

Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws

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Recommended Citation

Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. Health Care L. & Pol'y 159 (2009).

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COMPELLED SPEECH UNDER THE COMMERCIAL SPEECH DOCTRINE: THE CASE OF MENU LABEL LAWS

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ABSTRACT

One well-documented cause of the increase in obesity nationally is the increased consumption of restaurant and fast food meals. Under the current state of the law, restaurants are not required to supply nutrition information for their products similar to manufacturers of processed foods and beverages. Due to this information gap, leading authorities advocate for increased disclosure of nutrition information at food service establishments. Jurisdictions around the country are working to pass menu label laws. This Article explores the First Amendment issues surrounding such laws.

The Article analyzes First Amendment jurisprudence with regard to compelled speech and finds that the requirement to disclose factual commercial information receives less protection than government mandates to disclose facts or beliefs in other contexts. One value of commercial speech is an informed consumer population. The compelled disclosure of facts furthers this goal and underlies much of the consumer protection regulations in the United States. The Article analyzes menu label laws under the First Amendment and concludes that they are a constitutionally valid form of commercial disclosure requirement. Public health necessity dictates that this disclosure requirement become as pervasive and reliable as information on packaged foods and beverages throughout the country.

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INTRODUCTION

Obesity is a leading public health concern in the United States, showing no sign of decline.¹ This reality reflects a drastic shift in consumption and physical activity patterns over the last several decades.² One well-documented cause of the population's escalating body weight is the increased consumption of convenience food in the form of restaurant and fast food meals.³ The price of fast food remains inordinately low, but Americans' spending at fast food restaurants rose from \$6 billion to \$110 billion annually over the last thirty years.⁴ At restaurants, consumers in 2005 ate approximately 350 more calories per meal than they did in 1990.⁵ Portion sizes exceed United States Department of Agriculture and Food and Drug Administration (FDA) standards, thereby delivering more calories and encouraging over-consumption.⁶ The number of fast food establishments has also increased

1. See JEFFREY LEVI ET AL., TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA 3, 5 (2007), available at <http://healthyamericans.org/reports/obesity2007/Obesity2007Report.pdf>.

2. See KELLY D. BROWNELL, FOOD FIGHT 1, 7–10 (2004).

3. See, e.g., Jessica L. J. Greenwood & Joseph B. Stanford, *Preventing or Improving Obesity by Addressing Specific Eating Patterns*, 21 J. AM. BOARD FAM. MED. 135, 136 (2008); see also Megan A. McCrory et al., *Overeating in America: Association Between Restaurant Food Consumption and Body Fatness in Healthy Adult Men and Women Ages 19 to 80*, 7 OBESITY RES. 564 (1999).

4. ERIC SCHLOSSER, FAST FOOD NATION 3 (2001).

5. Heather Patrick & Theresa A. Nicklas, *A Review of Family and Social Determinants of Children's Eating Patterns and Diet Quality*, 24 J. AM. C. NUTRITION 83, 85 (2005).

6. *Id.*; see 21 C.F.R. § 101.9 (2008); U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 2005, at 15 (2005), available at <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>.

exponentially.⁷ Parent corporations expanded internationally and now fast food establishments can be found in more than 120 countries around the world.⁸ Calorie-dense foods are more accessible, more convenient, and more frequently consumed than ever before.

Studies confirm that frequent consumption of restaurant meals, and especially fast food, is positively associated with increased energy consumption, weight gain, insulin resistance, and an increased risk for obesity and type two diabetes.⁹ Consumption of fast food is specifically associated with a higher intake of calories, saturated fat, carbohydrates, and added sugars.¹⁰ Experts postulate that weight gain results because “a single meal from one of these restaurants often contains enough calories to satisfy a person’s caloric requirement for an entire day.”¹¹

Unlike manufacturers of processed and pre-packaged foods and beverages, restaurants are not required to disclose nutrition information for their products under the current state of the law.¹² At most food service establishments, consumers have no point of reference to determine the nutrition profile of the products offered.¹³ Without nutrition information, consumers often do not have the ability, or even the option, to make a choice suitable for their daily calorie and nutrition requirements. For example, it is not at all obvious that Burger King’s TENDERCRISP Chicken Sandwich is 800 calories, but a Bacon Cheeseburger is 330 calories.¹⁴ Further, a consumer should know that if they order the TRIPLE

7. See SCHLOSSER, *supra* note 4, at 3–4; see also Brownell, *supra* note 2, at 8–9. McDonalds opened a new restaurant every three hours in 1996. Brownell, *supra* note 2, at 9. It currently has over 31,000 restaurants worldwide. McDonald’s Canada, FAQs, <http://www.mcdonalds.ca/en/aboutus/faq.aspx> (last visited on Nov. 12, 2009).

8. See McDonald’s Canada, *supra* note 7 (stating that McDonald’s operates in more than 199 countries).

9. Shanthy A. Bowman et al., *Effects of Fast-Food Consumption on Energy Intake and Diet Quality Among Children in a National Household Survey*, 113 PEDIATRICS 112, 114 (2004); Simone A. French et al., *Fast Food Restaurant Use Among Women in the Pound of Prevention Study: Dietary, Behavioral and Demographic Correlates*, 24 INT’L J. OBESITY 1353, 1357–58 (2000); McCrory et al., *supra* note 3, at 564–71; Mark A. Pereira et al., *Fast-Food Habits, Weight Gain, and Insulin Resistance (the CARDIA Study): 15-Year Prospective Analysis*, 365 LANCET 36, 41 (2005).

10. Shanthy A. Bowman & Bryan T. Vinyard, *Fast Food Consumption on U.S. Adults: Impact on Energy and Nutrient Intakes and Overweight Status*, 23 J. AM. C. NUTRITION 163, 166–67 (2004).

11. Press Release, Nat’l Insts. of Health, U.S. Dep’t of Health & Human Servs., *Eating at Fast-Food Restaurants More than Twice a Week Is Associated with More Weight Gain and Insulin Resistance in Otherwise Healthy Young Adults* (Dec. 30, 2004), available at <http://www.nih.gov/news/pr/dec2004/nhlbi-30.htm>.

12. 21 C.F.R. §§ 101.9(j)(2)(i), 101.10 (2008).

13. See OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., *CALORIES COUNT* 25 (2004), available at http://www.fda.gov/OHRMS/DOCKETS/ac/04/briefing/4039b1_01_calories%20count.pdf.

14. Burger King, *Burger King USA Nutritionals*: November 2009, at 2 (2009), available at http://www.bk.com/cms/en/us/cms_out/digital_assets/files/menu_nutrition/NationalNutritionals.pdf.

WHOPPER Sandwich with Cheese, they are receiving more than half of their daily calorie requirements at 1250 calories each.¹⁵

Public health necessity dictates that we must add menu labels to the list of strategies used to address the escalation of obesity in the United States. Calorie and other information at the point of purchase would assist consumers in making informed decisions. Without such information, menus alone can be misleading because price increases for increased portion sizes do not adequately reflect the percentage increase in calories of the servings.¹⁶ Moreover, because consumers are accustomed to having this information available on packaged products,¹⁷ the absence of the same on menus can lead to consumer confusion about appropriate portions.

Due to this information gap, leading public authorities in the United States advocate for increased disclosure of nutrition information for food and beverages purchased at food service establishments. The Surgeon General's 2001 *Call to Action to Prevent and Decrease Overweight and Obesity* recommended "increas[ing] [the] availability of nutrition information for foods eaten and prepared away from home."¹⁸ The Institute of Medicine likewise recommended that "[f]ull-service and fast food restaurants should expand healthier food options and provide calorie content and general nutrition information at [the] point of purchase."¹⁹ In this vein, the American Medical Association's Resolution of 2007 stated that "our American Medical Association support[s] federal, state, and local policies to require fast-food and other chain restaurants . . . to provide consumers with nutrition information on menus and menu boards."²⁰ Finally, the FDA Working Group on Obesity explained that "the pervasiveness of the obesity epidemic means that more nutrition information must be presented to consumers in restaurant settings."²¹ The FDA recommended "standardized, simple, and understandable nutritional information, including calorie information, at the point-of-sale . . ."²² There is virtual unanimity among the nation's medical and public health organizations on the need to combat obesity by requiring the effective

15. *Id.* at 1.

16. Declaration of Thomas R. Frieden at 25, *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007) (No. 08-Civ-1000 (RJH)).

17. See 21 C.F.R. § 101.9 (2008).

18. U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY* 17 (2001).

19. JEFFREY P. KOPLAN ET AL., *INST. OF MED. OF THE NAT'L ACADS., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE* 165-66 (2005).

20. AM. MED. ASS'N HOUSE OF DELEGATES, *NUTRITION LABELING AND NUTRITIONALLY IMPROVED MENU OFFERINGS IN FAST FOOD AND OTHER CHAIN RESTAURANTS* 2 (2007), available at <http://www.ama-assn.org/ama1/pub/upload/mm/467/419.doc>.

21. OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., *supra* note 13, at 26.

22. *Id.* at 27.

communication of factual, nutritional information for food and beverages at food service establishments.

Based on this consensus, lawmakers around the country have introduced laws that would require certain food service establishments to disclose nutritional information about their products at the point of purchase. These laws are typically referred to as “menu label laws.” The point of purchase is most often defined as the location at which information can be placed directly on the menu or menu board.²³ This aims to convey the information to consumers prior to purchase in order to ensure their access to the information during the decision-making process.²⁴

Most menu label laws target chain restaurants that serve fast food due to Americans’ frequent consumption of fast food and the associated ill-health effects. The most common requirement of the proposed and passed menu label laws is that the calorie content of each menu item be placed on the restaurants’ menu and/or menu board.²⁵ This is based on the theory that calories are considered the most important consideration for weight control²⁶ and consumers are unable to correctly estimate the calorie content of pre-prepared foods and beverages.²⁷ Many jurisdictions have proposed or passed menu label laws requiring the posting of additional nutritional information on menus, such as saturated fat, trans fat, carbohydrates, and/or sodium.²⁸

23. See Lisa J. Harnack & Simone A. French, *Effect of Point-of-Purchase Calorie Labeling on Restaurant and Cafeteria Food Choices: A Review of the Literature*, 5 INT’L J. BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 51, 52 (2008).

24. *Id.*

25. *E.g.*, CAL. HEALTH & SAFETY CODE § 114094(b)(2) (Deering 2008); NEW YORK CITY, N.Y., N.Y. CITY HEALTH CODE § 81.50 (2009); KING COUNTY, WAS., KING COUNTY FOOD CODE §§ 5.02.010, 5.10.015(B)–(C) (2009); see also S.B. 1436, 48th Leg., 1st Reg. Sess. (Ariz. 2007); S.B. 686, Leg. 2007, Jan. Sess. (Conn. 2007); B. 17-0139, Leg. 2007 (D.C. 2007); S.B. 1290, Leg. 2007, 185th Sess. (Mass. 2007); S.B. 2264, 212th Leg. (N.J. 2006); H.B. 1203, 48th Leg., 1st Sess. (N.M. 2007); H.B. 1108, 2007 Leg., Sess. 2007 (Pa. 2007); S.B. 1696, Leg. 2007–2008, 105th Sess. (Tenn. 2007); H.B. 477, 2007–2008 Leg. (Vt. 2008); Legis. Doc. 123-1774, 1st Reg. Sess., at § 2502(2)–(3) (Me. 2007).

26. See, *e.g.*, OBESITY WORK GROUP, U.S. FOOD & DRUG ADMIN., *supra* note 13, at 27 (“[A] focus on total calories is the most useful single piece of information in relation to managing weight”); see also AM. MED. ASS’N HOUSE OF DELEGATES, *supra* note 20, at 2 (“[A]t a minimum, calories [should be labeled] on menu boards, since they have limited space”).

27. RUDD CTR. FOR FOOD POLICY & OBESITY, YALE UNIV., MENU LABELING IN CHAIN RESTAURANTS: OPPORTUNITIES FOR PUBLIC POLICY 9 (2008), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport2008.pdf>; Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96 AM. J. PUB. HEALTH 1669, 1671 (2006).

28. See, *e.g.*, CAL. HEALTH & SAFETY CODE § 114094(a)(5); PHILA., PA., ORDINANCE 070153 (March 1, 2007); S.B. 1436, 48th Leg., 1st Reg. Sess. (Ariz. 2007); B. 17-0139, Leg. 2007 (D.C. 2007); S.B. 1290, Leg. 2007, 185th Sess. (Mass. 2007); H.B. 1203, 48th Leg., 1st Sess. (N.M. 2007); H.B. 1108, 2007 Leg., Sess. 2007 (Pa. 2007), H. 477, 2007–2008 Leg. (Vt. 2008).

Prominent local jurisdictions around the country have passed menu label laws, including New York City (NYC),²⁹ San Francisco,³⁰ and Santa Clara, California.³¹ However, California recently passed a menu label law that preempted local efforts, making the ordinances passed in San Francisco and Santa Clara unenforceable.³² NYC's current menu label law was the first in the country to be enforced, going into effect on March 31, 2008.³³

Originally, the NYC Department of Health and Mental Hygiene sought to address the city's prevalence of overweight and obesity, thereby addressing highly correlated diseases, such as heart disease, diabetes, stroke, and cancer, by adopting Amendment § 81.50 Calorie Labeling to Article 81 of the New York City Health Code on December 5, 2006.³⁴ The New York State Restaurant Association (NYSRA) challenged the law in the United States District Court for the Southern District of New York based on two allegations: that the law was preempted by the federal Nutrition Labeling and Education Act of 1990 (NLEA), and that the law violated the First Amendment to the United States Constitution.³⁵ The court agreed with the NYSRA that the law was preempted.³⁶ Accordingly, NYC amended its law to correct the preemption violation and adopted the revised § 81.50 on January 22, 2008.³⁷ The current law requires that covered food service establishments disclose

29. NEW YORK CITY, N.Y., HEALTH CODE § 81.50.

30. S.F., CAL., HEALTH CODE § 468 (2008).

31. SANTA CLARA, CAL., ORDINANCE NS 300.793 (2008).

32. See S.B. 1420, 2008 Leg., 2007–08 Sess. (Cal. 2008) (requiring chain restaurants with twenty or more outlets in the state to provide detailed written nutrition information at the point-of-sale by July 2009, followed by placement of calorie information on menus and menu boards by January 2011; exempting drive-thru menu boards from the posting requirement, and preempting local menu labeling ordinances).

33. See Mark Hamblett, *New York City Wins Bid to Force Fast-Food Chains to List Calorie Count on Menus*, N.Y. L.J., Apr. 17, 2008; Roni C. Rabin, *Calorie Labels May Clarify Options, Not Actions*, N.Y. TIMES, July 17, 2007, <http://www.nytimes.com/2007/07/17/health/nutrition/17cons.html>. The New York City Health Code § 81.50 went into effect on March 31, 2008 but as a result of litigation, the City could only begin inspecting for compliance after April 30, 2008, and could start seeking fines for non-compliance after July 19, 2008. See Elissa Elan, *NYC's Law Forcing On-Menu Calorie Disclosure Impels Compliance Plans*, NATION'S RESTAURANT NEWS, May 12, 2008.

34. BD. OF HEALTH, N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§81.50) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE 2 (2006), available at <http://yaleruddcenter.org/resources/upload/docs/what/policy/NYCityMenuLabelingLaw.pdf>. At the time New York City passed the law, more than half of adults in the city were overweight (34.9%) or obese (21.7%). Declaration of Thomas R. Frieden, *supra* note 16, at 4. In 2006, 69.2% of all deaths in New York City were due to diseases highly correlated with obesity: heart disease, diabetes, stroke, and cancer. *Id.* at 5–6.

35. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007).

36. *Id.* at 363.

37. BD. OF HEALTH, N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 34, at 1.

the calorie content of their menu items directly on their menu or menu board.³⁸ The NYSRA again filed suit, alleging the same defects of the original law. The District Court found in favor of NYC and ordered covered food service establishments to comply.³⁹ The NYSRA appealed this decision to the United States Court of Appeals for the Second Circuit and, on February 17, 2009, the Court of Appeals upheld New York City's menu label law.⁴⁰ The FDA submitted an amicus brief to the Court of Appeals supporting affirmance of the District Court's judgment. Specifically, it argued that the NLEA does not preempt state and local menu label laws, and that NYC's ordinance does not violate the First Amendment.⁴¹

In the First Amendment portion of its memoranda of law in the NYC cases, the NYSRA alleged that the menu label law impermissibly compelled speech.⁴² The issues and arguments in that case beg an analysis of First Amendment jurisprudence with respect to compelled commercial speech. The context of the NYC menu label dispute provides a sound backdrop for this analysis.

This Article argues that the allegation that menu label laws violate the First Amendment is unsound in both theory and practice. As a practical matter, menu label laws are no different from many federal and state laws that require the disclosure of commercial information—laws that have been universally regarded as consistent with the First Amendment.⁴³ As a matter of First Amendment theory, the attack on menu label laws ignores two crucial distinctions: the distinction between commercial speech and non-commercial speech, and the distinction between laws that require the disclosure of purely factual information and laws that require a speaker to express a particular point of view.⁴⁴ As will be examined below, the United States Supreme Court's First Amendment cases restrict the government's ability to compel speakers to state a viewpoint with which they disagree. This is based on an underlying premise of the First Amendment, which protects the right of thought and thus the right to not say what is not on one's mind.⁴⁵ However, the compulsion to state facts is not as universally protected. In particular, protections against the compelled disclosure of facts—found in the traditional, non-commercial

38. *Id.* at 10–11. New York City's revised 2008 menu label law bases compliance on an establishment being one of a group of 15 or more food service establishments nationally. NEW YORK CITY, N.Y., HEALTH CODE § 81.50(a)(1) (2008).

39. *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 352–53.

40. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 120–23, 137 (2d Cir. 2009).

41. See Brief of the U.S. Food & Drug Admin. as Amicus Curiae in Support of Affirmance at 13–14, 24–25, *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. May 29, 2008) (No. 08-1892-cv), available at <http://www.nyc.gov/html/doh/downloads/pdf/cdp/US-FDA-brief-in-support-of-court-decision.pdf>.

42. See Brief for Plaintiff-Appellant at 32–33, *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. May 23, 2008) (No. 08-1892-cv).

43. See *N.Y. State Rest. Ass'n*, 556 F.3d at 131–34; *infra* Part III.

44. See *infra* Part V.

45. See *infra* Part III.

First Amendment arena—do not extend to mandatory disclosures of fact by commercial actors.⁴⁶

The basis for allocating different protection is based on the Supreme Court's rationale for the limited protection of commercial speech. This outcome turns on the distinction between traditional speech, where the emphasis is on the autonomy of the speaker, and commercial speech, where the emphasis is on the receipt of information by an audience.⁴⁷ Because one value of commercial speech is the increased amount of information to consumers, the compelled statement of facts furthers this goal and thus may be permissible.⁴⁸ This value underlies much of the current federal and state disclosure regulations in the United States, which require companies to disclose certain facts about their products.⁴⁹

Despite the pervasive and necessary regulatory environment in the United States, the NYSRA's lawsuit compels analysis of the government's ability to require the disclosure of such information under the First Amendment. The NYSRA alleged that NYC's menu label law violated its members' First Amendment rights.⁵⁰ However, if a menu label law is a commercial disclosure requirement similar to those already present in the commercial marketplace, then the NYSRA's assertion cannot be correct.

Part I of this Article discusses the general protection speech receives under the First Amendment. Part II briefly covers the constitutional analysis relevant to restrictions on speech. Part III analyzes First Amendment jurisprudence with regard to compelled speech. Part IV is dedicated to examining a subset of compelled speech: factual commercial disclosure requirements. The final part of this Article applies the commercial speech doctrine to menu label laws. The Article concludes that menu label laws are a constitutionally valid form of factual disclosure requirements under the commercial speech doctrine.

I. PROTECTION OF SPEECH UNDER THE FIRST AMENDMENT

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."⁵¹ This provision embodies the Constitution's "commitment

46. *Id.*

47. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4 (2000).

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

49. See, e.g., 21 U.S.C. § 343(i) (2006) (explaining food is misbranded if it does not include the name of the food and a list of ingredients); 21 U.S.C. § 343(e) (explaining that a food is misbranded if it is in package form and it does not contain the manufacturer's name and place of business, and the product weight).

50. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131–34 (2d Cir. 2009).

51. U.S. CONST. amend. I.

to the free exchange of ideas.”⁵² The First Amendment affords the broadest protection to political expression in order “‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”⁵³ Although First Amendment protections are not confined to “the exposition of ideas,”⁵⁴ “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”⁵⁵ This reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁵⁶ Thus, at the core of the First Amendment is the protection of ideas, political or otherwise, to ensure free debate. The rationale is that truth can only prevail if all ideas are tested in the marketplace of ideas.⁵⁷ This traditional form of free speech protection is at the heart of the First Amendment.

The United States Supreme Court has interpreted the First Amendment as protecting commercial speech as well. According to the Supreme Court, “[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”⁵⁸ In the seminal case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court explicitly held that speech that does “no more than propose a commercial transaction,” is protected by the First Amendment.⁵⁹ Recognizing the distinct value of commercial speech, the Court explained that the differences “suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.”⁶⁰ Supreme Court “jurisprudence has emphasized that ‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of *First Amendment* values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial

52. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quoting *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989)).

53. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

54. *Id.*

55. *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

56. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

57. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

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

59. 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

60. *Id.* at 772 n.24.

expression.”⁶¹ As such, less protection is accorded to commercial speech than traditional forms of expression.⁶²

Although an exact definition of commercial speech does not exist,⁶³ the Supreme Court provides guidance on what constitutes commercial speech. The Court explained that the “commercial speech doctrine rests heavily on ‘the ‘common-sense’ distinction between speech proposing a commercial transaction . . . and other varieties of speech.”⁶⁴ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, commercial speech was defined as an “expression related solely to the economic interests of the speaker and its audience.”⁶⁵ In *Bolger v. Youngs Drug Products Corp.*, the Court looked at whether the communication at issue was an advertisement, whether it referred to a specific product or service, and whether the speaker had economic motivations for the communication, and explained that the combination of these three characteristics provided strong support for the conclusion that it was commercial speech.⁶⁶ However, this three-part analysis has not become a constitutional test adhered to by the Supreme Court in later cases.⁶⁷ The Court has since differentiated between “speech for a profit” and “speech that *proposes* a commercial transaction,” the latter being “what defines commercial speech.”⁶⁸ The Court defined commercial speech “even more narrowly, by characterizing the proposal of a commercial transaction as ‘*the test* for identifying commercial speech.’”⁶⁹

It is noteworthy that the Court rarely distinguishes “commercial speech” from “advertising” and tends to use the terms interchangeably.⁷⁰ However, it is clear that not all commercial ‘speech is advertising, as understood by popular parlance. The best example of commercial speech that is not advertising can be found in *Rubin v.*

61. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)) (emphasis added).

62. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562–63.

63. See Tamara R. Piety, *Against Freedom of Commercial Expression*, 2 CARDOZO L. REV. 2583, 2591–92 (2008).

64. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (quoting *Ohralik*, 436 U.S. at 455–56).

65. 447 U.S. at 561.

66. 463 U.S. 60, 66–67 (1983).

67. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989).

68. *Id.* at 482 (emphasis in original).

69. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (quoting *Fox*, 492 U.S. at 473–74)).

70. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (classifying advertisements for legal services as commercial speech and analyzing the case under the court’s commercial speech doctrine). *But see* *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 69 n.31 (1976) (distinguishing commercial speech from advertising alone, by explaining that “[t]he power of the Federal Trade Commission to restrain misleading, as well as false, statements in *labels and advertisements* has been long recognized”) (emphasis added).

Coors Brewing, where the commercial speech at issue was a beer label.⁷¹ The respondent in this case argued that the Federal Alcohol Administration Act's ban on the displaying of alcohol content on beer labels violated the First Amendment's protection of commercial speech.⁷² In Justice Stevens' concurrence, he referred to the Surgeon General's Warning labels on cigarettes, and labeling requirements for food and drug products as commercial speech,⁷³ yet none of these labels are forms of advertising.⁷⁴

II. CONSTITUTIONAL ANALYSIS OF RESTRICTIONS ON SPEECH

First Amendment protection of traditional speech, which has been referred to as "public discourse,"⁷⁵ is the most robust because it is related to a citizen's right to freely participate "in the process of democratic self-governance."⁷⁶ Commercial speech, on the other hand, "consists of communication about commercial matters that conveys information necessary for public decision making, but that does not itself form part of public discourse."⁷⁷ Commercial speech differs from traditional speech mainly "because it is constitutionally valued for the information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination."⁷⁸ Thus, although in the context of traditional speech, the First Amendment protects against state intrusions on the right to speak and the right to remain silent, this principle does not entirely translate to the context of commercial speech.

First Amendment jurisprudence is well-established for government mandated restrictions on speech. The Supreme Court developed specific tests to scrutinize government mandates that implicate the First Amendment's guarantee of free speech. In the realm of traditional, non-commercial speech, a restriction on speech is subject to strict scrutiny if it discriminates against constitutionally protected speech based on its content.⁷⁹ For example, in *Police Department of Chicago v. Mosley*, the Supreme Court struck down a city ordinance that banned certain types of peaceful picketing, but not others, as violating the First Amendment because any

71. 514 U.S. 476, 478 (1995).

72. *Id.*

73. *Id.* at 492 n.1 (Stevens, J., concurring).

74. *See, e.g., Fox*, 492 U.S. at 472 (explaining that the commercial speech at issue was "Tupperware parties" which "consist[ed] of demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers . . .").

75. *See Post, supra* note 47, at 4 (citing *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 831 (1995); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

76. *See id.*

77. *Id.*

78. *Id.*

79. *But see United States v. Eichman*, 496 U.S. 310, 315 (1990) (asserting that the First Amendment does not fully protect some categories of speech, such as obscenity and "fighting words").

“restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”⁸⁰ This is because the government cannot “restrict expression because of its message, its ideas, its subject matter, or its content.”⁸¹ Thus, if the restriction is “content-based” and subject to the strict scrutiny test, it is only valid if it is necessary to serve a compelling state interest and it is narrowly tailored to that end. Government restrictions rarely meet this test.⁸²

On the other hand, a “content-neutral” regulation is one that does not target expression according to its content, meaning that the government’s justification for the regulation is made “without reference to the content of the regulated speech.”⁸³ For example, in *Members of the City Council v. Taxpayers for Vincent*, an ordinance prohibiting the posting of signs on public property was found to be content-neutral because the ordinance prohibited the posting of all signs regardless of their content.⁸⁴ In cases such as this, courts apply an intermediate level of scrutiny, which seeks to balance government interests against the right of free expression.⁸⁵ Content-neutral regulations that implicate expressive conduct are sustained if they are “shown to further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions [do] not ‘burden substantially more speech than is necessary to further’ those interests.”⁸⁶ Content-neutral time, place, and manner regulations are also valid if they are “designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication.”⁸⁷

Restrictions on commercial speech are not analyzed under the tests reserved for restrictions on traditional speech discussed directly above, but rather under an intermediate test set forth in *Central Hudson*.⁸⁸ The intermediate nature of the test reflects the subordinate position that commercial speech holds under the First

80. 408 U.S. 92, 96 (1972) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

81. *Id.* at 95.

82. *Boos v. Barry*, 485 U.S. 312, 321 (1988); see also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (“With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances.”).

83. *Boos*, 485 U.S. at 320 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

84. 466 U.S. 789, 791 & n.1, 804 (1984).

85. *Id.* at 804–05 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (“[A] government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”)).

86. *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 520 U.S. 180, 186 (1997) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)); see also *O’Brien*, 391 U.S. at 376–77.

87. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

88. 447 U.S. 557, 561–63 (1980).

Amendment. Although the application of this test to all commercial speech restrictions has been challenged by several Justices,⁸⁹ *Central Hudson* remains good law.⁹⁰ The *Central Hudson* test consists of four prongs. Courts must first determine whether the expression is protected by the First Amendment, meaning that it must relate to a lawful activity and not be false, deceptive, or misleading.⁹¹ Courts must then determine whether the government asserted a substantial interest in restricting the speech, whether the restriction directly advances that interest, and “whether it is not more extensive than necessary to serve that interest.”⁹²

First Amendment doctrine is less developed in the area of compelled speech,⁹³ as explored below. In the traditional speech arena, the First Amendment strictly protects against state intrusions on the right to remain silent, just as it protects the right to speak. However, this parallel does not exist in the realm of commercial speech.

III. FIRST AMENDMENT ANALYSIS OF COMPELLED SPEECH

A. Traditional Speech

Under the First Amendment, there is a “constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression”⁹⁴ This interpretation is based on the underlying “principle that ‘[t]he right to speak and the right to refrain from speaking ‘are complementary components of the broader concept of ‘individual freedom of mind.’”⁹⁵ The Supreme Court explained that “at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”⁹⁶ This right of freedom of thought protected by the First Amendment

89. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (“Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases.”) (citations omitted).

90. See *id.* at 554–55 (“But here, as in *Greater New Orleans*, we see ‘no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.”) (citation omitted); Antony Page, *Taking Stock of the First Amendment’s Application to Securities Regulation*, 58 S.C. L. REV. 789, 794 (2007).

91. *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

92. *Id.*

93. See Post, *supra* note 47, at 2 (noting that the commercial speech doctrine, which is intertwined with the compelled speech doctrine, is a “notoriously unstable and contentious domain of First Amendment jurisprudence”).

94. *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 797 (1988).

95. *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

96. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977).

includes the right to refrain from speaking if such coerced speech is contradictory to one's own beliefs.⁹⁷

This concept is highlighted in the cases of *West Virginia State Board of Education v. Barnette*⁹⁸ and *Wooley v. Maynard*.⁹⁹ In *Barnette*, the Supreme Court struck down a state law requiring public school children to participate in a compulsory flag salute and pledge of allegiance.¹⁰⁰ The Court explained that the First Amendment does not permit public authorities to compel an individual "to utter what is not on his or her mind."¹⁰¹ Likewise, in *Wooley*, the Court analyzed a New Hampshire law making it a misdemeanor for its citizens to obscure the motto "Live Free or Die" on their license plates.¹⁰² Relying on *Barnette*, the Court decided that New Hampshire could not require its citizens to use their own private property "as a 'mobile billboard' for the State's ideological message."¹⁰³ The Court found that the law unconstitutionally forced individuals "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."¹⁰⁴ Thus, the State cannot force its citizens to foster a point of view contrary to their own beliefs.

The right to be free from coerced speech in the traditional First Amendment realm is not limited to compulsions of subjective beliefs. The case of *Riley v. National Federation of the Blind* suggests that in the realm of traditional speech, the First Amendment protects against compulsory factual statements as well.¹⁰⁵ *Riley* involved a state law governing the solicitation of charitable contributions.¹⁰⁶ The law required that professional fundraisers disclose the percentage of charitable contributions that were actually turned over to the charity.¹⁰⁷ *Riley* must be understood in the charitable solicitation context because the speech at issue was a combination of fully protected speech with components of commercial speech which are "inextricably intertwined."¹⁰⁸ Because the individual components cannot be parceled out, the Court confirmed that charitable solicitation regulations must be

97. See *Wooley*, 430 U.S. at 714; see also *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (arguing that requiring a newspaper company to publish material without a choice is unconstitutional).

98. 319 U.S. 624 (1943).

99. 430 U.S. 705 (1977).

100. 319 U.S. at 625, 642.

101. *Id.* at 634, 642.

102. 430 U.S. at 706-07.

103. *Id.* at 715.

104. *Id.*

105. 487 U.S. 781, 797 (1988).

106. *Id.* at 784.

107. *Id.* at 795.

108. *Id.* at 796; see *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984); see also *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (explaining that the Court has not treated charitable solicitation as purely a form of commercial speech).

analyzed under the test for fully protected expression.¹⁰⁹ Thus, the Court decided that in the realm of traditional speech, cases like *Wooley* and *Barnette* “cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech.”¹¹⁰ As such, the mandate at issue was found to violate the First Amendment.¹¹¹ *Riley* lends insight into the Court’s interpretation of the First Amendment protection against the compulsion to disclose facts in the realm of fully protected speech. Thus, although not directly in line with other cases protecting core First Amendment values, the Court aligned charitable contribution cases with the interests in the traditional speech arena against the compulsion to speak beliefs, viewpoints, and facts.

B. Commercial Speech

First Amendment protection is not as broad in the context of commercial speech. In the seminal case of *Virginia Pharmacy*, the Court explained that the “hardiness of commercial speech” may “make it appropriate to 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.”¹¹² Since then, the first case analyzing such a commercial speech mandate was *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.¹¹³

In *Zauderer*, the Court considered a state requirement that attorney advertisements for contingent-fee representation disclose whether percentages were computed before or after deduction of court costs and expenses because the “failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement ‘deceptive.’”¹¹⁴ The Ohio Office of Disciplinary Counsel filed a complaint against attorney Zauderer for, among other things, failing to comply with this disclosure requirement.¹¹⁵ The Court made it clear that, although the compulsion to speak can violate the First Amendment in the realm of traditional speech, this is not the case in the commercial speech arena because:

109. *Riley*, 487 U.S. at 796.

110. *Id.* at 797–98.

111. *Id.* at 795, 803.

112. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

113. 471 U.S. 626 (1985). The Court addressed commercial speech mandates several decades before *Virginia State Board of Pharmacy*, but it was not recognized as a commercial speech case at the time. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (considering whether compelled monetary contributions to political causes by members of a union violated the First Amendment); *Riley*, 487 U.S. at 796–98 (determining that when generally commercial speech is intertwined with other protected speech elements, the Court’s test for fully protected expression must apply).

114. 471 U.S. at 633, 632 n.4.

115. *Id.* at 631–33.

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 prescription 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.¹¹⁶

Therefore, the Court held that the factual disclosure requirement should neither be analyzed under the strict scrutiny test reserved for restrictions or compulsions of traditional speech, nor should it be analyzed under the intermediate test for restrictions of commercial speech under *Central Hudson*.¹¹⁷ The requirement to disclose factual commercial information was instead analyzed under the most lenient constitutional test: the reasonable relationship test.¹¹⁸ Under the reasonable relationship test, the Court looked at whether the regulation bore a reasonable relationship to the government’s stated interest in passing the regulation, and as such, the mandate at issue was found to be constitutional.¹¹⁹

It is noteworthy that the *Riley* Court differentiated *Zauderer* from the charitable solicitation case by saying, “[p]urely commercial speech is more susceptible to compelled disclosure requirements.”¹²⁰ Unlike the factual disclosure requirements at issue in *Riley*, factual disclosure requirements in the commercial speech arena must only meet the reasonable relationship test. One reason for this is the purpose of the reduced protection for commercial speech and the value such information has in the commercial marketplace.¹²¹ In *Central Hudson*, the Court explained:

In most other contexts, the *First Amendment* prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the

116. *Id.* at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

117. *Id.* (“[W]e 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.”) (emphasis added); see also *supra* notes 79–82 and accompanying text (discussing strict scrutiny in the realm of commercial speech); *supra* notes 88–92 and accompanying text (discussing the *Central Hudson* intermediate test).

118. See *id.*; see also Recent Development, *Attorney Advertising and Commercial Speech After Zauderer v. Office of Disciplinary Counsel*, 21 TULSA L.J. 591, 602–03 (1986) (explaining how the holding in *Zauderer* established a more lenient First Amendment test).

119. *Zauderer*, 471 U.S. at 651–53.

120. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 n.9 (citing *Zauderer*, 471 U.S. 626 (1985)).

121. See *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001); see also *Zauderer*, 471 U.S. at 651.

lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not “particularly susceptible to being crushed by overbroad regulation.”¹²²

Because the commercial speaker has access to the facts regarding their products and services, inaccurate statements of fact are not protected by the First Amendment and the disclosure of accurate factual information may be compelled. In *Zauderer*, the Court explained that because “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides,” the commercial actor’s “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”¹²³ This is why the State may require a commercial actor “to provide somewhat more information than they might otherwise be inclined to present.”¹²⁴

In the case of *NYSRA v. NYC Board of Health*, the restaurant industry argued that *Zauderer*’s reasonable relationship test was limited to preventing consumer confusion or deception.¹²⁵ Although menu label laws and other disclosure requirements do prevent consumer confusion or deception because the absence of such information can make the sale of the target product misleading,¹²⁶ NYSRA’s argument is a misinterpretation of *Zauderer*. This reading incorrectly collapses the analysis of the first prong of the *Central Hudson* test with the reasonable relationship test applicable to commercial disclosure requirements.

In *Zauderer*, the Court’s language announcing its holding led to the NYSRA’s misunderstanding of the import of the case. Specifically, the Court held that although “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech . . . 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.”¹²⁷

122. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 n.6 (1980) (citations omitted).

123. 471 U.S. at 651 (citation omitted).

124. *Id.* at 650.

125. See Reply Memorandum in Support of Motion for Preliminary Injunction, Declaratory Relief and Partial Summary Judgment at 22–23, 33, 36–38, *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007) (No. c-05710).

126. See generally Burton et al., *supra* note 27, at 1674 (“[T]he provision of easily accessible nutrition information may provide significant public health benefits by making it easier for consumers to make more healthful food choices.”); Jennifer L. Pomeranz & Kelly D. Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, 98 AM. J. PUB. HEALTH 1578, 1579 (2008) (“Menu labels provide one tool for customers to make more-informed decisions and reduce the current confusion over portion sizes and the calorie and nutrition content of restaurant food.”).

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

Stating it another way, the Court explained that “because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, [warnings] or [disclaimers] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”¹²⁸ Due to these statements, *Zauderer* was misinterpreted by the NYSRA to mean that only these state interests (preventing consumer confusion or deception) are viable to support a factual disclosure requirement.¹²⁹ Rather than addressing consumer confusion or governmental interests, *Zauderer* analyzed whether the State could compel speech through commercial disclosure requirements.¹³⁰ If a menu label law is considered a routine factual disclosure requirement,¹³¹ then *Zauderer*’s reasonable relationship test must control the analysis of whether the government’s stated interest is reasonably related to the institution of such a law.

The correct reading of the passages above is that in *Zauderer*, the disclosure requirement was reasonably related to the government’s interest in that case: avoiding misleading voluntary advertisements by attorneys. In *Virginia Pharmacy*, the Court foresaw the potential for confusing or deceptive advertising by certain professionals:

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.¹³²

The fact that *Zauderer*’s disclosure requirement was validated for this reason reflects the Court’s special concern for the possibility of deception in the realm of professional advertisement. In *Bates v. State Bar of Arizona*, a case involving attorney advertising, the Court made a similar statement: “We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.”¹³³

The Supreme Court has paid particular attention to speech in the professional advertisement context. The Court has explained that “advertising by the professions

128. *Id.* (quoting *In re R. M. J.*, 455 U.S. 191, 201 (1982)).

129. See Reply Memorandum, *supra* note 125, at 22–23, 33, 35–38.

130. *Zauderer*, 471 U.S. at 627.

131. See *infra* Part V.

132. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n.25 (1976) (emphasis in original).

133. 433 U.S. 350, 384 (1977).

poses special risks of deception—“because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.”¹³⁴ Thus, in the professional advertising context, courts often talk in terms of inherently misleading speech, which is not protected by the First Amendment and can be prohibited entirely.¹³⁵ In *Zauderer*, the Court spoke of the omission in terms reminiscent of “inherently misleading” professional advertising cases:

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.¹³⁶

However, by definition, inherently misleading speech cannot be cured by disclosure requirements. *Zauderer* is not a case about curing misleading speech, but rather a case about the constitutionality of a disclosure requirement.¹³⁷ Thus, the Court did not need to consider which type of misleading speech the statute was designed to cure; rather, it only needed to determine whether the disclosure requirement was reasonably related to the state’s goal.¹³⁸

The NYSRA’s reading would place *Zauderer* in the context of the first prong of the *Central Hudson* test, which requires courts to ask whether the speech is protected by the First Amendment, meaning it is not misleading or about unlawful activity.¹³⁹ There is a clear distinction between mandating the disclosure of commercial facts and curing potentially misleading speech. The former is

134. *In re R. M. J.*, 455 U.S. 191, 200 (1982) (quoting *Bates*, 433 U.S. at 383).

135. *Id.* at 203 (“[W]hen the particular content or method of the advertising suggests that it is inherently misleading . . . , the States may impose appropriate restrictions [and it] may be prohibited entirely.”).

136. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652–53 (1985) (quoting *Fed. Trade Comm’n v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965)).

137. *See id.* at 629.

138. *Id.* at 651.

139. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

commonplace in the current consumer protection regulatory scheme in the U.S.¹⁴⁰ The latter is a judicial cure for potentially misleading speech.¹⁴¹

It also cannot be that all compelled disclosure requirements must be reasonably related to only one government interest—that of avoiding consumer confusion or deception. This reading would mean that the type of speech determines whether the government interest is constitutional. This is not a logical reading as it is for the government entity to define its interest and not the law to tailor a particular interest to be had.¹⁴² Further, as explored below, labels on food, beverage and textile products are a form of commercial speech that put more information in the commercial marketplace because the absence of this information can be confusing, deceptive, or just plain incomplete. United States Courts of Appeal that have considered this argument have interpreted *Zauderer* as applying to compelled disclosure requirements enacted for other purposes.¹⁴³ The result of the NYSRA's argument would be that all commercial disclosure requirements are constitutionally suspect. This is not only incorrect, but unfeasible.¹⁴⁴

C. Compelled Subsidization of Speech Cases

Although not directly in line with straightforward commercial speech cases, the Court found that a state-mandated requirement to financially contribute to speech contrary to one's beliefs violates the First Amendment in the case of *United States Department of Agriculture v. United Foods*.¹⁴⁵ *United Foods* involved a Congressional Act establishing the Mushroom Council, which was authorized to impose mandatory assessments upon handlers of fresh mushrooms.¹⁴⁶ Because the main goal of the scheme was to pay for advertisements,¹⁴⁷ the Supreme Court addressed whether the government may "sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom

140. See *infra* Part IV.

141. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990) ("To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty. A State may not, however, completely ban statements that are not actually or inherently misleading . . .") (citation omitted).

142. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining how "[t]he government's purpose is the controlling consideration").

143. See *infra* notes 211–229 and accompanying text.

144. See, e.g., *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (noting that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right").

145. 533 U.S. 405, 408–10, 416 (2001).

146. *Id.* at 408; see Mushroom Promotion, Research, and Consumer Information Act of 1990, Pub. L. No. 101-624, §§ 1921, 1925(b)–(g), 104 Stat. 3854, 3854, 3857–60.

147. See Mushroom Promotion, Research, and Consumer Information Act § 1922(b).

object to the idea being advanced.”¹⁴⁸ One handler of fresh mushrooms challenged the assessments, contending the “forced subsidy for generic advertising” violated its First Amendment rights because it wanted to convey the message that its brand of mushrooms was superior to those grown by other producers. The handler also objected to being charged for a message that mushrooms are worth consuming whether or not they are branded.¹⁴⁹ Because the forced subsidization was for speech of a “viewpoint” contrary to the handler’s “beliefs,” the scheme was held to violate the handler’s First Amendment right not to participate in speech contrary to its own interests.¹⁵⁰

United Foods stands for the proposition that the government cannot require a speaker to subsidize a controversial viewpoint. This case is part of the compelled subsidy of speech line of cases, but it is the closest Supreme Court case addressing the compelled statement of beliefs in the commercial context.¹⁵¹ The Court recalled past compelled subsidization of speech cases like *Abood v. Detroit Board of Education*¹⁵² and *Keller v. State Bar of California*¹⁵³ that likewise “recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one’s ‘freedom of belief.’”¹⁵⁴ The Court did not state which level test it applied to the mandate in *United Foods*, but based on its precedent, one would expect that an intermediate test would apply. There are no cases in which the Court applied strict scrutiny in the realm of commercial speech,¹⁵⁵ and the application of the reasonable relationship test implies that the law would pass First Amendment scrutiny.

What has emerged is a clear distinction between the government’s ability to compel facts and beliefs under the commercial speech doctrine. Relevant to this distinction is another compelled subsidization of speech case decided prior to *United Foods*: *Glickman v. Wileman Brothers & Elliott, Inc.*¹⁵⁶ In that case, a fruit

148. *United Foods, Inc.*, 533 U.S. at 410.

149. *Id.* at 409, 411.

150. *Id.* at 412–16.

151. *See id.* at 410 (“Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object.”) (citations omitted). *See also* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (explaining that the issue in this compelled subsidy of speech case was “whether the generic advertising at issue [wa]s the government’s own speech and therefore is exempt from First Amendment scrutiny”); *Glickman v. Wileman Bros. & Elliot Inc.*, 521 U.S. 457, 460, 474 (1997) (holding that the challenge to assessments imposed on respondents for generic advertising did not warrant First Amendment scrutiny).

152. 431 U.S. 209 (1977).

153. 496 U.S. 1 (1990).

154. *United Foods*, 533 U.S. at 413 (quoting *Glickman*, 521 U.S. at 471) (internal quotation omitted).

155. *Cf.* *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995) (explaining that the Supreme Court uses “intermediate” scrutiny—not strict scrutiny—to analyze restrictions on commercial speech).

156. 521 U.S. 457 (1997).

producer challenged certain provisions of the Agricultural Marketing Agreement Act, which Congress enacted to establish and maintain market conditions and fair prices for agricultural commodities.¹⁵⁷ Of the collective activities that Congress authorized, the fruit producer challenged the compulsion to fund advertising of the commodities subject to the broader collective enterprise.¹⁵⁸ Because the financial contribution for advertising in this case was “germane” to a larger regulatory regime, the Court found that it did not violate the First Amendment,¹⁵⁹ unlike in *United Foods*, where the contributions were being excised for the speech itself.¹⁶⁰

However, there is an important distinction between these two cases that often goes unrecognized. In *United Foods*, the Court found that the compelled message was contrary to the producer’s interests and beliefs,¹⁶¹ but in *Glickman*, the scheme at issue was for “factually accurate advertising.”¹⁶² The *Glickman* Court found that the producer’s “criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgment of anybody’s right to speak freely.”¹⁶³ Thus, the compulsion to pay for “factually accurate advertising” was found not to violate the First Amendment.¹⁶⁴ Unlike in *United Foods*, where the compulsion to subsidize a message was one with which the commercial actor disagreed,¹⁶⁵ in *Glickman* the Court explained that requiring the producer to pay the assessments “cannot be said to engender any crisis of conscience.”¹⁶⁶ Therefore, the Court allowed the government to compel contributions for a scheme that included factually accurate advertising.¹⁶⁷ Because *United Foods* explicitly held that *Glickman* was good law, the Court sustained the government’s ability to require the subsidization of a regulatory regime that includes the advertisement of factually accurate generic messages, in contrast to the subsidization of viewpoints contrary to one’s own.¹⁶⁸ By accepting the validity of *Glickman*, *United Foods* implicitly acknowledges that the government can compel commercial speech for reasons other than the avoidance of deception, as alleged by the NYSRA in *NYSRA*,¹⁶⁹

157. *Id.* at 460–61; Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246 (codified as amended at 7 U.S.C. § 602(1) (2006)).

158. *Glickman*, 521 U.S. at 469.

159. *Id.* at 469, 477.

160. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410, 413 (2001).

161. *Id.* at 413.

162. *Glickman*, 521 U.S. at 474.

163. *Id.*

164. *Id.*

165. *United Foods*, 533 U.S. at 410.

166. *Glickman*, 521 U.S. at 472.

167. *Id.* at 474, 477.

168. *United Foods*, 533 U.S. at 410–13.

169. Memorandum of Law in Support of Plaintiff’s Motion for Declaratory Relief and Preliminary Injunction at 23, *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007) (No. c-05710).

given that *Glickman* did not depend upon the avoidance of deception for its factual speech mandate.¹⁷⁰

D. The Fact/Belief Distinction Realized

The rationale for treating statements of fact and those of belief differently underlies basic principles of the First Amendment. As examined above, the First Amendment protects “the right of freedom of thought”¹⁷¹ which means a person cannot be compelled “to utter what is not in his mind.”¹⁷² Because this is a core First Amendment value, the Court seems to extend the protection to all speakers. There is no constitutional value to compelling statements antagonistic to one’s beliefs in either the realm of traditional speech or that of commercial speech. However, this First Amendment guarantee is not implicated by compelled disclosures of factual information about the products or services being offered in the commercial marketplace. These factual disclosures are “necessary to insure . . . the flow of truthful and legitimate commercial information.”¹⁷³ In the commercial marketplace, the emphasis is on the receipt of information by consumers, thus the compelled disclosure of facts is valued.

This distinction was noted in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, where the Supreme Court stated that “[a]lthough the State may at times ‘prescribe what shall be orthodox in commercial advertising’ by requiring the dissemination of ‘purely factual and uncontroversial information,’ outside that context it may not compel affirmance of a belief with which the speaker disagrees.”¹⁷⁴ Further, in the case of *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court found that while the Utilities Commission may order the public utility to carry factual legal notices such as “changes in the way rates are calculated,” it cannot force the corporation “to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation’s views.”¹⁷⁵ The Court was clear that the State could not require corporations to carry the political messages of third parties at issue in the case.¹⁷⁶ However, the Court cited *Zauderer* for the proposition that the “State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations.”¹⁷⁷

170. See *Glickman*, 521 U.S. at 476–77.

171. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

172. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

173. See *Va. State Bd. of Pharmacy v. Va. Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

174. 515 U.S. 557, 573 (1995) (citations omitted).

175. 475 U.S. 1, 4, 15 n.12 (1986).

176. *Id.* at 4–5, 9, 14–15.

177. *Id.* at 15 n.12.

The United States Court of Appeals for the Seventh Circuit engaged in a similar analysis in *Entertainment Software Association v. Blagojevich*.¹⁷⁸ There, the court reviewed a state law that required video game retailers to place labels on games saying *18* or *sexually explicit*, put signs in their stores, and provide brochures to customers explaining the video game rating system.¹⁷⁹ The question before the court was whether the “labeling and signage requirements are compelled speech in violation of the Constitution or simply requirements of purely factual disclosures.”¹⁸⁰ The court explained that “in the commercial arena, the Constitution permits the State to require speakers to express certain messages without their consent, the most prominent examples being warning and nutritional information labels.”¹⁸¹ The Court found, however, that the law in question violated the First Amendment because the State’s definition of *sexually explicit* was “opinion-based.”¹⁸² Moreover, “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.”¹⁸³ Relying on *Pacific Gas & Electric*, the court distinguished the subjective message at hand from the Surgeon General’s warning of the carcinogenic properties of cigarettes and a mercury disclosure requirement upheld by the United States Court of Appeals for the Second Circuit.¹⁸⁴ Unlike the law at issue in *Blagojevich*, these latter factual disclosure requirements mandated the disclosure of factual information, not subjective beliefs, about the products sold.

Thus, commercial factual disclosure requirements were differentiated from compelled statements of belief. The rationale behind the First Amendment protection for commercial speech is to increase the dissemination of information in the commercial marketplace. Guaranteeing the government’s ability to compel more commercial information serves this purpose.

IV. COMPELLED COMMERCIAL DISCLOSURE REQUIREMENTS

Compelled commercial disclosure requirements are a subset of commercial speech. Their value is based on the value of commercial speech to the commercial marketplace. As the Court stated in *Virginia Pharmacy*:

178. 469 F.3d 641 (7th Cir. 2006).

179. *Id.* at 643.

180. *Id.* at 652.

181. *Id.* at 651.

182. *Id.* at 652.

183. *Id.*

184. *Id.* (citing *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d. 104 (2d Cir. 2001)).

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹⁸⁵

The early commercial speech cases overturned restrictions on speech based on the First Amendment principle that “people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them.”¹⁸⁶ The Court reiterated this concept by stating that the “disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information.”¹⁸⁷ This principle underlies compelled disclosure mandates of factual information in the commercial marketplace.

Commercial disclosure requirements are a routine part of the current regulatory scheme in the United States. As early as 1919, the Supreme Court stated that “it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold.”¹⁸⁸ Due to an absence of voluntary and uniform disclosures, the government often requires commercial actors to disclose “purely factual and uncontroversial information”¹⁸⁹ about their products or services to ensure that the public is well-informed.

In 1966, Congress enacted the Fair Packaging and Labeling Act.¹⁹⁰ The Congressional declaration of the policy underlying the Act states:

Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods.¹⁹¹

185. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

186. *Bates v. State Bar*, 433 U.S. 350, 365 (1977) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 770).

187. *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994) (quoting *Peel v. Attorney Registration & Disciplinary Comm’n.*, 496 U.S. 91, 108 (1990)); see also, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.*, 447 U.S. 557, 561–62 (1980) (“Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”).

188. *Corn Prods. Ref. Co. v. Eddy*, 249 U.S. 427, 431 (1919).

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

190. Fair Packaging and Labeling Act, Pub. L. No. 89-755, 80 Stat. 1296 (1966).

191. *Id.* § 2.

This policy rationale underlies countless laws aimed at making information available to consumers. For example, textile and wool products must be labeled with their fiber content, country of origin, and the identity of the business responsible for marketing or handling the item.¹⁹² Articles of apparel made of fur must be labeled with the English name of the animal from which the fur was taken and whether the fur is dyed or previously used.¹⁹³ Cosmetics must have an information panel that lists the products' ingredients in descending order of predominance.¹⁹⁴ Similarly, packaged food and beverages must list the ingredients contained in the product,¹⁹⁵ the net weight of the contents,¹⁹⁶ and the alcohol content.¹⁹⁷ All foods regulated by the FDA must have labels that identify the source of all ingredients that are, or are derived from, the eight most common food allergens (milk, eggs, fish, crustacean shellfish, tree nuts, peanuts, wheat, and soybeans).¹⁹⁸ Federal law also requires that information on lead-based paint hazards must be disclosed before the sale or lease of residential housing built before 1978.¹⁹⁹

Labeling requirements further the goal that the free market economy functions fairly and efficiently through well informed consumers. Commercial disclosure requirements are specifically enacted to promote fair dealings, better informed decision-making, and fair and efficient commercial markets. Such laws are reasonably related to the government's interest in regulating for public health,²⁰⁰ safety²⁰¹ and an informed consumer population.²⁰²

Besides *Zauderer*, few Supreme Court cases mention the First Amendment issues relevant to compelled disclosure requirements in the commercial marketplace.²⁰³ One of the few cases that touch on commercial disclosure mandates is *Rubin v. Coors Brewing Company*.²⁰⁴ In that case, the Court struck down a

192. See 15 U.S.C. §§ 68(b), 70(b) (2006).

193. See *id.* § 69(b), (e).

194. 21 C.F.R. § 701.3 (2008).

195. 21 U.S.C. § 343(i) (2006).

196. *Id.* § 343(e).

197. 27 U.S.C. § 205(e)(2) (2006).

198. 21 U.S.C. § 343(w).

199. 42 U.S.C. § 4852(d) (2006).

200. See *Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153, 156–57 (1916) (explaining that a State may exercise its police power in protecting public health).

201. See *Sligh v. Kirkwood*, 237 U.S. 52, 58–59 (1915) (stating how the police power of the State includes regulations designed to promote public safety).

202. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764–65 (1976) (asserting that society has an interest in consumers make well informed and intelligent commercial decisions).

203. See generally R. Michael Hoefges, *Regulating Professional Services Advertising: Current Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953, 975–83 (2007) (interpreting the holding in *Zauderer* in ensuing cases).

204. 514 U.S. 476 (1995).

section of the Federal Alcohol Administration Act (FAAA) that prohibited beer labels from displaying alcohol content.²⁰⁵ The Court explained that a beer label constitutes commercial speech and thus the government could not prohibit the manufacturer from putting factual information about its product on the label.²⁰⁶ The FAAA mandated the disclosure of alcohol content for some beverages,²⁰⁷ and Justice Stevens briefly addressed this compelled commercial speech mandate in his concurring opinion. Justice Stevens stated that in the commercial context, the government “often requires affirmative disclosures that the speaker might not make voluntarily.”²⁰⁸ In the accompanying footnote, Stevens cited several United States Code provisions that require commercial actors to label their products for the purpose of providing consumers with information: “15 U.S.C. § 1333 (requiring “Surgeon General’s Warning” labels on cigarettes); 21 U.S.C. § 343 (1988 ed. and Supp. V) (setting labeling requirements for food products); 21 U.S.C. § 352 (1988 ed. and Supp. V) (setting labeling requirements for drug products).”²⁰⁹ These labeling requirements are examples of commercial disclosure mandates that are reasonably related to the government’s interest in regulating for public health, safety, and an informed consumer population.²¹⁰

United States Courts of Appeal consistently find factual disclosure requirements constitutional under the reasonable relationship test. In the United States Court of Appeal for the First Circuit case of *Pharmaceutical Care Management Association v. Rowe*, the court considered a trade association’s challenge to a state statute that would require its members (PBMs) to disclose certain factual information in order to enter contracts with covered entities.²¹¹ The association alleged that the disclosure requirements violated the First Amendment rights of its members by impermissibly compelling commercial speech in the context of a voluntary business relationship.²¹² The court found that the plaintiff’s claim was without merit and explained:

What is at stake here . . . is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes—in this case, protecting covered entities from questionable PBM business practices. There are literally thousands of similar regulations on the books—such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns

205. *Id.* at 478.

206. *Id.* at 481, 483.

207. Federal Alcohol Administration Act, Pub. L. No. 74-401, § 5(e)(2), 49 Stat. 977, 982 (1935).

208. *Rubin*, 514 U.S. at 492 (Stevens, J., concurring).

209. *Id.* at 492 n.1.

210. *See id.* at 485 (majority opinion), 492 (Stevens, J., concurring).

211. 429 F.3d 294, 298–99 (1st Cir. 2005).

212. *Id.*

to government units who use the information to the obvious disadvantage of the taxpayer.

The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken. *Zauderer* makes clear ‘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.’ This is a test akin to the general rational basis test governing all government regulations under the *Due Process Clause*. The test is so obviously met in this case as to make elaboration pointless.²¹³

Thus, *Rowe* stands for the proposition that the government can compel factual information from commercial actors. The court found that *Zauderer* affirms that commercial disclosure requirements must meet the rational relationship test²¹⁴ and regulations such as those set forth above clearly do.

The United States Court of Appeals for the Second Circuit came to the same conclusion in *National Electrical Manufacturers Association v. Sorrell*.²¹⁵ In that case, the court considered a State requirement that manufacturers of certain mercury-containing products label their products and packaging to inform consumers that the products contain mercury and should be disposed of properly.²¹⁶ The court explained that the First Amendment is satisfied “by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose.”²¹⁷ In upholding the commercial disclosure requirement, the court said: “To be sure, the compelled disclosure at issue here was not intended to prevent ‘consumer confusion or deception’ per se, *Zauderer*, but rather to better inform consumers about the products they purchase.”²¹⁸ The court explained that “[b]y encouraging such changes in consumer behavior, the labeling requirement is rationally related to the state’s goal of reducing mercury contamination.”²¹⁹ In fact, it went on to note “the potentially wide-ranging implications” of finding otherwise:

Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. See, e.g., 2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 781 (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of

213. *Id.* at 316 (Boudin, J., concurring) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)) (noting that the joint concurring opinion of Chief Judge Boudin and Judge Dyk represented the opinion of the court with respect to the First Amendment issues) (emphasis added).

214. *Id.*

215. 272 F.3d 104, 115 (2d Cir. 2001).

216. *Id.* at 107.

217. *Id.* at 115.

218. *Id.* (quoting *Zauderer*, 471 U.S. at 651).

219. *Id.*

pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 (“Proposition 65”; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). To hold that the Vermont statute is insufficiently related to the state’s interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.²²⁰

Like the laws delineated by the Court of Appeals for the First Circuit in *Rowe*, the regulations referred to above are commercial disclosure regulations that are rationally related to the government’s interest in a properly functioning marketplace where consumers have necessary information to make informed choices.

Finally, in the case of *Environmental Defense Center v. United States Environmental Protection Agency*, the United States Court of Appeals for the Ninth Circuit responded to challenges to certain regulations promulgated pursuant to the Clean Water Act dealing with pollution from stormwater runoff.²²¹ One of the regulations compels municipalities (MS4s) to “distribute educational materials to the community” about the impacts of stormwater discharges on water bodies and explain measures the public can take to reduce pollutants and to “[i]nform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste.”²²² The court rejected the MS4s’ claim that these sections violated their First Amendment right not to deliver EPA’s political message.²²³ The court explained that the interests at stake are not political like those in *Wooley* and *Barnette*. On the contrary:

Informing the public about safe toxin disposal is non-ideological; it involves no ‘compelled recitation of a message’ and no ‘affirmation of belief.’ It does not prohibit the MS4 from stating its own views about the proper means of managing toxic materials, or even about the Phase II Rule itself. Nor is the MS4 prevented from identifying its dissemination of public information as required by federal law, or from

220. *Id.* at 116. This case is controlling in the recent decision in *New York State Rest. Ass’n v. New York City Board of Health*, 556 F.3d 114, 132–34 (2d Cir. 2009), which allowed the expansion of required nutritional labeling.

221. 344 F.3d 832, 840 (9th Cir. 2003).

222. *Id.* at 848 (quoting 40 C.F.R. § 122.34(b)(1)(i), (b)(3)(ii)(D) (2000)).

223. *Id.* at 848–51.

making available federally produced informational materials on the subject and identifying them as such.²²⁴

The court emphasized the difference between compelling a subjective viewpoint and compelling factual information.²²⁵ The court suggested that the MS4s increase their own speech in response to the constitutionally permissible compulsion to make a factual statement in the commercial marketplace.²²⁶ Indeed the court went on to compare the EPA regulation requiring that MS4s inform and educate the public to the mercury disclosure requirement in *Sorrell*: “the Second Circuit held that 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.”²²⁷ The court noted that “the policy considerations underlying the commercial speech treatment of labeling requirements, *see, e.g.*, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1333-39, apply similarly in the context of the market-participant municipal storm sewer provider.”²²⁸ There are numerous such regulations on the books, and they all rely on the reasonable relationship test for their validity.²²⁹

V. MENU LABEL LAWS

This Article’s analysis of First Amendment jurisprudence with respect to commercial disclosure requirements started off with the issue of menu label laws. In order for a menu label law to be considered a valid factual disclosure requirement such as those discussed throughout this Article, we must address each step of the First Amendment analysis. First, menus (and menu boards) must be considered a form of commercial speech. Second, menu label laws must be a form of commercial disclosure requirements mandating the disclosure of factual information. Finally, the menu label laws must pass the reasonable relationship test.

Opponents of menu label laws may compare the laws to governmental compulsions of traditional speech. Such a far-reaching assertion seriously devalues the importance of the First Amendment. In fact, the Supreme Court rejected a similar argument in *Rumsfeld v. FAIR*:

Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to

224. *Id.* at 850 (quoting *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding state law protecting petitioning in malls and noting that “*Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief”).

225. *Id.* at 849–50.

226. *See id.* at 850.

227. *Id.* at 851 n.27 (quoting *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001)).

228. *Id.* at 851.

229. *See supra* text accompanying notes 192–199.

display the motto ‘Live Free or Die,’ and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.²³⁰

The same rationale applies here. It is highly unlikely that a court would find that menu label laws implicate traditional free speech rights.

Referring back to the discussion of a definition of commercial speech above, it is very likely that a court would find that menus are a form of commercial speech. Menus certainly propose a commercial transaction—even more so than beer labels.²³¹ Further, although not properly advertisements, menus meet the second and third part of the analysis in *Bolger*, as they refer to specific products, and the food service establishment has an economic motivation for the speech.²³² Menus provide factual information about the products offered and are related to the economic interests of both the speaker and its audience, meeting the *Central Hudson* requirements.²³³ In *Bates*, the Court found that lawyer advertisements about the prices of routine services were commercial speech.²³⁴ This is similar to a menu of standard products offered for sale. It is fair to conclude that menus are a form of commercial speech.

In order to determine whether a menu label law is a factual commercial disclosure requirement, the information being mandated must be analyzed. Opponents of menu label laws allege that they impermissibly compel a food service establishment to voice a point of view with which they disagree.²³⁵ However, a menu label law compels the disclosure of factual nutrition information about the products offered for sale. Some require the disclosure of the total number of calories in each product offered.²³⁶ A calorie is the “[a]mount of heat needed to raise the temperature of 1 gram of water by 1 degree Celsius.”²³⁷ Some require the disclosure of the total amount of saturated fat. Saturated fat is a “[f]atty acid chain that does not contain any carbon-to-carbon double bonds.”²³⁸ Others require the disclosure of the total amount of carbohydrates.²³⁹ Carbohydrates “are composed of the elements carbon (C), hydrogen (H), and oxygen (O)” and can be classified as monosaccharides, disaccharides, or polysaccharides.²⁴⁰ Others require the

230. 547 U.S. 47, 62 (2006).

231. See generally *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

232. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

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

234. See *Bates v. State Bar*, 433 U.S. 350, 367–68, 383–84 (1977).

235. See, e.g., *N.Y. State Rests. Ass’n v. N.Y. City Bd. of Health*, 509 F. Supp. 2d 351, 354 (S.D.N.Y. 2007), *aff’d*, *N.Y. State Rests. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

236. See *supra* note 25 and accompanying text.

237. PETER S. MURANO, UNDERSTANDING FOOD SCIENCE AND TECHNOLOGY, at G-3 (2003).

238. *Id.* at G-16.

239. See *supra* note 28 and accompanying text.

240. See MURANO, *supra* note 237, at 66–67.

disclosure of the total amount of sodium.²⁴¹ Sodium is a mineral, which is an inorganic substance listed on the periodic table of elements.²⁴² This is the same factual information that the NLEA requires food producers to disclose.²⁴³ These requirements are the same information required on the Nutrition Facts Panel on packaged food, which lists nutrition “facts.”²⁴⁴ There is nothing subjective about the disclosure of these facts, and thus, listing them is not asserting any point of view. Menu label laws compel the disclosure only of “purely factual and uncontroversial” commercial information—the nutritional contents of restaurant menu items.²⁴⁵

Menu label laws compel information disclosure in the commercial marketplace similar to the disclosure requirements listed by Justice Stevens in his concurrence in *Rubin v. Coors Brewing Company*: the Surgeon General’s Warning labels on cigarettes, labeling requirements for food products, and labeling requirements for drug products.²⁴⁶ Menu label laws require commercial actors to disclose nutritional information about their products at the point of purchase. Like all other labeling requirements, menu label laws require the information to be conveyed prior to purchase in order to ensure consumer access to the information during the decision-making process.²⁴⁷

Further, menu label laws do not prevent a restaurant from speaking an actual point of view.²⁴⁸ First Amendment cases provide guidance on this point. In *Pruneyard Shopping Center v. Robins*, peaceful political activists were advocating their political views at an outdoor shopping center, against the Center’s owners’ interests.²⁴⁹ The Supreme Court upheld their First Amendment right to do so and suggested that the disgruntled owners “can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of

241. See *supra* note 28 and accompanying text.

242. See MURANO, *supra* note 237, at 75, 77.

243. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 2(a), 104 Stat. 2353, 2353 (codified as amended at 21 U.S.C. § 343(q) (2006)).

244. 21 C.F.R. § 101.9(c) (2008).

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

246. 514 U.S. 476, 492 n.1 (1995) (Stevens, J., concurring).

247. United States Supreme Court and Court of Appeals precedent supports the conclusion that menu label laws are factual disclosure requirements. By comparing menu label laws to the regulation at issue in *United Foods*, see Memorandum of Law in Support of Plaintiff’s Motion for Declaratory Relief and Preliminary Injunction, *supra* note 169, at 9, antagonists of such laws completely ignore the valid precedents of *Zauderer* and *Glickman*, both of which are good law and stand on their own in contrast to *United Food*. See *United States v. United Foods, Inc.*, 533 U.S. 405, 415–16 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997); *Zauderer*, 471 U.S. 626 (1985).

248. See *Pomeranz & Brownell, supra* note 126, at 1581 (explaining that menu label laws only require factual disclosure of information and not a subjective viewpoint).

249. 447 U.S. 74, 77 (1980).

state law.²⁵⁰ Restaurant owners can similarly put up signs stating that the nutritional information is required by the governing authority mandating such disclosure.

Likewise, in *Meese v. Keene*, the Court upheld the provision of the Foreign Agents Registration Act, which required labeling of certain films as “political propaganda.”²⁵¹ The Court said that “[d]isseminators of propaganda may go beyond the disclosure required by statute and add any further information they think germane to the public’s viewing of the materials.”²⁵² Likewise, restaurateurs who are required to only post calories are free to add additional factual information to their menus that they believe patrons should consider when making food selections.

The final issue to address is whether menu label laws are reasonably related to the state’s interest in passing them. The state has an interest in promoting public health and an informed consumer population.²⁵³ It is reasonable for legislators and public health departments to find that requiring restaurants to post nutrition information is a valid tactic to address the nation’s poor nutrition and drastic rise in obesity. Governments have a substantial interest in protecting public health, and specifically, reducing and preventing future obesity.²⁵⁴ They also have an interest and a stake in reducing the cost of obesity and obesity-related diseases.²⁵⁵ Menu labels have the necessary objective of informing consumers of the nutritional composition of the foods and beverages they purchase for consumption in order to assist them in making choices better suited for their nutritional needs. Menu label laws correct the information disparity that currently acts to the detriment of consumers.

Because many menu label laws only require the disclosure of calorie information,²⁵⁶ a separate but related question is whether targeting calories is reasonably related to a state’s interest in enacting these calorie-specific menu label laws. As discussed above, leading authorities conclude that, at the minimum, calories should be placed at the point of purchase.²⁵⁷ Experts consider calories to be the single most important consideration for weight control.²⁵⁸ Studies confirm that

250. *Id.* at 87; *see also* *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 60, 65 (2006) (suggesting that a law school could put up signs or engage in protests in order to express their views against the Solomon Amendment’s equal access requirement for military recruiters).

251. 481 U.S. 465, 467, 479–80, 485 (1987).

252. *Id.* at 481.

253. *See* Pomeranz & Brownell, *supra* note 126, at 1580.

254. *Id.* at 1579.

255. *Id.* at 1579–80.

256. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 114094 (2009); NEW YORK CITY, N.Y., HEALTH CODE 24, § 81.50 (2006); S.B. 686, Leg. 2007, Jan. Sess. (Conn. 2007); H.B. 1203, 48th Leg., 1st Sess. (N.M. 2007); S.B. 1696, Leg. 2007–2008, 105th Sess. (Tenn. 2007).

257. JEFFREY P. KOPLAN ET AL., INST. OF MED. OF THE NAT’L ACADS., *supra* note 19, at 165–66.

258. *See, e.g.*, U.S. DEP’T OF HEALTH & HUMAN SERVS., DIETARY GUIDELINES FOR AMERICANS 2005, at 15 (2005), *available at* <http://www.healthierus.gov/dietaryguidelines> (remarking that “when it

consumers are unaware of and routinely underestimate the number of calories in pre-prepared foods and beverages.²⁵⁹ Moreover, not requiring a display of the entire nutritional profile does not make the law constitutionally suspect.²⁶⁰ Mandating the disclosure of any piece of nutritional information adds to the overall information in the commercial marketplace. The Court responded to a similar issue in *Bates*:

But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.²⁶¹

The same rationale applies to menu label laws. Menu label laws are similar to the countless other factual disclosure requirements currently in the commercial marketplace. They are one of many solutions to the obesity problem in the United States. As such, they are subject to the Court's most lenient First Amendment test, which they pass.

CONCLUSION

The First Amendment's purpose is to protect against state intrusions on the exposition of ideas in order to promote robust debate and protect against interference of expression. This implies the right to be able to choose what to say and what not to say.²⁶² These highly valued ideals are at the core of the founding of the United States.²⁶³ The Supreme Court extended this protection to commercial

comes to body weight control, it is calories that count—not the proportions of fat, carbohydrates and proteins in the diet"); OBESITY WORKING GROUP, U.S. FOOD & DRUG ADMIN., *supra* note 13 (finding "a focus on total calories is the most useful single piece of information in relation to managing weight"); AM. MED. ASS'N, HEALTH AND ETHICS POLICIES OF THE AMA HOUSE OF DELEGATES: H-150.945 NUTRITION LABELING AND NUTRITIONALLY IMPROVED MENU OFFERINGS IN FAST-FOOD AND OTHER CHAIN RESTAURANTS, 140 (2008), available at <http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf> (stating that "at a minimum, calories [should be labeled] on menu boards since they have limited space").

259. See RUDD CTR. FOR FOOD POLICY & OBESITY, YALE UNIV., *supra* note 27, at 9; Burton et al., *supra* note 27, at 1671, 1674.

260. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985) ("[W]e 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 all facts 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.").

261. *Bates v. State Bar*, 433 U.S. 350, 374–75 (1977).

262. See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988).

263. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977).

speech in a limited sense in order to enrich the commercial marketplace.²⁶⁴ More information about goods and services enable consumers to make informed decisions, strengthening the free market economy.²⁶⁵ It is absurd to evoke these core First Amendment principles in the case of menu label laws or to refute commercial disclosure requirements, in general. The First Amendment was not intended to protect corporations from being compelled to disclose the contents of their goods for sale to consumers.

Even if the Supreme Court continues to interpret the First Amendment's protection for commercial speech more broadly, it could not, consistent with any First Amendment jurisprudence, disrupt the ability of the government to require commercial entities from disclosing factual information about their products and services. The Supreme Court has consistently held that the First Amendment means that mandating more, not less information, is constitutionally protected and preferred.²⁶⁶

The status quo with respect to restaurant foods is a true information disparity to the detriment of consumers. Our country values informed consumers in order to strengthen the free market economy;²⁶⁷ commercial disclosure requirements further this purpose.²⁶⁸ The current regulatory system in the United States is based on these values.²⁶⁹ Many disclosure requirements are enacted to ensure an informed consumer population with the goal of protecting public health and safety.²⁷⁰ Menu label laws extend the public health rationale of current labeling requirements to food service establishments. Targeting chain restaurants aims to address the public health problem associated with restaurants that serve predominately inexpensive

264. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").

265. See 15 U.S.C. § 1451 (2006) (explaining in the context of package labeling that "[i]nformed consumers are essential to the fair and efficient functioning of a free market economy"); see also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) ("It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated.").

266. See, e.g., *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) (explaining that disclosure of truthful information makes a positive contribution to the decision making process); *Cent. Hudson*, 447 U.S. at 562 ("[T]he First Amendment presumes that some accurate information is better than no information at all.").

267. See 15 U.S.C. § 1451 (2006) ("Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons.").

268. See *id.*

269. See *id.* (declaring that the Congressional policy for trade and commerce is to encourage dissemination of information to educate the consumer thereby promoting fair and efficient functioning of the free market economy).

270. See *supra* notes 200–202 and accompanying text.

and highly caloric food to extensive populations.²⁷¹ Consumers are being supplied with an overabundance of non-nutritious, energy-dense foods²⁷² and must be given the tools to make informed decisions about food consumption. Public health necessity dictates that this disclosure requirement becomes as pervasive and reliable as information on packaged foods and beverages throughout the country.

271. See generally Forrest Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153 (2004) (explaining the various methods with which the public, legislators, and courts have addressed the fast food industry's contribution to the obesity problem).

272. See generally *id.* at 158–59 (discussing the prominence of harmful trans fatty acids in popular fast foods).