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## A Disclosure-Focused Approach to Compelled Commercial Speech

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## NOTE

### A DISCLOSURE-FOCUSED APPROACH TO COMPELLED COMMERCIAL SPEECH

Andrew C. Budzinski\*

*In 2010, the Food and Drug Administration passed a rule revising compelled disclaimers on tobacco products pursuant to the Family Smoking Prevention and Tobacco Control Act. The rule required that tobacco warnings include something new: all tobacco products now had to bear one of nine graphic images to accompany the text. Tobacco companies filed suit contesting the constitutionality of the rule, arguing that the government violated their right to free commercial speech by compelling disclosure of the graphic content. Yet First Amendment jurisprudence lacks a doctrinally consistent standard for reviewing such compelled disclosures. Courts' analyses typically depend on whether the regulation compels or restricts speech, how far that regulation extends, and why the government chose to regulate in the first place. This Note seeks to articulate a coherent standard—a disclosure-focused approach—for reviewing compelled commercial speech under the First Amendment. Under this disclosure-focused approach, courts would adopt a lenient standard of review for compelled disclosures of factual, uncontroversial information while reserving more exacting scrutiny for restricted speech or compelled ideological disclosures. This approach centers on the structure and content of the regulation rather than the governmental motive. Accordingly, the disclosure-focused approach aligns with the goal of commercial speech protection—namely, maximizing the information available to consumers.*

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### INTRODUCTION

Does the Constitution prevent the government from requiring cigarette companies to tell the truth? In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (“FSPTCA”).<sup>1</sup> Pursuant to that legislation, the Food and Drug Administration (“FDA”) began to toughen regulation of tobacco companies, particularly with respect to product marketing and packaging. As part of the crackdown on these companies’ commercial messaging, the FDA imposed a requirement that each package of cigarettes bear one of nine graphic images, each accompanied by a different written warning about the effects of tobacco use.<sup>2</sup> The nine warnings selected by the FDA appear as follows<sup>3</sup>:



1. Pub. L. No. 111-31, 123 Stat. 1776 (2009). Within the FSPTCA, Congress directed the Food and Drug Administration to “issue regulations that require color graphics depicting the negative health consequences of smoking to accompany” the written warnings described earlier in the act. *Id.* sec. 201(a), § 4(d), 123 Stat. at 1845 (codified at 15 U.S.C. § 1333(d) (2012) (Graphic label statements)).

2. 21 C.F.R. §§ 1141.10(a), 1141.12 (2013); see also *Cigarette Health Warning Images on Cigarette Packs*, FDA, <http://www.fda.gov/downloads/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/UCM259974.zip> (last downloaded Nov. 23, 2013).

3. The images are reproduced at Betsy McKay & David Kesmodel, *Labels Give Cigarette Packs a Ghoulish Makeover*, WALL ST. J. (June 22, 2011), <http://online.wsj.com/article/SB10001424052702303936704576399320327189158.html#slide/1>.

To ensure the message reached consumers, the FDA imposed additional requirements regarding the size and placement of the images on the package.<sup>4</sup>

Tobacco companies filed suit, arguing that the graphic warnings requirement violated their right to free speech and was therefore unconstitutional.<sup>5</sup> The companies' claims were rooted in First Amendment doctrine and its limited protection of "commercial speech," or speech by a commercial vendor to a consumer.<sup>6</sup> In *Discount Tobacco City & Lottery, Inc. v. United States*, the Sixth Circuit applied a rational basis standard to review compelled disclosures.<sup>7</sup> The court found that the statutorily required graphic warnings reasonably related to the government's interest in preventing consumer deception and did not unconstitutionally violate the companies' right to free commercial speech.<sup>8</sup> Months later, however, the D.C. Circuit, in *R.J. Reynolds Tobacco Co. v. FDA*, employed a more stringent intermediate scrutiny that had been traditionally applied to restrictions on commercial speech.<sup>9</sup> Applying that standard, the D.C. Circuit held that because the graphic warnings were unduly restrictive and did not directly advance a substantial governmental interest, the rule violated the plaintiffs' First Amendment rights.<sup>10</sup> Accordingly, the D.C. Circuit invalidated the rule under the Administrative Procedure Act.<sup>11</sup>

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4. 21 C.F.R. § 1141.10(a)(3)–(6).

5. Brief for Appellees at 20, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (No. 11-5532), 2012 WL 204198, at \*20 (arguing that the restriction "forces [tobacco companies] to serve as unwilling spokesmen for the Government's anti-smoking campaign"); Principal Brief of Plaintiffs-Appellants/Cross-Appellees, *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (No. 10-5234), 2010 WL 6510607, at \*19–20 ("The record unequivocally demonstrates that the scale and intrusiveness of the new warnings far outweighs any legitimate interest in conveying factual information to prevent consumer confusion, particularly since consumers *already overestimate* these health risks. Indeed, the obtrusive new warnings serve only to market Congress' subjective belief that tobacco products are socially unacceptable, in essence impermissibly forcing Plaintiffs to disseminate the stigmatizing anti-tobacco campaign slogan: 'Don't Buy This Product.'"), *cert. denied*, 133 S. Ct. 1996 (2013).

6. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'").

7. *Disc. Tobacco*, 674 F.3d at 558 (opinion of Stranch, J.).

8. *Id.* at 560–68.

9. *R.J. Reynolds*, 696 F.3d at 1217. First Amendment jurisprudence recognizes a difference between prohibitions or restrictions on speech ("You may not say X.") and compelled disclosure ("You must say Y."). For a full discussion of the difference, see *infra* Section I.A.

10. *R.J. Reynolds*, 696 F.3d at 1221–22.

11. *Id.*

In one sense, these two decisions address separate issues. *Discount Tobacco* upheld the FSPTCA provision requiring graphic warnings.<sup>12</sup> *R.J. Reynolds*, by contrast, overturned the FDA's implementation of that provision.<sup>13</sup> But on one common question—which standard of review to use when evaluating whether a compelled disclosure passes First Amendment scrutiny—the courts gave different answers: *Discount Tobacco* applied a variation of rational basis review while *R.J. Reynolds* employed a standard closer to intermediate scrutiny. There is no principled reason the answer to this question should be different when evaluating the constitutionality of legislation versus the constitutionality of agency action—the standard should be the same.<sup>14</sup> Yet the courts in these cases came to different conclusions.

The two opinions illuminate the doctrinal confusion surrounding the appropriate standard of review for compelled commercial speech. The decisions examined a variety of factors, including the format of the regulation (as a disclosure rather than restriction of speech), the content of the warnings, and the government's reason for regulating. The *R.J. Reynolds* court, in particular, employed a deception-focused approach and placed enormous emphasis on whether the government acted to “prevent[ the] deception of consumers.”<sup>15</sup> By contrast, the court in *Discount Tobacco* placed greater weight on the form and content of the regulation, moving closer to a disclosure-focused approach. Taken together, these opinions demonstrate that no clear framework exists to help courts apply the correct standard.

Thus, the controversy at issue in *R.J. Reynolds* and *Discount Tobacco* extends beyond cigarette packages. It implicates the authority of federal, state, and local governments to require more information about every product on the market. Indeed, the dispute calls into question the definition of “information” itself: To what extent do images convey a message? The FDA ultimately declined to appeal the *R.J. Reynolds* decision, opting instead to consider a new version of the rule.<sup>16</sup> But the tobacco warning cases demonstrate the need for a clear, doctrinally consistent standard of review—a standard lacking in First Amendment jurisprudence.

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12. *Disc. Tobacco*, 674 F.3d at 518 (lead opinion of Clay, J.) (explaining that “Plaintiffs’ claim” was directed at “certain provisions of the Family Smoking Prevention and Tobacco Control Act”).

13. *R.J. Reynolds*, 696 F.3d at 1208 (describing the challenge to “the rule” and the “FDA’s proposed graphic warnings”).

14. Under the Administrative Procedure Act, courts reviewing agency action “shall hold unlawful and set aside” any rule that is “contrary to constitutional right.” 5 U.S.C. § 706(2)(B) (2012). And, of course, it is “emphatically the province and duty of the judicial department to say what the law is” and to overturn any “law repugnant to the constitution.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 180 (1803). Thus, judicial review applies the same standards of constitutional law in reviewing both agency action and congressional legislation, although the judiciary’s power of review derives from different sources.

15. *R.J. Reynolds*, 696 F.3d at 1213 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)) (internal quotation marks omitted).

16. See *Cigarette Health Warnings*, FDA, <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels> (last updated June 3, 2013).

This Note seeks to articulate the appropriate legal standard for reviewing compelled commercial speech, advancing an approach that strikes a balance between the public's right to know what it is buying and the seller's competing right to speak as it pleases. This Note argues that courts should adopt and apply a disclosure-focused approach to compelled commercial speech that gives the government wide discretion in mandating disclosure of factual information to consumers. Part I introduces commercial speech doctrine, explains why compelled disclosure is different from other kinds of speech, and discusses how and why the FDA required tobacco companies to disclose graphic warnings. Part II critiques and rejects the deception-focused approach taken in *Discount Tobacco* and *R.J. Reynolds*, an approach that asks whether the disclosure specifically remedies deceptive advertising. Part II then argues for a disclosure-focused approach. Such an approach extends a lenient standard of review to regulations that compel disclosure of factual information and counsels courts to consider the government's intent only when applying that standard. Finally, Part III applies the disclosure-focused approach in the context of the FDA's graphic warnings rule. It also adds to compelled speech doctrine by showing how images, like text, can convey factual, uncontroversial information to consumers in furtherance of First Amendment principles.

## I. LEGAL BACKGROUND

The Supreme Court has established a separate line of cases relating to commercial speech that provides the foundation for reviewing compelled disclosures. Section I.A examines First Amendment doctrine, focusing on three seminal commercial speech decisions.<sup>17</sup> This discussion illustrates the tools currently available to courts when reviewing commercial speech regulations and explains why compelled speech merits a different analysis than restricted or prohibited speech. Section I.B examines compelled speech in the case of tobacco products specifically, providing historical and legal context for *Discount Tobacco* and *R.J. Reynolds*.

### A. Commercial Speech Doctrine

The First Amendment does not require that all forms of speech receive similar treatment. Some statements receive greater protection than others, depending on both the content of the speech and the context in which it was made.<sup>18</sup> For example, courts vigorously guard a person's right to advocate a

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17. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

18. See, e.g., *Va. State Bd. of Pharmacy*, 425 U.S. at 761–62 (discussing the way in which content might determine whether speech is protected); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“[T]he character of every act depends upon the circumstances in which it was done.”).

political position in furtherance of an “unfettered interchange of ideas.”<sup>19</sup> Courts do not, however, protect a person’s right to yell “fire” in a crowded theater, which puts other attendees in “clear and present danger.”<sup>20</sup> Thus, courts have looked not only at what the statement says but why the speaker said it and what effect it had on others.<sup>21</sup>

Commercial speech, or “expression related solely to the economic interests of the speaker and its audience,”<sup>22</sup> receives lesser protection than other constitutionally guaranteed forms of expression.<sup>23</sup> In part, commercial speech is treated differently because of the “common-sense distinction”<sup>24</sup> between speech initiating an economic exchange and other speech—namely, commercial speakers have a “purely economic” interest in making the statement.<sup>25</sup> For example, a poster that urges support for a ballot measure is easily distinguishable from a poster that advertises for a local restaurant. The first poster attempts to convince the reader to take political action by casting her vote in a certain way—this is not commercial speech. The advertisement, in contrast, is an attempt to get the reader to spend money at a particular establishment and is a prototypical example of commercial speech. While the differences between the content of these statements are easy to identify, the reasons for treating them differently are not nearly as apparent.<sup>26</sup> Nonetheless, for decades, courts refused to extend First Amendment protection to commercial speech at all, largely holding that the First Amendment only protects matters of “public interest” and not those of “private profit.”<sup>27</sup>

The Supreme Court first extended protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>28</sup> In overturning a statute prohibiting pharmacists from publishing the

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19. *Roth v. United States*, 354 U.S. 476, 484 (1957).

20. *Schenck*, 249 U.S. at 52.

21. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (affirming that the First Amendment does not protect statements that play “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).

22. *Cent. Hudson*, 447 U.S. at 561.

23. *Id.* at 563.

24. *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)) (internal quotation marks omitted).

25. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

26. Indeed, some have concluded that the Court’s “common-sense distinction” language fails to explain why commercial speech should be treated differently at all. *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000). Absent sweeping jurisprudential changes, however, this Note accepts the distinction.

27. *See, e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (refusing to extend First Amendment protection to “purely commercial advertising”), *abrogated by Va. State Bd. of Pharmacy*, 425 U.S. 748.

28. 425 U.S. at 762.

price of prescription medications,<sup>29</sup> the Court recognized a First Amendment interest in “intelligent and well-informed” private economic decision-making.<sup>30</sup> Commercial speech furthers this interest by providing information to the marketplace,<sup>31</sup> giving the consumer the tools necessary to make knowledgeable purchases. This justification makes sense—a consumer who knows, for example, that one business charges less than another for an identical product will almost surely choose the less expensive option. In that sense, she has made a more informed decision than if she had blindly purchased the product from either store. *Virginia State Board* extended First Amendment protection to commercial speech because such speech encourages informed consumer decisionmaking.

But *Virginia State Board* did not preclude all restrictions of commercial speech. For example, lawmakers are free to enact content-neutral “time, place, and manner” restrictions—that is, lawmakers can limit when, where, and how statements can be made, and those limitations apply regardless of the subject matter of the statement.<sup>32</sup> Lawmakers are also free to place restrictions on false or misleading commercial statements.<sup>33</sup> Thus, the holding of *Virginia State Board* is limited to content-based restrictions on “concededly truthful information about entirely lawful activity,”<sup>34</sup> leaving the government well within its rights to regulate outside that domain.

The Court expanded commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>35</sup> articulating a four-part test for evaluating the constitutionality of commercial speech restrictions. First, the court considers whether the commercial statement is misleading or related to unlawful activity.<sup>36</sup> As the Court held in *Virginia State Board*, the Constitution provides little protection for misleading or unlawful statements, and courts largely defer to a legislature’s decision to regulate these statements. Second, if the speech neither misleads nor promotes unlawful acts, the court asks whether the government’s asserted interest in restricting the speech at issue is “substantial.”<sup>37</sup> Third, the measure must “directly advance[ ]” the substantial interest and, fourth, it must do so no more intrusively than necessary.<sup>38</sup> Thus, overly broad restrictions on commercial speech will not stand, even where they directly advance a substantial state interest.

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29. *Va. State Bd. of Pharmacy*, 425 U.S. at 749–50, 773.

30. *Id.* at 765.

31. *See id.*

32. *E.g., id.* at 771.

33. *Id.*

34. *Id.* at 773.

35. 447 U.S. 557 (1980).

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

37. *Id.*

38. *Id.* The Court affirmed the four-part analysis in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which declined to apply strict scrutiny to questions of commercial speech restriction.



*Central Hudson* reaffirmed the constitutional value of speech that is “neither misleading nor related to unlawful activity.”<sup>39</sup> On the one hand, it acknowledged that commercial entities do not have a First Amendment right to deceive or encourage lawbreaking. On the other hand, it protected speech that is truthful and law-abiding. The preference for true speech in a commercial setting derives from the First Amendment and thus guides the review of compelled, restricted, and prohibited speech alike.<sup>40</sup> Because the issue was not presented, however, *Central Hudson* did not address the appropriate standard of review for compelled commercial speech.

The Supreme Court filled the doctrinal gap between compelled and restricted speech in *Zauderer v. Office of Disciplinary Counsel*.<sup>41</sup> The Court acknowledged that “disclosure requirements”—regulations that require commercial vendors to release specific information—are materially different from restrictions.<sup>42</sup> As the Court noted in *Virginia State Board*, commercial speech protections derive from the value of information to consumers.<sup>43</sup> For the same reasons that commercial entities have a right to distribute truthful information voluntarily, they have little defense when the government requires the disclosure of similarly factual content.<sup>44</sup> The Court concluded that advertisers’ rights are protected so long as the compelled disclosure of truthful information reasonably relates to the state’s interest in preventing consumer deception.<sup>45</sup>

The “reasonably relates” test of *Zauderer* makes it easy for the government to justify compelled disclosure, provided the statement is truthful. Of

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39. *Cent. Hudson*, 447 U.S. at 564.

40. Of course, courts may not necessarily enforce these preferences with the same level of deference in compelled disclosure cases as they do in restriction cases. See *infra* Part II. Nonetheless, as a general matter, the Court’s protection of truthful, lawful statements is illuminating.

41. 471 U.S. 626, 650 (1985). In *Zauderer*, an attorney published an advertisement offering to provide legal representation to women harmed by an allegedly defective intrauterine device. 471 U.S. at 630–31. The advertisement included a “line drawing” image of the device, as well as a promise to work on a “contingent fee basis.” *Id.* (internal quotation marks omitted). The Ohio Office of Disciplinary Counsel charged the attorney with violating numerous disciplinary rules regarding advertising, two of which were requirements to disclose how the contingency fee would be calculated and a separate restriction prohibiting use of illustrations and images in an advertisement. *Id.* at 632–33. The Office of Disciplinary Counsel charged the attorney with other violations as well. *Id.* While the Court addressed the constitutionality of each rule individually, this Note’s discussion of *Zauderer* will explore only the two rules regarding compelled disclosure of fee structures and the prohibition on graphic advertisements.

42. *Id.* at 650.

43. *Id.* at 651 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

44. *Id.* (“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.” (citation omitted)).

45. *Id.* The Court recently affirmed this holding in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 253 (2010).

course, the government does not have an unfettered ability to compel disclosure—some “unduly burdensome” disclosure requirements could chill protected speech and implicate First Amendment concerns.<sup>46</sup> Thus, so long as the disclosure does not hamper the advertiser’s right to distribute other information, compelled speech is far easier to justify under *Zauderer*’s “reasonably relates” standard than are restrictions under *Central Hudson*.

In the course of addressing a separate rule violation, the Court went on to discuss restrictions on the use of images. Images, like textual or verbal expression, convey information and consequently receive the same treatment under the First Amendment.<sup>47</sup> Images serve “important communicative functions,” both by focusing the reader’s attention on the advertiser’s message and by “impart[ing] information directly.”<sup>48</sup> Rejecting unsupported assertions that images are inherently more likely to mislead, manipulate, and confuse consumers, *Zauderer* held that the state cannot restrict a commercial entity’s ability to publish an “accurate and nondeceptive illustration.”<sup>49</sup> In other words, *Zauderer* gave images the same treatment as verbal or written expression.

B. *Implementing the FSPTCA—Commercial Speech  
in the Context of Tobacco*

Tobacco products have been subject to compelled disclosure since 1965,<sup>50</sup> and the FSPTCA is Congress’s most recent effort to update tobacco warnings. Congress delegated implementation of the Act to the FDA,<sup>51</sup> which enjoyed significant discretion in accomplishing that task.<sup>52</sup> Congress directed the FDA to “issue regulations that require color graphics depicting the negative health consequences of smoking to accompany” the written

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46. *Zauderer*, 471 U.S. at 651. For a discussion of how disclosure requirements might chill protected speech, see *infra* Section III.A.

47. See *Zauderer*, 471 U.S. at 647.

48. *Id.*

49. *Id.* at 648–49.

50. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C. § 1333 (2012)).

51. 15 U.S.C. § 1333(d) (2012) (Graphic label statements) (“[T]he Secretary [of Health and Human Services] shall issue regulations that require color graphics depicting the negative health consequences of smoking to accompany the [textual warnings].”).

52. *Id.* (“The Secretary may adjust the type size, text and format of [textual warnings] as . . . appropriate so that both the graphics and the accompanying label statements are clear, conspicuous, legible and appear within the specified area.”).

warnings described earlier in the Act.<sup>53</sup> In drafting color images to accompany the text, the FDA relied on both scientific studies<sup>54</sup> and historical experience.<sup>55</sup> In the end, the agency selected nine images, each accompanied by a related textual warning.<sup>56</sup>

The FDA implemented the mandates of the FSPTCA and promulgated a rule that made it “unlawful for any person to manufacture, package, sell, offer to sell, distribute, or import for sale or distribution within the United States any cigarettes the package of which fails to bear . . . one of” the nine warnings.<sup>57</sup> The FDA required that each warning cover at least 50 percent of the front of the packaging and specified that the warning must be placed at the top of the carton to ensure that shelving does not obscure the image.<sup>58</sup> The Final Rules also prohibited any additional packaging (such as cellophane wrapping) from covering the portion of the label that bears the graphic warning.<sup>59</sup> Notably, if products regulated by the Act fail to carry one of the nine prescribed warnings, the product is labeled as “misbranded” and considered “misleading.”<sup>60</sup>

Since 1965, Congress has repeatedly strengthened the advertising requirements and restrictions of § 1333. In 1970, Congress replaced the warning, “Caution: Cigarette Smoking *May Be* Hazardous to Your Health,” with

53. *Id.*

54. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,637–44 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2013)).

55. *Id.* at 36,631–32.

56. *Id.* at 36,649; *see supra* Introduction.

57. 15 U.S.C. § 1333(a)(1); 21 C.F.R. § 1141.10(a)(1) (2013). The warnings are described in the Final Rules, which are approved following notice-and-comment hearings, as follows:

“WARNING: Cigarettes are Addictive,” accompanied by the image referred to as “hole in throat”;

“WARNING: Tobacco Smoke Can Harm Your Children,” accompanied by the image referred to as “smoke approaching baby”;

“WARNING: Cigarettes Cause Fatal Lung Disease,” accompanied by the image referred to as “healthy/diseased lungs”;

“WARNING: Cigarettes Cause Cancer,” accompanied by the image referred to as “cancerous lesion on lip”;

“WARNING: Cigarettes Cause Strokes and Heart Disease,” accompanied by the image referred to as “oxygen mask on man’s face”;

“WARNING: Smoking During Pregnancy Can Harm Your Baby,” accompanied by the image referred to as “baby in incubator”;

“WARNING: Smoking Can Kill you,” accompanied by the image referred to as “man with chest staples”;

“WARNING: Tobacco Smoke Causes Fatal Lung Disease in Nonsmokers,” accompanied by the image referred to as “woman crying”; and

“WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health,” accompanied by the image referred to as “man I Quit t-shirt.”

Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,649–56.

58. 21 C.F.R. § 1141.10(a)(4).

59. *Id.* § 1141.10(a)(3).

60. *Id.* § 1141.14(a); Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,680.

the more direct, “Warning: The Surgeon General *Has Determined* That Cigarette Smoking Is Dangerous to Your Health.”<sup>61</sup> In 1984, Congress amended § 1333 again, adding more direct causal warnings about the link between tobacco use and risks of lung cancer, heart disease, and complications during pregnancy.<sup>62</sup> Moreover, the 1984 amendment specified the placement, size, and style of the required warnings.<sup>63</sup>

The FDA’s graphic warnings departed from the previous text-only warnings of § 1333 by adding images to accompany the textual content, as required by the FSPTCA. This change—from text-only warnings to text-and-image warnings—led tobacco companies to oppose vigorously the disclosure requirement. The underlying motivations for the warnings, however, have not changed: they are intended to educate the public about the realities of smoking and to decrease public consumption.<sup>64</sup>

Since the original imposition of the warning requirements, courts have become increasingly willing to accept the link between tobacco use and health problems. In 2009, the D.C. Circuit issued its decision in *United States v. Philip Morris USA Inc.*, in which the government alleged that various tobacco companies had engaged in wire and mail fraud in violation of the Racketeer Influenced and Corrupt Organizations Act.<sup>65</sup> The *Philip Morris* court determined that tobacco companies misled the public by suggesting that “light” and “low-tar” cigarettes did not cause negative health effects and by fraudulently denying the addictiveness of their products and the negative health effects of secondhand smoke.<sup>66</sup> Thus, the court upheld the finding that Big Tobacco—as the tobacco industry is sometimes called—engaged in a conspiracy to defraud the public.<sup>67</sup> Tobacco companies seeking to challenge the validity of marketing restrictions now have to grapple with the court’s conclusion that smoking causes adverse health effects, a point that is no longer up for serious debate.

The *Philip Morris* decision, in short, put a legal stamp of approval on the causal relationship between tobacco use and its attendant negative health effects. The decision likely reflects more of a shift in political attitudes toward tobacco companies than a change in the substantive requirements of legal challenges to regulation. Nonetheless, *Philip Morris* indicates that the

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61. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, sec. 2, § 4, 84 Stat. 87, 88 (1970) (emphasis added) (amending Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965)) (current version at 15 U.S.C. § 1333 (2012)).

62. Comprehensive Smoking Education Act, Pub. L. No. 98-474, sec. 4(a), § 4(a), 98 Stat. 2200, 2201–02 (1984) (amending same) (current version at 15 U.S.C. § 1333 (2012)).

63. *Id.* § 4(b), 98 Stat. at 2202–03.

64. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,637–38 (explaining that the purpose of the study underlying the rule was to “evaluate the relative effectiveness of the proposed color graphic images and their accompanying textual warnings statements at conveying information about various health risks of smoking, and additionally, at encouraging smoking cessation and discouraging smoking initiation”).

65. 566 F.3d 1095, 1105–06 (D.C. Cir. 2009) (per curiam).

66. *Philip Morris*, 566 F.3d at 1124–28.

67. *Id.*

government—and, arguably, the legal system—is unwilling to treat scientific studies on the effects of tobacco as anything less than conclusive.<sup>68</sup> *Philip Morris* informs the debate over the FDA’s graphic warnings, as the warnings convey the same basic information that led the D.C. Circuit to admit that tobacco causes health problems.<sup>69</sup>

That same year, Congress passed the FSPTCA.<sup>70</sup> Three years after President Obama signed the bill into law, the Sixth Circuit considered a facial challenge to the graphic warnings provisions in the Act.<sup>71</sup> In reviewing the propriety of the mandatory disclosure requirements, the court employed the *Zauderer* standard, asking if the requirement reasonably related to the government’s interest in preventing consumer deception.<sup>72</sup> Concluding that it passed this lenient standard of review, the court upheld the Act’s graphic warnings requirement.<sup>73</sup> Months later, the D.C. Circuit reviewed the FDA’s implementation of the requirement.<sup>74</sup> Unlike its sister circuit, the court refused to apply *Zauderer* to the mandatory graphic disclosure, in part because the government’s goal was “to discourage consumers from buying [tobacco] products.”<sup>75</sup> In other words, the court held that *Zauderer* only applies when compelled disclosures are “designed to combat specific deceptive claims.”<sup>76</sup> Employing the *Central Hudson* test instead, the court determined that both the interest and the means employed to advance it unconstitutionally infringed on the First Amendment rights of tobacco companies.<sup>77</sup>

## II. A DISCLOSURE-FOCUSED APPROACH TO REVIEWING COMPELLED DISCLOSURES

*Discount Tobacco* and *R.J. Reynolds* present the same fundamental question: What level of scrutiny should be applied when evaluating First Amendment challenges to the graphic warnings? Courts considering challenges to

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68. On this point, the D.C. Circuit found in *R.J. Reynolds* that, as a matter of law, the graphic warnings did not substantially relate to the government’s purported end of reducing tobacco use. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221 (D.C. Cir. 2012). As part of that analysis, the court rejected studies showing a link between graphic warnings and reduced smoking rates, indicating its willingness to question social science studies used to support governmental objectives. *Id.* at 1220.

69. Indeed, in light of *Philip Morris*, it is difficult to label the warnings as opinion rather than fact. See *infra* Part III for more discussion on fact versus opinion.

70. Pub. L. No. 111-31, 123 Stat. 1776 (2009).

71. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 561–69 (6th Cir. 2012) (opinion of Stranch, J.), *cert. denied*, 133 S. Ct. 1996 (2013).

72. *Id.* at 569 (“Because graphics can present factual information regarding the health risks of using tobacco, and because this information alleviates the possibility of consumer confusion, the Act’s graphic warning requirement is constitutional under *Zauderer*.” (emphasis added)).

73. *Id.*

74. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211–22 (D.C. Cir. 2012).

75. *Id.* at 1216.

76. *Id.* at 1214–16.

77. *Id.* at 1221–22.

compelled disclosures inevitably quote one sentence in *Zauderer*: “[A]n advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”<sup>78</sup> Specifically, the *Zauderer* standard of review is the “reasonably relates” test embedded in its holding. But some courts have extended this holding to the threshold question of whether the *Zauderer* standard applies at all, focusing on the phrase “preventing deception of consumers.” This approach improperly focuses on the government’s intent when determining whether to apply the *Zauderer* standard. As this Part demonstrates, governmental intent should have no bearing on which standard the court uses to review the disclosure requirement. Section II.A lays out two interpretations of *Zauderer*’s holding—the deception-focused approach and the disclosure-focused approach. Section II.B then analyzes which approach better furthers First Amendment goals, concluding that the disclosure-focused approach more successfully advances the goal of increasing the amount of truthful information available to consumers.

#### A. Two Approaches to Determining When *Zauderer* Applies

There are two ways to interpret the language of *Zauderer*: the Court utilized lenient review either (1) because the structure of the law—a compelled disclosure of truthful information—actively furthered First Amendment goals or (2) because the government’s exclusive purpose in requiring disclosure—preventing consumer deception—merits special deference.

Under the latter interpretation, which this Note calls the *deception-focused approach*, *Zauderer* review applies only when the government imposes a disclosure requirement *exclusively* to prevent consumer deception.<sup>79</sup> The deception-focused approach leads courts to look not only at the structure of the compelled disclosure but also at the government’s motives when imposing it.<sup>80</sup> Importantly, courts employ this analysis to determine which standard to apply, not whether the regulation survives scrutiny. In other words, the deception-focused approach makes the governmental intent to prevent consumer deception a prerequisite to *Zauderer* review. If the government

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

79. See, e.g., *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 93, 96 (2d Cir. 2010) (applying *Zauderer* both because the regulation did not “suppress[ ] speech” and because consumers’ “frequent ignorance and confusion . . . could otherwise subject them to easy deception”).

80. See, e.g., *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (describing the “two features” of restrictions analyzed under *Zauderer*), *cert. denied*, 133 S. Ct. 1723 (2013); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 463 (D. Md. 2011) (implying that compelled disclosures only receive *Zauderer* review when they “apply to inherently misleading statements”), *aff’d on reh’g*, 722 F.3d 184 (4th Cir. 2013) (en banc); *Euro. Connections & Tours, Inc. v. Gonzales*, 480 F. Supp. 2d 1355, 1375 (N.D. Ga. 2007) (noting that a compelled disclosure must aim at “a substantial state interest, such as preventing deception or confusion of consumers” (quoting *Tillman v. Miller*, No. 1:95-CV-1594-CC, 1996 WL 767477, at \*2 (N.D. Ga. Sept. 30, 1996)) (internal quotation marks omitted)).

acts for *any other reason*, the deception-focused approach would reject rational basis review and impose a heightened standard.<sup>81</sup>

In contrast, under what this Note will call the *disclosure-focused approach*, *Zauderer* applies to all cases involving compelled disclosure of factual commercial speech, regardless of the government's intent.<sup>82</sup> In other words, courts applying a disclosure-focused approach read the "deception of consumers" language from *Zauderer* as specific to that case and apply the "reasonably relates" standard of review to any legitimate governmental interest. The disclosure-focused approach originates, in part, from *National Electric Manufacturers Ass'n v. Sorrell*.<sup>83</sup> There, the court equated the aim of preventing consumer deception, as enunciated in *Zauderer*, with "increasing consumer awareness."<sup>84</sup> The *Sorrell* court hence acknowledged that by promulgating truthful information, the government inherently prevents deception by increasing consumers' access to facts.

Other courts have also refused to read *Zauderer*'s deception language as an exclusive intent requirement, although they have done so using different lines of reasoning. For example, in *Environmental Defense Center, Inc. v. EPA*, the Ninth Circuit upheld the compelled disclosure of the effects of improper waste disposal because the disclosure was "consistent with the regulatory goals of . . . the Clean Water Act."<sup>85</sup> The court noted that the disclosure was "non-ideological" because the information was based on fact rather than opinion.<sup>86</sup> Similarly, the First Circuit, in *Pharmaceutical Care Management Ass'n v. Rowe*, upheld a requirement that intermediary pharmaceutical sales companies disclose potential conflicts of interest. Refusing to limit

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81. See, e.g., *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-cv-635 (RLW), 2013 WL 3803918, at \*27 (D.D.C. July 23, 2013) (citing *R.J. Reynolds* for the proposition that compelled speech "not aimed at preventing misleading or deceptive speech" is "remove[d] . . . from the *Zauderer* framework").

82. See, e.g., *Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 228 (5th Cir. 2011) (upholding a disclosure requirement both because of the state's interest in preventing consumer deception and in "promoting the ethical integrity of the legal profession"); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) ("*Zauderer*'s holding was broad enough to encompass nonmisleading disclosure requirements."); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (per curiam) ("[Plaintiff] states that the holding in *Zauderer* is 'limited to potentially deceptive advertising directed at consumers.' . . . [W]e have found no cases limiting *Zauderer* in such a way."); *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 849 (9th Cir. 2003) (upholding a statute requiring sewer providers to educate the public about the hazards of improper waste disposal where the purpose of the provision is legitimate and consistent with the regulatory goals of the Clean Water Act); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (upholding a Vermont law requiring products to inform consumers of mercury content, despite that the law's primary purpose was to reduce the amount of mercury entering the environment); see also *Dex Media W., Inc. v. City of Seattle*, 793 F. Supp. 2d 1213, 1231 (W.D. Wash. 2011) ("While consumer deception was at issue in *Zauderer*, the rule has not been limited to those facts, and [the court finds] no sound basis for doing so."), *rev'd on other grounds*, 696 F.3d 952 (9th Cir. 2012).

83. *Sorrell*, 272 F.3d 104.

84. *Id.* at 115.

85. *Env'tl. Def. Ctr.*, 344 F.3d at 849.

86. *Id.* at 850.

*Zauderer* to “potentially deceptive advertising directed at consumers,”<sup>87</sup> the court determined that the disclosure furthered the state’s interest in “ensuring that its citizens receive the best and most cost-effective health care possible.”<sup>88</sup> Under the reasoning of these decisions, the standard of review does not require that the government specifically aim to combat consumer deception.

Synthesizing these cases reveals two prerequisites to *Zauderer* review under the disclosure-focused approach: (1) the restriction must constitute a compelled disclosure (rather than prohibition or restriction) of (2) factual information (rather than opinions). Whether the law intends to prevent the deception of consumers, while relevant to the application of *Zauderer*’s “reasonably relates” standard, does not bear on whether to apply this standard.

### B. *The Superiority of the Disclosure-Focused Approach*

Which application of *Zauderer* best furthers First Amendment goals? The answer to that question depends not only on the language of *Zauderer* but also on the policy aims of the First Amendment, the tenets of commercial speech jurisprudence generally, and the normative implications of each approach. A review of these concepts shows that the deception-focused approach is doctrinally inconsistent whereas the disclosure-focused approach provides a coherent and principled standard of review.

#### 1. Policy of the First Amendment

The philosophical underpinnings of First Amendment protections support the disclosure-focused approach. Many categorical First Amendment protections—for example, for political expression<sup>89</sup>—seek to cultivate “democratic legitimacy,”<sup>90</sup> or a political system that, with few exceptions, widely permits honest discourse. Open dialogue, in turn, fosters participation in a well-functioning, representative democracy. Commercial speech doctrine, in contrast, “serves an ‘informational function.’”<sup>91</sup> Commercial speech receives

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87. *Rowe*, 429 F.3d at 310 n.8 (internal quotation marks omitted).

88. *Id.* at 310. The *Rowe* court went on to conclude that the disclosures “‘reasonably related’ to Maine’s interest in preventing deception of consumers and increasing public access to prescription drugs.” *Id.* Thus, the court considered consumer deception, but it did not do so exclusively.

89. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (describing political speech as the “core of the protection afforded by the First Amendment”).

90. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2372 (2000) (“[This rationale] stresses the cognitive contribution of speech to democratic decision making, rather than the legitimization-producing effects of speech understood as a vehicle of participation.”).

91. *Id.* at 2371–72 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980)).



First Amendment protection principally because it increases the facts available to consumers<sup>92</sup> and thus encourages informed decisions in the marketplace.<sup>93</sup> Accordingly, the Constitution largely sanctions governmental regulation that requires companies to disclose factual information.<sup>94</sup> Open channels of communication better facilitate an informed consumer populous, and regulations that promulgate the truth complement the policy goals of the First Amendment.<sup>95</sup>

Compelled *opinions*, which would not add any factual information to the marketplace, would not receive *Zauderer* review under the disclosure-focused approach. The core of First Amendment jurisprudence emphasizes the need to protect individual opinions and their expression, regardless of the medium.<sup>96</sup> Moreover, consumers' purchasing decisions will not improve with added political or ideological content. The government has no legitimate interest in compelling opinions that would neither increase access to factual information nor improve consumer decisionmaking. For these reasons, the First Amendment shields commercial vendors from being forced to espouse an opinion they do not actually hold,<sup>97</sup> instead subjecting compelled disclosure of ideological and political statements to more exacting scrutiny.<sup>98</sup>

Accordingly, the disclosure-focused approach emphasizes the *factual* nature of the information rather than its potential to correct a pervasive public misunderstanding. This focus supports one of the main justifications for limited commercial speech protection—it is easier, and more tolerable, to verify facts than to endorse opinions.<sup>99</sup> Because compelled disclosure of truthful information adds knowledge to the marketplace, it furthers the informational goals of the First Amendment.

In contrast, the deception-focused approach sets a higher standard based on the government's reason for regulating in the first place. Far from

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

93. Jodi Schuette Green, Note, *Cheeseburger in Paradise? An Analysis of How New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation*, 59 DEPAUL L. REV. 733, 766 (2010) ("Such disclosures not only promote fair dealing and a more efficient marketplace, but they also allow for consumers to make informed decisions about their own best interests, especially in the context of consumer health and safety . . .").

94. *Id.* at 765–66.

95. *Id.* at 770.

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

97. *Zauderer*, 471 U.S. at 651 (distinguishing generally permissible factual disclosures from generally impermissible ideological and opinion-based disclosures).

98. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

99. Caleb Deats, Note, *Talk That Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?*, 110 COLUM. L. REV. 1818, 1837 (2010); cf. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634–35 (1990) ("It is certainly easier to determine the truth of the claim 'Cucumbers cost sixty-nine cents' than the claim 'Republicans will govern more effectively.'").

increasing access to information, the deception-focused approach would overturn even entirely factual disclosures where the government did not intend to combat specific deceptive advertising. For example, imagine a regulation requiring disclosure of the calorie count of fast-food products. Under the deception-focused approach, the regulation would only receive lenient review if the government could show that it acted to cure consumers' actual misunderstanding about the caloric content of cheeseburgers and French fries. If the government acted for any other reason—for example, to combat obesity—a court would impose heightened scrutiny. As a result, while the deception-focused approach might conservatively restrict the flow of information in the market, the disclosure-focused approach would consistently increase this flow, a result that aligns it more faithfully with First Amendment principles.

## 2. Tenets of Commercial Speech Jurisprudence

The *Zauderer* opinion itself strongly supports the disclosure-focused approach. Reviewing the language of the entire opinion—rather than one sentence summarizing the holding—reveals how the deception-focused approach misinterprets the Court's reasoning. First, the opinion emphasized the “material differences between disclosure requirements and outright prohibitions on speech.”<sup>100</sup> While prohibitions limit the information available to consumers, mandatory disclosures increase access to information. Because commercial speech protections are justified primarily by the value of information to consumers, *Zauderer* recognized that advertisers have a “minimal” interest in withholding it.<sup>101</sup> Thus, the opinion clearly requires that in order to receive “reasonably relates” review, the regulation must compel speech rather than restrict or ban it.<sup>102</sup>

Second, *Zauderer* distinguished between regulations that compel facts and those that compel opinions. The Court clearly recognized that compelled speech could, in some instances, violate First Amendment rights.<sup>103</sup> This risk primarily arises, however, in the context of opinions, not facts.<sup>104</sup> In other words, compelled disclosures do not violate First Amendment protections when they “prescribe what shall be orthodox in commercial advertising” rather than in “other matters of opinion.”<sup>105</sup> In the context of commercial speech, there is no injury to First Amendment rights so long as

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100. *Zauderer*, 471 U.S. at 650.

101. *Id.* at 651.

102. *Id.*; see also *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (“[W]here [laws] ‘impose a disclosure requirement rather than an affirmative limitation on speech,’ *Zauderer*, not *Central Hudson*, applies . . .” (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010))), *cert. denied*, 133 S. Ct. 1723 (2013).

103. *Zauderer*, 471 U.S. at 650 (citing *Wooley*, 430 U.S. 705).

104. *Id.* at 651.

105. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) (internal quotation marks omitted).

the compelled statements are factual and reasonably relate to a legitimate governmental interest.

Thus, *Zauderer* supports both prongs of the disclosure-focused approach: (1) compelled disclosure of (2) factual information. The deception-focused approach would add a requirement that the government act to prevent consumer deception. *Zauderer* plainly does not support such a requirement. The *Zauderer* Court explained that disclosure requirements are generally permissible to “dissipate the *possibility* of consumer . . . deception.”<sup>106</sup> It went on to hold that disclosure requirements must “reasonably relate[ ] to the State’s interest in preventing deception of consumers.”<sup>107</sup> But nowhere in the opinion does the Court state that the government must *intend* to prevent consumer deception, and it certainly never excludes other goals. *Zauderer* merely addressed the governmental interest at hand—preventing the *possible*, although not necessarily *actual*, deception of consumers. Indeed, in explaining its holding, the Court affirmed that “governments are entitled to attack problems piecemeal,” except when “their policies implicate rights so fundamental that strict scrutiny must be applied.”<sup>108</sup> An advertiser’s right “not to divulge accurate information regarding his services,” the Court noted, is not fundamental.<sup>109</sup> Thus, *Zauderer*’s consumer deception language does not set a requisite governmental intent. It merely reinforces what commercial speech jurisprudence had said all along—factual information is desirable because it inherently reduces “the potential for deception.”<sup>110</sup>

Commercial speech cases prior to *Zauderer* support this reading. For example, *Central Hudson* acknowledged that restrictions or prohibitions on commercial speech inherently limit the public’s access to information.<sup>111</sup> Accordingly, the government may only prohibit commercial speech outright when its content is “more likely to deceive the public than to inform it.”<sup>112</sup> Likewise, *Virginia State Board* respected the state’s right to ensure that “the stream of commercial information flow cleanly as well as freely.”<sup>113</sup> *Zauderer* stands for a comparable proposition but reverses roles—whereas *Central Hudson* laid out the standard for when the government restricts information available to consumers, *Zauderer* applies when the government increases access to that information. Logically, since the First Amendment prefers access to information, the standard of review is more lenient when the government

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106. *Id.* (emphasis added) (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)) (internal quotation marks omitted).

107. *Id.*

108. *Id.* at 652 n.14.

109. *Id.*

110. *Id.* at 654 n.15.

111. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–62 (1980).

112. *Id.* at 563.

113. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

seeks to introduce more information into the market than when the government attempts to limit information.<sup>114</sup>

*Zauderer* is not without limits. When the government crosses the line from compelling fact to compelling opinion, the courts will apply strict scrutiny.<sup>115</sup> As noted above, commercial speech doctrine vigilantly protects against compelled ideological disclosure.<sup>116</sup> The disclosure-focused approach does not counsel unquestioning deference to the legislature in all compelled disclosure cases. Indeed, to determine the standard of review, the court must evaluate whether the content is factual. The disclosure-focused approach merely recognizes that a compelled factual disclosure merits deference while an ideological disclosure does not. Moreover, *Zauderer* would not extend beyond the bounds of compelled speech. Under the disclosure-focused approach, *Zauderer* does not apply when the government restricts or flatly prohibits speech. In these cases, courts would apply the *Central Hudson* test. In the limited realm of compelled disclosure of factual content, however, courts should employ a lenient rational basis standard and overturn the disclosure only if it would impermissibly chill other protective speech.<sup>117</sup>

### 3. Normative Implications

The disclosure-focused approach aligns not only with First Amendment principles and doctrine but also with common sense. When compelled information is factual, by definition it informs the public. The idea that a factual disclosure could fail to reduce possible deception—at least to *some* extent—strains credulity. Assuming no market has perfect information, requiring factual commercial disclosures can only add to public knowledge.

The deception-focused approach, on the other hand, implies that a disclosure requirement will only receive lenient review when the commercial expression would *actively* misinform the public without the requirement. Indeed, using the word “deception” implies some act or intent on the part of the advertiser. In contrast, commercial speech protections simply seek to increase the amount of information at the public’s disposal.<sup>118</sup> *Zauderer* further undermines the focus on deception by using the phrase “possibility of consumer . . . deception” rather than *actual* deception.<sup>119</sup> Preventing active

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114. See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *In re R.M.J.*, 455 U.S. 191, 201 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) (“[T]he preferred remedy is more disclosure, rather than less.”).

115. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

116. See *supra* notes 96–97 and accompanying text.

117. For a discussion of this phenomenon, which this Note calls *restrictive disclosure*, see *infra* Section III.A.

118. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The Court describes the purpose of commercial speech protections as to “dissipate the *possibility* of consumer confusion or deception.” *Id.* (emphasis added) (quoting *In re R.M.J.*, 455 U.S. at 201) (internal quotation marks omitted). “Factual and uncontroversial information” accomplishes that goal by increasing consumer information. *Id.*

119. *Id.* (quoting *In re R.M.J.*, 455 U.S. at 201) (internal quotation marks omitted).

deception, while furthering the informational goals of commercial speech doctrine, should not be the floor at which compelled disclosures attain legitimacy.

That is not to say that the government's motivations are irrelevant. Indeed, under both *Zauderer* and *Central Hudson*, the Court must consider the extent to which the means relate to or advance the end.<sup>120</sup> The distinction is *when* the Court considers the regulatory motive. Under the deception-focused approach, it must conduct a preliminary review of the government's intent as a precondition to *Zauderer* review. Under the disclosure-focused approach, the court only looks at the government's motive to see if the compelled speech reasonably relates to that intent.

Of course, the disclosure-focused approach gives the government broad authority to compel commercial speech. One might question the wisdom of deferring to the government so readily: Why should the government be able to force disclosure of what *it* thinks is relevant in a commercial setting? On the surface, this argument challenges the distinction between commercial and noncommercial speech. Indeed, some commentators and jurists argue that the allegedly "common-sense distinction"<sup>121</sup> between commercial and noncommercial speech is nowhere near commonsensical.<sup>122</sup>

Putting aside issues of why commercial speech should be treated differently at all,<sup>123</sup> contesting the government's entitlement to introduce certain facts into the market is an attack on democratic accountability. Legislatures, and by extension the agencies they supervise, respond to the will of the electorate.<sup>124</sup> As with any law, so long as a compelled disclosure results from a fair democratic process, our political system legitimizes it.<sup>125</sup> While legislation that violates the Constitution is by definition illegitimate in our political system, the First Amendment counsels deference to the legislature in the

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120. *Id.*; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

121. *Cent. Hudson*, 447 U.S. at 562 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)) (internal quotation marks omitted).

122. See Kozinski & Banner, *supra* note 99; see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.").

123. The debate over whether to treat commercial speech differently from noncommercial speech is fairly academic, and no court has seriously challenged the distinction since *Virginia State Board*.

124. See generally LISA SCHULTZ BRESSMAN ET AL., *THE REGULATORY STATE* 703–11 (2d ed. 2013) (discussing the various mechanisms available to Congress to control agency action). In addition to legislatures' varying "police patrols," constituents also have tools that encourage monitoring of agency action, often called "fire alarms." *Id.* at 723–24. These include notice-and-comment rulemaking, citizen suits, and statutory entitlements such as the Freedom of Information Act. *Id.* at 724–25.

125. See Sherman J. Clark, Commentary, *A Populist Critique of Direct Democracy*, 112 *HARV. L. REV.* 434, 442 (1998) ("[A] regime is legitimate if people are made to follow only those rules to which they have consented.").

first instance. There is something bizarre about invoking the First Amendment's protection of democratic legitimacy to question a democratically elected legislature's decision to compel truthful information.

There are a number of other policy interests that support the disclosure-focused approach over the deception-focused approach. First, the disclosure-focused approach encourages a more honest interaction between the government and commercial vendors. Because the purpose motivating a compelled disclosure under this approach takes a back seat to the form and content of the required expression, the government has the ability to advance other motives of equal or greater public importance.<sup>126</sup> Under the deception-focused approach, by contrast, companies could avoid conveying otherwise truthful and uncontroversial information merely because the government acted (for example) to further public health rather than to prevent public deception.

Moreover, the deception-focused approach creates a perverse incentive for commercial entities in legal suits. Litigants challenging regulations that mandate disclosures would be able to raise the standard of review by assigning ulterior, albeit public-minded, motives to governmental regulation. Under the deception-focused approach, regulations requiring disclosure of nutritional information would require *Central Hudson* review where the government asserts an interest in public health. The government's interest in informing consumers would not be enough—the nutritional information would have to actively combat otherwise-deceptive marketing.<sup>127</sup> Related to the suggestion that the public largely knows about the dangers of tobacco products,<sup>128</sup> corporate plaintiffs could easily point to general public awareness of the unhealthy side effects of certain types of food, such as fast food and soda. The deception-focused approach handicaps the government merely because it set its aims above the nebulous concept of “preventing deception.”

Thus, the disclosure-focused approach best advances the goals of commercial speech protections. Permitting government to require the disclosure of factual information should survive First Amendment challenges when the disclosure reasonably relates to the stated government end. The government's motive, while relevant to the outcome, should not influence the standard of review.

### III. APPLYING THE DISCLOSURE-FOCUSED APPROACH TO THE GRAPHIC WARNINGS RULE

With the merits and operation of the disclosure-focused approach now laid out above, this Part applies it in the case of the FDA's graphic warnings

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126. See, e.g., *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (per curiam).

127. See Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 *FIRST AMEND. L. REV.* 140, 189 (2011).

128. See discussion *infra* Section III.B.

rule. The rule is a particularly apt case study because it raises new questions about the appropriate content of compelled disclosures—here, images accompanying text. This Section argues that the FDA’s graphic warnings requirements merit *Zauderer* review and that the requirements reasonably relate to the government’s regulatory motives. Section III.A clarifies the requirements of the disclosure-focused approach in the context of the FDA warning labels, addressing specific similarities and differences between the facts of *Zauderer* and the FDA’s graphic warnings. Section III.B applies the disclosure-focused approach to the FDA’s rule and argues that the graphic images constitute compelled disclosure of factual, uncontroversial information. Specifically, the Section explains why images receive the same treatment as text under the First Amendment. After the Section concludes that the FDA’s warnings merit *Zauderer* review, Section III.C applies the test to the FDA’s graphic warnings rule, asserting that the images pass constitutional muster.

#### A. Images as Disclosure and Truth

As mentioned above, the disclosure-focused approach requires (1) a compelled disclosure (rather than prohibition or restriction) of (2) factual information (rather than opinions).<sup>129</sup> To receive *Zauderer* review, the FDA’s rule must meet both of these prerequisites. Since the rule is clearly a compelled disclosure, the heart of the issue is whether the images constitute factual information for the purposes of applying *Zauderer*. Recall, however, that the government’s interest has no bearing on what standard to apply. Under the disclosure-focused approach, the structure and content of the regulation dictate the method of review. The government’s regulatory goal is only relevant to the application of the *Zauderer* standard, which asks whether the measure reasonably relates to the governmental interest. Evaluated under the disclosure-focused approach, the FDA’s graphic warnings requirement qualifies for *Zauderer* review.

First, the rule undisputedly constitutes a compelled disclosure—it requires tobacco products to be labeled with textual and graphic warnings,<sup>130</sup> a fact that was not seriously contested by the parties in *Discount Tobacco* or *R.J. Reynolds*.<sup>131</sup> Of course, any compelled disclosure restricts speech to some extent; after all, the FDA is restricting speech by taking up space on the label, in what might be called restrictive disclosure. Yet, courts have recognized a

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129. See *supra* Part II.

130. 21 C.F.R. § 1141.10(a) (2013); see also *id.* § 1141.3 (“Required warning means the combination of one of the textual warning statements and its accompanying color graphic . . .”).

131. Accordingly, both the *Discount Tobacco* and *R.J. Reynolds* decisions refer to the warnings as disclosure requirements, which suggests that the doctrinal disagreement rests elsewhere. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (referring to the warnings as “compelled commercial disclosure”); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 561 (6th Cir. 2012) (opinion of Stranch, J.) (referring to the warnings as “disclosure requirement[s]”), *cert. denied*, 133 S. Ct. 1996 (2013).

distinction between restrictive disclosure and regulations directly prohibiting certain content (the focus of *Central Hudson*).<sup>132</sup> The Supreme Court has consistently distinguished the effects of disclosure from outright restrictions on speech.<sup>133</sup> By definition, a compelled disclosure requires an entity to speak rather than restricting or prohibiting what it can say.<sup>134</sup>

This is not to say that all compelled disclosures escape the restrictive disclosure problem. Some “unduly burdensome” compelled disclosures could, in effect, “chill[ ] protected commercial speech.”<sup>135</sup> But compelled speech only unduly burdens an entity when the disclosure does not *reasonably* relate to the government’s stated interest.<sup>136</sup> For example, it would be unreasonable for the government to require a disclaimer to cover 100% of a product’s packaging, precluding basic information like the product’s name. In short, the notion of restrictive disclosure is only a product of unreasonable disclosure requirements—i.e., those requirements that do not reasonably relate to the government’s interest and thus fail *Zauderer* review. For that reason, to the extent the FDA’s graphic warnings rule constitutes a restrictive disclosure, the court would consider it during the substantive review stage, not during the preliminary inquiry of whether *Zauderer* applies at all.

Thus, since the rule qualifies as a compelled disclosure rather than a prohibition or restriction, the real dispute lies in whether the FDA’s graphic warnings convey “factual and uncontroversial” information.<sup>137</sup> Before determining if the warnings are factual and uncontroversial, that phrase must be defined in the context of the First Amendment. A plain definition of the phrase could require that viewers universally understand the statement, that the statement does not shock the reader, or, critically, that it does not stir up controversy. Indeed, given the facts of *Zauderer*, it would be easy to assume that disclosures are only uncontroversial when the information relates to a subject as banal as the structure of a contingency fee.<sup>138</sup>

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132. *E.g.*, *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 414 (D.C. Cir. 2012) (distinguishing between “limiting the manner in which [companies] may advertise information” and regulations that “prohibit[ ]” or “significantly burden[ ]” companies’ “ability to provide that information”), *cert. denied*, 133 S. Ct. 1723 (2013).

133. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

134. *Zauderer*, 471 U.S. at 650 (pointing to the “differences between disclosure requirements and outright prohibitions on speech”).

135. *Id.* at 651.

136. *Id.*

137. *See id.* (describing the information contained in the disclosure in that case). The D.C. Circuit concluded in *R.J. Reynolds* that the additional warnings do not simply convey “accurate statement[s]” about cigarettes. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (alteration in original) (quoting *Milavetz*, 559 U.S. at 250) (internal quotation marks omitted). In *Discount Tobacco*, by contrast, the court found that the warnings “require disclosing factual information rather than opinions.” *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 558 (6th Cir. 2012) (opinion of Stranch, J.), *cert. denied*, 133 S. Ct. 1996 (2013).

138. *Zauderer*, 471 U.S. at 652.



But limiting factual and uncontroversial disclosures to what the public already knows or would not find shocking, undermines the First Amendment goal of compelled commercial speech—if consumers already know the content of the disclosure, it does not *increase* market information.<sup>139</sup> *Zauderer* sheds light on the meaning of the phrase by contrasting factual and uncontroversial statements with prescriptions on “what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>140</sup> The Supreme Court later emphasized—correctly so—that *Zauderer* does not give license to the government to “require corporations to carry messages of third parties.”<sup>141</sup> In other words, a controversial statement is a matter of opinion or ideology while an uncontroversial statement is one of fact.<sup>142</sup> That difference aligns with the disclosure-focused approach—the content of the disclosure must add information to the public discourse, not attempt to shape the discourse with opinion. Thus, factual and uncontroversial information must include facts not necessarily known to the public. The relevant inquiry is whether the information is supported in fact, not whether it is widely understood.

Finally, the FDA’s warnings present an additional question: Can images, not just text, relay that sort of truthful message? Images can, and often do, convey factual information. As a basic example, educators commonly teach children the alphabet by showing them an image of a memorable object beginning with the object’s first letter—a strategy that has proved effective.<sup>143</sup> Similar to the graphic images at issue here, medical textbooks convey factual information through images by comparing healthy and unhealthy organs or cells.<sup>144</sup> At a minimum, the viewer is visually informed of the consequences of certain behaviors when confronted with images depicting those consequences, such as disease or cell death. Moreover, the text accompanying graphic images serves to focus the factual message, guiding the viewer’s understanding of the image.<sup>145</sup>

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139. See *supra* Section II.B.1.

140. *Zauderer*, 471 U.S. at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) (internal quotation marks omitted).

141. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 16 n.12 (1986) (plurality opinion); see also *Cent. Ill. Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987) (“*Zauderer* . . . does not suggest that companies can be made into involuntary solicitors for their ideological [*sic*] opponents.”).

142. *Cent. Ill. Light Co.*, 827 F.2d at 1173.

143. E.g., Barbara M. Fulk et al., *Effects of Integrated Picture Mnemonics on the Letter Recognition and Letter-Sound Acquisition of Transitional First-Grade Students with Special Needs*, 20 *LEARNING DISABILITY Q.* 33, 37–40 (1997) (finding improved letter-sound acquisition and letter recognition in special-needs children taught through an integrated picture mnemonics method).

144. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 (6th Cir. 2012) (opinion of Stranch, J.), *cert. denied*, 133 S. Ct. 1996 (2013).

145. Required Warnings for Cigarette Packages and Advertisements, 76 *Fed. Reg.* 36,628, 36,649 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2013)).

Of course, it would be easy to draw factual distinctions between the contingency-fee disclosure in *Zauderer* and the FDA's graphic warnings. Concededly, the graphic warnings differ in format from the disclosure in *Zauderer* and from other examples of compelled disclosure like nutritional information,<sup>146</sup> mercury content,<sup>147</sup> or conflicts of interest.<sup>148</sup> Nonetheless, the disclosures do the same work as those judicially sanctioned compelled disclosures by conveying *accurate* information. Under the disclosure-focused approach, *Zauderer* would not apply to images bearing no relationship to their accompanying text. An image of a frightening monster would add little value to a textual statement warning that smoking causes throat cancer. Here, however, the FDA's studies showed a positive correlation between the presence of these specific images and the viewer's understanding of the textual warnings.<sup>149</sup> It follows that these images sufficiently relate to the textual warnings to convey the same message.<sup>150</sup>

In general, images are not merely a means to frighten consumers or to manipulate their emotions.<sup>151</sup> The FDA's graphic warnings do not "browbeat consumers into quitting."<sup>152</sup> The images, of course, provoke *some* emotional response, as one might expect from any warning. Part of the FDA's support study considered the emotional impact on the viewer,<sup>153</sup> but it examined other factors as well, including the "cognitive" impact, the viewer's ability to "recall" the message, and the impact on the viewer's "beliefs" regarding the veracity of the warning content.<sup>154</sup> As the FDA explained, the images draw attention to the textual warnings and help consumers remember that message.<sup>155</sup> In short, the images contribute to the factual message by increasing consumer retention rather than provoking a purely emotional reaction.

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146. *Kraft, Inc. v. FTC*, 970 F.2d 311, 321 (7th Cir. 1992).

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

148. *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309–10 (1st Cir. 2005) (per curiam).

149. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,648 ("[T]he images showed a statistically significant effect on . . . the study populations (adult smokers aged 25 or older, young adult smokers aged 18 to 24, and youth who currently smoke or who are susceptible to smoking aged 13 to 17) . . .").

150. It may also follow that the images reasonably relate to the government's goal of educating consumers. But that conclusion involves the application of the standard, not which standard to apply. See *infra* Section III.C for a discussion of how the graphic warnings fare under *Zauderer* review.

151. For a summary of this criticism, see *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 529 (6th Cir. 2012) (lead opinion of Clay, J., dissenting in part), *cert. denied*, 133 S. Ct. 1996 (2013).

152. *Contra* *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012).

153. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,638–39.

154. *Id.*

155. *Id.* at 36,696 ("[T]he addition of graphic images to health warning messages causes consumers to notice and attend to the warning information in the first instance, and increases recall of the warning message and the depth of cognitive processing of the message.").

Some have argued that images have a uniquely emotional impact on viewers, leading to a normative message and an altered choice rather than a factual message and an informed choice.<sup>156</sup> That conclusion assumes that emotional reactions cannot inform the viewer. The possibility, or even likelihood, that a warning might provoke an emotional response should not render it counterfactual or controversial within the meaning of *Zauderer*.<sup>157</sup> For example, a customer may feel ill after reading the calorie count in a cheeseburger, but that does not make the caloric value controversial. Learning the mercury content of batteries could lead consumers to draw negative inferences about the manufacturer's attitudes toward the environment, but the information remains true.

The Supreme Court explicitly recognized these conclusions in *Zauderer* itself. The *Zauderer* decision rejected the argument that images can only be used "to play on the emotions of [their] audience."<sup>158</sup> The Court adopted the more sophisticated view that illustrations serve "important communicative functions," as they not only attract the attention of viewers but also "impart information directly."<sup>159</sup> In fact, the Court concluded its discussion by prohibiting the government from restricting graphic expression.<sup>160</sup> Hence, the holding essentially rejects treating images differently than text merely because they are images—as with all speech, the analysis comes down to content.

#### B. *Are the Graphic Warnings Factual and Uncontroversial?*

Whether the content of the FDA's graphic warnings is factual and uncontroversial depends on the truth of the warnings themselves. Each of the nine images conveys a factual, uncontroversial warning. As a result, the images satisfy the second step of the disclosure-focused approach and therefore merit *Zauderer* review. As a preliminary matter, when evaluating the information contained in the compelled disclosure, it is important to recognize scientific and commercial realities. As the court in *Discount Tobacco* noted, it is "beyond cavil" that smoking causes serious health problems.<sup>161</sup> No credible argument can be leveled to suggest that it is counterfactual or controversial that smoking tobacco adversely affects health.<sup>162</sup>

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156. Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 578–80 (2012).

157. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) (opinion of Stranch, J.) ("Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions."), *cert. denied*, 133 S. Ct. 1996 (2013).

158. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985).

159. *Id.* at 647.

160. *Id.* at 648–49.

161. *Disc. Tobacco*, 674 F.3d at 558, 560–61 (opinion of Stranch, J.).

162. See generally B. Adhikari et al., *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, 57 CDC MORBIDITY & MORTALITY

The FDA provided substantial evidence to suggest that by and large, the public does not have adequate information about the risks of smoking. While the public has at least a *general* understanding that smoking is “bad for you”—whatever that may mean from person to person—studies show that Americans are largely unfamiliar with the *specific* risks of tobacco use.<sup>163</sup> The public is particularly unfamiliar with effects unrelated to the lungs, mouth, or throat, including low birth weight in infants; increased likelihood of miscarriage; head and neck cancers; cervical cancer; stomach ulcers; adverse consequence for reproductive health; osteoporosis; and Sudden Infant Death Syndrome.<sup>164</sup> For that reason, when tobacco companies sell their products by emphasizing the pleasures or satisfactions of tobacco use, the Federal Trade Commission (“FTC”) requires disclosure of the negative health effects as well.<sup>165</sup>

Moreover, existing text-only warnings failed to inform the public about these general health risks.<sup>166</sup> Prior to the FDA’s graphic-warnings rule, the text-only warnings had not been changed in over twenty-five years, leaving

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WKLY. REP. 1226 (2008), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

163. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,633 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2013)); see also COMM. ON REDUCING TOBACCO USE, ENDING THE TOBACCO PROBLEM 93 (Richard J. Bonnie et. al. eds., 2007) (“[A]dolescents misperceive the magnitude of smoking harms and the addictive properties of tobacco and fail to appreciate the long-term dangers of smoking, especially when they apply the dangers to their own behavior”); Kathleen H. Jamieson & Berenice Saxon, *Sure, Smoking Causes Cancer, but It Won’t Happen to Me*, ROBERT WOOD JOHNSON FOUND. (July 2001), <http://www.rwjf.org/reports/grr/037045.htm>.

164. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,632–33; see also Cheryl Oncken et al., *Knowledge and Perceived Risk of Smoking-Related Conditions: A Survey of Cigarette Smokers*, 40 PREVENTIVE MED. 779, 781 (2005) (finding that the following percentages of smokers agreed that smoking could lead to the associated health risk: low birth weight in babies (88%); worsened asthma (85%); miscarriages (76%); other cancers (69%); head and neck cancers (68%); cervical cancer (48%); stomach ulcers (46%); reproductive difficulties (44%); osteoporosis (41%); and Sudden Infant Death Syndrome (40%)).

165. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 527–29 (1992) (plurality opinion) (quoting the FTC’s conclusion that “[t]o avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves” (quoting *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8356 (July 2, 1964) (codified as amended at 16 C.F.R. pt. 408 (2013))) (internal quotation marks omitted)). While the FTC vacated its 1964 labeling requirements in a 1965 regulation, the Commission reaffirmed its initial findings, noting that “it would be inconsistent with the objectives of [labeling requirements] for a manufacturer to be permitted to make advertising claims, or conduct an advertising campaign, which negate, contradict, or dilute the effectiveness of the cautionary statement on the packages.” *Vacation of Warning Requirements in Trade Regulation Rule Concerning Advertising and Labeling of Cigarettes*, 30 Fed. Reg. 9484, 9485 (July 29, 1965) (codified at 16 C.F.R. pt. 408 (2013)).

166. Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,529–31 (proposed Nov. 12, 2010) (final rule codified at 21 C.F.R. pt. 1141 (2013)).

them “unnoticed and stale.”<sup>167</sup> Consistent with that finding, statistical evidence shows that these warnings did not reach a large number of tobacco consumers. For example, 43.6% of adolescents viewing tobacco advertisements did not even look at the warnings.<sup>168</sup> Only 36.7% viewed the warnings long enough to read them, and, among that population, the warnings only occupied 8% of the total viewing time.<sup>169</sup> Finally, the FDA found that even where consumers noticed and read the warnings, the warnings were too small, vague, and wordy to convey effectively the risks inherent in using the product.<sup>170</sup> Summarizing its findings, the FDA noted that “[w]hile most smokers understand that smoking poses certain statistical risks to their health, many fail to appreciate the severity and magnitude of those risks.”<sup>171</sup> In total, the textual warnings failed to convey adequately the actual risks of use.

Absent effective warnings, which actually impart knowledge of the risks to potential smokers, consumers will often fail to appreciate the consequences of smoking.<sup>172</sup> Of course, the tobacco companies do not necessarily *intend* that their customers remain uninformed about these consequences.<sup>173</sup> But, as described above, the touchstone of the disclosure-focused approach is improving market information. In light of the inadequacy of previous text-only warnings, the graphic warnings paint a more complete picture for consumers, preparing them to make better-informed purchasing decisions.

Other counterarguments suggest that at a minimum, *Zauderer* should not apply to images devoid of health-related content—for example, the picture of a man wearing a T-shirt with the phrase “I QUIT.”<sup>174</sup> Of the nine images the FDA selected, this image most strongly resembles opinion rather than fact. Indeed, as the FDA noted in its Final Rule, the image received positive feedback from experts in the field precisely because it “model[ed] a positive behavior” and would “encourage others to quit.”<sup>175</sup> But this criticism falls into the trap of the deception-focused approach: it evaluates the

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167. *Id.* at 69,529–30 (internal quotation marks omitted).

168. *Id.* at 69,530.

169. *Id.*

170. *Id.* at 69,530–31 (“The mere textual presentation of vague hazard information in the current U.S. warnings is not sufficient to motivate perceptions of risk.”).

171. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,632 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2013)).

172. As the FDA noted, a 2005 study of smokers in the United States and three other countries found that “smokers are not fully informed about the risks of smoking, and that warnings that are graphic, larger, and more comprehensive in content are more effective in communicating the health risks of smoking.” *Id.*

173. Of course, many tobacco companies have demonstrated a willingness to perpetuate public ignorance on the health risks of smoking. See *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123–28 (D.C. Cir. 2009).

174. For the D.C. Circuit’s summary of this criticism, see *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012).

175. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,656.

government's regulatory motive.<sup>176</sup> Instead, one must look to the message the warning actually conveys.

By itself, the "I QUIT" image may well fall short of receiving *Zauderer* review under the disclosure-focused approach. But the text accompanying the image focuses the image's message: "WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."<sup>177</sup> This statement is one of fact, supported by many medical studies cited by the FDA in the Final Rules.<sup>178</sup> At the very least, this image, along with the compelled "1-800-QUIT-NOW" hotline number, conveys the support that is available to those who intend or desire to quit smoking.<sup>179</sup> Tobacco companies may not enjoy the message, as it makes their product less desirable. But the disclosure-focused approach asks what *is* true, not what an advertiser *wishes* were true. Moreover, there is an important difference between whether the statement is true and whether it reasonably relates to the government's goal—as mentioned above, the disclosure-focused approach requires a separation between selecting a standard and applying it. Since the "I-QUIT" warning conveys truthful information about the effects of not using the product, it falls within the bounds of *Zauderer* review.

Because the images proposed by the FDA each convey factual messages—such as the possibility of contracting heart and lung disease, suffering a stroke, or endangering children with secondhand smoke—they all fall within the ambit of *Zauderer*. Thus, the mandatory graphic warning requirement constitutes a compelled disclosure of purely factual, uncontroversial information, consistent with the disclosure-focused approach. The information embedded in the warnings works toward the goal of more perfect consumer information in the marketplace. As a result, courts should review the measure using *Zauderer*'s "reasonably related" standard.

### C. *The Governmental Motive—Applying the Zauderer Standard*

The Sixth and D.C. Circuits characterized differently the governmental interest animating the graphic warnings requirement. In *Discount Tobacco*, the Sixth Circuit asserted without much discussion that the warnings work to prevent consumer deception about tobacco products.<sup>180</sup> In *R.J. Reynolds*,

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176. The FDA made its purpose clear when describing the motivations of its graphic warnings study: "to evaluate the relative effectiveness of the proposed color graphic images and their accompanying textual warning statements at conveying information about various health risks of smoking, and additionally, at encouraging smoking cessation and discouraging smoking initiation." *Id.* at 36,636 (emphasis added).

177. *Id.* at 36,656.

178. See generally OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., HOW TOBACCO SMOKE CAUSES DISEASE (2010), available at <http://www.surgeongeneral.gov/library/reports/tobaccosmoke/executivesummary.pdf>.

179. See 21 C.F.R. § 1141.16 (2013); Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,680–90.

180. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 562, 569 (6th Cir. 2012) (opinion of Stranch, J.) ("The question we are thus faced with is whether graphic and textual warnings that convey factual information about the health risks of tobacco use are

however, the D.C. Circuit determined that the government's goal was to decrease tobacco consumption, a determination that informed the court's decision not to apply the *Zauderer* standard.<sup>181</sup> But both of these conclusions miss the mark: rather than examining the government's stated purpose as a substantive component of *Zauderer* review, they incorrectly regard it as a precondition to applying *Zauderer at all*. As mentioned above, under the disclosure-focused approach, courts should only evaluate Congress's motive to determine if the compelled disclosure reasonably relates to advancing the governmental interest.

In this instance, Congress directly stated its intent to educate the public through the FSPTCA's measures.<sup>182</sup> At the same time, Congress identified "promot[ing] cessation" of tobacco use as another primary objective.<sup>183</sup> Thus, if the warnings reasonably relate to the state's interest in educating consumers and decreasing tobacco consumption, the courts must uphold the disclosure.

From this perspective, the FDA rule easily passes constitutional muster. Out of thirty-six proposed graphic warnings, the FDA selected the nine that were most effective in educating consumers.<sup>184</sup> Because smoking is vastly more common among uneducated consumers than among those with higher levels of education,<sup>185</sup> the FDA suggested that it would be particularly important that graphic warnings were designed to ensure that less-educated consumers understood the health effects of tobacco products.<sup>186</sup> More generally, the FDA found evidence that in thirty other countries with graphic warning requirements on tobacco products, consumers showed a better understanding of the risks of tobacco use.<sup>187</sup> In short, the warnings requirement reasonably relates to both the government's interest in educating

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reasonably related to the purpose of preventing consumer deception."), *cert. denied*, 133 S. Ct. 1996 (2013).

181. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) ("The warnings thus represent an ongoing effort to discourage consumers from buying the Companies' products, rather than . . . a measure designed to combat specific deceptive claims.").

182. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(6), 123 Stat. 1776, 1782 (2009) (describing one purpose of the act as "to ensure that consumers are better informed, to require tobacco product manufacturers to disclose research which has not previously been made available, as well as research generated in the future, relating to the health and dependency effects or safety of tobacco products").

183. *Id.* § 3(9).

184. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,636.

185. *Id.* at 36,630 ("49.1 percent of adults with a General Education Development certificate (GED) and 28.5 percent of adults with less than a high school diploma were current smokers in 2009, compared with 5.6 percent of adults with a graduate degree.").

186. *Id.* ("[G]raphic health warnings may be particularly important communication tools for these smokers, as there is evidence suggesting that countries with graphic health warnings demonstrate fewer disparities in health knowledge across educational levels.").

187. *Id.* at 36,633 (citing Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,531-33 (proposed Nov. 12, 2010) (final rule codified at 21 C.F.R. pt. 1141 (2013))); see also COMM. ON REDUCING TOBACCO USE, *supra* note 163, at 295.

consumers about the negative health effects of tobacco use *and* the related interest in reducing tobacco consumption. As such, the FDA's rule passes *Zauderer* review.

#### CONCLUSION

The disclosure-focused approach to *Zauderer* recognizes that more information is better. As this Note has shown, images, such as those required by the FDA's graphic warnings rule, can help advance this goal. Tobacco products cause lung cancer, heart disease, emphysema, and many other health problems. Secondhand smoke can result in the same effects in bystanders. Absent effective warnings, consumers make purchasing decisions without knowing the health consequences of the products they buy. The imperfect nature of this purchasing information contravenes the fundamental reason justifying protection of commercial speech—to improve knowledge in the market. Requiring textual warnings of the dangers of tobacco use advances the information-driven underpinnings of the First Amendment, but it only does so if the warnings adequately convey the information. Including graphic images to accompany the text furthers this goal by providing legitimate content on the health risks while increasing consumer retention.

While the FDA has resigned itself to the D.C. Circuit's decision in *R.J. Reynolds*, courts should recognize the value of new methods of conveying information in the marketplace. Adopting the disclosure-focused approach and discarding the unnecessarily restrictive deception-focused approach will synchronize compelled disclosure cases with First Amendment doctrine. Since images facilitate the same informational goals as other modes of expression, courts should not limit the applicability of compelled disclosure cases to exclude graphic content. After all, a picture is worth a thousand words.