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Compelled Speech and the Irrelevance of Controversy

Seana Valentine Shiffrin*

Abstract

NIFLA v. Becerra *stealthily introduced a new First Amendment test for compelled speech that has injected chaos into the law of compelled disclosures. NIFLA reinterpreted the requirement that compelled disclosures contain only "purely factual and uncontroversial information" in a way that imbued independent force into the "uncontroversial" component of that test. Yet, the Court failed to supply criteria for what sort of purely factual information would fail to qualify as "uncontroversial information" and identified no important free speech concerns that this new prong protects.*

This Article distinguishes seven different interpretations of "uncontroversial information." It then assesses them to ascertain whether a meaningful and independent First Amendment value would be protected under each interpretation, making an effort not to conflate the stakes of compelling speech by organizations with the stakes for individuals. Most address no credible, independent free speech concerns whatsoever. Many of them read a disturbing intellectual cowardice into the First Amendment, empowering market actors to refuse to acknowledge inconvenient facts. Whether

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factual, informational speech is controversial in any meaningful sense should be irrelevant to a First Amendment inquiry.

Nonetheless, there are some other legitimate free speech concerns about compelled disclosures, pertaining to how they are worded, not to the factual information they convey. These concerns may be addressed without invalidating disclosure requirements. Arguably, however, the better frame for compelled disclosures that involve government-scripted speech is to characterize them as government speech and then to resolve significant questions about when we may mandate that institutional speakers broadcast government speech. Still, none of these questions turn on whether the informational content of the speech is controversial.

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I. INTRODUCTION

The recent trio of Supreme Court cases involving compelled speech in institutional contexts will not be celebrated in retrospect.[1] Although they were issued on the 75th anniversary of *West Virginia State Board of Education v. Barnette*,[2] none of them approached its inspiring example. In that landmark compelled speech case, decided during a comparably fraught time full of anxiety and fear, the Court took an important stand to protect nonconformist religious minorities and articulated free speech principles that have guided decisions for three quarters of a century.[3] By contrast, in its most recent forays into the compelled speech domain, the Court's decisions were disappointing both with respect to courage and legal leadership.

Rather than decisively rejecting the broad claim that free speech principles require exemptions from anti-discrimination laws, the Court instead skirted the main free speech issue in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[4] and decided the case on a contestable set of particularized facts.[5] In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[6] the Court (again) confused money for speech and mistook union membership for a partisan cause.[7] Rather than supporting efforts to prevent consumer deception and to enable meaningful, free choices

1. *See* Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (evading question of whether a public accommodation statute constituted compelled speech, as applied to a bakery); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018) (holding that compelled disclosures informing women of their reproductive health choices likely violated the First Amendment); Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (holding that requiring public-sector employees who were not part of a union to pay union agency fees violated the First Amendment).

2. 319 U.S. 624 (1943).

3. *See Barnette*, 138 S. Ct. at 641. Although the Court behaved admirably in *Barnette* by reversing the disastrous course set by Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), in the same period, it spectacularly failed to keep its head in the face of state-fomented public panic in Korematsu v. United States, 323 U.S. 214 (1944).

4. 138 S. Ct. 1719 (2018).

5. One strong discussion of the Court's evasion appears in Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018).

6. 138 S. Ct. 2448 (2018).

7. *See id.* at 2464. A more constructive perspective would have cast unions as quasi-governmental entities that enlist a quasi-adversarial structure of negotiation to help craft fair labor conditions within a market context. The Court invoked a parallel perspective in *Glickman v. Wileman Bros. & Eliot*, with respect to the quasi-governmental groups that case concerned. In that case, the Court permitted groups to levy funds to promote generic speech about a product to stoke demand. 521 U.S. 457, 473 (1997).

about reproduction, in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*),[8] the Court held that compelled disclosures that informed women of their reproductive health choices likely violated the First Amendment, in part because these disclosures, while factual, were not "uncontroversial".[9] In so doing, the Court confused the contours of the speech rights of institutional entities providing goods and services with the speech rights of individuals. Further, it injected gratuitous uncertainty about the constitutionality of commonplace and commonsense disclosure requirements.

By spotlighting the category of "uncontroversial information," without defining it, *NIFLA* has exacerbated confusion and division over the jurisprudential treatment of disclosure requirements in the lower courts.[10] More troubling, it flirts with an approach to the First Amendment that is inconsistent with the underlying framework of *Masterpiece Cakeshop*. What made *Masterpiece* seemingly an example of justice deferred rather than justice foreclosed was its strong, opening reiteration of the principle that religious and philosophical objections to policies do not, as *a general rule*, provide a basis for exemptions to generally applicable public accommodations laws.[11] This principle is just an instance of the more basic commitment to the rule of law;

8. 138 S. Ct. 2361 (2018).

9. *Id.* at 2377.

10. *See, e.g.*, Am. Beverage Ass'n v. City & Cty. of S.F., 871 F.3d 884, 895 (9th Cir. 2017) (defining "uncontroversial" as actually accurate and factual, but upholding a preliminary injunction against truthful compelled health warnings about sugar because they did not specify that *overconsumption* of sugar causes ailments); CTIA–The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117 (9th Cir. 2017) (finding that "uncontroversial" information "refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience"), *vacated*, 138 S. Ct. 2708 (2018) (remanding the decision for reconsideration in light of *NIFLA*), *aff'd*, 928 F.3d 832, 848 (9th Cir. 2019) (finding a compelled disclosure that "does not force cell phone retailers to take sides in a heated political controversy" to be uncontroversial); Evergreen Ass'n v. City of N.Y., 740 F.3d 233, 245 n.6 (2d Cir. 2014) (explaining in dicta that *Zauderer's* rational basis review of compelled commercial speech does not apply to a state requirement that "crisis pregnancy centers" disclose the existence of alternative family planning resources and their services, which include abortion, because the topic is politically controversial); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (holding that a warning label requirement on video games deemed sexually explicit by the state is an unconstitutional compelled disclosure of a controversial message because whether a game is sexually explicit involves a "subjective and highly controversial" opinion which others may disagree with); Masonry Building Owners of Oregon v. Wheeler, 394 F. Supp. 3d 1279, 1302 (D. Or. 2019) (understanding "uncontroversial" to mean not misleading); Nat'l Ass'n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842, 851 (E.D. Cal. 2018) (understanding "uncontroversial" to mean not misleading); Serova v. Sony Music Entm't, 237 Cal. Rptr. 3d 487, 501–02 (Ct. App. 2018) (understanding "uncontroversial information" to require the regulated party to agree with the recited facts).

11. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

special cases, special circumstances, and special burdens aside, disagreement with the law does not constitute a constitutionally protected permission to defy it, especially when that defiance diminishes the meaningful enjoyment of significant civil and constitutional rights. Yet, *NIFLA*'s confusing treatment of "uncontroversial information" raised the alarming prospect that mere disagreement with regulatory policy may be afforded unprecedented constitutional significance. This represents a confounding and unwarranted step past *Zauderer v. Office of Disciplinary Counsel.*[12]

On some interpretations of its new test, *NIFLA* appears to read a disturbing intellectual cowardice into the First Amendment. By empowering market actors and service providers to refuse to acknowledge facts they would prefer to ignore, the case represents an alarming acceleration of the Court's drift back to market libertarianism about contracting.[13] On some readings, it also endorses an interpretation of the First Amendment that allows disagreement with government policy to underwrite a First Amendment objection to complying with otherwise valid regulation.

Part II describes the *NIFLA* opinion and analyzes what speech values are implicated by compelled disclosures for institutional actors, including mission-based nonprofits, and market agents. It argues the free speech hazards posed by compelled speech are very different for individuals than for institutional actors. Part II then argues that *NIFLA* alters, without justification, the First Amendment requirement first announced in *Zauderer* that, to merit deferential review, compelled disclosures must just consist of "purely factual and uncontroversial information."[14] Whereas that phrase arguably articulated something bordering on a useful redundancy in *Zauderer*, the *NIFLA* Court newly treats this doublet as having two distinct parts that require a two-step

12. 471 U.S. 626 (1985) (upholding a compelled disclosure requirement in the context of attorney advertising).

13. The case thus adds new fuel to recent charges that the Court has reinvigorated Lochnerism through its First Amendment jurisprudence. *See, e.g.*, Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 178–79 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384 (1990); Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 286–88 (2000); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30–31 (1979); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism,* 116 COLUM. L. REV. 1915 (2016); Robert Post, *Compelled Commercial Speech*, 117 WEST VA. L. REV. 867, 919 (2015); *see also* Elizabeth Sepper, *Free Exercise Lochnerism,* 115 COLUM. L. REV. 1453 (2015) (tracking the Court's Lochnerite premises in its recent Free Exercise jurisprudence).

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

analysis.[15] But, it remains murky what "uncontroversial information" means if it is to be treated as an independent factor that goes beyond underscoring "purely factual."

Part III goes beyond the *NIFLA* opinion and attempts to discern what "uncontroversial information" *could* mean. It distinguishes *seven* distinct interpretations of the "uncontroversial information" requirement and identifies what, correspondingly, would comprise "controversial information."

First, on the *descriptive* interpretation, "uncontroversial information" could underscore "purely factual" and just indicate truthful information that is descriptive and factual in the sense of being non-normative and not a mere speculative hypothesis.[16] Second, on the *objective* interpretation, it could refer to non-normative facts susceptible to classification using objective criteria.[17] Third, on the *uncontroversial topics* interpretation, it could refer to truthful information about matters that are not the subject of controversy.[18]. Fourth, on the *relevance* interpretation, it could refer to non-normative facts, whose relevance with respect to the intended audience's decisions is not contested or controversial.[19] Fifth, on the *uncontested* interpretation, it could refer to non-normative facts, the truth of which is not a matter of controversy.[20] Sixth, on the *clarity* interpretation, it could refer to accurate, factual disclosures about which there is no controversy concerning their misleadingness.[21] Finally, on the *characterization* interpretation, it could refer to disclosures that

15. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2372 (2018) (severing the "uncontroversial" requirement from the "factual" requirement).

16. *See, e.g.*, CTIA–The Wireless Ass'n v. City of Berkeley (*CTIA*), 854 F.3d 1105, 1117 (9th Cir. 2017) ("'[U]ncontroversial' in this context refers to the factual accuracy of the compelled disclosure, not it its subjective impact on the audience."); Nat'l Ass'n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842, 851 (E.D. Cal. 2018) ("In this context, 'uncontroversial' 'refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the audience.'" (quoting *CTIA*, 854 F.3d at 1117)).

17. *See, e.g.*, Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

18. *See NIFLA*, 138 S. Ct. at 2372 (seeming to interpret "uncontroversial topics" to mean information about topics that are not the subject of controversy).

19. *See, e.g.*, EMW Women's Surgical Ctr., P.S.C v. Beshear, 920 F.3d 421, 428–29 (6th Cir. 2019) (interpreting "uncontroversial" to mean that there is agreement about the information's relevance).

20. *See, e.g.*, Serova v. Sony Music Entm't, 237 Cal. Rptr. 3d 487, 501–02 (Ct. App. 2018) (understanding "uncontroversial information" to require the regulated party to agree with the facts).

21. *See, e.g.*, *Zeise*, 309 F. Supp. 3d at 851 (invalidating a cancer warning on a herbicide because it found the warning misleading given readers' background knowledge).

characterize particular non-normative facts in a contested way.[22]

On all of these interpretations, the controversiality of the factual *information* within a compelled disclosure should not serve as an independent factor that represents a First Amendment defect.[23] On the descriptive interpretation, "uncontroversial information" amounts to a useful redundancy, not an independent factor. With respect to the objective interpretation, free speech issues may arise surrounding disclosures that involve "subjective" criteria, but the issues pertain to notice and vagueness, not controversiality.[24]

With respect to the third, fourth, fifth, and sixth interpretations (uncontroversial topics; relevance; uncontested facts; and clarity), although each can be discerned as implicitly operating in some lower court decisions, none of them captures a reasonable First Amendment interest that should ground an independent factor of First Amendment analysis. Worse, each of them, when construed as an independent factor, implicitly fuels an exceptionalist approach that is in tension with the rule of law.[25]

Compelled disclosures of "controversial information" as it would be understood on the *characterization* interpretation may raise legitimate free speech concerns, although, in truth, the issues do not arise from the controversiality of the *information* in such disclosures. These concerns could be addressed through accommodations, without invalidating the disclosures. Such accommodation efforts could, however, prove administratively challenging. As discussed in Part IV, an alternative resolution of the disputes over how factual information is categorized may require further consideration of issues raised by another compelled speech case, *Johanns v. Livestock Marketing Ass'n*,[26] strangely off stage in *NIFLA,* concerning when government-mandated speech should be thought of as government speech. Although these important First Amendment questions about mandating speakers to broadcast government speech deserve further exploration, they have very little to do with whether the content of the speech is *controversial*.[27]

22. *See, e.g.*, Am. Meat Inst. v. US Dept. of Agr., 760 F. 3d 18 (D.C. Cir. 2014) (acknowledging but bracketing plaintiff's claim that a disclosure referring to 'slaughter' rather than 'harvesting' to refer to meat production would involve controversial information).

23. *See infra* Part III.C.

24. *See infra* Part III.C.2.

25. *See infra* Part III.C.7.

26. 544 U.S. 550 (2005) (upholding a compelled subsidy program for beef advertising by framing the advertising as government speech).

27. *See infra* Part IV.B.

Part V concludes. We should return to a conservative interpretation of "purely factual and uncontroversial information," one closer to the virtually redundant meaning of the standard announced in *Zauderer*. That is, assuming compelled disclosures by institutions are purely factual, justified, and not unduly burdensome, they should be upheld against a First Amendment challenge so long as the required disclosures consist of documented, non-normative facts. There is no need for a separate inquiry and judgment about whether the disclosures are controversial in some other sense. Such inquiries encourage the untenable idea that there is a constitutional imperative that the government avoid taking controversial positions and that institutional disagreements over policy by themselves ground rationales for exemptions.

To be sure, some delicate questions may arise about whether institutions may insist on putting disclosures in their own terms so long as they effectively convey the same content. Answering those questions depends, in part, on resolving further issues about when governmentally scripted speech constitutes government speech and under what conditions institutions may resist displaying scripted speech. What seems clear, though, is that the answers to such questions do not revolve around whether the speech contains "controversial information" in any meaningful sense.[28]

II. COMPELLED SPEECH AND NONPROFIT SERVICE ORGANIZATIONS

A. The NIFLA *Decision*

National Institute of Family and Life Advocates v. Becerra concerned a First Amendment challenge to the Freedom, Accountability, Comprehensive Care and Transparency Act (FACT).[29] Under FACT, California required licensed pregnancy clinics to post disclosure[30] notices offering information about publicly funded family planning services, including contraception and

28. *See, e.g.*, *Johanns*, 544 U.S. at 560-67 (discussing whether governmentally scripted speech constituted government speech without addressing whether the speech was controversial).

29. *NIFLA*, 138 S. Ct. at 2368.

30. The sense of disclosure at issue in this line of cases and this Article is that of providing relevant information known by, at least, the state but about which a reader, such as a potential client, may be unaware. It does not encompass the sense of compelled disclosure involving the required revelation of information over which the compelled speaker has special access, such as compelled disclosure to the IRS of one's earnings.

abortion.[31] It required unlicensed clinics also to disseminate notices clarifying that their services and some of their service providers were not licensed by the State of California.[32] The aim of the compelled disclosures was to prevent deception of potential clients by informing them of their options, including the public availability of a broad range of services that extended beyond what so-called "pregnancy-crisis centers" offered and supported.[33] A number of anti-abortion organizations that ran such clinics filed suit, alleging that these requirements violated their freedom of speech. Largely, their complaints centered upon having to advertise services to which they objected.[34]

In an opinion authored by Justice Thomas, a 5-4 Court reversed a denial of a preliminary injunction against these disclosures, citing a number of First Amendment grounds.[35] The Court reaffirmed the standard announced in *Zauderer* that the state may, with only deferential review, compel commercial speakers to make disclosures so long as they involve "purely factual and uncontroversial information" about their services and are not unjustified or unduly burdensome.[36] Further, the state may regulate commerce or conduct in ways that incidentally burden speech, as exemplified by malpractice liability and informed consent requirements.[37] However, the Court objected that deferential review was inappropriate in this case, for the disclosures were about state services and not the pregnancy-crisis centers' services.[38] In addition, they were not tied to any procedure and were offered to "clients, regardless of whether a medical procedure is ever sought, offered, or performed."[39] Further, the Court claimed that the notices were not uncontroversial because they (partly) concerned abortion, "anything but an 'uncontroversial topic.'"[40] The Court also complained that in the case of the licensed notices, the requirements were not well-tailored or integral to meeting the state's educational

31. *Id.* at 2369 (explaining what FACT required).

32. *Id.* at 2370.

33. *Id.* at 2369 (explaining the purpose of FACT).

34. *See* Complaint at 2–3, Nat'l Inst. of Family & Life Advocates v. Harris, 2016 WL 3627327 (S.D. Cal. Feb. 9, 2016), (No. 15CV2277 JAH DHB).

35. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2370 (2018) (stating the Court's holding and discussing the First Amendment).

36. *Id.* at 2372; Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642, 651 (1985).

37. *NIFLA*, 138 S. Ct. at 2373.

38. *Id.* at 2372.

39. *Id.* at 2373–74.

40. *Id*. at 2372.

interests.[41] Finally, in the case of the unlicensed notices, the state interests were not well documented, and the state failed to show that the notices were "neither unjustified nor unduly burdensome."[42]

B. For Institutions and Market Agents, What Speech Values are Implicated by Compelled Disclosures?

Many arguments in the opinion are contestable. Justice Breyer, in a dissent joined by Justices Ginsburg, Sotomayor, and Kagan, placed his fingers squarely upon most of the weak spots.[43] The dissent worries about the uncertainty the case generates about health and safety warnings and product disclosures.[44] But, like the majority opinion, the dissent says little about how "purely factual and uncontroversial information" should be interpreted.

To grapple with this question, we should identify what free speech values are at stake with compelled disclosures of this kind. Cases of this profile raise different intrinsic issues than does the compelled speech of individuals. *Barnette*'s stance about a compelled, scripted recitation seems correct in large part because the dignity of individuals and their interest in freedom of thought precludes the state's attempting to influence their (and others') minds by recruiting their own speech facility to do so. By hijacking a person's speech against her will, the state compels a person to mouth insincere affirmations, which puts her speech in tension with her moral integrity and independence.[45] Further, ritual affirmations may influence her thought in an insidious way—rather than directly, through persuasion, the compelled speech may bypass a person's rational deliberation and recruit instincts associated with virtues of

41. *Id*. at 2375–76.

42. *Id*. at 2377.

43. *NIFLA*, 138 S. Ct. at 2379–93 (Breyer, J., dissenting).

44. *Id.* at 2376, 2381 ("The majority, for example, does not explain why the Act here, which is justified in part by health and safety considerations, does not fall within its 'health' category. . . . Nor does the majority opinion offer any reasoned basis that might help apply its disclaimer for distinguishing lawful from unlawful disclosures.").

45. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943); Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought, in* CONSTITUTIONAL LAW STORIES 409, 438–39 (Michael C. Dorf ed., 2004). Of course, some hijacked speakers may endorse the speech's content, but not its wording, the timing of the expression, how it is situated in the social context, how it may be taken in context as well as its larger meaning, and what its articulation suggests about its importance and appropriate expression. *Id.* at 436. Affirmations that are involuntary for any of these reasons fall under the term "insincere affirmations."

sincerity and familiarity, to identify and absorb what one says.[46] Finally, by using the person as a vehicle to transmit the state's message, the state treats a person as a mere means for transmitting the state's message, rather than as an independently-minded thinker and speaker, thereby marking another conflict with the due respect owed to a person with dignity.[47]

These arguments do not transfer neatly to contexts in which the speech is not ritually repeated. More important, they do not have the same resonance when it is not the speech of an individual that is compelled, but rather the speech of an institution or organization to which the term "dignity" does not well apply, and that does not have the same mental mechanisms and vulnerabilities, nor the identity and moral character, of a moral agent. Thus, it may be understandable that the complaints of commercial organizations against compelled disclosures meant to protect their customers compel much less sympathy than the claims of school children anxious to comply with religious mandates that they not worship false idols.

However, the litigants in *NIFLA*, as nonprofit organizations, occupy intermediate ground between commercial, for-profit organizations and individuals operating outside of the market. On the one hand, their mission is one of conscience—their moral and religious opposition to abortion underwrites their offers of support and alternatives to abortion for unwanted pregnancies.[48] There is little risk that posting these notices will fray their commitments, but because these compelled disclosures are not part of a regular ritual socially recognized as such, there might be a risk that the notices could be misunderstood as reflecting the sentiments or endorsements of the organization. So, there is the risk that their compelled posting could garble the organization's message—a message clearly protected by the First Amendment.[49] Further,

46. *Id.* at 434, 437–38; Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 854 (2005) ("Routine recitation [of the Pledge of Allegiance] may make its message familiar. Through regularity, it may become a comfort and an internal source of authority for consultation. At a later point, one might instinctively, without further thought and without awareness of the origin of thought, characterize the polity as a republic, or as a place where there is freedom and justice, or perhaps more plausibly, be more likely assent to another's assertion to that effect.").

47. *See* Wooley v. Maynard, 430 U.S. 705, 715, 717 (1997) (citing an individual's right to not serve as a "courier" for or an "instrument" for promoting the state's message); Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 645 (2001) (arguing that the right not to be commandeered to convey the state's message is a potent protection against state intrusion upon one's autonomy).

48. *NIFLA*, 138 S. Ct. at 2368.

49. *Id.* at 2378.

given that their mission is one of conscience, an enactment of collective moral commitment, their instrumental treatment by the state may provoke greater concern than would appropriately be extended to a purely commercial enterprise, whose dominant structure expresses an instrumental attitude toward its activities—that is, its activities are means to the animating end of generating profits.[50] Sensitivity to the concern over opportunistic use by the state and the instrumental treatment offers some motivation for the requirement that the compelled speech must serve an appropriate state interest in a non-arbitrary way.[51] *Zauderer* only required that the state interest be reasonable, but that case concerned purely commercial activity.[52] For a nonprofit, given its expressive purposes, there may be reason to demand that the state interest be important—a standard that would have been met in *NIFLA* because the state was attempting to avoid deception and to ensure the informed consent of potential patients—and that the compelled speech regulation serves that interest in a non-arbitrary, non-discriminatory way.[53]

Although the nonprofit, mission-based nature of an enterprise may be relevant to First Amendment interests, on the other hand, nonprofit organizations like NIFLA are not merely speech-based associations attempting to form or express their members' views, or to persuade the public of the merits of their cause. Rather, they offer medical services and advice, and they advertise for clients. As with other goods and services offered in the market, whether for profit or not, the state has an interest in ensuring the healthiness and safety of the services offered and that potential clients, consumers, and patients have sufficient, accurate information to offer informed consent to their purchase and/or their use.

Justice Thomas's majority opinion took the speech interests at stake rather more seriously than was warranted. His opinion is a little puzzling. In particular, his impassioned defense of freedom of professional speech[54] is

50. *See, e.g.*, Blasi & Shiffrin, *supra* note 45, at 437 n.123.

51. *NIFLA*, 138 S. Ct. at 2375–76.

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

53. *NIFLA*, 138 S. Ct. at 2385–88 (Breyer, J., dissenting).

54. *Id.* at 2374–75 (arguing that professional speech is vulnerable to content-based regulations that pose the risk of suppressing minority opinions). Although Justice Thomas' discussion of whether "professional speech" is a distinctive category deserving lesser First Amendment protection was partly provoked by the lower court's approach, the issue was a red herring, both in the instant case and more generally. *See id.* at 2371–72. After all, part of the thrust of the California regulation was to require

bizarre when coupled with his effort to distinguish this case from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[55] *Casey* reaffirmed the core right to abortion from *Roe*, but it also upheld substantial burdens on that right, including a regulation that *physicians* recite a cavalcade of information to patients about fetal development, adoption alternatives, and state services supporting childcare and adoption to their patients seeking abortion, before forcing patients into a medically unnecessary day of delay in the name of contemplation before proceeding with treatment.[56]

Justice Thomas defended this face-to-face state-mandated bullying as a form of "informed consent" that met First Amendment requirements.[57] Yet, he contended that the regulation in *NIFLA* failed to meet the standard that the First Amendment demands that the compelled disclosure be limited to "purely factual and uncontroversial" information.[58] Justice Breyer reasonably inquired how the speech in *Casey* was part of the informed consent process but not the speech at issue in *NIFLA*—speech that also informed potential clients of the clinic of other available, free services and made explicit that practitioners in some clinics were not licensed professionals.[59] Indeed, one might ask why other seemingly pertinent cases went unmentioned, namely: *Rust v.*

disclosure when these service providers were *not in fact* health professionals. *Id.* at 2370. Further, the regulation did not target professionals as such but rather sites of service provision. *Id.* More generally, the idea that "professional speech" as such is a distinctive First Amendment category seems an unhelpful conception of the issue, perpetuated by Justice Thomas' refutation, although not his invention. The category of "professionals" is rather capacious—ranging from racecar drivers and basketball players, to hedge fund managers and venture capitalists, and to doctors and lawyers. Some have specialized knowledge and offer specialized services to the public and others do not. What seems more relevant is that these organizations, on the one hand, were engaged in market activity, and on the other, that their expression was not dominantly commercial. Professional speech cuts across both domains. To be sure, the distinction between commercial enterprises and nonprofit enterprises is overly blunt. Some commercial enterprises are explicitly dedicated to articulating messages and serving causes, including but not limited to, B-corporations.

55. 505 U.S. 833 (1992).

56. *Id*. at 846, 882–83, 886. Since *Casey*, compelled disclosure requirements in the abortion context have been extended in cases like EMW Women's Surgical Ctr. v. Beshear, 920 F.3d 421, 423–25 (6th Cir. 2019) (upholding a requirement that forces doctors to perform unwanted, invasive, and medically unnecessary ultrasounds and to provide commentary on the ultrasound to the pregnant patient).

57. *NIFLA*, 138 S. Ct. at 2373.

58. *Id.* at 2372.

59. *Id.* at 2385–86; *see also* Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 111 (2019) (discussing the partisan nature of the tension).

Sullivan,[60] another case limiting federally funded ob-gyns (professionals!) from speaking candidly to patients about their options; and, *Johanns v. Livestock Marketing*,[61] a case that avoided a First Amendment challenge to a compelled subsidy case by noting that the funded speech was *government* speech, which is arguably true in this case as well.[62]

Justice Thomas did not bother to reply to Justice Breyer's question about *Casey*.[63] One worries that the majority's answer is that in-person bullying on the brink of a procedure counts as informed consent, but not a more subtle notification to potential clients.[64] One might have thought the distinction goes the other way. So, it is unfortunate that Justice Breyer intimated that the two go hand in hand; for my money, that aspect of *Casey* was wrong the day it was decided. Unlike the *Casey* speech, the *NIFLA* speech does not bully and it does not condescend. Most important, perhaps, the *NIFLA* speech does not require a *doctor* advising a patient to garble her message of support and preparation for one procedure by inserting judgment and advocacy of an alternative in the middle of it. The *NIFLA* speech only asks an *organization* to *post* information that need not come out of the mouth of a particular person identified as a trusted caregiver whose success partly depends upon the patient's subscription to that identity.

Justice Breyer's mystification about the inconsistency with *Casey* makes him worry aloud that a long list of mandated commercial and service disclosures are now at risk—including requirements that doctors provide parents with information about seat belts, that buildings post maps with staircase

60. 500 U.S. 173, 179–80 (1991).

61. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

62. *Id.* at 562–67.

63. *NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting) ("If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?").

64. The suggestion that it matters that the *NIFLA* disclosure was directed at potential clients and not patients about to undergo a medical procedure is absurd. *See NIFLA*, 138 S. Ct. at 2373–74. Informed consent is supposed to be a prerequisite to becoming a patient who undergoes a procedure or receives other sorts of care. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–87 (1992). If one may decline based on that information, then the information will often go to people who are not yet patients. Further, it is notable that in *Zauderer*, the Court upheld the permissibility of a compelled disclosure in an advertisement, one meant to solicit clients and not just to inform actual clients. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 629–31 (1985).

locations, and that landlords tell tenants when the trash-collector calls.[65] Justice Breyer is correct to worry that the disparate classification is hard to justify.[66]

Justice Thomas seems to interpret the standard that mandatory disclosures must consist of "purely factual and uncontroversial information" as a true conjunctive, rather than as something like a pleonastic legal doublet like "aid and abet" or "null and void." For Justice Thomas, it appears that the "and uncontroversial information" does not simply underscore that the compelled disclosure must be factual and not an opinion, although there is reason to believe that is what the original phrase from *Zauderer* meant.[67] Justice Thomas introduces a new standard that the material must be purely factual *and* the purely factual material must be uncontroversial.[68] Since the *provision* of state-supported abortion and contraceptive services is controversial—but not the truth of the claim that they are provided—Justice Thomas balks at their compelled disclosure. But, assuming he did not regard seat belt safety or timely egress controversial practices, he would have no reason to object to compelled statements about seat belt laws and staircase locations.[69] To be sure, Justice Thomas's quick treatment offers a way to distinguish the forms of government-mandated speech that Breyer thinks *NIFLA* now puts at risk, but it raises

65. *NIFLA*, 138 S. Ct. at 2380–81 (Breyer, J., dissenting); *see also The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 347, 351 (2018) [hereinafter *Leading Cases*] ("Taken as written, *NIFLA* represents a dramatic expansion of the scope of First Amendment protection for commercial speech that threatens the entire foundation of a broad range of consumer protections."). These concerns are not entirely hypothetical. Am. Beverage Ass'n v. City & Cty. of S.F., 916 F.3d 749, 753 (9th Cir. 2019) (en banc) (reversing denial of a preliminary injunction against compelled disclosure of health risks associated with sugary beverages); CTIA–The Wireless Ass'n v. City of Berkeley, 138 S. Ct. 2708 (2018) (mem.) (remanding a case involving compelled disclosure about exposure to radio waves from cell phone use for reconsideration in light of *NIFLA*), *aff'd*, 928 F.3d 832, 845 (9th Cir. 2019) (holding a compelled disclosure is only controversial when it forces a party to take sides in a "heated political controversy").

66. *See NIFLA*, 138 S. Ct. at 2385; Chemerinsky & Goodwin, *supra* note 59, at 108–09.

67. *See Zauderer*, 471 U.S. at 651; *see also* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F. 3d 509, 569 (6th Cir. 2012) (upholding tobacco warning requirement and stating "whether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information or an opinion, not on whether the disclosure emotionally affects its audience or incites controversy"); Lauren Fowler, *The "Uncontroversial" Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651, 1674–79 (2019) (discussing other cases that treated the test as centered on whether the speech is factual).

68. *NIFLA*, 138 S. Ct. at 2372.

69. *See NIFLA*, 138 S. Ct. at 2372–74, 2376 (noting that the Court does "not question the legality of health and safety warnings long considered permissible").

other substantial issues.

III. SEVEN DISTINCT INTERPRETATIONS

A. From Zauderer *to* NIFLA

Although the conjunctive reading may rescue Justice Thomas's approach from the particular parade of horribles imagined by Justice Breyer, that reading does not flow straight from *Zauderer*. The *Zauderer* protection that the state cannot expect speakers to make compelled disclosures unless those compelled disclosures consist of "purely factual and uncontroversial information" should be understood in light of the context that inspired its articulation.[70] Unlike the case at issue in *NIFLA*, *Zauderer* did not address government-scripted disclosures that would give important context to the speaker's statement.

Rather, *Zauderer* concerned attorney-written advertisements and the non-scripted disclosures that speakers might be expected to generate to accompany or clarify their advertisements so as to avoid consumer deception; for example, advertisements that no legal fees would be charged in an unsuccessful representation would have to explain that court costs were not included within "legal fees."[71] In that context, the "purely factual and uncontroversial" requirement seems best understood as a protection of speakers from overly demanding expectations that they be creative and entrepreneurial in discovering and identifying facts that must then be disclosed. Rather, the expectation is that what they disclose be "purely factual and uncontroversial information" in the sense of information that is "well-known or understood" as opposed to its being secret, obscure, esoteric, or a merely speculative, untested hypothesis. So, if part of the concern animating *Zauderer* is grounded in what speech a regulated entity may be expected to generate or produce on their own, that concern is not apposite where the compelled speech is scripted, for, in that case, the government would do the work to uncover the information.

Putting production costs aside, and assuming arguendo that the standard associated with scripted speech should be the same as for speaker-generated

70. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (holding that a layperson would not understand the difference between "legal fees" and "costs" which could lead that person to believe that using the appellant's legal services would be free of charge even in the event of a losing case).

71. *Id.* at 652–53.

speech, the important point is that the standard is not concerned with what the information is *about* but rather that it is information, not opinion. It has nothing to do with whether the information itself concerns a controversial matter or whether some contest the validity of the information. Hence, there is reason to think the standard in *Zauderer* meant something more modest by "uncontroversial information," something that would underscore "purely factual."

But, the facts in *NIFLA* differed in two significant ways from those presented in *Zauderer*. Perhaps those differences raise distinct First Amendment concerns that motivate the conjunctive and far more substantive reading of "uncontroversial." First, as previously noted, *Zauderer* directly concerned expectations that a speaker generate disclosures of her own to prevent consumer deception, rather than expectations that a speaker post disclosures generated by the state. Second, *Zauderer* concerned a commercial entity that was not associated with any particular cause, whereas *NIFLA* concerned a nonprofit service entity dedicated to a cause.[72]

In one respect, as just argued, the difference between compelling the generation of speech and compelling the posting of scripted speech cuts against any more expansive, conjunctive reading of "purely factual and uncontroversial information." When the compelled speech is provided, there is no operative concern that the state is unreasonably demanding that a speaker discover certain facts or have certain thoughts. But, one might have separate concerns about imposing state-drafted speech on an entity whose partial purpose is to express or advance a cause. When the speech is written by the government, one may be tempted to think that to avoid interfering with the mission-based entity's expression, the compelled speech should both be purely factual and *also* uncontroversial.

Despite the allure of the impulse to interpret "purely factual and uncontroversial information" as though it posited two distinct criteria for permissible disclosure requirements, that impulse should be resisted. This two-criteria interpretation represents a wrong-headed way to think about compelled speech for mission-driven nonprofit service providers, one that is not responsive to the underlying rationale for regulating service providers. It should be sufficient to uphold the regulations that the compelled speech is factual (in the

72. *Compare id.* (concerning an attorney advertising for legal representation), *with* Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2368 (2018) (concerning crisis pregnancy centers which are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center").

sense of not being a normative claim), that the compelled speech substantially furthers an appropriate governmental objective in a way that is reasonably connected to the conditions of service provision, and that its articulation would not interfere with the organization's ability to voice its message and for clients to receive it.

As I remarked earlier, mission-driven nonprofit service providers represent an interesting case because they have one foot in the market, broadly speaking, and another foot in the public forum of ideas. By saying they have a foot in the market, I do not mean that they charge money or seek profits. I mean that they are in the business of providing goods or services to people. Although what people think and what people say in the public forum of ideas and in private contexts must be subject to the strongest free speech protections, the acts involved in service provision are exactly the sort of thing the government may reasonably regulate. We cannot all be expected to be experts about every type of good and service, including how they are produced, in what market environment, who is qualified to render them, and what alternatives the market offers. To facilitate a safe environment of complex service provision, epistemic divisions of labor are essential so that individuals may safely buy and use services without having to invest in undue, infeasible amounts of research; freeing them from such research is not only socially efficient but enables intellectual freedom by permitting individuals to pursue their chosen goals and specific intellectual interests, rather than focusing their intellectual efforts to protect basic needs and vulnerabilities.[73] They need to be able to trust that service provision is expert and safe, and that service providers represent what they do and their limits accurately. (Similar things may be said about the provision of goods).

Note that this is an information-centered, epistemic argument.[74] As such,

73. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 645 (1985) ("[D]istinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics.").

74. This distinguishes it from the arguments about compelled commercial speech *subsidies*, which were justified on economic grounds of promoting a product. *See, e.g.*, Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 474–75 (1997) (holding that generic advertising funded by compelled subsidies has a legitimate purpose of stimulating consumer demand for an agricultural product in a regulated market and that it is consistent with the regulatory goals of the overall statutory scheme); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562–63 (2005). *But see* United States v. United Foods, Inc., 533 U.S. 405, 412 (2001) (holding that the commercial purpose of compelled subsidies does not

it shouldn't surprise anyone that some forms of governmental regulation will take the form of requiring communication and requiring service providers who may be expected to be centers of information about their services to provide accurate and useful information about those services, their providers, and the conditions of their provision.

The facts that a service provider also has a mission and does not seek profit do not detract from this argument. Neither fact bears on the central core of the epistemic argument. At the margins, there may be some differences that might influence the form of regulation. The profit motive may, sometimes, give one heightened reason to second-guess the representations made by a profit-seeker, given potential trade-offs between providing high-quality services and high-quality information about them and maximizing profits. Whereas the mission-driven nonprofit service provider provides the service as part of its mission, so ensuring the quality of the service dovetails with its mission. On the other hand, because nonprofits often provide services for a discounted rate or for free, some of the quality control offered by competition may be sacrificed. Further, the quality of the service will track the aim of the mission and may not necessarily, as in the case of *NIFLA*, track the aims of clients whose aims and needs may differ. Given their mission to discourage abortion and contraception, "pregnancy crisis" centers may offer good advice about adoption services and child care but may not comprehensively serve patients looking for the full range of advice and options about the crisis of their pregnancy.

Given that the epistemic argument squarely applies to mission-based service providers, why does this feel like a difficult case at all? Why not say to voluntary expressive associations that they enjoy perfect freedom to speak and to resist all compelled speech requirements (but perhaps for some disclaimers informing members of their protected rights of exit), but that if they begin to provide goods or services, those aspects of their activities are subject to whatever reasonable regulations govern commercial providers?

In essence, I think this is the correct position. There are reasons to be especially careful in this domain, though. The service provision is not speech, but it is an expressive outgrowth of the mission and, further, as a general matter, we may want to encourage and protect morally motivated market activity

deprive all First Amendment protection especially where the subsidies do not fall within a broader comprehensive regulatory scheme).

as an alternative to purely profit-based market activity.[75] So we may have special reasons to be sensitive to the organization's interest in ensuring that its message may be clearly articulated, given the organization's ability to cultivate and disseminate its message is closely tied to the identity and motivations of the members and its ability to inspire members and express their commitments.

Such sensitivity would not, however, bring us to Justice Thomas' position. Those regulations will already be subject to limitations based on the scope of the epistemic argument just provided, one that inherently is oriented toward regulation and disclosure of the sorts of facts discoverable through empirical and legal research. That argument offers no justification for the government to require services to articulate normative messages—messages that both run a special danger of garbling the message of a mission-based organization and of hazarding free speech violations through the appearance of government efforts to impose an orthodoxy. So, it makes sense to articulate the standard that compelled speech is to be limited to compelled *factual* speech.

B. Further Interpretations of "Uncontroversial Information"

But what about non-normative factual speech that is controversial? Might not compelling organizations to articulate and distribute it garble their message or, if not their message, their *voice*? The immediate difficulty is that, as lower court struggles attest,[76] it isn't at all clear what is meant by the requirement that the disclosures be limited to "uncontroversial information." We can distinguish at least seven interpretations.

First, on what we might call the *descriptive* interpretation, it could underscore and reinforce the "purely factual" requirement.[77] That is, it may just indicate truthful information that is descriptive and factual in the sense of being non-normative and not a mere speculative hypothesis. I have suggested that this is the best reading of the *Zauderer* requirement.[78] Despite its constitutional modesty, though, it cannot be what Justice Thomas had in mind since

75. *See* Seana Valentine Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L. REV. 317, 325–26 (2007) (discussing morally motivated activity by market agents).

76. *See supra* note 10.

77. *See infra* Part III.C.1.

78. *See supra* Part III.A.

the information at issue in *NIFLA* met these criteria.[79]

Second, on the *objective* interpretation, "uncontroversial information" could refer to non-normative facts susceptible to classification using objective criteria, whereas non-normative facts whose classification criteria are "subjective" would count as "controversial information."[80] This interpretation was advanced in *Entertainment Software Ass'n v. Blagojevich,*[81] a case involving a challenge to a requirement that video games with "sexually explicit" content be labeled as such. The court found the requirement was an unconstitutional compelled disclosure of a controversial message because whether a game should be classified as "sexually explicit" involves a "subjective and highly controversial" opinion with which others may disagree.[82]

Third, on the *uncontroversial topics* interpretation, "uncontroversial information" could refer to truthful information *about* matters that are not the subject of controversy.[83] On this view, regulations requiring the articulation of uncontested, established facts that concern controversial matters would run afoul of the standard. The facts in *NIFLA* supply the salient example,[84] prefigured by similar facts in *Evergreen Ass'n v. City of New York*.[85] A concurrence in *American Beverage Ass'n v. City & County of San Francisco* echoed this idea, suggesting that a health warning about sugary beverages failed the

79. *See Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2388 (2018) (Breyer, J., dissenting) ("Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other.").

80. *See infra* Part III.C.2.

81. 469 F.3d 641 (7th Cir. 2006).

82. *Id.* at 652 (decrying the subjectivity of the criteria for "sexually explicit" as rendering the categorization controversial).

83. *See infra* Part III.C.3.

84. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2368 (2018) (citation omitted) ("The [FACT Act] requires clinics that primarily serve pregnant women to provide certain notices. Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services.").

85. 740 F.3d 233, 245 n.6 (2d Cir. 2014) (explaining in dicta that *Zauderer*'s rational basis review of compelled commercial speech does not apply to a state requirement that "crisis pregnancy" centers disclose the existence of alternative family planning resources and their services, which include abortion, because the topic is politically controversial).

standard because it concerned a "controversial topic."[86]

Fourth, on the *relevance* interpretation, "uncontroversial information" could refer to non-normative facts, whose relevance with respect to the intended audience's decisions is not contested or controversial.[87] On this interpretation, a potential constitutional violation would arise when compelled disclosure regulations required articulation of a fact, the truth of which is uncontested, but the *relevance* of which is contested. For example, one might consider the objections of organic farmers to the FDA's "recommended" disclaimer on milk that is labeled as produced from rbST-free cows that "[n]o significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows."[88] Some organic farmers think the disclaimer draws attention to an irrelevant fact because many of their objections to rbST have to do with the effects of the hormone on *the cow*, not on consumers.[89]

Fifth, on the *uncontested* interpretation, "uncontroversial information" could refer to non-normative facts, the truth of which is not a matter of controversy.[90] Some compelled disclosure regulations are controversial because the truth of the (purported) fact remains contested by the regulated party, even though that fact has been established through evidence that meets relevant burdens. Think vaccine safety or, back in the day, tobacco toxicity.[91] Or, to return to the rbST example, while some farmers believe the issue with rbST

86. 916 F.3d 749, 761 (9th Cir. 2019) (Ikuta, J., concurring) (noting that "uncontroversial" went undefined in *NIFLA* but arguing that because a health warning about sugary beverages involves a "controversial topic," it fails *NIFLA*'s test)

87. *See infra* Part III.C.4.

88. Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 634 (6th Cir. 2010); *see also* Interim Guidance on the Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279, 6279–80 (Feb. 10, 1994) (recommending informational disclosures denying that milk from treated cows differs qualitatively from milk from untreated cows).

89. *See also* Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n, 800 F.3d 518, 530 (D.C. Cir. 2015) (opining in dicta that an SEC requirement that companies disclose whether their minerals were "DCR conflict free" would not satisfy the 'uncontroversial' requirement because the phrase "conveys moral responsibility for the Congo War" and the company may "disagree with that assessment of its moral responsibility" (quoting Nat'l Ass'n of Mfrs. V. Sec. & Exch. Comm'n, 748 F.3d 359, 371 (D.C. Cir. 2014))). *But see* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 870–71 (2014) (noting that the relevant regulation did not require *that* specific language to be used at all).

90. *See infra* Part III.C.5.

91. *See, e.g.*, Jan Hoffman, *How Anti-Vaccine Sentiment Took Hold in the United States*, N.Y. TIMES (Sept. 23, 2019), https://www.nytimes.com/2019/09/23/health/anti-vaccination-movement-us.html.

is its effect on cows, other farmers object to the disclaimer that there is no significant difference between milk derived from rbST-treated and non-rbST-treated cows because they believe it is untrue.[92] (So, the rbST case serves as an exemplar of potential violations of both the relevance and the uncontested interpretations.) Such cases may seem more pressing when the regulated organization's cause is intimately connected with the contestation of the purported facts, but it has been successfully invoked in circumstances where the speaker did not have any moral cause. In a recent commercial speech case, this interpretation propelled a California court to reason that the compelled disclosure of a dispute over the identity of the singer on a number of tracks on a posthumous Michael Jackson album does not survive the "purely factual and uncontroversial" analysis because it would require the marketer to present factual information with which it disagreed.[93]

Sixth, on the *clarity* interpretation, "uncontroversial" is interpreted to mean "not misleading."[94] Two concerns fall under the umbrella of this interpretation of "controversial." First, some courts have worried that literally true statements may be misunderstood by consumers who lack the technical information necessary to interpret them appropriately. For example, in *National Ass'n of Wheat Growers v. Zeise*,[95] a federal court invalidated a required warning about a herbicide that it was "known to cause cancer" because it found that claim misleading and therefore controversial on the grounds that many consumers would lack the background necessary to know that this warning could be based on single, unconfirmed findings.[96] Second, courts have found compelled disclosures "controversial-because-misleading" when those warnings were not precisely tailored. For example, in 2019, a federal magistrate judge found "controversial" a requirement that unreinforced masonry buildings post seismic safety warnings about unreinforced masonry because its purported over-inclusivity and under-inclusivity was misleading.[97] Some regulated buildings had to post the notice even if they had undergone some

92. *See Int'l Dairy Foods Ass'n*, 622 F.3d at 636–37.

93. *See, e.g.*, Serova v. Sony Music Entm't, 237 Cal. Rptr. 3d 487, 501–502 (App. Ct. 2018) ("By compelling disclosure of the controversy over the Disputed Tracks to avoid liability, the UCL and CLRA would, in effect, require Appellants to present views in their marketing materials with which they do not agree.").

94. *See infra* Part III.C.6.

95. 309 F. Supp. 3d 842, 851 (E.D. Cal. 2018).

96. *Id.*

97. Masonry Bldg. Owners of Or. v. Wheeler, 394 F. Supp. 3d 1279, 1302 (D. Or. 2019).

retrofitting. Yet, other sorts of buildings may also pose seismic hazards, but were not subject to the requirement. Thus, "singl[ing] out URM buildings for compelled disclosures" rendered the regulation "misleading, controversial, and inflammatory."[98]

Finally, on the *characterization* interpretation, "uncontroversial information" could refer to disclosures whose *characterization* of particular non-normative facts is uncontested.[99] The offending examples would then be regulations that require the articulation of facts framed, characterized, or categorized in a controversial way. Examples may include: when animal slaughter is called "slaughter" rather than the meat industry's preferred euphemism of "harvesting";[100] when the government tried to require graphic labels on cigarettes depicting the consequences of smoking and tobacco companies complained that graphic depictions were designed to elicit emotional, rather than purely cognitive responses;[101] and, when the government labels an IUD as "birth control," but some groups regard it not as contraception, but as an abortifacient.[102]

It's a strain to think of these cases as cases of controversial *information*. The *information* itself is not controversial. One might think of it as information, controversially described. So, "uncontroversial information" might be understood as factual information, uncontroversially described.

C. "Controversial" Information & First Amendment Concerns

Does compelled disclosure of "controversial information" raise any distinctive First Amendment concerns on any or all of the disparate interpretations just identified? No.

98. *Id.* at 1303.

99. *See infra* Part III.C.8.

100. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) ("As to whether it is 'controversial,' AMI objected to the word 'slaughter' in its reply brief. Though it seems a plain, blunt word for a plain, blunt action, we can understand a claim that 'slaughter,' used on a product of any origin, might convey a certain innuendo.").

101. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012); *see also* Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n, 800 F.3d 518, 530 (D.C. Cir. 2015) (suggesting in dicta that the phrase "DRC conflict-free" if required in an SEC disclosure would not be "uncontroversial" because the companies objected to its implicature of responsibility).

102. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691, 761 (2014) (considering Hobby Lobby's objection to providing funding for four contraceptive methods, including IUDs, which it characterized as abortifacients).

As argued in more detail below, the *descriptive* interpretation understands "uncontroversial" as a useful redundancy that gives "uncontroversial information" no independent force.[103] Cases that fall afoul of the second *objective* category should be analyzed in terms of vagueness and notice, not controversiality.[104]

The third through sixth interpretations also do not raise any serious *independent* First Amendment concerns that merit constitutional protection.[105] The effort to read them as doing so is both confused and in tension with the rule of law. With respect to the seventh interpretation concerning controversial *characterizations*, these do not really involve controversial *information*.[106] Nonetheless, controversial characterizations may raise some different First Amendment questions that have been lurking since *Johanns*.[107] These questions are worth attention, but have nothing to do with the controversiality of the information within the disclosures.

1. The Descriptive Interpretation

That "controversial information" poses no distinctive First Amendment issues is obvious in the case of the *descriptive* interpretation. This interpretation reads "uncontroversial information" as merely reinforcing and clarifying the "purely factual" prong, as in other doublets like "aid and abet," "null and void," and "terms and conditions." So, if the disclosure satisfies the "purely factual" requirement, it follows perforce that it involves uncontroversial information (and vice versa).

Although this seems like the most sensible reading of *Zauderer*, as argued above, it is also plain that it cannot be squared with the outcome in *NIFLA*. After all, the information about alternative care providers was purely factual, accurate, and nothing like a mere speculative hypothesis. Although the *NIFLA* Court did not specify what it meant by "uncontroversial" and how exactly the disclosure failed this test, the Court was implicitly relying on another interpretation.[108] While the only one that makes much sense of the outcome is the (implausible) *uncontroversial topics* interpretation, lower courts are not

103. *See infra* Part III.C.1.
104. *See infra* Part III.C.2.
105. *See infra* Parts III.C.3–7.
106. *See infra* Part III.C.8.
107. *See supra* Part III.A.
108. *NIFLA*, 138 S. Ct. at 2369.

hewing to that interpretation, but are explicitly and implicitly pursuing different understandings of what "uncontroversial" represents.

2. The Objective Interpretation

There may be more independent substance to the First Amendment complaints associated with the *objective* interpretation, in cases in which the criteria for identifying when a disclosure is apt is "subjective" and, therefore, subject to disagreement. In the lower court case that advanced this interpretation concerning a compelled disclosure that a video was "sexually explicit," the complaint was not that the disclosure was opinion-based in the sense of being ideological or that it advanced a speculative hypothesis.[109] Although there was a dispute about whether the classification of the video game as sexually explicit was accurate, that dispute traced back to a complaint about the criteria for classification being insufficiently determinate, thus provoking disagreement.[110] Although being sexually explicit is a non-normative property, one may imagine that what is regarded as sexually explicit may vary according to the habits, customs, conventions, and beliefs of different cultural subgroups and cultures at different times. Without more guidance, assessments of the category's contours may partly reflect the classifier's attitudes about gender relations and about what level of bodily exposure is sexually exciting or provocative. This "eye of the beholder" variance may make compliance difficult.

This seems like a relevant complaint, but it falls more in the category of inadequate notice or void for vagueness, which other doctrines address.[111] The issue is not really that the category or the criteria provoke

109. *See* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652–53 (7th Cir. 2006) (decrying the subjectivity of the criteria for 'sexually explicit' as rendering the categorization "controversial").

110. *Id.* at 652.

111. Consider *Smith v. Goguen*, 415 U.S. 566, 573–74 (1974), in which the Supreme Court held that a statute prohibiting public contemptuous treatment of the American flag was void for vagueness because it failed to draw the line between permissible and criminal nonceremonial treatment of the flag. The Court specifically relied on the issue of notice that accompanies such a statute in which the determination of what is contemptuous treatment may vary from person to person. *Id.* at 574; *see also* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 806–07 (2011) (Alito, J., concurring) (striking down a statute restricting the sale or rental of violent video games to minors in part because the law's definition of "violent video game" was impermissibly vague); Reno v. ACLU, 521 U.S. 844, 872–73 (1997) (striking down the Communications Decency Act and holding that the act's "indecent" and "patently offensive" standards were unconstitutionally vague).

disagreement.[112] The problem is that it is unclear when the requirement applies, and unclear criteria leave speech requirements open to the vagaries of individual government officials. That problem may exist even when everyone agrees about most of the classifications and when the gray areas merely provoke uncertainty, not disagreement or controversy. Further, clearer criteria (e.g., "sexually explicit" refers to direct, graphic depictions of sexual acts and unclothed genitals) may be thought less subjective but nevertheless provoke disagreement about the relevance of such classified facts, given such criteria. These arguments suggest that the invocation of this interpretation of "controversial information" may sometimes be a stand-in for the relevance interpretation, discussed below.[113]

3. Controversial Topics

NIFLA seems to fall into the controversial topics category: the crisis centers objected to the fact that state-provided abortion services were available, but they didn't contest the truth of the fact that they were available. Once it is explicitly isolated and articulated, it's hard to see how this feature could be reasonably thought to raise a difficult First Amendment issue. A mission-based organization may find certain facts objectionable, such as the fact that state abortion services are available. Even nonprofit employers may object to the minimum wage or the right to unionize. They may resent having to articulate these facts as a condition on providing goods or services or employing people to enable that provision. But, if they are facts that the government reasonably determines should be provided to consumers (or workers) in this context for purposes of safety or informed decision making, it just doesn't seem relevant that what is accurately reported is controversial in the sense of its being subject to criticism. And, controversial to whom? The regulated party? The society at large? Could a regulated entity render a governmental disclosure regulation unconstitutional on free speech grounds by *generating* a controversy about the desirability of an established fact? If such manufactured controversy can comprise a method of invalidating regulation, then Justice Breyer's worry that requirements that doctors tell parents about the

112. Indeed, many judgments labeled 'subjective' are those prototypically exempt from disagreement. I find honey disagreeably pungent and unctuous; you find it delicious. We differ but we do not *disagree*. When the tongue leaves the cheek, neither of us reasonably thinks the other is making an *error*.

113. *See infra* Part III.C.4.

availability of vaccines could be at risk becomes more serious.[114]

Take another example: Lawyers are required to be licensed and may be required to report on websites and advertising that they are members of the bar.[115] Some people object to professional licensing tout court. Others think the bar's standards are unnecessarily high and produce racially discriminatory effects.[116] It seems strange to think such objections could ground a compelling claim against a requirement to reveal the details of one's licensure (or lack thereof). So long as an organization is not barred from also explaining why, in its view, the fact is itself irrelevant or objectionable, I do not see how the compelled articulation of it objectionably trespasses on their free speech interest in articulating a message—especially given that the organization may, outside the service and goods context, advocate vociferously on the subject without making any compelled announcements.[117]

4. Contested Relevance

What about the fourth category in which the information's *relevance* to the purposes for which the government may regulate is contested? Might not this impinge on the free speech interest of the regulated party by garbling its

114. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2381; *see also Leading Cases*, *supra* note 65, at 352–53.

115. The MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2019) prohibits the practice of law in jurisdictions in which the lawyer is not licensed, while some specific state rules, including MONT. RULES OF PROF'L CONDUCT r. 7.1(l) (STATE BAR OF MONT. ETHICS COMM. 2003), require the identification of jurisdictions in which a lawyer is licensed to practice when advertising legal services. Further, some state professional rules like the LA. RULES OF PROF'L CONDUCT r. 7.6(b) (LA. ATT'Y DISCIPLINARY BD. 2018) require that all websites about a lawyer's or firm's services disclose all jurisdictions in which they are licensed to practice law.

116. *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 96–101 (1976) (describing the anti-Semitic and xenophobic motivations behind increased bar standards in the early twentieth century); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1711–15 (2002) (criticizing the disparate impact of the bar examination on applicants of color); Jennifer L. Mnookin, Stephen C. Ferruolo & David L. Faigman, *California Needs a Task Force to Study the California Bar and Needs It Now*, LAW.COM (May 28, 2019, 11:55 AM), https://www.law.com/therecorder/2019/05/28/california-needs-a-task-force-to-study-the-bar-exam-and-needs-it-now/?slreturn=20200025160001 (arguing that California "cut scores" for the bar exam have a racially disparate impact). *See generally* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985) (arguing that moral character requirements for bar licensing serve as a discriminatory and inconsistent filtering process).

117. *But see* Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1498 (2018) (arguing that Justice Thomas correctly interpreted "uncontroversial" in *NIFLA* to mean the speech at issue covers a non-ideological matter).

message when it must include facts that it regards as irrelevant into its discourse?

To examine this concern, we must isolate it carefully. If "uncontroversial information" represents a distinct factor, then what is at issue is not whether the disclosure is *in fact* relevant or not, but whether, *in addition*, its relevance remains contested. Recall that the "purely factual and uncontroversial information" requirement is just one element of what *Zauderer* requires to impose a compelled disclosure.[118] The requirements cannot be unjustified or unduly burdensome.[119] Disclosure requirements must be "reasonably related to the State's interest in preventing deception of consumers"[120] or reasonably related to the State's interest in ensuring informed consent. Presumably, irrelevant information would serve neither aim. For instance, in *EMW Women's Surgical Center, P.S.C. v. Beshear*, the plaintiffs challenged whether information gleaned from an involuntary ultrasound was relevant to a patient's medically informed consent.[121] (But, they did not argue that their *belief* about (as opposed to the fact of) its irrelevance grounded a First Amendment complaint.)

If the plaintiff cannot persuade a court that the disclosure fails, in fact, to serve the state interest because the disclosure is irrelevant to that interest, should it independently matter that the plaintiff or others nevertheless continue to contest its relevance? Assuming the "purely factual and uncontroversial" standard makes an independent contribution to the inquiry, then on this interpretation, although the plaintiff cannot *convincingly show* that the information is irrelevant, the mere fact that the plaintiff contests the relevance of the factual information to achieving a state interest would purportedly underwrite a significant First Amendment objection to disclosing that information.

This concern does not seem especially powerful, given that the requirement only arises with respect to the organization's market activity and its provision of goods and services. Any free speech concern is ameliorated by the fact that outside the service-provision context, no similar requirement may be imposed on the organization in its guise as a voluntary association.[122] Moreover, the regulated party may identify the source of the contested fact in its

118. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
119. *Id.*
120. *Zauderer*, 471 U.S. at 651.
121. 920 F.3d 421, 438 (6th Cir. 2019).
122. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 573–74 (1995).

articulation, e.g., "the government requires us to say that . . . ."[123] So long as it is not deceptive, the organization may engage in other distancing behavior, including criticizing the requirement to speak and, in their own voice, criticizing the relevance of what they are required to articulate. The organization also has reason to contest the relevance of facts in the political forum designed for the purpose of crafting and reconsidering regulations.

Hence, there are ample opportunities to ensure that the market organization is not misunderstood as endorsing the state's position on the relevant facts and has the ability to advocate in the political forum that the regulations are unnecessary. This leaves it unclear why, in the context of information provided to patients and consumers about a product or service, an organization's view of the *relevance* of that information rises to the level of a First Amendment freedom to refuse to offer it. If it did, wouldn't most organizations contest the relevance of disclosures? Wouldn't this empower them to decide for themselves whether consumers and patients need information that they were not otherwise inclined to provide?[124] In other words, such an interpretation would transform a constraint on compelled disclosures into a constitutional power by an industry to decide for itself whether and how to subject itself to anti-deception and informed consent requirements.

Surely, the fact of disagreement with a regulatory posture cannot amount to a claim of freedom of speech to ignore that regulation, as *Masterpiece Cakeshop* itself recognizes.[125] In most democratic circumstances, the correct response to controversy, and what the First Amendment facilitates, is to listen, have an open mind, reconsider, discuss, advocate, persuade, and seek common ground where available. The First Amendment is neither a provision that allows for self-selection in the application of laws nor protection for manufacturing controversy so as, indirectly, to facilitate such self-selection. In other words, the First Amendment underpins, rather than undermines, the rule of law.

123. *See* Greene, *supra* note 117, at 1491 (arguing that a private party forced to make disclosures has the right to announce that such statement is "not in [his or her] name").

124. *See* Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 467–68 (2019) (criticizing a broad reading of *NIFLA* as insensitive to listeners' informational interests).

125. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) (noting that philosophical and religious objections to same-sex marriage do not allow economic actors "to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law").

5. Contested Facts

What of cases where the facts in the compelled disclosures are contested? Might not an organization object that compelled speech, in such a case, is tantamount to forcing it, from its own perspective, to *lie* by forcing it to voice something it takes to be untrue? Isn't the protection against forced mendacity fundamental to the First Amendment compelled speech protection?

In thinking through this objection, it's again important to get the case clear. The "purely factual" prong already requires that the disclosure be accurate.[126] So, to make sense of the idea that the "uncontroversial information" prong is *independent*, we must imagine an organization that contests the truth of an accurate disclosure, but cannot refute the evidence that establishes its truth. In such a case, the compelled disclosure does not force the speaker to say something speculative or known to be false, but rather something established to be true but which the speaker nevertheless does not believe. So described, the situation is rife for manufactured controversy. This interpretation, as with the relevance interpretation, threatens to permit any regulated entity to generate a free speech objection merely through asserting disagreement about the (proven) facts in a disclosure. Even assuming the sort of good faith that has been absent in market actors' representations of the facts concerning tobacco toxicity[127] and climate change,[128] to take two examples, the lopsided incentives for market agents to identify and admit facts against interest may substantially lag behind the evidence.[129] Putting market agents in control of

126. Challenges about whether the disclosures are factual may merge with challenges to the need for compelled disclosures to prevent consumer deception. *Cf.* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 636 (6th Cir. 2010) (invalidating Ohio's ban on identifying milk as produced from cows not treated by rbST because such identifications are not inherently misleading, but not hearing a direct challenge to the FDA's suggested language).

127. *See, e.g.*, United States v. Philip Morris, 566 F.3d 1095 (D.C. Cir. 2009) (upholding a decision finding Philip Morris liable for RICO violations involving conspiracy to defraud the public concerning nicotine addiction).

128. *See, e.g.*, Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), http://graphics.latimes.com/exxon-arctic/ (documenting that Exxon was incorporating climate change projections into its plans while publicly denying that evidence of climate change was sufficient to warrant action).

129. *See, e.g.*, Benjamin Franta, *Shell and Exxon's Secret 1980s Climate Change Warnings*, GUARDIAN (Sept. 19, 2018 6:00 AM), https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/19/shell-and-exxons-secret-1980s-climate-change-warnings ("[O]il firms recognized that their products added CO_2 to the atmosphere, understood that this would lead to warming, and calculated the likely consequences. And then they chose to accept those risks on our behalf, at our expense, and without our knowledge.").

the mechanisms that activate their own regulation in the name of freedom of speech, rather than locating this power in government, seems irreconcilable with a regulated economy governed by the rule of law.

Whereas, requiring disclosures that are true, purely factual, and serve important interests such as safety or informed consent, do not seem to impinge importantly upon freedom of speech. Here, the distinctions between individuals and organizations and between individuals and market agents matter.[130] Forcing a (human) person to attest to facts that she believes are false, in her capacity as an individual, implicates the previously discussed concerns about individual dignity, freedom of thought, and the recruitment of the speech facility to generate a tension between her speech and her moral integrity. These concerns do not gain traction when the compelled disclosures are triggered by voluntarily undertaken market activity and limited to speech undertaken in the role of service or good provider, especially when the disclosure is required of an organization that may question the alleged fact in its other expressive activities.

To be sure, the fact of an organization's continued skepticism about the purported fact is a reason for the organization to contest the finding of fact in the political and legal fora designed for that purpose. The status of this purported fact may loom large in a group's mission, and the contest over it may ground a principled resistance to articulating this fact.[131] Such principled resistance underscores the obligation of the government to deliberate carefully about the need for a compelled disclosure and the accuracy of the facts that underlie it as well as to reconsider it if the resistance is meritorious.[132] But, the fact of principled resistance about a factual matter is not, in itself, a reason for the government to retreat in levying a justified restriction when the available evidence does not support the skepticism about the facts to be disclosed. In this case, the speech in question is just part of a larger regulatory framework governing service providers to ensure the safety and informed consent of clients and consumers.

130. *See supra* Part II.B.

131. *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d. 628, 636–37 (6th Cir. 2010).

132. In the abortion context, there is much to reconsider about the content of compelled disclosures that have been upheld as constitutional. *See, e.g.*, Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1327 (discussing the inaccuracy of some compelled abortion disclosures, including the myth that abortions increase suicidal thoughts).

6. Clarity and Nonmisleading Speech

Of course, compelled disclosures should not be misleading, especially as one of their primary functions is to protect against consumer and patient deception. Nonetheless, the idea that an "uncontroversial information" prong signals a requirement that disclosures are not to be misleading suffers difficulties to those encountered with respect to the last three interpretations.

First, it isn't obvious that there is much of a connection between standard notions of controversiality and misleadingness. A statement could be misleading, and it might be roundly and uniformly condemned for so being. So, misleading, but not controversially so. Further, a highly effective misleading statement might operate below the radar. It may go relatively unnoticed. Hence, it could be uncontroversial but also entirely misleading. It's difficult to know exactly what the connection between these concepts is supposed to be. Perhaps the idea is that, in the relevant cases, there may be a controversy about whether the statement is misleading. Proponents and authors of the disclosure may believe it to state facts in ways that appropriately inform readers; opponents of the disclosures may believe that they are written in ways that single out the wrong target or that falsely suggest the target is uniquely flawed or dangerous when it should not share that spotlight alone.

The primary difficulty with this interpretation is that there is entirely too much risk, as with the *relevance* interpretation, that "controversiality" here will either do no work or do entirely too much work. On the one hand, it seems to do no work. If a plaintiff can establish that a disclosure is actually misleading, then it will fail to advance the state's anti-deception aim and should flunk on the ground that it is "unjustified." Pointing out that it is also "controversial" adds nothing and seems beside the point. Showing that others also question the wisdom of its wording should not be a prerequisite for the success of that challenge. So again, this interpretation would fail to make sense of the idea that "uncontroversial information" represents an independent hurdle to the constitutionality of a compelled disclosure.

Nor should citing others' doubts about the clarity of a disclosure suffice to show the disclosure is misleading. The plaintiff should have to substantiate an allegation that the disclosure is unjustified because it's misleading, e.g., by producing evidence of consumer confusion, and not merely speculate about it by raising the *possibility* of an alternate, misguided interpretation. The rubric of "controversiality" encourages an overly casual approach that permits substituting mere allegations that a disclosure is misleading or unclear with doing

the hard work of assessing whether those allegations are true.[133]

7. A Common Problem: Exceptionalist Interpretations

Institutional actors cannot be exempt from every requirement with which they disagree within a complex, democratic society that protects the rights and interests of all of its members. When they choose to engage in market activities, the common interest in preserving consumers' health, safety and autonomy bears on what they do. When organizations choose to engage in practices that, in effect, suppress information or facilitate misunderstanding, their behavior runs at cross-purposes to the market's functioning. This problem, I have argued, plagues the last four interpretations of the "uncontroversial information" requirement (the controversial topics, contested relevance, contested facts, and clarity interpretations). From a free speech perspective, what matters for organizations is not that they agree with every regulatory rule that applies to them, including regulatory rules involving speech, but that they have sufficient breathing space in a substantial forum to articulate their own message in a way that may be understood as their own. That free speech interest is adequately satisfied by more robust protection of voluntary associations outside the market context and by limiting government speech regulations to requirements of factual statements and disclosures, since that limitation tracks the justification of governmental oversight and does not impose any forced orthodoxy of normative opinion or affirmation thereof. To exclude "controversial" facts from compelled disclosures on First Amendment grounds objectionably endorses a rather radical libertarian, bordering on anarchic, approach to government and a conflict- and issue-averse posture by government.

Ironically, such an exclusion is wrong-headed from a market libertarian standpoint, since the justificatory basis for markets and the putative conditions for their well-functioning depend upon market actors being fully informed and making autonomous choices. More important, it is wrong-headed from a civil libertarian standpoint. The First Amendment prizes a demarcated libertarianism about the mind, individual speech, and voluntary associations, but it is neither the thread that unravels collective government and regulation of the market, nor is it a demand that government insulate organizations from having to acknowledge inconvenient truths.

133. *See, e.g.*, *Masonry*, 394 F. Supp. at 1304 (citing no evidence of consumer confusion).

8. "Uncontroversial information" as Uncontroversially-characterized Information

This leaves the final category about controversial characterizations, about which there is more to be said on the First Amendment front. I take it that the posture of the regulated party is not that it objects to the information or to the demand that it supply that information, but rather objects to how that information is worded.[134] Its objection is that a particular way of putting the information may conflict with or obscure the organization's own message—a form of garbling. This issue did not arise in *Zauderer* or directly in *NIFLA* and, as noted earlier, is not really about the *information* as such, but rather to the disclosure's wording. Still, it poses an issue worth considering.

Suppose there were more than one way to convey information, as there usually is, and that alternative ways were equally effective at making the information salient and conveying it effectively to (potential) clients, consumers, and patients.[135] Mightn't an organization have a reasonable claim not to be forced to frame the fact in a way that undercuts its own message and to have a right to articulate that fact in its own way, assuming its own way is equally salient and conveys it equally effectively?

Put in the abstract, it's hard to resist this concern.[136] The objection does not, at its core, suffer from the frailties that dog many of the prior interpretations. Unlike the others, this objection does not implicitly challenge the authority of the government to determine the relevant facts and subject matters calling for regulation. This objection, in contrast with the others, responds to the features of the speech itself, rather than to the regulation that is implemented through speech. One can imagine a First Amendment doctrine that prevented enforcement of a compelled disclosure requirement specifying a particular script when the organization, instead, engaged in disclosure in its own voice and could demonstrate that its alternative was functionally equivalent in terms of information conveyed and absorbed by the audience.

When operationalized, however, difficulties could arise the

134. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2378 (2018). A related issue glancingly arose in *NIFLA*, with respect to the matter of how many languages the disclosure had to appear in. *Id.* Whether the statute actually required articulation in multiple languages seemed to require further factual inquiry. *Id.* at 2391–92 (Breyer, J., dissenting). In any case, that question bears on whether the compelled disclosure interferes with an organization's message, but the purported interference had to do more with bandwidth than with content. *See id.*

135. *See* Corbin, *supra* note 132, at 1330–31.

136. *See also* Eugene Volokh, *The Law of Compelled Speech*, 97 TEXAS L. REV. 355, 360 (2018).

administrability of this approach. One can imagine countless disputes about whether the substituted speech by the regulated party really is the functional equivalent of the required script. Substituting the term 'abortifacient' for 'birth control' may arguably make the relevant information less salient by adding what may seem like a more sensationalist, distracting element or by deceptively suggesting that a feature of the IUD is highly relevant to the point of the disclosure when it is not. (Taking more commercial examples, euphemistically substituting 'harvesting' for 'slaughter' and using print messages rather than graphic portrayals of health hazards makes the relevant facts less salient and communicates their contents less effectively.) These examples may seem like speakers' efforts to evade the regulation, but one can think of potential examples with a less evasive character. For instance, so-called informed consent speeches that abortion providers must deliver might mention "the mother," whereas a pro-choice provider might prefer "the pregnant patient."

Agencies like the FDA regularly issue guidelines about what sort of language to use to communicate simply and effectively to the public.[137] So, it isn't unimaginable that agencies could review the substituted language of regulated parties. On the other hand, were the environment to become rife with challenges and substitutes, it becomes more daunting to imagine how an accommodation of the sort just sketched could succeed. Because these are all cases in which the communication of the mission of an organization is at stake, it seems predictable that battles about compelled disclosures and functional equivalents would be fraught.

Looking ahead, one can foresee an impasse. There may be a legitimate First Amendment concern of organizations about being required to post or utter disclosures in their own voice but that are penned by state authors, in those cases when the disclosures use particular language that is fungible but that conflicts with the style or the message of the organization. Yet, operationalizing an accommodation scheme could become administratively and judicially daunting.

137. *See General and Cross-Cutting Topics Guidance Documents*, FDA, https://www.fda.gov/RegulatoryInformation/Guidances/ucm122044.htm (last visited Feb. 9, 2020).

IV. GOVERNMENT SPEECH, REDUX

A. Are Compelled Disclosures Governmental Speech?

Contemplating this difficulty returns us to an earlier puzzle about *NIFLA* and to an earlier solution the Court took to an earlier impasse in the compelled speech arena. The problem of controversial disclosures, as conceived in *NIFLA*, hinges on the framing that an organization is required to "speak," but, at the same time, it is using a state-provided script.[138] But it is unclear whether this is the correct conceptualization of these disclosures.[139] Why not characterize compelled disclosures involving state-provided scripts as, instead, requirements that organizations post or distribute *government speech* when they provide services?

Conceptualizing compelled speech as government speech was the technique the Court deployed in *Johanns* to circumvent the tension between *Glickman* and *United Foods*.[140] In 1997, *Glickman* held that compelled subsidies of generic advertising promoting stone fruit by a government-mandated agricultural committee did not violate the First Amendment rights of stone fruit growers.[141] Four years later, in 2001, *United Foods* held that compelled subsidies of generic advertising promoting mushrooms by a government-mandated agricultural committee did violate the First Amendment rights of fungi growers.[142] The purported difference did not reside in the special expressive interests of fungi growers, but in whether the advertising was part of a larger regulatory scheme.[143]

Whatever the merits of that distinction, the weight placed on it appeared too great for the Court to bear. Addressing a challenge to a similar set of

138. *See NIFLA*, 138 S. Ct. at 2371.

139. *See also* Carl Wiersum, *No Longer Business as Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 FOOD & DRUG L.J. 486, 530–52 (2018) (noting that the speech in *NIFLA* could have been construed as government speech).

140. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–62 (2005). See also the use of this designation in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009), to negotiate tricky issues about selection procedures for installing *permanent* private gifts to a traditional public forum.

141. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 477 (1997) (holding that compelled funding of generic advertising of a regulated industry was permissible because the mandatory participation was "a species of economic regulation" that contributed to goals of an overall statutory scheme).

142. United States v. United Foods, Inc. 533 U.S. 405, 412–13 (2001) (departing from *Glickman* because the mandatory funds were for the purpose of generic advertising for an otherwise unregulated industry).

143. *See id.* at 415.

compelled subsidies for generic beef advertising, the Court in 2005 reconsidered its approach and circumvented the First Amendment question by ruling that the advertising was government speech, and thus immune to First Amendment challenge.[144]

A similar maneuver characterized the Court's approach to a challenge to state decisions to refuse applications for specialized license plates where those decisions were viewpoint-discriminatory.[145] In *Walker v. Texas Division*, in a majority opinion joined by Justice Thomas (the author of the majority opinion in *NIFLA*), the Court ruled that the specialized license plates were government speech and thus immune to First Amendment challenge.[146] Given the similarities between license plates and compelled disclosures, it's worth exploring whether a similar analysis should govern these compelled disclosures that might allow the state to achieve its health, safety, and informational purposes without confronting the First Amendment conundrums associated with the manner of speech highlighted by the characterization interpretation.

The surface similarities are strong. Drivers are required to have license plates as a part of a regulatory scheme to ensure safety and accountability for engaging in an activity bearing significant social benefits and risks. License plates bear information such as the state of registration of the car but may also bear personal messages on them. The license plates must be publicly visible and are physically associated with the driver and a narrow circumference of the driver's activity. So, too, in cases like that presented in *NIFLA*, the disclosures were required as a condition of providing services, contained information on them, and were visibly associated with the place of business.[147]

The factors the Court applied to find that license plates were government speech also apply to (many) compelled disclosures that are scripted. First, as with license plates, compelled scripted disclosures posted at a place of service or business are forms of speech that have long been used to convey

144. *Johanns*, 544 U.S. at 560–61 (holding that even if the Secretary of Agriculture did not write the ad copy him or herself, the advertisements were government speech from "beginning to end" because they were directed by Congress and the Secretary).

145. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2253 (2015) (holding that license plates are government speech and not compelled private speech).

146. This was understandably surprising to many given *Wooley v. Maynard*, 430 U.S. 705 (1997). *Wooley* recognized a First Amendment right of an individual to cover up the portion of the New Hampshire license plate design that featured the state motto, "Live Free or Die," citing the compelled speech precedent from *Barnette*. *See Walker*, 135 S. Ct. at 2260 (Alito, J., dissenting).

147. *See* Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2369 (2018) (outlining the relevant California law).

governmental messages.[148] One need only think of requirements to post the closest fire escape, a restaurant's health and cleanliness ranking, OSHA standards, and minimum wage guarantees. Second, the state has direct control over the message's content—that just follows from its being scripted.[149] The trickiest factor has to do with whether observers identify the message with the state rather than with the compelled carrier.[150]

In some ways, that factor holds more strongly, or may easily be satisfied, in the case of compelled disclosures at the site of service provision than with license plates. After all, the compelled disclosures are more likely to be about true matters of state concern, in contrast with license plate messages such as "Rather Be Golfing!" Compelled disclosures are also more likely to complement one another, by contrast with messages that are in tension with each other, as with those plates that endorse competing athletic teams.[151] Further, compelled disclosures can be represented as originating from the state. They may be issued on state letterhead or printed with the state seal. They will have the same content in different places, and that regularity suggests the state and not the site is the author. The service provider can also frame the disclosure as emanating from the state, not the service provider, whereas such cues and elaboration are somewhat more difficult to achieve in the fleeting glimpse an observer has of a license plate.[152]

So, the *Walker* factors seem met in compelled disclosure cases like that confronted in *NIFLA*, where the state scripts the content of the disclosure. Regarding the disclosure as government speech would alleviate the First Amendment pressure posed by controversial characterizations of purely

148. *See, e.g.*, *Walker*, 135 S. Ct. at 2248.

149. *See, e.g.*, *id.* at 2249 ("Texas maintains direct control over the messages conveyed on its specialty plates.").

150. *See id.* at 2248 ("Texas license plate designs 'are often closely identified in the public mind with the [State].'" (alteration in original) (citation omitted)). Some empirical survey evidence suggests that the public is no less likely to perceive expression as government speech simply because the expression is generated by private parties. Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 80 (2017).

151. *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting).

152. Still, most observers know the regulatory context in which license plates are required. Further, drivers can make clear that the speech is not theirs by distancing themselves from the license plate's message through counter-speech in the form of bumper stickers or, even, as in *Wooley v. Maynard*, 430 U.S. 705, 715 (1997), to occlude aspects of the government speech that are not bound up with its regulatory ends. *See also* Greene, *supra* note 117, at 1491 (contending that the "misattribution" danger is in fact fairly easy to manage, given the ability of observers to understand contexts in which speech does not reflect the views of the "speaker").

factual material.[153] Although the service provider might not select that language as its own, the speech isn't the speech of the service provider, and as is routinely recited, governmental speech is not directly subject to First Amendment challenge on the grounds of viewpoint discrimination.[154]

Strangely, the question of whether to frame state-scripted disclosures as government speech was not confronted in the *NIFLA* opinion. Nor, oddly, was it addressed in a recent Ninth Circuit case in which the required disclosure identified the speech as that of the City of San Francisco: "Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."[155]

The issue was, however, taken up recently in *Masonry Building Owners of Oregon v. Wheeler* in a challenge to a state-scripted disclosure concerning the seismic hazards associated with unreinforced masonry.[156] That court declined to find the state-scripted disclosure government speech for two reasons.[157] First, whereas *Walker* and *Pleasant Valley* involved "private speech on government property," this sort of compelled disclosure involves state actors speaking on or through a private channel, so to speak.[158] Second, the compelled speech ordinance did "not provide for public funds to private

153. *See supra* Part III.C.8.

154. *See, e.g.*, *Walker*, 135 S. Ct. at 2246 (refusing "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals" (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991))); Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009) ("If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments."). Also, consider *Rumsfeld v. FAIR*, 547 U.S. 47, 70 (2006), which upheld the military's right to recruit on Yale's campus despite Yale's objection to its (controversial) message and practice at the time of excluding gay people. It arguably represents a "government speech" exception to the plurality decision of *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4, 20–21 (1986), which overturned a law requiring a private speaker to distribute another party's message. *See also* Volokh, *supra* note 136, at 357, 362, 371–77 (identifying the tension between the cases and identifying the factor that FAIR involves a government speaker as possibly determinative).

155. *See* Am. Beverage Ass'n v. City & Cty. of S.F., 916 F.3d 749, 753, 757–58 (9th Cir. 2019) (relying on *NIFLA* to overturn the denial of a preliminary injunction and finding a First Amendment challenge likely to win on the grounds that the compelled speech was unjustified and unduly burdensome).

156. 394 F. Supp. 3d 1279, 1293–96 (D. Or. 2019).

157. *Id.* at 1295.

158. *Id.*

entities to convey the government's message."[159]

These arguments are unpersuasive. It isn't evident why it matters *where* the speech occurs. It would be odd to think that speech is only government speech when it appears on government property. That certainly isn't true of individuals; my speech is my own even when I visit my neighbor or sit in a national park. The *Walker* factors do not single out location as a necessary criterion for speech to be governmental;[160] the license plates in question were on individuals' cars. Perhaps it is more likely that speech on governmental property will be associated with the government, but the connection is not exclusive; consumers, employees, and proprietors are accustomed to OSHA notices and restaurant health placards appearing at private workplaces. Such notices are a common way the government communicates with the public.

Neither does the source of funding seem critical. Putting aside the fact that the government injects resources into the enforcement of compelled disclosure requirements, it does not seem that it would make any difference whether the license plate scheme in Texas was fully funded by license fees paid by private applicants or not.[161]

B. Residual First Amendment Concerns

There are other First Amendment hazards to compelling a speaker to be the vehicle of the government's speech that merit attention.[162] First, there are the issues associated with the dignity of the speaker. Perhaps they are exacerbated when one must carry a governmental message on one's own property or when one must fund its printing and display. These issues seem, as argued above, more pressing in the case of individual speakers (and voluntary expressive associations) than in the case of organizations in their roles as service and good providers. In the latter case, the governmental interests are strong in ensuring the health, safety, and informed consent of their clients and the First Amendment objections against compelling a speaker to be a vehicle are diminished, at least so long as there is a nonarbitrary connection between the

159. *Id.*

160. *See id.* at 2247.

161. *Id.* at 2251 ("In this case, as in *Summum*, the 'government entity may exercise [its] freedom to express its views' even 'when it receives assistance from private sources for the purpose of delivering a government-controlled message.'" (alteration in original)).

162. See *supra* Part II.B. for a discussion of free speech values at stake with compelled speech, particularly for institutions and market agents.

government speech and the compelled speaker's market activities.[163]

Second, there are issues associated with ensuring that the regulated party's speech is not garbled or displaced in virtue of its carriage of the government's speech. As in *Zauderer,* with respect to a commercial, for-profit speaker, the speech interests of the nonprofit service provider seem protected so long as: it can distinguish its speech from the speech of the state (thereby protecting its own message from being garbled); the state speech is not so lengthy, prominent, or irrelevant so as to displace the regulated party's speech;[164] and the state only requires the disclosure of factual, nonnormative information that non-arbitrarily serves justified interests.[165] The latter requirement ensures both that the primary message of the speech is nonopinionated and that it is sufficiently limited in scope. That scope limitation may also help to ensure that the organization's speech is not eclipsed by the government speech, and its non-normative nature also mitigates the severity of any concerns about being treated as a vehicle for the government's ideological message.

Finally, even though government speech may itself express a viewpoint without raising First Amendment hackles, First Amendment concerns may arise if its selection criteria for who must carry the speech discriminate on illicit, viewpoint-based grounds.[166] Indeed, although Justice Kennedy's concurrence was not using a government speech lens, it did press allegations of viewpoint discrimination with respect to the selection criteria of the regulated parties.[167] Justice Breyer's dissent offered a persuasive rebuttal, connecting the identities of the regulated parties and their audience closely with the state interests in promulgating the speech.[168]

Whichever side of that dispute has the better of the latter argument, notice that what is at issue between the concurrence and the dissent has *nothing to do* with whether the compelled speech has controversial content in any of the senses that go beyond the meaning that merely underscores and reinforces

163. *See supra* Part II.B.

164. Am. Beverage Ass'n v. City & Cty. of S. F., 916 F.3d 749, 753, 757 (9th Cir. 2019) (finding that the City of San Francisco failed to show that a mandatory disclosure covering 20% of an advertisement would not drown out the advertiser's message).

165. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); *supra* Part III.A.

166. *See* Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2361 (2018).

167. *Id.* at 2379 (Kennedy, J., concurring).

168. *Id.* at 2387 (Breyer, J., dissenting).

"purely factual."[169] Indeed, the concerns about governmental speech garbling, drowning out, or displacing a speaker's message also have *nothing to do* with whether the compelled speech has controversial content or concerns a controversial matter.

V. CONCLUSION

The *NIFLA* decision is perplexing. It covertly reinterprets the requirement that compelled disclosures contain only "purely factual and uncontroversial information" in a way that bears little relationship to the meaning and motivations behind the standard articulated in *Zauderer*.[170] The failure to acknowledge this extension from a redundant standard to a true conjunctive represents a missed opportunity in at least two ways. First, by failing to provide a strong rationale for why "uncontroversial information" should operate as a distinct prong of the analysis in the case of requiring nonprofit service providers to follow a script, the Court lapsed into an implausible application of that prong.[171] It implicitly appeared to embrace the idea that the government cannot require service providers to acknowledge and inform patients and consumers of services and practices that some may find controversial.[172] This is an untenable and unwieldy idea, one that is in fundamental tension with the necessities of governmental regulation in a politically diverse environment.

Second, the Court failed to provide substantive guidance about what counts as "controversial" and what qualifies as "uncontroversial information."[173] As the seven distinct interpretations analyzed in this Article testify, many disparate notions may fall under that label that should be distinguished.[174] Most factual, but "controversial" disclosures should not trigger First Amendment scrutiny at all, at least so long as the First Amendment is not interpreted as a right to exemption from general laws with which one disagrees.

Further, the tangles of administrability posed by those circumstances in which a genuine First Amendment concern may arise about disfavored or contested wording and style could prove difficult to unravel. Rather than rushing

169. *Id.* at 2379 (Breyer, J., dissenting).
170. *See supra* Part II.; *Zauderer,* 471 U.S. at 626.
171. *See supra* Part III.C.1.
172. *See supra* Part III.C.3.
173. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2361 (2018).
174. *See supra* Part III.

to confront them, the Court might take a page from its recent past and avoid the constitutional questions by taking the highly reasonable position that compelled, government-authored disclosures in the service of health, safety, or informed decision-making constitute government speech.[175] In which case, there may be little reason to forge far beyond the descriptive interpretation of *Zauderer*—that "purely factual and uncontroversial information" refers to purely factual speech relating well-established facts.[176] Under this analysis, any remaining free speech concerns of service providers who are compelled to post government-written disclosures can be met by requiring that the state speech be clearly labeled in ways that allow recipients to identify its source, by ensuring that there is adequate room for the preferred speech of service providers outside of the service provision context, and by permitting service providers to distance themselves from and criticize the state speech in question, so long as the compelled disclosures receive sufficient prominence to communicate the government's message.

Thus, whether compelled disclosures involve *information* that is controversial in any meaningful sense should play no distinctive role in the First Amendment analysis.[177] Like other controversies, the dispute over what counts as "uncontroversial information" will only prove a time-consuming distraction that detracts from resolving real issues about how to protect consumers and patients while allowing adequate space for institutional actors to express their own nondeceptive messages.

175. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
176. *See id.*
177. *See* Part III.C.

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