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# A COMPELLING CASE: EXPLORING THE LAW OF DISCLOSURES AFTER *NIFLA*

Casey Adams\*

## INTRODUCTION

It has long been a legal adage that “hard cases make bad law.”<sup>1</sup> In the arena of compelled commercial speech, it might be said more precisely that controversial issues make for doctrinal puzzles. The difficult—and politically charged—issue of abortion has now bookended the development of constitutional protections for commercial speech, fostering and exacerbating the “impossible tension between commercial regulation and constitutional immunities.”<sup>2</sup>

Until 1976, commercial speech received no protection under the First Amendment.<sup>3</sup> The Supreme Court took its first step toward constitutional protection of commercial speech in *Bigelow v. Virginia*, where it invalidated a statute that made it a misdemeanor to encourage or prompt abortions, which at the time were subject to various state restrictions.<sup>4</sup> The advertisement at issue informed Virginia readers that abortions could be legally procured in New York regardless of state residency.<sup>5</sup>

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<sup>1</sup> *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (internal punctuation removed).

<sup>2</sup> Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 889 (2015).

<sup>3</sup> *Id.* at 872.

<sup>4</sup> 421 U.S. 809, 829 (1975).

<sup>5</sup> *Id.* at 812. The advertisement’s text read: “UNWANTED PREGNANCY LET US HELP YOU[.] Abortions are now legal in New York[.] There are no residency requirements. FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST Contact WOMEN’S PAVILION . . . AVAILABLE 7 DAYS A WEEK STRICTLY CONFIDENTAL. We will make all arrangements for you and help you with information and counseling.” *Id.*

The Supreme Court reasoned that “speech is not stripped of First Amendment protection merely because” it appears in the form of an advertisement, and found that the advertisement before it “conveyed information of potential interest and value to a diverse audience.”<sup>6</sup> The Court also noted that “the activity advertised pertained to constitutional interests” protected under *Roe v. Wade*.<sup>7</sup> Constitutional protection for commercial speech took root in a case involving the right to engage in commercial speech related to abortion.

More than four decades later, abortion would again play a key role in the evolution of commercial speech protection. This time, however, the case involved the right *not* to engage in commercial speech related to abortion. In *National Institute of Family & Life Advocates v. Becerra (NIFLA)*, the Supreme Court struck down, on First Amendment grounds, a California law that required Crisis Pregnancy Centers (CPCs) to post certain disclosures about the nature of their services and the availability of abortion services from the state.<sup>8</sup> The public reaction to the decision mostly focused on its potential effects on women’s access to reproductive healthcare and state efforts to combat misinformation targeted at women considering abortions.<sup>9</sup> But the sweep of the decision was much broader than just the reproductive health disclosure that brought it about. As Dean Erwin Chemerinsky and Professor Michele Goodwin put it, *NIFLA* “opens the door to challenges to a myriad of laws that require disclosures.”<sup>10</sup>

The fundamental problem for disclosure laws is that *NIFLA* struck down the California law on the basis that it was a content-based restriction on speech subject to strict scrutiny because it “compel[s] individuals to speak a particular message,” recited from “a government-drafted script.”<sup>11</sup> This, of course, is also true of most

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<sup>6</sup> *Id.* at 818, 822.

<sup>7</sup> *Id.* at 822; *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>8</sup> 138 S. Ct. 2361 (2018).

<sup>9</sup> See, e.g., Ronald J. Krotoszynski Jr., *The Supreme Court Gives Free Speech to Fake Doctors, But Not Real Ones*, WASH. POST (Dec. 11, 2019), [https://www.washingtonpost.com/opinions/the-supreme-court-gives-free-speech-to-fake-doctors-but-not-real-ones/2019/12/11/2c4f4bc8-1c27-11ea-8d58-5ac3600967a1\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-court-gives-free-speech-to-fake-doctors-but-not-real-ones/2019/12/11/2c4f4bc8-1c27-11ea-8d58-5ac3600967a1_story.html); Emma Green, *The Supreme Court Hands a Win to the Pro-Life Movement*, ATLANTIC (June 26, 2018), <https://www.theatlantic.com/politics/archive/2018/06/the-supreme-court-hands-a-win-to-the-pro-life-movement/563738/>.

<sup>10</sup> Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 68 (2019).

<sup>11</sup> 138 S. Ct. at 2371.

disclosure laws on the books. But *NIFLA* explicitly blessed more lenient scrutiny in certain cases, including commercial disclosures of “purely factual and uncontroversial information about the terms under which . . . services will be available” under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.<sup>12</sup> That *Zauderer* test continues to be the framework under which compelled speech commercial disclosures are analyzed. The *NIFLA* majority also declared that, contrary to the suggestion of the dissent, it was not “question[ing] the legality of health and safety warnings long considered permissible.”<sup>13</sup> The perceived difficulty of surmounting the strict scrutiny bar has given rise to “one of the famous epithets in American constitutional law”<sup>14</sup>—that the standard is “strict in theory, but fatal in fact.”<sup>15</sup> Courts have understood the *Zauderer* test to be a species of rational basis review, making the latter quoted phrases the difference between a law receiving the highest and lowest levels of scrutiny courts can apply.<sup>16</sup>

The *NIFLA* decision provoked reactions from legal commentators across the political spectrum. Robert McNamara and Paul Sherman of the conservative Institute for Justice hailed the decision as “one of the most important First Amendment rulings in a generation, clarifying decades of muddled precedent and significantly expanding protection for speech in the commercial marketplace.”<sup>17</sup> McNamara and Sherman concluded that “*NIFLA* cements the Roberts Court as the most libertarian in our nation’s history on free-speech issues.”<sup>18</sup>

Dean Chemerinsky and Professor Goodwin, in contrast, argued that *NIFLA* was “incorrectly analyzed and decided” and would “lead to pernicious results.”<sup>19</sup> Dean

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<sup>12</sup> *Id.* at 2376; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>13</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2376.

<sup>14</sup> Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 4 (2000).

<sup>15</sup> *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 797 (2006) (“While it remains true that the majority of laws subjected to strict scrutiny fall and that the government typically faces an onerous task defending laws under this standard, strict scrutiny is not nearly as deadly as generations of lawyers have been taught.”).

<sup>16</sup> *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 261–62 (2d Cir. 2014).

<sup>17</sup> Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 197.

<sup>18</sup> *Id.* at 198–99.

<sup>19</sup> Chemerinsky & Goodwin, *supra* note 10, at 68.

Chemerinsky and Professor Goodwin compiled a non-exhaustive sample of disclosure laws potentially vulnerable under *NIFLA*, spanning the fields of education, health, environment, credit lending, real estate, and housing.<sup>20</sup> The Professors conclude that “[e]ach and every one of them will have to meet strict scrutiny,” because the exception the Court recognized for “purely factual and uncontroversial information about the terms under which . . . services will be available” is so nebulous as to be unusable.<sup>21</sup>

However, it is not clear that all disclosure laws must receive strict scrutiny after *NIFLA*. This Article argues that the more significant question for the future of disclosure laws is how courts should interpret and apply the Supreme Court’s guidance as to what types of disclosures qualify for *Zauderer* review after *NIFLA*. That standard continues to ask whether information to be disclosed is “purely factual and uncontroversial information about the terms under which . . . services will be available.”<sup>22</sup> It will be equally important to decipher and apply the Court’s statement that it does “not question the legality of health and safety warnings long considered permissible.”<sup>23</sup>

The lower standard for compelled disclosures of purely factual, uncontroversial information has its roots in decades-old precedent. But as Dean Chemerinsky and Professor Goodwin point out, *NIFLA* itself “offers no criteria for what is factual and uncontroversial except for [the Court’s] own perceptions.”<sup>24</sup> In this regard, *NIFLA* teaches only that abortion is “anything but an ‘uncontroversial’ topic.”<sup>25</sup> Neither the pre- nor post-*NIFLA* cases in lower courts shed much light on the proper method for determining whether information is uncontroversial, the proper scope of the inquiry, or whether entire topics are controversial, or just particular types or forms of information about such topics. The same is true of health and safety warnings, a species of disclosure that *NIFLA* places into its own analytical category for the first time. Disclosure laws will rise or fall depending on how courts solve the mystery of how to apply these lessons going forward.

This Article, like *NIFLA*, does not provide clean or fool-proof methods for determining whether a disclosure should qualify for *Zauderer* review or be subject

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<sup>20</sup> *Id.* at 112–18.

<sup>21</sup> *Id.* at 117.

<sup>22</sup> Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018).

<sup>23</sup> *Id.* at 2376.

<sup>24</sup> Chemerinsky & Goodwin, *supra* note 10, at 111.

<sup>25</sup> 138 S. Ct. at 2372.

to strict scrutiny. It does, however, identify two possible outcomes that should be avoided. First, courts should avoid concluding that information is controversial merely because someone complained about, or sued over, the requirement to disclose it. This approach allows challengers of a disclosure to bootstrap themselves out of the *Zauderer* exception and into strict scrutiny by creating their own controversy. Second, courts should avoid the kind of “constitutional gerrymandering” described by Dean Chemerinsky and Professor Goodwin. Under this approach, courts effectively place certain topics wholly out-of-bounds for disclosure laws by declaring them categorically controversial. Arguably, the Supreme Court has already made an unfortunate start on this approach in *NIFLA* by declaring abortion controversial. Lower courts should decline to extend the topic-by-topic approach to other areas.

This Article proceeds in three parts. Part I examines the background of First Amendment law, *Zauderer* and its pre-*NIFLA* progeny, and *NIFLA* itself. Part II mines pre- and post-*NIFLA* Courts of Appeals decisions for clues as to how courts should understand and apply the *Zauderer* exception test going forward.<sup>26</sup> Part III offers concluding thoughts.

## I. BACKGROUND AND HISTORY

The First Amendment, applicable to the states through the Fourteenth Amendment, protects “freedom of speech” from abridgment by the government.<sup>27</sup> However, not all forms of speech receive the same level of protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court concluded that commercial speech is not “so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection” under the First Amendment.<sup>28</sup> The Court found that consumers, and society in general, have a strong First Amendment interest in the “free flow of commercial information” in the form of advertisements and that some protection is merited.<sup>29</sup> This extension of First Amendment protection meant that the Court would soon have to confront the

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<sup>26</sup> This Article uses the phrase “*Zauderer* exception test” to refer to the analysis for whether a disclosure should be given rational basis-like review under that case, rather than intermediate or strict scrutiny. This test must be distinguished from the substantive *Zauderer* test, which this Article does not discuss in-depth.

<sup>27</sup> U.S. CONST. amend I.; see *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that States are required to protect freedom of speech).

<sup>28</sup> 425 U.S. 748, 762 (1976) (internal citations and quotation marks omitted).

<sup>29</sup> *Id.* at 764.

intersection of commercial speech and constitutional restrictions on the government's ability to compel speech, a doctrine which had evolved in a very different environment and stood on a distinct theoretical bottom.

### A. *Compelled Speech Generally*

The Supreme Court has long held that, under the First Amendment, “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>30</sup> In *West Virginia State Board of Education v. Barnette*—the case where those words were first written—the Court struck down a statute mandating that students salute the American flag or face expulsion.<sup>31</sup> In a subsequent case, *Miami Herald Publication Corp. v. Tornillo*, the Court invalidated a Florida statute granting political candidates a “right of reply” in newspapers that published criticism of their character or record.<sup>32</sup> The Court opined that “[g]overnment-enforced right of access inescapably ‘dampens the vigor and limits the variety of public debate’” by discouraging editors from engaging in coverage that might trigger the right of reply.<sup>33</sup> The First Amendment forbids the government to “compel . . . editors or publishers to publish that which reason tells them should not be published” in the same way it restricts the government’s ability to prevent the publication of specified matter.<sup>34</sup>

In *Wooley v. Maynard*, the Court invalidated a criminal statute that punished those who knowingly obscured the New Hampshire state motto, “Live Free or Die,” on their vehicle license plates.<sup>35</sup> The Court “beg[a]n with the proposition 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.”<sup>36</sup> Consequently, New Hampshire could not force the Maynards to “use their private property as a ‘mobile billboard’ for the State’s ideological message or suffer a penalty.”<sup>37</sup>

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<sup>30</sup> 319 U.S. 624, 642 (1943).

<sup>31</sup> *Id.*

<sup>32</sup> 418 U.S. 241, 258 (1974).

<sup>33</sup> *Id.* at 257 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964)).

<sup>34</sup> *Id.* at 256.

<sup>35</sup> 430 U.S. 705, 707, 713 (1977).

<sup>36</sup> *Id.* at 714.

<sup>37</sup> *Id.* at 715.

The Court's holdings in this area rely on a "constitutional symmetry" between government commands that forbid speech and those that compel it.<sup>38</sup> However, "this symmetry does not exist within the domain of commercial speech," because the constitutional value of that speech derives from the free flow of information.<sup>39</sup> A compelled commercial disclosure may well enhance the flow of information, for example, by making consumers aware of facts about a product that the manufacturer would otherwise choose not to relay. By contrast, a command to speak in the context of public discourse "override[s] [the speaker's] autonomous choice to remain silent," which undermines the constitutional purpose of protecting "the right of all persons to participate in the formation of 'public opinion'" in the manner they choose.<sup>40</sup> For this reason, Professor Robert Post describes commands that restrict and compel commercial speech as "constitutionally asymmetrical."<sup>41</sup> The theoretical distinction between constitutional symmetry and asymmetry is key to understanding the Court's confrontation with the tension between the law's recognition of a right not to speak and its historical leniency toward disclosure laws.

### B. *Central Hudson and Zauderer*

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court refined its earlier pronouncements about protection of commercial speech into a legal test.<sup>42</sup> Commercial speech, "that is, expression related solely to the economic interests of the speaker and its audience," is accorded "a lesser protection than . . . other constitutionally guaranteed expression."<sup>43</sup> Under *Central Hudson*, restrictions on commercial speech that are "neither misleading nor related to unlawful activity," receive intermediate scrutiny.<sup>44</sup> This standard requires that restrictions on commercial speech be "narrowly drawn" to "directly advance" a "substantial interest" of the government.<sup>45</sup>

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<sup>38</sup> Post, *supra* note 2, at 877.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 873, 877.

<sup>41</sup> *Id.* at 877.

<sup>42</sup> 447 U.S. 557, 561–63 (1980).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 564.

<sup>45</sup> *Id.* at 564–65. The line between intermediate scrutiny under *Central Hudson* and strict scrutiny may be thinner in practice than in theory. *See, e.g.,* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996)



Five years after *Central Hudson*, the Supreme Court approached a slightly different question about commercial speech: what if the government sought to *compel* rather than *restrict* commercial speech about information related to a product or service? That was the issue presented in *Zauderer*, where a lawyer challenged a state disciplinary board's requirement that he make certain disclosures about contingent-fee arrangements in his advertisements<sup>46</sup> Attorney Zauderer's advertisements promised that "if there is no recovery, no legal fees are owed by our clients."<sup>47</sup> The advertisement failed to notify potential clients that they might still be liable for court costs, as distinct from fees.<sup>48</sup> Ohio disciplinary authorities filed a complaint against Zauderer claiming, among other things, that the failure to disclose a client's potential liability for costs in the event of an unsuccessful suit was deceptive within the meaning of Ohio's disciplinary rules.<sup>49</sup> Zauderer unsuccessfully challenged the imposition of discipline in the Ohio Supreme Court, and then appealed to the United States Supreme Court on the ground that his First Amendment rights had been violated.<sup>50</sup>

The Supreme Court also rejected Zauderer's argument.<sup>51</sup> The Court began by noting that there are "material differences between disclosure requirements and outright prohibitions on speech . . . [the state] has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present."<sup>52</sup> The Court reasoned that because protection of commercial speech is "justified principally by the value to consumers of the information such speech provides . . . [Zauderer's] constitutionally protected interest in *not* providing particular factual information in his advertising is minimal."<sup>53</sup> Here, the Court relied on the constitutional asymmetry later described by Professor Post. In the Court's view, the disclosure required of

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(striking down a blanket ban on liquor advertisements after applying intermediate scrutiny with "special care").

<sup>46</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985).

<sup>47</sup> *Id.* at 652.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 633–35.

<sup>50</sup> *Id.* at 635–36.

<sup>51</sup> *Id.* at 652.

<sup>52</sup> *Id.* at 650.

<sup>53</sup> *Id.* at 651.

Zauderer took the form of “purely factual and uncontroversial information about the terms under which his services will be available.”<sup>54</sup> The Court went on to clarify that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech,” but that the disclosure at bar did not fit that description.<sup>55</sup> The Court concluded that the possibility of deception was “reasonable enough to support a requirement” of disclosure about the distinction between fees and costs.<sup>56</sup>

*Zauderer* provided the fundamental framework for evaluating First Amendment challenges to compelled commercial speech, a role *NIFLA* reaffirmed. Compelled disclosures qualify for lesser scrutiny under *Zauderer* if they mandate disclosure of “purely factual and uncontroversial information about the terms under which [the entity’s] services will be available.”<sup>57</sup> Under the *Zauderer* test, a disclosure must be “reasonably related to the state’s interest” and may not be “unjustified or unduly burdensome.”<sup>58</sup> Later cases, including *NIFLA*, would seek to clarify the contours of both the gateway to lesser scrutiny under *Zauderer* and the proper application of that scrutiny.

### C. *Zauderer’s Progeny*

Relatively few Supreme Court cases cite *Zauderer*, and even fewer discuss the case’s holding on compelled commercial speech. Nevertheless, the cases provide some hints about *Zauderer’s* proper application. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court overturned an order of California’s Public Utilities Commission that required the company to allow third parties to advertise in a newsletter included in customer’s billing statement envelopes.<sup>59</sup> The third parties concerned frequently intervened in ratemaking proceedings in order to advocate on behalf of ratepayers, often against the interests of the company.<sup>60</sup> The Court seemed particularly bothered by the political nature of

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 653.

<sup>57</sup> *Id.* at 651.

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

<sup>59</sup> 475 U.S. 1, 5–6 (1986).

<sup>60</sup> *Id.* at 12–13.

the messages and the “one-sidedness” of the views represented.<sup>61</sup> It pointed out that the order “forces [a favored] speaker’s opponent . . . to assist in disseminating the speaker’s message.”<sup>62</sup> The Court distinguished the requirement from a *Zauderer* disclosure in a footnote, explaining that “[n]othing in *Zauderer* suggests, however, that the State is . . . free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation’s views.”<sup>63</sup> While *Pacific Gas* was not itself a disclosure case, it makes clear that there are outside limits on what messages commercial actors may be compelled to speak.

In *Ibanez v. Florida Department of Business & Professional Regulation*, the Court invalidated discipline imposed on an attorney for the content of her advertisements.<sup>64</sup> The attorney’s advertisements referred to her credentials as a Certified Public Accountant and Certified Financial Planner without including a required disclosure.<sup>65</sup> However, the case turned on the regulation’s restriction on the use of certain terms and the “failure of the [state] to point to any harm that is potentially real, not purely hypothetical,” rather than the requirement of disclosure.<sup>66</sup> The Court “express[ed] no opinion whether, in other situations or on a different record, the [state’s] insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion.”<sup>67</sup> It also hinted that the existing disclaimer might be unduly burdensome because the detail required “effectively rule[d] out” including it on “a business card or letterhead, or in a yellow pages listing.”<sup>68</sup>

*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* restated the *Zauderer* exception standard and attempted to clarify its scope.<sup>69</sup> This case pointed to *Zauderer* for the proposition that “the State may at times ‘prescribe what

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<sup>61</sup> *Id.* at 13–14.

<sup>62</sup> *Id.* at 15.

<sup>63</sup> *Id.* at 15 n.12.

<sup>64</sup> 512 U.S. 136, 146 (1994).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 146.

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

<sup>68</sup> *Id.* at 146–47.

<sup>69</sup> 515 U.S. 557 (1995).

shall be orthodox in commercial advertising’ by requiring the dissemination of ‘purely factual and uncontroversial information,’” but that “outside that context it may not compel the affirmance of a belief with which the speaker disagrees.”<sup>70</sup> The *Zauderer* quotation was mainly illustrative and ultimately played little role in the disposition of the case.

Prior to *NIFLA*, the Supreme Court’s most extensive treatment of *Zauderer* was *Milavetz, Gallop & Milavetz, P.A. v. United States*.<sup>71</sup> That case involved a law firm’s as-applied First Amendment challenge to provisions of the Bankruptcy Code that treated attorneys as “debt relief agencies” in some circumstances and required them to make certain disclosures to consumers in that capacity.<sup>72</sup> The Court first rejected *Milavetz*’s argument that *Central Hudson*, and not *Zauderer*, supplied the proper standard for evaluating these disclosures.<sup>73</sup> The Court then found that the Bankruptcy Code disclosures shared the “essential features of the rule at issue in *Zauderer*” because they were “intended to combat the problem of inherently misleading commercial advertisements,” and “entail[ed] only an accurate statement identifying the advertiser’s legal status and the character of the assistance provided.”<sup>74</sup> Without reciting or discussing the phrase “purely factual and uncontroversial,” the Court upheld the disclosures as “reasonably related to the [Government’s] interest in preventing deception of consumers.”<sup>75</sup>

After *Milavetz*, it seemed possible that the Court had reduced or eliminated the uncontroversial element as part of the *Zauderer* exception test.<sup>76</sup> Alternatively, it opened the possibility that some courts might begin to treat “purely factual and uncontroversial” as a single phrase contrasting fact with subjective, opinion-based

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<sup>70</sup> *Id.* at 573.

<sup>71</sup> 559 U.S. 229 (2010).

<sup>72</sup> *Id.* at 235.

<sup>73</sup> *Id.* at 249.

<sup>74</sup> *Id.* at 250.

<sup>75</sup> *Id.* at 253 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

<sup>76</sup> *See, e.g.*, *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (“In the 2010 *Milavetz* case, the Supreme Court clearly showed that a disclosure need not be *purely factual and noncontroversial* to apply the rational-basis rule because the phrase never appears in that case. The Court instead uses the *language required factual information and only an accurate statement* when describing the characteristics of a disclosure that is scrutinized for a rational basis.”).

information, rather than two discrete parts of a legal test. *NIFLA* would make clear that both of these approaches were off the mark.

#### D. NIFLA

*NIFLA* dealt with several challenges to California’s Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act).<sup>77</sup> The Act required Crisis Pregnancy Centers<sup>78</sup> to provide certain notices, the content of which differed depending on whether they were licensed by the state or not.<sup>79</sup> Licensed centers were required to post a notice that California provides free or low-cost services, including abortions, and provide a number to call to learn more.<sup>80</sup> Unlicensed centers were required to notify women that they were not licensed by California to provide medical services.<sup>81</sup> The Supreme Court referred to these communications as the “licensed notice” and “unlicensed notice,” and this Article follows that approach.<sup>82</sup> A group of unlicensed and licensed centers sought a preliminary injunction on First Amendment grounds, which the Ninth Circuit denied.<sup>83</sup> The Ninth Circuit concluded that the centers could not show a likelihood of success on the merits because the licensed notice survives the lower level of scrutiny applicable to “professional speech,” while the unlicensed notice satisfied any level of scrutiny.<sup>84</sup>

In a 5–4 decision split along ideological lines, the Supreme Court reversed the Ninth Circuit and held that the centers were likely to succeed on the merits of their First Amendment claims.<sup>85</sup> Addressing the licensed notice first, the Court, in an opinion by Justice Thomas, rejected the Ninth Circuit’s holding that professional speech merits a lower level of scrutiny than other forms of speech.<sup>86</sup> It held that

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<sup>77</sup> See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368 (2018).

<sup>78</sup> “Crisis Pregnancy Center” is a colloquial term the court borrowed from a legislative report. The Act itself contained more granular definitions for both licensed and unlicensed facilities. See *id.* at 2368–70.

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

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

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

<sup>82</sup> *Id.* at 2368.

<sup>83</sup> *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 845 (9th Cir. 2016).

<sup>84</sup> *Id.* at 843–44.

<sup>85</sup> *Nat’l Inst. of Family Life & Advocates*, 138 S. Ct. at 2370.

<sup>86</sup> *Id.* at 2371–72.

professional speech is not a constitutionally separate category of speech subject to lower protections, and content-based restrictions of such speech are subject to strict scrutiny “under First Amendment principles,” unless an exception like *Zauderer* applies or some other “persuasive reason” for lowering the standard of review is identified.<sup>87</sup> The Court further concluded that *Zauderer* did not apply because the licensed notice “in no way relates to the services that licensed clinics provide . . . [and] requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an ‘uncontroversial’ topic.”<sup>88</sup>

The Court went on to hold that the licensed notice “cannot survive even intermediate scrutiny” because it was “not sufficiently drawn to achieve” what it assumed was a substantial state interest in providing low-income women with information about state-sponsored services.<sup>89</sup> The Court concluded that the licensed notice was “wildly underinclusive”<sup>90</sup> because it excluded many clinics without reason and that California could have achieved its goal in a less burdensome way, for example by developing a public information campaign.<sup>91</sup>

The Court then turned to the unlicensed notice, where it again held that the centers were likely to succeed on the merits of their First Amendment challenge.<sup>92</sup> Here, the Court avoided the question of whether *Zauderer* even applied to the unlicensed notice by holding that California could not carry its burden to show that the notice was “neither unjustified nor unduly burdensome.”<sup>93</sup> The Court concluded that the unlicensed notice was unjustified because California had not advanced reasoning for the notice that was “more than ‘purely hypothetical.’”<sup>94</sup> It also found that even a non-hypothetical justification would not save the notice because it “unduly burdens protected speech” by “impos[ing] a government-scripted, speaker-

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<sup>87</sup> *Id.* at 2372, 2375.

<sup>88</sup> *Id.* at 2375.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2375 (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011)).

<sup>91</sup> *Id.* at 2376.

<sup>92</sup> *Id.* at 2377.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (quoting *Ibañez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994)). As the dissent observes, this conclusion is hard to square with the legislative record, which shows that legislators “heard that information-related delays in qualified healthcare negatively affect women seeking to terminate their pregnancies as well as women carrying their pregnancies to term, with delays in qualified prenatal care causing life-long health problems for infants.” *Id.* at 2390 (Breyer, J., dissenting).

based disclosure requirement that is wholly disconnected from California's informational interest."<sup>95</sup> This section of the opinion is not a model of clarity, and it is not altogether apparent how these features interact with the *Zauderer* test the Court purports to be applying.

The Court then reasoned that the unlicensed notice was burdensome because it required so much information, and in so many different languages, that it would "drown[] out the facility's own message."<sup>96</sup> The Court summed up its analysis by stating:

the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. California has offered no justification that the notice plausibly furthers. It targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech . . . . We express no view on the legality of a similar disclosure requirement that is better supported or less burdensome.<sup>97</sup>

Accordingly, the Court only assumed, but did not decide, that *Zauderer* is the proper standard for such a notice.<sup>98</sup> The Court asserted that, whatever its holding, "we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."<sup>99</sup> Nonetheless, the Court did not elaborate on what types of warnings have been "long considered permissible" or under what framework they were so held.<sup>100</sup> It also declined to clarify whether those health and safety warnings should be analyzed as *Zauderer* disclosures or under another standard.<sup>101</sup>

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<sup>95</sup> *Id.* at 2377.

<sup>96</sup> *Id.* at 2378.

<sup>97</sup> *Id.*

<sup>98</sup> Justice Kennedy wrote separately to "underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern." *Id.* at 2378 (Kennedy, J., concurring). In his view, "the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs." *Id.* at 2379 (Kennedy, J., concurring). The concurrence does not discuss *Zauderer*. *Id.* (Kennedy, J., concurring).

<sup>99</sup> *Id.* at 2366.

<sup>100</sup> *See id.* at 2376.

<sup>101</sup> *See id.*

In a lengthy dissent, Justice Breyer argued that “the majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.”<sup>102</sup> Justice Breyer took aim directly at the Court’s statement about health and safety warnings, stating that its “generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification.”<sup>103</sup> In other words, Justice Breyer warned of the complications this Article seeks to clarify.

## II. WHITHER *ZAUDERER*?

*NIFLA* raises several questions about the meaning and future application of *Zauderer*. First, how should courts interpret the “purely factual and uncontroversial” test, now that the Supreme Court has held that abortion is a controversial topic? Second, how strictly does *NIFLA* direct courts to apply the *Zauderer* requirement that information to be disclosed be related to the terms of a good or service being sold? Third, what are courts to make of *NIFLA*’s assertion that it does not affect “health and safety warnings long considered permissible”?<sup>104</sup>

### A. *Purely Factual and Uncontroversial*

In *NIFLA*, the Court nudged the “purely factual and uncontroversial” inquiry in a categorical, topic-by-topic direction. Speaking to the licensed notice, the Court stated that *Zauderer* did not apply in part because the FACT Act “requires these clinics to disclose information about *state*-sponsored services—including abortion,” which is “anything but an ‘uncontroversial’ topic.”<sup>105</sup> Unfortunately, the Court did not explain what factors led to this conclusion and instead took the controversiality of abortion as self-evident.<sup>106</sup> Thus, the Court’s reasoning strongly suggests that laws requiring disclosure of information related to a “controversial topic” are ineligible for the *Zauderer* exception and therefore subject to strict scrutiny. At the same time, it provides little to no guidance on how lower courts should decide whether a topic is controversial.

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<sup>102</sup> *Id.* at 2380 (Breyer, J., dissenting).

<sup>103</sup> *Id.* at 2381 (Breyer, J., dissenting).

<sup>104</sup> *Id.* at 2376.

<sup>105</sup> *Id.* at 2372.

<sup>106</sup> *Id.*



### 1. Pre-NIFLA Analysis of “Purely Factual and Uncontroversial”

Before *NIFLA*, courts struggled with whether controversiality was even a legal test and how to apply it. Some courts declined to treat the “purely factual and uncontroversial” language as discrete requirements of the *Zauderer* exception test. In *Discount Tobacco City & Lottery, Inc. v. United States*, the Sixth Circuit argued in dicta that *Zauderer* used the phrase to “describe[] the disclosure the Court faced in that specific instance,” not to establish a prospective legal test.<sup>107</sup> *Discount Tobacco* also notes, correctly, that the Supreme Court in *Milavetz* upheld disclosures imposed by the Bankruptcy Code under *Zauderer* without once using the word “controversial.”<sup>108</sup>

In *American Meat Institute v. United States Department of Agriculture (AMI)*, the en banc D.C. Circuit held that country-of-origin labeling for agricultural products was not “controversial in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy.”<sup>109</sup> The court left for another day the question of whether “some required factual disclosures could be so one-sided or incomplete that they would not qualify as ‘factual and uncontroversial.’”<sup>110</sup> Concurring in the judgment, then-Circuit Judge Kavanaugh recognized that “it is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial.”<sup>111</sup>

In *National Ass’n of Manufacturers v. SEC (NAM)*, a panel of the D.C. Circuit sympathized with the Sixth Circuit’s reasoning in *Discount Tobacco* but found itself bound to attempt to follow the en banc decision in *AMI*, which suggested that the phrase did some substantive work.<sup>112</sup> The panel observed that “‘uncontroversial,’ as a legal test, must mean something different than ‘purely factual.’”<sup>113</sup> It conjectured that “[p]erhaps the distinction is between fact and opinion,” but noted that “that line

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<sup>107</sup> 674 F.3d 509, 559 n.8 (6th Cir. 2012).

<sup>108</sup> *Id.*

<sup>109</sup> 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 34 (Kavanaugh, J., concurring).

<sup>112</sup> *See* 800 F.3d 518, 530 (D.C. Cir. 2015).

<sup>113</sup> *Id.* at 528.

is often blurred, and it is far from clear that all opinions are controversial.”<sup>114</sup> In dissent, Judge Srinivasan argued that *Zauderer* controversiality focuses on the accuracy of factual information and cannot mean merely that information “touches on a ‘controversial’ topic.”<sup>115</sup> He claimed that “‘controversial’ in [the *Zauderer*] context means exactly that: a ‘dispute about . . . factual accuracy.’”<sup>116</sup> Though the *NAM* panel provided an interesting discussion about what controversiality might or might not mean, it largely gave up on solving this “puzzle,” narrowly holding that the disclosure at issue failed the standard, and denied the petition for rehearing under *AMI*.<sup>117</sup> Prior to *NIFLA*, no appellate decision had made clear “whether ‘controversial’ has any meaning independent of ‘factual’ under *Zauderer*,” or what that meaning would be.<sup>118</sup>

Other courts found information controversial because it looked more like an opinion than a fact. For example, in *Entertainment Software Ass’n v. Blagojevich*, the Seventh Circuit declared that a mandated age restriction sticker on video games “ultimately communicates a subjective and highly controversial message” that the game’s content is sexually explicit.<sup>119</sup> The decision is not clear about which *Zauderer* requirement the problematic “opinion-based” assessment of whether a game is sexually explicit violates, but hints that it is both.<sup>120</sup>

The Ninth Circuit invalidated a similar law in *Video Dealers Ass’n v. Schwarzenegger*, because “it does not require the disclosure of purely factual information; but compels the carrying of the State’s controversial opinion.”<sup>121</sup> However, the court’s actual analysis concluded only that the label “does not convey factual information” because the law did not “clearly and legally characterize a video

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 538 (Srinivasan, J., dissenting).

<sup>116</sup> *Id.* (Srinivasan, J., dissenting) (quoting *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc)).

<sup>117</sup> *Id.* at 530 (“By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.”).

<sup>118</sup> Nigel Barrella, *First Amendment Limits on Compulsory Labeling*, 71 *FOOD & DRUG L.J.* 519, 534 (2016).

<sup>119</sup> 469 F.3d 641, 652 (7th Cir. 2006).

<sup>120</sup> *Id.*

<sup>121</sup> 556 F.3d 950, 953 (9th Cir. 2009).

game as ‘violent’ and not subject to First Amendment protections.”<sup>122</sup> Because *NIFLA* does not support the idea that the controversiality inquiry focuses on whether a message is objectively or subjectively true, much of the prior caselaw that analyzes potential interpretations of controversiality has no currency post-*NIFLA*.

## 2. Post-*NIFLA* Applications of “Purely Factual and Uncontroversial”

In sum, *NIFLA* strongly suggests that “uncontroversial” does, in fact, have some independent meaning, but provides little guidance as to what that meaning is. That leaves the task of teasing out the meaning of this element and applying it to the lower courts. The Ninth Circuit handed down the first post-*NIFLA* holding on the controversy element in *CTIA—The Wireless Ass’n v. City of Berkeley (CTIA)*.<sup>123</sup> The case involved a local ordinance requiring cell phone retailers to provide customers with information about radio-frequency exposure limits for cell phone devices developed by the federal government.<sup>124</sup> The Ninth Circuit concluded that the warning was “uncontroversial within the meaning of *NIFLA*,” because “[i]t does not force cell phone retailers to take sides in a heated political controversy.”<sup>125</sup> This was the first attempt by a circuit court to flesh out and apply the uncontroversial element in a post-*NIFLA* world.

The Ninth Circuit’s approach builds on the topic-based approach hinted at in *NIFLA*, and it carries many of the same disadvantages. Instead of declaring whole topics off-limits as controversial *per se*, courts must first determine whether there is a “heated political controversy” in which the law forces entities to “take sides.”<sup>126</sup> The constitutional gerrymandering problem is still present because once a court recognizes a “heated political controversy,” it will likely be extremely difficult to require disclosures on that topic. For example, what aspect of abortion does not constitute a “heated political controversy”? Moreover, the standard provides little guidance on whether, and how, courts should probe the factual basis for each “side’s” beliefs where there is genuine disagreement between experts or, more troublingly,

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<sup>122</sup> *Id.* at 966–67.

<sup>123</sup> 928 F.3d 832 (9th Cir.), *cert. denied*, 140 S. Ct. 658 (2019).

<sup>124</sup> *Id.* at 838.

<sup>125</sup> *Id.* at 848.

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

where a party fervently and genuinely holds a belief that is contrary to the overwhelming weight of the evidence.

As a result, many of the questions raised by *NIFLA* remain open under the Ninth Circuit's approach. Could a government require businesses to make disclosures about the importance of social distancing to prevent COVID-19? Some people genuinely believe that these measures are not worth the economic cost, or that the virus itself is a hoax invented or exaggerated by the media.<sup>127</sup> How could a court conclude that such a disclosure does not force citizens to "take sides" in a "heated political controversy" when the *New York Times* has declared that "[f]lattening the curve is now one of the most contentious issues in politics"?<sup>128</sup> How would disclosures about mandatory vaccines fare?<sup>129</sup> *NIFLA* provides little guidance on how courts should respond when "health and safety warnings long considered permissible" become *controversial* in their own right.<sup>130</sup> The scope of issues that might be gerrymandered out of *Zauderer* review is distressingly large.

The Ninth Circuit's approach also leaves open the danger of bootstrapping or astroturfing.<sup>131</sup> A sufficiently motivated party with enough resources could easily manufacture "a heated political controversy," especially if the government entity

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<sup>127</sup> See, e.g., Greg Sargent, Opinion, *Fox News Watchers Still Think the Media Hyped Coronavirus*, WASH. POST (Apr. 1, 2020, 2:26 PM), <https://www.washingtonpost.com/opinions/2020/04/01/fox-news-watchers-still-think-media-hyped-coronavirus/>; Jonathan Tilove, *Chanting 'Let Us Work!', 'Fire Fauci!', Protestors at Capitol Decry Virus Restrictions*, AUSTIN AMERICAN-STATESMAN (Apr. 18, 2020, 11:20 AM), <https://www.statesman.com/news/20200418/chanting-rsquolet-us-works-rsquo-fire-fauci-rsquo-protesters-at-capitol-decry-virus-restrictions>; Allan Smith, *'Lock Her Up!': Anti-Whitmer Coronavirus Lockdown Protestors Swarm Michigan Capitol*, NBC (Apr. 15, 2020, 1:14 PM), <https://www.nbcnews.com/politics/politics-news/lock-her-anti-whitmer-coronavirus-lockdown-protestors-swarm-michigan-capitol-n1184426>.

<sup>128</sup> Jeremy W. Peters, *How Abortion, Guns and Church Closings Made Coronavirus a Culture War*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/us/politics/coronavirus-protests-democrats-republicans.html>.

<sup>129</sup> See, e.g., Ala Errebhi, *Parents Take a Stand Against a Proposed Flu and HPV Vaccine Mandate*, WKBW BUFFALO (Dec. 5, 2019, 5:36 PM), <https://www.wkbw.com/news/local-news/parents-take-a-stand-against-a-proposed-flu-and-hpv-vaccine-mandate>.

<sup>130</sup> Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376 (2018).

<sup>131</sup> Bootstrapping can be understood as "the process by which an actor can, by doing Y, give itself the power to do Z." Joseph Blocher, *What We Fret About When We Fret About Bootstrapping*, 75 L. & CONTEMP. PROBS. 145, 145 (2012). "Astroturfing . . . is the attempt by a political or business group to create a false impression of grassroots support for some position." Erik Sherman, *How to Stop Astroturfing by Special Interests*, DONALD W. REYNOLDS NAT. CTR. FOR BUS. JOURNALISM (Feb. 22, 2018), <https://businessjournalism.org/2018/02/special-interests-want-to-astroturf-you>.

imposing the disclosure is small and the economic interests impacted are large. After all, many of the appellate cases challenging disclosures were brought by national or statewide trade associations, even where the requirement applied only at a state or local level.<sup>132</sup> Like the Supreme Court, the Ninth Circuit has not provided clear signposts for identifying controversy. Should courts consider if legislative meetings adopting the disclosure were particularly well-attended, or opposing testimony particularly voluminous? Media coverage of opposing views? Opinion pieces published by advocates? All of these levers are easily manipulated by industries accustomed to influencing state and local governments. The Ninth Circuit's analysis is an admirable attempt at applying a nebulous standard, but it introduces its own potential problems.

*NIFLA* ensures that controversiality will be a much-litigated part of *Zauderer* but leaves courts and litigants with few clues to decipher its meaning in cases that do not involve abortion. As such, this Article suggests some possible meanings that courts should *not* adopt. First, courts should be wary of effectively declaring entire topics as out-of-bounds for disclosure requirements simply because they are controversial, especially when the test for reaching such a conclusion remains totally opaque.<sup>133</sup> The Court's decision to do so in *NIFLA* is unfortunate, since it opens the door for the type of "constitutional gerrymandering" that Dean Chemerinsky and Professor Goodwin warn against.<sup>134</sup> Indeed, it is hard to imagine *any* disclosure

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<sup>132</sup> See, e.g., *CTIA-The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 836 (9th Cir.) (discussing a challenge brought by the national association for the wireless communications industry against Berkeley disclosure statute); *Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 753 (9th Cir. 2019) (en banc) (discussing a challenge brought by the national association of beverage manufacturers against San Francisco disclosure statute); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (discussing a challenge brought by a statewide trade association of restaurateurs against New York City calorie disclosures); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005) (discussing a challenge brought by a national association of pharmacies against Maine disclosure statute); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (discussing a challenge brought by a national association of light bulb manufacturers against Vermont disclosure statute); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (discussing a challenge brought by a national association of dairy producers against Vermont disclosure law).

<sup>133</sup> There are also outstanding issues about the precise meaning of "purely factual," but those went largely undisturbed by *NIFLA* because the Supreme Court focused on other elements of *Zauderer*. For a discussion of the approaches to this element, see Barrella, *supra* note 118.

<sup>134</sup> See Chemerinsky & Goodwin, *supra* note 10.

related to abortion receiving anything less than strict scrutiny in a post-*NIFLA* world unless it can be understood as an informed-consent requirement.<sup>135</sup>

Second, courts should avoid finding a topic controversial merely because “some people may be highly agitated and . . . willing to go court over the matter.”<sup>136</sup> Such a “bootstrap” approach would mean that *Zauderer* does not apply in any case that actually makes it to court, effectively rendering it a dead letter. The warning may seem obvious, but it is worth voicing as courts attempt to navigate the post-*NIFLA* era.

Nevertheless, courts can still set a high bar for finding issues controversial under *NIFLA*. The Supreme Court seemed to take a “know it when I see it” approach to whether an issue is controversial.<sup>137</sup> In the teeth of such a standard, one approach might be to decline to recognize an issue as controversial until the Supreme Court has declared it so. While this undoubtedly risks reinforcing the topic-based approach if the Court decides to proceed issue-by-issue, it would also give the Court a vehicle to articulate a more comprehensive test while avoiding unworkable, topic-wide prohibitions on *Zauderer* review that could potentially differ by circuit. Alternatively, courts might read *NIFLA* narrowly and reason that messages about “state-sponsored services” are more disfavored than neutral, “purely factual” messages as they relate to controversial topics.<sup>138</sup>

### B. Relation to Goods or Services Offered

*NIFLA* clearly held that *Zauderer*’s statement that its standard applies only to “information about the terms under which . . . services will be available” is an operative legal test.<sup>139</sup> In concluding that *Zauderer* did not apply to the licensed notice, the Court observed that “[t]he notice in no way relates to the services that licensed clinics provide. Instead, [the notice] required these clinics to disclose information about state-sponsored services.”<sup>140</sup> The licensed notice was required to be posted by facilities that had the “primary purpose” of “providing family planning

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<sup>135</sup> See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

<sup>136</sup> *United States v. Philip Morris USA, Inc.*, 907 F. Supp. 2d 1, 17 (D.D.C. 2012) (quoting *Fund for Animals v. Frizzell*, 530 F.2d 982, 988 (D.C. Cir. 1975)).

<sup>137</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>138</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372.

<sup>139</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>140</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372.

or pregnancy-related services” and met at least two of six other requirements.<sup>141</sup> The disclosure notified the public about “free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women.”<sup>142</sup> The licensed notice addressed some of the same services offered by covered facilities—like family planning—and was thus arguably “related” to those services within the meaning of *Zauderer*. But the Court seemed troubled that the licensed notice directed the public to an entirely different service provider—the state—rather than informing it about the nature of the services offered by the covered facility.<sup>143</sup>

*NIFLA* may undermine disclosures that direct the public to the government’s services instead of describing information about the regulated entity’s services. As *NIFLA* itself demonstrates, this is true even if those services are related to, or even directly overlap with, what the regulated entity is offering the public. But the case leaves open the question of how “related” disclosed information must be to the services offered by an entity. Pre-*NIFLA* appellate court decisions already recognized this link. In *AMI*, the en banc court noted that “the disclosure mandated must relate to the good or service offered by the regulated party, a link that in *Zauderer* itself was inherent in the facts.”<sup>144</sup> The court declined, however, to “decide on the precise scope or character of that relationship.”<sup>145</sup>

### 1. Pre-*NIFLA* Analysis of Relatedness

Unfortunately, most of the pre-*NIFLA* cases in lower courts took the same approach as *AMI* and paid little attention to a relatedness requirement under *Zauderer*. Those cases that did discuss “relation” focused mainly on the inquiry of whether the government had established a reasonable relation between the disclosure and the government interest to be furthered, rather than whether the disclosure itself was sufficiently “related” to the services the regulated entity offered.<sup>146</sup>

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<sup>141</sup> *Id.* at 2369.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 2376.

<sup>144</sup> *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc).

<sup>145</sup> *Id.*

<sup>146</sup> *See, e.g., Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (concluding that “it [is] obvious that the [statute]’s disclosure requirements are ‘reasonably related’ to Maine’s interest in preventing deception of consumers and increasing public access to prescription drugs”); *Nat’l Elec Mfrs.*

Consequently, these cases are not likely to be of much help for courts confronting statutes that push the limit of relation between information to be disclosed and the goods or services offered by the regulated entity. After all, a disclosure requirement could easily be reasonably related to a permissible government interest while having nothing at all to do with the product or service offered by the regulated entity. For example, some states and localities have considered or enacted requirements that barbers and cosmetologists receive training on domestic violence prevention prior to licensure because they are thought to be particularly well-placed to reach men and women in need at a time when they are away from abusive partners.<sup>147</sup> Suppose a government were to mandate that barber shops and beauty salons post a sign educating the public on how to recognize signs of domestic violence in a relationship in order to help victims escape dangerous situations. The requirement would certainly be reasonably related to the government's interest in preventing domestic violence, but the information disclosed would have little to no connection with the services offered by these businesses.

## 2. Post-*NIFLA* Applications of Relatedness

Once again, the Ninth Circuit was the first court to confront this inquiry in a post-*NIFLA* world. Interestingly, the en banc court's decision in *American Beverage Ass'n v. City & County of San Francisco (ABA)* does not even mention a relatedness requirement in its formulation of the *Zauderer* exception test as applied in *NIFLA*.<sup>148</sup> In *CTIA*, by contrast, the panel swiftly disposed of an argument that the disclosure "has nothing to do with the terms upon which cell phones are offered [by retailers]."<sup>149</sup> In *ABA*, the court concluded that "*NIFLA* plainly contemplates applying *Zauderer* to 'purely factual and uncontroversial disclosures about commercial products,'" a category into which it felt Berkeley's ordinance clearly

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*Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d. Cir. 2001) (discussing whether "the labeling requirement is rationally related to the state's goal of reducing mercury contamination").

<sup>147</sup> See H.B. 17-1175, 71st Gen. Assemb. (Colo. 2017) (requiring domestic violence awareness training as a condition of state licensure for barbers and cosmetologists); Christine Hauser, *A New Front Against Domestic Abuse: The Hairstylist's Chair*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/us/hairdressers-domestic-abuse-sexual-assault-illinois.html> (discussing Illinois requirement that cosmetologists take domestic violence training every two years in order to renew their licenses).

<sup>148</sup> 916 F.3d 749, 756 (9th Cir. 2019) (en banc) ("The *Zauderer* test, as applied in *NIFLA*, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.").

<sup>149</sup> *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 848 (9th Cir. 2019).



fit.<sup>150</sup> The court reasoned that the Berkeley ordinance “requires cell phone retailers to disclose information to prospective cell phone purchases about what the [Federal Communications Commission] has concluded is appropriate use of the product they are about to buy.”<sup>151</sup> The court found further support from *NIFLA*’s assertion that it did not question health and safety warnings like the one at issue.<sup>152</sup> Reading *ABA* and *CTIA* together suggests that the Ninth Circuit does not view relatedness as a major component of *Zauderer* under *NIFLA*.

In light of the paucity of pre-*NIFLA* discussion of the issue, it is likely that *Zauderer*’s relatedness requirement will be litigated more extensively in future cases. For now, it seems safe to conclude that messages directing the public to goods or services offered by someone other than the regulated entity are at least vulnerable to challenge. Disclosures that seem more like health and safety warnings or that repeat government conclusions about “the appropriate use of the product they are about to buy,” are likely safe.<sup>153</sup> We do not yet know how tight a “fit” courts will require, and *NIFLA* provides little guidance in this respect.

### C. Health and Safety Warnings

*NIFLA*’s most enigmatic language is its declaration that “[c]ontrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible.”<sup>154</sup> The Court does not cite any cases as providing examples of such warnings, nor does it explain how lower courts should distinguish a permissible health or safety warning that is eligible for *Zauderer* review from a general disclosure that should be subject to strict scrutiny.<sup>155</sup> Consequently, it is not entirely clear that “health and safety warnings long considered permissible” must surmount the same bar as other disclosures to qualify for *Zauderer* review. While the Court did not explicitly say this, it seems likely that the decision gestured toward things like nutrition labels and health warnings on potentially dangerous products like cigarettes. Courts have upheld both of these types of disclosures under

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<sup>150</sup> *Id.* (quoting *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018)).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2376.

<sup>155</sup> *Id.*

*Zauderer* before.<sup>156</sup> But it is hard to say whether—or how much further—courts should extend the category of unquestioned health and safety warnings beyond these presumably easy cases.

### 1. *NIFLA*'s Analysis of Health and Safety Warnings

Pre-*NIFLA* caselaw provides little evidence that courts understood “health and safety warning[s]” to be a discrete category of disclosure under *Zauderer*.<sup>157</sup> Rather, they were simply one type of warning likely to qualify for *Zauderer* treatment. Perhaps the best place to start is to examine the examples given by the dissent that the Court explicitly stated were not threatened by its opinion.<sup>158</sup> Justice Breyer’s dissent references (1) hospitals required to tell parents about seat belts,<sup>159</sup> (2) hospitals required to ask incoming parents if they would like to provide their family information about patients’ rights and responsibilities,<sup>160</sup> (3) hospitals required to tell parents of newborns about pertussis disease and vaccine,<sup>161</sup> (4) buildings required to post signs near elevators showing stair locations,<sup>162</sup> and (5) property owners required to inform tenants about garbage disposal procedures.<sup>163</sup>

The most interesting feature of this list is that one of the statutes, the California Vehicle Code, requires a “health and safety warning” that has very little to do with the services offered by the regulated entity. The law requires “[a] public or private hospital, clinic, or birthing center” to provide “information on the current law requiring child passenger restraint systems, safety belts, and the transportation of children in rear seats” to parents upon the discharge of a child under eight years of age.<sup>164</sup> Obviously, healthcare facilities do not sell or service cars, and their services

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<sup>156</sup> Disc. *Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 561 (6th Cir. 2012) (upholding cigarette health disclosure including textual and graphic warnings after applying *Zauderer*); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d, 114, 137 (2d Cir. 2009) (upholding local law requiring restaurants to disclose calorie content information on menus after applying *Zauderer* scrutiny).

<sup>157</sup> *NIFLA*, 138 S. Ct. at 2376.

<sup>158</sup> *Id.* at 2380–81 (Breyer, J., dissenting).

<sup>159</sup> CAL. VEH. CODE. § 27363.5 (West 2014).

<sup>160</sup> CAL. HEALTH & SAFETY CODE § 123222.2 (West 2018).

<sup>161</sup> N.C. GEN. STAT. ANN. § 131E-79.2 (2017).

<sup>162</sup> N.Y.C. R.R. tit. 1, § 27-01 (2018).

<sup>163</sup> S.F. CAL. DEP’T OF HEALTH, DIRECTOR’S RULES & REGS., GARBAGE AND REFUSE (July 8, 2010).

<sup>164</sup> CAL. VEH. CODE. § 27363.5(a) (West 2014).

are related to vehicle safety only in the sense that they may treat injuries sustained in collisions.

If we take the Court at its word, then the California vehicle safety notice is a health and safety warning that *NIFLA* does not question. One might be tempted to conclude from this that the relatedness requirement is either relaxed or eliminated if the content of the notice relates to “health and safety.” Maybe the Court meant to carve out health and safety warnings as a category of disclosures specially marked for *Zauderer* review, even if the information they carry is further attenuated from the regulated entity’s activities than would otherwise be permitted for disclosures related to other topics. However, this explanation would be hard to square with the outcome of *NIFLA* itself. Since the Court found that *Zauderer* did not apply to the licensed notice, it necessarily concluded that the licensed notice was not a health and safety warning, despite providing information about “free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women.”<sup>165</sup> Perhaps, then, the dividing line is that the licensed notice pointed the public to outside services, rather than educating it about health and safety more generally. Maybe a more general disclosure about the medical safety of abortion procedures would have fared better, though this too might have had trouble surmounting the non-controversiality requirement.

## 2. Post-*NIFLA* Analysis of Health and Safety Warnings

The Ninth Circuit discussed health and safety warnings post-*NIFLA* in *ABA* and *CTIA*. In *ABA*, the court observed that *NIFLA* “preserved the exception to heightened scrutiny for health and safety warnings.”<sup>166</sup> *CTIA* treated the health and safety language as bearing on controversiality after *NIFLA*.<sup>167</sup> The *CTIA* court quoted the Supreme Court’s language after concluding that the “required disclosure is uncontroversial within the meaning of *NIFLA* . . . [because it is] no more and no less than a safety warning.”<sup>168</sup> As noted above, the court also rejected the argument that the notice was not sufficiently related to the offering of cell phones at retail to justify *Zauderer* scrutiny. This reasoning suggests that health and safety warnings are not freed from the non-controversiality and relatedness requirements, further cutting

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<sup>165</sup> Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2369 (2018).

<sup>166</sup> Am. Beverage Ass’n v. City & Cty. of S.F., 916 F.3d 749, 756 (9th Cir. 2019) (en banc).

<sup>167</sup> *CTIA—The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019).

<sup>168</sup> *Id.* at 848.

against the notion that the Supreme Court established a categorical exemption for such disclosures.

Lastly, *ABA* and *CTIA* both suggest that health and safety warnings must still satisfy the relatedness and non-controversiality requirements to receive *Zauderer* review. However, the cases leave open the question of whether health and safety warnings should receive special favor when analyzing these requirements. Without some type of relaxed review, it is hard to see how California's seatbelt warnings could be analyzed under *Zauderer* after *NIFLA*, given the lack of relation between a healthcare facility's services and vehicle safety.

### 3. The Future of Health and Safety Warnings

Returning to a timely example, should a law requiring grocery stores to post a notice informing the public about the importance of social distancing to prevent the spread of COVID-19 receive *Zauderer* scrutiny? This notice would undoubtedly qualify as a health and safety warning, but it is no more related to the services offered by grocery stores than it is to those offered by any other type of retail business. At most, the government could argue that it is related to the way the store does its business because social contact occurs on its premises. And as discussed above in Section II.A., there is little clarity about what courts should do when confronting something that looks like a health and safety warning but relates to a controversial topic or active political issue. Lower courts will need to decide how literally to take the Court's word that it is not disturbing such warnings, especially when they appear not to fit neatly within the post-*NIFLA* analytical framework under *Zauderer*.

## III. CONCLUSION

*NIFLA* raises more questions than it answers about First Amendment law on compelled commercial speech. In some areas, pre-*NIFLA* caselaw may provide guidance. In others, courts will be forced to start from the beginning. Extensive litigation is likely before we achieve clarity. The central problem of *NIFLA*—and commercial speech protection in general—is striking the appropriate constitutional balance between the consumer's interest in the free flow of information and individuals' rights to be free from government restriction or compulsion in the exercise of free speech in connection with their businesses. Inevitably, this balance is hardest to strike when commercial speech intersects with deeply held moral, religious, or political beliefs.

It is also important to remain clear-eyed about what *NIFLA* did and did not do. It seems unlikely that Dean Chemerinsky and Professor Goodwin's prediction that *all* disclosure laws are doomed to face strict scrutiny will come to pass. Many such laws will probably still be reviewed under *Zauderer*. True, the path to qualifying for that review will not be precisely the same as it was before *NIFLA*, and it remains to be seen how drastic *NIFLA*'s impact will be. The way courts answer the questions

discussed above will determine exactly how deep *NIFLA*'s reach goes. If courts decide that entire topics can be walled off as “controversial,” then we may indeed see waves of decisions applying strict scrutiny to—and likely invalidating—disclosure laws in those areas. Yet even this unfortunate outcome would likely proceed topic by topic through litigation, rather than following inexorably from *NIFLA* itself.

Of course, it is also possible that *NIFLA*'s impact could be limited outside the realm of the uniquely controversial topic of abortion. Justice Scalia once argued that “[t]here is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.”<sup>169</sup> *NIFLA* may represent the inverse of that phenomenon, with the Court tacitly applying a bespoke, tougher version of the First Amendment tests to compelled commercial speech seen as forcing speakers to support abortion. This interpretation would provide one explanation for how the Court could state that it was not questioning the legality of health and safety warnings while appearing to chip away at the doctrinal foundations on which they stand. Yoking generally applicable compelled commercial speech doctrines to hard cases like abortion is likely to produce these kinds of confusing results. It is far from clear that carving those cases out of the doctrine *sub silentio* will solve, rather than further complicate, that problem.

Lower courts still have significant room to interpret and apply *NIFLA*'s teachings in a manner consonant with First Amendment principles and history. As they seek the answers to the questions arising under *NIFLA*, courts should bear in mind that protection of commercial speech under the First Amendment is “justified principally by the value to consumers of the information such speech provides.”<sup>170</sup> The process of answering *NIFLA*'s questions should be guided by that foundational understanding of the constitutional principles at stake.

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<sup>169</sup> *McCullen v. Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring).

<sup>170</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 626 (1985).