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**CENSORSHIP IS SO LAST CENTURY: THERAPEUTIC PRODUCTS,
PROPAGANDA, AND COMPELLED SPEECH**

LARS NOAH*

ABSTRACT

In 2018, the U.S. Supreme Court decided National Institute of Family & Life Advocates v. Becerra, striking down a California law mandating that clinics for low-income pregnant women disclose, among other things, the availability of publicly-funded abortion services at other facilities. Although frequently maligned for allowing crisis pregnancy centers to mislead their clients, the decision gave private parties a powerful new tool for resisting government demands to carry unwanted messages: only genuinely “uncontroversial” disclaimer requirements pass muster, and only to the extent necessary to guard against potentially misleading claims. If applied in an even-handed fashion, then courts should just as readily invalidate laws recently adopted in almost a dozen states (and sponsored by pro-life groups) that obligate suppliers of the abortifacient mifepristone to incorrectly advise patients that they could reverse the procedure even after starting use of the drug. More straightforward state and federal disclosure requirements may, however, also fare poorly. Under the cover of an abortion-related dispute, Justice Thomas finally appears to have succeeded in his long-running campaign to collapse the distinction between core and commercial speech.

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For the last several decades, sellers of pharmaceuticals and medical devices have invoked the First Amendment in order to resist efforts by the U.S. Food and Drug Administration (“FDA”) to squelch their dissemination of commercial speech.¹ Federal judges have become more receptive to such objections, reminding regulatory officials that the disclosure of more information represented the constitutionally preferred response to misgivings about potentially misleading promotional claims.² In an environment where crass political calculations have at times trumped evidence-based public health information,³ fears over government censorship have now started to give way to concerns about hijacking product labeling in order to spread propaganda.⁴

1. See Lars Noah, *Banning Off-Label Drug Promotion Offends the U.S. Constitution: Making the Strongest Case*, 83 ALB. L. REV. 301, 301 n.1 (2020) (citing some of the latest commentary on this question).

2. See, e.g., *Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196, 230–36 (S.D.N.Y. 2015) (issuing a preliminary injunction to bar threatened regulatory action against particular statements about off-label uses of a prescription omega-3 fatty acid product when accompanied by a series of disclosures specified by the court and based on proposed language offered by the parties); *All. for Nat. Health US v. Sebelius*, 714 F. Supp. 2d 48, 52–56, 61–65 (D.D.C. 2010) (recounting multiple successful challenges to the FDA’s failure to allow health claims for various dietary supplements accompanied by suitable disclaimers); *id.* at 66–72 (directing the agency to consider allowing certain anticancer claims—in some cases with milder disclaimers—for supplements containing selenium); see also Lars Noah, *Permission to Speak Freely?*, 162 U. PA. L. REV. ONLINE 248, 253 (2014) (“[I]n guarding against potentially false or misleading claims, the [Supreme] Court routinely suggests disclaimer requirements as less-speech-restrictive alternatives, even if audiences routinely fail to read the small print. In the context of prescription drug advertising, health care professionals remain the primary audience, which makes a preference for disclaimers over flat prohibitions easier to swallow.”).

3. See Sheryl Gay Stolberg & Noah Weiland, *President Perpetuates Falsehoods, Study Finds*, N.Y. TIMES, Oct. 1, 2020, at A9 (discussing “the first comprehensive examination of coronavirus misinformation in traditional and online media,” which found that “by far the most prevalent topic of misinformation . . . was ‘miracle cures,’ including Mr. Trump’s promotion of anti-malarial drugs and disinfectants as potential treatments for Covid-19”); Noah Weiland, *How the C.D.C. Lost Its Voice Under Trump*, N.Y. TIMES, Dec. 17, 2020, at A8 (“[P]olitical appointees at the health department repeatedly asked C.D.C. officials to revise, delay and even scuttle drafts they thought could be viewed, by implication, as criticism of President Trump.”); Noah Weiland & Sharon LaFraniere, *Inside the Administration’s Failed “Defeat Despair” Project*, N.Y. TIMES, Oct. 30, 2020, at A6 (“Michael R. Caputo, the assistant secretary for public affairs at the Department of Health and Human Services, . . . had drawn attention to the [shambolic] public relations campaign last month during an extended rant on Facebook, claiming that . . . career government scientists were engaging in ‘sedition’ to undermine the president.”).

4. In *Meese v. Keene*, 481 U.S. 465 (1987), the Supreme Court took pains to explain that the term “propaganda” did not invariably carry a pejorative meaning, see *id.* at 477–80, 483–85. It did so in the course of upholding a federal law requiring that certain movies containing political advocacy (in that case, related to acid rain, among other potentially subversive subjects) produced with the support of a foreign government (in that case, the National Film Board of Canada) disclose that they represent “political propaganda” after a U.S. citizen wishing to show these films—one of which had won an Oscar award as best foreign documentary—challenged application of the law to

Since the mid-1970s, the U.S. Supreme Court has recognized that advertising enjoys some of the First Amendment's guarantees for freedom of expression, with its earliest decisions in this line all arising in the health care context.⁵ Some of its newer decisions striking down laws for abridging commercial speech originated in that setting as well.⁶ Although the Court has regularly applied a form of intermediate scrutiny in such cases, the requirement for the government to demonstrate that it has narrowly tailored its laws to serve a substantial interest has become more demanding over time.⁷ The government may protect consumers from false or misleading information, but it generally may not prohibit truthful and nondeceptive claims in pursuit of some other valuable end.⁸

The Supreme Court's clearest early guidance about the constitutional treatment of disclosure requirements emerged from a different, but also frequently litigated, type of commercial speech case: advertising by attorneys.⁹

him. *See id.* at 467–76. Even though this plainly related to core speech, the majority viewed the required disclaimer as providing viewers with useful additional information, *see id.* at 480–82, much like a rating for violence or other content inappropriate for some viewers! I mean to use the term “propaganda” in its pejorative sense, focusing on the home-grown and unmarked variety. *Accord* Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 817–19, 826–64 (2020).

5. *See* *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681–82, 701–02 (1977) (invalidating a state prohibition on advertising nonprescription contraceptives); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772–73 (1976) (striking down a state prohibition against the advertising of prescription drug prices by pharmacists); *Bigelow v. Virginia*, 421 U.S. 809, 825–29 (1975) (invalidating a prohibition on newspaper advertisements by out-of-state abortion providers).

6. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577–80 (2011) (striking down a Vermont law that barred prescription data mining when it helps pharmaceutical salespeople refine the pitches that they make to physicians); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371–73 (2002) (invalidating a congressional prohibition on advertising by pharmacists about the availability of particular compounded drugs).

7. *See* Lars Noah, *When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?*, 85 GEO. WASH. L. REV. 1462, 1468–69, 1481–83 & n.79 (2017).

8. *See* Lars Noah, *Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA)*, 21 HEALTH MATRIX 31, 67 (2011) (explaining that “outright prohibitions designed to dampen demand (or to serve other collateral purposes) [are] vulnerable to constitutional invalidation”); *id.* at 67–68 (“[T]he First Amendment allows the government to guard against the dissemination of false or deceptive commercial speech but not much else.”); *see also id.* at 79 (“The [FDA] failed . . . to explain—as the current Court surely would insist—why disclosure requirements alone would not achieve its goal of guarding against the dissemination of potentially misleading information” to physicians when pharmaceutical manufacturers distribute article reprints that discuss off-label uses of their products.).

9. *See* Lars Noah, *Giving Personal Injury Attorneys Who Run Misleading Drug Ads a Dose of Their Own Medicine*, 2019 U. ILL. L. REV. 701, 714–16 (summarizing this line of decisions). In the pharmacy case that had inaugurated constitutional protection for commercial speech, the Court endorsed (in dicta) disclosure requirements, recognizing that certain attributes of advertising “make it appropriate to require that a commercial message . . . include such additional information,

In 1985, in *Zauderer v. Office of Disciplinary Counsel*,¹⁰ it upheld a requirement that attorneys clarify the nature of contingency fee arrangements in their print advertisements.¹¹ The Court demanded only that the state regulation be “reasonably related” to the asserted governmental interest,¹² though it recognized that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”¹³ In the more than three decades since, and in spite of the Court’s clearly expressed allegiance to that older decision,¹⁴ lower federal courts have struggled to make

warnings, and disclaimers, as are necessary to prevent its being deceptive.” *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24; *see also W. States Med. Ctr.*, 535 U.S. at 376 (“Even if the Government did argue that it had an interest in preventing misleading advertisements, this interest could be satisfied by the far less restrictive alternative of requiring each compounded drug to be labeled with a warning that the drug had not undergone FDA testing and that its risks were unknown.”).

10. 471 U.S. 626 (1985).

11. *See id.* at 650–53.

12. *See id.* at 651; *id.* at 651–52 n.14 (“Although we have subjected outright prohibitions on speech to such [a strict ‘least restrictive means’] analysis, all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech.”); *see also Peel v. Att’y Registration & Disciplinary Comm’n*, 496 U.S. 91, 109 (1990) (plurality opinion) (noting the “presumption favoring disclosure over concealment”); *id.* at 115–17 (Marshall, J., concurring in judgment) (same); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (“prefer[ring] a requirement of disclaimers or explanation”).

13. *Zauderer*, 471 U.S. at 651. The Court distinguished its more stringent approach to cases involving compelled noncommercial speech. *See id.* at 650–51. *See generally* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1; Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359 (2020).

14. Twenty-five years after *Zauderer*, for instance, the Court unanimously upheld a federal statute requiring, among other things, the following disclosure: “We are a debt relief agency. We help people file for bankruptcy” *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 233, 252–53 (2010). In rejecting a constitutional challenge brought by bankruptcy lawyers, the Court reiterated the distinction between commercial speech restrictions and requirements for fuller disclosure. *See id.* at 249–50. Somewhat confusingly, the opinion referred to “inherently misleading” claims, *see id.* at 250, which if true should have deprived them of any First Amendment protection, but elsewhere the Court discussed *potentially* deceptive claims and made it clear that the government would not have to prove that characterization, *see id.* at 251. It also focused on just the accuracy of the mandated disclosure rather than asking whether it was factual and uncontroversial. *See id.* at 250–52. Only one member of the Court wrote separately on this point. *See id.* at 255–59 (Thomas, J., concurring in part and concurring in judgment) (reiterating his view that commercial speech deserves full protection, and expressing particular qualms about *Zauderer*). In point of fact, and in contrast to *Zauderer*, the disclosure upheld in *Milavetz* was hardly reserved for curing instances of potentially deceptive messages; instead, Congress had demanded the provision of more information—and dictated the precise verbiage to use—about the nature of the services offered by any and all covered professionals and businesses.

sense of *Zauderer* when assessing constitutional objections to various other types of disclosure requirements.¹⁵

Although restrictions on commercial speech nominally remain subject to an unremarkable form of intermediate scrutiny, the Supreme Court has imported collateral rules affiliated with the stricter scrutiny previously reserved for core speech: the unconstitutional conditions doctrine,¹⁶ prohibitions on content- and viewpoint-discrimination,¹⁷ and, in *National Institute of Family & Life Advocates (NIFLA) v. Becerra*,¹⁸ a stringent approach to compelled speech. In that 2018 decision, the Court considered a pair of disclosure requirements imposed by a California statute. First, a “licensed covered facility,” which the law defined as a licensed medical clinic whose “primary purpose” was “providing family planning or pregnancy-related services,”¹⁹ had to post the following notice on site: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].”²⁰ Second, an “unlicensed covered facility,” which the law defined as having the same purpose,²¹ had to post the following notice on site as well as in any advertisements: “This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”²²

15. See Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 885–911 (2015); *id.* at 915 (discussing “the doctrinal turbulence presently enveloping compelled commercial speech”); Lauren Fowler, Note, *The “Uncontroversial” Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651, 1674–82 (2019); Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 972–74, 979–93 (2017); see also Lars Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 105 & n.207 (1995) (referencing older decisions on “coerced” speech, and observing that “the government’s power to demand warnings generally is accepted as legitimate”).

16. See Noah, *supra* note 8, at 54–55, 63 (explaining this barely visible feature of the decision in *Western States*); *id.* at 81 n.207; *id.* at 57 (“point[ing] out that this doctrine seems out of place in commercial speech cases”).

17. See Lars Noah, *Does the U.S. Constitution Constrain State Products Liability Doctrine?*, 92 TEMP. L. REV. 189, 196 n.31, 210 n.125 (2019).

18. 138 S. Ct. 2361 (2018).

19. CAL. HEALTH & SAFETY CODE § 123471(a) (West 2020).

20. *Id.* § 123472(a).

21. See *id.* § 123471(b).

22. *Id.* § 123472(b). Although not challenged, a different provision of state law imposed a disclaimer requirement potentially applicable to a common practice at many of these same clinics. See *id.* § 123620 (requiring written disclosure to a client undergoing fetal ultrasonography as follows: “The [FDA] has determined that the use of medical ultrasound equipment for other than medical purposes, or without a physician’s prescription, is an unapproved use.”). Although the title of this provision broadly referenced “non-medical purpose,” the operative text applied only to

Challenged by a pair of clinics and their sponsoring organization on free speech grounds, the lower courts rejected a motion for a preliminary injunction, but the Supreme Court reversed in a 5–4 decision, concluding that the petitioners had demonstrated a likelihood of success on the merits.²³ Justice Clarence Thomas penned the majority opinion for the Court’s conservative wing,²⁴ while Justice Stephen Breyer authored the dissenting opinion for the liberal wing.²⁵ Much of the majority’s analysis strikes me as dishonest, and the dissent provided a fairly comprehensive rebuttal. Given the subsequent changes in the Court’s makeup,²⁶ however, none of this really matters—*NIFLA* seems secure as a precedent for now. I am more interested in exploring what the decision might portend going forward, especially given some of the things left largely unsaid in any of the opinions.

facilities offering fetal ultrasounds “for keepsake or entertainment purposes,” without further defining the term “keepsake” (would printing out the image for a client to take home as a memento suffice?).

23. See *NIFLA*, 138 S. Ct. at 2370, 2378; see also *id.* at 2377 n.4 (“Nothing in our opinion should be read to foreclose the possibility that California will gather enough evidence in later stages of this litigation” to possibly justify the disclosure requirement for unlicensed clinics.).

24. In a brief concurrence, all members of the majority apart from Justice Thomas wrote separately “to underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern.” *Id.* at 2378 (Kennedy, J., concurring); *id.* at 2379 (“[The statute’s] underinclusive application suggest[s] a real possibility that these individuals were targeted because of their beliefs.”); *id.* (“Governments must not be allowed to force persons to express a message contrary to their deepest convictions.”). The notion that business entities unaffiliated with religious institutions can have deep convictions aligns with the high Court’s controversial decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014), which concluded that owners of closely held corporations had a statutorily protected right to opt out of the federally mandated health insurance coverage for contraceptives thought to interfere with the implantation of a fertilized egg. See Noah, *supra* note 7, at 1470–71 n.31 (“Most commentators . . . focused their criticism on the central premise of the Court’s opinion [in *Hobby Lobby*]—namely, the recognition that for-profit corporations enjoy free exercise rights.”). In any event, Justice Thomas found it unnecessary to reach the viewpoint-discrimination argument, see *NIFLA*, 138 S. Ct. at 2370–71 n.2 (majority opinion), while the four dissenters thought that the plaintiffs had produced no evidence to support this allegation, see *id.* at 2388–89 (Breyer, J., dissenting); *id.* at 2391 (“The Act does not, on its face, distinguish between facilities that favor pro-life and those that favor pro-choice points of view. Nor is there any convincing evidence before us . . . that discrimination was the purpose or the effect of the statute.”).

25. See *NIFLA*, 138 S. Ct. at 2379 (Breyer, J., dissenting); see also Adam Liptak, *How Free Speech Was Weaponized by Conservatives*, N.Y. TIMES, July 1, 2018, at A1 (reporting that the line up in this decision exemplifies fundamental shifts in First Amendment jurisprudence).

26. See Lawrence O. Gostin et al., *Health Policy in the Supreme Court and a New Conservative Majority*, 324 JAMA 2157, 2157–58 (2020); Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES, Apr. 6, 2021, at A14; cf. *FDA v. Am. Col. Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (mem.) (voting 6–3 to issue a stay pending appeal of the district court’s preliminary injunction against enforcement during the pandemic of the agency’s requirement that patients visit a health care provider in order to receive the abortifacient mifepristone).

The Justices devoted much of their energy to debating whether “professional speech” enjoyed reduced constitutional protection: the majority denied that such a separate category even existed,²⁷ while the dissent identified numerous precedents that plainly suggested otherwise.²⁸ Insofar as the lower courts had framed the question in these terms,²⁹ the preoccupation with professional speech comes as no great surprise, but it strikes me as an unfortunate distraction and too easily allowed the majority to view the speech at issue as meriting full protection.

In no sense did the statutory provisions obligate professionals to engage in any sort of speech whatsoever; indeed, the second disclosure requirement applied only to unlicensed facilities, which the law defined as those operated by persons lacking the status of medical professionals. Instead, the state demanded that *clinics* communicate this information.³⁰ Even though businesses may enjoy full constitutional protection when engaging in other forms of expression,³¹ commercial speech principles unmistakably govern those situations where they solicit customers.³²

The California law did not limit its application to “advertising” by these clinics, but the Court has never confined commercial speech only to such traditional forms of marketing.³³ Indeed, the law’s coverage depended on

27. See *NIFLA*, 138 S. Ct. at 2371–75 (majority opinion).

28. See *id.* at 2383–86 (Breyer, J., dissenting).

29. See *NIFLA v. Harris*, 839 F.3d 823, 838–41 (9th Cir. 2016); *id.* at 834 n.5 (“The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech.”).

30. In struggling to distinguish precedents upholding disclosure requirements as an aspect of informed consent, the majority seemingly recognized as much (though not the consequence of doing so). See *NIFLA*, 138 S. Ct. at 2373 (“The notice . . . is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed.”). The same goes for its effort to demonstrate under-inclusivity of the disclosure requirement for unlicensed facilities. See *id.* at 2378 (“[A] facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed.”). It takes little effort, however, to explain this differential treatment. See *id.* at 2391 (Breyer, J., dissenting) (“[P]regnant women generally do not need contraceptive services.”). More importantly, it concedes my point about the fundamentally commercial nature of the speech that triggers the disclosure obligations in the first place.

31. See Noah, *supra* note 8, at 92–95.

32. If, in fact, *NIFLA* did not involve commercial speech, then why did the majority bother discussing *Zauderer*? Obviously, even if only dictum, the Court’s explication of that precedent will prove to be influential in future cases that unmistakably involve commercial speech, but to my mind it reflects a concession about the nature of the case. After all, *Zauderer* (and *Milavetz*) had involved speech directed to prospective clients as opposed to speech occurring within an established professional relationship.

33. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481, 488–91 (1995) (beer labels: invalidating federal prohibition on disclosures of alcohol content); *Ibanez v. Fla. Dep’t of Bus. & Prof’l Reg.*, 512 U.S. 136, 138, 144–47 (1994) (law firm letterhead, business cards, and phone book

identifying the “primary purpose” of a clinic,³⁴ which would necessitate some inquiry into how they had presented themselves to the community (e.g., name of the facility, listing in a phone book or other directory).³⁵ Surely the state can insist that those clinics presenting themselves—through advertising or otherwise—as offering reproductive health services or catering to pregnant

listings: overturning a state Board of Accountancy order censuring one of its members for including references to her credentials as a certified public accountant and a certified financial planner); *see also* Noah, *supra* note 15, at 90; *id.* at 89 (“*Coors* represents the Court’s first commercial speech decision directly to address product labeling controls.”); *id.* at 64 (“The Court’s unanimous decision in *Coors* represents an important extension and clarification of its prior holdings in this area.”). In its latest decision expanding the category of commercial speech, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), the Court held that merely notifying customers of a “surcharge” for payment by credit card enjoys protection, *see id.* at 1151. The challenged state law only barred the act of imposing such an additional charge, however, and presumably would apply even where a merchant gave no advance warning to its customers, while the law did not actually prohibit posting a notice that merely threatened to impose a surcharge, perhaps simply as a bluff (i.e., an empty threat designed to discourage credit card use). Moreover, though the Court remanded the case to allow the lower courts to engage in heightened scrutiny, even if they read the state law as also banning the act of posting any such notice, it should survive insofar as no protection exists when the matter referenced by commercial speech itself qualifies as unlawful. *See* Noah, *supra* note 8, at 39, 56 & n.116.

34. *See* CAL. HEALTH & SAFETY CODE § 123471(a)&(b) (West 2020). The FDA’s regulatory regime turns on answering a comparable sort of question (i.e., what is the “intended use” of a product?), which explains why the newer commercial speech decisions pose such a fundamental threat to that agency’s traditional way of doing business. *See* Noah, *supra* note 8, at 55–56 n.112 (“If the FDA could no longer indirectly penalize commercial speech by subjecting the products described by such speech to more rigorous regulatory controls, then most erstwhile therapeutic products could escape agency licensure requirements altogether and face only the general prohibitions on misbranding that apply to all FDA-regulated products.”); *see also id.* at 65 (“[T]he robust version of commercial free speech doctrine that seems to prevail today could profoundly impinge upon the FDA’s (and other agencies’) preferred methods for promoting the public’s health.”).

35. *See* Sonya Borrero et al., *Crisis Pregnancy Centers: Faith Centers Operating in Bad Faith*, 34 J. GEN. INTERNAL MED. 144, 144 (2019) (“[T]hey typically advertise their services (most famously on highway billboards) using language and images that present themselves as unbiased, comprehensive health centers.”); Hayley E. Malcolm, Note, *Pregnancy Centers and the Limits of Mandated Disclosure*, 119 COLUM. L. REV. 1133, 1142–46, 1150–52 (2019); *see also* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 602 (2012) (“For women seeking pregnancy-related services, the centers are a service-provider competing with other organizations”); *id.* at 604–13 (elaborating on a contextual inquiry to this question); Kathryn E. Gilbert, Note, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 MICH. L. REV. 591, 600–16 (2013) (criticizing older lower court decisions treating these as cases of noncommercial speech even though most of the messages emanating from these clinics did not qualify as “core” or “pure” speech). *But see* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 879 F.3d 101, 108–10 (4th Cir. 2018) (holding, shortly before the decision in *NIFLA*, that such speech qualifies as noncommercial).

women ensure that their clients do not incorrectly assume that these facilities offer a comprehensive range of care.

The majority, however, regarded the first disclosure requirement as impermissibly content- and speaker-based.³⁶ As explained in the dissent, most restrictions on commercial speech share this character.³⁷ Justice Thomas asserted that the disclosure requirements likely would fail even if a lower level of scrutiny applied, focusing on their underinclusive character (imposed on just a subset of clinics that might encounter patients seeking reproductive health services) and the state's ability to communicate its desired messages directly.³⁸ Justice Breyer countered that neither of these features would justify invalidating the state law unless strict scrutiny applied.³⁹

More remarkably, Justice Thomas took the position that *Zauderer's* allowance for disclosure requirements did not apply in this context,⁴⁰ but then in what context might it still have application?⁴¹ The majority explained that its

36. See *NIFLA*, 138 S. Ct. at 2374–75; *id.* at 2378; see also *id.* at 2371 (“By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly alters the content of petitioners’ speech.” (internal quotation marks omitted)).

37. See *id.* at 2380–81 (Breyer, J., dissenting).

38. See *id.* at 2375 (majority opinion) (“If California’s goal is to educate low-income women about the services it provides, then the licensed notice is wildly underinclusive.” (internal quotation marks omitted)); *id.* at 2376 (arguing that the law’s exemption of other “clinics, which serve many women who are pregnant or could become pregnant in the future, demonstrates the disconnect between its stated purpose and its actual scope”); *id.* (“[I]t could inform the women itself with a public-information campaign. . . . California cannot co-opt the licensed facilities to deliver its message for it.”); *id.* at 2377 (“The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California’s informational interest. It requires covered facilities to post California’s precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers.”).

39. See *id.* at 2389 (Breyer, J., dissenting); see also *id.* at 2390 (“[I]t is self-evident that patients might think they are receiving qualified medical care when they enter facilities that collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care.” (internal quotation marks omitted)); *id.* at 2391 (“[I]t is unremarkable that the State excluded the provision of family planning and contraceptive services as triggering conditions.”).

40. See *id.* at 2372 (majority opinion); see also *id.* at 2377 n.3 (“California does not explain how the unlicensed notice could satisfy any standard other than *Zauderer*.”).

41. Justice Breyer wondered whether the majority had simply carved out speech related to abortion for special protection. See *id.* at 2388 (Breyer, J., dissenting) (noting that “one might take the majority’s decision to mean that speech about abortion is special”). Or, more troubling still, is it reserved only for those staking out a pro-life position?! Then again, the majority opinion could stand for the much broader proposition that commercial and core speech now enjoy comparable constitutional status. See *id.* at 2382–83 (complaining that this represents the second coming of “Lochnerism” and dilutes by comparison the value of core speech); see also *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 255 (2010) (Thomas, J., concurring in part and concurring in judgment) (“I am skeptical of the premise on which *Zauderer* rests”); *id.* at 257 (“*Zauderer* does not stand for the proposition that the government can constitutionally compel the

holding would not threaten well-established disclosure laws: “[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”⁴² The dissenters did not buy this reassurance,⁴³ and they have every reason to doubt its sincerity.⁴⁴ Indeed, just one year after *NIFLA*, the United States Court of Appeals for the Ninth Circuit preliminarily enjoined an ordinance that required a warning statement in certain advertisements for sugar-sweetened beverages.⁴⁵

use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake.”); Noah, *supra* note 8, at 53 n.103 (noting that, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), “Justice Thomas filed a one paragraph concurring opinion for himself to reiterate his oft-stated position that commercial speech should receive full protection under the First Amendment.”).

42. See *NIFLA*, 138 S. Ct. at 2376. Even if professional speech does not represent a separate category, is the majority suggesting a distinction between sales and services, so that only transactions in the former category enjoy reduced constitutional protection? The advertising in *Zauderer* unmistakably proposed a transaction in professional services as did all of the other attorney advertising cases routinely evaluated as involving commercial speech, while the pharmacist advertising cases tended to focus on the sale of drugs.

43. See *id.* at 2380 (Breyer, J., dissenting) (“[T]he majority’s view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.”); *id.* at 2381 (“In the absence of a reasoned explanation of the disclaimer’s meaning and rationale, the [majority opinion’s] disclaimer is unlikely to withdraw the invitation to litigation that the majority’s general broad ‘content-based’ test issues.”); *id.* at 2380 (“Virtually every disclosure law could be considered ‘content based,’ for virtually every disclosure law requires individuals to speak a particular message.” (internal quotation marks omitted)).

44. For a parallel, consider a similarly perplexing reassurance that the conservative wing offered when for the first time interpreting the Second Amendment as protecting an individual right to bear arms, which sowed confusion among the lower courts that a still more conservative Court may soon revisit. See Lars Noah, *Time to Bite the Bullet?: How an Emboldened FDA Could Take Aim at the Firearms Industry*, 53 CONN. L. REV. [Pt.II.C] (forthcoming 2021).

45. See *Am. Beverage Ass’n v. City & Cnty. of S.F.*, 916 F.3d 749, 755–57 (9th Cir. 2019) (en banc) (holding that the defendant had failed to provide evidence justifying its requirement that the warning occupy at least twenty percent of the ad space, and fearing that this would discourage sellers from advertising); see also *id.* at 757 (“We need not, and therefore do not, decide whether the warning here is factually accurate and noncontroversial.”); cf. *id.* at 758 (Ikuta, J., concurring in the result) (complaining that the majority had failed to acknowledge that “*NIFLA* broke new ground on several key issues”); *id.* at 759 & n.1 (noting that, when it “established, for the first time, that government-compelled speech is a content-based regulation,” *NIFLA* “arguably supersedes *Zauderer*”); *id.* at 762 (“*NIFLA* did not specify what sorts of health and safety warnings date back to 1791, but warnings about sugar-sweetened beverages are clearly not among them.”). In contrast, and in tandem with deciding *NIFLA*, the Supreme Court had vacated another compelled commercial speech decision from the Ninth Circuit for reconsideration, only to see the disclosure requirement in that case upheld again. See *CTIA-The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 842–49 (9th Cir. 2019) (affirming the denial of a preliminary injunction against a local ordinance requiring that cell phone retailers disclose information about exposure to high levels of

Alternatively, Justice Thomas viewed the disclosure requirements as not in fact “reasonably related” to anything potentially misleading about the messages expressly or impliedly conveyed by these clinics,⁴⁶ while the dissenters had no trouble discerning the connection.⁴⁷ Justice Breyer also emphasized the factually accurate nature of the required disclosures and their lack of any normative content.⁴⁸ After all, it is not as if these clinics had to carry messages to “buy California raisins,” “support public education by playing the state lottery,” or “vote for Proposition 16” (the latest unsuccessful effort to repeal the state’s ban on affirmative action).⁴⁹ What if we dropped the passing reference to abortion from the first disclosure—controversy continues to surround contraceptives in

radio-frequency radiation). *But see id.* at 853–54 (Friedland, J., dissenting in part) (arguing that the disclosure misleadingly suggested that cell phones are unsafe).

46. *See NIFLA*, 138 S. Ct. at 2372 (“The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state-sponsored* services—including abortion, anything but an ‘uncontroversial’ topic. Accordingly, *Zauderer* has no application here.”).

47. *See id.* at 2387 (Breyer, J., dissenting) (“[I]nformation about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide.”); *see also id.* (“Regardless, *Zauderer* is not so limited. . . . [T]he majority’s reliance on cases that prohibit rather than require speech is misplaced.”); *id.* at 2390 (“[The majority] applies a searching standard of review based on our precedents that deal with speech *restrictions*, not *disclosures*. . . . This approach is incompatible with *Zauderer*.”).

48. *See id.* at 2388 (“Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other.”); *cf. Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (explaining that advertisements by out-of-state abortion clinics “contained factual material of clear ‘public interest’”). In contrast, California plainly could not condition receipt of Medicaid or other public support on espousing pro-choice views. *Cf. Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 217–21 (2013) (invalidating a requirement that organizations adopt a policy of expressing opposition to prostitution as a condition of receiving federal funds for HIV-prevention programs).

49. *Cf. Michael Hiltzik, Raisin Farms Dance Way to Court*, L.A. TIMES, Dec. 18, 2016, at C1 (“[S]everal raisin growers are suing in Sacramento state court to overturn a state-sponsored raisin marketing program that succeeded the dancing raisins campaign, on grounds that it violates their free speech rights.”); Alexei Koseff, *Audit Says Lottery Is Shorting Education*, S.F. CHRON., Feb. 26, 2020, at C1 (“The lottery was created by California voters in 1984 to provide additional money for schools.”); David Lauter, *Racial and Age Divides Doomed Prop. 16; Wide Skepticism and Tepid Support Led to Defeat of Affirmative Action Effort, Poll Says*, L.A. TIMES, Nov. 24, 2020, at B1 (“California banned most government affirmative action programs nearly a quarter-century ago, in 1996, when voters approved Proposition 209. Since then, overturning the ban has been a major goal for many Democratic lawmakers and state officials . . .”). It strikes me as utterly absurd for the concurring opinion to suggest that California wanted to encourage residents to get abortions on the state’s tab. *See NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (“[T]he State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions.”).

some quarters,⁵⁰ but would that suffice to trigger the higher scrutiny imposed by the Court? Lastly, Justice Thomas invoked *Zauderer*'s caveat against "unduly burdensome" disclosure requirements,⁵¹ but posting conspicuous signage within covered facilities does not seem like any great imposition.

Near the end of its opinion, the majority offered a striking hypothetical: "a billboard for an unlicensed facility that says 'Choose Life' would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages."⁵² The dissent emphasized that imagining such extreme applications of the law served little purpose when resolving a facial challenge, adding that most counties in California would only require English and Spanish,⁵³ though surely the majority would regard just dual language disclosures as too burdensome as well. It struck me, instead, as a red-herring insofar as the hypothesized billboard hardly amounts to an "advertisement" subject to the state law.⁵⁴ If the "choose life" message got paired with an effort to promote the services of an unlicensed clinic, of course, then the billboard would have to prominently include the disclaimer in more than one language, which the majority took to mean that the clinic would decide not to advertise in this fashion; a clinic could instead, however, have decided to secure a license and free itself of this unwanted obligation, which would frame the question as an unconstitutional conditions problem (and a fairly mild one at that).⁵⁵

50. See, e.g., *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379–86 (2020) (rejecting objections lodged by a couple of states to the Trump administration's expansion of exemptions for employers who have religious or moral objections to the Affordable Care Act's contraceptive mandate).

51. See *NIFLA*, 138 S. Ct. at 2377 (majority opinion) ("We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be 'unjustified or unduly burdensome.'"); *id.* at 2378 ("It targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech.").

52. *Id.* at 2378.

53. See *id.* at 2391–92 (Breyer, J., dissenting); see also *id.* at 2392 (The hypothetical billboard with the disclosure in thirteen languages might be "a proper subject for a Los Angeles-based as applied challenge in light of whatever facts a plaintiff finds relevant. At most, such facts might show a need for fewer languages, not invalidation of the statute.").

54. Just such billboards litter the Florida Turnpike. Cf. Lars Noah, *A Postmodernist Take on the Human Embryo Research Debate*, 36 CONN. L. REV. 1133, 1140 n.26 (2004).

55. If California had entirely prohibited advertising by crisis pregnancy centers unless they first secured a license, then the unconstitutional conditions objection would have more punch. Cf. Lars Noah, *State Regulatory Responses to the Prescription Opioid Crisis: Too Much to Bear?*, 124 DICK. L. REV. 633, 640–41 (2020) (explaining that a few states recently tackled "pill mills" in precisely this fashion though one reviewing court failed to appreciate the nature of this constitutional problem).

Although frequently maligned for allowing pro-life clinics to mislead their clients,⁵⁶ the *NIFLA* decision gave private parties a powerful new tool for resisting government demands to carry unwanted messages: only genuinely “uncontroversial” disclaimer requirements pass muster,⁵⁷ and only to the extent necessary to guard against potentially misleading claims.⁵⁸ The Court in *NIFLA*, however, went overboard in treating disclosures as content-based simply because they altered the gist of the speaker’s message, which meant subjecting them to an even less forgiving standard of scrutiny than applied to outright prohibitions on commercial speech. Perhaps *Zauderer* has gotten misinterpreted as imposing a lower standard of scrutiny for disclosure requirements than other commercial speech restrictions, but it makes no sense to say that disclosures merit even stricter scrutiny than outright prohibitions.⁵⁹

56. See, e.g., Teneille R. Brown, *Crisis at the Pregnancy Center: Regulating Pseudo-Clinics and Reclaiming Informed Consent*, 30 YALE J.L. & FEMINISM 221, 236–47, 272–73 (2018); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 62–68, 94–99, 118–24 (2019); *id.* at 119 (“[P]rotecting First Amendment interests simply serves as a fig leaf.”); Diane Kee, Note, *Reclaiming Access to Truth in Reproductive Healthcare After National Institute of Family & Life Advocates v. Becerra*, 119 MICH. L. REV. 175, 183–84, 192–97, 203–04 (2020). For an unpersuasive attempt to defend at least some aspects of the holding in *NIFLA* (though offered primarily as part of a descriptive effort to make sense of the Court’s confusing compelled speech decisions), see Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 363, 389–90, 393–94 (2018). For a normative assessment that endorsed this development (though strangely neglecting to reference *NIFLA*), see Martin H. Redish, *Compelled Commercial Speech and the First Amendment*, 94 NOTRE DAME L. REV. 1749, 1758–74 (2019). Somewhat hypocritically, Professor Redish even complained that “it is misleadingly incomplete today to rely on *Zauderer* as controlling doctrine without acknowledging the dramatic expansion of commercial speech protection in cases stretching from the mid-1990s to the present,” *id.* at 1760, but he also had entirely failed to reference the Court’s nearly unanimous endorsement of *Zauderer* in 2010, see *supra* note 14 (discussing *Milavetz*).

57. See Wendy E. Parmet et al., *The Supreme Court’s Crisis Pregnancy Center Case—Implications for Health Law*, 379 NEW ENG. J. MED. 1489, 1490 (2018) (“In the past, ‘uncontroversial’ was usually interpreted to mean factually uncontroversial. In *NIFLA*, the Court found the required disclosure controversial simply because it was about a controversial topic—abortion. The subtle shift opens the door for companies to argue that factually accurate health-related warnings are unconstitutional if the underlying topic is contentious.”); Fowler, *supra* note 15, at 1683–85; Aaron Stenz, Note, *The Controversial Demise of Zauderer: Revitalizing Zauderer Post-NIFLA*, 104 MINN. L. REV. 553, 584–603 (2019); *id.* at 575 (observing that “interpreting ‘uncontroversial’ as applying to the topic underlying the message rather than its factual veracity represents a seismic shift from prior interpretations”).

58. Entirely apart from constricting the range of permissible ends, intermediate scrutiny demands some proof of efficacy. See Noah, *supra* note 8, at 47–49. Researchers have long struggled to demonstrate that disclosures successfully communicate information to consumers. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 667–70 (2011); Lars Noah, *The Imperative to Warn: Disentangling the “Right to Know” from the “Need to Know” About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 361–74 (1994).

59. Essentially all of the commentary related to this issue has neglected to mention the regular judicial endorsement of disclosure requirements when applying the narrow tailoring inquiry to

If applied in an even-handed fashion,⁶⁰ then courts should just as readily invalidate laws recently adopted in almost a dozen states, and sponsored by pro-life groups including NIFLA,⁶¹ that obligate physicians and sometimes also clinics that offer the abortifacient mifepristone to incorrectly advise patients that they could reverse the procedure even after starting use of the drug.⁶²

restrictions on commercial speech. *NIFLA* flipped this notion on its head, treating disclosure requirements as more (rather than less) speech restrictive. Counterintuitively, then, if disclosures no longer count as less-speech-restrictive alternatives, outright prohibitions of commercial speech now might stand a marginally better chance of surviving heightened scrutiny.

60. *Cf. NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting) (“After all, the rule of law embodies evenhandedness, and what is sauce for the goose is normally sauce for the gander.” (internal quotation marks omitted)). Actually, the majority endeavored to distinguish the Court’s earlier decision rejecting free speech objections to state laws demanding that abortion providers supply collateral information when securing informed consent. *See id.* at 2373 (majority opinion). The dissent saw no principled way of reconciling these positions. *See id.* at 2384–86 (Breyer, J., dissenting); *id.* at 2388 (“[A] Constitution that allows States to insist that medical providers tell women about the possibility of adoption should also allow States similarly to insist that medical providers tell women about the possibility of abortion.”); *see also* Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 365–66 (2002) (explaining that most jurisdictions now require informed consent in connection with even noninvasive medical treatments, thereby departing from the doctrine’s origins in the law of battery (i.e., nonconsensual touching)). Nonetheless, given this language in the majority’s opinion (and the increasingly conservative bent of the federal courts at all levels), obligations to communicate information favored by legislators seeking to discourage abortions may well fare better when challenged on constitutional grounds, which suggests that the Supreme Court itself has engaged in viewpoint discrimination in the course of formulating doctrine in this area. *See* Chemerinsky & Goodwin, *supra* note 56, at 66, 111, 118; *The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 277, 347 (2018) (“[T]he doctrine created by the Court preserves compelled disclosures in the interest of opposing abortion but forecloses disclosures aimed at increasing abortion access.”); *id.* at 355–56 (elaborating).

61. *See* Am. Med. Ass’n v. Stenehjem, 2019 WL 10920631 (D.N.D. 2019) (granting motions filed by NIFLA and Heartbeat International to intervene as defendants). Dr. George Delgado, the medical director of a crisis pregnancy center in San Diego, popularized the mifepristone reversal protocol, which substitutes the follow-up dose of misoprostol dictated by the FDA-approved protocol for completing the abortion with high doses of progesterone. *See* Ruth Graham, *A Second Chance at Choice*, N.Y. TIMES MAG., July 23, 2017, at 46, 49.

62. *See, e.g.*, KY. REV. STAT. ANN. § 311.774(2) (LexisNexis 2020) (requiring that such information be provided with the prescription of any abortifacient); N.D. CENT. CODE § 14-02.1-02.1(1)(e) (2021) (directing the state department of health to prepare printed materials for distribution to patients that includes this information); OKLA. STAT. tit. 63, § 1-756(B)(1), (C)(1)–(2) (2020) (requiring that facilities providing mifepristone post conspicuous signage with this information, including details about a hotline and website operated by Heartbeat International, and that physicians also share it with their patients); TENN. CODE ANN. § 39-15-218(b)–(e) (2020) (requiring that facilities providing mifepristone post conspicuous signage with this information and that physicians also share it with their patients); *see also* ARK. CODE ANN. § 20-16-1703(b)(8)–(9) (2020) (requiring that, in the process of securing informed consent, physicians provide this information); IND. CODE § 16-34-2-1.1(a)(1)(C) (2021) (same); NEB. REV. STAT. § 28-327(1)(e)–(2)(d) (2020) (same); S.D. CODIFIED LAWS § 34-23A-10.1(1)(h) (2020) (same); UTAH CODE ANN.

Controversy unmistakably attends such assertions about reversibility.⁶³ Moreover, these disclosures hardly guard against the tendency of already supplied information to mislead users; instead, such requirements represent efforts by conservative legislators to discourage successful abortions using this prescription drug. Self-righteous state officials could, of course, use other avenues to communicate such falsehoods,⁶⁴ but requiring these statements probably conflicted with the more forgiving scrutiny of pre-*NIFLA* decisions governing either non-medical disclosure or the informed consent process, and commandeering the latter in this manner plainly runs afoul of the Supreme Court's latest guidance on compelled speech.⁶⁵ Although manufacturers of mifepristone must supply physicians with an FDA-approved informed consent document for their patients' signatures,⁶⁶ none of these state laws at present purport to require that sellers modify this form.⁶⁷

§ 76-7-305.5(2)(u) (LexisNexis 2020) (directing the state health department to develop a website readily accessible in abortion clinics that includes this information, which physicians must use in the course of securing informed consent).

63. See Khadijah Z. Bhatti et al., *Medical Abortion Reversal: Science and Politics Meet*, 218 AM. J. OBSTETRICS & GYNECOLOGY 315, 318 (2018); Daniel Grossman & Kari White, *Abortion "Reversal"—Legislating Without Evidence*, 379 NEW ENG. J. MED. 1491, 1493 (2018). In contrast, recently enacted state laws obligating physicians and pharmacists to disclose to patients risks associated with prescription opioids hardly seem to invite similar sorts of objections. See Noah, *supra* note 55, at 654 n.84.

64. Cf. Lars Noah, *A Miscarriage in the Drug Approval Process?: Mifepristone Embroils the FDA in Abortion Politics*, 36 WAKE FOREST L. REV. 571, 586 & n.70 (2001) (noting a campaign sponsored by pro-life advocacy groups that mailed exaggerated risk information to 150,000 physicians in an effort to undercut use of the newly approved drug).

65. The handful of reported judicial decisions so far reflect only preliminary skirmishing. See, e.g., *Planned Parenthood Tenn. & N. Miss. v. Slatery*, 523 F. Supp. 3d 985, 1002–06 (M.D. Tenn. 2021) (granting a preliminary injunction); *Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134, 1149–52 (D.N.D. 2019); (same); *All-Options, Inc. v. Atty. Gen. Ind.*, 2021 WL 2685774 (S.D. Ind. 2021) (same). Even if *Zauderer* should have sufficed to invalidate such laws, *NIFLA* may provide the necessary additional impetus to ensure that result in a judiciary increasingly populated by true believers, though whose to say what might happen if such a case reached the high court as presently configured.

66. See Noah, *supra* note 64, at 586.

67. Cf. Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147, 2150 (2000) (“Now let us leave the comforting confines of the Beltway to discover how drug labeling is regulated in the heartland.”). I have expressed concern that pro-life providers might not advise their patients about the availability of potentially teratogenic therapeutic products that required the concomitant use of contraceptives or included labeling that suggested terminating a pregnancy in the event of an accidental exposure. See Lars Noah, *Too High a Price for Some Drugs?: The FDA Burdens Reproductive Choice*, 44 SAN DIEGO L. REV. 231, 233–35, 238, 250–52 (2007); see also *id.* at 254–58 (explaining why such requirements might not survive strict scrutiny). The manufacturers of these products did not object to including such information in the labeling because it helped to reduce their risk of tort liability. See *id.* at 236–37, 245–46. Imagine, however, a company that took issue with such a message. Cf. Noah, *supra* note 64, at 588–90 (noting that Searle initially had resisted having its ulcer drug misoprostol used in tandem

In the wake of *NIFLA*, more straightforward state and federal disclosure requirements applicable to therapeutic products may also fare poorly.⁶⁸ In the course of discussing that decision in the *New England Journal of Medicine*, one set of commentators noted that “it is unclear whether laws that require providers to inform patients about factors that are only indirectly related to medical services, such as laws requiring the disclosure of payments from pharmaceutical companies, remain constitutional.”⁶⁹ These state and federal transparency laws, however, only demand reporting to publicly accessible databases rather than requiring disclosures to patients,⁷⁰ and, in a classic (though noncommercial) compelled speech case, the Justices endorsed precisely such an approach.⁷¹

Far better illustrations of *NIFLA*’s potential impact exist. For instance, controversy certainly attended demands that sellers of dental amalgam warn that this medical device “contains a chemical [i.e., mercury] known to the State of California to cause birth defects or other reproductive harm.”⁷² Under

with the abortifacient mifepristone). Alternatively, what if California demanded that all licensed dermatologists inform their acne patients of the availability of isotretinoin even if some of these physicians took offense to the FDA’s contraception requirement?

68. The *NIFLA* dissent noted several fairly mundane disclosure requirements. See 138 S. Ct. at 2380–81 (Breyer, J., dissenting); *id.* at 2381 (“[T]he mine run of disclosure requirements . . . simply alert the public about child seat belt laws, the location of stairways, and the process to have their garbage collected, among other things.”). These strike me, however, as entirely innocuous; a better test would focus on those likely to trigger a constitutional challenge. For a range of possibilities, see Chemerinsky & Goodwin, *supra* note 56, at 74–75, 112–18; *id.* at 117 (explaining that they had offered just a “narrow sampling of disclosure laws across the fields of education, health, environment, credit lending, real estate, housing, and even vending machines”).

69. Parmet et al., *supra* note 57, at 1490.

70. See Lars Noah, *Doctors on the Take: Aligning Tort Law to Address Drug Company Payments to Prescribers*, 66 BUFF. L. REV. 855, 865–66, 869–72 (2018); see also *id.* at 882–86, 906–07 (doubting that judicial recognition of such an obligation as an aspect of satisfying the duty to secure informed consent would serve much of a purpose).

71. See Noah, *supra* note 7, at 1468 n.21 (“[T]he Supreme Court invalidated a state law requiring that charitable solicitors disclose what percentage of donations actually reach the charity because the state instead could have published the financial disclosure forms that it already collected.” (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988))).

72. See *Cmte. Dental Amalgam Mfrs. v. Stratton*, 92 F.3d 807, 813–14 (9th Cir. 1996) (holding that FDA requirements applicable to such devices did not preempt a state enforcement action against manufacturers); see also *Consumer Cause, Inc. v. SmileCare*, 110 Cal. Rptr. 2d 627, 639–45 (Ct. App. 2001) (reversing summary judgment granted to providers of dental care on claims brought by consumer activists alleging violations of the state’s right-to-know law); cf. *Kids Against Pollution v. Cal. Dental Ass’n*, 134 Cal. Rptr. 2d 373, 378–79, 388–90 (Ct. App. 2003) (dismissing misrepresentation claims against professional association for, among other things, threatening to discipline dentists who questioned the safety of amalgam), *vacated*, 143 P.3d 655 (Cal. 2006). The controversy over dental amalgam extends far beyond the borders of California. See, e.g., *Moms Against Mercury v. FDA*, 483 F.3d 824, 826–28 (D.C. Cir. 2007) (dismissing for lack of subject matter jurisdiction a petition to review the agency’s failure to take action on a form of dental amalgam because of a still pending device reclassification process).

Proposition 65, similar disclosures must appear on all manner of products suspected of either carcinogenicity or teratogenicity. If such warnings reflect genuine hazards and serve to assist consumers in California when making choices in the marketplace, then one can hardly quibble with the law. It seems, however, that Proposition 65 instead primarily aims to stigmatize certain products in the hopes of driving them from the market unless reformulated,⁷³ which makes the constitutional issue trickier. California remains free, of course, to communicate its concerns directly to its citizens,⁷⁴ but the state arguably cannot dictate that labeling carry a message serving any purpose other than to offset potentially deceptive statements made about a product.⁷⁵

73. See Noah, *supra* note 58, at 342 & n.229, 379; *id.* at 296 (“Instead of serving as a mechanism for improving consumers’ decisionmaking, such rules simply stigmatize products, perhaps in a veiled attempt to pressure companies into reformulating these products.”); *see also id.* at 341–43, 353–54, 364 (discussing other features of this law); *id.* at 393 (explaining that the law “indiscriminately labels substances as known carcinogens whether the lifetime risk of cancer is one-in-ten or one-in-100,000”); Haleigh S. Haffner, Note, *Amendments to California’s Proposition 65: Clarity for Consumers, Less Confusion for Businesses*, 31 LOY. CONSUMER L. REV. 128, 140–45 (2018) (discussing revisions adopted in 2016, including a change in the text of the safe harbor warnings to replace the word “contain” with “can expose you to”); Geoffrey Mohan, *Overwarned, Underinformed: How the Profusion of Notices Stemming from Prop. 65, California’s Landmark Consumer Safety Law, Leaves Shoppers Potentially Unprotected*, L.A. TIMES, July 26, 2020, at A1 (“That was exactly what Proposition 65’s architects had in mind . . . —to coerce companies into replacing toxic chemicals with safe ones rather than bear the burden of a Scarlet Letter stamped on their products.”).

74. See Nat’l Assoc. Wheat Growers v. Becerra, 468 F. Supp. 3d 1247, 1259–66 (E.D. Cal. 2020) (invalidating under NIFLA a Proposition 65 warning requirement applied to the weed-killer glyphosate (Roundup®) given continuing disagreement about its carcinogenicity and the state’s ability to communicate these concerns itself), *app. pending* (9th Cir. 2021); *cf.* R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 912–26 (9th Cir. 2005) (upholding California’s antismoking campaign financed by an excise tax on tobacco products and designed to denigrate the industry rather than simply disclose health hazards). Government dissemination of information can, of course, raise different concerns. See Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 NEB. L. REV. 89, 128–29 (2014) (discussing abuse of the power granted to the agency to issue adverse publicity).

75. See Jennifer L. Pomeranz, *Abortion Disclosure Laws and the First Amendment: The Broader Public Health Implications of the Supreme Court’s Becerra Decision*, 109 AM. J. PUB. HEALTH 412, 415–18 (2019) (emphasizing that disclosure requirements remain defensible if the government can prove that the messages of sellers of goods or services otherwise would deceive or mislead consumers); *see also id.* at 414 (conceding that “government cannot require an ‘Eat Vegetables!’ label on candy packages”). State laws mandating the disclosure that food products contain genetically engineered (GE) ingredients have prompted similar sorts of objections. See Lars Noah, *Genetic Modification and Food Irradiation: Are Those Strictly on a Need-to-Know Basis?*, 118 PENN ST. L. REV. 759, 765 & n.30 (2014); *see also id.* at 787 (calling such disclosure requirements “nothing more than efforts to stifle feared technologies by stigmatizing the resulting products in the marketplace”); *cf.* Grocery Mfrs. Ass’n v. Sorrell, 102 F. Supp. 3d 583, 621–35 (D. Vt. 2015) (declining to preliminarily enjoin Vermont’s GE food disclosure law). Congress preempted such state laws in 2016. See Noah, *supra* note 9, at 739 n.209.

In addition, sellers of dietary supplements plainly do not appreciate having to carry messages—namely, “This statement has not been evaluated by the [FDA]. This product is not intended to diagnose, treat, cure, or prevent any disease.”—whenever they make claims to affect the structure or function of the body.⁷⁶ Although Congress did so in pursuit of deregulation, authorizing the use of promotional statements that otherwise would have triggered drug status and the more demanding standards that accompany such a regulatory designation, these mandated disclaimers effectively undercut the central tenets of complementary and alternative medicine.⁷⁷ This federal requirement stands in contrast to the simple and entirely factual information at issue in *NIFLA*.

On occasion, the FDA has faced criticism when it orders the use of allegedly misleading information in therapeutic product labeling: in some cases, it has insisted on downplaying genuine risks;⁷⁸ in other cases, it has demanded the disclosure of exaggerated dangers posed by a product.⁷⁹ The former approach amounts to censorship insofar as the agency wants to keep consumers in the dark, while the latter resembles propaganda insofar as it enlists product sellers

76. See 21 U.S.C. § 343(r)(6)(C) (2018) (requiring that these disclaimers appear “in boldface type”); cf. Lars Noah, *Growing Organs in the Lab: Tissue Engineers Confront Institutional “Immune” Responses*, 55 JURIMETRICS J. 297, 328 (2015) (explaining that the FDA requires the following disclaimer for so-called humanitarian use devices: “Authorized by Federal law for use in the treatment of [specify disease or condition]. The effectiveness of this device for this use has not been demonstrated.”). In the course of explaining that “California does not single out pregnancy-related facilities for this type of disclosure requirement,” the dissenting opinion in *NIFLA* referenced a state law subjecting unlicensed providers of alternative health services to comparable treatment. See 138 S. Ct. at 2391 (Breyer, J., dissenting).

77. See Lars Noah, *A Drug by Any Other Name . . . ? : Paradoxes in Dietary Supplement Risk Regulation*, 17 STAN. L. & POL’Y REV. 165, 166 & n.8, 177–78, 192 & n.98, 194 & n.105 (2006); see also Redish, *supra* note 56, at 1761, 1772 (hypothesizing a case where a “seller sincerely believes that honey cures certain ills” but the government forces him to include a disclaimer in advertising at odds with this belief).

78. See *Henley v. FDA*, 77 F.3d 616, 620–21 (2d Cir. 1996) (rejecting a challenge to the agency’s decision to remove animal carcinogenicity disclosures from the patient labeling for oral contraceptives); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 4–5, 15 (Cal. 2004) (holding that the agency’s decision to exclude information about reproductive toxicity of nicotine in smoking cessation products preempted application of Proposition 65 to require such a warning); Sandhya Somashekhar, *Smoking-Cessation Restrictions to Be Eased*, WASH. POST, Apr. 2, 2013, at A2 (reporting that, at the urging of public health advocates and in order to encourage efforts to quit smoking, the FDA further watered down the instructions for guarding against nicotine overdose).

79. See Lars Noah, *Medicine’s Epistemology: Mapping the Haphazard Diffusion of Knowledge in the Biomedical Community*, 44 ARIZ. L. REV. 373, 442 (2002) (discussing a long-running dispute over the FDA’s requirement that a class of diabetes drugs disclose cardiovascular risks); Noah, *supra* note 8, at 92 n.245 (“The FDA has at times mandated the use of exaggerated warnings—for instance, about the risks of products containing chlorofluorocarbon (CFC) propellants—solely in the hope of influencing purchasing behavior (and, thereby, encouraging reformulation) even though the products posed no direct risks to consumers.”).

to affirmatively mislead users. Even more strangely, federal officials may urge sellers to exaggerate the benefits of certain products. Cautious manufacturers of pharmaceuticals approved for other uses—such as the antimalarial agent hydroxychloroquine also indicated for treating certain autoimmune diseases—had good reason to resist White House pressure that they tout unfounded promises of a cure for Covid-19.⁸⁰ Insofar as the government may pressure therapeutic product sellers into helping propagate its misinformation campaigns, the decision in *NIFLA* has provided clearer constitutional cover to members of these and other industries for resisting such official entreaties.

NIFLA appears to have disavowed the prior understanding of *Zauderer* as more readily tolerating disclosure requirements either to serve purposes unrelated to the potential to mislead or on weaker evidence of guarding against this allowable purpose. Although I have identified a few settings where good reason may exist for applauding this development, the Court's decision plainly threatens to unsettle a far broader swath of less troublesome warning and disclaimer requirements. In short, while distracting us with an abortion-related dispute, Justice Thomas finally appears to have succeeded in his still more controversial campaign to collapse the distinction between core and commercial speech. On balance, that strikes me as a terribly worrisome outcome.

80. See Christopher Rowland et al., *White House Efforts to Sidestep FDA Revealed*, WASH. POST, Nov. 2, 2020, at A19 (“The anti-malarial drugs in the [Strategic National] stockpile were donated by Sandoz . . . and Mylan But even as the manufacturers issued news releases about their large contributions, they made no claims of their effectiveness to treat [C]ovid-19.”) see also Reid J. Epstein, *G.O.P. Senator Johnson from Wisconsin to Run Again*, N.Y. TIMES, Jan. 10, 2022, at A12 (“Aside from Mr. Trump, there is perhaps no major Republican official who has made more false claims about the coronavirus and its vaccines than Mr. Johnson. . . . In December, he falsely claimed that gargling with mouthwash could help stop transmission of the virus, an assertion that drew a rebuke from the manufacturer of Listerine.”); Cindy K. Goodman, *Fla. Surgeon General Touts Unproven Treatments for COVID-19; Ladapo’s New PSA Angers Physicians, Medical Experts*, ORLANDO SENT., Dec. 8, 2021, at A1 (“In addition to monoclonal antibodies, he advises people . . . to talk to their doctor about these other two treatments: Fluvoxamine, an antidepressant pill [and] Budesonide, a medication commonly used for asthma patients.”); cf. Steven Woloshin et al., *A Shot of Fear*, WASH. POST, Oct. 25, 2005, at F1 (“To promote vaccine use, many in the public health community have overstated the risk of flu-related death and the effectiveness of the vaccine in preventing it.”).

