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Climate Change Disclosures After NIFLA

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I. INTRODUCTION

Climate change[1] represents one of the defining global problems of the twenty-first century.[2] The effects of warming have led to mass displacement, more extreme weather events, and degradation of natural habitat.[3] There is significant discord on the proper means to address this global issue: whether it is the role of government alone or if industry must assume responsibility for its role in climate change.[4] Even within these different camps, there is dispute about the proper means to address such an expansive issue.[5] One method governments have in their repertoire to combat climate change is disclosure requirements related to energy consumption or carbon emissions. Disclosures compel the regulated party to provide information to consumers and the public. The goal is to provide consumers with more information so that they can make an informed choice and drive competition.

In the context of climate change, these disclosures can take many forms. In New York City, as of May 2020, many buildings are required to disclose their energy consumption and post an energy-efficiency

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[1] For the purposes of this comment, I will define "climate change" as the effects of anthropogenic emission of greenhouse gases, or human caused warming of the planet through the discharge of carbon, methane, and other pollutants.

[2] *Global Issues: Climate Change*, UNITED NATIONS, https://www.un.org/en/sections/issues-depth/climate-change/ [https://perma.cc/Y5LR-F68G] (last visited Sept. 3, 2020) ("Climate Change is the defining issue of our time and we are at a defining moment.").

[3] *Climate Impacts*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/climate/impacts [https://perma.cc/CUE8-EZUT] (last visited Sept. 3, 2020).

[4] *See, e.g.*, *Should Fossil-Fuel Companies Bear Responsibility for the Damage Their Products Do to the Environment?*, WALL ST. J. (Nov. 19, 2019), https://www.wsj.com/articles/should-fossil-fuel-companies-bear-responsibility-for-the-damage-their-products-do-to-the-environment-11574190219 [https://perma.cc/SSE3-3968].

[5] *See* Saabira Chaudhuri, *Companies Say They Want to Save the Planet—but They Can't Agree How*, WALL ST. J. (Dec. 10, 2019), https://www.wsj.com/articles/companies-say-they-want-to-save-the-planetbut-they-cant-agree-how-11575973800 [perma.cc/VC5C-4ZYE]; Lisa Friedman, *On Climate Change, Biden Has a Record and a Plan. Young Activists Want More.*, WALL ST. J. (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/climate%20/climate-change-biden.html%20 [https://perma.cc/D4SH-F3Y6].

rating in a conspicuous place to inform the public.[6] The logic behind this plan is to increase competition between buildings to decrease their energy consumption and promote public pressure to stimulate behavioral change through circulation of greater information. Japan has attempted a similar tactic by requiring food packaging to carry a carbon footprint label.[7] In the same vein, the Japanese food packaging disclosure requirement promotes more informed choices from consumers, who may value a like product higher if it required less energy to manufacture. While disclosures are not the only method for governments to address climate change, they can be successful while effectuating minimum intrusion on regulated parties by raising collective consciousness and using the market to drive better behavior from regulated industries.

The government's ability to force disclosures from private parties is not unlimited. In the United States, the First Amendment can be a barrier to implementing a climate change disclosure requirement. The First Amendment cabins government efforts to restrict or compel speech.[8] However, its reach is not absolute. There are certain instances where the government has the ability to regulate speech or compel a factual disclosure. One instance occurs when there is "dissemination of commercial speech that is false, deceptive, or misleading."[9] Under the standard created by *Zauderer v. Office of Disciplinary Counsel*,[10] government regulation of commercial speech in the form of compelled disclosure is appropriate when (1) there is a substantial state interest to which the regulation is reasonably related, (2) the regulation addresses deception, (3) the information compelled is "factual and uncontroversial," and (4) the regulation is not unduly burdensome. This standard has come to be known as the *Zauderer* test. The *Zauderer* test has morphed over time,[11] and has been used to both invalidate and to approve of government attempts at regulating commercial speech.[12]

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[6] Devin Gannon, *Starting Next Year, Big NYC Buildings Will Display Letter Grades Based on Energy Efficiency*, 6SQFT (Nov. 21, 2019), https://www.6sqft.com/starting-next-year-big-nyc-buildings-will-display-letter-grades-based-on-energy-efficiency/ [https://perma.cc/354V-T67P].

[7] Justin McCurry, *Japan to Launch Carbon Footprint Labelling Scheme*, GUARDIAN (Aug. 20, 2008), https://www.theguardian.com/environment/2008/aug/20/carbonfootprints.carbonemissions [https://perma.cc/QES8-EPFR].

[8] U.S. Const. amend. I.

[9] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).

[10] Id.

[11] *See generally* Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972 (2017) (discussing how Zauderer's scope and strictness have changed over time).

[12] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 849 (9th Cir. 2019) (providing an example of a disclosure that was upheld because it properly addressed a public health concern); Entm't Software v. Blagojevich, 469 F.3d 641 (7th Cir. 2006) (providing an example of a disclosure that was invalidated as not rationally related to the harm).

Compelled disclosure jurisprudence underwent "a profound shift"[13] in 2018, when the Supreme Court passed down *National Institute of Family & Life Advocates v. Becerra (NIFLA)*.[14] The Court's ruling in *NIFLA* specifically changed the landscape around the *Zauderer* prong of "factual and uncontroversial" by holding that disclosures related to abortion were controversial.[15] Whether the prong now excludes all political controversies, ideological or scientific disagreements, or any subject with opposing viewpoints is now up for debate.[16]

The impact of the changes in compelled disclosure standards and the scope of *NIFLA* could have effects on federal, state, and local governments' ability to inform the public about the threat associated with greenhouse gas emissions and climate change.[17] Like abortion, climate change is a much-discussed, much-debated issue, that could colloquially be considered controversial. Were the Court to take this position, it would limit the government's ability to create regulations addressing the effects of climate change.

In Part II, this Comment will address the history of compelled disclosure jurisprudence in order to understand the case law that persists after *NIFLA* and the changes to the *Zauderer* standard as a result of *NIFLA*, including what "factual and uncontroversial" means today. Part III will distinguish climate change from abortion in order to set any climate change disclosure apart from the disclosures in *NIFLA*. Part IV will identify a pathway for a government regulation compelling disclosure to overcome the new higher burden imposed by *NIFLA* with regard to greenhouse gas emissions and climate change. Part IV will take a step-by-step approach through the *Zauderer* test and will argue that a climate change disclosure requirement should easily survive challenges under the first and second *Zauderer* prong under settled case law. This analysis will utilize the New York and Japanese disclosures, referenced above, as examples against which to test potential environmental disclosures that might be enacted in the United States, consistent with First Amendment disclosure law. Further, Part IV will argue that through a focus on scientific certainty, and the distinction from abortion, climate change disclosure regulations can survive the third and fourth prongs of *Zauderer*, which have shifted since the *NIFLA*

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[13] *The Supreme Court 2017 Term—Leading Case, First Amendment—Freedom of Speech—Compelled Speech*—National Institute of Family & Life Advocates v. Becerra, 132 HARV. L. REV. 347, 351 (2018).

[14] 138 S. Ct. 2361 (2018).

[15] *Id.* at 2372.

[16] *See* Lauren Fowler, *The "Uncontroversial" Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651, 1676 (2019).

[17] *See* Lauren Sherman, *A Warning for Environmental Warnings*, 27 N.Y.U. ENVTL. L. J. 240, 294–95 (2019).

decision. Government entities must distinguish climate change from abortion and emphasize the scientific certainty and "uncontroversiality" of the issue. This Comment will ultimately argue that the government *can* overcome *NIFLA*'s high bar by reframing the argument as a debate about means to combat the ends, rather than the existence of climate change.

II. THE HISTORY OF COMPELLED DISCLOSURE, *ZAUDERER,* AND *NIFLA*

A. Recognizing Commercial Speech

The Supreme Court first recognized a distinct category of speech, "commercial speech," in 1942. However, at the time the Court found it ineligible for First Amendment protection.[18] It took another three decades for the Court to afford commercial speech any level of constitutional protection.[19] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[20] the Supreme Court defined commercial speech as "speech which does 'no more than propose a commercial transaction.'"[21] In striking down the law in that case, the Court pointed to the fact that suppression of commercial information hurts vulnerable populations the most.[22] The Court also recognized the First Amendment ideal of a free flow of information that improves and benefits the market.[23] While the court found the statute in question unlawful, it held that the state could regulate advertising but could not create an outright prohibition on the advertisements.[24]

In the wake of *Virginia Pharmacy Board*, the Supreme Court took up the regulation of commercial speech again in 1980 in *Central Hudson Gas v. Public Service Commission of New York*.[25] In *Central Hudson*, a utility company challenged the state Public Service Commission's prohibition on promotional advertising by electrical utilities.[26] The Supreme Court found the company's advertisements to be commercial

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[18] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no such restraint as respects purely commercial speech.").

[19] *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 58 (1999).

[20] 425 U.S. 748 (1976).

[21] *Id.* at 762 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

[22] *Id.* ("Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged.").

[23] *Id.* at 765.

[24] *Id.* at 771.

[25] 447 U.S. 557 (1980).

[26] *Id.* at 559–60.

speech[27] and, in the process, identified the value of such speech for informing the listener and for contributing to larger societal interests.[28] At the same time, the Court held that the First Amendment extends less protection to commercial speech than to other constitutionally guaranteed expression, a distinction the Court referred to as being based on common sense.[29] In articulating the *Central Hudson* test, the Court stated that "[f]irst, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[30] The Court noted that if the regulation only indirectly advanced the state interest, it would not survive. Also, if the regulatory technique employed exceeded the interest, the regulation also would not survive.[31] The *Central Hudson* test has come to represent an intermediate scrutiny test for the regulation of commercial speech.[32] Over time, the *Central Hudson* test has been cabined to apply to cases where the government prohibits or restricts commercial speech. The case to follow, *Zauderer v. Office of Disciplinary Counsel*,[33] has been applied to compelled commercial speech.

B. *Zauderer* & Lower Constitutional Scrutiny

In contrast to the regulation in *Central Hudson*, in *Zauderer*, the Supreme Court was presented with a government attempt to compel information from a commercial entity.[34] While the Court found in *Central Hudson* that the government needed to pass a heightened level of scrutiny in order to regulate factual communications by commercial entities,[35] *Zauderer* dealt with the state's interest in supplementing information in order to avoid misleading or potentially deceptive communication.[36]

The controversy in *Zauderer* related to several attorney advertisements in Ohio, which violated the existing professional guidelines in

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[27] *Id.* at 560 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience").

[28] *Id.* at 560.

[29] *Id.* at 562–63.

[30] *Id.* at 564.

[31] *Id.* at 565.

[32] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 842 (9th Cir. 2019).

[33] 471 U.S. 626 (1985).

[34] *Id.* at 629.

[35] *Cent. Hudson*, 447 U.S. at 564.

[36] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637–38 (1985).

the state.[37] The Court held the prohibition on factual advertisements unconstitutional under the framework of *Central Hudson* and cited the benefits to the public from the free flow of information.[38] However, the Court also found that the other advertisements in question were potentially deceptive and that the state had an interest in regulating deceptive advertising.[39] The Court went on to lay out a test that required a lower level of scrutiny than *Central Hudson*.[40] It justified this lower level of scrutiny as follows:

> [T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides[;] appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [W]e have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[41]

The Court went on to add that the disclosure requirement could not be "unduly burdensome" so that it chilled protected commercial speech.[42] Additionally, the disclosure requirement only had to be "reasonably related to the State's interest in preventing deception of consumers."[43] In the process, the Court recognized that disclosures are a less intrusive means to achieve the state's interest and thus required a lower level of scrutiny.[44] At the same time, even under this lower standard, the state could still overreach and chill constitutionally protected commercial speech.[45]

Out of *Zauderer* came the test for compelled disclosure that persists today. That test can be summarized in four prongs. To survive a First Amendment challenge, a disclosure must (1) address a substantial state

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[37] *Id.* at 631.

[38] *Id.* ("Appellant also put on the stand two of the women who had responded to his advertisements, both of whom testified that they would not have learned of their legal claims had it not been for appellant's advertisement.").

[39] *Id.* at 650.

[40] *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (referring to Zauderer as a standard requiring "less exacting scrutiny").

[41] *Zauderer*, 471 U.S. at 651 (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)) (internal citations omitted).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 650.

[45] *Id.* at 651.

interest, which the regulation is reasonably related to, (2) address consumer deception, (3) be factual and uncontroversial and (4) not be unduly burdensome.[46] Courts have debated, redefined, or limited the scope of these requirements over the years, but from *Zauderer* came a stable body of law interpreted by the circuit courts to give the government some latitude in requiring factual disclosures to benefit consumers and the general society.

C. Interpreting *Zauderer*

Zauderer stood as the definitive statement on compelled disclosure up until *NIFLA v. Becerra*.[47] While *NIFLA* has changed the landscape, it is still informative to understand the case law built up in the circuit courts around *Zauderer*, much of which still stands as good law after *NIFLA*.[48] This section will continue to utilize the New York energy-efficiency score and the Japanese food-labelling examples to help guide the analysis.

1. Prong one: substantial state interest

The first *Zauderer* prong requires that a compelled disclosure regulation address a substantial state interest.[49] Stated differently, in order for the government to restrict constitutionally protected speech, the state must have a substantial interest in the policy it seeks to advance through regulation. Dating back to *Virginia Pharmacy Board*, courts have recognized the goal of combatting deception as a valid state interest in regulating and compelling speech.[50] In *Zauderer*, that interest was "preventing deception of consumers."[51] One potential avenue for success in any government compelled climate change disclosure would be to argue that disclosures are necessary to combat the well-documented practice of deceptive advertising and misinformation campaigns by fossil fuel companies.[52]

Another set of well-established state interests that justify compelled disclosure in the eyes of the courts is protection of public health

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[46] *Id.*

[47] 138 S. Ct. 2361 (2018).

[48] Fowler, *supra* note 16, at 1689–91 (2019).

[49] *Zauderer*, 471 U.S. at 650.

[50] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976); *see also* Ibanez v. Fla. Dep't of Bus. and Pro. Reg., Bd. of Accountancy, 512 U.S. 136, 141 (1994); *In re* R.M.J., 455 U.S. 191, 200 (1982); Dwyer v. Cappell, 762 F.3d 275, 281 (3rd Cir. 2014).

[51] *Zauderer*, 471 U.S. at 651.

[52] *See* Miriam A. Cherry & Judd F. Sneirson, Chevron*, Greenwashing, and the Myth of "Green Oil Companies"*, 3 WASH. & LEE J. ENERGY, CLIMATE & ENV'T. 133 (2012).

and safety.[53] Courts have used this broad category to validate disclosures related to mercury poisoning in light bulbs[54] and the risk of radiation exposure from cellphones.[55] A government entity could rest justification for climate change disclosure on the substantial health and safety concerns associated with the impacts of climate change.[56] These effects include "increased respiratory and cardiovascular disease, injuries and premature deaths related to extreme weather events, changes in the prevalence and geographical distribution of food-and water-borne illnesses and other infectious diseases, and threats to mental health."[57]

When courts have struck down disclosures based on the first *Zauderer* prong, it has often been because the state interest cited and the harm addressed were not reasonably related. Examples of voided disclosures include a label related to milk from cows injected with growth hormones (no scientific evidence supported harm caused by the milk) [58] and a disclosure of conflict diamonds harvested from the Democratic Republic of the Congo (unclear link between diamond disclosure and resolving civil strife in Congo).[59] In both cases, the courts rejected any link between the disclosure and the harm it attempted to remedy. To survive a First Amendment challenge, any climate change disclosure will have to overcome this hurdle.

For both climate-related disclosures previously mentioned—the New York building score, where each building's energy consumption is posted at the entrance and the Japanese labels, where the carbon footprint in the supply chain of the product is listed—the government could argue the harm is excessive energy use, which translates to greenhouse gas emissions and exacerbates issues associated with climate change. This would fit the disclosure comfortably in the health and safety context, which is a valid state interest.

The takeaway from the "substantial state interest" prong of *Zauderer* is that a regulation is more likely to succeed when it addresses deception or a health-and-safety concern affecting consumers. That harm must be fully realized and not be merely "speculation or conjecture."[60] Additionally, a state regulation must reasonably connect the regulation to the interest it purports to advance. Thus, climate change

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[53] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 844 (9th Cir. 2019); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

[54] *Sorrell*, 272 F.3d at 115.

[55] *CTIA*, 928 F.3d at 844.

[56] *Climate Effects on Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 2019), https://www.cdc.gov/climateandhealth/effects/default.htm [https://perma.cc/ZR99-QALN].

[57] *Id.*

[58] Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 73 (2d Cir. 1996).

[59] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 525–27 (D.C. Cir. 2015).

[60] *Edenfield v. Fane*, 507 U.S. 761, 770 (1994).

disclosures designed to address health and safety through reduced emissions and energy consumption will likely succeed on this prong.

2. Prong two: addressing deception

The second prong of the *Zauderer* test asks whether the regulated behavior is false, deceptive, or misleading.[61] In the event that the regulated speech is not found to be misleading, false, or deceptive, the analysis shifts to *Central Hudson* and intermediate scrutiny applies. At that point, the government is regulating truthful content.[62] This distinction was clear when the opinion in *Zauderer* was written, but the interpretation of the *Zauderer* standard and the line between it and *Central Hudson* has changed.[63]

While *Zauderer* initially covered only deception, circuit courts have expanded this prong to reach a broader set of behavior that includes potentially misleading disclosures, or disclosures that serve a public interest in providing information. In *Discount Tobacco City & Lottery v. United States*,[64] a tobacco industry trade group challenged a disclosure requirement on cigarette packs.[65] The Sixth Circuit noted that even "potentially misleading"[66] speech regulation would fall under *Zauderer* rather than *Central Hudson*. The Second Circuit went a step further in *National Electrical Manufacturers Ass'n v. Sorrell*,[67] where plaintiffs challenged a mercury-poisoning disclosure requirement.[68] The court rejected the requirement to show deception to conduct the *Zauderer* analysis, although it admitted that the disclosure in question was not motivated by the need to dispel deception but rather to "better inform consumers about the products they purchase."[69]

Sorrell was decided in 2001 and, in wake of the move by the Second Circuit, other circuit courts followed suit.[70] The D.C. Circuit in *American Meat Institute v. USDA*[71] held, similarly to the Second Circuit, that "*Zauderer* in fact does reach beyond problems of deception."[72] The Ninth Circuit held the same in *CTIA–The Wireless Ass'n v. City of Berkeley*,

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

[62] *Id.* at 646.

[63] *See* Am. Meat Inst. v. U.S. Dep't of Agriculture, 760 F.3d 18, 22 (D.C. Cir. 2014).

[64] 674 F.3d 509 (6th Cir. 2012).

[65] *Id.* at 524.

[66] *Id.*

[67] 272 F.3d 104 (2d Cir. 2001).

[68] *Id.* at 107.

[69] *Id.* at 115.

[70] *See CTIA*, 928 F.3d at 842; *Am. Meat*, 760 F.3d at 22.

[71] *Am. Meat*, 760 F.3d 18 (D.C. Cir. 2014).

[72] *Id.* at 20.

noting that "[u]nder *Zauderer* as we interpret it today, the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is reasonably related to a substantial government interest."[73] Any case resolving a dispute over climate change disclosure would likely survive the second *Zauderer* prong, particularly because of the recent expansion beyond deception. As the Ninth Circuit held, the government must emphasize the reasonable relation of the disclosure to the interests in public health and safety associated with climate change.[74]

Due to the shift in scope of *Zauderer* away from deception toward a more comprehensive look at compelled speech, courts have also reinterpreted *Central Hudson* to cover cases where speech was restricted.[75] The *Sorrell* Court identified a binary decision between application of *Central Hudson* and *Zauderer*.[76] The court held that *Zauderer* controls cases of compelled disclosure while *Central Hudson* governs cases of restrictions or prohibitions on speech.[77] The Second Circuit configuration was echoed by the D.C. Circuit in *American Meat Institute v. FDA*[78] and the Ninth Circuit in *American Beverage v. City of San Francisco*.[79]

The dispute over whether *Central Hudson* or *Zauderer* governs is a battleground of litigation. It is often the plaintiff who argues that *Central Hudson* controls, thus compelling an intermediate scrutiny analysis, while the government entity argues for *Zauderer* and its looser standard.[80]

Climate change disputes are no exception. There is no Supreme Court precedent declaring that *Zauderer* or *Central Hudson* applies. This dispute would ultimately relate to how the deciding court views the second prong of *Zauderer*, whether the disclosure address deception. If, as the test was originally designed, the lower standard is only called for when the government is regulating deception, the Court may be more likely to analyze a disclosure law under *Central Hudson*. If the Court takes a more expansive view of *Zauderer* similar to what the D.C., Second and Ninth Circuits have adopted, the government will have more success in arguing for the lower *Zauderer* standard.

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[73] *CTIA*, 928 F.3d at 842.

[74] *Id.*

[75] *See Am. Meat*, 760 F.3d at 22.

[76] Nat'l Electrical Mfr.'s Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (stating that *Zauderer* provides the test for compelled commercial speech and *Central Hudson* provides the test for restricted commercial speech).

[77] *Id.*

[78] *Am. Meat*, 760 F.3d at 22.

[79] 916 F.3d 749, 755 (9th Cir. 2019).

[80] *See id.* at 755; Dwyer v. Cappell, 762 F.3d 275, 280 (3rd Cir. 2014); *Am. Meat*, 760 F.3d at 22.

3. Prong three: factual and uncontroversial

The third prong of the *Zauderer* test asks whether the government-required disclosure is "factual and uncontroversial."[81] The Court explained in the context of its body of decisions on the First Amendment that "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[82] Circuit court interpretations have shed light on what the *Zauderer* decision may have meant by the factual and uncontroversial prong. While these interpretations have largely been superseded and controverted by the holding of *NIFLA*,[83] they still provide color to the new questions that have emerged after *NIFLA*.

Courts and legal scholars have debated "factual and uncontroversial" and come to a number of different conclusions as to the meaning of the phrase. In *American Meat,*[84] the D.C. Circuit treated "factual" and "uncontroversial" as separate requirements under *Zauderer*.[85] The D.C. Circuit took for granted that country-of-origin labelling was factual.[86] The court also found that the labelling requirement was not controversial.[87] It explained, "[W]e also do not understand country-of-origin labelling to be controversial in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy."[88] Interestingly, current Supreme Court Justice Kavanaugh wrote a concurrence in *American Meat* which could portend future compelled disclosure cases at the highest Court. Then-Judge Kavanaugh identified the confusion in the "uncontroversial" prong at the time, writing that it "may be difficult in some compelled commercial speech cases in part because it is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial."[89] Rather than resolve the difficult question, then-Judge Kavanaugh found the disclosure in question "straightforward, evenhanded."[90]

Other circuit courts have taken a range of approaches to the third *Zauderer* prong. At one time, the Sixth Circuit did not include the

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

[82] *Id.*

[83] NIFLA v. Becerra, 138 S. Ct. 2361 (2018).

[84] *Am. Meat*, 760 F.3d at 18.

[85] *Id.* at 27.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 34 (Kavanaugh, J., concurring).

[90] *Id.*

factual-and-uncontroversial prong in its *Zauderer* analysis,[91] while the Seventh Circuit, prior to *NIFLA*, treated the prongs as one combined factor.[92]

Legal scholars have proposed several different readings of "uncontroversial" in this context, both before and after *NIFLA*.[93] One reading is that "factual and uncontroversial" refers simply to accurate, undisputed factual information.[94] Even within this interpretation, scholars have varying opinions as to the amount of disagreement allowed that still qualifies within the threshold of "accurate"—whether that is any disagreement, reasonable disagreement, or a completely unverified scientific claim.[95] Another interpretation seemingly supported by *NIFLA* and *Zauderer* requires both factual accuracy and that the disclosure not "convey ideology."[96] There is enough uncertainty in *NIFLA* and *Zauderer* that either of these interpretations, and their various sub-readings, could be possible.

The factual-and-uncontroversial inquiry will be critical to the success of any climate-change disclosure. If "factual and uncontroversial" refers to accuracy and consensus, a climate-change disclosure will be far more likely to succeed; if, however, "factual and uncontroversial" means a compelled disclosure that does not convey ideology, there will be a harder path to success. At its root, much of the debate or dialogue around climate change today is based around responses to the problem, not the existence of the problem in the first place.[97]

4. Prong four: unduly burdensome

The fourth prong of the *Zauderer* test asks whether the compelled disclosure is "unjustified or unduly burdensome" in such a way that it would chill protected commercial speech.[98]

Disclosure is often considered the least intrusive form of government compelled speech and is thus more likely to survive a First Amendment challenge.[99] In *Discount Tobacco City & Lottery v. United*

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[91] Discount Tobacco City & Lottery v. United States, 674 F.3d 509, 559 n.8. (6th Cir. 2012).

[92] Entm't Software v. Blagojevich, 469 F.3d 641, 652–53 (7th Cir. 2006).

[93] *See* Fowler, *supra* note 16, at 1674.

[94] *Id.* at 1676.

[95] *Id.*

[96] *Id.*

[97] John Schwartz, *Fossil Fuels on Trial: New York's Lawsuit Against Exxon Begins*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/climate/new-york-lawsuit-exxon.html [https://perma.cc/BJH7-GDQ4] (In ongoing litigation, Exxon's lead attorney has asserted the company "has long acknowledged that climate change is real").

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

[99] *See id.* at 650 ("[D]isclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech. . . .").

States, the Sixth Circuit cited the fact that, even with a disclosure, the company can still make "direct comments on public issues."[100] This idea fits with the First Amendment values of the marketplace of ideas and the free flow of information. It is the government's burden to prove that a compelled disclosure is justified and not overly burdensome to the regulated party.[101]

When determining whether a disclosure is unduly burdensome, courts look to the magnitude of the disclosure compared to the content it is regulating, as well as the source of the disclosure, and the viewpoint it expresses.[102] Courts have previously struck down disclosures that required an interest group to convey ideas "expressly contrary to their views,"[103] disclosures where the government had not justified the size or scope of the disclosure,[104] and disclosures with sets of facts that indicated there were other means to accomplish the government's desired outcome without compelling speech.[105]

For a climate change disclosure to succeed, the government entity must be able to demonstrate the public benefit of the disclosed information. The disclosures suggested in Part I—the requirement that New York City skyscrapers post energy-efficiency scores in a conspicuous place[106] and the Japanese requirement that the carbon footprint of food production be posted on the packaging[107]—both benefit the public by providing it with additional information. In theory, the market functions better when consumers have more information, and producers whose process is energy intensive would lose market share or be forced to modify their supply chain.

D. *NIFLA*: A Sea Change in Compelled Disclosure

The Supreme Court addressed compelled disclosures head-on during the 2018 Term in *NIFLA v. Becerra*.[108] In *NIFLA*, a group of anti-abortion groups, including crisis pregnancy centers,[109] challenged a

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[100] Discount Tobacco City & Lottery v. United States, 674 F.3d 509, 559 n.8. (6th Cir. 2012).

[101] *See* Am. Beverage Ass'n v. City of San Francisco, 916 F.3d 749, 757 (9th Cir. 2018).

[102] *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2377 (2018).

[103] Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 71 (2d Cir. 1996).

[104] *See Am. Beverage*, 916 F.3d at 757; Public Citizen v. La. Attorney Disciplinary Bd., 632 F.3d 212, 229 (5th Cir. 2011).

[105] Entm't Software v. Blagojevich, 469 F.3d 641, 652–53 (7th Cir. 2006).

[106] *See* Gannon, *supra* note 6.

[107] *See* McCurry, *supra* note 7.

[108] 138 S. Ct. 2361 (2018).

[109] *See* WATTERS ET AL., PUB. LAW RES. INST., PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 4 (2011). Crisis Pregnancy Centers 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." *Id.*

California disclosure requirement[110] that mandated the disclosure of available public programs providing comprehensive medical services.[111] The law distinguished between licensed[112] and unlicensed facilities,[113] and laid out different required disclosures for each. The groups challenged the laws as an infringement on their First Amendment rights. Both the district court and the Ninth Circuit denied the plaintiffs a preliminary injunction under the existing *Zauderer* standard.[114] The Supreme Court granted certiorari and reversed the Ninth Circuit on the notice requirements for both the licensed and unlicensed facilities.[115]

The Court, in a majority opinion written by Justice Thomas, held the disclosure requirement for the licensed facilities presumptively unconstitutional as a content-based speech regulation.[116] In this case, the Court determined that the requirement that crisis pregnancy centers promote state-provided abortion services regulated the content of pregnancy centers' speech.[117] The Court rejected the Ninth Circuit's formulation of a category of speech called "professional speech" and applied strict scrutiny to the licensed-facility disclosure.[118]

While the Court found that *Zauderer* did not apply, it noted that even if it had, the California licensed-facility disclosure requirement would fail on two prongs.[119] First, "the notice in no way relates to the services that licensed clinics provide."[120] This fits into the first prong of *Zauderer:* whether there is a substantial state interest reasonably related to the regulation. Secondly, and crucially for future compelled disclosure cases, the Court weighed in on the factual-and-controversial prong of *Zauderer*. The Court found that the disclosure "requires these clinics to disclose information about *state* sponsored services—including

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[110] Cal. Health & Safety Code Ann. § 123470 et seq. (West 2020). The requirement comes from the FACT Act—the stated purpose of which was "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." NIFLA v. Becerra, 138 S. Ct. 2361, 2369 (2018).

[111] *NIFLA*, 138 S. Ct. at 2368.

[112] *See id.* at 2369. The facilities had to disseminate a government-drafted notice that read: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Id.*

[113] *See id.* Unlicensed facilities had to disseminate a government drafted notice on site that read: "[T]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.*

[114] *Id.* at 2370.

[115] *Id.*

[116] *Id.* at 2371.

[117] *Id.*

[118] *Id.* at 2371–72.

[119] *Id.* at 2372.

[120] *NIFLA*, 138 S. Ct. at 2372.

abortion, anything but an 'uncontroversial' topic. Accordingly, *Zauderer* has no application here."[121]

While it may seem obvious that abortion is controversial, the disclosure in *NIFLA* is now a guidepost against which future disclosures will be measured. Abortion could be controversial for a number of different reasons, and the lack of specificity at which the Court addressed the issue has left the meaning of "uncontroversial" vague. Simply put, the holding in *NIFLA* provides no direction on the future of how "uncontroversial" will be interpreted going forward, and under which understanding of the word the Court found abortion to be "uncontroversial."

The *NIFLA* Court also analyzed the unlicensed-facility disclosure under *Zauderer*, but its analysis differed from that of the lower courts.[122] The state bore the burden of showing that the disclosure requirement was narrowly tailored to its interest so as not to chill protected speech.[123] The Supreme Court found the state did not meet its burden.[124] Not only was the statute not narrowly tailored, but the Court found that the state's interest was purely hypothetical.[125] The Court noted that the state justification was ensuring that "pregnant women in California know when they are getting medical care from licensed professionals,"[126] but also that California already made it a crime for unlicensed facilities to practice medicine.[127] This spoke to the fact that the state had other means to police their interest and that the disclosure was superfluous.

While the Supreme Court upended compelled disclosure law in *NIFLA*, particularly the factual-and-uncontroversial prong of *Zauderer*, the Court attempted to reassure lower courts and the public that the prior fifty years of commercial speech case law was not lost. It wrote, "[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[128] This dicta within *NIFLA* provides hope of stability for many longstanding disclosures, as well as the possibility that future government efforts to compel disclosure, including efforts to curb climate change, will be upheld.

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[121] *Id.*
[122] *Id.* at 2377.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 2376.

A four-justice dissent written by Justice Breyer challenged the majority on virtually every ground. Justice Breyer questioned how the issues at stake were not related to health and safety, as the majority contended.[129] It is worth noting that Justice Breyer also left open a window to narrow *NIFLA* to the subject of abortion, calling the issue "special."[130] Finally, Justice Breyer defined the scope of the disclosure differently than the majority, shifting away from abortion to a larger critique: "[A]bortion 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."[131] Breyer also critiqued the majority for its hypocritical approach to disclosure—where information about fetal heartbeats was allowed previously[132]—but information about health and resources available to patients was disallowed in the case before the Court.[133]

E. How *NIFLA* Changes the Analysis

NIFLA has yet to be widely interpreted by most lower courts. Since *NIFLA*, however, the Ninth Circuit has considered the constitutionality of compelled disclosure.[134] In *CTIA–The Wireless Ass'n v. City of Berkeley*, the Ninth Circuit stressed a reading of *NIFLA* that brought the meaning of "factual and uncontroversial" to the forefront of the court's analysis.[135] The court noted that "*NIFLA* thus stands for the proposition that the *Zauderer* standard applies only if the compelled disclosure involves 'purely factual and uncontroversial' information."[136] The court went on to explain that it did "not read the Court [in *NIFLA*] as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason, controversial."[137] For the Ninth Circuit, what distinguished *NIFLA* from *Zauderer* was that "[w]hile factual, the compelled statement [in *NIFLA*] took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its [crisis pregnancy center's] mission."[138]

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[129] *Id.* at 2388 (Breyer, J., dissenting).

[130] *Id.*

[131] *Id.*

[132] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882–84 (1992); *see also infra* Part III for further discussion.

[133] *NIFLA*, 138 S. Ct. at 2383.

[134] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019).

[135] *Id.* at 845.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 845.

Outside of *CTIA*, no other circuit court cases have addressed the impact of the *NIFLA* ruling on compelled disclosures. One journal article on the subject proposed that, in a pre-*NIFLA* world, there were two interpretations of "factual and uncontroversial."[139] One stated that the information simply needed to be factual, and the other held that the information needed to be factual and also not implicitly convey an ideology.[140] Another legal scholar called the impacts of *NIFLA* "seismic."[141] In his view, the opinion left the scope of the government's power to compel disclosure "an uncertainty."[142] The *Harvard Law Review* called the decision "a profound shift in the Court's treatment of compelled commercial disclosures."[143] The Harvard article predicted that "[t]he way the *NIFLA* Court applied intermediate scrutiny would also seem to preordain failure for almost all consumer-protective regulations."[144]

This Comment argues that the alarm and uncertainty stressed by other legal scholars overemphasizes the impact of *NIFLA* on compelled disclosure law. The Court signaled its intention not to upset the "legality of health and safety warnings long considered permissible."[145] It remains to be seen how courts will treat *NIFLA* going forward, but considering the limited intrusion and effectiveness of disclosure, it is unlikely to cause the seismic change some predict. Instead, *NIFLA* can likely be limited to the issue of abortion; other disclosures aimed at public health and safety will survive.

III. COMPARING CLIMATE CHANGE TO ABORTION

A government entity arguing that a climate change disclosure is lawful after *NIFLA* will have the difficult task of distinguishing climate change from abortion. *NIFLA* is now the most recent word from the Supreme Court on compelled disclosures and the *Zauderer* standard. Thus, any future compelled disclosures will be measured against the "controversiality" of abortion. For a climate change disclosure to survive a First Amendment challenge, the government entity must be able to distance climate change from *NIFLA* and the controversy associated with abortion. At its root, this argument will come down to the basic facts around climate change and its effects juxtaposed against abortion,

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[139] Fowler, *supra* note 16, at 1676.

[140] *Id.*

[141] Robert McNamara & Paul Herman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 220 (2018).

[142] *Id.*

[143] *First Amendment—Freedom of Speech—Compelled Speech*—National Institute of Family & Life Advocates v. Becerra, *supra* note 13, at 351.

[144] *Id.* at 354.

[145] NIFLA v. Becerra, 138 S. Ct. 2361, 2376 (2018).

a topic that has loomed large in America's consciousness for half a century.[146]

Abortion relates to unknowable moral issues: when life begins, personal autonomy, and the rights of a fetus. Abortion concerns religious and moral convictions and opposing worldviews that are seemingly impossible to reconcile.[147] There will certainly be those who disagree with this basic premise, yet, even if science were to distill when life begins, or the consciousness of a fetus, it is not clear that this would resolve the deep-seated issues around abortion. Abortion pits the concerns of the unborn versus the right to dictate life choices on behalf of the mother. The opposing viewpoints on abortion are likely unresolvable because both sides harbor interests so immutable that they will not compromise. This is unlike climate change, which does not elicit the same moral reactions, and is more akin to the evolving science on tobacco use in the mid-twentieth century.[148]

Conversely, climate change is not a disagreement about morals as much as a dispute about scientific projections and the proper means to address the threat. Climate change relates to the amount of carbon dioxide in the atmosphere and the resulting effects on our planet. Climate change is measurable and observable, no matter the level of obfuscation and denial that opponents bring to meeting the problem head on.[149] The evidence for and against abortion, such as when life begins or the moral implications of abortion, may never be before the Court; the same cannot be said for climate change. We know how fast sea levels are rising,[150] how fast glaciers are melting,[151] the rate of deforestation,[152] and the forced migration of populations as a result. Even more critically, we

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[146] *See* Robert Post & Riva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 406–09 (2007) (describing the sweeping, organized, and ongoing nature of conservative opposition to Roe v. Wade).

[147] *See* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (stating that abortion regulations implicate "imponderable values" such as "the potentiality of human life," "the health of the woman," and "the woman's liberty interest in defining her own concept of existence, of meaning, of the universe, and of the mystery of human life") (internal quotation marks omitted).

[148] *See* Allan M. Brandt, *Inventing Conflicts of Interest: A History of Tobacco Industry Tactics*, 102 AM. J. PUB. HEALTH 63 (2012).

[149] Suzanne Goldenberg, *Leak Exposes how Heartland Institute Works to Undermine Climate Science*, GUARDIAN (Feb. 14, 2012), https://www.theguardian.com/environment/2012/feb/15/leak-exposes-heartland-institute-climate [https://perma.cc/M68H-HUF5].

[150] Rebecca Lindsey, *Climate Change: Global Sea Level*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (Nov. 19, 2019), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level [https://perma.cc/3AE3-RABY].

[151] Daniel Glick, *The Big Thaw*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/environment/global-warming/big-thaw/ [https://perma.cc/647M-U3SU].

[152] *What is the Relationship Between Deforestation and Climate Change*, RAINFOREST ALLIANCE (Aug. 12, 2018), https://www.rainforest-alliance.org/articles/relationship-between-deforestation-climate-change [https://perma.cc/GNE2-YJAE].

know what causes these global shifts.[153] Unlike abortion, climate change is supported by evidence courts can weigh. Courts can then determine the validity of a compelled disclosure tailored to these issues. While there is certainly a vocal minority opposed to the idea of climate change, which this article addresses in Part IV.C, the science has progressed beyond this viewpoint to the point of academic consensus.[154] Whereas people with opposing viewpoints on abortion may never reach consensus on the unknowable or resolve differences between deeply held worldviews, climate change data is at our fingertips.

To reiterate, regardless of whether one believes in climate change or its dangers, there is *actual evidence* of its veritable existence—its probability of harm—that the Court can weigh against a general public policy in favor of speech. Denial of this evidence, and a lack of belief in climate change, will not prevent a court from appropriately weighing the evidence. In abortion, there is no such counterbalance. As mentioned above, even if the science on abortion were clearer, it is not obvious that this would dissuade either side from their respective views. Abortion is unresolvable on a moral level; there will always be disagreement between those who favor a woman's autonomy and those who advocate for the life of the unborn fetus. One way to see this is to look at the fundamental differences in how courts treat these two topics.

The Supreme Court has taken vastly different approaches to the issues of climate change and abortion. The Supreme Court has walked a careful line in dealing with abortion in the many cases it has handled, while in climate change cases the Court has shown a much greater willingness to rely on scientific expertise, partially because of the measurable data related to climate change that is far less clear in the abortion context.[155] Also, while abortion litigation often pits two sides with diametrically opposed moral convictions, the same cannot be said about climate change. In many cases, the question is not whether it exists, but what is the proper means to address it.[156]

The way the Supreme Court has addressed climate change is best exemplified in the most high-profile climate change case yet to come before the Court.[157] In *Massachusetts v. EPA*,[158] the Commonwealth

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[153] *See supra* notes 146–148.

[154] *Scientific Consensus: Earth's Climate is Warming*, NASA, https://climate.nasa.gov/scientific-consensus/ [https://perma.cc/A5AU-8VZ4] (last visited Sept. 6, 2020).

[155] *See* Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007); *cf.* Roe v. Wade, 410 U.S. 113, 116 (1973); Planned Parenthood of Southeast Pa. v. Casey, 505 U.S. 833, 851 (1992).

[156] *See* Schwartz, *supra* note 97.

[157] RICHARD LAZARUS, THE RULE OF FIVE: MAKING CLIMATE CHANGE HISTORY AT THE SUPREME COURT 1 (2020) (calling Massachusetts v. EPA "the most important environmental law case ever decided by the Court").

[158] 549 U.S. 497 (2007).

sought judicial review of the EPA's refusal to regulate greenhouse gas emissions.[159] Justice Stevens began his opinion with a matter-of-fact assessment of the situation:

> A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflect heat. It is therefore a species—the most important species—of a "greenhouse gas."[160]

Significantly, the Supreme Court held that the states had standing to challenge the EPA's decision not to promulgate a rule on greenhouse gases,[161] a "win" in the long game for environmental advocacy and the fight against climate change.[162]

Throughout the opinion, Justice Stevens relied on bureaucratic expertise to demonstrate the threat of continued greenhouse gas emissions and climate change.[163] At various points in the opinion, he cited the National Research Council,[164] the Intergovernmental Panel on Climate Change,[165] and the United Nations Framework Convention on Climate Change.[166] While the fight in *Massachusetts v. EPA* centered on the delegated authority to the EPA and administrative law principles,[167] at no point in the arguments did either party refute the science

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[159] *Id.* at 505.

[160] *Id.* at 504–05.

[161] *Id.* at 526.

[162] *See* Jonathan Z. Cannon, *The Significance of* Massachusetts v. EPA, 93 VA. L. REV. ONLINE 53 (2007) ("The decision was an enormous if narrow, victory for environmentalists . . . ."); Robert Barnes, *Supreme Court: EPA Can Regulate Greenhouse Gas Emissions, with Some Limits*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/politics/supreme-court-limits-epas-ability-to-regulate-greenhouse-gas-emissions/2014/06/23/c56fc194-f1b1-11e3-914c-1fbd0614e2d4_story.html [https://perma.cc/S74V-QDJE] ("[The Court] nevertheless granted the Obama administration and environmentalists a big victory by agreeing that there are other ways for the EPA to reach its goal of regulating the gases that contribute to global warming."); Emily Atkin, *The Growing Movement to Take Polluters to Court Over Climate Change*, THE NEW REPUBLIC (Dec. 20, 2017), https://newrepublic.com/article/146326/growing-movement-take-polluters-court-climate-change [https://perma.cc/2EUY-QYRD] ("The success of Massachusetts v. Environmental Protection Agency keeps corporate attorneys up at night.").

[163] *Massachusetts v. EPA*, 549 U.S. at 508–09.

[164] *Id.* ("The Council's response was unequivocal: 'If carbon dioxide continues to increase, the study group finds no reason to doubt that climate change will result and no reason to believe that these changes will be negligible. . . . A wait-and-see policy may mean waiting until it is too late.'").

[165] *Id.* ("The IPCC concluded that 'emissions resulting from human activities are substantially increasing the atmospheric concentrations of greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface.").

[166] *Id.*

[167] *Id.* at 511.

underlying climate change.[168] Justice Stevens put it bluntly when he described the injury to the challenging states, writing, "[t]he harms associated with climate change are serious and well recognized."[169]

This contrasts with the Court's approach to abortion, which it has treated in a careful, measured way, wary of upsetting individuals of all viewpoints. The Court's signature ruling on abortion was *Roe v. Wade*[170] in 1973.[171] The *Roe* Court acknowledged a woman's right to an abortion, while at the same time recognizing the state's interest in the health and safety of the mother and the fetus.[172] *Roe* attempted to juggle these competing interests and find a middle ground on a very difficult issue. Writing for the Court, Justice Blackmun did not shy away from the diametrically opposed viewpoints on the issue and the gravity of the controversy before the court. In the second paragraph of his opinion he wrote:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and *seemingly absolute* convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[173]

Justice Blackmun's acknowledgment of the high stakes set the tone for the opinion, which walked a fine line by acknowledging the convictions on both sides. Further into the opinion, Justice Blackmun addressed the unknowable question of when life begins and the difficulty faced by a court in tackling such issues.[174] Blackmun's approach highlighted the high-level moral and philosophical questions that abortion raised. As

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[168] *Id.* at 523 ("[The] EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming.").

[169] *Id.* at 521.

[170] 410 U.S. 113 (1973).

[171] Kathrine Kubak et al., *Abortion*, 20 GEO. J. GENDER & L. 265, 265–68 (2019).

[172] In *Roe*, the Court held that the right to personal privacy, which it located in the Due Process Clause, is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. At the same time, the Court recognized that "certain compelling state interests—primarily protecting women's health and the potential life of fetuses—[can] justify the regulation of abortion. Kubak, *supra* note 171, at 267 (citing *Roe*, 410 U.S. at 154).

[173] *Roe*, 410 U.S. at 116.

[174] *Id.* at 159 ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

he made clear, the Court's role in a dispute of such magnitude is to attempt to find a line of compromise; the Court is not to play expert on the moral and the metaphysical. Instead, Blackmun ended with the sentiment that "[t]his holding, we feel, is consistent with the relative weights of the respective interests involved."[175]

The way the Court handled these two opinions could not be more disparate. These cases represented the Supreme Court's first chance to dictate the law on issues important to the country. In *Massachusetts v. EPA*, Justice Stevens acknowledged at the outset the harms associated with climate change and the risks it posed.[176] In *Roe*, Justice Blackmun sought a middle ground and conceded the unknowable questions at the root of abortion.[177] While the *Roe* opinion trod carefully on existential questions, *Massachusetts v. EPA* treated climate change tactically, as an evident problem that the government *must* address.[178]

The Supreme Court has revisited both issues since these first cases, and the trajectories of jurisprudence have continued along their initial paths.[179] Climate change was before the court again in *American Electric Power Company v. Connecticut*,[180] four years after *Massachusetts v. EPA*. Like the dispute in *Massachusetts v. EPA*, the dispute in *American Electric Power* was not centered on the existence, threat, or scientific fact of climate change.[181] Rather, in *American Electric Power*, the question centered on choice-of-law rules.[182] At points, the Court cited EPA rulemaking on climate change as authority, stating:

> [The] EPA concluded that "compelling" evidence supported the "attribution of observed climate change to anthropogenic" emissions of greenhouse gases. Consequent dangers of greenhouse gas emissions, [the] EPA determined, included increases in heat-related deaths; coastal inundation, and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other "extreme weather events" that cause death and destroy infrastructure; drought due to reductions in mountain snowpack and shifting precipitation patterns;

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[175] *Id.* at 165.

[176] Massachusetts v. EPA, 549 U.S. 497, 508–09 (2007).

[177] *Id.* at 116.

[178] Massachusetts v. EPA, 549 U.S. 497 (2007).

[179] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[180] 564 U.S. 410 (2011).

[181] *Id.* at 415.

[182] *Id.* at 420.

> destruction of ecosystems supporting animals and plants; and potentially "significant disruptions" of food production.[183]

The Court cited the EPA rule as persuasive authority supporting the agency's role in regulating greenhouse gases and the threat of climate change.[184] At the same time, in a footnote, the Court gave some credence to the opposing viewpoint.[185] It stated, "For views opposing [the] EPA's . . . , [t]he Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change."[186] This was somewhat of a shift from the Court's position four years earlier in *Massachusetts v. EPA*, where it strongly supported the executive branch's conclusions on climate change.[187]

Unlike the deference afforded to government regulators in the climate change context, the Court's abortion jurisprudence has continued the careful balancing act staked out in *Roe*. Nineteen years after the Supreme Court decided *Roe*, it revisited the standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[188] Justice O'Connor wrote portions of the Court's opinion in *Casey*[189] and elaborated on Justice Blackmun's sensitivity to the topic. She wrote:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision.[190]

Justice O'Connor acknowledged that no court decision can resolve the existential dispute and that the "moral and spiritual implications" of abortion were unresolvable.[191] Justice O'Connor's opinion explicitly accepted that disagreement about abortion is inevitable.[192] At various points throughout her opinion, Justice O'Connor described the singularity of the issue. She stated that "abortion is a unique act," placing

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[183] *Id.* at 417 (quoting 74 Fed. Reg. 66496, 66518, 66524–66535) (codified at 40 C.F.R. pt. 1 et seq.) (internal citations omitted).

[184] *Id.*

[185] *Id.* at 417 n.2.

[186] *Id.*

[187] *See supra* notes 158–60.

[188] 505 U.S. 833 (1992).

[189] *Id.* at 844.

[190] *Id.* at 851.

[191] *Id.*

[192] *Id.* at 878 (stating that "some disagreement is inevitable" and that disagreement is "to be expected in the application of a legal standard which must accommodate life's complexity").

the issue of abortion, and the *Roe* line of cases, in rarefied territory.[193] Justice O'Connor compared the abortion issue to the Court's opinion in *Brown v. Board of Education*,[194] which overruled *Plessy v. Ferguson*[195] and the separate-but-equal-doctrine.[196] The comparison came from the importance of the issue, as well as the critical need for the Court not to overturn the fragile *Roe* precedent.[197] In comparing *Roe* to *Brown*, Justice O'Connor clearly articulated the role of the court in such divisive matters:

> It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.
>
> The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.[198]

Both Justices Blackmun and O'Connor's views of the significance of the issue lives on in the national consciousness and the current dialogue on the issue.[199] It can be seen in Justice Thomas's *NIFLA* majority opinion, which held that abortion is "anything but an 'uncontroversial' topic."[200] The thread continued through Justice Breyer's *NIFLA* dissent that labeled the issue "special."[201]

While *American Electric Power* shifted away from complete acceptance of climate change as an undeniable fact,[202] it still stands far afield from the tone and caution with which the Supreme Court has addressed abortion. *Roe* and *Casey* invoked the metaphysical, the spiritual, and the philosophical.[203] Justice O'Connor compared the fragile

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[193] *Id.* at 853.

[194] 347 U.S. 483 (1954).

[195] 163 U.S. 537 (1896).

[196] *Casey*, 505 U.S. at 867.

[197] *Id.*

[198] *Id.*

[199] Amy Harmon, *'Fetal Heartbeat' v. 'Forced Pregnancy': The Language Wars of the Abortion Debate*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/us/fetal-heartbeat-forced-pregnancy.html [https://perma.cc/5FBY-QS6G].

[200] NIFLA v. Becerra, 138 S. Ct. 2361, 2372 (2018).

[201] *Id.* at 2388 (Breyer, J., dissenting).

[202] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 417 n.2 (2011).

[203] Roe v. Wade, 410 U.S. 113, 116 (1973); *Casey*, 505 U.S. at 851.

precedent of *Roe* to *Brown*,[204] a comparison that puts the issue in rare historical company. On the other hand, climate change is handled with basic statement of facts, and deference to agency expertise.[205] The Court does not grapple with the existence of climate change in the way that is apparent in both *Roe* and *Casey*.

This analysis, and the difference between the two lines of cases, helps to provide context for *NIFLA* and what it will mean for compelled disclosure going forward. Based on how the Supreme Court has handled abortion over the last fifty years, it should not be a surprise that Justice Thomas found abortion "anything but an 'uncontroversial' topic."[206]

This was in contrast to the way the Court has viewed climate change. In *Massachusetts v. EPA*, the Court treated it simply as a problem to be solved. In *American Electric Power,* while recognizing the opposition, the Court still cited the serious threats climate change posed to the nation.[207] It stands to reason that a climate change disclosure would be judged in the light of the evidence before the court. Climate change is a subject that is inherently knowable in a way that abortion is not today, and may never be. Opinions on abortion reflect a comprehensive worldview that may never be reconciled between opponents. Disputes on climate change are limited to facts and different strategies to approach the problem. They relate to tradeoffs between short-term and long-term gains, not deeply seated world views. Abortion relates to other constitutional considerations like the Establishment Clause and the Ninth Amendment right to privacy. Though great in importance, at its core, climate change is simply a policy issue. Abortion is not only about matters of life and death, but bodily integrity; it is conceived of as an individual liberty, a quality that climate change does not share.

IV. ASSESSING CLIMATE CHANGE DISCLOSURES UNDER *ZAUDERER*

Aside from differentiating itself from abortion, a successful defense of any climate change disclosure will have to survive the *Zauderer* standard on its own merits. This standard certainly looks different after *NIFLA*, but a government entity can still stress the scientific strength of the case for plans to address climate change as well as the one-sided health and safety consequences that merit the disclosures and a change in consumer behavior. This Part will analyze climate change disclosures under each *Zauderer* prong, address counterarguments, and demonstrate that under most, if not all, conceptions of the *Zauderer* standard

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[204] *See Casey*, 505 U.S. at 862–64.

[205] *See* Massachusetts. v. EPA, 549 U.S. 497, 504–05 (2007).

[206] *NIFLA*, 138 S. Ct. at 2372.

[207] *Am. Elec. Power*, 564 U.S. at 417.

after *NIFLA*, a climate change disclosure should survive review. Where helpful, this analysis will incorporate the examples referenced previously, the New York energy efficiency score posted on buildings and the Japanese carbon footprint on food labels.

A climate change disclosure should easily pass *Zauderer* prong one, which requires that the disclosure reasonably relate to a substantial state interest. While prong two is arguably no longer relevant to the analysis, it is still illustrative of the tension between a Court's choice to apply *Zauderer* or *Central Hudson*. Prong three, "factual and uncontroversial" is the most difficult to pass after *NIFLA*. However, with a proper conception of "uncontroversial," and a focus on scientific certainty, a climate change disclosure can survive. Finally, prong four requires the disclosure not be unduly burdensome. So long as the disclosure remains facially neutral and avoid pitfalls of past failed disclosures, it should survive.

A. Prong One: Substantial State Interest

Any climate change disclosure should be able to meet the first *Zauderer* prong requiring that the regulation be reasonably related to a substantial state interest. As mentioned earlier, health, safety and the environment are the traditional realms of government interests that can lead to valid compelled disclosures.[208] The Supreme Court has also previously recognized the substantial state interest in regulating greenhouse gases in *Massachusetts v. EPA*.[209] Once a substantial interest is identified, the government entity must argue that the disclosure reasonably relates to that interest. The party arguing for the disclosure simply must link the effects of climate change to the energy consumed by the skyscraper in the New York example, or the supply chain in the food labelling context. In both cases, there is a bedrock of science to support energy consumption and the contribution of power plants to the increase in greenhouse gases in the atmosphere and the effects of climate change.[210]

Parties fighting the regulation will compare this case to cases that have failed on this prong, such as the conflict diamond labelling disclosure, where the disclosure was only tenuously linked to the civil war in the Democratic Republic of the Congo.[211]

So long as the government grounds its argument in the long-established precedent of a state interest in health and safety, a disclosure

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[208] *See supra* part II.C.1.

[209] 549 U.S. 497 (2007).

[210] *Sources of Greenhouse Gas Emissions*, EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions [https://perma.cc/R32D-L5K9] (last visited Sept. 6, 2020).

[211] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

will survive prong one. The Japanese labelling scheme and the New York building score share much in common with the mercury labelling in *Sorrell*,[212] or the risk of radiation in *CTIA–The Wireless Ass'n v. City of Berkeley*.[213] Another data point that could help the disclosure survive a First Amendment challenge is the Congressional intent articulated in the Clean Air Act that identifies the substantial state interest in mitigating climate change.[214] Given this strong background and the ability to point to congressional will, it is likely that a climate change disclosure would pass the first *Zauderer* prong.

B. Prong Two: Addressing Deception

While the second prong of the *Zauderer* test originally required deception, both the D.C. Circuit and the Ninth Circuit have found that the test sweeps far beyond deception.[215] Therefore, any climate change disclosure will not have to prove that it addresses deception. However, the regulated parties challenging any disclosure could attempt to argue using the remnants of this prong that nondeceptive communication should be governed by *Central Hudson* and its intermediate scrutiny test rather than *Zauderer*. The government entity will argue for the lower standard that *Zauderer* brings, which is more deferential to the government interest. While this analysis would change depending on the disclosure before the court, given the expansion of *Zauderer* beyond deception, it is likely that a government entity would prevail, and the disclosure would be analyzed under *Zauderer*.

C. Prong Three: Factual and Uncontroversial

The third *Zauderer* prong, which requires the disclosure be "factual and uncontroversial," will be where the majority of the argument around a climate change disclosure takes place. After *NIFLA*, we know this prong does not simply mean factual, and that both words operate to define the limits of the government's ability to compel disclosure.[216] But does "factual and uncontroversial" mean the regulation cannot convey an ideology? Does a lack of scientific controversy survive? Or is it politically controversial? I argue that, under any of these standards, a climate change disclosure can survive the post-*NIFLA Zauderer*

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[212] 272 F.3d 104 (2d Cir. 2001).

[213] CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 842 (9th Cir. 2019).

[214] *See* 42 U.S.C. § 7411; *The Clean Air Act and GHG Emissions*, CTR. FOR CLIMATE STRATEGIES, http://www.climatestrategies.us/clean-air-act-and-ghg-emissions [https://perma.cc/WND4-RMAF].

[215] *See CTIA*, 928 F.3d at 842; Am. Meat Institute v. USDA, 760 F.3d 18, 22 (D.C. Cir 2014).

[216] NIFLA v. Becerra, 138 S. Ct. 2361, 2372 (2018).

analysis. The government must argue using the analysis above, which differentiates abortion from climate change, on all of these levels to show that climate change is not "controversial" in the way that abortion is.

If, as one scholar suggests, "factual and uncontroversial" means that a disclosure must not "convey a controversial ideology,"[217] a climate change disclosure can survive by focusing on the information to be disclosed, which will narrow the scope of inquiry. The government can also argue that the movement to respond to climate change is *not* an ideology. If the challenge is directed at a carbon footprint disclosure, like the New York building score or the Japanese scheme, then the government can defend the disclosure by arguing that, unlike the *NIFLA* disclosure, this does not express an ideology.

At this stage it is important to differentiate the "conveyance" of an ideology from tacit support for an ideology. Of course, climate change disclosures can be linked to a variety of ideologies, but under that standard, all disclosures on any range of topics, would be unconstitutional. What separates the *NIFLA* disclosures from Japanese nutritional labels or a New York energy efficiency score is that the content of the disclosure *is* the ideology. While one can feel however they want about nutrition or energy consumption, the *NIFLA* disclosures required the speakers to advocate for abortion services, which were antithetical to the speakers' worldview.

Requiring a carbon footprint disclosure in itself is not a value judgment on the amount of energy used to deliver a product to the consumer. On the other hand, the *NIFLA* disclosures specifically disclaimed the services provided by the regulated entities, thus conveying an ideology that state-operated services (which provided abortion services) were a superior form of medical care.[218] A climate-change-related disclosure simply intends to provide more extensive information to consumers in order to improve the marketplace.

It can be instructive to consider the harm inflicted by requiring the speech in each case, as well as the ability to counter the compelled speech. In the case of the *NIFLA* disclosure, the state was requiring the speakers to express a view completely inapposite of their beliefs, and the mission of their organization.[219] No ability for the speaker to counter that speech with their own beliefs could take away from the dignitary harm inflicted by the disclosure requirement. However, in the example of the New York building score, it is hard to fathom how displaying

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[217] Fowler, *supra* note 16, at 1679.

[218] *NIFLA*, 138 S. Ct. at 2377.

[219] *Id.* at 2379 (Kennedy, J., concurring) (stating that the disclosure law at issue "compels individuals to contradict their most deeply held beliefs").

energy consumption is in and of itself antithetical to any worldview. Even if a building owner believes climate change is a hoax, the disclosure simply requires display of energy efficiency. Furthermore, the building owner could counter the compelled disclosure with their own information.

On a broader level, efforts to mitigate the effects of climate change are not an ideology in the same way that either pro-life or pro-choice segments of society are. Much argument about climate change relates to the best institutions, and best means to resolve the issue, as opposed to whether climate change is, in fact, a problem at all. For example, in litigation between Exxon and the State of New York regarding Exxon's knowledge of climate change and alleged fraudulent disclosures, none of the argument centered on the existence of climate change, instead it concerned who should address the problem and how.[220]

In contrast, in the abortion context, a crisis pregnancy center and a Planned Parenthood condemn the fundamental objectives that each seeks to carry out. This is an example of polar opposites in ideology, whereas the effects of climate change do not inform a worldview in the same way. Regardless of how we feel about climate change, the seas will continue to rise. A government argument grounded in science can succeed in differentiating itself from deeply held personal beliefs like the morality of abortion rights.

If "factual and uncontroversial" can be proven through a lack of scientific controversy, then a climate change disclosure should certainly survive. The overwhelming consensus among scientists globally is that human activity is contributing to an unprecedented warming of the planet.[221] While the Supreme Court identified a possible difference in opinion in a footnote in *American Electric Power*,[222] when the source of the criticism of climate change is put in proper context, it becomes far easier to dismiss. The majority of academic work that questions climate change has been funded by the Heartland Institute, an organization funded by the fossil fuel industry.[223] When the overwhelming majority[224] is stacked against the miniscule dissent to the facts of climate change, it is hard to identify the argument as "controversial."

If "uncontroversial" can be established through scientific consensus, a climate change disclosure is likely to survive. Courts are adept at hearing technical evidence and making critical determinations, and differentiating fact from falsehood, a space where the science in support of

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[220] *See* Schwartz, *supra* note 97.

[221] NASA, *supra* note 154.

[222] Am. Elec. Power v. Connecticut, 564 U.S. 410, 417 n.2 (2011).

[223] *See* Goldenberg, *supra* note 149.

[224] *See* EPA, *supra* note 210.

climate change overwhelms. Unlike abortion, where disagreements cannot be resolved by marshalling more evidence, courts can resolve questions related to the warming of the planet, its effects, and reasonable ways to mitigate the harm.

If "factual and uncontroversial" relates to the political controversy of the disclosure, while more of an uphill battle, a climate change disclosure can still survive this analysis by pointing to public opinion and agency expertise. This is a particularly fascinating analysis under the Trump administration, which has worked diligently to deregulate and deconstruct executive branch attempts to combat climate change.[225] If "factual and uncontroversial" relates to political disagreement, it may be the hardest standard to overcome, particularly under the Trump administration. However, a government entity could point to public support for addressing climate change. A Yale study on climate change from 2019 shows that 67 percent of Americans polled believe that "global warming is happening," and 60 percent believe that the President and Congress "should do more to address global warming."[226] If that is not compelling to a court, the government entity can point to the consensus among agencies about climate change and the need to address it, despite what political appointees say.[227] In this way, the case can be compared favorably to *American Beverage*, where the disclosure was ruled invalid because the FDA did not agree with the regulators.[228] However, in this case, we can see at least fourteen prominent executive agencies with a published policy plan to address climate change.[229] Still, if the court were to emphasize the controversy on a political level, as a debate framed and governed by the political process, a court may find the disclosure "controversial."

On the other hand, the fact that a legislature or city government passed the disclosure requirement in the first place should demonstrate the political viability of the disclosure in the first place. It seems implausible that a change in federal political control could result in creating a controversy out of scientific consensus. For instance, if the next president were to say that cigarettes have medicinal value, would that

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[225] Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES, https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html [https://perma.cc/N5PE-BU8F] (last updated July 15, 2020).

[226] *Yale Climate Opinion Maps 2019*, YALE PROGRAM ON CLIMATE CHANGE COMM. (Sept. 17, 2019), https://climatecommunication.yale.edu/visualizations-data/ycom-us/ [https://perma.cc/TL98-FBKA].

[227] *Climate Change Adaptation: What Federal Agencies Are Doing*, CTR. FOR CLIMATE & ENERGY SOLUTIONS (Feb. 2012), https://www.c2es.org/site/assets/uploads/2012/02/climate-change-adaptation-what-federal-agencies-are-doing.pdf [https://perma.cc/N852-79YQ].

[228] Am. Beverage Ass'n v. City of San Francisco, 916 F.3d 749, 761 (9th Cir. 2018).

[229] *See* EPA, *supra* note 210.

make their regulation controversial? At the same time, courts can rest on the fact that local legislatures are politically accountable, therefore not insulated from the costs of promulgating "controversial" policy. In this regard, while politics may be a factor, it is likely judges are looking for something more to create controversy.

D. Prong Four: Unduly Burdensome

The fourth prong of *Zauderer* requires the disclosure not be unduly burdensome to the regulated party. The *NIFLA* disclosure was unduly burdensome because it required antiabortion advocates to deliver a script antithetical to their views.[230] The *NIFLA* court also found that there were other means to accomplish the goals of the disclosure.[231] The proposed disclosure in *American Beverage* was unduly burdensome because it required too large an area of the packaging to be devoted to the disclosure.[232]

While this inquiry is more fact based, there are lessons to draw from disclosures that have failed on this prong. First, unlike *American Beverage*, climate change disclosures do not require too much space from the regulated entity's label or advertising, whether that is in the form of a carbon score posted on the side of a New York building, or on a candy bar wrapper. Additionally, most buildings and food manufacturers should have their energy consumption data readily available, as this is a large cost in either business. Therefore, the costs to calculate the score should not be prohibitive. Second, the government must be able to successfully argue that, while there are other means to accomplish this goal, by putting the information before the consumer directly, it has a greater impact. Further, unlike *NIFLA*, the disclosure of this information is not loaded in the same way. Requiring the owners of a skyscraper to disclose their energy footprint is not antithetical to their mission. Courts generally recognize that disclosure is the least intrusive form of compelled government speech, and that determination will play in the government's favor here. In many ways the government can argue that this disclosure looks similar to the nutritional facts already disclosed on many food packages.

V. CONCLUSION

By emphasizing the science and differentiating from the unknowable, deeply held moral beliefs tied to abortion, a climate change disclosure can successfully pass *Zauderer* scrutiny. If a court measures a

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[230] NIFLA v. Becerra, 138 S. Ct. 2361, 2371. (2018).

[231] *Id.* at 2372.

[232] *Am. Beverage*, 916 F.3d at 761.

"controversy" according to the political salience of the issue, it will be a harder argument to make, but public opinion is behind government regulation addressed at climate change. While *NIFLA* has altered the landscape around compelled disclosure, the extraordinary nature of the issue before the Court in that case explains the result. Climate change has been difficult to tackle at the federal level, but local initiatives like the New York building code change can be effective in informing consumers and driving change through a more perfect market.

Disclosure should be a tool that legislators worldwide use to continue to mitigate the harm associated with climate change. While the First Amendment addresses the scope and reach of compelled disclosure, a climate change disclosure that intends simply to inform consumers, rather than persuade as to a correct course of action should be successful under *Zauderer*. Yet, the way in which the Supreme Court resolved *NIFLA* leaves some mystery as to the future direction on the topic. This Comment has attempted to address possible interpretations of "factual and uncontroversial" and the *Zauderer* standard going forward, and under many of those possibilities, a climate change disclosure will survive.