COMPETING FREE SPEECH RIGHTS: EVALUATING COMPELLED DISCLOSURES ON FOOD PACKAGING IN A WAY THAT REFLECTS SCIENTIFIC REALITIES—OR A LACK THEREOF

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INTRODUCTION

Science changes.[1] And not just a general understanding of science, but new truths in science come to light that run counter to long-held beliefs of what was thought to be true.[2] These changes can arise unexpectedly or as a result of the scientific advancements we actively seek and achieve through research.[3] Such principles, often prevalent in relation to medicine or climate change, for example, also apply to the scientific study of the food we eat.[4]

Scientific and technological explorations are becoming increasingly common in the food and beverage industry.[5] In addition to the

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1 *See generally* Rebecca J. Rosen, *How Science Changes*, ATLANTIC (Dec. 12, 2012), https://www.theatlantic.com/technology/archive/2012/12/how-science-changes/266145 [https://perma.cc/V3V3-Z6BK]; Natasha Umer, *18 Science Facts You Believed in the 1990s That Are Now Totally Wrong*, BUZZFEED (Mar. 23, 2015), https://www.buzzfeed.com/natashaumer/science-facts-you-might-have-believed-in-the-90s [https://perma.cc/695D-V3BY].

2 *See* sources cited *supra* note 1.

3 *See* Rosen, *supra* note 1.

4 *See* Annie Gasparro & Jesse Newman, *Six Technologies That Could Shake the Food World*, WALL STREET J. (Oct. 2, 2018), https://www.wsj.com/articles/six-technologies-that-could-shake-the-food-world-1538532480 [https://perma.cc/F3P3-2MFN].

5 Genetically modified organisms are an example of the way our food can be altered or affected through science. *See id.* (discussing examples of new food technologies); *see also* Julia Moskin, *How Do the New Plant-Based Burgers Stack Up? We Taste-Tested Them*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/dining/veggie-burger-taste-test.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/A7E2-YPX2] (discussing the increase in fake "meat" products and the new technologies used to make them).

longstanding efforts by major food and crop companies,[6] venture capital funds have invested two billion dollars in food-tech firms through mid-September 2018, up from $1.5 billion annually in 2016 and 2017.[7] Contrast those numbers to the amount of funds invested in food technology ten years ago, when only tens of millions of venture capital funds were invested in such companies.[8]

There are many reasons for this trend, chief among them a need for new sources of food.[9] Data shows that by the year 2050, the global food supply will not satisfy food demand.[10] Therefore, new mechanisms for increasing food production, enhancing current food supply, and creating new foods altogether are increasingly popular—and necessary.[11]

This concept is not a new one.[12] In recent decades, however, it has become more prevalent in our society as is best exemplified by the creation and evolution of genetically modified organisms (GMOs).[13] Gene modifications in food occur when the gene of one organism is inserted into the genome of a different organism, resulting in an entirely different organism that is not found in nature and carries specifically intended traits.[14] Early uses of GMOs centered around extending the shelf life of crops so produce would not go bad by the time it reached

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6 *See, e.g.*, Erin Brodwin, *A New Monsanto-Backed Company Is on the Verge of Producing the First Fruit Made with a Blockbuster Gene-editing Tool That Could Revolutionize Agriculture*, BUS. INSIDER (Mar. 27, 2018, 9:44 AM), https://www.businessinsider.com/monsanto-gmo-gene-editing-crispr-produce-2018-3 [https://perma.cc/VFS7-LXTD].

7 Gasparro & Newman, *supra* note 4.

8 *Id.*

9 *Why People in Rich Countries Are Eating More Vegan Food*, ECONOMIST (Oct. 13, 2018), https://www.economist.com/briefing/2018/10/13/why-people-in-rich-countries-are-eating-more-vegan-food [https://perma.cc/D5MF-8V2A].

10 Joseph Hincks, *The World Is Headed for a Food Security Crisis. Here's How We Can Avert It*, TIME (Mar. 28, 2018, 2:47 AM), https://time.com/5216532/global-food-security-richard-deverell [https://perma.cc/QX2N-Q5VS].

11 *Id.*; *Why People in Rich Countries Are Eating More Vegan Food*, *supra* note 9.

12 Stephen Tan & Brian Epley, *Much Ado About Something: The First Amendment and Mandatory Labeling of Genetically Engineered Foods*, 89 WASH. L. REV. 301, 306–07 (2014); *Questions & Answers on Food from Genetically Engineered Plants*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/Food/IngredientsPackagingLabeling/GEPlants/ucm346030.htm [https://perma.cc/RWN6-ALNN] (last updated Jan. 4, 2018).

13 Sources cited *supra* note 12.

14 Sources cited *supra* note 12.

consumers.[15] Today, the use of GMOs has expanded tremendously, and includes creating gene traits that allow crops to endure harsh chemical herbicides or even growing genetically modified animals.[16]

In the scientific community, GMOs are largely deemed safe for human consumption.[17] That said, there are still many scientists who are not so convinced, since some studies show adverse health effects stemming from GMOs.[18] This debate surrounding the safety of GMOs has existed for a long time and shows no signs of slowing down.[19] And while GMOs are commonly used in the United States, they are almost entirely banned in the European Union and many other countries around the globe.[20]

Despite the United States being one of a minority of industrial countries that uses GMOs,[21] consumer advocates in this country fought for years to get foods that contain or were produced with GMOs to be labeled as such.[22] Strong and vocal curiosity on the part of consumers led

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15 Tan & Epley, *supra* note 12, at 307.

16 David H. Freedman, *The Truth About Genetically Modified Food*, SCI. AM. (Sept. 1, 2013), https://www.scientificamerican.com/article/the-truth-about-genetically-modified-food [https://perma.cc/Z5VV-HE2Y?type=image]. Even today, uses for and variations of GMOs continue to expand. *See id.* ("Funding, much of it from the companies that sell GM seeds, heavily favors researchers who are exploring ways to further the use of genetic modification in agriculture."); Seth Slabaugh, *Genetically Engineered Salmon: An Update on How They Are Growing in Albany*, STAR PRESS (Jan. 2, 2020, 1:13 PM), https://www.thestarpress.com/story/news/local/2020/01/02/genetically-engineered-salmon-doing-well-here/2737140001 [https://perma.cc/N5KV-ALAM] ("The fish, engineered to grow faster than conventional Atlantic salmon, are attracting attention because they're the first genetically modified animals approved for human consumption in the U.S.").

17 Freedman, *supra* note 16.

18 *Id.*; *see also GMO Science*, NON-GMO PROJECT, https://www.nongmoproject.org/gmo-facts/science [https://perma.cc/7XY3-URGY].

19 *See generally* NON-GMO PROJECT, https://www.nongmoproject.org [https://perma.cc/VT4F-MFUD].

20 Freedman, *supra* note 16 (noting that most U.S.-grown corn and soybeans are genetically modified, "but only two GM crops, Monsanto's MON810 maize and BASF's Amflora potato, are accepted in the European Union. . . . Throughout Asia, including in India and China, governments have yet to approve most GM crops, including an insect-resistant rice that produces higher yields with less pesticide").

21 *Id.*

22 *See, e.g.*, JUST LABEL IT, http://www.justlabelit.org [https://perma.cc/DNJ6-EVLW].

some states to enact GMO labeling laws,[23] eventually leading to a GMO labeling law at the federal level.[24] Food manufacturers, though, contest these compelled disclosure laws, claiming the mandated disclosures violate their First Amendment rights.[25]

Yet GMOs are just one example of the ways our food can be changed by science. Unsurprisingly, studies show that consumers like to know what they are consuming, including if their food was made with ingredients produced with scientific or technological modifications.[26] When it comes to governments compelling food manufacturers to share this information with consumers, both sides point to the First Amendment to make their case.[27] But whose free speech rights are stronger?

This Note explores the standard under which compelled disclosures on food packaging are evaluated and the ways in which that standard should be considered in the context of changing food science. Part I of this Note describes the evolution of the commercial speech doctrine and examples of state and federal legislation that compelled disclosures on food and beverage products ("food products"). Part II takes a closer look at the *Zauderer* standard. Section II.A considers the "factual and uncontroversial" requirement of the *Zauderer* standard and how courts have interpreted those terms. Section II.B looks at the free speech implications of the commercial speech doctrine and how the *Zauderer* standard has been and should be applied to effectuate this larger purpose of the commercial speech doctrine. Lastly, Part III proposes that Vermont's GMO labeling law should be used as the model legislation for

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23 Morgan Simpson & Doug Farquhar, *Regulating GMO Labelling at State and Federal Levels*, NAT'L CONF. ST. LEGISLATURES BLOG (June 30, 2016), http://www.ncsl.org/blog/2016/06/30/regulating-gmo-labelling-at-state-and-federal-levels.aspx [https://perma.cc/PH2X-AEVP].

24 Gary Langer, *Poll: Skepticism of Genetically Modified Foods*, ABC NEWS (Jan. 7, 2006, 7:57 AM), https://abcnews.go.com/Technology/story?id=97567&page=1 [https://perma.cc/D4A7-XJZU]; *see infra* Section I.B and Part III for explanations and critiques of the federal GMO labeling law.

25 *See, e.g.*, Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015); Council for Educ. & Research on Toxics v. Starbucks Corp., No. BC435759, 2018 WL 1678204 (Cal. Super. Ct. Mar. 28, 2018); *see also infra* Part II.

26 For example, according to a 2015 survey, ninety percent of U.S. consumers want to know if their food contains GMOs. Scott Faber, *Just Label GMO Foods*, AGMAG (July 13, 2015), https://www.ewg.org/agmag/2015/07/just-label-gmo-foods [https://perma.cc/8WX5-4CDU].

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

future compelled disclosure laws for food products. This Part also proposes that oversight by a state agency should be a component of such compelled disclosure laws at the state level.

I. BACKGROUND

A. *The Commercial Speech Doctrine*

At its core, First Amendment protection of commercial speech is meant to shield commercial actors from "unwarranted governmental regulation."[28] However, since the Supreme Court first recognized that commercial speech was entitled to constitutional protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, it has struggled to characterize what "unwarranted" means.[29] More so, the Court has recognized that the First Amendment also protects receivers of information—in other words, those who warrant receiving information, like consumers.[30]

1. The *Central Hudson* Standard: Intermediate Scrutiny

A few years after *Virginia State Board of Pharmacy*, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission* held unconstitutional the New York Public Service Commission's regulation banning advertising that promoted the use of electricity.[31] In doing so, the Court established a four-part test[32] that

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28 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

29 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In *Virginia State Board of Pharmacy*, the Supreme Court held that a Virginia statute preventing licensed pharmacists from advertising drug prices violated the First Amendment, and the First Amendment interests in the "free flow of price information" were not "outweigh[ed by] the countervailing interests of the State." *Id.* at 755, 770.

30 *See infra* Section II.B; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588 n.3 (1980) (Brennan, J., concurring) ("[T]his Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." (quoting Saxbe v. Wash. Post Co., 417 U.S. 843, 862–63 (1974) (Powell, J. dissenting))).

31 447 U.S. 557.

32 The four-part test is:

applies an intermediate level of scrutiny to commercial speech.[33] The *Central Hudson* test is the standard most commonly applied by courts evaluating commercial speech, and it is a difficult test for the government to overcome when defending regulations.[34] For this reason, companies fighting disclosure laws on First Amendment grounds often implore courts to apply the *Central Hudson* standard given its higher level of scrutiny.[35] However, since the creation of the *Zauderer* standard,[36] the *Central Hudson* test is mostly applied in cases where the government is restricting a commercial actor's speech, not compelling it.[37]

2. The *Zauderer* Standard: Rational Basis

The Supreme Court explored the more specific issue of compelled commercial speech some years later in *Zauderer v. Office of Disciplinary Counsel*.[38] Like *Central Hudson*, *Zauderer* stemmed from a dispute over

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> (1) whether the commercial speech in question is misleading or unlawful; (2) whether or not there is a substantial governmental interest at stake; (3) whether or not the regulation directly advances the governmental interest asserted; and (4) whether or not the regulation is more extensive than is necessary to serve that interest.

ROBERT G. FLANDERS, JR. & THOMAS W. MADONNA, A PRACTICAL GUIDE TO LAND USE LAW IN RHODE ISLAND § 9.2.1 (2017).

33 In *Virginia State Board of Pharmacy*, the Court made clear that the intermediate level of scrutiny is less stringent than that applied to political or religious speech. Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972, 974–75 (2017).

34 Samantha Rauer, *When the First Amendment and Public Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations That Restrict Commercial Speech*, 38 AM. J.L. & MED. 690, 691 (2012) ("Despite the conceptualization of *Central Hudson* as an intermediate standard, when examining public health regulations, the Court has been increasingly strict in its level of scrutiny. Public health regulations subjected to the *Central Hudson* analysis are almost always invalidated.").

35 *See, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

36 See *infra* Section I.A.2.

37 *Sorrell*, 272 F.3d at 115 ("*Zauderer*, not *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech.").

38 471 U.S. 626 (1985). Previously, compelling speech was considered a violation of a speaker's First Amendment rights. Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 331 (2008) ("The First Amendment prohibits the government from compelling speech, from requiring, for example, that students pledge allegiance to the flag . . . . The Supreme

an advertisement.[39] Here, an attorney challenged the State of Ohio's regulation that required certain disclosures of his attorney fee structure as this structure was portrayed in his advertisement.[40] Among other issues, the State of Ohio argued the attorney's advertisement was misleading and that the compelled disclosures being challenged served to prevent the deception of consumers.[41] The Court agreed on this point and held that a state can properly require advertisers to include "purely factual and uncontroversial information" so long as the compelled disclosure is reasonably related to a state's interest in protecting consumers from deception.[42] For this reason, the *Zauderer* standard is often referred to by courts as a rational basis review, although courts do more than just a rational basis analysis in cases that fall under the *Zauderer* umbrella.[43] The Court also noted that for a disclosure to pass the *Zauderer* test, it cannot be "unduly burdensome" to the speaker.[44]

A clear factor underlying the Court's decision in this case was protecting consumers from misinformation, which is seemingly the goal of compelled disclosure regulations.[45] In contrast to *Central Hudson*, the shift in *Zauderer* to a lower threshold of scrutiny for compelled speech—versus the restrictions on commercial speech at issue in *Central Hudson*—follows naturally from this overarching goal of informing the

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Court has eloquently defended the right against compelled speech as on par with the First Amendment's right to speak." (internal citations omitted)). The Supreme Court argued that compelled speech "invades the speaker's freedom of mind." *Id.* at 332.

39 *Zauderer*, 471 U.S. 626.

40 *Id.* at 629.

41 *Id.*

42 *Id.* at 651. Importantly, *Zauderer* also applies to compelled disclosures that do not necessarily serve the purpose of "preventing deception." In *New York State Restaurant Ass'n v. New York City Board of Health*, the Second Circuit confirmed that "in *Sorrell*, . . . we held that *Zauderer*'s holding was broad enough to encompass nonmisleading disclosure requirements." 556 F.3d 114, 133 (2d Cir. 2009). The D.C. Circuit previously restricted *Zauderer*'s scope to disclosures preventing deception, but now finds the standard "seems inherently applicable beyond the problem of deception." Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc).

43 For example, the "factual and uncontroversial" requirement falls outside the rational basis inquiry, but has been given increased weight as the standard has evolved. *See Repackaging* Zauderer, *supra* note 33, at 976.

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

45 *Id.*; *see also Repackaging* Zauderer, *supra* note 33, at 976 ("The Supreme Court was careful to frame *Zauderer* as a natural extension of the concern for consumers' informational interests animating the First Amendment's protection of commercial speech more broadly.").

public.[46] However, since this decision, there has been a lot of uncertainty regarding the interpretation and application of the conditions in *Zauderer*, leading to circuit splits and varying approaches to regulations of compelled commercial speech.[47] It is clear why this confusion is so pervasive and why application of *Zauderer* is so varied.[48] The Court based its holding on terms like "reasonably related," "uncontroversial," and "deception."[49] Each of these words or phrases is naturally open to interpretation,[50] and the Court did not offer definitions or qualifications for these words in its opinion that go outside the scope of the advertisement at issue in that case.[51] Following this lack of direction, some commentators have noted that lower courts interpret "uncontroversial" to mean "factual," thereby eliminating any need to debate the benefits and risks of a given statement.[52]

Another source of confusion in the *Zauderer* decision is the level at which a regulation must be reasonably related to a state's interest.[53] The State did not need to show evidence proving its interest in protecting consumers in the specific case of *Zauderer* as the Court noted the

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[46] Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 147 (2016) (arguing that "[t]his sharp asymmetry in the level of scrutiny makes sense because the constitutional value in commercial speech is that it can provide information to the public so that the public may make more intelligent decisions. Restrictions on commercial speech are thus necessarily more constitutionally suspect than mandated disclosures").

[47] *See* Jennifer L. Pomeranz, *Outstanding Questions in First Amendment Law Related to Food Labeling Disclosure Requirements for Health*, 34 HEALTH AFF. 1986, 1987–88 (2015); *see also Repackaging* Zauderer, *supra* note 33, at 979 ("Yet *Zauderer*'s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic.").

[48] *See* Pomeranz, *supra* note 47, at 1988 (noting that "[t]he Supreme Court did not explain what constitutes 'uncontroversial' information. . . . '[U]ncontroversial' has been somewhat conflated with 'factual'"); *see also Repackaging* Zauderer, *supra* note 33, at 984 ("No consistent understanding of what either 'factual' or 'controversial' means for the purposes of evaluating compelled commercial disclosures has emerged among commentators or circuit courts that have attempted to flesh out this prong of *Zauderer*'s test."); Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL'Y 53, 60 (2016) ("Far less clear, however, are (1) what counts as a 'factual and uncontroversial' warning requirement, subject to the *Zauderer* test . . . .").

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

[50] *See generally* Pomeranz, *supra* note 47, at 1988; *Repackaging* Zauderer, *supra* note 33, at 984; Berman, *supra* note 48, at 60.

[51] Pomeranz, *supra* note 47, at 1987–88.

[52] *Id.*

[53] *Id.* at 1988–89.

potential for deception was "self-evident."[54] Yet not all compelled disclosures are so obvious and do require a showing of proof that a state's interest is genuine and valid.[55] In the case of public health, however, which is the premise of this Note, a state's interest is similarly obvious and unlikely to be a point of contention.[56]

3. The Scope of the First Amendment

The evolution of the commercial speech doctrine has shed new light on the scope of the First Amendment all the while raising questions about how much protection, and to whom, the First Amendment provides.[57] The commercial speech doctrine was created in *Virginia State Board of Pharmacy* in part for the purpose of informing consumers.[58] The Supreme Court even went so far as to equate, in certain situations, the First Amendment rights of speakers with those who are receiving the information.[59] This sentiment was later echoed in *Zauderer*,[60] which applied the commercial speech doctrine originally intended to qualify

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[54] *Zauderer,* 471 U.S. at 652–53.

[55] *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 120 (2d Cir. 2009) (regulation requiring the disclosure of calories in chain restaurants was tied to the state's interest in "combat[ing] rising rates of obesity and associated health care problems").

[56] *Id.* However, in *International Dairy Foods Ass'n v. Amestoy*, the Second Circuit concluded that "consumer curiosity alone is not a strong enough state interest" to require the disclosure of a factual statement. 92 F.3d 67, 74 (2d Cir. 1996). Similarly, in *National Institute of Family & Life Advocates v. Becerra*, the Supreme Court noted that "[w]e need not decide what type of state interest is sufficient to sustain a disclosure requirement like the unlicensed notice. California has not demonstrated any justification for the unlicensed notice that is more than 'purely hypothetical.'" 138 S. Ct. 2361, 2377 (2018) (quoting Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146 (1994)). Thus, it appears that, so long as the state can pass the "factual and uncontroversial" prong of the *Zauderer* standard, it follows that the state has met the "rational basis" prong, as well.

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

[58] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

[59] *Id.* ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.").

[60] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." (internal citations omitted)).

speech restrictions to speech that was compelled.[61] When the Court first recognized this role of the First Amendment in compelling speech, the Court sparked a new dimension of First Amendment protection.[62] This interpretation went beyond mere protection of speech, but emphasized the significance of information-sharing to consumers and the government's interest in doing so.[63] The Court explained that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . ."[64] "Value" in this context could, of course, mean any number of things. In the case of *Zauderer*, this "value" was quite literally money, since the Court determined that by not disclosing his attorney fees, Zauderer was misleading potential clients into thinking they would not be charged if they lost in court.[65] But this "value" expands far beyond dollars and cents, and where public health is concerned, this value is quite significant.[66]

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[61] *Id.*

[62] *Id.* That said, Justice White was careful to frame this new standard for compelled commercial speech as an "extension of First Amendment protection to commercial speech." *Id.*

[63] *Id.* Even before the compelled speech doctrine was created, however, the Court made a point of this important distinction between protecting the right to speak as well as the right to receive. *Va. State Bd. of Pharmacy*, 425 U.S. at 757 ("[T]his Court has referred to a First Amendment right to receive information and ideas, and that freedom of speech necessarily protects the right to receive." (internal citations and quotations omitted)); *see also* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 81 (2d Cir. 1996) (Leval, J., dissenting).

> The benefit the First Amendment confers in the area of commercial speech is the provision of accurate, non-misleading, relevant information to consumers. Thus, regulations designed to prevent the flow of such information are disfavored; regulations designed to provide such information are not.
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> The milk producers' invocation of the First Amendment for the purpose of concealing their use of rBST in milk production is entitled to scant recognition. They invoke the Amendment's protection to accomplish exactly what the Amendment opposes. And the majority's ruling deprives Vermont of the right to protect its consumers by requiring truthful disclosure on a subject of legitimate public concern.

Id.

[64] *Zauderer*, 471 U.S. at 651 (citing *Va. State Bd. of Pharmacy*, 425 U.S. 748).

[65] *Id.*

[66] This issue is, at its basic level, about the health of consumers, but, from a state's perspective, this is also a long-term economic concern as public health issues can be costly. *See infra* notes 196–199 and accompanying text; *see also* Susan Scutti, *Avoiding "Ultraprocessed" Foods May Increase*

B. *Notable Approaches to Food Product Disclosure Regulations*

Many state legislatures have enacted––or tried to enact––disclosure laws in an attempt to inform consumers of what, specifically, they are eating and drinking.[67] Similar laws are also in place at the federal level.[68] In either scenario, such laws face pushback from lobbying groups and companies themselves that claim compelling disclosures on food packaging is a violation of their First Amendment rights.[69]

1. California's Proposition 65

In 2010, the Council for Education and Research on Toxics (CERT) sued Starbucks and eighteen other major coffee companies who sell ready-to-drink coffee in the State of California for violations of California's Proposition 65.[70] Proposition 65 was enacted in 1986 for the purpose of keeping chemicals that are known to cause cancer from entering the state's drinking water, and compels businesses to alert consumers of potential exposure to the enumerated chemicals.[71] Under the purview of Proposition 65 is a list of chemicals linked to cancer in

Lifespan, Study Says, CNN (Mar. 6, 2019, 11:36 AM), https://www.cnn.com/2019/02/11/health/ultraprocessed-foods-early-death-study/index.html [https://perma.cc/XA8F-ATPY].

67 *See, e.g.*, 24 R.C.N.Y. § 81.50 (2008) (requiring labeling of calorie content information on restaurant menus); *see also* VT. STAT. ANN. tit. 6, § 2754(c) (repealed 1998) (requiring labeling of milk products that were produced with rBST).

68 *See* U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: VOLUNTARY LABELING INDICATING WHETHER FOODS HAVE OR HAVE NOT BEEN DERIVED FROM GENETICALLY ENGINEERED PLANTS (2019), https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm059098.htm [https://perma.cc/T2MX-U968]; *see also* Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, § 202(1)(B), 118 Stat. 891, 905 (2004) (codified at 21 U.S.C. § 343 (2018)).

69 *See infra* Part II.

70 Council for Educ. & Research on Toxics v. Starbucks Corp., No. BC435759, 2018 WL 1678204 (Cal. Super. Ct. Mar. 28, 2018).

71 *The Proposition 65 List*, OFF. ENVTL. HEALTH HAZARD ASSESSMENT, https://oehha.ca.gov/proposition-65/proposition-65-list [https://perma.cc/SCQ5-4LCF]; CAL. HEALTH & SAFETY CODE § 25249.6 (Deering 2019).

humans.[72] In its lawsuit, CERT alleged that coffee companies throughout California failed to notify consumers that coffee contains acrylamide, a carcinogen on the Proposition 65 List, which is formed during the roasting of coffee.[73] Defendant coffee companies raised numerous affirmative defenses including "alternative significant risk level"[74] and "violation of the First Amendment to the United States Constitution (right of free speech)."[75]

A California judge in the Superior Court of the State of California for the County of Los Angeles ruled in March 2018 that defendant coffee companies failed to meet the burden of proof for their Alternative Significant Risk Level affirmative defense.[76] As a result of this ruling, coffee sold in coffee shops throughout California will need to be accompanied by a cancer risk warning.[77] This decision faced a lot of criticism, especially from coffee lobbies, which claimed this decision did not reflect a widely-held belief in science that coffee does not lead to cancer.[78]

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72 OFF. ENVTL. HEALTH HAZARD ASSESSMENT, *supra* note 71. According to the website of the Office of Environmental Health Hazard Assessment, "[t]he list contains a wide range of naturally occurring and synthetic chemicals that are known to cause cancer or birth defects or other reproductive harm. These chemicals include additives or ingredients in pesticides, common household products, food, drugs, dyes, or solvents." *Id.* This list is updated on a regular basis, most recently January 3, 2020. *Id.*

73 *Council for Educ. & Research on Toxics*, 2018 WL 1678204.

74 *Id.* The state's Health and Safety code provides an exemption to the warning requirement if it can be shown that there is no significant risk for lifetime exposure of the contaminant at the levels present in the product. *Id.*

75 *Id.*

76 *Id.* While the court did not address the merits of the First Amendment defense, the court discussed the purpose of Proposition 65 to protect consumers, as well as California citizens' right to be informed of potential exposure to contaminants. *Id.*

77 *See* Aaron E. Carroll, *California, Coffee and Cancer: One of These Doesn't Belong*, N.Y. TIMES (Apr. 23, 2018), https://www.nytimes.com/2018/04/23/upshot/california-coffee-and-cancer-one-of-these-doesnt-belong.html [https://perma.cc/E6F4-68P4]; *see also California Judge Rules that Coffee Requires Cancer Warning*, CNBC (Mar. 30, 2018, 7:19 AM), https://www.cnbc.com/2018/03/30/california-judge-rules-that-coffee-requires-cancer-warning.html [https://perma.cc/E83L-2WRR] ("Scientists haven't rendered a verdict on whether coffee is good or bad for you but a California judge has. He says coffee sellers in the state should have to post cancer warnings.").

78 Sources cited *supra* note 77.

2. Vermont's GMO Labeling Law

In 2014, the Vermont Legislature passed a law requiring food companies to label food products produced with genetic engineering as "partially produced with genetic engineering," "may be partially produced with genetic engineering," or "produced from genetic engineering."[79] The Vermont Legislature, recognizing the Food and Drug Administration (FDA) does not require such labeling nor does it require independent testing of food products produced with genetic engineering, enacted this legislation to help the public make "informed decisions."[80]

Response to the Vermont law was both positive and negative.[81] The Organic Consumers Association as well as other consumer advocate groups were proponents of the labeling requirement.[82] However, the law faced serious opposition and criticism from the Grocery Manufacturers Association, who unsuccessfully tried to challenge the law both in court and from a legislative angle.[83] Large food companies such as General Mills and Mars also disapproved of the law and made it clear that they only complied to avoid paying fines.[84]

Food manufacturers sued Vermont over the law on multiple grounds, including a variety of First Amendment violations.[85] Specifically, plaintiffs sought an injunction and argued, in part, that the disclosure requirement compelled "controversial" speech, which needed to be analyzed under intermediate scrutiny, namely the *Central Hudson*

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79 H. 112, 2013 Leg., Legis. Sess. (Vt. 2014).

80 *Id.* The FDA has concluded that the nutritional quality of genetically engineered foods is the same as the original crop itself, so it does not require labeling of GMOs. U.S. FOOD & DRUG ADMIN., *supra* note 68. This position has been met with strong opposition from consumer advocacy groups who contend that the research on GMOs potentially says otherwise. Freedman, *supra* note 16.

81 For arguments in favor of the law, see Ronnie Cummins, *GMOs: Ban Them or Label Them?*, ORGANIC CONSUMERS ASS'N (Mar. 6, 2014), https://www.organicconsumers.org/essays/gmos-ban-them-or-label-them [https://perma.cc/6W6N-Y47N]; *see also* JUST LABEL IT, *supra* note 22. For arguments against the law, see Dan Charles & Allison Aubrey, *How Little Vermont Got Big Food Companies to Label GMOs*, NPR (Mar. 27, 2016, 8:07 AM), https://www.npr.org/sections/thesalt/2016/03/27/471759643/how-little-vermont-got-big-food-companies-to-label-gmos [https://perma.cc/R2K7-KPYB].

82 *See generally* Cummins, *supra* note 81. *See also* JUST LABEL IT, *supra* note 22.

83 Charles & Aubrey, *supra* note 81.

84 *Id.*

85 Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015).

standard.[86] However, the district court denied injunctive relief, determining the *Zauderer* standard was more appropriate in this instance.[87]

The court concluded that the state's law would be upheld under the *Zauderer* standard since the Legislature's findings presented a "substantial" interest, and, even if these findings are contested, they are nonetheless "real."[88] In short, while the District Court of Vermont did acknowledge the controversy and disputed theories of GMOs, it found that this controversy did not preempt enforcement of the law in favor of an injunction at this stage in the litigation.[89]

3. The Federal GMO Labeling Law

Vermont's GMO labeling law went into effect on July 1, 2016.[90] On July 29, 2016, President Obama signed a federal GMO labeling law that preempted that of Vermont.[91] Such a federal law had long been in the works,[92] but the process of passing the federal law was expedited in response to the passage of Vermont's law.[93] The National Bioengineered

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[86] *Id.* at 628.

[87] *Id.* at 632. The court cited Second Circuit precedent indicating that "when 'regulations compel disclosure without suppressing speech, *Zauderer*, not *Central Hudson*, provides the standard of review.'" *Id.* (citation omitted).

[88] *Id.* at 633–34.

[89] *Id.* at 648. Again, the court postulated that the law would pass the *Zauderer* standard, but this would need to be reevaluated at a later point as this decision was based on plaintiff's request for injunctive relief and defendant's motion to dismiss under 12(b)(6). *Id.* at 632–35.

[90] H. 112, 2013 Leg., Legis. Sess. (Vt. 2014).

[91] Mary Clare Jalonick, *Obama Signs Bill Requiring Labeling of GMO Foods*, ASSOCIATED PRESS (July 29, 2016), https://www.apnews.com/65c61c63e3df4b74bb90a2187122d744 [https://perma.cc/7SB8-6XTA].

[92] Tan & Epley, *supra* note 12, at 307.

[93] S. 764, 114th Cong. (2016) (enacted); *see also* Dan Charles, *Congress Just Passed a GMO Labeling Bill. Nobody's Super Happy About It*, NPR (July 14, 2016, 5:34 PM), https://www.npr.org/sections/thesalt/2016/07/14/486060866/congress-just-passed-a-gmo-labeling-bill-nobodys-super-happy-about-it [https://perma.cc/E6MH-PCEQ]; 162 CONG. REC. H4934 (daily ed. July 14, 2016) (statement of Rep. Conaway) ("The House of Representatives passed its own bill, the Safe and Accurate Food Labeling Act of 2015, last year. However, because of the time constraint imposed by the Vermont law, the House and Senate w[as] . . . unable to conference the two bills . . . .").

Food Disclosure Standard, which went into effect on January 1, 2020,[94] requires that foods manufactured with GMOs carry a label in the form of "a text, symbol, or electronic or digital link."[95] It is up to the food company itself which of these options it would prefer to use on its products.[96] From the outset, this law faced a lot of criticism from GMO labeling advocates who were concerned that if companies choose the latter option, a QR code on the food product's packaging, it could be missed by consumers––plus it requires an extra step on the consumer's part to get any information.[97] Other label options under the Act use the term "bioengineered" instead of the more commonly known "genetically modified."[98] These proposed label options feature the letters "BE" with a smiley face or in front of a backdrop of a field and the sun shining above.[99] Smaller companies are permitted instead to print a URL on the packaging, which would require consumers to manually plug the URL into their mobile device.[100] In either case, most of these label options do not provide any information, but rather prompt consumers to scan the

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94 While the National Bioengineered Food Disclosure Standard is in effect as of January 1, 2020, mandatory compliance does not begin until January 1, 2022. The U.S. Department of Agriculture (USDA) will rely on self-reporting by food manufacturers for enforcement. Exemptions to the labeling requirement will exist, but the USDA has yet to clarify the specifics of what those exemptions will be. Pan Demetrakakes, *GMO Labeling Regulations Still Causing Confusion*, FOOD PROCESSING (Jan. 3, 2020), https://www.foodprocessing.com/industrynews/2020/gmo-labeling-regs-still-causing-confusion [https://perma.cc/P2UD-J75X]; *see* Charles, *supra* note 93 ("[T]he law leaves many details of the new labeling scheme to be worked out by the U.S. Department of Agriculture. These include, for instance, whether refined products like soy oil or sugar from beets will need to be labeled. While they are made from GMO crops, the final product doesn't contain any genetically modified material, such as proteins or DNA.").

95 S. 764, 114th Cong. (2016) (enacted). This excludes "Internet website Uniform Resource Locators not embedded in the link." *Id.*

96 *Id.*

97 Brad Plumer, *The Controversial GMO Labeling Bill That Just Passed Congress, Explained*, VOX (July 14, 2016, 3:08 PM), https://www.vox.com/2016/7/7/12111346/gmo-labeling-bill-congress [https://perma.cc/KR5A-F6LV].

98 Merrit Kennedy, *USDA Unveils Prototypes for GMO Food Labels, and They're . . . Confusing*, NPR (May 19, 2018, 7:55 AM), https://www.npr.org/sections/thesalt/2018/05/19/612063389/usda-unveils-prototypes-for-gmo-food-labels-and-theyre-confusing [https://perma.cc/73BK-Q6VD]; *see also* Amy Harmon, *G.M.O. Foods Will Soon Require Labels. What Will the Labels Say?*, N.Y. TIMES (May 12, 2018), https://www.nytimes.com/2018/05/12/us/gmo-food-labels-usda.html [https://perma.cc/SV63-ZSLY].

99 For images of the proposed BE labels, see Kennedy, *supra* note 98.

100 S. 764, 114th Cong.

code or manually type the web address to find out if the product contains GMOs.[101] In the same vein, the law is also criticized over the concern that consumers will not know, based on the label, what it is for since it is not clear from the label itself what information will be available.[102]

It is too early to tell, but if this law follows a pattern similar to that of prior food product-related disclosure laws, it will likely face First Amendment challenges from food manufacturers.[103] On the other side, some experts predict the law could face legal battles for not disclosing enough information to consumers.[104]

II. ANALYSIS

There are an increasing number of ways science is changing crop growth and food production.[105] The changes to food products that result from scientific advancements and new technologies may not be conclusively[106] proven safe or unsafe by the time these products hit the market.[107] Yet, without explicit disclosures, it may not be apparent that the product was not created by natural or conventional means.[108] Recent studies show that transparency of ingredients and processing methods of

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101 *See generally* Danica Lo, *New GMO Labeling Law Hides Information Behind QR Codes, Critics Charge*, FOOD & WINE (Aug. 2, 2016), https://www.foodandwine.com/blogs/how-new-gmo-labeling-law-will-affect-your-shopping-experience [https://perma.cc/J8P8-3XE6]; Baylen Linnekin, *A Crummy Law Leads to Crummy GMO Regulations*, REASON (Oct. 2018), https://reason.com/archives/2018/09/15/a-crummy-law-leads-to-crummy-g [https://perma.cc/HB3W-TSR3]; Charles, *supra* note 93.

102 *See* Plumer, *supra* note 98.

103 *See generally* Mary Christine Brady, Comment, *Enforcing an Unenforceable Law: The National Bioengineered Food Disclosure Standard*, 67 EMORY L.J. 771 (2018) ("If the GE labeling law withstands likely First Amendment challenges, or until successful First Amendment litigation overturns the law, the government should anticipate two other sources of litigation: (1) consumer class actions . . . and (2) competitor suits by manufacturers seeking to enforce the GE labeling law through the Lanham Act.").

104 *Id.*

105 *See supra* note 5 and accompanying text.

106 "Conclusively" as used here is relative, which is to the point of this Note.

107 *See infra* Section II.A.

108 *See* Gasparro & Newman, *supra* note 4.

food products is a key factor in consumers' decisionmaking.[109] The First Amendment guarantees this disclosure of information,[110] and the government has an interest in ensuring this information sharing to protect public health.[111]

A. Zauderer*'s "Factual and Uncontroversial" Requirements in Light of Evolving Food Science*

The *Zauderer* Court held that government can compel a commercial actor to disclose information as long as it is "reasonably related to the State's interest in preventing deception of consumers."[112] The focus of the *Zauderer* standard has evolved slightly with an increased focus on whether or not a required disclosure is "factual and uncontroversial."[113] A state's interest in compelling disclosures that inform consumers about what is in their food or how their food was produced is an easily identifiable one: public health.[114] In this sense, a state's desire to provide consumers with information that does, or could, impact the health of its citizens over the short- or long-term, is certainly a state interest.[115] Courts

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109 According to a 2015 study, about half of consumers make purchasing decisions based on the following five "evolving drivers:" health & wellness, safety, social impact, experience, and transparency. JACK RINGQUIST ET AL., DELOITTE, CAPITALIZING ON THE SHIFTING CONSUMER FOOD VALUE EQUATION (2016), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/us-fmi-gma-report.pdf [https://perma.cc/AR3H-HJER].

110 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

111 *See* Stephen D. Sugarman, *Should Food Business Be Able to Use the First Amendment to Resist Providing Consumers with Government-Mandated Public Health Messages?*, 5 FDLI'S FOOD & DRUG POL'Y F. 1 (Apr. 29, 2015).

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

113 *Id.*; *see also Repackaging* Zauderer, *supra* note 33, at 973–74.

114 *See* Scutti, *supra* note 66 (discussing a study published in February 2019 that found an association between the consumption of ultraprocessed food and increased mortality).

115 However, while the *Zauderer* standard is often called a "rational basis standard," there is some indication that *Zauderer*'s holding does not *require* a rational showing of a "substantial governmental interest." Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 633 (D. Vt. 2015). "[I]t is not clear whether *Zauderer* requires a state to identify a 'substantial' governmental interest before it may require a factual, non-controversial commercial disclosure. *Zauderer*, itself, does not impose this requirement." *Id.* (quoting *Zauderer*, 471 U.S. at 657–58 (Brennan, J., concurring in part and dissenting in part) (agreeing with the Court's reasonable relationship inquiry "only on the understanding that it comports with the standards more precisely set forth in [its] previous

rarely disagree on this point.[116] A key issue legislatures face when defending a compelled disclosure law (or in considering whether or not a law should be enacted) is whether it will meet *Zauderer*'s "purely factual and uncontroversial" requirement.[117] It is unclear, however, what those words truly mean in the context of this standard.[118] This lack of clarity has resulted in lower courts assigning these terms their own meanings.[119]

If the words are taken at face value, a state is at a disadvantage from the outset if and when it needs to defend a compelled disclosure law since it may not be able to overcome this prong of the *Zauderer* standard.[120] This is because nutrition- and health-related science often lacks strong factual support.[121] It is beside the point, according to the standard, that the disclosure law was likely put in place because the state wants to inform its consumers of a controversial issue.[122] But when a state, in defense of a compelled disclosure law, relies exclusively on the first part of the *Zauderer* standard—"reasonably related to the State's interest"—but has insufficient evidence to meet the level of "factual and uncontroversial," the state loses.[123]

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commercial-speech cases [requiring, among other things,] that a State can demonstrate a legitimate and substantial interest to be achieved by the regulation" (alteration in original))).

116 *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009); *Sorrell*, 102 F. Supp. 3d 583.

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

118 *See* Pomeranz, *supra* note 47; *see also Repackaging* Zauderer, *supra* note 33, at 973–74, 984 n.73.

119 See *CTIA–The Wireless Ass'n v. City of Berkeley*, 158 F. Supp. 3d 897, 904 (N.D. Cal. 2016), for an example of one interpretation. *See also* Berman, *supra* note 48, at 65–73.

120 *See* Berman, *supra* note 48, at 80.

121 Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73, 80 (2018) ("In areas with contested knowledge—and nutrition and health is dominated by them—weakly supported factual claims are as good as it gets."). A good example of this is the research surrounding the health of eggs. For more information on this back-and-forth debate, see Susan Scutti, *Three or More Eggs a Week Increase Your Risk of Heart Disease and Early Death, Study Says*, CNN (Mar. 15, 2019, 5:10 PM), https://www.cnn.com/2019/03/15/health/eggs-cholesterol-heart-disease-study/index.html [https://perma.cc/XU6M-R67T].

122 In the same way, states could refrain from writing such laws in the first place out of fear that it will fail in court when sued on the basis of First Amendment violations.

123 *See, e.g.*, Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996). This is also why the label "rational basis" review is a misnomer for the *Zauderer* standard. *See Repackaging* Zauderer, *supra* note 33, at 985 ("*Zauderer*'s factual and uncontroversial prong is not the only basis on which courts have relied to overturn regulations that seem too restrictive of commercial speakers' rights.").

In *International Dairy Foods Ass'n v. Amestoy*, the Second Circuit granted an injunction to dairy manufacturers who sued the State of Vermont over a law that would have required the manufacturers to label dairy products produced with milk from cows treated with the growth hormone rBST.[124] The court of appeals overturned the district court's decision, finding the state's interest in consumer concern was not enough to compel this disclosure.[125] The dissenting opinion, however, criticized the majority for basing its decision on a select few short-term studies and for being naïve about the potential for negative impacts of this new advancement in food science over the long-term.[126] Following the black-and-white rule of true or false undermines the state's ability to care for its citizens, ignores the realities of advancements in science,[127] and inhibits the First Amendment's ability to allow states to protect consumers.[128]

Arguably, "factual" and "uncontroversial" are relative and subjective.[129] This is illustrated by the aforementioned cases of *Grocery*

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124 *Int'l Dairy Foods Ass'n*, 92 F.3d 67.

125 *Id.* In other areas of the law, consumer fear is also not considered enough to warrant action. *See* Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (holding an employee could not recover under the Federal Employers' Liability Act for negligently inflicted emotional distress when the employee did not exhibit any signs of contracting an illness from his exposure to asbestos on the job). *But see Int'l Dairy Foods Ass'n*, 92 F.3d at 74–76 (Leval, J., dissenting). In its opinion, the court mentioned that the FDA "has determined that there is no significant difference between milk from treated and untreated cows." *Id.* at 70 (majority opinion). While the court did not say this was a determinative factor in its conclusion, it was apparent that the court weighed this more heavily than it led on, as the dissent acknowledged. "Third, the majority suggests that, because the FDA has not found health risks in this new procedure, health worries could not be considered 'real' or 'cognizable.'" *Id.* at 76 (Leval, J., dissenting).

126 *Id.* at 74–76. Judge Leval goes on to compare the infancy of this issue to that of smoking, admitting "when I (and nearly everyone) smoked, no one told us that we might be endangering our health." *Id.* at 77. This argument is in line with the district court's decision in denying a request for an injunction to prevent Vermont's labeling law from going into effect. The court paired the state's interest in providing information to consumers with mixed studies on the health impacts of GMOs. Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015).

127 *See* Bambauer, *supra* note 121, at 76 ("A true/false dichotomy that fails to account for contested claims is bound to be incoherent and pretentious. Low standard for 'truth' will hamstring government efforts to support public safety, but high standards screen out most of the available information.").

128 *See* discussion of First Amendment *infra* Section II.B.

129 As this Note argues, in the instances of compelled disclosures on food, these terms *should* be construed in a relative manner.

Manufacturers Ass'n v. Sorrell[130] and *Council for Education & Research on Toxics v. Starbucks*.[131] In *Sorrell*, for example, the district court acknowledged that there are studies "supporting both 'sides' of the [GMO] debate."[132] Whether or not one believes those respective courts came to the proper conclusions, the decisions aptly demonstrate the grey area of these terms, especially with regard to evaluating government-mandated disclosures.[133]

The legal field is often criticized for its oversimplification of what is or is not a known fact, especially as it relates to evaluating what constitutes the truth for First Amendment purposes.[134] More specifically, the law has a tendency to ignore the varying degrees of knowledge that inform the "facts" upon which legal decisions are made.[135] A common yet mistaken approach in the law conflates accepted knowledge and contested knowledge as one broad category of factual claims.[136] The advancements in food and crop science often fit into the contested knowledge category, meaning any consensus as to their safety is still questioned and debated within the scientific community.[137] Such

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130 102 F. Supp. 3d 583.

131 No. BC435759, 2018 WL 1678204 (Cal. Super. Ct. Mar. 28, 2018).

132 *Sorrell*, 102 F. Supp. 3d at 634.

133 *Council for Educ. & Research on Toxics*, 2018 WL 1678204; *Sorrell*, 102 F. Supp. 3d at 634.

134 *See* Bambauer, *supra* note 121, at n.5; *see also* Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 471–72 (2018).

135 Bambauer, *supra* note 121, at 75–76 (discussing how the law often conflates accepted knowledge and contested knowledge).

136 *Id.*

137 *Id.* There are other concerns about the reliability of scientific research itself. *See* Roesler, *supra* note 134, at 471–72 (discussing issues such as unreliable scientific methods and confirmation bias). Another issue that calls into question the efficacy of research and health guidance relied upon in the United States is the conflicts of interest in these studies. *See* Freedman, *supra* note 16 ("Critics often disparage U.S. research on the safety of genetically modified foods, which is often funded or even conducted by GM companies, such as Monsanto."); *see also* Kate Bratskeir, *Food Companies Funded These 8 Studies to Prove Their Products Are "Healthy,"* BUS. INSIDER (June 23, 2016, 12:56 PM), https://www.businessinsider.com/these-8-company-funded-studies-proved-their-products-are-healthy-2016-6#finding-2-diet-soda-is-better-than-water-for-weight-loss-2 [https://perma.cc/9EZX-QJZ4] (noting that a 2015 report analyzing relationships between food companies and food scientists determined "that the American Society for Nutrition [(ASN)] accepts sweet sums of cash to produce research that falls in the favor of big food companies. The ASN allows companies like PepsiCo, Nestlé, Coca-Cola and McDonald's to sponsor events and supply researchers from their own boards to see through scientific research").

contested knowledge is on par with scientific exploration generally, which is often characterized by, and progresses as a result of, debates over scientific truths.[138]

Interestingly, compelled disclosures on foods often do not have a problem meeting the "factual and uncontroversial" requirement—from a literal perspective.[139] For example, under Vermont's GMO disclosure law, food products containing GMOs had to bear the label "PARTIALLY PRODUCED WITH GENETIC ENGINEERING."[140] It is hard to dispute the truth of this compelled disclosure and impute any controversy into such a straightforward statement.[141] Along those lines, the Second Circuit found that requiring N.Y.C. chain restaurants to disclose caloric information to customers was "a simple factual disclosure" that did not undermine any constitutionally-protected speech.[142]

However, there is an argument to be made, as plaintiffs did in *Sorrell*, that while the words in such a label are not controversial in-and-of themselves, disclosing that a product was made with GMOs could insinuate that GMOs are bad for human consumption.[143] This sentiment, in turn, is controversial.[144] But this is not a guaranteed interpretation and

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138 Berman, *supra* note 48, at 72. Global warming is an example of one such debate since, even with all of the research available so far, there are still some scientists who do not agree that global warming is as severe as other scientists contend. *Id.*; *see also* Freedman, *supra* note 16 ("But as medical researchers know, nothing can really be 'proved safe.' One can only fail to turn up significant risk after trying hard to find it . . . .").

139 Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 630 (D. Vt. 2015); *see also* Berman, *supra* note 48, at 70–71.

140 This is one example of a label under the Vermont law. The specific language was dictated by the amount of GMOs used to produce the given food item. H. 112, 2013 Leg., Legis. Sess. (Vt. 2014). For examples of images of what the label looked like, see Chris Morran, *Vermont's GMO Labeling Law Is Now in Effect. Here Are the Labels the Senate Is Trying to Get Rid Of*, CONSUMERIST (July 1, 2016, 2:51 PM), https://consumerist.com/2016/07/01/vermonts-gmo-labeling-law-is-now-in-effect-here-are-the-labels-senate-is-trying-to-get-rid-of [https://perma.cc/QY2W-54HF].

141 For a discussion of labels that warn against specific health concerns, see Sabrina S. Adler et al., *You Want a Warning with That? Sugar-Sweetened Beverages, Safety Warnings, and the Constitution*, 71 FOOD & DRUG L.J. 482 (2016) (discussing the issue of warning labels for sugar-sweetened beverages).

142 N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

143 *Sorrell*, 102 F. Supp. 3d at 628–30; *see also* Berman, *supra* note 48, at 70.

144 The district court acknowledged that the law "was enacted in the midst of public and political controversy regarding the safety and benefits of GE and GE food." *Sorrell*, 102 F. Supp. 3d at 628. In their brief, plaintiffs also wrote that "[i]t would be difficult to point to a current consumer issue *more* controversial than genetic engineering." Memorandum of Points & Auths. in Support of

is further based on the plaintiffs' own assumptions.[145] The district court was similarly not persuaded by this argument.[146] Even if some consumers do interpret the label to have negative connotations, the disclosure is purely factual and serves the state's interest—and its constitutional right—of informing consumers of what they are eating.[147] The label is a stepping stone, provided for by the state, for those consumers who would like more information about GMOs or who are intent on making choices based on this information.[148]

The district court's decision in *Sorrell*, however, is not necessarily indicative of how other courts would classify an equally factual compelled disclosure. Many courts' ruling on similar disclosures, many of which are not disclosures on food packaging, have come to the opposite conclusion.[149] In *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), the most recent compelled commercial speech case reviewed by the Supreme Court, the argument that a disclosure based in fact can still be controversial was upheld.[150] In *NIFLA*, licensed crisis pregnancy centers[151] sued California officials alleging that a state law violated their

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Plaintiffs' Motion for Preliminary Injunction at 46, *Grocery Mfrs. Ass'n*, 102 F. Supp. 3d 583 (No. 5:14-cv-117-cr).

145 *Sorrell*, 102 F. Supp. 3d at 628–30.

146 *Id.*

147 *See infra* Section II.B.

148 Plumer, *supra* note 98. Proponents of the federal GMO labeling law argue that the QR code will similarly lead interested consumers to get more information about GMOs. Yet, as discussed *infra*, opponents and concerned consumers argue the QR code is more of a roadblock to this information.

149 *See, e.g.*, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (country of origin labeling); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 77 (2d Cir. 1996); *see also* CTIA—The Wireless Ass'n v. City & Cty. of San Francisco, 494 F. App'x 752 (9th Cir. 2012). *CTIA* is slightly unique from compelled disclosures on food packaging as the disclosure at issue in that case was a point-of-sale warning required of cell phone retail stores. The warning informed consumers matter-of-factly that "cell phones emit radio-frequency energy. . . . Studies continue to assess potential health effects of mobile phone use." *CTIA—The Wireless Ass'n v. City & Cty. of San Francisco*, 827 F. Supp. 2d 1054, 1058 (N.D. Cal. 2011), *aff'd*, 494 F. App'x 752 (9th Cir. 2012). The warning went on to offer suggestions on behalf of the City of San Francisco for reducing exposure to radio frequencies. The Ninth Circuit determined that since there was "a debate in the scientific community about the health effects of cell phones," these statements were the city's opinion. *CTIA—The Wireless Ass'n*, 494 F. App'x at 753–54.

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

151 Crisis pregnancy centers are pro-life clinics that offer services and inform clients only of options that involve a woman carrying the baby to term. *Id.* at 2368.

free speech rights by requiring them to post visible notices that the State of California offered free family-planning services, including abortions and contraceptives.[152] The Court concluded that the disclosures were controversial and violated the plaintiff crisis pregnancy centers' First Amendment rights.[153]

By the same standards, requiring a food company to include text to the effect of "this product contains GMOs" is not dissimilar to requiring a crisis pregnancy center to notify its customers that there are other places in the state that offer a larger variety of options.[154] Justice Thomas further argued that the crisis pregnancy centers only needed to inform patients of information that promotes the centers' views on this "controversial" issue.[155] So too have food companies argued that by having to put a "factual" statement on its products (one they argue implies there are risks or harms associated with their product) they are being forced to present the opposing side of a given "controversial" issue.[156] By the Supreme Court's standards, at least as it pertains to crisis pregnancy centers, it is a violation of companies' First Amendment rights to force them to disclose information that is against their own beliefs.[157]

In *Sorrell*, by contrast, the district court discounted plaintiffs' argument that Vermont's GMO disclosure law forces food manufacturers to engage in controversial speech solely on the basis that the topic of GMOs was controversial.[158] The court clarified that a compelled disclosure will only be deemed "controversial" if the compelled information is controversial.[159] Any implication, controversial or otherwise, that could be derived from the disclosure is not enough to deem it as such.[160] The Second Circuit similarly concluded that requiring a company to speak against its will, such as by requiring the company to

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152 *Id.* at 2370. Unlicensed crisis pregnancy centers also sued, claiming it was a violation of their free speech rights for the state to force them to distribute notices that they were unlicensed. *Id.*

153 *Id.* at 2378.

154 *Id.*

155 *Id.* The "controversial" element is discussed further *infra* Section II.B.

156 *See, e.g.*, Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 628 (D. Vt. 2015).

157 *NIFLA*, 138 S. Ct. 2361.

158 *Sorrell*, 102 F. Supp. 3d at 628. In plaintiffs' brief, they argued that it would be hard to find a "current consumer issue *more* controversial than genetic engineering." *Id.*

159 *Id.*

160 *Id.*

share more about its products than the company would prefer to do, does not disqualify a disclosure requirement on grounds that it is controversial.[161]

The lack of clarity as to the interpretation of the "factual and uncontroversial" requirement in the *Zauderer* standard presents both a problem and an opportunity. When it comes to compelled disclosures on food packaging, courts must keep in mind the reality of the food industry and the extensive food processing that stems from scientific advancements.[162] And when viewed in light of a state's interest in informing and protecting consumers for public health purposes,[163] it is all the clearer why courts need to analyze compelled disclosure laws with comprehensive definitions of "factual" and "uncontroversial."

B. *Back to Basics: The Purpose of the Commercial Speech Doctrine*

The expanded vision of protected speech laid out in *Virginia State Board of Pharmacy* and built upon in *Zauderer* is in line with the overall purpose of the First Amendment: to ensure the free flow of information.[164] In support of this goal, the Court recognized in *Zauderer* that in situations where a factual disclosure is beneficial to consumers, the speaker's First Amendment protection for not sharing this information is significantly reduced.[165] A speaker's free speech rights are even further reduced when the speech at issue is being compelled rather than inhibited.[166] Needless to say, these overarching principles of the First

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161 Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001).

162 *See generally* Beth Kowitt, *Special Report: The War on Big Food*, FORTUNE (May 21, 2015, 8:30 AM), http://fortune.com/2015/05/21/the-war-on-big-food/?iid=sr-link2 [https://perma.cc/EZC8-DEJW] (discussing the different ways foods are artificially changed and how consumers are more interested in purchasing cleaner products).

163 *See infra* Section II.B.

164 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). Notably, the Second Circuit has expanded on this view even more, recognizing that commercial disclosures that effectively promote consumer decisionmaking enhance "the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" *Sorrell*, 272 F.3d at 114.

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

166 *Id.* at 651 n.14 ("[T]he First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed."); *see also* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22 (D.C. Cir. 2014).

Amendment that shape the modern commercial speech doctrine cannot be ignored when courts evaluate disclosures on food packaging.[167] Public health requires a higher bar,[168] and this equal footing of speakers and receivers of information[169] must be applied in such cases.

1. Application of the Commercial Speech Doctrine Post-*Zauderer*

While there is a disconnect among lower courts regarding the scope of *Zauderer*,[170] application of the standard has expanded beyond just providing a remedy for deceptive or potentially deceptive commercial speech, as was the case in *Zauderer*.[171] A number of courts are utilizing *Zauderer* to make sure states can facilitate more information to consumers, not just "purely factual and uncontroversial" information meant to cure deceptive or potentially deceptive speech.[172] This is a positive and appropriate expansion of the commercial speech doctrine as applied to disclosures on food packaging. As mentioned, the lack of clarity surrounding the factual and uncontroversial requirement from *Zauderer* creates an opportunity for courts to interpret these terms in a way that reflects the reality of food science.[173] In other words, there may

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167 Some commentators take this argument further, arguing that public health messages, including compelled disclosures for food companies, should not be evaluated as commercial speech, but rather as political speech. *See* Sugarman, *supra* 111.

168 The commercial speech doctrine derived from cases involving advertisements. This same standard is applied to compelled disclosures on food packaging. Arguably, courts should consider the importance of a state's regulation over a potential public health issue compared to an issue where the stakes are not as high. For example, the same *Zauderer* standard was applied in *Massachusetts Ass'n of Private Career Schools v. Healey*, 159 F. Supp. 3d 173 (D. Mass. 2016) to determine whether the State of Massachusetts's regulations requiring private schools to disclose certain information to prospective students violated the schools' First Amendment rights.

169 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

170 Pomeranz, *supra* note 47, at 1987–88; *see also Repackaging* Zauderer, *supra* note 33, at 972–73; Keighley, *supra* note 57, at 541–42.

171 *See, e.g.*, Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015). *But see* Berman, *supra* note 48, at 60 (noting that some courts have become more stringent when evaluating compelled disclosure laws).

172 *Repackaging* Zauderer, *supra* note 33, at 982; *see, e.g.*, *Sorrell*, 102 F. Supp. 3d 583. That said, there are plenty of other cases in which courts have declined to allow compelled disclosures that provide information to consumers when it would not be to correct or qualify a misconception. *International Dairy Foods Ass'n v. Amestoy* is an example of such a case. 92 F.3d 67 (2d Cir. 1996).

173 *See supra* Section I.A.

not be a conclusive and definitive understanding of the health concerns related to a given trend, food, ingredient, or farming method until it is too late.[174] And in cases where public health is implicated, it is not appropriate for courts to abide by a strict, narrow interpretation of the *Zauderer* standard[175] and effectively ignore a major objective of the commercial speech doctrine: to protect receivers of information.[176]

Food manufacturers who have contested this expansion of the commercial speech doctrine argue that compelled disclosures violate their First Amendment rights because the disclosures force them to share information they do not want to share.[177] Some companies go further, claiming that these disclosures even require them to share information that runs counter to their own message to consumers.[178] This is concerning, and arguments like the ones consistently made by food manufacturers should be seen as red flags to states. While states arguably want to foster their economies and not inhibit sales of food products or create contentious relationships with major food companies,[179] avoiding these consequences should not come at the expense of public health.[180] If food manufacturers (understandably) do not want to disclose on their packages that their product was, for example, produced with GMOs—

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174 Berman, *supra* note 48, at 76. Another consideration is that without this relaxed approach, courts become interpreters of science and are forced to determine whether a disclosure or regulation is warranted, a role for which courts are not qualified. Berman, *supra* note 48, at 76. Consider the example of smoking. As Judge Leval explained in his dissenting opinion in *International Dairy Foods Ass'n*, "[f]orty years ago, when I (and nearly everyone) smoked, no one told us that we might be endangering our health. Tobacco is but one of many consumer products once considered safe, which were subsequently found to cause health hazards." *Int'l Dairy Foods Ass'n*, 92 F.3d at 77 (Leval, J., dissenting).

175 *See generally* Sugarman, *supra* note 111.

176 *See supra* Section I.A.

177 *See, e.g.*, *Sorrell*, 102 F. Supp. 3d 583. In his dissenting opinion in *International Dairy Foods Ass'n*, Judge Leval characterized "[t]he milk producers' invocation of the First Amendment" to combat a disclosure requirement as an effort to "*conceal*[] their use of rBST in milk production." *Int'l Dairy Foods Ass'n*, 92 F.3d at 81 (Leval, J., dissenting) (emphasis added).

178 *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001).

179 *See* Berman, *supra* note 48, at 76 (discussing how communities should be able to weigh for themselves the economic and health implications of a compelled disclosure).

180 Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 895 (2015); *see also* Berman, *supra* note 48, at 76.

information the majority of the country would like to know[181]—it must be up to the government to make sure this information is available to consumers.[182] The government cannot do this, however, if the standard by which their disclosure laws will be evaluated ignores the complexities of scientific findings and the ongoing progression of food science.[183]

This approach to applying the *Zauderer* standard becomes clearer when considered in light of the consequences of not adhering to a more lenient understanding in cases of compelled disclosures for food products. Put another way, from a state's perspective, what is the harm in being proactive? Where scientific evidence has yet to reach the point of "factual and uncontroversial," there is minimal or no harm in allowing states to strictly provide the information to the public so that consumers can make their own decisions.[184] Notably, the high standards and regulations required by the scientific community are different than those of the general population.[185] Consumers want information as soon as they can have it, not necessarily after it has been through levels of time consuming, rigorous studies.[186] Similarly, FDA recognition of a potential health issue, or federal regulations requiring compelled disclosures, often do not come quickly enough to meet a state's needs.[187] In many cases, this

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[181] Scott Faber, *Just Label GMO Foods*, AGMAG (July 13, 2015), https://www.ewg.org/agmag/2015/07/just-label-gmo-foods [https://perma.cc/CHL4-LVGQ].

[182] *See generally* Sugarman, *supra* note 111.

[183] *See supra* Section II.A.

[184] Bambauer, *supra* note 127, at 119–20. In the same vein, disclosure laws regarding foods, at both the state and federal levels, are enacted with the purpose of providing information so consumers can make their own informed decisions. For example, California's Proposition 65 was "[p]assed via ballot proposition in 1986 . . . 'to facilitate the notification of the public of potentially harmful substances, so informed decisions may be made by consumers on the basis of disclosure.'" Thomas J.K. Schick, *Consumer News: Proposition 65: Why Coffee in California May Come with a Cancer Warning*, 30 LOY. CONSUMER L. REV. 474, 475 (2018) (quoting DiPirro v. Bondo Corp., 62 Cal. Rptr. 3d 722, 747–48 (2007)).

[185] Bambauer, *supra* note 127, at 120 ("Stringent standards, like placebo controls and double-blind experiments, are appropriate for studies published in scientific journals, but consumers in the real world need information more quickly than can be produced under such demanding standards.").

[186] *Id.*

[187] *Id.* at 119–20. Judge Leval recognized this issue in his dissenting opinion in *International Dairy Foods Ass'n*.

> [T]here are many possible reasons why a government agency might fail to find real health risks, including inadequate time and budget for testing, insufficient advancement of

is because the FDA has strict requirements for studies that do not lend themselves to quick decisions; in other cases, it may be the result of the FDA's policies that allow new food ingredients to enter the market before the testing for any health implications is complete.[188] Thus, not only do consumers lose out on potentially important information while waiting for a scientific consensus,[189] the public health costs to the government for waiting can be very substantial down the line.[190] Conversely, if the concerns turn out to be unwarranted or not as grave as initially expected, consumers have not lost much.[191] It should be up to the states to inform consumers if and when they see fit,[192] and compelled disclosures on food packaging, or elsewhere at the point of purchase, is a practical way to do so.[193]

> scientific techniques, insufficiently large sampling populations, pressures from industry, and simple human error. To suggest that a government agency's failure to find a health risk in a short-term study of a new genetic technology should bar a state from requiring simple disclosure of the use of that technology where its citizens are concerned about such health risks would be unreasonable and dangerous. Although the FDA's conclusions may be reassuring, they do not guarantee the safety of rBST.

Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 76–77 (2d Cir. 1996) (Leval, J., dissenting).

188 *See generally* Berman, *supra* note 48. When a new food ingredient enters the market, the FDA does not need to sign off on it for it to be used and sold to consumers. Companies can test the health and safety of a food themselves by hiring consultants to run tests in a process called "self-affirmation." The companies do not have to share the results, however, with the FDA. Stephanie Strom, *Impossible Burger's "Secret Sauce" Highlights Challenges of Food Tech*, N.Y. TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/business/impossible-burger-food-meat.html?module=inline [https://perma.cc/WBR5-ZU7T].

189 See the example of "the Kellogg claim" in Bambauer, *supra* note 121, at 120.

190 *See Int'l Dairy Foods Ass'n*, 92 F.3d at 76–77 (Leval, J., dissenting).

191 Bambauer, *supra* note 127, at 120. See the Kellogg example. *Id.* at 121–22.

192 Adler, *supra* note 141, at 482 ("[R]ates of obesity and diabetes have skyrocketed . . . . At the same time, a growing body of research has linked consumption of sugar-sweetened beverages (SSBs)—drinks with added sugars—to these chronic health conditions. FDA, despite repeatedly having been petitioned to address the health effects of SSBs . . . has not taken action."). To note, this does not mean that compelled disclosures should not come at the federal level. However, most disclosures do come from the states, and the federal government often takes action in response to state initiatives on these issues. The GMO labeling bill is the most recent example of this.

193 *See generally id.* at 488–90 (discussing the reach and effectiveness of health warnings and disclosures). Along the same lines, in *New York State Restaurant Ass'n*, the Second Circuit rejected plaintiff's argument that the stricter *Central Hudson* standard of review should be applied since the City "has alternative means of achieving its goals." N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, n.22 (2d Cir. 2009).

If the "factual and uncontroversial" requirement is omitted, or the bar is lowered too much, there is concern that a state could compel disclosures for almost anything related to their products and manufacturing processes.[194] Furthermore, if too many disclosures were required on packaging, it would dilute the information and the disclosures could become counterproductive. This argument, however, should not disqualify a state's right—and arguably its obligation—to inform consumers about a potential threat to consumers' health when studies are reasonably inconclusive.[195]

If a state determines that it is in its best interest, either based on substantiated consumer curiosity or other legitimate public health concerns, to disclose information to consumers, it should be able to make this determination independently.[196] Of course, any such reason would need to outweigh the potential negative economic effects of requiring a disclosure.[197] But after a state makes this calculated decision, lack of scientific consensus should not be a bar to a state seeking to inform consumers, especially given the reasons why such a consensus may not exist,[198] and, more importantly, in light of the government's short-term and long-term interests in protecting public health.[199]

III. VERMONT'S GMO LABELING LAW SHOULD BE CONSIDERED A MODEL FOOD LABELING LAW WITH AN ADDED AGENCY OVERSIGHT COMPONENT

Arguably the most important consideration when it comes to the future of compelled disclosure laws is the level of scrutiny under which a court applies the *Zauderer* standard. More so, a court's interpretation of the language of the *Zauderer* holding could make or break any disclosure

194 *Int'l Dairy Foods Ass'n*, 92 F.3d 67; *see also* Post, *supra* note 180, at 895 ("*Amestoy* and Judge Kavanaugh suggest that if government were authorized to require labels to respond to 'mere' consumer interest, government could demand disclosure of information responsive to every whimsical, irrelevant question that might come into a consumer's head.").

195 Post, *supra* note 180, at 895.

196 *Id.*

197 *Id.*; *see also* Berman, *supra* note 48, at 76 ("Although a disclosure requirement may cause economic harm in some cases, communities should be given leeway to balance those economic impacts against potential health concerns.").

198 *See supra* Section II.A.

199 *See generally* Berman, *supra* note 48.

law.[200] If such a law is challenged, courts should interpret the *Zauderer* standard in a way that is realistic so as to best advance the purpose of the commercial speech doctrine.[201] Specifically, application of this standard should take into consideration the complexities of scientific advancements and the grey area of scientific research.[202] This more comprehensive approach, which is in accord with the progression of the commercial speech doctrine,[203] would better protect the government's interest in protecting public health.[204] "Factual and uncontroversial" are not straightforward terms[205] and application of *Zauderer*'s requirements to a compelled disclosure must be done with consideration of evolving scientific advancements and exploration in the food industry.[206]

However, if a state's compelled disclosure is dismissed by a court because it did not meet the *Zauderer* threshold of factual and uncontroversial,[207] a state would in effect be powerless to protect consumers[208] without taking other drastic measures that may not be as informative.[209] Dismissing a state's disclosure requirement on these grounds would undermine the Court's own valuation of the importance of the First Amendment in ensuring consumers get the information they need to make decisions.[210]

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200 *See supra* Section II.A.

201 *See supra* notes 134–138 and accompanying text (discussing the legal field's general lack of understanding of science, and yet science and the First Amendment often intersect).

202 *See supra* Section II.A.

203 Berman, *supra* note 48, at 59.

204 *See generally* Sugarman, *supra* note 111.

205 Keighley, *supra* note 57, at 542–43 (noting the lack of clarity surrounding the *Zauderer* standard and the commercial speech doctrine).

206 *See supra* notes 134–138 and accompanying text.

207 As noted *supra*, courts have consistently relied on the factual and uncontroversial aspect of the *Zauderer* standard as grounds for rejecting a compelled disclosure. *See Repackaging* Zauderer, *supra* note 33, at 985.

208 Berman, *supra* note 48, at 73; *see also supra* notes 120–123 and accompanying text.; Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 81 (2d Cir. 1996) (Leval, J., dissenting).

209 For example, a state could take out advertisements to inform consumers, but this would come at a cost and is not guaranteed to reach potential consumers the same way a label on the packaging of food products would.

210 *See supra* Section II.B; Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). To note, the *Zauderer* standard applies to laws enacted at the federal and state levels; thus, the proposal in this Note would apply to federal and state disclosure legislation.

A. *Model Law: Vermont's GMO Labeling Law*

The ideal food labeling law imposes disclosures on food packaging that are purely factual and that truly serve an informational purpose.[211] Vermont's GMO labeling law met these *Zauderer* requirements.[212] As discussed, Vermont's legislation mandated that food manufacturers label products with words akin to "produced with genetic engineering," depending on the circumstances.[213] The legislation thus imposed a straightforward, factual disclosure of how the food item was produced.[214] Any controversy surrounding whether or not the disclosure should be there is not a bar to passing the "purely factual and uncontroversial" requirement.[215]

While protecting consumers in the given instance of *Zauderer*, the Supreme Court also made note of the outer boundaries of this First Amendment protection, warning regulators that "unjustified or unduly burdensome" disclosures could have a chilling effect on protected speech.[216] "Unduly burdensome" had been interpreted more literally, such as if language of the disclosure was too long or too large on a given

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211 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); *see also Repackaging* Zauderer, *supra* note 33, at 976. Importantly, Vermont's GMO labeling law did not require food manufacturers to say anything speculative or directly implicating negative health outcomes, such as "genetic engineering could have adverse effects on your health" or "genetic engineering could cause cancer." Such a requirement would be overly burdensome and arguably cross the line of "purely factual and uncontroversial." *Zauderer*, 471 U.S. at 651. Straightforward, factual labels on food packaging have proven effective at allowing consumers to make healthier choices when shopping for food. A new study found that consumption of sugary drinks was down almost twenty-five percent in Chile eighteen months after a food labeling law went into effect in the country. Chile's labeling law, adopted by the Chilean government to help curb the country's high obesity rates, requires "black stop signs that must appear on the front of packaged foods and beverages high in salt, sugar, fat or calories." Andrew Jacobs, *Sugary Drink Consumption Plunges in Chile After New Food Law*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/health/chile-soda-warning-label.html [https://perma.cc/XCG8-Q3G5].

212 *See supra* Section I.B; H. 112, 2013 Leg., Legis. Sess. (Vt. 2014).

213 Sources cited *supra* note 212.

214 *See generally* Lo, *supra* note 101.

215 Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 630 (D. Vt. 2015); *see also* Berman, *supra* note 48, at 70–71.

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

package or notice.[217] In *NIFLA*, the Supreme Court expanded on the "unduly burdensome" concern.[218] Taking the issue one step further, the Court ruled in part that state regulations cannot force an organization to post notice requirements, which are distinct from disclosures, that contradict the organization's own messages.[219] This emphasis on protecting the speaker could give fuel to manufacturers trying to prevent compelled disclosures, and validly so. For example, if a food product is marketed as "healthy," could a compelled disclosure on the packaging inherently contradict this message? But this issue only arises when the legislation is too broad, and when consumer deception is a significant concern, as it can be with public health, the *Zauderer* standard dictates that the disclosure of purely factual and uncontroversial information is limited in scope.[220]

Vermont's GMO disclosure legislation required the words to be placed on packaging in the approximate area where other nutritional information already existed.[221] The font size also had to match the rest of the packaging so the label did not stand out any more so than other nutritional information or ingredients.[222] Contrast this to the notice requirement at issue in *NIFLA*, which required unlicensed clinics in California to make a twenty-nine-word disclosure using language drafted by the state and printed in as many languages as the state required.[223] The Vermont bill strikes the right balance of informing consumers in a useful, practical way and in a way that does not take up too much space or impose

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217 *See, e.g.*, Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146–47 (1994) (holding that a disclaimer requirement so lengthy that it "effectively rule[d] out" plaintiff's ability to use a "specialist" designation on her business cards or letterhead served as an undue burden on the corporate actor's speech). This was also an issue in *National Institute of Family & Life Advocates v. Becerra* as the Court found that the disclosure requirement was unduly burdensome on the clinics. 138 S. Ct. 2361 (2018).

218 *NIFLA*, 138 S. Ct. 2361.

219 *Id.*

220 United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005) ("In assessing disclosure requirements, *Zauderer* presumes that the government's interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored.").

221 *See supra* note 140.

222 Consumer Protection Rule 121.02(b)(iii), OFF. VT. ATT'Y GEN. (2013).

223 *NIFLA*, 138 S. Ct. at 2378.

unnecessary language to achieve the end goal.[224] Thus, not only did the legislation pass the *Zauderer* standard,[225] but it also allowed Vermont to meet the larger First Amendment goal of information sharing so consumers could make their own informed decisions.[226]

Interestingly, the current federal GMO labeling law falls short in this respect and should not be used as a model for future compelled disclosure legislation.[227] As noted, in addition to using the lesser-known term of "bioengineered," the federal law allows food manufacturers to comply with the law by printing a QR code on the packaging of qualifying food products.[228] Critics argue this method of informing consumers fails to adequately provide any information at all as consumers will not know what it is—or even to look for it in the first place.[229] Proponents of the law are few and far between as the law was a compromise to appease those who support mandatory labeling and those who think it is not necessary at all.[230] The federal law thus falls short of adequately informing consumers of the basic information, namely that a food product contains GMOs, that the law was meant to provide.[231] Thus, unlike Vermont's

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224 See *supra* Section I.B for a discussion of Vermont's GMO labeling law.

225 Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 630–35 (D. Vt. 2015).

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

227 A general critique of this law not explored in this Note is the alleged backing from and ties of agriculture businesses and major food companies. For more information, see Lo, *supra* note 101 ("Consumer watchdog website Consumerist also points out the bill's vague language—and obvious loopholes—written by two senators who have a recent history of accepting more than $2.1 million in donations from agricultural businesses in just one election cycle."). *See* Bernie Sanders (@BernieSanders), TWITTER (July 6, 2016, 10:58 AM), https://twitter.com/BernieSanders/status/750750669158559744?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E750750669158559744&ref_url=http%3A%2F%2Ffortune.com%2F2016%2F07%2F31%2Fgmo-labeling-bill%2F [https://perma.cc/4AJ5-HURC] ("The Senate is voting on a very bad piece of Monsanto-backed legislation today. Text GMO to 82623 to oppose it.").

228 Plumer, *supra* note 98.

229 Jalonick, *supra* note 91.

230 Charles, *supra* note 93.

231 To note, the other option besides the QR code that the federal law allows is a graphic or other label with the words "bioengineering," or worse yet the initials "BE." This is unfamiliar language to American consumers who are used to the terms "GMOs" or "genetic engineering." *See* Caitlin Dewey, *Mandatory GMO Labels Are Coming to Your Food*, WASH. POST (May 4, 2018, 6:30 AM), https://www.washingtonpost.com/news/wonk/wp/2018/05/04/mandatory-gmo-labels-are-coming-for-your-food/?noredirect=on&utm_term=.acd65de01edf [https://perma.cc/P2EG-LYH9].

GMO labeling law, the federal legislation does not meet the government's supposed goal of informing consumers of important and relevant factual information as the First Amendment requires.[232]

B. *The Agency Approach*

One of the main issues here is that science changes—but this works both ways. This Note has focused in large part on how scientific advancements and exploration require a better approach to analyzing compelled disclosures for food products.[233] In the same vein, these changes require a mechanism for getting rid of a disclosure if it no longer serves its purpose of allowing a government to inform consumers of a genuine or potential health concern, and at which point the disclosure could become unduly burdensome to the food companies. Therefore, execution of compelled disclosure legislation should be under the purview of the FDA, or if at the state level, the state health agency, so as to keep tabs on any new scientific research and consumer sentiment about the issue.[234]

Adding an agency component to compelled disclosure legislation would give the agency the authority to step in and remove the labeling requirement at the point when, based on new research or other discovery, the disclosure is deemed unnecessary and thus an infringement on the food companies' free speech rights.[235] The agency approach thus better ensures the compelled disclosure complies with *Zauderer*'s "factual and uncontroversial" requirement by making sure the disclosure is timely and relevant while in effect.[236] Proponents of food labeling may not be satisfied by this approach as it could leave too much discretion to the

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232 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *see also supra* Section II.B.

233 *See supra* Part II.

234 At the federal level, this agency would ideally be the FDA, and at the state level, the agency would be the one designated for health-related matters. For example, in New York, the appropriate agency is the New York State Department of Health. *State Health Departments*, HEALTHFINDER.GOV, https://healthfinder.gov/FindServices/SearchContext.aspx?show=1&topic=820 [https://perma.cc/VR3Y-EJWB]. For a list of state health departments, see *id.*

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

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

given agency, as agency decisionmaking can be tainted by external factors and considerations.[237] Discretion, however, can be a risk no matter who is ruling on or evaluating the disclosure.[238]

The Clean Air Act has a similar mechanism in place and is a good example of how an agency could be involved with compelled disclosures on food packaging.[239] When Congress amended the Act in 1990, it included a list of 189 hazardous pollutants.[240] This list, however, is malleable.[241] "[A]ny person" can petition for a substance to be added or removed from the list, and the Administrator must remove a substance from the list upon a determination that the substance is not reasonably expected to have any harmful effect on human health or the environment.[242]

Inclusion of a similar agency component in a compelled disclosure law would enable an agency to review on an ongoing basis relevant updates in scientific research and consumer sentiment toward the compelled disclosure.[243] In the event pertinent information becomes available that could establish a compelled disclosure law is no longer necessary to achieve the intended purpose,[244] the agency could, if it so determines, get rid of that compelled disclosure.[245] Adding this agency oversight procedure may not absolve a compelled disclosure law of criticism from proponents or opponents;[246] however, such an addition

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237 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting) (discussing how political motivations likely contributed to the arbitrary change in regulation at the National Highway Traffic Safety Administration).

238 *See, e.g.*, Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996).

239 Clean Air Act, 42 U.S.C. § 7412 (2018).

240 *Initial List of Hazardous Air Pollutants with Modifications*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/haps/initial-list-hazardous-air-pollutants-modifications#mods [https://perma.cc/GE8Z-KF87].

241 42 U.S.C. § 7412.

242 *Id.* In addition, the Administrator "shall periodically review" the list and make additions to the list as the Administrator deems necessary. *Id.*

243 *See, e.g.*, *id.*

244 *See supra* notes 112–115 and accompanying text (discussing a government's interest in public health).

245 *See, e.g.*, 42 U.S.C. § 7412.

246 The core arguments for and against compelled disclosure laws discussed *supra* Part II would still be of concern to interested parties, but the added element of oversight and review could make both sides, and consumers generally, more comfortable with the compelled disclosure law.

could offer fairer and timelier oversight of the disclosure at issue. In this sense, consumers will have access to the information they have a right to know and manufacturers will not be burdened with a compelled disclosure long after it is deemed unnecessary.[247] This is in line with *Zauderer*'s "factual and uncontroversial" requirement and, importantly, the precautions and considerations behind the *Zauderer* standard.[248]

CONCLUSION

The commercial speech doctrine, which serves to prevent unwarranted governmental regulation of commercial speech, has evolved and expanded over time.[249] The Supreme Court's most recent addition to the commercial speech doctrine extended protections to compelled commercial speech.[250] The *Zauderer* standard—which came about in the context of advertising, specifically with regard to a misleading portrayal of attorneys' fees—is now the standard most often applied to compelled disclosures, those in advertising or otherwise. Thus, when courts evaluate compelled disclosures on food packaging under the *Zauderer* standard, application of the standard can go awry.[251] Governments have the right, in the name of public health, to inform consumers of what is in the food they are eating,[252] and as increasingly relevant, how that food was produced.[253] In certain situations, the First Amendment arguably protects this right as much as it protects speakers' right not to disclose such information.[254] Yet the standard under which compelled disclosures are reviewed by courts, if taken at face value, does not lend itself to such

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247 In other words, the agency could remove the specific compelled disclosure before it becomes "unduly burdensome" and therefore in violation of the *Zauderer* standard. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

248 *Id.*

249 *See generally* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *Zauderer*, 471 U.S. 626.

250 *Zauderer*, 471 U.S. 626.

251 *See* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 76–81 (2d Cir. 1996) (Leval, J., dissenting).

252 *Zauderer*, 471 U.S. at 651 (discussing how the First Amendment protects consumers' right to information).

253 *See* Gasparro & Newman, *supra* note 4 (discussing examples of new food technologies).

254 *See* Sacharoff, *supra* note 38, at 331; *see also* Shanor, *supra* note 46, at 148.

equal protection.[255] Consumers, therefore, could be left in the dark and the government could face unforeseeable public health issues in the future.[256] A more comprehensive interpretation of this standard as applied to compelled disclosures on food packaging, paired with ongoing consideration of the disclosures at issue, could better offer both sides the protection granted to them by the Constitution.[257]

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[255] *See supra* Part II.

[256] *See supra* note 66 and accompanying text.

[257] *See* Shanor, *supra* note 46, at 148; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).