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THE TREACHERY OF IMAGES: REINTERPRETING COMPELLED COMMERCIAL-SPEECH DOCTRINE

Peter Bozzo*

ABSTRACT

In 2012, the Court of Appeals for the District of Columbia Circuit struck down a federal rule that required tobacco companies to print graphic images on cigarette packs. The court found that the regulation violated the First Amendment by forcing cigarette manufacturers to convey the government's anti-smoking message. But the court's reasoning suffered from two flaws. First, the majority failed to articulate the interpretive assumptions on which its decision rested. When the court described the graphic images, it implicitly adopted a particular view of them; the majority was not acting as a neutral translator but as an active interpreter. Yet the court failed to recognize that it was making interpretive choices, and it failed to justify those choices adequately. Second, when deciding which tier of scrutiny to apply, the majority relied on an outmoded distinction between "purely factual" and "emotional" appeals. That distinction has no basis in the realities of peoples' decision-making processes or in the caselaw on which the D.C. Circuit relied. To account for these two critiques—critiques that apply not just to the D.C. Circuit's opinion but to many compelled commercial-speech decisions—courts should focus on the accuracy and relevance of the information conveyed to consumers, rather than on the "purely factual" nature of that information, when deciding compelled commercial-speech cases.

I. INTRODUCTION

In late 2012, a new rule governing tobacco products went into effect in Australia.¹ The regulation required distributors to print textual and graphic warnings on cigarette packs.² One warning label cautioned that "SMOKING CAUSES PERIPHERAL VASCULAR DIS-

* Yale Law School, J.D. 2015. I am grateful to Tom R. Tyler and the editors of the *DePaul Law Review* for their thoughtful comments on this Article.

1. *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) s 1.5(4) (Austl.). Although the rule took partial effect on January 1, 2012, it did not apply to "all tobacco products" until December 1, 2012. *Id.* ss 1.2, 1.5.

2. *Id.* ss 2.1–2.2, 3.1.

EASE” and depicted a ghastly, gangrenous foot.³ Another label displayed the emaciated body of a smoker suffering from lung cancer.⁴ A caption revealed that the man had died at age thirty-four, while a nearby warning statement bluntly declared, “SMOKING CAUSES LUNG CANCER.”⁵ Other images portrayed an infant connected to a ventilator (“SMOKING HARMS UNBORN BABIES”) and the browned, rotting gums of two smokers’ mouths (“SMOKING DAMAGES YOUR GUMS AND TEETH”).⁶ The regulations provided that the warning statements and graphic images must cover seventy-five percent of the front surfaces of cigarette packs.⁷

FIGURE 1
GRAPHIC IMAGE THAT APPEARS ON SOME AUSTRALIAN
CIGARETTE PACKS⁸



3. *Id.* s 3.6(1)–(2).

4. *Id.* s 3.4(1)–(3).

5. *Id.*

6. *Id.* ss 3.2(1)–(2), 4.2(1)–(3).

7. *Competition and Consumer (Tobacco) Information Standard 2011* (Cth) s 9.13(1) (Austl.). The regulations provided a few exceptions to this requirement. *See id.* s 9.13(2).

8. This image is taken from *id.* s 3.6(2).

The Australian government outlined three goals⁹ when it issued the regulation in 2011.¹⁰ The objectives were to (1) “increase consumer knowledge of [the] health effects” of tobacco use; (2) “ensure the continuing effectiveness of health warnings” on tobacco-product packaging; and (3) promote “cessation” of tobacco use and “discourage uptake or relapse.”¹¹ But the most immediate effect of the regulation was unexpected: Australian smokers began to report that cigarettes *tasted* different.¹² As Tanya Plibersek, Australia’s then-Minister for Health, reported, “[T]he best short-term indication I have that [the effort to decrease smoking rates and improve residents’ health is] working is the flood of calls we had in the days after the introduction of [the new regulations] accusing the government of changing the taste of cigarettes.”¹³ Public officials and tobacco companies denied that the cigarettes’ compositions had changed, and Plibersek posited a psychosomatic explanation for the complaints: “It was just that people being confronted with the ugly packaging made the psychological leap to disgusting taste.”¹⁴ Plibersek’s intuition finds support in numerous studies, which show that packages and labeling can influence people’s palates.¹⁵

Although regulators might have been surprised by the images’ gustatory effect, in a sense the pictures were working exactly as expected: They were altering people’s conceptions of cigarettes and providing smokers with new reasons to quit (or driving home old reasons with new force). Australia’s regulations provide just one example of a global trend.¹⁶ As of September 2014, seventy-seven nations had imposed graphic-warning requirements for cigarette packages.¹⁷ The

9. *Id.* s 1.4.

10. The regulations are dated December 22, 2011. *Id.* at 1.

11. *Id.*

12. Matt Siegel, *Law Spoils Tobacco’s Taste, Australians Say*, N.Y. TIMES (July 10, 2013), <http://www.nytimes.com/2013/07/11/business/global/law-spoils-tobaccos-taste-australians-say.html>.

13. *Id.*

14. *Id.*

15. See, e.g., Christina A. Roberto et al., *Influence of Licensed Characters on Children’s Taste and Snack Preferences*, 126 PEDIATRICS 88, 90–92 (2010) (describing an experiment in which children tasted identical food products, some of which were contained in packages depicting popular cartoon characters and some of which were not; finding that the subjects reported more positive taste perceptions when the food was contained in packages with cartoon characters); Brian Wansink et al., *How Soy Labeling Influences Preference and Taste*, 3 INT’L FOOD & AGRIBUSINESS MGMT. REV. 85, 87–91 (2000) (describing an experiment in which researchers falsely labeled a food product to indicate that it contained soy; explaining that subjects who tried the product with the soy label reported less favorable taste perceptions than subjects who tried the identical product without the label).

16. See, e.g., CAN. CANCER SOC’Y, CIGARETTE PACKAGE HEALTH WARNINGS: INTERNATIONAL STATUS REPORT 2, 3 (5th ed. 2016).

17. *Id.* at 2.

United States nearly joined this growing chorus in 2011, when the U.S. Food and Drug Administration (FDA) issued a final rule that required tobacco companies to print graphic images on cigarette packs.¹⁸ But the next year, a federal district court struck down the regulation in *R.J. Reynolds Tobacco Co. v. FDA*,¹⁹ and the Court of Appeals for the District of Columbia Circuit affirmed.²⁰

FIGURE 2.
GRAPHIC-IMAGE CIGARETTE WARNINGS PROMULGATED BY THE
U.S. FOOD AND DRUG ADMINISTRATION²¹



18. See 21 C.F.R. § 1141.10 (2012).

19. 845 F. Supp. 2d 266 (D.D.C. 2012).

20. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part by* *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (holding that government interests other than correcting deception may sustain a mandate for disclosure of purely factual information in commercial context).

21. These images are taken from FOOD & DRUG ADMIN., CIGARETTE REQUIRED WARNINGS—ENGLISH AND SPANISH (2010), <https://www.regulations.gov/document?D=FDA-2010-N-0568-0002>.

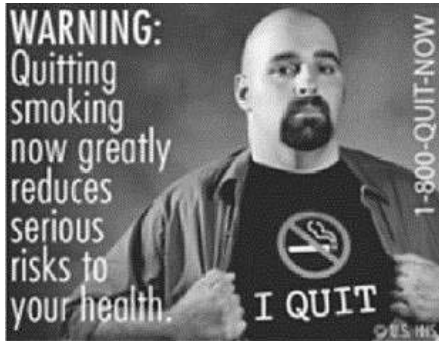
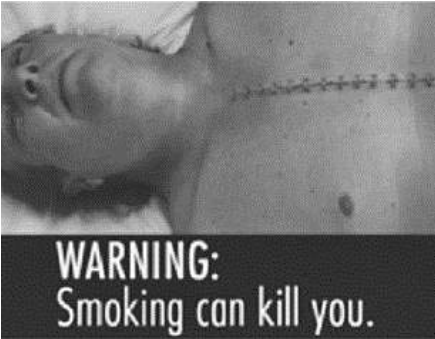
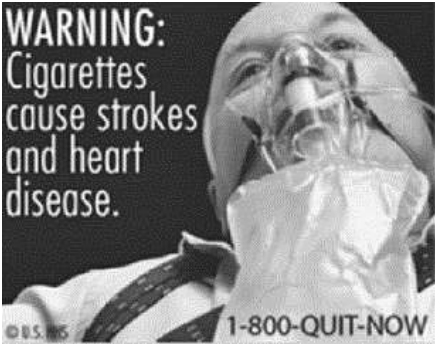


FIGURE 3.
 SAMPLES OF CIGARETTE PACKAGES WITH THE FDA'S
 GRAPHIC-IMAGE WARNINGS²²



In striking down the FDA's graphic-warning requirement, the D.C. Circuit relied on a line of Supreme Court cases about compelled commercial speech.²³ Although "commercial speech" is notoriously difficult to define,²⁴ a sketch of its contours will suffice for purposes of analyzing the D.C. Circuit's reasoning. Compelled commercial-speech cases generally arise when the state requires corporations to disclose information about products or services, often in the course of advertising.²⁵ The foundational Supreme Court precedent in this

22. *Id.*

23. *R.J. Reynolds Tobacco*, 696 F.3d at 1211–12, 1217–18.

24. *See, e.g., Caroline Mala Corbin, Compelled Disclosures*, 65 ALA. L. REV. 1277, 1285–86 (2014) (pointing out some of the difficulties and ambiguities that come with attempts to define "commercial speech"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5–8 (2000) (noting that the "boundaries" of commercial speech are "quite blurred," and attempting to define the term with reference to specific constitutional values rather than by isolating a set of "unique characteristics possessed by speech acts included within the category"). According to Corbin, "A common definition of commercial speech is that which 'does no more than propose a commercial transaction.'" Corbin, *supra*, at 1285 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)). However, this definition has been sharply disputed. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 580 (1980) (Stevens, J., concurring) ("Whatever the precise contours of the concept ['commercial speech'], . . . I am persuaded that it should not include the entire range of communication that is embraced within the term 'promotional advertising.'").

25. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 233–34 (2010) (addressing a federal law that required "debt relief agencies" to disclose in certain advertisements that they "help people file for bankruptcy relief under the Bankruptcy Code"); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 633 (1985) (addressing an Ohio regulation that

field, *Zauderer v. Office of Disciplinary Counsel*,²⁶ held that compelled commercial disclosures satisfy the First Amendment as long as they “are reasonably related to the State’s interest in preventing deception of consumers.”²⁷ In *R.J. Reynolds*, the D.C. Circuit held that this lenient standard of review applies only to disclosures that convey “purely factual and uncontroversial information.”²⁸ Because the FDA’s grisly images did not satisfy this prerequisite,²⁹ the court invoked an intermediate standard of review, far more onerous than the *Zauderer* inquiry, to strike down the FDA regulation.³⁰

In explaining why the graphic warnings did not convey “purely factual and uncontroversial information,” the *R.J. Reynolds* court noted that “many of the images chosen by [the] FDA could be misinterpreted by consumers.”³¹ If viewers misunderstood an image, they could come away with inaccurate information—the very antithesis of “purely factual” information.³² The D.C. Circuit also found that “many of the images [did] not convey *any* warning information at all.”³³ Instead, the pictures were “primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning.”³⁴ Because the pictures operated largely as emotional appeals, they were not “purely factual.”³⁵

The court’s reasoning falls prey to two critiques. First, the majority failed to articulate the interpretive assumptions that underpinned its decision. When courts classify a warning as “factual” or “emotional,” they implicitly adopt an interpretation of that warning. They must determine *what information* the disclosure conveys before they can decide whether the disclosure operates as a factual or emotional appeal. The *R.J. Reynolds* majority implicitly undertook this task but failed to explain or defend its understanding of the graphic images. When the court concluded that the pictures operated by appealing to viewers’

required attorneys to disclose—in “any advertisement that mentions contingent-fee rates”—whether the rates are calculated before or after deducting court costs); *Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18, 20–21 (D.C. Cir. 2014) (en banc) (addressing a federal regulation that required suppliers of meat products to disclose the country (or countries) where the animal was “born, raised, and slaughtered”).

26. 471 U.S. 626.

27. *Id.* at 651.

28. *Id.*

29. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213–17 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

30. *Id.* at 1217, 1222.

31. *Id.* at 1216.

32. *Id.*

33. *Id.*

34. *Id.*

35. *R.J. Reynolds*, 696 F.3d at 1216–17.

emotions, it did not ground its determination in a reasoned assessment of the information that the images conveyed.

Second, the court's sharp distinction between "purely factual" and "emotional" disclosures does not capture the realities of consumers' decision-making processes because many disclosures operate as both factual and emotional appeals. What is more, facts and emotions frequently reinforce one another; facts can trigger emotional reactions, which, in turn, can enhance consumers' retention of the facts conveyed. *Logos* and *pathos* often work together, but the D.C. Circuit's too-neat distinction fails to account for the interaction between the two.

These problems are pervasive in the compelled commercial-speech caselaw, but the *R.J. Reynolds* decision amplifies them because pictures sit at the center of the decision. When people view an image, they tend to conflate the picture with the thing it depicts.³⁶ René Magritte famously illustrated this phenomenon with his painting *The Treachery of Images*, which displays a pipe sitting atop the phrase "Ceci n'est pas une pipe" ("This is not a pipe").³⁷ Magritte reminds viewers that they are not seeing a real, tangible pipe but are simply looking at a picture of one.³⁸ The fact that the audience needs this reminder demonstrates, just as the artist supposed, the treachery of images: People often assume that pictures present an unmediated vision of the world, and viewers may overlook the ways that they are implicitly interpreting an image.³⁹ When someone looks at Magritte's work and sees a pipe, she ascribes meaning to the painting. She engages in an interpretive act, even if it seems like an obvious and straightforward one. When confronting disclosures that contain pictures, courts may also presume that they have unobstructed insight into the images' meanings. Like the *R.J. Reynolds* majority, judges may fail to engage critically with their understandings of the pictures that come before them in compelled commercial-speech cases.⁴⁰

Pictorial disclosures also put pressure on the *R.J. Reynolds* court's distinction between "purely factual" and "emotional" information. Images are effective tools for "conveying meaning through associational logic, often infused with emotions that are triggered beneath

36. NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* 8–10 (2009).

37. *The Treachery of Images*, L.A. COUNTY MUSEUM OF ART, <http://collections.lacma.org/node/239578> (last visited June 13, 2017).

38. *Id.*; see also Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 689 (2012).

39. FEIGENSON & SPIESEL, *supra* note 36, at 9–10.

40. *Id.* at 8–10.

our conscious awareness.”⁴¹ At the same time, when pictures accompany textual information, they typically enhance viewers’ retention of the material discussed in the text.⁴² Because images can generate heightened emotional reactions *and* improve recollection of facts, placing pictorial disclosures into one category or the other—emotional or factual?—seems too reductive to capture images’ overlapping effects.

The *R.J. Reynolds* opinion highlights the difficulties of interpreting still images, but the problem does not stop there. In May 2013, an Obama Administration task force released a report on “smart disclosure” techniques.⁴³ “Smart disclosure,” the report said, “involves providing consumers with access to data in user friendly electronic formats, in order to fuel the creation of products and tools that benefit consumers.”⁴⁴ The report refers to a U.S. Department of Education program that used a “net price calculator tool[]” to “help students understand the expected costs of college.”⁴⁵ The Department of Education encouraged people to develop videos that would “explain what net price means” and help users “look for the net price calculator information.”⁴⁶ Smart disclosure tools like the net price calculator enable regulators to make disclosures increasingly imminent, pressing, and credible to viewers. Imagine an online video that shows, in accurate, painstaking detail, the decay of a smoker’s lungs or the growth of a tumor to illustrate the risks of smoking. The danger is that, as disclosures become ever more vivid and realistic, they will frequently defeat judges’ interpretive faculties and further blur the line between factual and emotional information. Courts will assume that they are seeing reality when, in fact, they are simply seeing a picture of it.

The *R.J. Reynolds* opinion, coupled with the increasing use of smart disclosure tools, demonstrates the urgency of developing a new doctrinal framework for compelled commercial-speech cases. This framework must provide judges with the tools to make interpretive choices, and it must prevent courts from relying on the fuzzy, ill-advised distinction between facts and emotions. It must recognize that images

41. *Id.* at 7.

42. RICHARD E. MAYER, MULTIMEDIA LEARNING 73–74 (2001) (“[S]tudents perform better on verbal retention when they learn with text and illustrations or narration and animation than when they learn with text alone or narration alone.”).

43. EXEC. OFFICE OF THE PRESIDENT & NAT’L SCI. & TECH. COUNCIL, SMART DISCLOSURE AND CONSUMER DECISION MAKING: REPORT OF THE TASK FORCE ON SMART DISCLOSURE 7 (2013), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf.

44. *Id.*

45. *Id.* at 27.

46. *Id.*

can manipulate consumers' feelings, but it must also leave room for smart disclosure regimes that incorporate pictures and videos to convey accurate, helpful information to viewers. Fortunately, crafting such a framework does not require a great deal of innovation. It simply requires a return to *Zauderer's* roots.

Zauderer explicitly defines the value of commercial speech: "[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."⁴⁷ Placing consumers at the center of the doctrinal analysis suggests that courts should undertake a four-part inquiry to assess the constitutionality of compelled commercial disclosures. First, judges should determine whether the regulation at issue is a "disclosure requirement[]" or an "outright prohibition[] on speech."⁴⁸ If the regulation prohibits corporations from speaking, then intermediate scrutiny applies;⁴⁹ if the regulation requires corporations to speak, then *Zauderer* review applies.⁵⁰ If the disclosure is subject to *Zauderer* scrutiny, the court should move on to articulate, as precisely as possible, *what information* the disclosure conveys (Step Two). This step will require courts to acknowledge that they are engaged in an interpretive act, and judges should expressly justify their proposed interpretations with references to specific textual or graphic elements of the disclosure. After determining what information a disclosure conveys, courts should assess whether the information is *accurate* (Step Three). Finally, judges should ask whether the information is *relevant* to consumers (Step Four). Accurate disclosures convey truthful, nonmisleading information, and relevant disclosures contain information that will influence the typical consumer's purchasing decisions. Disclosures that reveal accurate and relevant information should survive First Amendment scrutiny under *Zauderer*.

When undertaking this four-step inquiry, courts should rely on any available (valid) data that sheds light on the key doctrinal questions. Courts might have access to survey data compiled by administrative agencies that illustrate how consumers will interpret or understand an image, and judges should invoke these data to justify interpretations of challenged disclosures. In *R.J. Reynolds*, the D.C. Circuit might have relied on evidence about how people's attitudes changed after exposure to the graphic images—evidence that was readily available

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

48. *Id.* at 650.

49. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564–66 (1980).

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

in the administrative record.⁵¹ Similarly, when deciding whether information in a disclosure is relevant to consumers, judges should refer to available information that addresses the facts that consumers would like to know in deciding whether to purchase a product. Once courts signal their willingness to rely on surveys and other data in performing the doctrinal analysis, agencies will have powerful incentives to collect the necessary information, which will in turn provide courts with a robust foundation on which to base their judgments. The goal of this data-driven approach is to discipline courts' interpretive choices—to ensure that judges look at disclosures from the perspective of the typical consumer, not just the typical judge.

This doctrinal proposal differs from those offered by other scholars, in part because I articulate the nature of the problems with compelled commercial-speech doctrine differently from these theorists. Caroline Mala Corbin, Ellen P. Goodman, and Rebecca Tushnet have all argued that the doctrinal difficulties in compelled commercial-speech cases stem from courts' fallacious distinction between reason (or fact) and emotion.⁵² But the trouble runs deeper. The problem is not simply that courts have developed an incoherent scheme for classifying disclosures; the problem is that judges have failed to recognize the interpretive act that necessarily precedes classification. Focusing on this act brings attention to a crucial doctrinal move that typically occurs beneath the surface—and that has given rise to many of the difficulties in compelled commercial-speech cases.

Because I articulate the flaws with the current doctrine differently from Corbin, Goodman, and Tushnet, my proposed solutions aim in a different direction as well. Corbin suggests that courts ask four questions in assessing the constitutionality of mandated disclosures:

1. Does the compelled disclosure risk chilling speech?

51. 21 C.F.R. § 1141 (2012); JAMES NONNEMAKER ET AL., FOOD & DRUG ADMIN., EXPERIMENTAL STUDY OF GRAPHIC CIGARETTE WARNING LABELS: FINAL RESULTS REPORT 3-1 to 3-37 (2010), <http://www.tobaccolabels.ca/wp/wp-content/uploads/2013/12/USA-2010-Experimental-Study-of-Graphic-Cigarette-Warning-Labels-Final-Results-Report-and-Appendices-FDA.pdf>.

52. Corbin, *supra* note 24, at 1321 (“Compelled speech may manipulate audiences if it is false or misleading, or if it intentionally exploits decision-making heuristics. Notably, this does not mean that all emotional appeals are problematic, as not all emotional speech exploits cognitive errors.”); Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 559 (2014) (“When it comes to the cigarette labels and other forms of graphic disclosure, the right question is not whether the speaker intentionally activates emotional responses but whether the speaker intentionally uses emotions to distort or bypass rational choice.”); Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2422 (2014) (“The reality that emotions are inextricably intertwined with reason means that many of the conventional arguments for distinguishing legitimate and illegitimate government interventions into the marketplace for speech misdescribe the world, and therefore don’t work.”).

2. Does the compelled disclosure distort the discourse in some way?
3. Does the compelled disclosure infringe on the autonomy of the speaker?
4. Does the compelled disclosure infringe on the autonomy of the audience?⁵³

According to Corbin, in evaluating a disclosure's impact on audience autonomy, courts should ask "not whether the compelled speech appeals to emotion, but whether the persuasive impact is due to the merits of the argument or to the intentional exploitation of a cognitive shortcut."⁵⁴ In Corbin's view, only disclosures that rely on "cognitive shortcut[s]" raise First Amendment concerns.⁵⁵ Similarly, Goodman cautions, "When it comes to cigarette labels and other forms of graphic disclosure, the right question is not whether the speaker intentionally activates emotional responses but whether the speaker intentionally uses emotions to distort or bypass rational choice."⁵⁶ To protect consumers from manipulation, courts "should be skeptical of disclosures that, even if purely factual, are designed to advance a controversial ideology as opposed to a generally accepted norm."⁵⁷

Corbin and Goodman's proposals are similar in that they seek to replace the fact/emotion distinction with an allegedly superior classification scheme. For Corbin, the relevant distinction is between disclosures that exploit cognitive heuristics and those that do not;⁵⁸ for Goodman, it is between controversial and noncontroversial disclosures.⁵⁹ The categories that Corbin and Goodman develop, however, are no more determinate than the distinction between reason and emotion that the authors condemn. Consider Corbin's description of the FDA's graphic disclosures. On the one hand, the images might "make[] it more likely that the viewer will actually read and think about the government's message."⁶⁰ If the images have this effect, according to Corbin, they do not "seem[] to undercut the decision-making autonomy of the viewer."⁶¹ On the other hand, the images might reflect the government's attempt to "link[] smoking with something that triggers a negative emotional response, hoping that negative

53. Corbin, *supra* note 24, at 1308.

54. *Id.*

55. *Id.*

56. Goodman, *supra* note 52, at 559.

57. *Id.* at 550.

58. Corbin, *supra* note 24, at 1308.

59. Goodman, *supra* note 52, at 550.

60. Corbin, *supra* note 24, at 1322.

61. *Id.* at 1322-23.

emotion will then be transferred to smoking itself.”⁶² If the images have this effect, Corbin claims, they rely on an illegitimate cognitive heuristic and disclosures that incorporate them violate the First Amendment.⁶³ The problem with Corbin’s analysis is that the images’ effects cannot be disentangled quite so easily. The pictures operate *both* by making the text warnings more salient *and* by ensuring that viewers associate cigarettes with negative emotions. Each effect reinforces the other; viewers’ negative reactions to the images increase the text warnings’ salience, and the text’s increased salience intensifies viewers’ concerns about the risks of smoking. To distinguish between the two effects—between the images’ impact on rational thought and their exploitation of cognitive heuristics—is to misunderstand how people think.

Goodman’s proposal, which focuses on the “controversialness” of disclosures, suffers from a similar indeterminacy.⁶⁴ As Goodman candidly acknowledges, “A usable definition of ‘controversial’ would have to be worked out, as courts have worked out other standards based on assessments of social consensus. Undoubtedly, it would have to include a substantiality component that controlled for outlying opinions, as even a proposition such as ‘smoking kills’ has its detractors.”⁶⁵ As this concession reveals, Goodman’s test remains fuzzy, and its application to the FDA’s graphic images demonstrates the ambiguity. On one view, the pictures are not controversial because they simply illustrate the text warnings, which themselves disclose (largely) undisputed facts about smoking (“Cigarettes are addictive,” “Tobacco smoke can harm your children”).⁶⁶ From another perspective, the images controversially manipulate consumers’ emotions and attempt to shame smokers into quitting.⁶⁷ But Goodman does not provide courts with guidance in choosing between these two conceptions. A judge must understand how the images work before she can determine whether they are controversial, and Goodman does not advance a sufficiently robust theory of interpretation to help courts reach this understanding.

62. *Id.* at 1323.

63. *Id.*

64. Goodman, *supra* note 52, at 531.

65. *Id.* at 554.

66. 15 U.S.C. § 1333(a)(1) (2012).

67. See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (“These inflammatory images and the provocatively-named hotline . . . are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”), *overruled in part by Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

Tushnet has sought doctrinal clarity by abandoning classification schemes altogether. In her view, “factual misleadingness” should be the touchstone of compelled commercial-speech doctrine: “Because emotion and reason are inextricable, emotional appeals should be fair game for the government as well as for private parties, unless the emotion is tied to factual deception.”⁶⁸ But Tushnet’s hands-off test requires a departure from current compelled commercial-speech doctrine. *Zauderer* counsels that compelled disclosures serve a useful purpose *to the extent* that they provide consumers with accurate, relevant information.⁶⁹ Tushnet maintains a focus on informational accuracy, but she ignores the importance of the information’s relevance to consumers and betrays *Zauderer*’s reasoning in the process. While Tushnet rightly focuses on the overlap between reason and emotion, she jumps too quickly from her belief in the incoherence of the fact/emotion dichotomy to the conclusion that courts should back away from aggressively monitoring the government’s disclosure regimes. The appropriate response is to develop a doctrinal test that maps the realities of people’s decision-making processes, not to give up the game entirely.

Returning to *Zauderer*’s foundations offers a way around the doctrinal dilemmas that Corbin, Goodman, and Tushnet have identified—and that their proposals would amplify. This backward-looking reform does not require, à la Tushnet, that courts abandon *Zauderer*’s doctrinal formulations or passively permit the government to move ahead with all non-deceptive emotional appeals. Nor does this reform give up on the fact/emotion dichotomy only to develop equally opaque classification schemes centered on cognitive heuristics or “controversialness.” My proposal is, in some senses, less ambitious than other scholars’ alternatives because it seeks simply to reinvigorate a precedent that, while remaining on the books, has been ignored for too long. But in an area where the caselaw has become so muddled—and strayed so far from *Zauderer*—a return to the doctrine’s roots may represent the most radical departure of all. Looking backward, at least in the field of compelled commercial-speech doctrine, reveals a clear path ahead.

68. Tushnet, *supra* note 52, at 2425.

69. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”).

II. GRAPHIC DISCLOSURES AND *R.J. REYNOLDS*

On June 22, 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act.⁷⁰ The Act listed nine statements, such as “[c]igarettes are addictive” and “[t]obacco smoke can harm your children,” and provided that “[i]t shall be unlawful for any person to manufacture, package, sell, offer to sell, distribute, or import for sale or distribution within the United States any cigarettes the package of which fail[ed] to bear” one of the nine warnings.⁷¹ The statute also directed the Secretary of the U.S. Department of Health and Human Services to “issue regulations that require[d] color graphics depicting the negative health consequences of smoking.”⁷² Relying on this authority, the FDA promulgated a proposed rule on November 12, 2010,⁷³ and a final rule on June 22, 2011.⁷⁴ The regulation required all cigarette packages to display one of the nine textual warnings, an accompanying graphic image, and the “1-800-QUIT-NOW” hotline number.⁷⁵ The text, image, and phone number were to cover at least half of each of the front and back surfaces of cigarette packs.⁷⁶ Similar text warnings and graphic images were to occupy at least twenty percent of the space in cigarette advertisements.⁷⁷ Within two months of the final rule’s issuance,⁷⁸ five tobacco companies sued the FDA.⁷⁹ The corporations challenged the graphic-warning regulations on both First Amendment and Administrative Procedure Act (APA) grounds.⁸⁰ After granting a preliminary injunction,⁸¹ the District Court for the District of Columbia struck down the graphic-image re-

70. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 15 U.S.C. and 21 U.S.C.).

71. 15 U.S.C. § 1333(a)(1) (2012).

72. *Id.* § 1333(d).

73. Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524 (proposed Nov. 12, 2010) (codified at 21 C.F.R. § 1141 (2012)).

74. 21 C.F.R. § 1141.

75. *Id.* §§ 1141.10(a), 1141.16; see *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208–09 (D.C. Cir. 2012) (describing the statutory scheme and the FDA’s final rule), *overruled in part by* *Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

76. 21 C.F.R. § 1141.10(a)(4).

77. *Id.* § 1141.10(b)(1), (5).

78. *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 268 (D.D.C. 2012).

79. *Id.* at 268.

80. *Id.* at 268 & n.3. Neither the district court nor the circuit court reached the APA question because both disposed of the case on First Amendment grounds. See *id.*; *R.J. Reynolds Tobacco*, 696 F.3d at 1208 n.1.

81. *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 53 (D.D.C. 2011).

quirement as a violation of the First Amendment,⁸² and the FDA appealed.⁸³

On appeal, the D.C. Circuit first addressed the applicable tier of scrutiny.⁸⁴ Courts generally review commercial-speech laws or regulations under the intermediate-scrutiny standard outlined by the Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁸⁵ That case delineated a four-part inquiry for evaluating commercial-speech regulations.⁸⁶ First, the court must ask whether the speech concerns unlawful activity or is misleading.⁸⁷ Speech that falls into either of these categories receives no First Amendment protection.⁸⁸ For other speech, courts move on to the second stage to assess "whether the asserted governmental interest" in compelling speech "is substantial."⁸⁹ The court then inquires "whether the regulation directly advances the governmental interest asserted,"⁹⁰ and the final step requires judges to ensure that the regulation "is not more extensive than is necessary to serve that interest."⁹¹ If the regulation satisfies this four-part test, then it survives First Amendment review.⁹²

In *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court carved out an exception to the *Central Hudson* inquiry.⁹³ *Zauderer* addressed a number of Ohio state rules that regulated attorney conduct.⁹⁴ One such regulation "provide[d] that any advertisement that mentions contingent-fee rates must 'disclos[e] whether percentages

82. *R.J. Reynolds Tobacco*, 845 F. Supp. 2d at 277.

83. *R.J. Reynolds Tobacco*, 696 F.3d at 1211.

84. *Id.*

85. 447 U.S. 557, 566 (1980).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Central Hudson*, 447 U.S. at 566.

92. *Id.*

93. 471 U.S. 626, 650–51 (1985). The relationship between *Central Hudson* and *Zauderer* is contested. In *American Meat Institute v. Department of Agriculture*, the en banc D.C. Circuit tentatively suggested that *Zauderer* could be read as an application of *Central Hudson*'s intermediate-scrutiny standard, rather than as an exception to that standard. 760 F.3d 18, 26–27 (D.C. Cir. 2014) (en banc). In a concurrence, Judge Rogers sharply disputed this characterization of *Zauderer*. See *id.* at 28 (Rogers, J., concurring in part) ("Viewing *Zauderer* as simply an application of *Central Hudson* to special circumstances . . . finds support in neither Supreme Court precedent nor the precedent of this court or our sister circuits."). While this doctrinal debate does not directly influence my analysis, my understanding of *Zauderer*, reflected in some of the language used in this Article, comports with Judge Rogers's view. I see *Zauderer* as carving out an exception to the *Central Hudson* standard rather than as applying that standard.

94. *Zauderer*, 471 U.S. at 630–34.

are computed before or after deduction of court costs and expenses.”⁹⁵ When Philip Q. Zauderer was charged with violating the rule, he challenged it on First Amendment grounds.⁹⁶ In assessing his claim, the Supreme Court distinguished between “disclosure requirements” and “outright prohibitions on speech.”⁹⁷ It noted that, in some cases, “compulsion to speak may be as violative of the First Amendment as prohibitions on speech.”⁹⁸ The case at hand, however, presented a distinct set of facts:

Ohio has not attempted to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.⁹⁹

The Court concluded that, in the commercial-speech context, disclosure requirements are subject to less strict scrutiny than outright prohibitions: “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.”¹⁰⁰ As a result, *Central Hudson*’s four-part test did not apply when the government mandated commercial speech.¹⁰¹ Instead, disclosure requirements were constitutional as long as they were “reasonably related to the State’s interest in preventing deception of consumers.”¹⁰² The contingent-fee disclosure requirement “easily passe[d] muster” because it was reasonably related to the government’s desire to eliminate client confusion about legal costs.¹⁰³

In *R.J. Reynolds*, the D.C. Circuit offered two rationales in concluding that *Zauderer*’s lenient standard of review did not apply to the

95. *Id.* at 633 (second alteration in original) (quoting OHIO RULES OF PROF’L CONDUCT DR 2-101(B)(15) (1985), *superseded by* OHIO CODE OF PROF’L CONDUCT DR 2-101(E)(1)(c) (2007)).

96. *Id.* at 634.

97. *Id.* at 650.

98. *Id.*

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

100. *Zauderer*, 471 U.S. at 651 (citation omitted).

101. *Id.*

102. *Id.*

103. *Id.* at 652.

FDA's graphic-image regulation.¹⁰⁴ First, the court found that *Zauderer* comes into play only when a disclosure seeks to prevent consumer deception.¹⁰⁵ Because the graphic images did not attempt to achieve this goal—but rather sought to “discourage consumers from buying” cigarettes—*Zauderer* was inapplicable.¹⁰⁶ Second, the court stated that *Zauderer* applies only when a disclosure conveys “‘purely factual and uncontroversial’ information”—a condition that, according to the court, the graphic images did not satisfy.¹⁰⁷

In explaining why the graphic images did not qualify as “purely factual and uncontroversial,” the court again provided two reasons.¹⁰⁸ First, “many of the images chosen by [the] FDA could be misinterpreted by consumers”—an observation that, in the court's view, meant that the images could not qualify as “purely factual.”¹⁰⁹ Second, the court said that the graphic warnings were “primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning.”¹¹⁰ In the court's view, the pictures manipulatively attempted to scare viewers into quitting, rather than seeking to persuade rationally with facts.¹¹¹ As a result, the court applied *Central Hudson's* intermediate level of scrutiny and struck down the regulation.¹¹²

III. A TWOFOLD CRITIQUE

The *R.J. Reynolds* opinion suffers from two flaws. First, the court failed to justify its interpretations of the FDA's graphic images and the information that they conveyed. Second, the majority's distinction between “purely factual” and “emotional” disclosures does not reflect the ways that consumers actually process information. While many compelled commercial-speech decisions suffer from the same problems, these difficulties are particularly acute in the *R.J. Reynolds* opinion because the case addresses pictorial disclosures.

104. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213–17 (D.C. Cir. 2012), *overruled in part by* *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

105. *Id.* at 1213–14.

106. *Id.* at 1216.

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

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

109. *Id.*

110. *Id.*

111. *Id.* at 1216–17.

112. *Id.* at 1217, 1222.

A. *The Necessity of Interpretation*

In assessing whether a disclosure is “purely factual and uncontroversial” under *Zauderer*, courts implicitly undertake a two-step process (although judges may not always acknowledge, or even recognize, that they are doing so). First, the court determines what information the challenged disclosure conveys. Second, the judge assesses whether this information qualifies as “purely factual and uncontroversial.” The *R.J. Reynolds* court engaged in just this sort of analysis when explaining why the FDA’s graphic images were not “purely factual”:

[M]any of the images do not convey *any* warning information at all, much less make an “accurate statement” about cigarettes. For example, the images of a woman crying, a small child, and the man wearing a T-shirt emblazoned with the words “I QUIT” do not offer any information about the health effects of smoking. . . . These inflammatory images . . . cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.¹¹³

The court’s reasoning embodies the implicit *Zauderer* two-step. Next, the majority advances an argument about the facts (or lack thereof) that the images convey, albeit without acknowledging that it is making an interpretive claim.¹¹⁴ Then, the court determines that, because many of the pictures do not offer “*any* warning information at all,” they cannot qualify as “purely factual” under *Zauderer*.¹¹⁵

The court’s opinion reflects one possible interpretation of the FDA’s graphic images, but not the only conceivable one. Some viewers might find that the picture of the crying woman enunciates cigarettes’ harmfulness or dramatizes the grief that might accompany the loss of a loved one from a smoking-induced illness.¹¹⁶ Similarly, one might believe that the image of a small child illustrates the effects of involuntary tobacco inhalation because the picture depicts a baby gazing at an ominous billow of smoke.¹¹⁷ Indeed, the *R.J. Reynolds* dis-

113. *Id.* at 1216.

114. *Id.*

115. *R.J. Reynolds*, 696 F.3d at 1216–17.

116. See Tushnet, *supra* note 52, at 2411–12 (noting that the image of the tearful woman might convey that “nonsmokers who contract fatal lung disease will be mourned” or that “smokers who discover that an intimate has fatal lung disease will feel guilt”).

117. See *R.J. Reynolds Tobacco*, 696 F.3d at 1232 (Rogers, J., dissenting) (“Regarding the [image of the small child], commentators noted that it would ‘clearly inform parents that when they smoke in the presence of their children, their children will also be inhaling toxins.’” (quoting Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,650 (codified at 21 C.F.R. § 1141 (2012))))).

sender advanced precisely these interpretations: “Addressing potential purchasers of cigarettes, these two warning labels convey the message that smoking poses risks not only to them, but also to their family members and others.”¹¹⁸ While a viewer might look at the graphic images and emerge with no new information, that outcome is not inevitable—a point that the *R.J. Reynolds* majority ignored when it assumed that the images could be interpreted in only one way.

Despite the contestability of its interpretive choices, the *R.J. Reynolds* court did not attempt to justify its proposed understandings of the images. The majority did not explain why its interpretations of the pictures were better than any alternative understandings, and the court did not respond to the dissenter’s view that the images *did* convey valuable information. Consider the court’s interpretation of another of the FDA’s graphic images:

[T]he image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking—a more logical interpretation than [the] FDA’s contention that it symbolizes “the addictive nature of cigarettes,” which requires significant extrapolation on the part of the consumers.¹¹⁹

Once again, the court adopts a particular understanding of the image—one view is “more logical” than another—without pointing to specific aspects of the picture that support the allegedly superior interpretation. And once again, the dissenter disputed the majority’s characterization:

The image accompanying the textual warning “Cigarettes are addictive” depicts a man smoking through a tracheotomy opening in his throat. Viewed with the accompanying text, this image conveys the tenacity of nicotine addiction: even after . . . undergoing surgery for cancer, one might be unable to abstain from smoking.¹²⁰

The majority treated the images as if they were “transparent”—as if their meanings were not open to legitimate debate¹²¹—even as the dissent vigorously debated the very interpretations adopted by the court.

The *R.J. Reynolds* court is not the only one to assume the validity of its interpretive choices in compelled commercial-speech cases. In *Na-*

118. *Id.*

119. *Id.* at 1216 (majority opinion) (quoting Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,649).

120. *Id.* at 1231 (Rogers, J., dissenting).

121. See Tushnet, *Worth a Thousand Words*, *supra* note 38, at 687 (“When courts treat images as transparent, they deny that interpretation is necessary, claiming that images merely replicate reality, so that the meaning of an image is so obvious that it admits of no serious debate.”).

tional Ass'n of Manufacturers v. SEC,¹²² the D.C. Circuit addressed a First Amendment challenge to a federal statute and the Securities and Exchange Commission (SEC) regulation that implemented that statute.¹²³ Enacted in 2010, the law addressed “conflict minerals,” which were defined as “(A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo [DRC] or an adjoining country.”¹²⁴ In regulations implementing the statute, the SEC required specified entities to indicate whether their products were “DRC conflict free”—in other words, whether the products contained any conflict minerals that had originated in the DRC or neighboring nations.¹²⁵ The D.C. Circuit struck down the regulation, as well as the relevant statutory provision, on First Amendment grounds.¹²⁶ Although the court’s holding did not primarily rest on *Zauderer*’s “purely factual and uncontroversial” language,¹²⁷ the majority suggested that the conflict-minerals rule was neither “purely factual” nor “uncontroversial”:

[T]he description at issue—whether a product is “conflict free” or “not conflict free”—[is] hardly “factual and non-ideological.” . . . “Products and minerals do not fight conflicts. The label ‘[not] conflict free’ is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that ‘message’ through ‘silence.’ By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.”¹²⁸

122. 748 F.3d 359 (D.C. Cir. 2014), *overruled in part by* *Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

123. *Id.* at 363–65. Although the D.C. Circuit issued its initial opinion in April 2014, it later granted panel rehearing. See Order Granting Petition for Panel Rehearing, *Nat’l Ass’n of Mfrs.*, No. 13-5252 (D.C. Cir. Nov. 18, 2014). Following rehearing, the court reaffirmed its initial judgment. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 520–21 (D.C. Cir. 2015). The court “assume[d] familiarity” with its original opinion and did not reiterate the facts of the case, *id.* at 519, so I refer to the first opinion when discussing factual matters. I will refer to the opinion issued after panel rehearing when discussing the court’s legal reasoning.

124. 15 U.S.C. § 78(m)(4) (2012); Conflict Minerals, 77 Fed. Reg. 56,274, 56,275 n.6 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p-1, 249b.400 (2012)).

125. Conflict Minerals, 77 Fed. Reg. at 56,364.

126. *Nat’l Ass’n of Mfrs.*, 800 F.3d at 521; see *Nat’l Ass’n of Mfrs.*, 748 F.3d at 370–73.

127. *Nat’l Ass’n of Mfrs.*, 800 F.3d at 521–27.

128. *Id.* at 530 (third alteration in original) (citations omitted) (quoting *Nat’l Ass’n of Mfrs.*, 748 F.3d at 371).

In this passage, the D.C. Circuit makes a number of contestable interpretive choices without sufficiently defending those choices. While a viewer might read the “conflict free” disclosure as a confession of moral culpability, that understanding is not inevitable.¹²⁹ Consumers might instead regard the disclosure as a factual statement about the origins of certain minerals without attributing blame to issuers that use those minerals.¹³⁰ The majority did not explain why the disclosure was better understood as an admission of guilt than as a statement of fact, and, as in *R.J. Reynolds*, the dissenter forcefully disputed the majority’s characterizations.¹³¹

In *CTIA-The Wireless Ass’n v. San Francisco*,¹³² the Ninth Circuit similarly failed to grapple with its interpretive assumptions. The court confronted a San Francisco ordinance that sought to inform consumers about the “potential for adverse health effects from long-term cell phone use, particularly for children.”¹³³ The law required the San Francisco Department of the Environment to draft an “informational factsheet,” which—along with an “informational poster” and “set of statements”—would “inform consumers of issues pertaining to radiofrequency energy emissions from cell phones and actions that can be taken by cell phone users to minimize exposure to radiofrequency energy.”¹³⁴ The ordinance also required retailers to distribute the factsheet to all cell phone purchasers (and to anyone else who requested it).¹³⁵ When an association representing the telecommunications in-

129. See *id.* at 539–40 (Srinivasan, J., dissenting) (noting that issuers may explain the meaning of “DRC conflict free” in their disclosures, and stating that such explanations “do[] not ‘require[] an issuer to tell consumers that its products are ethically tainted,’ much less ‘to confess blood on its hands.’ [They] instead communicate[] a statement of fact about the geographic source of the minerals in its products—*i.e.*, that the issuer could not determine with certainty whether component minerals directly or indirectly finance armed groups in the DRC region, thus obligating the issuer to describe the products as having ‘not been found to be DRC conflict free.’” (first alteration in original) (citation omitted) (quoting *id.* at 530 (majority opinion))).

130. See *id.* at 538–39 (Srinivasan, J., dissenting) (“The term ‘DRC conflict free’ is a term of art defined in the Rule and statute: a product is ‘DRC conflict free’ if it contains no ‘conflict minerals’ originating in the DRC or adjoining countries that finance armed groups in those countries. The question whether a product has been ‘found to be DRC conflict free’ thus calls for a ‘factual’ response: the product either has, or has not, been ‘found to be DRC conflict free’ under the statutory definition. There is nothing non-factual about the required disclosure, nor is the factual accuracy of the disclosure subject to dispute.” (citations omitted) (quoting 15 U.S.C. § 78m(p)(1)(A)(ii), (D) (2012); 77 Fed. Reg. 56,274, 56,321 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p-1, 249b.400 (2016)))).

131. *Id.* at 538–39.

132. 494 F. App’x 752 (9th Cir. 2012).

133. S.F., CAL., ORDINANCE 156-11, § 1 (2011).

134. *Id.* § 1104(a)–(b).

135. *Id.* § 1103(b).

dustry¹³⁶ challenged the law on First Amendment grounds,¹³⁷ the Ninth Circuit concluded that the factsheet was not “purely factual and uncontroversial”:

[T]he . . . fact sheet contains more than just facts. It also contains San Francisco’s recommendations as to what consumers should do if they want to reduce exposure to radiofrequency energy emissions. This language could prove to be interpreted by consumers as expressing San Francisco’s opinion that using cell phones is dangerous.¹³⁸

Notice the equivocal nature of the opinion’s language. The court is implicitly advancing an interpretation of the factsheet but cannot bring itself to admit that it is engaged in an interpretive act. Instead, it passively notes that the document “*could prove* to be interpreted by consumers” in a particular way.¹³⁹ The court does not explain why this interpretation is a likely (or even plausible) one. Some viewers might think that the factsheet provides worried consumers with information about cell-phone use without endorsing those consumers’ concerns. The court implies that it is just proposing one possible interpretation of the disclosure, but the opinion’s halfhearted language conceals what is actually going on: The court is actively adopting that interpretation, which provides the basis for striking down the ordinance.

136. See Complaint for Declaratory and Injunctive Relief ¶ 9, *CTIA-The Wireless Ass’n v. San Francisco*, 827 F. Supp. 2d 1054 (N.D. Cal. 2011) (No. cv-10-3224-LB), 2010 WL 2917618, at *1 (“CTIA represents all sectors of the wireless industry . . .”).

137. *CTIA-The Wireless Ass’n*, 827 F. Supp. 2d at 1056.

138. *CTIA-The Wireless Ass’n v. San Francisco*, 494 F. App’x 752, 753 (9th Cir. 2012).

139. *Id.* at 752 (emphasis added).

FIGURE 5
INFORMATIONAL FACTSHEET DEVELOPED BY THE SAN FRANCISCO
DEPARTMENT OF THE ENVIRONMENT¹⁴⁰

You can limit exposure to Radio-frequency (RF) Energy from your cell phone.



Although all cell phones sold in the United States must comply with RF safety limits set by the Federal Communications Commission (FCC), no safety study has ever ruled out the possibility of human harm from RF exposure.

This material was prepared solely by the City and County of San Francisco and must be provided to consumers under local law.

RF Energy has been classified by the World Health Organization as a possible carcinogen (rather than as a known carcinogen or a probable carcinogen) and studies continue to assess the potential health effects of cell phones. **If you are concerned about potential health effects from cell phone RF Energy, the City of San Francisco recommends:**

- **Limiting cell phone use by children**
Average RF energy deposition for children is two times higher in the brain and up to ten times higher in the bone marrow of the skull compared with cell phone use by adults.
- **Using a headset, speakerphone or text instead**
Exposure decreases rapidly with increasing distance from the phone.
- **Using belt clips and purses to keep distance between your phone and body**
Do not carry on your body to at least meet the distance specified in your phone's user manual.
- **Avoiding cell phones in areas with weak signals (elevators, on transit, etc.)**
Using a cell phone in areas of good reception decreases exposure by allowing the phone to transmit at reduced power.
- **Reducing the number and length of calls**
Turn off your cell phone when not in use.



Learn More: SF Department of the Environment @ SFEnvironment.org/cellphoneradiation • (415) 355-3700
Federal Communications Commission @ FCC.gov/cgb/consumerfacts/mobilephone.html
World Health Organization @ WHO.int/mediacentre/factsheets/fs193/en/

This material was prepared solely by the City and County of San Francisco and must be provided to consumers under local law.

140. This image is used with the permission of the San Francisco Office of City Attorney General. See *You Can Limit Exposure to Radio-Frequency (RF) Energy from Your Cell Phone*, CITY & CTY. S.F., <https://www.sfcityattorney.org/wp-content/uploads/2011/10/Citys-factsheet.pdf> (last visited June 13, 2017).

In *Entertainment Software Ass'n v. Blagojevich*,¹⁴¹ the Seventh Circuit analyzed an Illinois law that required video game retailers “to place a sign in their stores explaining the video game rating system and to produce consumers with brochures about the . . . system.”¹⁴² In striking down this portion of the statute, the court engaged in “[c]areful consideration of what the signs and brochures are in fact communicating.”¹⁴³ Such consideration revealed that

the message is neither purely factual nor uncontroversial. The signs and the brochures are intended to communicate that any video games in the store can be properly judged pursuant to the standards described in the [Entertainment Software Ratings Board] ratings. Moreover, the signs communicate endorsement of ESRB, a non-governmental third party whose message may be in conflict with that of any particular retailer.¹⁴⁴

While a viewer could conceivably think that the signs and brochures amount to a ratification of the ESRB system, a consumer might instead regard the postings as “purely factual” statements about how to interpret the ESRB’s ratings. When it determined that the signs and brochures “communicate[d] endorsement,” the Seventh Circuit took an interpretive leap, but the court did not point to specific aspects of the disclosure to justify that leap.

In each of these instances, courts engaged in an interpretive act to determine whether a disclosure was “purely factual and uncontroversial.”¹⁴⁵ In none of these cases, however, was the proposed interpretation self-evident. Each disclosure could have been understood in more than one way, and the court adopted one of the possible understandings in determining whether *Zauderer* applied. Yet judges were loath to acknowledge the contestability of their interpretive choices. In some cases, courts simply asserted that one interpretation was more reasonable than another without explaining why. In other instances, courts claimed that consumers *might* understand the disclosure to convey misleading information without clarifying why deception was likely. These cases reveal that, when courts apply *Zauderer*’s “purely factual and uncontroversial” language, they frequently advance contestable interpretations without offering sufficient justification for pivotal interpretive choices.

141. 469 F.3d 641 (7th Cir. 2006).

142. *Id.* at 643.

143. *Id.* at 652.

144. *Id.* at 652–53 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

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

If courts struggle to defend their interpretive assumptions in run-of-the-mill compelled commercial-speech cases, the problem only intensifies when pictorial disclosures (like the FDA's graphic images) come into play. As Neal Feigenson and Christina Spiesel have highlighted, certain pictures are "descriptive" in the sense that they depict "what we might see with our eyes looking out on the world" (as opposed to abstract images that do not provide documentary depiction of what the world looks like).¹⁴⁶ People tend to view descriptive images as depictions of "unmediated reality"—as illustrations that do not require interpretation but that convey highly accurate representations of the portrayed object.¹⁴⁷ Feigenson and Spiesel refer to this tendency as "naïve realism," which encompasses two related beliefs.¹⁴⁸ First, naïve realism rests on "the common-sense notion that there's an objective world out there and that anyone with open eyes can know it and see it."¹⁴⁹ Second, naïve realism draws on people's propensity "to conflate representations with direct perceptions of reality, to 'look through' the mediation at what is depicted."¹⁵⁰ Because vision is "the primary sense through which we experience the world outside ourselves," people typically treat visual stimuli as if they were particularly trustworthy¹⁵¹ while casting a wary eye on texts.¹⁵²

The inclination to trust images has a basis in cognitive neuroscience. The portions of the brain that register "sensory inputs," such as the inputs that come from viewing images, are located far from the frontal lobe, which processes "the kinds of language-mediated thoughts that lead to reflection, critique, and suspicion."¹⁵³ The distance between these areas of the brain may lead viewers to accept intuitively the truth of pictures instead of taking a step back to criticize or reevaluate the images.¹⁵⁴ As Randall Bezanson puts the point,

[T]he sensory and emotional and often visual or re-representational nature of art makes it more powerful and less susceptible to the cooling impact of cognitive expression and reason. It is an entirely

146. FEIGENSON & SPIESEL, *supra* note 36, at 6.

147. *Id.* at 8 ("Pictures that are descriptive . . . [are] more likely to provoke cognitive and especially emotional responses similar to those aroused by the real thing depicted.").

148. *Id.* at 8–9.

149. *Id.* at 9.

150. *Id.*

151. *Id.* at 9–10.

152. FEIGENSON & SPIESEL, *supra* note 36, at 8 ("Pictures tend to be more vivid than words and, especially in the case of the rapid picture sequences in video and film, they can be more involving and entertaining, decreasing the mental resources available for doubt.").

153. *Id.* at 9.

154. RANDALL P. BEZANSON, *ART AND FREEDOM OF SPEECH* 252 (2009).

different experience to read about a burning cross than to witness it firsthand or to see its image on film or canvas.¹⁵⁵

Images have power over the viewer in a way that words—cool, reflective, rational—do not.

This analysis of image processing suggests that pictorial disclosures may exacerbate the difficulties that plague compelled commercial-speech doctrine. When assessing images, judges may fail to subject their interpretive instincts to the kind of critical reflection that textual disclosures trigger.¹⁵⁶ Even worse, judges may fail to recognize that they are engaged in an interpretive act at all.¹⁵⁷ They may assume that they have unmediated access to a picture's meaning, and they may think that they have no obligation to justify their understanding of the image. Because pictorial disclosures inhibit judges' ability to articulate interpretive choices, these disclosures amplify a problem that underlies much of compelled commercial-speech doctrine.

B. *The Incoherence of the Fact/Emotion Dichotomy*

The *R.J. Reynolds* court also found that the FDA's graphic images were not "purely factual" because they operated primarily by appealing to viewers' emotions.¹⁵⁸ The court's distinction between "factual" and "emotional" disclosures does not hold up because this dichotomy fails to account for the ways that people actually process information. At the risk of stating the obvious, disclosures can both convey facts *and* incite emotion. When designing the graphic images, the FDA sought to achieve both objectives. Before issuing its final rule, the agency conducted a study to assess how consumers would respond to the graphic cigarette warnings.¹⁵⁹ The researchers concluded that many of the selected pictures would trigger negative feelings in consumers, but the images would simultaneously improve viewers' knowledge of the health risks of smoking.¹⁶⁰ Consider, as an analogy, the

155. *Id.*

156. FEIGENSON & SPIESEL, *supra* note 36, at 9.

157. *Id.*

158. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

159. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,637 (June 22, 2011) (codified at 21 C.F.R. § 1141 (2012)); NONNEMAKER ET AL., *supra* note 51, at 1-2 to 1-3.

160. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,649–57 (explaining the emotional and cognitive impact of each of the selected images); see Christine Jolls, *Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation*, 169 J. INSTITUTIONAL & THEORETICAL ECON. 53, 62–63 (2013) (noting that the FDA's questions on subjects' emotional responses "tended to produce fairly dramatic results"); see also NONNEMAKER ET AL., *supra* note 51, at 4-1 ("Most of the warning images elicited strong emotional

nutrition facts on the sides of food products. These seemingly neutral labels convey information about the food (number of calories, percent of daily vitamins, protein content). But the labels, while “purely factual,” may still have emotional effects, as anyone who has felt disappointment or anger upon discovering the unhealthy content of a favorite food can attest. Moreover, the D.C. Circuit’s contrast between fact- and emotion-driven decision making overlooks the ways that both facts and emotions contribute to sound judgment. People tend to recall events with particular clarity when those events are associated with strong emotions.¹⁶¹ When it promulgated the graphic images, the FDA made precisely this point: “[E]liciting strong emotional and cognitive reactions to graphic warnings enhances recall and information processing, which helps to ensure that the warning[s are] better . . . understood[] and remembered.”¹⁶² Rather than attempting to overwhelm the facts conveyed by the text warnings, the FDA sought to cement viewers’ memories of those facts.¹⁶³

The boundary between fact and emotion becomes murky when pictorial disclosures come into play because images are often more emotionally charged than words.¹⁶⁴ In a 2005 study, Emily A. Holmes and Andrew Mathews asked subjects to listen to recordings that described potentially anxiety-inducing situations.¹⁶⁵ One recording intoned, “You are at work when you hear the fire alarms go off. You run to the exit when you discover that it is for *real*.”¹⁶⁶ Some subjects heard about shark attacks: “You have gone to Australia. You are swimming in the sea and see a fin snaking toward you and realize it is a *shark*.”¹⁶⁷

and cognitive responses compared with controls.”); Jolls, *supra*, at 67 (noting that the graphic images also “tend[ed] to reduce individuals’ factual misperceptions relative to these warnings’ text-only counterparts”).

161. See, e.g., Adam K. Anderson et al., *Emotion Enhances Remembrance of Neutral Events Past*, 103 PROC. NAT’L ACAD. SCI. 1599, 1601 (2006) (“The present studies demonstrated that on an event-by-event basis increased intensity of an emotional experience enhanced memory for prior neutral events”); Elizabeth A. Kensinger, *Negative Emotion Enhances Memory Accuracy: Behavioral and Neuroimaging Evidence*, 16 ASS’N FOR PSYCHOL. SCI. 213, 213–14 (2007) (“[A]lthough emotional experiences are not remembered with picture-perfect accuracy, emotion can enhance memory for many details, including the color of the font in which a word was presented, the spatial location of a word on a computer screen, or whether information was visually presented or mentally imagined.” (citations omitted)).

162. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,640–41.

163. *Id.*

164. Elinor Amit, *Visual Versus Verbal Thinking and Dual-Process Moral Cognition*, in DUAL-PROCESS THEORIES OF THE SOCIAL MIND 340, 345 (Jeffrey W. Sherman et al. eds., 2014).

165. See Emily Holmes & Andrew Mathews, *Mental Imagery and Emotion: A Special Relationship?*, 5 EMOTION 489 (2005).

166. *Id.* at 490.

167. *Id.*

The researchers asked one group of subjects to “imagin[e] the event” (the “imagery condition”) and told another group to “think about the meaning of the verbal text without using imagery” (the “verbal-semantic condition”).¹⁶⁸ The researchers found that “[p]articipants in the imagery condition reported greater increases in . . . anxiety than those in the verbal-semantic condition.”¹⁶⁹ Translating a situation into images triggered more intense emotional reactions than translating the same situation into words.

Similarly, in a 1994 study, Jan De Houwer and Dick Hermans exposed subjects to various combinations of pictures and words.¹⁷⁰ The researchers asked some participants whether the pictures had a positive or negative connotation (the “Picture-condition”) and asked other participants whether the words had a positive or negative connotation (the “Word-condition”).¹⁷¹ In some cases, subjects in the “Word-condition” saw a word coupled with a neutral image (a rectangle), while subjects in the “Picture-condition” saw an image coupled with neutral text (a row of five X’s).¹⁷² In other cases, the researchers projected an image and a word with inconsistent connotations—for instance, an image of a rabbit (positive) with the word “SNAKE” (negative).¹⁷³ For subjects in the “Picture-condition,” average reaction times did not meaningfully differ between the neutral-text situations and the inconsistent-connotation situations.¹⁷⁴ However, subjects in the “Word-condition” responded much more slowly when they saw an inconsistent picture-word combination than when they saw a neutral image.¹⁷⁵ From these findings, the researchers concluded that the emotional force of the images overpowered subjects’ attempts to associate positive or negative emotions with the words.¹⁷⁶ On the other hand, the emotional power of the words did not interfere with participants’ ability to place the images in the “positive” or “negative” category.¹⁷⁷ Once again, cognitive neuroscience sheds light on

168. *Id.*

169. *Id.* at 492.

170. Jan De Houwer & Dirk Hermans, *Differences in the Affective Processing of Words and Pictures*, 8 *COGNITION & EMOTION* 1, 4–5 (1994).

171. *Id.* at 5.

172. *Id.*

173. *Id.* at 4–5.

174. *Id.* at 7.

175. *Id.*

176. Houwer & Hermans, *supra* note 170, at 9 (“The present results demonstrate that, compared to words, pictures have privileged access to affective information. Incongruent pictures interfered with the affective categorization of words, whereas the affective categorization of pictures was not influenced by the presence of a word.”).

177. *Id.* at 7.

these results. Ralph Adolphs and Daniel Tranel have discovered that damage to the amygdala, a portion of the brain that helps “process[] socially and emotionally relevant information,”¹⁷⁸ affects people’s perceptions of pictures.¹⁷⁹ The links between the image- and emotion-processing sections of the brain aid in explaining why graphics produce more intense emotional responses than words do.¹⁸⁰

As these studies reveal, images can stimulate powerful emotional reactions, but pictures can also enhance viewers’ retention of important facts. Cognitive psychologist Allan Paivio has distinguished between two “modes of symbolic representation” (or “coding systems”) that people use to collate information about the world.¹⁸¹ One mode is imagery; the other consists of “verbal processes.”¹⁸² In his studies of symbolic representation, Paivio found some support for the “coding redundancy hypothesis,” which suggests that one’s memory of information improves when one stores the information in both nonverbal (pictorial) and verbal (textual) form.¹⁸³

The work of educational psychologist Richard E. Mayer offers further support for this hypothesis.¹⁸⁴ Mayer and his colleagues presented students with information about how pumps and brakes work.¹⁸⁵ Some of the students listened to narration accompanied by animation, while other students listened to the narration without any corresponding graphics.¹⁸⁶ In another set of experiments, Mayer and his collaborators provided students with information about how pumps, brakes, or generators work or how lightning is produced.¹⁸⁷ Some students learned this information by reading illustrated texts, while other students read texts without pictures.¹⁸⁸ In both sets of

178. Ralph Adolphs & Daniel Tranel, *Preferences for Visual Stimuli Following Amygdala Damage*, 11 J. COGNITIVE NEUROSCIENCE 610, 610 (1999).

179. *Id.* at 611–12.

180. FEIGENSON & SPIESEL, *supra* note 36, at 8 (“The same areas of the brain that process visual perceptions are also responsible for mental imagery, and these are connected to the amygdala and other areas of the brain critical for emotion. And, because visual information acquires emotional valence before that information ever gets to the cortex, the whole picture passes along its emotional colors even as we begin to decode its parts.” (footnotes omitted)).

181. ALLAN PAIVIO, *IMAGERY AND VERBAL PROCESSES* 8 (1979); *see also* ALLAN PAIVIO, *MENTAL REPRESENTATIONS: A DUAL CODING APPROACH* 53 (1990).

182. PAIVIO, *MENTAL REPRESENTATIONS*, *supra* note 181, at 53 (“The most general assumption in dual coding theory is that there are two classes of phenomena handled cognitively by separate subsystems, one specialized for the representation and processing of information concerning nonverbal objects and events, the other specialized for dealing with language.”).

183. *Id.* at 181, 207–08, 220.

184. MAYER, *supra* note 42, at 63–80.

185. *Id.* at 72.

186. *Id.*

187. *Id.*

188. *Id.*

studies, students took a “retention test” and a “transfer test” after being exposed to the relevant information.¹⁸⁹ The retention test required subjects to recall information that they had learned, while the transfer test required students to complete problem-solving exercises (with scoring based on the number of creative responses that each student offered).¹⁹⁰ After conducting these experiments, Mayer and his fellow researchers concluded that “adding pictures to words tended to improve student performance on retention tests.”¹⁹¹ Similarly, the researchers found that “students who learned with words and pictures generated considerably more creative answers to problems than did students who learned with words alone.”¹⁹² As Mayer stated, “[The] results support the thesis that a deeper kind of learning occurs when learners are able to integrate pictorial and verbal representations of the same message.”¹⁹³

This discussion of image processing hints at both the dangers and the benefits of pictorial disclosures. Images may manipulatively undermine consumers’ rational faculties, just as the D.C. Circuit ominously warned in *R.J. Reynolds*.¹⁹⁴ But images can also improve recollection of facts. Moreover, courts may have difficulty disaggregating an image’s effects, especially because these effects can interact with one another: The visceral impact of an emotional image might enhance viewers’ ability to remember facts associated with that image. The judicial distinction between facts and emotions, already suspect when applied to text disclosures, becomes even blurrier when images come into play.

IV. A DOCTRINAL RECOMMENDATION

As Robert Post has written, protections for commercial speech guard against specific type of harm, and they instantiate a specific view of the consuming public.¹⁹⁵ Outside of the commercial-speech realm, the First Amendment typically safeguards “those forms of communication that are deemed necessary to ensure that a democratic state remains responsive to the views of its citizens.”¹⁹⁶ These protections, which ensure that people are able to contribute to “public dis-

189. *Id.*

190. MAYER, *supra* note 42, at 63–80.

191. *Id.* at 73.

192. *Id.* at 76.

193. *Id.* at 79.

194. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

195. Post, *supra* note 24, at 4.

196. *Id.*

course,” are “speaker oriented,” focused on enabling individuals to participate in collective discussion.¹⁹⁷

When the First Amendment operates to check government prohibitions of commercial speech, the amendment operates differently because it protects individuals as consumers—as *homo economicus*, “independent and rational” beings—rather than as political actors.¹⁹⁸ Commercial speech is valuable because it provides consumers with information that is useful to them as they make economic choices.¹⁹⁹ Commercial-speech safeguards are “sharply audience oriented” because they place high value on the information that is conveyed to consumers, rather than on the ability of corporations to contribute to public discourse or political debate.²⁰⁰

When the government attempts to compel commercial speech, the First Amendment, as interpreted by the Supreme Court, strikes a balance between the harm of requiring a corporation to subsidize a government message and the benefit of giving consumers access to information that might shape economic choices.²⁰¹ *Zauderer* is the Court’s effort to explain how this balance operates. The *Zauderer* Court began by distinguishing between “disclosure requirements” and “outright prohibitions on speech”—a distinction, the Court acknowledged, that had little relevance outside of the commercial-speech context.²⁰² But in the realm of commercial speech, “disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”²⁰³ Because corporations’ “constitutionally protected interest in *not* providing any particular factual information in [their] advertising is minimal,” the Court determined that disclosure requirements should be subject to less strict scrutiny than prohibitions on commercial speech.²⁰⁴ Disclosure requirements

197. *Id.* at 14–15.

198. *Id.* at 4.

199. *Id.* at 14; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 563 (1980) (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”).

200. Post, *supra* note 24, at 14–15.

201. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (“This case contains elements of compulsion and forced subsidization.”), *overruled in part by* Am. Meat Inst. v. Dep’t of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc).

202. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985) (“We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. Indeed, in *West Virginia State Bd. of Ed. v. Barnette*, the Court went so far as to state that ‘involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.’” (citations omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1942))).

203. *Id.* at 651.

204. *Id.*

would survive, the Court said, as long as they were “reasonably related to the State’s interest in preventing deception of consumers.”²⁰⁵

Zauderer’s test has a logic to it. The Court recognized that corporations endure some harm when they are required to speak; otherwise, disclosure mandates would not be subject to any First Amendment scrutiny at all²⁰⁶—just as “misleading” commercial speech receives no First Amendment protection.²⁰⁷ Nonetheless, in the typical case, the harm suffered by corporations is “minimal” and is outweighed by the government’s interest in providing information to consumers.²⁰⁸ After weighing these competing concerns, the Court concluded that a rational-basis-type test sufficed to protect commercial interests.²⁰⁹

Taking *Zauderer* at its word, a simple doctrinal test emerges. When evaluating a commercial-speech regulation, courts should ask whether the regulation is a “disclosure requirement” or an “outright prohibition on speech.”²¹⁰ If the law bans commercial speech, then *Central Hudson*’s intermediate standard of review applies. If the law requires commercial speech, then *Zauderer*’s lower tier of scrutiny applies. That is all *Zauderer* says.

Despite this straightforward lesson, lower courts have made a mess of the *Zauderer* doctrine. The primary problem is that courts have treated aspects of the *Zauderer* test as prerequisites to invocation of that test. *Zauderer* asks courts to assess whether “disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers,”²¹¹ but in *R.J. Reynolds*, the D.C. Circuit flipped around the inquiry. The court stated that *Zauderer* review did not apply because the government had not shown that “there [was] a self-evident—or at least ‘potentially real’—danger” of deception in the absence of the graphic warnings.²¹² The court should have assessed the regulation’s ability to combat deception as part of the *Zauderer* inquiry itself, not when determining whether *Zauderer* should apply at all.

The *R.J. Reynolds* court’s “purely factual and uncontroversial” inquiry suffers from the same flaw. *Zauderer*’s sole reference to this

205. *Id.*

206. *Id.* (describing “appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising,” but noting that this interest was “minimal”).

207. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

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

209. *Id.*

210. *Id.* at 650.

211. *Id.* at 651.

212. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst. v. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

inquiry came when the Court stated that Ohio's attorney-conduct regulation "has taken the form of a requirement that [Zauderer] include in his advertising purely factual and uncontroversial information about the terms under which his services will be available."²¹³ This language does not outline a legal test but simply buttresses the Court's conclusion that disclosure requirements—many of which mandate the provision of "purely factual and uncontroversial information"—warrant less strict scrutiny than prohibitions on speech. The "purely factual and uncontroversial" language does not outline a legal standard that must be satisfied before *Zauderer* review applies. The phrase simply describes the Ohio regulation at issue in *Zauderer* itself.²¹⁴

I do not intend to dismiss this phrase entirely, and any test based on *Zauderer* must account for the Court's decision to include the "purely factual and uncontroversial" language in its opinion. The Court used

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

214. *Id.* The Sixth Circuit reached a similar conclusion in concluding that *Zauderer* applied to a facial challenge to the Family Smoking Prevention and Tobacco Control Act's disclosure regime:

[The] "purely factual and uncontroversial" . . . language appears in *Zauderer* once and the context does not suggest that the Court is describing the characteristics that a disclosure must possess for a court to apply *Zauderer*'s rational-basis rule. That language instead merely describes the disclosure the Court faced in that specific instance. This reading is buttressed by the fact that elsewhere *Zauderer* refers to a commercial speaker[s] disclosing "factual information" and "accurate information."

Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (citations omitted). The Sixth Circuit went on to note that a recent Supreme Court decision validated this reading of *Zauderer*: "[A] disclosure need not be *purely factual and noncontroversial* to apply the rational-basis rule The Court instead uses the language *required factual information* and *only an accurate statement* when describing the characteristics of a disclosure that is scrutinized for a rational basis." *Id.* at 559–60 n.8 (citing *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010)). In his dissent in *National Ass'n of Manufacturers v. SEC*, Judge Srinivasan may have been alluding to the same point when he noted:

In assessing whether the conflict minerals disclosure squares with the phrase "purely factual and uncontroversial," it is important to bear in mind that [the] phrase comes from a judicial opinion, not a statute. And the "language of an opinion is not always to be parsed as though we were dealing with language of a statute." Language in a judicial opinion should be "read in context," taking into account the whole of the court's analysis.

800 F.3d 518, 537 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (citations omitted) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). In that case, however, Judge Srinivasan was bound by D.C. Circuit precedent that treated the "purely factual and uncontroversial" standard as a prerequisite to *Zauderer* review. See *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) ("In this case, the criteria triggering the application of *Zauderer* are either unchallenged or substantially unchallenged. The decision requires the disclosures to be of 'purely factual and uncontroversial information' about the good or service being offered."). But see *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring in the judgment) ("If . . . a challenged regulation simply requires a commercial speaker to disclose 'purely factual and uncontroversial information,' courts will apply a more permissive standard of review." (quoting *Zauderer*, 471 U.S. at 651)).

this phrase to point out that disclosure requirements typically seek to provide information to the consuming public. That information is generally valuable only to the extent that it is accurate. If the information misleads consumers, provides them with facts that are irrelevant to their purchasing decisions, or conveys contested facts as if they were undisputed, it may no longer serve a useful economic purpose. *Zauderer's* “purely factual and uncontroversial” language stands for a proposition that should itself be uncontroversial: Compelled disclosures are worth protecting only if they enhance consumers’ knowledge.²¹⁵ Building from that principle, factual accuracy should sit at the center of any doctrinal test that emerges from *Zauderer*.

This discussion of *Zauderer*, coupled with the earlier critiques of the D.C. Circuit’s decision in *R.J. Reynolds*, suggests a new approach to compelled commercial-speech cases (or, perhaps, reawakens an old approach). When faced with a commercial-speech case, courts should undertake a four-part inquiry. First, they should determine whether the regulation at issue prohibits speech or compels speech. Disclosure requirements should be subject to *Zauderer* review, while bans on commercial speech warrant *Central Hudson* intermediate scrutiny. Second, if they decide that *Zauderer* applies, courts should determine *what information* the disclosure provides to consumers, typically with reference to surveys or other data and with attention to the specific aspects of the disclosure that trigger reactions from consumers. Third, courts should assess whether the information conveyed by the disclosure is accurate. Fourth, judges should evaluate whether the information is relevant to consumers’ purchasing decisions—again, typically with reference to any available (valid) survey results or other data. Disclosure requirements that satisfy Steps Three and Four—that result in the transmission of both accurate and relevant information—should survive First Amendment review.

A. *Distinguishing Prohibitions from Disclosures*

Step One of the revised commercial-speech inquiry seems straightforward. Courts must simply determine whether a challenged regulation compels speech (requires corporations to disclose certain information) or prohibits speech (requires corporations to *not* disclose certain information). Pushing hard on this distinction might reveal,

215. See *Nat'l Ass'n of Mfrs.*, 800 F.3d at 537–38 (Srinivasan, J., dissenting) (“To qualify as ‘purely factual and uncontroversial,’ . . . the disclosed information must in fact be ‘factual,’ and it must also be ‘uncontroversially’ so, in the sense that there could be no ‘disagree[ment] with the truth of the facts required to be disclosed.’” (alteration in original) (citation omitted) (quoting *Am. Meat Inst.*, 760 F.3d at 27)).

however, that it is fuzzier than it first appears. If tobacco companies are required to print graphic images on cigarette packs, are these companies implicitly prohibited from using that space for other purposes?

While prohibition and compulsion are often two sides of the same coin, focusing on the content of the banned (or mandated) speech helps focus the inquiry. The FDA's graphic-image regulation tells tobacco companies what they must say but does not prevent them from saying anything.²¹⁶ If they would like, cigarette companies can combat the FDA's campaign by taking out ads that sing tobacco's praises. Admittedly, the graphic-warning regulation prevents cigarette retailers from using certain spaces on cigarette packs for these purposes, but the FDA's rule does not prevent tobacco companies from saying anything *in particular* in the spaces that are available to them for speech. This analysis gets at the difference between prohibition and compulsion, at least as those terms are relevant to First Amendment analysis. The crucial question is how the law regulates the content of speech: Does the regulation require companies to make a specific statement or does the regulation prevent them from doing so? Only regulations that mandate speech should receive *Zauderer* review.

B. *Justifying Interpretive Choices*

If a regulation compels speech, *Zauderer's* lenient standard of review applies. To perform *Zauderer* scrutiny, courts should begin by asking precisely *what information* the compelled speech conveys. This step of the analysis seeks to focus courts' attention on aspects of the doctrinal inquiry that typically escape sustained consideration. Simply by interrogating what information they gain from a disclosure, judges will force themselves to acknowledge that they are engaged in a fundamentally interpretive act. They will have to point to specific aspects of the disclosure that convey information or incite emotion. By making their interpretive assumptions explicit, courts will enable attorneys and other judges to challenge those assumptions and propose alternative understandings of the disclosure. This step serves a disciplinary function by forcing courts to articulate the crucial, often contestable, assumptions that drive compelled commercial-speech decisions.

216. This point draws on the Supreme Court's analysis of "time, place, and manner" restrictions, which regulate the way that speech is conveyed but not the content of that speech. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (noting that "time, place, and manner" restrictions survive First Amendment review "provided that *they are justified without reference to the content of the regulated speech*, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information" (emphasis added)).

At first glance, this inquiry might seem to empower judges more than it constrains them. Interpretive judgments are, at least to a certain extent, subjective, and different people might emerge with different messages after viewing the same disclosure. This degree of flexibility creates opportunities for manipulation. A judge might offer an interpretation that preordains the legal outcome she favors; she might claim that she gleaned deceptive information from a disclosure simply so that she can strike down that disclosure. The subjectivity of some interpretive choices means that they can be difficult to challenge, which also means that the revised *Zauderer* test may be ripe for abuse by politically motivated judges.

But comparing this revised *Zauderer* inquiry to the test's current incarnation reveals that the dangers are not as threatening as they appear. Judges *already* make interpretive choices in compelled commercial-speech cases, as the *R.J. Reynolds* majority did when it said that "many of the [FDA's] images do not convey *any* warning information at all."²¹⁷ Judges *already* have tremendous discretion when they make these choices, in part because the current doctrinal framework does not force them to articulate and defend their assumptions. When the *R.J. Reynolds* court characterized the FDA's images as "emotional" rather than "purely factual," it exercised a great deal of discretion in assessing the information that the pictures conveyed; the majority simply concealed that discretion by engaging in a broad categorization exercise (fact or emotion?) rather than a specific interpretive one. By bringing the interpretive act to the surface, the revised *Zauderer* inquiry seeks to subject this act to the constraints and limits that clarity provides.

Another disciplinary device will operate to limit judicial discretion at this stage of the inquiry. Courts should rely on any accessible (valid) data to determine how consumers will view the challenged disclosure. The *R.J. Reynolds* court had such data at its fingertips because the FDA had conducted a study to determine which graphic images were most effective "in communicating the harms of smoking" to consumers.²¹⁸ As the agency explained in its final rule, researchers used an online study to collect data from eighteen thousand participants and evaluated the subjects' responses to thirty-six possible images (from which the final nine were selected).²¹⁹ Subjects viewed the graphic-warning labels (including the images, text, and the 1-800-

217. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012).

218. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,637 (June 22, 2011) (codified at 21 C.F.R. § 1141 (2012)).

219. *Id.*

QUIT-NOW number), while a control group viewed the text statements without any accompanying imagery.²²⁰ Immediately after their exposure to the labels, viewers were asked questions to assess reactions to (and the subjects' recall of) the information conveyed by the warnings.²²¹ The researchers also contacted subjects a week after the initial exposure to gauge the images' continuing impact.²²²

The FDA's study contained useful information that the D.C. Circuit might have invoked in assessing how consumers would interpret the graphic images. The agency asked subjects to "tell us how much you agree or disagree with the following statement: If I have smoked a pack of cigarettes a day for more than 20 years, there is little health benefit to me quitting smoking."²²³ Another section asked respondents to "tell us how much you agree or disagree with the following statement: Many people who smoke live to a ripe old age, so smoking is not all that bad for me."²²⁴ As Christine Jolls has noted, people with "factually accurate risk perceptions" would likely regard these statements as incorrect:²²⁵ Smoking has negative health effects,²²⁶ and quitting (even after smoking for an extended period) frequently yields significant health benefits.²²⁷ The FDA's study found that subjects who saw certain graphic-image warnings emerged with a better understanding of smoking's risks than viewers who saw text-only warnings.²²⁸ The FDA also asked respondents to estimate their risks of cancer, fatal lung disease, heart disease, and stroke, and to provide general assessments of their health (for instance, "Do you think your smoking has affected your health?"; "How concerned are you that your smoking has affected your health?").²²⁹ Subjects' answers suggested that exposure to certain of the images improved viewers' risk perceptions.²³⁰ Given the FDA's study, the D.C. Circuit had a readily available source on which to draw in assessing consumers' responses

220. *Id.* at 36,638.

221. *Id.*

222. *Id.*

223. Jolls, *supra* note 160, at 62.

224. *Id.*

225. *Id.* at 63–64.

226. Prabhat Jha et al., *21st-Century Hazards of Smoking and Benefits of Cessation in the United States*, 368 *NEW ENG. J. MED.* 341, 343 (2013).

227. *Id.* at 345.

228. Jolls, *supra* note 160, at 64. Not all of the images produced less agreement with the stated assertions; respondents who viewed certain images expressed higher rates of agreement. *Id.* But as Jolls concluded, "Overall, the estimates . . . provide support for the conclusion that factual misperceptions tend to be (though they are not inevitably) lower with [the FDA's graphic-image] warning[s] than with a text-only alternative." *Id.*

229. *Id.* at 62.

230. *Id.* at 64–68.

to the graphic-image warnings. Based on the data, the court's assumption—that “many of the images do not convey *any* warning information at all”²³¹—moves from a contestable premise to an implausible one, a speculative assessment contradicted by the thorough research assembled by the FDA.

When they grapple with the constitutionality of disclosure requirements, judges should rely on valid data to guide interpretive choices. If courts embark down this path, agencies should take the cue by gathering and presenting the types of data to which courts are receptive. By drawing on consumers' actual reactions to contested disclosures, courts can evaluate the disclosures' effects with a reasonable degree of accuracy and avoid giving in to judges' initial, untested interpretive impulses.

C. *Assessing Accuracy*

After offering reasoned explanations for their interpretive choices, judges should move on to Step Three of the revised *Zauderer* inquiry: Is the information accurate? The disputed nature of some facts means that this inquiry will not always be clear-cut. Even seemingly innocuous factual statements can generate debate. (Is a disclosure really accurate if it states that “cigarettes cause cancer” when they do not invariably do so? Should the statement say instead that “cigarettes sometimes cause cancer”?) But while the accuracy inquiry may pose difficulties at the margins, it also excludes a broad swath of inaccurate or misleading material.²³² Imagine that consumers begin to drastically overestimate their risk of lung cancer after viewing the FDA's graphic images. These viewers might overestimate to such an extent that they now have a less accurate understanding of smoking's health effects than they did before seeing the pictures. In this case, the images convey inaccurate information, and they should not be permitted under the First Amendment.

An initial question arises: How should judges, lacking expertise in the areas that compelled disclosures address, determine whether a piece of information is accurate? Courts may confront competing expert testimony, and they may come across sharply disputed factual is-

231. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012), *overruled in part by* *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

232. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 541 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (noting that “there could well be difficult questions of application [with respect to the ‘purely factual and uncontroversial’ test] at the margins,” but that such questions are “not entirely uncommon in the area of the First Amendment, in which standards at times have been characterized as ‘elusive’ in their application” (quoting *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014))).

sues. The way out of these difficulties is to think of the accuracy prong as an evidentiary requirement, not as a scientific showdown. While judges may need to wade into technical debates at this stage of the inquiry, agencies bear the primary responsibility for presenting evidence that proves the truth of the information contained in any compelled disclosure. If the agency provides such evidence, the regulation satisfies the accuracy prong; if the agency does not offer such evidence, the regulation should not survive First Amendment review. Thinking of the accuracy analysis as an evidentiary requirement imports a dose of deference into the doctrine because judges will have to rely on agencies to showcase evidence that confirms the relevant facts. Courts will also have access to countervailing evidence presented by opposing parties, and judges will always, at the end of the day, have to undertake an independent analysis of the proof presented by both sides—just as happens every time a court confronts a contested factual issue about which the judge has no expertise.

In performing the accuracy analysis, courts should remain mindful of the close connection between Steps Two and Three of the revised *Zauderer* inquiry. Judges can assess the accuracy of information only if they know the nature of the information they are evaluating. If viewers interpret the phrase “cigarettes cause cancer” to mean that cigarettes *always* cause cancer, then the phrase does not convey accurate information; if viewers interpret the phrase to mean that cigarettes *can* cause cancer, then the phrase is accurate. Determining the disclosure’s content is a necessary prerequisite to assessing accuracy.

Courts should also recognize that the accuracy prong does not require them to deal in binaries. Some statements are demonstrably false while others are irrefutably true, but there are many shades of gray in between. “Cigarettes cause cancer” is more accurate than “cigarettes never cause cancer,” but “cigarettes *can* cause cancer” might be more accurate—at least more precisely accurate—than both. Courts must recognize that “accurate” need not mean scientifically validated; it might simply mean that consumers who view the disclosure emerge with a more accurate understanding than they began with. Assume that smokers are twenty-five times more likely than nonsmokers to receive a diagnosis of lung cancer,²³³ but that consumers *think* smokers are only five times as likely as non-smokers to get lung cancer. After seeing the FDA’s graphic images, viewers’ estimates improve. Now consumers think that smokers are ten times as

233. See U.S. DEP’T HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 161 (2014).

likely as non-smokers to receive the diagnosis. The images have not provided “accurate” information because they have not conveyed the correct risk level, but the images have enabled viewers to develop *more accurate* beliefs than those viewers held before. If a disclosure increases the accuracy of consumers’ perceptions, then that disclosure satisfies Step Three, even if viewers’ knowledge does not completely align with scientific learning on the subject.

Relatedly, accuracy is not synonymous with correctness. A statement that is literally true can still be deceptive, and courts should use Step Three to strike down technically accurate disclosures that nonetheless mislead consumers. Think of a bar graph that manipulates the scale so that viewers overestimate the extent to which smoking-related deaths have increased over time. Or consider a statistic, based on a too-small sample size, that misleads consumers about the average life expectancies of smokers versus nonsmokers. Once again, courts can easily spot deceptive disclosures by considering Step Two in tandem with Step Three. The key move is to look at the information that consumers actually receive from the disclosure. Even if images or text are, strictly speaking, accurate, do consumers come away with incorrect impressions? If so, the disclosure should not survive Step Three of the revised *Zauderer* review.²³⁴

Difficult questions might arise at this stage if a disclosure enhances consumers’ factual perceptions on some scales but worsens viewers’ perceptions on others. Consumers who see a particular image might emerge with an improved understanding of their risk of lung cancer but also come away with a decreased understanding of their risk of heart disease. In these cases, courts will have to balance the conflicting signals and determine whether the inaccurate components of the warning outweigh the accurate elements. Judges should assess the magnitude of consumers’ improved judgments as compared to the magnitude of any decreases in accurate understandings, and courts should consider the importance of the issues on which consumers demonstrate increased and decreased knowledge. An image that conveys misinformation about the risk of bad breath is likely less worrisome than an image that conveys misinformation about the risk of cancer. As this example illustrates, an accuracy analysis is not a true/false quiz; courts will have to make knotty, contestable judgments about knotty, contestable facts. But the benefits of an accuracy analysis remain clear: Step Three offers courts a way to protect consumers

234. See MARK TWAIN, *FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD* 580 (Am. Publ’g Co. 1897) (“Often, the surest way to convey misinformation is to tell the strict truth.”).

against one of the core dangers of compelled commercial speech—the risk that viewers will base their economic decisions on wrong information.

D. *Determining Relevance*

If a disclosure does not convey accurate information, it should not survive *Zauderer* review. If a regulation passes the accuracy analysis, courts should move on to the final question: Does the disclosure convey information that is relevant to consumers' economic choices? Data gathered by agencies can—and should—play a role at this stage of the analysis. Agencies should undertake surveys and gather data to assess whether the information contained in a proposed disclosure will influence consumers' purchasing decisions, and courts should refer to these data in assessing the information's relevance. The doctrinal inquiry should center on whether the *typical consumer* would find the information relevant to her economic decision making, so judges should avoid the temptation to determine whether *they* find the information relevant. Relying on agency-gathered (or other publicly accessible) data will further this goal.

This prong of the revised *Zauderer* inquiry seeks to prevent the government from using mental heuristics that might encourage consumers to associate negative emotions with certain products.²³⁵ Consider a requirement that tobacco companies print images of spiders on cigarette packs. A regulator might hope that these images will cause viewers to associate negative, fearful, or disgusted emotions with cigarettes. However, because consumers presumably would not find that the spider image provides relevant information, the disclosure should fail under Step Four.

How relevant is relevant enough? Imagine that one-third of consumers say a piece of information will influence their economic decisions, one-third say it will have no impact, and one-third say they are not sure. This hypothetical piece of information should satisfy the relevance inquiry. Step Four should not pose a high bar to most disclosure regimes, and even *de minimis* relevance should suffice to pass the test. If a small minority of consumers finds the information relevant, then the disclosure offers them substantial benefits, while the remaining consumers suffer little harm (assuming that the information is accurate) because they can go about their purchasing decisions and disregard the material that they find irrelevant. Although corporations might resist disclosing information that most consumers will find

235. See Tushnet, *supra* note 52, at 2411.

irrelevant, *Zauderer* counsels that consumers, not corporations, should remain at the center of the compelled commercial-speech analysis. Assuming that some consumers find the information significant in shaping their economic choices, the disclosure should survive.

While regulators need not clear a high hurdle to satisfy the relevance inquiry, this inquiry remains a central component of the revised *Zauderer* test. The government should not have free rein to impose *any* disclosure requirement on regulated entities simply because the disclosure conveys accurate information: A certain subset (perhaps a small subset) of accurate disclosures will shape people's preferences in illegitimate ways. The relevance prong acts as a failsafe protection against this sort of manipulation by shielding consumers from the dangers illustrated by the spiders-on-cigarette-packs example. While the government is unlikely to require a disclosure that reveals entirely irrelevant information, doctrinal completeness requires that the test guard against the possibility of such a requirement. Not every accurate disclosure should survive.

While scholars²³⁶ and judges²³⁷ generally support a doctrinal emphasis on accuracy, they have been hesitant to import a relevance inquiry into the analysis. Rebecca Tushnet, relying on research performed by Douglas Kysar, offers a forceful critique:

[C]onsumers' preferences are not stable and depend on what gets disclosed to them. Disclosure at the point of purchase makes conditions of production (whether a product was made with child or slave labor, whether it contains genetically modified organisms, and so on) more salient and removes "moral wiggle room." As a result, we face a choice between a vision of a marketplace in which "consumers satisfy their personal interests unimpeded by concern for the welfare of others" and one in which consumers behave in accordance with more "altruistic ideals" held by the norm entrepreneurs who focus on particular conditions of production. These ideals may involve animal welfare, union labor, foreign production, or something else. Kysar concludes that neither set of behaviors reveals "true" preferences. Rather, context and the ability to see how one's

236. See Corbin, *supra* note 24, at 1295 ("[C]ompelled speech that is itself false or misleading distorts the discourse."); Goodman, *supra* note 52, at 525 ("Because the principal purpose of commercial speech protection is to safeguard the consumer's interests in accurate information, it naturally follows that inaccurate information would fall outside the zone of protection."); Tushnet, *supra* note 52, at 2432 ("Ultimately, I can't see why the government can't express its preferences, even in emotional terms, as long as it isn't deceptive about those preferences.").

237. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 538 (Srinivasan, J., dissenting) ("But even if the disclosure qualifies as 'purely factual,' it would still fall outside of *Zauderer* review if the accuracy of the particular information disclosed were subject to dispute.").

choices affect others determine behavior, meaning that the choice of a disclosure regime is fundamentally normative.²³⁸

Disclosures influence preferences, which in turn influence the information that consumers desire to have disclosed.²³⁹ Simply asking people whether they find a particular piece of information relevant may shape their understanding of that information's relevance. Because disclosures and preferences loop back on one another, Tushnet contends, asking consumers to assess a disclosure's relevance is an exercise in futility.

I concede Tushnet's point about the normativity of preferences, but I do not share the conclusion she draws from it. First, the state's (or the market's) ability to mold people's preferences is not infinite. A consumer who views the FDA's graphic images might change her views about the relevance of the information that the images convey. But a consumer who sees a picture of a spider on a cigarette pack is unlikely to find the spider an illuminating intervention in the debate over smoking. The relevance inquiry seeks to protect against these sort of extreme regulations, not to force courts to make close calls about the intersection between information disclosures and consumer preferences.

To put the point simply: Tushnet gives up too much ground. She begins with the premise that preferences are (at least in many cases) normative. I accept this foundation. But she then concludes that preferences should have *no* role in the doctrinal inquiry. That is a bridge too far. Revealed preferences are not useless, as I hope Tushnet would concede; they reveal people's understandings of their own values at a given point in time, even if those understandings reflect consumers' views in incomplete and contingent ways. When the state mandates commercial speech, it makes an assumption about the public's present preferences and makes a judgment about what those preferences should be. This point hints at the crucial difference between Tushnet's approach and my own. Tushnet asks whether people's preferences are normative, and when she answers affirmatively, her inquiry ends. I think that compelled commercial-speech doctrine needs to go a step further: Given the normativity of people's preferences, who should make decisions about the relevance of contested information? Should agencies be permitted to promulgate any regulation that they regard as relevant, even if the FDA suddenly starts to

238. Tushnet, *supra* note 52, at 2428–29 (footnotes omitted) (quoting Douglas A. Kysar, *Preferences for Process: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 628–32 (2004)).

239. *Id.*

put spiders on cigarette packs or snakes on sugary foods? Should courts give the FDA unlimited authority to shape people's preferences in potentially insidious ways?

Instead of offering regulators near-unlimited discretion, I propose that agencies ask people about their views on relevance and that courts rely on the information gathered by agencies in applying the revised *Zauderer* test. The data compiled by agencies may not give courts a complete understanding of consumers' views, but revealed preferences offer a kind of insight that judges could not glean simply by allowing the state to impose regulations as it sees fit. *Zauderer* counsels that consumers should drive the doctrinal analysis, and relying on their preferences—unstable as they may be—offers an important check on agencies' power to manipulate consumers' views.

E. Evaluating the FDA's Graphic Images

The final question: Would the FDA's graphic images survive the revised *Zauderer* inquiry? I suspect that eight of the nine images would pass the test, while the remaining picture would likely fail.

To evaluate the FDA's graphic-warning regulation, courts should begin by asking whether the regulation compels or prohibits speech. Because the regulation requires tobacco companies to say something, it mandates speech, so *Zauderer* scrutiny applies.

Second, courts must explain precisely what information the images convey. While the *R.J. Reynolds* dissenter's interpretation of the images is not the only valid one, her discussion of one of the images demonstrates how courts should go about Step Two: "The image accompanying the textual warning 'Cigarettes are addictive' depicts a man smoking through a tracheotomy opening in his throat. Viewed with the accompanying text, this image conveys the tenacity of nicotine addiction: even after undergoing surgery for cancer, one might be unable to abstain from smoking."²⁴⁰ Here is how I might urge a court to advance its interpretation of one of the other images:

One picture depicts a small child peering at a waft of smoke. The fearful look in the child's eyes hints at the ways in which second-hand smoke can affect those who are exposed to it—including those who are very vulnerable, such as infants in a smoker's care. The presence of an adult's face in the upper right-hand corner evokes the ways in which children depend on their caretakers, as well as the ways in which caretakers (as a result of smoking's externalities) can

240. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1231–32 (D.C. Cir. 2012) (Rogers, J., dissenting) (citations omitted), *overruled in part by* *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

harm those under their protection. The cloud of smoke moving directly towards the child's face adds an eerie sense of omen to the picture. If the image itself were not enough, the words make the message explicit: "WARNING: TOBACCO SMOKE CAN HARM YOUR CHILDREN."

These passages demonstrate that acts of interpretation need not fade into subjective attempts at meaning making. Both passages point to specific aspects of the images that drive the interpretive judgments ("the accompanying text," "an adult's face in the upper-right hand corner"). Judges might supplement these sorts of interpretive analyses with references to the administrative record. The FDA's surveys revealed that the graphic images conveyed information about smoking's risks to consumers by enhancing viewers' understandings of the benefits of quitting and the health risks of continued tobacco use.²⁴¹ By pointing to specific features of the images and relying on valid data, courts can ensure that interpretation, despite its status as a deeply personal act, does not become an unreasonable (or unreasoned) one.

After advancing interpretations of the contested disclosures, courts should ask whether the disclosed information is accurate. The FDA's data provides sufficient information to conclude that, in this case, the images convey accurate information to consumers. Subjects who viewed the pictures walked away with an improved sense of the health effects of cigarette smoking, and no party in *R.J. Reynolds* presented evidence that the accuracy of consumers' understandings declined in any substantial or meaningful way.²⁴² The regulation satisfies Step Three of the revised *Zauderer* inquiry.

Finally, courts should conclude by assessing the disclosure's relevance to consumers. The FDA's study does not shed much light on whether the graphic images contain relevant information. The less-than-illuminating nature of the FDA's data is not surprising because most courts have not emphasized relevance in applying *Zauderer* or assessing compelled disclosures. But if courts were to refocus the *Zauderer* test on relevance, agencies would have immediate and powerful incentives to gather information about a disclosure's relevance to the typical consumer. Without survey results or other data, any conclusions on relevance will necessarily be speculative, but my suspicion is that the FDA's images would satisfy the relevance prong of the revised *Zauderer* inquiry. The Centers for Disease Control and Preven-

241. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,649-70 (June 22, 2011) (codified at 21 C.F.R. § 1141 (2012)); *NONNEMAKER ET AL.*, *supra* note 51, at 3-2 to 3-7.

242. *See supra* notes 227-31 and accompanying text.

tion have found that nearly seventy percent of smokers would like to quit;²⁴³ had these people possessed an accurate understanding of smoking's health impact when they started, they might have avoided purchasing their first pack, and had they gained an accurate understanding of smoking's health impact later on, they might have been able to quit. Especially because of the severity of some of smoking's health consequences, information about tobacco's risks is likely relevant to smokers' purchasing decisions. Given that the relevance prong should not pose a high bar to disclosure regimes, most of the FDA's graphic images should satisfy this stage of the test.

The revised *Zauderer* inquiry should not act as a rubber stamp, and I suspect that some proposed regulations would fail under this standard. One of the FDA's graphic images, for example, seems less informative than the others. It depicts a man wearing a T-shirt that reads "I QUIT."²⁴⁴ I am not sure what information this image reveals to consumers, and to the extent it does convey information, I am not sure consumers will see that material as relevant to their purchasing decisions. The image might survive *Zauderer* scrutiny only because of the accompanying text, which reads, "Quitting smoking now greatly reduces serious risks to your health."²⁴⁵ But I am not sure how the image relates to that statement or whether it advances the caption's message in any way. Absent more data about how viewers interpret the image and about its relevance to their decisions, I am skeptical that this picture would survive the revised *Zauderer* inquiry.

The updated *Zauderer* test has clear benefits when used to analyze the FDA's graphic images, but its advantages are not limited to this context: The inquiry highlights particular factors—accuracy and relevance prime among them—that courts should emphasize when assessing *any* disclosure, whether presented in textual, pictorial, or some other form. The reason the test applies across so many types of disclosures is that it refocuses attention on the concrete benefits that any disclosure should offer: accurate information that consumers will use in making economic choices. By bringing their interpretive assumptions to the surface, courts will open those assumptions to reasoned analysis and critique. By ensuring that disclosures convey accurate and relevant information, courts will protect consumers' interests in having sound facts on which to base their purchasing decisions. Collectively, these changes will put compelled commercial-speech doc-

243. *Smoking & Tobacco Use: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts (last updated Mar. 29, 2017).

244. See Jolls, *supra* note 160, at 61 fig. 2.

245. *Id.*

trine on a solid foundation by accounting for the values that this doctrine is supposed to protect.

V. CONCLUSION

In developing proposals to reform compelled commercial-speech doctrine, some scholars, including Goodman and Corbin, have sought to revise the categories that courts use to classify compelled disclosures. Does this disclosure rely on a cognitive heuristic? Does that disclosure convey controversial information? The categories that scholars have devised tend to replicate, rather than eliminate, the problems that current doctrinal categorization schemes (fact or emotion?) create. Other scholars, including Tushnet, have abandoned the project altogether by suggesting that non-misleading emotional appeals are presumptively permissible under the First Amendment. But this approach is too extreme because it permits the government to require disclosures that consumers will not find useful.

The key flaw in these proposals is their emphasis on reform. Upon recognizing that the current doctrinal categories are not working, scholars rush forward to develop new ones (or to abandon the effort at categorization writ large). The proposed solutions are not only unsatisfying; they are also untethered to the values that compelled commercial-speech doctrine, according to *Zauderer*, was designed to protect. My four-part test builds on the tradition of scholars like Goodman, Corbin, and Tushnet by seeking to rationalize the foundation of compelled commercial-speech doctrine. Rather than branching out in new directions, however, I see a simple solution in returning to *Zauderer's* roots. *Zauderer* outlined a doctrinal formula that is administrable and that tracks the values that courts seem to care about when assessing compelled disclosures. Subsequent developments, especially caselaw from the lower courts, have obscured this formula by ignoring the nature of interpretation and by relying on a false distinction between facts and emotions. The best solution is to revert to *Zauderer* itself—to focus on its distinction between compulsion and prohibition, to recognize its emphasis on accuracy, and to place consumers at the core of the doctrinal analysis. This straightforward methodology cuts through the recent caselaw and returns the doctrine to a rational footing, all while staying true to the foundational Supreme Court precedent in this area. By focusing on the values that animate compelled commercial-speech doctrine, this proposal seeks to create a comprehensible body of law that remains attuned to the basic (but often neglected) benefit of mandatory disclosures: the information that these disclosures convey to consumers.