A WARNING FOR ENVIRONMENTAL WARNINGS: REGULATORY UNCERTAINTY IN THE FACE OF FIRST AMENDMENT LITIGATION

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TABLE OF CONTENTS

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INTRODUCTION

Informational disclosure requirements are an important environmental policy tool for local and state governments promoting environmental protection and public health. The basic objective of informational disclosures is to provide the public with information as they are making decisions about what product to buy or which action to take.[1] These disclosures can address asymmetries in the market when the seller or service provider has more information than the consumer,[2] such as with restaurants and patrons or manufacturers and customers. Consumers may then choose to use the information to make decisions that align with their own priorities, values, and risk preferences.[3] Assuming that the public or investors care about the risks disclosed, they may change their purchasing or investing decisions accordingly, such that firms will face market incentives to change their behavior, even absent a regulatory mandate.[4] Additionally, informational disclosures can be used to address behavioral market failures, which are "costs that individuals impose on themselves" by failing to internalize the long-term impacts at the time of a decision.[5] For example, a consumer may want to save money now by buying an energy inefficient appliance which has the lowest price tag, but,

1 *See, e.g.*, ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 155–56 (3d ed. 2000) (discussing examples such as wearing ear protection in loud areas or avoiding high sodium foods).

2 *See, e.g.*, George Loewenstein et al., *Disclosure: Psychology Changes Everything*, 6 ANN. REV. ECON. 391, 394 (2014), https://www.cmu.edu/dietrich/sds/docs/loewenstein/DisclosurePsychChgsEvery.pdf.

3 *See, e.g.*, *id.* at 392.

4 *See, e.g.*, Shameek Konar & Mark A. Cohen, *Information as Regulation, The Effect of Community Right to Know Laws on Toxic Emissions*, 32 J. ENVTL. ECON. & MGMT. 109, 110 (1995), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.462.5469&rep=rep1&type=pdf (discussing the toxic release inventory as an informational disclosure approach and finding that firms whose stock prices declined in response to the release of information reduced emissions more than peer industries).

5 Loewenstein et al., *supra* note 2, at 394.

without considering the higher electricity bill each month, may end up paying far more in costs over the lifetime of the product.[6]

Informational disclosures have been used to address behavioral market failures in various settings. In the public health arena, disclosures designed to alleviate the obesity crisis have garnered media attention. Examples include calorie postings on restaurant menus, which started as local initiatives[7] but are now federally required,[8] and San Francisco's litigious sugar-sweetened beverage warning.[9] Local and state governments have also used informational disclosure approaches to address a range of environmental issues from providing information about building energy efficiency[10] to warnings about carcinogenic substances.[11] There is untapped potential to expand the use of informational disclosures to address an even wider range of environmental issues at the state and local level, including to reduce greenhouse gas emissions.[12]

Due to preemption concerns, local governments may be hesitant, or flat-out unable, to directly regulate environmental

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6 *See id.*

7 N.Y.C. Health Code § 81.50, which required chain restaurants to post calorie content information on their menus and menu boards, survived First Amendment challenges in N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2d Cir. 2009). While studies find that such menu labeling leads to increased awareness of the number of calories, by itself, it may not lead to reduced calorie consumption. *See, e.g.*, Mary T. Bassett, Opinion, *Having Calorie Counts on Menus will Make us Healthier*, CNN (May 7, 2018), https://www.cnn.com/2018/05/07/opinions/calorie-count-requirements-opinion-bassett/index.html (discussing increased awareness and citing a study finding "consumers underestimated the caloric content of less healthy menu items by about 600 calories"); Aaron E. Carroll, *The Failure of Calorie Counts on Menus*, N.Y. TIMES (Nov. 30, 2015), https://www.nytimes.com/2015/12/01/upshot/more-menus-have-calorie-labeling-but-obesity-rate-remains-high.html (noting that training servers to suggest downsizing starchy sides and offering healthier menu default options have produced more promising results in studies).

8 *See* Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 71156, 71157 (Dec. 1, 2014). For more information on the requirements, see *Menu Labeling Requirements*, FDA, https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm515020.htm.

9 *See* discussion *infra* Part III.

10 *See* discussion of New York City's Benchmarking Law *infra* Part I.

11 *See* discussion of California's Proposition 65 *infra* Part I.

12 *See* discussion *infra* Part I.

issues.[13] Moreover, even when local governments are not preempted, they might want to avoid more extreme policy measures like an outright ban. Informational approaches are therefore appealing as an intermediate policy option.[14] Recognizing the value of informational approaches, President Obama issued Executive Order 13,563, which advocated for "warnings" and "disclosure requirements" that "maintain flexibility and freedom of choice for the public."[15] Although the Executive Order applied to administrative agencies, the same rationale pertains to informational approaches used by local governments.

While policymakers may see disclosures as a palatable policy option, they often face legal challenges from the regulated community. Regulated communities have been diligently sharpening a new sword for such legal battles: The First Amendment.[16] In recent years, courts across the country have heard First Amendment challenges to mandatory labels covering topics ranging from country-of-origin to conflict minerals.[17] As argued by John Coates, "corporations have begun to displace individuals as the direct beneficiaries of the First Amendment," with almost "half of First Amendment legal challenges now benefit[ting] business corporations and trade groups."[18] In

13 It is possible that local governments would be preempted from using informational approaches too.

14 *See* WESLEY A. MAGAT & W. KIP VISCUSI, INFORMATIONAL APPROACHES TO REGULATION 4–5 (1992).

15 Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

16 *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (Kagan, J., dissenting) (Criticizing the majority for "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."). For a discussion of this opinion, and others in the trend of weaponizing the First Amendment, see Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html ("Conservative groups, borrowing and building on arguments developed by liberals, have used the First Amendment to justify unlimited campaign spending, discrimination against gay couples and attacks on the regulation of tobacco, pharmaceuticals and guns.").

17 Other examples include genetically modified organism labeling and the health risks of cell phones. *See* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 424.

18 John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015).

covering the rise of these commercial speech First Amendment challenges, Tim Wu has observed that "[i]t is tempting to call it the new nuclear option for undermining regulation, except that its deployment is shockingly routine."[19] Thus, governments may be hesitant to employ mandatory informational disclosures as a policy tool because of the potential time and expense involved in litigation.[20]

Moreover, given the instability and unpredictability of the First Amendment doctrine, state and local regulators may be concerned that by time they develop a factual record supporting the need for a disclosure and pass legislation requiring a disclosure, the legal standard will have shifted such that the disclosure will not survive judicial review.[21] Although historically commercial advertising was not considered speech for purposes of the First Amendment, the Court has fortified a commercial speech doctrine in recent decades.[22] While some, including the majority of Justices on the current Supreme Court,[23] have argued that the rights of commercial free speech should be construed even more broadly,[24] others fear that providing heightened First Amendment scrutiny to mandatory disclosures will eat away at the ability of

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19 Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, THE NATION (June 3, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation.

20 *See id.* ("But even when First Amendment suits do not eliminate the law, they may weaken it, as well as intimidate legislatures and agencies contemplating future regulations by sending the message that expensive, time-consuming litigation is a near inevitability."); George A. Kimbrell & Aurora L. Paulsen, *The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense*, 39 VT. L. REV. 341, 346 (2014) ("[I]ndustry has resorted to threatening litigation in order to intimidate state legislatures and thereby prevent them from passing labeling legislation.").

21 *See infra* Parts II & III.

22 *See* Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189, 1189 (2004) (explaining that "purely commercial advertising" was not protected under the First Amendment until the mid-1970s).

23 This can be seen in cases from *Citizens United v. FEC*, 558 U.S. 310 (2010), protecting political speech of corporations, to *Sorrell v. IMS*, 564 U.S. 552 (2011), finding that a Vermont statute banning the sale, transmission or use of prescriber-identifiable data, absent prescriber consent, unconstitutionally restricts the free speech rights of pharmaceutical research companies. *See generally* David H. Gans, *The Roberts Court Thinks Corporations Have More Rights Than You Do*, NEW REPUBLIC (June 30, 2014), https://newrepublic.com/article/118493/john-roberts-first-amendment-revolution-corporations.

24 *See infra* Parts II & III.

local and state governments to protect and inform the public.[25] Some legal scholars and Justices have called this expansive use of the First Amendment a return to the *Lochner*-era, with judges undermining ordinary economic regulations.[26] The Supreme Court's recent decision in *National Institute of Family and Life Advocates v. Becerra*[27] reveals just how deep this ideological divide runs, highlighting that even what were previously considered to be routine health and safety regulations may be called into question.

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25 *See, e.g.*, Micah Berman et al., *American Beverage Association v. San Francisco: When the First Amendment Jeopardizes Public Health*, BILL OF HEALTH (Sept. 29, 2017), http://blogs.harvard.edu/billofhealth/2017/09/29/american-beverage-association-v-san-francisco-when-the-first-amendment-jeopardizes-public-health/; Rebecca Tushnet, *It Depends on What the Meaning of "False" is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 229 (2007) ("We are better off overall in a system that regulates false and misleading commercial speech without heightened First Amendment scrutiny.").

26 *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (Sotomayor, J., dissenting) ("Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with Justice Kagan that *Sorrell*—in the way it has been read by this Court—has allowed courts to 'wiel[d] the First Amendment in . . . an aggressive way' just as the majority does today."); Janus, 138 S. Ct. at 2448 (Kagan, J., dissenting) ("There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1916 (2016) (arguing that "[r]ather than defending an illusory tradition of economically neutral First Amendment enforcement, critics of today's First Amendment Lochnerism might more accurately and persuasively position themselves as reformers. They could then set to work breaking with a legal tradition long insensitive to the deleterious effects of judicial civil libertarianism on political regulation of the economy."); *Sorrell*, 564 U.S. at 591–92 (2011) (Breyer, J., dissenting) ("Moreover, given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists."). For an alternative argument that *Lochner* is based on the concepts of "government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law," with "[g]overnmental intervention [being] constitutionally troublesome," rather than representing an "aggressive judicial role in general," see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

27 138 S. Ct. 2361 (2018).

This Note focuses on the implications of these trends in the First Amendment doctrine for local and state governments planning to use mandatory informational disclosure approaches as an environmental policy tool. Given the anti-science and anti-regulatory stance of the Trump Administration,[28] leadership on environmental policy must come from state and local governments. Unfortunately, at a time when local policymakers need an array of tools at their disposal, applying the standards of the commercial speech doctrine is becoming more and more uncertain. And, it is a particularly tricky time for mandated informational disclosures dealing with any colorable degree of scientific uncertainty or novel informational policy approaches, both of which are common in the context of mandated environmental disclosures. Although courts are tasked with assessing whether information is factual under the First Amendment jurisprudence, "the complex nature of scientific knowledge complicates the assessment of the truth or falsity of speech about science."[29] Thus, corporations may play up the "uncertainty inherent in science to obscure scientific consensus," undermining "informed decision making by consumers, investors, and regulators."[30]

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28 The anti-science and anti-regulatory practices of the Trump administration have been widely discussed by the press and concerned advocacy groups. *See, e.g.*, Eric Niiler, *The Future of Former EPA Chief Scott Pruitt's Anti-Science Legacy*, WIRED (July 6, 2018), https://www.wired.com/story/the-future-of-former-epa-chief-scott-pruitts-anti-science-legacy/; Christina Cauterucci, *Trump Adds Another Anti-Science, Anti-Choice Woman to Oversee Critical Health Programs*, SLATE (June 1, 2018), https://slate.com/news-and-politics/2018/06/trump-has-put-a-slew-of-anti-science-anti-choice-women-in-charge-of-critical-health-programs.html; Carolyn Kormann, *America's Top Scientists Reprimand Donald Trump (Again)*, NEW YORKER (Apr. 24, 2018), https://www.newyorker.com/science/elements/americas-top-scientists-reprimand-donald-trump-again; Nicole Greenfield, *Saving Science in the Age of Trump*, NRDC (Apr. 17, 2018), https://www.nrdc.org/stories/saving-science-age-trump. For a discussion of the Trump administration's antiregulatory and antigovernment agenda, and the trend of judicial anti-administrativism, see Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

29 Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 461 (2018).

30 *Id.* Roesler discusses the example of ExxonMobil's own scientists conducting scientific research starting in the 1970s, and writing memos to the corporate executives in the early 1980s citing a clear scientific consensus that burning fossil fuels contributes to climate change. Yet, in public facing

Part I of this Note begins by discussing informational disclosures as an environmental policy tool and provides examples of local and state initiatives. The Part explains how informational disclosures could be used to address other pressing environmental issues, such as climate change, at a more local level. Part II provides an overview of the policy rationales animating the commercial speech doctrine. It then traces the key developments in the Supreme Court jurisprudence relevant to commercial speech and mandatory disclosures, focusing on *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[31] *Zauderer v. Office of Disciplinary Counsel*,[32] and *National Institute of Family and Life Advocates v. Becerra*.[33] Part III analyzes recent First Amendment challenges to mandatory informational disclosures aimed at addressing environmental and public health problems. The ongoing litigation in *National Association of Wheat Growers v. Zeise*[34] and *American Beverage Ass'n v. City and County of San Francisco*[35] act as case studies which demonstrate how analyzing policy decisions and scientific certainty through a First Amendment lens raises important questions of deference. Part IV examines how states and local governments attempting to utilize informational disclosures as an environmental regulatory policy may attempt to navigate the challenging and shifting legal landscape.

I. DISCLOSURE REQUIREMENTS AS A LOCAL ENVIRONMENTAL POLICY TOOL

There are various arguments asserting the importance of setting local policies to represent local preferences. Charles Tiebout's theory of a market for residence has long been the key analysis on the subject. Essentially, Tiebout's theory is that individuals and firms will move to areas that reflect their bundle of preferences, which includes the combination of goods and services

documents from ExxonMobil, they attacked the scientific certainty of such claims. *See id.* at 461–62.

31 447 U.S. 557 (1980).

32 471 U.S. 626 (1985).

33 138 S. Ct. 2361 (2018).

34 309 F. Supp. 3d 842 (E.D. Cal. 2018).

35 187 F. Supp. 3d 1123, 1126 (N.D. Cal 2016); 871 F.3d 884 (9th Cir. 2017).

provided at a certain tax rate.[36] Thus, cities that cannot keep up with the preferences of their residents may lose them to more attractive destinations. Other scholars have questioned this approach, arguing that connections to place run deeper than would allow for uprooting each time another locale offers a better bundle of goods and services, and furthermore these mobility arguments ignore equity concerns.[37] If residents do have an investment in their current locale because of the high social costs of leaving their networks or the prohibitive expense of moving, then this would also provide a compelling reason to tailor local policy to local preferences. After all, residents should not feel stuck in a location that disregards their interests. Under either understanding, there are good reasons for local governments to tailor policies to match their residents' values and preferences.[38]

Although having a wide range of policy tools would allow local governments to take a more nuanced approach to regulation, local governments face many constraints when attempting to enact new regulations. The first challenge for local governments is that the U.S. Constitution does not grant them any powers.[39] As creatures of the state,[40] local governments are limited to the powers granted to them by the state. The state grant of authority to local governments is referred to as "home rule,"[41] and is typically found in the state constitution or statutes.[42]

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36 *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLITICAL ECON. 416 (1956).

37 *See, e.g.*, Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L.J. F. 458 (2017) (discussing how arguments for mobility can ignore general welfare and sex equality considerations).

38 Of course, there will be differences in values and preferences even within a locality.

39 *See, e.g.*, David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 390 (2001) ("As a formal legal matter, the federal Constitution does not treat local governments as anything approximating coequal sovereigns.").

40 Under the Dillion's Rule interpretation, local governments are creatures of the states, so grants of local power depend on constitutional amendment or statutory action at the state level. *See* Dale Krane et al., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK vii (Dale Krane et al. eds., 2001) (introducing idea of home rule and state limitations upon local autonomy); *see also Home Rule*, BLACK'S LAW DICTIONARY (10th ed. 2010) (defining "home rule" as a "state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms.").

41 For a discussion of home rule in the context of the relationship between states and their local governments, see Paul S. Weiland, *Federal and State*

While the specific powers of local governments vary by state, all local governments must avoid a common legal pitfall when attempting to regulate local environmental concerns: preemption.

A. *The Problem with Preemption*

Until the 1950s, local governments took the lead on environmental issues ranging from supplying clean drinking water to addressing solid waste disposal.[43] The state and federal governments were not regulating these issues, leaving considerable flexibility to local governments to address these challenges as they saw fit.[44] In the 1960s and 1970s, however, the federal government became more involved in promulgating environmental laws.[45]

While there may be benefits to environmental issues receiving more national regulatory attention,[46] federal laws often came with

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Preemption of Environmental Law: A Critical Analysis, 24 HARV. ENVTL. L. REV. 237, 263–64 (2000) ("The home rule movement has two objectives: (1) to provide local governments with the power necessary to enact laws related to local affairs and (2) to protect some portion of local government action from infringement by the state."); George D. Vaubel, *Democratic Government and Municipal Home Rule*, 19 STETSON L. REV. 813, 813 (1990) ("The principal characteristic of municipal home rule is the establishment of some degree of municipal autonomy through the vertical allocation of power between state and municipalities.").

42 *See, e.g.*, CAL. CONST. art. XI, § 5 (2018). States like Nevada, are considered a non-home rule or Dillon's Rule state because the Nevada Constitution does not expressly grant local governments any powers; rather, it grants the state legislature the authority to grant localities authority:

> The legislature shall provide for the organization of cities and towns by general laws and shall restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water; *provided, however*, that the legislature may, by general laws, in the manner and to the extent therein provided, permit and authorize the electors of any city or town to frame, adopt and amend a charter for its own government, or to amend any existing charter of such city or town.

Nev. Const. Art. VIII, § 8 (2018).

43 *See* Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467, 467 (1999).

44 *See, e.g.*, JOEL A. TARR, THE SEARCH FOR THE ULTIMATE SINK 8 (1996) ("The water supply and human waste and wastewater disposal systems utilized in most cities during the eighteenth and the nineteenth centuries were characterized by a local focus.").

45 *See* Weiland, *supra* note 43, at 467.

46 There are arguments on both sides of this debate. Some argue that federal "minimum standards may raise the bar by establishing a baseline of protection" thus "foreclose[ing] the possibility of a race to the bottom" at a state level.

the downside of preemption.[47] When the federal government sets uniform standards preempting further state or local regulation, it raises questions about the wisdom of placing all of the decisionmaking power in one institution, and heightens risks of regulatory failure.[48] For example, the Trump Administration does not acknowledge climate change,[49] while many state and local

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Weiland, *supra* note 41, at 242. However, others argue that "federal regulatory action has the potential to discourage or crowd out state regulatory efforts," and so, "the adoption of a federal regulatory floor may actually lower instead of raise the aggregate level of environmental protection in a given jurisdiction." Jonathan H. Adler, *When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 70 (2006). Additionally, the oft-cited public choice argument for federal regulation over state regulation does not hold up under close examination. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001). Rather differences in levels of protection between states "stem from different levels of preference for environmental protection rather than from public choice pathologies." *Id.* at 554.

47 Although federal laws do not have to preempt local action, and can act to set a floor, many federal laws set uniform national standards. Instances of setting a floor and setting uniform national can both be found in the Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970). For example, the Clean Air Act preempts states from setting their own automobile emission standards. *See* 42 U.S.C. § 7543(a) (2000). The Clean Air Act also establishes National Ambient Air Quality Standards, which act as a floor that states must meet when submitting their State Implementation Plans. *See* 42 U.S.C. § 7410 (2000).

48 As noted by Buzbee:

> In settings ranging from product approvals to regulation of risks posed by chemical plants to possible climate change legislation regarding greenhouse gases, legislators and regulators have embraced the broad, preemptive impact of unitary federal choice preemption. The federal action regarding such risks would be the final regulatory choice. But under what theory of regulation and legislation can one be confident that placing all decisionmaking power in one institution at one time will lead to appropriate standard setting? In fact, advocates of risk regulation, 'experimentalist regulation' scholars, and skeptics about the likelihood of public-regarding regulation all call for attention to pervasive risks of regulatory failure. Agency and legislative inertia, information uncertainties and asymmetries, outdated information and actions, regulatory capture, and a host of other common regulatory risks create a substantial chance of poor or outdated regulatory choice.

William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1548 (2007). Thus, there are crucial distinctions between "[f[loors [which] embrace additional and more stringent state and common law action" and "ceilings [which] are better labeled a 'unitary federal choice' due to how they preclude any other regulatory choice by state regulators and also eliminate the possibility of the different actors, incentives, and modalities of information elicitation." *Id.* at 1547.

49 *See, e.g.*, James Rainey, *The Trump Administration Scrubs Climate Change Info from Websites. These Two Have Survived.*, NBC NEWS (July 17,

governments are eager to take action to reduce greenhouse gas emissions.[50] Yet, lower levels of government are preempted from utilizing many potential regulatory approaches.[51]

Additionally, even if federal laws do not preempt a locality's[52] chosen environmental regulatory approach, states may pass legislation preempting local laws.[53] There are many ways to describe preemption,[54] but, the crucial feature is the "expansion in

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2018), https://www.nbcnews.com/news/us-news/two-government-websites-climate-change-survive-trump-era-n891806 ("From the Environmental Protection Agency, to the Energy Department, to the State Department and beyond, references to climate change, greenhouse gases and clean energy keep disappearing."); Emily Holden, *Climate Change Skeptics Run the Trump Administration*, POLITICO (Mar. 7, 2018), https://www.politico.com/story/2018/03/07/trump-climate-change-deniers-443533 ("President Donald Trump is filling the upper ranks of his administration with appointees who share his disbelief in the scientific evidence for climate change — giving them an opportunity to impose their views on policies ranging from disaster planning to national security to housing standards.").

50 It is worth noting that this divide between federal and state policy goals regarding climate change is not unique to this administration. Under the Bush administration climate change measures that failed to gain traction at the federal level were often taken up by states. *See* BARRY G. RABE, GREENHOUSE & STATEHOUSE, THE EVOLVING STATE GOVERNMENT ROLE IN CLIMATE CHANGE 1 (Nov. 2002) (discussing state policies to address climate change).

51 *See, e.g.*, Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281 (2003) (discussing California's A.B. 1493 and other attempts to regulate greenhouse gas emissions from automobiles, and the preemption challenges under the Clean Air Act and Energy Policy and Conservation Act).

52 As explained by Annie Decker in her concept of the "conflation axiom," there is "general inattention to state-local differences in the federal preemption universe." And, although Congress and the courts do not have to treat state and local laws as equivalents for preemption purposes, they often do. Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 332–34 (2012). When examining preemption provisions, Decker found that "Congress sometimes mentions both state and local regulatory authority and sometimes only state authority in its preemption and savings clauses," which "chip[s] away at the assumption of state-local merger." *Id.* at 339.

53 As noted by Weiland, "[s]tates can preempt any local law except to the extent that they are prevented from doing so by the state constitution or by statute." Weiland, *supra* note 41, at 265.

54 *See, e.g.*, Randall E. Kromm, Note, *Town Initiative and State Preemption in the Environmental Arena: A Massachusetts Case Study*, 22 HARV. ENVTL. L. REV. 241, 252 (1998) ("Grounded in the conception of supremacy of 'higher' levels of government over 'lower' levels, preemption analysis is the framework by which courts evaluate statutory directives to determine what powers otherwise possessed by a lower level of government have been restrained or denied by a higher level.").

power of a higher level of government" accompanied by the "reduction in power of a lower level of government."[55] Thus, local governments are often constrained by preempting federal, as well as state, legislation when choosing among policy tools to address pressing environmental issues. Preemption can stifle local policy innovation by constraining the range of options available to respond to local concerns, increasing the need for city lobbying efforts at the state level, necessitating greater legal counsel involvement in policymaking decisions, and limiting the ability of local governments to redistribute the costs and benefits of policy decisions.[56] For example, imagine a city wants to reduce the waste associated with disposable plastic bottles and conducts an economic analysis that determines a new tax is the most effective way to discourage the use of plastic bottles. However, there is a state law forbidding taxes on bottles and containers, and so there is a limited range of options left to the city's discretion. In cases like these, policies may be shaped more by the need to avoid preemption issues rather than by technical expertise.

And, to complicate matters further for local governments, in addition to express preemption, there are also two types of implied preemption: field preemption and conflict preemption.[57] Therefore, even when a statute does not explicitly say that local regulations are preempted, courts may find that Congress or the state legislature intended to occupy the field[58] or that it is impossible for the regulated party to simultaneously comply with the federal and local requirements, and so the federal requirement reigns supreme.[59] Legal preemption challenges may knock less sophisticated or less resourced local governments out of the

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55 Weiland, *supra* note 43, at 468.

56 *See* Weiland, *supra* note 43, at 497–503; *see also* Weiland, *supra* note 41, at 244–47 (discussing many of these same issues framed as the benefits of decentralization in policymaking). Additionally, smaller localities with limited resources and staffs may be dissuaded entirely from trying to develop solutions to local environmental problems when there are potential preemption conflicts. *See id.* at 498–99.

57 *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) (differentiating between express, field, and conflict preemption).

58 *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

59 *See, e.g.*, United States v. City of Denver, 100 F.3d 1509 (10th Cir. 1996) (finding Denver's local zoning ordinance in conflict with CERCLA's goal of expeditious remediation).

policymaking arena entirely. Bigger cities that can afford a legal staff may be able to defend their policies, whereas smaller communities may give up when facing such legal challenges.[60]

There are numerous examples of federal statutes preempting local environmental laws. The Energy Policy and Conservation Act preempted New York City's efforts to encourage more hybrid and clean diesel taxis by providing a higher cap on the lease rates of more efficient vehicles,[61] and the Clean Air Act preempted the South Coast Air Quality Management District from establishing vehicle fleet rules based on emissions standards.[62] A Denver zoning ordinance prohibiting maintenance of hazardous waste in areas zoned for industrial use conflicted with CERCLA's purpose of "expeditious and permanent cleanup of hazardous waste sites."[63] Both the Atomic Energy Act and the Hazardous Materials Transportation Act preempted New Jersey's Township of Lacey ordinance prohibiting the importation of nuclear waste to local disposal facilities.[64]

State governments may also block local environmental policy efforts. For example, in 2016, New York City attempted to curb the use of billions of plastic bags annually.[65] These bags are costly

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60 *See* Weiland, *supra* note 43, at 498 (citing the example of the Town of Wendell, with a population of 899 not having the resources necessary to research alternative methods of regulation or to lobby state officials to change the law when their pesticides law was struck down).

61 *See* Metro. Taxicab Bd. of Trade v. City of New York, 615 F.3d 152 (2d Cir. 2010), *cert. denied*, 562 U.S. 1264 (2011) (as an incentivize, the City raised the lease caps for hybrid and clean diesel taxis by $3 per shift). For further discussion of this case and its implications for local and state governments considering similar incentives, see Jonathan Skinner, *Who Killed the Hybrid Car? State and Local Green Incentive Programs after Metropolitan Taxicab Board of Trade v. City of New York in the Second Circuit*, 30 STAN. ENVTL. L.J. 311, 327–30 (2011).

62 *See* Engine Mfrs. Assoc. v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) (dealing with section 209(a) of the Clean Air Act, which prohibits states from enforcing "any standard relating to the control of emissions from new motor vehicles."). There is a market participant exception. *See, e.g.*, Swin Res. Sys., Inc. v. Lycoming Cty., 883 F.2d 245, 248–51 (3d Cir. 1989) (discussing Supreme Court cases distinguishing between "market participant" and "market regulator").

63 United States v. City of Denver, 100 F.3d at 1512–13.

64 *See* Jersey Cent. Power & Light Co. v. Lacey, 772 F.2d 1103 (3d Cir. 1985).

65 The League of Conservation Voters estimates 10 billion bags are thrown away each year throughout the city. *See* Sarah Maslin Nir, *State Senate Takes*

to dispose of in landfills, litter streets and parks, and contribute to the plastic pollution problem in local waterbodies.[66] Rather than banning the bags outright, New York City passed a law adding a five-cent fee on plastic grocery bags to encourage shoppers to bring their own reusable bags.[67] Many other cities, including Chicago and Washington, D.C., have imposed plastic bag fees with apparent success: plastic bag consumption in Washington, D.C. has decreased by more than 60 percent in response to their five-cent fee.[68] Yet, just one day before the City law was scheduled to take effect, Governor Cuomo signed a bill preempting the bag fee.[69] Thus, the notorious political tensions between New York State and New York City resulted in preemption being used by the State as a weapon to strike down the City's local policy decisions.[70]

Due to the constraints of preemption, local governments may be unable to directly regulate pressing environmental issues and thus may be forced to turn to informational approaches.[71] This is not necessarily a bad outcome: even when local governments are not preempted from regulating, informational approaches may be better suited, or more politically palatable, to the task at hand than alternative approaches. Below, this Note discusses the theory and application of informational approaches as an environmental policy tool.

B. *The Informational Approach: Theory and Application*

Informational disclosures are a common regulatory approach at the federal,[72] state,[73] and local level.[74] Informational disclosures

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Aim at Plastic Bag Fee in New York City, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/nyregion/plastic-bags-new-york.html.

66 NRDC noted that the disposal of plastic bags in landfills is costing the City 12 million dollars annually. Eric A. Goldstein, *State Wrecks NYC's Plastic Bag Fee Law & Bashes Home Rule*, NRDC (Feb. 17, 2017), https://www.nrdc.org/experts/eric-goldstein/state-wrecks-nycs-plastic-bag-fee-law-bashes-home-rule.

67 *See id.*

68 More than 200 local governments across the U.S. have enacted plastic bag fees or outright bans. *See id.*

69 *See id.*

70 *See, e.g.*, Nir, *supra* note 65.

71 It is of course possible that local governments would be preempted from using informational approaches too.

72 The Toxic Release Inventory, requiring the disclosure of toxic chemicals stored in or released from facilities, of The Emergency Planning and Community

can provide positive environmental information, such as LEED certifications;[75] negative disclosures, such as government mandated warning labels;[76] and neutral disclosures, such as Environmental Impact Statements.[77] Because positive disclosures, like certifications or eco-labels, have generally involved voluntary participation and have largely been run by non-governmental organizations,[78] the First Amendment discussion in this Note will focus on mandated neutral and negative informational disclosures. Negative disclosures tend to be some of the most effective,[79] and so are prone to industry challenge.[80]

Informational disclosures are meant to address information asymmetries between businesses and customers: although businesses may know the source of their materials, the contents of their product, health risks associated with the product, and energy consumption of the product, consumers have no way of assessing these factors simply by looking at the product.[81] Consumers can

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Right-to-Know Act of 1986 is one prominent example. A substantial reduction in the storage and release of toxic chemicals has been attributed to this disclosure requirement. *See* Richard B. Stewart, *A New Generation of Environmental Regulation*, 29 CAP. U.L. REV. 21, 139 (2001–2002). FIFRA includes labeling requirements for pesticides. FIFRA § 3, 7 U.S.C. § 136a (2000). There are also numerous examples in the field of public health. For example, there are federal laws regulating the labeling of food products, 21 U.S.C. § 343(a)–(y) (2012), and requiring alcoholic beverage containers to disclose alcohol content and health warnings, 27 U.S.C. §§ 205(e), 215(a)(1-2) (2012).

73 *See* California examples, *infra* Part I.B.2.

74 *See* examples of New York and Chicago energy benchmarking *infra* Part I.B.1.

75 According to the U.S. Green Building Council, LEED "is the most widely used green building system in the world." For a variety of homes and buildings, "LEED provides a framework to create healthy, highly efficient and cost-saving green buildings." For information on the LEED program, visit, *Home*, LEED, https://new.usgbc.org/leed (last visited Nov. 20, 2018).

76 *See* Stewart, *supra* note 72, at 134.

77 NEPA requires federal agencies to prepare an Environmental Impact Statement before starting a project or program creating serious environmental harms, and includes opportunities for public comment. *See id.* at 140–41.

78 *See id.* at 136–39.

79 *See id.* at 141.

80 *See* discussion *infra* notes 117–122 and accompanying text on Proposition 65.

81 *See, e.g.*, Adler, *supra* note 17, at 439 (2016). Although Adler would agree that consumer cannot determine these factors by looking at a product, he does not categorize disclosures to address ethical or religious concerns as a basis for limiting free speech. *Id.* at 440–41 (arguing that "any harm the individual suffers comes from the knowledge that a product's contents or the manner in which it was produced did not conform to the individual's subjective value

suffer serious health or financial consequences without adequate information.[82] Thus, disclosures attempt to close this information gap by providing consumers with factual information about a product—such as allergens in food or hidden fees in services—to promote informed decisionmaking.[83]

Assuming that consumers are environmentally conscious, the premise is that consumers who can afford to do so[84] will choose products with fewer health or environmental impacts, motivating changes in business behavior to match that market demand.[85] Some environmental disclosures may help consumers save money on their electricity bills while contributing to environmental policy goals, such as those that provide information about appliance[86] or building energy efficiency.[87] Informational disclosures also impact larger market dynamics, not just individual transactions. Being seen as a good or bad environmental actor can impact a company's larger reputation with the government, the public, the press, and other businesses.[88]

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preferences. The injury would not exist were the information not disclosed."). However, Kysar has argued that the product versus process debate is too formalistic. *See* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004).

82 *See, e.g.*, Adler *supra* note 17, at 439.

83 *See, e.g.*, Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 406 (2012).

84 *See, e.g.*, *Higher Prices Prevent Some Consumers from Going Green*, CONSUMER REPORTS (Sept. 24, 2012), https://www.consumerreports.org/cro/news/2012/09/higher-prices-prevent-some-consumers-from-going-green/index.htm; *see also* Philemon Oyewole, *Social Costs of Environmental Justice Associated with the Practice of Green Marketing*, 29 J. OF BUS. ETHICS 239 (2001) (discussing how environmental justice relates to green marketing).

85 *See* Stewart, *supra* note 72, at 134–35.

86 For more information on the Energy Star Program, visit ENERGY STAR, https://www.energystar.gov (last visited Nov. 20, 2018).

87 *See* discussion *infra* notes 105–116 and accompanying text on Benchmarking in New York City.

88 *See* Stewart, *supra* note 72, at 142. One prominent example of an industry fighting the potential negative reputational impacts can be seen in the battle over the labeling of genetically engineered crops. Agricultural companies spent $80 million opposing genetically engineered food labeling between 2012 and the first quarter of 2014. *See* Carey Gillam, *U.S. GMO Crop Companies Double Down on Anti-Labeling Efforts*, REUTERS (July 29, 2014), https://www.reuters.com/article/usa-gmo-labeling/u-s-gmo-crop-companies-double-down-on-anti-labeling-efforts-idUSL2N0Q30Y520140729. For an in-depth discussion of state-mandated labeling of genetically engineered foods, see Kimbrell, *supra* note 20.

At an abstract level, proponents of informational disclosures cite that they promote transparency, fairness, and market efficiency.[89] Additionally, informational disclosures may have lower administrative costs than regulations, allow for more flexibility than command-and-control approaches, and contribute to democratic deliberation.[90] Rather than mandating a particular outcome, individuals are free to act in their own best interest on the basis of information about potentially harmful effects of a given action or product.[91]

Studies that look at specific examples of disclosure approaches demonstrate that disclosure policies can, in fact, move the market. For example, dolphin-safe tuna[92] has become the norm in the U.S. market. After Earth Island Institute led an effective media campaign in the 1980s to raise consumer awareness of the issue of setting tuna nets on dolphins, the major tuna companies changed their purchasing policies.[93] Now, "[t]here is very little demand from U.S. consumers for tuna product produced from setting on dolphins."[94] Green building labels are another prime example of labels impacting the market. After analyzing the sale of 1.6 million homes sold in California, researchers found a nine percent price premium for homes labeled by Energy Star, LEED, and GreenPoint compared to similar non-labeled homes.[95] Another

89 *See, e.g.*, Pomeranz, *supra* note 83, at 406.

90 *See* Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 530 (2004).

91 Christopher H. Schroeder, *Third Way Environmentalism*, 48 U. KAN. L. REV. 801, 818–19 (2000).

92 The meaning of dolphin-safe and the legality of the dolphin-safe tuna label has been a contentious and long-running battle. Various groups have fought about this issue for decades. Essentially, dolphins swim above tuna, and so, fishing fleets developed the practice of chasing dolphins and then setting their nets on the dolphins in order to capture the tuna beneath. For background on this issue, see *Breaking News: World Trade Organization Rules in Favor of U.S. on Dolphin-Safe Tuna Labels*, HUMANE SOCIETY (Oct. 26, 2017), https://blog.humanesociety.org/2017/10/breaking-news-world-trade-organization-rules-favor-u-s-dolphin-safe-tuna-labels.html.

93 U.S. Written Submission, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse by the United States to DSU Article 22.6*, WT/DS381 (Aug. 3, 2016), ¶ 28, https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.fin.PUBLIC.pdf.

94 *Id.* ¶ 29.

95 This "study controlled for key variables that influence home prices including location, size, vintage, and the presence of major amenities such as swimming pools, views and air conditioning." NILS KOK & MATTHEW E. KAHN,

review of the literature on LEED and Energy Star buildings found that both the rental prices and building values were higher on these "green" labeled buildings than on comparable "non-green" labeled buildings.[96]

Yet, there are still costs associated with disclosures, such as gathering and reporting information.[97] The regulated community may oppose these disclosures, arguing that they can harm an entire industry, or force companies to divulge information that may be used against them by competitors.[98] And, opponents may also assert that "[h]ighlighting a particular characteristic . . . communicates a value and view-based message about what is important for consumers to consider."[99] Some even argue that there is no need for mandatory labeling; after all, "[t]here is a long history of voluntary disclosure and labeling systems developed in response to consumer demands, including demands based upon religious, ideological, and other interests."[100]

Finally, as with any regulatory tool, there are limitations to informational disclosures.[101] While informational disclosures can be effective, there are concerns that if governments mandate businesses to disclose too much information, consumers may become overwhelmed and disregard all of it.[102] Furthermore, even if individuals pay attention to disclosures, they may not accurately

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THE VALUE OF GREEN LABELS IN THE CALIFORNIA HOUSING MARKET: AN ECONOMIC ANALYSIS OF THE IMPACT OF GREEN LABELING ON THE SALES PRICE OF A HOME 1 (2012), http://www.cherp.net/sites/default/files/ec_pro/cherp/ValueofGreenHomeLabelsStudy_July2012.pdf.

96 Sofia V. Dermisi, *Effect of LEED Rating and Levels on Office Property Assessed and Market Value*s, 1 J. SUSTAINABLE REAL ESTATE 24 (2009), https://leadinggreen.com/wp-content/uploads/2013/06/2009-AV-and-MV-Effect-of-LEED-Ratings-and-Levels-on-assessed-prop-and-mrkt-val.pdf.

97 *See, e.g.*, Stewart, *supra* note 72, at 140.

98 Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism*, 51 AM. BUS. L.J. 599, 600 (2014).

99 Adler, *supra* note 17, at 448.

100 *Id.* at 426.

101 *See* Stewart, *supra* note 72, at 141–43.

102 *See id.* at 140; Lisa A. Robinson et al., *Consumer Warning Labels Aren't Working*, HARV. BUS. R. (Nov. 30, 2016), https://hbr.org/2016/11/consumer-warning-labels-arent-working (explaining that "the present [warning] system fails miserably at distinguishing between large and small risks"); Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. L. REV. 653, 656 (1993) (explaining that the "optimal level" of information "is not complete information").

process the information provided.[103] These issues are frequently raised in the context of environmental disclosures, because they are complex and involve some degree of scientific uncertainty.[104] Thus, regulators must carefully weigh how much to simplify information in order to clearly convey the environmental information, and the regulated community may disagree with those simplifications.

1. *Examples of City Environmental Disclosures*

New York City has implemented informational disclosure programs as part of its overarching commitment to reduce greenhouse gas (GHG) emissions. In 2014, the City committed to its 80 x 50 plan: reducing GHG emissions by at least 80 percent by the year 2050.[105] And, in 2017, New York was the first city to unveil a Paris Agreement-compliant plan to reduce GHG emissions.[106] Both plans cite to reducing building energy consumption as a key component to reach emission reduction goals.[107]

To this end, the City has recently implemented several new informational disclosure approaches in the context of building energy consumption. In 2009, the City passed Local Law 84 as part of the Greener, Greater Buildings Plan, which requires the largest buildings in the City to measure their energy and water

103 *See* Stewart, *supra* note 72, at 141; *see also* Robinson, *supra* note 102 (noting "consumers may mistakenly assume that items without warnings are safe even though many risky products are exempted").

104 *See* Stewart, *supra* note 72.

105 *See* N.Y.C. MAYOR'S OFFICE OF SUSTAINABILITY, NEW YORK CITY'S ROADMAP TO 80 X 50 at 3 (2016), https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/New%20York%20City's%20Roadmap%20to%2080%20x%2050_Final.pdf.

106 The "plan identifies actions NYC will take in the next three years to accelerate emissions reductions in support of the global 1.5° Celsius warming target." *NYC Delivers First-Ever City Plan to Meet the Goals of the Paris Climate Agreement*, N.Y.C. OFFICE OF THE MAYOR (Oct. 3, 2017), https://www1.nyc.gov/office-of-the-mayor/news/634-17/nyc-delivers-first-ever-city-plan-meet-goals-the-paris-climate-agreement. To view the plan online, see *1.5°C: Aligning New York City with the Paris Climate Agreement*, N.Y.C. MAYOR'S OFFICE OF SUSTAINABILITY, https://www1.nyc.gov/site/sustainability/codes/1.5-climate-action-plan.page (last visited Nov. 20, 2018).

107 *See id.*; N.Y.C. MAYOR'S OFFICE OF SUSTAINABILITY, *supra* note 105, at 8–9.

consumption and to submit that data to the City.[108] The goals of this benchmarking program include "mak[ing] energy consumption in buildings quantifiable and transparent, enabling building owners and operators to prioritize their energy investments, reduc[ing] their consumption and sav[ing] money."[109] The City discloses the benchmarking information online.[110] The City expanded its building energy benchmarking program in Local Law 133 of 2016 to include mid-sized buildings.[111] With this expansion, almost 60 percent of the City's built area is now benchmarking buildings.[112]

Simply providing the benchmarking information online, however, was not going far enough to notify the public about building energy consumption. As noted in a New York City Council Committee Report on Local Law 84 and the expanded Local Law 133, there was no guarantee that the public would be aware of the existence of the information, nor that prospective lessees or purchasers would be presented with the benchmarking information while considering the property.[113] To further increase transparency and accountability, starting in 2019, it will be mandatory to display benchmarking information near building entrances in the largest buildings in the City so that members of

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108 Buildings over 50,000 square feet were included in the initial benchmarking program. *NYC Benchmarking Law*, N.Y.C. MAYOR'S OFFICE OF SUSTAINABILITY, http://www.nyc.gov/html/gbee/html/plan/ll84.shtml (last visited Nov. 20, 2018); N.Y.C. MAYOR'S OFFICE OF LONG-TERM PLANNING AND SUSTAINABILITY, NEW YORK CITY LOCAL LAW 84 BENCHMARKING REPORT 7 (2012), http://www.nyc.gov/html/gbee/downloads/pdf/nyc_ll84_benchmarking_report_2012.pdf.

109 *Id.* at 8.

110 The thinking behind disclosing the information online was that "current or prospective tenants and banks and other financing parties" could look up the information, "allowing them to make more informed decisions that positively influence the market for energy efficiency." N.Y.C. MAYOR'S OFFICE OF LONG-TERM PLANNING AND SUSTAINABILITY, *supra* note 108 at 9.

111 The 2016 amendment included buildings over 25,000 square feet. *See* New York Local Law No. 133 (2016), http://www1.nyc.gov/assets/buildings/local_laws/ll133of2016.pdf.

112 *See* Donna DeCostanzo, *NYC's Landmark Building Energy Plan About to Get Even Better*, NRDC (Oct. 14, 2016), https://www.nrdc.org/experts/donna-de-costanzo/nycs-landmark-building-energy-plan-about-get-even-better.

113 *See* N.Y.C. COUNCIL COMM. ON ENVTL. PROT., REPORT OF THE INFRASTRUCTURE DIVISION (June 27, 2017), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3066694&GUID=A4E3E696-2927-4A44-BD39-4C2DCC8CAADD (click on attachment number 5 "Committee Report 6/27/17").

the public will also be aware of building energy consumption and grades.[114] Furthermore, owners will be required to disclose energy efficiency information to prospective tenants.[115]

Other U.S. cities appear to be following New York City's benchmarking lead. For example, Chicago initiated a similar approach, creating a new Chicago Energy Rating system to be posted on benchmarking buildings starting in 2019.[116]

2. *Examples of State Environmental Disclosures*

Similarly, states may rely on environmental disclosures to inform the public. California's Safe Drinking Water and Toxic Enforcement Act of 1986—commonly referred to as Proposition 65—requires the State to publish a list of chemicals known to cause cancer, birth defects, or other reproductive harm and requires businesses to provide a "clear and reasonable" warning before exposing consumers to listed chemicals.[117] Specifically, manufacturers and retailers must provide a warning label, unless exposure is low enough to pose no significant risk of cancer or birth defects.[118] While critics have charged Proposition 65 with

114 Under Intro 1632A, "buildings will be assigned a letter grade based on their energy score and landlords will be required to post that grade, along with the energy score, in a conspicuous location near the building's public entrances." Press Release, N.Y.C. Council, New York to Become First U.S. City to Require Energy Grades to be Publicly Posted at Commercial and Residential Buildings (Dec. 19, 2017), https://guarinicenter.org/wp-content/uploads/2017/12/RELEASE-NYC-BECOMES-FIRST-US-CITY-TO-REQUIRE-ENERGY-GRADES-FOR-BUILDINGS.pdf; *see also* N.Y.C. COUNCIL COMM. ON ENVTL. PROT., *supra* note 113.

115 *See* N.Y.C. COUNCIL COMM. ON ENVTL. PROT., *supra* note 113.

116 The system is a 4-star rating system. Properties are incentivized to improve their energy scores because if they improve by 10 points or more on the 100-point scale in 2 reporting years they will gain an additional star. *See Chicago Energy Benchmarking Homepage*, CITY OF CHICAGO, https://www.cityofchicago.org/city/en/progs/env/building-energy-benchmarking—-transparency.html (last visited Nov. 20, 2018).

117 *See* The Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code § 25249.6 (West 1999). For an explanation of Proposition 65, see *Proposition 65 in Plain Language*, OEHHA (Feb. 1, 2013), https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language.

118 *See id.* ("For chemicals that are listed as causing cancer, the 'no significant risk level' is defined as the level of exposure that would result in not more than one excess case of cancer in 100,000 individuals exposed to the chemical over a 70-year lifetime."); Stewart, *supra* note 72, at 139.

being alarmist,[119] the labeling scheme has successfully impacted business behavior: many manufacturers do not want to have to use the Proposition 65 warning labels, and so have chosen to remove covered chemicals from their products.[120] For example, Proposition 65 was particularly effective in removing lead from products that were not addressed by federal law.[121] California has recently enacted another labeling law dealing with chemicals in household products, The Cleaning Product Right to Know Act of 2017, which requires the ingredients in cleaning products to be listed both on product labels and online.[122]

California also uses mandatory informational disclosures to address the threat of natural disasters, which complicate the state real estate market. For example, although homes located in floodplains are supposed to disclose that information under the National Flood Insurance Program (NFIP), homes located in floodplains in California were selling at the exact same price as comparable homes located outside of the floodplains.[123] California realized that some homebuyers, especially Hispanic buyers, were not receiving important information about the flood risks prior to the decision to purchase a home with just the federal NFIP mandated disclosure.[124] The authors of an extensive study of homes purchased in California attributed this information gap particularly impacting Hispanic buyers to two causes. First, there is a disproportionately large share of Hispanic homebuyers in floodplain areas in comparison to other racial and ethnic groups in California.[125] Second, the NFIP disclosure occurs during the mortgage-origination process, and so homebuyers turning to

119 Stewart notes that critics claim the Proposition 65 warning labels "fail to convey the magnitude of the risks posed by different substances." Stewart, *supra* note 72, at 140.

120 *See* Vandenbergh, *supra* note 90, at 610; Stewart *supra* note 72, at 140.

121 *See* Schroeder, *supra* note 91, at 819–820.

122 2017 Cal. Legis. Serv. Ch. 830 (S.B. 258) (West).

123 *See* AUSTIN TROY & JEFF ROMM, CALIFORNIA POLICY RESEARCH CENTER, AN ASSESSMENT OF THE 1998 CALIFORNIA NATURAL HAZARD DISCLOSURE LAW (AB 1195) at vii (2006), http://www.uvm.edu/~atroy/cprctroy.pdf.

124 *See id.* at viii.

125 *See id.*

under-regulated subprime mortgage lenders may be less likely to receive the disclosure.[126]

To remedy this situation, California passed AB 1195—now known as California Civil Code 1103—requiring sellers to disclose when their property is located in a flood, wildfire, or seismic zone.[127] These disclosures are located on a Natural Hazard Disclosure Statement, and are to be made available "as soon as practicable before . . . the making or acceptance of an offer."[128] The mandatory disclosure of risks is meant to ensure that buyers will be able to take the risks into consideration when making an offer, as well as to correct market price signals that could cause overdevelopment in high hazard areas.[129] After AB 1195, homes located in floodplains sold for 4.1 percent less than homes outside of floodplains, suggesting that AB 1195's disclosure mechanism[130] is more effective than the NFIP disclosure mechanism.[131]

C. *Future Uses of Environmental Disclosures as a Policy Tool*

There are numerous promising future uses of informational disclosures. Some scholars have argued that because individual behaviors aggregate to impose large environmental harms, there is a huge untapped potential to address these harms at the local level.[132] A prime example is the case of GHG emissions. Although people often think of industrial polluters as the problem,[133]

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126 *See id.* The authors of this study "analyzed over 20,000 housing transactions that took place in 63 zip codes across California, representing both urban and rural areas, from January 1997 to February 2000." *Id.*

127 *See* 1997 Cal. Stat. Ch. 65 (A.B. 1195).

128 Cal Civ. Code § 1102.3(b), https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1102.3.&lawCode=CIV.

129 Of course, an informational disclosure may not be enough to address the risks of overdevelopment in high hazard areas. *See, e.g.*, TROY & ROMM, *supra* note 123, at 40 ("[W]hile disclosure is critical to correcting major gaps in the information that is needed to make good decisions and protect consumers, government regulation and planning are still needed to limit and direct development in hazard zones and ultimately to reduce the burden of disaster aid.").

130 "AB 1195 appears to have a high rate of compliance because it clearly articulates where sellers and real-estate agents are liable for disclosure and protects them from liability exposure due to error, omission, or inaccuracy in the disclosure." *Id.* at vii.

131 *See id.* at vii.

132 *See generally* Katrina Fischer Kuh, *Capturing Individual Harms*, 35 HARV. ENVTL. L. REV. 155 (2011).

133 *See id.* at 159.

individual consumers and households make a significant contribution to climate change: in the United States, individuals generate approximately one-third of GHG emissions, and households consume one-third of all energy.[134] In fact, estimates suggest the individual household behavior in the United States was responsible for around eight percent of the total global GHG emissions in 2000.[135] Yet, despite the fact that individuals and households contribute so significantly to emissions, historically, when the federal government has sought to reduce GHG emissions, large point sources were the focus of regulations.[136] Perhaps even attempting to change the behavior of millions of households seemed too preposterous to even consider as a policy option.

However, as noted by Michael Vandenbergh and Anne Steinemann, "[i]f regulators begin by assuming that changing individual behavior is a viable means of achieving desired environmental outcomes, the analysis shifts."[137] To be sure, conservation behaviors, which require ongoing behavioral changes, are harder to achieve than one-time purchase decisions.[138] Nonetheless, these ongoing behavioral changes are crucial because they can lead to some of the largest gains in emissions reductions.[139] Katrina Fischer Kuh argues that individual behaviors contributing to GHG emissions are well suited to being tackled at the local level given the local government's superior ability to account for community norms and to make programs personalized.[140] When developing policies to change individual consumption habits, personal lifestyle choices and social norms come into play.[141] In the academic literature, informational

134 *See id.* at 157 (quoting Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 120–21 (2009)).

135 *See* Michael P. Vandenbergh & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1694 (2007).

136 *See* Thomas Daniel Wuertenberger, *The Regulation of CO2 Emissions Caused by Private Households – An Analysis of the Legal Situation in the European Union and Germany*, 16 MO. ENVTL. L. & POL'Y REV. 1, 5 (2009) (citing Vandenbergh & Steinemann, *supra* note 135, at 1676–77).

137 Vandenbergh & Steinemann, *supra* note 135, at 1689.

138 See *id.* at 1697.

139 *See id.*

140 *See* Kuh, *supra* note 132.

141 *See id.* at 159.

approaches are seen as an appealing policy option when such daily individual choices are involved.[142] Research by Robert Cialdini and colleagues suggests that individuals are influenced by the "descriptive norm," or what they see as the behavior of others in their community.[143] This means that if people see emissions-reducing behaviors as common, rather than as extreme practices of environmentalists, they will be more likely to engage in these behaviors themselves.[144] Additionally, research finds that people are motivated by feelings of moral obligation to their communities, such as reducing their electricity consumption during peak demand to avoid expensive additions to the grid that will make prices unaffordable for their neighbors.[145] This research suggests that framing environmental initiatives as community efforts that everyone else is contributing to will promote greater participation.

Despite the large potential for local informational approaches to make an impact, many efforts have been underfunded and understaffed, limiting their efficacy.[146] Still, there is evidence that community-based informational approaches work when done right. For instance, some of the most successful recycling programs include local information comparing a household's recycling performance to that of its neighbors.[147] Additionally, personal accountability matters: recycling programs with block captains increase their recycling by 28 percent as compared to programs without them.[148]

While mandatory informational approaches may be appealing, particularly at the local level, it is also important to consider the

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142 *See* Vandenbergh, *supra* note 90, at 608.

143 *See* Vandenbergh & Steinemann, *supra* note 135, at 1705 (citing Robert Cialdini et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 201, 203 (Mark P. Zanna ed., 1991)).

144 *See id.*

145 *See id.* at 1709–10.

146 "One study found that fifty local programs that attempted to reduce non-point source runoff from households were poorly staffed and had miniscule budgets ranging from $2,000 to $25,000." Vandenbergh, *supra* note 90, at 613 n.373 (citing Thomas R. Schueler, *On Watershed Education*, 3 WATERSHED PROTECTION TECH. 680, *reprinted in* THE PRACTICE OF WATERSHED PROTECTION 629, 630 (Thomas R. Schueler & Heather K. Holland eds., 2000)).

147 *See* Kuh, *supra* note 132, at 189 (citing Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231, 1287–91 (2001)).

148 *See* GERALD T. GARDNER & PAUL C. STERN, ENVIRONMENTAL PROBLEMS AND HUMAN BEHAVIOR 88 (2d ed. 2002).

legality of such disclosures. The next Part discusses how the Supreme Court has analyzed mandatory disclosures under the First Amendment.

II. MANDATORY DISCLOSURES, COMMERCIAL SPEECH, AND THE SUPREME COURT

Recent developments in the First Amendment commercial speech jurisprudence could have major impacts on local policymakers who are considering implementing a mandatory environmental disclosure. The commercial speech doctrine has shifted dramatically, elevating the scrutiny applied to speech that has little to do with traditional First Amendment concerns.[149] Although commercial speech has been recognized as warranting some degree of protection under the First Amendment for over forty years, an exact definition of commercial speech,[150] and the boundaries between commercial speech and public discourse, are

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149 The shift in the commercial speech law has been observed since at least the early 2000s. *See* Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292 (2004) ("Examination of actual case decisions demonstrates that the trajectory of modern commercial speech law has been an accelerating rise of protection for advertising."). While some might suggest this expansion of the First Amendment is a "misuse," that suggests that there is some static purpose of the First Amendment. Rather, the meaning of the First Amendment is the result of "the evolution of decisions over time." Frederick Schauer, *First Amendment Opportunism*, KSG Working Paper No. 00-011 (Aug. 2000), at 3 n.5. However, from a policy perspective, we may want to reconsider continuously expanding how we define speech covered by the First Amendment.

150 As summarized by Victor Brudney:

> [A] workable concept of commercial speech may fairly be said to entail two sorts of expression. One is expression that may be called 'narrow' commercial speech. It consists of a communication that (1) proposes or offers explicitly or 'implicitly' a sale or exchange transaction in a specified commodity or service, and is made by the proposer (or its agents) as part of its business of profiting from such transactions, and (2) does no more than describe the terms of such proposal or simply identify the putative seller's products.

Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C.L. REV. 1153, 1155–56 (2012). Numerous articles have discussed this point. *See generally* Charles G. Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1 (1990); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995); Jason A. Cade, Note, *If the Shoe Fits:* Kasky v. Nike a*nd Whether Corporate Statements About Business Operations Should Be Deemed Commercial Speech*, 70 BROOK. L. REV. 247 (2004).

"blurred."[151] Additionally, an appropriate standard of scrutiny for mandated disclosures has proved challenging to pin down.[152] As a final layer of complication, some disclosures might not be classified as occurring in the context of commercial speech if the business or organization is not proposing a commercial transaction.[153] Much to the chagrin of legal scholars in the field, "[u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner."[154]

This Section starts by discussing the theoretical underpinnings of the commercial speech doctrine. It then reviews the foundational Supreme Court cases of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[155] and *Zauderer v. Office of Disciplinary Counsel*,[156] as well as the major shift in the doctrine reflected in *National Institute of Family and Life Advocates v. Becerra*.[157]

A. Virginia State Board of Pharmacy *and the Theoretical Underpinnings of the Commercial Speech Doctrine*

The application of the First Amendment to commercial speech is a relatively recent phenomenon. In 1975, the Supreme Court, in *Bigelow v. Virginia*, declared that commercial speech, such as a paid advertisement in a newspaper or a product label, "is not stripped of First Amendment protection merely because it appears in that form."[158] The Court applied this principle in 1976,

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151 Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. REV. 1, 5 (2000).

152 *See, e.g.*, American Meat Institute v. USDA: *D.C. Circuit Applies Less Stringent Test to Compelled Disclosures*, 128 HARV. L. REV. 1526, 1526 (2015).

153 Scholars have noted the problems with an outdated definition of commercial transactions as immediately buying or selling a product, particularly in an age when many major social media and technology businesses profit from gathering user information and advertisements. *See, e.g.*, Eric Bernstein & Theresa J. Lee, *Where the Consumer is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 40 ("[O]utdated notions of what constitutes a 'commercial transaction' threaten to leave the advertisements and other representations to users of services like Facebook, Google, Twitter, Bing, and Pinterest entirely unregulable.").

154 Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990).

155 447 U.S. 557 (1980).

156 471 U.S. 626 (1985).

157 138 S. Ct. 2361 (2018).

158 421 U.S. 809, 818 (1975).

holding that a prohibition on the advertisement of pharmaceutical prices violated the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[159] Prior to *Virginia State Board of Pharmacy*, there was not a constitutional "restraint on government as respects purely commercial advertising."[160] Since *Virginia State Board of Pharmacy*, the commercial speech doctrine has grown, but there remain "oft-recurring issues in the First Amendment treatment of commercial speech."[161] These issues are particularly thorny for state-mandated disclosures.[162]

To understand the difference in treatment between government-imposed limits on commercial speech versus government-mandated informational disclosures, it is helpful to understand the policy rationales underlying the commercial speech doctrine. The Court's decision to extend First Amendment protections to commercial speech in *Virginia State Board of Pharmacy* was justified first by appealing to economic efficiency.[163] Justice Blackmun reasoned that the "allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."[164] Citing economic efficiency as a First Amendment concern has

159 425 U.S. 748 (1976). This could be seen an example of Constitutional displacement, as the pre-New Deal economic liberty arguments had been foreclosed. *See* Schauer, *supra* note 149, at 5 ("[T]hose who would a generation earlier have couched their objections in terms of economic liberty now argued that Virginia's prohibition on the advertising of pharmaceutical prices violated the First Amendment."); Thomas Jackson & John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 4–5 (1979) (discussing it as an economic liberty case). The prohibition on advertising prices was the result of independent pharmacists lobbying the Board for protection from chain pharmacies. *See id.* at 6. It is noteworthy that in the case, the focus was on the plaintiffs, who were consumers who wanted to receive the speech in the advertisements, and not the advertisers. *See* Va. State Bd. of Pharmacy, 425 U.S. 748, 756–57 (1976).

160 Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); *see also* Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n, 413 U.S. 376, 384 (1973) (quoting *Valentine v. Chrestensen*).

161 Borgner v. Florida Bd. of Dentistry, 537 U.S. 1080 (2002) (Thomas, J., dissenting from denial of certiorari) (mandating a disclaimer on a dentist's commercial "speech [that] is only potentially, not inherently, misleading").

162 *See id.* (Thomas dissent in *Borgner*).

163 *See Virginia Bd. of Pharmacy*, 425 U.S. at 764.

164 *Id.* at 765.

been criticized by scholars, who argue that the First Amendment is being treated as a "repository of microeconomic theory."[165] Justice Rehnquist even argued that the commercial speech jurisprudence is the reincarnation of "the discredited doctrine" of substantive due process in "cases such as *Lochner v. New York* and *Tyson & Brother v. Banton*."[166] Later, though, as evidenced by the Powell Memorandum,[167] calls to expand the commercial speech doctrine were motivated, at least in part, by economic ideology: protecting capitalism from the dangerous onslaught of consumer and environmental protection.[168]

The second rationale in *Virginia State Board of Pharmacy*—to protect the "free flow" of information[169]—does have a more plausible connection to the First Amendment. There is a link between obtaining information about goods and services, including their prices, and the formation of public opinion on policy issues.[170] Thus, commercial speech is not itself public discourse,

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165 Post, *supra* note 151, at 10; *see also* Coates, *supra* note 18, at 243 (noting that in *Virginia Pharmacy* "the Court extended First Amendment protection to *any* (non-deceptive) *expression by any business*—a dramatic if subtle expansion of the reach of the Courts in overseeing economic regulation.").

166 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. at 589 (Rehnquist, J., dissenting). Other scholars have commented on the similarities in the use of First Amendment to further deregulation goals and the use of the Fourteenth Amendment in the *Lochner* era. *See* Coates, *supra* note 18, at 269 (citing Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2015); Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 8 YALE L.J. 124 (2015)).

167 *See* Memorandum from Eugene B. Sydnor, Jr. to Lewis F. Powell, Jr., Educ. Comm. Chairman, U.S. Chamber of Commerce (Aug. 23, 1971), law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf.

168 For a detailed discussion of the Powell Memorandum, see Coates, *supr*a note 18, at 242. Coates also provides an excellent overview of the history of corporations in the United States, as well as underscoring that the application of the First Amendment to commercial speech is recent phenomenon, not a historical practice.

169 *See also* Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994) ("[D]isclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[I]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

170 To illustrate this point, Robert Post uses the example, "[i]f citizens learn from commercial advertising that pharmacy drugs are too expensive, for

but it does affect public discourse. Alexander Meiklejohn forcefully argued that the purpose of the First Amendment is to protect the sharing of information needed for "the voting of wise decisions."[171]

In *Central Hudson*, discussed below, the Supreme Court declared that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising."[172] Thus, in contrast to the primarily speaker-oriented First Amendment protections for public discourse,[173] this rationale roots commercial speech in a listener-oriented focus on the First Amendment.[174] In the context of regulations mandating disclosures, theoretically at least, the focus of the analysis should be on the First Amendment interests of the recipient of the speech. After all, the prohibition on the commercial speech of price of pharmaceuticals at issue in *Virginia Pharmacy* raises distinct concerns from those of compelled commercial speech, when a speaker is required to share information that it would not voluntarily choose to convey.

B. Central Hudson *and Restrictions on Speech*

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court addressed the constitutionality of a New York regulation banning promotional advertising by an electrical utility.[175] The lower courts sided with the Public Service

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example, they might organize politically to advocate within public discourse for the creation of national health insurance." Post, *supra* note 151, at 11.

171 ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1st ed. 1960).

172 447 U.S. 557, 563 (1980).

173 Of course, the listener is important here too. However, Supreme Court cases have focused the discussion on protecting the speaker's ability to convey their message. *See, e.g.*, Bernstein & Lee, *supra* note 153, at 71–72 (citing Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam) (focusing on speaker's "intent to convey a particularized message")).

174 *See* Post at 1266. *See also* Robert Post & Amanda Shanor, Commentary, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015); First Nat'l Bank of Bos. v. Belotti, 435 U.S. 765, 783 (1978) ("A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the free flow of commercial information.") (internal citation omitted).

175 *See Central Hudson*, 447 U.S. at 558. The ban on promotional advertising began due to a fuel shortage during the winter months of the 1970s energy crisis. *See id.* at 559. However, after the shortage passed, the Public Service

Commission, noting that the utility operated in a noncompetitive market and consumers had no choice, so this advertising would not be First Amendment speech contributing to "'informed and reliable' economic decisionmaking."[176] The Supreme Court reversed, explaining that "[i]f the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed."[177] The Court settled on an intermediate level of scrutiny: when restricting commercial speech, the "State must assert a substantial interest to be achieved by the restrictions," and "the regulatory technique must be in proportion to that interest."[178] To meet the second requirement, the Court laid out two criteria: (1) "the restriction must directly advance the state interest involved," and (2) "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[179]

Rehnquist's dissent highlights several problems with the Court's *Central Hudson* approach for policymakers. First, he would have characterized the state law as an "economic regulation," and if the speech involved "falls within the scope of the First Amendment at all," it would "occup[y] a significantly more subordinate position in the hierarchy of First Amendment values."[180] Second, he posited that the "'no more extensive than necessary'" prong of the test would "unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought of to be of great importance to the State."[181] Thus, the *Central Hudson* test leaves considerable room for industry groups to challenge

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Commission extended the promotional advertising prohibition, citing energy conservation goals. *See id.* at 559–60.

176 Consolidated Edison Co. v. Pub. Serv. Comm'n, 47 N.Y.2d 94, 110 (1979).

177 *Central Hudson*, 447 U.S. at 564.

178 *Id.*

179 *Id.* Although the governmental interests in "energy conservation" and "fair and efficient" rates in *Central Hudson* were substantial, the Court found that the regulation did not directly advance the interest in fair rates. *Id.* at 568–69 ("The link between the advertising prohibition and appellant's rate structure is, at most, tenuous."). The promotional advertising ban did advance the Commission's interest in energy conservation. *See id.* at 569 ("Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.").

180 *Id.* at 584 (J., Rehnquist Dissent).

181 *Id.* at 584–85 (J., Rehnquist Dissent).

regulations by suggesting that less extensive means could be utilized.

C. Zauderer *and the Reasonable Relationship Test for Mandatory Disclosures*

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Court considered an Ohio law both banning certain forms of advertising, as well as mandating commercial disclosure of specific information in legal services advertisements.[182] When addressing the ban, the Court applied the *Central Hudson* test.[183] However, the mandated disclosures presented different considerations than the ban.[184] The Court found that a compelled disclosure in commercial advertising was qualitatively distinct from other compelled speech cases dealing with public discourse, such as politics or religion.[185] Rather, this compelled commercial speech furthered First Amendment interests in providing information to listeners.[186] Ohio did not "prevent attorneys from conveying information to the public;" instead, it "required them to provide somewhat more information than they might otherwise be inclined to present."[187] The Court explicitly based its holding in *Zauderer* on consumer interests: "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [Zauderer's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[188] Thus, in *Zauderer*, the Court established a rational basis test for government-mandated disclosures.[189] Additionally, the Court found that

182 *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). Zauderer was an attorney who placed newspaper advertisements for legal services in drunk-driving cases. In his advertisements, Zauderer failed to comply with the Ohio state requirements that advertisements of legal services had to disclose certain information about the fees for attorneys in contingent fee cases, as well as the allocation of costs in cases. *See id.* at 633.

183 *See id.* at 642–44.

184 The "disclosure requirement[]" had "material differences" from "outright prohibitions on speech." *Id.* at 650.

185 *See id.* at 650. The Court cited cases including *W. Va. State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

186 *See Zauderer*, 471 U.S. at 650.

187 *Id.* at 650.

188 *Id.* at 651 (internal citation omitted) (emphasis in original).

189 *See id.*

protecting consumers from deception in contingent fee arrangements was a legitimate state interest.[190]

At the broadest level, *Zauderer* applies to mandated disclosures,[191] while *Central Hudson* applies to restrictions on speech.[192] Relying on *Zauderer*, courts have upheld mandatory disclosures that meet the four-part test of being (1) purely factual, (2) uncontroversial, (3) reasonably related to a legitimate government interest, and (4) not unduly burdensome.[193] That said, the application of *Zauderer* has not been straightforward. Courts have placed a lot of weight on the fact that this disclosure about fees and costs was "factual," and that factual information was "uncontroversial."[194] Unfortunately, the meaning of "factual" and "uncontroversial" remains elusive.

In discussing the challenges of applying the "factual" and "uncontroversial" standard from *Zauderer*, the D.C. Circuit posed questions such as:

> Is Einstein's General Theory of Relativity fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that

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190 *See id.* at 652 ("The advertisement makes no mention of the distinction between 'legal fees' and 'costs,' and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition.").

191 *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) ("*Zauderer*, not *Central Hudson Gas & Electric Corp v. Public Service Comm'n*, describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech." (internal citation omitted)); *accord* Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403 at 412, 413 (D.C. Cir. 2012) ("Disclosure requirements . . . are not the kind of limitations that the Court refers to when invoking the *Central Hudson* standard of review."); Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 233 F.3d 981, 994 (7th Cir. 2000) ("The government can impose affirmative disclosures in commercial advertising if these are reasonably related to preventing the public from being deceived or misled.").

192 Some would argue that the same standards should apply. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'").

193 *See, e.g.*, *Spirit Airlines*, 687 F.3d 403.

194 *Zauderer*, 471 U.S. at 651. Later cases interpreted "uncontroversial" to mean that the disclosure contains "accurate factual information," that is undisputed. *See Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 114–15. *See also* Safelite Grp., Inc. v. Jepsen, 764 F.3d 258, 263 (2d Cir. 2014) (quoting Safelite Grp., Inc. v. Jepsen, 988 F. Supp. 2d 199, 207 (D. Conn. 2013)). *But see* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 559 n.8 (6th Cir. 2012).

> "USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING" would that be fact or opinion? It is easy to convert many statements of opinion into assertions of fact simply by removing the words "in my opinion" or removing "in the opinion of many scientists" or removing "in the opinion of many experts."[195]

The D.C. Circuit also puzzled over the meaning of controversial: "A controversy, the dictionary tells us, is a dispute, especially a public one. Was there a dispute about the disclosures . . . or . . . was there a controversy 'for some reason other than [a] dispute about simple factual accuracy'?"[196] After *National Institute of Family and Life Advocates v. Becerra*, discussed below, prior case law on the meaning of "factual" and "uncontroversial" may be called into question.

D. National Institute of Family and Life Advocates *and a Shift in Doctrine*

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) was enacted to regulate centers providing pregnancy-related services, which are commonly referred to as crisis pregnancy centers.[197] Many of these centers are affiliated with anti-abortion groups and do not have licenses to provide medical services.[198] The purpose of the FACT Act was to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them."[199] Additionally, in the case of unlicensed facilities, the FACT Act informed "pregnant

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195 Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 528 (D.C. Cir. 2015). For further discussion, see Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 542 (2012).

196 *Nat'l Ass'n of Mfrs.*, 800 F.3d. at 529.

197 *See* Cal. Health & Safety Code Ann. § 123470 *et seq.* (West 2018). For a brief overview of the Act and the issues in this case, see Adam Liptak, *Supreme Court Backs Anti-Abortion Pregnancy Centers in Free Speech Case*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/us/politics/supreme-court-crisis-pregnancy-center-abortion.html.

198 *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018).

199 *Id.* at 2369; 2015 Cal. Legis. Serv. Ch. 700, § 2 (A.B. 775) (West).

women in California . . . when they are getting medical care from licensed professionals."[200]

The FACT Act placed distinct requirements on licensed and unlicensed facilities. The FACT Act required that licensed crisis pregnancy centers notify patients that California provides free or low-cost services, including prenatal care, contraceptives, and abortion, and to give them a phone number to call to inquire about available services.[201] The centers could choose between posting the notice in the waiting room, printing and distributing the notice to all clients, or providing a digital copy of the notice upon check in.[202] The pregnancy clinics without a license from the State and without a licensed medical professional on staff had to inform patients via a notice that they did not have a license to provide medical services.[203] The required notice reads: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."[204]

A licensed crisis pregnancy center, an unlicensed crisis pregnancy center, and an organization of crisis pregnancy centers filed suit in the Southern District of California seeking a preliminary injunction to prevent enforcement of the FACT Act and alleging that the FACT Act requirements violated their First Amendment rights to free speech and free exercise of religion.[205] The district court denied the injunction.[206] The Ninth Circuit affirmed the district court's denial of the preliminary injunction holding that the plaintiffs were unlikely to succeed on the merits.[207] The Ninth Circuit also found that the disclosure

200 *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2370 (quoting 2015 Cal. Legis. Serv. Ch. 700, § 1(e)).

201 *See id.* at 2368 ("California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." (quoting Cal. Health & Safety Code Ann. § 123471(a)(1))).

202 *See id.* at 2369 (quoting Cal. Health & Safety Code Ann. § 123472(a)(2)).

203 *See id.* at 2368.

204 *Id.* at 2370 (quoting Cal. Health & Safety Code Ann. § 123472(b)(1)).

205 Nat'l Inst. of Family & Life Advocates v. Harris, 2016 U.S. Dist. LEXIS 92612 (S.D. Cal. 2016).

206 *See id.*

207 Nat'l Inst. of Family & Life Advocates v. Harris, 839 F. 3d 823, 829 (9th Cir. 2016).

requirement in unlicensed clinics would survive any level of review and that the disclosure in licensed clinics survived intermediate scrutiny, which was the appropriate standard because the clinics were engaging in professional speech.[208]

Commentators thought that this would be an "easy case" for the Court to uphold the California law,[209] but the Supreme Court reversed, finding a likelihood of success on the merits, and strongly disagreed with the Ninth Circuit's free speech analysis in regards to both notice requirements.[210] First, rather than discussing the notice of available California services required in licensed facilities as a mandated disclosure, the Court classified this notice as "content-based regulation of speech."[211] According to the Court, "[b]y requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech."[212] In other words, even though this notice was posted in a pregnancy center where patients were seeking out "expert knowledge and judgment" regarding medical care, the government would not be allowed to impose restrictions.[213]

Although this notice would have been included as a mandated disclosure under prior understandings of *Zauderer*, the Court set forth an incredibly narrow reading of *Zauderer* to exclude this notice.[214] The Court found that the "licensed notice is not limited to 'purely factual and uncontroversial information about the terms under which . . . services will be available.'"[215] Essentially, because these centers were not themselves providing a medical procedure at the time the notice was provided, the Court found this notice fell outside of *Zauderer*. According to the Court, the notice

208 *See id.* at 834–35.

209 *See* Erwin Chemerinsky, *Symposium: Ensuring Accurate Information for Patients Does Not Violate the First Amendment*, SCOTUSBLOG (Dec. 12, 2017), http://www.scotusblog.com/2017/12/symposium-ensuring-accurate-information-patients-not-violate-first-amendment/.

210 *See Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2378.

211 *Id.* at 2371.

212 *Id.*

213 *Id.*

214 *See id.* at 2372. According to the Court, *Zauderer* "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.*

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

"requires these clinics to disclose information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic." Here, the Court redefined the understanding of "controversial" as a legal term of art from *Zauderer's* meaning that the accuracy of the statement is debatable, to a new definition of controversial meaning that the statement is related to any contentious subject, even if the notice itself only contains factual and accurate information.

In addition, the Court rejected not only the Ninth Circuit's conclusion that this was professional speech related to medical care, but also the notion that there even is a separate category of professional speech facilitating the ability of states to regulate professional conduct that involves speech.[216] While this opinion indicates a major shift in the doctrine regarding what it means to be "factual" and "uncontroversial," not to mention raising questions about where the line is between conduct and speech, the Court did nothing to explain the bounds of this new interpretation. Instead, the Court concluded by declaring, "we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[217]

Justice Breyer was joined by all three female Justices in a forceful dissent. Justice Breyer was disturbed by the policy implications of the majority's approach to analyzing notice requirements under the First Amendment:

> This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's

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216 *See id.* at 2371–72. Professional speech can be defined as "what professionals may say to clients in the course of their provision of individual services." Erika Schutzman, *We Need Professional Help: Advocating for a Consistent Standard of Review when Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2022 (2015). The circuits have been split on what standard of scrutiny should apply to professional speech. *See, e.g.*, *id.* at 2037 (discussing the Third, Fourth, Ninth, and Eleventh Circuit Courts of Appeals split as to what level of scrutiny applies to professional speech). Recent cases include *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (intermediate scrutiny); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), *cert denied*, 134 S. Ct. 2871 (2015) (rational basis review); and *Moore-King v. County of Chesterfield*, 798 F.3d 560 (4th Cir. 2013) (unclear level of scrutiny).

217 *Id.* at 2376 (citing Ibanez v. Fla. Dep't of Bus. & Prof. Reg., Bd. of Accountancy, 512 U.S. 136, 146 (1994)).

> approach at the least *threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.* Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message." . . . Thus, the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.[218]

Breyer discussed how this opinion could call into question "numerous disclosure requirements found in other areas," such as environmental and public health disclosures.[219] As examples, he cited New York City regulations requiring signs be placed by elevators showing the location of stairs[220] and San Francisco regulations requiring property owners to inform their tenants about waste disposal procedures.[221] Based on the majority's opinion, one could imagine First Amendment challenges to such regulations: the City requiring that signs to the stairs be placed by elevators is a state message endorsing the viewpoint that exercise is better than a sedentary lifestyle.[222] Thus, while the sign itself may contain nothing more than directions to the stairs, there is nothing in the majority opinion that forecloses the validity of such a First Amendment challenge. After all, the California notices at issue simply list available services and provide a phone number. And, while a First Amendment challenge to mandated notices about the stairs might seem farfetched, it is easy to imagine such debates over any informational disclosure even tangentially related to climate change. Climate change is certainly a contentious and divisive political issue, with adamant non-believers. Thus, would mandating notices intending to reduce GHG emissions for the purpose of mitigating climate change violate the First Amendment

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218 *Id*. at 2380 (Breyer, J., dissenting) (emphasis added).

219 *Id.* at 2381.

220 *See id.* (citing N.Y.C. Rules & Regs., tit. 1, § 27-01 (2018), https://www1.nyc.gov/assets/buildings/rules/1_RCNY_27-01.pdf).

221 *See id.* (citing S.F. Dept. of Health, Director's Rules & Regs., Garbage and Refuse (July 8, 2010), https://www.sfdph.org/dph/files/EHSdocs/SolidWaste/RefuseService.pdf).

222 This could also be framed as a message about the virtues of energy conservation, such as the sign contains a value judgment that it is better to save electricity by taking the stairs.

rights of individuals, corporations, or fossil fuel advocacy groups with conflicting, deeply held beliefs?[223]

In analyzing the notice required of unlicensed facilities, the Court sidestepped entirely whether the *Zauderer* "factual and uncontroversial standard" was satisfied by jumping straight to the conclusion that this disclosure was "unjustified or unduly burdensome"[224] and that the justification for the notice was to remedy a "purely hypothetical" harm.[225] After providing little guidance about the factors that a court should consider going forward, the Court concluded that "[w]e express no view on the legality of a similar disclosure requirement that is better supported or less burdensome." Once again, regulators are left to puzzle over how supported is "supported enough," or what level of burden would pass muster.

And, Justice Breyer criticized this oversight too: "Nor does the majority opinion offer any reasoned basis that might help apply its disclaimer for distinguishing lawful from unlawful disclosures."[226] Instead, this decision "invites courts around the Nation to apply an unpredictable *First Amendment* to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle."[227] Of course, as discussed by Justice Breyer, this decision is reminiscent of the *Lochner* era, when courts passed policy judgement on "ordinary economic and social legislation," rather than respectfully deferring to the Legislature.[228] Worse still, this decision treads further than even the *Lochner*-era Court, as this is not just an economic

223 Additionally, the opinion does not address how to square this opinion with *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), which held that universities may be required to host military recruiters on campus, as well as to circulate information about the visits to students, regardless of how such messages conflict with their beliefs.

224 *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2380 at 2377. This determination seemed to be motivated in part by the argument that "petitioners raise serious concerns that both [notices] discriminate based on viewpoint." *Id.* at 2370 n.2.

225 *Id.* at 2377–78.

226 *Id.* at 2381 (Breyer, J., dissenting).

227 *Id.* (emphasis in original).

228 *See id.* at 2381–82.

regulation of industry, but rather is a state regulation of medical facilities.[229]

Justice Breyer would have held that *Zauderer* was applicable to this case, as this was a mandatory disclosure, not a restriction, and that under *Zauderer*'s standard, these notices conform with the First Amendment.[230] As emphasized by Breyer, "*Zauderer* turned on the 'material differences between disclosure requirements and outright prohibitions on speech.'"[231] The regulations at issue did not prevent the clinics from speaking their messages, and they were free to put up anti-abortion signs right next to the required notices. Furthermore, as explained in *Zauderer*, the First Amendment concerns regarding commercial speech are for the value such speech provides the listener.[232] Thus, the focus of the analysis should be on the women entering pregnancy centers and providing them with accurate information about the range of health services available.[233] As argued by Jennifer Keighley, "[f]rom the perspective of the speech's audience, women who are or may be pregnant, these facilities are service-providers competing with other market participants that provide pregnancy-related services."[234] When considering the listener's interests, a more inclusive definition of commercial speech seems appropriate.

As Justice Breyer's concurrence in the judgment in *Expressions Hair Design v. Schneiderman* notes, "virtually all government regulation affects speech."[235] Thus, Breyer counsels, courts should examine how a "statute, rule, or regulation affects an interest that the First Amendment protects."[236] Breyer's approach

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229 *See id.* at 2382. Breyer explains that the historical view has long been that:

> a State may condition the practice of medicine on any number of requirements, and physicians, in exchange for following those reasonable requirements, could receive a license to practice medicine from the State. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions.

Id. (citing a long list of cases from 1898 onwards).

230 *See id.* at 2386–87.

231 *Id.* (quoting *Zauderer*, 471 U.S. at 650).

232 *See id.* (citing *Zauderer*, 471 U.S. at 651).

233 *See id.* at 2388.

234 Keighley, *supra* note 195, at 544.

235 Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring in the judgment).

236 *Id.*

remains committed to the traditional three tiers of scrutiny. The first tier is when a government regulation "negatively affects the processes through which political discourse or public opinion is formed or expressed," and courts "normally scrutinize that regulation with great care."[237] The second tier covers a "challenged regulation" that "restricts the 'informational function' provided by truthful commercial speech," when "courts will apply a 'lesser' (but still elevated) form of scrutiny."[238] The third tier includes "a challenged regulation [that] simply requires a commercial speaker to disclose 'purely factual and uncontroversial information,'" and receives a "more permissive standard of review."[239] Breyer explains that this "permissive standard" makes sense in the context of the "similarly permissive standard of review [applied] to 'regulatory legislation affecting ordinary commercial transactions'"[240] in *Carolene Products*.[241]

Unfortunately, the majority in *National Institute of Family and Life Advocates* ignored Justice Breyer's well-reasoned analysis, instead bumping up the scrutiny on mandatory disclosures, thereby inviting judges to evaluate policy determinations under the amorphous "purely factual" and "uncontroversial" standard.

III. FIRST AMENDMENT CHALLENGES TO MANDATORY INFORMATIONAL DISCLOSURES

While this Note could discuss many First Amendment challenges to mandatory disclosures from local and state governments[242] this section will focus on two ongoing cases in California, highlighting how the "factual and uncontroversial"

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237 *Id.* (citing Boos v. Barry, 485 U.S. 312, 321(1988)).

238 *Id.* (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563–564 (1980).

239 *Id.* (citing Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).

240 *Id.* at 1152.

241 United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

242 For a local example, in *N.Y. State Restaurant Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2nd Cir. 2009), the Second Circuit upheld New York City's calorie labeling as constitutional because it furthered a legitimate interest preventing obesity. For a state example, in *Int'l Dairy Foods v. Boggs*, 622 F.3d 628 (6th Cir. 2010), the Sixth Circuit upheld an Ohio requirement that milk contain a notice stating that according to the FDA there is no difference in the milk between rBGH-treated cows and untreated cows.

analysis plays out when there are arguments about scientific uncertainty.

A. *The Battle Over Warnings on Sugar-Sweetened Beverage Advertisements*

In 2015, San Francisco passed an ordinance modifying the San Francisco Administrative and Health Codes, which mandates billboards, posters, walls, and bus shelters[243] advertising sugar-sweetened beverages (SSBs) to include a notice warning of the contribution of SSBs to obesity, diabetes, and tooth decay.[244] Additionally, the SSB warnings could not follow tiny asterisks, but rather must cover 20 percent of the space on the advertisement.[245] The City and supporting amicus briefs, including from the American Heart Association, presented numerous public health findings supporting the ordinance. The City's findings included statistics about how SSB consumption contributes to the overconsumption of sugar across a range of demographics, figures on childhood obesity, links between sugar consumption and cardiovascular disease, as well as the estimated increased healthcare costs in San Francisco due specifically to SSB consumption.[246] The City's stated purpose in passing the ordinance was to "promote informed consumer choice that may result in reduced caloric intake and improved diet and health" by "inform[ing] the public of the presence of added sugars."[247] There is ample research supporting the use of these warnings as a public health policy tool. For example, studies have indicated that SSB warning labels may reduce consumer likelihood of purchasing such beverages by 6 to 19 percent.[248] And, modeling of the

243 *See* S.F. Health Code § 4202 (2016).

244 The exact mandatory language reads: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." Am. Bev. Ass'n v. City & Cty. of S.F., 187 F. Supp. 3d 1123, 1126 (N.D. Cal 2016); S.F. Health Code § 4203(a) (2016).

245 *See* S.F. Health Code § 4203(b) (2016) ("The Warning shall occupy at least 20% of the area of each SSB Ad.").

246 *See Am. Bev. Ass'n*, 187 F. Supp. 3d at 1127–30.

247 *Id.* at 1130.

248 *See* Bruce Y. Lee, *Here Is What Sugar-Sweetened Drink Warning Labels May Do to Obesity*, FORBES (Jan. 20, 2018), https://www.forbes.com/sites/brucelee/2018/01/20/here-is-what-sugar-sweetened-drink-warning-labels-can-do-to-obesity/#41579ffc5199.

impacts of SSB warnings on the prevalence of obesity indicate that they could reduce obesity by about four percent in San Francisco.[249]

The American Beverage Association and other plaintiffs[250] sought an injunction, contending that "the ordinance compels speech unconstitutionally."[251] Although the plaintiffs attempted to characterize a substantial portion of their advertisements as noncommercial speech,[252] the Federal District Court for the Northern District of California declined to extend the injunction, finding that this was a commercial disclosure, and the applicable standard of review was whether the disclosure requirement was reasonably related to the state's interest per *Zauderer*.[253] According to the court's then-established precedent in *CTIA – Wireless Ass'n v. City of Berkeley*,[254] "the 'factual and uncontroversial' requirement of *Zauderer* means, at most, that the compelled disclosure must convey a fact rather than an opinion and that, generally speaking, it must be accurate."[255] The district court rejected the industry argument that the ordinance is misleading because it singled out sugary beverages. Instead, the court explained that given the use of the word "contribute" in the warning, "a reasonable consumer would understand that the warning is directed to the general public and that the statement that SSBs are a contributing factor is to be viewed in the larger context of public health."[256] The warning "does not say that SSBs inevitably result in or will necessarily cause tooth decay."[257]

The plaintiffs also argued that this ordinance unfairly "singles out one of many cause(s)," but the court quickly disposed of this

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249 *See id.* (modeling assuming labels were present at all locations selling SSBs and such labels reduced the likelihood of purchase by 8 percent).

250 The other plaintiffs in the case are the California Retailers Association and California State Outdoor Advertising Association.

251 *See Am. Beverage Ass'n*, 187 F. Supp. 3d at 1126.

252 For example, "Coke issued advertisements proclaiming 'Love Wins' after the Supreme Court's marriage equality ruling." *Id.* at 1132.

253 *See id.* at 1134.

254 *See* CTIA - Wireless Ass'n v. City of Berkeley, 158 F. Supp. 3d 897 (2016). The Supreme Court vacated the judgment and remanded for further consideration in light of Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). *See* CTIA - The Wireless Ass'n v. City of Berkeley, 138 S. Ct. 2708 (2018).

255 *Am. Bev. Ass'n*, 187 F. Supp. 3d at 1135.

256 *Id.* at 1137.

257 *Id.*

under-inclusiveness argument, which was addressed in *Zauderer* itself: "we are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is 'under-inclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate."[258] The district court approvingly cited the idea that "[a]s a general matter, governments are entitled to attack problems piecemeal."[259] After going through a similar analysis in regards to obesity and diabetes,[260] the court concluded:

> The City has a legitimate interest in public health and safety, and the warning that SSBs contribute to obesity and diabetes is reasonably related to the City's interest in public health and safety, particularly in light of the evidence indicating that SSBs are a significant source of calories as well as a significant source of added sugar.[261]

Finally, the district court was not persuaded by plaintiffs' argument that this warning was "unduly burdensome" and would "chill" commercial speech.[262] The court explained that while this warning imposed a burden, "*Zauderer* simply requires that a disclosure requirement be reasonably related to the government's interest."[263] The court further acknowledged that a line exists when the disclosure requirement would no longer be reasonably related to the government's interest.[264] However, a textual warning covering 20 percent of the advertisement did not cross this threshold, particularly when colors and pictures on the remaining 80 percent still gave advertisers plenty of space to grab consumers' attention.[265] Although major corporations like PepsiCo provided declarations that such warnings would cause them to withdraw from the covered media entirely, these corporations did not provide any data testing the impacts of the warnings on consumers or estimates of the anticipated lost revenue if they continued to advertise with the warnings.[266] The district court cited to precedent

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258 *Id.* (citing *Zauderer*, 471 U.S. at 651 n.11).

259 *Id.*

260 *See id.* at 1139–42.

261 *Id.* at 1142.

262 *Id.*

263 *Id.*

264 *See id.* (providing examples, such as if the warning covered 80 percent of the ad).

265 *See id.* at 1143 (discussing research on the subject in the *Journal of the American Medical Association*).

266 *See id.* at 1144–45.

rejecting similar self-serving and unsubstantiated arguments in the context of cigar manufacturers, as tobacco companies had continued to profit while incorporating mandated warnings into their advertising schemes.[267]

The Ninth Circuit reversed and remanded, "conclud[ing] that the Associations are likely to succeed on the merits of their claim that the ordinance is an 'unjustified or unduly burdensome disclosure requirement[] [that] might offend the First Amendment by chilling protected commercial speech.'"[268] Additionally, the court found that the warning was "controversial as that term is used in the *Zauderer* framework."[269] The Ninth Circuit determined that a warning reading "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay . . . conveys the message that sugar-sweetened beverages contribute to these health conditions regardless of the quantity consumed or other lifestyle choices."[270] Instead, to be uncontroversial, the Ninth Circuit suggested that the warning should be qualified with terms like "overconsumption" and "may contribute."[271] Furthermore, the court agreed with the advertisers' under-inclusiveness argument, writing that "the warning conveys the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute to obesity, diabetes, and tooth decay than other foods."[272] However, in a footnote, the court explains that this is problematic not because the government is taking a piecemeal approach, but rather because it is misleading.[273] The Ninth Circuit characterizes the warning as a "disputed policy view[]," which is "one-sided."[274] Due to the allegedly misleading nature of the message, the court found that the required warning covering 20 percent of the advertisement "unduly burdens and chills protected commercial speech."[275]

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267 *See id.* at 1144.

268 Am. Beverage Ass'n v. City & Cty. of San Francisco, 871 F.3d 884, 888 (9th Cir. 2017) (quoting *Zauderer*, 471 U.S. at 651).

269 *Id.* at 895.

270 *Id.*

271 *Id.* (emphasis omitted).

272 *Id.*

273 *See id.* at 896 n.9.

274 *Id.* at 896.

275 *Id.* at 897.

Unfortunately, following the Ninth Circuit's opinion, the distinction between being under-inclusive and being misleading seems to collapse if a warning must account for all other contributing factors to avoid being misleading. As noted by commentators, "[s]uch nitpicking is perhaps explained by a failure to understand basic epidemiology;"[276] after all, there are usually numerous contributing factors to public health problems. It also strains common sense to suggest that a reasonable consumer will read a warning label saying SSBs contribute to obesity, diabetes, and tooth decay and jump to the conclusions that (A) sugary beverages are the only diet or lifestyle factor that contributes to diabetes, obesity, or tooth decay; (B) not drinking SSBs will prevent them from developing such health problems; or (C) drinking an occasional soda as part of an otherwise healthy lifestyle and diet will immediately cause health problems. In these interpretations, it seems the word "contribute" is being replaced with "is the sole and immediate cause." Based on the Ninth Circuit's opinion, a reasonable consumer is more akin to a lawyer looking for arguments as to why a warning could be misconstrued to be misleading. Judge Dorothy Nelson wrote a concurrence in the judgment, expressly to explain that the "tenuous conclusion that the warning's language is controversial and misleading" was unnecessary.[277] Instead, Judge Nelson would have remanded on the basis that the government has not demonstrated that the requirement that the warning cover 20 percent of the advertisement would not be unduly burdensome in the covered mediums.[278] Although this opinion was written before *National Institute of Family and Life Advocates*, the heightened analysis is in line with the majority of the Supreme Court's new approach.

This case was reheard en banc,[279] but the panel has yet to release an opinion.[280] Even assuming San Francisco ultimately

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276 Berman, *supra* note 25.

277 Am. Beverage Ass'n v. City & Cty. of San Francisco, 871 F.3d 884, 901 (9th Cir. 2017) (Nelson, J., concurring in the judgment).

278 *See id.* (Agreeing "that the City has not carried its burden in demonstrating that the twenty percent requirement at issue here would not deter certain entities from advertising in their medium of choice.").

279 *See* Am. Bev. Ass'n v. City & County of San Francisco, 880 F.3d 1019, 1020 (9th Cir. 2018).

280 For updates on the status, see *Status of Pending En Banc Cases*, U.S. COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/enbanc/ (last visited Oct. 10, 2018).

wins a favorable outcome in the case, which is even more uncertain after the intervening decision in *National Institute of Family and Life Advocates*, it will have required years of litigation and countless hours of staff resources to finally enforce an ordinance that was passed in 2015. Furthermore, while San Francisco was litigating to defend the regulations, the warnings could not serve their intended purpose of addressing major public health issues. Going forward, much uncertainty remains; it is particularly problematic that the district and circuit court firmly reached opposite conclusions about whether a given warning is misleading supposedly applying the same standard to the same set of facts.

B. *The Fight for Carcinogenic Warnings on Glyphosate*

The ongoing litigation in the California case *National Ass'n of Wheat Growers v. Zeise*,[281] highlights the challenges of evaluating scientific claims through a First Amendment lens. In *Wheat Growers*, industry groups sought an injunction on the listing of glyphosate as a chemical known to cause cancer, as well as on the warning requirement that goes into effect twelve months after that listing[282] pursuant to Proposition 65.[283] The industry groups, including Monsanto,[284] argued that both the listing and warning requirements violated their First Amendment rights by compelling them to make false, misleading, and controversial statements about their products. The Eastern District of California found that the listing itself was governmental speech, not commercial speech, and so First Amendment protections did not apply.[285] The court also found, as expected, that the warning label compels speech and is subject to *Zauderer*.[286] However, unexpectedly, the court granted

281 309 F. Supp. 3d 842 (E.D. Cal. 2018).

282 *See id*.

283 See discussion of Proposition 65, *supra* notes 117–121 and accompanying text.

284 Glyphosate is found in Roundup, "which is widely used by farmers on genetically engineered crops and by consumers on lawns. The company's agricultural productivity segment, which includes glyphosate, had net sales of $3.7 billion in fiscal-year 2017." Tom Polansek, *U.S. Judge Halts California Plan to Require Glyphosate Warnings*, REUTERS (Feb. 27, 2018), https://www.reuters.com/article/us-usa-pesticides-monsanto/u-s-judge-halts-california-plan-to-require-glyphosate-warnings-idUSKCN1GB2H0.

285 *See Wheat Growers*, 309 F. Supp. 3d at 850.

286 *See id.* ("It is only the upcoming July 2018 deadline for providing the Proposition 65 warning that compels private speech.").

the injunction for the warning label, concluding that the industry groups had a likelihood of success on the merits of their First Amendment claims.[287]

The bulk of the court's analysis addressed the question of whether the warning was "purely factual and uncontroversial information."[288] It is helpful to understand the Proposition 65 listing process in order to fully address how *Zauderer's* "purely factual and uncontroversial" was applied in this case. Under Proposition 65, known carcinogens, which may be identified by any member of a list of organizations, including the EPA, FDA, and International Agency for Research on Cancer (IARC), are listed by the state of California, and a "clear and reasonable" warning must be provided on the products containing those chemicals within one year of the listing.[289] As noted by the State, at the time litigation ensued in *Wheat Growers*, there had yet to be a determination of exactly what the warning label would have to say for glyphosate.[290] In its briefs, the State did not "provide . . . example[s] of a more detailed warning explaining the debate regarding glyphosate's carcinogenicity that would pass muster under Proposition 65 and the applicable regulations," and during oral arguments would not agree to "alternative warnings proposed by the court."[291] The court broadly declared that "any warning which plaintiffs might be able to devise consistent with defendants' demands under the regulations interpreting Proposition 65 would be inconsistent with plaintiffs' First Amendment rights."[292]

When requesting reconsideration of the injunction, the state proposed several alternative warning labels that it believed were factually accurate and uncontroversial.[293] However, the court

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287 *See id.* at 853.

288 *Id.* at 850–53.

289 Cal. Health & Safety Code § 25249.6.

290 *See* National Ass'n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842, 852 (E.D. Cal. 2018).

291 *Id.*

292 *Id.* at 850.

293 One proposed warning reads: "WARNING: This product can expose you to glyphosate, a chemical listed as causing cancer pursuant to the requirements of California law. For more information go to www.P65Warnings.ca.gov." Memorandum and Order RE: Motion to Alter or Amend Preliminary Injunction Order, Nat'l Ass'n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842 (E.D. Cal. 2018) (2:17-cv-02401-WBS-EFB), 5. The second reads:

found that despite "purportedly committ[ing] clear error by determining there is no possible warning that can comply with Proposition 65 and not violate plaintiffs' First Amendment rights," the "extraordinary remedy of reconsideration" is not warranted.[294] The court determined that the new evidence presented by the State did not change the purely factual and uncontroversial analysis.[295] According to the court, the "analysis here is not whether the IARC's determination is persuasive or supported by competent evidence, but rather whether a warning conveying the message that glyphosate causes cancer is factual and uncontroversial."[296] Unfortunately, the opinion does not expand on how one would go about proving a claim is factual and uncontroversial if the credibility of IARC's determination is irrelevant.

C. *The Imbedded Deference Question*

Although *Wheat Growers* and *American Beverage Ass'n* are ostensibly First Amendment cases, they raise important questions about deference. *Wheat Growers* can be reframed as asking, if voters pass a law requiring warning labels on the basis of a scientific finding from one of more of a list of agencies and organizations, should courts be able to second-guess the sufficiency of the finding that triggered a listing? Rather than deferring to the judgment of the voters who enacted Proposition 65—who specified which findings from which scientific organizations would trigger warning labels—the district court evaluated the scientific certainty of this finding and determined that it did not warrant a warning. By categorizing this determination as falling under the heading of a factual and uncontroversial analysis, the court rewrote the policy embodied in Proposition 65 by favoring findings of a U.S. agency (EPA) over

> WARNING: This product can expose you to glyphosate, a chemical listed as causing cancer pursuant to the requirements of California law. The listing is based on a determination by the United Nations International Agency for Research on Cancer that glyphosate presents a cancer hazard. The U.S. Environmental Protection Agency has tentatively concluded in a draft document that glyphosate does not present a cancer hazard. For more information go to www.P65warnings.ca.gov.

Id. at 7.

294 *Id.* at 4.

295 *See id.* at 4–5.

296 *Id.* at 5.

those of an international agency (IARC) when the court asserted that the EPA "concluded that there is no evidence that glyphosate causes cancer."[297]

The court flatly rejected the State's argument "that chemicals are 'known' to the State to cause cancer when, inter alia, they are classified by the IARC as '[p]robably carcinogenic to humans' and there is 'sufficient evidence of carcinogenicity in experimental animals.'"[298] Instead, the court found that the "required warning would nonetheless be misleading to the ordinary consumer,"[299] as a reasonable consumer would not interpret its assumed warning label of "'known to cause cancer'" as applying when only one organization has found it is a probable carcinogen.[300] Based on this portion of the opinion, it is impossible to know how many organizations would have to agree on a scientific finding before it would not be misleading to a reasonable consumer.

Additionally, *Wheat Growers* ignores qualitative considerations. Perhaps only one agency has made a carcinogenic finding, but the finding is based on a robust examination of years' worth of peer-reviewed studies by a panel of experts. In contrast, maybe other agencies that did not reach the same conclusion did not devote as many resources to examining the issue or relied exclusively on industry-funded studies. State and local regulators may, and should, want to take such methodological factors into consideration, rather than regulating based on how many agencies made a finding. Furthermore, this decision raises questions about whether agency findings in the United States should be given more weight than those of international bodies. What if only the EPA had found glyphosate was a probable carcinogen, but no other listed organizations had? Perhaps the finding of a U.S. agency would be sufficient to trigger a warning label. Then again, maybe this would be insufficient if the majority of international agencies determined that there was not enough information to decide either way.[301]

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297 National Ass'n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842, 847 (E.D. Cal. 2018).

298 *Id.* at 851. (citing Cal. Code Regs. tit. 27 § 25904(b)).

299 *Id.*

300 *Id.*

301 Part of the opinion suggests that one agency finding is never enough: "However, a reasonable consumer would not understand that a substance is

The court seemed aware that this opinion may raise more questions than it answers. In fact, in the final footnote of the opinion denying California's motion to alter or amend the preliminary injunction, the court explicitly declines to provide further guidance: "Once again, the court expresses no opinion as to whether a statement that a chemical causes cancer is factual and uncontroversial where there is stronger evidence in support of the chemical's carcinogenicity."[302] Thus, pre-litigation, regulators have no guideposts for determining whether their evidence in support of a mandatory disclosure is strong enough to survive a First Amendment challenge.

Additionally, this case raises challenging questions of risk assessment, risk tolerance, and risk allocation. While we may be able to measure and quantify risks using scientific methods, there is no scientific basis for determining an acceptable level of risk—that is a policy judgment dependent upon values.[303] To complicate matters further, even when there is a scientific consensus on the level of risk, people may not perceive that consensus. Research into the cultural cognition of scientific consensus supports the notion that people "form risk perceptions that are congenial to their values."[304] For example, researchers have found:

> Persons whose values are relatively hierarchical and individualistic will thus be skeptical of environmental risks, the widespread acceptance of which would justify restricting commerce and industry, activities that people with these values prize; persons with more egalitarian and communitarian values, in contrast, resent commerce and industry as forms of noxious self-seeking productive of unjust disparity, and thus readily

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'known to cause cancer' where only one health organization had found that the substance in question causes cancer." *Id.*

302 Memorandum and Order RE: Motion to Alter or Amend Preliminary Injunction Order, Nat'l Ass'n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842 (E.D. Cal. 2018) (2:17-cv-02401-WBS-EFB), 9 n.8.

303 *See* RICHARD L. REVESZ, ENVIRONMENTAL LAW & POLICY 51 (3d ed. 2012). Risk assessment is a process to "analyze the magnitude of an environmental risk," and risk management is "decid[ing] whether and how much risk should be regulated." *Id.* No scientific process can determine how much we should regulate risk; that involves a policy judgment based on values.

304 Dan M. Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. RISK RESEARCH 147 (2011). The theory of the cultural cognition of risk "posits a collection of psychological mechanisms that dispose individuals selectively to credit or dismiss evidence of risk in patterns that fit values they share with others." *Id.* at 148.

> accept that such activities are dangerous and worthy of regulation.[305]

Additionally, studies in psychology and behavioral economics indicate that numerous cognitive factors warp an individual's risk assessment.[306] For example, people generally struggle with understanding risk as statistical probabilities,[307] and might resort to black-and-white categories such as dangerous and safe.

These factors become crucial when making factual and uncontroversial determinations under *Zauderer*. While judges may make every effort to be neutral arbiters, these studies suggest that, like all other people, judges have values which will influence their perception of scientific certainty. Yet, the values of judges might not be the same as those of a regulatory agency, the members of a legislature, or the majority of voters in a given community. Perhaps voters would rather err on the side of caution,[308] instead of labeling products as carcinogenic only after there is widespread scientific consensus, which may only be reached after millions of people have been exposed to the chemicals at issue and face an elevated risk of cancer. Evaluating scientific certainty as a First Amendment issue creates situations where a judge may supersede policy determinations with his or her own view of the acceptable allocation of risks in regulation.

Law firms representing clients who are regulated under Proposition 65 have followed *Wheat Growers* closely. Beveridge & Diamond P.C. has explained that this "glyphosate case[] exemplifies the regulatory uncertainty that arises when the complex scientific findings behind laws and regulations are challenged in courts."[309] Other firms are more cautious about the impacts of this Proposition 65 case, noting that "[n]ot all Prop 65 chemicals have the same issues that exist with Glyphosate and the

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305 *Id.* at 148.

306 *See* Roesler, *supra* note 29, at 494 (citing sources); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 33–39 (1993).

307 *See id.*

308 *See id.* (explaining that some people "view chemical substances as either safe or dangerous in absolute terms," and "believe risk can and should be completely minimized.").

309 Gary Smith, *California Appeals Court Upholds State's Reliance on Conclusion by a Foreign Agency to Classify Glyphosate as "Cancer-Causing"*, BEVERIDGE & DIAMOND P.C. (May 23, 2018), https://web.archive.org/web/20180527195220/http://www.bdlaw.com/news-2238.html.

axiom that 'bad facts make bad law' may come into play here, such that any ruling by the Federal court may be narrow and will certainly be appealed."[310]

These questions about assessment of scientific certainty become all the more pertinent in our current political climate, where federal agencies, like EPA, have removed any mention of climate change—and decades' worth of data—from their websites entirely.[311] When read alongside the ongoing *American Beverage Ass'n* case, even when there is a broad basis of scientific support, labels may nonetheless be misleading to consumers.[312] This instability leaves policymakers in a tricky spot.

IV. THE SIGNIFICANCE OF FIRST AMENDMENT CHALLENGES FOR ENVIRONMENTAL POLICYMAKERS

Although *Wheat Growers* is currently on appeal, it should be of concern to policymakers, as it is the result of a judge reweighing the scientific evidence for himself and disregarding the policy determination made through the democratic process in Proposition 65. Similarly, while *American Beverage Ass'n* is superficially a debate about whether a warning label is factual or misleading, it demonstrates conflicting views about the appropriate reach of local governments in addressing complicated public health concerns, such as obesity. Furthermore, both of these cases demonstrate that every single word of a warning may be turned over and debated, with even small differences in phrasing, that may not make a difference to ordinary consumers, playing a large role in the

310 Daniel J. Herling, *A Federal Court Gets Opportunity to Weigh in on Prop 65 with a Little Help from Some Friends*, MINTZ VIEWPOINTS (Jan. 11, 2018), https://www.mintz.com/insights-center/viewpoints/2171/2018-01-federal-court-gets-opportunity-weigh-prop-65-little-help.

311 *See, e.g.*, Chris Mooney, *EPA's Climate Change Website Went Down a Year Ago for 'Updating.' It's Still Not Back.*, WASH. POST (May 4, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2018/05/04/it-has-been-more-than-a-year-since-epa-took-down-its-climate-website-for-updating/ ("The U.S. Environmental Protection Agency had removed an informational website about climate change, taking down a page that had been up, in some form, for nearly two decades and under three presidents.").

312 Finding the warning false or misleading even in the face of government arguments that the warnings reflected "a clear scientific consensus." Am. Beverage Ass'n v. City & Cty. of San Francisco, 871 F.3d 884, 895 (9th Cir. 2017).

court's analysis.[313] The Supreme Court's opinion in *National Institute of Family and Life Advocates* confuses matters further by suggesting that there are "facts," and then there are facts connected to politically controversial subjects, which may be treated as "non-facts" in the First Amendment analysis.[314] A lack of consensus about how to even define the word "fact" does not bode well for environmental disclosure regulations. Under the Trump Administration, many previously established scientific findings are now up for debate. The country is deeply divided,[315] and, regardless of the voluminous record of data and scientific research, many environmental and public health issues are contentious.

Even when regulators present what has long been seen as a legitimate state interest, such as public health, and spend years developing a factual record and carefully crafting regulations, courts may find that mandatory informational disclosures fail to meet the purely factual and uncontroversial standard from *Zauderer*. As explained by John Coates, many of these First Amendment decisions ignore the practical realities of regulatory work, and seem to be based on some alternate reality where,

> agencies or legislatures can simply rewrite their regulations or statutes with minimal effort and delay, to bring them into line with the court's view of what is "necessary" to achieve the valid purposes of the regulation or statute. Such naiveté is hard

313 *See, e.g.*, *id.* ("Because San Francisco's warning does not state that *overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay, the accuracy of the warning is in reasonable dispute.") (emphasis in original).

314 *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018) (the notice "requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic. Accordingly, *Zauderer* has no application here.").

315 *See* Monica Anderson, *For Earth Day, Here's How Americans View Environmental Issues*, PEW RESEARCH CTR. (Apr. 20, 2017), http://www.pewresearch.org/fact-tank/2017/04/20/for-earth-day-heres-how-americans-view-environmental-issues/ (noting that environmental protection is an increasingly partisan issue: in 1994, 85 percent of Democratic voters and 71 percent of Republican voters supporting doing whatever it takes to protect the environment, in 2016 those figures were 90 percent and 52 percent, respectively). There is also a divide on the issue of the extraction and use of fossil fuels, from coal to fracking. *See* Brian Kennedy, *Clinton, Trump Supporters Deeply Divided Over Use of Fossil Fuel Energy Sources*, PEW RESEARCH CTR. (Oct. 31, 2016), http://www.pewresearch.org/fact-tank/2016/10/31/clinton-trump-supporters-deeply-divided-over-use-of-fossil-fuel-energy-sources/.

> to understand in an era of political logjams, "do-nothing" Congresses, and increasingly bitter and polarized politics, which make it more likely that the result of a court striking down a law is that it will stay struck.[316]

Of course, another explanation is that judges are aware of the political capital required to prepare and pass new regulations, and these First Amendment decisions are just part of a larger deregulatory strategy.[317] After all, framing the striking down of these disclosures as an issue of free speech makes it sound like a more righteous cause than judicial activism—the overturning regulations on the basis of ideological differences.[318]

From the perspective of policymakers, mandating even a simple informational disclosure may be such a litigation gamble that they are deterred from attempting an informational approach. When facing years of First Amendment litigation, "[a]gencies risk resources, demoralization, and loss of reputation and status when they lose these battles."[319] Perhaps agencies will avoid litigation by collecting information from regulated entities and publishing it themselves, such as on a website.[320] However, as discussed above in the context of benchmarking, there are no guarantees that such information will ever reach the intended audience.[321]

Agencies could also try to avoid protracted litigation by being extremely cautious with the language used in warning labels. For instance, San Francisco's SSB warning could read:

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316 Coates, *supra* note 18, at 247.

317 *See* Haley Sweetland Edwards, *How the First Amendment Became a Tool for Deregulation*, TIME (July 19, 2018), http://time.com/5342749/first-amendment-deregulation/ (discussing the Supreme Court's "conservative majority . . . redefin[ing] the First Amendment, making it a powerful deregulatory tool"); *see generally* Coates, *supra* note 18, at 247.

318 Ilya Shapiro at the Cato Institute advises lawyers to employ free speech arguments whenever possible because "it's easier for people to accept" decisions protecting speech. Edwards, *supra* note 317.

319 Coates, *supra* note 18, at 270.

320 This aspect of Proposition 65 easily survived judicial review even in *Wheat Growers*. *See* Nat'l Ass'n of Wheat Growers v. Zeise, 309 F. Supp. 3d 842, 850 (E.D. Cal. 2018) ("California's listing of chemicals it purportedly knows to cause cancer is neither a restriction of private speech nor government-compelled private speech.").

321 *See supra* notes 105–116 and accompanying text on New York City Benchmarking and the addition of a mandatory disclosure requirement for information to be posted in the building itself, as opposed to only on an online portal.

> WARNING: Drinking sugar-sweetened beverages may be one of many dietary factors that can contribute to the future development of Type II diabetes, obesity, and tooth decay. High calorie foods and beverages, in general, contribute to obesity. Lifestyle factors, like exercise, also play a role in reducing risks of obesity and Type II diabetes. This is a message from the City and County of San Francisco.

There are tradeoffs involved here too, because, at a certain point, having longer disclosures with a more diluted message may defeat the purpose of the disclosure entirely, which is to quickly give consumers the facts that they need to make informed decisions. Instead, if you throw in too many clauses and hedges, consumers may no longer be able to discern a clear message, or may be deterred from reading the warning in the first place.[322]

Furthermore, although governments are supposed to face less demanding legal standards when implementing mandatory informational disclosures than when implementing restrictions on speech, the line between these two categories was blurred in *National Institute of Family & Life Advocates*. It seems that disclosures are more secure from First Amendment challenges when presenting a numerical measurement, such as the number of calories,[323] the miles-per-gallon, or the kilowatt hours of energy consumed. The real rub comes when governments attempt to connect an action or product with the risk or policy issue that they are trying to address. For example, while San Francisco might be able to have a label reading "WARNING: A 12 Oz Coke contains 39 grams of Sugar," the label becomes controversial when linked to a public health problem, like obesity.[324] However, reminders about the health impacts of actions are the point these public health disclosures. So, if disclosures cannot connect information with consequences, it thwarts the entire purpose of the regulatory approach.

Most, if not all, public health and environmental issues have numerous causes, thus local and state policymakers may—quite

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322 *See, e.g.*, Sunstein, *supra* note 102, at 668–69 (explaining consumers may "treat a large amount of information as equivalent to no information at all").

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

324 Companies would still likely challenge such a warning as misleading by claiming that it suggests sugar is worse than other forms of calories. However, this seems to be more in line with widely accepted disclosures, like calorie counts on menus.

reasonably—want to address the low-hanging fruit first. They may also want to innovate by trying new regulatory approaches that represent the values of their constituents. The ability of policymakers to tailor regulations to their community's priorities is seriously undermined if they cannot address any politically controversial subjects, such as climate change, directly. Unfortunately, under the First Amendment analysis, industry groups can prey upon the complexity of causation to cast basic environmental or public health disclosures as misleading. By analyzing these issues through a First Amendment lens, rather than deferring to reasonable attempts by policymakers to address public health and environmental threats, courts take policy judgments away from voters, legislators, and expert agencies, instead imposing their own views of what makes good policy from the bench.

CONCLUSION

Given the current inconsistency in the First Amendment doctrine regarding what is factual and uncontroversial, prior to litigation, the level of scrutiny that a court will apply to a disclosure regulation and how stringently that particular standard will be applied is unpredictable. For regulators, this instability can undermine confidence that a new disclosure requirement will survive judicial review, and lead to uncertainty about what evidence is required to support the regulation. For the regulated community, this is an inviting atmosphere to make First Amendment challenges against informational disclosure regulations, as there are unsettled standards. Unfortunately, the regulated community has discovered that if they do not get their desired result during the regulatory process, they have a second chance to persuade judges sympathetic to their views of economic and regulatory policy[325] by bringing a First Amendment challenge.

Unlike public discourse, which is crucial for the functioning of a democratic society, commercial speech "is constitutionally valued merely for the information it disseminates."[326] Thus, the First Amendment analysis of mandatory informational disclosures should be focused on the interests of the public. However, the First Amendment doctrine is being used as a backdoor for judges to

325 *See* Wu, *supra* note 19.

326 Post, *supra* note 151, at 4.

make economic and social policy judgments about the wisdom of public health and environmental disclosures. Instead of allowing voters, legislators, and delegated agencies to determine what information is important and what level of risk is acceptable, judges are making these policy judgments under the cloudy cover of determinations about whether information is "purely factual" and "uncontroversial." What is nominally a First Amendment challenge actually raises important questions regarding deference.

These issues are particularly salient in the context of environmental regulations, as environmentally-progressive cities or states may want to take the lead on environmental and public health issues, act on the basis of cutting-edge scientific evidence, and address problems that the federal government is neglecting. Rather than having the freedom to act as laboratories of experimentation[327] during a crisis of leadership at the federal level, local and state governments are curtailed from implementing novel informational disclosures due to First Amendment litigation risks and the time and expense that comes along with it.

327 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").