⁷ *Safelite Grp.*, 764 F.3d at 264.

⁸⁸ For example, one court recently cautioned that courts do not “affix[] the ‘controversial’ label lightly.” *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 628 (D. Vt. 2015).

⁸⁹ A few authors have also gestured toward this approach. See Goodman, *supra* note 11, at 537–38; Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1188–89 (2013). An alternative proposal would be to restrict *Zauderer's* scope to disclosures focused solely upon information endogenous to a particular product. See Royal, *supra* note 54, at 239–43; Recent Case, *National Ass’n of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), reh’g en banc denied, *No. 13-5252* (D.C. Cir. Nov. 9, 2015), 129 HARV. L. REV. 819, 825–26 (2016).

This Note has made much of the recent divergence between the greater solicitude shown to commercial actors in cases dealing with restrictions on commercial speech and the emphasis on consumers embodied in courts' expansion of *Zauderer's* scope. Yet there can be little doubt that the effect of, if not the impetus for, both of these trends has been to provide *more* information to consumers, not less. Viewed in this light, the fact that courts have imported some of the anxieties regarding commercial speakers' rights embodied in *Sorrell* into their analyses of compelled commercial disclosures — most frequently by relying on *Zauderer's* requirement that a disclosure be factual and uncontroversial — is unfortunate. Not only do these cases further complicate *Zauderer's* already jumbled jurisprudence, but they could also serve to stem the flow of useful information, intended to address consumer confusion or corporate deception, into the market.

For those concerned with the encroachment of commercial actors' interests into the realm of compelled commercial disclosures, an initial reaction to courts' recent affinity for striking down regulations deemed to have run afoul of the factual and uncontroversial requirement might be to propose eliminating these tests altogether.⁹⁰ This suggestion is not nearly as extreme as it might at first appear. At least one court has observed that the Supreme Court in *Zauderer* merely noted that the regulation at issue mandated the display of factual and uncontroversial information, not that all compelled commercial disclosures need meet this requirement.⁹¹

Yet regardless of whether courts *must* examine a disclosure to ensure that it is factual and uncontroversial, this requirement, at least in theory, does have some role to play in evaluating the permissibility of compelled commercial disclosures. Supreme Court precedent makes clear that commercial speakers cannot be forced to transmit others' opinions,⁹² and a requirement that a disclosure be both factual and uncontroversial can be understood as a potential safeguard against just such an eventuality.⁹³ It does not follow from this observation, how-

⁹⁰ See Goodman, *supra* note 11, at 543–44 (discussing some of the drawbacks of this approach).

⁹¹ See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012); *cf. Am. Beverage Ass'n v. City & County of San Francisco*, No. 15-cv-03415-EMC, 2016 WL 2865893, at *9 (N.D. Cal. May 17, 2016) (noting that “it is not clear whether *Zauderer* itself imposed a . . . ‘factual and uncontroversial’ requirement”).

⁹² See Post, *supra* note 14, at 901 (noting that *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), “makes clear that close constitutional scrutiny will apply to government efforts to compel entities to disseminate ideas or opinions, even within the medium of commercial speech”).

⁹³ See Daniel E. Herz-Roiphe, *Stubborn Things: An Empirical Approach to Facts, Opinions, and the First Amendment*, 113 MICH. L. REV. FIRST IMPRESSIONS 47, 51 (2015) (noting that “[c]ourts . . . treat factual and opinion disclosures differently because they do different things to their audiences” and that “[t]he law of defamation offers a clear analogue” to this situation); *cf. Post*, *supra* note 14, at 901.

ever, that commentators need not be concerned with courts' increasing reliance on this requirement to determine the types of messages determined to be deserving of *Zauderer's* more lenient review. Indeed, this development — and courts' willingness to exclude certain disclosures from *Zauderer's* scope because of their impacts on commercial speakers — is detrimental because of both the ambiguity it creates in this doctrine and the potential damage that an expansive understanding of the dictates of *Zauderer's* factual and uncontroversial requirement could have on this area of the law.

There can be little doubt that courts' treatment of compelled commercial disclosures — and indeed First Amendment jurisprudence more broadly — is hardly a model of doctrinal clarity. Yet there is value in making explicit the interests and values that are motivating courts' analyses of statutes mandating certain types of disclosures. If courts are, as this Note has suggested, becoming increasingly solicitous toward commercial actors when evaluating compelled commercial disclosures, it is important to make this fact clear — both for legislatures attempting to draft disclosure requirements and for commentators attempting to assess (and, if necessary, critique) the value courts assign to commercial actors' speech.

Moreover, courts' reliance on *Zauderer's* factual and uncontroversial requirement as a bulwark against compelled commercial disclosures believed to trench too significantly on commercial actors' rights has the potential to be uniquely harmful to this doctrine's vitality. Weighing the difference between fact and opinion is not beyond courts' capabilities. Yet parsing this distinction — much less the difference between controversial and uncontroversial⁹⁴ — is, as many commentators have noted, a uniquely difficult exercise.⁹⁵ Disagreements abound regarding questions as varied as a regulator's ability to conclusively demonstrate that a particular empirical claim — for example, that a product is safe or harmful — is factual and whether the mechanism or medium by which information is relayed can make an otherwise factual statement an opinion, or vice versa.⁹⁶ The move to ascribe greater significance to this aspect of *Zauderer's* test, therefore,

⁹⁴ Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2427–28 (2014) (discussing the difficulties inherent in this inquiry); see also Berman, *supra* note 73, at 72–73.

⁹⁵ See, e.g., Post, *supra* note 14, at 907 (“The boundary between fact and opinion is an intrinsically troubled area.”); see also Goodman, *supra* note 11, at 517; Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411, 1442–43 (2015).

⁹⁶ See *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 77 (2d Cir. 1996) (Leval, J., dissenting) (highlighting the difficulty of assessing the “safety” of a particular product); Tushnet, *supra* note 94, at 2407–08.

could be a dangerous one.⁹⁷ It is not difficult to imagine that courts' decisions to question the permissibility of regulations that involve the use of "metaphor" to provide information⁹⁸ or to strike down disclosures that relay a factual statement whose implication a court finds troubling⁹⁹ could open the door to a slew of First Amendment challenges to compelled commercial disclosures. Courts relying on *Zauderer's* factual and uncontroversial requirement to guard against disclosures that they perceive to be particularly detrimental to commercial speakers' interests may thus have selected a uniquely potent, and difficult to cabin, tool that provides broad leeway for judges' own subjective beliefs — both conscious and unconscious — to shape their decisionmaking.

In light of these concerns, it may be useful to separate courts' increasing solicitude toward commercial actors from their inquiry into whether a particular disclosure is factual and uncontroversial. Admittedly, at first blush, *Zauderer's* inquiry into the permissibility of a particular disclosure provides no such mechanism. Yet there is a small, but fascinating, subset of cases in which courts' examinations of whether a disclosure is "rationally related" to a permissible government interest or poses an "undue burden" on a commercial speaker both serve as the basis for their decisions to strike down a regulation compelling commercial speech *and* focus solely on the format of an otherwise permissible disclosure.¹⁰⁰ Put differently, the only question these cases present is the extent to which courts will provide protections to commercial speakers otherwise required to provide a disclosure.

The Sixth Circuit, for example, has held that the inclusion of an asterisk on a corporation's packaging failed *Zauderer's* rational basis test because this requirement was based on only "anecdotal experience"

⁹⁷ See Rostron, *supra* note 3, at 572 (noting that "one often finds a hazy middle ground, rather than a bright line, between truth and falsehood or between fact and opinion" but "[t]hat does not mean the distinction between purely factual information and other statements is entirely unhelpful" though it simply "counsel[s] in favor of not overemphasizing the distinction"); cf. Goodman, *supra* note 11, at 569 (noting that "[d]isputes about what is factual and objective communication can obscure . . . more important question[s]" regarding the appropriate scope and impact of compelled commercial disclosures).

⁹⁸ See Nat'l Ass'n of Mfrs. v. SEC (*NAM*), 800 F.3d 518, 530 (D.C. Cir. 2015).

⁹⁹ See *CTIA — The Wireless Ass'n v. City & County of San Francisco*, 494 F. App'x 752, 753 (9th Cir. 2012) ("This language could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous.").

¹⁰⁰ For a discussion of some of these cases and the application of *Zauderer* to requirements "regulating the manner of commercial speech," see Recent Case, *Spirit Airlines, Inc. v. U.S. Department of Transportation*, 687 F.3d 403 (D.C. Cir. 2012), 126 HARV. L. REV. 1422, 1426–27 (2013); see also Post, *supra* note 14, at 900 (noting that the undue burden requirement "follows from the underlying purpose of commercial speech doctrine" because "[i]f the government compels a disclosure that" disrupts "the circulation of information" "by being so burdensome as to 'chill' the communication of information . . . it contradicts the essential goal of commercial speech doctrine").

that failed to reveal anything about “whether the use of an asterisk to link information was effective in conveying a disclosure to consumers.”¹⁰¹ A separate prohibition against draconian disclosure obligations has also emerged since the Supreme Court hinted that a regulation imposing an “unduly burdensome disclosure” could provide an independent barrier to the permissibility of certain disclosures.¹⁰² Several lower courts have breathed life into this standard as an additional constraint on the constitutionality of compelled commercial disclosures.¹⁰³ Most have relied on this particular aspect of *Zauderer*’s test only for the purpose of striking down disclosure requirements that completely preclude commercial actors from speaking.¹⁰⁴ However, some cases have suggested the beginnings of an expansion in its scope.¹⁰⁵

¹⁰¹ See *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 643 (6th Cir. 2010); see also *Pub. Citizen, Inc. v. La. Att’y Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011) (finding that requirements relating to “font size, speed of speech, and spoken/written provisions” of disclosures were not reasonably related to the government’s interest where the only evidence supporting their imposition was study participants’ complaints that disclaimers in lawyer advertisements were difficult to understand). This “rational basis” requirement has not always served as a check on the form of disclosures whose messages have otherwise been deemed acceptable. Courts have, for example, shown relatively little sympathy for litigants who claim that disclosures that cover 20% or 50% of their packaging are not reasonably related to the state’s interest despite the potential burdens the size of these messages might place on commercial speakers. See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 530–31 (6th Cir. 2012); *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 54–55 (1st Cir. 2000). Requirements pertaining to the “font, style, case, and color” of disclosures have been upheld, see *Int’l Dairy Foods Ass’n*, 622 F.3d at 643, as have regulations that mandate that a particular disclosure be “the most prominent figure” in a company’s advertisement, see *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 413–15 (D.C. Cir. 2012). Yet the fact remains that courts have, in the past, been willing to rely on this test if a disclosure was unlikely to actually ensure that consumers would receive the “factual and uncontroversial” message that was intended.

¹⁰² *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146–47 (1994) (holding that a disclaimer requirement so lengthy that it “effectively rule[d] out,” *id.* at 146, plaintiff’s ability to use a “specialist” designation on her business cards or letterhead served as an undue burden on the corporate actor’s speech).

¹⁰³ See, e.g., *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (“[T]hough it may be obvious, we note that *Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech.”); 1-800-411-Pain Referral Servs., LLC v. Otto, D.C., 744 F.3d 1045, 1062 (8th Cir. 2014) (“Under *Zauderer*, we ask whether the No-Fault Act’s disclosure requirements are ‘reasonably related to the State’s interest in preventing deception of consumers,’ and whether they are ‘unjustified or unduly burdensome’ to the point that they ‘offend the First Amendment by chilling protected commercial speech.’” (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985))).

¹⁰⁴ See *Dwyer v. Cappell*, 762 F.3d 275, 284 (3d Cir. 2014) (finding a regulation that “effectively rules out the possibility that [the plaintiff could] advertise with even an accurately quoted excerpt of a judicial statement about his abilities” constituted an undue burden); *Pub. Citizen, Inc.*, 632 F.3d at 229 (holding that where the combination of “font size, speed of speech, and spoken/written requirements” imposed on attorney advertisements “effectively rule[d] out an attorney’s ability to include one or more of the disclaimer-requiring elements in television, radio, and print advertisements of shorter length or smaller size,” the disclosure was unduly burdensome); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) (finding a requirement that retailers “maintain three signs in the store” was unduly burdensome because

These “packaging” cases, which focus on the format rather than the message of a particular disclosure, make clear that *Zauderer* does provide a space for courts to more explicitly balance their concerns regarding a disclosure’s encroachment on commercial actors’ speech with consumers’ interests in a particular message. Admittedly, the rational basis test, which is both quite lenient and focused primarily on a lack of evidence connecting the form of a disclosure to its intended message, is unlikely to be particularly helpful in addressing this problem. Yet a slightly more expansive reading of *Zauderer*’s requirement that a disclosure not impose an undue burden on commercial speakers could serve as a useful tool for courts.

Take, for example, cases in which a particular message has been found to be “controversial” or otherwise has fallen outside *Zauderer*’s bounds because those courts believe that forcing a commercial actor to disclose certain information would be uniquely detrimental to its ability or willingness to speak. In *Safelite Group v. Jepsen*,¹⁰⁶ the Second Circuit held that a regulation barring a company from promoting its own services unless it also disclosed the name of one of its competitors was not subject to *Zauderer*’s more lenient review.¹⁰⁷ The court reasoned that forcing a company to, in essence, “choose between silence about the products and services of their affiliates or give a (random) free advertisement for a competitor” was a “very serious deterrent to commercial speech.”¹⁰⁸ The court justified this decision in part because, “as far as we know, all federal cases applying *Zauderer* [to factual, commercial disclosures have] dealt with disclosure requirements about a company’s own products or services.”¹⁰⁹ Yet the fact that a business has competitors seems neither shocking nor so wholly disconnected from a commercial actor’s product that it would clearly fall outside *Zauderer*’s bounds.¹¹⁰ Similarly, requiring a school to disclose that its credits are not officially accepted at other schools, despite the potential existence of informal credit-transfer agreements with certain schools, is not necessarily “controversial” as the term is conventionally

“[l]ittle imagination is required to envision the spacing debacle that could accompany a small retailer’s attempt to fit three signs, each roughly the size of a large street sign, into” the relatively small space of most video game stores).

¹⁰⁵ See, e.g., *Disc. Tobacco City & Lottery*, 674 F.3d at 531 (intimating that a speaker’s inability to place its “brand names, logos, or other information” on its packaging would constitute an undue burden on speech).

¹⁰⁶ 764 F.3d 258 (2d Cir. 2014).

¹⁰⁷ *Id.* at 264.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Indeed, one of the principal justifications for commercial speech more generally, and *Zauderer* in particular, is to assist individuals in making smarter commercial choices — a process that presumably entails selecting among different products or competitors.

understood.¹¹¹ Rather, the gravamen of the court's concern in both these cases appears to have been that the disclosure involved imposed too great of a burden on a commercial speaker, not that the required message was controversial or problematic from the perspective of consumers.

It is possible, therefore, that these courts could have relied on a slightly more expansive use of the undue burden test to find that, even if these regulations otherwise met *Zauderer's* requirements, they trenched so significantly on commercial speakers' rights that they should be struck down. Such an approach would have permitted these courts to rely on a more context-dependent, nuanced analysis of the effects of the disclosure at issue, rather than, as in *Safelite*, simply deeming all statements not directly concerning a company's products to be outside *Zauderer's* bounds.

The Ninth and D.C. Circuits' decisions in *CTIA* and *R.J. Reynolds*, respectively, similarly demonstrate that relying on the undue burden test could be useful. These cases involved concerns either that consumers would misinterpret a disclosure or interpret an arguably factual and uncontroversial disclosure¹¹² as impermissibly relaying an opinion, rather than facts, with respect to a particular issue.¹¹³ Yet, as discussed above, in the fuzzy boundary between fact and opinion, such as the situation faced by the court in *CTIA*, courts may be better served not by trying to parse the blurry distinction between the two,¹¹⁴ but instead by evaluating such difficult hybrid cases — where consumers otherwise have an interest in the message being relayed — with *Zauderer's* undue burden test.

There are, of course, some obvious drawbacks to more explicitly relying on *Zauderer's* undue burden test to address concerns that compelled commercial disclosures are intruding too significantly on

¹¹¹ See *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 206 (D. Mass. 2016). It should be noted, however, that in this particular case the district court could arguably have found that the disclosure at issue simply was not factual, rather than suggesting that it was "sufficiently controversial" to fall outside *Zauderer's* scope.

¹¹² For example, all of the constitutive elements of the warning at issue in *CTIA* were, as the district court held, factual and uncontroversial. The Ninth Circuit merely took issue with their implication. Similarly, some commentators have argued that graphic images merely provide a more effective way of assisting individuals in retaining and comprehending otherwise factual and uncontroversial information — for example, "smoking is bad." See Corbin, *supra* note 20, at 1312–13; Jolls, *supra* note 95, at 1440–41; Tushnet, *supra* note 94, at 2432–33.

¹¹³ If these labels did unequivocally relay an opinion, they would be analyzed pursuant to the Supreme Court's holding in *United Foods, Inc.*, rather than *Zauderer*. See Post, *supra* note 14, at 909.

¹¹⁴ Cf. R. George Wright, *Are There First Amendment "Vacuums?": The Case of the Free Speech Challenge to Tobacco Package Labeling Requirements*, 76 ALB. L. REV. 613, 625–26 (2012–2013) (questioning whether the distinction between information and opinion is "really tenable in practice," *id.* at 626).

commercial speakers' rights. Perhaps the most obvious would be that, by expanding the scope of this particular mechanism for courts to channel their concerns regarding impositions on commercial actors' speech, these anxieties may result in a more searching review of compelled commercial disclosures than initially intended by the Court in *Zauderer*. Yet, while this Note has proposed a greater role for *Zauderer's* undue burden test than is currently embraced by this doctrine, it should not be read to suggest that it could or should apply to every compelled commercial disclosure. Indeed, in cases involving clearly factual and uncontroversial labels — where there is no suggestion that a warning may be taken as opinion or dispute that a product contains a chemical that is demonstrably harmful to an individual — it is unlikely that this test could, or should, be invoked. Rather, it is intended to serve as a safety valve where courts are concerned that a particular commercial disclosure is particularly burdensome with respect to a commercial speaker's rights.

Alternatively, some could argue that, when caught between *Sorrell's* greater emphasis on commercial actors' speech and *Zauderer's* general shift toward more explicitly embracing consumers' rights, the correct answer is simply to embrace one of these extremes — either by jettisoning courts' increasing reliance on the factual and uncontroversial requirement of *Zauderer's* test, or by cutting back on the greater attentiveness to consumer rights evident in courts' expansion of *Zauderer's* scope. Yet not only is such an outcome unlikely, but either approach would also require courts to give up on a set of interests — whether those of consumers or commercial actors — that they seem to see as important. Thus, if courts continue to embrace both a greater respect for consumers' interests *and* a greater concern for commercial speakers, then they ought to take more seriously *Zauderer's* undue burden requirement in attempting to balance these competing interests.

CONCLUSION

Sorrell — and the broader trend toward greater solicitude for commercial actors' speech that it represents — has cast a long shadow over courts' treatment of commercial speech. Yet courts' increasing willingness to rely on *Zauderer's* factual and uncontroversial requirement to strike down disclosures is in tension with the greater commitment to the rights of consumers embodied in the expansion of *Zauderer's* scope that some courts have undertaken over the past few decades. No easy solution exists to resolve these divergent interests. However, a potentially useful, and currently underutilized, tool for untangling this Gordian knot would be to reallocate concerns about commercial speakers' interests to *Zauderer's* test for whether a requirement imposes an undue burden on a commercial speaker.