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JEFFREY S. WETTENGEL\*

## Reconciling the Consumer “Right to Know” with the Corporate Right to First Amendment Protection

### INTRODUCTION

Requiring a company to publicly condemn itself is undoubtedly a more effective way for the government to stigmatize and shape behavior than for the government to convey its view itself, but that makes the requirement more constitutionally offensive, not less so.<sup>1</sup> This Comment will confirm the constitutional validity of this statement as it applies to government-mandated disclosures in the context of commercial speech.

The First Amendment guarantees both “the right to speak freely and the right to refrain from speaking at all.”<sup>2</sup> In 1976, the United States Supreme Court unequivocally extended these protections to “commercial speech,”<sup>3</sup> which is broadly defined as “speech [that] does ‘no more than propose a commercial transaction.’”<sup>4</sup> Challenges to governmental regulations, both attempting to suppress and to compel commercial speech, have produced two levels of First Amendment scrutiny: *Central Hudson*’s intermediate scrutiny and *Zauderer*’s rational-basis review.<sup>5</sup> *Central Hudson* was designed to address governmental regulation of commercial speech that is not false or deceptive, and does not deal with unlawful activities.<sup>6</sup> *Zauderer*, at its inception, was designed to apply to the government’s regulatory efforts to cure

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1. Reply Brief of Appellants, at 27–28, Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015), 2013 WL 6019681, at \*13.

2. See *American Meat Ruling May Whet Supreme Court Appetite*, WILEY REIN, LLP (May 15, 2014) <http://www.wileyrein.com/newsroom-articles-3158.html> (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

3. See *infra* text accompanying note 32; *infra* Section II.

4. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Couns., Inc.*, 425 U.S. 748, 762 (1976)).

5. *Infra* Section II.

6. *Infra* note 23 and accompanying text.

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consumer deception in the context of commercial speech.<sup>7</sup> While the application of *Central Hudson* has maintained a relatively steady course, lower courts have proven unable to uniformly interpret and apply *Zauderer*.<sup>8</sup> Specifically, these courts have improperly applied *Zauderer*'s rational-basis review to information-forcing disclosure mandates promulgated by the government that are not intended to cure perceived threats of consumer deception.<sup>9</sup>

Federal regulatory agencies, as well as state legislatures, have latched on to this expansion of *Zauderer* in attempting to require corporate disclosures of product information that corporations otherwise elected to omit.<sup>10</sup> Many of these regulations stem from what has come to be known as the consumer "right to know."<sup>11</sup> The basic premise underlying this movement is that consumers have a right to know about product processes and characteristics, and that, absent such regulations, corporations would not otherwise disclose such information.<sup>12</sup> The application of *Zauderer*, rather than *Central Hudson*, is ideal for the government because *Zauderer*'s rational-basis review presents a significantly lower threshold for the government to meet than *Central Hudson*'s intermediate scrutiny.<sup>13</sup> While the public could theoretically benefit from the government having a lower constitutional bar in promulgating regulations, *Zauderer*'s rational-basis scrutiny applies only to regulations intended to cure consumer deception.<sup>14</sup> Because regulations prompted by the consumer right to know entail disclosure mandates aimed at satisfying consumer curiosity, *Central Hudson*'s intermediate scrutiny necessarily governs.<sup>15</sup> Accordingly, the application of *Zauderer*'s rational-basis review in these circumstances unconstitutionally infringes on the heightened protections that are afforded to private corporations under the First Amendment when consumer deception is not at issue.<sup>16</sup>

Section I of this Comment outlines the evolution of Supreme Court jurisprudence in the realm of commercial speech under the First Amendment. Section II then discusses the emergence of *Central Hudson*'s intermediate scrutiny and *Zauderer*'s rational-basis review, as well as the way in which these two standards were designed to apply. It also highlights the inconsistent and extremely convoluted way in which lower federal courts have applied *Zauderer*. In Section III, this

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7. *Infra* note 24 and accompanying text.

8. *See infra* Section II.C.

9. *See infra* Section II.C.

10. *Infra* Sections IV.A, IV.B.

11. *See infra* Section IV.

12. *See infra* text accompanying notes 109–10.

13. *Compare infra* Section II.A, *with infra* Section II.B.

14. *See infra* Section III.A.

15. *See infra* Sections II.A, II.B.

16. *See infra* Section V.

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Comment offers guidance as to the proper circumstances in which to apply *Zauderer* and the way that courts should apply *Zauderer*'s legal test. Section VI defines the consumer right to know and highlights two notable pieces of legislation that were directly, or incidentally, intended to appease such consumer curiosity. Thereafter, Section V reinforces the reasons that *Central Hudson*, rather than *Zauderer*, should govern information-forcing regulations intended merely to better educate consumers in their purchasing decisions. This section demonstrates that much of the pre-existing regulatory structure will remain unchanged because the majority of those regulations do, in fact, satisfy *Central Hudson*. Section VI discusses the impact that the degradation of *Zauderer* may have on corporate disclosures mandated by the U.S. Securities and Exchange Commission.

The increasing pervasiveness of the consumer right to know movement highlights the need for the Supreme Court to reign in the lower courts' improper expansion of *Zauderer*. By cabining *Zauderer* to consumer deception and declaring that *Central Hudson* governs regulations intended to appease consumer curiosity, the Supreme Court will ensure that private corporations receive adequate protection under the First Amendment.

#### I. BACKGROUND OF COMMERCIAL SPEECH DOCTRINE AND THE FIRST AMENDMENT

Private corporations find protection under the First Amendment just as individual citizens do.<sup>17</sup> However, commercial speech, or *commercial silence*, is often the subject of criticism from state and federal governments.<sup>18</sup> The two most fundamental challenges to governmental action under contemporary First Amendment commercial speech jurisprudence are *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*<sup>19</sup> and *Zauderer v. Office of Disciplinary Counsel of Supreme Court*.<sup>20</sup> *Central Hudson* revolved around the issue of private electric utilities using advertisement to promote increased use of electricity,<sup>21</sup> and *Zauderer* was centered on concerns of attorney advertisements.<sup>22</sup> From these cases emerged two different levels of scrutiny, intended to be applied in different circumstances: *Central Hudson*'s "intermediate scrutiny" was designed to address governmental regulation of commercial speech that was not false or

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17. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (citing *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Couns., Inc.*, 425 U.S. 748, 761–62 (1976)).

18. *See, e.g., Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

19. 447 U.S. 557 (1980).

20. 471 U.S. 626 (1985).

21. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 558–60.

22. *Zauderer*, 461 U.S. at 629.

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deceptive, and does not deal with unlawful activities<sup>23</sup>; *Zauderer* is a more relaxed level of scrutiny which, *at its inception*, was designed to apply to governmental regulation of commercial speech involving consumer deception.<sup>24</sup>

Commercial speech has not always found refuge under the First Amendment. In 1942, there was general agreement among federal courts that the Constitution did not impose a restraint on the government with respect to commercial advertising.<sup>25</sup> Supreme Court jurisprudence, however, began to shift in the years following the 1942 declaration that the Constitution provided unfettered control over commercial advertising by the government. The Supreme Court recognized that speech in political ads,<sup>26</sup> classified ads,<sup>27</sup> and ads for abortion services<sup>28</sup> was protected under the First Amendment.<sup>29</sup> While these cases marked a significant departure from the holding in *Valentine v. Christensen* in 1942,<sup>30</sup> the rulings were narrowly confined to regulating advertising and had yet to fully address commercial speech as a whole.<sup>31</sup>

In 1976, the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* held that the First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted government regulation.<sup>32</sup> *Virginia Pharmacy* was the seminal case in recognizing that commercial speech was entitled to full First Amendment protection under what is now widely referred to as the “Commercial Speech

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23. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (interpreting *Central Hudson's* intermediate scrutiny test).

24. *Id.* at 651.

25. *Valentine v. Christensen*, 316 U.S. 52, 54 (1942) (“We are equally clear that the Constitution imposes no such restraint on government as respects commercial advertising.”), *overruled by* *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

26. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964) (considering an Alabama court’s award of damages pursuant to a libel suit related to an editorial advertisement).

27. *See generally* *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 391 (1973) (rejecting claims that a local ordinance limiting advertisements in a wanted advertisement violated the press companies constitutional speech rights).

28. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that a state statute prohibiting the sale or circulation of any publication promoting an abortion infringed on constitutional protections of free speech). The Court clarified its ruling in *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, emphasizing the speech was not protected only because it was illegal and otherwise would have received some level of protection under the First Amendment. *Id.* at 821.

29. Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movements*, 11 J. BUS. & TECH. L. 1, 4 (2016).

30. 316 U.S. 52, 54 (1942) (holding that the Constitution does not impose restrictions on governmental regulation of commercial speech).

31. *See supra* text accompanying notes 26–28.

32. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980) (citing *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976)).

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Doctrine.”<sup>33</sup> Protections for commercial speech became further entrenched in the First Amendment in *Central Hudson* when the Supreme Court noted that “[i]n applying the First Amendment to [commercial speech], we have rejected the ‘highly paternalistic’ view that government has complete power to suppress or regulate commercial speech.”<sup>34</sup> While commercial speech does enjoy First Amendment protection, the Court in *Zauderer* tempered that protection by holding that a state may, without violating the First Amendment, correct the problem of commercial speech that is deceptive or misleading.<sup>35</sup>

## II. FOUNDATIONS OF COMMERCIAL SPEECH STANDARDS

Prior to the Supreme Court’s unqualified declaration in *Virginia Pharmacy* that the First Amendment protected commercial speech from unwarranted governmental regulation,<sup>36</sup> courts were unclear as to the scope of the term “commercial speech” and whether such speech enjoyed constitutional protection.<sup>37</sup> In 1983, the Court again emphasized that there was no longer any room to doubt that what had come to be known as “commercial speech” was entitled to protection by the First Amendment.<sup>38</sup> By 1985, the Court had promulgated two standards by which to evaluate the constitutionality of governmental regulation of commercial speech.<sup>39</sup>

Section II.A of this Comment will discuss *Central Hudson*’s intermediate scrutiny, a standard that applies to governmental regulation of commercial speech that does not concern consumer deception.<sup>40</sup> Section II.B of this Comment will discuss the *Zauderer* Standard, a standard that, *at its inception*, was designed to evaluate the constitutionality of governmental redress of deceptive commercial speech.<sup>41</sup>

A. *Central Hudson*’s *Intermediate Scrutiny*

The Supreme Court first formalized a test under the commercial speech doctrine in its 1980 decision in *Central Hudson*.<sup>42</sup> In this case, the Court was presented with the

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33. John M. DiPippa, *The Demise Of The Commercial Speech Doctrine And The Regulation Of Professional’s Advertising: The Virginia Pharmacy Case*, 34 WASH. & LEE L. REV. 245, 245 (1977) (“The Supreme Court in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* finally put the doctrine to rest by holding that commercial speech, like other forms of expression, is entitled to full first amendment protection.”).

34. 447 U.S. 557, 562 (1980).

35. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985).

36. See *supra* text accompanying note 32.

37. See *Population Servs. Int’l v. Wilson*, 398 F. Supp. 321, 337 (S.D.N.Y. 1975).

38. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983).

39. See *infra* Sections II.A, II.B.

40. See *infra* Section II.A.

41. See *infra* Section II.B.

42. See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

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issue of whether New York State's Public Service Commission order that electric utilities in the state cease all advertising promoting the use of electricity was unconstitutional under the First Amendment.<sup>43</sup> In December of 1973, the Commission ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity."<sup>44</sup> The order was based on the Commission's finding that "the interconnected utility system in New York State [did] not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter."<sup>45</sup> The Commission also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation was needed.<sup>46</sup>

From this case, the Court developed a four-part analysis that would dictate when the government could regulate commercial speech:

*At the outset, we must determine whether expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.*<sup>47</sup>

In subsequently discussing the applicability of *Central Hudson's* intermediate scrutiny, the Supreme Court explained that the test applies to governmental regulation of commercial speech that is not false or deceptive, and that does not concern unlawful activities.<sup>48</sup>

#### B. Zauderer's Rational-Basis Review

While the precise bounds of the category of expression that may be termed "commercial speech" are subject to question, it is clear that advertising falls within those constraints.<sup>49</sup> In *Zauderer v. Office of Disciplinary Counsel of Supreme Court*,<sup>50</sup> the Supreme Court was faced with two unresolved questions regarding the regulation of commercial speech made by attorneys: (1) whether a State may

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43. *Id.* at 558.

44. *Id.*

45. *Id.* at 559.

46. *Id.* at 560.

47. *Id.* at 566.

48. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985) (interpreting *Central Hudson's* intermediate scrutiny test).

49. *Id.* at 637.

50. 471 U.S. 626 (1985).

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discipline an attorney for soliciting business by running newspaper advertisements containing non-deceptive illustrations and legal advice; and (2) whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose certain information regarding fee arrangements in their advertising.<sup>51</sup>

In resolving these issues, the Court channeled the teachings of three precedential cases involving advertising.<sup>52</sup> Both *Bates v. State Bar of Arizona*<sup>53</sup> and *In re R. M. J.*<sup>54</sup> permitted regulations designed to prevent the use of deceptive advertising.<sup>55</sup> The Court in *In re R. M. J.* also recognized that even non-deceptive advertising might be restricted if the restriction was narrowly designed to achieve a substantial state interest,<sup>56</sup> thus meeting *Central Hudson's* intermediate scrutiny.<sup>57</sup> The Court, citing *Ohralik v. Ohio Sate Bar Association*,<sup>58</sup> further noted that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible.<sup>59</sup> The Court's application of the foregoing principles to the commercial speech of attorneys led to the conclusion that blanket bans on price advertising by attorneys and rules preventing attorneys from using non-deceptive terminology to describe their fields of practice were impermissible.<sup>60</sup>

Critical, also, to the Court's resolution of the second issue presented in *Zauderer* was the distinction it drew between Ohio's legislation and Supreme Court jurisprudence establishing that compulsion to speak *may* be a violation of the First Amendment<sup>61</sup>:

*[T]he 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." (internal citation omitted). The State has attempted only to*

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51. *Id.* at 629.

52. *Id.* at 638.

53. 433 U.S. 350 (1977).

54. 455 U.S. 191 (1982).

55. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, at 635–36 (1985).

56. *Id.*

57. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (prong two of the *Central Hudson* test requires the governmental interest asserted to be substantial).

58. *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447 (1978).

59. *Zauderer*, 471 U.S. at 638.

60. *Id.* at 638.

61. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that, in some instances, compulsion to speak may be as violative of the First Amendment as prohibitions on speech); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that, in some instances, compulsion to speak may be as violative of the First Amendment as prohibitions on speech); *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that, in some instances, compulsion to speak may be as violative of the First Amendment as prohibitions on speech).



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*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.*<sup>62</sup>

In its conclusion, the Court first noted the well-settled general approach to commercial speech that state and federal governments are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposed an illegal transaction.<sup>63</sup> Additionally, the Court stated that “in virtually all . . . commercial speech decisions to date, [it] has emphasized that because disclosure requirements trench much more narrowly on 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.*”<sup>64</sup> From these conclusions, the *Zauderer* Standard was born:

*[A]n advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing the deception of consumers.*<sup>65</sup>

The *Zauderer* Standard, akin to rational-basis review,<sup>66</sup> is a looser standard than *Central Hudson’s* intermediate scrutiny test.<sup>67</sup> The standard by which consumer deception in advertising is evaluated is justifiably looser than *Central Hudson’s* intermediate scrutiny because one’s “constitutionally protected interest in *not providing* any particular *factual* information in his *advertising* is minimal.”<sup>68</sup> The Court did, however, recognize that unjustified or unduly burdensome disclosure requirements may offend the First Amendment.<sup>69</sup>

62. *Zauderer*, 471 U.S. at 651 (emphasis added).

63. *Id.* at 638 (citing *Friedman v. Rogers*, 440 U.S. 1 (1979); *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376 (1973)).

64. *Zauderer*, 471 U.S. at 651 (citing *In re R. M. J.*, 455 U.S. 191, 201 (1982)) (emphasis added).

65. *Id.*

66. *N.Y. St. Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009); *CTIA-The Wireless Ass’n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1064 (N.D. Cal. 2015) (“[C]ircuit courts have essentially characterized the *Zauderer* test as a rational basis or rational review test.”); see also Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 FIRST AMENDMENT L. REV. 140, 184 (2011) (“[The *Zauderer* Standard] has been variously described as a reasonable-relationship rule, a rational relationship test, and rational-basis review.”) (internal citations omitted).

67. See *supra* Section II.A (discussing *Central Hudson’s* intermediate scrutiny test).

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

69. *Id.*

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C. *The Zauderer Federal Circuit Split*

Unquestionably, two levels of First Amendment scrutiny have emerged in the context of commercial speech.<sup>70</sup> While the application of *Central Hudson* has remained relatively unchallenged, the expansiveness of *Zauderer*'s rational-basis review has become hotly contested amongst the lower federal courts.<sup>71</sup> Some circuits have taken *Zauderer* at its word and have applied the *Zauderer* Standard in the context of correcting consumer deception.<sup>72</sup> The First Circuit and Second Circuit, on the other hand, have held that *Zauderer* is not limited to cases in which the government aims to prevent deception.<sup>73</sup> In an opinion overruling years of precedence, the D.C. Circuit, which hears the lion's share of challenges to federal regulatory action,<sup>74</sup> held that *Zauderer* "seems inherently applicable beyond the problem of deception."<sup>75</sup> The Supreme Court has done little to delineate this issue, and federal circuits remain in a constitutional grey-zone as to the precise bounds of *Zauderer*'s rational-basis review.<sup>76</sup>

The outgrowth of this confusion has culminated into a question that federal courts have answered quite divergently:

*Whether, under the First Amendment, judicial review of mandatory disclosure of "purely factual and uncontroversial" commercial information, compelled for reasons other than preventing deception, can properly proceed under Zauderer v. Office of Disciplinary Counsel, or whether such compelled disclosure is subject to review under Central Hudson Gas & Elec. v. PSC of New York.*<sup>77</sup>

To date, the Supreme Court has refused to definitively answer this question, and the result has been a divisive split among federal circuits.<sup>78</sup>

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70. See *supra* Sections II.A, II.B.

71. See *infra* note 78.

72. See WILEY REIN, *supra* note 2 (citing Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 640–41 (6th Cir. 2010)).

73. See WILEY REIN, *supra* note 2; see Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

74. See WILEY REIN, *supra* note 2.

75. Am. Meat Inst. v. USDA, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) ("To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.").

76. See *infra* note 78 and accompanying text.

77. Am. Meat Inst. v. USDA, 2014 WL 2619836, at \*1 (D.C. Cir. Apr. 4, 2014) (granting cert.) (question presented on review).

78. Compare *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (applying *Zauderer* because the Government's regulation imposing a disclosure requirement were "directed at misleading commercial speech") (emphasis in original); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640–41 (6th Cir.

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III. SUPREME COURT GUIDANCE: A PROPER PARSING OF *ZAUDERER*

The heavily fractured and extremely inconsistent application of the *Zauderer* Standard in the lower federal courts demands Supreme Court review.<sup>79</sup> In doing so, the Court must decide whether *Zauderer*'s rational-basis review requires a showing that disclosure mandates aim to correct deceptive speech, or whether *Zauderer*'s relaxed standard can be counted on to protect disclosure obligations determined by the government to promote various interests, ranging from public and environmental health to economic development, social issues, and foreign policy.<sup>80</sup>

The following subsections will argue that purely factual and uncontroversial disclosures are permissible if they are reasonably related to the State's interest in addressing communication that is either false or deceptive, provided that the requirements are not unjustified or unduly burdensome. Subsection A will argue that *Zauderer* should be confined to cases of consumer deception. Subsection B will then explain that information subject to government-mandated disclosures designed to cure consumer deception must be both "purely factual" and "uncontroversial" in order to satisfy *Zauderer*'s legal test.

A. *When to Apply Zauderer: Consumer Deception*

The Supreme Court has never extended *Zauderer* to disclosure requirements other than those correcting misleading commercial speech,<sup>81</sup> and this should not come as a surprise. Justice Byron White, writing for the majority in *Zauderer*, expressed the

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2010) (holding that "*Zauderer* applies where a disclosure requirement targets speech as inherently misleading"); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005) (noting that the *Zauderer* Court "presumes that the government's interest in preventing consumer deception is substantial"); *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002) (upholding required disclaimers on dental advertisements to correct consumer misconception); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006) (holding that video game labels were subject to strict scrutiny because they were not purely factual and uncontroversial); *Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 228 (5th Cir. 2011) (holding that required attorney advertising disclosures were reasonably related to the state's interest in preventing deception); *Ficker v. Curran*, 119 F.3d 1150, 1152 (4th Cir. 1997) (striking down state ban on an attorney's targeted mailings because restriction failed intermediate scrutiny review); *United States v. Bell*, 414 F.3d 474, 484 (3d Cir. 2005) (upholding court order requiring fraudulent tax advice site to post injunction prominently on website to prevent consumer deception under *Zauderer*), *with Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 297-98, 310, 316 (1st Cir. 2005); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (affirming use of the "reasonable-relationship *Zauderer* standard when the compelled disclosure at issue . . . was not intended to prevent 'consumer confusion or deception'"); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556 (6th Cir. 2012) (holding that "*Zauderer*'s framework can apply even if the required disclosure's purpose is something other than or in addition to preventing consumer deception").

79. See *supra* Section II.C.

80. See WILEY REIN, *supra* note 2.

81. Bianca Nunes, *The Future of Government-Mandated Health Warnings After R.J. Reynolds and American Meat Institute*, 163 U. PA. L. REV. ONLINE 177, 185 (2014) (citing *R.J. Reynolds Tobacco Co. v. FDA*, 760 F.3d 1205, 1213 (D.C. Cir. 2012)).

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Court's holding with his customary precision: "We hold that an advertiser's rights are adequately protected *as long as* the disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."<sup>82</sup>

In qualifying the application of its intermediate scrutiny test, the Court in *Central Hudson* provided guidance as to the way courts should delineate the contrasting standards of *Zauderer* and *Central Hudson*: "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed."<sup>83</sup> This language suggests that the government's power is less circumscribed when commercial speech involves communication that is either misleading or related to unlawful activity. *Zauderer*'s rational-basis review is completely consistent with the foothold intentionally carved out by *Central Hudson* for deceptive commercial speech.<sup>84</sup>

In an effort to contrast its rational-basis scrutiny from *Central Hudson*'s intermediate scrutiny, the Court first highlighted those circumstances governed by *Central Hudson*:

*Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.*<sup>85</sup>

Implicit in this interpretation of *Central Hudson* is a declaration that (1) *Zauderer*'s rational-basis review applies to communication that *is* false or deceptive and (2) *Central Hudson* applies to commercial speech that is *not* false or deceptive. Thus, under *Zauderer*, purely factual and uncontroversial disclosures are permissible if they are reasonably related to the State's interest in addressing communication that is either false or deceptive, provided that the requirements are not unjustified or unduly burdensome.<sup>86</sup>

*B. How to Apply Zauderer: A Legal Test*

The Supreme Court's responsibility in clarifying *Zauderer* will also require a parsing of the way in which the standard is actually applied.<sup>87</sup> The legal test articulated by *Zauderer* "requires the disclosures to be of 'purely factual and uncontroversial

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82. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 519 (D.C. Cir. 2015) (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985)).

83. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

84. *Supra* text accompanying note 83.

85. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985).

86. *See id.* at 651.

87. *See infra* notes 96–97.

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information' about the good or service being offered."<sup>88</sup> In applying this test, the Court must evaluate the type of speech that can be compelled by determining when a disclosure ceases to provide "purely factual and uncontroversial information," and instead requires the speaker to recite a government message.<sup>89</sup>

In attempting to dissect the separate elements of this test, the D.C. Circuit has properly gleaned from *Zauderer* that "uncontroversial" must mean something other than "purely factual."<sup>90</sup> The D.C. Circuit, speaking directly to the issues that are inherent in an interpretation of *Zauderer* that a disclosure requirement is "uncontroversial" if it is "purely factual," rightly pointed out that:

*[I]f the law were otherwise, there would be no end to the government's ability to skew public debate by forcing companies to use the government's preferred language. For instance, companies could be compelled to state that their products are not "environmentally sustainable" or "fair trade" if the government provided "factual" definitions of those slogans — even if the companies vehemently disagreed that their [products] were "unsustainable" or "unfair." Appellants Supp. Br. 12.<sup>91</sup>*

Admittedly, however, that which differentiates "factual" and "uncontroversial" is very much up for debate.<sup>92</sup> Perhaps the distinction is between fact and opinion, but that line is often blurred, and it is far from clear that all opinions are controversial.<sup>93</sup>

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88. *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985)). There is dissent amongst the federal circuits as to whether this language does, in fact, create a legal standard. *See, e.g., Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (opinion for court by Stranch, J.) ("Plaintiffs' argument that *Zauderer* applies only to 'purely factual and noncontroversial' disclosures is unpersuasive. This language appears in *Zauderer* once and the context does not suggest that the Court is describing the characteristics that a disclosure must possess for a court to apply *Zauderer's* rational-basis rule. That language instead merely describes the disclosure the Court faced in that specific instance. This reading is buttressed by the fact that elsewhere in *Zauderer* refers to a commercial speaker disclosing 'factual information' and 'accurate information.'") (internal citations omitted). This disagreement amongst the federal circuits may explain why "few courts have considered the constitutionality of disclosure regulations that fail the 'factual' or 'uncontroversial' prerequisites of *Zauderer*." *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 206 (D. Mass. 2016).

89. Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 542 (2012).

90. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 528 (D.C. Cir. 2015) ("Hence, the statement in *AMI* [that 'uncontroversial' must mean something different than 'purely factual'] describing 'controversial in the sense that [the compelled speech] communicates a message that is controversial for some reason other than [a] dispute about a simple factual accuracy. *AMI*, 760 F.3d at 27.").

91. *Id.* at 530.

92. *See, e.g., infra* note 93.

93. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 528. In highlighting the difficulty in defining these two elements of *Zauderer's* legal test, the D.C. Circuit posed the following quandaries: "Is Einstein's General Theory of Relativity

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Notwithstanding the difficulty inherent in parsing these two elements, the need for courts to treat “purely factual” and “uncontroversial” as two distinct elements of the *Zauderer* legal test is critical.<sup>94</sup>

While *Zauderer*’s “factual” requirement is relatively straightforward,<sup>95</sup> the “uncontroversial” prong of *Zauderer*’s legal test is not one that, on its face, provides courts with much clarity.<sup>96</sup> As such, courts have understandably struggled in determining whether a mandated disclosure compels “uncontroversial” information.<sup>97</sup>

Some scholars have convincingly argued that courts should determine whether a mandated disclosure is “uncontroversial” by looking to the government’s purpose behind the regulation.<sup>98</sup> In this sense, the government no longer compels factual and uncontroversial information when the mandated disclosure moves beyond compelled speech that provides factual, descriptive information about a product to compelled speech that urges the audience to take a certain course of action.<sup>99</sup> This kind of disclosure law does not seek to change behavior through information, but rather to change behavior by spreading the government’s message that a certain product should or should not be used.<sup>100</sup> In order to determine whether rational-basis scrutiny applies to disclosure laws, courts should evaluate the government’s purpose in mandating the disclosure: if the government’s actual purpose is not to inform consumers, but rather to spread the government’s normative message, then the disclosure falls outside of *Zauderer*.<sup>101</sup> Speech that expresses the government’s beliefs about how an individual should behave is known as “normative speech.”<sup>102</sup>

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fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that “USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING” would that be fact or opinion? It is easy to convert many statements of opinion into assertions of fact simply by removing the words “in my opinion” or removing “in the opinion of many scientists” or removing “in the opinion of many experts.” *Id.*

94. See *infra* note 208 and accompanying text (discussing the problems inherent in an interpretation of *Zauderer* that “purely factual” necessarily implies “uncontroversial”).

95. See, e.g., *infra* Section V.B (recognizing as factual the information the FDA required food labels to include because it is supported by scientific data).

96. See *infra* note 97.

97. Compare *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (“We also do not understand country-of-origin labeling to be controversial in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy.”), with *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 529 (D.C. Cir. 2015) (“That the en banc court viewed the country-of-origin disclosures in *AMI* as ‘uncontroversial’ poses another puzzle. A controversy, the dictionary tells us, is a dispute, especially a public one. Was there a dispute about the county-of-origin disclosures in *AMI* or as *AMI* put it, was there a controversy ‘for some reason other than [a] dispute about simple factual accuracy?’”).

98. See, e.g., Keighley, *supra* note 89, at 569–74.

99. *Id.* at 569.

100. *Id.* at 573.

101. *Id.* at 574.

102. *Id.* at 569.

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Recognizing the difficulty in evaluating whether a disclosure mandates normative speech, courts should look to the government's actual purpose in mandating the disclosure when determining whether *Zauderer's* rational-basis scrutiny is warranted.<sup>103</sup> Arguments in favor of this analysis submit that a "purpose inquiry" is the most reliable way of ensuring that the state does not use commercial disclosure laws to spread normative messages that are disguised as factual speech.<sup>104</sup> This approach provides an effective means to ferret out improper governmental motives and, in doing so, will shelter private corporations from regulatory mandates forcing them to disseminate the government's messages.<sup>105</sup> It should be noted that, in such circumstances, the government remains free to influence consumer behavior with its own speech – such as through advertising campaigns and consumer education.<sup>106</sup>

A proper interpretation of *Zauderer* demands that the Court limit its application to cases involving consumer deception.<sup>107</sup> Furthermore, when applied to cases of consumer deception, the Court should find that information-forcing disclosures necessarily fail *Zauderer's* legal test if they do not compel information that is both "purely factual" and "uncontroversial."<sup>108</sup>

IV. PERCEIVED PROBLEMS WITH A NARROW INTERPRETATION OF  
*ZAUDERER*: THE "CONSUMER RIGHT TO KNOW"

Many advocates of labeling and disclosure requirements assert that consumers have a "right to know" about various product or process characteristics.<sup>109</sup> Arguments that government regulations should require the disclosure of particular information about products or services rest on the premise that such information will not be disclosed—or will not be disclosed sufficiently—absent such a government

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103. Keighley, *supra* note 89, at 574.

104. *Id.*

105. See, e.g., R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 272 (D.D.C. 2012) (finding that an FDA regulation requiring graphic images on tobacco products did not fit within *Zauderer* because the graphic images "were neither designed to protect the consumer from confusion or deception, nor to increase consumer awareness of smoking risks; rather, they were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking"), *aff'd*, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012) (concluding that the Final Rule's "inflammatory images and the provocatively-named hotline cannot rationally be viewed as pure attempts to convey information to consumers"), *abrogated on other grounds*, Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

106. Jonathan H. Adler, *D.C. Circuit Finds SEC's Conflict Mineral Disclosure Rule Violates First Amendment*, WASH. POST: THE VOLOKH CONSPIRACY (Apr. 15, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/15/d-c-circuit-finds-secs-conflict-mineral-disclosure-rule-violates-first-amendment/?utm\\_term=.a047e7366ad1](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/15/d-c-circuit-finds-secs-conflict-mineral-disclosure-rule-violates-first-amendment/?utm_term=.a047e7366ad1).

107. See *supra* Section III.A.

108. See *supra* III.B.

109. Jonathan H. Adler, *There is No Consumer "Right to Know,"* 39 CATO REG., no. 3, Fall 2016, at 26, 30.

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requirement.<sup>110</sup> First Amendment scholar Jonathan H. Adler has aptly summarized the current regulatory backdrop and corresponding legal challenges:

*Governments at all levels frequently require the disclosure of potentially relevant information about goods or services offered for sale. Many disclosure requirements protect consumers from harms of which they are unaware and are relatively uncontroversial. In recent years, however, governments have imposed broader disclosure requirements extending beyond product characteristics to production processes, product history, and even information about the producer or service provider. Such disclosure requirements, often predicated on an alleged “consumer right to know,” have prompted legal challenges. In just the last two years, courts have struggled with constitutional challenges to mandatory country-of-origin labels, mandatory genetically modified organism (“GMO”) content labels, conflict mineral disclosures, and labels about the purported health risks posed by cell phones. This has revealed confusion and uncertainty about the extent to which the First Amendment protects and limits compelled commercial speech.<sup>111</sup>*

This Section will highlight two pieces of legislation that are directly, or incidentally, aimed at satisfying the proclaimed consumer right to know: one at the state level and one at the federal level. Subsection A will discuss Vermont’s GMO “Right to Know” Act, and Subsection B will discuss the underpinnings of the U.S. Food & Drug Administration’s (“FDA”) supplemental revisions to nutrition labeling regulations. Both of these examples demonstrate the current regulatory reliance on *Zauderer* in promulgating legislation responsive to the alleged consumer right to know. As will be discussed in Section V, *infra*, however, neither of these

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110. *Id.* at 32.

111. Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* 58 ARIZ. L. REV. 421, 424 (2016) (citing Brian R. Roe et al., *The Economics of Voluntary Versus Mandatory Labels*, 6 ANN. REV. RESOURCE ECON. 407, 409 (2014) (“[P]roduct labeling is an increasingly popular tool of regulators.”); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 868 (2015) (noting that “the growing number of circuit court decisions . . . have used the specific doctrine of ‘compelled commercial speech’ doctrine to strike down mandatory commercial disclosures”); *Am. Meat Inst. v. USDA*, 746 F.3d 1065 (D.C. Cir. 2014), *aff’d en banc* 760 F.3d 18, 27 (D.C. Cir. 2014) (upholding mandatory country-of-origin labels for meat products as against First Amendment challenges); *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015) (upholding mandatory genetically engineered content labels as against First Amendment challenge); *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (holding that mandatory “conflict mineral” disclosures violate First Amendment rights of regulated firms), *aff’d on reh’g*, 800 F.3d 518 (D.C. Cir. 2015); *CTIA-The Wireless Ass’n v. City of Berkeley*, 158 F. Supp. 3d 897 (N.D. Cal. Jan. 27, 2016) (holding that local ordinances requiring disclosure of alleged radio frequency risks posed by cellular telephones did not violate the First Amendment)).



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regulations trigger *Zauderer* because neither of them are designed to cure issues of consumer deception.<sup>112</sup>

A. Vermont's GMO "Right to Know" Act

On May 8, 2014, the Vermont legislature passed the "Right to Know" Act ("Act 120") that permitted the Attorney General of Vermont to adopt requirements that labels required for food produced from genetic engineering (1) include a disclaimer that the FDA does not consider foods produced from genetic engineering to be materially different from other foods and (2) identify food produced entirely or in part from genetic engineering in a manner consistent with requirements in other jurisdictions for the labeling of food, including the labeling of food produced with genetic engineering.<sup>113</sup> Plainly stated, the purpose of this bill was to establish a system to allow for informed decisions by consumers with respect to potential health effects of genetically modified foods by requiring labels on covered food products to state that they are either "produced with genetic engineering" or "may be produced with genetic engineering."<sup>114</sup>

In response to Act 120, the Grocery Manufacturers Association filed a complaint in federal district court in June 2014 and sought a preliminary injunction in September 2014.<sup>115</sup> The state of Vermont countered that the legislation should be subject to, and readily satisfied, the *Zauderer* Standard.<sup>116</sup> In support of its argument that *Zauderer* should apply, Vermont contended that "Act 120's GE disclosure requirement *compels only factual, non-controversial commercial information*."<sup>117</sup> Federal District Court Judge Christina Reiss accepted the state of Vermont's argument that the *Zauderer* Standard should govern her analysis because she deemed the compelled speech to be commercial in nature and to involve *purely factual and uncontroversial information*, and found that Vermont had a state interest beyond merely satisfying consumer curiosity.<sup>118</sup> In support of these findings, Judge Reiss reasoned that "[b]ecause Act 120's GE disclosure requirement mandates the

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112. See *supra* Section III.A (establishing that *Zauderer* applies solely to governmental regulation intended to cure issues of consumer deception).

113. Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 601 (D. Vt. 2015). Under the Final Rule, "partially" may be used to modify "produced with genetic engineering" only when a processed food contains less than 75% genetically engineered material by weight. "May be" may be used to modify "produced with genetic engineering" only when the food's manufacturer does not know, after reasonable inquiry, whether the food is, or contains a component that is, produced with genetic engineering. *Id.* at 602–03.

114. Scott K.G. Kozak, *Vermont GMO Battle Continues in Second Circuit*, THE NAT'L L. REV. (Oct. 9, 2015), <http://www.natlawreview.com/article/vermont-gmo-battle-continues-second-circuit>.

115. *Id.*

116. Brief for Defendants-Appellees at 31–52, Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. Aug. 24, 2015), 2015 WL 5086077, at \*19–40.

117. *Grocery Mfrs. Ass'n*, 102 F. Supp. 3d at 626 (emphasis added).

118. *Id.* (emphasis added).

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disclosure of only factual information—whether a food product contains GE ingredients—in conjunction with a purely commercial transaction, it does not require the disclosure of ‘controversial’ information.”<sup>119</sup> Judge Reiss subsequently refused to enjoin the law in a ruling issued on April 27, 2015.<sup>120</sup>

The Grocery Manufacturers Association shortly thereafter filed appeal with the Second Circuit.<sup>121</sup> The basis of the Grocery Manufacturers Association’s position on appeal, as was the case at the trial court level, was that Act 120 violated the First Amendment by imposing a burden on speech based upon the content of that speech.<sup>122</sup> The Grocery Manufacturers Association submitted that the constitutionality of Act 120 should be subject to *Central Hudson*’s intermediate scrutiny, rather than the *Zauderer*’s rational-basis review, and that its GMO labeling mandate fails *Central Hudson*.<sup>123</sup>

Opining in its appellate brief that the public debate surrounding genetic engineering did not trigger intermediate scrutiny under *Central Hudson*, Vermont relied heavily on the D.C. Circuit’s *en banc* decision in *American Meat Institute v. USDA*.<sup>124</sup> In doing so, Vermont likened the labels required by Act 120 that required the disclosure of “only factual and accurate information” to the country-of-origin label requirements in *American Meat Institute*.<sup>125</sup> Specifically, Vermont suggested that the court in *American Meat Institute* applied *Zauderer* due to the fact that the content of the country-of-origin labels at issue were deemed uncontroversial because they compelled factual information.<sup>126</sup> To further solidify its argument that the *Zauderer* Standard applied, Vermont noted that “[a]lthough the Supreme Court confirmed that *Zauderer* applied to disclosures that combat misleading advertisements, it did not *limit Zauderer* to that context.”<sup>127</sup>

Congress ultimately settled this matter before the Grocery Manufacturers Association’s appeal was heard by the Second Circuit. On July 14, 2016, the U.S. House of Representatives voted to approve H.R. 1599, The Safe and Accurate Food

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119. *Id.* at 630.

120. *See* Kozak, *supra* note 114.

121. Brief for Plaintiffs-Appellants at 14, *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. June 24, 2015), 2015 WL 3940689, at \*1.

122. *Id.* at 38, at \*25; *see* Kozak, *supra* note 114.

123. *Id.* at 47–59, at \*34–46.

124. Brief for Defendants-Appellees at 32–36, *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. Aug. 24, 2015), 2015 WL 5086077, at \*20–24.

125. *Id.* at 35–36, at \*24–25.

126. *Id.* at 35, at \*23 (citing *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014) (*en banc*) (applying *Zauderer* because the court deemed the content of the message to be uncontroversial and because the court did parties did “not disagree with the truth of the facts required to be disclosed”).

127. *Id.* at 43, at \*31 (citing *Am. Meat Inst. v. USDA*, 760 F.3d 18, 22 (D.C. Cir. 2014) (*en banc*) (noting that *Milavetz P.A. v. United States*, 559 U.S. 229, 249 (2010) “focused on remedying misleading advertisements,” but holding that *Zauderer* “sweeps far more broadly than the interest in remedying deception”).

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Labeling Act of 2015, to preempt Vermont's mandatory GMO food labeling law.<sup>128</sup> This bill, commonly referred to as the "Deny American's Right to Know" Act ("DARK Act") by anti-GMO activists, was shortly thereafter signed into law by President Obama.<sup>129</sup>

Though litigation concerning the constitutionality of Vermont's GMO "Right to Know" Act has since become moot,<sup>130</sup> the issue as to whether advocates of information-forcing regulations can rely on the *Zauderer* framework still very much remains.<sup>131</sup>

*B. FDA's Revision of the Nutrition and Supplement Facts Label*

In the same way that Vermont channeled *Zauderer* in support of its GMO "Right to Know" Act, federal regulatory agencies have latched on to *Zauderer* as the rubber stamp of approval by which to promulgate information-forcing regulations.<sup>132</sup> On May 20, 2016, the FDA announced its "Revision of the Nutrition and Supplement Facts Label" for packaged food to reflect new scientific information, including the link between diet and chronic diseases such as obesity and heart disease.<sup>133</sup> The FDA asserted that the new label would make it easier for consumers to make better-informed food choices and to maintain healthy dietary practices.<sup>134</sup> The requirements of this rule were designed to ensure that nutrient declarations on food labels were accurate, truthful, and not misleading based on information known only to the manufacturer.<sup>135</sup> The FDA further asserted that the final rule would help with the efficient enforcement of the Federal Food, Drug, and Cosmetic Act.<sup>136</sup>

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128. Thomas P. Redick & Jhoset A. Burgos-Rodriguez, *Vermont's GMO Labeling Law Meets Congress and the World Trade Organization*, 20 A.B.A. AGRIC. MGMT. COMM. NEWSL., no. 1, Nov. 2016, at 14, 14.

129. Christian Detisch, *President Obama Signs DARK Act into Law*, FOOD & WATER WATCH (Aug. 1, 2016), <http://www.foodandwaterwatch.org/news/president-obama-signs-dark-act-law>. The DARK Act places the National Bioengineered Food Disclosure Standard in The Agricultural Marketing Act of 1946 and establishes a national mandatory "GM" food disclosure standard. Redick & Burgos-Rodriguez, *supra* note 114, at 15. "As directed by the DARK Act, states will no longer have the right to mandate labeling of GE foods." *Id.* at 16.

130. See *supra* text accompanying notes 128–29.

131. See *infra* Section V (negatively answering that question and explaining that *Central Hudson* governs regulations intended to appease the consumer "right to know").

132. I refer to *Zauderer* as a "rubber stamp of regulatory approval" because of the ways in which courts and regulatory agencies have contorted the standard to one that rarely, if ever, serves as a check on the government; the government almost always wins.

133. *Changes to the Nutrition Facts Label*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm> (last visited Feb. 7, 2017).

134. *Id.*; Food Labeling: Revision of the Nutrition and Supplement Facts Label, 81 Fed. Reg. 33,741, at 33,744 (2016) (to be codified at 21 CFR pt. 101).

135. Food Labeling: Revision of the Nutrition and Supplement Facts Label, 81 Fed. Reg. at 33,746.

136. *Id.* at 33,745. Section 403(q) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 343(q)) specifies certain nutrients to be declared in nutrition labeling, and authorizes the Secretary of Health

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The FDA's final rule was published in the Federal Register on May 27, 2016.<sup>137</sup> Comments submitted to the FDA's proposed rule, accompanied by the FDA's corresponding responses, were also published alongside the final rule.<sup>138</sup> In support of its revisions to food labeling requirements, the FDA relied heavily on the D.C. Circuit's expansion of *Zauderer* in *American Meat Institute* to information-forcing regulations not intended to cure issues of consumer deception:

*(Comment 21)* Some comments said the added sugars declaration is not subject to the test in *Zauderer*, or, even if subject, does not meet such test. . .

*(Response)* . . . Under *Zauderer*, the government can require disclosure of factual information in the realm of commercial speech as long as the disclosure provides accurate, factual information; is not unjustified or unduly burdensome; and "reasonably relate[s]" to a government interest.

. . . .

Some comments asserted that *Zauderer* is limited to cases where the government interest is in preventing consumer deception. Case law interpreting *Zauderer* clarifies that the government need not establish that compelled disclosure will prevent consumer deception for the *Zauderer* standard to apply. In *American Meat Institute*, the court held that "[t]he language with which *Zauderer* justified its approach . . . sweeps far more broadly than the interest in remedying deception. 760 F.3d 18, 22 (D.C. Cir. 2014) (*en banc*)."<sup>139</sup>

The FDA's reliance on *Zauderer* in promulgating information-forcing disclosures such as this nutrition labeling law demonstrates the significant role currently served by *Zauderer* in the current regulatory framework.

As will be discussed at length in the following section, there is great concern that a ruling by the Supreme Court cabinining *Zauderer* to exclusively issues of consumer deception would pull the lynchpin on regulations like the FDA's nutrition labeling law because these types of regulations would therefore be subject to *Central Hudson*'s intermediate scrutiny. This notion is very much a misnomer and the

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and Human Services to require other nutrients to be declared if the Secretary determines that a nutrient will provide information regarding the nutritional value of such food that will assist consumers in maintaining healthy dietary practices. *Id.* at 33,744.

137. See *Changes to the Nutrition Facts Label*, *supra* note 133.

138. Food Labeling: Revision of the Nutrition and Supplement Facts Label, 81 Fed. Reg. 33,741 *passim*. The FDA was required to allow time for comments to be submitted by the public in response to the proposed rule. Administrative Procedure Act, 5 U.S.C. § 553(c) (2012) ("[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. . . .").

139. Food Labeling: Revision of the Nutrition and Supplement Facts Label, 81 Fed. Reg. at 33,758–60.

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FDA's nutrition labeling regulation, along with many others regulations similarly promulgated by federal agencies, is not necessarily doomed under *Central Hudson's* framework.

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PROMPTED BY A NARROW INTERPRETATION OF *ZAUDERER* ARE  
UNFOUNDED

Most existing labeling and disclosure requirements imposed under federal law are justified by a substantial state interest, such as the protection of unwitting consumers or the facilitation of a non-speech-related regulatory program.<sup>140</sup> This Comment is not designed to refute the legitimacy of *all* information-forcing disclosures. As will be discussed in subsection B, information-forcing disclosure mandates that are designed to address a legitimate, scientifically backed, public health or safety risks satisfy the "substantial" government interest required by *Central Hudson*.<sup>141</sup> This Comment fully intends, however, to demonstrate that regulations premised upon bald assertions of public health or safety risks—which *find no scientific evidentiary support*—merely demonstrate an effort to appease the consumer "right to know." Regulatory efforts of this sort merely reflect an attempt by the federal government, as well as state legislatures, to enlist private corporations as mouthpieces for its own views and policy initiatives. These types of regulations necessarily fail *Central Hudson*, and private corporations are therefore protected under the bulwark of the First Amendment's commercial speech doctrine.

The premise of the First Amendment is that American consumers are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source.<sup>142</sup> One can imagine, however, a scenario in which an uninformed consumer, or a "sheep," may in certain circumstances *need* protection.<sup>143</sup> Certainly, under such circumstances, the government should be able to offer some sort of protection to consumers.<sup>144</sup> Consumer protection, in the form of government-mandated disclosures about a specific product, is not, however, without its constraints: it must comport with the

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140. Adler, *Compelled Commercial Speech and the Consumer "Right to Know," supra* note 111, at 458.

141. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (prong two of the *Central Hudson* test requires the governmental interest asserted to be substantial).

142. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part).

143. For example, forcing candy makers to disclose the presence of peanuts protects those with allergies. Adler, *Compelled Commercial Speech and the Consumer "Right to Know," supra* note 111, at 443. Product safety labels can protect those who might be unaware of the danger a specific product may pose. *Id.* In such cases, the failure to label can leave otherwise uninformed consumers exposed to risks. *Id.*

144. *Id.* ("Protecting consumers from unwitting harm is a substantial interest comparable to the government's interest in protecting consumers from fraud or deception.")

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First Amendment.<sup>145</sup> In attempting to regulate within the constitutional strictures of the First Amendment, the discussion necessarily shifts full circle to the standard by which courts should utilize to assess the propriety of such regulations: *Zauderer* or *Central Hudson*.<sup>146</sup> The fundamental question in making this assessment is whether the information sought by the mandatory disclosure is designed to cure consumer deception.<sup>147</sup>

As has been discussed at length, *Zauderer* applies to government-mandated disclosures of purely factual and uncontroversial information that are designed to cure deceptive commercial speech.<sup>148</sup> Information-forcing regulations designed to quell consumer curiosity—which, in turn, enlist private corporations as mouthpieces for governmental policy initiatives, as opposed to serving to protect the public from legitimate health or safety concerns—simply do not fall under this purview.<sup>149</sup> Rather, such regulations implicate *Central Hudson*'s framework. Proponents of consumer curiosity driven disclosures, and those who are concerned that a narrow application of *Zauderer* would doom the American regulatory structure as we know it,<sup>150</sup> need not run for the hills. Though *Central Hudson*'s framework does not provide legislatures with the regulatory rubber stamp of approval that is inherent with *Zauderer*, it does not create an absolute bar to regulations directed toward protecting consumers from unknown harm.<sup>151</sup>

This Section will compare the application of *Central Hudson* to information-forcing regulations that are founded upon consumer curiosity, such as Vermont's Act 120, with regulations, such as the FDA's "Revision of the Nutrition and Supplement Facts Label," in which there exists scientific evidence supporting the

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145. See *supra* Section II.

146. See *supra* Sections II.A, II.B.

147. See *supra* Section III.A (establishing that *Zauderer* applies exclusively to regulations designed to cure consumer deception, and that *Central Hudson* governs all other types of information-forcing regulations).

148. See *supra* Section III.A (establishing that *Zauderer* applies solely to governmental regulation intended to cure issues of consumer deception).

149. See *supra* Section III.A (establishing that *Zauderer* applies solely to governmental regulation intended to cure issues of consumer deception).

150. See, e.g., Nunes, *supra* note 81, at 179–80 ("Given that the D.C. Circuit is responsible for reviewing many federal agency regulations, *American Meat Institute* marks a very significant victory for regulators. A contrary holding—one limiting the protection of *Zauderer* rational basis review to compelled speech aimed at curing consumer deception—would have threatened to unsettle the regulatory regime, and would have particularly threatened mandates aimed at promoting public health."); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 885 (2015) (arguing that an application of *Central Hudson* to information-forcing regulations would "jeopardize the entire movement of American administrative law toward information-forcing strategies").

151. "Protecting compelled commercial speech as commercial speech under *Central Hudson* does not pose a threat to the free flow of information in the marketplace. To the contrary, constraining undue government in the marketplace ensures the broadest space for the discovery and disclosure of information that consumers are most worried about, while also ensuring that the government retains the ability to protect consumers from unscrupulous producers and sellers." Adler, *There is No Consumer "Right to Know,"* *supra* note 109, at 33.

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government's asserted interest in protecting consumers from public health risks. This Section will demonstrate that regulations like Vermont's Act 120 fail, rightfully so, *Central Hudson*.<sup>152</sup> This Section will also alleviate regulatory and consumer concern by demonstrating that regulations designed to address to protect consumers from health or safety risks, *which are supported by scientific evidence*, satisfy the "substantial" government interest required by *Central Hudson*. Subsections A and B of this Comment will demonstrate why some information-forcing disclosures likely fall short of satisfying *Central Hudson*, while others unquestionably pass muster. Subsection C will then highlight the ways in which the free market, absent governmental regulations, has and will continue to accommodate perceived voids in information available to consumers.

*A. Regulations intended to appease consumer curiosity, absent scientific evidence of a legitimate public health or safety risk, likely fail Central Hudson.*

Consumer curiosity, alone, is not a strong enough state interest to sustain compulsion of even an accurate, factual statement in a commercial context.<sup>153</sup> If consumer curiosity were alone sufficient to compel labeling, there would be no end to the information companies may be required to disclose.<sup>154</sup> There is a general consensus surrounding this paradigm, even amongst those federal regulatory agencies that seek to apply the *Zauderer* Standard to such regulations.<sup>155</sup> For example, even the FDA, which asserted that *Zauderer* governed its promulgation of the "Revision of the Nutrition and Supplement Facts Label," conceded that the government could not rely exclusively on consumer curiosity in its attempt to require mandatory labeling.<sup>156</sup>

Much of the discussion surrounding the consumer right to know involves consumer curiosity, rather than an absolute lack of consumer knowledge or an asserted health or safety risk that is alleged to be inherent in corporate silence.<sup>157</sup> Vermont's GMO "Right to Know" Act 120 required the "clear and conspicuous" labeling of all food intended for human consumption "produced entirely or in part from genetic engineering."<sup>158</sup> The Vermont legislature reasoned that a mandatory

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152. See *infra* Section V.A (establishing that consumer curiosity, alone, fails to satisfy *Central Hudson's* "substantial interest" requirement).

153. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

154. *Id.*

155. See, e.g., *infra* note 156.

156. The FDA, in its response to comments submitted its proposed rule revising nutritional facts labeling, conceded that consumer interest. Food Labeling: Revision of the Nutrition and Supplement Facts Label, 81 Fed. Reg. 33,741, at 33,813 ("[C]onsumer interest alone is not sufficient to require mandatory labeling.").

157. See, e.g., *infra* notes 158–60.

158. Adler, *Compelled Commercial Speech and the Consumer "Right to Know," supra* note 111, at 463 (citing Vt. Stat. Ann. tit. 9 § 3043 (2016)).

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label would provide consumers with “information they can use to make decisions about what products they would prefer to purchase” and would “prevent inadvertent consumer deception, prevent potential risks to human health, protect religious practices, and the environment.”<sup>159</sup> In support of this regulation, the Vermont legislature declared that such foods “potentially pose risks to health, safety, agriculture, and the environment,” citing an alleged “lack of consensus regarding the validity of the research and science surrounding the safety of genetically engineered foods.”<sup>160</sup> These goals are irrefutably compelling. Under *Central Hudson*, however, the dispositive question is not whether the Vermont legislature’s regulation was well intended; rather, the question is whether the government’s interest in promulgating Act 120 was substantial.<sup>161</sup>

By the Vermont legislature’s own admission, these consumers are not sheep, nor are they fools; the legislature simply sought to provide additional information in an attempt to best-educate consumers on their purchasing decisions.<sup>162</sup> The question in assessing this regulation therefore becomes whether the government’s interest in compelling information to satisfy consumer curiosity or meet the demands of an alleged consumer right to know is *substantial*.<sup>163</sup> Of course, it is not. Absent scientific support of a legitimate public health or safety concern, like that cited by the FDA in its revisions to nutrition labeling, regulations premised exclusively on satisfying the whimsical desires of the consumer fall short of satisfying *Central Hudson*’s intermediate scrutiny.<sup>164</sup>

*B. Central Hudson’s “substantial interest” prong is met when the government can point to scientific evidence of a legitimate public health or safety concern.*

The FDA’s supplemental nutrition labeling legislation was enacted, at least in part, with the intention of satisfying the government’s interest in providing information

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159. *Id.* (citing Vt. Acts & Resolves No. 120 (codified as amended Vt. Stat. Ann. tit. 9 § 3041 (2016))). Vermont’s GMO “Right to Know” Act, for example, was designed with the intent to reduce consumer confusion and deception, improve public health and food safety, inform decisions regarding environmental impacts, and protect religious practices. Redick & Burgos-Rodriguez, *supra* note 128, at 15.

160. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,” supra* note 111, at 463.

161. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). There can be little question at the outset of this inquiry that such expressions satisfy the first prong of *Central Hudson* and are, in fact, protected by the First Amendment. *Id.* (for commercial speech to find protection under the First Amendment, “it must at least concern lawful activity and not be misleading”).

162. See *supra* note 159 and accompanying text (citing Vermont’s desire to aid consumers in more effectively purchasing products that they preferred, rather than protect consumers from a *known* health or safety risk).

163. See Adler, *Compelled Commercial Speech and the Consumer “Right to Know,” supra* note 111, at 453.

164. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (prong two of the *Central Hudson* test requires the governmental interest asserted to be substantial).



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needed to assist consumers in maintaining healthy dietary practices.<sup>165</sup> In this sense, the FDA's intentions weren't dissimilar from those of the Vermont legislature in passing the GMO "Right to Know" Act.<sup>166</sup> Unlike Vermont's GMO "Right to Know" Act, however, the FDA's nutrition labeling regulation is heavily backed by scientific support of a legitimate public health concern.<sup>167</sup> This distinction is constitutionally significant, as the primary argument against a generic "contains GMOs" label is that the government lacks a substantial interest in compelling disclosures absent scientific evidence of a causal connection between the consumption of GMOs and an asserted risk to public health.<sup>168</sup> If the government is unable to point to a substantial interest in compelling information-forcing disclosures, the regulation necessarily fails *Central Hudson*.<sup>169</sup>

The asserted interest in the FDA's revised nutrition labeling regulations was to address public health concerns that were brought to light by developments within the scientific community. In its preamble to the proposed rule, the FDA discussed in great detail the scientific foundation upon which it concluded that revisions to the nutrition labeling regulations were warranted:

*Rates of chronic disease, such as cardiovascular disease, diabetes, and cancer, and changes in obesity rates;*

*Dietary recommendations, consensus reports, and national survey data, such as the Institute of Medicine (IOM) Dietary Reference Intakes Reports (which resulted in the development of a set of reference values known collectively as Dietary Reference Intakes (DRIs)). . . . The DGA is developed jointly by the U.S. Department of Agriculture and the U.S. Department of Health and Human Services and provides key recommendations on dietary patterns and quantitative intake recommendations with respect to micronutrients and macronutrients. Although the preamble to the proposed rule discussed the DGA that was issued in 2010, in February 2015, the Scientific Report of the 2015 Dietary Guidelines Advisory Committee (DGAC Report) became publicly available. While the DGAC Report is not a DGA itself (because the Federal government must determine how to use*

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165. Food Labeling: Revision of the Nutrition and Supplement Facts Label, 81 Fed. Reg. 33,741, at 33,759.

166. See *supra* Section IV.A (discussing the Vermont legislature's intention to educate consumers in decisions).

167. Cf. *supra* Section V.A. (noting a lack of consensus regarding the validity of the research and science surrounding the safety of genetically engineered foods).

168. Adler, *Compelled Commercial Speech and the Consumer "Right to Know," supra* note 111, at 464.

169. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (prong two of the *Central Hudson* test requires the governmental interest asserted to be substantial); *supra* Section III.A (establishing that *Central Hudson* applies to disclosure mandates not intended to cure issues of consumer deception).

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*the information in the DGAC Report to develop the 2015-2020 version of the DGA), the DGAC Report contains scientific information on specific nutrients and vitamins as well as a review of the underlying scientific evidence.*

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*The 2015 DGAC report further contributed to the scientific support for the added sugars declaration. For the first time, the 2015 DGAC conducted a systematic review of the relationship between dietary patterns and health outcomes. The DGAC found a strong association of a dietary pattern characterized, in part, by lower consumption of sugar-sweetened foods and beverages relative to a less healthy dietary pattern and reduced risk of CVD. We reviewed and considered the evidence that the 2015 DGAC relied upon, including an existing review from the Nutrition Evidence Library (NEL) Dietary Patterns Systematic Review Project as well as the NHLBI Lifestyle Interventions to Reduce Cardiovascular Risk: Systematic Evidence Review from the Lifestyle Work Group (“NHLBI Lifestyle Evidence Review”) and the associated American Heart Association (AHA)/American College of Cardiology (ACC) Guideline on Lifestyle Management to Reduce Cardiovascular Risk (“Lifestyle Management Report”).<sup>170</sup>*

Where there is scientific evidence that inadequacies in current nutrition labels pose a risk to public health or safety, it should be relatively easy to impose a product or material-specific labeling requirement without raising First Amendment problems.<sup>171</sup> Scientific evidence, such as that cited by the FDA, is significant because it demonstrates a legitimate public health or safety risk.<sup>172</sup> In the case of Vermont’s GMO “Right to Know” Act, the legislature’s bald, unsubstantiated claim of public health risks merely masked its intention to satisfy consumer curiosity; an interest that is not *substantial* and, therefore, fails *Central Hudson*.<sup>173</sup> When the government is able to substantiate its cited interest in protecting the public from health or safety concerns, *Central Hudson* is almost undoubtedly satisfied.<sup>174</sup>

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170. Food Labeling: Revision of the Nutrition and Supplement Facts Label, 81 Fed. Reg. at 33,747, 33,759 (internal citations omitted).

171. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* *supra* note 111, at 465.

172. See *id.* at 464 (“As the Second Circuit concluded in *Amestoy*, it is hard to justify such a label without a public-health or safety justification.”). See also *id.* at 464 n.226 (citing *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir. 2001) (noting the *Amestoy* decision “was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of ‘consumer curiosity.’”)).

173. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (prong two of the *Central Hudson* test requires the governmental interest asserted to be substantial).

174. *Id. Cf. Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (“Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern, the manufacturers cannot be compelled to disclose it.”).

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C. *The free market can effectively account for consumer curiosity even in the absence of information-forcing disclosure mandates.*

In the absence of a substantial interest, regulations compelling corporate disclosures necessarily fail *Central Hudson*.<sup>175</sup> Accordingly, the government should be precluded from dictating corporate discourse in these areas. A constitutional bar on these types of information-forcing regulations does not, however, leave consumers in the dark.<sup>176</sup> To the contrary, the absence of governmental regulations presents an opportunity for corporations to gain a competitive edge in the market by responding to perceived gaps in information sought by consumers.

In competitive markets, the failure to disclose information desired by consumers can be costly.<sup>177</sup> Notwithstanding the inherent skepticism regulators may harbor towards free markets, there has already been a shift in the way markets are responding to the consumer movement towards increased product disclosures even in the absence of governmental regulations. Take, for example, the Non-GMO Project.<sup>178</sup> The Non-GMO Project is a nonprofit organization committed to preserving and building sources of non-GMO products, educating consumers and providing verified non-GMO choices.<sup>179</sup> The Non-GMO Project was created in 2007 by two grocery stores: the Natural Grocery Company in Berkeley, California and the Big Carrot Natural Food Market in Toronto, Ontario.<sup>180</sup> The Non-GMO Project believes that “everyone has a right to know what is in their food and deserves access to non-GMO choices.”<sup>181</sup> Also among the Non-GMO Project’s asserted beliefs is the insistence that “by voting with [consumer] dollars every time we shop, collectively [consumers] have the power to change the way our food is grown and made.”<sup>182</sup> To give the Project the rigorous scientific foundation and world-class technical support

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175. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (prong two of the *Central Hudson* test requires the governmental interest asserted to be substantial).

176. Cf. Scott Faber, *Pompeo’s DARK Act Will Keep Consumers in the Dark*, JUST LABEL IT!, <http://www.justlabelit.org/pompeos-dark-act-will-keep-consumers-in-the-dark/> (last visited Feb. 28, 2017) (“Rep. Mike Pompeo (R-Kans.) has introduced the Deny Americans the Right to Know (DARK) Act to keep consumers, well, in the dark about whether or not their food contains GE ingredients.”).

177. Adler, *Compelled Commercial Speech and the Consumer “Right to Know,”* *supra* note 111, at 453.

178. NON GMO PROJECT, <https://www.nongmoproject.org> (last visited Feb. 7, 2017).

179. *Mission*, NON GMO PROJECT, <http://www.nongmoproject.org/about/mission> (last visited Feb. 7, 2017).

180. *History*, NON GMO PROJECT, <http://www.nongmoproject.org/about/mission> (last visited Feb. 7, 2017). The Natural Grocery Company had rallied 161 stores in a letter-writing campaign asking manufacturers about the GMO status of their products. The Big Carrot Natural Food Market developed its own non-GMO purchasing policy after more than a year of research. They combined their efforts into the Non-GMO Project with the goal of creating a standardized definition for non-GMO products in the North American food industry. *Id.*

181. *Mission*, NON GMO PROJECT, <http://www.nongmoproject.org/about/mission> (last visited February 7, 2016).

182. *Id.*

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necessary for their endeavor, the organization began working with the Global ID Group,<sup>183</sup> the world leaders in non-GMO testing, certification, and consulting.<sup>184</sup>

The first products to bear the Non-GMO Project's standard butterfly label reached the marketplace in early 2010.<sup>185</sup> The Non-GMO Project's Product Verification Program has grown steadily since then, with more than 3,000 verified brands, representing nearly 43,000 products and more than \$19.2 billion in sales.<sup>186</sup> As a result of consumer demand across North America, Non-GMO Project Verified products remain one of the fastest growing sectors in the marketplace and the Project's butterfly is one of the most trusted labels for GMO avoidance among shoppers today.<sup>187</sup>

In the case of GMO's, the free market is already experiencing an "arms race" to provide consumers with the information they are seeking.<sup>188</sup> In areas not yet affected by this race to disclose, the government is not facially precluded from mandating disclosures designed to remedy consumer curiosity so long as there is a substantial government interest.<sup>189</sup> *Central Hudson's* framework remains a viable avenue by which the government can mandate corporate disclosures of this type.<sup>190</sup> While the added hurdles of *Central Hudson* do not provide a rubber stamp for all information-forcing regulations, ample means by which to regulate within the confines of the First Amendment remain.<sup>191</sup> Furthermore, even in the absence of such regulations, there are market forces that nonetheless lure corporations to disclose information that consumers, who speak collectively vis-à-vis their pocketbooks, seek.

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183. "Global ID Group companies provide integrated food safety and food quality solutions that address the challenges and opportunities in the rapidly evolving food industry. Serving more than 15,000 clients in over 100 countries with a market-leading portfolio of testing, inspection, certification and consulting services, the Global ID Group helps companies navigate an increasingly regulated global food economy demanding higher levels of transparency, accountability, safety and sustainability." GLOBAL-ID GROUP, <https://www.global-id-group.com/> (last visited Feb. 7, 2017).

184. *History*, NON GMO PROJECT, <http://www.nongmoproject.org/about/mission> (last visited Feb. 7, 2017).

185. *Id.*

186. *Id.*

187. *Id.*

188. Consumers generally assume that firms highlight the positive attributes of their products. Adler, *Compelled Commercial Speech and the Consumer "Right to Know," supra* note 111, at 453. As a result, the failure to disclose positive information creates a negative inference, particularly when competitors highlight the attribute in question. *Id.* (internal citation omitted). This often creates a dynamic known as "unfolding" or "competitive disclosure," as firms face pressure to match the positive claims made by their competitors. *Id.* (citing Pauline M. Ippolito & Alan D. Mathios, *The Regulation of Science-Based Claims in Advertising*, 13 J. CONSUMER POL'Y 413, 427-28 (1990)).

189. *Supra* text accompanying note 174.

190. *See supra* Section V.B.

191. *See supra* Section V.B (establishing that disclosure mandates designed to protect consumers from unwitting harm or health and safety risks readily satisfy *Central Hudson's* "substantial interest" requirement).

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## VI. WRITING ON THE WALL: PRIVATE SECTOR MOUTHPIECE FOR A PUBLIC SECTOR POLICY INITIATIVE

The introduction of this Comment posited that requiring a company to publicly condemn itself is undoubtedly a more effective way for the government to stigmatize behavior than for the government to convey a certain view itself.<sup>192</sup> Though initially posed as theoretical, an expansive interpretation of *Zauderer*—one extending its application beyond issues of consumer deception—would provide the government with the means by which to actually use corporations as its mouthpiece for its views and policy initiatives through mandated disclosures of factual information.<sup>193</sup> Corporate responsibility disclosures demonstrate exactly the type of policy warfare that the government could wage against publicly traded corporations through the U.S. Securities and Exchange Commission.

In July 2011, the Sustainability Accounting Standards Board (“SASB”) was incorporated for the purpose of establishing industry-based sustainability standards for the recognition and disclosure of material environmental, social, and governance impacts by companies traded on U.S. exchanges.<sup>194</sup> SASB standards are designed for disclosure in mandatory filings to the SEC, such as the Form 10-K and 20-F.<sup>195</sup> SASB offers disclosure guidance on material sustainability issues for the benefit of investors and the public.<sup>196</sup> Sustainability, according to SASB, refers to *environmental, social, and governance* dimensions of a company’s operation and performance.<sup>197</sup> SASB’s mission is to, over time, provide the reasonable investor with accounting for a corporation’s sustainability performance by providing better access to the “total mix” of information that would be useful to financial valuation.<sup>198</sup>

Currently, sustainability standards identified by SASB are not required to be included in SEC filings.<sup>199</sup> SASB simply identifies sustainability topics in different

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192. Reply Brief of Appellants, *supra*, note 1.

193. See, e.g., *infra* text accompanying notes 210–11.

194. About SASB, SUSTAINABILITY ACCOUNTING STANDARDS BOARD, [www.sasb.org/sasb](http://www.sasb.org/sasb) (last visited Jan. 27, 2016). SASB is an independent 501(c)(3) non-profit organization and it accredited to set standards by the American National Standards Institute (ANSI). *Conceptual Framework of the Sustainability Accounting Standards Board*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD (Oct. 2013), at 3, <http://www.sasb.org/wp-content/uploads/2013/10/SASB-Conceptual-Framework-Final-Formatted-10-22-13.pdf>.

195. *Id.*

196. *Id.* “Ultimately, the goal of sustainability accounting and disclosure is to inform development of an integrated business strategy for corporate management and assess sustainability risks and opportunities inherent to investment decisions.” *Id.*

197. *Id.* at 7.

198. *Id.* at 4.

199. *Id.* at 19–20.

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industries that *may* be material to certain companies within that industry.<sup>200</sup> In identifying topics that may be material, SASB analysis is guided by the Supreme Court's definition of "material": information is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of the information made available."<sup>201</sup> Bearing in mind that publicly traded corporations are required to disclose all material information in their filings with the SEC,<sup>202</sup> the sustainability standards identified by SASB are merely guidance—or suggestions—as to information that *may* be considered as material in certain industries.<sup>203</sup> Ultimately, however, the burden to identify and disclose material information in a Form 10-K, 20-F, or other SEC filing falls exclusively on the company.<sup>204</sup>

Again, it is worth emphasizing that SASB's sustainability standards currently serve merely as guidance for public corporations when filing material information with the SEC.<sup>205</sup> According to SASB, "sustainability issues are of interest to an investor because mega-trends like climate change, resource constraints, population growth, and civil unrest affect the ability of corporations to sustain creation of financial value."<sup>206</sup> At its core, SASB sustainability standards attempt to factor non-economic issues into an economic valuation of publicly traded corporations by asking corporations to disclose factual information that would not generally appear in a corporation's SEC filings.<sup>207</sup> What if, however, SASB—or another federal governmental agency, like the SEC—had the authority to actually mandate the disclosure of this non-economic information? In *Nat'l Ass'n of Mfrs.*, the D.C. Circuit echoed this exact concern and provided a prophetic response:

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200. *Conceptual Framework of the Sustainability Accounting Standards Board*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD (Oct. 2013), at 19, <http://www.sasb.org/wp-content/uploads/2013/10/SASB-Conceptual-Framework-Final-Formatted-10-22-13.pdf>.

201. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

202. Securities Act of 1933 §§ 11(a), 12(a)(2), 15 U.S.C. §§ 77k, 77l (2012).

203. *Conceptual Framework of the Sustainability Accounting Standards Board*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD (Oct. 2013), at 19, <http://www.sasb.org/wp-content/uploads/2013/10/SASB-Conceptual-Framework-Final-Formatted-10-22-13.pdf>.

204. *Id.* at 19–20. According to case law and SEC guidance, corporate management should use a two-part assessment based on probability and magnitude when determining whether information should be disclosed: (1) a reasonable likelihood that the known trend, demand, commitment, event or uncertainty will occur; and (2) a reasonable likelihood that the occurrence will have a material effect on the registrant's financial condition or results of operation. *Id.* at 9.

205. See *supra* text accompanying note 199.

206. *Conceptual Framework of the Sustainability Accounting Standards Board*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD (Oct. 2013), at 14, <http://www.sasb.org/wp-content/uploads/2013/10/SASB-Conceptual-Framework-Final-Formatted-10-22-13.pdf>.

207. Sustainability accounting and disclosure is intended as a complement to financial accounting, such that financial information and sustainability information can be evaluated side by side and provide a complete view of a corporation's performance and value creation, both financial and non-financial, and across all forms of capital. *Id.* at 3.

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*[C]ompanies could be compelled to state that their products are not “environmentally sustainable” or “fair trade” if the government provided factual definitions of those slogans – even if the companies vehemently disagreed that their [products] were “unsustainable” or “unfair.”*<sup>208</sup>

While this concern may seem overly speculative, we need only look as far as the U.S. District Court’s decision in *Grocery Mfrs. Ass’n v. Sorrell* and the subsequent appellate brief submitted by the state of Vermont<sup>209</sup> to see that an expansion of *Zauderer* could have a real impact on the ability of the government to compel publicly traded corporations to disclose non-economic information about their business. If the U.S. District Court’s decision that factual information is inherently uncontroversial were to be accepted by the Supreme Court, the government would have the capability to mandate the disclosure of not only GMOs in food products, but also the type of non-economic information addressed in SASB’s sustainability standards.<sup>210</sup> Because the government would have the power to mandate the disclosure of factual information, the SEC could adopt SASB’s sustainability standards as part of the filings it requires from publicly traded corporations.<sup>211</sup> In this scenario, SASB could potentially evolve from providing guidance to serving as an administrator of disclosure mandates that companies in certain industries would be required to disclose to the SEC, and thus the public. In this scenario, publicly traded corporations would serve as a corporate mouthpiece for factual information that the government deemed relevant to its policies and interests. Thus, First Amendment protections from disclosure mandates would become virtually non-existent.

Applying *Zauderer* to mandate the disclosure of information in an attempt to regulate corporate responsibility is a far cry from curing issues of consumer deception.<sup>212</sup> The application of *Zauderer* in this scenario, however, is not a far cry from the way that the *American Meat Institute* Court and subsequently lower courts have employed the standard to promulgate and approve disclosure mandates.<sup>213</sup>

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208. Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (internal citation omitted).

209. See *supra* Section IV.A.

210. See *supra* text accompanying notes 118–19; *supra* note 207 (discussing suggested disclosure of “non-financial” information).

211. While the sustainability disclosures are currently optional, an interpretation of *Zauderer* that “factual” necessarily implies “uncontroversial” would readily permit the SEC to mandate sustainability disclosures that were deemed “factual.”

212. Compare *supra* Section III.A (establishing that *Zauderer* is confined to curing issues of consumer deception), with *supra* Section VI (posing the hypothetical or using *Zauderer* to compel the disclosure of information that is “factual” in an effort to further educate consumers in the securities market).

213. See *supra* Sections II.C, IV.B.

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### CONCLUSION

The expansion of *Zauderer* outside the scope of consumer deception renders private corporations defenseless against the self-interested motives of both consumers and the government. At the mercy of *Zauderer*'s rational-basis review, private corporations have found themselves subject to regulations mandating the disclosure of information serving to appease consumer curiosity and to enlist corporations as mouthpieces for governmental views and policy initiatives. The constitutional propriety of these regulations should be assessed under *Central Hudson*'s intermediate scrutiny—rather than *Zauderer*'s rational-basis review—because they are not responsive to perceived issues of consumer deception.

*Central Hudson* appropriately counterbalances the corporate right to First Amendment protection against both the consumer right to know and the government's interest in furthering its own views and policy initiatives. The Supreme Court can ensure adequate protection under the Constitution by cabining *Zauderer* to consumer deception and by asserting, with finality, that *Central Hudson* governs all other regulations.



