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Timely commentary from WLF's blog

September 9, 2025

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It's Time for the Supreme Court to Fix the *Zauderer* Problem

by Zac Morgan

The Supreme Court has repeatedly affirmed that the First Amendment protects both "[t]he right to speak and the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Whether stopping New Hampshire from forcing its citizens to carry state propaganda on their car, *id*., striking down a requirement for newspapers to carry the ripostes of criticized political candidates, *Miami Herald Publishing Co v. Tornillo*, 418 U.S. 241, 258 (1974), or signaling that state purview of a social media platform's content moderation is verboten, *Moody v. NetChoice, LLC*, 603 U.S. 707, 732 (2024), the Court has repeatedly pushed down efforts to hijack private speech for public purposes. And it has done so by insisting that, at a minimum, before the government gets to take over private speech, the state must show that the need to do so is unusually great and that few other means (short of prohibition or prior restraint) could cure the problem. This is what the law sometimes refers to as "narrow tailoring," *AFPF v. Bonta*, 594 U.S. 595, 609 (2021), traditionally part of the First Amendment's exacting scrutiny analysis.

But that long line of venerable caselaw means nothing in the commercial context. There, compelled speech is everywhere—from mandatory disclaimers before certain purchases (that nobody really reads or avails themselves of), to country-of-origin labels, to the regular hectoring on tobacco advertising that cigarettes are a health hazard (Dear FDA: we know). Given the stouthearted First Amendment caselaw against state-sponsored ventriloquism of private actors—including corporations like Twitter or the *Miami Herald*'s publisher—why does the government so often get a cut of commercial advertising for its own priorities?

Because of a man named Philip Zauderer. Mr. Zauderer, an attorney, wanted to conduct a certain amount of commercial advertising for his business, and wished to advertise that his business model was based on contingency—clients would bear no responsibility for fees if they lost. Zauderer did not wish to inform his audience, however, "that the client may have to bear certain expenses," notwithstanding that arrangement. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985). So Ohio forced him to say it—and the Supreme Court upheld that compulsion over Zauderer's First Amendment objections.

But *Zauderer* was never intended as a license for the government to get to say anything related to a commercial transaction of its interest. Rather, the Court was trying to deter a specifically heightened risk of fraud or deception. A normal consumer might see a "no fees" advertisement as a pitch of genuinely free-if-you-lose-your-case legal services and be suckered

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into an agreement stating otherwise by an unscrupulous barrister.

As Judge Janice Rogers Brown aptly put it in a 2014 dissent, "the state's option to require a curative disclosure cannot be disconnected from its right to entirely prohibit deceptive, fraudulent, or misleading commercial speech. Requiring an advertiser to provide 'somewhat *more* information than they might otherwise be inclined to present' is" only "constitutionally permissible when the government's available alternative is to completely ban that deceptive speech." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 39-40 (D.C. Cir. 2014) (Brown, J., dissenting) (emphasis supplied in original, internal citation omitted). Or as the Supreme Court put it in nine years after *Zauderer*, the government may use compulsory disclaimers as "an appropriately tailored check against deception or confusion." *Ibanez v. Fla. Dep't of Bus. and Prof. Regul., Bd. of Accountancy*, 512 U.S. 136, 146 (1994). Given this robust (and ancient) anti-fraud interest, the Court required something less than the "narrow tailoring" typically required to uphold a compelled speech regime.

Unfortunately, the lower courts don't see it that way. Rather than limiting compelled speech to cases implicating the government's inherent and obvious power to fight fraud, many circuit courts have approved government co-authorship of commercial messaging where fraud concerns are nowhere to be found. Now, in vast swaths of the country, any "legitimate" governmental interest will do, so long as the speech compelled is arguably—even if only woodenly—true.

Most outrageously, the Ninth Circuit upheld a City of Berkeley disclaimer requirement that misinformed cellphone purchasers of the (likely nonexistent) cancer risk of using a smartphone, on the grounds that the individual sentences in the (lengthy) script could be parsed in such a way as to be technically correct. (In this instance, being technically correct is *not* the best kind of correct.) This isn't just a Berkeley problem. Since the Ninth is hardly alone in unmooring *Zauderer* from its facts, bad law on compelled speech goes from coast-to-coast.

The time has come for the Supreme Court to step in and take cert as soon as an appropriate vehicle comes to its doorstep. The Court has done yeoman's work in recent years to reinforce the importance of exacting scrutiny, but it has done so in cases involving campaign finance, *McCutcheon v. Fed. Election Commission*, 572 U.S. 185 (2014), or a culture war fault-line like abortion, *NIFLA v. Becerra*, 585 U.S. 755 (2018). The Court needs to go further in a case that's unambiguously commercial speech, shorn of any political tinging, to fix the *Zauderer* problem once and for all.

In sum, the Court should either limit *Zauderer* explicitly to deceptive advertising, or overrule it altogether—with the understanding that the state should be able to easily meet the normal First Amendment burden where the risk of fraud is material and palpable. Otherwise, current trends risk a future where the Constitution's protections against compelled speech in the commercial context will simply wither away, subject to a *Zauderer* problem that allows the government to force speakers to parrot functional nonsense at the point of sale.

