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CAN CLIMATE CHANGE LABELS BE "PURELY FACTUAL AND UNCONTROVERSIAL"?

by Barak Kamelgard

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With every passing day, the dangers of climate change are becoming more and more obvious. One of the myriad solutions proposed to combat this crisis is the addition of warning and informational labels to gas pumps, airline tickets, energy bills, and even food and drinks, detailing the effects our purchases have on the climate and quantifying the amount each purchase has in terms of emissions.[1] In fact, gas station pumps in Cambridge, Massachusetts, have already begun to display the first climate change warning labels on any gas station pumps in the United States.[2]

Yet, as the city of Cambridge itself acknowledged,[3] any required labels would need to meet the First Amendment standard for government-compelled disclosures in commercial speech, set forth by the U.S. Supreme Court in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[4] To be constitutionally permitted, such labels need to be "purely factual and uncontroversial."[5]

If these labels get mandated at the state and federal levels, their legality will certainly be litigated.[6] Yet, there has not been a single court decision, at any level, about any form of government-compelled disclosures regarding climate change under the *Zauderer* standard. Consequently, it is uncertain how any given court, including the Supreme Court, would rule on this issue. Accordingly, we must analyze what it means to be "purely factual and uncontroversial" under the *Zauderer* standard, and what the answer means for prospective climate change-related disclosures thereunder.

Zauderer did not define "purely factual and uncontroversial" or give any insight into how that standard should be applied. Accordingly, different circuits have grappled with what the phrase means, ultimately falling into one of two positions: those of the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit and the U.S. Court of Appeals for the Ninth Circuit.

Author's Note: Warning—This Comment contains purely factual and uncontroversial information. Read at your own risk.

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1. *See, e.g.*, Courtney Linder, *Climate Experts Want Fossil Fuel Warning Labels at the Pump*, Popular Mechanics, Apr. 5, 2020, https://www.popularmechanics.com/science/green-tech/a32036783/gas-pump-warning/; Brian Kateman, *Carbon Labels Are Finally Coming to the Food and Beverage Industry*, Forbes, July 20, 2020, https://www.forbes.com/sites/briankateman/2020/07/20/carbon-labels-are-finally-coming-to-the-food-and-beverage-industry/?sh=25b1f1a97c03.
2. Louise Boyle, *Cambridge, MA Is First Place in US to Have Climate Warning Labels at Gas Pumps*, Independent, Dec. 31, 2020, https://www.independent.co.uk/climate-change/news/gas-warning-climate-change-cambridge-b1779687.html ("Warning—Burning Gasoline, Diesel and Ethanol has major consequences on human health and on the environment including contributing to climate change.").
3. *See* Cambridge, Mass., Policy Order 327 (Jan. 27, 2020) (citing the opinion of the city solicitor).
4. 471 U.S. 626, 651 (1985). Please note, the labels discussed herein are certainly considered commercial speech even though they "link[ ] a product to a current public debate." *Id*. at 637 n.7 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 n.5 (1980) (rejecting suggestion that links to current public debate transformed commercial speech into noncommercial speech because "many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety")).
5. *See also Daniel Abrams, Climate Change Disclosures After* NIFLA, 2020 Univ. of Chi. Legal F. 335 (2020) (providing a broad overview of climate change disclosures under *Zauderer*).
6. *See* Matthew N. Metz & Janelle London, *Governing the Gasoline Spigot: Gas Stations and the Transition Away From Gasoline*, 51 ELR 10054, 10071-72 (Jan. 2021) (discussing Cambridge's ordinance and similar ones considered in Santa Monica, California, and Berkeley, California, as well as a subsequent First Amendment challenge to Berkeley's ordinance).

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I. The D.C. Circuit's Subjective Approach

The D.C. Circuit has held that "controversial" is "in the sense that [a disclosure] communicates a message that is controversial for some reason *other than dispute about simple factual accuracy*."[7] Thus, according to the D.C. Circuit, "'uncontroversial,' as a legal test, must mean something *different than 'purely factual.'*"[8] So, while it has never expressly defined "purely factual," the D.C. Circuit equates "purely factual" with there being no "dispute about simple factual accuracy."[9]

But could *Zauderer* have used "purely factual" to distinguish a disclosure that includes opinion? The D.C. Circuit said no: "that line [between fact and opinion] is often blurred, and it is far from clear that all opinions are controversial" (i.e., including opinion in a disclosure, in and of itself, does not mean that the disclosure would be controversial).[10] To illustrate why it rejected the fact/opinion distinction—in a case having nothing to do with climate change—the court gave the following example: "If the government required labels on all internal combustion engines stating that 'USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING' would that be fact or opinion?"[11]

Even if such a statement were "in the opinion of many scientists" or "many experts," it would still be a "statement[ ] of opinion," according to the D.C. Circuit, not fact.[12] Yet, if one cannot rely on the opinions of many scientists or experts, it is hard to imagine there ever being a scientific statement that would meet the threshold of being a "fact" under this standard—even the theory of relativity is still a "theory."[13] This is particularly problematic in the climate change context given that it is the scientific consensus (i.e., the opinion of a consensus of the scientific community) that climate change is real and an immediate threat.[14] Moreover, for the purposes of determining if a disclosure is "purely factual," how could one judge whether there is a dispute about "simple factual accuracy" without first determining if the disclosure states facts or opinions?

The D.C. Circuit has provided no further guidance. This lack of clarity and definition has led to the court questioning *its own* holdings.[15] It is, therefore, no surprise that as a result of this indeterminate approach, the D.C. Circuit has no clear standard, as the U.S. District Court for the District of Columbia put it best: "So, what does it mean for a disclosure to be 'purely factual and uncontroversial'? Nobody knows exactly. The D.C. Circuit has 'made no attempt to define those terms precisely,' and 'it is unclear how [courts] should assess . . . whether a mandatory disclosure is controversial.'"[16]

The D.C. Circuit's approach is essentially that if a judge reviewing the applicable case thinks the subject of a disclosure is "controversial" in and of itself (i.e., the message is controversial for some reason other than its accuracy), then even if that disclosure were factually accurate, it cannot pass the *Zauderer* test. In other words, "what is or is not controversial will lie in the eye of the beholder."[17]

II. The Ninth Circuit's Objective Approach

On the other side of the debate is the Ninth Circuit, which specifically rejected the D.C. Circuit's subjective approach.[18] First, and of particular relevance in the climate change context, the Ninth Circuit stated that a disclosure being "uncontroversial" does not mean it has to be undisputed.[19] As if in response to the question about internal combustion engines posed by the D.C. Circuit, the Ninth Circuit explained why science is always going to have some level of opinion and debate: "A 'controversy' cannot be created any time there is a disagreement between the parties because *Zauderer* would never apply, especially where there are health and safety risks, which invariably are dependent in some degree on the current state of science and research."[20] Thus, "[a] 'controversy' cannot automatically be deemed created any time there is a disagreement about the science behind a warning because science is almost always debatable at some level."[21]

Instead, the court held that "purely factual" does distinguish from opinion, and "'[u]ncontroversial' should generally be equated with the term 'accurate.'"[22] Uncontroversial in this context, therefore, "refers to the factual accuracy of the compelled disclosure, not to its subjective impact on the

7. American Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27, 44 ELR 20173 (D.C. Cir. 2014) (*AMI*) (emphasis added).
8. National Ass'n of Mfrs. v. Securities & Exch. Comm'n, 800 F.3d 518, 528, 529 n.28, 45 ELR 20155 (D.C. Cir. 2015) (*NAM II*) (emphasis added) (rejecting the argument that "purely factual and uncontroversial" means "purely factual" and "accurate" (i.e., the standard as stated by the Ninth Circuit, as discussed *infra*, Part II)).
9. Kimberly-Clark Corp. v. District of Columbia, 286 F. Supp. 3d 128, 140, 48 ELR 20001 (D.D.C. 2017) ("[A] disclosure requirement is 'purely factual' when there is no dispute about factual accuracy.").
10. *NAM II*, 800 F.3d at 528.
11. *Id.*
12. *Id.* ("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.'").
13. *Id.* ("Is Einstein's General Theory of Relativity fact or opinion, and should it be regarded as controversial?").
14. *See, e.g.*, Intergovernmental Panel on Climate Change, Global Warming of 1.5°C (Valérie Masson-Delmotte et al. eds., 2018).
15. *See NAM II*, 800 F.3d at 529 (indicating that the mere existence of a public, legal dispute could show that a disclosure is "controversial," therefore calling it a "puzzle" why, in an earlier D.C. Circuit case, it had previously found a disclosure "uncontroversial" when there was a public dispute about the disclosure, and then nonetheless not reversing that earlier case).
16. Kimberly-Clark Corp. v. District of Columbia, 286 F. Supp. 3d 128, 140, 48 ELR 20001 (D.D.C. 2017) (quoting *NAM II*, 800 F.3d at 528; *AMI*, 760 F.3d 18, 34, 44 ELR 20173 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment)).
17. *See AMI*, 760 F.3d at 54 (Brown, J., dissenting).
18. *See* CTIA-The Wireless Ass'n v. City of Berkeley, 158 F. Supp. 3d 897, 904-05 (N.D. Cal. 2016) (*CTIA I*), *aff'd sub nom*. CTIA-The Wireless Ass'n v. City of Berkeley, Cal., 854 F.3d 1105 (9th Cir. 2017) (*CTIA II*), *cert. granted, judgment vacated sub nom*. CTIA-The Wireless Ass'n v. City of Berkeley, Cal., 138 S. Ct. 2708 (2018), *aff'd sub nom*. CTIA-The Wireless Ass'n v. City of Berkeley, Cal., 928 F.3d 832 (9th Cir. 2019) (*CTIA III*), *cert. denied*, 140 S. Ct. 658 (2019).
19. *CTIA I*, 158 F. Supp. 3d at 904 (rejecting the D.C. Circuit and noting that even the D.C. Circuit had difficulty understanding this standard (i.e., that it was a "puzzle")).
20. *Id.*
21. *Id.* (noting the potential implication of the many regulatory programs that require the disclosure of product and other commercial information, including tobacco and nutritional labeling and reporting of toxic substances and pollutants).
22. *Id.*

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audience."[23] By contrast, a disclosure would be controversial if it were inaccurate in the sense that it is "contrary to any established facts or applicable governmental policies,"[24] or is "literally true but nonetheless misleading and, in that sense, untrue."[25] Under this approach, a factually accurate disclosure would still be "uncontroversial" even though "it disturbs the party being compelled to make the disclosure or disturbs its customers, including if it 'discourages the latter from' purchasing the product or service at issue or 'harms the reputation' of the entity that previously benefitted" from the pre-disclosure commercial speech.[26]

In other words, according to the Ninth Circuit, a disclosure requirement is "purely factual and uncontroversial" under *Zauderer* so long as (1) it provides the consumer only facts (as opposed to opinion), and (2) those facts are accurate (i.e., not contrary to established facts or applicable governmental policies and not misleading). Although the Ninth Circuit does not offer guidance on how to determine if a disclosure contains facts or opinion, its test is nonetheless better than the D.C. Circuit's formulation because its objectivity provides regulators and lawmakers with greater certainty as to what content labels must have to pass First Amendment muster. For example, under the Ninth Circuit's standard, it is safe to assume that if "many experts" and "many scientists" said that use of internal combustion engines contributes to global warming, that would be considered a fact.[27]

III. The Supreme Court's *NIFLA* Decision

The Supreme Court had its first opportunity to address the *Zauderer* controversiality requirement in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*).[28] It declined to do so. The majority stated that *Zauderer* did not apply, because the disclosure was "not limited to 'purely factual and uncontroversial information about the terms under which . . . services will be available.'"[29] The mandatory disclosure at issue required crisis pregnancy centers to display notices regarding the availability of state facilities that provided abortions and other family planning services.[30] Thus, according to the majority, the disclosure concerned "state-sponsored services" rather than "services that licensed clinics provide," including information about "abortion, *anything but an 'uncontroversial' topic*."[31]

Despite expressly declining to address *Zauderer*, the reference to abortion not being an uncontroversial topic seems to imply the majority's inclination to agree with the D.C. Circuit's approach to controversiality. The question, as framed by the majority, was not whether the disclosure was factually accurate (i.e., "uncontroversial" under the Ninth Circuit's standard) but whether the topic of the disclosure—abortion—was "controversial" in the plain meaning sense of the word, or, as the D.C. Circuit stated, "controversial for some reason other than simple factual accuracy." *NIFLA*'s formulation asked whether abortion was controversial in the eyes of the majority and, in their eyes, the answer was "yes."

IV. The Ninth Circuit's Approach Revisited

Yet, this is not the end of the road. While the D.C. Circuit has not subsequently analyzed the impact of *NIFLA* on the *Zauderer* analysis, the Ninth Circuit has. The Ninth Circuit stated that, by not addressing *Zauderer*, *NIFLA* does nothing to suggest that the Ninth Circuit's precedent was wrongly decided nor disapproves that precedent.[32] To the contrary, as the Ninth Circuit pointed out, the Supreme Court stated specifically that it was "not question[ing] the legality of health and safety warnings, long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[33]

However, according to the Ninth Circuit, *NIFLA* did elaborate on *Zauderer*'s "purely factual and uncontroversial" standard in two respects. First, the disclosure at issue in *NIFLA* required a clinic, whose primary purpose was to oppose abortion, to provide information about abortion.[34] "While factual, the compelled statement took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission."[35] That is why the disclosure was "controversial."[36] The Ninth Circuit makes clear that it "do[es] not read [*NIFLA*] as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial."[37] Thus, although the Ninth Circuit does not specifically refer to the D.C. Circuit, it does again reject the D.C. Circuit's position.[38]

Second, according to the Ninth Circuit, *NIFLA* "required that the compelled speech relate to the product or service that is provided by an entity subject to the

23. *CTIA II*, 854 F.3d at 1117.
24. Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 733 n.16 (9th Cir. 2017) (comparing American Beverage Ass'n v. City & County of S.F., 871 F.3d 884, 893 (9th Cir. 2017) (*ABA I*), *on reh'g en banc*, 916 F.3d 749 (9th Cir. 2019) (*ABA II*) (finding that a required warning was not "factual and uncontroversial" because it was true, but misleading and contrary to statements by the Food and Drug Administration)).
25. *ABA I*, 871 F.3d at 893.
26. *Nationwide Biweekly Admin.*, 873 F.3d at 732 (quoting *CTIA II*, 854 F.3d at 1118).
27. This would also not be contrary to applicable governmental policies because it is also the U.S. Environmental Protection Agency's (EPA's) position. *See, e.g.*, Utility Air Regul. Grp. v. Environmental Prot. Agency, 573 U.S. 302, 311, 44 ELR 20132 (2014) (citing EPA's endangerment finding regarding motor vehicle greenhouse gas emissions, 74 Fed. Reg. 66496, 66523, 66537 (Dec. 15, 2009)).
28. 138 S. Ct. 2361, 2372 (2018).
29. *Id.* (quoting Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).
30. *Id.*
31. *Id.* (emphasis added).
32. *ABA II*, 916 F.3d 749, 756 (9th Cir. 2019).
33. *CTIA III*, 928 F.3d 832, 844 (9th Cir. 2019) (quoting *NIFLA*, 138 S. Ct. at 2376); *see also* Cambridge, Mass., Ordinance 1,418 (Jan. 27, 2020) (requiring gas pumps to "display a clear warning label explaining that burning gasoline, diesel and ethanol has major consequences on human health and on the environment, including contributing to climate change").
34. *CTIA III*, 928 F.3d at 845.
35. *Id.*
36. *Id.*
37. *Id.*
38. *See id.*; *see also CTIA I*, 158 F. Supp. 3d 897, 904-05 (N.D. Cal. 2016) (rejecting the arguments made in *NAM II*).

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requirement."[39] By comparison, the disclosure in *NIFLA* required clinics that did not provide abortion services to post a notice about abortion services offered elsewhere.[40] Thus, *NIFLA* "struck down the requirement that clinics post information about services they did not provide."[41] This would obviously not be an issue for product or service warning and information labels as, definitionally, they would relate to the product or service being provided.

V. Looking Forward

So, what comes next? Even though *NIFLA* does not explicitly adopt the D.C. Circuit's approach, the likelihood of the Supreme Court doing so in a future case was bolstered by the post-*NIFLA* confirmation of now-Justice Brett Kavanaugh, who concurred in the D.C. Circuit's original recitation—if one can call it that—of its standard.[42] This is even more troubling given statements made in the past couple years by two of his colleagues, Justices Samuel Alito and Amy Coney Barrett. Justice Alito, who was part of the *NIFLA* majority, stated, in two post-*NIFLA* opinions, that there is a "controversial nature of the whole subject of climate change,"[43] and, writing for a 5-4 majority, equated it to subjects like "the Confederacy, sexual orientation and gender identity, evolution, and minority religions."[44] Likewise, during her confirmation hearing, Justice Coney Barrett declined to respond to then-Senator, now-Vice President Kamala Harris' question about climate change. Instead she stated, "I will not express a view on a matter of public policy, especially one that is politically controversial," and referred to Senator Harris' question as one about "a very contentious matter of public debate."[45]

Justices Alito and Coney Barrett were not referring to *Zauderer* or *NIFLA* in making their statements, but under the D.C. Circuit's approach, that does not matter. If the Supreme Court adopts the D.C. Circuit's approach and, in the eyes of enough Justices, the subject of climate change itself is considered "controversial," then the Supreme Court would likely hold that even factually accurate climate change-related disclosures fail the *Zauderer* test. Moreover, this would give a perverse incentive to any entity or individual with the means and resources to create a public controversy about a topic such as climate change to do so and, thereby, make it even harder for such disclosures to pass constitutional muster. There is a long history of such conduct,[46] and plenty of reason to think the Supreme Court's adoption of the D.C. Circuit's subjective approach will only lead to more gamesmanship.

By comparison, if the Ninth Circuit's approach is adopted, a climate change-related warning or information label on a product would be allowed under *Zauderer* if the label (1) states facts, (2) in an accurate, non-misleading manner. The Ninth Circuit's test is certainly not perfect. There is still uncertainty as to what would be considered facts and what would be considered opinion, especially in an ever-changing field such as climate science. Nonetheless, the biggest advantage of the Ninth Circuit's approach is its attempt at objectivity. The test would ignore the subjective controversiality of climate change as a topic. This minimizes any incentive interested parties have in creating controversy. Put differently, interested parties can create controversy, but they cannot create facts.

For these reasons, and those discussed above, the Supreme Court should adopt the Ninth Circuit's standard. Otherwise, anything can be "controversial" under *Zauderer*, which would render it useless. All that would be left would be subjective judicial opinions. The topics most likely to be controversial are, like climate change, the areas where the public should have the most information. This can only be achieved by objective, factual, accurate disclosures. "[L]aws requiring *disclosure* of accurate information does not silence truthful speech or keep people in the dark; disclosures are designed precisely to accomplish the opposite."[47]

39. *CTIA III*, 928 F.3d at 845; *see also ABA II*, 916 F.3d 749, 756 (9th Cir. 2019) (citing *NIFLA*, 138 S. Ct. 2361, 2372 (2018)) ("A compelled disclosure accompanying a related product or service must meet all [the *Zauderer* test] criteria to be constitutional.").
40. *CTIA III*, 928 F.3d at 845.
41. *Id.*
42. *AMI*, 760 F.3d 18, 30-35, 44 ELR 20173 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment).
43. National Review, Inc. v. Mann, 140 S. Ct. 344, 346 (2019) (dissenting individually from the denial of certiorari).
44. Janus v. American Fed'n of State, County & Mun. Employees, Council 31, 138 S. Ct. 2448, 2476 (2018) (citing, unironically, an article about a study that concluded that "continuing to portray a scientific debate [about climate change] is dishonest" as a basis for his opinion that the topic was controversial). Moreover, Justice Alito wrote for the 5-4 majority consisting of himself, Chief Justice John Roberts, and Justices Anthony Kennedy, Clarence Thomas, and Neil Gorsuch so it is possible that they agree with his categorization of climate change as a "controversial subject[ ]."
45. *Amy Coney Barrett Senate Confirmation Hearing Day 3 Transcript*, Rev, Oct. 14, 2020, https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-3-transcript (comparing, in Justice Coney Barrett's opinion, the question to "questions that are completely uncontroversial, like whether COVID-19 is infectious, whether smoking causes cancer").
46. *See*, *e.g.*, Naomi Oreskes & Erik M. Conway, Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues From Tobacco Smoke to Global Warming (2010); Susanne Rust, *Report Details How Exxon Mobil and Fossil Fuel Firms Sowed Seeds of Doubt on Climate Change*, L.A. Times, Oct. 21, 2019, https://www.latimes.com/environment/story/2019-10-21/oil-companies-exxon-climate-change-denial-report.
47. *CTIA I,* 158 F. Supp. 3d 897, 901 (N.D. Cal. 2016) (citing *Zauderer*)..