Abortion Disclosure Laws and the First Amendment: The Broader Public Health Implications of the Supreme Court's *Becerra* Decision

In 2018, the US Supreme Court analyzed a California state requirement that clinics serving pregnant women must provide government notices—1 for licensed clinics about the availability of state health services including abortion and 1 for unlicensed clinics, notifying potential clients that the clinics are not licensed medical facilities and have no licensed medical professionals on-site.

The Supreme Court found that both notices violated the First Amendment rights of the clinics. The Supreme Court's opinion elicits new uncertainties about the government's ability to require the disclosure of factual information in the context of reproductive health services and more broadly in the commercial context.

However, the Supreme Court's silence on 1 of the state's purposes for the unlicensed clinic notice, which was to address deceptive speech by the clinics, highlights a potential avenue for future regulation. Policymakers can require the disclosure of factual information in the commercial context specifically to prevent consumer deception consistent with the First Amendment. Public health researchers can generate evidence to support such disclosure requirements intended to protect health and safety. (*Am J Public Health*. 2019;109:412–418. doi:10.2105/AJPH.2018.304871)

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See also Parasidis, p. 352.

In June 2018, the US Supreme Court struck down a California law, the Reproductive FACT Act, which required clinics to provide information to pregnant women, in *National Institute of Family & Life Advocates v. Becerra* (*Becerra*).[1] Specifically, the act required that clinics serving pregnant women provide 1 of 2 government notices: licensed clinic were required to notify women about health services available from the state, and unlicensed clinic were required to notify women that these clinics are not medical facilities licensed by the state.[2] Although the act itself did not refer to the clinics at issue as crisis pregnancy centers that oppose abortion, the majority found that the act targeted these clinics; several such clinics sued the state to prevent enforcement of the act. In a 5 to 4 opinion that fell along traditional conservative–liberal lines, the Supreme Court found that both notice requirements violated the clinics' First Amendment rights.[1,3] The majority made several First Amendment conclusions that implicated states' ability to regulate speech related to reproductive health services but also had much broader implications for the government's ability to require factual disclosures in the commercial context.

Commercial disclosure requirements are routine consumer protection and public health tools intended to address problems of imperfect information for consumers, prevent consumer deception, or alert consumers to potential health and safety harms.[4–6] Courts routinely uphold such disclosure requirements (e.g., calorie disclosures on restaurant menus[7]) as consistent with the First Amendment under the Supreme Court's 1985 case, *Zauderer v. Office of the Disciplinary Counsel*.[8] In *Zauderer*, the Supreme Court upheld the government's ability to compel purely factual and uncontroversial information and warnings in the commercial advertising context.

In the 2018 California clinic notice case, *Becerra*, the Supreme Court explicitly found that *Zauderer* did not apply to the notice requirements.[1] The majority discussed *Zauderer*'s nonapplication in such broad language that the Supreme Court's decision elicits cause for concern for future disclosure requirements intended to protect public health and safety. At the same time, *Becerra*'s silence on an issue directly relevant to the unlicensed notice—deceptive commercial speech—highlights a potential avenue for future regulation.

I identify a path forward for government to enact commercial disclosure requirements more likely to withstand constitutional challenges—by addressing deceptive and misleading commercial speech about products and services themselves. I provide background into First Amendment jurisprudence and then describes the *Becerra* decision's findings with respect to the licensed and unlicensed notices to highlight policy implications for future disclosure requirements, the need for evidence, and methods the research community can contribute to generating evidence to support disclosures intended to protect public health and safety.

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FIRST AMENDMENT BACKGROUND

There are 3 categories of speech for which a disclosure requirement could potentially qualify: government speech,[9] compelled public discourse,[10] and a factual disclosure requirement in the commercial speech context.[8] Government speech refers to the government's right to "speak for itself" and select the views that it seeks to express.[9] When the government speaks, such as in a public service announcement touting its recycling program, the First Amendment does not apply, so the government may take a viewpoint ("Recycle!") without being required to disclose contrary perspectives.[9] Nonetheless, the Supreme Court has stated that the First Amendment "may constrain" the government if it "seeks to compel private persons to convey the government's speech."[9] Few cases discuss this constraint on government speech in the commercial context, and the government rarely argues in court that disclosure requirements are a form of government speech.

The First Amendment provides the most protection for public discourse that is political, religious, and artistic expression, making it difficult for the government to restrict or compel such speech. If challenged in court, government restrictions or compulsions of this speech are analyzed under the most exacting test, "strict scrutiny," which requires the government to prove that the regulation furthers a compelling interest and is narrowly tailored to achieve that interest.[10] Regulations of speech subjected to this test are generally found to be unconstitutional.

Commercial speech is speech that proposes a commercial transaction, such as advertising and labeling,[11] and is principally protected to provide information to consumers.[6,8] If a government regulation of commercial speech is challenged, courts use different tests for restrictions on commercial speech as opposed to compulsions of speech in the commercial context. Restrictions on commercial speech are subject to an intermediate, or midlevel, 4-part test called the *Central Hudson* test.[11] Under this test, courts first must determine whether the speech is protected by the First Amendment, which means that it must not be false, deceptive, or misleading.[11] If the speech is protected, courts ask whether the asserted governmental interest in restricting the speech is substantial, whether the regulation directly advances that interest, and whether it is not more extensive than necessary to serve that interest.[11] In most cases, courts find that restrictions do not meet this test and are thus unconstitutional.[12]

The Supreme Court has been more lenient on government compulsions of purely factual information in the commercial context.[8] Therefore, commercial disclosure requirements about goods and services offered in the marketplace are traditionally subject to the least burdensome test, the reasonable basis test, developed in *Zauderer*.[8] In *Zauderer*, the Supreme Court held that a disclosure requirement must be reasonably related to the government's interest, may only compel purely factual and uncontroversial information about the product or service at issue, and cannot be unjustified or unduly burdensome.[8,13] Under this standard, courts have upheld various warning and disclosure requirements, such as country of original labeling on food,[14] textual health warnings on tobacco products,[15] and calorie disclosures on restaurant menus.[7]

BECERRA AND COMMERCIAL DISCLOSURE

In *Becerra*, the Supreme Court struck down California's notice requirements under various First Amendment rationales. Although the majority's position—that the act unconstitutionally targeted clinics that oppose abortion—provided the context for much of the decision, the Supreme Court's explanation for why the notice requirements were not routine commercial disclosure requirements subject to *Zauderer* has broader implications for public health policy (see the box on pages 414–415).

Licensed Notice Requirement

The first notice required licensed clinics to notify women of California's free or low-cost public programs providing family planning services, including contraception, abortion, and prenatal care, and provide a contact telephone number. The Supreme Court found that this requirement should be subject to, and fail, the strict scrutiny test.[1]

As a preliminary matter, the Supreme Court found that the licensed notice was not an informed consent requirement or regulation of professional conduct.[1] This finding is especially relevant to disclosures in the abortion context because the Supreme Court previously upheld a state law requiring physicians to provide information about adoption services, among other topics, to obtain informed consent for an abortion.[20] The Supreme Court's finding in *Becerra* provoked the dissent to argue that the majority was not ruling evenhandedly with respect to abortion- versus adoption-related speech; the majority sidestepped this issue by classifying the notice's speech as not related to obtaining informed consent, as was the case in previous abortion-related decisions.[1] Additionally, although the text of the notice seems like government speech by informing readers about the availability of government services, the majority explained that "California cannot co-opt the licensed facilities to deliver its message for it."[1] The Supreme Court suggested that California instead use a public information campaign or post information on its own property near the clinics to accomplish this goal.[1]

The Supreme Court also found that the licensed notice requirement was not a commercial disclosure requirement under *Zauderer* because it was "not limited to 'purely factual and uncontroversial information about the terms under which services will be available.'"[1] The Supreme Court went on to explain its finding that the notice "in no way relates to the services that licensed clinics provide" because the notice "requires these clinics to disclose information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic."[1] The first point requires that disclosures "must relate to the good or service offered by the regulated party."[14] Therefore, policymakers should ensure that future disclosure requirements directly relate to the product or service at issue, and the government should use its own speech and venues for additional messages (see the box on pages 414–415).

The Supreme Court's position that the notice's mention of abortion required the disclosure of "anything but an 'uncontroversial' topic" is of potential concern for future commercial disclosure requirements.[1] This statement provides the Supreme Court's first interpretation of the term

FUTURE DIRECTIONS FOR POLICYMAKERS SEEKING TO ENACT COMMERCIAL DISCLOSURE REQUIREMENTS IN THE UNITED STATES

FACT Act Legislative History and Statutory Language	Supreme Court's Findings[1]	Future Directions for Policymakers
	Legislative history	
"The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights."[16]	The Supreme Court started its opinion quoting this part of the legislative history and expressed concerns that the state was unconstitutionally "disfavoring a particular speaker or viewpoint."	The statutory language of the act itself did not refer to crisis pregnancy centers or express the concern stated in the legislative history[2]; however, courts often use the legislative history and statutory preamble as evidence of unconstitutional intent.[17] Governments cannot discriminate against viewpoints, so it is important that policymakers avoid drafting legislation, preambles to legislation, or legislative reports that seem to choose 1 viewpoint over another.
"CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully informed, time-sensitive decisions about critical health care."[16]	The Supreme Court did not mention this part of the legislative rationale and the government did not seem to argue this issue before the Supreme Court.[18] However, the California state legislature's finding that clinics' advertising practices were "intentionally deceptive" was directly relevant to the unlicensed notice requirement.[16]	Policymakers should rely on the interest in preventing consumer deception to support commercial disclosure requirements when relevant.[13] If challenged in court, government should also highlight this valid rationale.[8]
	Licensed clinic notice	
"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]."[2]	The Supreme Court found that strict scrutiny applied, under which the licensed notice would fail. It found that professional speech is not a separate category of speech under the First Amendment and that this is not an informed consent requirement or regulation of professional conduct. The government cannot require private entities to convey its message. The Supreme Court found that *Zauderer* does not apply because "the licensed notice is not limited to purely factual and uncontroversial information about the terms under which . . . services will be available." "The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic." The Supreme Court will not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."	Stand-alone public information campaigns are a method to engage in government speech without implicating the First Amendment. The finding that this is not an informed consent requirement seems to continue to insulate state laws that require government-scripted statements to be uttered by medical professionals to obtain informed consent for abortions. Those laws would presumably not fall within the decision's holding. Disclosure requirements must be about the products or services provided by the regulated entity (e.g., government cannot require an "Eat Vegetables!" label on candy packages). Policymakers should be prepared to defend both politically charged disclosures (e.g., in the firearm safety context) and routine commercial disclosure requirements as "uncontroversial"; courts will likely struggle with this term going forward. Policymakers should continue to gather scientific evidence supporting warning requirements and draw from "health and safety warnings long considered permissible."

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FACT Act Legislative History and Statutory Language	Supreme Court's Findings[1]	Future Directions for Policymakers
	Unlicensed clinic notice	
"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."[2]	The Supreme Court found that California has not demonstrated any justification for the unlicensed notice; the disclosure did not remedy a harm that is "potentially real not purely hypothetical" and failed to extend "no broader than reasonably necessary."	Policymakers should rely on the government's interest in preventing deception when relevant and gather evidence of deception to support commercial disclosure requirements aimed at addressing "actually" misleading commercial speech.
	It stated, "The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest."	The Supreme Court had not previously distinguished warnings from disclosures, but although it disapproved of government-scripted disclosures, it presumably did not reject government-scripted warnings because most if not all "health and safety warnings long considered permissible" are government scripted (e.g., the Surgeon General's warning on tobacco products).
	The Supreme Court expressed concern that the disclosure was unduly burdensome because it was required to be in larger text or contrasting type or color than the advertisement and in as many as 13 different languages.	The question of what constitutes an unduly burdensome disclosure requirement has been a bit of a subjective question when referring to text size, color, or font, so policymakers should use caution and weigh the need for conspicuousness against the increasingly more strongly protected rights of the commercial speaker.[19] Disclosures required in multiple languages at a time will likely provoke legal challenges.

Note. FACT = Freedom, Accountability, Comprehensive Care, and Transparency; FDA = Food and Drug Administration.

"uncontroversial" and represents a substantial shift in how federal courts have historically interpreted the requirement.[13] Previously, federal courts defined "uncontroversial" as a disagreement about the "truth of the facts required to be disclosed" or a factual disclosure that is "one-sided or incomplete,"[14] but not referring to a controversial political issue. Many public health issues are politically controversial, and there is often controversy over routine government-mandated factual disclosure requirements precisely because they are challenged by the regulated industries.[5] In an attempt to clarify this holding, the majority stated, "We do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[1]

The Supreme Court did not provide examples of requirements that would fall into this protected category, but it would seem to insulate long-standing requirements on the products themselves like tobacco and alcohol health warnings, directions for safe use labeling for infant formula, and food ingredient and allergen information. Going forward, entities subject to all types of disclosure requirements will likely challenge them by arguing that they are controversial.[13,21] Policymakers should continue to gather scientific evidence supporting warning requirements, which should resemble health and safety warnings long considered permissible.[15] Further, new disclosure requirements should be purely factual and accurate about the commercial products and services themselves.

Unlicensed Notice Requirement

The second notice required unlicensed clinics to notify women that the facility was not licensed by the state and that no licensed medical provider was present at the facility. The Supreme Court did not decide which test to apply because it found that this requirement would fail any First Amendment test, including *Zauderer*.[1] The Supreme Court specifically found that the notice did not meet *Zauderer* because the notice was "unjustified" and "unduly burdensome," and California did not provide evidence that the problem it intended to address was "potentially real not purely hypothetical."[1] It went on to find other deficiencies, including that it was "government-scripted" and "disconnected from California's informational interest"[1] (see the box on pages 414–415).

The Supreme Court's discussion of California's informational interest is enlightening. In the decades since the Supreme Court's decision in *Zauderer*, lower courts have struggled with the question of which government interests are valid to support a commercial disclosure requirement[14]; the Supreme Court had only previously upheld an interest in preventing consumer deception (in 2 attorney advertising cases: *Zauderer* and *Milavetz*).[4,8] Federal appellate courts found that other interests, such as health,[7,13] were valid, and the *Becerra* decision did not negate this possibility—it only found that the notice requirement was disconnected from the state's informational interest. The Supreme Court did not say an interest in relaying information was itself invalid, and the dissent agreed that such an interest is legitimate.[1]

Accepting an informational interest as permissible under *Zauderer* seems to align with the Supreme Court's acknowledgment that it would "not question the legality of health and safety warnings" or "purely factual and uncontroversial disclosures about commercial products."[1]

Nevertheless, the Supreme Court found that the unlicensed notice requirement was "unjustified" because the state did not produce evidence that pregnant women did not already know the information. This evidentiary requirement arguably conflicts with the Supreme Court's approval of health and safety warnings, some of which provide information that certain consumers may already know. For example, despite alcoholic beverage industry arguments that consumers already knew the health risks of alcohol consumption, the federal government required health warnings on alcoholic beverage labels in 1988 on the basis of the rationale that a warning would "provide a clear, nonconfusing *reminder*" of "the health hazards that may result from the consumption or abuse of alcoholic beverages."[22]

In the Supreme Court's 2 previous cases applying *Zauderer*, it found that the need for the disclosure—to rectify the "possibility of deception"—was "self-evident,"[4,8] so *Becerra* was the first Supreme Court case to confirm that evidence is required to support disclosures (federal appellate courts had been routinely reviewing the evidentiary record).[13,15] In *Becerra*, the Supreme Court specifically stated that it did not "foreclose the possibility that California will gather enough evidence" to support the unlicensed notice.[1] However, the Supreme Court did not indicate what evidentiary threshold of not knowing would render such a requirement constitutional. Rather, the Supreme Court qualified this discussion by explaining that the services provided by the clinics "do not require a medical license,"[1] which seems to undercut the actual necessity of the notice—as framed by the majority.

Through disclosure requirements, policymakers generally seek to impart information for underlying purposes, such as to protect health or avoid consumer deceptions, and not just for the sake of imparting information.[5,14,15] It belies logic that in the context of reproductive health services, the Supreme Court would have upheld the unlicensed notice even with evidence supporting the government's rationale as the Supreme Court framed it: that consumers do not know that medical professionals are not present in locations where their services are not provided. It remains to be seen how courts will evaluate an informational interest in other contexts. Nonetheless, the Supreme Court's silence on how much and what type of evidence would satisfy *Zauderer* leads to the conclusion that policymakers should consider different rationales for disclosure requirements.

In previous cases, when the government gathered substantial social science evidence, the Supreme Court still struck down laws that implicate speech. For example, in *Brown v. Entertainment Merchants Association*, the Supreme Court found that a state law restricting the sale of violent video games directly to minors failed strict scrutiny.[23] The majority (composed of both conservative and liberal justices) found the state's evidence "not compelling," whereas the dissent examined more than 100 studies and expert opinions to find "sufficient grounds" to defer to the "legislature's conclusion that the video games in question are particularly likely to harm children."[5] Because of unclear guidance on the extent to which social science evidence can justify speech regulations, it is necessary to determine whether another type of evidence, and thus a different government interest, could be more compelling.

The California legislator who proposed the Reproductive FACT Act stated that 1 explicit rationale was that "crisis pregnancy centers" engage in

> intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.[16]
> (see the box on pages 414–415)

On the basis of this finding, the Ninth Circuit found that California's interest in presenting accurate information about the licensing status of individual clinics was particularly compelling.[24] Yet, California did not seem to explicitly argue that the unlicensed clinic notice was necessary to prevent deception,[18] and the majority did not mention deception or confusion, even when seemingly relevant.[1] Had the *Becerra* majority discussed the "state's interest in preventing deception of consumers,"[8] it would have had to highlight a potential avenue for states to successfully enact requirements similar to the unlicensed notice requirement. Curing deception is universally accepted as a valid rationale supporting disclosure requirements.[4,8] It is thus important to determine how government's attempt to cure deception may support public health because pursuing other goals through speech regulation has not been routinely successful in the Supreme Court.

CURING MISLEADING AND DECEPTIVE SPEECH

Although First Amendment jurisprudence has shifted substantially over the past few decades, 1 consistently agreed on aspect is that "warnings or disclaimers might be appropriately required to dissipate the possibility of consumer confusion or deception."[8] In fact, *Zauderer*'s full statement—"that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers"[8] —has often been relied on by opponents of public health regulations to undermine the government's use of health and safety interests to support disclosures.[25] Yet, addressing deceptive speech is an area ripe for government regulation in furtherance of health and safety.

How do disclosures to cure deception directly relate to health? The unlicensed notice addressed the deception of crisis pregnancy centers, which created a barrier to obtaining necessary health care.[16] Standardized front-of-package food labels address manufacturers' misleading nutrition-related claims on unhealthy food packaging. Health and safety warnings on sugary beverages—if not automatically falling into the category "of health and safety warnings long considered permissible" presumably like tobacco warnings—would prevent consumer deception in light of "decades-long" advertisement and manipulation of science that undermines knowledge about the "serious health risks" of consuming sugary beverages.[15,26] Researchers thus have a critical role to play in exposing deceptive marketing and labeling practices about products and services that cause harm, in addition to generating scientific evidence supporting the health and safety rationales for regulation.

Commercial Speech

The Federal Trade Commission (FTC) finds deception when there is a misrepresentation,

omission, or other practice that misleads consumers acting reasonably in the circumstances to the consumer's detriment (e.g., by purchasing a product they would not have otherwise purchased).[27] For First Amendment purposes, the Supreme Court has expressed nuanced definitions of misleading commercial speech, distinguishing among 3 types: potentially, inherently, and actually misleading commercial speech.[28] Potentially misleading commercial speech is found when "the information also may be presented in a way that is not deceptive,"[28] and it remains fully protected by the First Amendment. Therefore, restrictions on potentially misleading commercial speech are subject to the *Central Hudson* test so the legally more viable remedy is to require disclaimers for clarification.[29]

Inherently misleading speech has been defined as speech that is "incapable of being presented in a way that is not deceptive"[30] and has been found when terms have no inherent meaning in the context of the advertisement (e.g., the use of a trade name for optometrists[31]). Conversely, actually misleading speech requires "evidence of deception."[32] The Supreme Court has noted that actually misleading speech arises when "empirical evidence," or "experience has proved that in fact such advertising is subject to abuse"[32] or "has proved to be misleading in practice."[28] Inherently and actually misleading commercial speech, like false commercial speech, are considered not protected by the First Amendment.[11]

Recall that the *Central Hudson* test starts by asking if the speech is protected, meaning it must not be false, deceptive, or misleading commercial speech.[11] Therefore, the Supreme Court historically stated that government "may impose appropriate restrictions,"[28] including that such speech "may be prohibited entirely."[14] Nonetheless, the Supreme Court has not upheld a commercial speech restriction in decades, and in both *Zauderer* and *Milavetz*, the Supreme Court upheld disclosures to cure inherently misleading speech.[4,8] When regulating deceptive speech, it would behoove policymakers to gather evidence of deception because courts rarely find speech to be inherently misleading and courts look for evidence to support speech regulations.[29]

When viewed against previous case law on deceptive and misleading speech, the Supreme Court's statement in *Becerra* that California could gather evidence to support the unlicensed notice requirement might be read to indicate that the state would be on firmer ground by gathering evidence of deception. If California can present evidence that pregnancy clinics engage in misleading commercial speech or that pregnant women are misled to believe that unlicensed clinics are staffed by licensed medical professionals, this would reveal a deception in need of a cure.[16] Likewise, policymakers nationally should gather evidence of deception for future commercial disclosure requirements.

Evidence of Deception

Similar to the outstanding question of how much health and safety evidence would satisfy the Supreme Court under *Zauderer*, the Supreme Court has not clarified how much evidence of deception would suffice. In the context of commercial speech restrictions under *Central Hudson*, the Supreme Court accepted a 106-page summary of a 2-year government study that contained "both statistical and anecdotal" data showing that 57% of the general public and 27% of attorneys surveyed supported the purpose of the regulation.[33] Similarly, the Fifth Circuit relied on survey results showing 32% to 78% agreement on varying questions of the survey to support a speech restriction.[34] In the context of a disclosure requirement aimed at reducing confusion, the Sixth Circuit accepted a federal agency's interim guidance document and consumer comments indicating "weak evidence of deception" but demonstrating "that the risk of deception" was "not speculative."[35]

In the context of other types of cases related to consumer confusion, courts routinely review surveys indicating consumer deception or confusion. Courts evaluate the methodological rigor of these surveys and will exclude them if the court determines they are flawed.[36] In the context of the FTC's finding of deceptive advertising, when the agency has presented evidence of deception, courts have upheld the FTC's finding when surveys revealed that 10%, 15%, 10.5% to 17.3%, or 20% to 36% of survey respondents were misled.[37]

In another legal context, business competitors sue each other for violating trademark-related laws under the Lanham Act, arguing that the competitor's design caused consumer confusion about the source of a product or service. (Trademarks are protected to reduce confusion over brands so consumers can make informed decisions.) In these cases, businesses produce empirical surveys to provide evidence of consumer confusion. Courts have agreed with the plaintiffs when surveys indicated that 10%,[38] 15%, or 25%[39] of the respondents were confused. Conversely, in a Lanham Act and FTC case, respectively, courts rejected claims of consumer confusion when the survey indicated that only 2.5%[36] or 3.9%[40] of respondents were confused. Evidence of deception is an important element of these cases and may inform future cases in the context of disclosure requirements intended to address deceptive and misleading speech.

There remains an outstanding question about whether the efficacy of a disclaimer is relevant. In *Milavetz*, a law firm opposed using the required disclaimer in its advertising, arguing that the phrase "debt relief agency" "is confusing and misleading," so requiring the disclosure of this term would not prevent consumer deception.[4] The Supreme Court found that this "contention amounts to little more than a [word] preference," which the Supreme Court found "lacks any constitutional basis."[4] Yet, the Supreme Court also noted that the law firm offered "no evidence to support its claim that the label is confusing."[4] Similarly, *Pearson v. Shalala* is 1 of the more pivotal federal appellate cases because it serves as the basis for the Food and Drug Administration's allowance on food and dietary supplements of "qualified health claims," which include disclaimers noting the level of scientific support for the claim. In *Pearson*, the court noted that if "the government could demonstrate with empirical evidence that disclaimers" suggested by the court "would bewilder consumers and fail to correct for deceptiveness," a prohibition might be more warranted in those cases.[29] These statements may point to a future need for studies aimed at ensuring that disclaimers accomplish their goal of reducing confusion in addition to revealing when prohibition is the only option because of the

extreme nature of the deceptive speech.

Wherever the Supreme Court eventually comes out on how much government regulation will be permissible for various types of misleading speech, policymakers should rely on evidence of deception going forward to support clear and factual disclosure and warning requirements that seek to dissipate consumer confusion and highlight potential health and safety harms. This will also allow government to make a cogent case in court if sued. The research community is in the best position to generate evidence of deception in addition to epidemiological links between harmful activity and the public's health.

CONCLUSIONS

For decades, the US Supreme Court has granted increased protection to commercial speakers and decreased deference to government regulation of speech in the context of commercial speech (as well as public discourse). Therefore, the Supreme Court has struck down governments' attempts to limit tobacco advertisement near schools and playgrounds,[12] protect children from purchasing violent video games,[23] and, now, require clinics serving pregnant women to provide factual and relevant information to women.[1]

The *Becerra* decision created outstanding questions about how controversy factors into the constitutionality of commercial disclosure requirements and what kind of and how much evidence will satisfy the Supreme Court under *Zauderer*. This case thus counsels in favor of using existing disclosures and warnings as templates for future requirements and generating and gathering evidence of deceptions to support speech regulations. The public health community is in the best position to identify evidence of both the health harms caused by products and services and the deceptive nature of related advertising and labeling to support disclosure requirements intended to protect public health and safety. AJPH

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