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Clarifying Standards for Compelled Commercial Speech

Micah L. Berman*

INTRODUCTION

San Francisco recently became the first community in the country to require advertisements for sugar-sweetened beverages to include a health warning. The warning, which must cover at least 20 percent of the advertising space, reads: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes and tooth decay. This is a message from the City and County of San Francisco.”¹ Separately, state legislatures in California and New York are currently considering laws that would require similar warnings to be placed on all bottles and cans of sugar-sweetened beverages.²

The American Beverage Association has already challenged San Francisco’s law in federal court, claiming that it “violates private speakers’ constitutional right to decide for themselves what to say, and what not to say.”³ Undoubtedly, if a state law requiring warnings on cans and bottles is passed into law, such a law will be challenged on First Amendment grounds as well.

The two sides of this legal dispute could not be further apart. Advocates supporting the warnings claim that they will convey important health-related information to the public and raise no substantial First Amendment concerns. By contrast, opponents argue that the warnings are subject to “strict scrutiny”—the highest level of

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1. Sugar-Sweetened Beverage Warning Ordinance, S.F., Cal., Ordinance 100-15 (2015).

2. Ponice Rutsch, *Is It Time for a Warning Label on Sugar-Loaded Drinks?*, NAT’L PUB. RADIO (Apr. 9, 2015), <http://www.npr.org/sections/thesalt/2015/04/09/398526965/is-it-time-for-a-warning-label-on-sugar-loaded-drinks>.

3. Complaint, *Am. Beverage Ass’n v. City & Cnty. of San Francisco* (N.D. Cal. 2015) (No. 3:15-cv-03415) [hereinafter *ABA Complaint*].

constitutional review—and fail that standard because they are misleading, ineffective, and reflect only the city’s “opinion.”⁴

This dispute is just one example of recent legal clashes between public health and commercial advertising interests, which have increasingly centered on the doctrine of *compelled commercial speech*.⁵ In recent years, the Supreme Court’s First Amendment doctrine has gradually made it ever more difficult to impose *restrictions* on commercial advertising.⁶ As a result, public health advocates have instead looked to warning requirements and mandated disclosures as potentially more legally viable methods of combatting the negative health consequences of unrestrained advertising.⁷

Despite the widespread use of mandated warnings as a public health tool, legal doctrine—and legal scholarship—in this area remains remarkably underdeveloped. While the Supreme Court has addressed the constitutionality of “compelled speech” requirements on a few occasions, it has never done so in the context of health-related warnings or disclosures.⁸ Thus, this area of law is rife with circuit splits, ambiguous opinions, and unanswered questions that make it difficult to issue any clear statements about black letter law.

4. Under strict scrutiny, government regulations “are generally unconstitutional unless they are narrowly tailored to a compelling state interest.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 680 (1994).

5. See LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 361–65 (2d ed. 2008) (explaining compelled commercial speech doctrine and discussing intersection with public health).

6. See Samantha Rauer, *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, 702 (2012) (concluding that the Supreme Court “essentially appears to apply strict scrutiny to public health regulations” that restrict commercial speech); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) (applying “heightened judicial scrutiny” to state law restricting marketing of pharmaceuticals).

7. See, e.g., Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL’Y 159, 193 (2009) (arguing for use of compelled disclosures as a public health tool, and predicting that “[e]ven if the Supreme Court continues to interpret the First Amendment’s protection for commercial speech more broadly, it could not, consistent with any First Amendment jurisprudence, disrupt the ability of the government to require commercial entities from disclosing factual information about their products and services”).

8. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1 (1986); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

This Article identifies and analyzes unsettled areas in compelled commercial speech doctrine, especially those critical to identifying the appropriate level of scrutiny to be applied to mandated warnings and disclosures. Looking back to the original purpose of the commercial speech doctrine, this article suggests that communities should have considerable flexibility to mandate warnings geared towards protecting the public's health. Mandated warnings may not always be the most effective *policy* option, but as a matter of First Amendment doctrine, communities should be given broad leeway to decide whether and how to use warnings in order to better inform the public about potential dangers.

Part I provides the factual and legal background necessary to explore this issue. After briefly discussing the use of mandated warnings and disclosures as public health tools, it reviews the *Zauderer* test, which is the prevailing standard for analyzing compelled commercial speech under the First Amendment. It then reviews the 2012 D.C. Circuit Court of Appeals opinion striking down graphic health warnings for cigarette packs and advertisements, which exemplifies the courts' increasingly aggressive review of compelled commercial speech requirements. Part II identifies some of the core doctrinal questions in need of clarification. It also considers how these questions might best be resolved, keeping in mind the government's interest in promoting and protecting public health. Finally, Part III concludes the Article by returning to a brief discussion of the San Francisco warnings for sugar-sweetened beverage advertisements.

I. BACKGROUND OF THE COMPELLED COMMERCIAL SPEECH DOCTRINE

A. *Compelled Speech as a Public Health Tool*

“Compelled commercial speech” refers to requirements for commercial entities to include government-mandated messaging in

their advertising, on their products, or elsewhere.⁹ As a public health tool, compelled speech has a mixed record at best. The current warning labels on cigarettes, for example, are widely understood to be ineffective because their size and placement makes them “inadequate to attract attention,” and their content is not “persuasive[] and memorable.”¹⁰ To the contrary, the warning requirement has arguably *harmed* public health by insulating tobacco companies from litigation.¹¹ Similarly, there is little evidence that the current warning labels on alcohol have any significant impact on consumer decision-making.¹²

The evidence regarding the effectiveness of calorie disclosures—which will soon be coming to chain restaurants nationwide—is also equivocal.¹³ Both experimental and observational studies suggest that calorie-posting requirements may be ineffective or may have at modest impact at best.¹⁴ New York City, for instance, has required calorie postings since 2008. Yet a study tracking the behavior of adolescents before and after the law went into effect concluded that they “did not respond in any measurable way to the presence of

9. See Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 515 (2014) (providing examples of compelled commercial speech).

10. INST. OF MED., GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 234–44 (Barbara S. Lynch & Richard J. Bonnie eds, National Academy Press 1994).

11. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524–25 (1992) (ruling that “failure to warn” tort claims were preempted by the federal cigarette labeling requirement).

12. See David P. MacKinnon et al., *The Alcohol Warning and Adolescents: 5-Year Effects*, 90 AM. J. PUB. HEALTH 1589, 1589 (2000) (concluding that “[t]he alcohol warning has not affected adolescents’ beliefs about alcohol or alcohol-related behaviors”); TIM STOCKWELL, CENTRE FOR ADDICTIONS RESEARCH OF BC, A REVIEW OF RESEARCH INTO THE IMPACTS OF ALCOHOL WARNING LABELS ON ATTITUDES AND BEHAVIOR 4–7 (2006) (summarizing that although warnings may have led to “greater awareness of the messages they contained,” studies of their impact have been nearly unanimous in their conclusion that the “impacts on drinking behaviour are either nonexistent or minimal”).

13. Marion Nestle, *Health Care Reform in Action—Calorie Labeling Goes National*, 362 NEW ENG. J. MED. 2343, 2344 (2010) (suggesting that while there is “potential value in posting calorie counts,” the evidence to date is “not easily interpreted”).

14. Jacqueline I. Aron et al., *Paradoxical Effect of a Nutrition Labeling Scheme in a Student Cafeteria*, 15 NUTRITION RES. 1251 (1995); Lisa J. Harnack et al., *Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: Results from an Experimental Trial* 5 INT’L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 63, 64–65 (2008); Brian Elbel et al., *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, 28 HEALTH AFFAIRS W1110 (2009).

labels”¹⁵ Some experts have argued that calorie labeling will pressure restaurants to reformulate their foods, which could produce public health gains, but the evidence underlying this assertion is inconclusive thus far.¹⁶

The upshot of such evidence is not that all warnings are ineffective; for instance, there is compelling evidence that sufficiently large graphic warnings on cigarette packs can meaningfully promote smoking cessation.¹⁷ Rather, the point is that the provision of information should not be *assumed* to have a direct and straightforward effect on consumer behavior. Among other complicating factors, individuals with low literacy levels may not understand the information presented,¹⁸ advertising and other forms of promotion (*e.g.*, price discounts) may counteract the impact of mandated disclosures,¹⁹ and warnings may trigger psychological defense mechanisms that produce the opposite of the intended result.²⁰ Changing behavior is an exceedingly difficult endeavor, and “[i]t turns out that the simple act of conveying information to an individual seldom suffices to change that individual’s behavior.”²¹ Moreover, almost by definition, mandated disclosures put the onus for behavioral change on the individual receiving the message,

15. B. Elbel et al., *Child and Adolescent Fast-Food Choice and the Influence of Calorie Labeling: A Natural Experiment*, 35 INT’L J. OBESITY 493, 493 (2011).

16. Nestle, *supra* note 13, at 2344–45.

17. See, *e.g.*, David Hammond, *Health Warning Messages on Tobacco Products: A Review*, 20 TOBACCO CONTROL 327, 327 (2011) (concluding that “whereas obscure text-only warnings appear to have little impact, prominent health warnings on the face of packages serve as a prominent source of health information for smokers and non-smokers, can increase health knowledge and perceptions of risk and can promote smoking cessation”).

18. See, *e.g.*, Terry C. Davis et al., *Low Literacy Impairs Comprehension of Prescription Drug Warning Labels*, 21 J. GEN. INTERNAL MED. 847, 850 (2006) (finding that many patients with low literacy skills had trouble interpreting warnings written at a first grade reading level).

19. See, *e.g.*, Leslie B. Snyder & Deborah J. Blood, *Caution: Alcohol Advertising and the Surgeon General’s Alcohol Warnings May Have Adverse Effects on Young Adults*, 20 J. APPLIED COMM. RES. 37, 37 (1992) (finding that alcohol advertisements “reduc[ed] people’s ability to recall the content of the warning[s]”).

20. See, *e.g.*, Debra Jones Ringold, *Boomerang Effects in Response to Public Health Interventions: Some Unintended Consequences in the Alcoholic Beverage Market*, 25 J. CONSUMER POL’Y 27, 27 (2002) (discussing the psychological theory of “reactance,” which suggests that consumers can be “aroused in opposition to perceived threats to personal choice,” rendering warnings ineffective or counterproductive).

21. Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 377 (2006).

ignoring the population-level social, economic, cultural, and environmental forces that may influence or promote unhealthy behaviors.²² Public health advocates should therefore promote the use of mandated disclosures only as part of a package of policy measures that takes these contextual factors into account.

Accordingly, as matter of good public health practice, warning requirements should not be assumed to promote public health: rigorous research, testing, and evaluation is required. Whether laws mandating warnings should be subjected to rigorous scrutiny as a matter of First Amendment doctrine, however, is a separate question.

B. The First Amendment Standard: Zauderer

The foundational Supreme Court case on compelled commercial disclosures is *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.²³ In this 1985 opinion upholding a required disclosure on attorney advertisements, the Court clearly distinguished compelled *commercial* speech from compelled *non-commercial* speech.²⁴ Although the Court had stated in the non-commercial context that that “the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all,”²⁵ *Zauderer* clarified that this maxim is inapplicable in the context of commercial advertisements.²⁶

22. As noted above, however, disclosure requirements may also pressure companies to change their conduct in order to avoid embarrassment. Starbucks, for example, introduced its low-calorie “Vivanno” line of products shortly after New York City’s calorie labeling law went into effect, presumably in response to the disclosure requirement. Samantha K. Graff et al., *Policies for Healthier Communities: Historical, Legal, and Practical Elements of the Obesity Movement*, 33 ANN. REV. PUBLIC HEALTH 307, 315 (2012).

23. 471 U.S. 626 (1985).

24. The state’s rule required attorney advertisements mentioning contingency fees to “inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful.” *Id.* at 633.

25. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that New Hampshire could not compel citizens to display the state’s “Live Free or Die” motto their on license plates over their objections).

26. *Zauderer*, 471 U.S. at 651 (“[T]he interests at stake in this case are not of the same order as those discussed in [compelled political and ideological speech cases]. Ohio has not attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’ The State has

It explained:

Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, *appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal*. . . . [B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”²⁷

The relaxed standard called for in *Zauderer* is generally viewed as being akin to a rational basis standard.²⁸ So long as the government can establish that the proposed disclaimer or warning is “factual and uncontroversial”—an issue discussed later—a relaxed standard of review applies. For instance, in upholding New York City’s calorie labeling requirement, the Second Circuit found that the “calorie disclosure rules were clearly *reasonably related* to [the regulation’s] goal of reducing obesity.”²⁹ Without reviewing the scientific literature on the effectiveness of calorie labeling, the court found it sufficient that (1) obesity is significant public health concern, driven in large part by out-of-home consumption; and (2) providing calorie information in restaurants might help to better inform consumer decision-making. This conclusion accurately reflects the general principle that under rational basis review, government actions “may be based on rational speculation unsupported by evidence or empirical data,” and the party challenging the requirement must “negate every conceivable basis that might support it.”³⁰

attempted only to prescribe what shall be orthodox in commercial advertising. . . .”) (alteration in original) (citations omitted).

27. *Id.* at 651 (emphasis added) (citations omitted).

28. *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009); *CTIA-The Wireless Ass’n v. City of Berkeley*, 2015 WL 5569072, at *11 (N.D. Cal., Sept. 21, 2015) (“[C]ircuit courts have essentially characterized the *Zauderer* test as a rational basis or rational review test.”).

29. *N.Y. State Rest. Ass’n*, 556 F.3d at 136 (emphasis added).

30. *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 315 (1993).

Although some businesses groups are attempting to blur the line between commercial and non-commercial compelled speech, at the moment there is still broad agreement that the “*Zauderer* test” applies to compelled commercial disclosures.³¹ Far less clear, however, are (1) what counts as a “factual and uncontroversial” warning requirement, subject to the *Zauderer* test; and (2) what doctrinal test applies if *Zauderer* does not. These were the key questions addressed by the D.C. Circuit in its review of the U.S. Food and Drug Administration’s (FDA) proposed graphic warnings for cigarette packages and advertisements, widely seen as one of the most important recent cases involving compelled commercial speech.³²

C. Cigarette Warning Labels: *R.J. Reynolds v. FDA*

In *R.J. Reynolds*, the D.C. Circuit, by a 2-1 margin, struck down the FDA’s proposed graphic warnings for cigarettes on First Amendment grounds.³³ Numerous law review articles have summarized the facts of the case and both praised and criticized the decision.³⁴ For the purposes of this article, this decision is important because it (1) exemplifies the trends of courts applying heightened scrutiny to laws involving compelled commercial speech, in contrast to the more cursory review outlined in *Zauderer*; and (2) highlights

31. Stephen D. Sugarman, *Compelling Product Sellers to Transmit Government Public Health Messages*, 29 J.L. & POL. 557, 560 (2014) (“Tobacco companies [and] business interests in general . . . argue that requiring gas stations, grocery stores, and gun companies to post [governmentally compelled] messages is unconstitutional because it violates the free speech rights of these businesses. They argue that such requirements are legally the same thing as requiring school children to stand up, put their hand over their heart or put their fingers to their forehead in a salute, and say the pledge of allegiance to the flag.”).

32. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part* by *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014).

33. *R.J. Reynolds*, 696 F.3d 1205.

34. *See, e.g.*, Goodman, *supra* note 9, at 516–17 (describing the “[t]wo opposing narratives” of the case; the public health narrative that the cigarette warning labels “merely update textual labels that have been in place for a half-century, providing consumers with full information about the risks of smoking,” and the industry’s narrative that “graphic labels convert government from objective informer to ideological persuader, shouting its warning in order to manipulate consumer decisions”); Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 563–74 (2013); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 MD. L. REV. 458 (2014).

some of the important unsettled doctrinal questions relating to compelled commercial speech.

1. Applicability of *Zauderer*

The court began by acknowledging that “factual and uncontroversial” required disclosures are subject to the *Zauderer* standard, which is “akin to rational basis review.”³⁵ But it then concluded that *Zauderer* was not the appropriate standard to apply the cigarette graphic warning labels for two reasons.

First, it suggested that the *Zauderer* standard was limited to cases where the “government affirmatively demonstrates that an advertisement threatens to deceive consumers.”³⁶ Despite a long history of misleading (and false) tobacco advertisements, the court concluded that because the 2009 Tobacco Control Act now prohibits unverified health claims and the use of misleading terms in tobacco advertisements, the government could no longer demonstrate that future tobacco advertisements were likely to deceive consumers.³⁷ As discussed further below, this portion of the D.C. Circuit’s opinion was later overruled by an *en banc* panel in *American Meat Institute v. USDA*.³⁸

Second, the D.C. Circuit questioned whether the graphic warnings were the type of “purely factual and uncontroversial” disclosure to which the *Zauderer* standard applies.³⁹ Other than a related Sixth Circuit case,⁴⁰ *R.J. Reynolds* was the first case to directly consider whether required disclosures of *images* raised different issues than compelled disclosure of *text*.⁴¹ The D.C. Circuit, while

35. *R.J. Reynolds*, 696 F.3d at 1212.

36. *Id.* at 1214.

37. *Id.* at 1216 (concluding that *Zauderer* did not apply because “[t]he warnings . . . represent an ongoing effort to discourage consumers from buying the Companies’ products, rather than . . . a measure designed to combat specific deceptive claims”).

38. *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014).

39. *R.J. Reynolds*, 696 F.3d at 1216.

40. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (rejecting a facial challenge to the cigarette graphic warning requirement).

41. New York City recently began requiring an image of a salt shaker to be placed next to menu items with high sodium content. The National Restaurant Association has threatened a lawsuit to challenge the rule, which applies to chain restaurants. This may provide the courts with another opportunity to consider the constitutional status of mandated images (in this case,

acknowledging that none of the images were “patently false,” wrote that the images were “not ‘purely’ factual because . . . they are primarily intended to evoke an emotional response.”⁴² Judge Janice Rogers Brown, writing for the majority, concluded: “These inflammatory images . . . cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”⁴³ In short, Judge Rogers Brown equated “factual and uncontroversial” communications with “pure attempts to convey information.” But what are “pure attempts to convey information”? 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. Thus, the 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 *Zauderer* is to apply.

2. Standard of Review if *Zauderer* is Inapplicable

A subsidiary question raised by *R.J. Reynolds* is what the appropriate standard of review should be if a court concludes that a required warning or disclaimer is not “factual and uncontroversial” as required by *Zauderer*. Previously, courts had found most warnings to either satisfy *Zauderer* or fail under any conceivable standard; therefore this question was also without a clear answer.

The plaintiff tobacco companies asserted that if *Zauderer* did not apply, strict scrutiny was the appropriate backup standard. In contrast, the government argued that if the court found *Zauderer* to be inapplicable, the warnings would alternatively survive scrutiny

a simple illustration, rather than graphic images). Daniel Victor, *High-Salt Warnings on New York Menus to Start Tuesday*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/01/nyregion/salt-warnings-new-york-restaurants.html?_r=0.

42. *R.J. Reynolds*, 696 F.3d at 1216–17.

43. *Id.*

under the *Central Hudson* test, implicitly suggesting that this was the correct backup standard.⁴⁴

After concluding that *Zauderer* was inapplicable, the D.C. Circuit chose to apply the *Central Hudson* test, which is an intermediate scrutiny standard normally applied to *restrictions* on commercial speech.⁴⁵ This test consists of four prongs:

1. To qualify for First Amendment protection, the commercial speech must concern lawful activity and not be misleading.
2. The government's asserted interest in restricting the speech must be substantial.
3. The restriction must directly advance the government's asserted interest.
4. The restriction must not be more extensive than necessary to serve the asserted government interest.⁴⁶

These requirements were designed to test restrictions on commercial speech, and it should be readily apparent that these four prongs are not easily applicable to mandated disclosures. As there is no speech being restricted in this type of case, the first prong appears to be inapplicable, and the D.C. Circuit did not even mention it. Likewise, it is hard to apply the fourth prong to a compelled disclosure. What would it mean for a warning to be "more extensive than necessary"?⁴⁷ Making the (reasonable) assumption that larger and stronger warnings are generally more effective than a smaller and weaker

44. *Id.* at 1217.

45. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The D.C. Circuit applied *Central Hudson* rather than strict scrutiny in part because it felt bound by the Circuit's prior decision in *United States v. Philip Morris*, 566 F.3d 1095, 1142–45. (D.C. Cir. 2009) (reviewing the constitutionality of requiring cigarette companies to publish "corrective statements").

46. *Cent. Hudson*, 447 U.S. at 566.

47. See Nat Stern, *Graphic Labels, Dire Warnings, and the Facile Assumption of Factual Content in Compelled Commercial Speech*, 29 J.L. & POL. 577, 584 (2014) ("The requirement that a restriction not be 'more extensive than is necessary to serve [the state's] interest' . . . has no direct counterpart in the government's injection of nonfactual speech into an advertiser's message.").

ones, how is a court supposed to determine what is “too much” warning?

Since there is no clear way in which the *Central Hudson* test can be applied to compelled speech cases, the courts are left with a free-floating, standardless means/ends test. In *R.J. Reynolds*, the court concluded that the FDA had failed prong two of *Central Hudson* because it had not provided a “shred of evidence . . . showing that the graphic warnings will ‘directly advance’ its interest in reducing the number of Americans who smoke.”⁴⁸ This conclusion was belied by the evidence presented in the case and has been appropriately criticized elsewhere.⁴⁹ Indeed, the conclusion is quite ironic (or troubling, from a public health perspective), because graphic health warnings for tobacco are one of the few types of required warnings for which there *is* a well-developed body of supportive evidence. For purposes of this article, though, it is sufficient to note that application of this modified *Central Hudson* test allowed the Court of Appeals to engage in essentially unrestrained second-guessing of the FDA’s scientific conclusions.⁵⁰

The FDA did not appeal the *R.J. Reynolds* decision to the Supreme Court, instead electing to develop new warning labels that would be more likely to survive legal review.⁵¹ It has now been more

48. *R.J. Reynolds*, 696 F.3d at 1219.

49. See, e.g., Wendy E. Parmet & Peter D. Jacobson, *The Courts and Public Health: Caught in a Pincer Movement*, 104 AM. J. PUB. HEALTH 392, 394–95 (2014) (“The majority’s disdain for the FDA’s evidence shows a fundamental misunderstanding of the science behind epidemiology.”).

50. See Stephen D. Sugarman, *Should Food Businesses Be Able to Use the First Amendment to Resist Providing Consumers with Government-Mandated Public Health Messages?*, 5:4 FOOD & DRUG L. POL’Y FORUM 7 (2015) (writing that the use of *Central Hudson* in compelled speech cases “turns courts into the equivalent of the Office of Information and Regulatory Affairs (OIRA)—the office within the Office of Management and Budget (OMB) that applies tough cost-benefit analysis to regulations proposed by federal agencies,” and that judicial review of this sort is “an invitation to a return to the *Lochner* era”).

51. Letter from Hon. Eric H. Holder, Jr., Attorney General, to Hon. John Boehner, Speaker of the U.S. House of Representatives (Mar. 15, 2013), <http://www.mainjustice.com/files/2013/03/Ltr-to-Speaker-re-Reynolds-v-FDA.pdf> (stating that the FDA had decided not to appeal the decision because it can “address issues identified by the court of appeals” in a new rulemaking process, and it would have another opportunity to seek Supreme Court review if revised graphic warnings were later struck down). This decision was perhaps “a strategic step to avoid a Supreme Court that has aggressively protected corporate speech.” Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment*, 64 HASTINGS L.J. 1467, 1470 (2013).

than three years since the D.C. Circuit's opinion, and the FDA has yet to propose new warnings. This may be in part because the decision in *R.J. Reynolds v. FDA* raises far more questions than it answers. The opinion, including the court's confusing application of both the *Zauderer* test and the *Central Hudson* test, highlighted how many doctrinal questions in the area of compelled commercial speech remain unresolved.

II. OPEN QUESTIONS IN COMPELLED COMMERCIAL SPEECH DOCTRINE

This part introduces four critical doctrinal questions relating to compelled commercial speech that remain unresolved or unaddressed following the *R.J. Reynolds* decision and other recent federal court opinions. As government policymakers and public health advocates consider what innovative policies could help protect and promote the public's health, there is a critical need for additional legal and interdisciplinary scholarship that could explore the potential implications of resolving these doctrinal disputes in different ways. This section is intended to lay the groundwork for such future research by identifying some of the critical open questions and suggesting how, in my view, they could best be resolved in a manner that is consistent with both the Supreme Court's doctrinal foundations and the interests of public health.

A. What Is "Factual and Uncontroversial"?

What types of warnings/disclaimers are "factual and uncontroversial" such that they are reviewed under *Zauderer's* relaxed standard? This is perhaps the most critical question under the *Zauderer* test. Although courts seem flummoxed by this question, in my view the answer is—or at least should be—rather straightforward: the "factual and uncontroversial" limitation is best read as a check to ensure that any mandated statement is *factually accurate* (or *factually uncontroversial*).

This understanding follows from the historical and doctrinal underpinnings of *Zauderer* and the commercial speech doctrine as a whole. The commercial speech doctrine dates back only to the mid-

1970s; before that time the Supreme Court did not consider commercial speech to be protected by the First Amendment at all.⁵²

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc. (Virginia Pharmacy)*, the Supreme Court changed course and decided that the First Amendment's protections extended to commercial speech.⁵³ The reasoning focused squarely on the protection of consumer interests: commercial speech was deserving of constitutional protection because of its ability to communicate useful information to consumers and to help them make more informed choices.⁵⁴ As Justice Stewart wrote in concurrence, "the one facet of commercial price and product advertising that warrants First Amendment protection . . . [is] its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking."⁵⁵

Zauderer based its reasoning on *Virginia Pharmacy*'s logic. Because commercial speech is constitutionally protected only to the extent it conveys "accurate and reliable" information to consumers, the *Zauderer* Court reasoned that an advertiser's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal."⁵⁶ A disclaimer that helps inform consumers or counter potentially misleading advertising may impose some burdens on the advertiser, but it furthers the goals of the commercial speech doctrine. Such disclaimers however, must be *factually accurate* (and non-misleading) in order to serve a valid governmental purpose.⁵⁷ Understood in its proper context, the

52. See *Valentine v. Christensen*, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising.").

53. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1967); Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 503 (2015).

54. See Berman, *supra* note 53, at 503–04 (2015).

55. *Va. State Bd. of Pharmacy*, 425 U.S. at 781 (Stewart, J., concurring).

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

57. While there is no agreed-upon meaning of the term "factually accurate," it may be instructive to note that the Affordable Care Act defined "medically accurate" to mean "verified or supported by the weight of research conducted in compliance with accepted scientific methods and (A) published in peer-reviewed journals, where applicable; or (B) comprising information that leading professional organizations and agencies with relevant expertise in the

“factual and uncontroversial” limitation is thus focused only on whether the disclaimer provides factual information that will help to inform consumers.

1. What Is “Factual”?

R.J. Reynolds read the requirement that mandated disclosures be “factual” narrowly, suggesting that images are inherently less factual than text-only disclosures and that disclosures that “persuade” are less factual than those that merely “inform.” In my view, both of these distinctions are neither doctrinally nor logically sustainable. That an image provokes emotion or is compelling to viewers does not render it non-factual. As the Supreme Court explained in *Zauderer* (in a separate section of the opinion), “The use of illustrations or pictures . . . serves important communicative functions: it attracts the attention of the audience . . . and it may also serve to impart information directly.”⁵⁸ Again focusing on the underlying purpose of the commercial speech doctrine, it is clear that pictures can be an extremely effective method of communicating accurate information, particularly to low-literacy and non-English-speaking audiences.⁵⁹ Likewise, even textual warnings, such as those indicating that a product can cause cancer or birth defects, trigger emotional

field recognize as accurate” 42 U.S.C.A. § 713 (2015). Importantly, for information to be considered “factually accurate,” there does not need to be complete scientific consensus, as many well-established facts are contested by a small number of dissenters. *See, e.g.*, Beau Dure, *Flat-Earthers Are Back: ‘It’s Almost Like the Beginning of a New Religion,’* THE GUARDIAN (Jan. 20, 2016), <https://www.theguardian.com/science/2016/jan/20/flat-earth-believers-youtube-videos-conspiracy-theorists>.

58. *Zauderer*, 471 U.S. at 647.

59. *See* David Hammond, *Tobacco Packaging and Labeling Policies Under the U.S. Tobacco Control Act: Research Needs and Priorities*, 14 NICOTINE & TOBACCO RES. 62, 64–65 (2012) (“Pictorial warnings may be particularly important in communicating health information to populations with lower literacy rates. This is particularly important considering that, in countries such as the United States, smokers have lower levels of education than the general population.” (citation omitted)).

responses.⁶⁰ “Emotional” (or “persuasive”) is not the opposite of “factual.”⁶¹

It is also important to point out that the D.C. Circuit’s opinion would make it exceedingly difficult for the government to mandate *effective* warnings or disclaimers.⁶² Text-only warnings simply do not stand a chance when pitted against sophisticated companies’ use of advertising techniques that rely on non-informational, image-driven, emotional appeals.⁶³ This dynamic likely explains the ineffectiveness of the cigarette and alcohol warnings discussed in Part I. In order to effectively break through the clutter of the extensive advertising to which consumers are exposed on a daily basis, pictorial images may be required in some circumstances.⁶⁴

Likewise, nothing in *Zauderer* suggests that warnings cannot be designed to influence consumer behavior—or that such warnings fail the “factual” requirement. There may be cases where simply informing a consumer is sufficient—and *Zauderer* was likely one of them. In *Zauderer*, the government required attorneys to inform potential clients of the costs they might incur if they hired an attorney on a contingency-fee basis.⁶⁵ Once fully informed of those costs, whether a prospective client chose to respond to an attorney’s

60. See Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2407 (2014) (“Under the majority’s reasoning [in *R.J. Reynolds*], the government is apparently not allowed to mandate a warning that works through an emotional mechanism. One immediate problem with that conclusion is that ‘purely’ factual words also work that way.”).

61. See Cortez, *supra* note 51, at 1486 (“Just because the images may be discomfiting or even disturbing to look at does not make them factually inaccurate.”); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) (“Facts can disconcert, displease, provoke and emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions.”).

62. Cortez, *supra* note 51, at 1499 (suggesting that First Amendment doctrine should facilitate the use of “disclosure methods that actually work—meaning they are actually seen and digested rather than ignored”).

63. Berman, *supra* note 53, at 535; Goodman, *supra* note 9, at 567 (“An understanding of factual that insists on single provable assertions and that is hostile to the use of complex emotional-cognitive pathways will leave little room for more effective forms of communication.”).

64. This is why at least sixty countries around the world now required graphic cigarette warning labels that cover at least 50 percent of the package’s front and back. CANADIAN CANCER SOC’Y, CIGARETTE PACKAGE HEALTH WARNINGS 8–9 (4th ed. 2014).

65. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 652 (1985).

solicitation was of no concern to the government; rather, the government's interest was fully satisfied when the relevant facts were disclosed. But when the governmental interest involved is public health (and what is being mandated is a warning, rather than a disclosure), the government most clearly *does* have a stake in how a consumer responds to the warning. The D.C. Circuit in *R.J. Reynolds* appears to take the position that the government's interest is satisfied so long as consumers are informed of the dangers of smoking; whether or not they choose to smoke given those dangers is none of the government's business. In this respect, the D.C. Circuit adopted quite a radical position. If addressing the leading cause of preventable death is not the government's business, it is not clear what would be. Why else would the government inform a consumer of the risks? As a matter of policy or ideology, one can reasonably take the position that the government should not use warnings to influence consumer behavior. But as a matter of First Amendment doctrine there is no such limitation, and the D.C. Circuit provided no case law demonstrating otherwise.

Though the First Amendment does not prohibit the government from seeking to influence consumer behavior, *Zauderer's* "factual" requirement does limit *how* the government can use required disclosures to do so. For example, a warning that states "WARNING: The Tobacco Industry is Not Your Friend" expresses an opinion, not an empirically verifiable fact, and should not be examined under *Zauderer*, but instead under a more stringent standard.⁶⁶ Likewise, it is possible that some images (for example, an image of a smoker being shamed by his friends) may be best characterized as expressions of opinion rather than of fact. But the use of warnings, whether textual or pictorial, to influence consumer behavior does not, in and of itself, render them nonfactual. As Ellen Goodman writes, "the government often seeks simultaneously to inform and to influence consumer purchases by mandating product disclosures"

66. This mock "warning" was used as part of the State of California's public education campaign. As the Ninth Circuit found, the government can express such an opinion when it is acting as the speaker. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 912 (9th Cir. 2005). See discussion *infra* Part II.D.

such as “[n]utritional labels, toxic chemical disclosures, . . . cigarette warnings” and other familiar requirements.⁶⁷

2. What Is “Uncontroversial”?

As explained above, “factual and uncontroversial” is best understood as a single requirement addressing the accuracy of the disclosure at issue.⁶⁸ In recent cases, however, industry plaintiffs have tried to elevate “uncontroversial” to a separate and distinct requirement with a very different meaning.

For instance, in an ongoing case, *Grocery Manufacturers Association v. Sorrell*, food manufacturers and retailers are challenging a Vermont law that requires food sold in the state to disclose whether it was produced in part through genetic engineering.⁶⁹ Although the required disclosure is unquestionably factual, the plaintiffs argue that it is nonetheless “controversial” because it “requires manufacturers to convey an *opinion* with which they disagree . . . namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant.”⁷⁰ In other words, the disclosure is “controversial” and reflects an “opinion” because the manufacturers disagree about the need for a required disclosure. Of course, if this were the standard, *every* warning or disclosure that a manufacturer did not want to convey would be “controversial.”⁷¹ The District Court

67. Goodman, *supra* note 9, at 515; see also Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 569–72 (2012) (agreeing with this argument, but suggesting that the government crosses a line when it goes beyond factual statements and requires commercial actors to “express[] the government’s beliefs about how an individual should behave”).

68. Moreover, the Sixth Circuit suggested in *Discount Tobacco* that “uncontroversial” should not even be seen as a required attribute under *Zauderer*. In its view, the term “merely describes the disclosure the Court faced in that specific instance.” For *Zauderer*’s rational basis rule to apply, the Sixth Circuit said that disclosures must only be “factual” or “accurate.” *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012).

69. *Grocery Mfrs. Ass’n v. Sorrell*, No. 5:14-CV-117, 2015 WL 1931142 (D. Vt. Apr. 27, 2015).

70. *Id.* at *26 (emphasis added) (quoting Complaint).

71. The same issue was raised in *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014). The court struck down a required disclosure that would have made pregnancy services centers disclose whether or not they “provide or provide referrals for abortion.” *Id.* at 242. The court stated that the disclosure “requires centers to mention

succinctly rejected this argument, writing, “[a] factual disclosure does not reflect an opinion merely because it compels a speaker to convey information contrary to its interests.”⁷²

It is unlikely that courts would accept the strong form of the argument put forth by the plaintiffs in *Grocery Manufacturers Association*, which would render essentially all warnings and disclosures “controversial.” But courts might be more easily persuaded by a variant of this argument—that warnings implying the existence of dangers that have not been conclusively proven are “controversial.”

CTIA-Wireless v. San Francisco, which addressed compelled disclosures relating to radio-frequency emission from cell phones, is an interesting example.⁷³ In that case, San Francisco required point-of-sale warnings at cell phone retail outlets that read:

Cell phones emit radio-frequency energy. Studies continue to assess the potential health effects of mobile phone use. If you wish to reduce your exposure, the City of San Francisco recommends that you:

- Keep distance between your phone and body
- Use a headset, speakerphone, or text instead
- Ask for a free factsheet with more tips.⁷⁴

The City noted that every statement in the required warning was entirely factual: cell phones indisputably do emit radiation, and

controversial services that some pregnancy services centers, such as Plaintiffs in this case, oppose,” and was therefore “controversial.” *Id.* at 245 n.6. In the commercial speech context, it cannot be correct that a factual disclosure is “controversial” simply because the speaker would rather not be associated with it. It is not clear, however, that *Evergreen* should have been analyzed as a case involving commercial speech. Required disclosures for pregnancy services centers and/or abortion providers raise challenging First Amendment issues that are beyond the scope of this paper. Such cases also raise other constitutional issues, such as placing an undue burden on obtaining abortion services, that may impact the appropriate level of scrutiny. See Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 WASH. U. J.L. & POL’Y 11 (2016).

72. *Sorrell*, 2005 WL 1931142, at *32 (suggesting that a “controversial” requirement would be one that is “opinion-based,” as opposed to fact-based).

73. *CTIA—The Wireless Ass’n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054 (N.D. Cal. 2011), *aff’d*, 494 F. App’x 752 (9th Cir. 2012).

74. *Id.* at 1058.

studies are continuing to assess the related health effects. In its view, even if the science is unsettled, the precautionary principle justified the regulation; radio-frequency emissions *might* cause harm, and “better safe than sorry” was an appropriate warning message to communicate to the public.⁷⁵

The Ninth Circuit, in an unpublished opinion, found that the City’s warnings implicitly suggested that cell phone use is dangerous.⁷⁶ Because “[t]here is a debate in the scientific community about the health effects of cell phones,” this was an expression of the City’s “opinion,” rather than an expression of fact.⁷⁷ It is unclear whether the Ninth Circuit viewed the warning as being “non-factual,” “controversial,” or both. But in any event, the decision is troubling from a public health perspective.⁷⁸

Opponents of mandated warnings will nearly always be able to point to some scientific studies questioning the government’s position. Heated dispute over scientific truths is inherent in the nature of scientific inquiry, and, as the current “debate” over global warming demonstrates, there will always be critics and dissenters from the scientific consensus.⁷⁹ But it cannot be the case that “the requirement that automobile manufacturers . . . affix a label to the fuel compartments of vehicles capable of operating on alternative fuels” is subjected to a higher level of scrutiny “because of public controversies about climate change.”⁸⁰ Such a rule would force legislatures to wait for the chimera of “scientific certainty” before

75. *Id.* at 1058; Stephen G. Wood et al., *Whither the Precautionary Principle? An American Assessment from an Administrative Law Perspective*, 54 AM. J. COMP. L. 581, 581 (2006) (“The precautionary principle permits decisionmakers to avoid or minimize risks whose consequences are uncertain but potentially serious by taking anticipatory action. The ‘catchphrase’ attached to this principle is: better safe than sorry.”).

76. *Wireless Ass’n v. City & Cnty. of San Francisco*, 494 F. App’x 752 (9th Cir. 2012).

77. *Id.* at 753–54.

78. A district court judge recently ruled in favor of Berkeley, California when reviewing Berkeley’s similar required disclosures relating to cell phone radio-frequency. *CTIA—The Wireless Ass’n v. City of Berkeley*, 2015 WL 5569072 (N.D. Cal. Sept. 21, 2015) (finding one section of the mandated disclosure preempted by federal law, but otherwise upholding the requirement against First Amendment challenges). *See infra* text accompanying notes 117–20.

79. Depending on the issue, those dissenters may be industry-funded.

80. Brief of Tobacco Control Legal Consortium et al., Supporting Appellees’ Petitions for Rehearing En Banc, *Nat’l Ass’n of Mfrs. v. SEC*, 2015 WL 5996680, at *4 (D.C. Cir.) (referencing the disclosure requirement in 49 U.S.C. § 32908 (2012)).

taking any action to disclose proven or potential risks, essentially rendering them powerless. Instead, warnings should be invalidated only if the government lacks a factual basis for the required statements.

B. What Is a Sufficient Government Interest Under Zauderer?

A second unsettled issue is what government interests are sufficient to trigger the *Zauderer* test, as opposed to a more heightened standard of review. *R.J. Reynolds* suggested that *Zauderer* could only be invoked when the government was seeking to counter deception in the marketplace (which was the factual context presented in *Zauderer*). This part of *R.J. Reynolds* was expressly overruled by an *en banc* panel of the D.C. Circuit in *American Meat Institute v. USDA*, which upheld a requirement for country-of-origin labeling for meat.⁸¹ The D.C. Circuit held that “enabling customers to make informed choices based on characteristics of the products they wished to purchase” was an adequate governmental interest, even in the absence of consumer deception.⁸²

American Meat Institute’s conclusion is, in my view, correct.⁸³ Even though every Supreme Court case to apply *Zauderer* has done so in the context of preventing consumer deception,⁸⁴ the Court has also suggested that compelled disclosures are preferable to restrictions on speech—even when consumer deception is not involved. In the *Central Hudson* case, for example, the Court struck down advertising restrictions that were intended to further the government’s interest in energy conservation by limiting advertising for electricity.⁸⁵ The Court’s holding centered on its conclusion that

81. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*).

82. *Id.* at 24–25.

83. *Cf. CTIA—The Wireless Ass’n*, 2015 WL 5569072, at *14 (“[I]t would make little sense to conclude that the government has greater power to regulate commercial speech in order to prevent deception than to protect public health and safety, a core function of the historic police powers of the state.”).

84. *Id.* at 42 (Brown, J., dissenting); *see also* *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (“*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.”).

85. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 558–60 (1980).

the restrictions were more burdensome than necessary because the government could alternatively “require that the advertisements include information about the relative efficiency and expense of the offered service.”⁸⁶ In other words, the *Central Hudson* framework relies heavily on the supposition that “more speech” (i.e., required disclosures) is preferable to restrictions on speech, whether or not the governmental interest at stake involves countering consumer deception.⁸⁷

In ruling that *Zauderer* is not limited to cases of combating deception, the D.C. Circuit followed the First and Second Circuits’ lead.⁸⁸ Though not addressing the issue quite as directly, decisions in the Third and Seventh Circuits appear to go the other way.⁸⁹ Most circuits, however, have not addressed this issue. Thus, although the trend appears to be towards a broader application of the *Zauderer* rule, the question is by no means settled.

Assuming that *Zauderer* applies beyond cases of consumer deception, however, there is a subsidiary question of what type of interest the government must assert. Must it be a “substantial”

86. *Id.* at 570–71 (1980).

87. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (stating broadly that “[w]hen a State . . . requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review”).

88. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (holding the government interest in “better inform[ing] consumers about the products they purchase” was sufficient); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009); *Pharm. Care Mgt. Ass’n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005), *accord* *Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 89 (2013) (“Laws requiring a commercial speaker to make purely factual disclosures related to its business affairs, whether to prevent deception or simply to promote informational transparency, have a ‘purpose . . . consistent with the reasons for according constitutional protection to commercial speech.’” (quoting 44 *Liquormart*, 517 U.S. at 501)). The Sixth Circuit can arguably be added to this list as well. Citing the Second Circuit, it stated in *Discount Tobacco* that “*Zauderer’s* framework can apply even if the required disclosure’s purpose is something other than or in addition to preventing consumer deception.” *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556 (6th Cir. 2012). Since the majority found that the interest in preventing consumer deception was implicated in the case, however, that statement could be characterized as dicta.

89. *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (“The Court has allowed states to require the inclusion of ‘purely factual and uncontroversial information . . . as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.’” (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985))); *Dwyer v. Cappell*, 762 F.3d 275, 283 (3d Cir. 2014).

interest?⁹⁰ Is any legitimate interest sufficient, as would be the case if *Zauderer* were truly equivalent to rational basis review? Because the Supreme Court’s compelled commercial speech cases have all involved consumer deception, the nature of the government interest required outside of this context remains unclear.

In *International Dairy Foods Association v. Amestoy*, the Second Circuit struck down Vermont’s labeling requirement for dairy products produced using recombinant Bovine Somatotropin (rBST or rbST), ruling that “consumer curiosity alone is not a strong enough state interest” to trigger *Zauderer* review.⁹¹ It wrote:

Although the Court is sympathetic to the Vermont consumers who wish to know which products may derive from rBST-treated herds, their desire is insufficient to permit the State of Vermont to compel the dairy manufacturers to speak against their will. Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered. Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other *sufficiently substantial governmental concern*, the manufacturers cannot be compelled to disclose it.⁹²

Though it did not use the term, Vermont had justified its law with respect to the “precautionary principle,”—the concern that rBST “may have long-term health effects that have not been sufficiently studied.”⁹³ Like the Ninth Circuit in *CTIA*, the Second Circuit

90. See *Grocery Mfrs. Ass’n v. Sorrell*, No. 5:14-CV-117, 2015 WL 1931142, at *35 (D. Vt. Apr. 27, 2015) (discussing this issue and concluding that “substantial interest” is not required by *Zauderer*).

91. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

92. *Id.* (emphasis added).

93. Brief of Defendants-Appellees at 7-8, *Int’l Dairy Foods Ass’n v. Amestoy*, 1995 WL 17049818 (C.A.2).

determined that the precautionary principle was not a “sufficiently substantial governmental concern.”

The Second Circuit’s rejection of the precautionary principle as a substantial governmental interest is troubling for three reasons.⁹⁴ First, from a public health perspective, communities should be permitted to decide that they want to take proactive steps to avoid or mitigate potential harms, even if those harms are still speculative.⁹⁵ By the time potential harms (cancer, for example) materialize, they may well be impossible to undo. Although a disclosure requirement may cause economic harm in some cases, communities should be given leeway to balance those economic impacts against potential health concerns. Second, the unclear distinction between “satisfying consumer curiosity” and more “substantial” government interests potentially puts courts in the role of a scientific review committee, second-guessing legislative decisions by analyzing whether or not the science has accumulated to some unspecified level that justifies action. Judges—who are not trained to be sophisticated reviewers of scientific literature—are not well suited to this type of role. Third, so long as the mandated disclosure is factual and not misleading, it is hard to square the Second Circuit’s conclusion with the original purpose of the commercial speech doctrine. As noted above, that doctrine focuses on the interests of consumers in receiving information that might help to inform their decisions. The *Amestoy* decision exemplifies the problematic trend of courts shifting their focus away from the public’s interest in obtaining information and instead validating the “implausible claim of conscience” by manufacturers “compel[led] . . . to speak against their will.”⁹⁶

94. The doctrinal basis underpinning this rule is unclear. Presumably it reflects an implicit assumption that the government must have a “substantial” government interest underlying the required disclosure in order for *Zauderer* to apply.

95. Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 895 (2015) (“If the citizens of Vermont distrust FDA conclusions that rBST is safe, and if they are willing to pay more for the identification of milk products made from rBST-treated cows than it costs to produce that identification, why should the Constitution prohibit Vermont from recognizing and responding to that distrust, especially because analogous suspicions of medical omniscience have in the past sometimes proved correct?”).

96. Richard J. Bonnie, *The Impending Collision Between First Amendment Protection for Commercial Speech and the Public Health: The Case of Tobacco Control*, 29 J.L. & POL. 599, 617 (2014); *Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996); Micah L. Berman, *Commercial Speech Law and Tobacco Marketing: A Comparative Discussion of the United States and Canada*, 39

The upcoming Second Circuit appeal from *Grocery Manufacturers Association v. Sorrell* (the genetic engineering disclosure case) will give the Second Circuit an opportunity to reconsider *Amestoy* and clarify the current state of law.⁹⁷ The district court in *Grocery Manufacturers* suggested that so long as there is “scientific debate” about the health effects of genetic engineering, the state’s interest in requiring a disclosure is supported by more than the “mere appeasement of consumer curiosity” and *Zauderer* applies.⁹⁸ Although this effectively distinguishes *Amestoy*, in which the state essentially conceded that it did not yet have evidence of negative health effects from rBST, this rule would still limit the government’s use of the precautionary principle as a basis for policymaking. Instead, the Second Circuit should rule that *Zauderer* requires only a *rational basis* (not a “substantial interest”) for the government to require a factual disclosure.⁹⁹

C. What Happens if *Zauderer* Does Not Apply?

A third major unanswered question is what the appropriate standard of review should be if a court determines that *Zauderer* does not apply. To date, most courts have turned to one of two options in this situation: (1) strict scrutiny, the highest standard of review,¹⁰⁰ or

AM. J.L. & MED. 218, 234 (2013) (“[T]he commercial speech doctrine in the United States started out by emphasizing the interests of consumers. Since that time, however, the focus of the courts has gradually shifted from the consumer to the speaker.”).

97. *Amestoy* has already been significantly limited by subsequent case law. See Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 115 n.6 (2d Cir. 2001) (holding that *Amestoy* is “expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of ‘consumer curiosity’”).

98. Grocery Mfrs. Ass’n v. Sorrell, No. 5:14-CV-117, 2015 WL 1931142, at *33 (D. Vt. Apr. 27, 2015) (noting that *Amestoy* “has . . . been confined to its facts”); see also Nat’l Elec., 272 F.3d at 115 (2d Cir. 2001) (finding that “better inform[ing] consumers” was an interest that triggered *Zauderer* review even if “satisfying consumer curiosity” did not).

99. Note that even under a rational basis standard there must be some articulable reason why the government is requiring the disclaimer or warning. To take an example from Jennifer Keighley, “if the state were to compel all toys to have a label displaying the names of the individuals who designed the toy, with absolutely no rationale for why that information was of interest or value to consumers,” it is hard to see how such a requirement would survive even *Zauderer*’s lenient standard or review. Keighley, *supra* note 67, at 567.

100. See, e.g., Entm’t Software Ass’n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny after determining that mandated sticker on sexually explicit video games was “non-factual” and *Zauderer* therefore did not apply).

(2) the *Central Hudson* test, a form of intermediate scrutiny.¹⁰¹ In my view, the appropriate standard depends on why *Zauderer* was found to be inapplicable—but courts to date have not focused on this distinction.

Strict scrutiny is appropriate *only if* the nature of the warning effectively transforms the issue from one involving commercial speech to one involving ideological or political speech, thereby triggering a higher standard of review. Even corporate actors engaged in commerce have a protected right not to “propound political messages with which they disagree.”¹⁰² This was the lesson of the Supreme Court’s decision in *Pacific Gas & Electric Company v. Public Utilities Commission of California*, which overturned a California utility regulation requiring a power company to print political messages from a ratepayers’ advocacy organization in its newsletter.¹⁰³ This was not a warning or disclaimer requirement to which the commercial speech doctrine should apply; it was a requirement for a utility to distribute *political* messages with which it disagreed. As Justice Marshall explained in concurrence, the state can “restrict or mandate [commercial] speech in order to prevent deception or otherwise protect the public’s health and welfare,” but it cannot compel one party to transmit a political message on behalf of another.¹⁰⁴

What might be deemed “political,” however, should not be overstated. Contrary to the D.C. Circuit’s recent conclusion in *National Association of Manufacturers v. Securities and Exchange Commission*, whether or not a product is “fairly traded” or whether or not a diamond is “conflict free” is not, in my view, an “ideological” or “political” statement, so long as those terms are adequately defined.¹⁰⁵ That a company may vigorously disagree with how its

101. See, e.g., *R.J. Reynolds Tobacco Co. v. FDA.*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (concluding that *Central Hudson* set forth the appropriate standard).

102. *Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 16 (1986).

103. *Id.* at 20.

104. *Id.* at 26 (Marshall, J., concurring).

105. *Nat’l Ass’n of Mfrs. v. SEC*, No. 13-5252, 2015 WL 5089667, at *8-9 (D.C. Cir. Aug. 18, 2015) (holding, incorrectly in my view, that a requirement for companies to communicate in securities disclosures whether minerals are “conflict free” requires “ideological” speech). *National Ass’n of Manufacturers* likened the case to *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006) (striking down a requirement that “sexually explicit”

product is characterized does not transform the issue into an ideological debate.¹⁰⁶

Subject to the narrow exception noted above, strict scrutiny is not the appropriate standard, because of the basic principle that commercial speech is entitled to First Amendment protection “less extensive than that afforded noncommercial speech.”¹⁰⁷ And even within the world of commercial speech, mandated disclosures “trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech,”¹⁰⁸ and are therefore appropriately subjected to a lesser standard of review. Applying strict scrutiny to compelled

video games be labeled with a sticker reading “18”) and *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (voiding a law that required “violent” video games to be labeled with an “18” sticker). Both of these cases are distinguishable for two reasons. First, they involve labeling on video games, a protected form of First Amendment communication (analogous to a book), which arguably requires a higher level of scrutiny. Secondly, both “sexually explicit” and “violent” were not clearly defined terms; the definitions in both cases referred to “community standards,” making it impossible for companies to determine with any certainty when the labels were required. It should also be noted that *National Association of Manufacturers* is an odd case in which to apply *Zauderer*, as the “conflict free” disclosure was required to appear on securities disclosure reports, not on product advertising or product labeling. Thus, one could argue that the case is about securities regulation, not “commercial speech” per se. See Post, *supra* note 95, at 872 (“[T]he disclosures at issue in *NAM* do not concern ‘speech proposing a commercial transaction’; they do not even concern advertisements.”); *Nat’l Ass’n of Mfrs.*, 2015 WL 5089667, at *8 (Srinivasen, J., dissenting) (“Issuers of securities must make all sorts of disclosures about their products for the benefit of the investing public. No one thinks that garden-variety disclosure obligations of that ilk raise a significant First Amendment problem.”).

106. *National Association of Manufacturers* has been appealed to the D.C. Circuit. On appeal, the D.C. Circuit should look to the Supreme Court’s decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). In *Milavetz*, the Court upheld a requirement that certain companies state in their advertisement that they are “debt relief agencies.” *Id.* Even though that term does not have any inherent meaning, and the company in question objected to being characterized as a “debt relief agency,” the Court rejected the company’s argument that the law violated *Zauderer*. *Id.* The same is true in *National Association of Manufacturers*; so long as the term in question is well-defined and provides useful information to consumers, companies have no constitutional right to wordsmith the government’s required disclosures. *Nat’l Ass’n of Mfrs. v. SEC*, No. 13-5252, 2015 WL 5089667. Instead, as in *Milavetz*, companies have the right to provide any *additional* information to consumers that they desire.

107. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) (internal quotation marks omitted); Rostron, *supra* note 34, at 572 (“Applying strict scrutiny to compelled disclosures that fall outside *Zauderer* . . . runs counter to the Supreme Court’s frequent suggestion that disclosure requirements pose much less of a threat to First Amendment values than speech restrictions.”).

108. *Zauderer*, 471 U.S. at 651.

commercial disclosures, even as a backup standard to *Zauderer*, would flip these principles on their heads.¹⁰⁹

What standard should apply, however, is a more difficult question. As discussed in Part I.C, the *Central Hudson* standard—which applies to *restrictions* on commercial speech—can be applied to disclosure requirements only if twisted nearly beyond recognition. And as I have written elsewhere, even when applied as intended to restrictions on commercial speech, the *Central Hudson* test is internally inconsistent and requires courts to weigh incommensurable values (*e.g.*, public health vs. consumer autonomy).¹¹⁰ If courts continue to narrow the definition of “factual and uncontroversial” and limit the governmental interests to which *Zauderer* applies, then it seems that the courts will also need to develop a new, intermediate standard of review that can replace *Central Hudson* as a backup standard of review.

Such a backup standard may not be necessary, however. So long as a required disclosure is *factually accurate* and the government can identify a legitimate governmental interest, *Zauderer* should apply. If the required disclosure is factually false or misleading, or if the government cannot identify any legitimate governmental interest motivating the requirement, then the law should fail not only *Zauderer*, but also any other possible standard of review. Further, as discussed above, if a required warning is ideological or political in nature (or the warning/disclosure is being applied to speech that is not commercial advertising), strict scrutiny should apply. It is only because the courts have read the “factual and uncontroversial” and

109. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 376 (2002) (suggesting that instead of restricting advertising for compounded drugs, the government’s interest “could be satisfied by the far less restrictive alternative of requiring each compounded drug to be labeled with a warning that the drug had not undergone FDA testing and that its risks were unknown”); see also *Rostron*, *supra* note 34, at 572 (“[T]he Supreme Court has repeatedly urged governments to consider mandating disclosures as a less burdensome alternative to regulating what advertisers can say.”).

110. *Berman*, *supra* note 53, at 508–09; cf. *Rostron*, *supra* note 34, at 531 (suggesting that the Supreme Court’s commercial speech doctrine is at odds with itself because of attempts to accommodate both “a pragmatic inclination to defer to reasonable legislative judgments,” and “an anti-paternalistic impulse that condemns governments for acting on fears that truthful information will encourage people to make bad choices”).

governmental interest requirements too narrowly that the question of a backup standard has become important.

D. Does Identifying a Disclosure Requirement as “Government Speech” Matter?

One final open question is whether unambiguously identifying a disclosure as “governmental speech” leads to an even more relaxed standard of review than *Zauderer*, as some have proposed. The Supreme Court stated in *Johanns v. Livestock Marketing Association* that “the Government’s own speech . . . is exempt from First Amendment scrutiny.”¹¹¹ Although that case involved a compelled subsidy of government speech, not a required warning or disclosure, Stephen Sugarman has argued that the same principle should apply in the latter context. He writes:

[If] what is being compelled is the carrying of government speech (and that should be made quite clear in the actual message if need be) . . . this sort of regulatory restriction does not involve the First Amendment at all so long as it does not preclude the product sellers from also conveying their message.¹¹²

In his view, as long as cigarette warnings clearly state “Surgeon General’s Warning” or “FDA Warning,” they should be insulated from First Amendment review, because it is clear that the message being conveyed is the government’s, and not the manufacturer’s or retailer’s.

At first blush, it may seem unreasonable to suggest that disclosures can be shielded from legal challenge simply by ensuring that the government is identified as the speaker. However, the logic underlying this argument is that as long as it is clear that the government is the speaker, the commercial actor is not being forced to speak against its will (because it is not the speaker at all). Just as the government could tax private businesses and use the proceeds to express its own views, compelled disclosures are another (and

111. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

112. Sugarman, *supra* note 31, at 574.

perhaps more direct) way of requiring private parties to fund the distribution of the government's message.¹¹³ And because the messages are clearly identified as government speech, if the public objects to a disclosure requirement it can seek redress through the political process.

Despite the Supreme Court's broad language, use of the government speech doctrine is not completely unrestrained. As discussed above, the government cannot commandeer private property to express a political or ideological message, and the message must be germane to the product at issue. Furthermore, even though the government is not forcing the private entity to "speak" a message, it is requiring it to carry the government's message (presumably against its will). This imposes a real burden on the private entity that, in essence, has no way to refuse to carry the government's message short of going out of business. Thus, there must be a limit to the amount of space the government can claim on a company's product or advertising in order to convey its message.¹¹⁴ Sugarman would use the Fifth Amendment's Takings Clause as the doctrinal hook for imposing that limit.¹¹⁵ I would instead suggest that *Central Hudson* (or some similar intermediate standard or review) is appropriate to analyze the degree to which a compelled speech requirement limits a private entity's ability to communicate its own message. But such a review would consider only the amount of space being taken up by the government's message; it would not be a forum for second-guessing the *content* of the governmental message. A benefit of applying *Central Hudson* in this context is its sensitivity to the strength of the governmental interest at stake. Thus, very large mandated warnings on cigarette packages may be justified given the scope of the public health issue involved; for more minor public health concerns, such intrusive warnings may not be acceptable.

113. *Id.* at 575.

114. *See Post, supra* note 95, at 900 ("The function of the doctrine is to safeguard the circulation of information. If government compels disclosures that interrupt that circulation . . . by being so burdensome as to 'chill' the communication of information . . . it contradicts the essential goal of commercial speech doctrine.").

115. Sugarman, *supra* note 31, at 574 ("[I]n my view, [the Fifth Amendment's Takings Clause] is where this constitutional battle should be fought—and not with the First Amendment.").

The courts have rarely analyzed compelled commercial disclosures through a “government speech” frame, largely because governmental defendants have not asked them to do so.¹¹⁶ Governments should reconsider their unwillingness to pursue this line of argument. Approaching these cases from a “government speech” perspective could relieve the courts of the obligation to parse which messages are “factual and uncontroversial,” thereby providing a pathway around some of the knotty questions outlined above.

In one of the few cases to directly discuss this issue, a district court judge in California recently upheld the City of Berkeley’s required point-of-sale disclosures relating to cell phone radio-frequency.¹¹⁷ (Berkeley’s required disclosures were similar to, but somewhat distinct, from San Francisco’s.¹¹⁸) The judge in that case wrote that “there is a persuasive argument that, where . . . the compelled disclosure is that of clearly identified *government* speech, and not that of the *private speaker*, a standard even less exacting than that established in *Zauderer* should apply.”¹¹⁹ In such a case, the court concluded, “the *Zauderer* factual-and-uncontroversial requirement is not needed to minimize the intrusion upon the plaintiff’s first amendment interest,” and some version of rational

116. It does not appear that this argument was asserted by either the FDA in *R.J. Reynolds* or San Francisco in *CTIA—The Wireless Ass’n*. New York City’s government did present this argument in *23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174 (2d Cir. 2012), a case involving mandated point-of-sale warnings for tobacco products, but the case was decided on preemption grounds, rather than First Amendment grounds.

117. *CTIA—The Wireless Ass’n v. City of Berkeley*, 2015 WL 5569072 (N.D. Cal. Sept. 21, 2015).

118. Berkeley’s disclosure can either be provided to each customer who purchases a cell phone or posted at the point-of-sale. It reads in relevant part:

The City of Berkeley requires that you be provided the following notice:

To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation. This potential risk is greater for children. Refer to the instructions in your phone or user manual for information about how to use your phone safely.

Id. at *1 (quoting Berkeley, Cal. Mun. Code § 9.96.030 (2015)).

119. *Id.* at *14.

basis review should apply instead.¹²⁰ Notably, the judge in that case (Judge Edward Chen) is the same district court judge assigned to review San Francisco's sugar-sweetened beverage warnings.

III. LOOKING FORWARD: *AMERICAN BEVERAGE ASSOCIATION V. SAN FRANCISCO*

The San Francisco sugar-sweetened beverage warnings lawsuit raises all four of the unsettled doctrinal issues discussed above:

- **Are the warnings “factual and uncontroversial”?** Building on previous attempts to turn “factual” and “uncontroversial” into two separate requirements, the plaintiffs argue that these warnings are neither. Analogizing to *CTIA*, they assert that even if the warnings are technically factual (which they do not concede), they are misleading, and therefore “non-factual,” because they “convey . . . the misleading and controversial view that [sugar-sweetened beverages] are hazardous in any quantity and more hazardous to health than any other food or beverage about which the City requires no warning.”¹²¹ Secondly, they argue that the warnings are “controversial” because they reflect only San Francisco’s “opinion” that sugar-sweetened beverages “have little or no value” and cannot be part of a healthy lifestyle.¹²²
- **Is the city’s interest sufficient to trigger *Zauderer* review?** The plaintiffs argue that *Zauderer* is inapplicable because the warning “does not cure or mitigate any consumer deception.”¹²³ Thus, this case raises the same issue recently decided by the D.C. Circuit in *American Meat Institute*.

120. *Id.* at *15. The court ultimately decided that the disclosure requirement would withstand review under either an application of a “more rigorous rational basis review” or the *Zauderer* test. *Id.* at *16.

121. *ABA Complaint*, *supra* note 3, at 4.

122. *Id.* at 1.

123. *Id.* at 28.

- **What happens if *Zauderer* does not apply?** The plaintiffs assert that “at least heightened scrutiny” should apply in this case because the warnings are not “factual and uncontroversial” and do not counter consumer deception.¹²⁴ They strongly suggest that strict scrutiny is the appropriate standard, but argue in the alternative that the warnings would also fail *Central Hudson* review. The city has not yet responded to this legal argument, will presumably argue that even if *Zauderer* is inapplicable, strict scrutiny is not the proper standard.
- **Are the warnings “government speech”?** The warnings clearly state: “This is a message from the City and County of San Francisco.” Inclusion of that language suggests that San Francisco may be preparing to argue that the warnings constitute “government speech” and even *Zauderer*’s relatively lenient review is not necessary.

In some respects, it seems that the American Beverage Association is fighting an uphill battle. The warnings involved do not involve images or graphics, and the textual warning is difficult to distinguish from longstanding cigarette warnings such as “SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.” Even though other products also cause these diseases and a few contrarian scientists might dispute the warning’s accuracy, the tobacco industry has never claimed that this warning is non-factual or controversial. Indeed, in *R.J. Reynolds*, the industry challenged only the mandated images, not the textual warnings.¹²⁵ The fact that the American Beverage Association is willing to mount this challenge illustrates the degree to which courts have increasingly become open to challenges that might have seemed unimaginable in years past.

At the same time however, San Francisco must consider whether this is the case in which it wants the courts to answer the doctrinal questions outlined above. Presumably in order to avoid raising

124. *Id.* at 7.

125. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1229 (D.C. Cir. 2012) (Rogers, J., dissenting).

Dormant Commerce Clause or federal preemption concerns, the warning requirement does not apply to advertisements in “any newspaper, magazine, periodical, advertisement circular or other publication, or on television, the internet or other electronic media.”¹²⁶ Nor does it apply to the beverages themselves or to branded vehicles such as delivery trucks. For the most part, it will apply only to billboards and to advertisements in retail stores. Pointing out that a statute is not fully comprehensive is not grounds to invalidate it; a city should be permitted to act incrementally or incompletely, particularly when trying not to overstep the limits of its authority. Moreover, a city should not be faulted for acting modestly in order to stay within the limits of its constitutional authority. Nonetheless, one could question the likely effectiveness of the required warning, given that advertising resources can easily be channeled from billboards to other forms of advertising. Thus, if the court finds *Zauderer* to be inapplicable, it may well question whether the ordinance furthers the city’s interests to the “substantial degree” required by the *Central Hudson* test.

Moreover, the “findings and purpose” section of San Francisco’s ordinance details voluminous evidence of the harms caused by sugar-sweetened beverages, but it does not cite any evidence demonstrating the likely effectiveness of the proposed warning labels in reducing consumption (or even with respect to the intermediate goal of better informing consumer choice).¹²⁷ Again, as a legal matter, such evidence should not be a prerequisite to action. Cities must have the flexibility to try creative and promising approaches that have not yet been tested, particularly as part of a multi-faceted approach to a complex problem. But the city might well prefer to litigate these issues in another test case in which it *does* have such evidence. As discussed in Part I, one should not assume that mandated warnings will necessarily have a positive public health impact. The city is no doubt aware that “bad facts make bad law.”

Some legal experts have warned of a “collision course between public health and the First Amendment,” driven in part by conflicting

126. S.F., Cal., Ordinance 100-15 (2015).

127. *Id.* at 1–5.

interpretations of the compelled speech doctrine.¹²⁸ Although *R.J. Reynolds* and other troubling recent cases hint as such a pending collision, a train wreck is not inevitable. The compelled speech doctrine can serve the interests of public health, particularly if courts look back to the Supreme Court's original vision of the commercial speech doctrine in cases such as *Virginia Pharmacy* and *Zauderer*. As explained by the Supreme Court in those cases, compelled disclosures *furthered* the First Amendment interest in informing consumers, which was the primarily purpose of the doctrine. Accordingly, compelled speech was seen as a preferred form of governmental intervention, in contrast to restrictions on commercial speech. Although some recent lower court cases have strayed from this approach, the lack of recent Supreme Court precedent on point means that many lower courts retain broad flexibility in this area. The doctrine is still being developed.

At the same time, however, public health advocates and government officials must be thoughtful and selective in using mandated disclosures as a tool. Disclosures and warnings have a mixed record in terms of effectiveness, and pushing too hard for warnings of questionable efficacy could undermine the standing of public health advocates with both the courts and the public.

128. Bonnie, *supra* note 96, at 600.