RECORD NO. 18-5195

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

CIGAR ASSOCIATION OF AMERICA; INTERNATIONAL PREMIUM CIGAR AND PIPE RETAILERS ASSOCIATION; CIGAR RIGHTS OF AMERICA,

Plaintiffs – Appellants,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX MICHAEL AZAR, II, in His Official Capacity as Secretary of Health and Human Services; SCOTT GOTTLIEB, M.D., in His Official Capacity as Commissioner of Food and Drugs,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* PROFESSOR OF MARKETING J. SCOTT ARMSTRONG IN SUPPORT OF NEITHER PARTY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amicus curiae*. All parties are listed in the Brief for the Appellants. As of the date of this Brief, no other amici curiae have filed notices or briefs with the Court.

B. *Rulings under review*. References to the rulings at issue appear in the Brief for the Appellants.

C. *Related Cases.* References to any related cases are appear in the Brief for the Appellants.

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STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief of Appellants.

STATEMENT OF IDENTITY, INTEREST OF *AMICUS CURIAE*[1], AND SOURCE OF AUTHORITY TO FILE

J. Scott Armstrong is a Professor of Marketing at the University of Pennsylvania's Wharton School. In this role, Professor Armstrong has personally conducted, overseen, and reviewed substantial research analyzing the practical effects of compelled disclaimers on consumers. This research covers a broad spectrum of consumer goods, and the results are striking—government-mandated disclaimers not only tend to be ineffective, but to actually increase consumer confusion.

Aware of these practical effects, Professor Armstrong has long been troubled by the false assumptions that have underpinned court rulings on the subject of compelled disclaimers. Professor Armstrong was therefore encouraged to see the Supreme Court's opinion in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377–78 (2018) ("*NIFLA*"), which imposed meaningful

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae* or his counsel—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D) and Circuit Rule 29(a)(2), counsel for *amicus* states that counsel for the appellants and counsel for the appellee have consented to the filing of this brief.

evidentiary burdens on government, as this approach is most consistent with the likelihood, or lack thereof, that a government-mandated disclaimer will actually have a beneficial effect.

Professor Armstrong is providing his practical knowledge to this Court in the hope that it will assist the Court in performing the meaningful scrutiny called for by *NIFLA* and other Supreme Court precedent. Professor Armstrong takes no position on the ultimate outcome of the case or whether Appellees can meet the burdens imposed by the Supreme Court.

SUMMARY OF ARGUMENT

"'Mandated disclosure' may be the most common and least successful regulatory technique in American law." Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 3 (2014). Indeed, government-mandated disclaimers not only tend to be ineffective, but "often have effects opposite to those intended." Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. of Pub. Pol'y & Mktg. 293–304 (2012) ("*Mandatory Disclaimers*"). In a review of 18 separate experimental studies, government-mandated disclaimers increased consumer confusion in all of them. *See id.* at 293–94, 302.

The misguided push for government-mandated disclaimers has been powered by a series of false assumptions that have also found their way into judicial opinions. Those judicial opinions have overstated disclaimers' effectiveness (often without reviewing any evidence as to their effectiveness) and grossly understated their harms (often without reviewing any evidence as to their harms). The result has been to cause more harm to society than would otherwise have been inflicted.

Last term, the Supreme Court clarified that the government bears the entire burden in all compelled commercial speech cases, including the "burden to prove" that a compelled disclaimer will "remedy a harm." *See Nat'l Inst. of Family and*

Life Advocates v. Becerra, 138 S. Ct. 2361, 2377–78 (2018) ("*NIFLA*"). For the practical reasons stated herein, Professor Armstrong contends that this is the correct approach. After all, considering that compelled disclaimers typically result in net harm to the consuming public, the government should bear the burden to prove that the specific disclaimer at issue is the rare exception where the claimed harm is actually remedied instead of worsened.

BACKGROUND

This brief discusses the interplay, or unfortunate lack thereof, between the Supreme Court's compelled disclaimer jurisprudence and the actual effects of compelled disclaimers on consumers. Before turning to the research conducted by Professor Armstrong and others, along with the impact the research results should have on this Court's analysis, it would therefore be helpful to provide some brief background on the test for compelled corrections to inherently misleading speech set forth in *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 650–53 (1985). This will include a review of *Zauderer* and its Supreme Court progeny, ending (for now) with *NIFLA*.

In recent years, *Zauderer* has played an outsized role in commercial-speech cases, often leading courts to uphold laws that compel speech with little evidence of their supposed benefits. But *Zauderer* was never supposed to feature so prominently in First Amendment jurisprudence. A different case, *Central Hudson*,

was where the Supreme Court announced the general test for commercial speech regulations. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Under that test, any speech that was not false, deceptive, or misleading (otherwise known as *Central Hudson*'s threshold prong) was to receive, at a minimum,[2] meaningful protection under a form of intermediate scrutiny that has come to be known as the *Central Hudson* test.[3] *Id.* at 564–71.[4]

Zauderer, on the other hand, was a more modest case that primarily involved the application of the full *Central Hudson* test to regulations of non-misleading speech. However, buried in its pages was a section analyzing a compelled supplement to speech that *was* inherently misleading and therefore was not entitled to full protection under *Central Hudson*. *Compare* 471 U.S. at 637–49 (applying *Central Hudson* test to censorship of speech that was not "false, deceptive, or

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[2] In *NIFLA*, the Supreme Court explained that government-scripted disclaimers are inherently content-based. *Id.* at 2371. Therefore, strict scrutiny should typically apply (except for when the underlying speech is actually or inherently misleading). *See id.*; *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny to compelled warning label). Although this is not the focus of this brief, Professor Armstrong would view the application of strict scrutiny as entirely consistent with the fact that the instances when compelled disclaimers actually have a beneficial impact on consumers are rare.

[3] The *Central Hudson* test's remaining prongs require the government to prove that: (i) the government possesses a substantial interest; (ii) the regulation directly advances the interest; and (iii) the restriction is narrowly tailored. *See id.* at 564–71.

[4] The Supreme Court has applied *Central Hudson* to food and beverage labels. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (holding that federal restriction on listing alcohol content on beer labels failed the *Central Hudson* test).

misleading") *with id.* at 650–53 (explaining different test for compelled corrections of inherently misleading speech). The inherently misleading advertisement in question had promised clients that they would owe "no legal fees" if their lawsuits were unsuccessful, but failed to explain that "legal fees" did not include "significant litigation costs" for which they could still be liable. *Id.* at 631, 650.

In upholding the mandated correction, the Court explained that, when it came to speech that was inherently misleading, the government need not satisfy *Central Hudson*; it could compel corrections if it satisfied a more lenient test. Under that test—now commonly called the *Zauderer* test—the government may require correction of inherently misleading speech if it is able to show that the compelled speech: (i) only included factual and uncontroversial language; (ii) was reasonably related to correcting inherently misleading speech; and (iii) was not unduly burdensome. *Id.* at 650–53.

In subsequent opinions, the Supreme Court repeatedly explained that *Zauderer*'s test applies only to compelled corrections of "inherently misleading speech." *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (applying *Zauderer* because, as "in that case, [the] required disclosures are intended to combat the problem of inherently misleading commercial advertisements"); *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 146–49 (1994) (applying intermediate scrutiny to compelled disclaimer directed at non-

misleading speech); *see also Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari and explaining that even though the Eleventh Circuit was correct to apply *Central Hudson* to compelled disclaimer directed at non-misleading speech, the Justices would have granted certiorari because the Eleventh Circuit was not strict enough on the government).

Nonetheless, in the over three decades since *Zauderer*, the opinion's test for compelled disclaimers has been increasingly invoked by the lower courts in situations outside of its original purpose. In doing so, the courts have created two different circuit splits. The first split is over *how* to apply *Zauderer*'s test.[5] The second split is over *when* to apply *Zauderer*'s test.[6]

Last term, the Supreme Court resolved the first split and implied the eventual resolution of the second. *See NIFLA*, 138 S. Ct. at 2371–72, 2377–78. As to the question of *how* to apply *Zauderer*, the Court explained that, unlike rational basis review, the *Zauderer* test places the entire burden on the government. *See id.* at 2377. Specifically, the Supreme Court held in *NIFLA* that *Zauderer* imposes on government the "burden to prove" that: (i) the required disclaimer will "remedy a harm"; (ii) the supposed harm being addressed is "potentially real not purely hypothetical"; and (iii) the required disclaimer "extends no broader than

[5] *See infra* Argument § III.
[6] *See infra* Argument § V.

reasonably necessary." *Id.* at 2378 (internal citations omitted); s*ee infra* Argument § III.

As to the question of *when* to apply *Zauderer*, the Court did not expressly mention this aspect of *Zauderer*, but arguably provided doctrinal guidance. Specifically, in the opinion's other sections, the Court held that exceptions to the heightened scrutiny typically applied in First Amendment cases should not be created or expanded. *See id.* at 2371–72. This suggests that some circuits' expanded use of *Zauderer*'s more lenient standard of review may be mistaken. *See infra* Argument § V.

As this case law has developed, so, too, has social science regarding compelled disclaimers' effects. Today, there is a large body of experimental research finding that compelled disclaimers typically do not work. *See infra* Argument § II. Particularly given the Supreme Court's recent clarification that the burden to justify compelled speech is borne by the government, these findings suggest that courts should view the claimed benefits of compelled speech with significant skepticism. Unfortunately, until now, these remarkably consistent research results showing the harms caused to consumers by compelled disclaimers have been underused by advocates, and consequently, the courts.

ARGUMENT

I. Introduction

Professor Armstrong's research (as well as research performed by others) strongly indicates that compelled disclaimers are ineffective and frequently harmful. This makes it unlikely that many compelled disclaimers would be able to overcome any meaningful evidentiary burden at all, let alone the burdens imposed by the Supreme Court in *NIFLA*. Therefore, this section will first discuss the research examining compelled disclaimers' effects on consumers. Next, it will discuss *NIFLA*'s clarification that *Zauderer* is a meaningful standard of review, after which it will apply the research to *NIFLA*'s directive. Finally, it will argue that the confusion over when to apply *Zauderer* should be resolved in a manner consistent with the practical effects of compelled disclaimers on consumers.

II. Professor Armstrong's research shows that many government-mandated disclaimers are counterproductive.

Despite the ubiquity of government-compelled disclaimers in modern commerce, there is no evidence that this type of compelled speech generally provides benefits to consumers. Although this may sound counter-intuitive—how could additional information fail to benefit consumers?—it is actually consistent with a large and well-established body of economic theory. And the failure of mandatory disclaimers is not merely theoretical: numerous studies have attempted to quantify the alleged benefits of mandatory disclaimers only to find that such

disclaimers are often worse than useless, leading consumers to make systematically worse commercial decisions.

To begin, economic theory predicts that sellers have a direct incentive to disclose useful information about their products and services to consumers; namely, sellers want buyers to be satisfied with their purchases so that they will become repeat customers or recommend their products or services to others. *Mandatory Disclaimers* 293–94. Sellers also have a strong incentive to calibrate the amount of disclosure they provide to the buyer's needs. Among other things, this means that sellers are motivated to provide warnings with products that may be dangerous in surprising ways or extents—for example, with a clear liquid that is poisonous—but not with products whose dangers are well known or obvious, such as a knife. *Id.* at 293. Sellers are also motivated to make sure that these disclosures are effective and easy to understand. And sellers know that if they fail to make these types of disclosures, their competitors might do so for them. *Id.* at 294 (observing that when the FTC's prohibition on comparative health claims in cigarette advertisements was lifted, cigarette companies reduced levels of tar and nicotine in order to distinguish themselves from their competitors). As a result, sellers that fail to adequately disclose the risks associated with their products or services run the risk of reputational harm, lost sales, and often tort liability.

By contrast, government regulators do not face these same incentives. If a government-compelled disclaimer fails to disclose a surprising or difficult-to-detect risk, the government bears no particular cost. The same is true if a compelled disclaimer fails to disclose a risk effectively, either because the disclaimer itself is confusing or because it is buried among other disclaimers that address obvious or well-known risks. As a result, one would expect that government-compelled disclaimers will, in general, be both more prolific and less useful than disclaimers voluntarily provided by sellers. And these poorly calibrated disclaimers can cause serious harm. "By requiring disclaimers, governments absolve buyers and sellers of responsibility for care and thus encourage irresponsibility." *Id.* at 295.

A recent survey of the literature on compelled disclaimers by Professor Armstrong and his co-author Kesten Green supports these concerns. After conducting a comprehensive search for empirical studies on the effects of mandatory disclaimers, Professors Armstrong and Green discovered two recurrent problems with government-compelled disclaimers: (i) government-compelled disclaimers cause consumer confusion, and (ii) government-compelled disclaimers have unintended (often perverse) effects on beliefs and behavior. *See generally id.* at 293–304.

First, disclosures often confuse consumers. *See id.* at 297. This problem is well-illustrated by an experiment that Professors Armstrong and Green conducted in 2007 regarding the efficacy of disclaimers Florida required for certain dentists. *See id.* at 298–301. Under Florida law, any licensed dentist was allowed to perform implant dentistry, but some dentists chose to pursue additional credentialing from the American Academy of Implant Dentistry. *See id.* at 298. Dentists who wished to disclose this credential in their advertising were required to include a disclaimer that read:

> Note: Implant dentistry is not recognized as a specialty area by the American Dental Association or the Florida Board of Dentistry. The AAID is not recognized as a bona fide specialty accrediting organization by the American Dental Association or the Florida Board of Dentistry.

Id. at 299.

The experiments performed by Professors Armstrong and Green showed that the disclaimer's effect on consumers was to increase, rather than decrease, confusion. *Id.* at 300. Even though AAID certification is difficult to acquire and signifies genuine expertise in implant dentistry, consumers who were exposed to the disclaimer were more likely than those who were not to conclude that an AAID certified dentist was *less qualified* to perform implant dentistry than a dentist who was not certified. *Id.* This misinterpretation was particularly acute among less-

educated subjects. *Id.* This finding is consistent with multiple other studies on the subject of compelled disclaimers. *Id.* at 296–98.[7]

Beyond increasing consumer confusion, even the clearest government-compelled disclaimers can backfire in other ways that are at odds with the government's stated goals. In one laboratory experiment, for example, 155 subjects were exposed to an advertisement (a picture of a bottle or can of an alcoholic beverage with its label) with the U.S. Surgeon General's warning displayed underneath. *Id.* at 297. These subjects rated the benefits of the advertised product as greater and the risks as lower than other subjects who were given the advertisement without the warning. *Id.* In addition, male subjects exposed to the warning reported higher drinking intentions than those who were not. *Id.* In another experiment, approximately 200 male high-school students who were exposed to warning signs stating "DANGER, Shallow Water, You Can Be Paralyzed, NO DIVING," were found to be more likely to dive into the shallow end of the pool than were the similar number of students who were not exposed to the sign. *Id.*

These examples are not outliers. After examining the evidence from 18 experimental studies related specifically to mandatory disclaimers, Professors

[7] This research was based on the facts presented in *Borgner*, wherein the Eleventh Circuit held that this compelled disclaimer survived the *Central Hudson* test. *Borgner v. Brooks*, 284 F.3d 1204, 1210–15 (11th Cir. 2002).

Armstrong and Green found that in all cases the mandatory disclaimers caused confusion among consumers, and were ineffective or harmful in 15 studies that examined perceptions, attitudes, or decisions. *Id.* at 302. In short, in the absence of contrary evidence, there is no reason to assume that any particular compelled disclaimer will benefit consumers, and there is considerable reason to fear that such a disclaimer will confuse and mislead them. *Id.* at 296–98.

III. *NIFLA* resolved the circuit split over *how* to apply *Zauderer*, placing the evidentiary burden squarely on the government.

In *NIFLA*, the Supreme Court provided clear guidance on how to apply *Zauderer* in those cases where it is applicable. *See* 138 S. Ct. at 2377–78. This guidance is irreconcilable with the approaches taken by the Second and Ninth Circuits, and to a lesser extent, this Court. Therefore, the circuit split will be briefly addressed before turning to *NIFLA*'s resolution of the split and its relationship to the experimental research discussed above.

Prior to *NIFLA*, circuit courts disagreed over whether *Zauderer*'s section on compelled corrections of inherently misleading speech imposed meaningful burdens on the government. On one end of the spectrum were the circuits that required the government to show that the compelled disclaimers actually had a beneficial impact. *See*, *e.g.*, *Dwyer v. Cappell*, 762 F.3d 275, 283 (3d Cir. 2014) (holding that compelled disclaimer failed *Zauderer* where the compelled disclaimer did not "reasonably remedy consumer deception"); *Tillman v. Miller*,

133 F.3d 1402, 1403 (11th Cir. 1998) (holding that government could not survive *Zauderer* if the government "has presented no proof" that the "pertinent compelled disclosure would likely significantly reduce fraudulent claims").

On the other end were the circuits that treated *Zauderer* as requiring nothing more than rational basis review. *See, e.g.*, *Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 95–97 (2d Cir. 2010) (holding that compelled disclosures satisfied "the rational basis test stated in *Zauderer*"); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966–67 (9th Cir. 2009) (holding the labeling requirement for violent video games failed "*Zauderer*'s rational relationship test").

This Circuit's initial approach viewed *Zauderer* as "akin to rational basis review." *See R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205, 1212 (D.C. Cir. 2012), *overruled on other grounds by Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) ("*AMI*"). However, this Circuit changed its approach in *AMI*'s en banc opinion. *See* 760 F.3d at 26–27.

In *AMI*, this Circuit stated that *Zauderer* should be viewed as an application of *Central Hudson* where certain prongs, including the prong requiring the compelled speech to directly advance a government interest, were already assumed to have been met. Therefore, the government was only required to show that the compelled speech was factual information that was neither controversial nor unduly burdensome. In the Court's words, "one could think of *Zauderer* largely as

an application of *Central Hudson*, where several of *Central Hudson*'s elements have already been established." *Id.*

Unfortunately, the assumptions made in *AMI*—that compelled commercial speech tends to be beneficial and advance legitimate governmental interests—are the exact same assumptions that experimental testing has repeatedly shown to be false. *See supra* § II. To be fair, the approach stated in *AMI* was based on this Court's reading of *Zauderer*, not a review of the studies testing the practical effects of compelled disclaimers on consumers. And at the time, the guidance from the Supreme Court was sparse.

That is no longer true. *NIFLA* expressly clarified how *Zauderer*'s test should be applied. *See* 138 S. Ct. at 2377–78. Moreover, the Court explained that it did not even need to address the question of whether *Zauderer* or a higher standard of review applied to the compelled disclaimer at issue there, as the compelled disclaimer clearly could not survive *Zauderer*. *Id.* at 2377.

Specifically, the Supreme Court held in *NIFLA* that *Zauderer* imposes on government the "burden to prove" that: (i) the required disclaimer will "remedy a harm"; (ii) the supposed harm being addressed is "potentially real not purely hypothetical"; and (iii) the required disclaimer "extends no broader than reasonably necessary." *Id.* at 2377 (internal citations omitted). Put differently, the government now bears the entire "burden to prove that the [compelled disclaimer]

is neither unjustified nor unduly burdensome." *Id.* This is wholly irreconcilable with any approach that treated *Zauderer* as "akin to rational basis review," *see R.J. Reynolds*, 696 F.3d at 1212, which is a test where the burden is borne entirely by the challenger rather than the government. *See, e.g.*, *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (discussing rational basis test).

Even though the approach announced in *NIFLA* does not appear to have been based on the body of experimental research discussed in this brief, *see supra* § II, *NIFLA*'s clarification of *Zauderer* is in accord with that research. As discussed above, the research repeatedly shows that many compelled disclaimers harm, rather than help, the consuming public. *See id*. Therefore, it is entirely consistent with the research for courts to impose the burden on the government rather than the challenger. *See id.* And that is what the Supreme Court did in *NIFLA*. 138 S. Ct. at 2377–78.

IV. The counterproductive nature of government-mandated disclaimers means that many would fail to meet *NIFLA*'s evidentiary requirements.

The burdens *NIFLA* places on the government are modest, but they are burdens that many government-mandated disclaimers would be unable to meet. *See supra* § II. Specifically (and as already mentioned), *NIFLA* imposes on government the "burden to prove" that: (i) the required disclaimer will actually "remedy a harm"; (ii) the supposed harm being addressed is "potentially real not purely

hypothetical"; and (iii) the required disclaimer "extends no broader than reasonably necessary." 138 S. Ct. at 2377 (internal citations omitted).

The first prong will often be particularly difficult for the government to satisfy. To overcome it, the government must prove that the compelled disclaimer will actually "remedy a harm." In the case at hand, this would require the government to prove that the challenged changes to the mandated disclaimer will actually increase consumer understanding of the products' risks. For example, the government could attempt to produce consumer-response studies comparing the sellers' labels with the old disclaimer to the sellers' labels with the new disclaimer. But, as shown by Professor Armstrong's research, the studies' results will be unlikely to support the government. *See supra* § II. Indeed, most government-compelled disclaimers actually *decrease* the level of consumer understanding. *Id.*[8]

Perhaps this specific compelled disclaimer is different. Perhaps this specific compelled disclaimer is the rare compelled disclaimer that actually makes a positive difference. But this Court may not assume that to be the case—the burden is on the government to prove it. *See NIFLA*, 138 S. Ct. at 2377.

[8] And it almost goes without saying that forcing businesses to confuse their customers is unconstitutional. *See, e.g., Dwyer*, 762 F.3d at 283 (explaining that the challenged compelled speech "may add only greater confusion"); *Video Software Dealers*, 556 F.3d at 967 (explaining that the government has "no legitimate reason to force retailers to affix false information on their products").

The second requirement, that the supposed harm being addressed is "potentially real not purely hypothetical," may also be difficult for the government to meet. *See NIFLA*, 138 S. Ct. at 2377. In the case at hand, the challenged regulation was "aimed at informing the public about the risks of cigar and pipe tobacco use and at correcting the public's misperceptions about such products' use." District Court's Mem. Op., ECF 106 at 5. But, as explained by the Supreme Court, the government is required to do more than merely state laudable goals. 138 S. Ct. at 2377. It must produce real evidence.

Here, that may prove difficult. In order to meet its burden, the government must either prove that the public is not already aware of the risks of cigar and pipe tobacco use or prove that the public has specific misperceptions about their use. *See id.* This task is made even more difficult by the fact that the warning label required here *replaces* a previous (albeit smaller) warning label. But if the previous version of the mandated warning label was sufficiently unsuccessful to justify the new increase in size, then the government may have difficulty showing that the new version will actually succeed where the prior version failed.

Third, the government will also tend to have difficulty proving that the compelled disclaimer "extends no broader than reasonably necessary." *See id.* Again, this could prove troublesome in the case at hand, where the asserted legal challenge is to a regulation that increases the size of an existing compelled

disclaimer. The government is therefore required to prove both that the prior size was insufficient and that the new size will not face the same failure and will instead be effective enough to justify crowding out an additional portion of the challengers' message on advertisements and labels that already face severe space restraints.

V. The circuit split over *when* to apply *Zauderer* should be resolved in a manner consistent with *NIFLA*'s holding that the circuits should not create or expand exceptions to heightened scrutiny.

In addition to providing express guidance on *how* to apply *Zauderer*, the Supreme Court also provided implicit guidance on *when* to apply *Zauderer*. Therefore, this section will address *NIFLA*'s impact on the question of when to apply *Zauderer*, as well as the fact that the suggested approach would be more consistent with the results of the practical research discussed in this brief.

A. The Supreme Court has never expanded *Zauderer*'s application.

In *NIFLA*, the Supreme Court expressly refused to address the question of when to apply *Zauderer*. 138 S. Ct. at 2377 ("We need not decide whether the *Zauderer* standard applies to the unlicensed notice"). However, other portions of the opinion held that courts should not expand the exceptions to the heightened scrutiny typically applied in First Amendment cases beyond those already recognized by the Supreme Court. *See id.* at 2371–72. It is therefore remarkable that the Supreme Court has never expanded *Zauderer*'s application beyond compelled corrections of inherently misleading speech. This means that some

circuits' application of *Zauderer* to cases not involving inherently misleading speech may be incorrect.

It is important to remember that *Zauderer*'s relevant section merely addressed the narrow situation where the government compels speech to correct otherwise inherently misleading speech. 471 U.S. at 650–52. And in the over three decades since issuing *Zauderer*, the Supreme Court has repeatedly refused the invitation to apply *Zauderer* to compelled speech where the underlying speech was not inherently misleading. The two most notable examples are *Ibanez* and *Milavetz*. *See Ibanez*, 512 U.S. at 149; *Milavetz*, 559 U.S. at 250.

In *Ibanez*, the Supreme Court addressed three government arguments for restricting or compelling commercial speech. 512 U.S. at 142–49. The first two addressed whether the government could ban the use of the credentials "CPA" and "CFP," respectively. *Id*. at 142–45. The third addressed whether the government could alternatively compel a disclaimer to accompany the use of "CFP." *Id*. at 146–149. The Supreme Court rejected all three arguments, and in so doing, implicitly refused to expand *Zauderer*'s application beyond compelled corrections to inherently misleading speech. *See id*. at 142–49.

The Supreme Court held that, because Ms. Ibanez actually possessed these credentials, mentioning them was neither actually nor inherent misleading and therefore could not be banned. *See id*. at 142–45. The Court also held that, since

Ms. Ibanez's underlying speech was neither actually nor inherently misleading, intermediate scrutiny must be applied to the compelled disclaimer. *Id*. at 147–48 (citing precedent applying *Central Hudson* test). This led the Court to find the compelled disclaimer to be unconstitutional. *Id*. at 146–49.

Significantly, the Court in *Ibanez* distinguished *Zauderer*'s section correcting inherently misleading speech on the very fact that Ms. Ibanez's speech was not inherently misleading. The Court explained that if Florida had shown Ms. Ibanez's speech to be inherently misleading, then the compelled disclaimer would have received the more lenient approach shown by *Zauderer*'s section addressing the correction of inherently misleading speech. *See Ibanez*, 512 U.S. at 147 (citing *Zauderer*'s section reviewing the inherently misleading fees advertisement, 471 U.S. at 651). But since Florida had only shown Ms. Ibanez's speech to be, at most, "potentially misleading" instead of inherently misleading, the full *Central Hudson* test was required for the compelled disclaimer, just as it was required regarding *Zauderer*'s other claims not involving inherently misleading speech. *See Ibanez*, 512 U.S. at 146, 149 (citing *Zauderer*'s section applying *Central Hudson* to regulations imposed on non-misleading speech, 471 U.S. at 648–49).[9]

[9] The Eighth Circuit has provided a helpful explanation of this same point. *See 1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1061–62 (8th Cir. 2014) (explaining that the Supreme Court in *Ibanez* applied intermediate scrutiny instead of *Zauderer* to the compelled disclaimer because the underlying speech in *Ibanez* was merely potentially misleading instead of inherently misleading).

The Supreme Court reaffirmed this understanding of *Zauderer*'s limited application in *Milavetz*. *See* 559 U.S. at 250. There, the Supreme Court justified its use of reduced First Amendment scrutiny by noting that:

> The challenged provisions … share the essential features of the rule at issue in *Zauderer*. As in that case, [the] required disclosures are intended to combat the problem of *inherently misleading* commercial advertisements …"

Id. (emphasis added).

In *Ibanez* and *Milavetz*, the Supreme Court easily could have extended *Zauderer*'s use beyond cases involving actually or inherently misleading speech, but declined to do so. When viewed in conjunction with *NIFLA*'s command that the recognized exceptions to heightened First Amendment protection should not be expanded, a reasonable inference can now be drawn that *Zauderer*'s application must not be expanded beyond the realm of compelled corrections to inherently misleading speech.

B. The circuits have been split over when to use *Zauderer*, and this Court has applied a hybrid approach that is inconsistent with *NIFLA*.

In the decades prior to *NIFLA*, a minority of circuits expanded *Zauderer*'s reach beyond cases where the underlying speech was misleading. *See, e.g.*, *Conn. Bar*, 620 F.3d at 95–97 (applying *Zauderer* to compelled disclaimer intended to mitigate consumers' "frequent ignorance and confusion"); *Video Software Dealers*,

556 F.3d at 966–67 (applying *Zauderer* to compelled disclaimers on violent video games).

On the other hand, the majority of circuits addressing the issue continued to limit *Zauderer* to compelled corrections of misleading speech. *See*, *e.g.*, *Dwyer*, 762 F.3d at 280–82 (discussing different approaches for inherently misleading, potentially misleading, and non-misleading speech); *Discount Tobacco City & Lottery, Inc., v. U.S.*, 674 F.3d 509, 523–25 (6th Cir. 2012) (limiting use of *Zauderer* to corrections of misleading speech); *1-800-411-Pain Referral Serv.*, 744 F.3d at 1061–62 (8th Cir. 2014) (discussing *Zauderer*, *Milavetz*, and *Ibanez*); *Borgner*, 284 F.3d at 1210 (applying *Central Hudson* to compelled disclaimer for dentists and relying on *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (holding that compelled disclaimer for attorneys failed *Central Hudson* test)).

This Court recently became a microcosm of the circuit split over when to use *Zauderer* instead of either intermediate or strict scrutiny. Until 2014, this Court applied *Central Hudson* instead of *Zauderer* to all compelled disclaimers involving lawful, non-inherently-misleading commercial speech. *See R.J. Reynolds*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled by AMI*. But in *AMI*, this Court reached the opposite conclusion and began applying *Zauderer* to compelled disclosures that were not designed to correct inherently misleading speech. *See* 760 F.3d at 27. The following year, this Court limited *Zauderer*'s newly expanded use to point-of-sale

disclosures. *See Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015) (limiting *AMI*'s holding to point-of-sale disclosures); *see also United States v. Philip Morris USA, Inc.*, 855 F.3d 321, 327–-28 (D.C. Cir. 2017) (explaining that, but for law-of-the-case doctrine, *Central Hudson* may have applied).

The result was this Court's unique hybrid approach. For cases involving neither misleading speech nor point-of-sale disclosures, this Court joined the majority of circuits in applying either the *Central Hudson* test or strict scrutiny. For cases involving point-of-sale disclosures, this Court joined the Second and Ninth Circuits' approach that *Zauderer*'s lower standard applied regardless of whether there was any inherently misleading speech.

NIFLA indicates that expanding exceptions to heightened First Amendment scrutiny beyond their original purpose is likely incorrect. Therefore, the approach taken by the Second and Ninth Circuits generally, and this Circuit for point-of-sale disclaimers, of using *Zauderer* in situations where the underlying speech was not inherently misleading is difficult to reconcile with *NIFLA*. To the extent there is doubt over which approach to take, Professor Armstrong would contend that limiting *Zauderer* to its original purpose, instead of expanding it to address non-inherently-misleading speech, would be more consistent with the results of the experimental tests on consumers.

Finally, *NIFLA* also indicates an increased willingness to treat government-scripted compelled disclaimers as content-based restrictions on speech. 138 S. Ct. at 2371. This approach would likely lead courts to apply strict scrutiny. *See*, *e.g.*, *Entm't Software Ass'n*, 469 F.3d at 652 (applying strict scrutiny to compelled warning label). Professor Armstrong views strict scrutiny as the best approach, as it is most consistent with the fact that compelled disclaimers harm consumers more often than they benefit consumers.

VI. Conclusion

Having long been troubled by the harm inflicted on the public by government-mandated disclaimers, Professor Armstrong is optimistic that the Supreme Court's holding in *NIFLA* may serve to alleviate some of this harm. However, this will only happen if courts do not allow themselves to be misled by the same false assumptions as before. Professor Armstrong has submitted this amicus brief in the hope that the research discussed herein may prevent these false assumptions from reemerging.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,794 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 4th day of March 2019, I caused this ***Brief of Amicus Curiae Professor of Marketing J. Scott Armstrong in Support of Neither Party*** to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following counsel registered as CM/ECF users:

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