Compelled Disclosure and the Workplace Rights it Enables

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Worker and consumer protection laws often rely on the regulated entity to notify workers or consumers of their legal rights because it is effective and efficient to provide information at the time and place where it is most likely to be useful. Until the Supreme Court ruled in NIFLA v. Becerra *in 2018 that a California law regulating crisis pregnancy centers was an unconstitutional speaker-based, content-discriminatory regulation of speech, mandatory disclosure laws were constitutionally uncontroversial economic regulation. Yet, the day after striking down a disclosure law in* NIFLA*, the Court in* Janus v. AFSCME Council 31 *expanded the right of workers to resist supporting unions, a right that depends on an even more intrusive compelled notice regime than the one the Court struck down in* NIFLA*. When the Court found a First Amendment right not to disclose on one day and a First Amendment right to receive information based on a system of mandatory disclosure on the next, it revealed that treating disclosure rules as compelled speech inevitably requires the Court to pick sides in fights involving free speech or other rights claims on both sides. This essay argues that compulsory notice or disclosure laws are not constitutionally problematic when and insofar as they require statements of fact or statements of policy that are unambiguously labeled as speech of the government rather than the views of the speaker.*

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INTRODUCTION

Disclosure requirements imposed on providers of goods and services are a longstanding approach to regulation. Disclosure provides information to consumers at the point when the information is most likely to enable informed choice. Product labels promote public health by enabling those with health conditions to avoid allergens, or harmful drug interactions, or cancer-causing substances.[1] Some product labels, such as the one on a bottle of wine I have been enjoying that says that alcohol should be avoided by pregnant women and can cause health problems, convey governmental value choices more than precise scientific fact, but still provide information.[2] Some mandatory disclosure laws advance a public interest in preventing misleading or illegal behavior by the speaker or a third party,[3] or helping consumers know their legal rights.[4] Truth in lending and securities disclosure laws fall into this category, as do the disclosure requirements of the federal Family and Medical Leave Act and the Employee Retirement Income Security Act.[5] Some

1. *See* Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. § 343 (requiring labeling of certain foods advising consumers that they may contain certain enumerated allergens).

2. *See* Alcohol Beverage Labeling Act, 27 U.S.C. § 215 (requiring all alcoholic beverage containers to display a government warning that "[a]ccording to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects."). However, some studies have shown no health hazards to babies born to mothers who consumed small amounts of alcohol during pregnancy. *See* Howard E. LeWine, *Drinking a Little Alcohol Early in Pregnancy May Be Okay*, HARV. HEALTH BLOG (Jan. 29, 2020), https://www.health.harvard.edu/blog/study-no-connection-between-drinking-alcohol-early-in-pregnancy-and-birth-problems-201309106667 [https://perma.cc/Q8VT-M4TY].

3. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) (holding that a restriction on attorneys advising people to incur more debt in contemplation of filing for bankruptcy is a constitutionally permissible disclosure requirement because it is reasonably related to the government's interest in preventing deception of consumers).

4. Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 652-653 (1985) (upholding state bar rule that attorneys who advertise contingent fee arrangements must disclose that clients may be liable for litigation costs even if not attorney fees).

5. *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1601; Family and Medical Leave Act, 29 U.S.C. § 2611; Employee Retirement Income Security Act, 29 U.S.C. § 1022. The number of federal labor and employment statutes requiring employers to provide notice to employees about their rights is sufficiently great that the U.S. Department of Labor has created a

mandatory disclosure laws are part of statutory regulations, but others—informed consent rules in law, medicine, and other professions, *Miranda* or other warnings,[6] or the union dues disclosure requirements I discuss below—are judge-made rules to enforce common law or constitutional rights. Until recently, mandatory disclosure laws were constitutionally uncontroversial economic regulation.

But in 2018, the Supreme Court threw the constitutionality of disclosure laws into doubt in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*.[7] The Court struck down a California disclosure law on the grounds that it was a speaker-based, content-discriminatory regulation of speech. The law at issue required so-called crisis pregnancy centers to post a notice informing patients if the centers were unlicensed or did not have any licensed professionals on staff, and that the state offered free or low-cost reproductive health services.[8] Because almost all mandatory disclosure laws are speaker-based regulations that compel speech on the basis of content, *NIFLA* has created a quandary for lower courts trying to decide how broadly the Court's reasoning applies to invalidate disclosure rules.

Ironically, the day after the Court struck down the disclosure rule in *NIFLA*, it issued a ruling in *Janus v. American Federation of State, County, and Municipal Employees (AFSCME) Council 31* that depends on the very form of compulsory disclosure that *NIFLA* struck down.[9] *Janus* invalidated public-employer labor contracts requiring the employer to make payroll contributions to unions for any union-represented employees who objected to the deductions. The Court reasoned that such contributions are compelled employee speech that violate the First Amendment rights of the objecting employees.[10] The rule that the Court created in *Janus* depends on unions being required to inform their members and all employees they represent that they have a right to leave the union, terminate dues or fee payments, and receive union representational services for free.[11] Not only is it impossible to square the reasoning of *NIFLA* with the legal regime of *Janus*, *NIFLA* suggests that requiring unions to inform workers of their right to free ride is compelled speech that violates the union's First Amendment rights.

Part I explains the role of disclosure rules in the regulatory regime that the Supreme Court invented to enforce its rules regarding union dues and fees. Part II

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compliance assistance program focused just on which posters employers are required to display in the workplace. FIRSTSTEP POSTER ADVISOR, https://webapps.dol.gov/elaws/posters.htm?_ga=2.226289375.432122649.1628718112-1151412948.1628718112 [https://perma.cc/GCZ6-NWFB].

6. *Miranda v. Arizona*, 384 U.S. 436 (1966), requires police to warn people of their rights, and might be read as a restriction only on government speech. But other cases and rules require warnings by private parties. For example, *Upjohn v. United States*, 449 U.S. 383 (1981), and Model Rule 1.13(f) both require lawyers representing organizational clients to warn employees and other constituents that the lawyer represents the organization, not the individual, whenever a misconception about who the lawyer represents might adversely affect the interests of the individual.

7. 138 S. Ct. 2361 (2018).

8. *Id.* at 2368–70.

9. 138 S. Ct. 2448 (2018).

10. *Id.* at 2478.

11. *See* Marquez v. Screen Actors Guild, 525 U.S. 33, 48 (1998).

explains why they violate the Court's new *NIFLA* rule about compelled speech. Part III explains why the First Amendment should play no role in such disclosure rules. There are First Amendment interests on both sides—the right not to be compelled to disclose and the right to receive information. Striking down mandatory disclosure, the *NIFLA* majority focused only on the rights of the speaker. Striking down union fees, *Janus* focused only on the rights of the audience and ignored the mandatory disclosure that makes the regulation of union fees possible. Part IV explains why mandatory disclosure or notice regimes, like that on which *Janus* rights rest, should not violate the First Amendment.

When the Court found a First Amendment right not to disclose on one day and a First Amendment right to receive information based on a system of mandatory disclosure on the next, it revealed that treating disclosure rules as compelled speech will inevitably mean courts will be picking sides in fights involving free speech or other rights claims on both sides. By removing mandatory disclosure rules from the ambit of the First Amendment, the Court can avoid choosing whose First Amendment rights it prefers and extricate itself from the political task of deciding, on the sole basis of the justices' own preferred values, which speakers and which audiences will receive constitutional protection.

I. COMPELLED DISCLOSURE IN THE REGULATION OF UNION DUES

Under the National Labor Relations Act (NLRA) and the labor laws governing state and local government employees, a union selected by the majority of workers in a workplace or other unit is the exclusive bargaining representative of all workers, including the minority who do not support the union.[12] Although unions selected by a majority gain the right to represent all, they remain private membership organizations that, like clubs or other groups, can impose their own rules regarding membership and dues.[13] To protect the minority, the Supreme Court in 1944 imposed a duty of fair representation on unions that requires them to represent, fairly and adequately, *all* workers in the unit, not just their dues-paying members.[14] Unions gain negotiating power by speaking with one voice on behalf of all represented workers and by excluding those who would work under conditions below what the majority considers the minimum. As amended in 1947, the NLRA prohibits employment rules that require union membership at the time of hire to prevent union solidarity from being used to blackball non-union workers. But Congress also understood the union concern that, without some rule requiring dues payments to the union that owes a duty of fair representation in contract negotiation and administration, some employees will free ride; non-payers will share the benefits of contract coverage and,

12. *See generally* Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right to Work Law*, 4 U.C. IRVINE L. REV. 857 (2014).

13. *See* NLRB v. Allis-Chalmers, 388 U.S. 175, 182–84, 195 (1967) (discussing legal limits on a union constitutions and by-laws that allow for fines and expulsion of members who violate union rules, and holding that a union may legally fine a member for crossing a picket line). *See generally* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015) (discussing the anomalous position of unions as private membership organizations that exercise significant statutorily granted power).

14. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).

especially, the right to have the union and its lawyers represent them in grievances under the contract, but pay none of the costs. Accordingly, the statute allows unions and employers to agree to require employees to join the union thirty days after becoming employed. At the same time, however, Congress also allowed states to ban such membership requirements. Anti-union groups and the Supreme Court have been chipping away at the statutory compromise ever since it was adopted.

A business-funded, self-styled, civil liberties organization known as the National Right to Work Committee (NRTW) formed in 1955 to combat the spread of unions.[15] It launched a long and successful litigation and lobbying campaign challenging majority rule unionism and the compulsory dues system. NRTW won its first Supreme Court victory in 1956, when the Court held that an agreement between a railroad and a railway employees' union was subject to constitutional scrutiny based on a later-discredited theory that federal preemption of state law was sufficient state action to trigger the application of the First Amendment to a labor contract between a private employer and a union.[16] In 1961, to avoid the question whether compulsory dues violated the First Amendment, the Court interpreted the Railway Labor Act not to require dissenting employees to provide financial support for union political speech, but only for the costs germane to the union's role as the exclusive representative for collective bargaining and grievance handling.[17] In 1977, the Court extended the First Amendment right not to pay for union political activity to public sector unions in *Abood v. Detroit Board of Education*.[18]

In the private sector, where labor contracts involve no state action (the Court having since backed away from the expansive view of state action that launched the challenge to union finance in the 1950s), the Supreme Court in *Communication Workers of America v. Beck* extended the *Abood* fair share fee system to private sector employees as a matter of statutory interpretation.[19] The statute specifically allows such agreements, so long as the employer does not discriminate "against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."[20] Even though the statute specifically allows such "union security" agreements, the Supreme Court held that the most such agreements can require is that the employee pay an amount equal to initiation fees and dues; the worker does not actually have to join.[21] In *Beck*, the Court held that the most a union and employer could agree to charge non-members

15. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014); UAW v. Nat'l Right to Work Legal Def. & Educ. Found., Inc., 781 F.2d 928, 929 (D.C. Cir. 1986); UAW v. Nat'l Right to Work Legal Def. & Educ. Found., Inc., 590 F.2d 1139, 1143 (D.C. Cir. 1978).

16. Ry. Emps.' Dept. v. Hanson, 351 U.S. 225 (1956).

17. Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

18. 431 U.S. 209 (1977).

19. 487 U.S. 735 (1988).

20. 29 U.S.C. § 158(a)(3).

21. NLRB v. Gen. Motors Corp., 373 U.S. 734, 737 (1963).

was a sum that reflects the employee's pro rata share of the union's expenses that do not include political and ideological activity.[22]

In *Janus* in 2018, the Court overruled *Abood* and held that union-represented *public* employees not only have a right not to subsidize union political activities but also have a much broader right not to pay their fair share of union contract negotiation or administration costs.[23] But under *Beck,* in the private sector it remains lawful and customary for an employer and a union to agree that the employer will pay a union each pay period a sum equal to each union member employee's dues and a slightly lesser sum for each nonmember.[24] What that lesser sum is has been the subject of numerous court decisions.[25]

This framework of dues reduction and union membership opt-out was invented by the Court because, as noted, the NLRA and many public sector statutes allow agreements requiring union membership and payment of fees.[26] To enforce its dues reduction and opt-out framework, the Court decided a dozen or more cases distinguishing between union political activity, on the one hand, and collective bargaining and grievance handling, on the other.[27] It required unions to develop a system for determining what each worker's pro rata share of those expenses are. And, most important for purposes of understanding the *NIFLA* compelled speech problem, it requires a system for union-represented employees to learn about their rights not to join the union or to pay full dues and their right to contest the calculation the union uses to distinguish between political and contract expenditures and to calculate what unions call fair share fees and what others call agency fees.[28]

In 1986, in *Chicago Teachers Union v. Hudson*, the Court rejected a system that a teachers' union had used to handle employee challenges to the calculation of fair share fees.[29] The Court ruled that the union provided too little information to employees and left them "in the dark about the source of the figure for the agency fee."[30] The union did not "provide an adequate explanation for the advance reduction of dues, and it [did] not provide a reasonably prompt decision by an impartial-decisionmaker" to handle employee challenges to the union's calculations.[31]

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22. 487 U.S. at 745.

23. 138 S. Ct. 2448 (2018).

24. Valley Hosp. Med. Ctr., Inc., 368 N.L.R.B. No. 139 (2019) (holding that an employer's contractual obligation to remit union dues through payroll deduction expires with the collective bargaining agreement), *overruling* Lincoln Lutheran of Racine, 362 N.L.R.B. 1655 (2015) (holding that an employer's obligation to remit dues through payroll deduction does not expire with the contract).

25. *See, e.g.*, Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507 (1991).

26. *See* 29 U.S.C. § 158(a)(3).

27. *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012).

28. *See* Phila. Sheraton Corp., 136 N.L.R.B. 888 (1962) (holding that the union must notify employees how much fees or dues are, how dues or fees are computed, the date by which employees must pay them, and that the employee will be terminated pursuant to the contract for failure to pay); Chi. Tchrs. Union v. Hudson, 475 U.S. 292, 294, 310 (1986) (holding that the union's notice was inadequate, as was the system the union provided to enable employees to contest the fee calculation).

29. 475 U.S. 292 (1986).

30. *Id.* at 306.

31. *Id.* at 309.

Accordingly, the Court required unions to notify all workers they represent of their right not to join the union or to pay dues, their right to pay a fee representing only their pro rata share of the union's contract negotiation and administration costs, and their right to contest how the union calculated that reduced fee.[32] The whole purpose of this compulsory disclosure regime was to advance the non-union workers' interest in not subsidizing union speech with which they disagreed.

The National Labor Relations Board has adopted a similar rule governing private sector workers under *Beck*.[33] The *Beck* Court held that the NLRA allows union contracts to require payment "of only those fees and dues necessary to 'performing the duties'" involved in negotiating and enforcing a contract and does not allow compulsory contributions to other union efforts to build worker power through organizing or political action or to represent workers in forums other than bargaining and grievance arbitration.[34] The Board requires private sector unions to notify employees of their right to opt out of union membership and dues payments and to contest the union's calculation of the sum that nonmembers must pay.

The content of the disclosure that unions are required to provide has been the subject of litigation. In *Marquez v. Screen Actors Guild, Inc.*, the Court ruled on a clause in the agreement between the Hollywood actors' union and the alliance of motion picture and television producers providing that any performer who worked under the agreement must be "a member of the Union in good standing."[35] The contract quoted verbatim the language from the NLRA about employees having thirty days to join the union and the prohibition on discrimination on the basis of union membership except where membership is denied for reasons other than a failure to pay dues.[36] But it did not explain that the Supreme Court has determined that section 8(a)(3) cannot be enforced as written, but instead can require only payment of fair share fees. The Court rejected the employee's argument that the contract violated the duty of fair representation because it failed to explain the fair share fee rules and thus could not be enforced as written.[37] Rather, the Court explained, "this clause *can* be enforced as written, because by tracking the statutory language, the clause incorporates all of the refinements that have become associated with that language."[38] The Court continued: "After we stated that the statutory

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32. *Id.* at 311.

33. Cal. Saw & Knife Works, 320 N.L.R.B. 224 (1995).

34. Commc'n Workers of Am. v. Beck, 487 U.S. 735, 762 (1988) (quoting Ellis v. Ry. Clerks, 466 U.S. 435, 448 (1984)).

35. 525 U.S. 33, 38 (1998).

36. *Id.* at 38–39. Section 8(a)(3) provides that "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment" so long as membership is available to every employee who "tender[s] the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 28 U.S.C. § 158(a)(3). Section 8(a)(3) prohibits employer discrimination against nonmembers only where the employer "has reasonable grounds for believing [that membership] was not available to the employee on the same terms and conditions generally applicable to other members" or was denied for failure to pay dues or initiation fees. *Id.*

37. *Id.* at 46.

38. *Id.*

language incorporates an employee's right not to 'join' the union (except by paying fees and dues) and an employee's right to pay for only representational activities, we cannot fault SAG for using this very language to convey these very concepts."[39]

Following *Hudson* and *Beck*, the National Labor Relations Board has imposed very precise requirements on what private sector unions must explain to all employees they represent.[40] The union must provide notice of the right to object to payment of full fees and the use of fair share fees.[41] Ruling on a notice system in which the union published the notice annually in the union magazine, the Board ruled that the union did not have to provide additional notice of *Beck* rights to employees at the time they resign their union membership but must give such notice to both newly hired nonmember employees and to currently employed employees at the time they cease to be union members if they have not been sent a copy of the magazine containing the *Beck* notice.[42] The notice must inform employees that they have "the right to be or remain a nonmember and that nonmembers have the right . . . to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities . . . ."[43] Under *Janus*, it would appear that all public sector unions must notify all workers they represent of their right to refuse to join the union or to pay any fees at all.[44]

To sum up, unions in both the private and public sector remain private membership organizations. They have both First Amendment and statutory rights to speak and to engage in other expressive activity, on their own behalf, on behalf of their members, and on behalf of the workers they represent.[45] Indeed, they have statutory duties to speak on behalf of all workers they represent.[46] But, under a combination of the Supreme Court First Amendment and statutory decisions, they are limited in what they can charge those whom they represent who choose not to become members. And, to protect both the First Amendment and statutory rights of the workers they represent to free ride on the dues and fees paid by others, unions are compelled to tell everyone they represent, in detail, about their rights not to join, not to pay, and indeed to do things that their member coworkers consider inimical to the reason why the union exists.

II. *NIFLA* AND UNION DISCLOSURES

The disclosure requirement that sparked the Court majority's ire in *NIFLA v. Becerra* was one targeted at so-called "crisis pregnancy centers," which provide a

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39. *Id.*

40. Cal. Saw & Knife Works, 320 N.L.R.B. 224 (1995).

41. *Id.* at 235.

42. *Id.*

43. *Id.* at 233.

44. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

45. *See* Estlund, *supra* note 13, at 173 (explaining that "[u]nions are voluntary membership associations with a long history of independent activism, a foundational claim to organizational autonomy, and constitutional rights to freedom of speech and association.").

46. Vaca v. Sipes, 386 U.S. 171, 177 (1967). *See generally* Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127 (1992).

limited range of services to pregnant women with the goal of encouraging them not to have an abortion.[47] Critics of these centers argue they mislead women about the services they provide, and mislead each patient about her options, about the risks of pregnancy and abortion, and even about the stage of her pregnancy with the goal of persuading her to carry the fetus to term, or to delay having an abortion until it is too late under state law.[48] The California legislature enacted the Reproductive Freedom, Accountability, Comprehensive Care and Transparency (FACT) Act, which required clinics that serve primarily pregnant women to post a notice in the waiting room, or to provide an electronic notice at the time patients register, informing patients that the state provides free or low-cost services, including abortions, and a phone number to call.[49] In addition, any clinic that was not state licensed was required to notify patients that California had not licensed the clinic to provide medical services.[50]

The Court struck down the California law, reasoning that the mandated notices are compelled speech.[51] The heart of the majority's argument was that the state compelled clinics to speak by requiring them to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them."[52] To the majority, what was most troublesome was that the content of the state-mandated message was about "abortion—the very practice that petitioners are devoted to opposing."[53] The majority continued: "By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech."[54]

The majority distinguished a number of its precedents upholding various regulations on advertising and professional speech on five main grounds.[55] First, the majority opinion distinguished between laws that mandate disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available" from the mandated notices about the availability of free or low cost services elsewhere.[56] Given that the Court did not dispute the factual nature of the information California sought to require clinics to provide, the problem must have been (though the Court did not say so) that advising women about reproductive choices is not "uncontroversial."[57] Second, the majority emphasized that the mandatory disclosure was unnecessary both because it applied regardless of what the facilities' own messaging is and because the state of California could provide the

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47. 138 S. Ct. 2361 (2018).

48. *See, e.g.*, Diane Kee, Note, *Reclaiming Access to Truth in Reproductive Healthcare After* National Institute of Family & Life Advocates v. Becerra, 119 MICH. L. REV. 175 (2020).

49. NIFLA, 138 S. Ct. 2361, 2368–69 (2018) (citing CAL. HEALTH & SAFETY CODE ANN. § 123472(a)(2) (2018)).

50. *Id.* at 2370.

51. 138 S. Ct. at 2376, 2378.

52. *Id.* at 2371.

53. *Id.*

54. *Id.* (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

55. *Id.* at 2372–77.

56. *Id.* at 2372 (alteration in original) (quoting Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

57. *Id.* at 2372.

information in other means—through "a public-information campaign" or on a billboard on public property near the center.[58] Third, the majority suggested that compelled disclosure would be permissible only if the state proved that the restriction was neither unduly burdensome nor overly broad, and that alternative methods of notice were not effective; California allegedly had not done so.[59] Fourth, the majority emphasized that the mandatory disclosure about unlicensed facilities and providers was constitutionally infirm because it targeted only some speakers, but not others.[60] Finally, and most fundamentally, what both the majority and Justice Kennedy's concurring opinion seemed to find most objectionable is that the compelled disclosure was contrary to the message that the center wished to convey.

As to each one of these, the majority's reasoning suggests that the *Hudson/Beck* notice system is equally constitutionally infirm.

First, *Hudson/Beck* notices are as controversial as are notices about the availability of reproductive health services and state licensing of facilities that provide services to pregnant women. It is not clear how to measure the controversy associated with an issue as to which the government requires disclosure. But requiring unions to tell both their own members and the workers they represent that they have a right to refuse to be members, to refuse to support the solidarity that is essential to union strength, and to continue to receive for free the services that members pay to support are controversial by any measure. Imagine if the government instructed the National Rifle Association, the ACLU, or churches that they are required to tell their members that they can leave or can retain the benefits of membership without paying dues. Or, to use another measure of controversy, NRTW has been litigating and lobbying for over half a century to prohibit the membership arrangements that unions have been fighting for almost two centuries to establish.[61] Surely, this is controversial.

Second, as to the necessity of the *Hudson/Beck* notices: it is always the case that the government could provide the information itself rather than requiring the provider of goods or services to do so. The same could be said about the dues objection notice. The NLRB or the public employee relations board for state employees could easily send out notices to all workers covered by collective bargaining agreements (CBAs) or could post the notice on their websites. Or the government could prepare posters and mail them to employers to hang in the worksite alongside the notices that are already posted about the minimum wage, or equal employment opportunity, or the Occupational Safety and Health Act. The government could launch a public service announcement campaign like state health

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58. *Id.* at 2376.

59. *Id.* at 2376. The majority said that disclosures are permissible only "to remedy a harm that is 'potentially real not purely hypothetical,'" (quoting Ibanez v. Fla. Dep't. of Bus. & Pro. Regul., 512 U.S. 136, 146 (1994)), and must be "no broader than reasonably necessary," *id.* (quoting *In re* R. M. J., 455 U.S. 191, 203 (1982)); Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976); Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977); *Zauderer*, 471 U.S. at 649.

60. *Becerra*, 138 S. Ct. at 2378.

61. *See A Brief History of the Foundation*, NRTW, https://www.nrtw.org/a-brief-history-of-the-foundation/ [https://perma.cc/WMZ2-3PYR] (describing the organization's work since 1968 challenging union security provisions).

insurance exchanges do during the open enrollment period each year, or it could send out email or text messages to those who subscribe to Nixle, put public service announcements on TV and radio, or buy billboard space. Government employees could fan out across the state and hand out flyers outside workplaces.

Third, the majority suggested that compelled disclosure would be permissible only if the state provided that alternative methods of notice were not effective, and California allegedly had not done so.[62] Here, too, the same could be said about *Hudson*/*Beck* notices. NRTW launched a huge public relations campaign around the time that the Court was deciding *Janus* with the goal of getting union-represented workers to resign their membership and to become free riders.[63] Employers contract with union-avoidance businesses to defeat union organizing campaigns, and surely those businesses could be mobilized to advise workers of their right not to pay union dues or fees. Given the amount of information that is out there informing union-represented employees of their right to free ride, it is difficult to see why workers need to hear the same information from unions.

Fourth, the majority emphasized that the mandatory disclosure about unlicensed facilities and providers was constitutionally infirm because it targeted only some speakers, but not others.[64] Of course, that is true of all disclosure rules. But, as applied to unions, the *Hudson*/*Beck* framework requires only the union, not the employer who is the other party to a CBA, to provide the notice and to administer the complex dues objection system. Why not impose the duty on the employer?

Fifth, the majority was troubled that California required all covered centers to post the notice with the government's precise message, regardless of what the center said in its own advertisements or other communications with clients.[65] Yet many product labeling requirements do exactly that (think of the Surgeon General's warning on cigarettes). Multiple Supreme Court and NLRB rulings specify in precise detail what unions must say about the right not to join or pay dues, how to register a dues objection, how often such notices must be provided, how to challenge the union's calculation of an agency fee, how fees are calculated, and the procedure for resolving such objections. Why is it permissible to require unions to deliver the government's message?

Finally, and most fundamentally, what both the majority and Justice Kennedy's concurring opinion seemed to find most objectionable is that the compelled disclosure was contrary to the message that the center wished to convey or, as Kennedy put it, "contrary to their deepest convictions."[66] It would, the majority said, "drown[] out the facility's own message."[67] Justice Kennedy put the point even more forcefully: compelled disclosure is constitutionally infirm when it "compels

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62. *Becerra*, 138 S. Ct. at 2376.

63. *See* NAT'L RIGHT TO WORK, www.myjanusrights.org [https://perma.cc/V944-ASRZ]. The site is linked through a tab on the NRTW homepage and includes forms that people can use to end their fair share fee contributions. The site also offers free legal assistance to workers seeking to challenge fair share fees and union dues. *Id.*

64. *Becerra*, 138 S. Ct. at 2378.

65. *Id.* at 2377.

66. *Id.* at 2379 (Kennedy, J., concurring).

67. *Id.* at 2378 (majority opinion).

individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these."[68]

This is where unions have the strongest argument against *Hudson*/*Beck* notices. There is no principle more deeply held by unions than the principle of solidarity—building power through unity, pursuing shared goals, and equitably sharing sacrifice.[69] Moreover, many unions exist in workplaces in which the employer relentlessly campaigns against them and seeks every opportunity to persuade workers to decertify the union. And the employer enjoys broad statutory and constitutional free speech and property rights to inveigh against unionism generally and against the union that represents or seeks to represent its employees in particular. Employers need not, and most do not, provide access to the union to deliver a contrary message.[70] One of the few forms of power that unions have is the power to cultivate community and solidarity. Requiring the union to tell its members and those whom it wishes to become members that they do not need to support the union or their co-workers is a bit like requiring churches, mosques, and synagogues to advise their congregants that they have a right to be atheists and heretics yet still benefit from the religious community's programs.

III. INCONSISTENCY IN RESPECTING FIRST AMENDMENT RIGHTS IN MANDATORY DISCLOSURE LAW

The Court's First Amendment jurisprudence judging the permissibility of disclosure rules has largely failed to recognize that there are free speech interests on both sides. As illustrated in the contrast between *NIFLA* and the *Hudson/Beck* notice cases, when courts scrutinize disclosure rules under the First Amendment, they necessarily choose one set of free speech interests over another in a way that is at best arbitrary and at worst reflects nothing other than judicial policy preferences.

The First Amendment protects speech both because of the autonomy interests of speakers to express their views and because of the informational interests of the recipients of information in a robust marketplace of ideas.[71] The First Amendment protection for speech of corporations is justified primarily by the interest of audiences in receiving information; as the Supreme Court explained in *Citizens United*, even if corporations are fictional entities that cannot enjoy personal expression, corporate political speech serves the interests of voters who learn what corporations have to say.[72]

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68. *Id.* at 2379 (Kennedy, J., concurring).

69. *See* Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

70. *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (holding unconstitutional as a taking of property without compensation a state law granting union temporary and limited access to work site to discuss unionism); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (holding that employer may exclude union organizers from parking lot otherwise open to the public); NLRB v. United Steelworkers of Am., 357 U.S. 357 (1958).

71. The scholarly literature exploring the many values advanced by a constitutional protection for free speech is so vast as to defy economical or fair citation practice. Both the autonomy and the truth-promoting values are articulated in Justice Brandeis' dissenting opinion in *Whitney v. California*, 274 U.S. 357, 375–77 (1927).

72. Citizens United v. FEC, 558 U.S. 310, 339 (2010).

The inconsistency among *NIFLA*, *Janus*, and *Hudson/Beck* is in whose speech interests the Court considers. *NIFLA* focuses entirely on the speech interests of the organization and gives no weight to the interests of women in receiving full information about their options for reproductive care. The majority does not even acknowledge that women have a constitutional right to have abortions and that the failure of the clinics to provide accurate information is intended to prevent the exercise of that right.

Janus, in contrast, focuses entirely on the interests of organizational stakeholders in not subsidizing organizational speech with which they disagree and entirely ignores the interests of the majority. And *Hudson/Beck* focus entirely on advancing the interests of employees in receiving the information that would enable them to become dissenters and ignores the burdens on the union members in compelling them to convey a message they consider anathema. In establishing this new constitutional right not to contribute to what the Court called the union's ideological activity, the Court discounted the union's First Amendment interests in engaging in such activity on behalf of all employees it represents. And the Court entirely ignored the burdens on the union of being compelled to tell members that they have the right to be nonmembers while still receiving all the benefits of membership.[73]

In most union security cases, the Court has either discounted or completely ignored the First Amendment speech and associational rights of unions and their members.[74] In the early days of the union security litigation, when the Court rarely perceived the First Amendment as applying to speech in the economic realm of conduct, unions were seen mainly as economic actors, and regulation of union conduct or union-employer relations was seen as economic regulation entitled to the *Carolene Products* presumption of constitutionality.[75] The Court nevertheless recognized unions as having First Amendment rights to engage in political activity in *International Association of Machinists v. Street*, the same case in which the Court recognized dissenters' interests in not funding union political activity. The Court reversed an injunction against a union collecting dues from objecting employees.[76] The Court acknowledged the importance of avoiding free riding in the context of the unions' obligations to enforce contracts and engage in the elaborate self-regulatory mechanisms imposed by the Railway Labor Act. The Court also acknowledged the dissenting workers' interests in not subsidizing political activity they considered anathema. The Court balanced these two competing interests by saying that protecting dissenters' rights must not sacrifice the rights of the union to engage in political activity:

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73. Nor, as a coauthor and I have explained elsewhere, did it consider the First Amendment interests of the union or its members who would be required to subsidize the free riders. Catherine L. Fisk & Margaux Poueymirou, Harris v. Quinn *and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 482 (2015).

74. Ry. Emps.' Dep't v. Hanson, 351 U.S. 225 (1956); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 773 (1961) (noting that broadly restricting how unions spend money "would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters.").

75. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

76. *Street*, 367 U.S. at 740.

> many of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters.[77]

Therefore, the majority concluded: "To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other."[78]

But in later cases, the First Amendment rights of unions disappeared from the discussion. When the Court extended the *Street* rule from the Railway Labor Act to the National Labor Relations Act in *Beck* in 1988, it made no mention of the unions' First Amendment rights.[79] To be sure, *Beck* did not rule on whether private sector contracts requiring dues payments without discounts for nonmembers violated the First Amendment; it held only that section 8(a)(3) must be construed the same as the provision of the RLA at issue in *Street*.[80] The briefs of and in support of the dues objector mentioned the First Amendment rights of objectors, but those of unions mentioned only statutory obligations.[81] There is reason for this: as the briefs of the union and its amici explained, by the time *Beck* was decided in the late 1980s, the Court had long since abandoned the notion on which *Street* rested that comprehensive statutory regulation of labor-management relations, or the union's statutory certification as exclusive bargaining representative, clothed the actions of the union, or the employer, or the contract they negotiated, with state action.[82] Given that the unions' theory was that there was no state action, it made no sense to argue that the Court would limit the unions' right to engage in political speech if the law and contract were construed to prohibit collection or use of fees to fund political activity.

However, as NRTW continued its campaign to prohibit unions from collecting or spending money on politics, it became necessary for union opponents to develop a theory to rebut the point that the Court had recognized in *Street* that restrictions on union expenditures can violate the unions' First Amendment rights. In 2007, the Supreme Court, in an opinion by Justice Scalia, delivered the theory they needed.[83]

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77. *Id.* at 773.

78. *Id.*

79. *See* Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 744–47 (1988).

80. *Id.* at 747–54.

81. *See* Brief for Petitioners, Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988) (No. 86-637), 1987 WL 881075; Brief for the AFL-CIO as Amicus Curiae in Support of Petitioners, Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988) (No. 86-637), 1987 WL 881077.

82. Brief for Petitioners, Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988) (No. 86-637), 1987 WL 881075, at *12–20 (citing Jackson v. Metro. Edison. Co., 419 U.S. 345 (1974); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987)).

83. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 180, 191–92 (2007).

It came in a case involving a state campaign finance law. As the Court was steadily expanding the First Amendment rights of corporations to spend their general treasury funds on politics, the Supreme Court explained why restrictions on such corporate expenditures would violate the First Amendment while restrictions on union expenditures would not. In *Davenport v. Washington Education Association*, the Supreme Court upheld a Washington state law that required labor unions to obtain advance permission from members and fee payers before spending any union general treasury funds (that is, member dues and fair share fees) on political activity.[84] The Washington Supreme Court had held that the law infringed unions' First Amendment right to engage in political speech.[85] The Supreme Court reversed and distinguished the Court's campaign finance cases that had found restrictions on corporate political speech to violate the First Amendment.[86] It explained that the law restricted not how the union spent its money (and thus the union's speech), but how the union spent "other people's money."[87] The Court reasoned that the union had money to spend only because of state law making unions the exclusive representative and allowing unions and employers to negotiate agreements requiring members and fee payers to make the payments.[88]

In *Davenport*, the Court ignored the fact that unions also have money because all members and some fee payers voluntarily pay dues or fees. It is simply wrong to assert that union political expenditures are financed with "other people's money."[89] Moreover, even if we focus only on the expenditure of money obtained from those who oppose the union's message, unions are not alone in having money contributed more or less involuntarily. Many corporations likewise have money because of compulsory contributions under various legal regimes. Employer-sponsored pension, health, disability, and other insurance programs funnel money from workers to corporations, and there has never been a rule restricting whether the insurance and other financial services companies are restricted from expending money on political speech.[90] Public utilities including gas, electric, water, and waste management companies finance political speech with money paid by ratepayers who have no choice about whether or which utility company to support or how much to pay.[91]

When the Court has recognized the interest of organizations that receive compulsory payments in engaging in speech without having to create an opt-out (or opt-in) system, it has emphasized the shared or public interest in promoting speech or receiving information. Thus, in ruling that universities can spend student activity

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84. *Id.*

85. State v. Wash. Educ. Ass'n, 156 Wash. 2d 543, 570 (2006).

86. *Davenport*, 551 U.S. at 187 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767–68 (1978); Austin v. Mich. Chamber of Com., 494 U.S. 652, 654–56 (1990)).

87. *Id.* (emphasis omitted).

88. *Id.*

89. *Id.*

90. *See, e.g.*, Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800 (2012); *See, e.g.*, Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023 (2013); *See, e.g.*, Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981).

91. *See* Brudney, *supra* note 90.

fees on speech, the Court emphasized the role of the university in providing a forum for a range of speakers.[92] In ruling that integrated state bar associations can charge bar dues, the Court noted the important role the bar plays in regulating the profession.[93] And in upholding compelled contributions to some agricultural cooperative marketing organizations while striking down others, the Court emphasized the unique and combined private-public role such organizations play.[94] All of the cases upholding compelled subsidies emphasize, as *Citizens United* did, the value of promoting speech and the interest of both the organization in speaking and its audience in receiving the information made possible by compelled subsidies. But when the Court strikes down compelled subsidies or other forms of speech regulation, as it has in the union context, it emphasizes that the speech is not necessary or valuable or that voluntary contributions will produce adequate speech.

The Court has failed to explain when or why the interest in promoting speech or disseminating information through compelled speech or subsidies outweighs the interest in not being required to convey information or subsidize speech. It is impossible to reconcile the Court's cases in any way other than the ipse dixit the Court employed when it attempted to distinguish fees paid to unions for representation services from fees paid to integrated state bars or universities.[95] States, the Court said, "have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices" and universities would face "insuperable" "administrative problems" if they had to allow students to opt out of supporting speech.[96] But the Court in *Janus* and *NIFLA* simply said that it found compelled subsidies or speech unnecessary because voluntary contributions would suffice (which could be true of state bar dues or student activity fees), or because people could get information from other sources (which is always true in every compelled speech case). And the Court entirely overlooked the fact that the union fees opt-in regime it held to be constitutionally required in *Janus* rests on a compelled notice rule it invented in *Hudson*. Unions conceivably could, relying on *NIFLA*, make a constitutional challenge to the compelled notices that *Hudson* requires.

In short, there is no way for the Court to decide compelled speech cases except by declaring that some speech is valuable and other speech is not, and that some speech regulations infringe the rights of a speaker whom the Court chooses to prioritize and others do not. In *NIFLA*, the Court emphasized only the First Amendment rights of the pregnancy centers not to convey a message contrary to their beliefs.[97] The next day, in *Janus*, the Court emphasized only the First Amendment

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92. *See* Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 221 (2000).

93. *See* Keller v. State Bar of Cal., 496 U.S. 1, 10–14 (1990).

94. *See generally* Johanns v. Livestock Mktg Ass'n, 544 U.S. 550 (2005) (upholding a compulsory fee imposed on beef producers); United States v. United Foods, Inc., 533 U.S. 405 (2001) (striking down a compulsory fee imposed on mushroom producers); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) (upholding a compulsory fee imposed on tree fruit producers).

95. *See* Harris v. Quinn, 573 U.S. 616, 655–56 (2014).

96. *Id.*

97. See NIFLA v. Becerra, 138 S. Ct. 2361, 2374 (2018) (noting that "regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to

rights of dissenters to opt out, a system which depends on compelling unions to provide information about opt-out rights under circumstances that run afoul of the same principles the Court prioritized in *NIFLA*.[98]

IV. THE PROPER AND LIMITED ROLE OF THE FIRST AMENDMENT IN MANDATORY WORKPLACE NOTICES

To this point, I have shown that the Court's compelled speech cases have reflected the Court majority's value choices, not some set of neutral principles. Here, I sketch a principled approach to compelled disclosure rules. Relying on *NIFLA*'s carve out for factual statements that are part of a regulatory framework, I show that compulsory workplace notices are a category of speech that is permissible under the First Amendment when and insofar as they require truthful statements of fact or, alternatively, where they unambiguously state that the message reflects the government's policy rather than the views of the compelled speaker.

All First Amendment analysis begins with the Court assigning a particular form of speech regulation to a category.[99] Some categories are unprotected (e.g., child pornography or false and deceptive advertising), and some are less protected (such as commercial speech). The Court then classifies the regulation as requiring strict, exacting, intermediate, or rational basis review.[100] In *NIFLA*, as a scholar has recently pointed out, the Court recategorized some compulsory disclosure laws from the category of factual compelled commercial disclosures upheld in *Zauderer v. Office of Disciplinary Counsel*, which invalidated Ohio Bar disciplinary rules prohibiting attorney advertising seeking to represent women in litigation against manufacturers of an intrauterine birth control device.[101] *NIFLA* also redefined the category of regulation of professional conduct only incidentally affecting speech, as in *Planned Parenthood v. Casey*, which upheld a state law requiring abortion providers to recite certain information to patients.[102] In so doing, the Court also said it was not calling into question "the legality of health and safety warnings long considered permissible,

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advance a legitimate regulatory goal, but to suppress unpopular ideas or information'" and that "[t]hroughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities") (first and third alterations in original) (first quoting Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641 (1994); and then quoting Paula Berg, *Toward a First Amendment Theory of Doctor–Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201 (1994)).

98. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2461 (2018) (describing the elaborate process the union used to calculate fees and administer the opt-out regime and the petitioner's objections to the union's public policy positions).

99. *See* Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 345, 352–54 (2022).

100. *Id.* at 354.

101. 471 U.S. 626 (1985). The same category was recognized in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), which upheld, as reasonably related to the government's interest in preventing consumer deception, a compulsory notice under bankruptcy law that required attorneys who provide bankruptcy assistance to refrain from advising clients to incur more debt in contemplation of filing for bankruptcy. *See* Chemerinsky, *supra* note 99, at 359.

102. 505 U.S. 833, 887 (1992); *see* Chemerinsky, *supra* note 99, at 359–60.

or purely factual and uncontroversial disclosures about commercial products."[103] Instead, the Court put the notice law into the category of compelled speech subject to some kind of heightened scrutiny. Then, in *Americans for Prosperity Foundation v. Bonta*, the plurality opinion classified "compelled disclosure requirements" as receiving "exacting scrutiny" "[r]egardless of the type of association" subject to the disclosure requirement, at least where the disclosure involves the revelation of information that impinges on First Amendment rights of association.[104]

Laws that require disclosure or notice of facts, procedures, or substantive rights of employees or in the workplace are close enough to the categories of "health and safety warnings long considered permissible" and "purely factual and uncontroversial disclosures about commercial products."[105] In *NIFLA*, the Court described this category as "purely factual and uncontroversial information about the terms under which . . . services will be available," and explained that requirements to disclose such information "should be upheld unless they are 'unjustified or unduly burdensome.'"[106] The Court said this category of speech regulation receives "a lower level of scrutiny" than the "heightened scrutiny" that it applied in *NIFLA*.[107] The category of "factual and uncontroversial information" originated, the Court said, in *Zauderer v. Office of Disciplinary Counsel*, which invalidated Ohio Bar disciplinary rules prohibiting attorney advertising seeking to represent women in litigation against manufacturers of an intrauterine birth control device.[108] The same category was recognized in *Milavetz, Gallop & Milavetz, P.A. v. United States*, which upheld, as reasonably related to the government's interest in preventing consumer deception, a compulsory notice under bankruptcy law that required attorneys who provide bankruptcy assistance to identify themselves to clients as debt relief agencies, to include certain information in their advice, and to refrain from advising clients to incur more debt in contemplation of filing for bankruptcy.[109]

The contours of the *Zauderer*/*Milavetz* category for "factual and uncontroversial information" are somewhat unclear.[110] First, it is not clear whether the category is limited to notices in advertisements or whether it extends more broadly. *Zauderer* involved an advertisement; *Milavetz* involved legal representation and legal advice. In *NIFLA*, the Court said in passing that *Zauderer* noted "that the disclosure requirement governed only 'commercial advertising,'"[111] but *NIFLA* did not *limit* the category to advertising and *Milavetz* applied it more broadly. Second, *NIFLA* created uncertainty about the bounds of the category by saying that it did not apply to the statutory notice at issue in *NIFLA* because the "notice in no way relates to the services that licensed clinics provide," and instead requires disclosure of "information about

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103. NIFLA v. Becerra, 138 S. Ct. 2361, 2376 (2018).
104. 141 S. Ct. 2373, 2383 (2021).
105. *NIFLA*, 138 S. Ct. at 2376.
106. *Id.* at 2372 (quoting Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).
107. *Id.*
108. 471 U.S. 626, 651 (1985).
109. 559 U.S. 229, 252 (2010).
110. *Zauderer*, 471 U.S. at 651.
111. *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651).

state-sponsored services."[112] The Court did not explain whether this sentence was intended to limit the *Zauderer*/*Milavetz* exception to notices about services provided directly by the entity at issue.

To be sure, *NIFLA* said that *Zauderer* did not apply because the notice required by California law concerned "abortion, anything but an 'uncontroversial' topic."[113] If this is a limit on the *Zauderer* category, it is potentially significant and vague, because the Court may have transformed the meaning of "purely factual and uncontroversial."[114] In *Zauderer*, the information was a diagram and description of a birth control device.[115] In that context, the term "uncontroversial" meant something like accurate, non-misleading, or perhaps not open to question or debate.[116] But *NIFLA* suggested it means on "an 'uncontroversial' topic,"[117] which is entirely different. Whether an intrauterine device is a "noncontroversial"[118] topic may depend on one's perspective: opponents of birth control consider it an abortifacient, but most physicians and women's health advocates consider it an effective medical device that benefits many women (or anyone with a uterus). Whatever the boundaries of the "purely factual and uncontroversial"[119] category, informing employees about the law and their legal rights would fit into the category. If the law requires workers to be paid no less than fifteen dollars per hour for the first eight hours of work in a day or forty hours of work in a week, that is factual and uncontroversial. People may disagree with the wisdom of imposing any minimum wage, or with what it is, but until the law is changed it cannot be controverted what the requirement is.

The same would be true of *Hudson* notices, as controversial as they are among the ranks of union members.[120] If employees have a legal right to opt out of paying union fees, it is an uncontroverted fact. That is why the Court upheld the union's notice in *Marquez v. SAG* against the argument that the notice was inadequate because it did not explain perfectly what a union-represented employee must pay or do.[121] The Court emphasized that the union's notice said exactly what section 8(a)(3) says, and the Court said that was sufficient, even though the Court has not read 8(a)(3) to require/permit anything like what the statute says, as Blackmun complained in his separate opinion in *Beck*.[122]

When the government requires a person or entity to post a notice or to provide specified factual information to the public, in most instances the notice is recognized as being the government's message, not the message of the speaker's own views or preferences. Thus, when a compulsory notice reflects a policy judgment more than a

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112. *Id.* (emphasis in original).

113. *Id.* (quoting Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

114. *Zauderer*, 471 U.S. at 651.

115. *Id.* at 630.

116. *Id.* at 651.

117. *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651).

118. *Id.*

119. *Zauderer*, 471 U.S. at 651.

120. *See* Chi. Tchrs. Union v. Hudson, 475 U.S. 292 (1986).

121. Marquez v. Screen Actors Guild, Inc., 525 U.S. 33 (1998).

122. *See* Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988) (Blackmun, J., concurring in part and dissenting in part).

simple statement of fact, it is permissible only to the extent that the notice unambiguously states that it reflects the government's views. Nobody thinks the surgeon general's warning about the hazards of consuming tobacco or alcohol reflects the views of tobacco companies, vintners, brewers, or distillers. When the city of San Francisco required certain food companies to warn consumers that drinking sugary beverages contributes to diabetes, nobody thought that Taco Bell or the Coca-Cola Company thought people should abstain from consuming the products they sell. It was on this basis that the Court presumably has never seen an issue with the *Hudson*/*Beck* notices, and also upheld an assessment on beef producers to fund beef advertising in *Johanns v. Livestock Marketing Association*. The law authorizing the assessment did not require beef producers to embrace or endorse a particular perspective, just to fund a joint government-private program.[123] This distinguishes the cases in which the Court has struck down compelled statements of belief in *Wooley v. Maynard* (where a motorist refused to display the motto "Live Free or Die" on his vehicle license plate),[124] or in *Barnette* (where school children refused to pledge allegiance to the flag).[125]

The approach I propose—allow compelled disclosure that are either purely factual or are clearly labeled as reflecting the government's own views—is a principled approach that largely reflects where the law stood prior to *NIFLA* and *Janus*. Where the Court has strayed in recent cases is by suggesting there is a First Amendment right of speakers to avoid complicity in the values served by compelled disclosure (as in *NIFLA*) without also recognizing that many disclosures serve the government interest in providing factual information protected by a First Amendment right to receive information. *NIFLA* recognizes only the rights of speakers, and *Hudson/Beck/Janus* recognize only the rights of recipients of disclosures. Recognizing there are often free speech or other rights on both sides of any compelled notice regime counsels caution in balancing one person's rights against another's. It is abundantly clear in comparing *NIFLA* and *Janus* that both speakers and recipients of information had constitutional rights at stake and that the Court majority values some speech or other rights more than others.

Not all mandatory disclosure laws involve equally weighty legal rights on both sides. The right to receive information about abortion, like the right not to pay fair share fees, involves balancing constitutional rights. FMLA, EEO, and FLSA notices involve notification about federal statutory rights. Some compelled disclosures might be to avoid life-threatening danger (e.g., ingredient labels for those with catastrophic food or drug allergies), while others (e.g., food labels about calorie or alcohol content) don't involve any obvious legal right or high risk. And some, such as in *Americans for Prosperity Foundation v. Bonta*, involve privacy and informational interests on both sides.[126] If the Court is going to uphold some compulsory notice regimes and strike others down, it must develop clearer and more well-reasoned categories for such disclosure regimes so that it is not in the business of protecting only the free speech and other rights valued by the Court's majority.

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123. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).
124. 430 U.S. 705 (1977).
125. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
126. 141 S. Ct. 2373 (2021); *see* Chemerinsky, *supra* note 99, at 366–67.

A more principled approach to compulsory notices is desirable because they are an efficient and effective form of regulation that can be less intrusive than the alternatives. Compulsory notices allow the government to achieve regulatory goals (e.g., providing full information about legal rights or hazards) without government involvement. As a regulatory strategy, compulsory notices are efficient because they provide information to those who most need it at the time and place when it is most likely to be useful. As Cynthia Estlund pointed out in her analysis of the constitutionality of compulsory subsidies of union speech, unions are anomalous organizations because they are both private membership organizations *and* have a state-granted role as exclusive bargaining representative under a framework that seeks to substitute collective bargaining for government-mandated minimum labor standards.[127] This anomalous status may make it legitimate to impose burdens on their speech, and also to require subsidies for their speech, that would be problematic for any other entity.[128] Similarly, compelled notice regimes that are a cornerstone of other workplace regulatory regimes recognize the important role employers play in notifying workers of their rights and how to enforce them. If the government cannot require employers to notify workers of their rights to safety, to be paid the minimum wage, or to equal employment opportunity, the alternative is either much more intrusive government involvement or much less knowledge of legal rights. Ironically, for a Court with six members appointed by a political party that has long professed skepticism about intrusive government regulation, the alternative to laws mandating private parties to disclose certain information is much more government intervention and much less self-regulation.

CONCLUSION

The Supreme Court in *NIFLA* struck down a compelled notice necessary to protect the exercise of the constitutional right of reproductive freedom.[129] The very next day, the Court in *Janus* dramatically expanded a right not to pay union fees that requires an even more intrusive form of compelled notice than the one the Court struck down the day before.[130] These two decisions reveal that there are First Amendment speech and informational rights, or other legal rights, on both sides of most compelled notice legal regulations.

The most straightforward argument I have made is that for all the reasons that *NIFLA* found that the First Amendment prohibits compelling anti-abortion service providers to notify recipients of information the providers do not wish to share, it should similarly violate unions' First Amendment rights to compel them to tell workers of their right to free ride. If the government believes that workers need to be informed about their right not to join or pay fees to unions that represent them, the holding and reasoning of *NIFLA* suggest the government can inform them of that itself without compelling unions to undermine the very solidarity they exist to promote. Alternatively, given the weight the Court assigned in *Janus* to the right of

127. Estlund, *supra* note 13, at 173.

128. *Id.* at 136, 211–30.

129. *See NIFLA*, 138 S. Ct. at 2361.

130. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

workers to refuse to pay their fair share of the cost of union representation, and by implication workers' right to receive information, the Court was unprincipled in *NIFLA* in ignoring women's right to receive information about their constitutional right.

More broadly, I have suggested the Court's expansion of First Amendment rights in *NIFLA* and *Janus* was premised on ignoring that there are legal rights, and sometimes constitutional rights, on both sides of compulsory notice regimes. Recognizing that there are legal rights on both sides should prompt courts to be more circumspect in treating compelled notice regulation as violating the First Amendment. Thus, the Court could make its First Amendment jurisprudence more principled and coherent by recognizing that compelled disclosure and compulsory notice regimes are a category of regulation that are not subject to challenge under the First Amendment when and insofar as they require disclosure of factual information or are clearly labeled as reflecting the government's views rather than those of the speaker.