WHAT THE ABORTION DISCLOSURE CASES SAY ABOUT THE CONSTITUTIONALITY OF PERSUASIVE GOVERNMENT SPEECH ON PRODUCT LABELS

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INTRODUCTION

In Malaysia, it's a diseased lung.[1] In Thailand, it's skulls floating behind the smoker.[2] In Brazil, it's a dead fetus lying among cigarette butts.[3] "In New Zealand, it's a gangrenous foot."[4] In the United States, it's going to be the same type of color graphics, along with pointed warnings, covering the top half of the cigarette package.[5] And tobacco labels are just the tip of the iceberg. Alcohol vendors already must include warnings on their labels,[6] the new national health reform legislation requires that fast food chains post calorie counts on signs and menus,[7] and proposals continue to surface to mandate "cigarette-style" warnings on a range of other products because they pose a public health danger. Products targeted for warning labels, both here and abroad, include sugary sodas, violent video games, cell phones, sun beds, butter, cheese, foods children consume which contain artificial coloring that may increase hyperactivity, and vacation travel because it results in global warming.[8]

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1. Ranit Mishori, *Packing a Heavier Warning; Elsewhere, Cigarette Boxes Bear Graphic Evidence of Smoking's Ill Effects; U.S. Labels Will Soon Do the Same*, WASH. POST, Aug. 4, 2009, at HE1.

2. Miranda Hitti, *Cigarette Warnings: Is Bigger Better?*, CBS NEWS.COM, Feb. 6, 2007, http://www.cbsnews.com/stories/2007/02/06/health/webmd/main2439660.shtml.

3. Mishori, *supra* note 1, at HE1.

4. *Id.*

5. The Family Smoking Prevention and Tobacco Control Act requires that the Secretary of Health and Human Services issue guidelines no later than June 2011 requiring color graphics depicting the health effects of smoking to accompany label warnings. *See* Act of June 22, 2009, Pub. L. No. 111-31, § 201(d), 123 Stat. 1776, 1845 (2009) (to be codified at 15 U.S.C. § 1333(d)).

6. *See* MICHAEL S. WOGALTER, HANDBOOK OF WARNINGS 669–85 (2006).

7. Stephanie Rosenbloom, *Calorie Data to be Posted at Most Chains*, N.Y. TIMES, March 24, 2010, at B1, *available at* http://www.nytimes.com/2010/03/24/business/24menu.html.

8. *See* Press Release, U.S. Congressman Joe Baca, Rep. Baca Introduces Legislation to Make Violent Video Games Sold With Health Warning Label (Jan. 7, 2009) ("Warning: Excessive exposure to violent video games and other violent media has been linked to aggressive behavior."), *available at* http://www.house.gov/apps/list/press/ca43_baca/videogame_health_010709.html; Press Release, Ctr. for Sci. in the Pub. Interest, CSPI Calls on FDA to Require Health Warnings on Sodas (July 13, 2005), *available at* http://www.cspinet.org/new/200507131.html ("To help protect your waistline and your teeth, consider drinking diet sodas or water."); Daily Mail Online, *Dairy Products to Carry Cigarette-Style Health Warnings as Government Uses 'Shock Tactics'*, MAIL ONLINE, March 3, 2008, http://www.dailymail.co.uk/health/article-524931/Dairy-products-carry-cigarette-

Of course, producers protest the labeling requirements and, frequently, succeed in defeating proposed regulation.[9] But sometimes they don't; and then, increasingly, they go to court, arguing that the Constitution protects the integrity of their commercial message from government imposed speech.[10] Specifically, cigarette sellers contend that, even if the purpose is public protection, Congress cannot force them "to disseminate a Government-drafted anti-tobacco message" or to "stigmatize their own product on their own packaging."[11] The district court hearing the cigarette sellers' case has rejected this part of their challenge,[12] but the parties will likely appeal. And other challenges to new labeling requirements will surely follow.

One may have thought this battle was over, given the ubiquity of product disclosure requirements and the fact that more cautious and less eye-catching cigarette package warnings have been in place for over 40 years.[13] Furthermore, even though the Court has elevated product advertising to a category of constitutionally protected speech, early on it signaled that its skepticism would be directed primarily toward regulations that restricted the free flow of commercial speech[14] and that it would accord more deferential review to requirements that vendors disclose additional information along with their own speech.[15]

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style-health-warnings-Government-uses-shock-tactics.html (England's Food Standards Agency considered and rejected a proposal to put warnings on cheese and butter); Kate Devlin, *Sunbeds 'Should Carry Cigarette-Style Health Warnings'*, TELEGRAPH, June 20, 2009, http://www.telegraph.co.uk/health/healthnews/5579038/Sunbeds-should-carry-cigarette-style-health-warnings.html; Liane Katz, *Call For Cigarette-Style Warnings for Flights*, GUARDIAN.CO.UK, April 5, 2007, http://www.guardian.co.uk/travel/2007/apr/05/travelnews.green.cheapflights; SnackCheck, The Twenty Worst Snacks, http://www.snackcheck.co.uk/2566/bottom-20-snacks/ (last visited June 3, 2010) ("In July 2010, the [European Union] will make it mandatory to put cigarette-style labels on products that include these colourings [that the Hyperactive Children's Support Group recommends against]."); Posting of Michelle Quinn to The Bay Area, *S.F. May Require Warnings About Cellphone Radiation*, http://bayarea.blogs.nytimes.com/2009/12/23/sf-may-require-warnings-about-cellphone-radiation (Dec. 23, 2009, 5:40 PM).

9. *See, e.g.*, Press Release, Wash. Legal Found., WLF Opposes Efforts By Food Police Targeting Soft Drink Beverages, Dec. 16, 2005 (explaining comments filed with Food and Drug Administration opposing proposed labeling requirement).

10. *See infra* Part I.C (discussing recent lower court disclosure requirement decisions).

11. Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 39, 51, Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-CV-117-M) (plaintiffs include: Commonwealth Brands, Inc.; Conwood Co., LLC; Discount Tobacco City & Lottery, Inc.; Lorillard Tobacco Co.; National Tobacco Co.; and R.J. Reynolds Tobacco Co.).

12. Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 529–30 (W.D. Ky. 2010).

13. The 1964 Surgeon General's Report on Smoking and Health led to enactment of the FCLAA in 1965, which required that health warnings be included on cigarette packages. Lindsey v. Tacoma-Pierce County Health Dep't, 195 F.3d 1065, 1069 (9th Cir. 1999). The statute and its amendments represented a compromise between health proponents and tobacco interests. NAT'L CANCER INST., MONOGRAPH 19: THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE 301–03 (2008).

14. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 755 (1976).

15. *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

But things are changing across the free speech landscape. Recently, the Supreme Court has rendered decisions that interpret the free speech guarantee more expansively to protect commercial[16] and corporate[17] speakers from government regulations that restrict their speech. The recurring and unresolved question is whether and how these changes in the jurisprudence of speech restrictions will modify the authority of governments to achieve their legitimate regulatory objectives by means of information disclosure requirements imposed on commercial speech. All of the current Supreme Court justices agree that governments have the constitutional authority to require commercial speakers to publish some relevant facts when the government purpose is to supplement advertising that would otherwise be false, misleading, or have the potential to mislead consumers.[18] But countering the potential for consumer deception has never been the only purpose that disclosure requirements have served.[19] Increasingly, government regulators require disclosure along with commercial speech to counter the potential for consumer persuasion as well. That is, governments select information and require its disclosure not only to aid the rational, self-interested decision making of individual consumers, but also to influence the consumer's decision making in a way that serves a broader public interest.[20] Consequently, that broader public interest may well be reducing demand for the lawful product on which the information disclosure must appear. In the context of speech restraints, the Court has repeatedly emphasized that governments may not constitutionally engage in the "paternalism" of restricting truthful commercial speech that individual consumers may hear, when the purpose of that restriction is to reduce demand for a lawful product.[21] Left uncertain is whether the Court's constitutional interpretations that

16. *See infra* Part I (discussion of commercial speech).

17. *See* Citizens United v. Fed. Election Comm'n*,* 130 S. Ct. 876, 913 (2010) (pre-election corporate spending is constitutionally protected from federal regulation).

18. Milavetz , Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1341 (2010) (upholding federal statutory requirement that law firms offering bankruptcy services "include certain information about its bankruptcy-assistance and related services" because the requirement was "'reasonably related to the [Government's] interest in preventing deception of consumers'" (quoting *Zauderer*, 471 U.S. at 651)); *Id.* 1343 n.1 (Thomas, J., concurring) (acknowledging the Court's "longstanding assumption that a consumer-fraud regulation that compels the disclosure of certain factual information in advertisements may intrude less significantly on First Amendment interests than an outright prohibition on all advertisements that have the potential to mislead").

19. *See* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods*,* Zauderer*, and* Abood, 40 VAL. U. L. REV. 555, 584 (2006) ("[C]ommercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception."); *see also* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 125–27 (1996).

20. The new cigarette package labeling mandate makes obvious the persuasive objectives that underpin, at least in part, many disclosure requirements imposed to advance public purposes in the modern marketplace. It is indeed difficult to deny that the new labeling mandate is "plainly intended to deliver a visually striking, attention-grabbing anti-smoking message." Complaint for Declaratory Judgment and Injunctive Relief ¶ 53, Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010) (No. 1:09-CV-117-M).

21. For a discussion of the anti-paternalism trend in the Court's commercial speech jurisprudence, see *infra* Part I.C.2.

limit regulators' abilities to *restrict* commercial speech because consumers may find it persuasive also apply to contract government discretion to impose commercial speech *disclosure* requirements for the same public purpose of reducing demand and because of the same presumption about the potentially persuasive effect of unsupplemented speech.

Yet this apparent uncertainty in the commercial speech jurisprudence has an odd and inconsistent counterpart. At the same time that members of the Court have suggested disclosure requirements imposed on commercial speech for purposes other than preventing consumer deception may be constitutionally suspect, in the entirely analogous context of the abortion service transaction, the Court has applied deferential rational basis review to uphold selective and persuasive disclosure requirements that were imposed for purposes other than correcting potentially misleading speech.[22] Although the Court's plurality analysis with respect to the Free Speech Clause analysis' application to "informed consent" to abortion requirements was terse, the lower courts have parsed, expanded, and relied upon it.[23] In light of the Court's changing jurisprudence, it is not clear what level of scrutiny should apply to the emerging genre of informational and persuasive disclosure requirements that the new cigarette labels exemplify. What is clear is that there is no difference between the speakers' Free Speech Clause rights in the two lines of cases that should lead to a different judicial analysis of government disclosure requirements imposed on them. So long as the informed consent to abortion jurisprudence remains unchanged, it is controlling in the context of commercial speech disclosures.[24] Deferential rational basis scrutiny applies to judicial evaluations of information disclosure mandates imposed on product labels and other types of commercial speech, even if the government's purpose is something other than preventing consumer deception and even if the information is obviously selected and presented to persuade.

Part I situates disclosure requirements within the framework the Court has developed to evaluate government regulations of commercial speech. Part II describes the different law that courts have developed to evaluate disclosure requirements imposed on the abortion procedure. Part III points out that what courts tend to treat as different lines of cases—compelled commercial speech and abortion disclosure—in fact involve the same type of government action imposed on the same category of

22. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) ("To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.") (citations omitted).

23. *See infra* Part II.B.

24. *See infra* Part III.

speech, and so the Free Speech Clause analysis applied to each must be the same.

I. THE LAW OF GOVERNMENT MANDATED COMMERCIAL SPEECH DISCLOSURES

Government entities at all levels mandate that certain information appear on product labels. These include Congress,[25] a number of federal government agencies,[26] state legislatures,[27] state agencies,[28] and city councils and agencies.[29] California voters imposed a labeling requirement by voter initiative.[30] Product sellers have always used the political process to fight labeling requirements, and have often succeeded.[31] Only fairly recently have they begun to use the Free Speech Clause as a direct means of challenging information disclosure requirements.[32] These challenges rely both on the lack of clarity in the disclosure requirement jurisprudence and the trend evident in the speech restraint cases to interpret the rights of corporate and commercial speakers more expansively to limit the scope of permissible government regulatory actions.

A. The Disclosure Distinction in the Supreme Court's Commercial Speech Jurisprudence

Free Speech Clause protection for commercial speech began in the mid 1970's. Reversing previous interpretations, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[33] the Court

25. *See, e.g.*, Nutrition Labeling and Education Act of 1990 (NLEA), 21 U.S.C. § 343 (2006).

26. *See, e.g.*, 21 C.F.R. §§ 101.1 -101.95 (2010) (Food and Drug Administration regulations imposing Food for Human Consumption Labeling Standards); 27 C.F.R. §§ 4.1–4.5 (2010) (Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau, imposing labeling requirements for wine); 16 C.F.R. §§ 1201.1–1420.1 (2010) (Consumer Product Safety Commission product labeling standards).

27. *See, e.g.*, CTR. FOR SCI. IN THE PUB. INTEREST & NATURAL RES. DEF. COUNCIL, SHREDDING THE FOOD SAFETY NET (2006), *available at* http://www.cspinet.org/new/pdf/shredding.pdf (reviewing state food safety and labeling laws that proposed action in Congress would preempt).

28. *See, e.g.*, CAL. FOOD & AGRIC. CODE §§ 32912–32921 (West 1994) (milk product labeling); CAL. BUS. & PROF. CODE §§ 19080–19093 (West 1964) (home furnishings labeling).

29. *See, e.g.*, 8 S.F. CAL. HEALTH CODE § 468.3 (2010) (menu labeling at chain restaurants).

30. Proposition 65, which became law as the Safe Drinking Water and Toxic Enforcement Act of 1986, requires businesses to "notify Californians about significant amounts of chemicals in the products they purchase, in their homes or workplaces, or that are released into the environment." OEHHA Proposition 65: Proposition 65 in Plain Language!, http://oehha.ca.gov/Prop65/background/p65plain.html (last visited June 4, 2010).

31. *See, e.g.*, Leonard H. Glantz & George J. Annas, *The FDA, Preemption, and the Supreme Court*, 358 NEW ENG. J. of MED. 1883, 1884–85 (2008) (describing efforts by cigarette makers and drug manufacturers to obtain immunity from state law requirements, including disclosure requirements, through federal law preemption); Dan Shapley, *Pennsylvania Allows Hormone-Free Milk Labeling: Monsanto is Lobbying States to Restrict Labeling*, THE DAILY GREEN, Jan. 17, 2008, *available at* http://www.thedailygreen.com/healthy-eating/eat-safe/hormone-free-milk-47011701#ixzz0f5Mm9Csu.

32. *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y. City Bd. Of Health, 556 F.3d 114, 117–18 (2d Cir. 2009) (fast food calorie count labels); Nat'l Elec. Mfr. Ass'n v. Sorrell, 272 F.3d 104, 106 (2d Cir. 2001) (labeling of products containing mercury); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996) (milk hormone labels).

33. 425 U.S. 748 (1976).

held that speech "propos[ing] a commercial transaction" is not "wholly outside the protection of the First Amendment."[34] The Court explained that the constitutional protection commercial speech receives is grounded in the "public interest that [economic] decisions, in the aggregate, be intelligent and well-informed," and in the "particular consumer's interest in the free flow of commercial information."[35] In other cases the Court has described "[t]he commercial marketplace" as "a forum where ideas and information flourish," to which "the general rule" applies, "that the speaker and the audience, not the government, assess the value of the information presented."[36] Still, a majority of the Court continues to acknowledge "the 'distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'"[37]

In *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*,[38] the Court established a four-part test[39] which both protects commercial speech because of its "constitutional value" and recognizes that commercial speech's distinguishing attributes make certain types of content based government regulation more constitutionally permissible.[40] The Court has described the *Central Hudson* test as imposing "intermediate scrutiny," a standard between the rigorous strict scrutiny that applies to other speech regulations and the rational basis standard that the Court uses to review regulations that do not implicate the free speech right.[41] Although a number of justices have criticized the test as insufficiently protective of commercial speech, at least in particular contexts, the Court's majority continues to apply it to evaluate regulations that restrict or suppress commercial speech. [42]

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34. *Id.* at 760–62 (overruling Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)).

35. *Id.* at 763, 765.

36. Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

37. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980)).

38. 447 U.S. 557 (1980).

39. *Id.* at 564 (stating that if the speech is "neither misleading nor related to unlawful activity," the state "must assert a substantial interest," the restriction must "directly advance" that interest, and the restriction must not be "excessive," meaning it cannot survive if more limited means could accomplish the purpose).

40. *Id.* at 561. Specifically, the characteristics that distinguish commercial speech are its "greater objectivity," which "justifies affording the State more freedom to distinguish false commercial advertisements from true ones," and its "greater hardiness," which "inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (plurality opinion).

41. Milavetz , Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010); *Lorillard*, 533 U.S. at 554 (describing *Central Hudson* test as "'substantially similar' to the test for time, place, and manner restrictions").

42. Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (noting that "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases," but nevertheless finding it to provide "'an adequate basis for decision'" of the case) (quoting *Lorillard*, 533 U.S. at 554–555)).

Soon after its decision in *Central Hudson*, however, the Court relied upon the differences between commercial and other constitutionally protected speech to hold that a lower level of judicial scrutiny should apply to at least certain types of government regulations requiring commercial speakers to disclose additional information about their products or services than to those that directly restrict or suppress commercial speech.[43] In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[44] an attorney challenged the constitutionality of a state disciplinary rule requiring any attorney advertisement that mentioned contingent fee rates to "disclos[e] whether percentages are computed before or after deduction of court costs and expenses."[45] His advertisement had stated that clients would pay no fees if they lost, but it did not disclose that they would still be liable for the lawsuit's costs.[46] The Ohio Office of Disciplinary Counsel filed a complaint, alleging that, absent the required disclosure, the attorney's advertising was "deceptive" in violation of the disciplinary rule.[47] The Court upheld application of the disciplinary rule to sanction the attorney for failing to include the required disclosure.[48]

The Court explicitly rejected the attorney's argument that "precisely the same inquiry as determining the validity of [] restrictions on advertising content" should apply to determine the constitutionality of the disclosure requirement.[49] The Court stated that the "[a]ppellant . . . overlooks material differences between disclosure requirements and outright prohibitions on speech."[50] The Court distinguished instances in which government mandated noncommercial speakers recite or publicize ideological speech—mandates which the Court has consistently invalidated[51]—from the situation before it, in which the government required commercial speakers to supplement their own commercial speech with additional facts:

> But the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its pre-

43. *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).
44. 471 U.S. 626 (1985).
45. *Id.* at 633 (alteration in original).
46. *Id.* at 652.
47. *Id.* at 631.
48. *Id.* at 655.
49. *Id.* at 650.
50. *Id.*
51. *See id.* (citing Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating government requirement that plaintiff display "Live Free or Die" license plate); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating right of reply requirement for newspaper); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating mandatory pledge recitation and flag salute)).

> scription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. 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. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[52]

However, the Court added:

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.[53]

The Court found the disciplinary rule disclosure requirement in the case met the rational basis test, which meant that it accepted as reasonable the state's assertion that the potential harm of deception existed, that the disclaimer would help to correct it,[54] and that it did not require the means be closely tailored to achieve this end.[55] The Court also rejected the at-

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52. *Zauderer*, 471 U.S. at 651 (alterations in original).

53. *Id.*

54. *Id.* at 652–53 ("The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'—terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.' The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed." (quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–92 (1965) (alterations in original)).

55. *Id.* at 651 n.14 ("Although we have subjected outright prohibitions on speech to [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. Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized. Similarly, we are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is 'under-inclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." (citations omitted)).

torney's claim that its application "would in fact be unduly burdensome and would tend to chill advertising of contingent-fee arrangements."[56]

The Court in *Zauderer* thus planted the seeds for either a broad or narrow interpretation of its holding. On the one hand, the Court broadly distinguished between "disclosure requirements" and "outright prohibitions on speech," noting that the former is an "acceptable less restrictive alternative to actual suppression of speech."[57] It affirmed that the primary reason commercial speech receives protection is "the value to consumers of the information," and that, although vendors may prefer not to disclose certain information about their products or services, the extent of their "*constitutionally protected* interest in *not* providing any particular factual information in . . . advertising is minimal."[58] It also confirmed that governments may be selective rather than comprehensive in mandating factual disclosures, addressing one problem at a time.[59]

On the other hand, and despite the broad language and reasoning that seem to distinguish between speech restraints and required factual disclosures, the Court discussed disclosure requirements in the context of one imposed for the purpose of correcting commercial speech that would otherwise be deceptive, and included that government purpose in the articulation of its rational basis test.[60] The Court also noted that, although listeners' interests are the primary reason the Constitution protects commercial speech, advertisers in fact possess "First Amendment rights," and that, at some point, even disclosure requirements may be "unjustified" or "unduly burdensome" and "might offend the First Amendment by chilling protected commercial speech."[61]

In the 25 years since *Zauderer*, the Court's decisions and the statements of various justices have muddied, rather than clarified, the decision's meaning with respect to the appropriate standard of review for disclosure requirements imposed on commercial speech. In *Meese v. Keene*,[62] decided one year after *Zauderer*, the Court rejected a challenge

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56. *Id.* at 652 n.15 ("Evaluation of this claim is somewhat difficult in light of the Ohio court's failure to specify precisely what disclosures were required. The gist of the report of the Board of Commissioners on this point, however, was that appellant's advertising was potentially deceptive because it 'left standing the impression that if there were no recovery, the client would owe nothing.' Accordingly, the report at a minimum suggests that an attorney advertising a contingent fee must disclose that a client may be liable for costs even if the lawsuit is unsuccessful. The report and the opinion of the Ohio Supreme Court also suggest that the attorney's contingent-fee rate must be disclosed. Neither requirement seems intrinsically burdensome; and they certainly cannot be said to be unreasonable as applied to appellant, who included in his advertisement no information whatsoever regarding costs and fee rates. This case does not provide any factual basis for finding that Ohio's disclosure requirements are unduly burdensome." (citations omitted)).

57. *Id.* at 650–51 & n.14.

58. *Id.* at 651 (first emphasis added).

59. *See id.* at 651 n.14.

60. *Id.* at 651 ("[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.").

61. *Id.*

62. 481 U.S. 465 (1987).

by a California legislator to a federal statutory designation of films produced by the Canadian government as "political propaganda" and the requirement that he disclose details about his connections to the "foreign government" producer and details of its required registration with the Department of Justice pursuant to the statute.[63] Although the case involved a disclosure requirement imposed on core political speech, the Court upheld the statutory requirements in strong language that distinguished disclosure requirements from prohibitions of speech:

> Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit. To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. . . . Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.[64]

In contrast to its deferential treatment of Congress's "propaganda" label, the Court in *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*[65] more rigorously reviewed a state bar's reprimand of an attorney for, among other things, failing to include a disclaimer in her advertising that explained the meaning of her specialty designation.[66] The Court's analysis of the disclaimer requirement confusingly mixed references to considerations that it used in *Zauderer* to analyze the constitutionality of disclosure requirements imposed on commercial speech with references to considerations that it employs to determine whether commercial speech restraints comport with the free speech guarantee.[67]

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63. *Id.* at 467, 469. The legislator was not required to place the term "political propaganda" on the film as he showed it to a public audience. The Court nevertheless held that he had demonstrated injury sufficient to establish standing to challenge the term in the statute based upon evidence that demonstrated that "his exhibition of films that have been classified as 'political propaganda' by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Id.* at 474.

64. *Id.* at 481 ("The prospective viewers of the three films at issue may harbor an unreasoning prejudice against arguments that have been identified as the 'political propaganda' of foreign principals and their agents, but the Act allows appellee to combat any such bias simply by explaining-before, during, or after the film, or in a wholly separate context-that Canada's interest in the consequences of nuclear war and acid rain does not necessarily undermine the integrity or the persuasiveness of its advocacy.").

65. 512 U.S. 136 (1994).

66. *See id.* at 139–40.

67. Most of the case involved review of the reprimand based upon the content of the attorney's advertising, without reference to the possible alternative of including a disclaimer to explain the significance of the specialty designation. The Court characterized the sanctions in this respect as

In other cases not directly addressing disclosure requirements, combinations of justices have distinguished *Zauderer* in ways that suggest a narrow interpretation. In *Glickman v. Wileman Bros. & Elliot, Inc.*,[68] a closely divided Court rejected the claim of fruit growers that the mandatory assessments to fund generic advertising violated their free speech rights.[69] The four dissenting justices would have accepted it, and in the course of their discussion rejected *Zauderer* as precedent for low level scrutiny of the subsidization mandate:

> In speaking of the objecting lawyer's comparatively modest interest in challenging the state requirement, we referred to protection of commercial speech as "justified principally by the value to consumers of the information such speech provides . . . ." We said "principally," not exclusively, and proceeded to uphold the state requirement not because a regulation adding to public information is immune from scrutiny, but because the mandate at issue bore a reasonable relation to the "State's interest in preventing deception of consumers," who might otherwise be ignorant of the real terms on which the advertiser intended to do business. *Zauderer* thereby reaffirmed a longstanding preference for disclosure requirements over outright bans, as more narrowly tailored cures for the potential of commercial messages to mislead by saying too little. But however long the pedigree of such mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.[70]

"restraints" on commercial speech and analyzed them under its mid-level test for commercial speech restrictions, finding that the state had not established a substantial purpose for imposing the restriction because it had not offered evidence that the specialty designation was actually or inherently misleading. *Id.* at 139–43. At the end of its opinion, however, the Court addressed the state's alternative claim that, even if it could not prohibit the attorney's speech entirely, it was entitled to reprimand her for failing to publish a disclaimer because her use of the specialty designation was "potentially misleading." *Id.* at 146. The Court did not directly acknowledge that the state's use of the alternate means of a disclosure requirement might subject its action to a more lenient, rational basis review under *Zauderer*. Instead, it said that "[i]f the 'protections afforded commercial speech are to retain their force,'" then "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree,'" which are requirements drawn from the *Central Hudson* test that applies to speech restraints. *Id.* at 146 (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 648–49 (1985) (addressing speech restraints), and Edenfield v. Fane, 507 U.S. 761, 771 (1993)). Next, however, the Court applied a portion of its disclosure requirement reasoning in *Zauderer*, finding that the disclaimer at issue was "copiously detailed," and invalidating it as unduly burdensome. *Ibanez*, 512 U.S. at 146–47 & n.11. Throughout its decision, the Court emphasized the state of the record, indicating that, with respect to the disclaimer, its analysis might well have been different had the State been able to "point to any harm that is potentially real, not purely hypothetical." *Id.* at 146. The Court noted, as well, that it was unsure whether use of the disclaimer would have "saved [the attorney] from censure," suggesting that it viewed the reprimand, in the context of the case, as equivalent to a speech restraint. *Id.* at 147 n.11.

68. 521 U.S. 457 (1997).

69. *Id.* at 460–61.

70. *Id.* at 490–91 (Souter, J., dissenting) (citations omitted) (alteration in original).

In *United States v. United Foods, Inc.*,[71] the *Glickman* dissenters joined several justices in the majority to invalidate a federal statutory requirement that mushroom producers pay an assessment for generic advertising that was not government speech.[72] Echoing the *Glickman* dissenters, the *United Foods* Court adopted the view that product producers have First Amendment rights that may be infringed by regulatory actions compelling them to subsidize commercial speech with which they disagree. In its short opinion, the Court also distinguished *Zauderer*:

> Noting that substantial numbers of potential clients might be misled by omission of the explanation, the [*Zauderer*] Court sustained the requirement as consistent with the State's interest in "preventing deception of consumers." There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.[73]

Justice Thomas and Justice Ginsburg commented directly on the confusion that the Court's case law and comments have engendered in their joint dissent from the Court's denial of certiorari in a case in which the Eleventh Circuit Court of Appeals upheld a Florida statute imposing disclosure requirements on dentists who practice implant dentistry.[74] The two justices argued that the Court should "provide lower courts with guidance on the subject of state-mandated disclaimers," and distinguished *Zauderer* as insufficient to validate the "government-scripted disclaimer" at issue in that case.[75]

Most recently, eight members of the Court avoided addressing the outer boundaries of *Zauderer*'s applicability by finding that a disclosure requirement imposed on bankruptcy attorneys was subject to lenient rational basis review because the government's purpose was to correct misleading commercial speech.[76] Justice Thomas concurred, agreeing to resolve the case pursuant to *Zauderer*, but indicating that he would be willing to reexamine whether its standard "provide[s] sufficient First Amendment protection against government-mandated disclosures" in an appropriate case.[77]

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71. 533 U.S. 405 (2001).

72. *Id.* at 408–409.

73. *Id.* at 416 (citation omitted). The Justices in the majority were Kennedy, Rehnquist, Stevens, Scalia, Souter and Thomas.

74. Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080, 1080 (2002).

75. *Id.* The Justices also noted that the dentist "also raises doubts about whether the Eleventh Circuit's conclusion is consistent with *Ibanez*." *Id.*

76. Milavetz , Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010).

77. *Id.* at 1342–45 & n.1 (expressing doubt that the lesser burden that disclosure requirements may impose on speakers "justifies an entirely different standard of review for regulations that compel, rather than suppress, commercial speech").

B. The Consequences of Applying Commercial Speech Restraint Analysis to Information Disclosure Requirements

Most of the commercial speech jurisprudence has developed in the context of speech restraints. The general speech-protective trend apparent in these cases, as well as the specific judgments that guide the Court's application of the prongs of the *Central Hudson* test, provide important background that helps to explain the uncertainty in the current jurisprudence of disclosure requirements. The cases also provide a foreshadowing of the limitations government regulators would face if a majority of the Court were to limit the application of *Zauderer*'s deferential review standard to disclosure requirements imposed to correct deceptive or misleading commercial speech.

In its most recent articulation, the Court confirmed that "[t]he *Central Hudson* test is significantly stricter than the rational basis test,"[78] which it described as follows:

> [W]e ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask "whether the asserted governmental interest is substantial." If it is, then we "determine whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest." Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.[79]

This section discusses the consequences of transposing each of these "stricter" speech restraint inquiries into the analysis of disclosure requirements imposed on commercial speech.

1. Deceptive or Misleading Speech

Central Hudson's first prong most obviously incorporates the critical differences the Court has identified between commercial and other types of speech. Although content discrimination is highly suspect with respect to non-commercial speech, this prong permits governments to suppress entirely commercial speech that is "more likely to deceive the public than to inform it."[80] While a deferential approach to government judgments could provide wide latitude to restrict commercial speech, the choice apparent in the speech restraint cases is instead that the Court will carefully scrutinize a government determination that commercial speech should be suppressed to protect consumers from being deceived. The

78. Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).
79. *Id.* at 357 (citations omitted).
80. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

Court has clarified that government authority to suppress commercial speech entirely extends only to speech that is in fact deceptive or "inherently misleading."[81] The Court requires proof to find speech in fact deceptive,[82] and will exercise de novo review to determine whether a statement is inherently misleading.[83] It has rejected state determinations that certain advertising claims met either of these standards, noting "the complete absence of any evidence of deception"[84] and opining that members of the public are generally sophisticated enough to recognize the limits of advertising and are not as easily misled as would-be regulators claim them to be.[85]

By contrast, the Court tends to accord more deference to government determinations that commercial speech may mislead consumers when the regulatory means are mandated disclosure rather than restriction of speech. The Court has repeatedly emphasized that disclosure requirements are less burdensome alternatives to restrictions of commercial speech. Despite use of the same word, the Court in *Zauderer* seemed to apply different degrees of deference to the State's assertions that the attorney's speech was "deceptive" according to the remedy the State sought to apply.[86] Since *Zauderer*, the Court has changed its wording somewhat, acknowledging that a government's discretion to impose disclosure requirements extends beyond what is required to justify a speech restraint, to supplementing speech that is "potentially misleading."[87]

While it has seemed to say that, even when imposing a disclosure requirement, a government regulator must demonstrate the "harms it recites are real,"[88] most recently, eight members of the Court signed on to a reiteration of *Zauderer*'s conclusion that a "possibility of deception" may be so "self-evident" that no specific proof by the government regu-

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81. *See* Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 110 (1990) ("A State may not . . . completely ban statements that are not actually or inherently misleading.").

82. *See id.* at 106 ("Given the complete absence of any evidence of deception in the present case, we must reject the contention that petititioner's letterhead is actually misleading.").

83. *See id.* at 108.

84. *Id.* at 106.

85. *See Peel*, 496 U.S. at 105 ("We reject the paternalistic assumption that the recipients of petititioner's letterhead are no more discriminating than the audience for children's television."); Bates v. State Bar of Ariz., 433 U.S. 350, 374–75 (1977) (rejecting the assumption "that the public is not sophisticated enough to realize the limitations of advertising" as based on an "underestimation of the public").

86. *Compare* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 648 (1985) (rejecting State's contention that illustrations in advertisements created "unacceptable risks that the public will be misled, manipulated, or confused" as sufficient to justify suppressing them), *with id.* at 652–53 (accepting State's contention that the attorney's reference to "fees" without mention of "costs" was "deceptive" where the remedy was a disclosure requirement).

87. *See, e.g.*, Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 8–9 (1st Cir. 2007) ("[T]he Court has made a doctrinal refinement, distinguishing in the professional services context between commercial speech that is inherently or actually misleading and commercial speech that is only potentially misleading. . . . We need not (and do not) decide the issue, but we note that recent decisions have applied this dichotomy beyond the professional services context.").

88. Ibanez v. Fla Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 146 (1994) (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993)).

lator is required to justify mandating certain information be disclosed in connection with commercial speech.[89]

But even applying the greater deference to government judgments that commercial speech has the potential to deceive will not obviously validate many modern disclosure requirements regulators impose to fulfill objectives other than preventing consumers from being misled by uncorrected speech. That is, graphic cigarette warnings, calorie counts on fast food, and statements about the adverse environmental impact of the products on which they appear do not counter commercial speech the Court would find has a self-evident "tendency to mislead."[90] Consequently, were the Court to limit *Zauderer*'s deferential review to disclosure requirements that serve the purpose of preventing actual or potential consumer deception, the remaining three prongs of the *Central Hudson* test would become relevant to determining the constitutionality of the many disclosure requirements that serve other regulatory purposes.

2. Substantial Purpose

Central Hudson's second prong requires the government to establish a "substantial" purpose for its regulation.[91] It is in this purpose inquiry where a majority of the justices have drawn a sharp line between unconstitutional and permissible commercial speech regulations. Early on, the Court rejected what it characterized as the "highly paternalistic approach" of restricting commercial speech to protect people from "the reactions it is assumed [they] will have to the free flow of . . . information."[92] Specifically, governments have often sought to achieve their valid regulatory objective of reducing demand for a product by imposing advertising restrictions on its producers. Governments' reasons for reducing demand may be to promote public health,[93] to conserve scarce resources,[94] to stabilize economic activity,[95] or to limit the spread of "vice" activity.[96] In each instance, the government regulator reasoned that the advertising it restricted, if allowed, would influence consumer

89. Milavetz , Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1340 (2010) (quoting *Zauderer*, 471 U.S. at 652–53).

90. *Milavetz*, 130 S. Ct. at 1340 (quoting *Zauderer*, 471 U.S. at 652–53); *see, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2001) (observing that the requirement that products containing mercury disclose it served the purposes of providing information and protecting the environment, not preventing consumers from being deceived).

91. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

92. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 769–70 (1976).

93. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) (reducing underage smoking); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996) (plurality opinion) (reducing alcohol consumption).

94. *See Cent. Hudson*, 447 U.S. at 560 (conserving electricity).

95. *See* Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 95–96 (1977) (preventing "white flight" and blight).

96. *See* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 182, 185 (1999) (noting that the Fifth Circuit labeled gambling as "vice activity").

activity in a way that would undermine the public interest, even if many of the individual decisions based on unrestricted advertising might in fact be in the rational self interest of the individual decisionmaker.[97] That is, governments have sought to modify consumer behavior because they have determined that the result of aggregated self interested *individual* purchasing behavior would undermine a *public* interest.

Although the Court has acknowledged that regulating to modify consumer purchasing behavior to achieve a public purpose is within governments' legitimate authority, it has emphasized that it will view such regulations with great skepticism when they take the form of speech restrictions. Restricting speech is a constitutionally offensive means of achieving the government's legitimate citizen "protectiveness" objective because its effectiveness "rests . . . on the advantages of their [citizens] being kept in ignorance."[98] With increasing vehemence, the Court and individual justices have condemned the "paternalistic assumption that the public will use truthful, nonmisleading information unwisely," and the Court has invalidated speech-suppressing regulations that are based upon that assumption.[99] The alternative that the Constitution requires speech restrictions based on the "offensive assumption that the public will respond 'irrationally' to the truth"[100] is to "open the channels of communication" so that people can be "well enough informed" to "perceive their own best interests."[101]

It is unclear precisely which characteristics of a regulation must exist for particular justices to label a government regulation as unconstitutionally "paternalistic." All of the regulations condemned by the Court on this basis have *restricted* commercial speech and some of the troublesome characteristics noted by the Court and individual justices are specific to speech restraints.[102] One troublesome characteristic is that speech restraints modify consumer behavior by "keep[ing] people in the dark for . . . their own good." [103] Another is a political process concern that restricting speech "to pursue a nonspeech-related policy" may "screen from public view the underlying government policy."[104] Additionally, the Court continues to emphasize that disclosure requirements are a "far less

97. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 387 (2002) (Breyer, J., dissenting) ("[T]he Government fears the safety consequences . . . [that] flow from the adverse cumulative effects of multiple individual decisions each of which may seem perfectly reasonable considered on its own.").

98. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 769 (1976).

99. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996) (plurality opinion).

100. *Id.* at 503 (quoting Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 96 (1977)).

101. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

102. *See, e.g.*, Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 193 (1999).

103. *44 Liquormart*, 517 U.S. at 503.

104. *Id.* at 500 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 n.9 (1980)).

restrictive alternative" than advertising restrictions, although it is unclear the extent to which this conclusion extends beyond correcting "misleading" advertisements.[105]

By contrast, some statements by individual justices and combinations of justices suggest a view that the Constitution prohibits the more general regulation of commercial speech for "paternalistic" behavior modification purposes.[106] Justice Thomas has most vociferously advocated the view that strict scrutiny should apply to government regulations that depend on the content of commercial speech, unless the government can demonstrate that the speech is untruthful or misleading.[107] Other justices have joined in similar reasoning in some cases.[108] Nevertheless, these justices and others have also emphasized that such content based purposes are particularly problematic in the context of broad speech restrictions, which they characterized as "blanket bans" that "entirely suppress" speech,[109] and that governments may require the disclosure of at least some types of "beneficial consumer information" without running afoul of the anti-paternalistic purpose rule that they interpret the Constitution to contain.[110] Consequently, it is unclear how a majority of the Court would evaluate a disclosure requirement aimed to counter the potentially persuasive, as opposed to deceptive, content of commercial speech under *Central Hudson*'s second prong.

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105. Thompson v. W. States Med. Ctr., 535 U.S. 357, 376 (2002) ("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.").

106. *See, e.g.*, *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

107. Milavetz , Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1342 (2010) (Thomas, J., concurring); *Thompson*, 535 U.S. at 377 (Thomas, J., concurring); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring); *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

108. *44 Liquormart*, 517 U.S. at 501 (plurality opinion) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."). By contrast, Justices Stevens and Ginsburg joined Justice Breyer's dissent in *Thompson*, accepting the Federal Drug Administration's consumer demand modification purpose for restricting compounded drug advertising. *Thompson*, 535 U.S. at 382 (Breyer, J., dissenting). This may be because the FDA's restrictions were tailored and not a "complete ban."

109. *See, e.g.*, *44 Liquormart*, 517 U.S. at 500 (plurality opinion) ("'[S]pecial care' should attend the review of . . . blanket bans. . . .") (citing *Cent. Hudson*, 447 at 566 n.9); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 110 n.17 (1990) (plurality opinion) ("[A] holding that a total ban is unconstitutional does not necessarily preclude less restrictive regulation of commercial speech."); *Cent. Hudson*, 447 U.S. at 566 n.9 ("We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy.").

110. *44 Liquormart*, 517 U.S. at 501 (plurality opinion) ("When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.").

3. Directly Advance

Prong three of the *Central Hudson* test looks to the relationship of the government's means to its end.[111] Speech restrictions must directly advance the government's substantial purpose for imposing the regulation.[112] The Court has applied this test with increasing rigor, questioning the details of government line-drawing and demanding proof that particular restrictions will actually advance the government objective substantially.[113] Where government has imposed speech restrictions for the purpose of reducing demand as the intermediary means to achieving a public end, the Court has examined closely whether the restriction imposed will actually achieve the specific type of demand reduction the government asserts. In *44 Liquormart*, a four justice plurality refused to assume, without findings of fact or evidentiary support, that restricting price advertising of alcohol would "*significantly* reduce alcohol consumption," finding, among other things, that a lack of such information is unlikely to deter heavy drinkers.[114] In both *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*[115] and *Rubin v. Coors Brewing Co.*,[116] the Court rejected the one-step-at-a-time reasoning, failing to find a close enough fit between the government's purpose and its means because of contradictions contained in the overall regulatory schemes for alcohol and gambling, respectively.[117] And in *Lorillard Tobacco Co. v. Reilly*,[118] a plurality similarly rejected the state's assertion that requiring tobacco advertising be at five feet or higher directly advanced its goal of curbing minors' demand for cigarettes because, "Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings."[119] Finally, in *Thompson v. Western States Medical Center*,[120] the Court seemed to say that restricting advertisements to reduce consumer demand as a means to protect those same consumers "from making bad decisions with the information" per se does not *directly* advance the government's interest.[121] Obviously, this close examination of means-end fit applied to disclosure requirements would invalidate more of them than the *Zauderer* rational basis review.

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111. *Cent. Hudson*, 447 U.S. at 566.
112. *Id.*
113. *See, e.g.*, *44 Liquormart*, 517 U.S. at 505.
114. *Id.* (requiring a strong showing by the State because of the "drastic nature of its chosen means").
115. 527 U.S. 173 (1999).
116. 514 U.S. 476 (1995).
117. *Greater New Orleans*, 527 U.S. at 190–93; *Rubin*, 514 U.S. at 489.
118. 533 U.S. 525 (2001).
119. *Id.* at 566 (plurality opinion).
120. 535 U.S. 357 (2002).
121. *Id.* at 374–76 ("Even if the Government had asserted an interest in preventing people who do not need compounded drugs from obtaining those drugs, the statute does not directly advance that interest. . . . [T]he statute does not directly forbid such sales. It instead restricts advertising, of course not just to those who do not need compounded drugs, but also to individuals who do need compounded drugs and their doctors.").

4. Alternate Means

When it reaches the fourth prong of the *Central Hudson* test, the Court inquires whether the regulation is "more extensive than is necessary to serve [the government's] interest."[122] The Court has applied this requirement increasingly rigorously as well, looking both to whether the restriction imposed is well tailored to the government's purpose,[123] and to whether alternative types of regulations that do not restrict speech could adequately accomplish the government's objective.[124] According to the Court, "[R]egulating speech must be a last—not first—resort."[125] A number of speech restrictions imposed to reduce consumer demand have failed this fourth prong inquiry.[126] The Court has consistently indicated that direct, non-speech regulations are preferable to advertising restrictions,[127] although it has also recited more narrowly tailored speech restrictions as available alternatives that cause the regulation under review to fail the fourth prong inquiry.[128] In connection with this inquiry, the Court has frequently mentioned that disclosure requirements are constitutionally preferable, less-restrictive means to speech suppression,[129] and that governments are free to engage in their own speech to counter the content of advertisements.[130] Consequently, the extent to which the Court would invalidate disclosure requirements because even less restrictive

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122. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

123. *See Lorillard*, 533 U.S. at 563 ("The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.").

124. *Thompson*, 535 U.S. at 371 ("In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").

125. *Id.* at 373.

126. *Id.* at 371 (prescription drugs); *Lorillard*, 533 U.S. at 561 (cigarettes); Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995) (alcohol).

127. *Thompson*, 535 U.S. at 372 ("Several non-speech-related means of drawing a line between compounding and large-scale manufacturing [of drugs] might be possible here."); *Rubin*, 514 U.S. at 490–91 (one alternative available to prohibiting alcohol content advertising of beer is "directly limiting the alcohol content of beers"); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) ("[H]igher prices [for alcohol] can be maintained either by direct regulation or by increased taxation."); Linmark Assoc., Inc. v. Twp. of Willingboro, 431 U.S. 85, 97 (1977) (financial incentives to reduce home sales are an available alternative to restricting display of For Sale signs).

128. *Rubin*, 514 U.S. at 490–91 (alternatives to alcohol content advertising for all beer are "prohibiting marketing efforts emphasizing high alcohol strength (which is apparently the policy in some other western nations), or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war").

129. *Thompson*, 535 U.S. at 376; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 571 (1980) (reasoning that in order to address its interest in promoting energy conservation, the government "might, for example, require that the [utility's] advertisements include information about the relative efficiency and expense of the offered service"); Bates v. State Bar of Ariz., 433 U.S. 350, 375 (1977) ("[T]he preferred remedy is more disclosure, rather than less."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) (suggesting that governments may "require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive").

130. *See* Linmark Assoc., Inc. v. Twp. of Willingboro, 431 U.S. 85, 97 (1977) (suggesting the alternative of government counter-speech).

means of achieving the government's purpose are available, such as direct regulation or government speech, is unclear.

C. Disclosure Requirements in the Lower Courts

The intersection of the Court's early distinction between commercial speech disclosure requirements and restraints imposed on commercial speech creates a number of open issues with respect to government authority to mandate speech on product labels.

1. What is the test?

Lower courts have differed as to whether *Zauderer*'s rational basis review applies to all instances where governments mandate disclosure of commercial information, or whether it is limited to instances where governments act for the purpose of preventing consumer deception.

The Second Circuit Court of Appeals has addressed this question in a series of recent cases. In *International Dairy Foods Ass'n v. Amestoy* (*IDFA*),[131] Judges Altimari and McLaughlin held for a two-judge majority that dairy marketers had established a likelihood of success on the merits of their claim that a Vermont statutory requirement mandating producers to label certain dairy products—those made from milk derived from cows treated with the synthetic growth hormone rBST—violated the Constitution.[132] The court applied the *Central Hudson* test to find the disclosure requirement likely unconstitutional for lack of a substantial purpose without explicitly addressing whether *Zauderer*'s rational basis test applied.[133] Judge Leval dissented, also without specifically distinguishing between the tests offered in *Central Hudson* and *Zauderer*.[134] Instead, he argued both that the state's interests were substantial under *Central Hudson*, and that *Zauderer*'s distinction between "disclosure requirements and outright prohibitions on speech" rendered the Vermont requirement constitutional.[135]

Five years later, in *National Electrical Manufacturers Ass'n v. Sorrell*,[136] a unanimous panel composed of Chief Judge Walker, Judge Pooler and then-Judge Sonia Sotomayor reversed and remanded a district court decision and ordered preliminarily enjoining application of Vermont statutory and regulatory requirements that manufacturers label products to indicate they contain mercury and must be disposed of as hazardous waste.[137] The district court relied on the prior decision in

131. 92 F.3d 67 (2d Cir. 1996).
132. *Id.* at 74.
133. Implicitly, the court seemed to limit *Zauderer*'s application to disclosure requirements aimed at "preventing deception of consumers." *Id.* (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).
134. *Id.* at 77–78 (Leval, J., dissenting).
135. *Id.* at 81.
136. 272 F.3d 104 (2d Cir. 2001).
137. *Id.* at 116.

IDFA and, applying *Central Hudson*, found the plaintiff manufacturers' association likely to succeed on the merits of its constitutional claim.[138] The circuit court directly addressed the different tests articulated in *Central Hudson* and *Zauderer*, and held that the district court had "misperceived" which one applied to the disclosure requirement in that case.[139] According to the court, the Free Speech Clause objectives underlying the distinction between disclosure requirements and restraints on speech meant that the "reasonable-relationship rule in *Zauderer*" governed review of the disclosure requirement before it, even though it "was not intended to prevent 'consumer confusion or deception' per se."[140] The court explained:

> Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas." Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.
>
> Additionally, the individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state are not ordinarily implicated by compelled commercial disclosure. Required disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality.[141]

The court thus concluded that "*Zauderer*, not [*Central Hudson*], describe[d] the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech."[142] It distinguished its prior decision in *IDFA* as "expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity,'" noting that "because our decision in *IDFA* was predicated on the state's inability to

138. Nat'l Elec. Mfrs. Ass'n v. Sorrell, 72 F. Supp. 2d 449, 456. (D. Vt. 1999).
139. *Sorrell*, 272 F.3d at 113.
140. *Id.* at 115 (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).
141. *Id.* at 113–14 (footnote omitted) (citations omitted).
142. *Id.* at 115.

identify a sufficient legitimate state interest, we did not reach the proper relationship between a disclosure regulation's means and its ends, the issue we face here."[143] It commented as well that applying the *Central Hudson* test to government disclosure requirements not aimed specifically at preventing consumer deception would "expose [many] long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required."[144]

In a later decision, with the panel again including Judge Poole and then-Judge Sotomayor, the court rejected the New York State Restaurant Association's (NYSRA) argument that New York City's requirement that restaurants post the calorie content of food should be reviewed under the *Central Hudson* test because its purpose was to combat obesity rather than prevent consumer deception, and because the plaintiff association disputed that the disclosure requirement would fulfill that purpose.[145] The court reiterated its *Sorrell* reasoning "that *Zauderer*'s holding was broad enough to encompass nonmisleading disclosure requirements"[146] and that "*Zauderer*, not *Central Hudson* . . . describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases."[147]

The Second Circuit panel noted that "[w]e have not been alone in accepting this broader reading,"[148] citing the First Circuit's decision in *Pharmaceutical Care Management Ass'n v. Rowe*.[149] In that case, the court applied *Zauderer* to Maine's statutory requirement that middlemen entities in the pharmaceutical distribution network disclose certain information about their operations and finances as a condition for doing business in the state.[150] The court rejected plaintiff's argument that "*Zauderer* is 'limited to potentially deceptive advertising directed at consumers,'" noting that it had "found no cases limiting *Zauderer* in such a way."[151] The weight of the lower court precedent, therefore, interprets the *Zauderer* rational basis test to apply to disclosure requirements gen-

143. *Id.* at 115 n.6.

144. *Id.* at 116 (noting that "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," including reporting of federal election campaign contributions, securities disclosures, tobacco labeling, nutritional labeling, reporting of pollutant concentrations in water, reporting of releases of toxic substances, disclosures in prescription drug advertisements, posting notification of workplace hazards, warning of potential exposure to hazardous substances, and disclosure of pesticide formulas) (citations omitted).

145. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA*), 556 F.3d 114, 132–33 (2d. Cir. 2009).

146. *Id.* at 133.

147. *Id.* (quoting *Sorrell*, 272 F.3d at 115) (alteration in original).

148. *NYSRA*, 556 F.3d at 133

149. 429 F.3d 294 (1st Cir. 2005).

150. *Id.* at 316.

151. *Id.* at 310 n.8.

erally, even if they are not specifically or exclusively aimed at preventing consumer deception.[152]

Other courts, however, have applied the *Central Hudson* test to disclosure requirements, specifically in the context of advertising by lawyers and other professionals, where the Court's decision in *Ibanez* muddies the precedent. In *Borgner v. Brooks*,[153] the case in which Justices Thomas and Ginsburg dissented from denial of the writ of certiorari,[154] both the district court and the appellate court applied the *Central Hudson* test to a state requirement that dentists include a disclaimer with their advertisements of an implant dentistry specialty.[155] Neither acknowledged the option of lower level review that *Zauderer* presented.[156]

In *Mason v. Florida Bar*,[157] the Eleventh Circuit confronted a state bar rule that on its face prohibited attorneys from making certain types of "self laudatory" statements without a lengthy disclaimer in the lawyer's advertising.[158] Confronted with the state bar's argument that "its restriction on [the plaintiff attorney's] speech should be upheld because it has not insisted upon an outright ban on speech, but merely requires the use of a disclaimer,"[159] the court interpreted the Supreme Court's decision in *Ibanez* to require that "[e]ven partial restrictions on commercial speech must be supported by a showing of some identifiable harm."[160] It held "that the Bar is not relieved of its burden to identify a genuine threat of

152. *See, e.g.*, Conn. Bar Assoc. v. United States, 394 B.R. 274, 286–87 (D. Conn. 2008) (finding that for review of a required disclosure for bankruptcy attorneys "the reasonable relation test is more appropriate," but also determining that the required disclosures are not misleading, are not overbroad, and "advance[] a sufficiently compelling government interest and do[] not unduly burden the attorney-client relationship"); European Connections & Tours, Inc. v. Gonzales, 480 F. Supp. 2d 1355, 1371–72 (N.D. Ga. 2007) ("IMBRA's disclosure requirements are properly analyzed under *Zauderer* and must be upheld if there is a reasonable relationship to a legitimate government interest. . . . IMBRA's disclosure requirements are reasonably related to Congress' legitimate interest in preventing fraud and deception and addressing domestic abuse and human trafficking against so-called 'mail-order brides.'"); Beeman v. Anthem Prescription Mgmt., Inc., No. EDCV 04-407-VAP (SGLx), 2007 U.S. Dist. LEXIS 39779, at *36–39 (C.D. Cal. May 4, 2007) (addressing the question whether strict scrutiny or rational basis scrutiny applied to state statutory requirement that pharmacies conduct and distribute a bi-yearly rice survey, and concluding that no scrutiny applied because the statistics were not required to be distributed with advertising materials and so did not burden commercial speech); Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 845 n.18 (9th Cir. 2003) (subjecting EPA rule that requires municipalities to distribute information about the hazards of storm water run-off to unspecific low level scrutiny); Texans Against Censorship, Inc. v. State Bar of Tex., 888 F. Supp. 1328, 1357–59 (E.D. Tex. 1995), *aff'd*, 100 F.3d 953 (5th Cir. 1996).

153. 284 F.3d 1204 (11th Cir. 2002).

154. Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080 (2002) (Thomas, J., dissenting).

155. *Borgner*, 284 F.3d at 1210.

156. *Id.* at 1214 (citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) for the rule that "[d]isclaimers are significantly different than outright bans on commercial speech," but applying the *Central Hudson* test); Borgner v. Brooks, 152 F. Supp. 2d 1317, 1324 (2001) (citing *Zauderer*, 471 U.S. at 648–49 for the rule that restrictions on advertising cannot be based on "'unsupported assertions' without 'evidence or authority of any kind'").

157. 208 F.3d 952 (11th Cir. 2000).

158. *Id.* at 954.

159. *Id.* at 958.

160. *Id.*

danger simply because it requires a disclaimer, rather than a complete ban on . . . speech," and that the Bar "has failed to satisfy the third prong of *Central Hudson*."[161] Similarly, the district court in *Schwartz v. Welch*[162] reviewed a series of disclosure requirements imposed on lawyer advertising under the *Central Hudson* test, characterizing the rules as imposing "restrictions" because the requirements caused the lawyer–plaintiffs to modify their advertisements and forego certain advertisement techniques.[163] A Massachusetts state court recently discussed the difficulty of analyzing disclosure requirements coupled with an enforcement mechanism present in the context of mandated security offering registration and disclosure.[164] The problem of characterization arises because the disclosure requirement serves "not to restrict speech, but to expand it," but the "necessary corollary" of such a scheme is the prohibition of speech without the required disclaimer.[165] The enforcement mechanism "inherently restrict[s] speech," but "without such prohibitions it is difficult to imagine how a . . . disclosure system could operate with any degree of effectiveness."[166]

In *Milavetz, Gallop & Milavetz, P.A. v. United States*,[167] the district court applied the *Central Hudson* test to a disclaimer imposed on lawyers.[168] The appellate court agreed that *Zauderer* applied only to disclosure requirements imposed for the purpose of preventing deception, but applied that test because it determined that this was the government's purpose in that case.[169] The Supreme Court affirmed the appellate court's reasoning,[170] which meant that it did not resolve whether *Zauderer*'s "less exacting scrutiny" applies to disclosure requirements imposed for purposes other than correcting potentially deceptive commercial speech. Additionally, although the case before it did not depend upon the distinction, the Ninth Circuit recently appears to have assumed that the deception prevention purpose is essential to the application of the *Zauderer* standard.[171]

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161. *Id.*

162. 890 F. Supp. 565 (S.D. Miss. 1995).

163. *Id.* at 573–74.

164. Bulldog Investors Gen. P'ship v. Galvin, No. 07-1261-BLS2, 2007 WL 4647112, at *9–*10 (Mass. Dec. 26, 2007).

165. *Id.* at *9–*10.

166. *Id.* at *10.

167. 541 F.3d 785 (8th Cir. 2008).

168. *Id.* at 796.

169. *Id.* at 796 ("[R]estrictions on non-deceptive advertising are reviewed under intermediate scrutiny. . . . The district court in this case reviewed § 528's disclosure requirements under the intermediate scrutiny standard, but we conclude that rational basis review is proper. The disclosure requirements here, like those in *Zauderer*, are intended to avoid potentially deceptive advertising.").

170. Milavetz, Gallop & Milavetz, P.A., v. United States, 130 S. Ct. 1324, 1339 (2010) (applying the deferential review of *Zauderer* because the statute imposed a disclosure requirement and because it "is directed at *misleading* commercial speech").

171. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 966 (9th Cir. 2009) ("Compelled disclosures, justified by the need to 'dissipate the possibility of consumer confusion or deception,' are permissible if the 'disclosure requirements are reasonably related to the State's inter-

2. Can The Purpose Be "Paternalistic"?

The "paternalism" the Court condemns in the speech restraint cases involves a three-step ends/means continuum: (1) a government agency suppresses speech (2) to modify individual buyer/seller transactions (3) to achieve a public purpose, which is something other than preventing consumer deception. Steps two and three are commonplace aims of legitimate non-speech regulatory actions. It is the very essence of regulation to restrict the freedom of individual marketplace actors in some instances to serve the democratic government's conception of the public interest. The many types of public interests served by these actions are not exclusively, or even primarily, preventing consumer deception.

As noted above, a number of courts have rejected claims by vendors that *Zauderer*'s rational basis review is limited to disclosure requirements that are intended to protect consumers from deception.[172] These courts have reasoned that the "free flow of information" value that underpins the protection of commercial speech must extend to render a government's purpose to provide more information to aid fully informed consumer decision-making legitimate, even if the regulator did not impose the disclosure requirement to correct affirmatively deceptive or misleading vendor speech.[173] Extended this far, the reasoning remains consistent with that articulated by the Court in condemning "paternalistic" speech restraints.[174] Many existing disclosure requirements can be characterized as intended simply to provide additional information, which will assist consumers in making decisions that reflect their own rational self-interests and which the consumers would not know was in their interest without government mandated disclosure. Requirements that vendors label products as kosher,[175] as containing ingredients to which certain consumers may have an allergic reaction,[176] or with safe handling advice[177] fall into this category.

But many disclosure requirements have purposes that extend beyond merely facilitating the exercise of each individual consumer's ra-

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est in preventing deception of customers.'" (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985))).

172. *See supra* text accompanying notes 131–171.

173. *See supra* text accompanying notes 131–171.

174. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (less than strict judicial review is appropriate when states "require[] the disclosure of beneficial consumer information").

175. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW §§ 201-a(1), 201-c(1), *invalidated by* Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002) (establishment clause violation).

176. *See, e.g.*, Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, 118 Stat. 905, 905–11 (codified at 21 U.S.C. § 301 (2006), *available at* http://www.fda.gov/Food/LabelingNutrition/FoodAllergensLabeling/GuidanceComplianceRegulatoryInformation/ucm106187.htm.

177. *See, e.g.*, Mandatory Safe Handling Statements on Labeling of Raw Meat and Poultry Products, 9 C.F.R. §§ 317.2, 317.5, 381.125, 381.134 (1994).

tional self-interest. Often, government regulators impose disclosure requirements for the purpose of modifying the "reactions" that they anticipate consumers will have to un-supplemented advertiser information.[178] Regulators require disclosure because of "a fear that people would make bad decisions" if given only the information provided by the vendors.[179] That is, an explicit government purpose is to change individual product purchasing behavior to implement a judgment about "what the government perceives to be their own good,"[180] or, often, and more specifically, what the government has determined is in the public good.

Labeling requirements may be part of a comprehensive regulatory scheme that makes clear the consumer behavior modification objective. Cigarette package labeling requirements exist within a complex structure of many different federal, state, and local regulations, including direct marketing restrictions, taxes, and public education efforts aimed at serving the public interest in reducing demand for a product that results in high social and economic costs.[181] An explicit strategy of cigarette regulations is to change public attitudes about the desirability of the product—to "denormalize" tobacco use.[182]

Similar multi-level and multi-faceted regulatory structures with the underlying agenda of changing public attitudes and purchasing behavior exist with respect to other products governments have identified as causing harms to public health and resulting in high social and economic costs.[183] While a requirement that food manufacturers label products with sodium, sugar, or transfat can be characterized as a government effort to "open the channels of communication," another, more aggressive, purpose is obvious as well. Each requirement is part of a broader strategy to promote *healthy* food consumption, not just *any* food consumption rational consumers may happen to choose. And the judgment of what constitutes "healthy" food consumption can be controversial.[184] Consequently, many existing labeling requirements depend upon government authority to require disclosure of information because of the "reactions"

178. See Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 250 & n.107 (2007) (discussing the "preference-shaping effects" of labeling requirements).

179. Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

180. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996).

181. *See, e.g.*, TOBACCO CONTROL LEGAL CONSORTIUM, FEDERAL REGULATION OF TOBACCO: IMPACT ON STATE AND LOCAL AUTHORITY (2009), *available at* http://publichealthlawcenter.org/topics/tobacco-control/federal-regulation-tobacco/federal-regulation-tobacco-collection.

182. *See* R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 912 (9th Cir. 2005) (describing campaign of California Department of Health Services "to 'denormalize' smoking, by creating a climate in which smoking would seem less desirable and less socially acceptable.").

183. *See, e.g.*, Penny Starr, *First Lady Links Childhood Obesity to National Security in Launch of 'Let's Move' Campaign*, CNSNEWS.COM, Feb. 09, 2010, http://cnsnews.com/news/article/61157 (describing elements of anti-obesity campaign).

184. *See, e.g.*, John Tierney, *Diet and Fat: A Severe Case of Mistaken Consensus*, N.Y. TIMES, Oct. 9, 2007, at F1 (describing controversy about USDA Food Pyramid and advice to eat a low-fat diet), *available at* http://www.brown.edu/Departments/Economics/Diet%20and%20Fat.pdf.

it presumes consumers will have to un-supplemented information and for the purpose of modifying consumer behavior to serve the government's determination of the public interest.[185]

The Second Circuit's three cases all involve labeling requirements where a government purpose to modify behavior is mixed with the purpose to inform. In *IDFA*, the panel invalidated a Vermont requirement that milk manufacturers disclose use of the hormone rBST.[186] Vermont passed the law because its citizens wanted to know the information.[187] The court held that "consumer curiosity" was not enough to justify imposing the disclosure requirement on the producer's commercial speech.[188] As the dissent pointed out, milk producers vigorously opposed the labeling requirement because of the reaction they feared consumers would have to it.[189] The milk producers also successfully argued that the information provided should have no impact on a reasonable consumer, because consumers should only be concerned about health effects of the hormone on the milk product, and that had not been scientifically demonstrated.[190] That is, milk producers were concerned that consumers would react irrationally to the information provided at purchase of the product, despite the fact that the vendors remained free to provide whatever contrary information they wanted, at either that moment or in other advertising.[191] Specifically, the milk producers conceded the powerful persuasive effect of information provided at the product purchase moment. By requiring that the government provide a particular showing of harm in order to require disclosure, the majority interpreted the First Amendment as granting the milk producers a right of "concealment" in order to present their persuasive product messages in their own way.[192] The milk labeling controversy helps make clear that what is at stake on

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185. Regulators may also seek to influence producer behavior through imposition of labeling requirements because of the anticipated consumer behavior modification effect. When threatened with an upcoming trans fat labeling requirements many food producers abandoned using them to avoid the anticipated reaction of consumers to the disclosure. *See, e.g.*, LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 177 (2000) (describing decision of Kraft Foods to remove trans fats from Oreo cookies in anticipation of mandatory labeling); Elise Golan, Fred Kuchler & Barry Krissoff, *Do Food Labels Make a Difference? . . . Sometimes*, AMBER WAVES, Nov. 2007, http://www.ers.usda.gov/AmberWaves/Scripts/print.asp?page=/November07/Features/FoodLabels.htm.

186. Manufacturers could comply with the law by placing a small blue sticker on their milk, in conjunction with a sign posted by the retailers indicating that the sticker marked hormone-exposed milk. Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69–70 (2d Cir. 1996).

187. *Id.* at 75–76 (Leval, J., dissenting).

188. *Id.* at 74 (majority opinion) ("[W]e hold that consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement in a commercial context.") (citation omitted).

189. *See id.* at 80 (Leval, J., dissenting).

190. *Id.* at 73 (majority opinion) ("[T]he already extensive record in this case contains no scientific evidence . . . that rBST has any impact at all on dairy products.").

191. *Id.* at 80 (Leval, J., dissenting) ("[The manufacturers] do not wish consumers to know that their milk products were produced by use of rBST because there are consumers who, for various reasons, prefer to avoid rBST.").

192. *See id.* at 74, 80.

both sides of the argument about the extent of government authority to impose disclosure requirements is the power to influence to modify consumer behavior, not simply to inform it.

The Second Circuit in *Sorrell* directly acknowledged the consumer behavior modification objective of the disclosure requirement.[193] The "overall goal" of the requirement that manufacturers label products containing mercury with content and proper disposal information was not simply to inform consumers so that they could decide upon their own rational self-interests and pursue them. Rather, it was "plainly" to pursue the additional public interest in "reduc[ing] the amount of mercury released into the environment."[194] This purpose, the court noted, was "inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products."[195] Increasing public awareness through mandated disclosure had the purpose of "encouraging . . . changes in consumer behavior."[196] Although the "change" the court referred to was in consumers' product disposal behavior, it is not hard to imagine that the required mercury content disclosures were also for the purpose of reducing demand for mercury containing products as well. The court nevertheless explicitly recited the linkage of disclosure requirements, consumer behavior change, and fulfillment of the government purpose as appropriate to demonstrate the reasonable ends-means relationship required by the *Zauderer* test.[197]

More recently, in reviewing calorie content disclosure requirements imposed on New York restaurants, the same court found these means rationally related to the city's purpose "to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it."[198] Although the court noted that the city was not obliged to produce evidence to support its decision-making under the rational basis review applied, it listed much of the evidence the city chose to produce showing that obesity is a public health problem, that obesity correlates to eating in restaurants, and that "calorie information is most relevant to obesity prevention."[199] The court thus concluded that the "calorie disclosure rules are clearly reasonably related to [the city's] goal of reducing obesity."[200]

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193. *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).
194. Id.
195. *Id.*
196. *Id.*
197. *Id.* ("By encouraging such changes in consumer behavior, the labeling requirement is rationally related to the state's goal of reducing mercury contamination.").
198. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA*), 556 F.3d 114, 134 (2d Cir. 2009).
199. *Id.* at 136 (quoting THE KEYSTONE FORUM ON AWAY-FROM-HOME FOODS: OPPORTUNITIES FOR PREVENTING WEIGHT GAIN AND OBESITY (2006)), *available at* http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm082064.htm.
200. *NYSRA*, 556 F.3d at 136.

These cases illustrate that the "purpose" behind modern labeling requirements is more complex than the discussions in the speech restraint cases may suggest. Regulators mandate disclosure both to provide information, in the hope that consumers will modify their purchasing behavior to align with the public interest, and to persuade them to view the public interest as their own. The government's means of achieving behavior modification is what is importantly different between the speech restraint and speech disclosure cases. The "paternalism" of regulating to modify consumer behavior to achieve a public interest remains the same.

3. Can the Information Be Selected and Presented to Persuade?

The Court in *Zauderer* distinguished unconstitutional compulsions that individuals publicize or recite ideological government messages from the requirement that the attorney include "purely factual and uncontroversial information" with his own commercial speech.[201] Several courts have evaluated disclosure requirements against this standard, reaching different conclusions as to whether the disclosure requirement was unconstitutionally persuasive.

The Seventh Circuit accepted this argument in striking down an Illinois statute that required distributors to place a four square inch "18" label on "sexually explicit" video games, and to post signs and distribute brochures explaining the rating system.[202] The state's purpose for the regulation was "shielding children from indecent sexual material and in assisting parents in protecting their children from that material."[203] The court rejected the state's contention that the contents of the label and signage were similar to the required disclosure of mercury content in lights, which was upheld by the Second Circuit in *Sorrell*:

> With regard to the "18" sticker requirement, this argument seems to be plainly unsound. The [state statute] requires that the "18" sticker be placed on games that meet the statute's definition of "sexually explicit." The State's definition of this term is far more opinion-based than the question of whether a particular chemical is within any given product. Even if one assumes that the State's definition of "sexually explicit" is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different definition of this term. Yet the requirement that the "18" sticker be attached to all games meeting the State's definition forces the game-seller to include this non-factual information in its message that is the game's packaging. The sticker ultimately communicates a subjective and highly controversial message—that the game's content is sexually explicit.

201. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

202. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 643 (7th Cir. 2006).

203. *Id.* at 646.

> This is unlike a surgeon general's warning of the carcinogenic properties of cigarettes, the analogy the State attempts to draw.[204]

Because it found the speech to be ideological, the court applied strict scrutiny to invalidate it as not narrowly tailored. It reached the same conclusions with respect to the signs and brochures explaining the rating system, finding in addition that these items unconstitutionally required sellers to "communicate endorsement of the [Entertainment Software Rating Board], a non-governmental third party whose message may be in conflict with that of any particular retailer."[205] The court did not cite or distinguish the Supreme Court's decision in *Meese*, which upheld a "propaganda" label on political speech.[206]

Outside the context of video game labels,[207] courts have found selective disclosure requirements to meet *Zauderer*'s "factual and uncontroversial" requirement. For example, the Ninth Circuit reviewed a challenge by municipal units to an EPA rule that required, as a condition to receiving a permit to discharge waste into waterways, that they "distribute educational materials to the community" about the dangers of storm water runoff.[208] The court found that "[i]nforming the public about safe toxin disposal is non-ideological."[209] The Second Circuit in *NYSRA* specifically addressed the restaurant association's claim that calorie disclosure was unconstitutionally selective:

> NYSRA does not contend that disclosure of calorie information is not "factual"; it only claims that its member restaurants do not want to communicate to their customers that calorie amounts should be prioritized among other nutrient amounts, such as those listed in [the] Nutrition Fact panel. However, the First Amendment does not bar the

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204. *Id.* at 652.

205. *Id.* at 653.

206. Meese v. Keene, 481 U.S. 465, 480–85 (1987); *see supra* notes 62–64 and accompanying text. The Ninth Circuit invalidated a similar "18" labeling requirement for violent videos, finding it inconsistent with "the factual information and deception prevention standards set forth in *Zauderer*" after it held that the state could not constitutionally prohibit under 18 year olds from purchasing the videos. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 966–67 (9th Cir. 2009) (citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)) ("Unless the Act can clearly and legally characterize a video game as 'violent' and not subject to *First Amendment* protections, the '18' sticker does not convey factual information.") (emphasis added).

207. That the product labeled is, itself, speech, muddies the analysis. *See, e.g.*, Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576–77 (7th Cir. 2001) (holding that video games are speech). Additionally, ratings systems present an intermediary step between the product information and the information on the label, which makes the government's selective judgment about the information provided more apparent.

208. Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 848 (9th Cir. 2003).

209. *Id.* at 849–50 (analyzing EPA's administrative rules implementing the Clean Water Act that require small municipal sewer systems that discharge waste to conduct public education efforts about the effects of sewer discharges.); *see also* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114 n.5 (2d Cir. 2001) ("Our decision reaches only required disclosure of factual commercial information [about mercury content]."); Conn. Bar Ass'n v. U.S., 394 B.R. 274, 286 n.13 (D. Conn. 2008) ("In contrast [to the cases involving compelled dissemination of ideological speech], the required disclosures here are all facts about the bankruptcy process.").

> City from compelling such "under-inclusive" factual disclosures, where . . . the City's decision to focus its attention on calorie amounts is rational.[210]

Although they involve selective disclosures arguably crafted, at least in part, to persuade, all of the disclosure requirements addressed by the courts thus far have involved information that consumers likely would not know without the disclosure. In challenging the new cigarette labels, sellers argue that the graphic, colorful labels are more constitutionally offensive because they present information that consumers already know or could be brought to know in a far less eye-catching way, and so are obviously crafted not to inform but to persuade.[211] The district court disagreed, finding that "the government's goal is not to stigmatize the use of tobacco products on the industry's dime; it is to ensure that the health risk message is actually *seen* by consumers in the first instance."[212] The court rejected the cigarette manufacturers' proposed analogy to video game labeling, describing the message required to be disclosed on the packages as "objective" and as having "not been controversial for many decades."[213] As to the required addition of graphic imagery, the court said that it did "not believe that [it] will alter the substance of such messages, at least as a general rule."[214] Interestingly, in an earlier part of the decision, the court accepted the cigarette manufacturers' challenge to a portion of the statute that banned the use of color or graphics in their labeling or advertising, finding that symbols and "some uses of color" communicate information in a different, and potentially more persuasive, way than the black and white text the statute requires.[215]

II. THE ABORTION DISCLOSURE CASES

At the same time that it has been reviewing restrictions of commercial speech more rigorously, the Court has been developing a jurisprudence of constitutionally permissible disclosure requirements in the context of abortion. By contrast to the tightening of review of government regulations and the mixed signals that fuel challenges to commercial speech disclosure requirements, the abortion disclosure jurisprudence is relatively unambiguous. In this line of cases, firm answers exist – either in the Court's terse comments or in the lower courts' more lengthy appli-

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210. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA*), 556 F.3d 114, 134 (2d Cir. 2009) (citation omitted).

211. Commonwealth Brands v. United States, 678 F. Supp. 2d 512, 530 (W.D. Ky. 2010).

212. *Id.*

213. *Id.* at 531.

214. *Id.* at 532.

215. *Id.* at 525. The district court invalidated the "ban on color and graphics in labels and advertising" for tobacco products under the third and fourth prongs of *Central Hudson*, which require a "direct" and "no more extensive than is necessary" relationship between the end and means. *Id.* at 521, 541.

cations – to what seems like open questions in the commercial speech line of cases.

A. The Supreme Court's Informed Consent to Abortion Cases

The abortion disclosure cases began immediately after *Roe v. Wade*[216] established a constitutional right to choose abortion before fetal viability.[217] In the early cases after the *Roe v. Wade* decision, the Court addressed the impact of informed consent provisions on a woman's privacy right, without discussing the impact of the requirements on abortion providers' free speech rights.[218] Under *Roe*'s trimester framework, a state could not impose a regulation that had a "significant impact on the woman's exercise of her [abortion] right"[219] during the first three months of pregnancy, and could not impose such a regulation for the purpose of protecting fetal life until the third trimester.[220] Employing this analysis, the Court reasoned that protecting the woman's health was the only purpose that could support a mandatory information disclosure requirement, and it scrutinized the pieces of information that states selected for disclosure,[221] invalidating disclosure requirements that it deemed "not relevant to [informed] consent"[222] and "designed to influence the woman's informed choice between abortion or childbirth."[223]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[224] a majority of the Court modified its prior decision in *Roe* to acknowledge the existence of a legitimate government interest in protecting fetal life that attaches at the beginning of the pregnancy, and applied this revision to uphold disclosure requirements indistinguishable from those it had invalidated in prior cases.[225] The plurality and concurring justices on this issue wrote separately.[226] Only the plurality addressed the abortion pro-

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216. 410 U.S. 113 (1973).

217. *Id.* at 164–65.

218. *See, e.g.*, Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 490–91 (1983) (upholding a state consent statute which comported with *Belotti II*); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 643 (1979) (concluding a state could require parental consent but only if the state also provides "an alternative procedure whereby authorization for the abortion can be obtained"); Bellotti v. Baird (*Bellotti I*), 428 U.S. 132, 145 (1976) (explaining that a state consent statute may not create a "parental veto"); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69–70 (1976) (striking down a state statute requiring a husband's written consent).

219. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 430 (1983).

220. *See* Beal v. Doe, 432 U.S. 438, 446 (1977).

221. *City of Akron*, 462 U.S. at 443 (clarifying that a state does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion").

222. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 763 (1986) ("Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.").

223. *City of Akron*, 462 U.S. at 444.

224. 505 U.S. 833 (1992).

225. *Id.* at 878.

226. Justices O'Connor, Kennedy and Souter announced the judgment of the Court and delivered a plurality opinion. *Id.* at 841. Justices Rehnquist, White, Scalia and Thomas concurred in the judgment that the disclosure requirement did not violate the due process clause, but would have applied rational basis analysis to reach this result. *Id.* at 967–69.

viders' Free Speech Clause claim.[227] While preserving the "essence of the abortion right," the plurality rejected *Roe*'s trimester framework reasoning and replaced it with an "undue burden" inquiry that applies to state regulations imposed from the onset of the pregnancy.[228] In determining that the disclosure requirements at issue did not impose an undue burden on the abortion right, the plurality explicitly rejected prior Court holdings that only a purpose to protect women's health could support required disclosure. It held that states may select information and mandate disclosure for the purpose of protecting fetal life and "to persuade her to choose childbirth over abortion."[229] In discussing the required disclosures that may survive this undue burden analysis, the plurality twice stated that the disclosures should be "truthful and not misleading."[230]

After finding that the disclosure requirements imposed no unconstitutional burden on the prospective abortion consumer, the *Casey* plurality briefly addressed the abortion providers' claim that the mandated disclosures violated their Free Speech Clause rights.[231] The plurality first reasoned that the providers' claim acquired no heightened value because of its articulation in the context of the protected abortion right.[232] With this put aside, "[a]ll that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State."[233] The plurality reasoned:

> To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[234]

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227. *Id.* at 884 (concluding that an abortion provider's constitutional right "not to provide information" extends "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State").

228. *Id.* at 876 ("[T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

229. *Id.* at 878, 882–83 (asserting that governments may require that women considering abortion receive information about "the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health," and even when the information provided "expresses a preference for childbirth over abortion").

230. *Id.* at 882 (prior cases went too far in invalidating disclosure of "truthful, nonmisleading information").

231. *Id.* at 884.

232. *Id.* ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.").

233. *Id.*

234. *Id.* (citations omitted).

Although not specifically reviewing a disclosure requirement, the Court later, in *Gonzales v. Carhart*,[235] characterized its holding in *Casey* to be that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[236] In addressing the question whether barring a type of procedure imposed an undue burden on the right to choose abortion, in light of claims that it was necessary in some circumstances to protect the health of abortion consumers, it said, "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[237]

B. Informed Consent in the Lower Courts—Issues and Answers

States have enacted a number of abortion disclosure requirements since the Court's decision in *Casey*, and as the Court's commercial speech and government speech jurisprudences have continued developing. Many of these "informed consent" provisions both go beyond information normally required by the informed consent doctrine and can reasonably be interpreted as designed to persuade women not to choose abortion.[238] Lower courts have addressed the increasing Free Speech Clause challenges brought by abortion providers to the disclosure requirements, fleshing out *Casey*'s few sentences to identify the standard of review and analysis that apply to such claims.

1. The Test is Rational Basis

Lower courts have uniformly interpreted *Casey* to apply a "reasonable relationship" test to claims by abortion providers that disclosure requirements violate their free speech rights.[239] Several courts have noted that the level of review would change if states were to require doctors to provide patients with state mandated "ideology" instead of factual disclosures.[240] Many courts have noted and grafted onto the Free Speech

235. 550 U.S. 124 (2007).

236. *Id.* at 157.

237. *Id.* at 163.

238. Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1609 (2008). According to a recent Guttmacher Institute report 17 states mandate that women be given "counseling" before an abortion that includes information on at least one of the following: the purported link between abortion and breast cancer (6 states), the ability of a fetus to feel pain (9 states), long-term mental health consequences for the woman (7 states) or information on the availability of ultrasound (8 states). Commentators argue that at least some of these provisions should be interpreted to violate the Free Speech Clause. *Id.* at 1609–12; *see* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 1007–09 (2009) (provisions violate the rights of the listener); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL L. REV. 939, 959 (2007) (provisions violate the right of the speaker).

239. This tracks the Court's language and brief analysis. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (doctors' speech subject to "reasonable . . . regulation by the State").

240. *See, e.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 734–35 (8th Cir. 2008) ("*Casey* and *Gonzales* establish that the State cannot compel an individual simply to speak the State's ideological message . . . .").

Clause test the additional requirement twice articulated by the *Casey* plurality in its undue burden analysis that "permissible" disclosure requirements must be "truthful and not misleading."[241]

This phraseology parallels language contained in several different parts of its commercial speech jurisprudence. *Central Hudson*'s first prong requires that commercial speech be "lawful activity and not be misleading" to earn entry into the protected category.[242] And, as noted above, lower courts have interpreted *Zauderer* to require that the content of mandated disclosure requirements be "factual and uncontroversial."[243] The Supreme Court plurality did not make any of these connections, and neither have the lower courts. No court has considered applying the full tests set out in *Central Hudson* or *Zauderer* to state requirements that doctors deliver state mandated information along with their own speech.

2. The Purpose Can Be "Paternalistic"

As to legitimate purposes that can support mandated disclosure requirements, courts have applied as binding precedent the *Casey* plurality's reasoning that either a purpose to protect maternal health or to protect the life of the unborn fetus will suffice.[244] Protecting maternal health is a purpose consistent with furthering the consumer's rational self interest in self protection. Protecting the life of an unborn fetus is a purpose that asks the abortion consumer to think beyond herself, to consider how other beings, and one "being" in particular, will be affected by her decision to undergo the procedure. That is, despite some efforts by the Court to cast it as a purpose that serves the woman's self interest,[245] protecting the life of the unborn fetus is a public purpose that may well conflict with the consumer's rational self interest.

As explained above, the "paternalistic approach" that the Court condemns in the context of commercial speech restraints involves the combination of (1) restricting speech, (2) to reduce demand, (3) to serve a public interest, which is something other than ensuring fully informed and accurate consumer decision-making.[246] In holding that states may constitutionally mandate disclosure, in a way "which might cause the

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241. *Id.* at 746.

242. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

243. *See supra* Part I.C.3.

244. *See, e.g.*, Karlin v. Foust, 188 F.3d 446, 495 (7th Cir. 1999) ("[T]he district court concluded that the provisions challenged . . . bore a reasonable relationship to the state's goal of promoting childbirth over abortion. . . . [T]he district court went on to pronounce that 'were *Casey* not binding, I might be inclined to hold that [the statute containing the disclosure requirements] was passed with an impermissible purpose . . . . However, lower courts are bound by Supreme Court precedent. I do not see how *Casey* does not control this question.'") (third omission in original).

245. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (stating that information about the fetus is relevant to a woman's "psychological well-being," which "is a facet of health").

246. *See supra* Part I.C.2.

woman to choose childbirth over abortion," and which was enacted for the purpose of "express[ing] a preference for childbirth over abortion,"[247] the Court has held that steps two and three are constitutional when combined with the means of required disclosure in the context of consumer decision making with respect to the service of abortion.[248] Lower courts uniformly understand and apply this principle.

3. The Information Can Be Selected and Presented to Persuade

The *Casey* plurality was not ambiguous.[249] The lower courts have interpreted its words to say that states may pursue their legitimate purpose of protecting fetal life by requiring disclosure of information selected to persuade potential abortion consumers to decide against the procedure.[250] They have also addressed claims by abortion providers that particular state disclosure requirements go beyond the bounds of permissible state persuasion authorized in *Casey*, either because they impart ideology instead of information, or because the information required to be disclosed is untruthful or misleading.[251]

Lower courts have had to address the two prongs of the *Casey* plurality's reasoning and to reconcile them with the particular statutory provisions under review. These are, first, that the First Amendment would prohibit a state from mandating that a private individual "simply . . . speak the State's ideological message"[252] and second, that the informational disclosures required by the Pennsylvania statute at issue in *Casey,* even though, at least in part, "designed to persuade [women] to choose childbirth over abortion,"[253] did not do that. Although these courts have reached different conclusions with respect to the application of *Casey*'s reasoning to particular types of provisions, they have generally interpreted the precedent to allow government regulators a wide range of discretion both to choose information that abortion providers must present to potential consumers, and to direct the means of presentation in order to further the public purpose of reducing demand for a lawful service.

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247. *Casey*, 505 U.S. at 883.

248. *Id.*

249. *See id.* at 878 (noting that a state measure may be "designed to persuade [a woman] to choose childbirth over abortion").

250. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008) ("[A State may] use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."); *see also* Karlin v. Foust, 188 F.3d 446, 495 (7th Cir. 1999) (reviewing and approving, in the context of undue burden analysis, the district court's conclusion that *Casey* directs that "legislation is based on a permissible purpose if it is reasonably related to promoting childbirth over abortion or protecting maternal health").

251. *See Rounds,* 530 F.3d at 735–36.

252. *Id.* at 735.

253. *Casey*, 505 U.S. at 878.

In *Eubanks v. Schmidt*,[254] the district court noted that the "possible ideological component" of the informed consent requirement presented an "interesting and important enough issue."[255] After reasoning that, according to its brief discussion, the *Casey* plurality must have "believed these [challenged disclosures] to convey information reasonably related to informed consent, not ideology," the court further observed that "it is easy to see why some would disagree."[256] The court noted that "a statute requiring every physician to advise women of their right to have an abortion . . . might be equally justified as the one here," but concluded that "[s]imply because a subject is controversial . . . does not make it ideological."[257] Although "the legislature passed [the statute at issue] to further its preference for birth over abortion," the mandated disclosures "do not overtly trumpet that preference."[258] Consequently, the court, like the Supreme Court, viewed them as "merely providing information."[259]

The *Eubanks* court further rejected the abortion providers' claim that the state statute was invalid because it required providers to pay for the state-created literature they were also required to distribute.[260] Two other district courts reached the opposite result, reasoning differently as to both whether a state ideological message was obvious in the disclosure requirement, and whether abortion providers could constitutionally be required to pay. In *Karlin v. Foust*,[261] the court found that the state statutory requirement that abortion providers distribute "state-printed and county-compiled materials" was "far more than a simple vehicle for information distribution."[262] In its view, the disclosure requirement "force[d] physicians to associate themselves with the state's anti-abortion message, a message that is implicit in the information provided even if it is never stated explicitly."[263] Although the court acknowledged that *Casey* was binding as to the constitutionality of the distribution requirement, it invalidated the additional requirement that the abortion providers pay for the information.[264]

The district court in *Summit Medical Center of Alabama, Inc. v. Riley*[265] addressed these questions more recently. In its view:

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254. 126 F. Supp. 2d 451 (W.D. Ky. 2000).
255. *Id.* at 458 n.11.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 460 ("[I]t is not clear that requiring the physicians to pay for the pamphlets changes the constitutional analysis to any extent.").
261. 975 F. Supp. 1177 (W.D. Wis. 1997).
262. *Id.* at 1225.
263. *Id.*
264. *Id.* at 1226. The appellate court did not review the Free Speech Clause part of the holding. Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).
265. 274 F. Supp. 2d 1262 (M.D. Ala. 2003).

> The Supreme Court's First Amendment decision in *Casey* expressly rejected the notion that a state may require distribution only of ideologically neutral information regarding abortion—that is, information that not only is truthful and not misleading, but also that does not express a preference in favor of either childbirth or abortion, because Pennsylvania's challenged informational materials did express a preference for childbirth over abortion.[266]

After reviewing Supreme Court precedent with respect to compelled contributions to ideological and commercial speech,[267] the court concluded, like the court in *Karlin*, that "providers of abortion services constitutionally may be required to distribute the state-prepared materials, and offer for viewing the state-prepared videotape, advancing policy positions with which they disagree, i.e., the preference of alternatives to abortion, but they may not be compelled to finance the production of the materials and videotape."[268]

In the Eighth Circuit, four judicial decisions thus far address South Dakota's requirement that doctors provide those considering abortion a writing stating, among other things, "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being."[269] The district court, which was the first court to review the challenge, granted a preliminary injunction against enforcement of the disclosure requirement, finding that the abortion providers had established a fair chance of success on their claim that the provision unconstitutionally required them to "espouse the State's ideology."[270] In a divided decision, a circuit court panel affirmed.[271] The Eighth Circuit reversed the panel in an 8–4 en banc decision.[272] Judge Gruender, a dissenter in the original panel, wrote the court's opinion, reasoning that, although "[t]aken in isolation," the "human being" disclosure requirement "certainly may be read to make a point in the debate about the ethics of abortion," it must properly be read to include its narrowing statutory definition.[273] The two judges from the

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266. *Id.* at 1270; *see also id.* at 1273 n.10 ("*Casey* distinguished *Wooley* by saying that the distribution of an ideological message under the statute at issue in *Casey* was required only as a part of the practice of medicine . . . .").

267. The Court had not yet decided *Johanns*, which held that individuals have no First Amendment right to avoid targeted taxes that fund government speech with which they disagree. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005).

268. *Summit Med. Ctr.*, 274 F. Supp. 2d at 1277.

269. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2009).

270. Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881, 887 (D. S.D. 2005) ("Unlike the truthful, non-misleading medical and legal information doctors were required to disclose in *Casey*, the South Dakota statute requires abortion doctors to enunciate the State's viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a human being.").

271. Planned Parenthood Minn., N.D., S.D. v. Rounds, 467 F.3d 716, 725 (2006) (statute's disclosure provision "forc[es] an abortion provider to recite the state's ideological objections to abortion").

272. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008).

273. *Rounds*, 530 F.3d at 735. This "define[s] 'Human being' for the purposes of the informed-consent-to-abortion statute as 'an individual living member of the species of Homo sapiens, includ-

panel majority dissented, joined by two other judges, reasoning more emphatically than they had in their panel opinion that the "human being" statement "crosses the constitutional line [between permissible factual disclosures and impermissible ideology] by requiring physicians to communicate metaphysical ideas unrelated to any legitimate state interest in regulating the practice of medicine."[274]

The district court on remand granted the state's motion for summary judgment with respect to the "human being" provision, finding no Free Speech Clause violation because the statute permitted abortion providers to explain to patients that the term is biological and not ideological.[275] It then addressed whether two other challenged disclosure requirements were "truthful and not misleading," as the court read *Casey* to require.[276] Relying upon the state's concession that the required disclosure "[t]hat the pregnant woman has an existing relationship with th[e] unborn human being" referred to a legal, rather than a biological, relationship between the woman and fetus, the court found it to be untruthful, misleading and thus unconstitutional because such a legal relationship between born and unborn does not exist as a matter of federal constitutional or state law.[277] The court also evaluated the statutory requirement that abortion providers disclose "all known medical risks of the procedure . . . including . . . [an] [i]ncreased risk of suicide ideation and suicide."[278] Based on a finding that "[d]efendants have produced no evidence . . . to show that it is generally recognized that having an abortion causes an increased risk of suicide ideation and suicide," the court concluded that "[b]ecause such a risk is not 'known,' the suicide disclosure language of the statute is untruthful and misleading."[279]

Other courts have applied the "truthful and not misleading" requirement to abortion disclosure requirements. In *Eubanks,* as part of its Free Speech Clause inquiry, the court determined that photographs of fetal development included in state produced material met this standard, even though some were over-colored and oversized:

> True, some of the fetal development photographs are color enhanced and other photos are enlarged. Even so, the photographs are neither misleading nor untruthful. Regardless of their size, photographs do not become misleading so long as the statutorily required scale allows an average person to determine their actual size. Nor does the

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ing the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.'" *Id.* at 727 (quoting S.D. CODIFIED LAWS § 34-23A-1).

274. *Rounds*, 530 F.3d at 743 (Murphy, J., dissenting).

275. Planned Parenthood Minn., N.D., S.D. v. Rounds, 650 F. Supp. 2d 972, 976–77 (D. S.D. 2009).

276. *Id.* at 977–78. The court seemed to be applying the Free Speech Clause, although some language suggests that it was considering due process undue burden analysis as well.

277. *Id.* (first alteration in original).

278. S.D. CODIFIED LAW § 34-23A-10.1(1)(e)(ii) (2009).

279. *Rounds*, 650 F. Supp. 2d at 983.

> color enhancement make an otherwise accurate depiction misleading. The pictures provide an accurate rendition of the fetus at various stages of development, as required by the Statute.[280]

In *Karlin v. Foust*,[281] the Seventh Circuit Court of Appeals held that a statutory requirement that providers inform women seeking abortions that medical technology was available "to enable a pregnant woman to view the image or hear the heartbeat of her unborn child" was not false and misleading, even though it could not actually detect a fetal heartbeat in the early stages of pregnancy.[282] In *Summit Medical Center of Alabama, Inc. v. Siegelman*,[283] the district court required the addition of certain other information to render the state-imposed requirement that providers inform a woman "that a nonviable unborn child at more than 19 weeks gestation 'may be able to survive' outside the womb" consistent with *Casey*'s requirement that the disclosures be "truthful and not misleading."[284]

In sum, in the context of informed consent to abortion, lower courts have applied the *Casey* precedent to uphold a wide range of information disclosure requirements against Free Speech Clause challenges by service providers. More explicitly than in the so-called commercial speech cases, a number of courts and judges have noticed that governments have selected the particular pieces of information for required disclosure, and, in some instances, crafted the means of presentation and disclosure for the purpose of modifying consumer decision making rather than merely informing it. In this line of cases, the courts uniformly interpret Supreme Court precedent to require that the court apply deferential review to disclosure requirements imposed on abortion service providers' speech without respect to whether preventing consumer deception is the government's aim.

III. THE DEFERENTIAL ABORTION "INFORMED CONSENT" ANALYSIS CONTROLS COMMERCIAL SPEECH DISCLOSURE CASES

Although the Court has never noted the similarity, the commercial speech and abortion disclosure cases in fact address the same Free Speech Clause right.[285] Whatever signals various combinations of jus-

280. Eubanks v. Schmidt, 126 F. Supp. 2d 451, 459 (W.D. Ky. 2000).

281. 188 F.3d 446 (7th Cir. 1999).

282. *Id.* at 491–92 (reasoning that "the information required to be conveyed under the fetal heartbeat provision is neither false nor misleading because the services are available to all women; it is simply a question of when such services would render useful results").

283. 227 F.Supp. 2d 1194 (M.D. Ala. 2002).

284. *Id.* at 1203 (stating that providers "must go beyond a simple mechanical reading of this provision and provide the woman with the following information: 1) a full and complete definition of the term 'survive' in accordance with the physician's good faith clinical judgment; 2) the nature of any survival; 3) survival is merely a possibility; and 4) survival will or may be of extremely limited duration").

285. The right to choose abortion is a constitutionally protected right on the consumer side, and so the undue burden analysis could perhaps limit what an abortion provider can be compelled to say

tices may be sending about the continuing vitality of *Zauderer* and deferential review of commercial speech disclosure requirements, the Court cannot consistently apply a higher level of scrutiny to disclosure requirements imposed on products and other types of services so long as the current abortion "informed consent" jurisprudence exists.

Regulatory authority to require disclosures in the contexts of abortion and other services and product sales stems from the same source.[286] Justice White, joined by Justice Rehnquist, made precisely this point when dissenting from one of the Court's early decisions applying *Roe* to invalidate persuasive disclosure requirements because of the burden they placed on the abortion right.[287] According to the dissent:

> The rationale for state efforts to regulate the practice of a profession or vocation is simple: the government is entitled not to trust members of a profession to police themselves, and accordingly the legislature may for the most part impose such restrictions on the practice of a profession or business as it may find necessary to the protection of the public. This is precisely the rationale for infringing the professional freedom of doctors by imposing disclosure requirements upon them: "Respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves."[288]

The Court has repeatedly recognized that lawyer speech to potential clients, through advertising, is commercial speech.[289] Both of the Court's primary speech disclosure cases involved lawyer speech.[290] Lawyers are professionals and doctors are professionals. Both provide information about their services that may influence a potential client to buy it. Both types of speech, like commercial speech more generally, have constitutional value primarily because of the information they provide to potential consumers. Again, Justice White in his early dissent, convincingly linked government regulation of the two types of professional speech,

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if the requirement that the woman receive the information poses a significant obstacle to the right to choose the procedure. *See* Corbin, *supra* note 238.

286. States have a general police power to protect consumer and other public interests. Congress's authority to regulate interstate commerce allows it to impose disclosure requirements on sales and services, and includes regulating the abortion procedure. *See* Gonzales v. Carhart, 550 U.S. 124, 166 (2007).

287. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986).

288. *Id.* at 803 (quoting Canterbury v. Spence, 464 F.2d 772, 784 (D.C. Cir. 1972)).

289. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995); Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 142 (1994); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 99–101, 110–11 (1990); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 468 (1988); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637–38 (1985); In re R. M. J., 455 U.S. 191, 206–07 (1982); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454 (1978); Bates v. State Bar of Az., 433 U.S. 350, 384 (1977).

290. Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010) ("The parties agree, as do we, that the challenged provisions regulate only commercial speech."); *Zauderer*, 471 U.S. at 629.

citing *Zauderer* for the conclusion that the same standard of judicial review should apply to disclosure requirements imposed to regulate all types of commercial speech:

> Were the Court serious about the need for strict scrutiny of regulations that infringe on the "judgment" of medical professionals, "structure" their relations with their patients, and amount to "state medicine," there is no telling how many state and federal statutes (not to mention principles of state tort law) governing the practice of medicine might be condemned. And of course, there would be no reason why a concern for professional freedom could be confined to the medical profession: nothing in the Constitution indicates a preference for the liberty of doctors over that of lawyers, accountants, bankers, or brickmakers. Accordingly, if the State may not "structure" the dialogue between doctor and patient, it should also follow that the State may not, for example, require attorneys to disclose to their clients information concerning the risks of representing the client in a particular proceeding. Of course, we upheld such disclosure requirements only last Term.[291]

In *Casey*, a Court majority adopted Justice White's proposed interpretation of the appropriate scope of government authority to require doctors to disclose information in connection with the abortion procedure.[292] Although none of the justices linked the Free Speech Clause analysis to its lawyer advertising or commercial speech disclosure cases, the Third Circuit had explicitly characterized the informed consent provision at issue as a disclosure requirement imposed on commercial speech.[293] More recently, a few other courts and commentators have noted that the constitutional questions presented by mandated disclosures of information are similar, whether it is a professional service or a product for sale.[294] No court or commentator appears to have addressed the two lines of cases and reasoned that the Constitution requires more deferential judicial review of abortion disclosures than of disclosure requirements imposed on other types of commercial speech.[295] Because

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291. *Thornburgh*, 476 U.S. at 802–03 (citing *Zauderer*, 471 U.S. 626).

292. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

293. Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 705 (3d Cir. 1991), *rev'd*, 505 U.S. 833 (1992).

294. Conn. Bar Ass'n v. United States, 394 B.R. 274, 286 n.13 (D. Conn. 2008) ("Although *Zauderer* was decided in the commercial speech context, and *Casey* in the abortion context, a reasonable relation test was applied in both situations to analyze the constitutionality of factual disclosures by professionals."); Hersh v. United States, 553 F.3d 743, 766 (5th Cir. 2008); Olsen v. Gonzales, 350 B.R. 906, 918 (D. Or. 2006) (quoting Hersh v. United States, 347 B.R. 19 (N.D. Tex. 2006)); *see also* Tushnet, *supra* note 178, 237 ("We don't generally think of doctor-patient interactions as instances of commercial speech, but the problems of regulating what can be said about a service provided for money are very similar."); Post, *supra* note 238, 974–79 (noting the similarity of the two lines of cases in the context of his argument that certain "informed consent" requirements should be held to unconstitutionally intrude onto professional speech).

295. If there were to be any difference between the scrutiny applied to disclosure requirements imposed on pre-abortion speech as opposed to speech preceding other commercial transactions, the scrutiny with respect to the doctor-patient interchange should be higher. Abortion is a constitution-

both lines of cases involve the same type of government action taken with respect to the same category of speech, the analysis that the Court applies to commercial speech and abortion disclosure requirements must be the same.

CONCLUSION

In the context of abortion disclosure, the Supreme Court has held that governments may, through the means of requiring disclosure of information, pursue purposes other than preventing consumer deception or even ensuring that the potential abortion consumer receives a free and unbiased flow of information. The Supreme Court has held that governments may select information and require its disclosure for the purpose of persuading potential consumers to eschew the procedure. That is, governments may provide information to influence consumer reactions for the purpose of reducing demand for a lawful product. Additionally, lower courts have held that governments may present information likely already known to the consumer in vivid, eye-catching ways that make the purpose to persuade even more apparent.

All of these holdings provide firm answers to the cigarette manufacturers' allegation that graphic labels unconstitutionally compel them to deliver government speech, as it does to similar challenges that may be mounted by other types of commercial speakers. The Constitution allows the government to select and compel the delivery of information in connection with commercial transactions for the purpose of modifying consumer behavior, and, more specifically, for the purpose of persuading consumers to avoid the purchase entirely. Unless and until the informed consent to abortion jurisprudence changes, product vendors who argue that only a government purpose to prevent deception can justify a disclosure requirement imposed on their commercial speech have no case.

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ally protected right, which could mean it would add weight to the listener's interest in avoiding government speech choices. *See Casey*, 505 U.S. at 884. And, doctors are professionals, which may add weight to their interest in avoiding impositions on their patient counseling speech. *See* Post, *supra* note 238, 974–78.